

**1999 No. 3323**

**TERMS AND CONDITIONS OF EMPLOYMENT**

**The Transnational Information and Consultation of  
Employees Regulations 1999**

*Made - - - - 12th December 1999*

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*Coming into force 15th January 2000*

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

### **PART I GENERAL**

#### **Citation, commencement and extent**

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

(2) These Regulations extend to Northern Ireland.

#### **Interpretation**

2.—(1) In these Regulations–

“the 1996 Act” means the Employment Rights Act 1996(**c**);

“the 1996 Order” means the Employment Rights (Northern Ireland) Order 1996(**d**)

“ACAS” means the Advisory, Conciliation and Arbitration Service;

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(a) 1972 c.68.

(b) S.I. 1999/2788.

(c) 1996 c.18.

(d) S.I. 1996/1919 (N.I. 16).

“Appeal Tribunal” means the Employment Appeal Tribunal;

“CAC” means the Central Arbitration Committee;

“central management” means–

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

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

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

“Community-scale group of undertakings” means a group of undertakings which has–

- (a) at least 1000 employees within the Member States,
- (b) at least two group undertakings in different Member States, and
- (c) at least one group undertaking with at least 150 employees in one Member State and at least one other group undertaking with at least 150 employees in another Member State;

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

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

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

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

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

“employees’ representatives” means–

- (a) if the employees are of a description in respect of which an independent trade union is recognised by their employer for the purpose of collective bargaining, representatives of the trade union who normally take part as negotiators in the collective bargaining process, and
- (b) any other employee representatives elected or appointed by employees to positions in which they are expected to receive, on behalf of the employees, information–
  - (i) which is relevant to the terms and conditions of employment of the employees, or
  - (ii) about the activities of the undertaking which may significantly affect the interests of the employees,

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

“European Works Council” means the council, established under and in accordance with–

- (a) regulation 17, or regulation 18 and the provisions of the Schedule, or
- (b) where appropriate, the provisions of the law or practice of a Member State other than the United Kingdom which are designed to give effect to Article 6 of, or Article 7 of and the Annex to, the Transnational Information and Consultation Directive,

with the purpose of informing and consulting employees;

“Extension Directive” means Council Directive 97/74/EC of 15 December 1997<sup>(a)</sup> extending, to the United Kingdom, the Transnational Information and Consultation Directive;

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(a) OJ L 10, 16.1.98, p.22.

“group of undertakings” means a controlling undertaking and its controlled undertakings;

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

“independent trade union” has the same meaning as in the Trade Union and Labour Relations (Consolidation) Act 1992(a), or in Northern Ireland the 1996 Order;

“information and consultation procedure” means one or more information and consultation procedures agreed under–

(a) regulation 17, or

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

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

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

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

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

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

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

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

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

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

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

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

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(a) 1992 c.52.

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

(c) O.J. L 254, 30.9.94, p.64.

## **Controlled and Controlling Undertaking**

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

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

- (a) can appoint more than half of the members of that undertaking’s administrative, management or supervisory body;
- (b) controls a majority of the votes attached to that undertaking’s issued share capital; or
- (c) holds a majority of that undertaking’s subscribed capital.

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

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

(4) Notwithstanding paragraphs (1) and (2) an undertaking shall not be a controlling undertaking of another undertaking in which it has holdings where the first undertaking is a company referred to in Article 3(5)(a) or (c) of Council Regulation (EEC) No. 4064/89 of 21 December 1989<sup>(a)</sup> on the control of concentrations between undertakings.

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

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

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

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

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

## **Circumstances in which provisions of these Regulations apply**

4.—(1) Subject to paragraph (2) the provisions of regulations 7 to 41 and of regulation 46 shall apply in relation to a Community-scale undertaking or Community-scale group of undertakings only where, in accordance with regulation 5, the central management is situated in the United Kingdom.

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

- (a) regulations 7 and 8(1), (2) and (4) (provision of information on employee numbers);
- (b) regulations 13 to 15 (UK members of the special negotiating body);

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(a) O.J. L 395, 30.12.89, p. 1.

- (c) regulation 18 to the extent it applies paragraphs 3 to 5 of the Schedule (UK members of the European Works Council);
- (d) regulations 23(1) to (5) (breach of statutory duty);
- (e) regulations 25 to 33 (protections for members of a European Works Council, etc.);
- (f) regulations 34 to 39 (enforcement bodies) to the extent they relate to applications made or complaints presented under any of the other regulations referred to in this paragraph;
- (g) regulations 40 and 41 (restrictions on contracting out).

### **The central management**

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

- (a) the central management is situated in the United Kingdom;
- (b) the central management is not situated in a Member State and the representative agent of the central management (to be designated if necessary) is situated in the United Kingdom; or
- (c) neither the central management nor the representative agent (whether or not as a result of being designated) is situated in a Member State and—
  - (i) in the case of a Community-scale undertaking, there are employed in an establishment, which is situated in the United Kingdom, more employees than are employed in any other establishment which is situated in a Member State, or
  - (ii) in the case of a Community-scale group of undertakings, there are employed in a group undertaking, which is situated in the United Kingdom, more employees than are employed in any other group undertaking which is situated in a Member State,

and the central management initiates, or by virtue of regulation 9(1) is required to initiate, negotiations for a European Works Council or information and consultation procedure.

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

- (a) the representative agent referred to in paragraph (1)(b); or
- (b) the management of the establishment referred to in paragraph (1)(c)(i) or of the group undertaking, referred to in paragraph (1)(c)(ii),

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

## **PART II**

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

#### **Calculation of numbers of employees**

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

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

with the provisions of the law or practice of that Member State which is designed to give effect to the Transnational Information and Consultation Directive.

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

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

(b) adding together all of the monthly numbers, and dividing the number so determined by 24.

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

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

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

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

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

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

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

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

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

### **Entitlement to information**

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

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

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

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

8.—(1) An employee or employees’ representative who has requested information under regulation 7 may present a complaint to the CAC that—

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

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

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



- (a) the information in respect of which the CAC finds that the complaint is well-founded and which is to be disclosed to the complainant;
- (b) the date (or if more than one, the earliest date) on which the recipient refused or failed to disclose information, or disclosed false or incomplete information;
- (c) a date (not being less than one week from the date of the order) by which the recipient must disclose the information specified in the order.

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

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

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

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

- (a) a valid request has been made by employees or employees' representatives; and
- (b) on the relevant date the undertaking is a Community-scale undertaking or the group of undertakings is a Community-scale group of undertakings.

(2) A valid request may consist of—

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

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

- (a) be in writing;
- (b) be sent to—
  - (i) the central management, or
  - (ii) the local management;
- (c) specify the date on which it was sent; and
- (d) where appropriate, be made after the expiry of a period of two years, commencing on the date of a decision under regulation 16(3) (unless the special negotiating body and central management have otherwise agreed).

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

- (a) where it consists of a single request satisfying paragraph 2(a) or of separate requests made on the same day satisfying paragraph 2(b), the date on which the request is or requests are sent; and
- (b) where it consists of separate requests made on different days satisfying paragraph 2(b), the date of the sending of the request which resulted in that paragraph being satisfied.

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

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

10.—(1) If the central management considers that a request (or separate request) did not

satisfy any requirement of regulation 9(2) or (3) it may apply to the CAC for a declaration as to whether the request satisfied the requirement.

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

- (a) the application is made within a three month period beginning on the date when a request, or if more than one the first request, was made for the purposes of regulation 9, whether or not that request satisfied the requirements of regulations 9(2) and (3);
- (b) the application is made before the central management takes any step to initiate negotiations for the establishment of a European Works Council or an information and consultation procedure; and
- (c) at the time when the application is made, there has been no application by the central management for a declaration under paragraph (3).

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

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

- (a) commencing on the date of the application; and
- (b) ending on the date of the declaration.

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

## PART III

### SPECIAL NEGOTIATING BODY

#### **Functions of the special negotiating body**

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

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

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

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

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

- (a) one additional member from a Member State in which there are employed 25 per cent or more but less than 50 per cent of the employees of the undertaking or group of undertakings who are employed in the Member States;
- (b) two additional members from a Member State in which there are employed 50 per cent or more but less than 75 per cent of the employees of the undertaking or group of undertakings who are employed in the Member States;
- (c) three additional members from a Member State in which there are employed 75

per cent or more of the employees of the undertaking or group of undertakings who are employed in the Member States.

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

### **Ballot arrangements**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(7) A person is an independent ballot supervisor for the purposes of paragraph (3)(d) if the UK management reasonably believes that he will carry out any functions conferred

on him in relation to the ballot competently and has no reasonable grounds for believing that his independence in relation to the ballot might reasonably be called into question.

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

- (a) any of the requirements specified in sub-paragraphs (b) to (f) of paragraph (3) is not satisfied; or
- (b) in a case where the ballot is to comprise separate ballots, the constituencies determined by the UK management do not reflect adequately the interests of the UK employees as a whole.

### **Conduct of ballot**

**14.**—(1) The UK management must—

- (a) ensure that a ballot supervisor appointed under regulation 13(3)(d) carries out his functions under this regulation and that there is no interference with his carrying out of those functions from the UK management, or the central management (where it is not also the UK management); and
- (b) comply with all reasonable requests made by a ballot supervisor for the purposes of, or in connection with, the carrying out of those functions.

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

- (a) supervises the conduct of the ballot, or the separate ballots he is being appointed to supervise, in accordance with the arrangements for the ballot of the UK employees published by the UK management under regulation 13(3)(f) or, where appropriate, in accordance with the arrangements as required to be modified by an order made as a result of a complaint presented under regulation 13(4);
- (b) does not conduct the ballot or any of the separate ballots before the UK management has satisfied the requirement specified in regulation 13(3)(e) and—
  - (i) where no complaint has been presented under regulation 13(4), before the expiry of a period of 21 days beginning on the date on which the UK management published its arrangements under regulation 13(3)(f); or
  - (ii) where a complaint has been presented under regulation 13(4), before the complaint has been determined and, where appropriate, the arrangements have been modified as required by an order made as a result of the complaint;
- (c) conducts the ballot, or each separate ballot, so as to secure that—
  - (i) so far as reasonably practicable, those entitled to vote are given the opportunity to vote,
  - (ii) so far as reasonably practicable, those entitled to stand as candidates are given the opportunity to stand,
  - (iii) so far as is reasonably practicable, those voting are able to do so in secret, and
  - (iv) the votes given in the ballot are fairly and accurately counted.

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

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

- (a) any of the requirements referred to in paragraph (2) was not satisfied with the result that the outcome of the ballot would have been different; or
- (b) there was interference with the carrying out of his functions or a failure by management to comply with all reasonable requests made by him with the result that he was unable to form a proper judgment as to whether each of the requirements referred to in paragraph (2) was satisfied in relation to the ballot.

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

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

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

- (a) if there has been a single ballot or an ineffective ballot report has been published in respect of every separate ballot, the outcome of the ballot or ballots shall have no effect and the UK management shall again be under the obligation in regulation 13(2);
- (b) if there have been separate ballots and sub-paragraph (a) does not apply—
  - (i) the UK management shall arrange for the separate ballot or ballots in respect of which an ineffective ballot report was issued to be reheld in accordance with regulation 13 and this regulation, and
  - (ii) no such ballot shall have effect until it has been reheld and no ineffective ballot report has been published in respect of it.

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

### **Consultative Committee**

**15.**—(1) Where a consultative committee exists—

- (a) no UK member of the special negotiating body shall be elected by a ballot of the UK employees, except in the circumstances specified in paragraphs (2), (3) or (9) below; and
- (b) the committee shall be entitled to nominate from its number the UK members of the special negotiating body.

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

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

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

- (a) whose normal functions include or comprise the carrying out of an information and consultation function;
- (b) which is able to carry out its information and consultation function without interference from the UK management, or from the central management (where it is not also the UK management);
- (c) which, in carrying out its information and consultation function, represents all the UK employees; and
- (d) which consists wholly of persons who were elected by a ballot (which may have consisted of a number of separate ballots) in which all the employees who, at the time, were UK employees were entitled to vote.

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

- (a) receiving, on behalf of all the UK employees, information which may significantly affect the interests of the UK employees, but excluding information which is relevant only to a specific aspect of the interests of the employees, such as health and safety or collective redundancies; and
- (b) being consulted by the UK management or the central management (where it is not also the UK management) on the information referred to in sub-paragraph (a) above.

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

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

- (a) the consultative committee does not satisfy the requirements in paragraph (4) above; or
- (b) any of the persons nominated by the consultative committee is not entitled to be nominated,

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

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

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

- (a) no nomination made by the consultative committee shall have effect; and
- (b) all of the UK members of the special negotiating body shall be elected by a ballot of the UK employees in accordance with regulations 13 and 14.

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

- (a) where no complaint has been presented under paragraph (7), the expiry of a period of 21 days beginning on the date on which the consultative committee published under paragraph (6) the names of persons nominated; or
- (b) where a complaint has been presented under paragraph (7), the complaint has been determined without a declaration under paragraph (8) having been made.

## PART IV

### EUROPEAN WORKS COUNCIL AND INFORMATION AND CONSULTATION PROCEDURE

#### **Negotiation procedure**

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

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

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

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

- (a) the procedure to negotiate and conclude the agreement referred to in regulation 17 shall cease from the date of the decision; and
- (b) a purported request made under regulation 9 less than two years after the date of the decision shall not be treated as such a request, unless the special negotiating body and the central management otherwise agree.

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

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

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

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

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

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

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

- (a) the undertakings of the Community-scale group of undertakings or the establishments of the Community-scale undertaking which are covered by the agreement;
- (b) the composition of the European Works Council, the number of members, the allocation of seats and the term of office of the members;
- (c) the functions and the procedure for information and consultation of the European Works Council;
- (d) the venue, frequency and duration of meetings of the European Works Council;
- (e) the financial and material resources to be allocated to the European Works Council; and
- (f) the duration of the agreement and the procedure for its renegotiation.

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

- (a) the agreement establishing the procedure must specify a method by which the information and consultation representatives are to enjoy the right to meet to discuss the information conveyed to them; and
- (b) the information conveyed to the information and consultation representatives shall relate in particular to transnational questions which significantly affect the interests of the employees.

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

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

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

## **Subsidiary requirements**

18.—(1) The provisions of the Schedule shall apply if—

- (a) the parties so agree;
- (b) within the period of six months beginning on the date on which a valid request referred to in regulation 9 was made, the central management refuses to commence negotiations; or
- (c) after the expiry of a period of three years beginning on the date on which a valid request referred to in regulation 9 was made, the parties have failed to conclude

an agreement under regulation 17 and the special negotiating body has not taken the decision under regulation 16(3).

### **Cooperation**

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

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

## **PART V**

### **COMPLIANCE AND ENFORCEMENT**

#### **Failure to establish European Works Council or information and consultation procedure**

**20.**—(1) A complaint may be presented to the Appeal Tribunal by a relevant applicant who considers—

- (a) that the parties have reached agreement on the establishment of a European Works Council or an information and consultation procedure, or that regulation 18 applies; and
- (b) that, because of a failure of the central management, the European Works Council or information and consultation procedure has not been established at all, or has not been established fully in accordance with the terms of the agreement under regulation 17 or, as the case may be, in accordance with the provisions of the Schedule.

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

(3) In this regulation “relevant applicant” means—

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

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

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

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

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

- (a) the steps which the central management is required to take;
- (b) the date of the failure of the central management; and
- (c) the period within which the order must be complied with.

(7) If the Appeal Tribunal makes a decision under paragraph (4) above it shall issue a



written penalty notice to the central management requiring it to pay a penalty to the Secretary of State in respect of the failure.

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

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

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

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

**21.**—(1) Where—

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

(b) a European Works Council has been established by virtue of regulation 18, a complaint may be presented to the Appeal Tribunal by a relevant applicant who considers that, because of the failure of a defaulter, the terms of the agreement under regulation 17 or, as the case may be, the provisions of the Schedule, have not been complied with.

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

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

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

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

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

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

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

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

(b) the date of the failure; and

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

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

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

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

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

### **Penalties**

**22.**—(1) A penalty notice issued under regulation 20 or 21 shall specify—

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

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

- (c) the failure and period to which the penalty relates.
- (2) No penalty set by the Appeal Tribunal under this regulation may exceed £75,000.
- (3) When setting the amount of the penalty, the Appeal Tribunal shall take into account—
  - (a) the gravity of the failure;
  - (b) the period of time over which the failure occurred;
  - (c) the reason for the failure;
  - (d) the number of employees affected by the failure; and
  - (e) the number of employees of the Community-scale undertaking or Community-scale group of undertakings in the Member States.
- (4) The date specified under paragraph (1)(b) above must not be earlier than the end of the period within which an appeal against a decision or order made by the Appeal Tribunal under regulation 20 or 21 may be made.
- (5) If the specified date in a penalty notice has passed and—
  - (a) the period during which an appeal may be made has expired without an appeal having been made; or
  - (b) such an appeal has been made and determined,
 the Secretary of State may recover from the central management, as a civil debt due to him, any amount payable under the penalty notice which remains outstanding.
- (6) The making of an appeal suspends the effect of a penalty notice.
- (7) Any sums received by the Secretary of State under regulation 20 or 21 or this regulation shall be paid into the Consolidated Fund.

## PART VI

### CONFIDENTIAL INFORMATION

#### **Breach of statutory duty**

- 23.**—(1) A person who is or at any time was—
- (a) a member of a special negotiating body or a European Works Council;
  - (b) an information and consultation representative; or
  - (c) an expert assisting a special negotiating body, a European Works Council or its select committee, or information and consultation representatives,
- shall not disclose any information or document which is or has been in his possession by virtue of his position as described in sub-paragraph (a), (b) or (c) of this paragraph, which the central management has entrusted to him on terms requiring it to be held in confidence.
- (2) In this regulation and in regulation 24, a person specified in paragraph (1)(a), (b) or (c) of this regulation is referred to as a “recipient”.
- (3) The obligation to comply with paragraph (1) is a duty owed to the central management, and a breach of the duty is actionable accordingly (subject to the defences and other incidents applying to actions for breach of statutory duty).
- (4) Paragraph (3) shall not affect the liability which any person may incur, nor affect any right which any person may have, apart from paragraph (3).
- (5) No action shall lie under paragraph (3) where the recipient reasonably believed the disclosure to be a “protected disclosure” within the meaning given to that expression by section 43A of the 1996 Act<sup>(a)</sup> or, as the case may be, Article 67A of the 1996 Order<sup>(b)</sup>.
- (6) A recipient whom the central management (which is situated in the United Kingdom) has entrusted with any information or document on terms requiring it to be held in confidence may apply to the CAC for a declaration as to whether it was reasonable for the central management to impose such a requirement.

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<sup>(a)</sup> Section 43A of the 1996 Act was inserted by the Public Interest Disclosure Act 1998 (c.23), section 1.  
<sup>(b)</sup> Article 67A was inserted by the Public Interest Disclosure (Northern Ireland) Order (S.I. 1998 No. 1763 (N.I. 17)).

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

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

### **Withholding of information by central management**

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

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

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

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

- (a) the information or document to be disclosed;
- (b) the recipient or recipients to whom the information or document is to be disclosed;
- (c) any terms on which the information or document is to be disclosed; and
- (d) the date before which the information or document is to be disclosed.

## **PART VII**

### **PROTECTIONS FOR MEMBERS OF A EUROPEAN WORKS COUNCIL, ETC.**

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

**25.**—(1) An employee who is—

- (a) a member of a special negotiating body;
- (b) a member of a European Works Council;
- (c) an information and consultation representative; or
- (d) a candidate in an election in which any person elected will, on being elected, be such a member or representative,

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

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

#### **Right to remuneration for time off under regulation 25**

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

(2) Chapter II of Part XIV of the 1996 Act (a week's pay) and, in relation to Northern Ireland, Chapter IV of Part I of the 1996 Order shall apply in relation to this regulation as

they apply, respectively, in relation to section 62 of the 1996 Act and Article 90 of the 1996 Order.

(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 ("contractual remuneration").

(7) Any contractual remuneration paid to an employee in respect of a period of time off under regulation 25 goes towards discharging any liability of the employer to pay remuneration under paragraph (1) in respect of that period, and, conversely, any payment of remuneration under paragraph (1) in respect of a period goes towards discharging any liability of the employer to pay contractual remuneration in respect of that period.

### **Right to time off: complaints to tribunals**

**27.**—(1) An employee may present a complaint, in Great Britain to an employment tribunal and in Northern Ireland to an industrial tribunal, that his employer—

- (a) has unreasonably refused to permit him to take time off as required by regulation 25; or
- (b) has failed to pay the whole or any part of any amount to which the employee is entitled under regulation 26.

(2) A tribunal shall not consider a complaint under this regulation unless it is presented—

- (a) before the end of the period of three months beginning with the day on which the time off was taken or on which it is alleged the time off should have been permitted; or
- (b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

(3) Where a tribunal finds a complaint under this regulation well-founded, the tribunal shall make a declaration to that effect.

(4) If the complaint is that the 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 26 if the employer had not refused.

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

## Unfair dismissal

28.—(1) An employee who is dismissed and to whom paragraph (2) or (5) applies shall be regarded, if the reason (or, if more than one, the principal reason) for the dismissal is a reason specified in, respectively, paragraph (3) or (6), as unfairly dismissed for the purposes of Part X of the 1996 Act and of Part XI of the 1996 Order.

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

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

(3) The reason is that—

- (a) the employee performed any functions or activities as such a member, representative or candidate; or
- (b) the employee or a person acting on his behalf made a request to exercise an entitlement conferred on the employee by regulation 25 or 26;

or proposed to do so.

(4) The reason in paragraph (3)(a) does not apply where the reason (or principal reason) for the dismissal is that in the performance, or purported performance, of the employee's functions or activities he has disclosed any information or document in breach of the duty in regulation 23(1), unless the employee reasonably believed the disclosure to be a "protected disclosure" within the meaning given to that expression by section 43A of the 1996 Act or, as the case may be, by Article 67A of the 1996 Order.

(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 or industrial tribunal to enforce a right or secure an entitlement conferred on him by these Regulations;
- (b) exercised, or proposed to exercise, any entitlement to apply or complain to the Appeal Tribunal or the CAC, or in Northern Ireland the Industrial Court, conferred by these Regulations;
- (c) requested, or proposed to request, information in accordance with regulation 7;
- (d) acted with a view to securing that a special negotiating body, a European Works Council or an information and consultation procedure did or did not come into existence;
- (e) indicated that he supported or did not support the coming into existence of a special negotiating body, a European Works Council or an information and consultation procedure;
- (f) stood as a candidate in an election in which any person elected would, on being elected, be a member of a special negotiating body or of a European Works Council or an information and consultation representative;
- (g) influenced or sought to influence the way in which votes were to be cast by other employees in a ballot arranged under these Regulations;
- (h) voted in such a ballot;
- (i) expressed doubts, whether to a ballot supervisor or otherwise, as to whether such a ballot had been properly conducted; or
- (j) proposed to do, failed to do, or proposed to decline to do, any of the things mentioned in sub-paragraphs (d) to (i).

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

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

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

### **Subsidiary provisions relating to unfair dismissal: Great Britain**

**29.**—(1) 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)(a) there shall be inserted “or (7D)” immediately before “applies” and after subsection (7C) there shall be inserted—

“(7D) This subsection applies if the reason (or, if more than one, the principal reason) for which the employee was selected for dismissal was one specified in paragraph (3) or (6) of regulation 28 of the Transnational Information and Consultation of Employees Regulations 1999 (read with paragraphs (4) and (7) of that regulation).”.

(2) In section 108(b) of the 1996 Act (exclusion of right: qualifying period of employment) in subsection (3) (cases where no qualifying period of employment is required)(c) the word “or” at the end of paragraph (gh) shall be omitted and after paragraph (h) there shall be inserted—

“or

(hh) paragraph (3) or (6) of regulation 28 of the Transnational Information and Consultation of Employees Regulations 1999 (read with paragraphs (4) and (7) of that regulation) applies.”.

(3) In section 109 of the 1996 Act (exclusion of right: upper age limit) in subsection (2) (cases where upper age limit does not apply)(d) the word “or” at the end of paragraph (gh) shall be omitted and after paragraph (h) there shall be inserted—

“or

(hh) paragraph (3) or (6) of regulation 28 of the Transnational Information and Consultation of Employees Regulations 1999 (read with paragraphs (4) and (7) of that regulation) applies.”.

### **Subsidiary provisions relating to unfair dismissal: Northern Ireland**

**30.**—(1) In Article 137(e) of the 1996 Order (redundancy as unfair dismissal) in paragraph (1)(c) (which requires one of a specified group of paragraphs to apply for a person to be treated as unfairly dismissed) for “(7A)” there shall be substituted “(7B)” and after paragraph (7A) there shall be inserted—

“(7B) This paragraph applies if the reason (or, if more than one, the principal reason) for which the employee was selected for dismissal was one specified in paragraph (3) or (6) of regulation 28 of the Transnational Information and Consultation of Employees Regulations 1999 (read with paragraphs (4) and (7) of that regulation).”.

(2) In Article 140(f) of the 1996 Order (exclusion of right: qualifying period of employment) in paragraph (3) (cases where no qualifying period of employment is required)(g) the word “or” at the end of sub-paragraph (h) shall be omitted and after sub-paragraph (j) there shall be inserted—

“or

(k) paragraph (3) or (6) of regulation 28 of the Transnational Information and Consultation of Employees Regulations 1999 (read with paragraphs (4) and (7) of that regulation) applies.”.

(3) In Article 141 of the 1996 Order (exclusion of right: upper age limit) in paragraph

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(a) 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.

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

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

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

(e) Article 137 has been amended on a number of occasions to specify additional circumstances in which an employee dismissed by reason of redundancy is to be regarded as unfairly dismissed.

(f) Article 140(1) was amended by S.R. 1999 No. 277, Article 3.

(g) Article 140(3) has been amended on a number of occasions to specify additional cases in which no qualifying period of employment is required.

(2) (cases where upper age limit does not apply)(a) the word “or” at the end of sub-paragraph (h) shall be omitted and after sub-paragraph (j) there shall be inserted–

“or

- (k) paragraph (3) or (6) of regulation 28 of the Transnational Information and Consultation of Employees Regulations 1999 (read with paragraphs (4) and (7) of that regulation) applies.”.

### **Detriment**

**31.**—(1) 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 European Works Council;
- (c) an information and consultation representative; or
- (d) a candidate in an election in which any person elected will, on being elected, be such a member or representative.

(3) The ground is that–

- (a) the employee performed any functions or activities as such a member, representative or candidate; or
- (b) the employee or a person acting on his behalf made a request to exercise an entitlement conferred on the employee by regulation 25 or 26;

or proposed to do so.

(4) The ground in paragraph (3)(a) does not apply where the ground for the subjection to detriment is that in the performance, or purported performance, of the employee’s functions or activities he has disclosed any information or document in breach of the duty in regulation 23(1), unless the employee reasonably believed the disclosure to be a “protected disclosure” within the meaning given to that expression by section 43A of the 1996 Act or, as the case may be, Article 67A of the 1996 Order.

(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 or industrial tribunal to enforce a right or secure an entitlement conferred on him by these Regulations;
- (b) exercised, or proposed to exercise, any entitlement to apply or complain to the Appeal Tribunal, the CAC, or in Northern Ireland the Industrial Court, conferred by these Regulations;
- (c) requested, or proposed to request, information in accordance with regulation 7;
- (d) acted with a view to securing that a special negotiating body, a European Works Council or an information and consultation procedure did or did not come into existence;
- (e) indicated that he supported or did not support the coming into existence of a special negotiating body, a European Works Council or an information and consultation procedure;
- (f) stood as a candidate in an election in which any person elected would, on being elected, be a member of a special negotiating body or of a European Works Council or an information and consultation representative;
- (g) influenced or sought to influence the way in which votes were to be cast by other employees in a ballot arranged under these Regulations;
- (h) voted in such a ballot;
- (i) expressed doubts, whether to a ballot supervisor or otherwise, as to whether such a ballot had been properly conducted; or

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(a) Article 141(2) has been amended on a number of occasions to specify additional cases where the upper age limit does not apply.

(j) proposed to do, failed to do, or proposed to decline to do, any of the things mentioned in sub-paragraphs (d) to (i).

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

(a) whether or not the employee has the right; or

(b) whether or not the right has been infringed;

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

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

**32.**—(1) An employee may present a complaint, in Great Britain to an employment tribunal and in Northern Ireland to an industrial tribunal, that he has been subjected to a detriment in contravention of regulation 31.

(2) The provisions of–

(a) sections 48(2) to (4) and 49 of the 1996 Act<sup>(a)</sup> (complaints to employment tribunals and remedies); or

(b) in relation to Northern Ireland, Articles 71(2) to (4) and 72 of the 1996 Order<sup>(b)</sup> (complaints to industrial tribunals and remedies);

shall apply in relation to a complaint under this regulation as they apply in relation to a complaint under section 48 of that Act or Article 71 of that Order (as the case may be), but taking references in those provisions to the employer as references to the employer within the meaning of regulation 31(1) above.

(3) Regulation 31 does not apply where the detriment in question amounts to dismissal.

### **Conciliation**

**33.**—(1) In section 18 of the Employment Tribunals Act 1996 (conciliation) in subsection (1) (which specifies the proceedings and claims to which the section applies)<sup>(c)</sup>–

(a) at the end of paragraph (f), the word “or” shall be omitted; and

(b) after paragraph (ff), there shall be inserted–

“or

(g) under regulation 27 or 32 of the Transnational Information and Consultation of Employees Regulations 1999.”.

(2) In Article 20 of the Industrial Tribunals (Northern Ireland) Order 1996 (conciliation) in paragraph (1) (which specifies the proceedings and claims to which the Article applies)<sup>(d)</sup>–

(a) at the end of sub-paragraph (e), the word “or” shall be omitted; and

(b) after sub-paragraph (f) there shall be inserted–

“or

(g) under regulation 27 or 32 of the Transnational Information and Consultation of Employees Regulations 1999.”.

## **PART VIII**

### **MISCELLANEOUS**

#### **The Appeal Tribunal, Industrial Court, CAC, ACAS and the Labour Relations Agency**

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(a) Sections 48 and 49 were amended respectively by sections 1(2)(b) and 1(2)(a) of the Employment Rights (Dispute Resolution) Act 1998 (c.8); there have also been amendments to the sections that are not relevant to these Regulations.

(b) There have been amendments to Articles 71 and 72 that are not relevant to these Regulations.

(c) 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.

(d) S.I. 1996/1921 (N.I. 18). Article 20(1) has been amended on a number of occasions to specify additional proceedings and claims to which the Article applies.



### **Appeal Tribunal: jurisdiction**

**34.**—(1) Any proceedings before the Appeal Tribunal arising under these Regulations, other than proceedings before the Appeal Tribunal under paragraph (i) of section 21(1) of the Employment Tribunals Act 1996<sup>(a)</sup>, shall—

- (a) where the central management is situated in England and Wales, be in England and Wales;
- (b) where the central management is situated in Scotland, be in Scotland.

(2) Paragraph (1) shall apply to proceedings before the Appeal Tribunal arising under regulation 8 as if for the words “central management” there were substituted the words “recipient (within the meaning given to that term by regulation 7)”.

(3) Paragraph (1) shall apply to proceedings before the Appeal Tribunal arising under regulation 13 or 15 or paragraph 4 of the Schedule as if for the words “central management” there were substituted the words “UK management”.

### **Appeal Tribunal: proceedings**

**35.**—(1) The Employment Tribunals Act 1996 shall be amended as follows.

(2) At the end of section 20 (the Appeal Tribunal), insert—

“(4) Subsection (2) is subject to regulation 34 of the Transnational Information and Consultation of Employees Regulations 1999.”.

(3) In section 21 (jurisdiction of the Appeal Tribunal), in subsection (1) (which specifies the proceedings and claims to which the section applies)—

- (a) at the end of paragraph (ff), the word “or” shall be omitted; and
- (b) in paragraph (g), for “or under the Working Time Regulations 1998” there shall be substituted—  
“  
(h) the Working Time Regulations 1998, or  
(i) the Transnational Information and Consultation of Employees Regulations 1999.”.

(4) In section 30 (Appeal Tribunal procedure rules), in paragraph (b) of subsection (2)<sup>(b)</sup>, after “any application” insert “or complaint”.

### **Industrial Court: jurisdiction**

**36.**—(1) Where the central management is situated in Northern Ireland, any complaint under regulation 20 or 21 shall be presented to the Industrial Court instead of to the Appeal Tribunal and references in those regulations and in regulation 22 to the Appeal Tribunal shall be read as references to the Industrial Court.

(2) Where the central management is situated in Northern Ireland, any application under regulation 10, 23 or 24 shall be made to the Industrial Court instead of to the CAC, and references in those regulations to the CAC shall be read as references to the Industrial Court.

(3) Where the recipient (within the meaning given to that term by regulation 7) is situated in Northern Ireland, any complaint under regulation 8 shall be presented to the Industrial Court instead of to the CAC, and references in regulation 8 to the CAC shall be read as references to the Industrial Court.

(4) Where the UK management is situated in Northern Ireland, any complaint under regulation 13 or 15 or paragraph 4 of the Schedule shall be presented to the Industrial Court instead of to the CAC, and references in those regulations or that paragraph to the CAC shall be read as references to the Industrial Court.

### **Industrial Court: proceedings**

**37.**—(1) Where under these Regulations a person presents a complaint or makes an

- 
- (a) Section 21(1) has been amended on a number of occasions to specify additional proceedings and claims to which the section applies. Paragraph (i) is inserted by regulation 35(3) of these Regulations from the date they come into force.
  - (b) Section 30(2) was amended by the Employment Rights (Dispute Resolution) Act 1998 (c.8), section 1(2)(a).

application to the Industrial Court, the complaint or application must be in writing and in such form as the Court may require.

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

(3) A decision, declaration or order made by the Industrial Court under these Regulations—

- (a) must be in writing and state the reasons for the Court's findings; and
- (b) may be relied on and enforced as if it were a decision, declaration or order made by the High Court in Northern Ireland.

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

### **CAC: proceedings**

**38.**—(1) 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 an application or complaint under these Regulations, the CAC shall make such enquiries as it sees fit and give any person whom it considers has a proper interest in the application or complaint an opportunity to be heard.

(3) Where the central management is situated in England and Wales—

- (a) a declaration or order made by the CAC under these Regulations may be relied on as if it were a declaration or order made by the High Court in England and Wales; and
- (b) an order made by the CAC under these Regulations may be enforced in the same way as an order of the High Court in England and Wales.

(4) Where the central management is situated in Scotland—

- (a) a declaration or order made by the CAC under these Regulations may be relied on as if it were a declaration or order made by the Court of Session; and
- (b) an order made by the CAC under these Regulations may be enforced in the same way as an order of the Court of Session.

(5) Paragraphs (3) and (4) shall apply to an order made under regulation 8 as if for the words “central management” there were substituted the word “recipient”.

(6) Paragraphs (3) and (4) shall apply, as appropriate, to a declaration or order made under regulation 13 or 15 or paragraph 4 of the Schedule as if for the words “central management” there were substituted the words “UK management”.

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

(8) An appeal lies to the Appeal Tribunal on any question of law arising from any declaration or order of, or arising in any proceedings before, the CAC under these Regulations.

### **ACAS and the Labour Relations Agency**

**39.**—(1) If on receipt of an application or complaint under these Regulations the CAC, the Appeal Tribunal, or as the case may be the Industrial Court, is of the opinion that it is reasonably likely to be settled by conciliation, it shall refer the application or complaint to ACAS or to the Labour Relations Agency and shall notify the applicant or complainant and any persons whom it considers have a proper interest in the application or complaint accordingly, whereupon ACAS, or as the case may be the Labour Relations Agency, shall seek to promote a settlement of the matter.

(2) If an application or complaint so referred is not settled or withdrawn and ACAS, or as the case may be the Labour Relations Agency, is of the opinion that further

attempts at conciliation are unlikely to result in a settlement, it shall inform the CAC, the Appeal Tribunal, or as the case may be the Industrial Court, of its opinion.

(3) If the application or complaint is not referred to ACAS or to the Labour Relations Agency, or if it is so referred, on ACAS, or as the case may be the Labour Relations Agency, informing the CAC, the Appeal Tribunal, or as the case may be the Industrial Court, of its opinion that further attempts at conciliation are unlikely to result in a settlement, the CAC, the Appeal Tribunal, or as the case may be the Industrial Court, shall proceed to hear and determine the application or complaint.

## **Restrictions on contracting out**

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

**40.**—(1) Any provision in any agreement (whether an employee's contract or not) is void in so far as it purports—

- (a) to exclude or limit the operation of any provision of these Regulations other than a provision of Part VII; or
- (b) to preclude a person from bringing any proceedings before the Appeal Tribunal or the CAC, or in Northern Ireland the Industrial Court, under any provision of these Regulations other than a provision of Part VII.

(2) Paragraph (1) does not apply to any agreement to refrain from continuing any proceedings referred to in sub-paragraph (b) of that paragraph made after the proceedings have been instituted.

### **Restrictions on contracting out: Part VII**

**41.**—(1) Any provision in any agreement (whether an employee's contract or not) is void in so far as it purports—

- (a) to exclude or limit the operation of any provision of Part VII of these Regulations; or
- (b) to preclude a person from bringing any proceedings before an employment tribunal, or in Northern Ireland an industrial tribunal, under that Part.

(2) Paragraph (1) does not apply to any agreement to refrain from instituting or continuing proceedings before an employment tribunal or, in Northern Ireland, an industrial tribunal where—

- (a) a conciliation officer has taken action under section 18 of the Employment Tribunals Act 1996 (conciliation); or
- (b) in relation to Northern Ireland, the Labour Relations Agency has taken action under Article 20 of the Industrial Tribunals (Northern Ireland) Order 1996 (conciliation).

(3) Paragraph (1) does not apply to any agreement to refrain from instituting or continuing before an employment tribunal, or in Northern Ireland an industrial tribunal, proceedings within—

- (a) section 18(1)(g) of the Employment Tribunals Act 1996 (proceedings under these Regulations where conciliation is available); or
- (b) in relation to Northern Ireland, Article 20(1)(g) of the Industrial Tribunals (Northern Ireland) Order 1996,

if the conditions regulating compromise agreements under these Regulations are satisfied in relation to the agreement.

(4) For the purposes of paragraph (3) the conditions regulating compromise agreements are that—

- (a) the agreement must be in writing;
- (b) the agreement must relate to the particular proceedings;
- (c) the employee must have received advice from a relevant independent adviser as to the terms and effect of the proposed agreement and, in particular, its effect on his ability to pursue his rights before an employment tribunal or, in Northern Ireland, an industrial tribunal;
- (d) there must be in force, when the adviser gives the advice, a contract of insurance,

- or an indemnity provided for members of a profession or professional body, covering the risk of a claim by the employee in respect of loss arising in consequence of the advice;
- (e) the agreement must identify the adviser; and
  - (f) the agreement must state that the conditions in sub-paragraphs (a) to (e) are satisfied.
- (5) A person is a relevant independent adviser for the purposes of paragraph (4)(c)–
- (a) if he is a qualified lawyer;
  - (b) if he is an officer, official, employee or member of an independent trade union who has been certified in writing by the trade union as competent to give advice and as authorised to do so on behalf of the trade union; or
  - (c) if he works at an advice centre (whether as an employee or as a volunteer) and has been certified in writing by the centre as competent to give advice and as authorised to do so on behalf of the centre.
- (6) But a person is not a relevant independent adviser for the purposes of paragraph (4)(c) in relation to the employee–
- (a) if he is, is employed by or is acting in the matter for the employer or an associated employer;
  - (b) in the case of a person within paragraph (5)(b) or (c), if the trade union or advice centre is the employer or an associated employer; or
  - (c) in the case of a person within paragraph (5)(c), if the employee makes a payment for the advice received from him.
- (7) In paragraph (5)(a), “qualified lawyer” means—
- (a) as respects England and Wales, a barrister (whether in practice as such or employed to give legal advice), a solicitor who holds a practising certificate, or a person other than a barrister or solicitor who is an authorised advocate or authorised litigator (within the meaning of the Courts and Legal Services Act 1990)(a);
  - (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; and
  - (c) as respects Northern Ireland, a barrister (whether in practice as such or employed to give legal advice) or a solicitor who holds a 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.

## PART IX

### EXCEPTIONS

#### Article 6 agreements

**42.**—(1) Where, in accordance with regulation 5, the central management is situated in the United Kingdom and, immediately before the date on which these Regulations come into force an Article 6 agreement is in force, those provisions referred to in regulation 4(1) which apply only where the central management is situated in the United Kingdom shall only apply if–

- (a) the parties to the Article 6 agreement agree or have agreed (whether before or after these Regulations come into force) to the effect that the provisions of these Regulations which would have applied in respect of the agreement had it been made under regulation 17 should apply in respect of the Article 6 agreement; or
- (b) the Article 6 agreement ceases to have effect.

(2) In paragraph (1) and regulation 47 “Article 6 agreement” means an agreement for

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(a) 1990 c.41.

the establishment of a European Works Council or information and consultation procedure made under the provisions of the law or practice of a Member State other than the United Kingdom which are designed to give effect to Article 6 of the Transnational Information and Consultation Directive.

(3) Where paragraph (1)(a) applies these Regulations shall apply as if the Article 6 agreement had been made under regulation 17.

### **Article 7 European Works Councils**

**43.**—(1) Where, in accordance with regulation 5, the central management is situated in the United Kingdom, and immediately before the date these Regulations come into force an Article 7 European Works Council exists, those provisions referred to in regulation 4(1) which apply only where the central management is situated in the United Kingdom shall only apply if—

- (a) the central management and European Works Council agree or have agreed (whether before or after these Regulations come into force) to the effect that the provisions of these Regulations which would have applied in respect of the European Works Council had it been made, by virtue of regulation 18, under these Regulations should apply in respect of the Article 7 European Works Council; or
- (b) the European Works Council decides, under the provisions of the law or practice of a Member State other than the United Kingdom which are designed to give effect to paragraph 1(f) of the Annex to the Transnational Information and Consultation Directive, to negotiate an agreement for a European Works Council or an information and consultation procedure.

(2) In paragraph (1) and regulations 47 and 48 “Article 7 European Works Council” means a European Works Council established under the provisions of the law or practice of a Member State other than the United Kingdom which are designed to give effect to Article 7 of, and the Annex to, the Transnational Information and Consultation Directive.

(3) Where paragraph (1)(a) or (b) applies these Regulations shall apply, subject to the modifications referred to in paragraphs (4) to (6) of regulation 48, as if the Article 7 European Works Council had been established, by virtue of regulation 18, under these Regulations and, in a case where paragraph (1)(b) applies, as if a decision had been taken under paragraph 10(2) of the Schedule.

### **Article 3 agreements**

**44.**—(1) None of the obligations in these Regulations applies to a Community-scale undertaking or Community-scale group of undertakings where the conditions specified in Article 3 of the Extension Directive are satisfied.

(2) The conditions referred to in paragraph (1) above are that—

- (a) an agreement is in force which—
  - (i) is in force immediately before 16th December 1999;
  - (ii) covers the entire workforce in the Member States; and
  - (iii) provides for the transnational information and consultation of employees, and
- (b) the obligation (whether arising under these Regulations or under the national law or practice of any other Member State), to initiate negotiations for the establishment of a European Works Council or information and consultation procedure would, but for this paragraph, have applied to the Community-scale undertaking or Community-scale group of undertakings solely as a result of the Extension Directive.

(3) If an agreement when taken together with one or more other agreements satisfies the requirements specified in paragraph (2)(a) that agreement, when taken together with such other agreements, shall be treated as an agreement for the purposes of that paragraph.

### **Article 13 agreements**

**45.**—(1) None of the obligations in these Regulations applies to a Community-scale

undertaking or Community-scale group of undertakings where the conditions specified in Article 13 of the Transnational Information and Consultation Directive are satisfied.

(2) The conditions referred to in paragraph (1) are that an agreement is in force which—

- (a) was in force immediately before whichever is the earlier of 23rd September 1996 and the day after the date on which the national law or practice giving effect to the Transnational Information and Consultation Directive came into force in the Member State (other than the United Kingdom) whose national law governs the agreement;
- (b) covers the entire workforce in the Member States; and
- (c) provides for the transnational information and consultation of employees.

(3) If an agreement when taken together with one or more other agreements satisfies the requirements specified in paragraph (2) that agreement, when taken together with such other agreements, shall be treated as an agreement for the purposes of that paragraph.

### **Merchant Navy**

**46.**—(1) Subject to paragraph (3), no long haul crew member shall be—

- (a) a member of a special negotiating body;
- (b) a member of a European Works Council; or
- (c) an information and consultation representative.

(2) In paragraph (1), a “long haul crew member” means a person who is a member of a merchant navy crew other than—

- (a) a ferry worker; or
- (b) a person who normally works on voyages the duration of which is less than 48 hours.

(3) Paragraph (1) shall not apply where the central management decides that the long haul crew member in question shall be permitted to be, as the case may be, a member of a special negotiating body or of a European Works Council, or an information and consultation representative.

(4) Where paragraph (1) applies, no long haul crew member shall—

- (a) stand as a candidate for election as a member of a special negotiating body or of a European Works Council, or as an information and consultation representative; or
- (b) be appointed or nominated to be a member of a special negotiating body or of a European Works Council, or an information and consultation representative.

## **PART X TRANSITIONALS**

### **Transitionals: special negotiating body**

**47.**—(1) Where immediately before the date on which these Regulations come into force—

- (a) a special negotiating body has been validly requested or established under the provisions of the law or practice of a Member State other than the United Kingdom which is designed to give effect to the Transnational Information and Consultation Directive;
- (b) no Article 6 agreement is in force; and
- (c) no Article 7 European Works Council has been established—

paragraphs (2) and (3) shall apply.

(2) Where the central management is situated in the United Kingdom these Regulations shall apply, with the modifications specified in paragraphs (4) to (6), as if a valid request had been made under regulation 9 and, where appropriate, as if the special negotiating body had been established under these Regulations.

(3) Where the central management is not situated in the United Kingdom the regulations

referred to in regulation 4(2) shall apply with the modifications specified in paragraphs (5) and (6) of this regulation.

(4) Regulation 12 shall apply in respect of the composition of the special negotiating body only to the extent that it determines the number of UK members on the special negotiating body but shall not affect in any way the number of non-UK members on the special negotiating body.

(5) Where, as a result of the implementation of the Extension Directive by a Member State (including the United Kingdom) there are required to be UK members on the special negotiating body and immediately before the date on which these Regulations come into force—

- (a) no person has been designated to attend meetings of the special negotiating body as a representative of employees in the United Kingdom; or
- (b) one or more persons have been designated to attend meetings of the special negotiating body as a representative of employees in the United Kingdom,

then in the case mentioned in sub-paragraph (a), the UK members of the special negotiating body shall be elected or appointed in accordance with regulations 13 to 15, and in the case mentioned in sub-paragraph (b), the person or persons shall be treated as from the date on which these Regulations come into force as a UK member of the special negotiating body who has been elected or appointed in accordance with regulations 13 to 15.

(6) Where the number of persons referred to in paragraph (5)(b) is—

- (a) in a case where regulation 12 applies, less than the number of UK members of the special negotiating body required by that regulation, or
- (b) in a case where regulation 12 does not apply, less than the number of UK members of the special negotiating body required by the provisions of the law or practice of the Member State under which the special negotiating body was established,

the additional number of UK members of the special negotiating body needed to secure compliance with regulation 12 or, as the case may be, the law or practice of the Member State referred to in sub-paragraph (b) of this paragraph shall be elected or appointed in accordance with regulations 13 to 15.

### **Transitionals: Article 7 European Works Councils**

**48.**—(1) Where, immediately before the date on which these Regulations come into force, a European Works Council has been established under the provisions of the law or practice of a Member State other than the United Kingdom, which are designed to give effect to Article 7 of, and the Annex to, the Transnational Information and Consultation Directive, paragraphs (2) and (3) shall apply.

(2) Where the central management is situated in the United Kingdom and regulation 43(1)(a) or 43(1)(b) applies these Regulations shall apply with the modifications specified in paragraphs (4) to (6) as if the European Works Council had been established under these Regulations.

(3) Where the central management is not situated in the United Kingdom, or is situated in the United Kingdom but neither regulation 43(1)(a) nor 43(1)(b) applies, the regulations referred to in regulation 4(2) shall apply with the modifications specified in paragraphs (5) and (6) of this regulation.

(4) Paragraph 2 of the Schedule shall apply in respect of the composition of the European Works Council only to the extent that it determines the number of UK members on the European Works Council but shall not affect in any way the number of non-UK members on the European Works Council.

(5) Where, as a result of the implementation of the Extension Directive by a Member State (including the United Kingdom), there are required to be UK members on the European Works Council and immediately before the date on which these Regulations come into force—

- (a) no person has been designated to attend meetings of the European Works Council as a representative of employees in the United Kingdom; or
- (b) one or more persons have been designated to attend meetings of the European Works Council as a representative of employees in the United Kingdom,

then in the case mentioned in sub-paragraph (a), the UK members of the European Works Council shall be appointed or elected in accordance with paragraphs 3 to 5 of the Schedule, and in the case mentioned in sub-paragraph (b), the person or persons shall be treated as from the date on which these Regulations come into force as a UK member of the European Works Council who has been elected or appointed in accordance with paragraphs 3 to 5 of the Schedule.

(6) Where the number of persons referred to in paragraph (5)(b) is—

(a) in a case where paragraph 2 of the Schedule applies, less than the number of UK members of the European Works Council required by that paragraph; or

(b) in a case where paragraph 2 of the Schedule does not apply, less than the number of UK members of the European Works Council required by the law or practice of the Member State under which the European Works Council was established,

the additional number of UK members needed to secure compliance with paragraph 2 or, as the case may be, the law or practice of the Member State referred to in sub-paragraph (b) of this paragraph shall be elected or appointed in accordance with paragraphs 3 to 5 of the Schedule.

*Alan Johnson*

Parliamentary Under Secretary of State  
for Competitiveness,  
Department of Trade and Industry

12th December 1999

## SCHEDULE

Regulation 18

### SUBSIDIARY REQUIREMENTS

#### **Establishment of European Works Council**

1. A European Works Council shall be established in the Community-scale undertaking or Community-scale group of undertakings in accordance with the provisions in this Schedule.

#### **Composition of the European Works Council**

2.—(1) The European Works Council shall comprise a minimum of three, and a maximum of 30, members.

(2) Subject to sub-paragraph (1), the European Works Council shall be constituted in accordance with sub-paragraphs (3) and (4) below.

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

(4) There shall be on the European Works Council the following additional members—

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

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

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

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

(6) Where the European Works Council decides its size so warrants, it shall elect from among its members a select committee comprising no more than three members who are to act on behalf of the European Works Council.



### **Appointment or election of UK members of the European Works Council**

- 3.—(1) The UK members of the European Works Council must be UK employees and—
- (a) in a case where all of those employees are represented by UK employees' representatives, shall be elected or appointed by such employees' representatives;
  - (b) in a case where not all of those employees are represented by UK employees' representatives, shall be elected by ballot.

(2) For the purposes of this paragraph all of the UK employees are represented by UK employees' representatives if each of the employees referred to in sub-paragraph (1) is a UK employee—

- (a) in respect of which an independent trade union is recognised by his employer for the purpose of collective bargaining; or
- (b) who has elected or appointed an employees' representative for the purpose of receiving, on the employee's behalf, information—
  - (i) which is relevant to the employee's terms and conditions of employment; or
  - (ii) about the activities of the undertaking which may significantly affect the employee's interests

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

(3) Where sub-paragraph (1)(a) above applies, the election or appointment of members of the European Works Council shall be carried out by whatever method the UK employees' representatives decide.

(4) Where sub-paragraph (1)(b) applies, the UK members of the European Works Council are to be elected by a ballot of the UK employees in accordance with paragraphs 4 and 5.

### **Ballot arrangements**

4.—(1) The UK management must arrange for the holding of a ballot of employees referred to in paragraph 3(4), which satisfies the requirements specified in sub-paragraph (2).

(2) The requirements referred to in sub-paragraph (1) are that—

- (a) the ballot of the UK employees must comprise a single ballot, but may instead, if the UK management so decides, comprise separate ballots of employees in such constituencies as the UK management may determine where—
  - (i) the number of UK members of the European Works Council to be elected is more than one, and
  - (ii) the UK management considers that if separate ballots were held for those constituencies, the UK members of the European Works Council to be elected would better reflect the interests of the UK employees as a whole than if a single ballot were held;
- (b) a UK employee who is an employee of the Community-scale undertaking or the Community-scale group of undertakings on the day on which votes may be cast in the ballot or, if the votes may be cast on more than one day, on the first day of those days is entitled to vote in a ballot of the UK employees;
- (c) any UK employee who is an employee of the Community-scale undertaking or Community-scale group of undertakings immediately before the latest time at which a person may become a candidate in the ballot, is entitled to stand in the ballot of the UK employees as a candidate for election as a UK member of the European Works Council;
- (d) the UK management must, in accordance with sub-paragraph (6), appoint an independent ballot supervisor to supervise the conduct of the ballot of the UK employees but may instead, where there are to be separate ballots, appoint more than one independent ballot supervisor in accordance with that sub-paragraph, each of whom is to supervise such of the separate ballots as the UK management may determine, provided that each separate ballot is supervised by a supervisor;
- (e) after the UK management has formulated proposals as to the arrangements for the ballot of the UK employees and before it has published the final arrangements under paragraph (f) it must, so far as reasonably practicable, consult with the UK employees' representatives on the proposed arrangements for the ballot of the UK employees;
- (f) the UK management must publish the final arrangements for the ballot of the UK

employees in such manner as to bring them to the attention of, so far as reasonably practicable, the UK employees and the UK employees' representatives.

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

(4) Where the CAC finds the complaint well-founded it shall make a declaration to that effect and may make an order requiring the UK management to modify the arrangements it has made for the ballot of the UK employees or to satisfy the requirements in paragraph (e) or (f) of sub-paragraph (2).

(5) An order under sub-paragraph (4) shall specify the modifications to the arrangements which the UK management is required to make and the requirements which it must satisfy.

(6) A person is an independent ballot supervisor for the purposes of sub-paragraph (2)(d) if the UK management reasonably believes that he will carry out any functions conferred on him in relation to the ballot competently and has no reasonable grounds for believing that his independence in relation to the ballot might reasonably be called into question.

(7) For the purposes of sub-paragraph (3), the arrangements for the ballot of the UK employees are defective if—

- (a) any of the requirements specified in paragraphs (b) to (f) of sub-paragraph (2) is not satisfied; or
- (b) in a case where the ballot is to comprise separate ballots, the constituencies determined by the UK management do not reflect adequately the interests of the UK employees as a whole.

### **Conduct of ballot**

5.—(1) The UK management must—

- (a) ensure that a ballot supervisor appointed under paragraph 4(2)(d) carries out his functions under this paragraph and that there is no interference with his carrying out of those functions from the UK management, or the central management (where it is not also the UK management); and
- (b) comply with all reasonable requests made by a ballot supervisor for the purposes of, or in connection with, the carrying out of those functions.

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

- (a) supervises the conduct of the ballot, or the separate ballots he is being appointed to supervise, in accordance with the arrangements for the ballot of the UK employees published by the UK management under paragraph 4(2)(f) or, where appropriate, in accordance with the arrangements as required to be modified by an order made as a result of a complaint presented under paragraph 4(3);
- (b) does not conduct the ballot or any of the separate ballots before the UK management has satisfied the requirement specified in paragraph 4(2)(e) and—
  - (i) where no complaint has been presented under paragraph 4(3), before the expiry of a period of 21 days beginning on the date on which the UK management published its arrangements under paragraph 4(2)(f); or
  - (ii) where a complaint has been presented under paragraph 4(3), before the complaint has been determined and, where appropriate, the arrangements have been modified as required by an order made as a result of the complaint;
- (c) conducts the ballot, or each separate ballot, so as to secure that—
  - (i) so far as reasonably practicable, those entitled to vote are given the opportunity to vote,
  - (ii) so far as reasonably practicable, those entitled to stand as candidates are given the opportunity to stand,
  - (iii) so far as is reasonably practicable, those voting are able to do so in secret, and
  - (iv) the votes given in the ballot are fairly and accurately counted.

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

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

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

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

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

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

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

- (a) if there has been a single ballot or an ineffective ballot report has been published in respect of every separate ballot, the outcome of the ballot or ballots shall have no effect and the UK management shall again be under the obligation in paragraph 4(1);
- (b) if there have been separate ballots and paragraph (a) does not apply—
  - (i) the UK management shall arrange for the separate ballot or ballots in respect of which an ineffective ballot report was issued to be reheld in accordance with paragraph 4 and this paragraph, and
  - (ii) no such ballot shall have effect until it has been so reheld and no ineffective ballot report has been published in respect of it.

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

### **Competence of the European Works Council**

6.—(1) The competence of the European Works Council shall be limited to information and consultation on the matters which concern the Community-scale undertaking or Community-scale group of undertakings as a whole or at least two of its establishments or group undertakings situated in different Member States.

(2) In the case of a Community-scale undertaking or Community-scale group of undertakings falling within regulation 5(1)(b) or 5(1)(c), the competence of the European Works Council shall be limited to those matters concerning all of its establishments or group undertakings situated within the Member States or concerning at least two of its establishments or group undertakings situated in different Member States.

### **Information and consultation meetings**

7.—(1) Subject to paragraph 8, the European Works Council shall have the right to meet with the central management once a year in an information and consultation meeting, to be informed and consulted, on the basis of a report drawn up by the central management, on the progress of the business of the Community-scale undertaking or Community-scale group of undertakings and its prospects.

(2) The central management shall inform the local managements accordingly.

(3) The information and consultation meeting shall relate in particular to the structure, economic and financial situation, the probable development of the business and of production and sales, the situation and probable trend of employment, investments, and substantial changes concerning organisation, introduction of new working methods or production processes, transfers of production, mergers, cut-backs or closures of undertakings, establishments or important parts thereof, and collective redundancies.

### **Exceptional information and consultation meetings**

8.—(1) Where there are exceptional circumstances affecting the employees' interests to a considerable extent, particularly in the event of relocations, the closure of establishments or undertakings or collective redundancies, the select committee or, where no such committee exists, the European Works Council shall have the right to be informed. It shall have the right to meet in an exceptional information and consultation meeting, at its request, the central management, or any other more appropriate level of management within the Community-scale undertaking or group of undertakings having its own powers of decision, so as to be informed and consulted on measures significantly affecting employees' interests.

(2) Those members of the European Works Council who have been elected or appointed by the establishments or undertakings which are directly concerned by the measures in question shall also

have the right to participate in an exceptional information and consultation meeting referred to in sub-paragraph (1) of this paragraph organised with the select committee elected under sub-paragraph (6) of paragraph 2.

(3) The exceptional information and consultation meeting referred to in sub-paragraph (1) of this paragraph shall take place as soon as possible on the basis of a report drawn up by the central management or any other appropriate level of management of the Community-scale undertaking or Community-scale group of undertakings, on which an opinion may be delivered at the end of the meeting or within a reasonable time.

(4) The exceptional information and consultation meeting referred to in sub-paragraph (1) of this paragraph shall not affect the prerogatives of the central management.

### **Procedures**

**9.**—(1) Before an information and consultation meeting or exceptional information and consultation meeting with the central management, the European Works Council or the select committee, where necessary enlarged in accordance with sub-paragraph (2) of paragraph 8, shall be entitled to meet without the management concerned being present.

(2) Subject to regulation 23, the members of the European Works Council shall inform—

- (a) the employees' representatives of the employees in the establishments of a Community-scale undertaking or in the undertakings of a Community-scale group of undertakings; or
- (b) to the extent that any employees are not represented by employees' representatives, the employees themselves

of the content and outcome of the information and consultation procedure carried out in accordance with the provisions of this Schedule.

(3) The European Works Council shall adopt its own rules of procedure.

(4) The European Works Council or the select committee may be assisted by experts of its choice, in so far as this is necessary for it to carry out its tasks.

(5) The operating expenses of the European Works Council shall be borne by the central management; but where the European Works Council is assisted by more than one expert the central management is not required to pay such expenses in respect of more than one of them.

(6) The central management shall provide the members of the European Works Council with such financial and material resources as enable them to perform their duties in an appropriate manner. In particular, the cost of organising meetings and arranging for interpretation facilities and the accommodation and travelling expenses of members of the European Works Council and its select committee shall be met by the central management unless the central management and European Works Council, or select committee, otherwise agree.

### **The continuing application of the subsidiary requirements**

**10.**—(1) Four years after the European Works Council is established it shall examine whether to open negotiations for the conclusion of an agreement referred to in regulation 17 or to continue to apply the subsidiary requirements adopted in accordance with the provisions of this Schedule.

(2) If the European Works Council decides to negotiate an agreement in accordance with regulation 17, it shall notify the central management in writing to that effect, and

- (a) such notification shall be treated as a valid request made under regulation 9; and
- (b) regulations 16, 17 and 18 shall apply in respect of the negotiations for an agreement as if references in those regulations to the special negotiating body were references to the European Works Council.

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## **EXPLANATORY NOTE**

*(This note is not part of the Regulations)*

These Regulations implement Council Directive 97/74/EC (O.J. L10, 16.1.98, p.22). That Directive extends to the United Kingdom Directive 94/45/EC on the establishment of a European Works Council or a procedure in Community-scale undertakings or

Community-scale groups of undertakings for the purposes of informing and consulting employees (O.J. L254, 30.9.94, p.64).

The Regulations provide for the establishment of a European Works Council or information and consultation procedure in a Community-scale undertaking or Community-scale group of undertakings.

Part I contains general provisions. In particular, regulation 1 provides that the Regulations extend to Northern Ireland. Regulation 4 specifies regulations which apply only where the central management is situated in the United Kingdom and regulations which apply even where the central management is not situated in the United Kingdom.

Part II concerns the calculation of, and the provision of information on, the number of employees in the Community-scale undertaking or Community-scale group of undertakings. It also makes provision about requests to negotiate an agreement for a European Works Council or information and consultation procedure, and provides for the central management to be able to dispute the validity of such requests or the application of the obligation in regulation 9(1).

Part III concerns the special negotiating body, whose members are to represent employees in negotiations with the central management for an agreement to establish a European Works Council or information and consultation procedure.

Part IV makes provision about the negotiations for, and the content and scope of, an agreement for a European Works Council or information and consultation procedure. It also specifies when a European Works Council is required to be established in accordance with the provisions in the Schedule.

Part V provides for the enforcement of the establishment and operation of a European Works Council or information and consultation procedure.

Part VI deals with the unauthorised disclosure of confidential information, and with the withholding of information by central management.

Part VII contains provisions conferring protections on employees and their representatives, such as members of a European Works Council.

Part VIII concerns the bodies which are to enforce the Regulations. It also contains provisions restricting the possibility of contracting out of the provisions in Part VII and the other provisions in the Regulations.

Part IX concerns exceptions to the application of the Regulations, and Part X contains transitional provisions.

The Schedule sets out the provisions, which apply to a European Works Council, which is required to be established in the circumstances specified in regulation 18.

A Regulatory Impact Assessment of the costs and benefits which will result from these Regulations has been prepared by the Department of Trade and Industry and is available from Verona Bailey, Employment Relations Directorate 1a, Department of Trade and Industry, Bay 2135, 1 Victoria Street, London SW1H 0ET (telephone 020 7215 5768; fax 020 7215 2642). Copies have been placed in the libraries of both Houses of Parliament.

**1999 No. 3323**

**TERMS AND CONDITIONS OF EMPLOYMENT**

The Transnational Information and Consultation of  
Employees Regulations 1999