

OUTCOME OF THE PUBLIC CONSULTATION ON IMPLEMENTATION OF THE EUROPEAN WORKS COUNCIL DIRECTIVE

1. The Government has now made Regulations to implement the European Works Councils directive. These are the Transnational Information and Consultation of Employees Regulations 1999, which come into force on 15 January 2000. The Regulations will be available from the Stationery Office (telephone 0870 600 5522, or HMSO website: <http://www.legislation.hmso.gov.uk/stat.htm#1999>). This note sets out the outcome of the public consultation and records the main changes from the draft Regulations included in the consultation.
2. The DTI held a public consultation between 2 July and 8 October on the implementation of the directive. The consultation document was sent to 1,100 interested parties and was also placed on the DTI website. In addition, the Department held a seminar which was attended by about 80 interested parties. There were 51 formal responses. The main issues raised in the consultation and the Government's response are outlined below.

Application of the Regulations and central management

3. The Regulations have been amended to make clear which Regulations apply only to undertakings whose central management (or representative agent) is in the UK, and which ones apply to all Community-scale undertakings irrespective of the location of their central management. The Regulations falling into the latter category include those concerning controlling undertakings, provision of information about employee numbers, calculation of UK employee numbers, selection of the UK members of a special negotiating body, statutory protections, and transitional provisions.

Pre-existing "Article 13" agreements

4. The Regulations do not apply to undertakings which on 15 December 1999 had a pre-existing "article 13"¹ agreement, provided it fulfils certain conditions as set out in the Regulations. Some respondents considered that to be valid such agreements had to be legally binding on the parties and that this should be specified in the Regulations. Some also considered that disputes about the operation of article 13 agreements should be referred to the CAC or EAT in the same way as disputes about agreements made pursuant to the Regulations. The

¹ The term "Article 13" agreements is used for both voluntary agreements made before 23 September 1996 under the original directive and those made under "Article 3" of the extending directive before 16 December 1999 which exempt undertakings from the obligations of the directive.

Government's view is that it is up to the parties to such agreements, which were freely negotiated before the Regulations came into force, to decide on their legal status and on arrangements for dispute resolution. The directive does not state expressly that they must be legally binding and the Government has chosen not to elaborate on this point. Neither the CAC nor the EAT are given a role in the Regulations in terms of resolving disputes about their operation.

5. The CAC or EAT may however have to rule on the validity of an article 13 agreement, i.e. whether it fulfils the criteria for exemption from the Regulations. For example, if an undertaking which considers it has a valid article 13 agreement receives a request for an EWC, it may apply to the CAC within 3 months of receiving a valid request for a declaration that it is not subject to the Regulations. The CAC may then consider, in deciding whether to make such a declaration, whether the agreement covers the entire workforce and provides for the transnational information and consultation of employees, and was concluded within the time periods specified in the Regulations. Beyond that, however, the CAC would not be expected to rule on any matters arising from the operation of the agreement. If the undertaking made no application to the CAC and the employees who had made the request subsequently complained to the EAT that the management had refused to negotiate, then the EAT may take a view on whether the undertaking was subject to the Regulations (see also paragraph 9 below).

Repatriation of existing agreements

6. Some undertakings whose central management is in the UK already have EWC agreements which may have been made under the law of another member state. Some respondents thought that the Regulations should provide for the automatic "repatriation" of these agreements to the UK, or should give management discretion to do so. The UK Regulations provide that such agreements may henceforth be operated subject to the UK Regulations (e.g. as regards enforcement or confidentiality), if the parties to the agreement so decide. The decision to switch to UK jurisdiction would therefore be for both the management and employee sides. If an EWC agreement of a UK undertaking remains subject to the Regulations of another member state, then the UK Regulations will not apply to it (save for those provisions which apply irrespective of the location of central management as noted in para. 3 above). All new EWC agreements entered into by undertakings with UK central management after the entry into force of the UK Regulations will automatically be subject to them in full, including those where negotiations started under the law of other Member State. (See also the paragraph on transitional provisions below.)
7. No provision is made for the repatriation of article 13 agreements, consistent with the approach that they are private agreements which are not subject to the

Regulations. If the parties wish to make them subject to e.g. English law (other than the Regulations), that is up to them.

Status of EWC agreements

8. Some respondents considered that an “article 6” EWC agreement negotiated pursuant to the Regulations, as opposed to the “statutory” fall-back one, would constitute in UK law a collective agreement and should not therefore be legally binding. The Government’s view is that EWC agreements which implement the obligations imposed by the directive have to be enforceable. The Regulations therefore provide enforcement mechanisms through the CAC and EAT (or Industrial Court in Northern Ireland) in respect of all such agreements.

Disputes about the applicability of the Regulations

9. As noted in paragraph 5 above, where management has received a request for an EWC but considers that the Regulations do not apply to it (e.g., where it maintains that the organisation is not an undertaking, or is not of Community-scale, or already has a valid article 13 agreement, or an EWC agreement); or where it considers that a request for an EWC has not been properly made (e.g., not supported by the requisite number of employees) and is therefore invalid, it may apply to the CAC for a declaration to that effect. Some amendments have been made to these procedures which are now in one regulation (10). The application should be made within three months of first receiving a request, where the validity of the request is in dispute, and within three months of the date of a valid request, where the application of the Regulations is in dispute
10. If an undertaking which considers the Regulations do not apply to it does not make an application to the CAC, there is the possibility that after 6 months the employees may complain to the EAT that management has refused to negotiate and that a “statutory” EWC must now be established, as per the Schedule to the Regulations. If the EAT finds the complaint is well founded it may order the establishment of the “statutory EWC” and shall impose a civil financial penalty unless it considers the failure was for a reason beyond management’s control or that management had a reasonable excuse for its actions.

Definition of “Controlling Undertaking” in the case of joint ventures

11. Some respondents wanted the Regulations to prescribe rules for determining which undertaking should be considered the controlling one where two or more undertakings are equal partners in a joint venture such that none exercises a “dominant influence”. However there was no consensus on what the rules should be, and the Government has decided not to make specific provision.

Therefore there will not be a “controlling” or “controlled” undertaking if dominant influence cannot be demonstrated. A joint-venture undertaking might however be a Community-scale undertaking in its own right.

Exception for merchant navy crews

12. It was proposed that management may exclude merchant navy crews, apart from ferry or coastal workers (as defined in the Regulations), from membership of the SNB or EWC. The exclusion only applies where the central management is in the UK and does not otherwise affect the rights of all merchant navy crew members to be counted and included within the scope of an EWC. Some respondents opposed the exclusion whilst others wanted a complete exclusion for merchant navy crews. The Government has decided not to change the substance of the original proposal.

Definition of “employee”

13. Some respondents would have preferred the term “worker” to be used for the purposes of the Regulations rather the proposed definition of employee, while others were supportive of the “employee” definition. The Government does not consider the “worker” definition is appropriate in this case. The proposed method for calculating employee numbers received broad support and is also largely unchanged.

Counting of “part-time” employees

14. Part-time employees will have the same rights as full-time ones in undertakings which are of Community-scale. Some respondents were opposed to management having the option to count as half an employee those who are contracted to work less than 75 hours per month, for the purposes of determining whether the undertaking is of Community-scale and therefore subject to the Regulations. The Government believes that a pro-rata approach is appropriate for these purposes and is consistent with the numerical approach which the directive uses in applying an employee-numbers based threshold calculated on the basis of a two year reference period.

Eligibility of non-employees to stand for election to the SNB

15. A number of respondents wanted SNB membership to be restricted to employees only. The Government is however satisfied that all employees’ representatives who normally act on behalf of employees in the UK for the purposes of collective bargaining or information and consultation should have the opportunity to stand for election to the SNB, though the definition has been amended slightly to clarify

that the representative must normally take part as a negotiator in the bargaining process. Employees will therefore be able to elect, if they so wish, their habitual representatives to negotiate for them in the SNB. Whether or not non-employees can be members of an agreed EWC is a matter for negotiation, while the directive restricts membership of the statutory EWC to employees only.

Selection of UK members of the Special Negotiating Body (SNB)

16. There was support for the proposal that the UK members of the SNB (which negotiates with management for an EWC agreement) be elected by workforce ballot. Some respondents wanted existing employee representatives to be able to nominate the UK SNB members. The Government believes that a ballot is the right approach in most cases, but has accepted a suggestion that, where there exists a consultative committee whose members have been elected by all the UK employees and which fulfils an information and consultation role on their behalf, the committee members should have the right to nominate the UK members of the SNB from among their number. As representatives elected by the whole UK workforce, the committee members will have the appropriate mandate to justify their making nominations to the SNB on behalf of the UK employees. The committee, as a body, must represent all the employees of the undertaking, or group of undertakings, in the UK.
17. Concerning the conduct of the ballot for the election of the UK members of the SNB, the Regulations have been adjusted to reflect comments by respondents on the following aspects. First the Government has relaxed the proposed constraints on the way in which management may split the undertaking into constituencies where there is more than one SNB seat for the UK workforce, subject to the overall requirement that the constituencies must be in the interests of the UK employees as a whole. Second, management will be required to consult, as far as practicable, employees' representatives on the arrangements for the ballot. Third the independent "ballot supervisor", who will organise the ballot, will have the power to invalidate the ballot where he considers that there have been irregularities which affected the outcome.

Allocation of seats on the SNB

18. Where the central management is in the UK, it is the UK Regulations that determine the number of seats on the SNB to be allocated between the representatives of employees from the various Member States where the undertaking has operations. Several respondents considered that it would be preferable to follow the allocation formula adopted by most other Member States rather than the variation proposed in the consultation document. Accordingly the Regulations now provide, in addition to the first seat, extra ones per Member State where they have 25%, 50% and 75% of the total EU employed workforce. The maximum number of seats available to the employees in one member state

would therefore be four, where more than 75% of the workforce was employed there.

19. Some respondents asked whether it was necessary to allocate an SNB seat to employees in a member state where the workforce was very small. There is no de minimis exception in the directive which would allow the undertaking to deny a seat to employees in a member state on the grounds that they were too few to warrant representation. The employees are therefore entitled to their seat, but it may happen that they choose not to take it up.

Time-limit for negotiations with the SNB

20. A number of respondents said that the proposal to extend the 3 year negotiating period by mutual consent of the management and SNB was unnecessary and not permitted by the directive. This proposal has been dropped from the Regulations, with the result that an EWC agreement must be concluded within three years from a valid request, or else the statutory EWC model applies (unless the SNB decided to terminate the negotiations).

Enforcement

21. The Government's proposals to enforce the Regulations through the Central Arbitration Committee and the Employment Appeal Tribunal were broadly welcomed, including the proposal to enable the EAT to impose civil financial penalties of up to £75,000 in certain circumstances. The Regulations apply to the UK as a whole including N Ireland, but as the jurisdictions of the CAC and EAT are limited to Great Britain, issues or disputes relating to undertakings whose central management is based in Northern Ireland will in general be heard by the Industrial Court there.
22. A significant number of respondents thought it was necessary for there to be a right of appeal from the CAC to the EAT on points of law, and this has been incorporated into the Regulations. In N Ireland the N.I. Court of Appeal will hear any appeals from the Industrial Court.
23. The Regulations have been amended to make clear that where the CAC considers that an application was made vexatiously or abusively, the time-limits concerning the negotiation of an EWC (6 months and 3 years) will not be suspended for the period of the CAC's consideration of the application.
24. Some respondents believed that management should not be required to pay the EWC's legal costs for proceedings before the EAT, where the normal rules are that each side pays its own costs. The Government has decided that the normal EAT rules on costs should also apply in the case of EAT proceedings arising from these Regulations. Part of the reason for using the CAC and EAT in the

enforcement of the Regulations was their relative accessibility - legal representation is not necessary.

Chairing of “statutory” EWCs (created according to the Schedule)

25. Some respondents objected to the proposal that in the absence of any agreement to the contrary, the chairmanship of a “statutory” EWC should alternate between management and the employee side. The directive does not oblige Member States to legislate on this matter and the Government has decided to leave it to the parties to decide.

Confidential information

26. The directive allows management to withhold information from the SNB or EWC where its release could seriously harm or prejudice the company, according to objective criteria. Some respondents wanted the Regulations to define specific circumstances in which information can be withheld from the EWC, e.g. where there may be a conflict with British or foreign Stock Exchange rules. The Government accepts that a conflict with regulatory rules, for example, may result in serious harm and prejudice to the undertaking if the release of information to the EWC breached those regulatory rules, and that such a breach might be considered an objective criterion. But this may not always be the case and the Government believes that the test of serious harm or prejudice will have to be judged on a case by case basis in the light of all the relevant circumstances. The Regulations do not therefore elaborate on the precise circumstances in which information may be withheld or required to be held in confidence. Any disputes about this may be referred to the CAC.

Leaks of confidential information by EWC/SNB Members

27. Many respondents opposed the proposal that it should be a criminal offence for an SNB/EWC member to leak information provided to him in confidence. It was considered that an offence would be disproportionate to the mischief involved, potentially difficult to prosecute and could set the wrong climate for a positive dialogue. In the light of this the Government has decided to drop the offence from the Regulations and has instead provided for the possibility of civil actions. It has however been made clear that an SNB or EWC member who has made an unauthorised disclosure of confidential information will lose the right to protection against unfair dismissal and victimisation otherwise afforded by the Regulations.

Transitional provisions

28. There was broad support for the policy of leaving undisturbed negotiations in train, except to ensure that UK employees were fully represented. Where an

undertaking with a UK central management (or representative agent) has started negotiations under the implementing regulations of another Member State but not yet set up an EWC, the negotiations will continue subject to the UK Regulations after their entry into force, on the same timetable as had previously applied (i.e. the process will not start over again). The SNB need not be re-constituted and existing UK representatives need not be re-selected. However, where there are less UK representatives on the SNB than should be the case according to the formula for allocation of seats on the SNB, additional ones should be elected or appointed according to the procedures in the UK Regulations. The subsequent EWC agreement will be subject to the UK Regulations in the normal way, e.g. as regards enforcement and confidentiality rules.

29. The same approach applies where a “statutory” EWC has been established under the law of another Member State with an insufficient number of UK employee representatives, i.e. additional representatives should be selected, according to the procedures in the UK Regulations, to make up the required numbers according to the formula in the applicable member state legislation. Any adjustments in the case of article 6 (negotiated) EWC agreements will depend on the terms of the agreement as regards the number of representatives per member state.

Time-off for training

30. Some respondents wanted EWC and SNB members to be given time-off for training in their duties. The Government believes this is a matter best left to the parties to the negotiation/agreement to decide.

ER, DTI
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