

2009 No. 2401

EUROPEAN COMMUNITIES

The European Public Limited-Liability Company (Employee Involvement) (Great Britain) Regulations 2009

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The Secretary of State is a Minister designated for the purposes of section 2(2) of the European Communities Act 1972^(a) in relation to the creation, operation, regulation or dissolution of companies and other forms of business organisation^(b) and measures relating to employment rights and duties^(c).

The Secretary of State makes the following Regulations in exercise of the powers conferred by section 2(2) of that Act:

PART 1

INTRODUCTORY PROVISIONS

Citation, commencement and extent

1.—(1) These Regulations may be cited as the European Public Limited-Liability Company (Employee Involvement) (Great Britain) Regulations 2009.

- (2) These Regulations come into force on 1st October 2009.
(3) These Regulations extend to the whole of Great Britain.

EC Directive and EC Regulation

2.—(1) In these Regulations—

“the EC Directive” means Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European Company with regard to the involvement of employees^(d);

“the EC Regulation” means Council Regulation 2157/2001/EC of 8 October 2001 on the Statute for a European Company^(e).

(2) References in these Regulations to numbered Articles are, unless otherwise specified, references to Articles in the EC Regulation.

Interpretation

3.—(1) In these Regulations—

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

“Appeal Tribunal” means the Employment Appeal Tribunal;

(a) 1972 c. 68.
(b) S.I. 2007/193.
(c) S.I. 2000/738.
(d) OJ L 294, 10. 11. 2001, p. 22.
(e) OJ L 294, 10. 11. 2001, p.1.

“CAC” means the Central Arbitration Committee;

“dismissed” and “dismissal”, in relation to an employee, have the same meaning as in Part 10 of the Employment Rights Act 1996(a);

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

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

“employees’ representatives” means—

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

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

“information and consultation representative” has the meaning given to it in regulation 15(5);

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

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

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

“SE” means a European Public Limited-Liability Company (or Societas Europaea) within the meaning of the EC Regulation;

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

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

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

“standard rules on employee involvement” means the rules in the Schedule to these Regulations;

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

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

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

(a) 1996 c. 18.

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

(2) In these Regulations the following expressions have the meaning given by Article 2 of the EC Directive—

- “participating companies”,
- “subsidiary”,
- “special negotiating body”,
- “involvement of employees”,
- “information”,
- “consultation”,

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

(3) Except as otherwise provided, words and expressions used in the EC Regulation or the EC Directive have the same meaning in these Regulations as they have in that Regulation or Directive.

(4) Except as otherwise provided, references in these Regulations to an SE are to an SE that is to be, or is, registered in Great Britain.

Application of these Regulations

4.—(1) These Regulations apply where—

- (a) a participating company intends to establish an SE whose registered office is to be in Great Britain, or
- (b) an SE has its registered office in Great Britain.

(2) Where there are UK employees, Part 3 also applies (regardless of where the registered office is to be situated) in relation to the election or appointment of UK members of the special negotiating body, unless the majority of those employees is employed to work in Northern Ireland.

(3) Parts 6 to 9 also apply (regardless of where the registered office of the SE is, or is intended to be situated) if any of the following is registered or, as the case may be, situated in Great Britain—

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

PART 2

PARTICIPATING COMPANIES AND THE SPECIAL NEGOTIATING BODY

Duty on participating company to provide information

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

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

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

- (2) The information referred to in paragraph (1) must include, as a minimum, information—
- (a) identifying the participating companies, concerned subsidiaries and establishments,
 - (b) giving the number of employees employed by each participating company and concerned subsidiary and at each concerned establishment, and
 - (c) giving the number of employees employed to work in each EEA State.

(3) When a special negotiating body has been formed in accordance with regulation 8, the competent organs of each participating company must provide that body with such information as is necessary to keep it informed of the plan and progress of establishing the SE up to the time the SE has been registered.

Complaint of failure to provide information

6.—(1) An employees’ representative, or an employee for whom there is no such representative, may present a complaint to the CAC that—

- (a) the competent organ of a participating company has failed to provide the information referred to in regulation 5, or
- (b) the information provided by the competent organ of a participating company for the purpose of complying with regulation 5 is false or incomplete in a material particular.

(2) If the CAC finds the complaint well-founded, it must make an order requiring the competent organ to disclose information to the complainant.

(3) The order must specify—

- (a) the information in respect of which the CAC finds that the complaint is well-founded and which is to be disclosed to the complainant, and
- (b) a date (not less than one week after the date of the order) by which the competent organ must disclose the information specified in the order.

Function of the special negotiating body

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

Composition of the special negotiating body

8.—(1) The competent organs of the participating companies must make arrangements for the establishment of a special negotiating body constituted in accordance with the following provisions of this regulation.

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

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

(4) The number of additional members which the employees are entitled to elect or appoint under paragraph (3) must not exceed 20% of the number of ordinary members elected or appointed under paragraph (2). If the number of additional members under paragraph (3) would exceed that percentage, the employees who are entitled to appoint or elect the additional members are—

- (a) if one additional member is to be appointed or elected, those employed by the company not represented under paragraph (3) having the highest number of employees;

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

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

(6) If, following the appointment or election of members to the special negotiating body in accordance with this regulation, changes to the participating companies, concerned subsidiaries or concerned establishments result in the number of ordinary or additional members which employees would be entitled to elect or appoint under this regulation either increasing or decreasing—

- (a) the original appointment or election of members of the special negotiating body ceases to have effect, and
- (b) those employees are entitled to elect or appoint the new number of members in accordance with the provisions of these Regulations.

(7) If a member of the special negotiating body is no longer willing or able to continue serving as such a member, the employees whom the member represents are entitled to elect or appoint a new member in place of that member.

(8) In this regulation—

“eligible member” means a person who is—

- (a) in the case of a relevant company registered in an EEA state whose legislation allows representatives of trade unions who are not employees to be elected to the special negotiating body, an employee of the relevant company or a trade union representative;
- (b) in the case of a relevant company not registered in such an EEA state, an employee of the relevant company;

“relevant company” means a participating company which has employees in the EEA state in which it is registered and which it is proposed will cease to exist on or following the registration of the SE;

“the total workforce” means the total number of employees employed by all participating companies and concerned subsidiaries throughout all EEA states.

Complaint about establishment of special negotiating body

9.—(1) An application may be presented to the CAC for a declaration that the special negotiating body has not been established at all or has not been established properly in accordance with regulation 8.

(2) An application may be presented under this regulation by any of the following—

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

(3) The CAC may only consider an application made under paragraph (1) if it is made within a period of one month following the date or, if more than one, the last date on which the participating companies complied or should have complied with the obligation to inform their employees under regulation 8(5).

- (4) If the CAC finds the application well-founded—
- (a) it must make a declaration that the special negotiating body has not been established at all or has not been established properly, and
 - (b) the competent organs of the participating companies continue to be under the obligation in regulation 8(1).

PART 3

ELECTION OR APPOINTMENT OF UK MEMBERS OF THE SPECIAL NEGOTIATING BODY

Ballot arrangements

10.—(1) Subject to regulation 11, the UK members of the special negotiating body must be elected by balloting the UK employees.

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

(3) The requirements are—

- (a) in relation to the election of ordinary members under regulation 8(2), that—
 - (i) if the number of members which UK employees are entitled to elect to the special negotiating body is equal to the number of participating companies which have UK employees, there must be separate ballots of the UK employees in each participating company;
 - (ii) if the number of members which the UK employees are entitled to elect to the special negotiating body is greater than the number of participating companies which have UK employees, there must be separate ballots of the UK employees in each participating company and the management must ensure, as far as practicable, that at least one member representing each such participating company is elected to the special negotiating body and that the number of members representing each company is proportionate to the number of employees in that company;
 - (iii) if the number of members which the UK employees are entitled to elect to the special negotiating body is smaller than the number of participating companies which have employees in the United Kingdom—
 - (aa) the number of ballots held must be equivalent to the number of members to be elected,
 - (bb) a separate ballot must be held in respect of each of the participating companies with the higher or highest number of employees, and
 - (cc) it must be ensured that any employees of a participating company in respect of which a ballot does not have to be held are entitled to vote in a ballot held in respect of one of the other participating companies;
 - (iv) if there are any UK employees employed by a concerned subsidiary or establishment of non-UK participating companies, the management must ensure that those employees are entitled to vote in a ballot held pursuant to this regulation;
- (b) that in relation to the ballot of additional members under regulation 8(3) the management must hold a separate ballot in respect of each participating company entitled to elect an additional member;
- (c) that, in a ballot in respect of a particular participating company, all UK employees employed by that participating company or by its concerned subsidiaries or at its concerned establishments are entitled to vote;

- (d) that a person is entitled to stand as a candidate for election as a member of the special negotiating body in a ballot in respect of a particular participating company if, immediately before the latest time at which a person may become a candidate, the person is—
 - (i) a UK employee employed by that participating company, by any of its concerned subsidiaries or at any of its concerned establishments, or
 - (ii) if the management of that participating company so permits, a representative of a trade union who is not an employee of that participating company or any of its concerned subsidiaries;
- (e) that the management must appoint in accordance with paragraph (7) a person (a “ballot supervisor”)—
 - (i) to supervise the conduct of the ballot of UK employees, or
 - (ii) where there is to be more than one ballot, to supervise the conduct of each of the separate ballots,
 and, in a case falling within paragraph (ii), may appoint different persons to supervise the conduct of such different separate ballots as the management may determine;
- (f) that after the management has formulated proposals as to the arrangements for the ballot of UK employees and before it has published the final arrangements under sub-paragraph (g) it must, so far as reasonably practicable, consult the UK employees’ representatives on the proposed arrangements for the ballot of UK employees; and
- (g) that the management must publish the final arrangements for the ballot of UK employees in such manner as to bring them to the attention of, so far as reasonably practicable, all UK employees and the UK employees’ representatives.

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

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

(6) An order under paragraph (5) must specify—

- (a) the modifications to the arrangements which the management is required to make, and
- (b) the requirements it must satisfy.

(7) The management may appoint a person to be a ballot supervisor for the purposes of paragraph (3)(e) only if the management—

- (a) reasonably believes that the person will carry out competently any functions conferred on the person in relation to the ballot, and
- (b) has no reasonable grounds for believing that the person’s independence in relation to the ballot might reasonably be called into question.

Conduct of the ballot

11.—(1) The management must—

- (a) ensure that a ballot supervisor appointed under regulation 10(3)(e) carries out the functions conferred or imposed on the ballot supervisor under this regulation;
- (b) ensure that there is no interference from the management with the ballot supervisor’s carrying out of those functions;
- (c) 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 must require that the ballot supervisor—

- (a) supervises the conduct of the ballot, or the separate ballots, that the ballot supervisor is being appointed to supervise, in accordance with the arrangements for the ballot of UK employees published by the management under regulation 10(3)(g) or, where appropriate, in accordance with the arrangements as required to be modified by an order made as a result of a complaint presented under regulation 10(4);
- (b) does not conduct the ballot or any of the separate ballots before the management has satisfied the requirement specified in regulation 10(3)(g) and—
 - (i) where no complaint has been presented under regulation 10(4), before the expiry of a period of 21 days beginning on the date on which the management published its arrangements under regulation 10(3)(g), or
 - (ii) where a complaint has been presented under regulation 10(4), before the complaint has been determined and, where appropriate, the arrangements have been modified as required by an order made as a result of that complaint;
- (c) conducts the ballot, or each separate ballot, so as to secure that—
 - (i) so far as reasonably practicable, those entitled to vote are given the opportunity to vote,
 - (ii) so far as reasonably practicable, those entitled to stand as candidates are given the opportunity to stand,
 - (iii) so far as reasonably practicable, those voting are able to do so in secret, and
 - (iv) the votes given in the ballot are fairly and accurately counted.

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

(4) If a ballot supervisor considers (whether on the basis of representations made to the ballot supervisor by another person or otherwise)—

- (a) that 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) that there was interference with the carrying out of the ballot supervisor's functions, or a failure by the management to comply with all reasonable requests made by the ballot supervisor, with the result that the ballot supervisor was unable to form a proper judgement as to whether each of the requirements referred to in paragraph (2) was satisfied in the ballot,

the ballot supervisor must publish a report (“an ineffective ballot report”).

(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 must publish an ineffective ballot report in such manner as to make it available to the management and, so far as reasonably practicable, to 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 if an ineffective ballot report has been published in respect of every separate ballot, the outcome of the ballot or ballots has no effect and the management is again under the obligation in regulation 10(2);
- (b) if there have been separate ballots and sub-paragraph (a) does not apply—
 - (i) the management must arrange for the separate ballot or ballots in respect of which an ineffective ballot report was published to be re-held in accordance with regulation 10 and this regulation, and
 - (ii) no such ballot has effect until it has been re-held and no ineffective ballot report has been published in respect of it.

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

Appointment of UK members by a consultative committee

12.—(1) This regulation applies where—

- (a) regulation 10(3)(a)(i) or (ii) or (b) would (apart from this regulation) require a ballot to be held, but
- (b) there exists in the participating company in respect of which a ballot would be held under regulation 10, a consultative committee.

(2) Where this regulation applies—

- (a) the election provided for in regulation 10 must not take place;
- (b) the consultative committee is entitled to appoint the UK member or members of the special negotiating body who would otherwise be elected pursuant to regulation 10;
- (c) any such appointment by the consultative committee must comply with paragraph (3).

(3) The consultative committee may appoint as a member of the special negotiating body—

- (a) one of their number, or
- (b) if the management of the participating company in respect of which the consultative committee exists so permits, a trade union representative who is not an employee of that company.

(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 management of the participating company,
- (c) which, in carrying out its information and consultation function, represents all the employees of the participating company, and
- (d) which consists wholly of persons who are employees of the participating company or its concerned subsidiaries.

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

- (a) receiving, on behalf of all the employees of the participating company, information which may significantly affect the interests of the employees of that company, but excluding information which is relevant only to a specific aspect of the interests of the employees, such as health and safety or collective redundancies, and
- (b) being consulted by the management of the participating company on the information referred to in sub-paragraph (a).

(6) The consultative committee must publish the names of the persons whom it has appointed to be members of the special negotiating body in such a manner as to bring them to the attention of the management of the participating company and, so far as reasonably practicable, the employees and the employees’ representatives of that company and its concerned subsidiaries.

(7) Where the management of the participating company, or an employee or an employees’ representative, believes that—

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

the management of the participating company or, as the case may be, the employee or the employees’ representative may present a complaint to the CAC within a period of 21 days beginning on the date on which the consultative committee published under paragraph (6) the names of the persons appointed.

- (8) If the CAC finds the complaint well-founded it must make a declaration to that effect.
- (9) Where the CAC has made a declaration under paragraph (8)—
- (a) any appointment made by the consultative committee is ineffective, and
 - (b) the members of the special negotiating body must be elected by a ballot of the employees in accordance with regulation 10.
- (10) Where the consultative committee appoints any person to be a member of the special negotiating body, that appointment has effect—
- (a) where no complaint has been presented under paragraph (7), after the expiry of a period of 21 days beginning on the date on which the consultative committee published under paragraph (6) the names of the persons appointed;
 - (b) where a complaint has been presented under paragraph (7), as from the day on which the complaint has been determined without a declaration under paragraph (8) being made.

Representation of employees

13.—(1) A member elected in a ballot in accordance with regulation 8(2) is treated as representing the employees for the time being of the participating company and of any concerned subsidiary or establishment whose employees were entitled to vote in the ballot in which the member was elected.

(2) If an additional member is elected in accordance with regulation 8(3) and (4), that additional member, and not any member elected in accordance with regulation 8(2), is treated as representing the employees for the time being of the participating company and of any concerned subsidiary or establishment whose employees were entitled to vote in the ballot in which the additional member was elected.

(3) When a member of the special negotiating body is appointed by a consultative committee in accordance with regulation 12, the employees whom the consultative committee represents and the employees of any concerned subsidiary are treated as being represented by the member so appointed.

PART 4

NEGOTIATION OF THE EMPLOYEE INVOLVEMENT AGREEMENT

Negotiations to reach an employee involvement agreement

14.—(1) In this regulation and in regulation 15 the competent organs of the participating companies and the special negotiating body are referred to as “the parties”.

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

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

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

The employee involvement agreement

- 15.—(1) The employee involvement agreement must be in writing.
- (2) The employee involvement agreement must specify each of the following—
- (a) the scope of the agreement;
 - (b) the composition, number of members and allocation of seats on the representative body;
 - (c) the functions and the procedure for the information and consultation of the representative body;
 - (d) the frequency of meetings of the representative body;
 - (e) the financial and material resources to be allocated to the representative body;
 - (f) if, during negotiations, the parties decide to establish one or more information and consultation procedures instead of a representative body, the arrangements for implementing those procedures;
 - (g) if, during negotiations, the parties decide to establish arrangements for participation, the substance of those arrangements including (if applicable) the number of members in the SE's administrative or supervisory body which the employees will be entitled to elect, appoint, recommend or oppose, the procedures as to how these members may be elected, appointed, recommended or opposed by the employees, and their rights;
 - (h) the date of entry into force of the agreement and its duration, the circumstances, if any, in which the agreement is required to be re-negotiated and the procedure for its re-negotiation.

This paragraph is without prejudice to the autonomy of the parties and is subject to paragraph (4).

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

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

(5) If—

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

those representatives are “information and consultation representatives”.

Decisions of the special negotiating body

16.—(1) Each member of the special negotiating body has one vote.

(2) The special negotiating body must take decisions by an absolute majority vote, except in those cases where paragraph (3) or regulation 17 provides otherwise.

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

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

In this paragraph, “reduction of participation rights” means that the body representative of the employees has participation rights in relation to a smaller proportion of members of the supervisory or administrative organs of the SE than the employees' representatives had in the

participating company which gave participation rights in relation to the highest proportion of such members in that company.

(4) Where the special negotiating body takes a decision under this regulation or under regulation 17—

- (a) it must publish the details of the decision in such a manner as to bring the decision, so far as reasonably practicable, to the attention of the employees whom it represents, and
- (b) such publication must take place as soon as reasonably practicable and, in any event, no later than 14 days after the decision has been taken.

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

(6) The participating company or companies must pay for—

- (a) any reasonable expenses of the functioning of the special negotiating body, and
- (b) any reasonable expenses relating to the negotiations that are necessary to enable the special negotiating body to carry out its functions in an appropriate manner,

but where the special negotiating body is assisted by more than one expert the participating company is not required to pay such expenses in respect of more than one of them.

Decision not to open, or to terminate, negotiations

17.—(1) The special negotiating body may decide, by a two thirds majority vote,—

- (a) not to open negotiations with the competent organs of the participating companies, or
- (b) to terminate any such negotiations.

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

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

- (a) the duty in regulation 14(2) to negotiate with a view to reaching an employee involvement agreement ceases as from the date of the decision;
- (b) any rules relating to the information and consultation of employees in an EEA state in which employees of the SE are employed apply to the employees of the SE in that EEA state;
- (c) the special negotiating body is to be reconvened only if a request that meets the conditions in paragraph (4) is made by employees or employees' representatives.

(4) The conditions are that the request is made—

- (a) in writing;
- (b) by at least 10% of the employees of—
 - (i) the participating companies and their concerned subsidiaries, or
 - (ii) where the SE has been registered, the SE and its subsidiaries,or by employees' representatives representing at least that percentage of those employees;
- (c) no earlier than two years after the decision made under paragraph (1) was or should have been published in accordance with regulation 16(4) unless—
 - (i) the special negotiating body, and
 - (ii) the competent organs of every participating company or, where the SE has been registered, the SE,agree to the special negotiating body being reconvened earlier.

Complaint about decisions of special negotiating body

18.—(1) If a person who is a member of the special negotiating body, or who is an employees' representative or an employee for whom there is no such representative, believes that the special negotiating body has taken a decision referred to in regulation 16 or 17 and—

- (a) that the decision was not taken by the majority required by regulation 16 or 17, as the case may be, or
- (b) that the special negotiating body failed to publish the decision in accordance with regulation 16(4),

the person may present a complaint to the CAC within 21 days after the date on which the special negotiating body published their decision in accordance with regulation 16(4) or, if they have not done so, the date by which they should have so published their decision.

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

PART 5

STANDARD RULES ON EMPLOYEE INVOLVEMENT

Standard rules on employee involvement

19.—(1) Where this regulation applies, the competent organ of the SE and its subsidiaries and establishments must make arrangements for the involvement of employees of the SE and its subsidiaries and establishments in accordance with the standard rules on employee involvement.

This paragraph is without prejudice to paragraph (3).

(2) This regulation applies in the following circumstances—

- (a) where the parties agree that the standard rules on employee involvement are to apply; or
- (b) where the period specified in regulation 14(3)(a) or, where applicable, (b) has expired without the parties reaching an employee involvement agreement and—
 - (i) the competent organs of each of the participating companies agree that the standard rules on employee involvement are to apply and so continue with the registration of the SE, and
 - (ii) the special negotiating body has not taken any decision under regulation 17(1) either not to open, or to terminate, the negotiations referred to in that regulation.

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

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

has decided that the standard rules on participation will apply to the employees of the SE.

(4) Where—

- (a) the standard rules on participation apply, and
- (b) more than one form of employee participation exists in the participating companies,

the special negotiating body must decide which of the existing forms of participation is to exist in the SE and must inform the competent organs of the participating companies accordingly.

PART 6

COMPLIANCE AND ENFORCEMENT

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

20.—(1) Where—

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

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

(2) A complaint brought under paragraph (1) must be brought within the period of 3 months commencing with—

- (a) the date of the alleged failure, or
- (b) where the failure takes place over a period, the last day of that period.

(3) In this regulation—

“failure” means an act or omission;

“relevant applicant” means—

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

(4) Where it finds the complaint well-founded, the CAC—

- (a) must make a declaration to that effect, and
- (b) may make an order requiring the SE to take such steps as are necessary to comply with the terms of the employee involvement agreement or, as the case may be, the standard rules on employee involvement.

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

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

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

(7) Where such an application is made, the Appeal Tribunal must issue a written penalty notice to the SE requiring it to pay a penalty to the Secretary of State in respect of the failure, unless the Appeal Tribunal is satisfied, on hearing representations from the SE,—

- (a) that the failure resulted from a reason beyond its control, or
 - (b) that it has some other reasonable excuse for its failure.
- (8) Regulation 21 applies in respect of a penalty notice issued under this regulation.
- (9) No order of the CAC under this regulation has the effect of suspending or altering the effect of any act done or of any agreement made by the participating company or the SE.

Penalties

- 21.**—(1) A penalty notice issued under regulation 20 must specify—
- (a) the amount of the penalty which is payable;
 - (b) the date before which the penalty must be paid;
 - (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 must 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;
 - (e) the number of employees employed by the undertaking.
- (4) The date specified under paragraph (1)(b) must not be earlier than the end of the period within which an appeal against a decision or order made by the CAC under regulation 20 may be made.
- (5) If the specified date in a penalty notice has passed and —
- (a) the period during which an appeal may be made has expired without an appeal having been made, or
 - (b) such an appeal has been made and determined,
- the Secretary of State may recover from the SE, as a civil debt due to the Secretary of State, any amount payable under the penalty notice which remains outstanding.
- (6) The making of an appeal suspends the effect of the penalty notice.
- (7) Any sums received by the Secretary of State under regulation 20 or this regulation must be paid into the Consolidated Fund.

Misuse of procedures

- 22.**—(1) If an employees' representative, or an employee for whom there is no such representative, believes that a participating company or an SE is misusing or intending to misuse the SE or the powers in these Regulations for the purpose of—
- (a) depriving the employees of that participating company or of any of its concerned subsidiaries or, as the case may be, of the SE or of any of its subsidiaries of their rights to employee involvement, or
 - (b) withholding rights from any of the employees referred to in sub-paragraph (a),
- the representative or, as the case may be, the employee may make a complaint to the CAC.
- (2) Where a complaint is made to the CAC under paragraph (1)—
- (a) before registration of the SE, or
 - (b) within the period of 12 months following the date of its registration,
- the CAC must uphold the complaint unless the respondent proves that it did not misuse or intend to misuse the SE or the powers in these Regulations for a purpose specified in sub-paragraph (a) or (b) of paragraph (1).

- (3) If it finds the complaint to be well founded, the CAC—
- (a) must make a declaration to that effect, and
 - (b) may make an order requiring the participating company or the SE, as the case may be, to take such action as is specified in the order to ensure that the employees referred to in paragraph (1)(a) are not deprived of their rights to employee involvement or that such rights are not withheld from them,

and the provisions of regulations 20(6) to (9) and 21 apply where the CAC makes a declaration or order under this paragraph as they apply where it makes a declaration or order under regulation 20(4).

Exclusivity of remedy

23. The remedy for infringement of the rights conferred by these Regulations is by way of complaint to the CAC in accordance with these Regulations and not otherwise.

PART 7

CONFIDENTIAL INFORMATION

Breach of statutory duty

- 24.—(1) Where a body which is—
- (a) an SE,
 - (b) a subsidiary of an SE,
 - (c) a participating company, or
 - (d) a concerned subsidiary,

entrusts a person, pursuant to the provisions of these Regulations, with any information or document on terms requiring it to be held in confidence, the person must not disclose that information or document except in accordance with the terms on which it was disclosed to the person.

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

- (3) Where paragraph (1) applies—
- (a) the obligation to comply with that paragraph is a duty owed to the body that disclosed the information or document to the recipient, and
 - (b) a breach of the duty is actionable accordingly (subject to the defences and other incidents applying to actions for breach of statutory duty).
- (4) Paragraph (3) does not affect—
- (a) any legal liability which any person may incur otherwise than under this regulation by disclosing the information or document, or
 - (b) any right which any person may have in relation to such disclosure otherwise than under this regulation.

(5) No action lies under paragraph (3) where the recipient reasonably believed the disclosure to be a “protected disclosure” within the meaning given by section 43A of the Employment Rights Act 1996(a).

(6) A recipient to whom a body mentioned in paragraph (1) has, pursuant to the provisions of these Regulations, entrusted any information or document on terms requiring it to be held in

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

confidence may apply to the CAC for a declaration as to whether it was reasonable for the body to require the recipient to hold the information or document in confidence.

(7) If the CAC considers that the disclosure of the information or the document by the recipient would not, or would not be likely to, harm the legitimate interests of the undertaking, it must make a declaration that it was not reasonable for the body 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 is not at any time after the making of the declaration to 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

25.—(1) Neither an SE nor a participating company is required to disclose any information or document to a person for the purposes of these Regulations where the nature of the information or document is such that, according to objective criteria, the disclosure of the information or document would seriously harm the functioning of, or would be prejudicial to,—

- (a) the SE or any subsidiary or establishment of the SE, or
- (b) the participating company or any subsidiary or establishment of the participating company.

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

- (a) where a representative body has been appointed or elected, a member of that body, or
- (b) where a representative body has not been appointed or elected, an information and consultation representative or an employee,

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

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

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

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

PART 8

PROTECTION FOR MEMBERS OF SPECIAL NEGOTIATING BODY ETC.

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

26.—(1) Where an employee is any of the following—

- (a) a member of a special negotiating body,
- (b) a member of a representative body,
- (c) an information and consultation representative,
- (d) an employee member on a supervisory or administrative organ,

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

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

(2) In this regulation “working hours” means any time when, in accordance with the employee’s contract of employment, the employee is required to be at work.

Right to remuneration for time off under regulation 26

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

(2) Chapter 2 of Part 14 of the Employment Rights Act 1996 (a week’s pay)(a) applies in relation to this regulation as it applies in relation to section 62 of that Act.

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

(4) But where the number of normal working hours differs from week to week or over a longer period, the amount of one week’s pay is to 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 are—

- (a) the average number of normal working hours in a week which the employee could expect in accordance with the terms of the contract;
- (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 the employee’s contract of employment.

(7) But—

- (a) any contractual remuneration paid to an employee in respect of a period of time off under regulation 26 goes towards discharging any liability of the employer to pay remuneration under paragraph (1) in respect of that period, and
- (b) 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

28.—(1) An employee may present a complaint to an employment tribunal that the employer—

- (a) has unreasonably refused to permit the employee to take time off as required under regulation 26, or
- (b) has failed to pay the whole or any part of any amount to which the employee is entitled under regulation 27.

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

(a) 1996 c.18.

- (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 must 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 must also order the employer to pay to the employee an amount equal to the remuneration to which the employee would have been entitled under regulation 27 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 the employee is entitled under regulation 27, the tribunal must also order the employer to pay to the employee the amount which it finds is due to the employee.

Unfair dismissal

29.—(1) An employee who is dismissed is to be regarded as unfairly dismissed for the purposes of Part 10 of the Employment Rights Act 1996 if—

- (a) paragraph (2) applies to the employee and the reason (or, if more than one, the principal reason) for the dismissal is a reason specified in paragraph (3), or
- (b) paragraph (5) applies to the employee and the reason (or, if more than one, the principal reason) for the dismissal is a reason specified in paragraph (6).

(2) This paragraph applies to an employee who is any of the following—

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

(3) The reasons are—

- (a) that the employee performed, or proposed to perform, any functions or activities as such a member, representative or candidate (but see paragraph (4));
- (b) that the employee, or a person acting on behalf of the employee, made or proposed to make a request to exercise an entitlement conferred on the employee by regulation 26 or 27.

(4) Paragraph (3)(a) does not apply if—

- (a) the reason (or principal reason) for the dismissal is that, in the performance or purported performance of the employee's functions or activities, the employee has disclosed any information or document in breach of the duty in regulation 24, and
- (b) the case is not one where the employee reasonably believed the disclosure to be a "protected disclosure" within the meaning given by section 43A of the Employment Rights Act 1996.

(5) This paragraph applies to any employee (whether or not paragraph (2) also applies).

(6) The reasons are that the employee did any of the following—

- (a) took, or proposed to take, any proceedings before an employment tribunal to enforce any right conferred on the employee by these Regulations;
- (b) exercised, or proposed to exercise, any entitlement to apply or complain to the CAC or the Appeal Tribunal conferred by these Regulations or exercised, or proposed to exercise, the right to appeal in connection with any rights conferred by these Regulations;

- (c) acted with a view to securing that a special negotiating body, a representative body or an information and consultation procedure did or did not come into existence;
 - (d) indicated that the employee did or did not support the coming into existence of a special negotiating body, a representative body or an information and consultation procedure;
 - (e) stood as a candidate in an election in which any person elected would, on being elected, be a member of a special negotiating body or a representative body, an employee member on a supervisory or administrative organ, or an information and consultation representative;
 - (f) influenced, or sought to influence, by lawful means the way in which votes were to be cast by other employees in a ballot arranged under these Regulations;
 - (g) voted in such a ballot;
 - (h) expressed doubts, whether to a ballot supervisor or otherwise, as to whether such a ballot had been properly conducted;
 - (i) proposed to do, failed to do, or proposed to decline to do, any of the things mentioned in sub-paragraphs (d) to (h).
- (7) It is immaterial for the purposes of sub-paragraph (a) of paragraph (6)—
- (a) whether or not the employee has the right, or
 - (b) whether or not the right has been infringed,

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

Subsidiary provisions relating to unfair dismissal

30.—(1) In section 105 of the Employment Rights Act 1996 (redundancy as unfair dismissal) in subsection (1)(c) (which requires one of subsections (2A) to (7K) to apply for a person to be treated as unfairly dismissed)(a) for “(7K)” substitute “(7L)”.

(2) After subsection (7K) of that section insert—

“(7L) 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 29 of the European Public Limited-Liability Company (Employee Involvement) (Great Britain) Regulations 2009(S.I. 2009/2401) (read with paragraphs (4) and (7) of that regulation).”.

(3) In section 108 of the Employment Rights Act 1996 (exclusion of right: qualifying period of employment)(b) in subsection (3) (cases where no qualifying period of employment is required) (c)omit “or” immediately preceding paragraph (p) and after that paragraph insert—

“, or

(q) paragraph (1)(a) or (b) of regulation 29 of the European Public Limited-Liability Company (Employee Involvement) (Great Britain) Regulations 2009(S.I. 2009/2401) 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 the employer, done on a ground specified in, respectively, paragraph (3) or (6).

(2) This paragraph applies to an employee who is any of the following—

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

(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.

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

(3) The grounds are—

- (a) that the employee performed or proposed to perform any functions or activities as such a member, representative or candidate (but see paragraph (4));
- (b) that the employee, or a person acting on behalf of the employee, made or proposed to make a request to exercise an entitlement conferred on the employee by regulation 26 or 27.

(4) Paragraph (3)(a) does not apply if—

- (a) the ground for the subsection to detriment is that in the performance, or purported performance, of the employee's functions or activities the employee has disclosed any information or document in breach of the duty in regulation 24, and
- (b) the case is not one where the employee reasonably believed the disclosure to be a "protected disclosure" within the meaning given by section 43A of the Employment Rights Act 1996.

(5) This paragraph applies to any employee (whether or not paragraph (2) also applies).

(6) The grounds are that the employee did any of the following—

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

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

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

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

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

Detriment: enforcement and subsidiary provisions

32.—(1) An employee may present a complaint to an employment tribunal that the employee has been subjected to a detriment in contravention of regulation 31.

(2) The provisions of section 48(2) to (4) of the Employment Rights Act 1996 (complaints to employment tribunals)(a) apply in relation to a complaint under this regulation as they apply in relation to a complaint under section 48 of that Act but taking references in those provisions to the employer as references to the employer within the meaning of regulation 31(1).

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

Conciliation

33. In section 18 of the Employment Tribunals Act 1996 (conciliation)(c), in subsection (1) (which specifies the proceedings and claims to which the section applies) omit “or” immediately preceding paragraph (u) and after that paragraph insert—

“, or

- (v) under regulation 28 or 32 of the European Public Limited-Liability Company (Employee Involvement) (Great Britain) Regulations 2009(S.I. 2009/2401).”.

PART 9

MISCELLANEOUS

CAC proceedings

34.—(1) Where under these Regulations a person presents a complaint or makes an application to the CAC, the complaint or application must be in writing and in such form as the CAC may require.

(2) In its consideration of a complaint or application under these Regulations, the CAC must—

- (a) make such enquiries as it sees fit, and
- (b) give any person whom it considers has a proper interest in the complaint or application an opportunity to be heard.

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

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

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

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

(a) Section 48(3) was amended by section 1(2)(a) of the Employment Rights (Dispute Resolution) Act 1998 (c.8).

(b) Subsections (1) to (5) of section 49 have been amended by section 4(2) of the Public Interest Disclosure Act 1996 (c.18), section 1(2)(a) of the Employment Rights (Dispute Resolution) Act 1998 and by regulation 31 of S.I. 1988/1833.

(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.

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

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

Appeal Tribunal: location of certain proceedings under these Regulations

35.—(1) Any proceedings before the Appeal Tribunal under these Regulations, other than appeals under paragraph (w) of section 21(1) of the Employment Tribunals Act 1996 (appeals from employment tribunals on questions of law)(a), must—

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

(2) In section 20(4) of the Employment Tribunals Act 1996 (the Appeal Tribunal)(b)—

- (a) for “2006 and” substitute “2006,”;
- (b) after “2007”, insert “and regulation 33(1) of the European Public Limited-Liability Company (Employee Involvement) (Great Britain) Regulations 2009(S.I. 2009/2401)”.

Appeal Tribunal: appeals from employment tribunals

36. In section 21(1) of the Employment Tribunals Act 1996 (circumstances in which an appeal lies to the Appeal Tribunal from an employment tribunal) omit “or” immediately preceding paragraph (v) and after that paragraph insert—

“, or

- (w) the European Public Limited-Liability Company (Employee Involvement) (Great Britain) Regulations 2009(S.I. 2009/2401).”.

ACAS

37.—(1) If, on receipt of an application or complaint under these Regulations, the CAC is of the opinion that it is reasonably likely to be settled by conciliation, it must—

- (a) refer the application or complaint to the Advisory, Conciliation and Arbitration Service (“ACAS”), and
- (b) notify the applicant or complainant and any persons whom it considers have a proper interest in the application or complaint accordingly,

and ACAS must seek to promote a settlement of the matter.

(2) If—

- (a) an application or complaint so referred is not settled or withdrawn, and
- (b) ACAS is of the opinion that further attempts at conciliation are unlikely to result in a settlement,

ACAS must inform the CAC of that opinion.

(3) If—

- (a) the application or complaint is not referred to ACAS, or

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

(b) Section 20(4) was inserted by regulation 35 of S.I. 1999/3323, and amended by regulations 36(2) and 48(2) of S.I. 2004/3426, regulation 37(2) of S.I. 2006/2059 and regulation 58(2) of S.I. 2007/2974.

(b) it is so referred, but ACAS informs the CAC of its opinion that further attempts at conciliation are unlikely to result in a settlement,
the CAC must proceed to hear and determine the application or complaint.

Restrictions on contracting out: general

38.—(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 8, or
- (b) to preclude a person from bringing any proceedings before the CAC under any provision of these Regulations other than a provision of that Part.

(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 8

39.—(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 8 of these Regulations, or
- (b) to preclude a person from bringing any proceedings before an employment tribunal under that Part.

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

(3) Paragraph (1) does not apply to any agreement to refrain from instituting or continuing before an employment tribunal proceedings within section 18(1)(v) of the Employment Tribunals Act 1996 (proceedings under these Regulations where conciliation is available) if the conditions regulating compromise agreements under these Regulations are satisfied in relation to the agreement.

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

- (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 the ability of the employee to pursue the employee’s rights before an employment tribunal;
- (d) there must be in force, when the adviser gives the advice, a contract of insurance, or an indemnity provided for members of a profession or professional body, covering the risk of a claim by the employee in respect of loss arising in consequence of the advice;
- (e) the agreement must identify the adviser;
- (f) the agreement must state that the conditions in sub-paragraphs (a) to (e) are satisfied.

(5) For the purposes of paragraph (4)(c) a “relevant independent adviser” is a person who is any of the following—

- (a) a qualified lawyer;
- (b) an officer, official, employee or member of an independent trade union who has been certified in writing by the trade union as competent to give advice and authorised to do so on behalf of the trade union;
- (c) a person who works at an advice centre (whether as an employee or as a volunteer) and has been certified in writing by the centre as competent to give advice and authorised to do so on behalf of the centre;

but this is subject to paragraph (6).

(6) A person is not a relevant independent adviser for the purposes of paragraph (4)(c) in relation to the employee in any of the following cases—

- (a) if the person 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;
- (c) in the case of a person within paragraph (5)(c), if the employee makes a payment for the advice received.

(7) In paragraph (5)(a) “qualified lawyer” means any of the following—

- (a) as respects England and Wales—
 - (i) a barrister (whether in practice as such or employed to give legal advice);
 - (ii) a solicitor who holds a practising certificate;
 - (iii) 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);
- (b) as respects Scotland—
 - (i) an advocate (whether in practice as such or employed to give legal advice); or
 - (ii) a solicitor who holds a practising certificate.

(8) For the purposes of paragraph (6) any two employers are “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” is to be construed accordingly.

The Transnational Information and Consultation of Employees Regulations 1999

40. In the Transnational Information and Consultation of Employees Regulations 1999(a), for regulation 46A substitute—

“**46A.**—(1) These regulations do not apply to an SE that is—

- (a) a Community-scale undertaking, or
- (b) a controlling undertaking of a Community-scale group of undertakings,

except where the special negotiating body has taken the decision referred to in regulation 17 of the European Public Limited-Liability Company (Employee Involvement) (Great Britain) Regulations 2009 (decision not to open, or to terminate, negotiations)(S.I. 2009/2401) or, as the case may be, regulation 17 of the European Public Limited-Liability Company (Employee Involvement) (Northern Ireland) Regulations 2009 (S.I. 2009/2402).

(2) In this regulation an “SE” means a company established in accordance with the European Public Limited-Liability Company Regulations 2004(S.I. 2004/2326(b)).”.

Existing employee involvement rights

41.—(1) Nothing in these Regulations affects involvement rights of employees of an SE, its subsidiaries or establishments provided for by law or practice in the EEA state in which they were employed immediately prior to the registration of the SE.

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

(a) S.I. 1999/3323. Regulation 46A was inserted by regulation 53 of S.I. 2004/2326.

(b) S.I. 2004/2326 was amended by S.I. 2009/2400.

SCHEDULE Regulation 19(3)
STANDARD RULES ON EMPLOYEE INVOLVEMENT

PART 1

COMPOSITION OF THE REPRESENTATIVE BODY

1.—(1) The management of the SE must arrange for the establishment of a representative body in accordance with the following provisions.

(2) The representative body must be composed of employees of the SE and its subsidiaries and establishments.

(3) The representative body must be composed of one member for each 10%, or fraction of 10%, of employees of the SE, its subsidiaries and establishments employed for the time being in each EEA state.

(4) The members of the representative body must be elected or appointed by the members of the special negotiating body.

(5) The election or appointment is to be carried out by whatever method the special negotiating body decides.

2. Where its size so warrants, the representative body must elect a select committee from among its members comprising at most 3 members.

3. The representative body must adopt rules of procedure.

4. The representative body must inform the competent organ of the SE of the composition of the representative body and any changes in its composition.

5.—(1) Four years after its establishment, the representative body must decide—

(a) whether to open negotiations with the competent organ of the SE to reach an employee involvement agreement, or

(b) whether the standard rules in Part 2 of this Schedule and, where applicable, Part 3 of this Schedule are to continue to apply.

(2) Where a decision is taken under sub-paragraph (1) to open negotiations, regulations 14 to 16 and 18 apply to the representative body as they apply to the special negotiating body.

PART 2

STANDARD RULES FOR INFORMATION AND CONSULTATION

6.—(1) The competence of the representative body is limited to—

(a) questions which concern the SE itself and any of its subsidiaries or establishments in another EEA state, and

(b) questions which exceed the powers of the decision-making organ in a single EEA state.

(2) For the purpose of informing and consulting under sub-paragraph (1), the competent organ of the SE must—

- (a) prepare and provide to the representative body regular reports on the progress of the business of the SE and the SE's prospects;
- (b) provide the representative body with the agenda for meetings of the administrative or, where appropriate, the management or supervisory organs and copies of all documents submitted to the general meeting of its shareholders;
- (c) inform the representative body when there are exceptional circumstances affecting the employees' interests to a considerable extent, particularly in the event of relocations, transfers, the closure of establishments or undertakings or collective redundancies.

7.—(1) The competent organ must, if the representative body so desires, meet with that body at least once a year to discuss the reports referred to in paragraph 6(2)(a).

This sub-paragraph is without prejudice to paragraph 8.

(2) The meetings must relate in particular to the structure, economic and financial situation, the probable development of 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 or establishments, or important parts of undertakings or establishments, and collective redundancies.

8.—(1) In the circumstances set out in paragraph 6(2)(c), the representative body may decide, for reasons of urgency, to allow the select committee to meet the competent organ and it has the right to meet a more appropriate level of management within the SE rather than the competent organ itself.

(2) In the event of the competent organ not acting in accordance with the opinion expressed by the representative body, the two bodies must meet again to seek an agreement, if the representative body so wishes.

(3) In the circumstances set out in sub-paragraph (1), if the select committee attends the meeting, any other members of the representative body who represent employees who are directly concerned by the measures being discussed also have the right to participate in the meeting.

(4) Before any meeting referred to in this paragraph, the members of the representative body or the select committee, as the case may be, are entitled to meet without the representatives of the competent organ being present.

9. Without prejudice to regulations 24 and 25, the members of the representative body must inform the employees' representatives or, if no such representatives exist, the employees of the SE and its subsidiaries and establishments, of the content and outcome of the information and consultation procedures.

10. The representative body and the select committee may each be assisted by experts of its choice.

11.—(1) The costs of the representative body must be borne by the SE which must also provide the members of that body with financial and material resources needed to enable them to perform their duties in an appropriate manner, including (unless agreed otherwise) the cost of organising meetings, providing interpretation facilities and accommodation and travelling expenses.

(2) However, where the representative body or the select committee is assisted by more than one expert, the SE is not required to pay the expenses of more than one of them.

PART 3

STANDARD RULES FOR PARTICIPATION

12.—(1) In the case of an SE established by transformation, if the rules of a Member State relating to employee participation in the administrative or supervisory body applied before registration, all aspects of employee participation continue to apply to the SE.

(2) Paragraph 13 applies to that end with the necessary modifications.

13.—(1) In the case where—

- (a) an SE is established otherwise than by transformation, and
- (b) the employees or their representatives of at least one of the participating companies had participation rights,

the representative body has the right to elect, appoint, recommend or oppose the appointment of a number of members of the administrative or supervisory body of the SE.

(2) Their number must be equal to the highest proportion in force in the participating companies concerned before the registration of the SE.

14.—(1) The representative body must decide on the allocation of seats within the administrative or supervisory body.

(2) In doing so, the representative body must take into account the proportion of employees of the SE employed in each EEA state.

(3) If the employees of one or more EEA states are not covered by that proportional criterion, the representative body, in making its decision under sub-paragraph (1), must appoint a member from one of those EEA states including one from the EEA state in which the SE is registered, if appropriate.

(4) Every member of the administrative body or, where appropriate, the supervisory body of the SE who has been elected, appointed or recommended by the representative body or the employees is to be a full member with the same rights and obligations as the members representing shareholders, including the right to vote.

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations, made under section 2(2) of the European Communities Act 1972 (c.68), replace the provisions of Part 3 of the European Public Limited-Liability Company Regulations 2004 (S.I. 2004/2326) (“the 2004 GB Regulations”). They continue the implementation in Great Britain of Council Directive 2001/86/EC (O.J. L 294, 10.11.2001, p.22) supplementing the Statute for a European Company (Council Regulation 2157/2001/EC: O.J L 294, 10.11.2001, p.1) with regard to the involvement of employees. The Regulations come into force on 1st October 2009.

There are separate regulations continuing the implementation of Directive 2001/86/EC in Northern Ireland (the European Public Limited-Liability Company (Employee Involvement) (Northern Ireland) Regulations 2009 (S.I. 2009/2402)).

The remaining Parts of the 2004 GB Regulations are amended by the European Public Limited-Liability Company (Amendment) Regulations 2009 (S.I. 2009/2400) to reflect the enactment of the Companies Act 2006 (c.46) and the extension by section 1285 of that Act of the 2004 GB Regulations to Northern Ireland.

The Regulations continue the implementation in Great Britain of the Directive’s provisions relating to employee involvement in the form of public limited-liability company, *Societas Europaea*, known as the “SE”. The Regulations govern—

- the establishment of a special negotiating body (Part 2);
- the election or appointment of the UK members of the special negotiating body (Part 3);
- the negotiation of an employee involvement agreement (Part 4);
- standard rules on employee involvement (Part 5);
- compliance and enforcement (Part 6);
- treatment of confidential information (Part 7); and
- employee protection (Part 8).

A full Regulatory Impact Assessment of the effect that the 2004 GB Regulations would have on the costs of business was prepared and placed in the library of both Houses of Parliament, as were transposition notes. These documents can be obtained from the Department for Business, Innovation and Skills, 1 Victoria Street, London SW1H 0ET, and can be downloaded from http://www.opsi.gov.uk/si/em_20042326_en.pdf.

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