



**HIGH PERFORMANCE
WORKPLACES –
INFORMING AND
CONSULTING EMPLOYEES**

Consultation Document

JULY 2003



The DTI drives our ambition of 'prosperity for all' by working to create the best environment for business success in the UK. We help people and companies become more productive by promoting enterprise, innovation and creativity.

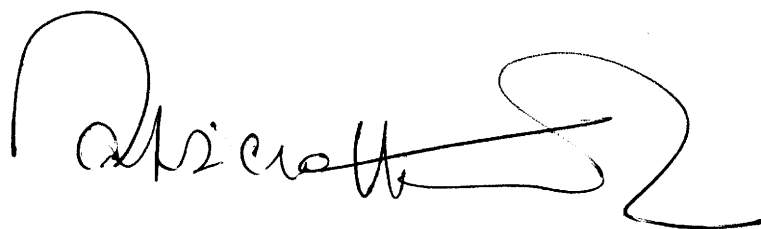
We champion UK business at home and abroad. We invest heavily in world-class science and technology. We protect the rights of working people and consumers. And we stand up for fair and open markets in the UK, Europe and the world.

Foreword by Patricia Hewitt

If the Government is to deliver its vision of prosperity for all it needs successful businesses. Employers and employees both have a stake in creating high performance workplaces. When we went round the country last year talking to employers, employees and representatives of both, there was recognition that involving employees more in understanding the business can be an important factor, although not the only one, in achieving high performance workplaces. The Government's aim in bringing in new minimum standards for workforce communication and involvement in larger firms (over 50 employees) is to do so in a way that facilitates rather than hinders the creation of high performance workplaces. We have been immensely helped in seeking to achieve this aim by the responses we received to the discussion document, published in July last year, and the roundtable discussions that followed. It was clear from these discussions that there is a larger degree of consensus about what will work and what will not than may be readily apparent on the surface.

We decided to build on this by inviting the TUC and the CBI to sit down with us to discuss how we should implement the requirements of the EC Directive on informing and consulting employees within parameters set by the Government. The UK has not, in the past, approached the implementation of European social legislation by sitting down with the CBI and the TUC to discuss it. We think this has been an interesting and successful experience, enabling the expertise of all our organisations to be brought to bear on how the Directive could be made to work best in the circumstances of the UK labour market. We are pleased to say that the TUC and the CBI have both agreed with us the framework for implementation of the Directive that is set out on pages 7 to 12 of this document.

We now have a real opportunity to make sure that employees are effectively informed and consulted about matters that affect them and that employers have the opportunity to reap the benefits through improved performance at the workplace.

A handwritten signature in black ink, appearing to read 'Patricia Hewitt', with a large, stylized flourish at the end.

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Chapter 1 Introduction and outline scheme of draft implementing Regulations

1.1 Effective employee dialogue can help staff feel more involved and valued by their employer, make them better aware of the business climate in which the organisation is operating and help them be more responsive to and better prepared for change. This in turn can benefit the business through better staff retention and lower absenteeism, increased innovation and adaptability to change. This should allow a greater ability to react rapidly to opportunities and threats, thereby ultimately enhancing a company's productivity.

1.2 This is the key message from the responses to consultation and the round table discussions last year following the publication of the discussion paper *High Performance Workplaces: The role of employee involvement in a modern economy* in July 2002.

1.3 But it was very clear that the implementation of the EC Directive on Information and Consultation needed to be handled extremely sensitively to be certain that the existing good practice in information and consultation could be carried forward when the legislation comes in.

1.4 Accordingly, in inviting the TUC and the CBI to sit down with Government Ministers to discuss how we should implement the requirements of the Directive, we set the following structure for the discussions:-

- The overall objective should be to enhance the contribution of everyone involved in the business, to the benefit of the company itself and all its staff.
- There should be no single, static model for information and consultation – a “one size fits all” approach will not do. Instead, we should build on UK experience and create room for the wide diversity of practices that have built over the years, combining both representative and direct forms of participation. Individual organisations should be able to develop their own arrangements tailored to their particular circumstances, through voluntary agreements.
- Legislation must be fully consistent with the new rights and responsibilities contained in the Information & Consultation Directive.
- Arrangements in individual organisations will need the support of both managers and employees if they are to succeed.
- Personnel and Human Resource Managers, in organisations that have them, will have a key role to play in promoting the benefits to managers and employees.

1.5 We are pleased to say that the TUC and the CBI have both agreed with us the framework for implementation of the Directive that follows on pages 7

to 12 below. This text is provided for information only and we are not inviting comments on it. We have transferred the framework into draft Regulations. We are now consulting on these draft Regulations. The rest of this document consists of:-

- A summary of responses to the previous consultation.
- Questions for discussion and how to respond.
- A narrative explaining the draft Regulations and setting out the main outstanding issues.
- The text of the Information and Consultation Directive.
- Draft Regulations.
- A summary of a partial Regulatory Impact Assessment.
- A list of respondents to the previous consultation and participants at roundtables

1.6 The CBI, the TUC and the Government have come together to try to agree the best approach for all sides. The Government is now keen to hear comments about how the Regulations will work in practice, in particular the detail of them, and of course information about the sort of guidance and support that employers and employees will need to make these new minimum standards work as we all desire to encourage high performance workplaces in the future.

INFORMATION AND CONSULTATION DIRECTIVE: OUTLINE SCHEME OF DRAFT IMPLEMENTING REGULATIONS

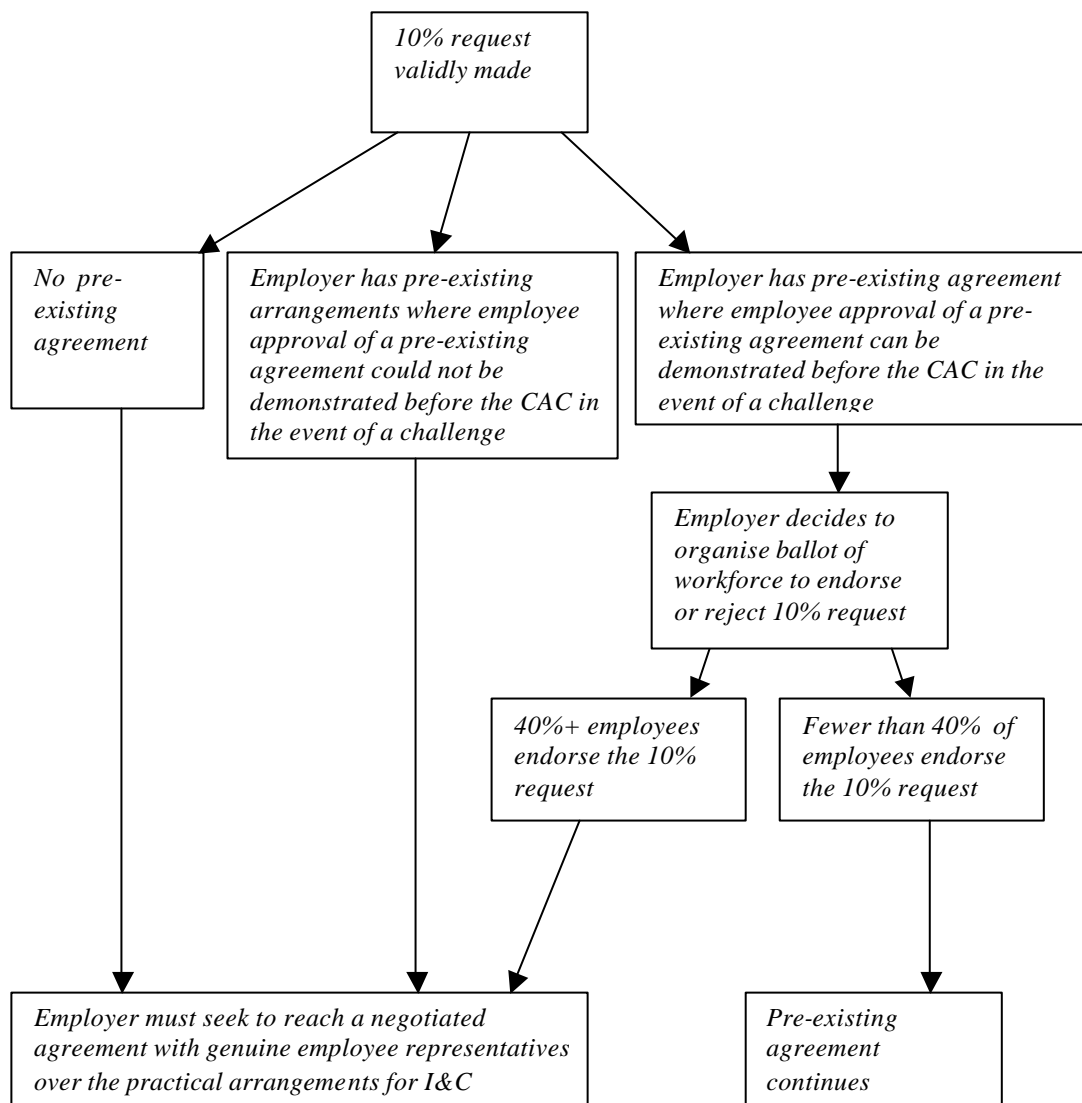
1. Scope

The draft Regulations apply to undertakings with 50 or more employees in the UK. The transitional provisions in the Directive for undertakings with fewer than 150 employees would apply.

2. Request for information and consultation procedures

(i) Subject to paragraph (ii) below (illustrated in graphic as well as written form for ease of understanding), the employer must establish information and consultation (I&C) procedures where a valid request has been made by employees. The request must be made in writing by 10% of the employees in the undertaking, subject to a minimum of 15 employees and a maximum of 2,500 employees. Where the employees making the request wish to remain anonymous, they will be able to submit it to an independent body, such as the Central Arbitration Committee (CAC) or one of the Qualified Independent Persons.

Flowchart: Including where a Pre-Existing Agreement is in place



(ii) Where an employee request is made:

- but there is already a pre-existing agreement with employees in place:
and
- with the proviso that the arrangements for the ballot would be subject to requirements intended to ensure its fairness and that employee representatives (or where there are no employee representatives, any employee) could bring a complaint to the CAC concerning a ballot, for example, by complaining that the conditions surrounding pre-existing agreements were not met (including that employee approval of a pre-existing agreement could not be demonstrated), or that a ballot had not been fair;

the employer would have the option to organise a ballot of all the employees in the undertaking so employees have the opportunity to endorse or reject the initial request made by the 10%. Where 40% or more of the employees in the undertaking endorse the request in the ballot, the employer must seek to reach a negotiated agreement with genuine employee representatives over the practical arrangements for I&C in accordance with paragraph 3(i) below. Where fewer than 40% of the employees endorse the request by the 10%, the employer would be able to continue with the pre-existing agreement and the obligation to negotiate a new agreement would not apply.

(iii) **“Pre-existing agreements”**. Guidance will elaborate upon how these arrangements might work in practice and, specifically on how employee approval of pre-existing agreements could be demonstrated before the CAC if a challenge is made. If employee approval cannot be demonstrated following a challenge and a valid request under paragraph 2(i) has been made, then the employer must seek to reach a negotiated agreement with genuine employee representatives over the practical arrangements for I&C. Methods by which employee approval of pre-existing agreements could be demonstrated would include support indicated by:

- (a) a majority in a ballot of the workforce; or
- (b) a majority expressing support through signatures; or
- (c) the agreement of employee representatives (including, where appropriate, officials of independent trade unions in workplaces with a recognised union) who represent a majority of the workforce.

Pre-existing agreements must cover all the employees in the undertaking, must be in writing so that everyone is clear what is involved, and may not consist of arrangements unilaterally imposed by management without any discussion with employees and where employees have had no opportunity to signify their approval.

(iv) The employer may initiate negotiations under the Regulations on his own initiative by notifying employees (“employer notification”).

(v) Where a request has been made by 10% of the employees or negotiations have been initiated by the employer, a further request or notification could not be made for a period of three years following the conclusion of a negotiated agreement or the application of the statutory provisions, unless there are material changes affecting the undertaking which render agreed arrangements no longer appropriate.

(vi) The employer may dispute before the CAC the validity of an employee request or whether the obligation to establish I&C procedures applies.

3. I&C deriving from an agreement (“negotiated agreement”)

(i) Following a valid employee request or an employer notification, the employer must seek to reach a negotiated agreement with genuine employee representatives over the practical arrangements for I&C. The parties have 6 months (extendable by agreement) in which to reach a negotiated agreement. Guidance will elaborate upon who might be considered to be genuine employee representatives.

(ii) Agreements must be in writing, cover all the employees in the undertaking, be signed by the employer and by a majority of the employee representatives, and be either:

- (a) approved by at least 50% of the employees in the undertaking;
or
- (b) approved by at least 50% of employees who vote in a ballot of all the employees in the undertaking; or
- (c) approved by all the employee representatives, or where it is not approved by all the employee representatives, approved by at least 50% of the employees who vote in a ballot of all the employees in the undertaking.

The parties to a negotiated agreement will be able to agree the information and consultation arrangements that best suit their needs and circumstances. The Government will provide guidance and greater certainty on this.

4. Practical arrangements for I&C (“statutory provisions”)

(i) Where a valid employee request or an employer notification has been made, but no negotiated agreement is reached within the required period of time, statutory provisions based on Article 4 of the Directive would apply. The employer would have a further period of 6 months in which to set up the necessary structures, before a complaint could be brought under paragraph 5(i) below.

(ii) Under the statutory provisions, an I&C committee must be established representing all the employees in the undertaking, by election of

representatives through a ballot. The number of representatives would be proportional to the number of employees (1 per 50 employees or part thereof), up to a maximum of 25.

The draft Regulations will reproduce the requirements set out in Article 4 of the Directive (as shown below). The Government envisages providing guidance on what these requirements might mean in practice for different sizes of organisation, giving practical examples. Changes to pension schemes would be examples of issues that should be discussed.

(iii) The undertaking's management must provide the I&C committee with information on:

- (a) the recent and probable development of the undertaking's activities and economic situation;
- (b) the situation, structure and probable development of employment within the undertaking and on any anticipatory measures envisaged, in particular where there is a threat to employment; and
- (c) decisions likely to lead to substantial changes in work organisation or in contractual relations, including collective redundancies and business transfers (as defined in the relevant legislation).

(iv) Information must be given at such time, in such fashion and with such content as are appropriate to enable, in particular, the I&C committee to conduct an adequate study and, where necessary, prepare for consultation.

(v) The management must consult the I&C committee on the matters in paragraph (iii)(b) and (c) above:

- while ensuring that the timing, method and content of the consultation are appropriate;
- on the basis of the information supplied by the management and of the opinion which the committee is entitled to formulate; and
- in such a way as to enable the committee to meet with the relevant level of management and obtain a reasoned response to any such opinion.

In relation to decisions under (iii)(c) above, consultation must take place with a view to reaching agreement on decisions within the scope of the management's powers.

(vi) The employer and the I&C committee may at any time decide to vary any of the statutory requirements by coming to a negotiated agreement. In that case, the agreement would be deemed approved by employees if it is signed by a majority of the members of the I&C committee.

5. Compliance and enforcement

Employer's failure to establish I&C procedures

(i) Where a valid employee request has been made (and if necessary validated in a ballot), or an employer notification was made, an employee representative (or where there are no employee representatives, any employee) may complain to the CAC that the employer has failed to establish I&C procedures either under a negotiated agreement or under the statutory provisions. Complaints would be barred for a period of 12 months from the request or notification (longer where the parties had agreed to negotiate beyond 6 months) to allow time to reach a negotiated agreement, and where no agreement is reached, to set up the necessary structures under the statutory provisions.

Disputes about operation of I&C procedures

(ii) Where an agreement has been negotiated following an employee request or employer notification, or the statutory provisions apply, disputes about the operation of the procedures may be brought before the CAC.

CAC decisions and penalties

(iii) Where the CAC upholds a complaint it may make an order specifying the steps the defaulter is required to take. Where the defaulter is the employer, the complainant may make an application to the Employment Appeal Tribunal (EAT) for an order requiring the employer to pay a penalty to the Secretary of State. The legislation would specify a maximum penalty of £75,000 and criteria the EAT should use in determining it, based on the criteria in the Transnational Information and Consultation of Employees (TICE) Regulations. No order of the CAC would have the effect of suspending or altering the effect of any act done, or any agreement made, by the employer. The employer could not use the defence that it failed to inform and consult because a parent company had failed to provide it with the necessary information. Decisions of the CAC could be appealed on a point of law to the EAT. Where an order of the CAC was not complied with, the complainant could apply to the EAT for a further order. Failure to comply with an EAT order would be contempt of court.

6. Other provisions

Confidential information, protection of I&C representatives, appointment of I&C representatives in the absence of a negotiated agreement, and election ballot arrangements, would be modelled on those in the TICE Regulations.

Chapter 2 Responses to the discussion paper *High Performance Workplaces*

2.1 The DTI's discussion paper *High Performance Workplaces: The role of employee involvement in a modern economy* was published in July 2002. It contained a number of questions designed to draw out views and experience related to workplace practices of employee involvement. The document also asked what should be the key features of domestic legislation to implement the Information and Consultation Directive. In parallel, the Department arranged a series of 13 roundtable meetings around Britain attended by Government ministers and hosted by organisations such as TUC, CBI and ACAS. The meetings discussed the questions raised in the document.

2.2 There were almost one hundred written replies to the discussion document, with respondents representing a broad range of interests. A quarter of the responses were from individual businesses, and a further quarter from business representative organisations. Ten responses were received from unions, with the remainder coming from human resources organisations, consultants, academics, lawyers and the public sector. The roundtable meetings also had a similar mixture of attendees. A full list of respondents to the document and attendees at the roundtables is contained at Annex D.

2.3 The written responses and the discussions at the roundtables showed considerable support, even enthusiasm, for the principle of informing and consulting employees, both because of the benefits for employees and the benefits for the organisations they work for. Indeed, it was recognised by many that this can be an essential element in maintaining a company's competitive edge. There was a broad consensus that information and consultation systems have an important part to play in creating high performance workplaces as part of an overall approach that seeks to get the best out of staff, but also a recognition that they do not constitute any sort of 'silver bullet'. Enthusiasm though was tempered with some concern, particularly on the part of business, about how the Directive would be implemented, including whether it was possible to raise standards of employee dialogue by means of legislation. The support for the principle of informing and consulting employees was evidenced by the widespread use of consultation arrangements, some of them quite innovative, embracing a broad range of practices involving both representative structures and direct communication with staff. A strong message coming out of the consultation was that legislation should not do away with pre-existing arrangements that work well and enjoy the support of employees. In some organisations though, it was felt that a culture change would be needed. This was most likely in those with little history of employee involvement, but also possibly in companies where any consultation that did take place tended to be at a relatively late stage in the decision-making process. Some queried whether it was appropriate for staff who may be outside of management grades to be consulted about decisions that could be of a high-level nature, and whether they would be qualified to play a useful role in the process. Others challenged

this outlook, but there was general agreement to the view that if value is to be added, participants in the process – both management and employees - will need appropriate training. There follows a summary of the responses to the individual questions raised in *High Performance Workplaces*.

What are important contributors to high performance workplaces?

2.4 There was a general recognition that there is no single template for creating a high performance workplace. Many factors are important including: good leadership; clear vision; effective workplace organisation; a commitment to continuous improvement; a culture that encourages innovation; customer focus; capital investment; a recognition that change is inevitable and must be embraced; the ability to respond rapidly and flexibly to change when it comes along, to remove inefficiencies and to grasp competitive opportunities; taking a long-term, strategic view of where the company and the industry generally is going; and seeking to get the most out of people and to secure their commitment to the business by adopting good people management practices. The relative importance of these and other factors will vary between companies depending on their individual circumstances, but whatever the mix, it is important to be consistent in pursuing them, and to keep reinforcing the approach.

2.5 The importance, some would say the centrality, of good people management was repeatedly stressed, naturally so given the background to the exercise. High performance workplaces gain competitive advantage primarily through the high performance of their people, was one contributor's comment. Again though, it was emphasised that there is no single set of people management practices that can be said to improve productivity. Rather, the better performing companies use a number of different but complementary human resources practices, including rigorous recruitment and selection procedures; learning and training for all; assessment and payment systems; performance management procedures; improved job design and flexibility in job descriptions; multi-skilling and job rotation; reducing organisational hierarchies and decentralising decision-making; team working; job security; involving employees; giving responsibility and encouraging initiative; and practicing two-way communications. At a general level, commitment, motivation and enthusiasm were seen as an outcome of investing in, and valuing, the workforce. From that came a sense of shared purpose, ownership and values, and a shared interest in the success of the business. A major ingredient was considered to be mutual trust and respect between management and the workforce, and a clear understanding of what is expected from employees. It was argued that the basis of a flexible workplace – one able to respond to customer demands by changing services or production, and adapting structures and teams to respond to business needs – was the commitment of its workforce. If the people were not on side, the business plan could not be delivered, was one comment. Another comment was that there should be a willingness from management to recognise diversity in their workforce, to promote equal opportunities and to encourage employees from all levels within the organisation.

2.6 Many respondents believed that good communication with workers at all levels was a major contributor, although working conditions, incentives, rewards and promotion prospects also played an important part. Information and consultation were seen as a catalyst for the development of innovative workplace processes and practices; they helped establish trust and thereby facilitated cultural change. Some stressed the importance of **two-way** communication – that there was more to it than simply keeping staff informed of what was going on; the decision-making itself could be improved through a process of genuine dialogue where minds could be changed. Responses from unions argued that both employee communications and business productivity tended to be higher in unionised businesses. Many companies though put the emphasis on direct forms of communication with staff. More detailed comments on how best to inform and consult employees are given below.

What do employees want from their place of work?

2.7 Answers to this question stressed that people were concerned in the first place about what directly affects them as individuals. This obviously included things like good pay and conditions, a safe working environment, the opportunity to progress in the organisation, and as much job security as possible (though it was widely recognised that jobs for life could not be guaranteed). But it went much further than that. Employees also wanted equal opportunities, non-discrimination, work life balance, and to be treated fairly and with respect. They wanted good training and developmental opportunities. They wanted leadership that is both competent and trustworthy. People also wanted fulfilling working lives, which means interesting and challenging work, the chance to make a positive contribution, to feel that their contribution is valued by the employer, and to be praised for doing well. The way people are managed was thought to be a vitally important factor. The role of immediate line managers and team leaders was said to be especially important. Where employees felt positively about management, and particularly their line manager, they expressed higher levels of commitment, motivation and job satisfaction.

2.8 Good communications were regarded as a key facilitator for much of this. Many employees wanted to hear about, and give their views on, a wide range of issues that affected them. Most, if not all, are interested in what will have an immediate and direct effect on them. This includes local issues such as the working environment and changes to work organisation. But for some, especially longer-term employees, it also includes higher-level issues of a more strategic nature, such as the future prospects and direction of the company, trading conditions, and key business decisions. Some contributions, especially those from unions, argued that most employees were happy to hear about, and be involved in, higher-level issues through representatives who were likely to be better qualified to represent their interests with management.

2.9 There was widespread consensus that good communication is especially important when bad news is in the pipeline. Virtually everyone

agreed that staff wanted bad news to be handled sensitively, though there were differences of opinion as to how **early** information should be shared about possible threats to employment.

The benefits of information and consultation

2.10 Almost all the respondents were in agreement that there were benefits, both to the employees themselves and to the businesses they work for, in informing and consulting staff. The benefits for employees stemmed from having a greater say in the way the business was run. This could have direct benefits in terms of a better and safer environment, improved work organisation and working conditions, and better training. By helping staff to feel valued and involved, information and consultation could lead to higher employee morale and motivation. In turn this could lead to fewer recruitment problems, less absenteeism and lower staff turnover, a willingness to take on responsibility, and if necessary, an acceptance of or ability to adapt to changes, whether in ways of working or as a result of larger scale re-organisation. One large union thought that employees would have a greater understanding when difficult decisions had to be made and that industrial relations generally could become more harmonious as a result.

2.11 The benefits for business included improved communication across the organisation; access to a wider pool of knowledge, experience and ideas; staff who better understood what they were doing and how it fits into the overall business; greater responsiveness and less resistance to change; problems resolved earlier and more effectively; and greater ownership of issues. Many respondents believed there was a link between information and consultation and improved productivity. Some saw a direct link, for example, one contributor believed its employees were more responsive to customer demands as a result of its information and consultation arrangements. Others considered that better company decisions could be made by tapping into the knowledge and ideas of the wider workforce. Other respondents saw more indirect links with business productivity, through improved individual productivity as a result of the benefits for employees described above.

2.12 A further point made was that a high performance workplace, with good employee communications, was more likely to be competitive and therefore profitable, and that this success could benefit employees through better job security and improved pay and conditions.

2.13 There was a note of caution though from some business stakeholders who feared that there could be costs as well as benefits to business, for example that too much consultation could introduce delays and confusion into decision making, or that informing and consulting too early over possible job losses could create uncertainty and hit morale among the workforce.

What information and consultation mechanisms are used, what works well, and what are the obstacles?

2.14 The replies to this question demonstrated the wide range of communication practices used in the UK, and the innovative approach adopted in many organisations. Most use a combination of arrangements for informing and seeking the views of their staff, for example, team and workforce briefings; newsletters, magazines and bulletin boards, both paper and electronic; e-mail, Intranet, video-conferencing and in a few cases, their own TV channel; periodic presentations from senior management; staff opinion polls, surveys and suggestion schemes; and away-days, and annual general meetings. These are primarily direct forms of communicating with employees. A range of indirect methods via representatives are also used, for example, through union representatives, staff associations, team leaders and team representatives, and communication “champions”. Sometimes staff representatives are elected by their colleagues, especially in larger organisations, sometimes they are simply volunteers. Some representative arrangements are relatively informal and fluid, some (again particularly in larger organisations) more formal and structured, perhaps operating at several levels within a company such as local, regional and national. Some representative groups are temporary, perhaps just brought together to look at a single issue or problem, some are more permanent either with a wider remit or looking on an on-going basis at specific matters like health and safety or issues like customer service, quality or productivity.

2.15 In the case of trade unions, many reported that where unions are recognised, union representatives are already involved in structures that facilitate the regular disclosure of business information. Senior union representatives meet with management to consult over business issues, threats, opportunities and other matters. Larger unions in particular found that these arrangements worked well and larger employers also agreed that they had benefited, particularly where there were partnership agreements in place.

2.16 In the main there was much support for direct forms of communicating with employees, but there was some difference of view over the value of collective consultation by means of employee representatives. Some businesses, particularly smaller ones, felt that direct communication with the whole workforce was sufficient for their needs. Unions on the other hand felt very strongly that representatives were needed in order to have effective dialogue, on the grounds that they were more likely to have, or be able to acquire, the necessary skills and experience to add value to the process. Where unions were recognised, they argued, they should always be involved, but where they were not, other representatives should be put in place. Amongst unions, many human resources organisations and academics, and some businesses (especially larger ones), there was a fair degree of consensus that direct and indirect methods of communication with employees are very much complementary, not alternatives.

2.17 There were many views offered on what were believed to be obstacles to developing meaningful dialogue and it was thought that employees, their

representatives, and management could all create obstacles. Each may hold entrenched views and distrust the other party involved, or may be inflexible and resistant to change. Employees may fear that only lip service was being paid to their views, or that they may be penalised in some way for seeking to give their views. At its worst, the process could be regarded as a 'sham', the decision already having been taken by managers. Lack of commitment by senior managers was identified as a key obstacle. This could be the result of a number of factors, for example, management seeing little value in the process, or doubting employees' ability to understand and probe business information and decisions; there might be concerns about how employee representatives would use confidential information, and a fear of letting them know too much too soon; it was thought that some representatives may be unwilling to be consulted on a confidential basis as they may feel in a difficult position if they cannot share the information with their colleagues (this view was shared by some union respondents, but rejected by others). There was also a fear that some fora did not fully represent the workforce and its views. But there was considerable consensus that a lack of trust between management and staff was the single biggest obstacle.

What issues do you think employees should be informed and consulted on? How and When?

2.18 The sorts of subjects mentioned in response to this subject ranged from higher level strategic issues, such as the economic and financial situation of the business (including information on business performance), organisation changes (including acquisitions, disposals, closures, and transfers of production), employment plans (both for expanding and contracting); through organisational type issues such as the introduction of new working methods or production processes, and flexible working arrangements; issues like training and development, equal opportunities, grievance and disciplinary procedures, pensions, working hours and holidays; and finally down to more local issues like the working environment, health and safety, and the proverbial parking spaces.

2.19 Almost everyone was prepared to accept that local issues, and those having a direct impact on the way staff worked, were appropriate issues for consultation. There was less agreement about whether issues towards the more "strategic" end of the scale were appropriate. Some thought that these were matters for management, and that in the main the wider workforce had neither the expertise nor the warrant to be consulted about such matters. Others were strongly of the view that strategic issues should be matters for consultation with staff, because they would also have an impact on them, and because staff might well have valuable contributions to bring. Again, the importance of trust was stressed by some contributors – as dialogue between management and staff became more established, as experience was gained, relationships deepened and trust grew, the issues for discussion could be broadened. A number of respondents pointed to the distinction between information and consultation, believing information on strategic and policy issues may be suitable when consultation might not. Some also thought that some matters were more suited to direct forms of communication, particularly

those directly impacting on staff, while indirect methods using representatives were more appropriate for high level issues with less direct consequences for the workforce and where a certain level of knowledge and expertise would be needed.

2.20 On the question of timing, there was a clear view among unions and some other respondents that consultation should take place before a final decision had been reached by management in order to give employee representatives a chance to have their say and influence the outcome. If this did not happen, consultation risked becoming an empty shell, and cynicism would result. However, there was concern among individual employers that such consultation should only take place after management had come to a reasonably firm view on a particular proposal – they should not be required to consult on plans that were only at a formative stage since this could create needless uncertainty amongst employees. The issue of confidentiality was also raised in this context.

2.21 A few respondents expressed a view on the frequency of meetings between representatives and management. The suggested minimum varied between quarterly and yearly meetings, although it was pointed out that the exact timing of such matters would very much depend on the issue.

Experience overseas of information and consultation arrangements

2.22 A significant number of respondents had practical experience of overseas information and consultation arrangements. Some respondents argued that different business and cultural environments operating overseas meant that a simple replication of those consultative mechanisms would be inappropriate for the UK which has had its own distinct voluntarist approach to employment relations. Others argued that the existence of works councils on the Continent had benefited both the companies that had them and the wider economy. Comparative data, it was said, shows that countries with comprehensive general frameworks for information and consultation have performed equally well or better than the UK in terms of general economic indicators.

2.23 Most responses in this section referred to experience with European Works Councils (EWCs). Views were somewhat divided as to whether EWCs have been successful or not. Employer groups and many individual employers were concerned that EWCs could become largely driven by process rather than content, and as such risked being no more than exercises in legal compliance, rather than genuinely adding value. They very much wished to avoid this with the information and consultation Directive. Others, in particular unions, were of the view that EWCs could play an important role, if they were adequately resourced, and their members well trained. It was pointed out that EWCs were generally relatively young organisations, and that the trust and shared understanding required for successful information and consultation processes needed time to develop.

2.24 The other main comparison concerned the US model. It was pointed out that there is very little required by way of regulation in this area in the United States, but that it is still a very successful economy. One response stated that US employers have been legally constrained in operating consultative committees that are not union-based, and this may have contributed to an increase in direct forms of employee involvement in the States.

What should be the key features of domestic legislation to implement the I&C Directive

2.25 A wide range of detailed issues were raised by many respondents. In terms of the overall nature of the legislation, employers' groups and many individual employers wanted to see a 'light-touch' approach to implementation, and the preservation as far as possible of existing information and consultation arrangements. Trade unions on the other hand, wanted to see robust legislation that was sufficiently detailed to ensure effective implementation.

2.26 Nevertheless, there is some overlap of approach between these two views in a number of areas. In particular, it was recognised that **voluntary agreements** were more likely to provide the necessary flexibility that will allow effective information and consultation arrangements to evolve tailored to the particular circumstances of the undertaking in question. They would also provide the best basis for safeguarding existing systems where they are working well.

2.27 There was widespread agreement on the need for a **“trigger” mechanism**, so that a certain number of employees, or representatives of employees, would have to put in a request for an information and consultation procedure in order to demonstrate a degree of employee support for such a procedure. There were differences of opinion as to the level of any trigger, ranging from as low as 5 employees to as high as 50% of the workforce.

2.28 It was widely recognised that there would need to be some kind of **“fallback” arrangements** to cover situations where it was not possible to reach a voluntary agreement. There were mixed views (both between and within groups of stakeholders) as to whether the implementing legislation should simply copy-out the provisions in Article 4 of the Directive, or whether it should seek to elaborate on them, for example by setting out matters like the number of meetings that should be held, procedures for electing employee representatives, as well as an expanding the list of subjects upon which information and consultation must take place. A good number of respondents were in favour of a code of practice, or guidance, perhaps drawn up by ACAS that would sit alongside the legislation.

2.29 The role of **employee representatives** provoked much comment, and some differing viewpoints. Trade unions were of the view that union representatives had a key role to play in information and consultation

procedures, although it was generally recognised that this role could not be an exclusive one given that the Directive confers rights upon the whole workforce and not just trade union members. Trade union respondents generally believed that information and consultation procedures should be kept separate from the collective bargaining process. Many other non-union respondents believed that trade union representatives should not be given any automatic participatory rights and that they should stand for election as information and consultation representatives alongside other non-union representatives.

2.30 Another key issue identified by respondents was that of **confidentiality**. Some respondents believed that a provision enabling management to withhold confidential information should be broadly framed so that there was enough discretion in this area to minimise the risk of leaks. Others disagreed stating that leaks of confidential information by employee representatives were rare or non-existent, and that it would not be in representatives' interests to do so if they wanted to continue being consulted in future. They feared it could be used as an excuse for not informing and consulting, or only doing so at a late stage.

2.31 The final main issue concerned **sanctions** for breaches of the legislation. A number of respondents suggested the Transnational Information and Consultation of Employees Regulations 1999 would provide a suitable enforcement model for this legislation, and that the Central Arbitration Committee had a role to play here. On specific remedies for breaches, most respondents agreed that a combination of specific performance orders and financial penalties would be most appropriate. A minority of respondents thought that the legislation should go further and provide for protective awards for affected employees as well as injunctive relief or the suspension or annulment of any decisions taken in breach of the legislation. Employers on the other hand very strongly opposed the idea of suspending or invalidating management decisions.

Information and consultation in small and medium sized businesses

2.32 Respondents from small firms did not believe the legislation should apply to them, although many were very happy to see non-binding guidance published, perhaps by ACAS, to promote information and consultation of employees in small firms. This should put a particular emphasis on direct forms of communication with staff. Some argued very forcefully that small firms were struggling to cope with the present regulatory system, and it was essential to avoid burdening them further. A number said that they simply did not have the money to put into additional resources and training, or indeed the time to look at new legislation. There was a suggestion that the Government could provide help with resources. By contrast, many unions argued that it would be unacceptable to deny information and consultation rights to employees of small firms, both on the grounds of fundamental employee rights, and the benefits for the employees and their employers. It was argued that promoting information and consultation could help reduce the number of employment tribunal cases by improving communication in the workplace.

Some also argued against delaying implementation of the Directive for undertakings with fewer than 150 employees.

Information and consultation in the public sector

2.33 Although there was no specific question in the discussion document on the issue of information and consultation in the public sector, some respondents and roundtable participants commented on it. In general, the argument was that employees in the public sector also deserved to be informed and consulted about matters that affect them, and that public sector organisations would benefit from doing so. The DTI has been discussing this issue with other Government Departments including the Cabinet Office, which has responsibility for central Government policy on employment relations within the Civil Service.

2.34 The Directive applies to private and public undertakings which carry out an “economic activity”, whether or not operating for gain. The precise scope of this definition is ultimately a matter for the courts to decide. However, the Transfer of Undertakings Directive¹ includes a definition of “undertaking” that is virtually identical to that in the Information and Consultation Directive. It seems likely therefore that the jurisprudence of the European Court of Justice (ECJ) in the context of that Directive would also be applied in the context of the Information and Consultation Directive. In the case of the former, the ECJ has given a fairly wide interpretation to the term “undertaking”. For example, it has held that it applies to people providing healthcare services (*Porter v Queen’s Medical Centre (Nottingham University Hospital)* [1993] IRLR 486) and assistance to drug addicts (*Dr Sophie Redmond Stichting v Bartol* [1992] IRLR 366).

2.35 However, the caselaw of the ECJ has held that organisations whose principal role is to carry out purely administrative functions or to exercise public authority are not covered by the definition of “undertaking” even if they carry out some economic activity, where that activity is merely ancillary to the main purpose (*Henke* [1996] IRLR 701). This would mean therefore that the great majority of civil servants and many local authority employees (although not necessarily all in either case) would **not** be covered by the Information and Consultation Directive. With this in mind, the Government is considering whether, and if so how, to apply the principles of information and consultation to public sector employees who are not covered by the Directive. One option would be a code of practice to apply to central government similar to the one founded upon the provisions of the Transfer of Undertakings (Protection of Employment) Regulations 1981 (*Cabinet Office Statement of Practice. Staff Transfers in the Public Sector. January 2000*).

¹ Council Directive 2001/23/EC on the approximation of the laws of the Member States relating to the safeguarding of employees rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses.

Assistance for information and consultation arrangements

2.36 One of the main messages coming out of the consultation and the roundtable discussions was that if consultative arrangements are to be effective and to add value the participants, both managers and employee representatives, would need to develop their knowledge and skills, and that training for both would be important. In addition, many companies recognised that their existing arrangements may need regenerating – or indeed arrangements set up for the first time - in light of the forthcoming legislation, and that they may need help in doing this.

2.37 The **DTI Partnership Fund** is relevant here. The Fund is an essential part of the Government's non-legislative approach to develop industrial relations in order to achieve productivity improvements. It provides a maximum of £50,000 of matched finance for projects, and to date has supported a variety of different organisations and projects that solve business problems by improving workplace relationships, and communication. A recent example of a project supported by the Fund is that of the United Welsh Housing Association which has successfully re-written its partnership agreement with Unison and improved the way staff are consulted and involved in decision making. The Fund is currently open to receive workplace applications aiming to develop partnership initiatives within organisations, including those related to information and consultation of employees. For organisations interested in making an application please contact: 020 7804 8044 or enquiries.partnershipfund@uk.pwcglobal.com.

2.38 The Partnership Fund is also offering grants across “hard-to-reach” sectors and regions. Business bodies such as unions, trade associations and chambers of commerce are eligible to apply to lead a Sector or Region-wide project that will reach out across the business community in that area. Applications are individually negotiated and interested parties should contact the DTI direct on 020 7215 6252. Further details can be found on the DTI website at www.dti.gov.uk/partnershipfund.

2.39 **ACAS**, the employment relations experts, provide advice, training and a range of other services to assist organisations when introducing new, or revising existing, policies, procedures and practices including employee communications and consultation mechanisms. ACAS have extensive experience of working in individual organisations developing employee communication and consultation mechanisms and can provide this assistance where appropriate. They can also design and deliver customised training, for which a charge will be made, to ensure such mechanisms are effective and sustainable. In addition, ACAS provide a conciliation service which would be available to organisations seeking to reach an agreement on information and consultation under the new legislation. Both before and during the implementation of the Information and Consultation Regulations, ACAS will be running seminars throughout Great Britain, aimed specifically at organisations

which are affected by the Regulations. In addition to detailing the legal requirements, the seminars will outline and encourage good employment relations practice.²

2.40 The **European Commission** can support activities related to a number of employee involvement Directives, including the Information and Consultation Directive, from Budget Heading B3-4003. This budget heading is for projects aimed at strengthening cooperation between employers and employees on information, consultation and participation. Eligible activities include exchange of experience and development of best practice and “innovative measures” concerning the dissemination of information and consultation rights and the anticipation and management of change in connection with company restructuring. Funding is aimed at employers, trade unions and employer representative organisations, but other organisations and associations may apply if they are mandated to do so by an employer or union. This year the budget has been extended to encourage women to participate more actively as representatives. Grants for projects usually average 70,000 euros, projects last a maximum of a year, and applicants are expected to contribute at least 20% to the cost of the project, which must be non-profit making. Wage costs and overheads incurred in running the project may go towards making up this contribution. As UK take up of the budget has been relatively low over recent years, it could be expected that the Commission would be particularly keen to hear from UK applicants.³

2.41 A number of companies have offered to test out the proposed legislation, by taking part in a **pilot scheme**. We see attractions in such an idea, and will be working up ideas for piloting the legislation over the coming months. Organisations interested in taking part in such a scheme should register their interest when responding to this consultation document.

Conclusion

2.42 The Government is extremely grateful to everyone who commented on the discussion paper and attended the roundtable discussions. The responses broadly confirmed the high level factors set out in the discussion paper which set the structure for discussions between the Government, CBI and TUC. The proposals set out in this consultation document aim as far as possible to take account of the wide range of comments that have been made to date.

² Further details about all ACAS services, including details of the forthcoming seminars, can be found on their website - www.acas.org.uk. ACAS also operate a nationwide Helpline on 08457 47 47 47.

³ There is further information and an application form on the Commission website at:

http://forum.europa.eu.int/Public/irc/empl/european_works_council/library

Chapter 3 Questions for discussion

We would welcome comments by **7 November 2003** on the following questions:

- Do you think the Regulations contained in this consultation document, supported by appropriate guidance, will work in your organisation? If not what changes would be needed to make them work?
- What sort of guidance on the legislation would you find useful? Where would you expect to obtain advice and information about operating information and consultation in practice?
- **Undertakings, groups of undertakings, and establishments.** The Directive applies to undertakings (according to the choice made by the Government), that is, to entities with their own separate **legal** identity. However, in many organisations it may be more appropriate to organise the practical arrangements for information and consultation at a level other than that of the individual undertaking, for example, different arrangements within different parts of the undertaking (such as different establishments), or arrangements that apply to several undertakings within a group of undertakings. It should be possible to agree such arrangements under a negotiated or a pre-existing agreement. However, some modifications to the draft Regulations may be needed to achieve this – see paragraphs 4.47 to 4.49 below. We would welcome views on what modifications to the draft Regulations may be needed.
- **Relationship to existing information and consultation requirements.** There are already requirements to inform and consult representatives of employees in a number of existing pieces of legislation, notably those dealing with collective redundancies and with transfers of undertakings. There is potentially an overlap between these provisions and the requirements of Article 4.2(c) of the Directive which requires information and consultation under that Article to cover decisions on collective redundancies and transfers of undertakings that are likely to lead to substantial changes in work organisation or in contractual relations. See paragraphs 4.50 to 4.52 below. We would welcome views on what problems, if any, this might cause in practice, and how any such problems could be alleviated.
- **Relationship to collective agreements with trade unions.** A collective agreement between an employer and a trade union could provide, to a greater or lesser extent, for information and consultation on matters covered by the Directive. Once the new Regulations come into force, employers will have a legal obligation to agree information and consultation arrangements with their employees when requested to do so. The introduction of this legislation could therefore impact on collective agreements with unions. See paragraphs 4.53 to 4.54 below. We would welcome views on what impact the new legislation

might have on collective agreements with unions, and what, if anything, should be done about this.

- Please comment on any other aspect of the Regulations not covered in the above questions.
- We would welcome comments on the summary partial Regulatory Impact Assessment contained at Annex C.

Responses to these questions can be e-mailed to informing@dti.gsi.gov.uk or sent to:

Information and Consultation Team
Employment Relations Directorate
DTI
1 Victoria Street
London SW1H 0ET

When responding to this consultation you may also wish to refer to two other consultations in the employee involvement area that the DTI is due to carry out over the Summer and Autumn 2003. These consultations concern the UK experience of European Works Councils and the employee involvement aspects of the European Company Statute.⁴

Your response to this consultation document may be made publicly available in whole or in part at the Department's discretion. If you do not wish all or part of your response (including your identity) to be made public, please state in the response which parts you wish us to keep confidential. Where confidentiality is not requested, responses may be made available to any enquirer, including enquirers from outside the UK, or published by any means, including on the Internet.

⁴ Further information on these consultations will be available on the DTI website:
http://www.dti.gov.uk/er/hot_topics.htm

Chapter 4 Explanation of draft implementing Regulations and main outstanding issues

4.1 Annex B contains proposed draft legislation to implement the Information and Consultation Directive in accordance with the framework agreed between the Government, CBI and TUC taking account of the responses to the DTI discussion paper published in July 2002. The legislation takes the form of a Statutory Instrument, that is, Regulations made broadly under section 2(2) of the European Communities Act 1972. Section 2(2) empowers Parliament to make Regulations for the purpose of implementing Community obligations such as the provisions of EC Directives.

Part I - General

4.2 Part I of the Regulations sets out who the legislation applies to and when it will apply, and defines some key terms used.

Regulation 1 – Citation, commencement and extent

4.3 The Regulations are called The Information and Consultation of Employees Regulations 2005 and come into force on 23 March 2005, the date for transposition set out in the Directive. They extend to Great Britain only. Regulations transposing the Directive in Northern Ireland will be drawn up separately.

Regulation 2- Interpretation

4.4 Certain terms used in the Regulations are defined in regulation 2. The definitions of “consultation” and “information” comprise the definitions of those terms set out in Article 2 of the Directive, but also allow for dialogue directly with the workforce under a negotiated agreement as provided for in regulation 14. The definitions of “contract of employment” and “employee” replicate those in related employment legislation, such as the Transnational Information and Consultation of Employees Regulations 1999.

4.5 **The term “undertaking”.** The definition of an “undertaking” in the Regulations is that contained in the Directive, ie “a public or private undertaking carrying out an economic activity, whether or not operating for gain”. The Government’s understanding, following the case-law of the European Court of Justice and the use of the term in related legislation such as the European Works Councils Directive, is that an undertaking is a **legal entity** such as a company, a co-operative or a partnership. In the case of companies, an undertaking is an individually incorporated legal entity, which may form part of a group of undertakings (ie subsidiaries) connected by shareholding structures to one or more parent companies. For the purpose of determining **whether** the Regulations apply to an organisation, it is the number of employees employed by the undertaking that is relevant – see Regulation 3. However, this should not necessarily determine **how in practice** the Regulations will apply to undertakings comprising several

establishments (eg plants, offices, retail outlets), or to undertakings that are part of a group. On this, see paragraphs 4.47 to 4.49 below.

Regulation 3 – Application

4.6 The legislation applies to undertakings with 50 or more employees, though there are transitional provisions in Schedule 1 which mean it does not apply to undertakings with between 100 and 149 employees until 23 March 2007, and to undertakings with between 50 and 99 employees until 23 March 2008. These transitional provisions are permitted by Article 10 of the Directive. The Regulations apply to undertakings with their registered or head office (or equivalent) in Great Britain. They do not apply to undertakings situated in Northern Ireland, which will have its own Regulations. However, employees employed throughout the United Kingdom (ie **including** Northern Ireland) should be counted when calculating whether the undertaking has 50 or more employees (or 150 or more, or 100 or more during the transitional periods up to March 2008). This reflects the requirements of Article 3.1 of the Directive.

Part II – Employee numbers and entitlement to information

4.7 Part II of the Regulations sets out the method for calculating the number of employees in the undertaking, and requires the employer to provide information on employee numbers when requested.

Regulation 4 – Calculation of numbers of employees

4.8 The method for calculating whether an undertaking has 50, 100 or 150 or more employees is the average number of employees employed in each month over the previous 12 months (or however many months the undertaking has existed, if less than 12 months). The employer may, but is not obliged, to count part-time workers as half a person for the purpose of this calculation.

Regulations 5 and 6 – Entitlement to information

4.9 Employees may need to obtain information on the number of employees in the undertaking to ascertain whether the undertaking is covered by the legislation and how many employees will be needed to request information and consultation arrangements (see Regulation 7). An employee, or a representative of employees, may request such information and the employer is obliged to provide it. The legislation does not seek to define who would constitute a representative of employees for this purpose. Where the employer fails to provide the necessary information, or it is thought to be false or incomplete in a material way, a complaint may be brought to the Central Arbitration Committee (CAC), but no earlier than one month after the request was made. The CAC may order the employer to provide the necessary information where a complaint is upheld.

Part III – Negotiated agreements

4.10 Part III of the Regulations set out the circumstances and procedures for reaching a negotiated agreement on information and consultation, and the requirements for such agreements.

Regulation 7 – Employee request to negotiate an agreement

4.11 Employees must request information and consultation arrangements. To be valid, a request must be made by 10% of employees in the undertaking, subject to a minimum of 15 and a maximum of 2,500 employees. In some cases the 10% threshold may not be achieved by a single request, but by combining two or more requests from different parts of the workforce. A request must be in writing, and specify the date on which it was sent. It may be sent directly to the employer, but there may be situations where employees are wary of doing this, so the draft legislation allows requests to be made anonymously via the CAC or a Qualified Independent Person (QIP). The CAC or QIP would notify the employer that a request had been made and request information from the employer so as to verify the names on the list and that the requisite number of employees has made the request. An employer may dispute the validity of an employee request – see regulation 12. Regulation 11 contains some restrictions on making a request. Where a valid request is made, the employer will, as a general rule, come under the obligation in regulation 13 to enter into negotiations to reach an agreement on information and consultation. Regulation 8 provides an exception to this general rule where there is a pre-existing agreement. The employer must enter into negotiations within one month of a valid employee request being made (unless a ballot is held under regulation 8 or the employer disputes the request under regulation 12).

Regulations 8 and 9 – Ballot for endorsement of employee request

4.12 Where a valid employee request has been made by fewer than 40% of the workforce, but there is already an agreement between the employer and employees providing for information and consultation, the employer may opt to hold a ballot of the workforce to determine whether the employees endorse the request. The ballot must be held as soon as reasonably practicable, but no earlier than 21 days after the employee request was made, to allow time for any complaint about holding the ballot to be brought under regulation 9 (see paragraph 4.14 below). Where 40% or more of the employees in the undertaking endorse the employee request in the ballot, the employer would come under the obligation in regulation 13 to enter into negotiations for a new agreement on information and consultation. Where fewer than 40% of employees in the undertaking endorse the request, the employer would not be obliged to negotiate a new agreement.

4.13 To be valid for the purpose of regulation 8, a pre-existing agreement must be in writing, must cover all the employees of the undertaking, have been approved by the employees, and set out how employees or their

representatives are to be informed and consulted. Guidance will elaborate on how employee approval of pre-existing agreements could be demonstrated, which would include support indicated by a majority in a ballot of the workforce, a majority expressing support through signatures, or the agreement of representatives of a majority of the workforce.

4.14 There are requirements concerning the holding of the ballot intended to ensure its fairness, and requirements to inform the employees about the ballot and its result. A complaint may be brought to the CAC that there is no valid pre-existing agreement in place, or that the requirements concerning the ballot had not been met. Where a complaint is upheld, the CAC may require the employer either to enter into negotiations for an agreement, or to re-run the ballot (if the failure concerned the ballot).

Regulation 10 – Employer notification of decision to initiate negotiations

4.15 The employer may take the initiative in entering into negotiations for an agreement, without waiting for a request from employees. Where the employer decides to do this, he would come under exactly the same obligations as when employees make a request – to negotiate with employee representatives with a view to reaching an agreement, and if agreement is not reached, to inform and consult in accordance with the standard provisions. The employer must notify the employees that he is initiating the procedure himself, so it will be clear that this is what he is doing, and he must begin the process within one month of his notification.

Regulation 11 – Restrictions on employee request and employer notification

4.16 There are a number of circumstances in which an employee request under regulation 7, or an employer notification under regulation 10, would not be allowed. These are where there has already been an employee request or an employer notification which has resulted in a negotiated agreement under regulation 14, or the application of the standard provisions in Part IV. They would also be ruled out where an employee request was made which was not endorsed by the workforce in a ballot under regulation 8. Subsequent employee requests and employer notifications would be ruled out for three years, except where there are material changes in the organisation or structure of the undertaking which mean that a negotiated agreement no longer covers all the employees, or a pre-existing agreement no longer does so or is no longer approved by employees. The moratorium on employee requests is intended to avoid repeated requests being made, and the obligations on the employer that follow on from a request. The moratorium on employer notifications is intended to prevent the employer unilaterally overturning agreed arrangements.

Regulation 12 – Dispute about employee request, employer notification or whether obligation in regulation 7(1) applies

4.17 An employer may, within one month of receiving a request from employees under regulation 7, dispute the validity of the request, or the applicability of the Regulations, before the CAC. This might be on the grounds that the request was not made by enough employees, it was not in writing, sent to the appropriate place or stated when it was made, or that the moratorium on requests applied (see regulation 11). An employer might also dispute whether the legislation applies to him, for example, on the grounds that he does not have 50+ employees (or 100+ or 150+ during the transitional periods before March 2008), or that he is not an “undertaking” as defined in the legislation. In addition, a representative of employees (or where there are no representatives, an individual employee) may dispute the validity of an employer notification of intention to initiate negotiations on the grounds that the moratorium in regulation 11 applies. The CAC must make a declaration as to whether the employee request or the employer notification was valid, or as to whether the obligation to initiate negotiations applies. CAC decisions would be appealable on a point of law to the Employment Appeal Tribunal (see regulation 32).

Regulation 13 – Negotiations to reach an agreement

4.18 Where a valid request has been made under regulation 7 (if necessary endorsed by the workforce in a ballot under regulation 8), or where an employer has notified employees under regulation 10 that he intends to initiate negotiations himself, the employer must take the necessary steps to begin negotiations for an agreement on information and consultation of employees. He must make arrangements for the employees to appoint or elect negotiating representatives, inform employees who has been elected or appointed, then invite the representatives to negotiate. All employees must be entitled to take part in appointing or electing negotiating representatives, and must be represented by one of those appointed or elected. Guidance will elaborate on who might be considered genuine representatives of employees for the purpose of the negotiations.

4.19 Negotiations for an agreement between the parties (ie the employer and the negotiating representatives) may last for up to 6 months, though this period is extendable without limit by agreement between the parties. Help is available from ACAS and other organisations to facilitate reaching agreements.

Regulations 14 and 15 – Negotiated agreements

4.20 The requirements for negotiated agreements are that they must:

- be in writing and dated;
- cover all the employees of the undertaking;

- set out the circumstances in which the employees will be informed and consulted - either directly or through “information and consultation representatives”;
- be signed by, or on behalf of, the employer; and
- either be signed by all the negotiating representatives, or else be signed by a majority of them and approved in writing by at least 50% of the employees or approved by 50% of employees who vote in a ballot.

4.21 It is for the employer to decide how to seek the approval of employees where not all of the negotiating representatives are willing to sign the agreement. If he decides to hold a ballot for the purpose of seeking employee approval for a negotiated agreement, the ballot must satisfy certain requirements intended to ensure its fairness. A complaint may be brought to the CAC by a negotiating representative that the requirements concerning the ballot had not been met (see regulation 15). Where a complaint is upheld, the CAC may require the employer to re-run the ballot.

4.22 There are no other requirements in the legislation as to the contents of negotiated agreements, such as the nature, subject matter or timing of information and consultation, or as to the number, means of choosing, or identity of any information and consultation representatives. These are matters for agreement between the employer and the negotiating representatives. This reflects Article 5 of the Directive which states that negotiated agreements may establish provisions which are different from those referred to in Article 4.

Part IV – Standard information and consultation provisions

4.23 Part IV of the Regulations sets out the information and consultation provisions that apply where a negotiated agreement is not reached. These provisions transpose Article 4 of the Directive.

Regulation 16 – Application of standard information and consultation provisions

4.24 The provisions in Part IV apply where the employer and the negotiating representatives do not reach an agreement within the 6 month time period for negotiations (which period may be extended by agreement between the parties). Following the expiry of the period for negotiations, the employer will have up to a further 6 months to arrange for the election of information and consultation (I&C) representatives under regulation 17. This period of 6 months is intended to give the employer time to set up the necessary information and consultation structures, but also to give a further limited period in which a negotiated agreement might be reached. Where there is no agreement, and once the I&C representatives have been elected under regulation 17, the employer will be obliged to inform and consult them in accordance with Regulation 18.

4.25 After I&C representatives have been elected, they may at any time agree with the employer to vary any of the standard requirements in regulation 18 by coming to a negotiated agreement. Such an agreement must comply with the requirements in regulation 14 (for which see paragraph 4.20 above), with the exception that the agreement is deemed approved where it is signed by a majority of the I&C representatives.

Regulation 17 – Election of information and consultation representatives

4.26 I&C representatives, representing all the employees in the undertaking, must be elected in a ballot that complies with provisions in Schedule 2 to the Regulations, to be organised by the employer. One I&C representative is to be elected per 50 employees or part thereof (ie 2 for undertakings with 51 to 100 employees, 3 for those with 101 to 150 employees, etc.), up to a maximum of 25 representatives.

Regulation 18 – Standard information and consultation provisions

4.27 Once the I&C representatives have been elected, the employer must provide them with information on:

- (a) the recent and probable development of the undertaking's activities and economic situation;
- (b) the situation, structure and probable development of employment within the undertaking and any anticipatory measures envisaged, in particular, where there is a threat to employment within the undertaking; and
- (c) decisions likely to lead to substantial changes in work organisation or in contractual relations, including decisions covered by the legislation on collective redundancies⁵ and transfers of undertakings⁶.

4.28 This information must be provided at such time, in such fashion and with such content as are appropriate to enable, in particular, the I&C representatives to conduct an adequate study and, where necessary, to prepare for consultation.

4.29 The employer must consult the I&C representatives on the matters at paragraph 4.27(b) and (c) above. This consultation must be conducted:

- in such a way that its timing, method and content are appropriate;

⁵ see Part IV, Chapter II of the Trade Union and Labour Relations (Consolidation) Act 1992 – “Procedure for handling redundancies”

⁶ see the Transfer of Undertakings (Protection of Employment) Regulations 1981

- on the basis of the information supplied by the employer and of any opinion expressed by the I&C representatives;
- in such a way as to enable the I&C representatives to meet the employer at the relevant level of management depending on the subject under discussion, and to obtain a reasoned response to any opinion they give; and
- with a view to reaching agreement on decisions referred to in paragraph 4.27(c) above that are within the scope of the employer's powers.

4.30 These provisions follow very closely the wording in Article 4 of the Directive. The Government envisages providing guidance on what these requirements might mean in practice for different sizes of organisation, giving practical examples. In relation to consultation over changes to pension schemes, the Government set out in its Green Paper⁷ last year a proposal to require employers to consult scheme members before making changes. The Secretary of State for Trade and Industry and the Secretary of State for Work and Pensions will be working together to take this into effect.

Part V – Duty of cooperation

4.31 **Regulation 19** requires the parties, when negotiating an agreement, and when implementing an agreement or implementing the standard provisions, to work in a spirit of cooperation and with due regard for their reciprocal rights and obligations, taking account of the interests of the undertaking and the employees. This transposes Article 1.3 of the Directive.

Part VI – Compliance and enforcement

4.32 Part VI of the Regulations sets out how complaints about non-compliance are to be brought and how the requirements are to be enforced. These provisions transpose Article 8 of the Directive.

Regulation 20 – Disputes about operation of a negotiated agreement or the standard information and consultation provisions

4.33 Where a negotiated agreement has been reached, or the standard information and consultation provisions apply, a complaint may be brought to the CAC that the terms of the agreement, or, where relevant, the standard provisions, have not been complied with. This would include a complaint that the employer has failed to establish the agreed or required procedure at all, or that, having established it, he has failed to inform and consult in accordance with the agreement or under the standard provisions. Complaints may be brought by the information and consultation representatives (or individual

⁷ *Simplicity, Security and Choice: Working and Saving for retirement*

employees where there are no such representatives) against the employer, or by the employer against information and consultation representatives. Where a complaint is upheld, the CAC may order the defaulter to take the necessary steps to rectify the situation within a specified period of time. No order of the CAC may have the effect of suspending or altering the effect of any act done, or of any agreement made, by the employer. CAC decisions would be appealable on a point of law to the Employment Appeal Tribunal (see regulation 33). Where a complaint is upheld against an employer, the complainant may also apply to the Employment Appeal Tribunal for a penalty to be imposed on the employer for his failure (see Regulation 21 concerning penalties).

Regulation 21 - Penalties

4.34 Where a complaint against an employer under regulation 20 is upheld by the CAC, the complainant may apply to the Employment Appeal Tribunal (EAT) for a penalty to be imposed on the employer. In setting the amount of any penalty, the EAT must take account of the size of the undertaking (in terms of the number of employees), the gravity of the failure, the period of time over which the failure occurred, the reason for the failure, and the number of employees affected by it. The maximum penalty would be £75,000, payable to the Secretary of State. The EAT must issue a penalty notice specifying the amount of the penalty, the date by which it must be paid (which may be no earlier than the deadline for appealing against a CAC decision), and the failure and period to which the penalty relates.

Part VII – Confidential information

4.35 Part VII of the Regulations sets out the circumstances in which an employer may impose a confidentiality restriction on information he provides, or may withhold information on grounds of confidentiality. It also sets out how disputes concerning confidential information are to be resolved and how the provisions are to be enforced. These provisions transpose Article 6 of the Directive.

Regulation 22 – Breach of statutory duty

4.36 Anyone who is, or was, a negotiating representative, an information and consultation representative, or any expert assisting such representatives, and to whom an employer entrusts information in confidence pursuant to a negotiated agreement or under the standard provisions may not disclose that information to third parties. This transposes Article 6.1 of the Directive. The employer may bring an action for damages in the civil courts where there is a breach of this provision. Anyone to whom information has been provided in confidence may apply to the CAC for a declaration as to whether it was reasonable for the employer to impose such a confidentiality restriction. Where the CAC considers that the employer's action was not reasonable, on the grounds that disclosure would not, or would not be likely, to prejudice or cause serious harm to the undertaking, it may make a declaration to that

effect. Thereafter the information will not be considered confidential. CAC decisions are appealable to the EAT on a point of law.

Regulation 23 – Withholding of information by the employer

4.37 The employer need not disclose information where to do so would, according to objective criteria, seriously harm the functioning of the undertaking or be prejudicial to it. This transposes Article 6.2 of the Directive. In the event of a dispute, an application may be made to the CAC for a declaration as to whether the employer was justified in withholding the information. Applications may be brought either by the employer, or by any person entitled to receive information under a negotiated agreement or under the standard provisions. Where the CAC considers that disclosing the information would not prejudice or seriously harm the functioning of the undertaking, it may order the employer to disclose it by a specified date. CAC decisions are appealable to the EAT on a point of law.

Part VIII – Protections for information and consultation representatives, etc.

4.38 Part VIII of the Regulations sets out a number of measures designed to protect employees and their representatives when pursuing their rights under the legislation. These provisions transpose Article 7 of the Directive.

Regulations 24 to 26 – Right to time off for information and consultation representatives, etc.

4.39 Employees who are negotiating representatives or information and consultation representatives are entitled to reasonable time off to perform their functions as such, and to be paid remuneration for the time taken off. These rights may be enforced through an employment tribunal.

Regulations 27 to 31 – Unfair dismissal and detriment

4.40 An employee is protected in respect of unfair dismissal or detriment by an employer when acting as a representative of employees under the legislation, or standing as a candidate for election as such, or seeking to enjoy rights conferred by the legislation, and in certain other circumstances. The protections do not apply where the employee has disclosed confidential information in breach of regulation 22. A claim for unfair dismissal, or a complaint of detriment, may be brought before an employment tribunal. Changes are made to the Employment Rights Act 1996 to buttress these provisions.

Part IX - Miscellaneous

4.41 Part IX of the Regulations contains provisions concerning proceedings of the CAC and the role of ACAS. It also has provisions restricting the ability to deny rights conferred by the legislation.

Regulation 32 – CAC proceedings

4.42 A complaint or application to the CAC must be made in writing and in the form required by the CAC. The CAC must make appropriate enquiries and give a hearing to anyone it considers has a proper interest in the matter. Any declaration or order by the CAC must be in writing and give reasons for the findings. Where necessary, enforcement of CAC orders may be pursued through the courts or the Employment Appeal Tribunal (EAT). Appeals may be made to the EAT on any question of law in respect of CAC decisions or proceedings.

Regulation 33 - ACAS

4.43 Where the CAC considers that an application or complaint made to it is reasonably likely to be settled by conciliation, it must refer the matter to the Advisory, Conciliation and Arbitration Service (ACAS) and ACAS must seek to promote a settlement.

Regulations 34 and 35 – Restrictions on contracting out

4.44 Any provision in an employees' contract or any other agreement is void in so far as it purports to exclude or limit the operation of any provision of the Regulations or to preclude a person from bringing proceedings before the CAC. This does not apply to an agreement to cease proceedings before the CAC. There are special provisions concerning agreements to refrain from proceedings before an employment tribunal under Part VIII of the Regulations (protections for information and consultation representatives, etc).

Schedule 1 – Application of Regulations

4.45 Schedule 1 sets out the dates on which the Regulations apply to undertakings with 150 or more employees (23 March 2005), 100 or more employees (23 March 2007), and 50 or more employees (23 March 2008). This transposes Article 10 of the Directive.

Schedule 2 – Requirements for ballots held under regulation 17

4.46 Where negotiations have failed to lead to an agreement, so that the standard information and consultation provisions in Part IV apply, the employer is required to organise a ballot of the workforce for the purpose of electing information and consultation representatives. This ballot must comply with the requirements in Schedule 2, which are based on those in the Transnational Information and Consultation of Employees Regulations 1999. In essence these require the employer to draw up, and consult on proposals for a ballot, bring the final arrangements to the attention of employees and

appoint an independent person to supervise the ballot. All employees must be entitled to stand for election and to vote in the ballot. The employer may hold separate ballots for separate parts of the workforce. Complaints about proposed ballot arrangements may be brought before the CAC which may order changes to be made. The ballot supervisor may require a ballot to be re-run if necessary. All costs relating to the ballot are to be borne by the employer.

Main outstanding issues

Establishments, undertakings and groups of undertakings

4.47 Member States are required by Article 3.1 of the Directive to choose whether to apply the legislation to undertakings with 50 or more employees or to establishments with 20 or more employees. As noted in paragraph 4.5 above, the Government's understanding of the term undertaking is that it means a **legal entity** such as an individually incorporated company; an establishment is a **physical entity** such as a factory, plant, office or retail outlet. An undertaking will carry on business at one or more establishments. A corporate structure could consist of several (or many) individual undertakings (ie subsidiaries), formed into a group of undertakings connected by shareholding structures some of which might be extremely complex. The proposed Regulations apply to undertakings with 50 or more employees, rather than to establishments with 20 or more employees.

4.48 This choice to apply the Directive to undertakings rather than establishments will determine **whether** the legislation applies to a particular legal entity. It does not necessarily determine **how in practice** information and consultation should be organised in a business under a negotiated or a pre-existing agreement. In some businesses, it will be more appropriate to organise information and consultation arrangements at a level **below** that of the undertaking, for example within individual establishments, or a number of establishments. In groups of companies it may be more appropriate to organise information and consultation arrangements at a level **above** that of the individual undertaking; in other words, arrangements might cover several undertakings (subsidiaries) within a group, or conceivably, all the undertakings within a group. Some organisations may wish to operate information and consultation at more than one level, for example, informing and consulting on local issues at establishment level, and on company-wide issues at undertaking or group level. Organisations should have the flexibility to agree with their employees arrangements at the level most appropriate to their particular circumstances. This should be possible by means of pre-existing or voluntary agreements. The legislation should not place any restrictions on the level at which arrangements operate under such agreements.

4.49 There are some implications for the drafting of the legislation. A number of provisions in the proposed Regulations assume that information and consultation will be organised at the level of the undertaking. For

example, the figures for an employee request (regulation 7(2)), for endorsing an employee request where there is a pre-existing agreement (regulation 8(6)), and for approving a negotiated agreement (regulation 14(2)(b)) are based on the number of employees in the undertaking, rather than in an establishment or in a group of undertakings. The procedure for making an employee request and for reaching a negotiated agreement in Part III, and the moratorium on subsequent employee requests or employer notifications in regulation 11 are also based on arrangements being drawn up at the level of the individual undertaking rather than a group of undertakings. Some modifications to the proposed Regulations may therefore be needed to achieve the objective of allowing pre-existing and negotiated agreements that operate at a level other than the individual undertaking. **We would welcome views on what modifications may be needed to achieve this objective.**

Relationship to existing information and consultation requirements

4.50 Article 9 of the Directive states that it is without prejudice to the specific information and consultation procedures set out in the Directives on collective redundancies⁸ and transfers of undertakings⁹, to provisions adopted in accordance with the European Works Councils Directive¹⁰, and to other rights to information, consultation and participation under national law. It also states that implementation of the Directive shall not be sufficient grounds for any regression in relation to the situation which already prevails in each Member State and in relation to the general level of protection of workers in the areas to which it applies. The requirements in this Directive are therefore **additional** to existing information and consultation requirements.

4.51 Article 4.2(c) of the Directive provides that information and consultation under that Article must cover decisions likely to lead to substantial changes in work organisation or in contractual relations to which the Directives on collective redundancies and transfers of undertakings apply. There is therefore potentially an overlap between these provisions (transposed by Part IV of the draft Regulations) and the legislation on collective redundancies and transfers of undertakings (“TUPE”). **We would welcome views on what problems, if any, this might cause in practice, and how any such problems could be alleviated by the legislation.**

4.52 The Government is publishing a separate consultation document concerning the UK experience of European Works Councils (EWCs) in parallel with this consultation document, and in it is seeking views on the implications for EWCs of the new legislation on information and consultation.

⁸ Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies.

⁹ Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees’ rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses.

¹⁰ Council Directive 94/45/EC of 22 September 1994 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees, extended to cover the UK by Directive 97/74/EC.

We will also shortly be publishing a consultation document containing draft Regulations implementing the European Company Statute including legislation to transpose the Directive on employee involvement in European Companies.

Relationship to collective agreements with unions

4.53 Many businesses will already have collective agreements with trade unions that provide, to a greater or lesser extent, for information and consultation on matters covered by the Directive. If an employee request under the Information and Consultation Regulations were made (or an employer notification), the question would arise what impact this would have on such agreements. An employee request might be made, for example, because the employees making it were not covered by the existing agreement or agreements, or because those agreements did not fully cover the subjects or provide for the type of information and consultation to which employees are entitled under the legislation.

4.54 As things stand at present, there is nothing of course to prevent employers who have collective agreements with unions from introducing separate information and consultation arrangements covering all their employees. The situation will be different once the new legislation comes into force because employers will then have a legal obligation to have information and consultation arrangements where requested by employees. The introduction of this legislation could therefore impact on collective agreements with unions in a new way. **We would welcome views on what impact the new legislation might have on collective agreements with unions, and what, if anything, should be done about this.**

Annex A Text of the Information and Consultation Directive

DIRECTIVE 2002/14/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 137(2) thereof,

Having regard to the proposal from the Commission ⁽¹⁾,

Having regard to the opinion of the Economic and Social Committee ⁽²⁾,

Having regard to the opinion of the Committee of the Regions ⁽³⁾,

Acting in accordance with the procedure referred to in Article 251 ⁽⁴⁾, and in the light of the joint text approved by the Conciliation Committee on 23 January 2002,

Whereas:

- (1) Pursuant to Article 136 of the Treaty, a particular objective of the Community and the Member States is to promote social dialogue between management and labour.
- (2) Point 17 of the Community Charter of Fundamental Social Rights of Workers provides, *inter alia*, that information, consultation and participation for workers must be developed along appropriate lines, taking account of the practices in force in different Member States.
- (3) The Commission consulted management and labour at Community level on the possible direction of Community action on the information and consultation of employees in undertakings within the Community.
- (4) Following this consultation, the Commission considered that Community action was advisable and again consulted management and labour on the contents of the planned proposal; management and labour have presented their opinions to the Commission.
- (5) Having completed this second stage of consultation, management and labour have not informed the Commission of their wish to initiate the process potentially leading to the conclusion of an agreement.
- (6) The existence of legal frameworks at national and Community level intended to ensure that employees are involved in the affairs of the undertaking employing them and in decisions which affect them has not always prevented serious decisions affecting employees from being taken and made public without adequate procedures having been implemented beforehand to inform and consult them.
- (7) There is a need to strengthen dialogue and promote mutual trust within undertakings in order to improve risk anticipation, make work organisation more flexible and facilitate employee access to training within the undertaking while maintaining security, make employees aware of adaptation needs, increase employees' availability to undertake measures and activities to

¹ OJ C 2, 5.1.1999, p. 3.

² OJ C 258, 10.9.1999, p. 24.

³ OJ C 144, 16.5.2001, p. 58.

⁴ Opinion of the European Parliament of 14 April 1999 (OJ C 219, 30.7.1999, p. 223), confirmed on 16 September 1999 (OJ C 54, 25.2.2000, p. 55), Council Common Position of 27 July 2001 (OJ C 307, 31.10.2001, p. 16) and Decision of the European Parliament of 23 October 2001 (not yet published in the Official Journal). Decision of the European Parliament of 5 February 2002 and Decision of the Council of 18 February 2002.

increase their employability, promote employee involvement in the operation and future of the undertaking and increase its competitiveness.

- (8) There is a need, in particular, to promote and enhance information and consultation on the situation and likely development of employment within the undertaking and, where the employer's evaluation suggests that employment within the undertaking may be under threat, the possible anticipatory measures envisaged, in particular in terms of employee training and skill development, with a view to offsetting the negative developments or their consequences and increasing the employability and adaptability of the employees likely to be affected.
- (9) Timely information and consultation is a prerequisite for the success of the restructuring and adaptation of undertakings to the new conditions created by globalisation of the economy, particularly through the development of new forms of organisation of work.
- (10) The Community has drawn up and implemented an employment strategy based on the concepts of 'anticipation', 'prevention' and 'employability', which are to be incorporated as key elements into all public policies likely to benefit employment, including the policies of individual undertakings, by strengthening the social dialogue with a view to promoting change compatible with preserving the priority objective of employment.
- (11) Further development of the internal market must be properly balanced, maintaining the essential values on which our societies are based and ensuring that all citizens benefit from economic development.
- (12) Entry into the third stage of economic and monetary union has extended and accelerated the competitive pressures at European level. This means that more supportive measures are needed at national level.
- (13) The existing legal frameworks for employee information and consultation at Community and national level tend to adopt an excessively *a posteriori* approach to the process of change, neglect the economic aspects of decisions taken and do not contribute either to genuine anticipation of employment developments within the undertaking or to risk prevention.
- (14) All of these political, economic, social and legal developments call for changes to the existing legal framework providing for the legal and practical instruments enabling the right to be informed and consulted to be exercised.
- (15) This Directive is without prejudice to national systems regarding the exercise of this right in practice where those entitled to exercise it are required to indicate their wishes collectively.
- (16) This Directive is without prejudice to those systems which provide for the direct involvement of employees, as long as they are always free to exercise the right to be informed and consulted through their representatives.
- (17) Since the objectives of the proposed action, as outlined above, cannot be adequately achieved by the Member States, in that the object is to establish a framework for employee information and consultation appropriate for the new European context described above, and can therefore, in view of the scale and impact of the proposed action, be better achieved at Community level, the Community may adopt measures in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve these objectives.
- (18) The purpose of this general framework is to establish minimum requirements applicable throughout the Community while not preventing Member States from laying down provisions more favourable to employees.
- (19) The purpose of this general framework is also to avoid any administrative, financial or legal constraints which would hinder the creation and development of small and medium-sized undertakings. To this end, the scope of this Directive should be restricted, according to the choice made by Member States, to undertakings with at least 50 employees or establishments employing at least 20 employees.

- (20) This takes into account and is without prejudice to other national measures and practices aimed at fostering social dialogue within companies not covered by this Directive and within public administrations.
- (21) However, on a transitional basis, Member States in which there is no established statutory system of information and consultation of employees or employee representation should have the possibility of further restricting the scope of the Directive as regards the numbers of employees.
- (22) A Community framework for informing and consulting employees should keep to a minimum the burden on undertakings or establishments while ensuring the effective exercise of the rights granted.
- (23) The objective of this Directive is to be achieved through the establishment of a general framework comprising the principles, definitions and arrangements for information and consultation, which it will be for the Member States to comply with and adapt to their own national situation, ensuring, where appropriate, that management and labour have a leading role by allowing them to define freely, by agreement, the arrangements for informing and consulting employees which they consider to be best suited to their needs and wishes.
- (24) Care should be taken to avoid affecting some specific rules in the field of employee information and consultation existing in some national laws, addressed to undertakings or establishments which pursue political, professional, organisational, religious, charitable, educational, scientific or artistic aims, as well as aims involving information and the expression of opinions.
- (25) Undertakings and establishments should be protected against disclosure of certain particularly sensitive information.
- (26) The employer should be allowed not to inform and consult where this would seriously damage the undertaking or the establishment or where he has to comply immediately with an order issued to him by a regulatory or supervisory body.
- (27) Information and consultation imply both rights and obligations for management and labour at undertaking or establishment level.
- (28) Administrative or judicial procedures, as well as sanctions that are effective, dissuasive and proportionate in relation to the seriousness of the offence, should be applicable in cases of infringement of the obligations based on this Directive.
- (29) This Directive should not affect the provisions, where these are more specific, of Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies ⁽¹⁾ and of Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses ⁽²⁾.
- (30) Other rights of information and consultation, including those arising from Council Directive 94/45/EEC of 22 September 1994 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees ⁽³⁾, should not be affected by this Directive.
- (31) Implementation of this Directive should not be sufficient grounds for a reduction in the general level of protection of workers in the areas to which it applies,

HAVE ADOPTED THIS DIRECTIVE:

¹ OJ L 225, 12.8.1998, p. 16.

² OJ L 82, 22.3.2001, p. 16.

³ OJ L 254, 30.9.1994, p. 64. Directive as amended by Directive 97/74/EC (OJ L 10, 16.1.1998, p. 22).

Article 1

Object and principles

1. The purpose of this Directive is to establish a general framework setting out minimum requirements for the right to information and consultation of employees in undertakings or establishments within the Community.
2. The practical arrangements for information and consultation shall be defined and implemented in accordance with national law and industrial relations practices in individual Member States in such a way as to ensure their effectiveness.
3. When defining or implementing practical arrangements for information and consultation, the employer and the employees' representatives shall work in a spirit of cooperation and with due regard for their reciprocal rights and obligations, taking into account the interests both of the undertaking or establishment and of the employees.

Article 2

Definitions

For the purposes of this Directive:

- (a) 'undertaking' means a public or private undertaking carrying out an economic activity, whether or not operating for gain, which is located within the territory of the Member States;
- (b) 'establishment' means a unit of business defined in accordance with national law and practice, and located within the territory of a Member State, where an economic activity is carried out on an ongoing basis with human and material resources;
- (c) 'employer' means the natural or legal person party to employment contracts or employment relationships with employees, in accordance with national law and practice;
- (d) 'employee' means any person who, in the Member State concerned, is protected as an employee under national employment law and in accordance with national practice;
- (e) 'employees' representatives' means the employees' representatives provided for by national laws and/or practices;
- (f) 'information' means transmission by the employer to the employees' representatives of data in order to enable them to acquaint themselves with the subject matter and to examine it;
- (g) 'consultation' means the exchange of views and establishment of dialogue between the employees' representatives and the employer.

Article 3

Scope

1. This Directive shall apply, according to the choice made by Member States, to:
 - (a) undertakings employing at least 50 employees in any one Member State, or
 - (b) establishments employing at least 20 employees in any one Member State.

Member States shall determine the method for calculating the thresholds of employees employed.

2. In conformity with the principles and objectives of this Directive, Member States may lay down particular provisions applicable to undertakings or establishments which pursue directly and essentially political, professional organisational, religious, charitable, educational, scientific or artistic aims, as well as aims involving information and the expression of opinions, on condition that, at the date of entry into force of this Directive, provisions of that nature already exist in national legislation.

3. Member States may derogate from this Directive through particular provisions applicable to the crews of vessels plying the high seas.

Article 4

Practical arrangements for information and consultation

1. In accordance with the principles set out in Article 1 and without prejudice to any provisions and/or practices in force more favourable to employees, the Member States shall determine the practical arrangements for exercising the right to information and consultation at the appropriate level in accordance with this Article.

2. Information and consultation shall cover:

- (a) information on the recent and probable development of the undertaking's or the establishment's activities and economic situation;
- (b) information and consultation on the situation, structure and probable development of employment within the undertaking or establishment and on any anticipatory measures envisaged, in particular where there is a threat to employment;
- (c) information and consultation on decisions likely to lead to substantial changes in work organisation or in contractual relations, including those covered by the Community provisions referred to in Article 9(1).

3. Information shall be given at such time, in such fashion and with such content as are appropriate to enable, in particular, employees' representatives to conduct an adequate study and, where necessary, prepare for consultation.

4. Consultation shall take place:

- (a) while ensuring that the timing, method and content thereof are appropriate;
- (b) at the relevant level of management and representation, depending on the subject under discussion;
- (c) on the basis of information supplied by the employer in accordance with Article 2(f) and of the opinion which the employees' representatives are entitled to formulate;
- (d) in such a way as to enable employees' representatives to meet the employer and obtain a response, and the reasons for that response, to any opinion they might formulate;
- (e) with a view to reaching an agreement on decisions within the scope of the employer's powers referred to in paragraph 2(c).

Article 5

Information and consultation deriving from an agreement

Member States may entrust management and labour at the appropriate level, including at undertaking or establishment level, with defining freely and at any time through negotiated agreement the practical arrangements for informing and consulting employees. These

agreements, and agreements existing on the date laid down in Article 11, as well as any subsequent renewals of such agreements, may establish, while respecting the principles set out in Article 1 and subject to conditions and limitations laid down by the Member States, provisions which are different from those referred to in Article 4.

Article 6

Confidential information

1. Member States shall provide that, within the conditions and limits laid down by national legislation, the employees' representatives, and any experts who assist them, are not authorised to reveal to employees or to third parties, any information which, in the legitimate interest of the undertaking or establishment, has expressly been provided to them in confidence. This obligation shall continue to apply, wherever the said representatives or experts are, even after expiry of their terms of office. However, a Member State may authorise the employees' representatives and anyone assisting them to pass on confidential information to employees and to third parties bound by an obligation of confidentiality.

2. Member States shall provide, in specific cases and within the conditions and limits laid down by national legislation, that the employer is not obliged to communicate information or undertake consultation when the nature of that information or consultation is such that, according to objective criteria, it would seriously harm the functioning of the undertaking or establishment or would be prejudicial to it.

3. Without prejudice to existing national procedures, Member States shall provide for administrative or judicial review procedures for the case where the employer requires confidentiality or does not provide the information in accordance with paragraphs 1 and 2. They may also provide for procedures intended to safeguard the confidentiality of the information in question.

Article 7

Protection of employees' representatives

Member States shall ensure that employees' representatives, when carrying out their functions, enjoy adequate protection and guarantees to enable them to perform properly the duties which have been assigned to them.

Article 8

Protection of rights

1. Member States shall provide for appropriate measures in the event of non-compliance with this Directive by the employer or the employees' representatives. In particular, they shall ensure that adequate administrative or judicial procedures are available to enable the obligations deriving from this Directive to be enforced.

2. Member States shall provide for adequate sanctions to be applicable in the event of infringement of this Directive by the employer or the employees' representatives. These sanctions must be effective, proportionate and dissuasive.

Article 9

Link between this Directive and other Community and national provisions

1. This Directive shall be without prejudice to the specific information and consultation procedures set out in Article 2 of Directive 98/59/EC and Article 7 of Directive 2001/23/EC.
2. This Directive shall be without prejudice to provisions adopted in accordance with Directives 94/45/EC and 97/74/EC.
3. This Directive shall be without prejudice to other rights to information, consultation and participation under national law.
4. Implementation of this Directive shall not be sufficient grounds for any regression in relation to the situation which already prevails in each Member State and in relation to the general level of protection of workers in the areas to which it applies.

Article 10

Transitional provisions

Notwithstanding Article 3, a Member State in which there is, at the date of entry into force of this Directive, no general, permanent and statutory system of information and consultation of employees, nor a general, permanent and statutory system of employee representation at the workplace allowing employees to be represented for that purpose, may limit the application of the national provisions implementing this Directive to:

- (a) undertakings employing at least 150 employees or establishments employing at least 100 employees until 23 March 2007, and
- (b) undertakings employing at least 100 employees or establishments employing at least 50 employees during the year following the date in point (a).

Article 11

Transposition

1. Member States shall adopt the laws, regulations and administrative provisions necessary to comply with this Directive not later than 23 March 2005 or shall ensure that management and labour introduce by that date the required provisions by way of agreement, the Member States being obliged to take all necessary steps enabling them to guarantee the results imposed by this Directive at all times. They shall forthwith inform the Commission thereof.
2. Where Member States adopt these measures, they shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. The methods of making such reference shall be laid down by the Member States.

Article 12

Review by the Commission

Not later than 23 March 2007, the Commission shall, in consultation with the Member States and the social partners at Community level, review the application of this Directive with a view to proposing any necessary amendments.

Article 13

Entry into force

This Directive shall enter into force on the day of its publication in the *Official Journal of the European Communities*. [23 March 2002]

Article 14

Addressees

This Directive is addressed to the Member States.

Done at Brussels, 11 March 2002.

For the European Parliament
The President
P. COX

For the Council
The President
J. PIQUÉ I CAMPS

STATUTORY INSTRUMENTS

200[x] No.

TERMS AND CONDITIONS OF EMPLOYMENT

The Information and Consultation of Employees Regulations 200[X]

Made... 200[X]

Laid before Parliament... 200[X]

Coming into force [23 March 2005]

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SCHEDULE 2

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The Secretary of State, being a Minister designated for the purposes of section 2(2) of the European Communities Act 1972¹¹ in relation to measures relating to the information and consultation of employees¹², in exercise of the powers conferred on her by that provision, hereby makes the following Regulations:-

PART I GENERAL

Citation, commencement and extent

1. (1) These Regulations may be cited as the Information and Consultation of Employees Regulations 200[x] and shall come into force on 23rd March 2005.

(2) These Regulations extend to Great Britain only.

Interpretation

2. In these Regulations –

“the 1996 Act” means the Employment Rights Act 1996¹³;

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

“Appeal Tribunal” means the Employment Appeal Tribunal;

“CAC” means the Central Arbitration Committee;

“consultation” means the exchange of views and establishment of a dialogue between –

¹¹ 1972 c. 68.

¹² S.I. 1999/2788.

¹³ 1996 c. 18.

- (a) information and consultation representatives and the employer; or
- (b) in the case of a negotiated agreement which contains a provision referred to in regulation 14(1)(g)(ii), the employer and the employees;

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

“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 request” means a request by employees under regulation 7 for the employer to enter into negotiations to reach an agreement under these Regulations;

“employer notification” means a notification by an employer under regulation 10 that he wishes to initiate negotiations to reach an agreement under these Regulations;

“information” means data transmitted by the employer –

- (a) to the information and consultation representatives; or
- (b) in the case of a negotiated agreement which contains a provision referred to in regulation 14(1)(g)(ii), directly to the employees,

in order to enable those representatives or those employees to examine and to acquaint themselves with the subject matter of the data;

“Information and Consultation Directive” means European Parliament and Council Directive 2002/14/EC of 11 March 2002¹⁴ establishing a general framework for informing and consulting employees in the European Community;

“information and consultation representative” means –

- (a) in the case of a negotiated agreement which contains a provision referred to in regulation 14(1)(g)(i), a person appointed or elected in accordance with that agreement; or
- (b) a person elected in accordance with regulation 17;

“negotiated agreement” means an agreement between the employer and the negotiating representatives referred to in regulation 14;

“negotiating representative” means a person elected or appointed under regulation 13;

¹⁴ OJ L 80, 23.3.2002, p29.

“parties” means the employer and the negotiating representatives or the information and consultation representatives, as the case may be;

“standard information and consultation provisions” means the provisions set out in regulation 18; and

“undertaking” means a public or private undertaking carrying out an economic activity, whether or not operating for gain.

Application

3. (1) These Regulations apply to undertakings –

- (a) employing in the United Kingdom the number of employees in column 1 of the table in Schedule 1 to these Regulations from the corresponding date in column 2; and
- (b) whose registered office, head office or principal place of business is situated in Great Britain.

(2) In these Regulations, an undertaking to which these Regulations apply is referred to, in relation to its employees, as the “employer”.

PART II EMPLOYEE NUMBERS AND ENTITLEMENT TO INFORMATION

Calculation of numbers of employees

4. (1) Subject to paragraph (3), the number of employees for the purposes of regulation 3(1) shall be determined by ascertaining the average number of employees employed in the previous twelve months, calculated in accordance with paragraph (2).

(2) (a) Subject to sub-paragraph (b), the average number of employees is to be ascertained by determining the number of employees employed in each month in the previous twelve months (whether they were employed throughout the month or not), adding together those monthly figures and dividing the number by 12;

(b) For the purposes of the calculation in sub-paragraph (a) if for the whole of a month within the twelve month period an employee works under a contract by virtue of which he would have worked for 75 hours or less in that month -

- (i) were the month to have contained 21 working days;
- (ii) were the employee to have had no absences from work; and
- (iii) were the employee to have worked no overtime,

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

(3) If the undertaking has been in existence for less than twelve months, the references to twelve months in paragraphs (1) and (2) shall be replaced by the number of months the undertaking has been in existence.

Entitlement to information

5. (1) An employee or an employees' representative may request information from the employer for the purpose of determining the number of people employed by that undertaking in the United Kingdom.

(2) The employer must provide the employee or the employees' representative who made the request with information to enable him to make the calculation of the number of employees referred to in regulation 4.

Complaint of failure to provide information

6. (1) An employee or an employees' representative who has requested information under regulation 5 may present a complaint to the CAC that -

- (a) the employer has failed to provide the information referred to in regulation 5(2); or
- (b) the information which has been provided by the employer is false or incomplete in a material particular.

(2) Where the CAC finds the complaint to be well-founded it shall make an order requiring the employer 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 employer 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 employer must disclose the information specified in the order.

(3) 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 5.

PART III NEGOTIATED AGREEMENTS

Employee request to negotiate an agreement

7. (1) (a) Subject to paragraph (8), the employer shall initiate negotiations to reach an agreement under these Regulations as soon as reasonably practicable

and, in any case, within one month of a valid employee request being made.

(b) The reference to entering into negotiations in sub-paragraph (a) is to taking the steps set out in regulation 13(1).

(2) Subject to paragraph (3), a valid employee request may consist of –

- (a) a single request made by at least 10% of employees in the undertaking; or
- (b) a number of separate requests made on the same or different days by employees which when taken together mean that at least 10% of employees in that undertaking have made requests.

(3) Where the figure of 10% in paragraph (2) would result in less than 15 or more than 2,500 employees being required to make a valid employee requests, those figures shall constitute the minimum and maximum number of employees required to make a valid request instead of the figure of 10%.

(4) To amount to a valid employee 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 registered office, head office or principal place of business of the employer;
 - (ii) the CAC; or
 - (iii) a qualified independent person; and
- (c) specify the date on which it was sent.

(5) Where the request is sent to the CAC or the qualified independent person under paragraph (4)(b)(ii) or (iii), the CAC or the qualified independent person, as the case may be, shall –

- (a) notify the employer that a request has been made as soon as reasonably practicable; and
- (b) request from the employer such information as it needs to verify the number of employees in the undertaking and to check that the request has been made by the number of employees required to make it a valid request under paragraph (2).

(6) Where the CAC or the qualified independent person requests information from the employer under paragraph (5)(b) the employer shall provide the information requested as soon as reasonably practicable.

- (7) 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 CAC or the qualified independent person notifies the employer that a request has been made or the date on which the request is or requests are sent to the employer by the employees, as the case may be; 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.
- (8) (a) If the employer decides to hold a ballot under regulation 8, the duty in paragraph (1) to initiate negotiations shall not commence until the outcome of the ballot is known and shall only commence if the outcome of the ballot is that in regulation 8(5)(b).
- (b) If an application is made to the CAC under regulation 12, the duty in paragraph (1) to initiate negotiations shall not commence until the application has been determined and shall only commence if the CAC's declaration is that the employee request or employer's notification was valid or that the obligation under paragraph (1) did apply to the employer.
- (9) In this regulation, a "qualified independent person" means a person specified by name in Article 4 of the Recognition and Derecognition Ballots (Qualified Persons) Order 2000¹⁵.

Ballot for employee endorsement of employee request

8. (1) This regulation applies where a valid employee request has been made under regulation 7 by fewer than 40% of employees employed in the undertaking on the date the request was made and where there exists between the employer and the employees one or more agreements which –

- (a) are in writing;
 - (b) cover all the employees of the undertaking;
 - (c) have been approved by the employees; and
 - (d) set out how the employer is to give information to the employees or their representatives and to seek their views on such information.
- (2) Where this regulation applies, the employer may, instead of entering into negotiations in accordance with regulation 7, hold a ballot to seek the endorsement of the employees of the undertaking for the employee request in accordance with paragraphs (3) and (4).

¹⁵ S.I. 2000/1306.

- (3) The employer must –
- (a) inform the employees in writing as soon as reasonably practicable and in any event within one month of the receipt of the employee request that he intends to hold a ballot under this regulation; and
 - (b) must arrange for the ballot to be held as soon as reasonably practicable thereafter provided that the ballot does not take place before a period of 21 days has passed after the employer has informed the employees under sub-paragraph (a).
- (4) A ballot must satisfy the following requirements –
- (a) the employer shall make such arrangements as are reasonably practicable to ensure that the ballot is fair;
 - (b) all employees on the date of the election must be entitled to vote in the ballot;
 - (c) the ballot must be conducted so as to secure that –
 - (i) so far as is reasonably practicable, those voting do so in secret; and
 - (ii) the votes given at the ballot are accurately counted.
- (5) Where the employer holds a ballot under this regulation –
- (a) he must as soon as reasonably practicable after the holding of the ballot inform the employees of the result; and
 - (b) if the result of the ballot is that at least 40% of employees in the undertaking endorse the employee request, the employer is under the obligation in regulation 7(1) to enter into negotiations; and
 - (c) if the result of the ballot is that less than 40% of employees in the undertaking endorse the employee request, the employer is no longer under the obligation in regulation 7(1) to enter into negotiations.
- (6) Where an employer, acting pursuant to paragraph (3)(a), has informed the employees that he intends to hold a ballot, any employees' representative or, where no such representatives exist, any employee who believes that the employer has not complied with sub-paragraph (b) of that paragraph may present a complaint to the CAC.
- (7) Where the CAC finds a complaint under paragraph (6) well-founded it shall make an order requiring the employer to hold the ballot within such period as the order may specify.

Complaint about ballot for endorsement of employee request

9. (1) Any employees' representative or, where no such representatives exist, any employee who believes that an agreement or agreements which satisfy the requirements set out in sub-paragraphs (a) to (d) of regulation 8(1) do not exist may, within 21 days of the employer informing the employees under regulation 8(3)(a), present a complaint to the CAC.

(2) Any employees' representative or, where no such representatives exist, any employee who believes that the arrangements for a ballot held under regulation 8 did not satisfy one or more of the requirements set out in regulation 8(4) may, within 21 days of the holding of the ballot, present a complaint to the CAC.

(3) Where the CAC finds a complaint under paragraph (1) or (2) well-founded it shall make an order requiring the employer –

- (a) in the case of a complaint under paragraph (1), to enter into negotiations under regulation 7; and
- (b) in the case of a complaint under paragraph (2), to –
 - (i) hold the ballot under regulation 8 again; or
 - (ii) if, prior to the order being made, the employer makes representations to the CAC that it would prefer to enter into negotiations under regulation 7, to enter into those negotiations.

Employer notification of decision to initiate negotiations

10. (1) The employer may initiate the negotiation process set out in regulation 13(1) on his own initiative by issuing a written notification, satisfying the requirements of paragraph (2), stating that he wishes to do so.

(2) The notification referred to in paragraph (1) must –

- (a) state that it is made for the purpose of these Regulations;
- (b) state the date on which it is issued; and
- (c) be published in such a manner as to bring it to the attention of, so far as reasonably practicable, all the employees of the undertaking.

(3) The employer must initiate negotiations as soon as reasonably practicable and, in any case within one month, after issuing the notification.

Restrictions on employee request and employer notification

11. (1) Subject to paragraph (2), no employee request or employer notification shall be valid if it is made or issued, as the case may be, –

- (a) in the case where a negotiated agreement applies, within a period of three years from the date of the agreement or, where the agreement is terminated within that period, before the date on which the termination takes effect;

- (b) where the standard information and consultation provisions apply within a period of three years from the date on which they started to apply; and
- (c) where the employer has held a ballot under regulation 8 and the result was that set out in regulation 8(5)(c), within a period of three years from the date of the employee request for which the employer sought the employees' endorsement in that ballot or, if more than one, the earliest request.

(2) Paragraph (1) does not apply where there are material changes in the undertaking during the applicable period having the result—

- (a) where a ballot held under regulation 8 had the result set out in paragraph (5)(c) of that regulation, that there is no longer an agreement which satisfies paragraph (1)(b) and (c) of that regulation; or
- (b) where a negotiated agreement exists, that the agreement no longer complies with regulation 14(1)(d).

Dispute about employee request, employer notification or whether obligation in regulation 7(1) applies

12. (1) If the employer considers that –

- (a) an employee request (or separate requests) was not valid because it did not satisfy any requirement of regulation 7(2) or (3) or was covered by the restriction in regulation 11; or
- (b) the obligation in regulation 7(1) did not apply to it on the relevant date,

it may apply to the CAC for a declaration as to whether the request was valid or whether the obligation did apply on the relevant date.

(2) If an employees' representative or, if none exists, an employee considers that an employer notification was not valid because it was covered by the restriction in regulation 11 he may apply to the CAC for a declaration as to whether the notification was valid.

(3) The CAC shall only consider an application for a declaration made under paragraph (1) or (2) if the application is made within a one month period beginning on the date –

- (a) when a request, or if more than one the request which resulted in the requisite number of employees having made the request, was made for the purposes of regulation 7, whether or not that request was valid; and
- (b) on which the notification was issued for the purposes of regulation 10, whether or not the notification was valid.

(4) For the purposes of paragraph (3)(a) the requisite number means the number required by regulation 7(2) or (3).

Negotiations to reach an agreement

13. (1) In order to initiate negotiations to reach an agreement under these Regulations the employer must –

- (a) make arrangements, satisfying the requirements of paragraph (2), for the employees of the undertaking to appoint or elect negotiating representatives; and thereafter
- (b) inform the employees in writing of the identity of the negotiating representatives; and
- (c) invite the negotiating representatives to enter into negotiations to reach a negotiated agreement.

(2) The requirements for the appointment or election of negotiating representatives under paragraph (1)(a) are that –

- (a) all employees of the undertaking must be entitled to take part in the appointment or election of the representatives;
and
- (b) the election or appointment of the representatives must be arranged in such a way that, following their election or appointment, all employees of the undertaking are represented by a representative.

(3) The negotiations referred to in paragraph (1)(c) shall last for a period not exceeding six months commencing on the date on which the employer informed the employees of the identity of the negotiating representatives in accordance with paragraph (1)(b), unless the parties agree to extend this period under paragraph (4).

(4) If, before the end of the six month period referred to in paragraph (3), the parties agree that it should be extended, it can be extended by such period as the parties agree and thereafter can be further extended by such period or periods as the parties agree.

Negotiated agreements

14. (1) A negotiated agreement must –

- (a) set out the circumstances in which the employer must inform and consult his employees;
- (b) be in writing;
- (c) be dated;
- (d) cover all employees of the undertaking;
- (e) be approved in accordance with paragraph (2);

- (f) be signed by or on behalf of the employer; and
- (g) either –
 - (i) provide for the appointment or election of information and consultation representatives to whom the employer must provide the information and whom the employer must consult in the circumstances referred to in sub-paragraph (a); or
 - (ii) provide that the employer must provide information directly to the employees of the undertaking and consult the employees directly.

(2) The negotiated agreement shall be deemed to have been approved in accordance with sub-paragraph (1)(e) if –

- (a) all the negotiating representatives sign it; or
- (b) a majority of negotiating representatives sign it, and either –
 - (i) at least 50% of employees employed in the undertaking approve the agreement in writing; or
 - (ii) at least 50% of employees who vote in a ballot, the arrangements for which satisfy the requirements set out in paragraph (3), approve the agreement,

and the employer may decide to seek approval in one or more of the ways set out in sub-paragraphs (a) and (b).

(3) A ballot must satisfy the following requirements –

- (a) the employer shall make such arrangements as are reasonably practicable to ensure that the ballot is fair;
- (b) all employees on the date of the election must be entitled to vote in the ballot; and
- (c) the ballot must be conducted so as to secure that –
 - (i) so far as is reasonably practicable, those voting do so in secret; and
 - (ii) the votes given at the ballot are accurately counted.

Complaint about ballot for employee approval of agreement

15. (1) Any negotiating representative who believes that the arrangements of a ballot held under regulation 14 did not satisfy one or more of the requirements set out in paragraph (3) of that regulation, may, within 21 days of the holding of the ballot, present a complaint to the CAC.

(2) Where the CAC finds the complaint well-founded it shall make an order requiring the employer to hold the ballot referred to in regulation 14 again.

PART IV STANDARD INFORMATION AND CONSULTATION PROVISIONS

Application of standard information and consultation provisions

16. (1) Subject to paragraph (2), if the parties do not reach a negotiated agreement within the time limit referred to in regulation 13(3) (or that period as extended by agreement under paragraph (4) of that regulation) the standard information and consultation provisions shall apply from the date which is six months from the day that time limit expires or from the date information and consultation representatives have been elected under regulation 17, whichever is the sooner.

(2) (a) Where the standard information and consultation provisions apply, the employer and the information and consultation representatives elected pursuant to regulation 17 may, at any time, reach an agreement that provisions other than the standard information and consultation provisions shall apply.

(b) Any agreement referred to in sub-paragraph (a) must comply with the requirements listed in regulation 14(1)(a) to (d), (f) and (g) and be signed by a majority of the information and consultation representatives.

Election of information and consultation representatives

17. (1) (a) Where the standard information and consultation provisions apply, the employer shall, before the standard information and consultation provisions start to apply, arrange for the holding of a ballot of its employees to elect the relevant number of information and consultation representatives.

(b) The ballot referred to in sub-paragraph (a) must comply with the provisions in Schedule 2 to these Regulations.

(2) In this regulation the “relevant number of information and consultation representatives” means one representative per fifty employees or part thereof, provided that that number does not exceed 25.

Standard information and consultation provisions

18. – (1) The employer must provide the information and consultation representatives with information on –

- (a) the recent and probable development of the undertaking’s activities and economic situation;
- (b) the situation, structure and probable development of employment within the undertaking and on any anticipatory measures envisaged, in particular, where there is a threat to employment within the undertaking; and

- (c) decisions likely to lead to substantial changes in work organisation or in contractual relations, including those referred to in-
 - (i) sections 188 to 192 of the Trade Union and Labour Relations (Consolidation) Act 1992¹⁶; and
 - (ii) regulations 10 to 12 of the Transfer of Undertakings (Protection of Employment) Regulations 1981¹⁷.

(2) The information referred to in paragraph (1) must be given at such time, in such fashion and with such content as are appropriate to enable, in particular, the information and consultation representatives to conduct an adequate study and, where necessary, to prepare for consultation.

(3) The employer must consult the information and consultation representatives on the matters referred to in paragraph (1)(b) and (c).

(4) The employer must ensure that the consultation referred to in paragraph (3) is conducted -

- (a) in such a way as to ensure that the timing, method and content of the consultation are appropriate;
- (b) on the basis of the information supplied by the employer to the information and consultation representatives and of any opinion which those representatives express to the employer;
- (c) in such a way as to enable the information and consultation representatives to meet the employer at the relevant level of management depending on the subject under discussion and to obtain a reasoned opinion from the employer to any such opinion; and
- (d) in relation to matters falling within paragraph (1)(c), with a view to reaching agreement on decisions within the scope of the employer's powers.

(5) Where there is an obligation in these Regulations on the employer to inform and consult its employees a failure on the part of a person who controls the employer (either directly or indirectly) to provide information to the employer shall not constitute a valid reason for the employer failing to inform and consult.

¹⁶ 1992 c. 52.

¹⁷ S.I. 1981/1794; regulations 10 to 12 have been amended by the Tribunals and Inquiries Act 1992 (1992 c. 53), the Trade Union Reform and Employment Rights Act 1993 (1993 c. 19), the Collective Redundancies and Transfer of Undertakings (Protection of Employment) Regulations 1995 (S.I. 1995 1925), the Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 1995 (S.I. 1995/2587), the Employment Rights (Dispute Resolution) Act 1998 (1998 c. 8) and the Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 1999 (S.I. 1999/2402)

PART V
DUTY OF COOPERATION

Cooperation

19. The parties are under a duty, when negotiating or implementing a negotiated agreement or when implementing the standard information and consultation provisions, to work in a spirit of cooperation and with due regard for their reciprocal rights and obligations, taking into account the interests of both the undertaking and the employees.

PART VI
COMPLIANCE AND ENFORCEMENT

Disputes about operation of a negotiated agreement or the standard information and consultation provisions

20. – (1) Where –

- (a) a negotiated agreement has been agreed; or
- (b) the standard information and consultation provisions apply,

a complaint may be presented to the CAC by a relevant applicant who considers that, because of the failure of a defaulter, the terms of the negotiated agreement or, as the case may be, one or more of the standard information and consultation provisions, have not been complied with.

(2) In this regulation –

“failure” means an act or omission,

“relevant applicant” means –

- (a) the employer,
- (b) in a case where information and consultation representatives have been elected or appointed, an information and consultation representative, or
- (c) in a case where no information or consultation representatives have been elected or appointed, an employee, and

“defaulter” means the person mentioned in sub-paragraph (a) or (b) of the definition of “relevant applicant” against whom the complaint is presented.

(3) Where the CAC finds the complaint well-founded it shall make a decision to that effect and may make an order requiring the defaulter to take such steps as are necessary to comply with the terms of the negotiated agreement or, as the case may be, the standard information and consultation procedure.

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

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

(5) If the CAC makes a decision under paragraph (3) and the defaulter in question is the employer, 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.

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

(7) Regulation 21 shall apply in respect of a penalty notice issued under this regulation.

(8) No order of the CAC under this regulation shall have the effect of suspending or altering the effect of any act done or of any agreement made by the employer.

Penalties

21. (1) A penalty notice issued under regulation 20 shall specify –

- (a) the amount of the penalty which is payable;
- (b) the date before which the penalty must be paid; and
- (c) the failure and period to which the penalty relates.

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

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

- (a) the gravity of the failure;
- (b) the period of time over which the failure occurred;
- (c) the reason for the failure;
- (d) the number of employees affected by the failure; and
- (e) the number of employees employed by the undertaking.

(4) The date specified under paragraph (1)(b) above must not be earlier than the end of the period within which an appeal against a decision or order made by the CAC under regulation 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 employer, as a civil debt due to him, any amount payable under the penalty notice which remains outstanding.
- (6) The making of an appeal suspends the effect of the penalty notice.
- (7) Any sums received by the Secretary of State under regulation 20 or this regulation shall be paid into the Consolidated Fund.

PART VII CONFIDENTIAL INFORMATION

Breach of statutory duty

22. – (1) A person who is or at any time was –

- (a) a negotiating representative;
- (b) an information and consultation representative; or
- (c) an expert assisting negotiating representatives 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) to (c) of this paragraph, which the employer has entrusted to him on terms requiring it to be held in confidence.

(2) In this regulation and in regulation 23, a person specified in paragraph (1)(a) to (c) of this regulation is referred to as a “recipient”.

(3) The obligation to comply with paragraph (1) is a duty owed to the employer, and a breach of the duty is actionable accordingly (subject to the defences and other incidents applying to actions for breaches 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 Act¹⁸.

(6) A recipient whom the employer 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 employer to impose such a requirement.

(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 employer to require the recipient to hold the information or document in confidence.

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

Withholding of information by the employer

23. (1) The employer 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.

(2) Where there is a dispute between the employer and a recipient as to whether the nature of the information or document which the employer has failed to provide is such as is described in paragraph (1), the employer 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, the CAC shall order the employer 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.

¹⁸ Section 43A of the 1996 Act was inserted by the Public Interest Disclosure Act 1998 (c. 23), section 1.

PART VIII
PROTECTIONS FOR INFORMATION
AND CONSULTATION REPRESENTATIVES, ETC.

Right to time off for information and consultation representatives, etc.

24. – (1) An employee who is –

- (a) a negotiating representative; or
- (b) an information and consultation 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 representative.

(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 24

25. – (1) An employee who is permitted to take time off under regulation 24 is entitled to be paid remuneration by his employer for the time taken off at the appropriate hourly rate.

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

(3) The appropriate hourly rate, in relation to an employee, is the amount of one week's pay divided by the number of normal working hours in a week for that employee when employed under the contract of employment in force on the day when 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 is taken off; or
- (b) where the employee has not been employed for a sufficient period to enable the calculations 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 24 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: complaint to tribunals

26. (1) An employee may present a complaint to an employment tribunal that his employer –

- (a) has unreasonably refused to permit him to take time off as required by regulation 24; or
- (b) has failed to pay the whole or part of any amount to which the employee is entitled under regulation 25.

(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 25 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 25, the tribunal shall also order the employer to pay to the employee the amount it finds due to him.

Unfair dismissal

27. (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.

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

- (a) an employees' representative;
- (b) a negotiating representative;
- (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 representative.

(3) The reason is that -

- (a) the employee performed any functions or activities as such a representative or candidate;
- (b) the employee or a person acting on his behalf made a request to exercise an entitlement conferred on the employee by regulation 24 or 25;

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 22, unless the employee reasonably believed the disclosure to be a "protected disclosure" within the meaning given to that expression by section 43A of the 1996 Act.

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

(6) The reasons are that the employee –

- (a) took, or proposed to take, any proceedings before an employment tribunal to enforce 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 CAC conferred by these Regulations;
- (c) requested, or proposed to request, information in accordance with regulation 5;
- (d) acted with a view to securing that an agreement was or was not negotiated or that the standard information and consultation provisions did or did become applicable;

- (e) indicated that he supported or did not support the coming into existence of a negotiated agreement or the application of the standard information and consultation provisions;
- (f) stood as a candidate in an election in which any person elected would, on being elected, be a negotiating representative 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 purpose 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

28. (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)¹⁹ there shall be inserted “or (7G)” immediately before “applies” and after subsection (7F) there shall be inserted –

“(7G) This subsection applies if the reason (or, if more than one, the principal reason) for which the employee was selected for dismissal was one specified in paragraph (3) or (6) of regulation 27 of the Information and Consultation of Employees Regulations [2003] (read with paragraphs (4) and (7) of that regulation).”.

(2) In section 108²⁰ of the 1996 Act (exclusion of right: qualifying period of employment) in subsection (3) (cases where no qualifying period of employment is

¹⁹ 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.

²⁰ Section 108(1) was amended by S.I. 1999/1436, Article 3.

required)²¹ the word “or” at the end of paragraph (i) shall be omitted and after paragraph (j) there shall be inserted -

“or

(k) paragraph (3) or (6) of regulation 27 of the Information and Consultation of Employees Regulations [2003] (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)²² the word “or” at the end of paragraph (i) shall be omitted and after paragraph (j) there shall be inserted -

“or

(k) paragraph (3) or (6) of regulation 27 of the Information and Consultation of Employees Regulations [2003] (read with paragraphs (4) and (7) of that regulation) applies.”.

Detriment

29. (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) an employees’ representative;
- (b) a negotiating representative;
- (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 representative.

(3) The ground is that -

- (a) the employee performed any functions or activities as such a representative or candidate;
- (b) the employee or a person acting on his behalf made a request to exercise an entitlement conferred on the employee by regulation 24 or 25;

or proposed to do so.

(4) The ground in paragraph (3)(a) does not apply where the ground (or principal 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

²¹ Section 108(3) has been amended on a number of occasions to specify additional cases in which no qualifying period of employment is required.

²² Section 109(2) has been amended on a number of occasions to specify additional cases where the upper age limit does not apply.

information or document in breach of the duty in regulation 22, unless the employee reasonably believed the disclosure to be a “protected disclosure” within the meaning given to that expression by section 43A of the 1996 Act.

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

(6) The grounds are that the employee –

- (a) took, or proposed to take, any proceedings before an employment tribunal to enforce 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 CAC conferred by these Regulations;
- (c) requested, or proposed to request, information in accordance with regulation 5;
- (d) acted with a view to securing that an agreement was or was not negotiated or that the standard information and consultation provisions did or did become applicable;
- (e) indicated that he supported or did not support the coming into existence of a negotiated agreement or the application of the standard information and consultation provisions;
- (f) stood as a candidate in an election in which any person elected would, on being elected, be a negotiating representative 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 purpose 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

30. (1) An employee may present a complaint to an employment tribunal that he has been subjected to a detriment in contravention of regulation 29.

(2) The provisions of sections 48(2) to (4) and 49 of the 1996 Act²³ (complaints to employment tribunals and remedies) shall apply in relation to a complaint under this regulation as they apply in relation to a complaint under section 48 of the Act but taking references to the employer as references to the employer within the meaning of regulation 29(1) above.

Conciliation

31. – In section 18 of the Employment Tribunals Act 1996 (conciliation) in subsection (1) (which specifies the proceedings and claims to which the section applies)²⁴ –

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

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

“or

(k) under regulation 26 or 30 of the Information and Consultation of Employees Regulations [200].”.

PART IX MISCELLANEOUS

CAC proceedings

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

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

(3) A declaration or order made by the CAC under these Regulations may be relied on –

(a) in relation to an employer whose registered office, head office or principal place of business is in England or Wales, as if it were a declaration or order made by the High Court, and

²³ 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 been other amendments not relevant to these Regulations.

²⁴ 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.

- (b) in relation to an employer whose registered office, head office or principal place of business is in Scotland as if it were a declaration or order made by the Court of Session.

(4) An order made by the CAC under these Regulations may be enforced by means of an application to the Appeal Tribunal which may make such order for the purposes of enforcing the order as it considers just and equitable in the circumstances.

(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.

ACAS

33. (1) If on receipt of an application or complaint under these Regulations the CAC is of the opinion that it is reasonably likely to be settled by conciliation, it shall refer the application or complaint to ACAS and shall notify the applicant or complainant and any persons whom it considers have a proper interest in the application or complaint accordingly, whereupon ACAS shall seek to promote a settlement of the matter.

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

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

Restrictions on contracting out: general

34. (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 VIII; or
- (b) to preclude a person from bringing any proceedings before the CAC under any provision of these Regulations other than a provision of Part VIII.

(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 VIII

35. (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 VIII; 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) of the Employment Tribunals Act 1996 (proceedings under these Regulations where conciliation is available) if the conditions regulating compromise agreements under these Regulations are satisfied in relation to the agreement.

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

- (a) the agreement must be in writing;
- (b) the agreement must relate to the particular proceedings;
- (c) the employee must have received advice from a relevant independent adviser as to the terms and effect of the proposed agreement and, in particular, its effect on his ability to pursue his rights before an employment tribunal;
- (d) there must be in force, when the adviser gives the advice, a contract of insurance, or an indemnity provided for members of a profession or a 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 legal 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 had 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 legal adviser for the purposes of paragraph (4)(c) –

- (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)(c), if the trade union or advice centre is the employer or an associated employer; or
- (c) in the case of a person within (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 a solicitor who is an authorised advocate or authorised litigator (within the meaning of the Courts and Legal Services Act 1990²⁵); and
- (b) as respects Scotland, an advocate (whether in practice as such or employed to give legal advice) or a solicitor who holds a practising certificate.

(8) For the purposes of paragraph (6) any two employers shall be treated as associated if –

- (a) one is a company of which the other (directly or indirectly) has control; or
- (b) both are companies of which a third person (directly or indirectly) has control;

and “associated employer” shall be construed accordingly.

²⁵ 1990 c. 41.

APPLICATION OF REGULATIONS

<i>Number of employees</i>	<i>Date Regulations apply</i>
At least 150	23 March 2005
At least 100	23 March 2007
At least 50	23 March 2008

SCHEDULE 2

Requirements for ballots held under regulation 17

Ballot arrangements

1. Ballots held under regulation 17 must comply with the requirements specified in paragraph 2.
2. The requirements referred to in paragraph 1 are that -
 - (a) the ballot must comprise a single ballot but may instead, if the employer so decides, comprise separate ballots of employees in such constituencies as the employer may decide where –
 - (i) more than one information and consultation representative is to be appointed; and
 - (ii) the employer considers that if separate ballots were to be held for those constituencies, the information and consultation representatives to be elected would better reflect the interests of the employees as a whole than if a single ballot were held;
 - (b) any employee who is an employee of the undertaking 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;
 - (c) any employee who is an employee of the undertaking at the latest time at which a person may become a candidate in the ballot is entitled to stand in the ballot as a candidate as an information and consultation representative;
 - (d) the employer must, in accordance with paragraph 6, appoint an independent ballot supervisor to supervise the conduct of the ballot;
 - (e) after the employer has formulated proposals as to the arrangements for the ballot and before he has published the final arrangements under sub-paragraph (f) it must, so far as reasonably practicable, consult with employees' representatives or, if no such representatives exist, the employees, on the proposed arrangements for the ballot; and
 - (f) the employer must publish the final arrangements for the ballot in such manner as to bring them to the attention of, so far as reasonably practicable, its employees and, where they exist, the employees' representatives.

3. Any employee or, if they exist, employees' representative who believes that the arrangements for the ballot are defective may, within a period of 21 days beginning on the date on which the employer published the final arrangements under paragraph 2(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 employer to modify the arrangements it has made for the ballot or to satisfy the requirements in sub-paragraphs (a) to (e) of paragraph 2.

5. An order under paragraph 4 shall specify the modifications to the arrangements which the employer is required to make and the requirements it must satisfy.

6. A person is an independent ballot supervisor for the purposes of paragraph 2(d) if the employer 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 might reasonably be called into question.

7. For the purposes of paragraph 3 the arrangements for the ballot are defective if any of the requirements specified in sub-paragraphs (a) to (e) of paragraph 2 is not satisfied.

Conduct of the ballot

8. The employer must –

- (a) ensure that a ballot supervisor appointed under paragraph 2(c) carries out his functions under this regulation and that there is no interference with his carrying out of those functions; 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.

9. A ballot supervisor's appointment shall require that he –

- (a) supervises the conduct of the ballot he is being appointed to supervise, in accordance with the arrangements for the ballot published by the employer under paragraph 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;
- (b) does not conduct the ballot before the employer has satisfied the requirement specified in paragraph 2(d) and –
 - (i) where no complaint has been presented under paragraph 3, before the expiry of 21 days beginning with the date on which the employer published its arrangements under paragraph 2(d); or
 - (ii) where a complaint has been presented under paragraph 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 so as to secure that –
 - (i) so far as reasonably practicable, those entitled to vote are given the opportunity to do so;
 - (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.

10. 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 employer and, so far as reasonably practicable, the employees entitled to vote in the ballot and the persons who stood as candidates in the ballot.

11. 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 the employer to comply with all reasonable requests made by him with the result that he was unable to form a proper judgement as to whether each of the requirements referred to in paragraph 2 was satisfied in the ballot.

12. 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 10.

13. A ballot supervisor must publish an ineffective ballot report in such manner as to make them available to the employer and, so far as reasonably practicable, the employees entitled to vote in the ballot and the persons who stood as candidates in the ballot.

14. Where a ballot supervisor publishes an ineffective ballot report the report then the outcome of the ballot shall be of no effect and -

- (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 be of no effect and the UK management shall again be under the obligation in regulation 17:

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

–

(i) the employer shall arrange for the separate ballot or ballots in respect of which an ineffective ballot report has been issued to be reheld in accordance with regulation 17, 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.

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

Annex C Summary of partial Regulatory Impact Assessment

1. This is a partial Regulatory Impact Assessment (RIA) prepared by the Department of Trade and Industry to accompany the public consultation document "*High Performance Workplaces. Informing and Consulting Employees*".²⁶ The purpose of the proposed legislation is to implement the EC Directive on Information and Consultation (I&C) in Great Britain. The Directive establishes a right to new minimum standards for workforce communication and involvement in undertakings with 50 or more employees or establishments with 20 or more employees. It is to be phased in between 2005 and 2008. It is proposed that the legislation should apply at the undertaking level.²⁷

2. Table 1 below presents the expected quantifiable costs associated with a number of different options for implementing the Directive. It should be noted that almost 97% of firms in the United Kingdom employ less than 50 employees, and so will not come within the scope of the Information and Consultation Regulations. This significantly reduces the likely cost impact of the Directive on UK business.

3. We have estimated the likely recurring and non-recurring costs faced by UK firms with 50 or more employees under several options. Option 1 would involve doing nothing. However, the Directive has been adopted into Community law and must be implemented, so Table 1 does not include this option. Option 2 would apply the requirements in Article 4 of the Directive to all undertakings with 50 or more employees. However, this option is inflexible as it makes no allowance for pre-existing or newly negotiated information and consultation agreements that take account of the individual circumstances of a particular business. Under option 3, the requirements in Article 4 of the Directive would apply to all undertakings with 50 or more employees as with Option 2, but only where 10% of the workforce have requested information and consultation arrangements.²⁸ This would ensure that there is a degree of employee demand for information and consultation, but does not get around the problem of relative inflexibility and rigid structures. Under Option 4, the legislation will only impact on undertakings where there is some employee demand for information and consultation, but it also allows for the use of pre-existing agreements adapted to the individual circumstances of the undertaking concerned, or gives employers and employees the opportunity to draw up new agreements. As such, Option 4 is the most flexible of the options and imposes least cost.

²⁶ Copies are available from DTI or online at:
www.dti.gov.uk/er/consultation/informconsult.htm

²⁷ An undertaking is defined as a public or private undertaking carrying out an economic activity, whether or not operating for gain, which is located within the territory of the Member States

²⁸ Under this option, the legislation is activated if at least 10% of all employees (subject to a minimum of 15 and a maximum of 2500 employees) in an undertaking make a formal request for information and consultation.

4. It is expected that despite not inconsiderable up-front implementation costs, there will be substantial economic and social benefits from the legislation over time. Employees will gain the right to be consulted on important decisions and have access to information that could directly impact on their working lives. Employers should see gains from a better informed, more motivated and committed workforce. This should lead to lower turnover of staff and higher productivity and if employees are more willing to undertake training as a result of greater information and consultation, the result would be a more skilled workforce. These benefits are more likely to be felt under option 4 as they allow for a more flexible approach, taking the individual characteristics of the undertakings into account and allowing existing practices that are working well to continue uninterrupted. Given the nature of these benefits, however, it is not possible to quantify them. However, we estimate that they are in the order of magnitude of hundreds of millions over a ten year period.

Table 1: Summary of recurring and non-recurring costs over a ten-year period for medium-sized and large firms under different options*

Summary of costs for medium-sized firms under different options*			
Costs	Option 2	Option 3	Option 4
Non-recurring cost	£68m	£29m	£26m
Recurring cost	£78m	£29m	£28m
Present Value of recurring costs	£431m	£244m	£232m
Total (On a Present Value Basis)**	£499m	£273m	£258m

Source: DTI estimates *Medium firms have 50-149 employees.**Rounded total of non-recurring costs and present value over 10 years of recurring costs.

Summary of costs for large firms under different options*			
Costs	Option 2	Option 3	Option 4
Non-recurring cost	£45m	£20m	£19m
Recurring cost	£52m	£20m	£18m
Present Value of recurring costs	£275m	£166m	£153m
Total (on a Present Value Basis)**	£320m	£186m	£172m

Source: DTI estimates *Large firms have 250 or more employees.**Rounded total of non-recurring costs and present value over 10 years of Recurring costs.

Annex D List of respondents to *High Performance Workplaces* and participants at roundtables

List of respondents to *High Performance Workplaces*

Advisory Conciliation and Arbitration Service (ACAS)	Engineering Construction Industry Association
Agroserve	Engineering Employers Federation
Amicus convenor in Acordis	European Study Group
Acetate Chemicals	Eversheds
Amicus-AEEU (Derby Central Branch)	Federation of Master Builders
Amicus representative in Allianz-Cornhill	Food and Drink Federation
Amicus-MSF	Ford Motor Company
Amicus-AEEU	GMB
Article 13	Graphical Paper and Media Union
Asda Stores Ltd	Health & Safety Executive
Association for College Management	HM Customs and Excise
Association of University Teachers	HSBC Bank
Barclays plc	Independent Family Brewers of Britain
Bevan Ashford	Institute of Public Relations
Birmingham Chamber of Commerce	Involvement and Participation Association
BNFL	John Lewis Partnership
BP	John Reid & Associates
British Chambers of Commerce	Ladybrook Nursery
British Hospitality Association (including The British Beer and Pub Association & Business in Sport and Leisure)	Legal and General/Amicus (joint response)
British Retail Consortium	Leverhulme Future of Trade Unions Group, Centre for Economic Performance, London School of Economics (Howard Gospel - King's College London, and Paul Willman - University of Oxford)
Business Services Association	Lloyds TSB
Carillion plc	London Borough of Camden
CBI	Marks and Spencer
Chartered Institute of Personnel and Development	Mid-Yorkshire Chamber of Commerce
Chartered Management Institute	National Pharmaceutical Association
Deltec International Courier Ltd	National Union of Journalists
Dibb Lupton Alsop	Network Partnership
Electricity Association	Newspaper Society
Employers Forum on Statute and Practice	Nick Tamair Associates
Employers' Organisation for Local Government (includes Local Government Association and the Welsh Local Government Association)	Northern Ireland Ards Borough Council
Employment Lawyers Association	Northern Ireland Department of Finance and Personnel
	Northern Ireland Disability Action

Northern Ireland Homefirst
Community Trust
Northern Ireland Labour Relations
Agency
Northern Ireland North Eastern
Education and Library Board
Northern Ireland Westcare
Business Services
ORC Inc
Public and Commercial Services
Union
Prospect
Q4 Consulting
Reed Executive plc
Reywood Communications
Road Haulage Association
Royal Mail
Saxonweald
Six Continents
Skanska Whessoe Ltd
Small Business Service

Stephenson Harwood
Stonewall
Talking People
Tesco plc
Thames Business Advice Centre
Thames Water UK plc
The Druine Partnership Ltd
The Eventworks
The Work Foundation
Thompsons
Transco plc
Travers Smith Braithwaite
TUC
Unquoted Companies Group
UNIFI
University of Manchester School of
Law
West Midlands Provincial Council
Wilts Wholesale Electrical Co.
3M UK plc

List of participants at roundtables

Abbey National
ACAS
Amicus
Amicus-AEEU
Amicus-MSF
Anglian Windows
Astra Zeneca
Atmel North Tyneside Ltd
Avon Cosmetics
Bank Restaurant Group plc
BAT
Beachcroft Wansbrough
Bernard Matthews
Better Regulation Task Force
Bevan Ashford
Bit 10 Ltd
BMW
BNFL
Booker Cash & Carry
British Bakeries
British Vita Plc
Business Link for London
CALA
Capital One
Cardiff University Business School
Caterpillar (UK) Ltd
CBI
Changeworld
Chartered Institute of Personnel
and Development
Chwarae Teg
Clark Door Ltd
Cobbetts Solicitors
Commission for Racial Equality
Consignia
Continental Teves Ltd
Council for Registered Gas
Installers
Communication Workers Union
Daniel Thwaites plc
David Franklin Ltd
Davis Derby Ltd
Disability Rights Commission
East of England Government Office
Edscha UK
Engineering and Marine Training
Authority EMTA
Engineering Employers Federation
Essex Chamber of Commerce
Etc Venues
Ethicon
European Study Group
Eversheds
Federation of Small Businesses in
Scotland
Filtronics
First Data Europe
First Milk
GKN plc
Glasgow Caledonian University
Glasgow University
GMB
Graphical Paper and Media Union
Halliburton Wellstream
Harvey Ingram Owtson
HBOS
IBM
Imperial Tobacco
Ina Bearing Company Ltd
Involvement and Participation
Association
Kier Group Plc
Komatsu UK Limited
Lafarge Aggregates Ltd
Lewis Silkin
Liverpool John Moores University
Lloyds TSB
Manchester Airport plc
MKW Engineering Ltd
MPCS
Nice and Easy Printing
North West Chamber of Commerce
North West Development Agency
Open University Business School
Optima
ORC Inc
Outlook Care
Paper Federation of Great Britain
Pattinson and Brewer
Public and Commercial Services
Union
Pearson Associates
Penny and Giles Controls Ltd
Pinsent Curtis Biddle

Police Mutual
Royal Bank of Scotland
Royal Sun Alliance
Sainsbury's
Sanctuary Housing
Scottish and Newcastle
Scottish Print Employers
Federation
Scottish TUC
SE Region TUC
Serco
Siemens
Six Continents
Small Business Service
South Wales Transformers
Stephenson Harwood
Sterling Consulting Group
T & G Scotland
Taylor Woodrow
Tecumseh UK Ltd
Telecom Services Centre
Tesco plc
TGWU
TGWU Wales
Thames Business Advice Centre

Thames Water
The Prison Service
Thompsons Solicitors
Trade Union Research
TUC
TUC Wales
Tullis Russel Group
UCATT
UNIFI
UNISON
University and College Lecturers
Union
University of Durham
University of Manchester
University of Salford
University of Stirling
University of Teesside
University of Warwick
USDAW
Vauxhall
Ward Hadaway
West Bromwich Tool and
Engineering company
3M UK plc

Roundtable Host Organisations

ACAS
Better Regulation Taskforce
CBI
Chartered Institute of Personnel and Development
Involvement and Participation Association
Engineering Employers Federation
European Study Group
Scottish TUC
TUC
University of Warwick Business School

