

**EUROPEAN PUBLIC LIMITED-LIABILITY COMPANY  
ACT 2005****Principal Act**

<b>Act. No. 2005-23</b>	<i>Commencement</i>	31.3.2005
	<i>Assent</i>	29.3.2005

Amending enactments	Relevant current provisions	Commencement date
LN. 2012/066	ss. 16(1), 18(2)(d), (e) & (f), 28(3A), 32(3A) & Sch. 2	26.4.2012
Act. 2014-04	s. 3(2) & Sch.	27.2.2014
2016-20	s. 16(1)	13.10.2016

**EU Legislation/International Agreements involved:**

Directive 68/151/EEC

Directive 78/855/EEC

Directive 89/667/EEC

Directive 94/45/EC

Regulation (EC) No 2157/2001

Directive 2001/86/EC

Directive 2008/104/EC

**English sources:**

None cited

**ARRANGEMENT OF SECTIONS****PART 1****GENERAL**

1. Title and commencement.
2. EC Directive and EC Regulation.
3. Interpretation.

**PART 2****REGISTRATION OF SEs AND THE REGISTRAR ETC.**

4. The Registrar.
5. Registration of an SE formed by merger in accordance with Article 2(1).
6. Registration of the formation of a holding SE in accordance with Article 2(2).
7. Registration of the formation of a subsidiary SE in accordance with Article 2(3).
8. Registration of an SE by the transformation of a public company in accordance with Article 2(4).
9. Registration of an SE formed as the subsidiary of an SE in accordance with Article 3(2).
10. Registration of an SE on the transfer of its registered office to Gibraltar in accordance with Article 8.
11. Certificate of the competent authority under Article 8(8).
12. Registration of an SE.
13. Documents sent to the Registrar.
14. Application of certain provisions to the registration of SEs.
15. False statements in documents sent to the Registrar or the Minister.

**PART 3****EMPLOYEE INVOLVEMENT****CHAPTER 1****INTERPRETATION OF PART 3**

16. Interpretation of Part 3.

**CHAPTER 2**

**PARTICIPATING COMPANIES AND THE SPECIAL  
NEGOTIATING BODY**

17. Circumstances in which certain provisions of Part 3 apply.
18. Duty on participating company to provide information.
19. Complaint of failure to provide information.
20. Function of the special negotiating body.
21. Composition of the special negotiating body.
22. Complaint about establishment of special negotiating body.

**CHAPTER 3**

**ELECTION OR APPOINTMENT OF GIBRLATAR MEMBERS OF  
THE SPECIAL NEGOTIATING BODY**

23. Ballot arrangements.
24. Conduct of the ballot.
25. Appointment of Gibraltar members by a consultative committee.
26. Representation of employees.

**CHAPTER 4**

**NEGOTIATION OF THE EMPLOYEE INVOLVEMENT  
AGREEMENT**

27. Negotiations to reach an employee involvement agreement.
28. The employee involvement agreement.
29. Decisions of the special negotiating body.
30. Decision not to open or to terminate negotiations.
31. Complaint about decisions of the special negotiating body.

**CHAPTER 5**

**STANDARD RULES ON EMPLOYEE INVOLVEMENT**

32. Standard rules on employee involvement.

**CHAPTER 6**

**COMPLIANCE AND ENFORCEMENT**

33. Disputes about operation of an employment involvement agreement or the standard rules on employee involvement.
34. Penalties.
35. Misuse of procedures.
36. Exclusivity of remedy.

**CHAPTER 7****CONFIDENTIAL INFORMATION**

- 37. Breach of statutory duty.
- 38. Withholding of information by competent organ.

**CHAPTER 8****PROTECTION FOR MEMBERS OF SPECIAL NEGOTIATING BODY, ETC.**

- 39. Right to time off for members of special negotiating body, etc.
- 40. Right to remuneration for time off under section 39.
- 41. Right to time off: complaints to Tribunal.
- 42. Unfair dismissal.
- 43. Unfair dismissal: application and reasons.
- 44. Detriment.
- 45. Detriment: enforcement and subsidiary provisions.

**CHAPTER 9****MISCELLANEOUS**

- 46. Tribunal proceedings.
- 47. Restrictions on contracting out: general.
- 48. Restrictions on contracting out: Chapter 8 of this Part.
- 49. Existing employee involvement rights.

**PART 4****EXERCISE OF MEMBER STATES OPTIONS UNDER THE EC REGULATION**

- 50. Participation in the formation of an SE by a company formed under the law of a Member State whose head office is not in the Community (Article 2(5)).
- 51. Additional forms of publication of transfer proposal (Article 8(2)).
- 52. Extension of protection given by Article 8(7) to liabilities incurred prior to transfer (Article 8(7)).
- 53. Power of the competent authorities of a Member State to oppose a transfer on public interest grounds (Article 8(14)).
- 54. Power of the management or administrative organ of an SE to amend statutes where in conflict with employee involvement arrangements (Article 12(4)).

55. Power of the competent authorities of a Member State to oppose the participation of a merging company governed by its law on public interest grounds (Article 19).
56. Minimum number of members of the management organ (Article 39(4)).
57. Minimum number of members of the supervisory organ (Article 40(3)).
58. Members of the supervisory organ to be entitled to require the management organ to provide certain information (Article 41(3)).
59. Minimum number of members of an administrative organ (Article 43(2)).
60. Timing of the first general meeting of an SE (Article 54(1)).
61. Proportion of shareholders of an SE who may require one or more additional items to be put on the agenda of any general meeting (Article 56).
62. SEs subject to law on public limited liability companies as regard the expression of their capital (Article 67(1)).

## **PART 5**

### **PROVISIONS REQUIRED BY THE EC REGULATION**

63. Publication of terms of transfer, formation and conversion (Articles 8(2), 32(3) and 37(5)).
64. Publication of completion of merger (Article 28).
65. Publication of fulfilment of conditions for the formation of a holding SE (Article 33(3)).
66. Publication of other documents or information (Articles 8(12), 15(2), 59(3) and 65).
67. Protection of creditors and others on a transfer (Article 8(7)).
68. Power of Minister where an SE no longer complies with the requirements of Article 7.
69. Review of decisions of a competent authority (Articles 8(14) and 19).

## **PART 6**

### **PROVISIONS RELATING TO THE EFFECTIVE APPLICATION OF THE EC REGULATION**

70. Competent authorities.
71. Enforcement of obligation to amend Statutes in conflict with Arrangements for Employee Involvement.
72. Records of an SE transferred under Article 8(11) or a public company ceasing to exist under Article 29(1) and (2).
73. Application of enactments to members of supervisory, management and administrative organs.

- 74. Register of members of supervisory organ.
- 75. Particulars of members to be registered under section 74.
- 76. The SE as a body corporate.
- 77. Notification of Amendments to Statutes and Insolvency Events (Articles 59(3) and 65).
- 78. Accounting Reference Period and Financial Year of Transferring SE.
- 79. Penalties for Breach of Article 11 (use of SE in name).

## **PART 7**

### **PROVISIONS RELATING TO THE CONVERSION OF AN SE TO A PUBLIC COMPANY IN ACCORDANCE WITH ARTICLE 66 OF THE EC REGULATION**

- 80. Registration of a public company by the conversion of an SE.
- 81. Publication of draft terms of conversion.
- 82. Registration under the Companies Act.
- 83. Effect of registration.
- 84. Records of a converting SE.

#### **SCHEDULE 1**

Provisions applying to the registration of SEs

#### **SCHEDULE 2**

Standard rules on employee involvement

#### **SCHEDULE 3**

Modifications of the Companies Act

#### **SCHEDULE 4**

The EC Regulation

AN ACT TO MAKE PROVISION FOR THE PARTS OF COUNCIL REGULATION (EC) NO 2157/2001 OF 8 OCTOBER 2001 ON THE STATUTE FOR A EUROPEAN COMPANY (SE) WHICH PERMIT OR OBLIGE THE MEMBER STATES TO MAKE CERTAIN PROVISIONS IN THEIR NATIONAL LAW INCLUDING PROVISION FOR THE EFFECTIVE APPLICATION OF THE REGULATION; AND TO TRANSPOSE INTO THE LAW OF GIBRALTAR COUNCIL DIRECTIVE 2001/86/EC OF 8 OCTOBER 2001 SUPPLEMENTING THE STATUTE FOR A EUROPEAN COMPANY WITH REGARD TO THE INVOLVEMENT OF EMPLOYEES; AND FOR CONNECTED PURPOSES.

## PART 1

### GENERAL

#### **Title and commencement.**

1. This Act may be cited as the European Public Limited-Liability Company Act 2005 and comes into operation on the date of publication.

#### **EC Directive and EC Regulation.**

2. In this Act—

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

“the EC Regulation” means Council Regulation (EC) No. 2157/2001 of 8 October 2001 on the Statute for a European company (which is set out in Schedule 4 to this Act),

and references to numbered Articles are, unless otherwise specified, references to Articles in the EC Regulation.

#### **Interpretation.**

3.(1) In this Act—

“SE” means a European Public Limited-Liability Company (or Societas Europaea) within the meaning of the EC Regulation and, except as provided in this Act, means an SE which is to be, or is, registered in Gibraltar;

“Member State” means a Member State of the European Community, and Norway, Iceland and Liechtenstein, and includes a reference to Gibraltar.

(2) In Parts 2, 5, 6 and 7 of this Act, “Minister” shall mean Minister with responsibility for financial services.

(3) Except as otherwise provided in this Act, words and expressions listed in the index of defined expressions in section 2 of the Companies Act have the same meaning as they have in that Act.

(4) Except as otherwise provided in this Act, words and expressions which are used in the EC Regulation or the EC Directive have the same meaning as they have in that Regulation or Directive.

(5) Where a word or expression is both defined in the Companies Act and used in the EC Regulation or the EC Directive, it has the meaning it has in that Regulation or Directive except as otherwise provided in this Act.

## PART 2

### REGISTRATION OF SEs AND THE REGISTRAR ETC.

#### **The Registrar.**

4.(1) In this Act, the “Registrar” means the Registrar of Companies appointed under section 343 of the Companies Act and, subject to that section, includes an Assistant Registrar of Companies.

(2) The Registrar has the functions conferred by this Part in relation to the registration, or the deletion of the registration, of an SE.

#### **Registration of an SE formed by merger in accordance with Article 2(1).**

5. Where it is proposed to register an SE formed by merger in accordance with Article 2(1) there shall be delivered to the Registrar a registration form in Form SE5, and, if applicable, Form SE(SR), set out in regulations made by the Minister, together with the documents specified in respect of each Form.

#### **Registration of the formation of a holding SE in accordance with Article 2(2).**

6. Where it is proposed to register a holding SE formed in accordance with Article 2(2) there shall be delivered to the Registrar a registration form in



Form SE6, and, if applicable, Form SE(SR), set out in regulations made by the Minister, together with the documents specified in respect of each Form.

**Registration of the formation of a subsidiary SE in accordance with Article 2(3).**

7. Where it is proposed to register a subsidiary SE formed in accordance with Article 2(3) there shall be delivered to the Registrar a registration form in Form SE7, and, if applicable, Form SE(SR), set out in regulations made by the Minister, together with the documents specified in respect of each Form.

**Registration of an SE by the transformation of a public company in accordance with Article 2(4).**

8. Where it is proposed to register an SE by the transformation of a public company in accordance with Article 2(4) there shall be delivered to the Registrar a registration form in Form SE8, and, if applicable, Form SE(SR), set out in regulations made by the Minister, together with the documents specified in respect of each Form.

**Registration of an SE formed as the subsidiary of an SE in accordance with Article 3(2).**

9.(1) Where it is proposed to register an SE formed as the subsidiary of an SE in accordance with Article 3(2) there shall be delivered to the Registrar a registration form in Form SE9(1), and, if applicable, Form SE(SR), set out in regulations made by the Minister, together with the documents specified in respect of each Form.

(2) The reference to an SE, a subsidiary of which is to be registered under this section, includes a reference to an SE whose registered office is in a Member State other than the United Kingdom.

**Registration of an SE on the transfer of its registered office to Gibraltar in accordance with Article 8.**

10. Where it is proposed to transfer to Gibraltar the registered office of an SE whose registered office is situated in a Member State other than the United Kingdom there shall be delivered to the Registrar a registration form in respect of that SE in Form SE10, and, if applicable, Form SE(SR), set out in regulations made by the Minister, together with the documents specified in respect of each Form.

**Certificate of the competent authority under Article 8(8).**

11. Where it is proposed to transfer the registered office of an SE from Gibraltar to a Member State other than the United Kingdom there shall be

delivered to the Minister for the purposes of applying for the issue of a certificate under Article 8(8), a transfer form in Form SE11, set out in regulations made by the Minister, together with the documents specified in that Form.

**Registration of an SE.**

12. The Registrar shall register an SE formed or transformed under the provisions of Articles 2 and 3 or an SE whose registered office is transferred to Gibraltar under Article 8 where he is satisfied that all the requirements of this Act and the EC Regulation in respect of such formation, transformation or transfer of an SE, as the case may be, have been complied with in respect of that SE.

**Documents sent to the Registrar.**

13.(1) The Registrar shall retain any document delivered to him under any provision of this Act or the EC Regulation and such documents shall be treated as records kept by the Registrar for the purposes of the Companies Act in respect of the SE or the company to which they relate.

(2) For the purposes of this section documents delivered to the Minister under section 11 shall be treated as documents delivered to the Registrar on the deletion of the registration of the SE making the application under the section and the provisions of section 14 will apply accordingly.

**Application of certain provisions to the registration of SEs.**

14. The provisions specified in Schedule 1 to this Act shall apply in respect of—

- (a) the registration or the deletion of registration of SEs under this Act and the EC Regulation;
- (b) the functions of the Registrar in respect of such registrations or deletions.

Those provisions shall apply under this section subject to any limitations or qualifications specified in relation to each such provision in that Schedule.

**False statements in documents sent to the Registrar or the Minister.**

15. Any person who makes a false statement—

- (a) in any registration form sent to the Registrar under sections 5 to 10 and section 80;

- (b) in any transfer form sent to the Minister under section 11;
- (c) in any document, specified in such a form; or
- (d) in any other document required to be sent to the Registrar under this Act,

which he knows to be false or does not believe to be true is liable, on conviction on indictment to imprisonment not exceeding two years, or to a fine, or to both, and on summary conviction to imprisonment not exceeding three months, or to a fine not exceeding the statutory maximum or to both.

### **PART 3**

#### **EMPLOYEE INVOLVEMENT**

##### **CHAPTER 1**

#### **INTERPRETATION OF PART 3**

##### **Interpretation of Part 3.**

16.(1) In this Part–

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

“agency worker” has the same meaning as in regulation 3 of the Agency Workers Regulations 2012;

“concerned subsidiary or establishment” means a subsidiary or establishment of a participating company which is proposed to become a subsidiary or establishment of the SE upon its formation;

“consultation” means the establishment of dialogue and exchange of views between the body representative of the employees and/or the employee’s representatives and the competent organ of the SE, at a time, in a manner and with a content which allows the employees’ representatives, on the basis of information provided, to express an opinion on measures envisaged by the competent organ which may be taken into account in the decision-making process within the SE;

“Court” means the Supreme Court;

“EEA state” means a state which is a Contracting Party to the Agreement on the European Economic Area, and Norway, Iceland and Liechtenstein, and includes a reference to Gibraltar;

“employee” means an individual who has entered into or works under or, where the employment has ceased, worked under–

- (a) a contract of service; or
- (b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract;

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

“employees’ representatives” means–

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

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

“Gibraltar employee” means an employee employed to work in Gibraltar;

“Gibraltar member of the special negotiating body” means a member of the special negotiating body elected or appointed by Gibraltar employees;

“information” means the informing of the body representative of the employees and/or employees’ representatives by the competent organ of the SE on questions which concern the SE itself and any of its subsidiaries or establishments situated in a Member State other than the United Kingdom or which exceed the powers of the decision-making organs in a single Member State at a time, in a manner and with a content which allows the employees’ representatives to undertake an in-depth assessment of the possible impact and, where appropriate, prepare consultations with the competent organ of the SE;

“information and consultation representative” has the meaning given to it in section 28(5);

“involvement of employees” means any mechanism, including information, consultation and participation, through which employees’ representatives may exercise an influence on decisions to be taken within the company;

“Minister” means the Minister with responsibility for Education, Employment and Training;

“participating companies” means the companies directly participating in the establishing of an SE;

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

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

“protected disclosure” means the disclosure of information which, in the reasonable belief of the employee making the disclosure, tends to show one or more of the following–

- (a) that a criminal offence has been committed, is being committed or is likely to be committed;

- (b) that a person has failed, or is failing or is likely to fail to comply with any legal obligation to which he is subject;
- (c) that a miscarriage of justice has occurred, is occurring or is likely to occur;
- (d) that the health or safety of any individual has been, is being or is likely to be endangered;
- (e) that the environment has been, or is likely to be damaged; or
- (f) that information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed.

The employee must make the disclosure in good faith, for reasons for other than personal gain and, in all the circumstances of the case, it must be reasonable for the employee to make the disclosure;

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

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

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

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

“special negotiating body” means the body established in accordance with Part 3 to negotiate with the competent body of the participating companies regarding the establishment of arrangements for the involvement of employees within the SE;

“standard rules on employee involvement” means the rules in Schedule 2;

“subsidiary” of a company means an undertaking over which that company exercises a dominant influence defined in accordance with Article 3(2) to (7) of Directive 94/45/EC;

“suitable information relating to the use of agency workers” means—

- (a) the number of agency workers working temporarily for and under the supervision and direction of the undertaking;
- (b) the parts of the undertaking in which those agency workers are working; and
- (c) the type of work those agency workers are carrying out.

“Tribunal” means the Employment Tribunal established under rule 3 of the Employment Tribunal Rules;

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

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

## CHAPTER 2

### PARTICIPATING COMPANIES AND THE SPECIAL NEGOTIATING BODY

#### **Circumstances in which certain provisions of Part 3 apply.**

17.(1) Subject to subsections (2) and (3), this Part shall apply where–

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

(2) Where there are Gibraltar employees, Chapter 2 (election or appointment of members of special negotiating body and representation of employees) shall apply, regardless of where the registered office is to be situated, in relation to the election or appointment of Gibraltar members of the special negotiating body.

(3) Chapters 6 to 9 shall apply, regardless of where the registered office of the SE is, or is intended to be situated, where–

- (a) a participating company, its concerned subsidiaries or establishments;

- (b) a subsidiary of an SE;
- (c) an establishment of an SE; or
- (d) an employee or an employees' representative,

is registered or situated, as the case may be, in Gibraltar.

**Duty on participating company to provide information.**

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

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

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

(2) The information referred to in subsection (1) must include, as a minimum, information—

- (a) identifying the participating companies, concerned subsidiaries and establishments;
- (b) giving the number of employees employed by each participating company and concerned subsidiary and at each concerned establishment;
- (c) giving the number of employees employed to work in each EEA State; and
- (d) the number of agency workers working temporarily for and under the supervision and direction of the undertaking;
- (e) the parts of the undertaking in which those agency workers are working; and
- (f) the type of work those agency workers are carrying out.

(3) When a special negotiating body has been formed in accordance with section 21, the competent organs of each participating company must



provide that body with such information as is necessary to keep it informed of the plan and progress of establishing the SE up to the time the SE has been registered.

**Complaint of failure to provide information.**

19.(1) An employees' representative or, where there is no such representative for an employee, the employee may present a complaint to the Tribunal that—

- (a) the competent organ of a participating company has failed to provide the information referred to in section 18; or
- (b) the information provided by the competent organ of a participating company for the purpose of complying with section 18 is false or incomplete in a material particular.

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

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

**Function of the special negotiating body.**

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

**Composition of the special negotiating body.**

21.(1) The competent organs of the participating companies shall make arrangements for the establishment of a special negotiating body which shall be constituted in accordance with subsections (2) to (7).

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

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

(4) The number of additional members which the employees are entitled to elect or appoint under subsection (3) shall not exceed 20% of the number of ordinary members elected or appointed under subsection (2) and if the number of additional members under subsection (3) would exceed that percentage the employees who are entitled to appoint or elect the additional members shall be—

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

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

(6) If, following the appointment or election of members to the special negotiating body in accordance with this section,

- (a) changes to the participating companies, concerned subsidiaries or concerned establishments result in the number of ordinary or additional members which employees would be entitled to elect or appoint under this section either increasing or decreasing, the original appointment or election of members of the special negotiating body shall cease to have effect and those employees shall be entitled to elect or appoint the new number of members in accordance with the provisions of this Act; and

- (b) a member of the special negotiating body is no longer willing or able to continue serving as such a member, the employees whom he represents shall be entitled to elect or appoint a new member in his place.

(7) In this section–

- (a) “eligible member” means a person who is–
  - (i) in the case of a relevant company registered in a EEA state whose legislation allows representatives of trade unions who are not employees to be elected to the special negotiating body, an employee of the relevant company or a trade union representative; and
  - (ii) in the case of a relevant company not registered in such a EEA state, an employee of the relevant company;
- (b) “relevant company” means a participating company which has employees in the EEA state in which it is registered and which it is proposed will cease to exist on or following the registration of the SE; and
- (c) “the total workforce” means the total number of employees employed by all participating companies and concerned subsidiaries throughout all EEA states.

**Complaint about establishment of special negotiating body.**

22.(1) An application may be presented to the Tribunal for a declaration that the special negotiating body has not been established at all or has not been established properly in accordance with section 21.

(2) An application may be presented under this section by–

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

(3) The Tribunal shall only consider an application made under subsection (1) if it is made within a period of one month from the date or, if more than one, the last date on which the participating companies complied or should have complied with the obligation to inform their employees under section 21(5).

(4) Where the Tribunal finds the application well-founded it shall make a declaration that the special negotiating body has not been established at all or has not been established properly and the competent organs of the participating companies continue to be under the obligation in section 21(1).

### CHAPTER 3

#### ELECTION OR APPOINTMENT OF GIBRALTAR MEMBERS OF THE SPECIAL NEGOTIATING BODY

##### **Ballot arrangements.**

23.(1) Subject to section 24, the Gibraltar members of the special negotiating body shall be elected by balloting the Gibraltar employees.

(2) The management of the participating companies that employ Gibraltar employees ('the management') must arrange for the holding of a ballot or ballots of those employees in accordance with the requirements of subsection (3).

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

- (a) in relation to the election of ordinary members under section 21(2)—
  - (i) if the number of members which Gibraltar employees are entitled to elect to the special negotiating body is equal to the number of participating companies which have Gibraltar employees, there shall be separate ballots of the Gibraltar employees in each participating company;
  - (ii) if the number of members which the Gibraltar employees are entitled to elect to the special negotiating body is greater than the number of participating companies which have Gibraltar employees, there shall be separate ballots of the Gibraltar employees in each participating company and the management shall ensure, as far as practicable, that at least one member representing each such participating company is elected to the special negotiating body and that the number of members

- representing each company is proportionate to the number of employees in that company;
- (iii) if the number of members which the Gibraltar employees are entitled to elect to the special negotiating body is smaller than the number of participating companies which have employees in Gibraltar—
    - (aa) the number of ballots held shall be equivalent to the number of members to be elected;
    - (bb) a separate ballot shall be held in respect of each of the participating companies with the higher or highest number of employees; and
    - (cc) it shall be ensured that any employees of a participating company in respect of which a ballot does not have to be held are entitled to vote in a ballot held in respect of one of the other participating companies; and
  - (iv) if there are any Gibraltar employees employed by a concerned subsidiary or establishment of non-Gibraltar participating companies, the management shall ensure that those employees are entitled to vote in a ballot held pursuant to this section;
- (b) in relation to the ballot of additional members under section 21(3) the management shall hold a separate ballot in respect of each participating company entitled to elect an additional member;
  - (c) in a ballot in respect of a particular participating company, all Gibraltar employees employed by that participating company or by its concerned subsidiaries or at its concerned establishments are entitled to vote;
  - (d) in a ballot in respect of a particular participating company, any person who is immediately before the latest time at which a person may become a candidate—
    - (i) a Gibraltar employee employed by that participating company, by any of its concerned subsidiaries or at any of its concerned establishments; or
    - (ii) if the management of that participating company so permits, a representative of a trade union who is not an

employee of that participating company or any of its concerned subsidiaries,

is entitled to stand as a candidate for election as a member of the special negotiating body in that ballot;

- (e) the management must, in accordance with subsection (7), appoint an independent ballot supervisor to supervise the conduct of the ballot of Gibraltar employees but may instead, where there is to be more than one ballot, appoint more than one independent ballot supervisor in accordance with that subsection, each of whom is to supervise such of the separate ballots as the management may determine, provided that each separate ballot is supervised by a supervisor;
- (f) after the management has formulated proposals as to the arrangements for the ballot of Gibraltar employees and before it has published the final arrangements under sub-paragraph (g) it must, so far as reasonably practicable, consult with the Gibraltar employees' representatives on the proposed arrangements for the ballot of Gibraltar employees; and
- (g) the management must publish the final arrangements for the ballot of Gibraltar employees in such manner as to bring them to the attention of, so far as reasonably practicable, all Gibraltar employees and the Gibraltar employees' representatives.

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

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

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

(7) A person is an independent ballot supervisor for the purposes of subsection (3)(e) if the management reasonably believes that he will carry out any functions conferred on him in relation to the ballot competently and has no reasonable grounds for believing that his independence in relation to the ballot might reasonably be called into question.

**Conduct of the ballot.**

24.(1) The management must–

- (a) ensure that a ballot supervisor appointed under section 23(3)(e) carries out his functions under this section and that there is no interference with his carrying out of those functions from the management; and
- (b) comply with all reasonable requests made by a ballot supervisor for the purposes of, or in connection with, the carrying out of those functions.

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

- (a) supervises the conduct of the ballot, or the separate ballots he is being appointed to supervise, in accordance with the arrangements for the ballot of Gibraltar employees published by the management under section 23(3)(g) or, where appropriate, in accordance with the arrangements as required to be modified by an order made as a result of a complaint presented under section 23(4);
- (b) does not conduct the ballot or any of the separate ballots before the Gibraltar management has satisfied the requirement specified in section 23(3)(g) and–
  - (i) where no complaint has been presented under section 23(4), before the expiry of a period of 21 days beginning on the date on which the management published its arrangements under section 23(3)(g); or
  - (ii) where a complaint has been presented under section 23(4), before the complaint has been determined and, where appropriate, the arrangements have been modified as required by an order made as a result of that complaint;
- (c) conducts the ballot, or each separate ballot so as to secure that–
  - (i) so far as reasonably practicable, those entitled to vote are given the opportunity to vote;
  - (ii) so far as reasonably practicable, those entitled to stand as candidates are given the opportunity to stand;

- (iii) so far as reasonably practicable, those voting are able to do so in secret; and
- (iv) the votes given in the ballot are fairly and accurately counted.

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

(4) A ballot supervisor shall publish a report (“an ineffective ballot report”) where he considers (whether on the basis of representations made to him by another person or otherwise) that—

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

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

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

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

- (a) if there has been a single ballot or an ineffective ballot report has been published in respect of every separate ballot, the outcome of the ballot or ballots shall have no effect and the Gibraltar management shall again be under the obligation in section 23(2);
- (b) if there have been separate ballots and sub-paragraph (a) does not apply—



- (i) the management shall arrange for the separate ballot or ballots in respect of which an ineffective ballot report was published to be re-held in accordance with section 23 and this section; and
- (ii) no such ballot shall have effect until it has been re-held and no ineffective ballot report has been published in respect of it.

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

**Appointment of Gibraltar members by a consultative committee.**

25.(1) This section applies where—

- (a) section 23(3)(a)(i) or (ii) or (b) would require a ballot to be held; and
- (b) there exists in the participating company in respect of which a ballot would be held under section 23, a consultative committee.

(2)

- (a) Where this section applies, the election provided for in section 23 shall not take place but the consultative committee shall be entitled to appoint the Gibraltar member or members of the special negotiating body who would otherwise be elected pursuant to section 23 provided that the consultative committee's appointment complied with sub-paragraph (b).
- (b) The consultative committee is entitled to appoint as a member of the special negotiating body—
  - (i) one of their number; or
  - (ii) if the management of the participating company in respect of which the consultative committee exists so permits, a trade union representative who is not an employee of that company.

(3) In this section, a “consultative committee” means a body of persons—

- (a) whose normal functions include or comprise the carrying out of an information and consultation function;
- (b) which is able to carry out its information and consultation function without interference from the management of the participating company;
- (c) which, in carrying out its information and consultation function, represents all the employees of the participating company; and
- (d) which consists wholly of persons who are employees of the participating company or its concerned subsidiaries.

(4) In subsection (3) “information and consultation function” means the function of—

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

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

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

- (a) the consultative committee does not satisfy the requirements in subsection (3); or
- (b) any of the persons appointed by the consultative committee is not entitled to be appointed,

it, or as the case may be, he may present a complaint to the Tribunal. The complaint must be presented within 21 days of the date on which the names of the persons appointed to the Special Negotiating Body are published under subsection (5).

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

(8) Where the Tribunal has made a declaration under subsection (7)–

- (a) no appointment made by the consultative committee shall have effect; and
- (b) the members of the special negotiating body shall be elected by a ballot of the employees in accordance with section 23.

(9) Where the consultative committee appoints any person to be a member of the special negotiating body, that appointment shall have effect–

- (a) where no complaint has been presented under subsection (6), after the expiry of a period of 21 days beginning on the date on which the consultative committee published under subsection (5) the names of the persons nominated; or
- (b) where a complaint has been presented under subsection (6), as from the day on which the complaint has been determined without a declaration under subsection (7) being made.

#### **Representation of employees.**

26.(1) Subject to subsections (2) and (3), a member elected in a ballot in accordance with section 21(2), shall be treated as representing the employees for the time being of the participating company and of any concerned subsidiary or establishment whose employees were entitled to vote in the ballot in which he was elected.

(2) If an additional member is elected in accordance with section 21(3) and (4), he, and not any member elected in accordance with section 21(2), shall be treated as representing the employees for the time being of the participating company and of any concerned subsidiary or establishment whose employees were entitled to vote in the ballot in which he was elected.

(3) When a member of the special negotiating body is appointed by a consultative committee in accordance with section 25, the employees whom the consultative committee represents and the employees of any concerned subsidiary shall be treated as being represented by the member so appointed.

### **CHAPTER 4**

#### **NEGOTIATION OF THE EMPLOYEE INVOLVEMENT AGREEMENT**

**Negotiations to reach an employee involvement agreement.**

27.(1) In this section and in section 28 the competent organs of the participating companies and the special negotiating body are referred to as “the parties”.

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

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

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

**The employee involvement agreement.**

28.(1) The employee involvement agreement must be in writing.

(2) Without prejudice to the autonomy of the parties and subject to subsection (4), the employee involvement agreement shall specify–

- (a) the scope of the agreement;
- (b) the composition, number of members and allocation of seats on the representative body;
- (c) the functions and the procedure for the information and consultation of the representative body;
- (d) the frequency of meetings of the representative body;
- (e) the financial and material resources to be allocated to the representative body;

- (f) if, during negotiations, the parties decide to establish one or more information and consultation procedures instead of a representative body, the arrangements for implementing those procedures;
- (g) if, during negotiations, the parties decide to establish arrangements for participation, the substance of those arrangements including (if applicable) the number of members in the SE's administrative or supervisory body which the employees will be entitled to elect, appoint, recommend or oppose, the procedures as to how these members may be elected, appointed, recommended or opposed by the employees, and their rights; and
- (h) the date of entry into force of the agreement and its duration, the circumstances, if any, in which the agreement is required to be re-negotiated and the procedure for its re-negotiation.

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

(3A) Where under the employee involvement agreement the competent organ of the SE is to provide information on the employment situation in that company, such information must include suitable information relating to the use of agency workers (if any) in that company.

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

(5) If the parties decide, in accordance with subsection (2)(f), to establish one or more information and consultation procedures instead of a representative body and if those procedures include a provision for representatives to be elected or appointed to act in relation to information and consultation, those representatives shall be "information and consultation representatives".

#### **Decisions of the special negotiating body.**

29.(1) Each member of the special negotiating body shall have one vote.

(2) Subject to subsection (3) and section 30, the special negotiating body shall take decisions by an absolute majority vote.

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

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

in this subsection, reduction of participation rights means that the body representative of the employees has participation rights in relation to a smaller proportion of members of the supervisory or administrative organs of the SE than the employees' representatives had in the participating company which gave participation rights in relation to the highest proportion of such members in that company.

(4) The special negotiating body must publish the details of any decision taken under this section or under section 30 in such a manner as to bring the decision, so far as reasonably practicable, to the attention of the employees whom they represent and such publication shall take place as soon as reasonably practicable and, in any event no later than 14 days, after the decision has been taken.

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

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

**Decision not to open or to terminate negotiations.**

30.(1) Subject to subsection (2), the special negotiating body may decide, by a two thirds majority vote, not to open negotiations with the competent organs of the participating companies or to terminate any such negotiations.

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

(3) Any decision made under subsection (1) shall have the following effects—

- (a) the duty in section 27(2) to negotiate with a view to reaching an employee involvement agreement shall cease as from the date of the decision;
- (b) any rules relating to the information and consultation of employees in a EEA state in which employees of the SE are employed shall apply to the employees of the SE in that EEA state; and
- (c) the special negotiating body shall be reconvened only if a valid request in accordance with subsection (4) is made by employees or employees' representatives.

(4) To amount to a valid request, the request referred to in subsection (3)(c) must—

- (a) be in writing;
- (b) be made by at least 10% of the employees of, or by employees' representatives representing at least 10% of the total number of employees employed by -
  - (i) the participating companies and its concerned subsidiaries; or
  - (ii) where the SE has been registered, the SE and its subsidiaries; and
- (c) be made no earlier than two years after the decision made under subsection (1) was or should have been published in accordance with section 29(4) unless the special negotiating body and the competent organs of every participating company or, where the SE has been registered, the SE agree to the special negotiating body being reconvened earlier.

#### **Complaint about decisions of special negotiating body.**

31.(1) If a member of the special negotiating body, an employees' representative, or where there is no such representative in respect of an

employee, that employee believes that the special negotiating body has taken a decision referred to in section 29 or 30 and—

- (a) that the decision was not taken by the majority required by section 29 or 30, as the case may be; or
- (b) the special negotiating body failed to publish the decision in accordance with section 29(4),

he may present a complaint to the Tribunal within 21 days of the date the special negotiating body did or should have published their decision in accordance with section 29(4).

(2) Where the Tribunal finds the complaint well-founded it shall make a declaration that the decision was not taken properly and that it shall have no effect.

## CHAPTER 5

### STANDARD RULES ON EMPLOYEE INVOLVEMENT

#### **Standard rules on employee involvement.**

32.(1) Without prejudice to subsection (3), where this section applies, the competent organ of the SE and its subsidiaries and establishments shall make arrangements for the involvement of employees of the SE and its subsidiaries and establishments in accordance with the standard rules on employee involvement.

(2) This section applies in the following circumstances—

- (a) where the parties agree that the standard rules on employee involvement shall apply; or
- (b) where the period specified in section 27(3)(a) or, where applicable, (b) has expired without the parties reaching an employee involvement agreement and—
  - (i) the competent organs of each of the participating companies agree that the standard rules on employee involvement shall apply and so continue with the registration of the SE; and
  - (ii) the special negotiating body has not taken any decision under section 30(1) either not to open or to terminate the negotiations referred to in that section.



(3) The standard rules set out in Part 3 of Schedule 2 to this Act (standard rules on participation) only apply in the following circumstances-

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

(3A) This subsection applies to an agency worker whose contract within regulation 3(1)(b) of the Agency Workers Regulations 2012 (contract with the temporary work agency) is not a contract of employment—

- (a) for the purposes of subsection (3)(a) and (b), any agency worker who has a contract with a temporary work agency, which was at the relevant time a participating company, is to be treated as having been employed by that temporary work agency for the duration of their assignment with a hirer; and
- (b) in this subsection “assignment” and “hirer” have the same meaning as in regulation 2, and “temporary work agency” has the same meaning as in regulation 4, of the Agency Workers Regulations 2012.

(4) Where the standard rules on participation apply and more than one form of employee participation exist in the participating companies, the special negotiating body shall decide which of the existing forms of participation shall exist in the SE and shall inform the competent organs of the participating companies accordingly.

## CHAPTER 6

### COMPLIANCE AND ENFORCEMENT

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

33.(1) Where—

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

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

(2) A complaint brought under subsection (1) must be brought within a period of 3 months commencing with the date of the alleged failure or where the failure takes place over a period, the last day of that period.

(3) In this section—

“failure” means an act or omission;

“relevant applicant” means—

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

(4) Where the Tribunal finds the complaint well-founded it shall make a declaration to that effect and may make an order requiring the SE to take such steps as are necessary to comply with the terms of the employee

involvement agreement or, as the case may be, the standard rules on employee involvement.

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

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

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

(7) Where such an application is made, the Court shall issue a written penalty notice to the SE requiring it to pay a penalty to the Minister in respect of the failure unless satisfied, on hearing representations from the SE, that the failure resulted from a reason beyond its control or that it has some other reasonable excuse for its failure.

(8) Section 34 shall apply in respect of a penalty notice issued under this section.

(9) No order of the Tribunal under this section shall have the effect of suspending or altering the effect of any act done or of any agreement made by the participating company of the SE.

### **Penalties.**

34.(1) A penalty notice issued under section 33 shall specify—

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

(2) No penalty set by the Court under this section may exceed £75,000.

(3) When setting the amount of the penalty, the Court shall take into account—

- (a) the gravity of the failure;
- (b) the period of time over which the failure occurred;

- (c) the reason for the failure;
- (d) the number of employees affected by the failure; and
- (e) the number of employees employed by the undertaking.

(4) The date specified under subsection (1)(b) must not be earlier than the end of the period within which an appeal against a decision or order made by the Tribunal under section 33 may be made.

(5) If the specified date in a penalty notice has passed and—

- (a) the period during which an appeal may be made has expired without an appeal having been made; or
- (b) such an appeal has been made and determined,

the Minister may recover from the SE, as a civil debt due to him, any amount payable under the penalty notice which remains outstanding.

(6) The making of an appeal suspends the effect of the penalty notice.

#### **Misuse of procedures.**

35.(1) If an employees' representative or where there is no such representative in relation to an employee, the employee, believes that a participating company or an SE is misusing or intending to misuse the SE or the powers in this Act for the purpose of—

- (a) depriving the employees of that participating company or of any of its concerned subsidiaries or, as the case may be, of the SE or of its subsidiaries of their rights to employee involvement; or
- (b) withholding rights from any of the people referred to in sub-paragraph (a),

he may make a complaint to the Tribunal.

(2) Where a complaint is made to the Tribunal under subsection (1) before registration or within a period of 12 months of the date of the registration of the SE, the Tribunal shall uphold the complaint unless the respondent proves that it did not misuse or intend to misuse the SE or the powers in this Act for either of the purposes set out in sub-paragraphs (a) or (b) of subsection (1).

- (3) If the Tribunal finds the complaint to be well founded—
- (a) it shall make a declaration to that effect and may make an order requiring the participating company or the SE, as the case may be, to take such action as is specified in the order to ensure that the employees referred to in subsection (1)(a) are not deprived of their rights to employee involvement or that such rights are not withheld from them; and
  - (b) the provisions of sections 33(6) to (9) and 34 shall apply to the complaint.

**Exclusivity of remedy.**

36. The remedy for infringement of the rights conferred by this Act is by way of complaint to the Tribunal in accordance with Chapters 1 to 5 of this Part and not otherwise.

**CHAPTER 7**

**CONFIDENTIAL INFORMATION**

**Breach of statutory duty.**

37.(1) Where an SE, a subsidiary of an SE, a participating company or any concerned subsidiary entrusts a person, pursuant to the provisions of this Part, with any information or document on terms requiring it to be held in confidence, the person shall not disclose that information or document except in accordance with the terms on which it was disclosed to him.

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

(3) The obligation to comply with subsection (1) is a duty owed to the company that disclosed the information to the person and a breach of the duty is actionable accordingly (subject to the defences and other incidents applying to actions for breach of statutory duty).

(4) Subsection (3) does not affect any legal liability which any person may incur by disclosing the information, or any right which any person may have in relation to such disclosure otherwise than under this section.

(5) No action shall lie under subsection (3) where the recipient reasonably believed the disclosure to be a protected disclosure.

(6) A recipient to whom a company has entrusted any information or document on terms requiring it to be held in confidence may apply to the

Tribunal for a declaration as to whether it was reasonable for the company to require the recipient to hold the information or document in confidence.

(7) If the Tribunal considers that the disclosure of the information or the document by the recipient would not, or would not be likely to, harm the legitimate interests of the undertaking, it shall make a declaration that it was not reasonable for the competent organ to require the recipient to hold the information or document in confidence.

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

**Withholding of information by the competent organ.**

38.(1) Neither an SE registered in Gibraltar nor a participating company registered in Gibraltar is required to disclose any information or document to a person for the purposes of this Part where the nature of the information or document is such that, according to objective criteria, the disclosure of the information or document would seriously harm the functioning of, or would be prejudicial to the SE or any subsidiary or establishment of the SE or, as the case may be, to the participating company or any subsidiary or establishment of the participating company.

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

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

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

(3) If the Tribunal makes a declaration that the disclosure of the information or document in question would not, according to objective criteria, be seriously harmful or prejudicial as mentioned in subsection (1), the Tribunal shall order the competent organ to disclose the information or document.

(4) An order under subsection (3) shall specify—

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

## CHAPTER 8

### PROTECTION FOR MEMBERS OF SPECIAL NEGOTIATING BODY, ETC.

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

39.(1) An employee who is—

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

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

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

#### **Right to remuneration for time off under section 39.**

40. (1) An employee who is permitted to take time off under section 36 is entitled to be paid remuneration by his employer for the time taken off at the appropriate hourly rate.

(2) A “week’s pay” means the average of the gross weekly payments made to an employee in the period of 13 weeks ending—

- (a) where the calculation date is the last day of a week, with that week; and
- (b) otherwise with the last complete week before the calculation date,

and “calculation date” means the day on which the time off was taken or on which it is alleged the time off should have been permitted.

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

(4) But where the number of normal working hours differs from week to week or over a longer period, the amount of one week’s pay shall be divided instead by—

- (a) the average number of normal working hours calculated by dividing by twelve the total number of the employee’s normal working hours during the period of twelve weeks ending with the last complete week before the day on which the time off is taken; or
- (b) where the employee has not been employed for a sufficient period to enable the calculation to be made under subparagraph (a), a number which fairly represents the number of normal working hours in a week having regard to such of the considerations specified in subsection (5) as are appropriate in the circumstances.

(5) The considerations referred to in subsection (4)(b) are—

- (a) the average number of normal working hours in a week which the employee could expect in accordance with the terms of his contract; and
- (b) the average number of normal working hours of other employees engaged in relevant comparable employment with the same employer.

(6) A right to any amount under subsection (1) does not affect any right of an employee in relation to remuneration under his contract of employment.



(7) Any contractual remuneration paid to an employee in respect of a period of time off under section 39 goes towards discharging any liability of the employer to pay remuneration under subsection (1) in respect of that period, and conversely, any payment of remuneration under subsection (1) in respect of a period goes towards discharging any liability of the employer to pay contractual remuneration in respect of that period.

**Right to time off: complaints to Tribunal.**

41.(1) An employee may present a complaint to the Tribunal that his employer—

- (a) has unreasonably refused to permit him to take time off as required under section 39; or
- (b) has failed to pay the whole or any part of any amount to which the employee is entitled under section 40.

(2) The Tribunal shall not consider a complaint under this section unless it is presented—

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

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

(4) If the complaint is that the employer has unreasonably refused to permit the employee to take time off, the Tribunal shall also order the employer to pay to the employee an amount equal to the remuneration to which he would have been entitled under section 40 if the employer had not refused.

(5) If the complaint is that the employer has failed to pay the employee the whole or part of any amount to which he is entitled under section 40, the Tribunal shall also order him to pay to the employee the amount which it finds is due to him.

**Unfair dismissal.**

42. An employee who is dismissed and to whom section 43(1) or 43(4) applies shall be regarded, if the reason (or, if more than one, the principal reason) for the dismissal is a reason specified in, respectively, section 43(2) or 43(5), as unfairly dismissed for the purposes of Part VI of the Employment Act.

**Unfair dismissal: application and reasons.**

43.(1) This section applies to an employee who is–

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

(2) The reason is that–

- (a) the employee performed or proposed to perform any functions or activities as such a member, representative or candidate; or
- (b) the employee or a person acting on his behalf made or proposed to make a request to exercise an entitlement conferred on the employee by section 39 or 40.

(3) Section 42 does not apply in the circumstances set out in subsection (2)(a) where the reason (or principal reason) for the dismissal is that in the performance, or purported performance, of the employee's functions or activities he has disclosed any information or document in breach of the duty in section 37, unless the employee reasonably believed the disclosure to be a protected disclosure.

(4) This subsection applies to any employee whether or not he is an employee to whom subsection (1) applies.

(5) The reasons are that the employee–

- (a) took, or proposed to take, any proceedings before the Tribunal to enforce any right conferred on him by this Act;

- (b) exercised, or proposed to exercise, any entitlement to apply or complain to the Tribunal or the Court conferred by this Act or to exercise the right to appeal in connection with any rights conferred by this Act;
  - (c) acted with a view to securing that a special negotiating body, a representative body or an information and consultation procedure did or did not come into existence;
  - (d) indicated that he did or did not support the coming into existence of a special negotiating body, a representative body or an information and consultation procedure;
  - (e) stood as a candidate in an election in which any person elected would, on being elected, be a member of a special negotiating body, a representative body, an employee member on a supervisory or administrative organ or be an information and consultation representative;
  - (f) influenced or sought to influence by lawful means the way in which votes were to be cast by other employees in a ballot arranged under this Act;
  - (g) voted in such a ballot;
  - (h) expressed doubts, whether to a ballot supervisor or otherwise, as to whether such a ballot had been properly conducted; or
  - (i) proposed to do, failed to do, or proposed to decline to do, any of the things mentioned in sub-paragraphs (d) to (h).
- (6) It is immaterial for the purposes of subsection (5)(a)–
- (a) whether or not the employee has the right or entitlement; or
  - (b) whether or not the right has been infringed,

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

**Detriment.**

44.(1) An employee to whom subsection (2) or (5) applies has the right not to be subjected to any detriment by any act, or deliberate failure to act, by his employer, done on a ground specified in, respectively, subsection (3) or (6).

- (2) This subsection applies to an employee who is–
- (a) a member of a special negotiating body;
  - (b) a member of a representative body;
  - (c) an information and consultation representative;
  - (d) an employee member on a supervisory or administrative organ;  
or
  - (e) a candidate in an election in which any person elected will, on being elected, be such a member or a representative.
- (3) The ground is that–
- (a) the employee performed or proposed to perform any functions or activities as such a member, representative or candidate; or
  - (b) the employee or person acting on his behalf made or proposed to make a request to exercise an entitlement conferred on the employee by section 39 or 40.
- (4) Subsection (1) does not apply in the circumstances set out in subsection (3)(a) where the ground for the subsection to detriment is that in the performance, or purported performance, of the employee’s functions or activities he has disclosed any information or document in breach of the duty in section 37, unless the employee reasonably believed the disclosure to be a “protected disclosure”.
- (5) This subsection applies to any employee, whether or not he is an employee to whom subsection (2) applies.
- (6) The grounds are that the employee–
- (a) took, or proposed to take, any proceedings before the Tribunal to enforce any right conferred on him by this Act;
  - (b) exercised, or proposed to exercise, any entitlement to apply or complain to the Tribunal or the Court conferred by this Act or to exercise the right to appeal in connection with any rights conferred by this Act;
  - (c) acted with a view to securing that a special negotiating body, a representative body or an information and consultation procedure did or did not come into existence;

- (d) indicated that he did or did not support the coming into existence of a special negotiating body, a representative body or an information and consultation procedure;
- (e) stood as a candidate in an election in which any person elected would, on being elected, be a member of a special negotiating body, a representative body, an employee member on a supervisory or administrative organ or be an information and consultation representative;
- (f) influenced or sought to influence by lawful means the way in which votes were to be cast by other employees in a ballot arranged under this Act;
- (g) voted in such a ballot;
- (h) expressed doubts, whether to a ballot supervisor or otherwise, as to whether such a ballot had been properly conducted; or
- (i) proposed to do, failed to do, or proposed to decline to do, any of the things mentioned in sub-paragraphs (d) to (h).

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

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

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

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

**Detriment: enforcement and subsidiary provisions.**

45.(1) An employee may present a complaint to the Tribunal that he has been subjected to a detriment in contravention of section 44.

(2) On such a complaint it is for the employer to show the ground on which any act, or deliberate failure to act, was done.

(3) The Tribunal shall not consider a complaint under this section unless it is presented–

- (a) before the end of the period of three months beginning with the date of the act to which the complaint relates or, where that act

or failure to act is part of a series of similar acts or failures, the last of them; or

- (b) within such further period as the Tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

(4) For the purposes of subsection (3)–

- (a) where an act extends over a period, the “date of the act” means the last day of that period; and
- (b) a deliberate failure to act shall be treated as done when it was decided on,

and, in the absence of evidence establishing the contrary, an employer shall be taken to decide on a failure to act when he does an act inconsistent with doing the failed act or, if he has done no such inconsistent act, when the period expires within which he might reasonably have been expected to do the failed act if it was to be done.

(5) Section 44 does not apply where the detriment in question amounts to dismissal.

## CHAPTER 9

### MISCELLANEOUS

#### **Tribunal proceedings.**

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

(2) No appeal shall lie except to the Court from any decision of the Tribunal under or by virtue of this Act.

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

47.(1) Any provision in any agreement (whether an employee’s contract or not) is void in so far as it purports–

- (a) to exclude or limit the operation of any provision of this Part other than a provision of Chapter 8 of this Part; or

- (b) to preclude a person from bringing any proceedings before the Tribunal, under any provision of this Part other than a provision of that Chapter.

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

**Restrictions on contracting out: Chapter 8 of this Part.**

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

- (a) to exclude or limit the operation of any provision of Chapter 8 of this Part; or
- (b) to preclude a person from bringing any proceedings before the Tribunal under that Chapter.

(2) Subsection (1) does not apply to any agreement to refrain from instituting or continuing proceedings before the Tribunal where a conciliation officer has taken action under rule 9 of the Tribunal Rules (conciliation).

**Existing employee involvement rights.**

49.(1) Subject to subsection (2), nothing in this Act shall affect involvement rights of employees of an SE, its subsidiaries or establishments provided for by law or practice in the EEA state in which they were employed immediately prior to the registration of the SE.

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

**PART 4**

**EXERCISE OF MEMBER STATES OPTIONS UNDER THE EC  
REGULATION**

**Participation in the formation of an SE by a company formed under the law of a Member State whose head office is not in the Community (Article 2(5)).**

50. A company, formed under the law of a Member State, the head office of which is not in the Community, may participate in the formation of an SE where the company's registered office is in that Member State and it has a real and continuous link with a Member State's economy.

**Additional forms of publication of transfer proposal (Article 8(2)).**

51.(1) The SE shall notify in writing its shareholders, and every creditor of whose claim and address it is aware, of the right to examine the transfer proposal and the report drawn up under Article 8(3), at its registered office and, on request, to obtain copies of those documents free of charge, not later than one month before the general meeting called to decide on the transfer.

(2) Every invoice, order for goods or business letter, which, at any time between the date on which the transfer proposal and report become available for inspection at the registered office of the SE and the deletion of its registration on transfer, is issued by or on behalf of the SE, shall contain a statement that the SE is proposing to transfer its registered office to a Member State other than the United Kingdom under Article 8 and identifying that Member State.

(3) If default is made in complying with subsections (1) or (2) the SE is liable on summary conviction to a fine not exceeding level 3 on the standard scale.

**Extension of protection given by Article 8(7) to liabilities incurred prior to transfer (Article 8(7)).**

52. The first sub-paragraph of Article 8(7) shall apply to liabilities that arise (or may arise) prior to the transfer.

**Power of the competent authorities of a Member State to oppose a transfer on public interest grounds (Article 8(14)).**

53.If a transfer of a registered office of an SE would result in a change in the law applicable to the SE, the competent authorities may, within the two month period referred to in Article 8(6), oppose the transfer, on public interest grounds.

**Power of the management or administrative organ of an SE to amend statutes where in conflict with employee involvement arrangements (Article 12(4)).**

54. Where there is a conflict between the arrangements for employee involvement and the existing statutes the management or administrative organ of the SE may amend the statutes to the extent necessary to resolve the conflict without any further decision from the general shareholders meeting.

**Power of the competent authorities of a Member State to oppose the participation of a merging company governed by its law on public interest grounds (Article 19).**



55. A company of a type specified in relation to the United Kingdom in Annex I to the EC Regulation may not take part in the formation of an SE, whether or not it is to be registered in Gibraltar, by merger if any of the competent authorities oppose it before the issue of the certificate referred to in Article 25(2) on public interest grounds.

**Minimum number of members of the management organ (Article 39(4)).**

56. The minimum number of the members of the management organ of an SE is two.

**Minimum number of members of the supervisory organ (Article 40(3)).**

57. The minimum number of the members of the supervisory organ of an SE is two.

**Members of the supervisory organ to be entitled to require the management organ to provide certain information (Article 41(3)).**

58. Each member of the supervisory organ is entitled to require the management organ to provide to that member information of a kind which the supervisory organ needs to exercise supervision in accordance with Article 40(1).

**Minimum number of members of an administrative organ (Article 43(2)).**

59. The minimum number of the members of the administrative organ of an SE is two.

**Timing of the first general meeting of an SE (Article 54(1)).**

60. The first general meeting of an SE may be held at any time in the 18 months following an SE's incorporation.

**Proportion of shareholders of an SE who may require one or more additional items to be put on the agenda of any general meeting (Article 56).**

61. The proportion of the shareholders of an SE who may require one or more additional items put on the agenda of any general meeting is to be the holders of at least 5% of the SE's subscribed capital.

**SEs subject to law on public limited liability companies as regard the expression of their capital (Article 67(1)).**

62. An SE shall be subject to the provisions of the enactments and rules of law applying to a public company as regards the expression of its capital.

## PART 5

### PROVISIONS REQUIRED BY THE EC REGULATION

#### **Publication of terms of transfer, formation and conversion (Articles 8(2), 32(3) and 37(5)).**

63.(1) Where a transfer proposal is drawn up under Article 8(2)–

- (a) a copy of the proposal shall be delivered to the Registrar together with Form SE63(1)(a); and
- (b) the Registrar shall cause notice of the receipt of the copy of the proposal to be published in the Gazette.

(2) Where draft terms for the formation of a holding SE, whether or not its registered office is to be in Gibraltar, are drawn up under Article 32(2)–

- (a) a copy of the draft terms shall be delivered to the Registrar together with Form SE63(2)(a); and
- (b) the Registrar shall cause notice of the receipt of the copy of the draft terms to be published in the Gazette.

(3) Where draft terms for the conversion of a public limited-liability company into an SE are drawn up under Article 37(4)–

- (a) a copy of the draft terms shall be delivered to the Registrar together with Form SE63(3)(a); and
- (b) the Registrar shall cause notice of the receipt of the copy of the draft terms to be published in the Gazette.

(4) The Forms referred to in subsections (1) to (3) are those set out in regulations made by the Minister.

#### **Publication of completion of merger (Article 28).**

64. Where an SE is formed by merger, whether its registered office is in Gibraltar or not, and a public company has taken part in that procedure, the Registrar shall cause to be published in the Gazette notice that the merger has been completed.

**Publication of fulfilment of conditions for the formation of a holding SE (Article 33(3)).**

65.(1) Where, in respect of a company of a type specified in relation to the United Kingdom in Annex II to the EC Regulation, the conditions for the formation of a holding SE, whether or not it is to be registered in Gibraltar, are fulfilled, the company shall deliver to the Registrar within 14 days of such fulfilment notice of that event in the Form SE65(1), set out in regulations made by the Minister, and the Registrar shall cause to be published in the Gazette notice that these conditions have been fulfilled.

(2) If default is made in complying with subsection (1), the company is liable on summary conviction to a fine not exceeding level 3 on the standard scale.

**Publication of other documents or information (Articles 8(12), 15(2), 59(3) and 65).**

66.(1) Where, under the Articles of the EC Regulation listed in subsection (2), the occurrence of an event is required to be publicised, the Registrar shall cause to be published in the Gazette notice of receipt of the particulars of that event described in those Articles.

(2) The Articles referred to in subsection (1) are—

- (a) Article 59(3)
- (b) Article 65

(3) Where, under the Articles listed in subsection (4), the registration of an SE, whether on formation under Title II of the EC Regulation, or on the transfer of the registered office of an SE under Article 8 or the deletion of a registration under that Article is required to be publicised, the Registrar shall cause to be published in the Gazette notice of that registration or the deletion of that registration and of the receipt of the documents and particulars related to that registration or deletion required to be delivered to the Registrar by the EC Regulation or this Act.

(4) The Articles referred to in subsection (3) are—

- (a) Article 8(12)
- (b) Article 15(2)

**Protection of creditors and others on a transfer (Article 8(7)).**

67.(1) Where an SE proposes to transfer its registered office to a Member State other than the United Kingdom under Article 8 the SE shall satisfy the Minister that the interests of creditors and holders of other rights in respect of the SE (including those of public bodies) have been adequately protected in respect of any liabilities arising (or that may arise) prior to the transfer by the making of a statement of solvency in the terms set out in subsections (4) and (5).

(2) The statement of solvency must be made by all the members of the administrative organ in the case of an SE within the one-tier system and by all the members of the management organ in the case of an SE within the two-tier system.

(3) In the case of an SE within the two-tier system the statement of solvency may not be made unless authorised by the supervisory organ.

(4) The statement shall state that the members of the administrative or management organ, as the case may be, have formed the opinion—

- (a) as regards its financial situation immediately following the date on which the transfer is proposed to be made, that there will be no grounds on which the SE could then be found to be unable to pay its debts; and
- (b) as regards its prospects for the year immediately following that date, that, having regard to their intentions with respect to the management of the SE's business during that year and to the amount and character of the financial resources which will in their view be available to the SE during that year, the SE will be able to carry on business as a going concern (and will accordingly be able to pay its debts as they fall due throughout that year).

(5) In forming their opinion for the purposes of subsection (4)(a), the members of the administrative or the management organ, as the case may be, shall take into account the same liabilities (including prospective and contingent liabilities) as would be relevant under section 220 of the Companies Act (winding up by the Court) to the question whether a company is unable to pay its debts.

(6) The statement required by this section shall be in the Form SE67(6), set out in regulations made by the Minister.

(7) A member of an administrative or management organ who makes a statement under this section without having reasonable grounds for the opinion expressed in the statement is liable, on conviction on indictment, to imprisonment not exceeding two years, or to a fine, or to both, and on

summary conviction to imprisonment not exceeding three months, or to a fine not exceeding the statutory maximum, or to both.

**Power of Minister where an SE no longer complies with the requirements of Article 7.**

68.(1) If it appears to the Minister that an SE no longer complies with the requirements laid down in Article 7 he may direct the SE to regularise its position in accordance with Article 64(1)(a) or (b) within such period as he may specify in the direction.

(2) A direction under this section is enforceable on the application of the Minister to the Court by injunction.

(3) Where—

- (a) an SE whose registered office is in Gibraltar is not in compliance with Article 7; and
- (b) it appears to the Minister that the SE should be wound up,

he may present a petition for it to be wound up if the Court thinks it is just and equitable for it to be so.

(4) Subsection (3) does not apply if the SE is already being wound up by the Court.

**Review of decisions of a competent authority (Articles 8(14) and 19).**

69.(1) Where any competent authority or competent authorities oppose—

- (a) the transfer of the registered office of an SE under Article 8(14); or
- (b) the taking part by a company of the type specified in relation to the United Kingdom in Annex I to the EC Regulation in the formation of an SE by merger under Article 19 whether or not its registered office is to be in Gibraltar,

the provisions of subsections (2) to (5) shall apply.

(2) An SE, the transfer of whose registered office is opposed by a competent authority or authorities under Article 8(14) or a company whose taking part in the formation of an SE by merger, whether or not its registered office is to be in Gibraltar, is opposed by a competent authority or competent authorities under Article 19, may appeal to the Court on the grounds that the opposition—

- (a) is unlawful; or
  - (b) is irrational or unreasonable; or
  - (c) has been made on the basis of a procedural impropriety or otherwise contravenes the rules of natural justice.
- (3) An appeal may only be brought under this section with the permission of the Court.
- (4) The Court determining an appeal may–
- (a) dismiss the appeal; or
  - (b) quash the opposition, and where the Court quashes an opposition it may refer the matter to the opposing competent authority or authorities with a direction to reconsider it and to make a determination in accordance with the findings of the Court.

## PART 6

### PROVISIONS RELATING TO THE EFFECTIVE APPLICATION OF THE EC REGULATION

#### **Competent authorities.**

70. The competent authorities designated under Article 68(2) are–
- (a) in respect of Articles 8, 54, 55 and 64, the Minister; and
  - (b) in respect of Article 25, the Registrar in relation to a public company whose registered office is in Gibraltar; and
  - (c) in respect of Article 26, the Registrar in relation to an SE where the registered office is proposed to be in Gibraltar.

#### **Enforcement of obligation to amend Statutes in conflict with Arrangements for Employee Involvement.**

- 71.(1) If it appears to the Minister that–
- (a) the statutes of an SE are in conflict with the arrangements for employee involvement determined in accordance with Part 3 of this Act; and

- (b) the statutes have not, to the necessary extent, been amended,

he may direct the SE to amend the statutes to that extent within such period as he may specify in the direction.

(2) A direction under this section is enforceable on the application of the Minister to the Court by injunction.

**Records of an SE transferred under Article 8(11) or a public company ceasing to exist under Article 29(1) and (2).**

72.(1) Where—

- (a) the registration of an SE is deleted under Article 8(11) pursuant to a transfer of its registered office to a Member State other than the United Kingdom; or
- (b) a public company ceases to exist under Article 29(1)(c) or (2)(c),

the records of that SE or public company, as the case may be, kept by the Registrar shall continue to be kept by him for a period of twenty years following such a deletion or cessation of existence.

(2) Where the registration of an SE is deleted, the Form, and the documents accompanying it, delivered to the Minister under section 11, together with a copy of the certificate issued under Article 8(8) shall be deemed to be documents to be retained by the Registrar under section 13 and the provisions of this Act apply accordingly.

**Application of enactments to members of supervisory, management and administrative organs.**

73.(1) This section applies to enactments relating to public companies to the extent that they are required, by the EC Regulation, in the manner described in subsection 2, to be applied in relation to SEs.

(2) Enactments are required to be applied for the purposes of subsection 1 where—

- (a) any provision of the EC Regulation, other than Article 9, requires the application of any enactment relating to public companies to determine any question or matter; or
- (b) in the case of any matter not regulated by the EC Regulation or, where matters are partly regulated by it, of those aspects not covered by it, Article 9 requires the application of any

enactment relating to public companies.

(3) Subject to subsections (4), (5) and (6) references to “directors” or “board of directors” in any enactment to which this section applies shall have effect as if they were references—

- (a) in a one-tier system, to the members of the administrative organ; and
- (b) in a two-tier system, to the members of the supervisory and management organs.

(4) Any enactment so applied in relation to a two-tier system shall be applied separately in respect of the members of the supervisory organ and the members of the management organ in relation to the functions of the organ, and in respect of the acts and omissions of the members of those organs.

(5) Where, in a two-tier system, any function relates to the management of the SE and, by virtue of Articles 39(1) or 40(1), is a function that cannot be carried out by the supervisory organ, nothing in subsection (3) has the effect of permitting or requiring the members of the supervisory organ to carry out any such functions.

(6) Where, by virtue of any provision in the EC Regulation or in the statutes, any transaction or function carried out by the management organ in a two-tier system requires the authorisation of the supervisory organ, nothing in subsection (3) affects, or removes, the requirement for such authorisation.

#### **Register of members of supervisory organ.**

74.(1) Every SE which has adopted the form of a two-tier system in its statutes shall keep at its registered office a register of the members of its supervisory organ (“the members”); and the register shall, with respect to the particulars to be contained in it of those persons, comply with the subsections below.

- (2) The SE shall, within the period of 14 days from the occurrence of—
  - (a) any change among the members; or
  - (b) any change in the particulars contained in the register,

send to the Registrar a notification in the Form SE74A, SE74B or SE74C, as may be appropriate, and, if applicable, Form SE(SR) or Form SE(SR)change, set out in regulations made by the Minister, of the change



and of the date on which it occurred; and a notification of a person having become a member shall contain a consent, signed by that person, to act in the relevant capacity.

(3) The register shall be open to the inspection of any shareholder of the SE without charge and of any other person on payment of a fee of £2.50 for each hour or part of an hour during which the right of inspection is exercised.

(4) If an inspection required under this section is refused, or if default is made in complying with subsection (1) or (2), the SE is liable on summary conviction to a fine not exceeding level 5 on the standard scale.

(5) In the case of a refusal of inspection of the register, the Court may by order compel an immediate inspection of it.

(6) Where an SE is required to keep a register of members of the supervisory organ by this section, the application of section 73 to that SE shall not require that particulars of members of the supervisory organ be kept on any register required be kept under section 194 or 195 of the Companies Act.

#### **Particulars of members to be registered under section 74.**

75.(1) Subject to the provisions of this section, the register kept by an SE under section 74 shall contain the following particulars with respect to each member—

- (a) in the case of an individual—
  - (i) his present name;
  - (ii) any former name;
  - (iii) his usual residential address;
  - (iv) his nationality;
  - (v) his business occupation (if any);
  - (vi) particulars of any other directorships held by him or which have been held by him; and
  - (vii) the date of his birth.

(2) In subsection (1)(a)—

- (a) “name” means a person’s Christian name (or other forenames) and surname, except that in the case of a peer, or an individual usually known by a title, the title may be stated instead of his Christian name (or other forename) and surname, or in addition to either or both of them; and
  - (b) the reference to a former name does not include—
    - (i) in the case of a peer, or an individual normally known by a British title, the name by which he was known previous to the adoption of or succession to the title; or
    - (ii) in the case of any person, a former name which was changed or disused before he attained the age of 18 years or which has been changed or disused for 20 years or more; or
    - (iii) in the case of a married woman, the name by which she was known previous to the marriage.
- (3) It is not necessary for the register to contain on any day particulars of a directorship of a company—
- (a) which has not been held by a director at any time during the 5 years preceding that day;
  - (b) which is held by a director in a company which -
    - (i) is grouped with the SE keeping the register; and
    - (ii) if he also held that directorship for any period during those 5 years, was for the whole of that period so grouped,
  - (c) which was held by a member for any period during those 5 years in a company which for the whole of that period was grouped with the SE keeping the register.
- (4) For purposes of subsection (4), “company” includes any body corporate incorporated in Gibraltar and a company or SE is to be regarded as being, or having been, grouped with another at any time if at that time it is or was a company or SE of which the other is or was a wholly owned subsidiary, or if it is or was a wholly owned subsidiary of the other or of another company or SE of which that other is or was a wholly owned subsidiary.

**The SE as a body corporate.**

76.(1) Where—

- (a) any enactment is applied in the manner described in section 73(2); or
- (b) any enactment applies to an SE otherwise than in the manner described in section 73(2),

and those enactments are expressed to apply to, or in respect of, a body corporate, an SE, whether or not registered in Gibraltar, shall be treated for the purposes of the application of those enactments as if it were a body corporate.

(2) Nothing in this section has the effect of constituting an SE as a body corporate incorporated in, or formed under the law of, Gibraltar.

**Notification of Amendments to Statutes and Insolvency Events (Articles 59(3) and 65).**

77.(1) Where, under Articles 59(3) and 65, publication by the Registrar in the Gazette of the events described in those Articles is required by section 66(1)—

- (a) in the case of Article 59(3), the amendments to the statutes shall be delivered to the Registrar by the SE accompanied by Form SE77(1)(a), set out in regulations made by the Minister, within 14 days of the adoption of those amendments; and
- (b) in the case of Article 65, notice of the relevant event set out in Form SE77(1)(b), set out in regulations made by the Minister, shall be delivered to the Registrar by the SE within 14 days of the occurrence of the event.

(2) If default is made in complying with subsection (1)(a) or (b) the SE is liable on summary conviction to a fine not exceeding level 3 on the standard scale.

**Accounting Reference Period and Financial Year of Transferring SE.**

78.(1) Where an SE transfers its registered office to Gibraltar under Article 8—

- (a) its first accounting reference period is the period of twelve months beginning with its last balance sheet date before the registration of the transfer and the date on which that period ends is its accounting reference date for those purposes; and

- (b) its first financial year begins with the first day of its first accounting reference period and ends with the last day of that period or such other date, not more than seven days before or after the end of that period as the SE may determine.

(2) For purposes of this section “the last balance sheet date” is the date as at which the balance sheet of the transferring SE was required to be drawn up under the provisions of the law of the Member State in which it had its registered office, where the balance sheet was the last one required to be drawn up before the registration of the transfer in Gibraltar.

(3) Where the transferring SE has not been required to draw up a balance sheet under the provisions of the law of the Member State where it had its registered office, or, if different, of the Member State where it was first registered, before the registration of the transfer in Gibraltar, its accounting reference date is the last day of the month in which the anniversary of its registration on formation falls and its first accounting reference period is the period beginning with its date of registration on formation and ending with its accounting reference date; and subsection (1)(b) applies in respect of its first financial year accordingly.

**Penalties for Breach of Article 11 (use of SE in name).**

79. Where—

- (a) an SE fails to comply with Article 11(1); or
- (b) any person fails to comply with Article 11(2),

the SE or that person is liable on summary conviction to a fine not exceeding level 3 on the standard scale.

**PART 7**

**PROVISIONS RELATING TO THE CONVERSION OF AN SE TO A  
PUBLIC COMPANY IN ACCORDANCE WITH ARTICLE 66 OF  
THE EC REGULATION**

**Registration of a public company by the conversion of an SE.**

80. Where it is proposed to convert an SE to a public company in accordance with Article 66 there shall be delivered to the Registrar a registration form in Form SE80, set out in regulations made by the Minister, together with the documents specified in that Form; and, for the purposes of registering the SE, (in this Part referred to as the “converting SE”), as a public company under the provisions of the Companies Act, the provisions

of that Act shall have effect with the modifications set out in paragraph 1 of Schedule 3 to this Act and subject to the provisions of this Part.

**Publication of draft terms of conversion.**

81. Where under Article 66(4) draft terms of conversion are required to be publicised there shall be delivered to the Registrar a copy of such draft terms accompanied by Form SE81, set out in regulations made by the Minister, and the Registrar shall cause to be published in the Gazette notice of the receipt by him of the copy of the draft terms.

**Registration under the Companies Act.**

82.(1) The Registrar shall not register the memorandum and articles of association of the converting SE delivered with Form SE80 unless he is satisfied that all the requirements of the Companies Act in respect of registration and of matters precedent and incidental to it have been complied with. Subject to this, the Registrar shall retain and register the memorandum and articles of association.

(2) On registration of the memorandum and articles of association of the converting SE the Registrar shall give a certificate stating—

- (a) that the converting SE is incorporated and retains the legal personality it had when an SE;
- (b) that its memorandum and articles of association are registered under the Companies Act; and
- (c) that it is a public company limited by shares.

(3) The certificate is conclusive evidence—

- (a) that the requirements of the Companies Act and this Act in respect of registration and of matters precedent and incidental to it have been complied with; and
- (b) that on and after the registration the converting SE is a public company limited by shares.

**Effect of registration.**

83.(1) In its application to a converting SE on or after registration the Companies Act shall have effect with the modifications set out in subsections 2 to 10 of Schedule 3 to this Act.

(2) On and after registration a converting SE shall be known by the name contained in its memorandum (subject to sections 19 and 20 of the Companies Act).

(3) The persons named in Form SE80 shall be deemed to have been appointed as the first directors or secretaries of a converting SE on registration.

**Records of a converting SE.**

84. The records of a converting SE, when the converting SE has been registered as a public company limited by shares under the provisions of this Part, relating to any period before its registration as a public company shall be treated for the purposes of the Companies Act as if they were records of that public company.

**SCHEDULE 1**

Section 14

**PROVISIONS APPLYING TO THE REGISTRATION OF SEs**

1. Wherever any act is by this Act or the Companies Act directed to be done to or by the Registrar, it shall be done by the existing Registrar, or to or by such person as the Minister with responsibility for financial services may for the time being authorise.

2.(1) The Registrar shall allocate to every SE a number, which shall be known as the SE's registered number.

(2) SE's registered numbers shall be in such form, consisting of one or more sequences of figures or letters, as the Registrar may from time to time determine.

(3) The Registrar may upon adopting a new form of registered number make such changes of existing registered numbers as appear to him necessary.

(4) A change of an SE's registered number has effect from the date on which the SE is notified by the Registrar of the change.

3. Sections 344, 345 and 346 of the Companies Act (documents delivered to the Registrar etc.) apply to documents delivered to the Registrar under this Act as they apply to documents etc. delivered to the Registrar under the Companies Act.

4. Section 349 of the Companies Act (enforcement of duty to make returns) applies to a default in complying with any provision of this Act requiring the delivery of documents, or the giving of notice, to the Registrar as it applies to a default in complying with a provision of the Companies Act.

**SCHEDULE 2**

Section 32

**STANDARD RULES ON EMPLOYEE INVOLVEMENT****Part 1: Composition of the representative body**

1. The management of the SE shall arrange for the establishment of a representative body in accordance with the following provisions—
  - (a) the representative body shall be composed of employees of the SE and its subsidiaries and establishments;
  - (b) the representative body shall be composed of one member for each 10% of fraction thereof of employees of the SE, its subsidiaries and establishments employed for the time being in each Member State;
  - (c) the members of the representative body shall be elected or appointed by the members of the special negotiating body; and
  - (d) the election or appointment shall be carried out by whatever method the special negotiating body decides.
2. Where its size so warrants, the representative body shall elect a select committee from among its members comprising at most three members.
3. The representative body shall adopt rules of procedure.
4. The representative body shall inform the competent organ of the SE of the composition of the representative body and any changes in its composition.
- 5.(1) Four years after its establishment, the representative body shall decide whether to open negotiations with the competent organ of the SE to reach an employee involvement agreement or whether the standard rules in Part 2 and, where applicable, Part 3 of this Schedule shall continue to apply.
  - (2) Where a decision is taken under paragraph (1) to open negotiations, sections 27 to 29 and 31 of this Act shall apply to the representative body as they apply to the special negotiating body.

**Part 2: Standard rules for information and consultation**

- 6.(1) The competence of the representative body shall be limited to questions which concern the SE itself and any of its subsidiaries or



establishments in a Member State or which exceed the powers of the decision-making organ in a single Member State.

(2) For the purpose of informing and consulting under paragraph (1) the competent organ of the SE shall—

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

(3)

- (a) The competent organ shall, if the representative body so desires, meet with that body, without prejudice to sub-paragraph (b), at least once a year to discuss the reports referred to in sub-paragraph (2)(a). The meetings shall relate in particular to the structure, economic and financial situation, the probable development of business and of production and sales, the situation and probable trend of employment, investments and substantial changes concerning organisation, introduction of new working methods or production processes, transfers of production, mergers, cut-backs or closures of undertakings, establishments or important parts thereof and collective redundancies;
- (b) in the circumstances set out in sub-paragraph (2)(c), the representative body may decide, for reasons of urgency, to allow the select committee to meet the competent organ and it shall have the right to meet a more appropriate level of management within the SE rather than the competent organ itself;
- (c) in the event of the competent organ not acting in accordance with the opinion expressed by the representative body, the two bodies shall meet again to seek an agreement, if the representative body so wishes.

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

(5) Before any meeting referred to in paragraph (3), the members of the representative body or the select committee, as the case may be, shall be entitled to meet without the representatives of the competent organ being present.

(5A) Where under the provisions of this Part, the competent organ of the SE is to provide information on the employment situation in that company, such information must include suitable information relating to the use of agency workers (if any) in that company.

(6) Without prejudice to sections 37 and 38 of this Act, the members of the representative body shall inform the employees' representatives or, if no such representatives exist, the employees of the SE and its subsidiaries and establishments, of the content and outcome of the information and consultation procedures.

(7) The representative body and the select committee may be assisted by experts of its choice.

(8) The costs of the representative body shall be borne by the SE which shall provide the members of that body with financial and material resources needed to enable them to perform their duties in an appropriate manner, including (unless agreed otherwise) the cost of organising meetings, providing interpretation facilities and accommodation and travelling expenses. However, where the representative body or the select committee is assisted by more than one expert the SE is not required to pay the expenses of more than one of them.

### **Part 3: Standard rules for participation**

7.(1) In the case of an SE established by transformation, if the rules of a Member State relating to employee participation in the administrative or supervisory body applied before registration, all aspects of employee participation shall continue to apply to the SE. Paragraph (2) shall apply *mutatis mutandis* to that end.

(2) In the case where an SE is established other than by transformation and where the employees or their representatives of at least one of the participating companies had participation rights, the representative body shall have the right to elect, appoint, recommend or oppose the appointment of a number of members of the administrative or supervisory body of the

SE, such number shall be equal to the highest proportion in force in the participating companies concerned before the registration of the SE.

(3)

- (a) Subject to sub-paragraph (b), the representative body shall, taking into account the proportion of employees of the SE employed in each Member State, decide on the allocation of seats within the administrative or supervisory body.
- (b) In making the decision set out in sub-paragraph (a), if the employees of one or more Member State are not covered by the proportional criterion set out in (a), the representative body shall appoint a member from one of those Member States including one from the Member State in which the SE is registered, if appropriate.
- (c) Every member of the administrative body or, where appropriate, the supervisory body of the SE who has been elected, appointed or recommended by the representative body or the employees shall be a full member with the same rights and obligations as the members representing shareholders, including the right to vote.

**SCHEDULE 3**

Sections 80 and 83

**MODIFICATIONS OF THE COMPANIES ACT****Modifications applying before registration.**

1.(1) The converting SE's memorandum and articles of association shall not have names subscribed on it.

(2) Section 4(4)(b) and (c), of the Companies Act (memorandum of association: subscribers) shall not apply.

(3) In section 5 (stamp and signature of memorandum) and section 8 (articles of association) of the Companies Act the requirement for signature by the subscribers to, respectively, the memorandum and articles shall not apply.

(4) Section 11(d) of the Companies Act (signature of articles) shall not apply.

(5) Section 14 of the Companies Act (documents to be sent to the Registrar) shall not apply.

**Modifications applying on or after registration.**

2. In the Companies Act, a reference to a company's incorporation shall be construed as a reference to the registration of a converting SE's memorandum and articles of association.

3. In the Companies Act, a reference to documents delivered under the Companies Act shall be taken to include a reference to documents delivered under section 80 of this Act.

4.(1) In the Companies Act, a reference to a company's certificate of incorporation shall be construed as a reference to the certificate given under section 82(3) of this Act.

(2) In the Companies Act, a requirement for the Registrar to issue a certificate of incorporation to a company shall—

- (a) be construed as a requirement to issue a certificate of registration similar to the certificate under section 82(3) of this Act; and

- (b) apply with such other modifications as the Registrar considers necessary in consequence of subsection (a).

5. In section 2 of the Companies Act (definition of company), and in other legislation relating to companies, any reference to a company formed and registered under that Act shall have effect as if the reference to formation were omitted.

**Effect of registration.**

- 6. Section 15 of the Companies Act (effect of registration) shall not apply.
- 7. Section 39(1) of the Companies Act (definition of “member”) shall not apply.

**Use of “limited”.**

8. In section 371 of the Companies Act (penalty for improper use of “limited”) the reference to incorporation with limited liability shall be construed as a reference to registration as a company with limited liability.

**Fees.**

9. A reference to any fees payable by virtue of section 347 of the Companies Act in relation to a certificate of incorporation shall be construed as including a reference to—

- (a) a certificate under section 82(3); and
- (b) a certificate issued in accordance with paragraph 4(2).

**Accounting Reference Date.**

10. No modification made under this Schedule shall affect the determination of the accounting reference date of a converting SE by virtue of Article 61 of the EC Regulation, or of section 78 prior to the registration of the converting SE under section 82.

**SCHEDULE 4****COUNCIL REGULATION (EC) NO 2157/2001  
of 8 October 2001  
on the Statute for a European company (SE)****THE COUNCIL OF THE EUROPEAN UNION,**

Having regard to the Treaty establishing the European Community, and in particular Article 308 thereof,

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

Having regard to the opinion of the European Parliament(2),

Having regard to the opinion of the Economic and Social Committee(3),

Whereas:

(1) The completion of the internal market and the improvement it brings about in the economic and social situation throughout the Community mean not only that barriers to trade must be removed, but also that the structures of production must be adapted to the Community dimension. For that purpose it is essential that companies the business of which is not limited to satisfying purely local needs should be able to plan and carry out the reorganisation of their business on a Community scale.

(2) Such reorganisation presupposes that existing companies from different Member States are given the option of combining their potential by means of mergers. Such operations can be carried out only with due regard to the rules of competition laid down in the Treaty.

(3) Restructuring and cooperation operations involving companies from different Member States give rise to legal and psychological difficulties and tax problems. The approximation of Member States' company law by means of Directives based on Article 44 of the Treaty can overcome some of those difficulties. Such approximation does not, however, release companies governed by different legal systems from the obligation to choose a form of company governed by a particular national law.

(4) The legal framework within which business must be carried on in the Community is still based largely on national laws and therefore no longer corresponds to the economic framework within which it must develop if the objectives set out in Article 18 of the Treaty are to be achieved. That situation forms a considerable obstacle to the creation of groups of companies from different Member States.

(5) Member States are obliged to ensure that the provisions applicable to European companies under this Regulation do not result either in discrimination arising out of unjustified different treatment of European companies compared with public limited-liability companies or in disproportionate restrictions on the formation of a European company or on the transfer of its registered office.

(6) It is essential to ensure as far as possible that the economic unit and the legal unit of business in the Community coincide. For that purpose, provision should be made for the creation, side by side with companies governed by a particular national law, of companies formed and carrying on business under the law created by a Community Regulation directly applicable in all Member States.

(7) The provisions of such a Regulation will permit the creation and management of companies with a European dimension, free from the obstacles arising from the disparity and the limited territorial application of national company law.

(8) The Statute for a European public limited-liability company (hereafter referred to as "SE") is among the measures to be adopted by the Council before 1992 listed in the Commission's White Paper on completing the internal market, approved by the European Council that met in Milan in June 1985. The European Council that met in Brussels in 1987 expressed the wish to see such a Statute created swiftly.

(9) Since the Commission's submission in 1970 of a proposal for a Regulation on the Statute for a European public limited-liability company, amended in 1975, work on the approximation of national company law has made substantial progress, so that on those points where the functioning of an SE does not need uniform Community rules reference may be made to the law governing public limited-liability companies in the Member State where it has its registered office.

(10) Without prejudice to any economic needs that may arise in the future, if the essential objective of legal rules governing SEs is to be attained, it must be possible at least to create such a company as a means both of enabling companies from different Member States to merge or to create a holding company and of enabling companies and other legal persons carrying on economic activities and governed by the laws of different Member States to form joint subsidiaries.

(11) In the same context it should be possible for a public limited-liability company with a registered office and head office within the Community to transform itself into an SE without going into liquidation, provided it has a subsidiary in a Member State other than that of its registered office.

(12) National provisions applying to public limited-liability companies that offer their securities to the public and to securities transactions should also apply where an SE is formed by means of an offer of securities to the public and to SEs wishing to utilise such financial instruments.

(13) The SE itself must take the form of a company with share capital, that being the form most suited, in terms of both financing and management, to the needs of a company carrying on business on a European scale. In order to ensure that such companies are of reasonable size, a minimum amount of capital should be set so that they have sufficient assets without making it difficult for small and medium-sized undertakings to form SEs.

(14) An SE must be efficiently managed and properly supervised. It must be borne in mind that there are at present in the Community two different systems for the administration of public limited-liability companies. Although an SE should be allowed to choose between the two systems, the respective responsibilities of those responsible for management and those responsible for supervision should be clearly defined.

(15) Under the rules and general principles of private international law, where one undertaking controls another governed by a different legal system, its ensuing rights and obligations as regards the protection of minority shareholders and third parties are governed by the law governing the controlled undertaking, without prejudice to the obligations imposed on the controlling undertaking by its own law, for example the requirement to prepare consolidated accounts.

(16) Without prejudice to the consequences of any subsequent coordination of the laws of the Member States, specific rules for SEs are not at present required in this field. The rules and general principles of private international law should therefore be applied both where an SE exercises control and where it is the controlled company.

(17) The rule thus applicable where an SE is controlled by another undertaking should be specified, and for this purpose reference should be made to the law governing public limited-liability companies in the Member State in which the SE has its registered office.

(18) Each Member State must be required to apply the sanctions applicable to public limited-liability companies governed by its law in respect of infringements of this Regulation.

(19) The rules on the involvement of employees in the European company are laid down in Directive 2001/86/EC(4), and those provisions thus form an indissociable complement to this Regulation and must be applied concomitantly.



(20) This Regulation does not cover other areas of law such as taxation, competition, intellectual property or insolvency. The provisions of the Member States' law and of Community law are therefore applicable in the above areas and in other areas not covered by this Regulation.

(21) Directive 2001/86/EC is designed to ensure that employees have a right of involvement in issues and decisions affecting the life of their SE. Other social and labour legislation questions, in particular the right of employees to information and consultation as regulated in the Member States, are governed by the national provisions applicable, under the same conditions, to public limited-liability companies.

(22) The entry into force of this Regulation must be deferred so that each Member State may incorporate into its national law the provisions of Directive 2001/86/EC and set up in advance the necessary machinery for the formation and operation of SEs with registered offices within its territory, so that the Regulation and the Directive may be applied concomitantly.

(23) A company the head office of which is not in the Community should be allowed to participate in the formation of an SE provided that company is formed under the law of a Member State, has its registered office in that Member State and has a real and continuous link with a Member State's economy according to the principles established in the 1962 General Programme for the abolition of restrictions on freedom of establishment. Such a link exists in particular if a company has an establishment in that Member State and conducts operations therefrom.

(24) The SE should be enabled to transfer its registered office to another Member State. Adequate protection of the interests of minority shareholders who oppose the transfer, of creditors and of holders of other rights should be proportionate. Such transfer should not affect the rights originating before the transfer.

(25) This Regulation is without prejudice to any provision which may be inserted in the 1968 Brussels Convention or in any text adopted by Member States or by the Council to replace such Convention, relating to the rules of jurisdiction applicable in the case of transfer of the registered offices of a public limited-liability company from one Member State to another.

(26) Activities by financial institutions are regulated by specific directives and the national law implementing those directives and additional national rules regulating those activities apply in full to an SE.

(27) In view of the specific Community character of an SE, the "real seat" arrangement adopted by this Regulation in respect of SEs is without

prejudice to Member States' laws and does not pre-empt any choices to be made for other Community texts on company law.

(28) The Treaty does not provide, for the adoption of this Regulation, powers of action other than those of Article 308 thereof.

(29) Since the objectives of the intended action, as outlined above, cannot be adequately attained by the Member States in as much as a European public limited-liability company is being established at European level and can therefore, because of the scale and impact of such company, be better attained at Community level, the Community may take measures in accordance with the principle of subsidiarity enshrined in Article 5 of the Treaty. In accordance with the principle of proportionality as set out in the said Article, this Regulation does not go beyond what is necessary to attain these objectives,

**HAS ADOPTED THIS REGULATION:**

**TITLE I**

**GENERAL PROVISIONS**

Article 1

1. A company may be set up within the territory of the Community in the form of a European public limited-liability company (*Societas Europaea* or SE) on the conditions and in the manner laid down in this Regulation.
2. The capital of an SE shall be divided into shares. No shareholder shall be liable for more than the amount he has subscribed.
3. An SE shall have legal personality.
4. Employee involvement in an SE shall be governed by the provisions of Directive 2001/86/EC.

Article 2

1. Public limited-liability companies such as referred to in Annex I, formed under the law of a Member State, with registered offices and head offices within the Community may form an SE by means of a merger provided that at least two of them are governed by the law of different Member States.
2. Public and private limited-liability companies such as referred to in Annex II, formed under the law of a Member State, with registered offices and head offices within the Community may promote the formation of a holding SE provided that each of at least two of them:

- (a) is governed by the law of a different Member State, or
- (b) has for at least two years had a subsidiary company governed by the law of another Member State or a branch situated in another Member State.

3. Companies and firms within the meaning of the second paragraph of Article 48 of the Treaty and other legal bodies governed by public or private law, formed under the law of a Member State, with registered offices and head offices within the Community may form a subsidiary SE by subscribing for its shares, provided that each of at least two of them:

- (a) is governed by the law of a different Member State, or
- (b) has for at least two years had a subsidiary company governed by the law of another Member State or a branch situated in another Member State.

4. A public limited-liability company, formed under the law of a Member State, which has its registered office and head office within the Community may be transformed into an SE if for at least two years it has had a subsidiary company governed by the law of another Member State.

5. A Member State may provide that a company the head office of which is not in the Community may participate in the formation of an SE provided that company is formed under the law of a Member State, has its registered office in that Member State and has a real and continuous link with a Member State's economy.

## Article 3

1. For the purposes of Article 2(1), (2) and (3), an SE shall be regarded as a public limited-liability company governed by the law of the Member State in which it has its registered office.

2. An SE may itself set up one or more subsidiaries in the form of SEs. The provisions of the law of the Member State in which a subsidiary SE has its registered office that require a public limited-liability company to have more than one shareholder shall not apply in the case of the subsidiary SE. The provisions of national law implementing the twelfth Council Company Law Directive (89/667/EEC) of 21 December 1989 on single-member private limited-liability companies(5) shall apply to SEs mutatis mutandis.

## Article 4

1. The capital of an SE shall be expressed in euro.

2. The subscribed capital shall not be less than EUR 120000.
3. The laws of a Member State requiring a greater subscribed capital for companies carrying on certain types of activity shall apply to SEs with registered offices in that Member State.

#### Article 5

Subject to Article 4(1) and (2), the capital of an SE, its maintenance and changes thereto, together with its shares, bonds and other similar securities shall be governed by the provisions which would apply to a public limited-liability company with a registered office in the Member State in which the SE is registered.

#### Article 6

For the purposes of this Regulation, "the statutes of the SE" shall mean both the instrument of incorporation and, where they are the subject of a separate document, the statutes of the SE.

#### Article 7

The registered office of an SE shall be located within the Community, in the same Member State as its head office. A Member State may in addition impose on SEs registered in its territory the obligation of locating their head office and their registered office in the same place.

#### Article 8

1. The registered office of an SE may be transferred to another Member State in accordance with paragraphs 2 to 13. Such a transfer shall not result in the winding up of the SE or in the creation of a new legal person.
2. The management or administrative organ shall draw up a transfer proposal and publicise it in accordance with Article 13, without prejudice to any additional forms of publication provided for by the Member State of the registered office. That proposal shall state the current name, registered office and number of the SE and shall cover:
  - (a) the proposed registered office of the SE;
  - (b) the proposed statutes of the SE including, where appropriate, its new name;
  - (c) any implication the transfer may have on employees' involvement;

- (d) the proposed transfer timetable;
- (e) any rights provided for the protection of shareholders and/or creditors.

3. The management or administrative organ shall draw up a report explaining and justifying the legal and economic aspects of the transfer and explaining the implications of the transfer for shareholders, creditors and employees.

4. An SE's shareholders and creditors shall be entitled, at least one month before the general meeting called upon to decide on the transfer, to examine at the SE's registered office the transfer proposal and the report drawn up pursuant to paragraph 3 and, on request, to obtain copies of those documents free of charge.

5. A Member State may, in the case of SEs registered within its territory, adopt provisions designed to ensure appropriate protection for minority shareholders who oppose a transfer.

6. No decision to transfer may be taken for two months after publication of the proposal. Such a decision shall be taken as laid down in Article 59.

7. Before the competent authority issues the certificate mentioned in paragraph 8, the SE shall satisfy it that, in respect of any liabilities arising prior to the publication of the transfer proposal, the interests of creditors and holders of other rights in respect of the SE (including those of public bodies) have been adequately protected in accordance with requirements laid down by the Member State where the SE has its registered office prior to the transfer.

A Member State may extend the application of the first subparagraph to liabilities that arise (or may arise) prior to the transfer.

The first and second subparagraphs shall be without prejudice to the application to SEs of the national legislation of Member States concerning the satisfaction or securing of payments to public bodies.

8. In the Member State in which an SE has its registered office the Court, notary or other competent authority shall issue a certificate attesting to the completion of the acts and formalities to be accomplished before the transfer.

9. The new registration may not be effected until the certificate referred to in paragraph 8 has been submitted, and evidence produced that the formalities required for registration in the country of the new registered office have been completed.

10. The transfer of an SE's registered office and the consequent amendment of its statutes shall take effect on the date on which the SE is registered, in accordance with Article 12, in the register for its new registered office.

11. When the SE's new registration has been effected, the registry for its new registration shall notify the registry for its old registration. Deletion of the old registration shall be effected on receipt of that notification, but not before.

12. The new registration and the deletion of the old registration shall be publicised in the Member States concerned in accordance with Article 13.

13. On publication of an SE's new registration, the new registered office may be relied on as against third parties. However, as long as the deletion of the SE's registration from the register for its previous registered office has not been publicised, third parties may continue to rely on the previous registered office unless the SE proves that such third parties were aware of the new registered office.

14. The laws of a Member State may provide that, as regards SEs registered in that Member State, the transfer of a registered office which would result in a change of the law applicable shall not take effect if any of that Member State's competent authorities opposes it within the two-month period referred to in paragraph 6. Such opposition may be based only on grounds of public interest.

Where an SE is supervised by a national financial supervisory authority according to Community directives the right to oppose the change of registered office applies to this authority as well.  
Review by a judicial authority shall be possible.

15. An SE may not transfer its registered office if proceedings for winding up, liquidation, insolvency or suspension of payments or other similar proceedings have been brought against it.

16. An SE which has transferred its registered office to another Member State shall be considered, in respect of any cause of action arising prior to the transfer as determined in paragraph 10, as having its registered office in the Member States where the SE was registered prior to the transfer, even if the SE is sued after the transfer.

#### Article 9

1. An SE shall be governed:

- (a) by this Regulation,

- (b) where expressly authorised by this Regulation, by the provisions of its statutes or
- (c) in the case of matters not regulated by this Regulation or, where matters are partly regulated by it, of those aspects not covered by it, by:
  - (i) the provisions of laws adopted by Member States in implementation of Community measures relating specifically to SEs;
  - (ii) the provisions of Member States' laws which would apply to a public limited-liability company formed in accordance with the law of the Member State in which the SE has its registered office;
  - (iii) the provisions of its statutes, in the same way as for a public limited-liability company formed in accordance with the law of the Member State in which the SE has its registered office.

2. The provisions of laws adopted by Member States specifically for the SE must be in accordance with Directives applicable to public limited-liability companies referred to in Annex I.

3. If the nature of the business carried out by an SE is regulated by specific provisions of national laws, those laws shall apply in full to the SE.

#### Article 10

Subject to this Regulation, an SE shall be treated in every Member State as if it were a public limited-liability company formed in accordance with the law of the Member State in which it has its registered office.

#### Article 11

1. The name of an SE shall be preceded or followed by the abbreviation SE.
2. Only SEs may include the abbreviation SE in their name.
3. Nevertheless, companies, firms and other legal entities registered in a Member State before the date of entry into force of this Regulation in the names of which the abbreviation SE appears shall not be required to alter their names.

#### Article 12

1. Every SE shall be registered in the Member State in which it has its registered office in a register designated by the law of that Member State in accordance with Article 3 of the first Council Directive (68/151/EEC) of 9 March 1968 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community(6).

2. An SE may not be registered unless an agreement on arrangements for employee involvement pursuant to Article 4 of Directive 2001/86/EC has been concluded, or a decision pursuant to Article 3(6) of the Directive has been taken, or the period for negotiations pursuant to Article 5 of the Directive has expired without an agreement having been concluded.

3. In order for an SE to be registered in a Member State which has made use of the option referred to in Article 7(3) of Directive 2001/86/EC, either an agreement pursuant to Article 4 of the Directive must have been concluded on the arrangements for employee involvement, including participation, or none of the participating companies must have been governed by participation rules prior to the registration of the SE.

4. The statutes of the SE must not conflict at any time with the arrangements for employee involvement which have been so determined. Where new such arrangements determined pursuant to the Directive conflict with the existing statutes, the statutes shall to the extent necessary be amended. In this case, a Member State may provide that the management organ or the administrative organ of the SE shall be entitled to proceed to amend the statutes without any further decision from the general shareholders meeting.

#### Article 13

Publication of the documents and particulars concerning an SE which must be publicised under this Regulation shall be effected in the manner laid down in the laws of the Member State in which the SE has its registered office in accordance with Directive 68/151/EEC.

#### Article 14

1. Notice of an SE's registration and of the deletion of such a registration shall be published for information purposes in the Official Journal of the European Communities after publication in accordance with Article 13. That notice shall state the name, number, date and place of registration of the SE, the date and place of publication and the title of publication, the registered office of the SE and its sector of activity.



2. Where the registered office of an SE is transferred in accordance with Article 8, notice shall be published giving the information provided for in paragraph 1, together with that relating to the new registration.

3. The particulars referred to in paragraph 1 shall be forwarded to the Office for Official Publications of the European Communities within one month of the publication referred to in Article 13.

## TITLE II

### FORMATION

#### Section 1

##### General

#### Article 15

1. Subject to this Regulation, the formation of an SE shall be governed by the law applicable to public limited-liability companies in the Member State in which the SE establishes its registered office.

2. The registration of an SE shall be publicised in accordance with Article 13.

#### Article 16

1. An SE shall acquire legal personality on the date on which it is registered in the register referred to in Article 12.

2. If acts have been performed in an SE's name before its registration in accordance with Article 12 and the SE does not assume the obligations arising out of such acts after its registration, the natural persons, companies, firms or other legal entities which performed those acts shall be jointly and severally liable therefor, without limit, in the absence of agreement to the contrary.

#### Section 2

##### Formation by merger

#### Article 17

1. An SE may be formed by means of a merger in accordance with Article 2(1).

2. Such a merger may be carried out in accordance with:

- (a) the procedure for merger by acquisition laid down in Article 3(1) of the third Council Directive (78/855/EEC) of 9 October 1978 based on Article 54(3)(g) of the Treaty concerning mergers of public limited-liability companies(7) or
- (b) the procedure for merger by the formation of a new company laid down in Article 4(1) of the said Directive.

In the case of a merger by acquisition, the acquiring company shall take the form of an SE when the merger takes place. In the case of a merger by the formation of a new company, the SE shall be the newly formed company.

#### Article 18

For matters not covered by this section or, where a matter is partly covered by it, for aspects not covered by it, each company involved in the formation of an SE by merger shall be governed by the provisions of the law of the Member State to which it is subject that apply to mergers of public limited-liability companies in accordance with Directive 78/855/EEC.

#### Article 19

The laws of a Member State may provide that a company governed by the law of that Member State may not take part in the formation of an SE by merger if any of that Member State's competent authorities opposes it before the issue of the certificate referred to in Article 25(2). Such opposition may be based only on grounds of public interest. Review by a judicial authority shall be possible.

#### Article 20

1. The management or administrative organs of merging companies shall draw up draft terms of merger. The draft terms of merger shall include the following particulars:

- (a) the name and registered office of each of the merging companies together with those proposed for the SE;
- (b) the share-exchange ratio and the amount of any compensation;
- (c) the terms for the allotment of shares in the SE;
- (d) the date from which the holding of shares in the SE will entitle the holders to share in profits and any special conditions affecting that entitlement;

- (e) the date from which the transactions of the merging companies will be treated for accounting purposes as being those of the SE;
- (f) the rights conferred by the SE on the holders of shares to which special rights are attached and on the holders of securities other than shares, or the measures proposed concerning them;
- (g) any special advantage granted to the experts who examine the draft terms of merger or to members of the administrative, management, supervisory or controlling organs of the merging companies;
- (h) the statutes of the SE;
- (i) information on the procedures by which arrangements for employee involvement are determined pursuant to Directive 2001/86/EC.

2. The merging companies may include further items in the draft terms of merger.

#### Article 21

For each of the merging companies and subject to the additional requirements imposed by the Member State to which the company concerned is subject, the following particulars shall be published in the national gazette of that Member State:

- (a) the type, name and registered office of every merging company;
- (b) the register in which the documents referred to in Article 3(2) of Directive 68/151/EEC are filed in respect of each merging company, and the number of the entry in that register;
- (c) an indication of the arrangements made in accordance with Article 24 for the exercise of the rights of the creditors of the company in question and the address at which complete information on those arrangements may be obtained free of charge;
- (d) an indication of the arrangements made in accordance with Article 24 for the exercise of the rights of minority shareholders of the company in question and the address at which complete information on those arrangements may be obtained free of charge;

- (e) the name and registered office proposed for the SE.

#### Article 22

As an alternative to experts operating on behalf of each of the merging companies, one or more independent experts as defined in Article 10 of Directive 78/855/EEC, appointed for those purposes at the joint request of the companies by a judicial or administrative authority in the Member State of one of the merging companies or of the proposed SE, may examine the draft terms of merger and draw up a single report to all the shareholders. The experts shall have the right to request from each of the merging companies any information they consider necessary to enable them to complete their function.

#### Article 23

1. The general meeting of each of the merging companies shall approve the draft terms of merger.
2. Employee involvement in the SE shall be decided pursuant to Directive 2001/86/EC. The general meetings of each of the merging companies may reserve the right to make registration of the SE conditional upon its express ratification of the arrangements so decided.

#### Article 24

1. The law of the Member State governing each merging company shall apply as in the case of a merger of public limited-liability companies, taking into account the cross-border nature of the merger, with regard to the protection of the interests of:
  - (a) creditors of the merging companies;
  - (b) holders of bonds of the merging companies;
  - (c) holders of securities, other than shares, which carry special rights in the merging companies.

2. A Member State may, in the case of the merging companies governed by its law, adopt provisions designed to ensure appropriate protection for minority shareholders who have opposed the merger.

#### Article 25

1. The legality of a merger shall be scrutinised, as regards the part of the procedure concerning each merging company, in accordance with the law on

mergers of public limited-liability companies of the Member State to which the merging company is subject.

2. In each Member State concerned the Court, notary or other competent authority shall issue a certificate conclusively attesting to the completion of the pre-merger acts and formalities.

3. If the law of a Member State to which a merging company is subject provides for a procedure to scrutinise and amend the share-exchange ratio, or a procedure to compensate minority shareholders, without preventing the registration of the merger, such procedures shall only apply if the other merging companies situated in Member States which do not provide for such procedure explicitly accept, when approving the draft terms of the merger in accordance with Article 23(1), the possibility for the shareholders of that merging company to have recourse to such procedure. In such cases, the Court, notary or other competent authorities may issue the certificate referred to in paragraph 2 even if such a procedure has been commenced. The certificate must, however, indicate that the procedure is pending. The decision in the procedure shall be binding on the acquiring company and all its shareholders.

#### Article 26

1. The legality of a merger shall be scrutinised, as regards the part of the procedure concerning the completion of the merger and the formation of the SE, by the Court, notary or other authority competent in the Member State of the proposed registered office of the SE to scrutinise that aspect of the legality of mergers of public limited-liability companies.

2. To that end each merging company shall submit to the competent authority the certificate referred to in Article 25(2) within six months of its issue together with a copy of the draft terms of merger approved by that company.

3. The authority referred to in paragraph 1 shall in particular ensure that the merging companies have approved draft terms of merger in the same terms and that arrangements for employee involvement have been determined pursuant to Directive 2001/86/EC.

4. That authority shall also satisfy itself that the SE has been formed in accordance with the requirements of the law of the Member State in which it has its registered office in accordance with Article 15.

#### Article 27

1. A merger and the simultaneous formation of an SE shall take effect on the date on which the SE is registered in accordance with Article 12.

2. The SE may not be registered until the formalities provided for in Articles 25 and 26 have been completed.

#### Article 28

For each of the merging companies the completion of the merger shall be publicised as laid down by the law of each Member State in accordance with Article 3 of Directive 68/151/EEC.

#### Article 29

1. A merger carried out as laid down in Article 17(2)(a) shall have the following consequences ipso jure and simultaneously:

- (a) all the assets and liabilities of each company being acquired are transferred to the acquiring company;
- (b) the shareholders of the company being acquired become shareholders of the acquiring company;
- (c) the company being acquired ceases to exist;
- (d) the acquiring company adopts the form of an SE.

2. A merger carried out as laid down in Article 17(2)(b) shall have the following consequences ipso jure and simultaneously:

- (a) all the assets and liabilities of the merging companies are transferred to the SE;
- (b) the shareholders of the merging companies become shareholders of the SE;
- (c) the merging companies cease to exist.

3. Where, in the case of a merger of public limited-liability companies, the law of a Member State requires the completion of any special formalities before the transfer of certain assets, rights and obligations by the merging companies becomes effective against third parties, those formalities shall apply and shall be carried out either by the merging companies or by the SE following its registration.

4. The rights and obligations of the participating companies on terms and conditions of employment arising from national law, practice and individual employment contracts or employment relationships and existing at the date

of the registration shall, by reason of such registration be transferred to the SE upon its registration.

## Article 30

A merger as provided for in Article 2(1) may not be declared null and void once the SE has been registered.

The absence of scrutiny of the legality of the merger pursuant to Articles 25 and 26 may be included among the grounds for the winding-up of the SE.

## Article 31

1. Where a merger within the meaning of Article 17(2)(a) is carried out by a company which holds all the shares and other securities conferring the right to vote at general meetings of another company, neither Article 20(1)(b), (c) and (d), Article 29(1)(b) nor Article 22 shall apply. National law governing each merging company and mergers of public limited-liability companies in accordance with Article 24 of Directive 78/855/EEC shall nevertheless apply.

2. Where a merger by acquisition is carried out by a company which holds 90 % or more but not all of the shares and other securities conferring the right to vote at general meetings of another company, reports by the management or administrative body, reports by an independent expert or experts and the documents necessary for scrutiny shall be required only to the extent that the national law governing either the acquiring company or the company being acquired so requires. Member States may, however, provide that this paragraph may apply where a company holds shares conferring 90 % or more but not all of the voting rights.

## Section 3

### Formation of a holding SE

## Article 32

1. A holding SE may be formed in accordance with Article 2(2).

A company promoting the formation of a holding SE in accordance with Article 2(2) shall continue to exist.

2. The management or administrative organs of the companies which promote such an operation shall draw up, in the same terms, draft terms for the formation of the holding SE. The draft terms shall include a report explaining and justifying the legal and economic aspects of the formation and indicating the implications for the shareholders and for the employees of

the adoption of the form of a holding SE. The draft terms shall also set out the particulars provided for in Article 20(1)(a), (b), (c), (f), (g), (h) and (i) and shall fix the minimum proportion of the shares in each of the companies promoting the operation which the shareholders must contribute to the formation of the holding SE. That proportion shall be shares conferring more than 50 % of the permanent voting rights.

3. For each of the companies promoting the operation, the draft terms for the formation of the holding SE shall be publicised in the manner laid down in each Member State's national law in accordance with Article 3 of Directive 68/151/EEC at least one month before the date of the general meeting called to decide thereon.

4. One or more experts independent of the companies promoting the operation, appointed or approved by a judicial or administrative authority in the Member State to which each company is subject in accordance with national provisions adopted in implementation of Directive 78/855/EEC, shall examine the draft terms of formation drawn up in accordance with paragraph 2 and draw up a written report for the shareholders of each company. By agreement between the companies promoting the operation, a single written report may be drawn up for the shareholders of all the companies by one or more independent experts, appointed or approved by a judicial or administrative authority in the Member State to which one of the companies promoting the operation or the proposed SE is subject in accordance with national provisions adopted in implementation of Directive 78/855/EEC.

5. The report shall indicate any particular difficulties of valuation and state whether the proposed share-exchange ratio is fair and reasonable, indicating the methods used to arrive at it and whether such methods are adequate in the case in question.

6. The general meeting of each company promoting the operation shall approve the draft terms of formation of the holding SE.

Employee involvement in the holding SE shall be decided pursuant to Directive 2001/86/EC. The general meetings of each company promoting the operation may reserve the right to make registration of the holding SE conditional upon its express ratification of the arrangements so decided.

7. These provisions shall apply mutatis mutandis to private limited-liability companies.

#### Article 33

1. The shareholders of the companies promoting such an operation shall have a period of three months in which to inform the promoting companies



whether they intend to contribute their shares to the formation of the holding SE. That period shall begin on the date upon which the terms for the formation of the holding SE have been finally determined in accordance with Article 32.

2. The holding SE shall be formed only if, within the period referred to in paragraph 1, the shareholders of the companies promoting the operation have assigned the minimum proportion of shares in each company in accordance with the draft terms of formation and if all the other conditions are fulfilled.

3. If the conditions for the formation of the holding SE are all fulfilled in accordance with paragraph 2, that fact shall, in respect of each of the promoting companies, be publicised in the manner laid down in the national law governing each of those companies adopted in implementation of Article 3 of Directive 68/151/EEC. Shareholders of the companies promoting the operation who have not indicated whether they intend to make their shares available to the promoting companies for the purpose of forming the holding SE within the period referred to in paragraph 1 shall have a further month in which to do so.

4. Shareholders who have contributed their securities to the formation of the SE shall receive shares in the holding SE.

5. The holding SE may not be registered until it is shown that the formalities referred to in Article 32 have been completed and that the conditions referred to in paragraph 2 have been fulfilled.

## Article 34

A Member State may, in the case of companies promoting such an operation, adopt provisions designed to ensure protection for minority shareholders who oppose the operation, creditors and employees.

## Section 4

### Formation of a subsidiary SE

## Article 35

An SE may be formed in accordance with Article 2(3).

## Article 36

Companies, firms and other legal entities participating in such an operation shall be subject to the provisions governing their participation in the

formation of a subsidiary in the form of a public limited-liability company under national law.

#### Section 5

Conversion of an existing public limited-liability company into an SE

#### Article 37

1. An SE may be formed in accordance with Article 2(4).
2. Without prejudice to Article 12 the conversion of a public limited-liability company into an SE shall not result in the winding up of the company or in the creation of a new legal person.
3. The registered office may not be transferred from one Member State to another pursuant to Article 8 at the same time as the conversion is effected.
4. The management or administrative organ of the company in question shall draw up draft terms of conversion and a report explaining and justifying the legal and economic aspects of the conversion and indicating the implications for the shareholders and for the employees of the adoption of the form of an SE.
5. The draft terms of conversion shall be publicised in the manner laid down in each Member State's law in accordance with Article 3 of Directive 68/151/EEC at least one month before the general meeting called upon to decide thereon.
6. Before the general meeting referred to in paragraph 7 one or more independent experts appointed or approved, in accordance with the national provisions adopted in implementation of Article 10 of Directive 78/855/EEC, by a judicial or administrative authority in the Member State to which the company being converted into an SE is subject shall certify in compliance with Directive 77/91/EEC(8) *mutatis mutandis* that the company has net assets at least equivalent to its capital plus those reserves which must not be distributed under the law or the Statutes.
7. The general meeting of the company in question shall approve the draft terms of conversion together with the statutes of the SE. The decision of the general meeting shall be passed as laid down in the provisions of national law adopted in implementation of Article 7 of Directive 78/855/EEC.
8. Member States may condition a conversion to a favourable vote of a qualified majority or unanimity in the organ of the company to be converted within which employee participation is organised.

9. The rights and obligations of the company to be converted on terms and conditions of employment arising from national law, practice and individual employment contracts or employment relationships and existing at the date of the registration shall, by reason of such registration be transferred to the SE.

## TITLE III

### STRUCTURE OF THE SE

#### Article 38

Under the conditions laid down by this Regulation an SE shall comprise:

- (a) a general meeting of shareholders and
- (b) either a supervisory organ and a management organ (two-tier system) or an administrative organ (one-tier system) depending on the form adopted in the statutes.

#### Section 1

##### Two-tier system

#### Article 39

1. The management organ shall be responsible for managing the SE. A Member State may provide that a managing director or managing directors shall be responsible for the current management under the same conditions as for public limited-liability companies that have registered offices within that Member State's territory.

2. The member or members of the management organ shall be appointed and removed by the supervisory organ. A Member State may, however, require or permit the statutes to provide that the member or members of the management organ shall be appointed and removed by the general meeting under the same conditions as for public limited-liability companies that have registered offices within its territory.

3. No person may at the same time be a member of both the management organ and the supervisory organ of the same SE. The supervisory organ may, however, nominate one of its members to act as a member of the management organ in the event of a vacancy. During such a period the functions of the person concerned as a member of the supervisory organ shall be suspended. A Member State may impose a time limit on such a period.

4. The number of members of the management organ or the rules for determining it shall be laid down in the SE's statutes. A Member State may, however, fix a minimum and/or a maximum number.

5. Where no provision is made for a two-tier system in relation to public limited-liability companies with registered offices within its territory, a Member State may adopt the appropriate measures in relation to SEs.

#### Article 40

1. The supervisory organ shall supervise the work of the management organ. It may not itself exercise the power to manage the SE.

2. The members of the supervisory organ shall be appointed by the general meeting. The members of the first supervisory organ may, however, be appointed by the statutes. This shall apply without prejudice to Article 47(4) or to any employee participation arrangements determined pursuant to Directive 2001/86/EC.

3. The number of members of the supervisory organ or the rules for determining it shall be laid down in the statutes. A Member State may, however, stipulate the number of members of the supervisory organ for SEs registered within its territory or a minimum and/or a maximum number.

#### Article 41

1. The management organ shall report to the supervisory organ at least once every three months on the progress and foreseeable development of the SE's business.

2. In addition to the regular information referred to in paragraph 1, the management organ shall promptly pass the supervisory organ any information on events likely to have an appreciable effect on the SE.

3. The supervisory organ may require the management organ to provide information of any kind which it needs to exercise supervision in accordance with Article 40(1). A Member State may provide that each member of the supervisory organ also be entitled to this facility.

4. The supervisory organ may undertake or arrange for any investigations necessary for the performance of its duties.

5. Each member of the supervisory organ shall be entitled to examine all information submitted to it.

#### Article 42

The supervisory organ shall elect a chairman from among its members. If half of the members are appointed by employees, only a member appointed by the general meeting of shareholders may be elected chairman.

## Section 2

The one-tier system

### Article 43

1. The administrative organ shall manage the SE. A Member State may provide that a managing director or managing directors shall be responsible for the day-to-day management under the same conditions as for public limited-liability companies that have registered offices within that Member State's territory.

2. The number of members of the administrative organ or the rules for determining it shall be laid down in the SE's statutes. A Member State may, however, set a minimum and, where necessary, a maximum number of members. The administrative organ shall, however, consist of at least three members where employee participation is regulated in accordance with Directive 2001/86/EC.

3. The member or members of the administrative organ shall be appointed by the general meeting. The members of the first administrative organ may, however, be appointed by the statutes. This shall apply without prejudice to Article 47(4) or to any employee participation arrangements determined pursuant to Directive 2001/86/EC.

4. Where no provision is made for a one-tier system in relation to public limited-liability companies with registered offices within its territory, a Member State may adopt the appropriate measures in relation to SEs.

### Article 44

1. The administrative organ shall meet at least once every three months at intervals laid down by the statutes to discuss the progress and foreseeable development of the SE's business.

2. Each member of the administrative organ shall be entitled to examine all information submitted to it.

### Article 45

The administrative organ shall elect a chairman from among its members. If half of the members are appointed by employees, only a member appointed by the general meeting of shareholders may be elected chairman.

### Section 3

#### Rules common to the one-tier and two-tier systems

#### Article 46

1. Members of company organs shall be appointed for a period laid down in the statutes not exceeding six years.
2. Subject to any restrictions laid down in the statutes, members may be reappointed once or more than once for the period determined in accordance with paragraph 1.

#### Article 47

1. An SE's statutes may permit a company or other legal entity to be a member of one of its organs, provided that the law applicable to public limited-liability companies in the Member State in which the SE's registered office is situated does not provide otherwise.

That company or other legal entity shall designate a natural person to exercise its functions on the organ in question.

2. No person may be a member of any SE organ or a representative of a member within the meaning of paragraph 1 who:
  - (a) is disqualified, under the law of the Member State in which the SE's registered office is situated, from serving on the corresponding organ of a public limited-liability company governed by the law of that Member State, or
  - (b) is disqualified from serving on the corresponding organ of a public limited-liability company governed by the law of a Member State owing to a judicial or administrative decision delivered in a Member State.

3. An SE's statutes may, in accordance with the law applicable to public limited-liability companies in the Member State in which the SE's registered office is situated, lay down special conditions of eligibility for members representing the shareholders.

4. This Regulation shall not affect national law permitting a minority of shareholders or other persons or authorities to appoint some of the members of a company organ.

## Article 48

1. An SE's statutes shall list the categories of transactions which require authorisation of the management organ by the supervisory organ in the two-tier system or an express decision by the administrative organ in the one-tier system.

A Member State may, however, provide that in the two-tier system the supervisory organ may itself make certain categories of transactions subject to authorisation.

2. A Member State may determine the categories of transactions which must at least be indicated in the statutes of SEs registered within its territory.

## Article 49

The members of an SE's organs shall be under a duty, even after they have ceased to hold office, not to divulge any information which they have concerning the SE the disclosure of which might be prejudicial to the company's interests, except where such disclosure is required or permitted under national law provisions applicable to public limited-liability companies or is in the public interest.

## Article 50

1. Unless otherwise provided by this Regulation or the statutes, the internal rules relating to quorums and decision-taking in SE organs shall be as follows:

- (a) quorum: at least half of the members must be present or represented;
- (b) decision-taking: a majority of the members present or represented.

2. Where there is no relevant provision in the statutes, the chairman of each organ shall have a casting vote in the event of a tie. There shall be no provision to the contrary in the statutes, however, where half of the supervisory organ consists of employees' representatives.

3. Where employee participation is provided for in accordance with Directive 2001/86/EC, a Member State may provide that the supervisory organ's quorum and decision-making shall, by way of derogation from the

provisions referred to in paragraphs 1 and 2, be subject to the rules applicable, under the same conditions, to public limited-liability companies governed by the law of the Member State concerned.

#### Article 51

Members of an SE's management, supervisory and administrative organs shall be liable, in accordance with the provisions applicable to public limited-liability companies in the Member State in which the SE's registered office is situated, for loss or damage sustained by the SE following any breach on their part of the legal, statutory or other obligations inherent in their duties.

#### Section 4

##### General meeting

#### Article 52

The general meeting shall decide on matters for which it is given sole responsibility by:

- (a) this Regulation or
- (b) the legislation of the Member State in which the SE's registered office is situated adopted in implementation of Directive 2001/86/EC.

Furthermore, the general meeting shall decide on matters for which responsibility is given to the general meeting of a public limited-liability company governed by the law of the Member State in which the SE's registered office is situated, either by the law of that Member State or by the SE's statutes in accordance with that law.

#### Article 53

Without prejudice to the rules laid down in this section, the organisation and conduct of general meetings together with voting procedures shall be governed by the law applicable to public limited-liability companies in the Member State in which the SE's registered office is situated.

#### Article 54

1. An SE shall hold a general meeting at least once each calendar year, within six months of the end of its financial year, unless the law of the Member State in which the SE's registered office is situated applicable to public limited-liability companies carrying on the same type of activity as



the SE provides for more frequent meetings. A Member State may, however, provide that the first general meeting may be held at any time in the 18 months following an SE's incorporation.

2. General meetings may be convened at any time by the management organ, the administrative organ, the supervisory organ or any other organ or competent authority in accordance with the national law applicable to public limited-liability companies in the Member State in which the SE's registered office is situated.

## Article 55

1. One or more shareholders who together hold at least 10 % of an SE's subscribed capital may request the SE to convene a general meeting and draw up the agenda therefor; the SE's statutes or national legislation may provide for a smaller proportion under the same conditions as those applicable to public limited-liability companies.

2. The request that a general meeting be convened shall state the items to be put on the agenda.

3. If, following a request made under paragraph 1, a general meeting is not held in due time and, in any event, within two months, the competent judicial or administrative authority within the jurisdiction of which the SE's registered office is situated may order that a general meeting be convened within a given period or authorise either the shareholders who have requested it or their representatives to convene a general meeting. This shall be without prejudice to any national provisions which allow the shareholders themselves to convene general meetings.

## Article 56

One or more shareholders who together hold at least 10 % of an SE's subscribed capital may request that one or more additional items be put on the agenda of any general meeting. The procedures and time limits applicable to such requests shall be laid down by the national law of the Member State in which the SE's registered office is situated or, failing that, by the SE's statutes. The above proportion may be reduced by the statutes or by the law of the Member State in which the SE's registered office is situated under the same conditions as are applicable to public limited-liability companies.

## Article 57

Save where this Regulation or, failing that, the law applicable to public limited-liability companies in the Member State in which an SE's registered

office is situated requires a larger majority, the general meeting's decisions shall be taken by a majority of the votes validly cast.

#### Article 58

The votes cast shall not include votes attaching to shares in respect of which the shareholder has not taken part in the vote or has abstained or has returned a blank or spoilt ballot paper.

#### Article 59

1. Amendment of an SE's statutes shall require a decision by the general meeting taken by a majority which may not be less than two thirds of the votes cast, unless the law applicable to public limited-liability companies in the Member State in which an SE's registered office is situated requires or permits a larger majority.

2. A Member State may, however, provide that where at least half of an SE's subscribed capital is represented, a simple majority of the votes referred to in paragraph 1 shall suffice.

3. Amendments to an SE's statutes shall be publicised in accordance with Article 13.

#### Article 60

1. Where an SE has two or more classes of shares, every decision by the general meeting shall be subject to a separate vote by each class of shareholders whose class rights are affected thereby.

2. Where a decision by the general meeting requires the majority of votes specified in Article 59(1) or (2), that majority shall also be required for the separate vote by each class of shareholders whose class rights are affected by the decision.

### TITLE IV

#### ANNUAL ACCOUNTS AND CONSOLIDATED ACCOUNTS

#### Article 61

Subject to Article 62 an SE shall be governed by the rules applicable to public limited-liability companies under the law of the Member State in which its registered office is situated as regards the preparation of its annual and, where appropriate, consolidated accounts including the accompanying annual report and the auditing and publication of those accounts.

## Article 62

1. An SE which is a credit or financial institution shall be governed by the rules laid down in the national law of the Member State in which its registered office is situated in implementation of Directive 2000/12/EC of the European Parliament and of the Council of 20 March 2000 relating to the taking up and pursuit of the business of credit institutions(9) as regards the preparation of its annual and, where appropriate, consolidated accounts, including the accompanying annual report and the auditing and publication of those accounts.

2. An SE which is an insurance undertaking shall be governed by the rules laid down in the national law of the Member State in which its registered office is situated in implementation of Council Directive 91/674/EEC of 19 December 1991 on the annual accounts and consolidated accounts of insurance undertakings(10) as regards the preparation of its annual and, where appropriate, consolidated accounts including the accompanying annual report and the auditing and publication of those accounts.

## TITLE V

## WINDING UP, LIQUIDATION, INSOLVENCY AND CESSATION OF PAYMENTS

## Article 63

As regards winding up, liquidation, insolvency, cessation of payments and similar procedures, an SE shall be governed by the legal provisions which would apply to a public limited-liability company formed in accordance with the law of the Member State in which its registered office is situated, including provisions relating to decision-making by the general meeting.

## Article 64

1. When an SE no longer complies with the requirement laid down in Article 7, the Member State in which the SE's registered office is situated shall take appropriate measures to oblige the SE to regularise its position within a specified period either:

- (a) by re-establishing its head office in the Member State in which its registered office is situated or
- (b) by transferring the registered office by means of the procedure laid down in Article 8.

2. The Member State in which the SE's registered office is situated shall put in place the measures necessary to ensure that an SE which fails to regularise its position in accordance with paragraph 1 is liquidated.

3. The Member State in which the SE's registered office is situated shall set up a judicial remedy with regard to any established infringement of Article 7. That remedy shall have a suspensory effect on the procedures laid down in paragraphs 1 and 2.

4. Where it is established on the initiative of either the authorities or any interested party that an SE has its head office within the territory of a Member State in breach of Article 7, the authorities of that Member State shall immediately inform the Member State in which the SE's registered office is situated.

#### Article 65

Without prejudice to provisions of national law requiring additional publication, the initiation and termination of winding up, liquidation, insolvency or cessation of payment procedures and any decision to continue operating shall be publicised in accordance with Article 13.

#### Article 66

1. An SE may be converted into a public limited-liability company governed by the law of the Member State in which its registered office is situated. No decision on conversion may be taken before two years have elapsed since its registration or before the first two sets of annual accounts have been approved.

2. The conversion of an SE into a public limited-liability company shall not result in the winding up of the company or in the creation of a new legal person.

3. The management or administrative organ of the SE shall draw up draft terms of conversion and a report explaining and justifying the legal and economic aspects of the conversion and indicating the implications of the adoption of the public limited-liability company for the shareholders and for the employees.

4. The draft terms of conversion shall be publicised in the manner laid down in each Member State's law in accordance with Article 3 of Directive 68/151/EEC at least one month before the general meeting called to decide thereon.

5. Before the general meeting referred to in paragraph 6, one or more independent experts appointed or approved, in accordance with the national

provisions adopted in implementation of Article 10 of Directive 78/855/EEC, by a judicial or administrative authority in the Member State to which the SE being converted into a public limited-liability company is subject shall certify that the company has assets at least equivalent to its capital.

6. The general meeting of the SE shall approve the draft terms of conversion together with the statutes of the public limited-liability company. The decision of the general meeting shall be passed as laid down in the provisions of national law adopted in implementation of Article 7 of Directive 78/855/EEC.

## TITLE VI

### ADDITIONAL AND TRANSITIONAL PROVISIONS

#### Article 67

1. If and so long as the third phase of economic and monetary union (EMU) does not apply to it each Member State may make SEs with registered offices within its territory subject to the same provisions as apply to public limited-liability companies covered by its legislation as regards the expression of their capital. An SE may, in any case, express its capital in euro as well. In that event the national currency/euro conversion rate shall be that for the last day of the month preceding that of the formation of the SE.

2. If and so long as the third phase of EMU does not apply to the Member State in which an SE has its registered office, the SE may, however, prepare and publish its annual and, where appropriate, consolidated accounts in euro. The Member State may require that the SE's annual and, where appropriate, consolidated accounts be prepared and published in the national currency under the same conditions as those laid down for public limited-liability companies governed by the law of that Member State. This shall not prejudice the additional possibility for an SE of publishing its annual and, where appropriate, consolidated accounts in euro in accordance with Council Directive 90/604/EEC of 8 November 1990 amending Directive 78/60/EEC on annual accounts and Directive 83/349/EEC on consolidated accounts as concerns the exemptions for small and medium-sized companies and the publication of accounts in ecu(11).

## TITLE VII

### FINAL PROVISIONS

#### Article 68

1. The Member States shall make such provision as is appropriate to ensure the effective application of this Regulation.

2. Each Member State shall designate the competent authorities within the meaning of Articles 8, 25, 26, 54, 55 and 64. It shall inform the Commission and the other Member States accordingly.

#### Article 69

Five years at the latest after the entry into force of this Regulation, the Commission shall forward to the Council and the European Parliament a report on the application of the Regulation and proposals for amendments, where appropriate. The report shall, in particular, analyse the appropriateness of:

- (a) allowing the location of an SE's head office and registered office in different Member States;
- (b) broadening the concept of merger in Article 17(2) in order to admit also other types of merger than those defined in Articles 3(1) and 4(1) of Directive 78/855/EEC;
- (c) revising the jurisdiction clause in Article 8(16) in the light of any provision which may have been inserted in the 1968 Brussels Convention or in any text adopted by Member States or by the Council to replace such Convention;
- (d) allowing provisions in the statutes of an SE adopted by a Member State in execution of authorisations given to the Member States by this Regulation or laws adopted to ensure the effective application of this Regulation in respect to the SE which deviate from or are complementary to these laws, even when such provisions would not be authorised in the statutes of a public limited-liability company having its registered office in the Member State.

#### Article 70

This Regulation shall enter into force on 8 October 2004.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Luxembourg, 8 October 2001.

For the Council  
The President

L. Onkelinx

- (1) OJ C 263, 16.10.1989, p. 41 and OJ C 176, 8.7.1991, p. 1.
- (2) Opinion of 4 September 2001 (not yet published in the Official Journal).
- (3) OJ C 124, 21.5.1990, p. 34.
- (4) See p. 22 of this Official Journal.
- (5) OJ L 395, 30.12.1989, p. 40. Directive as last amended by the 1994 Act of Accession.
- (6) OJ L 65, 14.3.1968, p. 8. Directive as last amended by the 1994 Act of Accession.
- (7) OJ L 295, 20.10.1978, p. 36. Directive as last amended by the 1994 Act of Accession.
- (8) Second Council Directive 77/91/EEC of 13 December 1976 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent (OJ L 26, 31.1.1977, p. 1). Directive as last amended by the 1994 Act of Accession.
- (9) OJ L 126, 26.5.2000, p. 1.
- (10) OJ L 374, 31.12.1991, p. 7.
- (11) OJ L 317, 16.11.1990, p. 57.

## ANNEX I

### **PUBLIC LIMITED-LIABILITY COMPANIES REFERRED TO IN ARTICLE 2(1)**

**BELGIUM:**

la société anonyme/de naamloze vennootschap

**DENMARK:**

aktieselskaber

**GERMANY:**

die Aktiengesellschaft

**GREECE:**

αίριόιç áðáέñβά

**SPAIN:**

la sociedad anónima

**FRANCE:**

la société anonyme

**IRELAND:**

public companies limited by shares

public companies limited by guarantee having a share capital

**ITALY:** società per azioni

**LUXEMBOURG:**

la société anonyme

## NETHERLANDS:

de naamloze vennootschap

## AUSTRIA:

die Aktiengesellschaft

## PORTUGAL:

a sociedade anónima de responsabilidade limitada

## FINLAND:

julkinen osakeyhtiö/publikt aktiebolag

## SWEDEN:

publikt aktiebolag

## UNITED KINGDOM:

public companies limited by shares

public companies limited by guarantee having a share capital

**ANNEX II****PUBLIC AND PRIVATE LIMITED-LIABILITY COMPANIES  
REFERRED TO IN ARTICLE 2(2)**

## BELGIUM:

la société anonyme/de naamloze vennootschap,

la société privée à responsabilité limitée//besloten vennootschap met beperkte aansprakelijkheid

## DENMARK:

aktieselskaber,

anpartselskaber

## GERMANY:

die Aktiengesellschaft,

die Gesellschaft mit beschränkter Haftung

## GREECE:

ἀνώνυμη εταιρεία

επιχειρησική εταιρεία

## SPAIN:

la sociedad anónima,

la sociedad de responsabilidad limitada

## FRANCE:

la société anonyme,

la société à responsabilité limitée

## IRELAND:

public companies limited by shares,

public companies limited by guarantee having a share capital,

private companies limited by shares,

private companies limited by guarantee having a share capital

## ITALY:

società per azioni,

società a responsabilità limitata

## LUXEMBOURG:

la société anonyme,



la société à responsabilité limitée

NETHERLANDS:

de naamloze vennootschap,

de besloten vennootschap met beperkte aansprakelijkheid

AUSTRIA:

die Aktiengesellschaft,

die Gesellschaft mit beschränkter Haftung

PORTUGAL:

a sociedade anónima de responsabilidade limitada,

a sociedade por quotas de responsabilidade limitada

FINLAND:

osakeyhtiö

aktiebolag

SWEDEN:

aktiebolag

UNITED KINGDOM:

public companies limited by shares,

public companies limited by guarantee having a share capital,

private companies limited by shares,

private companies limited by guarantee having a share capital.