

Subsidiary Legislation made under s. 86.

**EMPLOYMENT (EUROPEAN WORKS COUNCIL)  
REGULATIONS 2012**

**(LN. 2012/060)**

*Commencement*      **19.4.2012**

Amending enactments	Relevant current provisions	Commencement date
Act. 2016-20	rr. 13(7), (8), 14(2), (3), 19, 20(6)(a), (b), 22(1), 23, 24(3)(b), (4)	13.10.2016
LN. 2017/159	rr. 3(3), 16(2A)-(2C)	10.10.2017

**EU Legislation/International Agreements involved:**

Directive 2009/38/EC

Directive (EU) 2015/1794

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*In exercise on the powers conferred on him by section 86 of the Employment Act and in order to transpose into the law of Gibraltar Directive 2009/38/EC of the European Parliament and of the Council of 6 May 2009 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees, the Minister has made the following Regulations>*

**Title and commencement.**

1. These Regulations may be cited as the Employment (European Works Council) Regulations 2012 and come into operation on the day of publication.

**Purpose.**

2. The purpose of these Regulations is to improve the right to information and consultation of employees in Community-scale undertakings and Community-scale groups of undertakings by establishing a European Works Council or a procedure for informing and consulting employees in every such undertaking and group of undertakings, where requested, in the manner laid down in regulation 7.

**Scope.**

3.(1) These Regulations shall apply to all arrangements concerning the creation and functioning of a European Works Council or any procedure for the information and consultation of employees in Community-scale undertakings or Community-scale groups of undertakings, which are effected for the first time on or after the coming into operation of these Regulations.

(2) Save where regulation 26 applies, these Regulations do not apply to a Community-scale undertaking or a Community-scale group of undertakings where—

- (a) the conditions in regulation 36(2) or 37(2) of the Employment (European Works Council) Regulations 2006 are satisfied, whether or not the relevant agreements are revised due to changes in the structure of the Community-scale undertaking or Community-scale group of undertakings; or
- (b) an agreement concluded pursuant to regulation 17 of the Employment (European Works Council) Regulations 2006 has

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been signed or revised between the 5th of June 2009 and the 5th of June 2011.

(3) *Deleted.*

(4) In the case of an agreement to which subregulation (2)(b) applies the law applicable when the agreement is signed or revised shall continue to apply to the undertakings or groups of undertakings concerned.

(5) The Employment (European Works Council) Regulations 2006 shall continue to apply where an agreement referred to in subregulation (2)(a) or (b) expires and the parties to those agreements renew or revise such agreements, and where such agreements are neither renewed or revised, the provisions of these Regulations shall apply.

**Interpretation.**

4.(1) For the purpose of these Regulations and unless the context otherwise requires—

“the Act” means the Employment Act;

“central management” means the central management of the Community-scale undertaking or, in the case of a Community-scale group of undertakings, of the controlling undertaking;

“Community-scale group of undertakings” means a group of undertakings with the following characteristics—

- (a) at least 1,000 employees within the EEA States,
- (b) at least two group undertakings in different EEA States, and
- (c) at least one group undertaking with at least 150 employees in one EEA State and at least one other group undertaking with at least 150 in another EEA State;

“Community-scale undertaking” means any undertaking with at least 1,000 employees within the EEA States and at least 150 employees in each of at least two EEA States;

“consultation” means the establishment of dialogue and exchange of views between employees’ representatives and central management or any more appropriate level of management, at such time, in such fashion and with such content as enables employees’

representatives to express an opinion on the basis of the information provided about the proposed measures to which the consultation is related, without prejudice to the responsibilities of the management, and within a reasonable time, which may be taken into account within the Community-scale undertaking or Community-scale group of undertakings;

“controlling undertaking” means an undertaking which can exercise a dominant influence over another undertaking (hereinafter referred to as the “controlled undertaking”) by virtue of, amongst others, ownership, financial participation or the rules which govern it;

“EEA State” shall be construed in accordance with the European Communities Act;

“employees representatives” means either the recognized union representative or, in case of non-unionised employees, the representative or representatives duly elected from amongst the employees;

“European Works Council” means a council established in accordance with these Regulations or the provisions of the Schedule, with the purpose of informing and consulting employees;

“group of undertakings” means a controlling undertaking and its controlled undertakings;

“information” means transmission of data by the employer to the employees’ representatives in order to enable them to acquaint themselves with the subject matter and to examine it; such information shall be given at such time, in such fashion and with such content as are appropriate to enable employees’ representatives to undertake an in-depth assessment of the possible impact and, where appropriate, prepare for consultations with the competent organ of the Community-scale undertaking or Community-scale group of undertakings;

“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;

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- (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;

“Special Negotiating Body” means the body established in accordance with regulation 7 to negotiate with the central management regarding the establishment of a European Works Council or a procedure for informing and consulting employees as set out in regulation 2.

(2) Subject to the provisions of subregulation (1), terms and expressions used in these Regulations shall, unless the context otherwise requires, have the meaning assigned to them in the Act.

(3) Words and expressions used but not defined in these Regulations which are also used in Directive shall have the same meaning as they have in the Directive.

(4) For the purpose of these Regulations, the prescribed thresholds to determine whether an undertaking is a Community scale undertaking or a Community-scale group of undertakings, in the case of employees in Gibraltar, shall be based on the average number of employees who were employed during the two year period ending on the last day of the month preceding the month in which a request pursuant to regulation 7(2) was made, whether such employees are on an indefinite or definite contract, and including part time employees.

(5) The ability to exercise a dominant influence shall be presumed, unless the contrary is proven, when an undertaking, in relation to another undertaking directly or indirectly–

- (a) holds a majority of that undertaking’s subscribed capital;
- (b) controls a majority of the votes attached to that undertaking’s issued share capital; or
- (c) can appoint more than half of the members of that undertaking’s administrative, management or supervisory body.

(6) For the purposes of subregulation (5), a controlling undertaking’s rights as regards voting and appointment shall include the rights of any other controlled undertaking and those of any person or body acting in his or its own name but on behalf of the controlling undertaking or of any other controlled undertaking.

(7) Notwithstanding subregulations (2) and (5), an undertaking shall not be deemed to be a “controlling undertaking” with respect to another undertaking in which it has holdings where the former undertaking is a company referred to in Article 3(5)(a) or (c) of Council Regulation (EC) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings.

(8) A dominant influence shall not be presumed to be exercised solely by virtue of the fact that an office holder is exercising his functions, according to the law of an EEA State relating to liquidation, winding up, insolvency, cessation of payments, compositions or analogous proceedings.

(9) The law applicable in order to determine whether an undertaking is a controlling undertaking shall be the law of the EEA State which governs that undertaking and where the law governing that undertaking is not that of an EEA State, the applicable law shall be the law of the EEA State within whose territory the representative of the undertaking or, in the absence of such a representative, the central management of the group undertaking which employs the greatest number of employees is situated.

(10) Where, in the case of a conflict of laws in the application of subregulation (5), two or more undertakings from a group satisfy one or more of the criteria laid down in that subregulation, the under taking which satisfies the criterion laid down in subregulation (5)(c) shall be regarded as the controlling undertaking, without prejudice to proof that another undertaking is able to exercise a dominant influence.

**Objectives etc.**

5.(1) These Regulations shall be interpreted in the light of the following objectives–

- (a) arrangements for informing and consulting employees shall be defined and implemented in such a way as to ensure their effectiveness and to enable the undertaking or group of undertakings to take decisions effectively;
- (b) information and consultation of employees must occur at the relevant level of management and representation, according to the subject under discussion.

(2) For the purposes of subregulation (1)(b) the competence of the European Works Council and the scope of the information and consultation procedure for employees governed by these Regulations shall be limited to transnational issues.

(3) For the purposes of subregulation (2) matters shall be considered to be transnational where they concern the Community-scale undertaking or Community-scale group of undertakings as a whole, or at least two undertakings or establishments of the undertaking or group situated in two different EEA States.

(3) Notwithstanding any other provision in these Regulations, unless the agreements referred to in regulation 11 provide otherwise, a European Works Council shall be established at the level of the group where a Community-scale group of undertakings comprises one or more undertakings or groups of undertakings which are Community-scale undertakings or Community-scale groups of undertakings.

(4) Unless a wider scope is provided for in the agreements referred to in regulation 11, the powers and competence of European Works Councils and the scope of information and consultation procedures established to achieve the purpose specified in regulation 2 shall, in the case of a Community-scale undertaking, cover all the establishments located within EEA States and, in the case of a Community-scale group of undertakings, all group undertakings located within EEA States.

**Responsibilities of central management.**

6.(1) The central management shall be responsible for creating the conditions and means necessary for the setting up of a European Works



Council or an information and consultation procedure in a Community-scale undertaking and a Community-scale group of undertakings where—

- (a) the central management is situated in Gibraltar;
- (b) the central management is not situated in an EEA State and the representative agent of the central management (to be designated if necessary) is situated in Gibraltar; or
- (c) neither the central management nor the representative agent (whether or not as a result of being designated) is situated in an EEA State and—
  - (i) in the case of a Community-scale undertaking, there are employed in an establishment, which is situated in Gibraltar, more employees than are employed in any other establishment which is situated in an EEA State, or
  - (ii) in the case of a Community-scale group of undertakings, there are employed in a group undertaking, which is situated in Gibraltar, more employees than are employed in any other group undertaking which is situated in another EEA State, and the central management initiates, or is required to initiate, negotiations for a European Works Council or information and consultation procedure.

(2) Where the circumstances described in subregulation (1)(b) or (c) apply, the central management shall be treated, for the purposes of these Regulations, as being situated in Gibraltar and—

- (a) the representative agent referred to in subregulation (1)(b); or
- (b) the management of the establishment referred to in subregulation (1)(c)(i) or of the group undertaking, referred to in subregulation (1)(c)(ii),

shall be treated, respectively, as being the central management.

(3) It shall be the duty of—

- (a) the management of establishments of a Community-scale undertaking situated in Gibraltar; and

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- (b) the management of undertakings which form part of a Community-scale group of undertakings situated in Gibraltar; and
- (c) employees' representatives or, as the case may be, of employees,

to comply with the relevant provisions of these Regulations, irrespective of whether or not the central management is situated in Gibraltar.

(4) The management of every undertaking belonging to the Community-scale group of undertakings and the central management or the deemed central management within the meaning of subregulation (2), of the Community-scale undertaking or group of undertakings shall be responsible for obtaining and transmitting to the parties concerned by the application of these Regulations the information required for commencing the negotiations referred to in regulation 7, and in particular the information concerning the structure of the undertaking or the group and its workforce, including, in particular, information on the number of employees.

**Establishment of Special Negotiating Body.**

7.(1) In order to achieve the objectives set out in these Regulations, the central management shall initiate negotiations for the establishment of a European Works Council or an information and consultation procedure and for those purposes it shall establish a Special Negotiating Body.

(2) The central management shall initiate the negotiations and shall establish the Special Negotiating Body referred to in subregulation (1), either—

- (a) on its own initiative; or
- (b) on receipt of the written request of at least 100 or their representatives, in at least two undertakings or establishments in at least two different EEA States.

(3) The central management, the local management and the competent European workers' and employers' organizations shall be informed of the composition of the Special Negotiating Body and of the start of the negotiations.

**Special Negotiating Body: election of members.**

8.(1) The Special Negotiating Body shall have the task of determining, with the central management, by written agreement, the scope, composition, functions, and term of office of the European Works Council or the arrangements for implementing a procedure for the information and consultation of employees.

(2) The members of the Special Negotiating Body shall be elected or appointed in proportion to the number of employees employed in each EEA State by the Community-scale undertaking or Community-scale group of under taking, by allocating in respect of each EEA State one seat per portion of employees employed in that EEA State amounting to 10% or a fraction thereof, of the number of employees employed in all the EEA States taken together.

(3) With a view to the conclusion of an agreement in accordance with regulation 11, the central management shall convene a meeting with the Special Negotiating Body and shall inform the local managements accordingly.

(4) Before and after any meeting with the central management, the Special Negotiating Body shall be entitled to meet without representatives of the central management being present, using any necessary means for communication.

(5) For the purpose of the negotiations, the Special Negotiating Body may request assistance from experts of its choice which can include representatives of competent recognized Community-level trade union organizations, and such experts and such trade union representatives may be present at negotiation meetings in an advisory capacity at the request of the Special Negotiating Body.

(6) Any expenses relating to the negotiations referred to in this regulation shall be borne by the central management so as to enable the Special Negotiating Body to carry out its task in an appropriate manner.

(7) For the purposes of the preceding subregulation, reasonable expenses shall include the cost of meetings of the Special Negotiating Body, whether with the central management or otherwise, including the cost of materials, the venue, translations, travel and accommodation, and the equivalent cost of one expert per meeting.

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

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9.(1) The Special Negotiating Body may decide, by at least two thirds of the votes, not to open negotiations in accordance with regulation 8(3) to (5), or to terminate the negotiations already opened.

(2) The effect of a decision referred to in subregulation (1) shall be to stop the procedure to conclude the agreement referred to in regulation 10 and in such a case the provisions of the Schedule shall not apply.

(3) A new request to convene the Special Negotiating Body may be made at the earliest two years after the decision mentioned in subregulation (1) has been taken, unless the parties concerned agree on a shorter period.

**Election of Gibraltar representative.**

10.(1) The method of selection of the members representing employees employed by the undertaking, or as the case may be the group of undertakings, situated in Gibraltar to sit on the Special Negotiating Body shall be by means of an election from amongst eligible candidates who satisfy the criteria laid down in regulation 4(4) and who are in employment but not in their probationary period on the date of nomination, and the central management shall appoint a responsible person to act as ballot supervisor to oversee the whole process of nominations and election, and any expenses related to the process of appointing or electing the Special Negotiating Body shall be borne by the central management.

(2) The date for nomination of candidates, which shall be established by the ballot supervisor, shall be within 2 months from the date when the request to commence negotiations on an agreement to establish a European Works Council was made or when the decision was taken by central management to commence negotiations on its own initiative, whichever was the earlier.

(3) Where the number of candidates on the day of nomination equals the number of representatives to be elected to the Special Negotiating Body, these shall be considered to have been automatically appointed to the Special Negotiating Body.

(4) Where the number of candidates on the day of nomination exceeds the number of representatives to be elected to the Special Negotiating Body, arrangements shall be made by management to hold a secret ballot to elect the required number of representatives.

(5) Arrangements for the holding of such a ballot shall be finalised by the central management within 1 month from the date of nomination of candidates referred to in subregulation (2), and the central management shall

ensure that the process of nominations and the ballot itself shall be overseen by the ballot supervisor.

(6) Where a ballot is necessary it shall be held within 2 months from the date of nomination of candidates referred to in subregulation (2).

(7) Any employee who is in employment on the day or days of the election and satisfies the criteria referred to in regulation 4(4) shall be entitled to vote in such an election.

(8) Any person may make a written complaint in relation to any aspect relating to the election of the representatives to the Special Negotiating Body including the eligibility to stand for election, eligibility to vote or the organisation of such a ballot, to the Director of Employment, who shall investigate whether such a complaint is well-founded and who may direct that appropriate measures be taken by any person involved to eliminate any grounds for well-founded complaints, and any decision taken by the Director on any matter relating to the organisation of the ballot shall be final.

(9) It shall be the duty of the ballot supervisor to give the formal results of the process of nomination or ballot held to appoint the Special Negotiating Body to the central management, the local management, and the competent European workers' and employers' organizations as soon as practicable, and in any case within one month after the date of the election or appointment of its members.

## **Content of the agreement.**

11.(1) The central management and the Special Negotiating Body shall negotiate in a spirit of cooperation with a view to reaching a written agreement on the detailed arrangements for implementing the information and consultation of employees provided in regulation 2.

(2) Without prejudice to the autonomy of the parties, the written agreement mentioned in subregulation (1) shall determine—

- (a) the undertakings of the Community-scale group of undertakings or the establishments of the Community-scale undertaking which are covered by the agreement;
- (b) the composition of the European Works Council, the number of members, the allocation of seats, taking into account where possible the need for balanced representation of employees with regard to their activities, category and gender, and the term of office;

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- (c) the functions and the procedure for information and consultation of the European Works Council and the arrangements for linking information and consultation of the European Works Council and national employee representation bodies, in accordance with the principles set out in regulation 5(1)(b) and (2);
- (d) the venue, frequency and duration of meetings of the European Works Council;
- (e) where necessary, the composition, the appointment procedure, the functions and the procedural rules of the select committee set up within the European Works Council;
- (f) the financial and material resources to be allocated to the European Works Council;
- (g) the date of entry into force of the agreement and its duration, the arrangements for amending or terminating the agreement and the cases in which the agreement shall be renegotiated and the procedure for its renegotiation, including, where necessary, where the structure of the Community-scale undertaking or Community-scale group of undertakings changes.

(3) The central management and the Special Negotiating Body may decide, in writing, to establish one or more information and consultation procedures instead of a European Works Council, in which case, the agreement must stipulate by what method the employees' representatives shall have the right to meet to discuss the information conveyed to them: Provided that this information shall relate in particular to transnational questions which significantly affect workers' interests.

(4) An agreement referred to in subregulations (2) and (3) shall not be subject to the subsidiary requirements of the Schedule, except to the extent that the parties provide in the agreement that any of those requirements are to apply.

(5) For the purposes of concluding the agreements referred to in subregulations (2) and (3) the Special Negotiating Body shall act by a majority of its members.

**Subsidiary requirements.**

12. The subsidiary requirements as laid down in the Schedule shall apply if any of the situations below subsist—

- (a) where the central management and the Special Negotiating Body so decide; or
- (b) where the central management refuses to commence negotiations within six months of the request referred to in regulation 7(2)(b); or
- (c) where, after three years from the date of such a request, the parties are unable to conclude an agreement as laid down in regulation 11 and the Special Negotiating Body has not taken the decision provided for in regulation 9(1).

**Confidential information.**

13.(1) A person who is or at any time was—

- (a) a member of a Special Negotiating Body;
- (b) a member of a European Works Council;
- (c) an employees' representative in the framework of an information and consultation procedure; and
- (d) an expert assisting a Special Negotiating Body or a European Works Council,

shall not disclose any information or document which is or has been in his possession by virtue of his position as described in paragraphs (a) to (d), which has expressly been provided to him in confidence.

(2) The duty of confidentiality provided for in subregulation (1) shall continue to apply even after the person's term of office has expired.

(3) In this regulation a person specified in subregulation (1)(a) to (d) shall be referred to as a 'recipient'.

(4) The obligation to comply with subregulation (1) is a duty owed to the central management, and a breach of the duty is actionable accordingly (subject to the defences and other incidents applying to actions for breach of statutory duty).

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(5) Subregulation (4) shall not affect the liability which any person may incur, nor affect any right which any person may have, apart from subregulation (4).

(6) No action shall lie under subregulation (4) where the recipient reasonably believed the disclosure to be a protected disclosure.

(7) A recipient whom the central management (which is situated in Gibraltar) has entrusted with any information or document on terms requiring it to be held in confidence may apply to the Employment Tribunal for a declaration as to whether it was reasonable for the central management to impose such a requirement.

(8) If the Employment Tribunal considers that the disclosure of the information or document by the recipient would not, or would not be likely to, prejudice or cause serious harm to the undertaking, it shall make a declaration that it was not reasonable for the central management to require the recipient to hold the information or document in confidence.

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

**Withholding of information by central management.**

14.(1) The central management is not required to disclose any information or document to a recipient when the nature of the information or document is such that, according to objective criteria, the disclosure of the information or document would seriously harm the functioning of, or would be prejudicial to, the undertaking or group of undertakings concerned.

(2) Where there is a dispute between the central management and a recipient as to whether the nature of the information or document which the central management has failed to provide is such as is described in subregulation (1), the central management or a recipient may apply to the Employment Tribunal for a declaration as to whether the information or document is of such a nature.

(3) If the Employment Tribunal makes a declaration that the disclosure of the information or document in question would not, according to objective criteria, seriously harm the functioning of, or be prejudicial to, the undertaking or group of undertakings concerned, the Employment Tribunal shall order the central management to disclose the information or document.



- (4) An order under subregulation (3) shall specify–
- (a) the information or document to be disclosed;
  - (b) the recipient or recipients to whom the information or document is to be disclosed;
  - (c) any terms on which the information or document is to be disclosed; and
  - (d) the date before which the information or document is to be disclosed.

### **Operation of the European Works Council.**

15. The central management and the European Works Council or the employees' representatives in the framework of an information and consultation procedure for workers, as the case may be, shall work in a spirit of cooperation with due regard to their reciprocal rights and obligations.

### **Role and protection of employees' representatives.**

16.(1) The members of the European Works Council shall have the means required to apply the rights arising from these Regulations, to represent collectively the interests of the employees of the Community-scale undertaking or Community-scale group of undertakings, and this shall be without prejudice to the competence of other bodies or organisations in this respect.

(2) Without prejudice to regulation 13 and 14(1), the members of the European Works Council shall inform the representatives of the employees of the establishments or of the undertakings of a Community-scale group of undertakings or, in the absence of representatives, the workforce as a whole, of the content and outcome of the information and consultation procedure carried out in accordance with these Regulations.

(2A) A member, or his alternate, of a-

- (a) special negotiating body;
- (b) a European Works Council,

who is a member of the crew of a seagoing vessel, shall be entitled to participate in a meeting of the special negotiating body or of the European Works Council, or in any other meeting under any procedures established

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pursuant to regulation 11(3), where that member or alternate is not at sea or in a port in a country other than that in which the shipping company is domiciled, when the meeting takes place.

(2B) Meetings shall, where practicable, be scheduled to facilitate the participation of members or alternates, who are members of the crews of seagoing vessels.

(2C) In cases where a member of a special negotiating body or of a European Works Council, or such a member's alternate, who is a member of the crew of a seagoing vessel, is unable to attend a meeting, the possibility of using, where possible, new information and communication technologies shall be considered.

(3) In so far as this is necessary for the exercise of their representative duties in an international environment, the members of the Special Negotiating Body and of the European Works Council shall be provided with training without loss of wages.

**Right to time off for members of a European Works Council, etc.**

17.(1) An employee who is—

- (a) a member of a Special Negotiating Body;
- (b) a member of a European Works Council;
- (c) an information and consultation representative; or
- (d) a candidate in an election in which any person elected will, on being elected, be such a member or 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 purposes of this regulation the working hours of an employee shall be taken to be any time when, in accordance with his contract of employment, the employee is required to be at work.

**Right to remuneration for time off under regulation 17.**

18.(1) An employee who is permitted to take time off under regulation 17 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 12 the total number of the employee’s normal working hours during the period of 12 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 paragraph (a), a number which fairly represents the number of normal working hours in a week having regard to such of the considerations specified in 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.

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

(7) Any contractual remuneration paid to an employee in respect of a period of time off under regulation 17 goes towards discharging any liability of the employer to pay remuneration under subregulation (1) in respect of that period, and, conversely, any payment of remuneration under subregulation (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 Employment Tribunal.**

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

- (a) has unreasonably refused to permit him to take time off as required by regulation 17; or
- (b) has failed to pay the whole or any part of any amount to which the employee is entitled under regulation 18.

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

- (a) before the end of the period of 3 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 Employment 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.

(3) Where the Employment Tribunal finds a complaint under this regulation well-founded, the Employment 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 Employment Tribunal shall also order the employer to pay to the employee an amount equal to the remuneration to which he would have been entitled under regulation 18 if the employer had not refused.

(5) If the complaint is that the employer has failed to pay the employee the whole or part of any amount to which he is entitled under regulation 18, the Employment Tribunal shall also order the employer to pay to the employee the amount which it finds due to him.

## **Unfair dismissal.**

20.(1) An employee who is dismissed and to whom subregulation (2) or (5) applies shall be regarded, if the reason (or, if more than one, the principal reason) for the dismissal is a reason specified in, respectively, subregulation (3) or (6), as unfairly dismissed for the purposes of Part VI of the Act.

(2) This subregulation applies to an employee who is—

- (a) a member of a Special Negotiating Body;
- (b) a member of a European Works Council;
- (c) an information and consultation representative; or
- (d) a candidate in an election in which any person elected will, on being elected, be such a member or representative.

(3) The reason is that—

- (a) the employee performed any functions or activities as such a member, representative or candidate; or
- (b) the employee or a person acting on his behalf made a request to exercise an entitlement conferred on the employee by regulation 17 or 18;

or proposed to do so.

(4) The reason in subregulation (3)(a) does not apply where the reason (or principal reason) for the dismissal is that in the performance, or purported performance, of the employee's functions or activities he has disclosed any information or document in breach of the duty in regulation 13(1), unless the employee reasonably believed the disclosure to be a protected disclosure.

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

(6) The reasons are that the employee—

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- (a) took, or proposed to take, any proceedings before the Employment Tribunal to enforce a right or secure an entitlement conferred on him by these Regulations;
  - (b) exercised, or proposed to exercise, any entitlement to apply or complain to the Employment Tribunal conferred by these Regulations;
  - (c) requested, or proposed to request, information in order to establish whether and to what extent these Regulations apply to his establishment;
  - (d) acted with a view to securing that a Special Negotiating Body, a European Works Council or an information and consultation procedure did or did not come into existence;
  - (e) indicated that he supported or did not support the coming into existence of a Special Negotiating Body, a European Works Council or an information and consultation procedure;
  - (f) stood as a candidate in an election in which any person elected would, on being elected, be a member of a Special Negotiating Body or of a European Works Council or an information and consultation representative;
  - (g) influenced or sought to influence the way in which votes were to be cast by other employees in a ballot arranged under these Regulations;
  - (h) voted in such a ballot;
  - (i) expressed doubts, whether to a ballot supervisor or otherwise, as to whether such a ballot had been properly conducted; or
  - (j) proposed to do, failed to do, or proposed to decline to do, any of the things mentioned in paragraphs (d) to (i).
- (7) It is immaterial for the purposes of subregulation (6)(a)–
- (a) whether or not the employee has the right; or
  - (b) whether or not the right has been infringed;

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

**Detriment.**

21.(1) An employee to whom subregulation (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, subregulation (3) or (6).

(2) This subregulation applies to an employee who is—

- (a) a member of a Special Negotiating Body;
- (b) a member of a European Works Council;
- (c) an information and consultation representative; or
- (d) a candidate in an election in which any person elected will, on being elected, be such a member or representative.

(3) The ground is that—

- (a) the employee performed any functions or activities as such a member, representative or candidate; or
- (b) the employee or a person acting on his behalf made a request to exercise an entitlement conferred on the employee by regulation 17 or 18;

or proposed to do so.

(4) The ground in subregulation (3)(a) does not apply where the ground for the subjection to detriment is that in the performance, or purported performance, of the employee's functions or activities he has disclosed any information or document in breach of the duty in regulation 13(1), unless the employee reasonably believed the disclosure to be a protected disclosure.

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

(6) The grounds are that the employee—

- (a) took, or proposed to take, any proceedings before the Employment Tribunal to enforce a right or secure an entitlement conferred on him by these Regulations;

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- (b) exercised, or proposed to exercise, any entitlement to apply or complain to the Employment Tribunal conferred by these Regulations;
- (c) requested, or proposed to request, information in order to establish whether and to what extent these Regulations apply to his establishment;
- (d) acted with a view to securing that a Special Negotiating Body, a European Works Council or an information and consultation procedure did or did not come into existence;
- (e) indicated that he supported or did not support the coming into existence of a Special Negotiating Body, a European Works Council or an information and consultation procedure;
- (f) stood as a candidate in an election in which any person elected would, on being elected, be a member of a Special Negotiating Body or of a European Works Council or an information and consultation representative;
- (g) influenced or sought to influence the way in which votes were to be cast by other employees in a ballot arranged under these Regulations;
- (h) voted in such a ballot;
- (i) expressed doubts, whether to a ballot supervisor or otherwise, as to whether such a ballot had been properly conducted; or
- (j) proposed to do, failed to do, or proposed to decline to do, any of the things mentioned in paragraphs (d) to (i).

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

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

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

**Detriment: enforcement and subsidiary provisions.**



22.(1) An employee may present a complaint to the Employment Tribunal, that he has been subjected to a detriment in contravention of regulation 21.

(2) Regulation 23 does not apply where the detriment in question amounts to dismissal.

### **Employment Tribunal: proceedings.**

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

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

(3) A declaration or order made by the Employment Tribunal under these Regulations must be in writing and state the reasons for the Employment Tribunal's findings.

(4) An appeal lies to the Supreme Court of Gibraltar on any question of law arising from any declaration or order of, or arising in any proceedings before, the Employment Tribunal under these Regulations.

### **Restrictions on contracting out.**

24.(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 in regulations 17 to 22; or
- (b) to preclude a person from bringing any proceedings before the Supreme Court under any provision of these Regulations.

(2) Subregulation (1) does not apply to any agreement to refrain from continuing any proceedings referred to in subregulation (1)(b) made after the proceedings have been instituted.

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

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- (a) to exclude or limit the operation of any provision in regulations 17 to 22; or
- (b) to preclude a person from bringing any proceedings before the Employment Tribunal under regulations 17 to 22.

(4) Subregulation (3) does not apply to any agreement to refrain from instituting or continuing proceedings before the Employment Tribunal where a conciliation officer has taken action under rule 9 of the Tribunal Rules (conciliation).

**Relationship with other legislation.**

25.(1) Information and consultation of the European Works Council shall be linked to those of the employee representation bodies at the workplace, if any, with due regard to the competences and areas of action of each and to the principles set out in regulation 5(1)(b) and (2).

(2) Without prejudice to other enactments, the information and consultation of employees, the arrangements for the links between the information and consultation of the European Works Council and the employee representation bodies at the workplace, if any, shall be established by the agreement referred to in regulation 11.

(3) Where no such arrangements have been defined by agreement, the processes of informing and consulting must be conducted in the European Works Council as well as in the employee representation bodies, in cases where decisions likely to lead to substantial changes in work organisation or contractual relations are envisaged.

(4) These Regulations shall be without prejudice to the information and consultation procedures referred to in the Employment (Information and Consultation of Employees) Regulations 2006, Part VIA, and Part VIB of the Act.

**Adaptation.**

26.(1) Where the structure of the Community-scale undertaking or Community-scale group of undertakings changes significantly, and either in the absence of provisions established by the agreements in force or in the event of conflicts between the relevant provisions of two or more applicable agreements, the central management shall initiate the negotiations referred to in regulation 7 on its own initiative or at the written request of at least 100 employees or their representatives in at least two undertakings or establishments in at least two different EEA States.

(2) In the circumstances set out in subregulation (1) at least three members of the existing European Works Council or of each of the existing European Works Councils shall be members of the Special Negotiating Body, in addition to the members elected or appointed pursuant to regulation 10.

(3) During the negotiations referred to in subregulation (1), the existing European Works Council or Councils shall continue to operate in accordance with any arrangements adapted by agreement between the members of the European Works Council or Councils and the central management.

**Revocation.**

27. Subject to regulation 3(2) and (5) the Employment (European Works Council) Regulations 2006 are revoked.

**SCHEDULE**

Regulation 12

**SUBSIDIARY REQUIREMENTS**

1. In order to achieve the objective set out in regulation 2 and in the cases provided for in regulation 12, the establishment, composition and competence of a European Works Council shall be governed by the following rules—

- (a) the competence of the European Works Council shall be determined in accordance with regulation 5(1)(b) and (2).

The information of the European Works Council shall relate in particular to the structure, economic and financial situation, probable development and production and sales of the Community-scale undertaking or group of undertakings. The information and consultation of the European Works Council shall relate in particular to 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.

The consultation shall be conducted in such a way that the employees' representatives can meet with the central management and obtain a response, and the reasons for that response, to any opinion they might express;

- (b) the European Works Council shall be composed of employees of the Community-scale undertaking or Community-scale group of undertakings elected or appointed from their number by the employees' representatives or, in the absence thereof, by the entire body of employees.

The election or appointment of members of the European Works Council shall be carried out in accordance with regulation 10;

- (c) the members of the European Works Council shall be elected or appointed in proportion to the number of employees employed in each EEA State by the Community-scale undertaking or Community-scale group of undertakings, by allocating in respect of each EEA State one seat per portion of employees employed in that EEA State amounting to 10%, or a

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fraction thereof, of the number of employees employed in all the EEA States taken together;

- (d) to ensure that it can coordinate its activities, the European Works Council shall elect a select committee from among its members, comprising at most five members, which must benefit from conditions enabling it to exercise its activities on a regular basis. It shall adopt its own rules of procedure;
- (e) the central management and any other more appropriate level of management shall be informed of the composition of the European Works Council;
- (f) four years after the European Works Council is established it shall examine whether to open negotiations for the conclusion of the agreement referred to in regulation 11 or to continue to apply the subsidiary requirements adopted in accordance with this Schedule.

Regulations 11 and 12 shall apply, *mutatis mutandis*, if a decision has been taken to negotiate an agreement according to regulation 11, in which case “Special Negotiating Body” shall be replaced by “European Works Council”.

2. The European Works Council shall have the right to meet with the central management once a year, to be informed and consulted, on the basis of a report drawn up by the central management, on the progress of the business of the Community-scale undertaking or Community-scale group of undertakings and its prospects. The local managements shall be informed accordingly.

3. Where there are exceptional circumstances or decisions affecting the employees’ interests to a considerable extent, particularly in the event of relocations, the closure of establishments or undertakings or collective redundancies, the select committee or, where no such committee exists, the European Works Council shall have the right to be informed. It shall have the right to meet, at its request, the central management, or any other more appropriate level of management within the Community-scale undertaking or group of undertakings having its own powers of decision, so as to be informed and consulted.

Those members of the European Works Council who have been elected or appointed by the establishments and, or undertakings which are directly concerned by the circumstances or decisions in question shall also have the right to participate where a meeting is organised with the select committee.

This information and consultation meeting shall take place as soon as possible on the basis of a report drawn up by the central management or any other appropriate level of management of the Community-scale undertaking or group of undertakings, on which an opinion may be delivered at the end of the meeting or within a reasonable time.

This meeting shall not affect the prerogatives of the central management.

The information and consultation procedures provided for in the above circumstances shall be carried out without prejudice to regulations 2, 5(1)(a), 13 and 14(1).

4. The EEA States may lay down rules on the chairing of information and consultation meetings.

Before any meeting with the central management, the European Works Council or the select committee, where necessary enlarged in accordance with the second paragraph of point 3, shall be entitled to meet without the management concerned being present.

5. The European Works Council or the select committee may be assisted by experts of its choice, in so far as this is necessary for it to carry out its tasks.

6. The operating expenses of the European Works Council shall be borne by the central management.

The central management concerned shall provide the members of the European Works Council with such financial and material resources as enable them to perform their duties in an appropriate manner.

In particular, the cost of organising meetings and arranging for interpretation facilities and the accommodation and travelling expenses of members of the European Works Council and its select committee shall be met by the central management unless otherwise agreed.