

# The Information and Consultation of Employees Regulations 2004 DTI Guidance (January 2006)

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## Summary of the legislation

*Coverage.* The legislation applies to “undertakings” situated in Great Britain that carry out an economic activity and have 50 or more employees. There is equivalent legislation for undertakings situated in Northern Ireland.

*Trigger.* The requirement to inform and consult employees does not operate automatically. It is triggered either by a formal request from employees for an information and consultation agreement, or by employers choosing to start the process themselves.

*Negotiated agreements.* Where employees make a request, or employers start the process themselves, there would normally be a period for drawing up and agreeing the on-going information and consultation arrangements to be put in place. Employers and employees are free to agree arrangements and structures tailored to their individual circumstances.

*Standard provisions.* Where no agreement is reached, certain “standard” provisions would apply requiring the employer to inform and consult in the way set out in regulation 20.

*Pre-existing agreements.* There is an important exception for pre-existing agreements. Where the employer already has arrangements in place that have been agreed with employees prior to an employee request being made under the Regulations for new arrangements, the employer may ballot the workforce to determine whether it endorses the employee request, or whether it is happy with what it has. Only if the workforce endorses the request would the employer come under the obligation in the Regulations to negotiate a new agreement, otherwise the pre-existing agreement continues to apply. Pre-existing agreements must be in writing, state how employees or their representatives will be informed and consulted, and cover all the employees in the undertaking.

*Groups and establishments.* It will be possible to set up arrangements that cover more than one undertaking, and to have different arrangements in different parts of the business, for example, at different establishments (sites), in different business units, or covering different sections of the workforce.

*Confidential information and employee protections.* Information may be given to employee representatives on a confidential basis to protect the interests of the undertaking, or withheld altogether where disclosure would seriously harm or prejudice the undertaking. There are provisions to protect employees who seek to exercise their legal rights.

*Enforcement.* Most disputes are to be resolved by the Central Arbitration Committee. Employers may be liable to a financial penalty if they fail to

inform and consult as required. The enforcement provisions do not apply to pre-existing agreements.

## Introduction

1. The Information and Consultation of Employees Regulations 2004<sup>[1]</sup> give employees in larger firms – those with 50 or more employees – rights to be informed and consulted about the business they work for (what this may cover in practice is explained later in the guidance). The Regulations implement an EC Directive<sup>[2]</sup>, and are based on a framework for implementation agreed with the CBI and the TUC<sup>[3]</sup>. They apply to businesses with 150+ employees from 6 April 2005, to those with 100+ employees from 6 April 2007, and to those with 50+ employees from 6 April 2008. They will not apply to businesses with less than 50 employees.
2. The Government strongly supports the principle of employers informing and consulting their employees on an on-going basis about matters that may affect them. It is good for the employees themselves, and good for the organisations they work for. A wide body of evidence has demonstrated that good practice in human resources, work organisation and employee relations can help raise employee commitment and engagement, helps reduce absenteeism and staff turnover, and leads to higher levels of productivity, performance and customer satisfaction. The legal obligations contained in the Regulations apply to larger undertakings that carry out an economic activity, but the Government would encourage all employers, irrespective of their size and the nature of their activity, to inform and consult their employees in a way suited to their particular circumstances.
3. This guidance is designed to provide a plain explanation of the Information and Consultation Regulations. It aims to help employers comply with their legal obligations. In some places, it offers advice which is not a legal requirement, but which is recommended good practice to help in complying with the law – where this is the case, it is made clear in the text. In practice, the most effective way for employers to meet the legal requirements will be by reaching a voluntary agreement with their employees on how they will inform and consult, and the Government would strongly encourage this. In addition, ACAS provides good practice guidance on how to set up and operate effective arrangements for information and consultation taking account of the legal requirements<sup>[4]</sup>.
4. It is important to bear in mind that this guidance contains the DTI's interpretation of the I&C Regulations and of the EC Directive. Where the Regulations contain provisions not expressly required by the Directive (for example, the provisions on employee requests), this guidance seeks to explain the policy intentions behind them. Ultimately though, it is up to the courts to interpret the legislation - in the first instance, this normally means the Central Arbitration Committee (CAC). In taking decisions, the CAC is not bound to follow this guidance. However, those involved in CAC proceedings, such as employers, employees and their representatives, may bring

provisions in the guidance to the attention of the CAC as part of the evidence they submit to support their position. The final say rests with the European Court of Justice.

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<sup>[1]</sup> Statutory Instrument 2004 No. 3426.

<sup>[2]</sup> [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.

<sup>[3]</sup> See [High Performance Workplaces – Informing and Consulting Employees](#), July 2003, chapter 1.

<sup>[4]</sup> See the ACAS website at <http://www.acas.org.uk/>

## Coverage

5. When it is fully in force, the legislation will apply to undertakings with 50 or more employees in the UK that have their registered or head office, or principal place of business in Great Britain (see regulation 3):

**“undertakings”<sup>[1]</sup>**. These are defined in the Directive and the Regulations as “a public or private undertaking carrying out an economic activity, whether or not operating for gain”. In terms of companies, DTI believes this means a separately incorporated legal entity (which would have its own shareholders and, in the case of British companies, a unique registration number at Companies House), as distinct from say an organisational entity such as an establishment, division or business unit of a company. It would also include partnerships, co-operatives, mutuels, building societies, friendly societies, associations, trade unions, charities and individuals who are employers – if they carry out an economic activity. It may also include schools, colleges, universities, NHS trusts, and Government bodies (both central and local), again if they carry out an economic activity. Ultimately it is a matter for the courts to decide (in the first instance, the CAC), on a case-by-case basis, whether an organisation is carrying out an economic activity.

Identifying what constitutes an undertaking determines whether the legislation applies. It does not determine how it should apply under a pre-existing or a negotiated agreement. It is possible to have an agreement that covers more than one undertaking, or that provides for different arrangements in different parts of the undertaking (see paragraphs 21 and 41 below).

Further guidance on the meaning of the term “economic activity”, including application in the public sector

- The Acquired Rights Directive<sup>[2]</sup> applies to “undertakings or parts of undertakings that carry out an economic activity”. It is likely therefore that decisions of the European Court of Justice (ECJ) on the meaning of the term “economic activity” in the context of that Directive would also be relevant in the context of the Information and Consultation Regulations.
- The ECJ has given a fairly wide interpretation to the term “economic activity” in the context of the Acquired Rights Directive. For example, it has held that it covers the provision of healthcare services (*Porter v Queen’s Medical Centre (Nottingham University Hospital)*) and assistance to drug addicts (*Dr Sophie Redmond Stichting v Bartol* [1992] IRLR 366). However, the ECJ has also held that organisations whose principal role is to carry out purely administrative functions, or to exercise public authority, are not carrying out an economic activity where it is merely ancillary to the

main purpose (*Henke* [1996] IRLR 701).

- Recent decisions suggest that the *Henke* exception should be construed narrowly<sup>[3]</sup>, but further case law is required to clarify the situation. The main activities of traditional central government departments concern the exercise of public authority (eg legislation, administration and policy development) although they usually have ancillary economic support functions (such as catering and human resources). Accordingly, these departments are thought unlikely to be covered by the Information and Consultation Regulations.
- There may well be difficult cases where a public body both exercises public authority and carries out an economic activity, and it is not clear whether that activity is merely ancillary to its main purpose. Each organisation is unique, and so would have to be looked at on a case-by-case basis. Organisations that are unsure whether they are covered by the Regulations are advised to obtain their own legal advice.
- Leaving aside the issues around the legal definition of “undertaking” and “economic activity”, the Government fully supports the principle that employees have a right to be informed and consulted about important issues affecting them regardless of the type of organisation they are working in. With this in mind the Government is drawing up a code of practice for central government that will sit alongside the Regulations. It will apply the principles of the legislation to central government departments that are not within the scope of the Regulations. Local Authorities would not be formally covered by the code but, if they were not covered by the Regulations themselves, would be encouraged to adhere to its principles by adopting arrangements suitable for their particular circumstances. The Cabinet Office is responsible for developing the code.

- ***undertakings with 50 or more employees in the UK.*** There are transitional provisions which give smaller employers more time to prepare for the legislation. It applies to:
  - o undertakings with 150 or more employees from 6 April 2005
  - o undertakings with 100 or more employees from 6 April 2007
  - o undertakings with 50 or more employees from 6 April 2008

During these transitional periods, none of the requirements in the legislation would apply to undertakings which fell below the relevant threshold. This means that employees in such undertakings could not make a request for a negotiated agreement, and their employers could not initiate the statutory process themselves by making a notification under regulation 11. However, employers

and employees will be free during this period to draw up a pre-existing agreement as referred to in regulation 8, and the Government would encourage them to consider doing so.

The number of employees in an undertaking is averaged out over a twelve month period (see regulation 4). Only “employees” should be included when calculating whether the threshold is met. This would exclude certain categories of workers who are not employees, for example, temporary agency workers and sub-contractors. Part-time employees working under a contract for 75 hours or less a month may be counted as representing half a full-time employee.<sup>[4]</sup> Employees based in Northern Ireland should be included in the calculation, but not those employed overseas.

**Further guidance on calculation of employee numbers, including part-time employees and the meaning of the term “employee”**

- To calculate how many employees there are in an undertaking, an average figure over twelve months is used – that is, twelve completed calendar months before an employee request under regulation 7 is made. For each of the twelve months, take the number of UK employees employed during the month (whether employed for the whole of the month or only a part of it), add the numbers together and divide by twelve. So for example, if an employee request were made on 30 June, the relevant figure would be the number of employees employed in each month starting with June the previous year and ending with May this year, added together and divided by 12.
- If an undertaking has been in existence for less than twelve months, it is the number of months that it has existed that is used. So for example, if an undertaking has existed for nine completed calendar months, the relevant figure would be the number of employees employed in each of those months, added together and divided by 9.
- An employee who worked in two or more undertakings should be treated as though an employee of each, and so would count towards the 50/100/150 employee threshold in each, and could, for example, put their name to an employee request for an I&C agreement in each.
- **Part-time employees** are normally counted as though they were full-time employees. However, for the purpose of the 50/100/150 employee thresholds, the employer may (but is not obliged to) count a part-time employee as representing half a full-time employee for any month in which they worked under a contract for 75 hours or less. Absences from work and overtime are ignored when determining whether the contract provides for 75 hours or less during the month, as is the fact that a particular month

may have had less than 21 working days.

- Part-time employees could only be counted as representing half a full-time employee for those months in which they were employed part-time throughout the whole month. If they were employed full-time during any month (or part of a month), they must be counted as representing a full-time employee for that month. In addition, an employee working under a contract for more than 75 hours a month must also be counted as representing a full-time employee, even though within the organisation they may be regarded as “part-time” compared with other employees.
- It is important to bear in mind that this provision concerning part-time employees only applies when calculating whether an undertaking has 50, 100 or 150+ employees, and then only if the employer chooses to rely on it. Thereafter, part-time employees are treated in exactly the same way as full-time employees. For example, they are counted as representing a full-time employee for the purpose of the 10% threshold for employee requests in regulation 7, or for approving a negotiated or pre-existing agreement, or voting in an election for I&C representatives. They also have the same rights to be negotiating representatives and I&C representatives as full-time employees.
- **Meaning of the term “employee”.** The question of who is an “employee” has been a difficult area of law for many years and there is no single, conclusive test. The courts have, over the years, devised a number of criteria, some of which have stood the test of time better than others. The key factors to consider are:

(a) Does the person have to undertake the work personally? The more freedom they have not to do so, and to substitute another person in their place, the less likely they are to be an employee.

(b) What level of control does the employer have over the person? The greater the degree of control, the more likely they are to be an employee. However, this test can be difficult in the case of skilled or professional people when the employer might not have the necessary expertise to really control the person and they are left to undertake their work as they see fit.

(c) Are there any other factors in the relationship which would be incompatible with the contract being one of employment? An example of this might be that the person provided all their own tools and materials. While not conclusive, this makes the contract seem less like one of employment as employees usually use equipment provided by their employer.

- No one of these factors will be conclusive but by answering all three it should be possible to reach a decision as to whether most people are employees or not.
- The position of company directors is not straightforward, and depends on the individual circumstances. If a director has entered into a contract of employment with the company he/she would be an employee. If there is no express contract of employment, but he/she nevertheless gets a salary and is expected to work regularly for a certain number of hours, then the courts might find that the director is an employee.
- A partner in a partnership would not be an employee, but there are “salaried partners” who, depending on the circumstances, could argue that they are controlled by the partnership and are therefore employees.
- An employee who works offshore, or on a fixed-term contract would be an employee for the purpose of the Regulations.
- Where there is doubt about whether someone is an employee, and this is relevant to, for example, whether an undertaking has 50/100/150 employees, or whether 10% of employees have made a request for I&C arrangements, or whether a negotiated or pre-existing agreement covers all employees, the safest option would be to assume the person is an employee. Alternatively, legal advice should be sought.

**- undertakings with their registered or head office, or principal place of business in Great Britain.** A company with its registered office overseas, but with its head office in Great Britain (or vice versa), would be covered by the Regulations if it has 50+ employees in the UK. In the case of multi-nationals, the Regulations would apply to those companies registered in Great Britain or with their head office here. The reference to “principal place of business” is intended to capture organisations that, unlike companies, do not have a registered or head office.

#### *Guidance on undertakings with employees in both Great Britain and Northern Ireland*

- There is separate legislation implementing the Directive in Northern Ireland. An undertaking with employees in both Great Britain and Northern Ireland should count all such employees when calculating whether it has 50+ employees (or 100+ or 150+ employees in the transitional periods), because this threshold applies to employees in the United Kingdom (as required by the EC Directive). But the undertaking would only be subject to the Information & Consultation legislation in the country where it has its registered or head office, or principal place of

business.

- If a company's registered office was in Great Britain and its head office in Northern Ireland, or vice versa, the legislation of whichever of these countries where it has more employees would apply.
- Once it is determined whether the British or the Northern Ireland Regulations apply, the legislation would then apply in the same way to all employees of the undertaking, whether based in Britain or Northern Ireland. So for example, if the British legislation applied, employees based in Northern Ireland would have the same rights as British-based employees to request data on employee numbers under regulation 5, and would count towards the 10% threshold for employee requests in regulation 7. They would also have the same rights to become negotiating representatives or I&C representatives, and to bring complaints. Enforcement would be through the CAC, an employment tribunal, and the Employment Appeal Tribunal. If the Northern Ireland legislation applied, enforcement would in the main be through the Industrial Court in Northern Ireland.

### **Groups of companies**

6. The fact that an undertaking may be part of a group of companies is not relevant for working out whether that undertaking has enough employees to be covered by the legislation. It is the number of employees employed by an individual company that is relevant, not those employed by a subsidiary of the company, a parent company, or a fellow-subsubsidiary of a common parent company.

### **Employees' entitlement to data on employee numbers**

7. Employees may need data from their employer about the number of employees in an undertaking – to find out whether the undertaking is covered by the legislation at all (including during the transitional periods), and to work out how many employees are needed to make a request under regulation 7 to negotiate an I&C agreement. Regulation 5 gives them a right to this data and requires the employer to provide it within one month. A complaint may be made to the CAC if the employer fails to provide the data, or it is considered false or incomplete in a material way.

### *Further guidance on requests for data on employee numbers*

- A request by employees for data from their employer on the number of employees in the undertaking should be made in writing and dated. The data must be provided within one month of the request. The request may be made by any employee of the undertaking, or anyone on behalf of the employees.<sup>[5]</sup> If there are part-time employees that the employer intends to count as representing half a full-time employee for the purpose of the calculation, the employer must give the numbers.<sup>[6]</sup> If there are workers in the undertaking whom the employer considers not to be employees (for example, because they are temporary agency workers), it would be advisable to make this clear in the data provided to employees, to help avoid misunderstanding.
- Anyone who has requested data from the employer may, after one month of the request, complain to the CAC if the employer fails to provide it. They may also complain if they consider the data to be false or incomplete in a material way, for example, that it does not provide enough information to enable them to work out whether the undertaking is covered by the legislation or how many employees are needed to make a request for an I&C agreement; or that it was incorrect in a way that gave the impression the undertaking was not covered by the legislation. An error or deficiency in the data which had no effect on the outcome would not be material.
- Employees who believe the employer has failed to provide the required data, are advised to consider discussing the matter with the employer to see if a solution can be found before making a formal complaint to the CAC.
- Where the CAC upholds a complaint, it must make an order requiring the employer to provide the necessary data within a given period.

### **Disputes about coverage**

8. Employers who believe they do not come within the scope of the legislation, for example, because they do not have sufficient employees, or because they believe they are not an undertaking carrying out an “economic activity”, may apply to the CAC for a declaration on the matter (see regulation 13). However, they may only do so if they have received an employee request under regulation 7 to negotiate an I&C agreement. Speculative applications where no such request has been made would not be considered by the CAC.

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<sup>[1]</sup> The EC Directive gives Member States the option to apply the Directive either to “undertakings” with 50+ employees or to “establishments” with 20+ employees. The UK has decided to apply it to undertakings.

<sup>[2]</sup> 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. Implemented in the UK by the Transfer of Undertakings (Protection of Employees) Regulation 1981 or “TUPE”.

<sup>[3]</sup> For example, *Mayeur v Association Promotion de l'information Messine* [2000] IRLR 783 and *Collino v Telecom Italia SpA* [2000] IRLR 788.

<sup>[4]</sup> The provision on part-time workers in regulation 4(3) only applies when calculating the number of employees in the undertaking to determine whether it has 50, 100 or 150 employees. It does not apply, for example, to the 10% figure for employee requests in regulation 7.

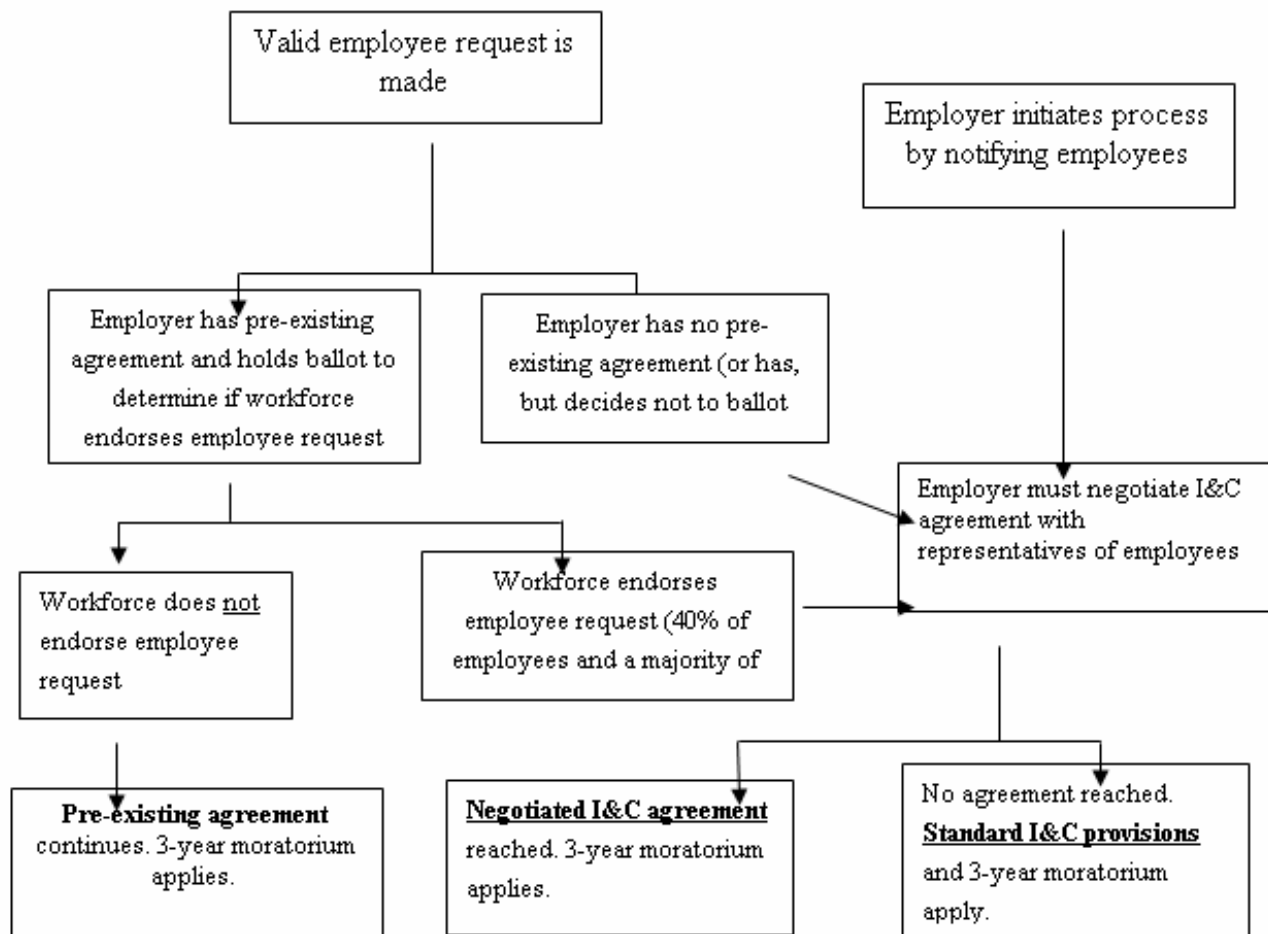
<sup>[5]</sup> Regulation 5(1) refers to an “employees’ representative” who may make a request for data. The term is not defined. It is intended to allow employees to request data through an intermediary such as a trade union or some other third party, if, for example, they do not want to identify themselves.

<sup>[6]</sup> A part-time employees as defined in regulation 4(3) may be counted as representing half a full-time employee for the purpose of calculating the number of employees in the undertaking. But they would count as representing a full-time employee for the purpose of calculating the 10% threshold for an employee request under regulation 7.

# The process for setting up consultation arrangements

## Overview of the process

- A valid **employee request** to negotiate an Information and Consultation (I&C) agreement must be made (or employers may start the process on their own initiative).
- This generally triggers a requirement to **negotiate an I&C agreement** with representatives of employees.
- However, if an employee request is made and an employer has a valid **pre-existing agreement** in place, the employer may ballot the workforce to determine whether it endorses the request. If the workforce endorses the request (or the employer decides not to hold a ballot), the requirement to negotiate a new agreement is triggered. If the workforce does not endorse the request in a ballot, the pre-existing agreement continues.
- Where negotiations take place but fail to lead to agreement, **standard provisions** to inform and consult I&C representatives apply.
- A **3-year moratorium** on further employee requests applies where a negotiated agreement is reached, or the standard provisions apply, or a pre-existing agreement has been upheld following a ballot to endorse an employee request.



## Employee requests to negotiate an I&C agreement

9. The process established by the legislation begins where employees ask to negotiate an I&C agreement (see regulation 7). Employers may also initiate the process themselves without waiting for an employee request (see paragraph 26 below). A request to negotiate an agreement must be made by at least 10% of the employees in the undertaking, subject to a minimum of 15 employees and a maximum of 2,500.<sup>[1]</sup>

10. Where an undertaking is part of a group of companies, an employee request must still be made by 10% of the employees **in the undertaking** (ie one of the

companies in the group), not 10% of the employees in the group of companies.<sup>[2]</sup> Similarly, where an undertaking consists of several separate establishments or business units, the request must still be made by 10% of the employees **in the undertaking**, not 10% of those in one of the establishments or business units.<sup>[3]</sup>

11. A request must be in writing, and state the names of the employees making it as well as the date on which it is sent. Requests may be sent directly to the employer, or to the CAC which will handle them on their behalf if the employees want to act anonymously.

12. It is possible for different requests to be made from different parts of the workforce, and aggregated over a rolling 6 month period to achieve the 10% threshold.

13. Employers may dispute the validity of an employee request – see paragraph 30 below. There is a three year moratorium on employee requests where there is already a negotiated agreement in force, or the standard I&C provisions apply to the undertaking, or an earlier request was not endorsed by the workforce in a ballot relating to a pre-existing agreement.

14. On receipt of a request from employees to negotiate an I&C agreement, employers are advised to acknowledge receipt of it, to inform the workforce as a whole of the request, and to explain how they intend to respond to it (though these are not requirements of the legislation). Failure to do so could lead to confusion amongst employees as to whether the employer believes the request is valid or believes that enough employees have made it. If an employer **wrongly** believes that a request is not valid or has been made by too few employees, and fails to act on it, the standard provisions would apply automatically after 6 months – again therefore, employers are advised to inform employees if they believe a request is not valid or has been made by too few employees.

#### Further guidance on employee requests to negotiate an I&C agreement

- The names of the employees making the request must be given so that the employer can check how many employees are making it (but see below for “anonymous” requests). Employees are advised to sign the request, and date their signature, to reduce the risk of disputes over whether they really support it. A trade union could collect the names of those wishing to make a request, but it will need to be clear that each individual does indeed support the request.
- Only those who are employees of the undertaking at the time the request is made may put their name to it. A part-time employee is taken to represent a full-time employee for the purpose of an employee request, even if they were counted as representing half a full-time employee for the

purpose of the 50/100/150 employee threshold. This means that, in an undertaking with 100 full-time and 100 part-time employees (and therefore 150 full-time equivalent employees), 20 would be required to make a request (10% of the total employees) and these 20 could be full-time or part-time employees.

- **Aggregated requests.** A valid employee request may consist of several separate requests made within a rolling 6 month period which, taken together, meet the 10% threshold. So for example, a request from 8% of the total workforce made by employees based at one site, and another request within 6 months from 5% of the total workforce based at another site would be aggregated. Where several requests are made from different parts of the workforce, the employer may wish to check that the same employee does not appear on more than one request, in order to avoid double counting. Employers are advised to retain employee requests which do not by themselves achieve the 10% threshold for 6 months in case further requests are made.
- **“Anonymous” requests.** Employees who wish to keep their identity secret from their employer may make a request via the CAC. The employees making the request must still give their names to the CAC, and are advised to sign it and date their signature, so that the CAC can check how many employees are making the request. The CAC will not forward the names to the employer. When making the request, employees are advised to state the name of their employer and give the registered or head office or principal place of business, together with a contact name and details of someone representing them (for example, one of the employees or a trade union representative), to help the CAC liaise between the employer and employees.
- When the CAC receives a request from employees it must notify the employer of the fact as soon as reasonably practicable, and ask the employer for the information it needs to check the number and names of the employees making the request. The employer must provide this information as soon as reasonably practicable. An employer may have previously received one or more requests directly from employees within the previous 6 months which did not meet the 10% threshold. In that case, the employer is advised to provide the CAC with the names of the employees making the previous request(s), to avoid double counting.
- The CAC would then compare the information provided by the employer (including the names of any employees who had made previous requests within the past 6 months) with the list of employees making the request, and inform both employer and employees how many employees have made the request via the CAC, on the basis of the information provided by

each.

- The CAC at this stage in the process is simply carrying out an administrative process on behalf of the employer and employees. It is not exercising any judicial function, for example, in deciding whether the employee request is valid.
- Once the CAC has performed this role of handling an anonymous request, the process would continue in the normal way, with employers required to initiate negotiations for a new agreement, or to hold a ballot of the workforce to endorse the request if they have one or more pre-existing agreements in place, or, if appropriate, challenging the validity of the request or the applicability of the legislation.
- **Date of employee request.** The date on which a request is made is normally the date on which it is sent to the employer, but there are two exceptions:
  - o *“anonymous” requests made via the CAC.* The date is that on which the CAC informs the employer and employees of how many employees have made the request.
  - o *aggregated requests.* The date is that on which the request was sent that achieved the 10% (or 15/2500 employee) threshold.

The date of an employee request determines:

- o the reference date for calculating the number of employees in the undertaking, averaged over the previous 12 months (regulation 4(1));
- o the start of the one month period in which employers must notify employees if they have a pre-existing agreement and want to hold a ballot to see if the workforce endorses the employee request (regulation 8(3)(a));
- o the start of the three year moratorium on further employee requests where the workforce fails to endorse an employee request in a ballot (regulation 12(1)(c));
- o the start of the one month period in which the employer may dispute an employee request (regulation 13(3));
- o the start of the three month period for initiating negotiations for an I&C agreement (regulation 14(3));

- o the start of the six month period after which the standard I&C provisions apply by default if an employer fails to act on an employee request (regulation 18(1)).

## Pre-existing agreements

15. As a general rule, when a valid employee request is made under regulation 7, the employer will come under an obligation to negotiate an Information and Consultation (I&C) agreement. However, there is an important exception where employers already have in place one or more pre-existing I&C agreements. Instead of negotiating a new agreement, they may ballot the workforce to ascertain whether it endorses the request by employees (see regulation 8(2)).<sup>[4]</sup> If they choose not to ballot the workforce, they will come under the obligation to negotiate a new agreement.

16. Where a ballot is held, and 40% of the workforce plus a majority of those who vote, endorses the employee request, the employer would come under the obligation to negotiate a new agreement. (This does not necessarily mean the pre-existing agreement would no longer stand, particularly if it is a collective agreement with a trade union – see paragraph 25 below).

17. Where fewer than 40% of the workforce or a minority of those voting endorses the employee request, the employer would not come under an obligation to negotiate a new agreement, and a three-year moratorium on further employee requests would begin.

18. Where a pre-existing agreement covers employees in more than one undertaking, employers may hold a single ballot of the employees in all the undertakings covered by the agreement (see regulation 9).

19. **Requirements for pre-existing agreements.** Pre-existing agreements must meet the four criteria in regulation 8(1), and must have been agreed before an employee request is made under regulation 7. They can include collective agreements with trade unions that meet the criteria in regulation 8(1)<sup>[5]</sup>, agreements that cover more than one undertaking, agreements that provide for different arrangements in different parts of the undertaking, and multiple agreements (see paragraph 21 below).

20. The criteria for pre-existing agreements are:

- *they must be in writing.* Where existing arrangements (including collective agreements with trade unions) are not set down in writing, for example because they are based on custom and practice, they would

need to be set down in writing if they are to qualify as a valid pre-existing agreement for the purpose of these Regulations;

- *they must cover all the employees of the undertaking.* An agreement may cover employees in other undertakings as well (for example in a group of companies); or there may be several different agreements each covering different parts of the workforce (such as different establishments), and which between them cover all the employees of the undertaking;
- *they must set out how the employer is to give information to the employees or their representatives and to seek their views on such information.* The legislation does not impose any requirements or set any restrictions, on the method, frequency, timing or subject-matter of the information and consultation arrangements set up under pre-existing agreements. There may be separate and different arrangements in different parts of the undertaking, such as different establishments or business units, either as a result of a single agreement creating such different arrangements, or as a result of several different agreements within the undertaking; and
- *they must have been approved by the employees.* The legislation does not go into detail on how employee approval could be demonstrated. In DTI's view, it would include support indicated by:
  - o a simple majority among those voting in a ballot of the workforce;
  - o a majority of the workforce expressing support through signatures. This may be most appropriate in smaller organisations; or
  - o the agreement of representatives of employees who represent a majority of the workforce. This would include officials of independent trade unions in workplaces with a recognised union. It would also include other appropriate representatives of employees.

Different agreements covering different parts of the workforce such as different establishments or business units may be approved by employees separately, and in different ways or at different times from each other; agreements covering employees in more than one undertaking may be approved by those employees together, or separately by the employees in each of the undertakings covered.

Further guidance on requirements for pre-existing agreements

- Employers may well find that their existing consultation arrangements do not meet the four criteria for pre-existing agreements set out in regulation 8(1). For example, their arrangements may not cover all the employees in the undertaking, or they may not have been formally approved by the employees.
- Employers wishing to have a valid pre-existing agreement are advised to review the situation in consultation with their employees or representatives of the employees such as trade union representatives or any existing employee consultation forum.
- It may be that existing arrangements do not cover all employees in the undertaking because, for example, they do not extend to management, or they take the form of a collective agreement with a trade union that covers only a part of the workforce. There are a number of options available:
  - o Existing arrangements could be extended to cover employees currently outside their scope, eg by giving these employees the right to appoint their own representative(s) to any existing consultation forum, or by broadening the constituencies of existing representatives to cover the currently excluded employees. This extension would need to be approved by the new employees it was designed to cover;
  - o Separate consultation arrangements could be put in place just for those employees not covered by the existing arrangements, and which would run in parallel with them. Again, these arrangements would need to be approved by the employees they will cover; or
  - o New consultation arrangements could be agreed covering the whole workforce.
- It may be that existing consultation arrangements have not been formally approved by the employees. Employers should not assume that the apparent absence of discontent means employees are happy with existing arrangements. They will need to obtain the express approval of employees for the arrangements in place if they are to meet the requirements of the legislation. This could be achieved by any of the methods set out above. In undertakings with an existing consultation forum, it may be appropriate to review, revamp and agree the arrangements with that forum.
- **Collective agreements with trade unions.** A collective agreement could be a valid pre-existing agreement if it is in writing, sets out how the employer will inform and consult trade union representatives, and has been approved by them. The agreement need not cover all the employees in the undertaking<sup>[6]</sup>, but in that case there would have to be

- one or more other pre-existing agreements (whether with a union or otherwise) covering the remaining employees.
- **European Works Council agreements.** A European Works Council (EWC) agreement would not be a valid pre-existing agreement for the purpose of Regulation 8. EWC agreements are those set up as a result of the EC Directive on European Works Councils<sup>[7]</sup>. Agreements establishing EWCs might meet the criteria for pre-existing agreements in regulation 8(1) of the I&C Regulations, but they would not be appropriate as such because their focus is on transnational issues. The I&C Regulations do not have the same emphasis.

21. ***Pre-existing agreements covering more than one undertaking, or covering different establishments etc, and multiple agreements.*** Although the legislation applies to “undertakings”, it is intended to be flexible enough to allow pre-existing agreements that:

- cover employees in more than one undertaking;
- provide for different arrangements in different parts of an undertaking (such as individual establishments, divisions, business units or sections of the workforce); or
- consist of several agreements each covering only a part of an undertaking.

22. The important point is that, either by themselves, or taken together with other agreements, they meet the criteria in regulation 8(1) – that they are in writing, cover all the employees of an undertaking (and possibly employees in other undertakings as well), set out how employees will be informed and consulted whether through representatives or directly (and they may provide for separate and entirely different arrangements in different parts of the undertaking), and are approved by employees.

Further guidance on pre-existing agreements covering more than one undertaking or covering different establishments etc, and multiple agreements

- ***Pre-existing agreements covering more than one undertaking.*** A pre-existing agreement, including a collective agreement with a trade union, may cover employees in more than one undertaking<sup>[8]</sup>. For example, in a group of companies, an agreement may establish consultation arrangements that apply to several individual companies within the group, or all of them.
- Where a valid employee request is made by employees in an undertaking with a pre-existing agreement covering more than one undertaking<sup>[9]</sup>,

employers may ballot the total workforce in all the undertakings to determine whether it endorses the request (see regulation 9)<sup>[10]</sup>, or just the employees in the undertaking from which the request was made.

- If the workforce endorses<sup>[11]</sup> the employee request in a ballot, the obligation to negotiate a new I&C agreement would apply in relation to all the undertakings where the ballot was held. However, employers would be free, if they wished, to negotiate either a new agreement applying to all the undertakings covered by the pre-existing agreement, or separate agreements for each (or combinations) of those undertakings.
- If the workforce fails to endorse the employee request in a ballot, employers would not be under any obligation to negotiate a new agreement, and a three-year moratorium on further employee requests would apply to all the undertakings where the ballot was held.
- ***Pre-existing agreements covering different establishments etc.*** A pre-existing agreement may provide for different consultation arrangements in different parts of an undertaking. For example, an undertaking may consist of several (or even hundreds of) establishments such as retail outlets, branches, sites, plants, factories and/or offices. Or it may consist of a number of distinct organisational divisions or business units, or several different groups of workers. Different consultation arrangements may be set up in those different establishments, divisions etc. This could be achieved by a single agreement covering the whole undertaking but providing for different arrangements in the different parts, or by separate agreements for each establishment, division etc.
- Where a valid employee request is made by employees in an undertaking with a pre-existing agreement covering different establishments etc.<sup>[12]</sup>, the employer may ballot the workforce to determine whether it endorses the request. This would be a ballot of all the employees in the undertaking.
- If the workforce endorses the request in a ballot, the obligation to negotiate a new I&C agreement would apply in relation to the whole undertaking. However, employers would be free, if they wished, to negotiate a new agreement again providing for different arrangements in the different parts of the undertaking.
- If the workforce fails to endorse the request in a ballot, the employer would not be under any obligation to negotiate a new I&C agreement, and a three-year moratorium on further employee requests would apply to the whole undertaking.
- ***Multiple pre-existing agreements.*** A pre-existing agreement may consist of several agreements, which when taken together meet the

- requirement in regulation 8(1) that all the employees in the undertaking are covered. In other words, a single agreement need not by itself cover all the employees in an undertaking, as long as there are one or more other agreements that cover the remaining employees.
- For example, in a multi-establishment undertaking, each establishment may be covered by a separate agreement; or in a multi-divisional undertaking, each division may be covered by a separate agreement. In some undertakings there may be a collective agreement with a trade union covering some of the employees, and another agreement (whether with a union or otherwise) covering the remaining employees.
  - In a group of undertakings, there may be multiple agreements each of which covers employees in more than one undertaking in the group. For example, one agreement may cover all the manual employees across the group of undertakings, and another all the administrative or managerial employees across the group.
  - The legislation gives employers flexibility with regard to the approval of multiple pre-existing agreements. Each agreement may be approved by employees separately, and in different ways and at different times from each other. So for example, one agreement may have been agreed with representatives of a majority of the employees covered by the agreement (it may, for example, be a collective agreement with a trade union), another may have been approved by a majority of the employees it covers voting in a ballot. Alternatively, an employer may decide to seek employee approval of the various agreements all together, for example, in a single ballot of the workforce.
  - Where a valid employee request<sup>[13]</sup> is made by employees in an undertaking with multiple pre-existing agreements, employers may ballot the workforce to determine whether it endorses the request. This would be a ballot of all the employees in the undertaking (or undertakings) covered by the agreements.
  - If the workforce endorses<sup>[14]</sup> the employee request in a ballot, the obligation to negotiate a new I&C agreement would apply in relation to the whole undertaking (or all the undertakings if a combined ballot was held in more than one). If it fails to endorse the request, employers would not be under any obligation to negotiate a new agreement, and a three-year moratorium on further employee requests would apply to the whole undertaking (or all the undertakings if a combined ballot was held in more than one).

23. **Complaints about pre-existing agreements.** Where employees believe there is no valid pre-existing agreement in place allowing an employer to hold a

ballot for endorsing an employee request, a complaint may be made to the CAC (see regulation 10(1)). A complaint may also be made that employers who intend to hold a combined ballot under regulation 9 are not entitled to do so. Where the CAC upholds a complaint, the employer would then come under an obligation to negotiate a new I&C agreement.

#### *Further guidance on complaints about the validity of a pre-existing agreement*

- A complaint to the CAC about the validity of a pre-existing agreement, or the ability to hold a combined ballot under regulation 9, must be made within 21 days of the employer informing employees<sup>[15]</sup> that he/she intends to hold a ballot to see if the workforce endorses an employee request. The employer may not proceed to hold the ballot until this 21 day period for making a complaint has expired. Where a complaint is made, the employer is advised to await the outcome of the CAC case before going ahead with the ballot.
- Complaints may be made by any employee of the undertaking, or by a representative of the employees<sup>[16]</sup>. However, before making a formal complaint to the CAC, employees are advised to consider discussing the matter with the employer to see if a solution can be found.
- The grounds for bringing a complaint are that the requirements for pre-existing agreements set out in regulation 8(1) have not been met, ie that the agreement is not set down in writing, it does not cover all the employees in the undertaking (or where there is more than one, that between them they do not cover all the employees), it does not set out how the employer is to give information to the employees or their representatives and to seek their views on it, or it has not been approved by the employees.
- In addition, where employers intend to hold a combined ballot under regulation 9 because they consider they have a pre-existing agreement covering a group of undertakings, a complaint could be brought that:
  - o the pre-existing agreement does not in fact cover employees in more than one undertaking;
  - o some employees in one or more of the undertakings where the ballot is to be held were not covered by a valid pre-existing agreement on the date when the employee request was made; or
  - o 40% or more of the employees in the group of undertakings where the ballot is to be held made a valid employee request for a new I&C agreement.

- In view of the requirement for a pre-existing agreement to be approved by employees, employers are advised (though they are not required by the legislation) to retain some evidence of employee approval.
- Where the CAC rejects a complaint about a pre-existing agreement, the employer would be free to go ahead with a ballot for endorsing an employee request.
- Where the CAC upholds a complaint about a pre-existing agreement, the employer would then come under an obligation to negotiate a new I&C agreement.<sup>[17]</sup> In the case of a complaint about the employer's ability to hold a combined ballot in a group of undertakings, the employer could choose either to hold a single ballot in the undertaking from which a valid employee request had been made (assuming there is a valid pre-existing agreement covering that undertaking), or to start negotiations for a new I&C agreement.
- It should be borne in mind that a complaint about the validity of a pre-existing agreement could only be brought after an employee request to negotiate a new I&C agreement had been made once the Regulations have come into force. Speculative applications to the CAC seeking a ruling on a pre-existing agreement before any such request had been made would not be considered.

24. **Endorsement ballot.** Before holding a ballot for endorsement of an employee request, employers must inform the employees that they intend to do so in writing, and within one month of the employee request (see regulation 8(3)).<sup>[18]</sup> They must then wait 21 days before holding the ballot, in case employees wish to challenge the validity of the pre-existing agreement(s), and arrange for the ballot to be held as soon as reasonably practicable thereafter. Once the ballot has been held, employers must inform the employees of the result as soon as reasonably practicable.

#### *Further information on the requirements for endorsement ballots*

- Employers are required to make such arrangements for the ballot as are reasonably practicable to ensure it is fair. Everyone who is an employee of the undertaking on the date of the ballot<sup>[19]</sup> must be entitled to vote in it, and so far as reasonably practicable, to do so in secret. Employers must also ensure that votes are accurately counted.
- One way to help ensure the ballot meets these requirements would be to appoint an independent person such as a "qualified independent person" to supervise it, though this is not a requirement of the legislation. A "qualified independent person" is defined in the [Recognition and Derecognition Ballots \(Qualified Persons\) Order 2000](#) (SI 2000/1306), and

includes lawyers, auditors, and certain specified organisations<sup>[20]</sup>. An alternative would be to give employee representatives a role in supervising or scrutinising the ballot and the count.

- An application or complaint may be brought to the CAC by an employee or an employees' representative that:

- o an employer has failed to inform employees within one month of an employee request that he/she intends to hold a ballot for endorsing the request (see regulation 8(7)). If the CAC upholds the application it must make a declaration that the employer is required to negotiate a new I&C agreement;
- o an employer has informed employees that he/she intends to hold a ballot for endorsing an employee request, but has then failed to hold the ballot (see regulation 8(8)). If the CAC upholds the complaint it must make an order requiring the employer to hold the ballot by a given date;
- o one or more of the requirements for a ballot had not been met, for example, that not everyone had been entitled to vote, or that they had not been able to vote in secret, or that the votes had not been accurately counted, or that the ballot had been unfair in some other way (see regulation 10(2)). Any such complaint must be brought within 21 days of the ballot. Where a complaint is upheld, the CAC must make an order requiring the employer either to re-run the ballot or, if the employer prefers, to start negotiations for a new I&C agreement.

- Before making a formal complaint to the CAC, employees are advised to consider discussing the matter with the employer to see if a solution can be found but employees should ensure that they do not miss the 21 day deadline for bringing any complaint in case no resolution with the employer is possible.

**25. Effect of workforce endorsing an employee request.** If the workforce endorses an employee request for a new I&C agreement where there is a pre-existing agreement in place, the employer will come under an obligation to negotiate a new I&C agreement. However, this would not necessarily mean that the pre-existing agreement no longer stood. For example, if the pre-existing agreement were a collective agreement with a trade union, it would continue in force. Where the collective agreement provided for collective bargaining, for example, over pay, this would be unaffected. Rather, it would simply mean that the agreement would not suffice as a means of fulfilling the employer's obligations under the I&C Regulations following an employee request for a new I&C agreement.

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[1] The minimum figure means that a very small number of employees in smaller firms would not be able to start the process; the maximum figure means that a very large number in bigger firms would not be required.

[2] even if there is a pre-existing agreement covering more than one company.

[3] even if there is a pre-existing agreement consisting of several agreements each covering a different establishment/business unit.

[4] This exception only applies if fewer than 40% of employees in the undertaking make the request. Where 40% or more of the employees make the request, employers may not hold a ballot to determine whether the workforce endorses it - the obligation to negotiate a new agreement will apply.

[5] the requirement that a pre-existing agreement must cover all the employees in the undertaking does not rule out collective agreements with trade unions even though they may rarely meet this criterion. This is because there may be other pre-existing agreements in place covering the remainder of the employees in the undertaking, such that all the employees are covered by the agreements taken together.

[6] employees in a bargaining unit covered by a collective agreement with a union are taken to be covered by that agreement whether they are members of the union or not.

[7] [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 undertakings for the purpose of informing and consulting employees. The exclusion applies to all types of EWC agreement, whether set up under Regulation 17, 42, 43, 44 or 45 of the Transnational Information and Consultation of Employees Regulations 1999 which implement the Directive.

[8] whether the employees have the same or different employers

[9] where a pre-existing agreement covers more than one undertaking, an employee request must still be made by 10% of the employees in one of the undertakings, not 10% of the employees in all the undertakings covered by the agreement

[10] The combined ballot under regulation 9 may only be held if fewer than 40% of the employees in all the undertakings covered by the agreement make one or more employee requests for an I&C agreement. For this purpose, requests from employees in different undertakings covered by the pre-existing agreement, would be aggregated if made within 6 months of each other. Where 40% or more of the employees in the undertakings covered by the agreement make the request, the employer may not hold a ballot to determine whether the workforce endorses it - the obligation to negotiate a new agreement will apply.

[11] ie the request is supported in the ballot by 40% of employees in all the undertakings covered by the agreement and a majority of those who vote.

[12] where a pre-existing agreement covers different establishments etc., an employee request, to be valid, must still be made by 10% of the employees in the undertaking as a whole, not 10% of the employees in one of the establishments etc.

[13] Where multiple pre-existing agreements are in place, an employee request for a new I&C agreement, to be valid, must still be made by 10% of employees in the undertaking as a whole, not 10% of the employees in the part of an undertaking covered by one of the agreements.

[15] as required by regulation 8(3)(a)

[16] Regulation 10(1) refers to an “employees’ representative” who may make a complaint to the CAC about a pre-existing agreement. The term is not defined. It is intended to allow employees to make complaints through an intermediary such as a trade union or some other third party, if, for example, they do not want to identify themselves.

[17] This would not necessarily mean that the pre-existing agreement no longer stood. For example, if the agreement were a collective agreement with a trade union, it would still remain in place. It would simply mean that the agreement would not suffice as a means of fulfilling the employer’s obligations under the I&C Regulations following an employee request for an I&C agreement. This is the same as where a workforce ballot had endorsed an employee request for a new I&C agreement.

[18] In the case of a combined ballot under regulation 9 concerning a pre-existing agreement covering a group of undertakings, employers must notify all the employees in the group of undertakings that they intend to hold a ballot.

[19] or if the ballot is to be held on more than one day, an employee on the first of those days

<sup>[20]</sup> the specified organisations are The Association of Electoral Administrators, Election.Com Limited, Electoral Reform Services Limited, The Industrial Society (now known as the Work Foundation), The Involvement and Participation Association and Twenty-First Century Press Limited. Contact details are available from the 30 the specified organisations are The Association of Electoral Administrators, Election.Com Limited, Electoral Reform Services Limited, Popularis Ltd, The Involvement and Participation Association and

Twenty-First Century Press Limited. Contact details are available from the [Central Arbitration Committee](#).

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### **Employer notifications (regulation 11)**

26. There is no need to wait for an employee request to start the process for negotiating a new I&C agreement under regulation 14. Employers may initiate the process themselves by notifying employees under regulation 11.<sup>[16]</sup> Where an employer does so, it would lead on to exactly the same process for negotiations as when employees trigger the process with an employee request. Employers may notify employees in more than one undertaking where they wish to negotiate a single I&C agreement covering more than one undertaking.

27. Following an employer notification to initiate negotiations, there is no possibility of holding a ballot under regulation 8 or 9 since those provisions are about endorsing an employee request to negotiate an I&C agreement. However, employees may dispute the validity of an employer notification at the CAC (see paragraph 30 below), and if a complaint is upheld the employer may not proceed to initiate negotiations for a new agreement.

#### *Further guidance on employer notifications*

An employer notification to initiate negotiations for an I&C agreement must state:

- o that the employer intends to start the negotiating process;
- o that the notification is given for the purpose of the Information and Consultation of Employees Regulations 2004; and
- o the date on which it is issued.

The notification must be published in such a way as to bring it to the attention of all the employees in the undertaking, so far as reasonably practicable. Where employers wish to negotiate an agreement covering more than one undertaking, they must notify the employees in all the undertakings to be covered.

Once employees have been notified in this way, the employer must initiate negotiations as soon as reasonably practicable, and within three months at the latest. This means making arrangements for the employees to appoint or elect negotiating representatives, then informing the employees who has been appointed or elected, and inviting the representatives to enter into negotiations (see regulation 14(1))

Where the CAC upholds a complaint about the validity of an employer notification, the employer may not proceed to initiate negotiations for a new agreement.

## **Restrictions on employee requests or employer notifications (regulation 12)**

28. An employee request for an I&C agreement or an employer notification under regulation 11 would not be valid where it was made within 3 years of:

- a negotiated agreement being drawn up; or
- the standard I&C provisions applying; or
- a ballot having been held under regulation 8 or 9 which failed to endorse an employee request to negotiate a new I&C agreement, where there was a pre-existing agreement in place.<sup>[\[17\]](#)</sup>

29. The purpose of this moratorium is to prevent the employer or the employees unilaterally overturning a negotiated agreement, or the application of the standard I&C provisions, or a pre-existing agreement where an employee request for a new agreement had not been endorsed by the workforce. However, the employer and employees could agree within this 3-year period to terminate a negotiated or pre-existing agreement or to adopt an agreement in place of the standard I&C provisions.

*Further guidance on restrictions on employee requests and employer notifications*

This restriction normally applies for three years from:

- the date of a negotiated agreement (unless the employer and employees or their representatives have agreed to terminate the agreement before the end of three years, in which case the moratorium ends when the agreement terminates); or
- the date on which the standard rules started to apply. This is 6 months after the period for negotiations ends, or 6 months after a valid employee request where an employer fails to start negotiations (or once I&C representatives have been elected if this is sooner) – see regulation 18(1); or
- the date of a valid employee request which was not endorsed by the workforce in a ballot under regulation 8 or 9 where there was a pre-existing agreement.

The three-year moratorium does not apply where there have been material changes in the undertaking which mean that:

- in the case of a pre-existing agreement or agreements, they no longer cover all the employees in the undertaking, or they can no longer be considered to be approved by employees; or
- in the case of a negotiated agreement, that it no longer covers all the employees in the undertaking.

Examples of situations where this “material change” clause might be relevant include:

- where the undertaking has been involved in a merger or acquisition, or there had been an expansion in the business, which resulted in significant numbers of additional employees in the undertaking who would not be covered by a pre-existing or negotiated agreement;
- where a pre-existing agreement has been terminated such that employees in the undertaking are no longer covered by any agreement.

If an employee request or an employer notification were made during the moratorium period, its validity could be disputed before the CAC under regulation 13. This might include a dispute over whether there had been material changes in the undertaking. However it would be advisable, if appropriate, to try to settle any such dispute without recourse to the CAC.

- Once the three-year moratorium period has ended, or where there has been a material change in the undertaking, employees are free to make a new request to negotiate an I&C agreement, and employers are free to make a notification under regulation 11 to initiate negotiations for an I&C agreement themselves.

## Disputes about employee requests or employer notifications (regulation 13)

30. The employer may dispute the validity of an employee request to negotiate an I&C agreement, for example, on the grounds that the request was made by insufficient employees, or the undertaking does not have enough employees to be covered by the legislation, or the organisation does not carry out an “economic activity”. In addition, employees may challenge the validity of an employer notification made under regulation 11, on the grounds that it was covered by the three-year moratorium or was not made in the prescribed way. An application can be made to the CAC for a declaration as to whether a request or notification was valid. Applications must be made within one month of the request or notification.

### *Further guidance on disputes about employee requests or employer notifications*

An employer may dispute the validity of an employee request for an I&C agreement on the grounds that it:

- o was not made by at least 10% of employees in the undertaking (subject to the minimum of 15 employees and maximum of 2,500), taking account of any other requests made by employees within a six month period;<sup>[18]</sup>
- o was not in writing;
- o was not sent to the employer’s registered or head office or principal place of business, or the CAC in the case of an anonymous request by employees;
- o did not specify the date on which it was sent; or
- o was subject to the three-year moratorium on employee requests.

An employer may also dispute an employee request on the grounds that:

- o the undertaking did not have sufficient employees to be covered by the Regulations on the date when the request was made.
- o the organisation concerned is not an “undertaking carrying out an economic activity”.

An employee, or a representative of the employees<sup>[19]</sup>, may dispute the validity of an employer notification made under regulation 11 on the grounds that it did not comply with the requirements in regulation 11(2) (for example, that it was not dated, or brought to the attention of employees) or that it was covered by the three-year moratorium on employer notifications.

There could be misunderstandings on the part of the employer or the employees about an employee request or an employer notification, or about whether the Regulations apply, or how they apply to the specific circumstances of an individual organisation. In view of this, where appropriate, it is advisable for the employer or employees to inform the other if they believe that an employee request or employer notification is not valid, or the Regulations do not apply, before considering bringing a dispute to the CAC.

For example, the Regulations allow employee requests from different parts of the workforce to be aggregated for the purpose of reaching the 10% threshold, where the requests are made within a six month period of each other. A request may be made in the full knowledge that it would not by itself achieve the 10% threshold, and there would therefore be no need to apply to the CAC for a declaration. Or employees might be mistaken as to how many of them need to make a request for a new I&C agreement, or as to whether some of those working in the undertaking are actually “employees” and can therefore make the request.<sup>[20]</sup> Rather than making an application to the CAC, it might be possible for the employees simply to obtain additional names for their request so that they do reach the threshold. In such cases, an application to the CAC could be avoided.

## **Negotiations for an I&C agreement (regulation 14)**

31. Following an employee request to negotiate an I&C agreement (if necessary, endorsed by the workforce in a ballot under regulation 8 or 9), or following an employer notification under regulation 11, the employer should initiate negotiations with representatives of the employees as soon as reasonably practicable, and within 3 months at the latest.<sup>[21]</sup>

32. ***Negotiating representatives.*** During this 3 month period, the employer must make arrangements for employees to elect or appoint negotiating representatives. The arrangements must ensure that all the employees of the undertaking are entitled to take part in the election or appointment of representatives, and that all employees are represented during the subsequent negotiations. Negotiating representatives do not necessarily have to be the same people as any I&C representatives who will be informed and consulted on an on-going basis under the agreement.

33. Negotiated agreements may cover more than one undertaking, or may provide for different arrangements in different parts of the undertaking (see paragraph 41 below). In the case of agreements covering more than one undertaking, employees in all the undertakings to be covered must be entitled to take part in the election or appointment of negotiating representatives and be

represented in the subsequent negotiations. In the case of agreements providing for different arrangements in different parts of the undertaking, separate negotiations may be held with representatives from the various parts.

34. Employers must inform employees in writing of the identity of the representatives who have been elected or appointed, and then invite those representatives to enter into negotiations to reach an I&C agreement. Beyond these requirements, the Regulations give considerable flexibility as to how representatives are appointed or elected, and who they are. However, given the important part they have to play in drawing up the arrangements for information and consultation, it is important that they are genuine representatives of the employees.

35. Employees or their representatives may bring a complaint to the CAC if they believe the requirements for negotiating representatives have not been met (see regulation 15). A complaint must be brought within 21 days of the election or appointment, and the CAC can order the election or appointment to take place again. However, before making a formal complaint to the CAC, employees are advised to consider discussing the matter with the employer to see if a solution can be found.

#### *Further guidance on negotiating representatives*

The role of negotiating representatives under the legislation is an important one. They must represent the interests of employees in negotiating with the employer the information and consultation arrangements to be put in place within the organisation. They will need to ensure that these arrangements are what employees want, for example, in terms of:

- methods for informing and consulting (whether through representatives, directly with the workforce, or a combination of the two);
- how any information and consultation representatives are to be chosen, how many of them, and how they may be replaced;<sup>[22]</sup>
- the types of subjects on which information and consultation will take place;
- the information to be provided;
- the timing and frequency of information provision and consultation;
- who will represent the employer at any meetings for information and consultation;
- the way in which the employer will respond to the views of employees or their representatives;
- the circumstances in which the arrangements can be modified, or terminated.

***Elected or appointed.*** Negotiating representatives may be elected in a ballot of the employees, or simply appointed by the employees directly without

an election, and it is for the employer to decide which. For example, it would be possible to invite different parts of the workforce to each choose their own representative; or it may be possible simply to invite volunteers to put themselves forward (this may be more appropriate in smaller organisations).

Different methods of electing or appointing representatives may be used in different parts of the undertaking. For example, in some parts there may be several people interested in being representatives so a ballot may be appropriate, while in other parts there may be only one candidate and no ballot would be needed. Whichever method is used, it is important to ensure that all the employees are entitled to take part in the election or appointment, and that they are all represented during the subsequent negotiations.

The employer must make the necessary arrangements to ensure that appropriate representatives meeting the legal requirements are elected or appointed by the employees. They could not all be appointed by the employer or by management, although managers who are employees will themselves need to be represented by one or more negotiating representatives, in proportion to their number, since negotiating representatives must represent all employees and a negotiated agreement must cover all employees.

Where a ballot is held to elect negotiating representatives, employers will need to ensure that it is fair and that all employees have the right to vote in it. They may wish to appoint an independent person to supervise the ballot, although this is not a requirement of the legislation.

***Number of negotiating representatives.*** There are no specific requirements as to the number of negotiating representatives, though the employer will need to ensure that sufficient are elected or appointed to represent all the employees. The employer will also need to ensure that representatives from different parts of the undertaking are elected or appointed (for example, different establishments, divisions, or sections of the workforce), so that where there may be differing viewpoints, these are adequately represented. However, in deciding how many negotiating representatives there should be, a balance needs to be struck – if there are too many, it could make it difficult to reach an agreement, or even to find times when everyone can be brought together.

***Trade union representatives.*** It is not a requirement of the legislation that trade union representatives within an undertaking where a union is recognised should become negotiating representatives. However, they are likely to be well placed to act as representatives in such workplaces. It should not be assumed though that trade union representatives can automatically represent all the employees in an undertaking, as required by the Regulations.

It is not a requirement of the legislation that negotiating representatives who draw up an agreement will become Information and Consultation representatives who are informed and consulted under that agreement. The employees, acting through the negotiating representatives, are free to decide to appoint different people to be I&C representatives, or not to have I&C representatives at all but instead to rely on direct forms of information and consultation only.

Where possible, there would be value in trying to have diversity among negotiating representatives, so that, for example, the views of minority groups within the undertaking are represented in the negotiations.

No “long haul crew member” may be a negotiating representative, or stand as a candidate for election as a negotiating representative, unless allowed by their employer (see regulation 43). A long haul crew member is a member of a merchant navy crew other than a ferry worker or someone who normally works on voyages of less than 48 hours<sup>[23]</sup>. This exclusion recognises the difficulties and disruption shipping companies would face in arranging for crew members to be replaced on ships in order to attend meetings to negotiate an agreement.

Given the points above, it is advisable (though this is not a requirement of the legislation) to inform employees or their representatives in advance of proposed arrangements for electing or appointing the negotiating representatives, and to give them an opportunity to give their views.

**36. *Conduct and duration of negotiations.*** When negotiating an agreement, the parties (that is, the employer and the negotiating representatives) are required to work in a spirit of co-operation and with due regard for their reciprocal rights and obligations, taking into account the interests of both the undertaking and the employees (see regulation 21). Negotiations between the parties may last for up to 6 months<sup>[24]</sup>, though this period is extendable without limit by agreement between the employer and a majority of the negotiating representatives. They must agree to extend this period – it could not be unilaterally extended by either the employer or the negotiating representatives. Help is available from [ACAS](#) and other organisations to assist in reaching information and consultation agreements.

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<sup>[16]</sup> It should be stressed that this is referring to starting the process for a negotiated agreement under regulation 14, where both the negotiation process and the resulting agreement would be subject to the requirements, and enforcement mechanism, in the Regulations. It is not referring to drawing up a pre-existing agreement referred to in regulation 8.

[17] Where a ballot had been held under regulation 9 because there is a pre-existing agreement covering a group of undertakings, the restriction on employee requests applies to all the undertakings.

[18] If the CAC agreed that the request had been made by insufficient employees, the request could still be aggregated with subsequent requests from other employees made within 6 months to achieve the 10% threshold.

[19] Regulation 13(2) refers to an “employees’ representative” who may make a complaint to the CAC about a an employer notification. The term is not defined. It is intended to allow employees to make complaints through an intermediary such as a trade union or some other third party, if, for example, they do not want to identify themselves.

[20] This is one reason why regulation 5 allows employees to request data from the employer so they can work out how many are needed to make the request.

[21] The 3 month period for starting negotiations is suspended if:

- a ballot to endorse an employee request is held under regulation 8 or 9, or any complaint is brought in relation to this ballot under regulation 10;
- a dispute is brought under regulation 13 about an employee request or an employer notification; or
- a complaint is brought under regulation 15 about the election or appointment of negotiating representatives.

In effect, the “clock” is stopped for the time it takes to hold a ballot, or to resolve a dispute or complaint (including during any appeal over a CAC decision), or to rehold a defective ballot or election if required by the CAC (see regulation 14(3)).

[22] Negotiating representatives may well themselves become Information and Consultation representatives, but do not have to.

[23] it does not include airline staff

[24] the 6 month period begins 3 months after an employee request was made or an employer

notification was issued (unless a ballot is held under regulation 8 or 9, or there is a dispute - see footnote 36 above). The six month period is suspended while any complaint about a ballot for approval of a negotiated agreement is resolved, and while the ballot is reheld if required by the CAC (see regulation 14(4))

## Negotiated agreements (regulation 16)

37. **Contents of negotiated agreements.** The legislation sets only very limited requirements as to the contents of negotiated agreements. It purposely leaves this to the employer and negotiating representatives to decide, giving them considerable flexibility to agree arrangements best suited to their particular circumstances. Agreements must set out the circumstances in which the employees will be informed and consulted, but the legislation does not specify the method, frequency, timing or subject-matter of information and consultation. It will be for the employer and negotiating representatives to agree these points between them. They are free to agree quite different arrangements from those set out in the standard I&C rules in regulation 20 if they wish, though these can be used as a guide.

38. **Information and Consultation representatives.** A negotiated agreement may provide for consultation to take place through representatives of the workforce ("I&C representatives"), or it may provide for direct forms of information and consultation with the workforce as a whole. Or it may provide for both representative and direct forms of information and consultation. Again, the parties are free to decide. If it is agreed there should be I&C representatives, it is also for the parties to decide how many there will be, how they will be appointed or elected, who they will represent, how long they will serve for, how they may be replaced, and whether anyone other than an employee may be a representative.

39. I&C representatives do not have to be the same people as negotiating representatives. In practice they may be the same, but the legislation does not require it because their role is different – negotiating representatives are those involved in drawing up a negotiated agreement with an employer, I&C representatives are those who may be informed and consulted by the employer under the agreement.

40. **Requirements for negotiated agreements** (see regulation 16(1)).

Negotiated agreements must:

- *set out the circumstances in which employers will inform and consult their employees*, though the legislation gives employers and employees freedom to agree on the, method, frequency, timing and subject matter of information and consultation best suited to their particular circumstances;
- *provide either for the appointment or election of Information and Consultation representatives, or for information and consultation directly with employees* (or both);

- *be in writing and dated.* It is important that everyone is clear what has been agreed. The date determines the start of the 3 year moratorium on employee requests or employer notifications;
- *cover all the employees of the undertaking, or group of undertakings if more than one undertaking is to be covered.* In addition, different arrangements in different parts of the undertaking may be agreed, for example in different establishments, divisions, business units or sections of the workforce. These separate arrangements may be entirely different from each other, but between them they must cover all the employees of the undertaking;
- *be signed by, or on behalf of, the employer.* It must be clear that the employer has agreed to it. It is for the management of the company to decide who exactly should sign the agreement; and
- *be approved by the employees.* This means it must either:
  - (a) be signed by all the negotiating representatives; or
  - (b) be signed by a majority of the negotiating representatives, and either:
    - (i) be approved in writing<sup>[25]</sup> by at least 50% of the employees in the undertaking (or group of undertakings in the case of an agreement covering more than one); or
    - (ii) approved by 50% of employees who vote in a ballot.

*Further guidance on approval of negotiated agreements.*

It is for the employer to decide how to seek the approval of employees where not all of the negotiating representatives have signed the agreement.

The provisions on approval of agreements are intended to be as flexible as possible, to give maximum scope for reaching agreements. So for example, if a ballot were held in which insufficient employees approved an agreement, it would still be open to the employer (assuming there was enough time) to negotiate with the representatives modifications to the agreement with a view to seeking employee approval again (or securing the approval of all the negotiating representatives).

Where employers decide to hold a ballot for the purpose of seeking employee approval for a negotiated agreement, they are required to make such arrangements for the ballot as are reasonably practicable to ensure it is fair (see regulation 16(5)). Everyone who is an employee of the undertaking

(or group of undertakings in the case of an agreement covering more than one) on the date of the ballot must be entitled to vote in it, and as far as reasonably practicable, to do so secret. Employers must also ensure that votes are accurately counted. One way to help ensure the ballot meets these requirements would be to appoint an independent person to supervise it, though this is not a requirement of the legislation.

A complaint may be brought to the CAC by one or more of the negotiating representatives that the requirements concerning the ballot had not been met (see regulation 17). The complaint must be made within 21 days of the ballot. Where a complaint is upheld, the CAC will require the employer to re-hold the ballot.

**41. *Negotiated agreements covering more than one undertaking, or covering different establishments etc.*** Although the legislation applies to “undertakings”, it is intended to be flexible enough to allow negotiated agreements that cover employees in more than one undertaking, or provide for different arrangements in different parts of an undertaking (such as individual establishments, divisions, business units or sections of the workforce). The important point is that such agreements meet the requirements in regulation 16 - that they are in writing, dated, signed by the employer, cover all the employees in the undertaking (and possibly employees in other undertakings as well), set out the circumstances in which employees will be informed and consulted whether through I&C representatives or directly (and they may provide for separate and entirely different arrangements in different parts of the undertaking), and that they are approved by the employees.

*Further guidance on negotiated agreements covering more than one undertaking or covering different establishments etc.*

***Negotiated agreements covering more than one undertaking.*** A negotiated agreement may cover employees in more than one undertaking.<sup>[26]</sup> For example, in a group of companies, an agreement may establish consultation arrangements that apply to several individual companies within the group, or all of them.

Where employers receive a valid employee request to negotiate an I&C agreement, and consider that the agreement should cover more than one undertaking, in the first instance they will need to notify the employees in all the undertakings to be covered that they intend to initiate the negotiation process (see paragraph 26 above concerning employer notifications).

Employers have 3 months to initiate negotiations, during which time they must arrange for the election or appointment of negotiating representatives from the undertakings to be covered.

It may be appropriate simply to have one negotiating representative from each undertaking to be covered, but not necessarily so. If there were only a few undertakings to be covered, more than one representative may be needed from each to ensure employees are adequately represented in the negotiations, particularly if the interest of employees within an undertaking may diverge significantly. On the other hand, if a large number of undertakings are to be covered, one representative from each may make the negotiations impractical. In that case, some representatives could represent more than one undertaking, or represent distinct groups of employees across the several undertakings. The legislation is intended to give as much flexibility as possible here.

A negotiated agreement covering more than one undertaking should be signed by the employers concerned and either signed by all the negotiating representatives involved, or by a majority of them and approved by the employees in writing or in a ballot. If a ballot is held, all the employees in the undertakings to be covered by the agreement must be entitled to vote in it.

Employers could not unilaterally decide that a negotiated agreement will cover more than one undertaking. The agreement will have to be approved by the employees, so this is something that should be discussed with the negotiating representatives at an early stage in the process.

Where a negotiated agreement covering more than one undertaking is agreed, the three year moratorium on employee requests and employer notifications under regulation 11 would apply to all the undertakings covered by the agreement.

Where negotiations for an agreement to cover more than one undertaking fail employers would become subject to the standard I&C provisions in regulation 20. These will apply separately to each of the undertakings involved in the negotiations.

**Negotiated agreements covering different establishments etc.** A negotiated agreement may consist of different parts each providing for separate consultation arrangements in different parts of an undertaking. For example, an undertaking may consist of several (or even hundreds of) establishments such as retail outlets, branches, sites, plants, factories, and/or offices. Or it may consist of a number of distinct organisational divisions or business units, or several different groups of workers. These different parts of an undertaking may have relatively little in common with each other – they may be engaged in quite different activities, with few, if any, subjects on which they would all want to be informed and consulted together.

It may be appropriate for each establishment, division etc to have its own consultation arrangements. Or separate arrangements might cover a number

of establishments, for example, on a regional basis. Or there might be different arrangements for different sections of the workforce.

Where employers receive a valid employee request to negotiate an I&C agreement, and consider that the agreement should provide for separate arrangements in different parts of the undertaking, they must arrange for the election or appointment of negotiating representatives from the various parts of the undertaking where the separate arrangements will exist, and have 3 months to do so.

It will be possible either to hold a single negotiation in respect of all the separate arrangements (though this could be quite complicated where there is to be a large number of separate arrangements), or separate negotiations in relation to separate arrangements. Again, the legislation is intended to give as much flexibility as possible here, but it will be important that the employees to be covered by these separate arrangements are adequately represented during the negotiations. This means there should be at the very least one representative to negotiate in respect of each separate arrangement, and probably several representatives to ensure that the employees are adequately represented during the negotiations.

Each part of a negotiated agreement providing for separate arrangements in different parts of an undertaking must be signed either by all the negotiating representatives involved in negotiating that part, or by a majority of them and approved by the employees in writing or in a ballot. The different parts of the agreement could be approved in different ways and at different times. If a ballot is held, all the employees to whom the part of the agreement relates must be entitled to vote in it. However, all parts of the agreement must be approved. It would not be possible for one part to remain unapproved.

Employers could not unilaterally decide that a negotiated agreement will provide for separate arrangements in different parts of an undertaking. The agreement will have to be approved by the employees, so this is something that should be discussed with the negotiating representatives at an early stage in the process.

Where a negotiated agreement providing for separate arrangements in different parts of an undertaking is agreed, the three year moratorium on employee requests and employer notifications under regulation 12 would apply to the whole undertaking.

Where negotiations for an agreement providing for separate arrangements in different parts of an undertaking fail, employers would become subject to the standard I&C provisions in regulation 20. These will apply to the undertaking as a whole.

42. **Enforcement of negotiated agreements.** Negotiated agreements are enforceable through the CAC (see paragraphs 65 and 66 below). Therefore, the more clearly they are worded, the easier it will be for the CAC to understand them correctly and to resolve any disputes as to whether the agreement has been properly followed.

## **Standard information and consultation provisions**

43. **Applicability of the standard provisions.** The standard information and consultation (I&C) provisions only apply where an employer fails to initiate negotiations for an information and consultation agreement when required to do so<sup>[27]</sup>, or where negotiations have failed to lead to an agreement (see regulation 18(1)).

44. The standard provisions apply at the undertaking level. This means that consultation must take place with information and consultation representatives elected from the undertaking – arrangements may not cover more than one undertaking, and there is no provision for different arrangements in different parts of the undertaking. If there had been negotiations aimed at agreeing arrangements covering more than one undertaking, or providing for separate arrangements in different parts of the undertaking, the standard provisions will nevertheless apply at the individual undertaking level.

45. Where negotiations have taken place but failed to reach an agreement, employers have up to a further 6 months to set up the necessary information and consultation structures. This period is intended to give employers time to arrange the election of I&C representatives, but it is also designed to give a further limited period in which a negotiated agreement might be reached. It should be borne in mind though that if there is still no negotiated agreement by the end of this further 6 month period, and no ballot has been arranged to elect I&C representatives, employers will be liable to a penalty (see paragraph 72 below).

46. Where employers fail to initiate negotiations for an I&C agreement when required to do so, the standard provisions apply automatically 6 months after a valid employee request is made or the employer has made a notification under regulation 11. The employer must have arranged for the election of I&C representatives before the end of this 6 month period, or will be liable to a penalty.

47. Where I&C representatives are elected before the end of the 6 month period in which they must be elected, the standard information and consultation provisions begin to apply straightaway.

48. ***Election of information and consultation representatives*** (regulation 19). I&C representatives must be elected in a ballot. They do not necessarily have to be the same people as negotiating representatives. The employer is responsible for organising the ballot, which must comply with the requirements in Schedule 2 to the Regulations. The number of I&C representatives is proportional to the number of employees in the undertaking – one per 50 employees or part thereof, subject to a minimum of 2 representatives and a maximum of 25. In other words, 2 representatives for undertakings with 50 to 100 employees, 3 for those with 101 to 150 employees, etc.

***Further guidance on the election of Information and Consultation representatives under the standard provisions***

The requirements for ballots set out in Schedule 2 only apply to elections of I&C representatives where the standard provisions apply. Where a negotiated or a pre-existing agreement provides for the election of I&C representatives, the legislation does not oblige employers to follow the requirements of Schedule 2, though they may wish to adopt similar arrangements.

In outline, Schedule 2 requires as follows:

- o employers must draw up proposals for the ballot and consult representatives of the employees about them (eg the negotiating representatives or trade union representatives);
- o there can be separate ballots for separate parts of the workforce (eg different sites, business units, groups of employees), if that would better reflect the interests of employees as a whole;
- o all employees of the undertaking must be entitled to stand for election and vote in the ballot;
- o employers must appoint an independent person to supervise the ballot and ensure he/she carries out their functions without interference;
- o once employers have consulted about the proposed ballot arrangements, and made any modifications in the light of this consultation, they must publish the final ballot arrangements for employees and their representatives to see;
- o any complaints about the final ballot arrangements may be made to the CAC within 21 days of their publication by any employee or representative of employees (eg about any constituencies chosen by the employer, the identity of the ballot supervisor, or the adequacy of consultation about the proposals). The CAC may order changes to be made;

- o the supervisor must supervise the ballot in accordance with the final arrangements, and hold the ballot no earlier than 21 days after the arrangements have been published in case a complaint is brought. He/she must ensure that everyone entitled to stand as a candidate or vote can do so, and can vote in secret, and that votes are fairly and accurately counted;
- o the ballot supervisor must publish the ballot results for the employer, employees and candidates to see, and must publish an “ineffective ballot report” where appropriate (eg where the ballot requirements were not met and this affected the outcome, or where the employer did not co-operate). Where an ineffective ballot report is published, the ballot is void, and must be reheld;
- o all costs are to be borne by the employer.

If too few employees stand as candidates for election, the employer does not need to hold the ballot, and the candidates will become the I&C representatives.

No “long haul crew member” may be an I&C representative, unless allowed by the employer (see regulation 43). A long haul crew member is a member of a merchant navy crew other than a ferry worker or someone who normally works on voyages of less than 48 hours.<sup>[28]</sup> This exclusion recognises the difficulties and disruption shipping companies would face in arranging for crew members to be replaced on ships in order to attend information and consultation meetings.

Where an employer fails to arrange to hold a ballot before the end of the 6 month period in which it must be held, a complaint may be brought to the CAC by an employee or a representative of employees. Where the CAC upholds a complaint it must order the employer to arrange and hold the ballot. The complainant may then apply to the Employment Appeal Tribunal for a penalty against the employer.

**49. Negotiated agreements after the standard provisions apply.** Employers and I&C representatives may come to a negotiated agreement at any time after the standard information and consultation provisions apply (see regulation 18(2)). Such agreements must comply with the requirements in regulation 16(1), with the exception that the agreement is deemed approved where it is signed by a majority of the I&C representatives. Where an agreement is reached, the moratorium on employee requests or employer notifications under regulation 11 applies for 3 years from date of the agreement.

**50. The standard I&C provisions** (regulation 20). Where an employer is subject to the standard provisions, the obligation on employers to inform and

consult in accordance with those provisions begins to apply once the I&C representatives have been elected. The requirements for informing and consulting I&C representatives in regulation 20 are based very closely on Article 4 of the EC directive, and are intended to be the same as the requirements in the directive. They are not intended to go beyond the requirements of Article 4 of the directive, and they cannot require less than Article 4 does.

51. What the requirements mean in practice for an individual organisation will vary depending on the circumstances of that organisation. For example, where there is a lot of change underway in the organisation such as a restructuring programme, more frequent information and consultation may be appropriate. I&C representatives should be given the opportunity to express their views on the information that ought to be provided, the subject matter, frequency, timing and method of consultation. It is good practice to seek to agree these things, although this is not a requirement of the legislation.

52. Ultimately it will be for the courts to interpret what these requirements might mean in practice in the particular circumstances of any specific complaint. It is possible the courts might take a wider, or a more restrictive, interpretation of the requirements than DTI. This guidance is intended to help firms think about such things as the subject-matter, frequency, timing and method of information and consultation. It is not intended to be either prescriptive or comprehensive.

53. **Information.** There are three categories of information that employers who are subject to the standard provisions must provide to I&C representatives:

- (a) information on “the recent and probable development of the undertaking’s activities and economic situation”. Given that the two following categories of information are about employment within the undertaking, and changes to work organisation or employees’ contractual relations, the purpose of this first category is best understood as helping I&C representatives understand the context in which decisions affecting employment, work organisation and employees’ contractual relations are made;
- (b) information on “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”. The emphasis here is on the overall number of employees within the undertaking;
- (c) information on “decisions likely to lead to substantial changes in work organisation or in contractual relations”. This includes decisions covered by the legislation on collective redundancies and transfers of undertakings. DTI believes “contractual relations” means an employer’s contractual relations with their employees.

54. What affects employment, work organisation and employees' contractual relations within an individual organisation will vary from one organisation to another, and it is therefore not possible to provide comprehensive guidance that would cover every organisation. It will depend on a variety of factors, for example, the nature and diversity of the organisation's activity, its size and financial position, the sector in which it operates, its position in the market and the strength of the competition.

55. To reduce the risk of a successful complaint being brought for breaching the legislation, it is advisable to seek the views of I&C representatives on the sort of information that should be provided, although this is not a requirement of the legislation.

*Further guidance on information to be provided under categories (a), (b) and (c) of the standard I&C provisions*

**Category (a) information.** Taken in isolation, the phrase "recent and probable development of the undertaking's activities and economic situation" might appear to cover a wide range of subjects. However, the quantity and scope of information provided should be limited both to avoid undue burdens on the employer, and so as not to overwhelm the I&C representatives. There is no requirement to consult I&C representatives about the matters on which category (a) information is provided.

The information provided must be "appropriate", in particular to enable the I&C representatives to study it adequately and where, necessary, prepare for consultation on the matters covered by categories (b) and (c). It should help provide the background, and inform the rationale, for subsequent decisions on which representatives are informed and consulted.

Employers are therefore advised in effect to "work backwards" from categories (b) and (c), by first considering what decisions are likely to lead to substantial changes in work organisation or employees' contractual relations in the specific circumstances of their undertaking, and what is likely to affect the situation, structure and development of employment within the undertaking. Having done so, they will be better able to decide what aspects of the recent and probable development of the undertaking's activities and economic situation they should provide information about under category (a).

The phrase "recent and probable development" implies both looking backwards and looking forwards. So, information should be provided on developments in the undertaking's activities and economic situation in the recent past, and on probable future developments. "Probable" implies that a development is likely to take place. In particular, it implies something more than the mere possibility of a development in the undertaking's activities and

economic situation, such as where discussions or negotiations with a third party were at a very preliminary or early stage.

Bearing the above points in mind, the information to be provided under category (a) might include:

information on the undertaking's activities:

- o the launch of new products or services, or significant changes to, or discontinuation of, existing products or services;
- o increase or reduction in production or sales as a result of, for example, under- or over-capacity, increased or reduced demand, moving into a new market or exiting a market, cost-saving measures;
- o takeovers/mergers (both by and of the undertaking) <sup>[29]</sup>, acquisitions and disposals of subsidiary companies, businesses, parts of a business, or other assets, investment, opening or closure of establishments (eg plants, offices, factories, retail outlets, branches), restructuring plans;
- o developments in technology, production processes or ways of working;
- o a reorganisation within the undertaking, including a transfer of production or posts to different locations, or to different divisions or units within the undertaking;
- o changes to the undertaking's aims, objectives, vision, mission statement, strategy, business plan etc;
- o changes in senior management;

where these developments are likely to affect employment within the undertaking, or lead to substantial changes in work organisation or employees' contractual relations;

information on the undertaking's economic situation:

- o the competitive environment in which the organisation operates, trading conditions, the outlook for the sector, the level of demand, and the state of the undertaking's order book; and
- o the undertaking's financial situation based on its accounts

where these developments are likely to affect employment within the undertaking, or lead to substantial changes in work organisation or employees' contractual relations.

There is no specific requirement in the legislation to meet with I&C representatives in relation to category (a) information. Employers could simply send the information to them. However, they should consider the need to meet in order to explain the information, since it must be given in an “appropriate” fashion, in particular to allow the representatives to conduct an adequate study of it.

Some of the above information above must be made public by law, for example in a company’s annual report and accounts. However, it may not be easily understood in this form, and employers should consider providing a separate report on such matters for the I&C representatives, or an explanation of the material.

**Category (b) information.** This comprises information on the “situation, structure and probable development of employment within the undertaking” and includes information on “any anticipatory measures envisaged .. in particular, where there is a threat to employment”. In addition to providing I&C representatives with this information, employers must also consult them about these matters.

The emphasis here is on the overall number of employees within the undertaking – both the present level of employment and future levels. It would therefore include recruitment of new employees and redundancies (both voluntary and compulsory), employee turnover, the possibility of moving to reduced hours working or the need for overtime, and could include changes in retirement policy or early retirement schemes.

It also includes the “structure” of employment, which can be understood to mean how employees are distributed within the undertaking, for example, geographically at different establishments (eg plants, offices, factories, retail outlets, branches), or organisationally within different divisions or units of the undertaking. It would therefore include a reorganisation of posts within the undertaking, redeployment of employees, or a transfer of posts to different locations.

The reference to “anticipatory measures envisaged, in particular, where there is a threat to employment” is clarified by recital 8 to the EC Directive, which refers to employee training and skill development so as to increase the “employability and adaptability” of affected employees. This suggests the employer should consider whether the threat to employment can be offset through redeploying and perhaps retraining employees whose posts are under threat.

**Category (c) information.** This comprises information on “decisions likely to lead to substantial changes in work organisation or in contractual relations” and includes decisions covered by the legislation on collective

redundancies and transfers of undertakings. In addition to providing I&C representatives with this information, employers must also consult them with a view to reaching agreement on these decisions.

There is little indication within the EC Directive, or its recitals as to what the terms “work organisation” and “contractual relations” are meant to include other than collective redundancies and business transfers. However, the context of the directive is about employment within the undertaking, and it is reasonable to infer that “contractual relations” means employers’ contractual relations with their employees, rather than a business’s contracts with third parties.

In DTI’s view, “changes in work organisation” would include:

- o changes in the level, or distribution of employment within the undertaking, including redundancies and relocation of posts;
- o changes in policy on flexible working, part-time working, overtime;
- o a move to reduced hours or overtime working, changes in shift working or other work patterns;
- o introduction of significant new technology or equipment, and any training associated with it.

In DTI’s view, “changes in contractual relations” would include:

- o a change of employer as a result of a transfer of the business, or part of the business;
- o changes in employees’ terms and conditions (including hours of work, leave entitlement, rest breaks). This would not necessarily include any and every change in terms and conditions. It should be a substantial change that affected the overall contractual relations between the employer and employees;
- o introduction of, or a change to, compulsory retirement age;
- o changes to an occupational pension scheme but only where there was a contractual right to participate in the scheme as that right would form part of the contract;
- o changes in disciplinary or grievance procedures.

In addition, any consideration of the phrase “changes in contractual relations” must be consistent with the Treaty Base (Article 137) under which

the Directive has been adopted, which states that matters such as pay are not covered by that Article. In DTI's view therefore, category (c) would not cover changes in pay or benefits that have a monetary value.

It should be borne in mind that consulting over a change in contractual relations under the standard provisions of the I&C Regulations would not relieve employers of any obligation they may have to agree such changes with employees (since in general, any change to contractual terms must be agreed between the employer and employee).

### ***Other points***

Category (b) concerns employment as a whole within the undertaking while category (c) concerns "substantial changes" in work organisation or contractual relations. Neither are about individual posts or employees. They do not require information and consultation to take place on the recruitment, redundancy, dismissal, retirement, redeployment, training, development, transfer or terms and conditions of an individual employee or a small number of employees.

It is not possible to specify a lower limit in terms of the number of employees who would have to be affected – this will depend on the circumstances of the individual case. Clearly, the more employees affected, and the greater the proportion of all the employees in the undertaking, the more likely it is to be covered. A situation that was likely to lead on to collective redundancies as defined by statute (that is, 20 or more redundancies at one establishment) would be covered.

There is no specific requirement in the legislation to provide information about the activities or economic situation of another undertaking. However, where they would have a significant impact on the undertaking itself, for example, in the case of the activities or economic situation of a parent or subsidiary company which might affect the prospects of the undertaking, then relevant information may need to be provided. The failure of a parent company to provide necessary information is not a valid reason for the employer failing to inform and consult under the standard provisions (see regulation 20(6)).

Employers who are subject to the standard I&C provisions are free to go beyond their requirements by informing and consulting on other matters. ACAS guidance suggests a range of issues for information and consultation, although many of these are not required by the I&C Regulations. Employers can also inform and consult the workforce directly, as well as through I&C representatives, though they are not obliged to do so by the legislation.

56. **Consultation under the standard I&C provisions.** Employers who are subject to the standard I&C provisions must consult the I&C representatives on the matters referred to in categories (b) and (c) above. The timing, method and content of consultation must be “appropriate”, and relate to the information supplied by the employer. The I&C representatives must have the opportunity to give their opinion on the matters they are being consulted about, and to meet with the employer for a discussion. The employer should be represented at this meeting at a level of management relevant to the subject being discussed. Where the representatives give their opinion, the employer must give a reasoned response to it.

57. Consultation about the decisions referred to in category (c) above must be undertaken “with a view to reaching agreement” if those decisions are within the scope of the employer’s powers. The employer must therefore aim to reach agreement with the I&C representatives on such decisions, though sometimes agreement may not be possible.

#### *Further guidance on consultation under the standard I&C provisions*

The legislation defines consultation as “the exchange of views and establishment of dialogue” between the employer and the I&C representatives. There is caselaw in other contexts that helps clarify the meaning of the term. <sup>[30]</sup>

Consultation is more than simply providing information. Consultees must be given a fair and proper opportunity to understand fully the matters about which they are being consulted, and to express their views on those subjects – that is, they must be given adequate information and time both to consider the matter, form a view on it, and express that view.

There must be genuine and conscientious consideration by the employer of the consultees’ views. The standard provisions in the I&C Regulations specifically require the employer to meet the I&C representatives at a level of management relevant to the subject under discussion, and to give a reasoned response to any opinion the representatives may give.

The purpose of consulting I&C representatives on the matters covered by categories (b) and (c) is to give them the opportunity to express their views on such things as the existing level and structure of employment within the undertaking, and its probable development, including possible recruitment, transfers or redundancies, and any plans to redeploy or retrain affected employees; and on decisions covered by category (c). I&C representatives may consider the existing level and structure of employment to be inappropriate, or may disagree with the employer’s plans for changes or for redeployment or retraining. They may disagree with decisions or have

suggestions for modifying them or alternative proposals. They may also have views on how decisions are to be announced to employees.

However, employers are not obliged to follow the I&C representatives' opinion. Consultation is different from negotiation, collective bargaining or joint decision-making. Decision-making remains the responsibility of management.

The requirement to consult with a view to reaching agreement is confined to decisions covered by category (c) that are within the scope of the employer's power. This would therefore exclude, for example, trying to reach agreement on decisions taken by a parent company that impacted on the undertaking, or decisions required by law or by a regulatory authority.<sup>[31]</sup> The requirement only applies to consultation about category (c) matters, not consultation about category (b) matters. This is because category (c) concerns decisions – something on which agreement may in principle be possible – whereas the “situation, structure and probable development of employment” referred to in category (b) is of a more factual nature and therefore less appropriate for “agreement”.

The standard provisions require consultation to take place at the level of management relevant to the subject under discussion. In some cases this will mean the management of the undertaking itself, in other cases it may mean local management. In a group of companies it may include management from a parent company. It is for individual employers to decide what it may mean for them in practice. In DTI's view it implies a level of management with the authority to change the decision being consulted about.

There is no specific obligation in the standard provisions for I&C representatives to report back to the employees they represent, or to obtain their views. Nevertheless, it is good practice to do so (subject to any confidentiality restrictions), so that the views of the workforce are fairly represented in meetings with employers.

ACAS guidance provides good practice advice on how to carry out effective consultation.

**58. *Frequency and timing of information and consultation under the standard I&C provisions.*** The legislation is not specific as to the frequency or timing of information and consultation. It requires information to be provided by the employer to the I&C representatives at an “appropriate” time, in particular to enable the I&C representatives to conduct an adequate study and to prepare for consultation.

59. The EC Directive is aimed at strengthening dialogue and promoting mutual trust, improving risk anticipation and promoting employee involvement. The

definition of “consultation” also refers to the establishment of a dialogue. This, and the subjects to be covered, imply that information and consultation should be on-going and regular, and not simply a one-off event when a problem arises.

60. As with the subject-matter of information and consultation, its frequency and timing will depend on the specific circumstances of individual organisations, and it is therefore not possible to provide comprehensive guidance that would cover every organisation.

61. To reduce the risk of a successful complaint being brought for breaching the legislation, it is advisable to seek the views of I&C representatives on the frequency and timing of information and consultation, although this is not a requirement of the legislation.

#### *Further guidance on the timing and frequency of information and consultation*

**Frequency.** Where there is a lot of change underway in a business, such as a restructuring, redundancies, or closures, more frequent information and consultation is likely to be needed. In any business though, at least one meeting per year would seem to be a minimum requirement – this may be an appropriate time to provide an overview of the undertaking’s activities and economic situation, and of employment within the undertaking.

The requirement to inform and consult the I&C representatives about the probable development of employment within the undertaking, may mean one or more additional meetings on this aspect are needed, because “probable” implies the developments are likely to place, which could be difficult to predict a long way in advance. In addition, the requirement for the employer and I&C representatives to meet for consultation on the decisions referred to in category (c), implies that special or one-off meetings concerning these decisions will be needed.

**Timing.** The requirement to provide information on the probable development of the undertaking’s activities and economic situation, and of employment, clearly means that some information must be provided in advance of these developments. The comments above concerning the frequency of information and consultation are relevant here – “probable” developments are those that are likely to take place, and so information and consultation on them could not take place a long way in advance when there was only a possibility of the development occurring.

Genuine consultation implies seeking views before a final decision has been taken, when proposals are still at a formative stage, and when it is not too late to change a decision. If it is believed a final decision has already been taken, and the employer is simply “going through the motions” of consultation, the outcome is likely to be mistrust and cynicism on the part of I&C representatives. However, there is a balance to be struck here – consultation too early in the decision-making process could be a waste of time and prove unsettling to employees and their representatives.

Information must be provided early enough to allow I&C representatives to conduct an adequate study of the material, and where necessary, prepare for consultation. This implies that information must be provided in advance of a consultation meeting - how far in advance will depend on the quantity and complexity of the information, although practical considerations may make it difficult to produce the necessary information a long way in advance of the meeting.

There may also be an issue of confidentiality to be considered. If confidential information is to be provided on a restricted basis, it may be appropriate to limit the period of time between it being provided to I&C representatives and it being made public, so as to reduce the risk of confidential information being misused.

**62. Overlap with legislation on collective redundancies, business transfers and from 6 April 2006 listed pensions changes.** The decisions referred to in category (c) above include decisions on collective redundancies, business transfers and in certain circumstances, listed pensions changes. The first two situations are covered by existing legal obligations to consult representatives of employees<sup>[32]</sup>. These existing legal obligations continue to apply and are not affected by the Information & Consultation (I&C) Regulations. The requirement to consult on listed pensions changes is created as a result of changes to occupational pensions legislation coming into force on 6 April 2006.<sup>[33]</sup> When in force, this obligation will apply regardless of the I & C Regulations. In all three cases, this could create a situation where an employer is subject to two different legal requirements to consult over the same decision.

63. To avoid this, the I&C Regulations relieve employers who are subject to the standard information and consultation provisions of the obligation to inform and consult under those provisions if they notify the I&C representatives in writing that they will be consulting under the legislation on collective redundancies, business transfers or from 6 April 2006, listed pensions changes (see regulation 20(5) as amended<sup>[34]</sup>). This notification needs to be made on each occasion when a collective redundancy, business transfer or from 6 April 2006, listed pensions change situation arises. Employers and employees may wish to include a similar provision in negotiated agreements, or agree to exclude collective redundancy, business transfers and after 6 April 2006, listed pensions

change situations altogether from negotiated agreements. Negotiated agreements concluded before 6 April 2006 may already include requirements for consultation on listed pensions changes. Because of this, from 6 April 2006 the I & C Regulations will be amended<sup>[35]</sup> to allow employers who are subject to negotiated agreements concluded before that date to relieve themselves of the obligation to consult under those provisions. As with the standard provisions, employers will only be relieved of the obligation to consult if they notify the I&C Representatives (or where there is direct I&C, the employers themselves) in writing that they will be consulting under the legislation on listed pensions changes.

*Further guidance on dealing with the overlap with collective redundancies, business transfers and from 6 April 2006, pensions legislation.*

- The exemption for decisions on collective redundancies, business transfers and from 6 April 2006 listed pensions changes in the standard I&C provisions can be used on a case-by-case basis. Employers who are subject to the standard provisions may make use of the exemption as and when they become subject to the legislation covering those situations. So for example, they must continue to inform and consult the I&C representatives under the standard provisions over matters that may lead on to, but have not yet become, a collective redundancy, business transfer or from 6 April 2006 a listed pension change situation covered by the relevant legislation.

Employers are not obliged to act in this way. Where they are required (or choose) to consult different representatives of employees under the collective redundancy, business transfer or from 6 April 2006, listed pension change legislation, they may be quite happy to do so at the same time as consulting I&C representatives under the I&C Regulations, and will be free to do so.

Collective Redundancies and business transfers - The legislation on collective redundancies and business transfers requires employers to consult representatives of employees. Where there is a recognised independent trade union representing employees who may be affected, the employer must inform and consult that union. Where there are affected employees who are not represented by a recognised union, the employer must inform and consult other appropriate representatives of those employees. These may be either new representatives specially elected for the purpose, or existing representatives provided that their remit and method of election or appointment gives them suitable authority from the employees concerned. I&C representatives elected or appointed under the I&C Regulations would be appropriate representatives for this purpose, although the employer would still be free to consult other appropriate representatives or arrange for new ones to be specially elected for the purpose.

Listed Pensions Changes – From 6 April 2006, The Occupational and Personal Pension Schemes (Consultation by Employers and Miscellaneous Amendment) Regulations 2006 (the “Pensions Regulations”) will require that employers must consult representatives of employees and, in some circumstances, the employees themselves when proposing to make listed pensions changes. Where there are recognised independent trade union representatives, information and consultation representatives or representatives under a pre-existing agreement, employers may choose to consult them. Where no such arrangement exists, employers will need to consult a “specific pensions representative” i.e. a representative appointed in accordance with the procedure laid down in the Pensions Regulations specifically for the purpose of consultation on listed change matters. Further guidance on the consultation requirements for the Pensions Regulations may be found at [www.dwp.gov.uk/publications/dwp/2006/occ\\_pen\\_schemes/oppsce-2006.pdf](http://www.dwp.gov.uk/publications/dwp/2006/occ_pen_schemes/oppsce-2006.pdf)

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<sup>[23]</sup> it does not include airline staff

<sup>[24]</sup> the 6 month period begins 3 months after an employee request was made or an employer notification was issued (unless a ballot is held under regulation 8 or 9, or there is a dispute - see footnote 36 above). The six month period is suspended while any complaint about a ballot for approval of a negotiated agreement is resolved, and while the ballot is reheld if required by the CAC (see regulation 14(4))

<sup>[25]</sup> this could include in writing by electronic means

<sup>[26]</sup> whether the employees have the same or different employers

<sup>[27]</sup> that is, where a valid employee request has been made under regulation 7, or where employers notify an intention to begin negotiations on their own initiative under regulation 11. Initiating negotiations involves arranging the appointment or election of negotiating representatives, informing employees who these representatives are and inviting them to enter into negotiations.

<sup>[28]</sup> it does not include airline staff

<sup>[29]</sup> where initial discussions are being held with a possible bidder or target company, a company may legitimately take the view that there was only the possibility of a takeover etc, rather than a “probable” development.

<sup>[30]</sup> For example, *R. v. British Coal Corporation and SoS for Trade and Industry ex parte Price and others* [1994] IRLR 72, where the judge adopted the tests set out in *R v Gwent CC, ex parte Bryant* (1988) COD 19.

<sup>[31]</sup> though there may still be a requirement to consult I&C representatives about those decisions.

<sup>[32]</sup> For collective redundancies - sections 188 to 192 of the Trade Union and Labour Relations (Consolidation) Act 1992; for business transfers – regulations 10 to 12 of the Transfer of Undertakings (Protection of Employment) Regulations 1981

<sup>[33]</sup> See regulations 11 – 13 of The Occupational and Personal Pension Schemes (Consultation by Employers) Regulation 2006 which is due to come into force on 6 April 2006

<sup>[34]</sup> Regulation 20(5) will be amended by The Information and Consultation of Employees (Amendment) Regulations 2006 which is due to come into force on the 6 April 2006

<sup>[35]</sup> Regulation 17A of the Information and Consultation of Employees Regulations 2004

## **Duty of cooperation**

64. Regulation 21 requires the employer, the negotiating representatives, and I&C representatives to work together in a spirit of cooperation. In other words, co-operation must be two-way. They must also have due regard for one another's rights and obligations under the legislation, while taking account of the interests of the undertaking and its employees.

## Enforcement of negotiated agreements and the standard I&C provisions

65. The provisions on compliance and enforcement in Part VI of the Regulations apply where a negotiated agreement is in place, or where an employer is subject to the standard I&C provisions in regulation 20. They do not apply to pre-existing agreements. Any dispute about the operation of a pre-existing agreement must be resolved in the way provided for in that agreement. A pre-existing agreement would be enforceable through the courts only if that means of enforcement had been expressly agreed between the parties to the agreement, or it was shown there was an intention to create legal relations.

66. Where a negotiated agreement is in place, or where an employer is subject to the standard I&C provisions, any complaint that the employer has failed to abide by the agreement, or to comply with the standard provisions, must be brought to the CAC within 3 months of the alleged failure. However, before making a formal complaint to the CAC, employees are advised to consider discussing the matter with the employer to see if a solution can be found.

### *Further guidance on disputes about the operation of a negotiated agreement or the standard information and consultation provisions*

- Complaints may be brought by one or more I&C representatives (where they exist), or where there are no I&C representatives, by one or more individual employees or an employees' representative. Complaints may not be brought against I&C representatives or individual employees.
- ***Breach of a negotiated agreement.*** In the case of a negotiated agreement, a complaint may be brought about failure to comply with any of the terms of the agreement. This might include:
  - a complaint that the employer has failed to establish the agreed consultation arrangements at all, or has not established them fully in accordance with the agreement. For example, an agreement might provide for the election or appointment of I&C representatives from different parts of the organisation, with the employer having agreed to make the necessary arrangements. If the employer failed to make these arrangements, or did so in a way that meant parts of the organisation were not represented as agreed, a complaint could be brought;
  - a complaint that the employer had not provided adequate information, or had provided it too late, or had not consulted in the way required by the agreement.
- Negotiated agreements may contain requirements that are different from the standard I&C provisions in regulation 20, for example, the employer

may agree to inform and consult on different subjects or in a different way compared with the standard provisions. A complaint of failure to comply with a negotiated agreement may include failure to comply with any such requirements.

- ***Breach of the standard I&C provisions.*** In cases where there is no negotiated agreement in place and the employer is subject to the standard I&C provisions in regulation 20, a complaint may be brought about failure to arrange for the election of I&C representatives (see regulation 19(4)), or failure to comply with any of the standard provisions. Such complaints might include that the employer:
  - had not provided adequate information;
  - had provided information too late for the I&C representatives to study it adequately;
  - had not met with the representatives at all, or had not been represented at a meeting by the level of management relevant to the subject under discussion;
  - had not allowed the I&C representatives an opportunity to give their opinion;
  - had not given a reasoned response to any opinion given by the representatives; or
  - had not consulted with a view to reaching agreement with the representatives, in other words, that consultation had not been genuine.

67. **CAC orders.** Where a complaint of failure to abide by a negotiated agreement or the standard I&C provisions is upheld by the CAC, it is required to make a decision to that effect. It may also make an order requiring the employer to take the necessary steps to rectify the situation within a given period of time. However, no order of the CAC may have the effect of:

- suspending any act done or any agreement made by an employer;
- altering the effect of any such act or agreement; or
- preventing or delaying any act which an employer proposes to do, or any agreement he/she proposes to make (see regulation 22(9)).

68. **CAC proceedings** (regulation 35). Any complaint or application to the CAC must be made in writing and in the form required by the CAC. The CAC will be publishing guidance on the procedures for handling cases concerning the Information and Consultation Regulations. The CAC must make appropriate enquiries and, as far as reasonably practicable, give a hearing to anyone it considers has a proper interest in the matter. The CAC may draw an adverse inference against someone if they fail to comply with any reasonable request to provide relevant information.

69. 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. Appeals against CAC declarations or orders on a point of law may be made to the Employment Appeal Tribunal (see paragraph 71 below). The CAC may refer questions of EC law to the European Court of Justice.

70. **Conciliation by ACAS** (regulation 38). Where the CAC considers that an application or complaint made to it is reasonably likely to be settled by conciliation or other assistance, it must refer it to the Advisory, Conciliation and Arbitration Service (ACAS) and ACAS may seek to promote a settlement. This applies to all applications or complaints, made under any provision in the Regulations. When referring cases to ACAS, the CAC must notify the applicant or complainant, as well as anyone it considers has a proper interest in the case. Where ACAS decides not to offer assistance, or is unable to resolve the dispute, and where the original application or complaint is not withdrawn, ACAS must inform the CAC, which will then be responsible for hearing and determining the dispute.

71. **Appeals**. Any question of law arising from a declaration or order of the CAC, or arising in any proceedings before the CAC, may be appealed to the Employment Appeal Tribunal (EAT). Appeals to the EAT are subject to requirements set out in Part II of the Employment Tribunals Act 1996 and the Employment Appeal Tribunal Rules 1993 (SI 1993/2854). An appeal must be brought within 42 days of the date on which written notification of the declaration or order was sent to the appellant. EAT decisions, including decisions on penalties, may be appealed to the Court of Appeal on a point of law.

72. **Penalties** (regulation 23). Employers are liable to a penalty where the CAC upholds a complaint that they have failed to inform and consult as required by a negotiated agreement (if they have one)<sup>[1]</sup> or as required by the standard I&C provisions (if they are subject to them). They are also liable to a penalty if they are subject to the standard I&C provisions but fail to arrange a ballot to elect I&C representatives. The provisions on penalties do not apply to other complaints upheld by the CAC such as a failure to provide data on employee numbers, or complaints concerning ballots, the identity of negotiating representatives, or information restricted or withheld on confidentiality grounds.

73. Where the CAC upholds a complaint for which a penalty is liable, the person who brought it may apply to the Employment Appeal Tribunal (EAT) for a penalty. The EAT must impose a penalty unless satisfied by the employer that the reason for the failure was beyond his/her control or there was some other reasonable excuse.

74. The maximum amount of any penalty £75,000. In setting the amount the EAT must take account of all relevant factors, including: the gravity and duration of the failure, the reason for it, the number of employees affected by it, and the

size (in terms of the number of employees) of the undertaking or group of undertakings where a negotiated agreement covers more than one. Penalties are payable to the Secretary of State. A penalty notice is suspended if an appeal against a CAC decision is made.

75. ***Exclusivity of remedy.*** Regulation 24 makes clear that where there is an infringement of any right conferred by Parts I to VI of the Regulations the remedy is by way of complaint to the CAC and not otherwise. This means that the rights cannot be pursued through the courts. However, a breach of a confidentiality restriction which is in Part VII of the Regulations, for example by an I&C representative, could be pursued in the civil courts, and the protections given to I&C representatives and others under Part VIII can be enforced through an employment tribunal.

## Confidential information

76. Employers who have a negotiated agreement<sup>[2]</sup>, or who are subject to the standard provisions may, on confidentiality grounds:

- (1) restrict any information or document they provide to I&C representatives or others<sup>[3]</sup>, so that it may not be passed on to anyone else (see regulation 25). They may do this where it is in the legitimate interest of the undertaking. It would include information that is share price sensitive;
- (2) withhold information or documents altogether that they would otherwise be required to give I&C representatives (see regulation 26). They may do this where disclosing it to them would seriously harm the functioning of the undertaking, or be prejudicial to it.

77. Disputes about confidential information are to be resolved by the CAC.

### *Further guidance on confidential and price-sensitive information*

- **Information subject to a confidentiality restriction.** Where employers impose a confidentiality restriction on information or documents, the recipients may not then disclose them to third parties, unless permitted by the employer.
- It is up to employers to make clear when providing information on a confidential basis what restrictions there are on it being passed to others. For example, an employer may allow the recipient to share the information with someone advising I&C representatives, or to other named employees of the undertaking, or to other people with the express consent of the employer. In doing so, employers should make sure the original recipients are clear as to whether they can share the information or document with anyone else, if so, with whom, and for how long the restriction applies. The employer should also make clear that any person with whom the original recipient shared the information or document would themselves be bound by an obligation of confidentiality
- A restriction could last for any length of time, although it should not be longer than is necessary in the legitimate interest of the undertaking. For example, it should cease if the information has been made public.
- Employers may only restrict information on confidentiality grounds where this is justified in the legitimate interest of the undertaking. Restricting information which is not genuinely confidential could hinder I&C representatives in carrying out their role. For example, they may need to

consult the employees they represent, or seek advice from an expert, about information they have been given.

- In deciding what information or documents to provide to I&C representatives or others, employers will need to bear in mind any confidentiality obligations they may themselves be subject to. For example, companies with securities listed on a stock exchange, will need to comply with their obligations regarding price-sensitive information<sup>[4]</sup>. Companies involved in a takeover or merger will need to comply with their obligations under relevant legislation or codes – in the UK, the City Code on Takeovers and Mergers. And companies that have entered into a contract, eg for the sale or purchase of plant or other assets, may be subject to contractual restrictions as to what information can be divulged to third parties (although no contract or other agreement could exclude or limit the information and consultation requirements in the Regulations, except in accordance with the confidentiality provisions – see paragraph 80 below).
- It is important to point out that neither the UK Listing Rules, nor the City Code on Takeovers and Mergers, nor US rules<sup>[5]</sup> prevent a company sharing price-sensitive information with representatives of employees before it is disclosed to the market, as long as those representatives are subject to an obligation of confidentiality. DTI does not believe there is any inconsistency between the obligations in the I&C Regulations and those in the Listing Rules or the Takeover Code, so there is no issue of one taking precedence over the other. However, the Listing Rules and the Takeover Code would limit the number of people who can be made privy to price-sensitive information, and restrict who those people can be.
- **Price-sensitive information.** Chapter 9 of the Listing Rules imposes a general continuing obligation of public disclosure on listed companies (and in the future on companies with securities admitted to trading on a regulated market) in respect of matters which are not public knowledge and which may substantially affect their share price.
- When a company is preparing proposals, for example a restructuring, this does not have to be publicly disclosed during the planning stage provided the relevant information is kept confidential. Rule 9.4 provides that a company need not notify to a Regulatory Information Service information concerning impending developments or matters in the course of negotiation. However, the company may give such information in confidence to recipients within the categories described in Rule 9.5. The categories include “representatives of employees or trades unions acting on their behalf”. The company must be satisfied that such recipients of information are aware that they must not deal in the company’s securities

before the relevant information has been made available to the public.

- Before it has been announced to the market, any price-sensitive information could not be shared with the wider workforce, but only with a limited number of named individuals<sup>[6]</sup>. For the purpose of regulation 25, it would therefore be legitimate to make price-sensitive information subject to a confidentiality restriction. Annex 2 of the guidance deals with making announcements to the wider workforce involving price-sensitive information within the requirements of the Listing Rules and Takeover Code.
- Investors who trade on inside information are liable to prosecution under the Insider Dealing laws. Furthermore, if an employee in receipt of confidential information disclosed it in breach of a restriction, their employer could take disciplinary measures against them. Such action by a recipient of confidential information could also amount to market abuse. In addition, the employer could bring an action for damages in the civil courts, whether or not the person concerned was an employee.<sup>[7]</sup>
- Chapter 9 of the Listings Rules will be revised through the implementation of the EU's Market Abuse Directive in the course of 2005. The directive includes two significant provisions directed at protecting the confidentiality of inside information. First, the directive permits companies and their advisers to disclose inside information on a selective basis, but only where there is a legitimate reason for doing so and the person receiving the information owes a duty of confidentiality. This could include representatives of employees. Secondly the directive requires companies that issue shares, or their advisers, to keep a list of those who have access to inside information concerning the company. These lists are to be made available to financial regulatory authorities on request.
- **Information withheld on confidentiality grounds.** Employers may withhold any information or document altogether from I&C representatives or others if giving the information to them would seriously harm the functioning of the undertaking or be prejudicial to it.
- This exemption could apply where, for example, information was so sensitive that, if it were leaked to third parties, whether inadvertently or deliberately, it could cause serious harm or prejudice to the undertaking. Evidence of past leaks might be relevant here.
- The fact that information may be price-sensitive or confidential would not necessarily, by itself, justify withholding information because it can be provided on a restricted basis to I&C representatives under regulation 25.

- **Disputes.** Anyone to whom the employer has provided information or documents 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 justified in the legitimate interest of the undertaking, it may make a declaration to that effect, and the confidentiality restriction will not be regarded as valid.
- In the event of a dispute over information withheld on confidentiality grounds, an application may be made to the CAC for a declaration as to whether the employer is justified in withholding the information. Applications may be brought either by the employer, or by one or more I&C representatives, or where there are no such representatives, one or more individual employees or a representative on their behalf. Where the CAC considers that disclosing the information to the I&C representatives or to others would not prejudice or seriously harm the functioning of the undertaking, it may order the employer to disclose it by a specified date.
- Before making a formal application to the CAC, employers and employees or their representatives are advised to consider discussing the matter with one another to see if a solution can be found.

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<sup>[1]</sup> the penalty provisions do not apply to pre-existing agreements

<sup>[2]</sup> The confidentiality provisions in the legislation do not apply to pre-existing agreements. Employers and employees or their representatives are free to agree whatever confidentiality provisions they wish in a pre-existing agreement. Disputes would not be resolved by the CAC.

<sup>[3]</sup> This guidance refers to "I&C representatives or others". The reference to "others" is intended to cover situations where the employer voluntarily chooses, whether under a negotiated agreement or under the standard provisions, to provide information to people other than I&C representatives. However, there is no obligation to do so.

<sup>[4]</sup> information which could affect the share price of a company listed on a stock market

<sup>[5]</sup> of the Securities Exchange Commission, the New York Stock Exchange and the National Association of Security Dealers

<sup>[6]</sup> This means that price-sensitive information could not be given out under a negotiated agreement that provides only for direct information and consultation with employees, rather than through representatives.

[\[7\]](#) no action may be taken against a person if they reasonably believed a disclosure was protected under Part IVA of the Employment Rights Act 1996 (the so-called “whistle-blower” protection).

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## Rights and protections for I&C representatives and employees

78. *Right to paid time off.* Employees who act as negotiating representatives or I&C representatives are entitled to take reasonable time off during working hours to perform their functions as representatives, and to be paid for this time (see regulations 27 and 28). Employees may complain to an employment tribunal if their employer unreasonably refuses to let them take time off, or fails to pay them for it (see regulation 29).

### *Further guidance on the right to paid-time off for representatives*

- The right to reasonable paid time off during working hours<sup>[1]</sup> applies to employees who are elected or appointed as negotiating representatives or as I&C representatives (whether under a negotiated agreement or because the employer is subject to the standard I&C provisions).
- A complaint may be made to an employment tribunal where an employer has unreasonably refused the time off, or failed to pay the employee. Complaints must be brought within 3 months<sup>[2]</sup> of the time taken off, or when it should have been taken off.
- Where a complaint is upheld, the tribunal must make a declaration to that effect and, if the time off had not been allowed, order the employer to pay the employee the remuneration they were entitled to (in addition to their normal pay), or if the employee had not been paid for the time off, order the employer to pay them what they were entitled to.

79. *Unfair dismissal and detriment.* Employees are protected against unfair dismissal or detriment by their employer when acting as representatives of employees under a negotiated agreement or under the standard information and consultation provisions. They are also protected when standing as candidates for election, or when seeking to enjoy rights given them by the Regulations, and in certain other circumstances. However, the protections do not apply where an employee has disclosed confidential information in breach of a restriction imposed by the employer. A claim for unfair dismissal, or a complaint of detriment, may be brought before an employment tribunal.

### *Further guidance on protection against unfair dismissal and detriment*

- An employee who is:
  - o an employees' representative<sup>[3]</sup>
  - o a negotiating representative

- o an information and consultation representative (where these have been elected or appointed under a negotiated agreement or the employer is subject to the standard provisions)
- o or a candidate to be such a representative

and who was dismissed for performing any function or activity as such, or for requesting paid time-off to act as a representative, would be unfairly dismissed. Similarly, representatives and candidates are protected against detriment by their employer done on the same grounds.

- Protections against unfair dismissal or detriment do not apply where an employee breached a confidentiality restriction imposed under regulation 25<sup>[4]</sup>.
- Any employee (whether or not a representative or candidate) is protected against unfair dismissal or detriment on a number of grounds including for:

- (1) taking proceedings before the CAC or an employment tribunal (whether or not there is a valid complaint, as long as it is made in good faith);
- (2) requesting data on employee numbers under regulation 5;
- (3) acting with a view to securing that an agreement was negotiated or the standard provisions apply;
- (4) indicating support or lack of support for a negotiated agreement or the application of the standard provisions;
- (5) seeking to influence by lawful means how votes were to be cast in a ballot, or voting in a ballot;
- (6) expressing doubts about whether a ballot had been properly conducted.

- The Dispute Resolution Regulations 2004<sup>[5]</sup> will apply to cases of unfair dismissal or detriment relating to the I&C Regulations. They do not apply to complaints made to the CAC. An employee would not be able to bring a complaint of detriment to an employment tribunal if they had not put the reasons for their grievance in writing to their employer at least 28 days before applying to the tribunal. Also, if an employee had not completed the statutory dispute resolution procedure in relation to unfair dismissal or detriment before bringing the complaint to the tribunal, even if they were

successful at the tribunal, their compensation would normally be reduced by between 10 and 50%. An employer who had not set up and followed a procedure that meets the minimum requirements in the Dispute Resolution Regulations, and against whom a complaint was upheld by a Tribunal, would normally have an award against them increased by between 10 and 50%.

## Restrictions on contracting out of rights given by the legislation

80. Employers may not try to exclude or limit the rights and obligations in the Regulations by means of an agreement, for example, through an agreement or contract with a third party, or through employees' contracts. Any provision of an agreement or contract that sought to do so would be void (see regulation 39). Similarly, any provision that sought to prevent someone bringing a dispute or complaint before the CAC or the Employment Appeal Tribunal would generally also be void. Similar rules apply in the case of rights to time off for employee representatives, and protections against unfair dismissal and detriment (see regulation 40), except that a formal agreement can be made not to take proceedings before an employment tribunal.

### *Further guidance on contracting out of rights given by the legislation*

- Employers may not try to exclude or limit the operation of any provision in the I&C Regulations, by means of any agreement. This would include by means of employees' contracts, an agreement or contract with a third party, or a pre-existing or negotiated agreement.
- The restriction on contracting out means, for example, that employees' contracts may not waive their rights to be informed and consulted as provided for by the I&C Regulations.<sup>[6]</sup> A contract for the sale of the undertaking, or part of it, could not prevent employers informing and consulting employees or their representatives about the sale if they were required to do so by the standard I&C provisions or by a negotiated agreement (although the provisions on confidential information may be relevant).
- A pre-existing agreement could not prevent employees making a request to negotiate a new I&C agreement (although if an employee request had been made that was not endorsed by the workforce in a ballot the 3-year moratorium on subsequent requests would be relevant).
- Regulation 39 is not intended to prevent negotiated or pre-existing agreements that differ from the standard provisions in regulation 20, for example by providing for information and consultation on different subjects, by different means, or with different timing, since this is expressly allowed by the legislation. However, Article 5 of the EC directive would only allow negotiated agreement to contain provisions that are different from the standard rules in regulation 20 (which transpose Article 4 of the directive), not provisions that differ from other requirements of the legislation. So for instance, negotiated agreements could not deal with confidentiality issues in a way that was contrary to the confidentiality provisions in regulations 25 and 26, and could not exclude the right to make an application or complaint to the CAC or to the Employment Appeal

### Tribunal (EAT).

- The restriction on contracting out does not apply to an agreement to stop proceedings before the CAC or the EAT, for example, because a dispute had been settled “out of court”.
- Any provision in an agreement (including an employee’s contract) which sought to exclude or limit employees’ rights to paid time-off, or to prevent someone bring a complaint to an employment tribunal under Part VIII of the Regulations, would be void. There are special provisions concerning formal agreements to refrain from instituting or continuing proceedings before an employment tribunal under Part VIII.

## Other points

81. **Changes in the undertaking.** Where there is a significant increase or decrease in the number of employees, for example, as a result of an acquisition, divestment or merger, or simply through substantial recruitment or redundancies, the employer and employees or their representatives will need to consider the implications for existing consultation arrangements.

82. A pre-existing or negotiated agreement must cover all the employees in an undertaking, so it is advisable to word it in such a way that new employees would automatically be covered. It is also advisable to include a provision stating how a restructuring will be dealt with, for example, in terms of any changes in the number and identity of employee representatives, including if appropriate arranging for new, additional or fewer representatives to be appointed or elected, and the possibility of revising the agreement.

83. **Crown employees.** Employees of the Crown are covered by the Regulations if they work in an undertaking that carries out an economic activity.

84. **Administrators and receivers.** Where there is a negotiated agreement, or an employer is subject to the standard information and consultation provisions, the obligation to inform and consult in accordance with that agreement or the standard provisions will continue to apply where a company goes into administration or receivership. The administrator or receiver would be acting on behalf of the employer who will continue to be subject to the obligations in the agreement or the standard provisions. The administrator or receiver must fulfil the employer's obligations, but would not be personally liable for failing to do so. The requirement to inform and consult would also continue to be subject to the provisions allowing confidential information to be subject to a confidentiality restriction in the legitimate interest of the undertaking, or to be withheld where disclosure would seriously harm the functioning of the undertaking or be prejudicial to it.

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<sup>[1]</sup> working hours are any time when employees are required by their employment contracts to be at work

<sup>[2]</sup> a tribunal can extend this 3 month deadline where it is satisfied it was not reasonably practicable to bring the complaint within that period

<sup>[3]</sup> that is, someone who may on behalf of employees, request data on employee numbers (see regulation 5), or who may bring a complaint to the CAC, ie concerning an endorsement ballot (see regulations 8(7) and 10(1) and (2)), concerning an employer notification (see regulation 13(2)), concerning the appointment or election of negotiating representatives (see regulation 15(1)), or

concerning proposed ballot arrangements under Schedule 2 (see Schedule 2 paragraph 3); or who must be consulted about ballot arrangements under Schedule 2 (see Schedule 2 paragraph 2(f) and (g)) .

<sup>[4]</sup> unless it was a “protected disclosure” (the so-called “whistle-blower” protection)

<sup>[5]</sup> The Employment Act 2002 (Dispute Resolution) Regulations 2004 (SI 2004/752)

<sup>[6]</sup> this does not mean that a pre-existing or negotiated agreement must follow the standard provisions in regulation 20

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## Glossary of terms and abbreviations

Acas	Advisory, Conciliation and Arbitration Service. Acas provides up-to-date information, advice and training to help employers and employees solve problems and improve employment relations.
Anonymous request	An employee request to negotiate an I&C agreement sent via the CAC which will handle it on the employees' behalf if they do not want to divulge their identity to their employer
CAC	Central Arbitration Committee. The CAC has the main enforcement role under the Regulations.
Confidentiality restriction	A restriction on information given by an employer to employee representatives preventing them passing it to anyone else except as permitted by the employer.
Contracting out	Agreeing to exclude or limit the operation of any right or obligation in the I&C Regulations, for example through an employment contract. This is not permitted by the legislation except in limited circumstances.
EAT	Employment Appeal Tribunal. The EAT hears appeals against CAC and employment tribunal decisions, and is responsible for imposing penalties.
Employee request	A request made by the employees to their employer under regulation 7 to negotiate an I&C agreement.
Employer notification	A notification by an employer to his/her employees under regulation 11 of an intention to negotiate an I&C agreement. This allows an employer to start the statutory process without waiting for an employee request.
Endorsement ballot	A ballot of all the employees in an undertaking to see if they support an employee request to negotiate an I&C agreement. The ballot is allowed where the employer already has a valid pre-existing agreement. At least 40% of the workforce and a majority of those who vote must support the employee request in order

	to require the employer to negotiate a new I&C agreement.
I&C representatives	Information and Consultation representatives who are informed and consulted under either a negotiated agreement or the standard I&C provisions.
Listing Rules	Rules drawn up and enforced by the Financial Services Authority. They apply to companies whose shares are “listed”, a requirement for admission to the main market of the London Stock Exchange.
Moratorium	A prohibition on employee requests and employer notifications to negotiate an I&C agreement. The prohibition normally applies for three years from the date of a negotiated agreement; the date on which the standard I&C provisions apply; or the date of an employee request which was not endorsed by the workforce in a ballot where there is a valid pre-existing agreement.
Negotiated agreement	An agreement negotiated between the employer and negotiating representatives under regulation 14, following a valid employee request, or an employer notification, and that meets the requirements in regulation 16.
Negotiating representatives	Representatives of the employees elected or appointed by the employees under regulation 14 to negotiate an I&C agreement following an employee request or an employer notification.
Pre-existing agreement	An agreement approved by employees before an employee request is made, and that meets the four criteria in regulation 8(1).
Price-sensitive information	Information which would be expected to cause a movement in a listed company’s share price.
Standard I&C provisions	The standard information and consultation provisions that apply where an employer fails to initiate negotiations for an I&C agreement when required to do so, or where negotiations have failed to lead to an agreement.

Undertaking	In the case of companies, a separately incorporated <b>legal</b> entity as distinct from an organisational entity such as an establishment (site) or business unit.
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## **Annex 1: Suggestions for contents of pre-existing or negotiated agreements**

This annex makes suggestions for the contents of pre-existing or negotiated agreements. It is not intended to be prescriptive. Employers and employees or their representatives are free to agree whatever arrangements they wish as to the method, frequency, timing and subject-matter of information and consultation, according to the specific circumstances of their own organisation. ACAS publishes good practice guidance on drawing up voluntary agreements for information and consultation.

Pre-existing or negotiated agreements may provide for separate and different arrangements in different parts of the undertaking, such as different establishments or business units.

### Coverage

- The undertaking covered by the agreement (or group of undertakings in the case of agreements covering more than one)
- Which employees in the undertaking(s) are covered by the agreement. (A negotiated agreement must cover all employees in the undertaking, though it could consist of several parts each of which only covers some of the employees. In the case of a pre-existing agreement, if the agreement does not cover all employees in the undertaking, there must be one or more other agreements which cover the remaining employees.)
- Whether separate arrangements will exist in different parts of the undertaking (for example, in different establishments, organizational divisions, or sections of the workforce)
- Where the employer has one or more collective agreements with trade unions, what the relationship is between those collective agreements and this agreement

### Methods of information and consultation

- The type of arrangements to be set up, including whether there will be representatives of employees, and/or direct information and consultation with the workforce
- Whether any “hierarchy” of structures will be set up, eg at national, regional, local level
- How any representatives of employees are to be chosen or appointed, how many such representatives, how long they will serve, how they are to be replaced
- Any facilities and time off for employee representatives

- Any obligations there may be on any employee representatives, for example, to report back to the workforce or to seek their views
- The nature of any direct forms of information and consultation with the workforce

#### Frequency and timing of information and consultation

- How often information and consultation will take place
- When information and consultation will take place

#### Subject-matter

- Types of subjects to be covered
- How subjects will be chosen and how agendas of any meetings will be drawn up

#### Information and consultation

- The type and nature of information to be provided
- How views/opinions of employees can be given
- What the employer will do in response Who will represent management at any meeting

#### Statutory consultation requirements

- How other legal requirements to consult employees (eg on collective redundancies, business (TUPE) transfers, health and safety, European Works Councils, pensions) will be handled where relevant, and what the relationship will be with the consultation arrangements set up under this agreement
- Employers and employees may wish to agree either to expressly exclude from the scope of the agreement matters about which there is a separate statutory obligation, or to adopt a similar arrangement to that allowed by regulation 20(5) of the standard I&C provisions. This would be to avoid being subject to two different legal requirements to consult over the same issue.

#### Confidential information

- How confidential or price-sensitive information will be dealt with (in the case of a negotiated agreement, this must be consistent with the requirements in I&C regulations 25 and 26 concerning confidential information)
- Obligations on anyone in receipt of confidential information
- Disciplinary measures for breach of any confidentiality restriction

#### Disputes

- How disputes can be resolved, ie disputes about whether the employer has properly informed and consulted in accordance with the agreement. (A negotiated agreement is enforceable at the Central Arbitration

- Committee, but it is advisable to have a mechanism for trying to resolve disputes without the need for a formal complaint.)
- In the case of a pre-existing agreement, whether it is legally enforceable

### Restructuring

- Implications of a company restructuring for I&C structures, for example, the implications for the number and identity of any employee representatives, or the possibility of revising the agreement

### Duration of agreement

- Duration of the agreement and the circumstances in which it can be reviewed, revised or terminated. This could be important because a three year moratorium on employee requests for a new I&C agreement (and on employer notifications under regulation 11) may apply.

## **Annex 2: Announcements to employees involving price-sensitive information (1)**

### Introduction

1. One of the key drivers behind the Government's approach to the implementation of the Information and Consultation Directive is that employees deserve fair treatment at work. This is particularly so when there have been rumours of a company restructuring, or an announcement of proposed redundancies is to be made. Ultimately, the decision to undergo a restructuring is for management but a commitment to establish a clear process and to communicate in an open and timely way with employees and their representatives is vital.
2. Employees have a right to know when their jobs are at risk. It is not acceptable that such news is first heard through the media. The reason sometimes given by employers for this is that these types of announcements involve price sensitive information which is required to be disclosed to the financial markets before it is disclosed to the employees themselves. This is not the case. This annex is intended to clarify that the Listing Rules and other equivalent rules do allow disclosure of price-sensitive information simultaneously to the financial markets and to the employees. Many companies already do this, and the Government strongly support such good practice.

### The Listing Rules

3. Companies whose securities are listed (a requirement for admission to the main market of the London Stock Exchange) are subject to rules drawn up and enforced by the Financial Services Authority. These rules are known as the Listing Rules. Following the implementation of the Market Abuse Directive, the rules relating to disclosure of price sensitive information will also apply to issuers whose securities are admitted to trading on a regulated market. Among the aims of the Listing Rules is the maintenance of an orderly market by seeking to ensure that all market participants have simultaneous access to accurate price-sensitive information. This too is a fundamental principle of the AIM and OFEX rules.
4. Chapter 9 of the Listing Rules requires issuers to announce price sensitive information without delay<sup>[2]</sup>. Equivalent standards are contained in the AIM and OFEX rules. A major restructuring operation will often be price-sensitive. In other words, the announcement of the proposed restructuring would be expected to cause a movement in the company's share price, reflecting the market's re-evaluation of the company's new prospects. If this is not the case the obligations in Chapter 9 of the Listing Rules will not be relevant.

5. As discussed at paragraph 76 of the guidance on confidential information, employee representatives may be privy to price sensitive information on a confidential basis before it is publicly announced. However, neither the Listing Rules, nor the AIM or OFEX rules or the City Code on Takeovers and Mergers allow companies to give price-sensitive information to all the employees during the pre-announcement phase. In order to give a reasonable guarantee that information will be kept confidential, the circle of people privy to price-sensitive information must necessarily be a restricted one<sup>[3]</sup>. To inform more widely before a public announcement would mean that a group of potential and perhaps actual shareholders (the employees) were given access to price-sensitive information before others, which might risk creating a disorderly market and might also lead to breaches of the insider dealing provisions and the market abuse regime.

6. The Listing Rules and its equivalents require announcements involving price-sensitive information to be made as soon as proposals are finalised. This is to reduce the possibility of leaks between the taking of a decision and its announcement. For some companies the practice appears to have developed that the board will approve decisions towards the end of the day, after trading in the Stock Exchange has ceased, and then notify them to a Regulatory Information Service for release at 7am the following day, before trading starts. A consequence of this is that in large-scale restructurings involving redundancies, the affected employees may first learn of the proposals through early morning news reports before they arrive at work, rather than directly from their employer. This is a deeply unsatisfactory situation for employees.

#### Good practice

7. The Listing Rules and its equivalents do not prescribe the specific time of day at which announcements should be made, only that the announcement must be made without delay. With this in mind the Government considers it good practice for a company to take such decisions during working hours so that the details can be released directly at the same time both to the stock market and the employees. There are provisions in the Listing Rules for submitting announcements at any time of the day and they can be released to market at any point between 7am and 6.30pm (there are other arrangements for releasing market announcements outside of these hours). <sup>[c1]</sup>This would allow the company to make a simultaneous announcement in the workplace to the employees concerned.

8. Many companies already do this and announce a decision involving price sensitive information to its workforce at the same time as to the market, by making the simultaneous announcement more or less straight after the decision is taken. The Government strongly supports this approach. However, it should be noted that the announcement of a decision could not be delayed overnight

until after the market had opened and employees were at work as that would constitute a breach of the Listing Rules.

9. Of course it may not always be possible to inform every single employee directly before they hear about the announcement through other channels. For example shift workers may not be at the workplace if an announcement there was made at say 3.00 pm. Also it may be difficult to control the timing of announcements made by multinational companies based in other countries and who are carrying out global restructuring operations.

#### Companies listed in the US

10. It has sometimes been said that companies whose shares are also listed on the New York Stock Exchange are prevented by US rules from either sharing price-sensitive information with employee representatives in advance of market disclosure, or of timing their announcement in the way advocated in this guidance. The Securities Exchange Commission's Regulation on Full Disclosure (FD) applies to disclosures outside the company and generally requires non-selective disclosure of price-sensitive information. However, a disclosure made to employees would not be outside the company, and so would not be subject to Regulation FD. Similarly, the New York Stock Exchange rules and the National Association of Security Dealers rules do not prevent disclosures of price-sensitive information to employees.

11. Some UK companies with a dual London and New York listing, time their announcements for the afternoon in the UK which would be the morning in New York

#### Conclusion

12. Employers sometimes have to make difficult decisions that impact upon their employees. But how they approach this is important both for the sake of the affected employees and also to allow the restructured company to move forward with good morale among the employees who remain. The Government believes that it is not acceptable that employees should hear about these kinds of developments via the media. Nor is it a legitimate defence to cite rules covering market announcements, either in the UK or overseas, as the reason why this should happen. Companies should be able to ensure that most of the employees affected by important announcements learn about them directly via company channels, no later than the public announcement is made.

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<sup>[1]</sup> DTI has consulted the Financial Services Authority, AIM Regulation, OFEX Plc, The Takeover Panel, Her Majesty's Treasury and the US Securities and Exchange Commission over the factual content of this annex.

<sup>[2]</sup> Chapter 9 of the Listing Rules will be revised as part of the implementation of the EU's Market Abuse Directive. The changes will come into force in the course of 2005. They will not change the need for companies to release inside information in a timely fashion.

<sup>[3]</sup> The City Code on Takeovers and Mergers requires that in the period before the announcement of a bid only a very restricted number of people can be privy to this information. The Panel's Annual Report 2003 stated that a very restricted number of people would generally be interpreted to mean no more than six external persons or parties. The Panel generally regards employee representatives as constituting one "person" for this purpose, but may take the view that this would not be appropriate if a large number of representatives were appointed.