Studies on the implementation of Labour Law Directives in the enlarged European Union

Directive 2003/72/EC supplementing the Statute for a European Cooperative Society with regard to the involvement of employees

NATIONAL IMPLEMENTATION REPORT

United Kingdom

LABOURasociados
consultores

Content

Executive summary[1]

Directive 2003/72/EC of 8 October 2001 supplementing the Statute for a European Cooperative Society with regard to the involvement of employees was transposed in the UK by a single piece of legislation. This is Statutory Instrument 2006 No. 2059 – The European Cooperative Society (Involvement of Employees) Regulations 2006, which implements the Directive across the whole of the United Kingdom.

The issue of employee participation at board level, which lies at the heart of the Directive, had been debated in the UK in the 1960s and 1970s, but, after the election of a Conservative government in 1979, the prospect of a national legal basis for this vanished and has not reappeared.

The Directive deals with cooperatives, which can exist in a variety of legal forms in the UK, although their most common corporate form is as Industrial and Provident Societies. However, there is no national body of law on cooperatives and employees of cooperatives do not benefit from any special legal status.

The Directive was implemented through a legislative rather than negotiated process and although the implementing departments, Her Majesty's Treasury and the Department of Trade and Industry, produced a consultative document, there was no specific consultation with the social partners, and neither submitted their views. The overall level of interest was very low, with only seven separate responses.

The Regulations implementing the Directive were introduced on time, coming into effect on 18 August 2006. Separate Regulations, making changes to domestic law to take account of EC Regulation 1435/2003/EC of 22 July 2003 on the Statute for a European Cooperative Society, were introduced at the same time.

The Regulations have in almost all cases accurately transposed the requirements of the Directive. The areas where the UK transposition seems most open to question are:

- the failure to include in the transposition of the standard rules on the composition of the representative body "rules to ensure that the number of members of, and allocation of seats on, the representative body shall be adapted to take account of changes occurring within the SCE and its subsidiaries and establishments";
- the failure to include in the standard rules for information and consultation a specific entitlement to paid time off for training; and
- the failure to include the duty on management and the representative body to work together "in a spirit of co-operation".

The UK has not taken up what could be described as the opt-out option provided by Article 7.3 of the Directive.

[1] *Report elaborated by Lionel Fulton.*

The overall approach of the UK government has been to avoid anything which could be described as adding additional complexity or costs. Examples include:

- confirming that there is no need to pay the expenses of more than one expert;
- leaving it to the Special Negotiating Body to appoint or elect members of the representative body;
- not taking up the option of laying down rules on the chairing of information and consultation meetings;
- not making a decision of management to withhold information subject to prior authorisation; and
- not taking specific measures to guarantee structures of employee representation which cease to exist because an SCE has been established.

The Regulations also limit the maximum penalty which can be imposed for a failure to abide by the terms of the agreement or the standard rules to £75,000, equivalent to around €110,000 at the rate applicable throughout most of the first six months of 2007.

In line with this, in contrast to some other member states, the UK has not gone beyond the requirements of the Directive and required renegotiations where subsequent changes affect employee participation.

On the question of who represents employees, the UK has been compelled to find specific solutions in the Directive, as the UK does not have an existing clear statutory structure similar to works councils, as found in other member states. UK members of the Special Negotiating Body must either be elected by all employees, or appointed by a consultative committee. But to be able to exercise this function, the consultative committee must meet a number of conditions, and it is not clear whether many existing bodies, which have no clearly defined statutory basis, will meet these conditions.

External union officials can be elected or appointed as members of the Special Negotiating Body – but management must agree to their presence, a decision which has been condemned by the unions.

There are no specific UK rules on the choice of UK representatives for the representative body. This is left entirely to the Special Negotiating Body.

No UK registered SCEs have been set up as yet.

There is no indication that the Directive has had any effect on UK industrial relations, and it seems unlikely to do so in the future. One reason for this is that the cooperative sector in the UK is small. At a generous estimate it employs 0.6% of all UK employees.

1. Introduction

This report aims to provide a report on the implementation in the United Kingdom of Council Directive 2003/72/EC of 22 July 2003 supplementing the Statute for a European Cooperative Society with regard to the involvement of employees.

The importance of this Directive lies in the way that it safeguards employee involvement in cooperatives which become, or are set up as, European Cooperative Societies or SCEs, in particular through participation (see paragraphs 3 and 7 of the preamble to the Directive). The legislation clearly parallels and has many similarities with Council Directive 2001/86/EC on employee involvement in European Companies.

Employee involvement
The UK, in contrast to many other member states, does not have national legislation which provides for **employee participation at board level** – the sort covered by the Directive – other than through the legislation that implements the Directive on employee involvement in the European Company – The European Public Limited-Liability Company Regulations 2004 for Great Britain, and The European Public Limited-Liability Company Regulations (Northern Ireland) 2004 for Northern Ireland.

This issue of employee participation at board level was debated in the UK in the 1960s and 1970s and in 1976 the then Labour government set up the "Committee of Enquiry into Industrial Democracy" chaired by a distinguished academic Lord Bullock, which reported in January 1977. In response the government published a White Paper – Industrial Democracy – in May 1978. This proposed giving employees in companies employing 2,000 or more the right to one third of the seats on the board, either on the existing single-tier board or on a newly created policy board, separate from the board responsible for day-to-day management. The representatives would not come exclusively from the unions as initially proposed by Bullock, although the details were not spelled out. The proposals would also be a fall-back, employers and unions could reach other agreements if they wished. Finally there would be a delay of three or four years before worker directors would be appointed, as they were to follow the creation of new Joint Representation Committees, with whom management would have to consult about company policy. In November 1978 the Labour government promised legislation. However, Labour lost the election in May 1979 before such legislation could be introduced.

In June 1979 the newly elected Conservative government announced that it would not be legislating on the issue. The first years of the Conservative government also saw the abandonment of the initiatives in worker participation on the boards of state-owned industries. The two-year experiment in the Post Office was ended in December 1980, and in 1983 the practice of appointing British Steel employees as non-executive directors was also terminated.

The prospect of legislation to guarantee employee representation in UK companies at board level had gone by the early 1980s and there has subsequently been no indication that the possibility will return.

There are greater rights to **information and consultation**, but there is no formal legal mechanism providing for on-going workplace representation in the UK. In contrast to some

EU countries there is no structure of works councils elected by all employees, and there is also no legislation or system of legally binding collective agreements which give wide ranging powers to local union organisations to represent all employees.

The main information and consultation rights provided by UK legislation derive from EU legislation. Employee representatives should be informed about and consulted on business transfers (Transfer of Undertakings (Protection of Employment) Regulations 2006) and there is no minimum threshold for this. They should be informed about and consulted on collective redundancies (Trade Union and Labour Relations (Consolidation Act) 1992), but only when 20 or more employees are to be made redundant.

There is a more general obligation to inform and consult employees under the Information and Consultation of Employees Regulations (2004) which implements the EU Directive on establishing a general framework on information and consultation (Directive 220/14/EC). However, the Regulations do not require employers to establish a structure for information and consultation if one does not exist. The process must be either initiated by the employer or by a request of 10% of the workforce. Once this has happened, the employer and employee representatives are required to start negotiations on an agreement on information and consultation, with fallback arrangements on setting up a committee if no agreement is reached. But if neither the employer nor 10% of the workforce ask for an information and consultation mechanism to be set up, then there is no need for further action.

There is also an employment threshold. The Regulations initially (2006) only applied to undertakings with more than 150 employees. In April 2007 the threshold fell to 100 employees, and it will fall further to 50 in April 2008.

UK legislation on cooperatives

The UK does not have specific legislation relating to cooperatives – businesses that are owned and democratically controlled by their members – the people who buy their goods or use their services. Cooperatives in the UK may set up as companies limited by guarantee, limited liability partnerships or more commonly in the United Kingdom as an Industrial and Provident Society (IPS) under the Industrial and Provident Societies Act 1965. To be registered as an Industrial and Provident Society, a society must show:

- "it is a society for carrying on an industry, business or trade; and it is
- either

  i) a bona fide cooperative; or

  ii) if its business will be run for the benefit of the community (that is, people other than its own members), there are special reasons why it should be registered as an industrial and provident society rather than as a company under the Companies Acts."[2]

[2] Information on the registration of bona fide co-operatives under the Industrial and Provident Societies Act 1965, Financial services Authority, 2006

A society will normally only be considered as a bona fide cooperative if it fulfils the following conditions:

- there is a community of interest between its members – which may be economic, social or cultural;
- business is run for the mutual benefit of members of the society – this may mean that the members buy from or sell to the society, that they use the society's services or amenities, or that they supply services to enable the society to carry on its business;
- the society is controlled by the members, with each having an equal share – membership rights should not vary, for example, according to the amount of money individual members have subscribed;
- interest on the share and loan capital subscribed should be limited;
- if profits are distributed this should be done in line with the society's rules and should reflect the amount of business the members have done with the society – in other cases profits will not be distributed but reinvested in improving services to members;
- there should normally be no restrictions on membership, other than those reflecting external factors – such as the size of club premises.

Industrial and provident societies registered under the Act benefit from limited liability and the fact that they then have a corporate status and can act in their own name, without the need for trustees.

These points and the fact that the majority of cooperatives in the UK are registered under the Industrial and Provident Societies Act 1965 led the UK government departments responsible for introducing the implementing legislation in the UK to state that "the closest equivalent in GB to a national law on cooperatives is the law concerning Industrial and Provident Societies".[3] However, it is worth emphasising again that there is **no** national body of law on cooperatives.[4]

Three other points should also be noted.

First, employees of cooperatives do not enjoy any special legal rights. They are covered by the same legislation as all other employees.

Second, employees have no express rights to be represented on the boards of cooperatives, although this is equally not forbidden, and an individual cooperative's articles of association – its rules – may voluntarily provide for such representation.

Third, there is no mechanism in UK law that specifically provides for employee participation in general meetings, although there is nothing to prevent employees participating in general meetings where they are also members.

[3] The European Cooperative Society: A consultative document, March 2006, HMT, DTI

[4] Other legislation governing the operation of cooperatives includes the Co-operatives and Community Benefit Societies Act 2003

2. Implementation

The Directive was implemented through a Statutory Instrument, introduced under the European Communities Act 1972, which permits the Secretary of State to make regulations. It is Statutory Instrument 2006 No. 2059 – the "European Cooperative Society (Involvement of Employees) Regulations 2006", referred to throughout this report as the Regulations. (These Regulations implement the Directive in the whole of the UK. This is in contrast to the Regulations implementing the Directive on employee involvement in the European Company, which were introduced separately for the UK and Northern Ireland.)

These Regulations simply implement the Directive. Again in contrast to the legislative arrangements made with reference to the European Company, separate Regulations have been made to change domestic law to take account of EC Regulation 1435/2003/EC of 22 July 2003 on the Statute for a European Cooperative Society. As an EC regulation, this piece of legislation has direct effect in the UK as elsewhere in the European Union. However, like most EU states, the UK made consequential changes to its domestic law and these are contained in Statutory Instrument 2006 No. 2078 – The European Cooperative Society Regulations 2006. These Regulations are not examined in this report.

The Regulations were made on 25 July 2006, laid [before parliament] on 27 July 2006, and came into effect on 18 August 2006 – the date required in the Directive itself.

In line with UK practice, there was a period of consultation by the government, on both the EC Regulation and the EC Directive, before the Regulations came into effect. A consultative document was published by the two government departments involved, Her Majesty's Treasury (HMT) and the Department of Trade and Industry (DTI) in March 2006. (The two departments had carried out a previous consultation on the European Commission proposal for a European Cooperative Society between July and October 2001. Only five organisations, of which three were from the cooperative sector, responded to the consultation undertaken at that time.)

The March 2006 document explained the requirements of the Directive and set out how the government proposed to implement them. It also set out the government's options linked to the EC Regulation 1435/2003/EC. The March 2006 consultative document also included a "partial regulatory impact assessment" providing the government's own expectation of the impact of the Directive.

This impact assessment stated that the proposals would "potentially benefit the cooperative sector as a whole" although it also pointed out that "it is difficult at this stage to provide a precise quantification of the expected benefits and costs associated with the EC Regulation and the EC Directive". This was particularly the case, given the wide range of organisations and individuals able to set up SCEs.[5] On the issue of the costs and benefits of the employee involvement foreseen by the Directive the assessment made the following points:

> "By being consulted, employees may feel more committed to the organisation and may feel more secure in their jobs. The benefits of information and consultation will

[5] The European Cooperative Society: A consultative document, Annex D, March 2006, HMT, DTI

> depend very much on the circumstances of the cooperative. The management organs of cooperatives and their employees (or their representatives) will be able to agree their employee involvement arrangements, taking into account their unique requirements and existing set of arrangements."[6]

On the specific point of employee participation at board level, the assessment concluded:

> "It is sometimes argued that employee participation on boards can slow down decision-making and hence reduce companies' competitive edge. However, research sponsored by the DTI on the impact of European Works Councils on UK employers finds that "consultation was not seen to slow down management decision making, as extraordinary meetings to discuss, for example, anticipated restructuring, could be convened fairly quickly"[7]. Accordingly, no costs have been factored in for longer decision-making processes."[8]

A further "Final Impact Assessment" was published in August 2006. It largely repeated the wording of the partial impact assessment and concluded, "The SCE form will offer national cooperatives and other interested parties a useful and convenient vehicle for engaging in cross border activity".[9]

The results of the public consultation were published in July 2006. Only seven responses were received. These came from an umbrella group for cooperatives (Cooperatives UK), two government agencies, two co-operative societies, a credit union association, and a law firm.

Neither of the main social partners – the Confederation of British Industry (CBI) and the Trade Union Congress (TUC) – responded to the consultative document, and it should be emphasised that there was no formal process specifically involving the social partners. (This is not unusual, but it is in contrast to the position in relation to Directive 2002/14/EC establishing a general framework on information and consultation in the European Community, where an agreement between the CBI and the TUC formed the basis for subsequent implementation through legislation.)

The overall approach to transposition taken by the UK has been "to ensure that domestic legislation does not impose additional requirements on persons who wish to form and operate as an SCE in the UK, unless it is shown to be justified on the basis of a rigorous cost-benefit analysis".[10]

Formal implementation

The Directive is implemented by the European Cooperative Society (Involvement of Employees) Regulations 2006

---

[6] Ibid

[7] Costs and benefits of European Works Councils Directive, T. Weber, P. Foster and K.L Egriboz, DTI Employment Relations Research Series 9 (February 2000).

[8] The European Cooperative Society: A consultative document, Annex D, March 2006, HMT, DTI

[9] Final Regulatory Impact Assessment on the European Cooperative Society, August 2006, HMT, DTI

[10] European Cooperative Society: A consultative document, March 2006, HMT, DTI

Regulations 1 to 3 provide the framework in which the legislation operates. Regulation 1 gives the name of the Regulations, the date on which they come into effect – 18 August 2006. Regulation 2 states that the Regulation also applies to Northern Ireland. Regulation 3 lists the interpretations to be used for the Regulations. The remainder of the Regulations implement the substance of the Directive. There are a total of 43 regulations and three Schedules.

I Objective and definitions

The objective of the Directive (Article 1.1) is not spelled out explicitly in the Regulations. However, the Explanatory Note, which is published with the Regulations, states that: "These Regulations implement Council Directive 2003/72/EC supplementing the Statute for a European Cooperative Society with regard to the involvement of employees".

The reference to the need for the arrangements to apply to every SCE (Article 1.2) is covered by regulation 4 of the Regulations. Regulation 4 (2) sets out that the Regulations apply to an SCE whose registered office is, or is intended to be in the UK. Regulation 4 (3) identifies the part of the Regulations – those dealing with the election or appointment of members of the special negotiating body – which apply to UK employees. Regulation 4 (4) identifies the parts of the Regulations which apply to legal entities, subsidiaries, establishments, employees or their representatives, if the SCE or the bodies intending to form an SCE have any UK presence. This is irrespective of where the SCE has its registered office. These parts of the Regulations deal with compliance, confidentiality and protection of employee representatives.

The definitions in Article 2 of the Directive are covered by regulation 3 of the Regulations. Five of the definitions – "participating legal entities" (Article 2b), "subsidiary" (Article 2c), "involvement of employees" (Article 2h), "information" (Article 2i) and "consultation" (Article 2j) – are stated to have the same meaning in the Regulations as they have in the Directive and are dealt with in regulation 3 (2). The same also applies to "concerned subsidiary or establishment" (Article 2d), although the Regulations indicate that an establishment may also include the establishments of a participating individual (regulation 3 (2)). There is no specific definition of an "undertaking" in the Regulations, nor is there an explicit definition of a "cooperative". Regulation 3 (1) states only that ""participating cooperative" means a participating legal entity which is a cooperative".

The definition of an "SCE" (Article 2a) is set out in regulation 3 (1), although the regulation notes that "except as provided in these Regulation", it refers to an SCE registered in the UK.

The definition of the "representative body" (Article 2f) is essentially the same as in the Directive, although it is briefer: "representative body means the persons elected or appointed under the employee involvement agreement or under the standard rules on employee involvement". And "participation" (Article 2 k) is defined almost the same way in the Regulations, although, among other slight changes, the words "in the affairs of a legal entity" are replaced by "in the SCE or a participating legal entity". The definition of "special negotiating body" (Article 2g) is set out in regulation 3 (3), although the wording makes it clear that it is not just the body to negotiate initially on the arrangements for employee involvement when an SCE is first set up, but also the body to negotiate these arrangements in an SCE which was previously exempt.

The definition of "employee representatives" (Article 2e) is provided by regulation 3 (1), although it takes account of the specific British situation and is discussed at greater length in section Vb of this report. Regulation 16 also states that "information and consultation representative" has the meaning given to it later in the regulations (see II B g. below).

Regulation 3 also provides a number of specifically British definitions for employee, dismissal, UK employee and UK members of the special negotiating body, explains some of the abbreviations used, and defines some of the terms used later in the Regulations, such as a "total workforce", "two-thirds majority vote" and an "absolute majority vote".

II Provisions that apply to an SCE based in the UK

A Field of implementation

Regulation 2 states that the Regulations extend to Northern Ireland, although, because elements of legislation are different in Northern Ireland, there are a number of modifications which only apply in Northern Ireland. These are set out in Schedule 3 of the Regulations. (The main differences are in the courts involved in dealing with complaints and infringements, and in other legislation cited.)

Regulation 4 (2) states that the Regulations apply both where the intention is to form an SCE whose "registered office is in the UK" and to an SCE whose registered office is already in the UK. The Regulations also make it clear in regulation 4 (3) that there are some elements of the Regulations which apply if there are UK employees involved, irrespective as to where the SCE has its registered office.

B Procedure for negotiations of the rights of involvement of workers in the SCE

a. Responsibility for the procedure

The requirements of Article 3.1 on responsibility are met, **in accordance with the Directive**, by regulation 7 of the Regulations, which requires the competent organs of participating bodies intending to set up an SCE to provide information to employee representatives (of the participating entity and its concerned subsidiaries or establishments) or, if there are no representatives, to the employees themselves. The information to be provided is in line with that required by Article 3.1 – identifying the individuals, participating legal entities, subsidiaries and establishments involved and giving the numbers of employees in these. It also requires the participating entities to give the numbers employed in each EEA state.

Regulation 10 (1) states that the competent organs of the participating legal entities "shall make arrangements for the establishment of a special negotiating body".

b. Start of procedure

The timing element of Article 3.1 is also transposed, **in accordance with the Directive**, by regulation 7, which states that information should be provided "as soon as possible after – (a) … publishing the draft terms of a merger, (b) … publishing the draft terms of conversion, or (c) … agreeing a plan to form an SCE".

c. Constitution and composition of the special negotiating body

The bulk of Article 3.2 is transposed, **in accordance with the Directive**, by regulation10 of the Regulations. This states (regulation 10 (2)) that employees in each member state, where the participating legal entities and concerned subsidiaries have employees, are entitled to one member for each 10% or fraction thereof of the total workforce they represent – described in the Regulations as "ordinary members". Regulation 10 (3 and 4) then set out the

arrangements to be followed in the case of an SCE established by merger. In line with the Directive, these conditions are that these additional members should not exceed 20% of those members elected in the normal way and it provides for a mechanism to reduce the number to 20%, if necessary.

Regulation 10 (6) requires that appropriate adjustments should be made to the composition of the special negotiating body, either if there are changes to the participating entities,which would alter their entitlement to seats, or if a member of the special negotiating body is no longer willing or able to serve.

d. The function of the special negotiating body
The first paragraph of Article 3.3, on the function of the special negotiating body, is largely transposed **in accordance with the Directive** by regulation 9 which states that the special negotiating body and the competent organs of the participating legal entities have the task of reaching an "employee involvement agreement", which is defined in regulation 3 (1). Regulation 17 (1) completes the transposition of the first paragraph of Article 3.3 by stating that the employee involvement agreement must be in writing, in line with the requirements of the Directive.

The second paragraph of Article 3.3, on the requirement for management to keep the special negotiating body informed of progress, is transposed **in accordance with the Directive** by regulation 7 (3).

Article 3.6, on the possibility of not opening or abandoning negotiations and the consequences which flow from that decision, is transposed **in accordance with the Directive** by regulation 19, although the definition of the "two thirds majority vote" in the Article is set out in regulation 3 (1).

e. The workings of the special negotiating body
Article 3.4 is transposed **in accordance with the Directive** by regulation 18 (1, 2 and 3) taking account of the definitions of "absolute majority vote" and "two thirds majority vote" set out in regulation 3 (1).

Article 3.5 on experts is transposed by regulation 18 (5). However, the UK wording makes no reference to the example provided in the Directive that these experts might come from "appropriate Community level trade union organisations". Nor does it refer to the promotion of "coherence and consistency at Community level". It states only "for the purposes of negotiations, the special negotiating body may be assisted by experts of its choice".

The Regulations do not refer to informing "representatives of appropriate external organisations, including trade unions, of the start of the negotiations". However, regulation 10 (5) requires management – "the competent organs of the participating legal entities" to inform their employees at the latest within a month of the "identity of the members of the special negotiating body".

Article 3.7 on the costs of the functioning of the special negotiating body, in particular the cost of experts, is transposed **in accordance with the Directive** by regulation 18 (6), although the wording used is "any reasonable expenses" rather than "any expenses" as in the Directive. The regulation also states, in line with the Directive, that there is no obligation to pay the expenses of more than one expert.

f. Duration of the negotiations
Article 5, on the duration of the negotiations, is transposed **in accordance with the Directive**, by regulation 16 (3) setting the duration of agreement at six months, which can be extended to 12 months by mutual agreement. However, the starting point of the negotiations is not "as soon as the special negotiating body is established" – as in the Directive – but one month after the date on which the last member of the special negotiating body is elected or appointed.

g. Content of the agreement
Article 4.1, on the way the negotiations should be conducted, is transposed, **in accordance with the Directive**, by regulation 16 (1and 2), which requires the "parties" – defined in regulation 16 (1) as the competent organs of the participating legal entities and the special negotiating body – "to negotiate in a spirit of co-operation with a view to reaching an employee involvement agreement" – regulation 16 (2).

Article 4.2, which sets out what the agreement must contain, is transposed, **in accordance with the Directive**, by regulation 17 (2). The wording is the same, except that the description of the representative body, included in Article 4.2 (b) of the Directive, is omitted. In addition the Regulations refer to the arrangements for employee participation in general or sectional meetings of the SCE (regulation 17 (2 (h))). These are examined in greater detail in section VII of this report.

Article 4.3, on the standard rules not applying where there is an agreement, is transposed, **in accordance with the Directive** by regulation 17 (3).

Article 4.4, on the same level of employee participation in an SCE established by conversion, is transposed, **in accordance with the Directive**, by regulation 17 (4).

In addition, regulation 17 (5) states that where the agreement provides for one or more information and consultation procedures, rather than a representative body, and that if these procedures involve electing or appointing individuals, these individuals shall be known as "information and consultation representatives". The significance of this is that "information and consultation representatives" also benefit from the protections for employee representatives set out elsewhere in the Regulations (see IV b below).

In contrast to the situation in some member states the UK legislation does not require re-negotiation of the agreement if there are substantial changes after the SCE has been set up that would affect participation rights. This is in line with the Directive, which does not require this, other than in the case of misuse of procedures, which is dealt with in the Regulations (see IV d. below).

III Reference provisions (standard rules)
a. Field of implementation
Article 7.1, on the requirement to have standard rules and some of the circumstances in which they apply, is transposed **in accordance with the Directive**, by regulation 21 (1) and 21 (2), although there are slight variations from the wording of the Directive.

The bulk of Article 7.2, on the circumstances required for the standard rules to apply in the area of board level participation, is transposed, **in accordance with the Directive**, by regulation 21 (3). Regulation 21 (3 (a)) deals with SCEs set up through merger – where the

25% threshold on employee numbers applies, and regulation 21 (3 (b)) deals with SCEs formed in any other way – where the 50% threshold applies. The Regulations, however, refer to "participating legal entities" (regulation 21 (3 (a))) and "participating individuals and legal entities" (regulation 21 (3 (b))), rather than using the language of the Directive, which is "participating cooperatives" in the first case and "participating legal entities" in the second.

There is no specific reference to an SCE established by transformation. However, this is logical in the light of the wording of Article 7.2 (a). This states that the rules relating to transformation only apply "if the rules of a Member State relating to employee participation in the administrative or supervisory board applied to a cooperative transformed into an SCE". The UK has no national rules on employee participation at board level and a UK cooperative transforming itself into an SCE would therefore not previously have been governed by national rules relating to employee participation.

The last paragraph of Article 7.2, relating to the forms of participation which apply, is transposed, **in accordance with the Directive**, by regulation 21 (4). This states that, "Where the standard rules on participation apply and more than one form of employee participation exists in the participating legal entities, the special negotiating body shall decide which of the existing forms of participation shall exist in the SCE and shall inform the competent organs of the participating legal entities accordingly."

The UK has not chosen to make use of the option, also included in the paragraph, of fixing rules in the absence of a decision by the special negotiating body.

The UK has also not chosen to make use of the option provided by Article 7.3 of providing that the standard rules on employee participation should not apply in the case of an SCE established by merger.

Regulation 21 (5) covers how the standard rules apply to employee participation in general and sectional meetings and is dealt with in section VII of this report.

b. Employees' representative bodies

Annex Part 1 of the Directive, covering the composition of the employees' representative body, is transposed, largely **in accordance with the Directive**, by Schedule 2 Part 1 of the Regulations. In most cases there are only minor changes in wording from the Annex in the Directive. For example, on the issue of the possibility of establishing a select committee, the Schedule simply repeats the wording of the Annex to the Directive: "Where its size so warrants, the representative body shall elect a select committee from among its members comprising at most three members."

However, this is not possible in all areas, as the Directive leaves it to "national legislation and/or practice" to determine the method for appointing or electing the members of the representative body.

In the UK the standard rules state that members of the representative body "shall be elected or appointed by members of special negotiating body and the election or appointment shall be carried out by whatever method the special negotiating body decides which should seek to promote gender balance" (Schedule 2 Part 1 (1) (c) and (d)). Although this seems to be **in accordance with the Directive**, which leaves the issue to the member states, in practice this seems a potentially unsatisfactory arrangement, as the special negotiating body has only a

short life-span – six months or a year – while the representative body is a permanent institution.

The UK regulation has not included in its standard rules any reference to the requirement in the second paragraph of Annex Part 1 (b) that the number of seats on the representative body shall take account of changes within the SCE.

With the exception of paragraph (g) on training, Annex Part 2 of the Directive, covering the standard rules for information and consultation is transposed, **in accordance with the Directive**, by Schedule 2 Part 2 of the Regulations. However, the individual provisions are re-ordered and combined in a different way in the Schedule to the Regulations than in the Annex to the Directive.

Paragraph (a) of the Annex is transposed by paragraph (1) of Part 2 of the Schedule.

Paragraph (b) of the Annex is transposed by sub-paragraphs (2 (a)), (2 (b)) and (3 (a)) of Part 2 of the Schedule.

Paragraph (c) of the Annex is transposed by sub-paragraphs (2 (c)), (3 (b)), (3 (c)), and (4) of Part 2 of the Schedule. However, Part 2 of the Schedule does not include a specific reference to the prerogatives of management being unaffected.

The ability of the representative body to meet separately from management, set out in paragraph (d) of the Annex is transposed by sub-paragraph (5) of Part 2 of the Schedule. However, the UK has not taken up the option of laying down rules on the chairing of information and consultation meetings.

Paragraph (e) of the Annex is transposed by sub-paragraph (6) of Part 2 of the Schedule. Indeed, here the requirement on members of the representative body is more onerous, as they must not only inform employee representatives, but also the employees themselves, “if no such representatives exist”.

Paragraph (f) of the Annex is transposed by sub-paragraph (7) of Part 2 of the Schedule.

Paragraph (g) of the Annex, on the right to time off for training, is NOT referred to in Part 2 of the Schedule. Regulation 28 (1) states that a member of the representative body, like a member of the special negotiating body, 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”. But there is no specific reference to training.

Paragraph (h) of the Annex is transposed by sub-paragraph (8) of Part 2 of the Schedule, where the UK uses the option to state that the SCE is not required to pay the expenses of more than one expert.

c. Participation of employees

Annex Part 3, on the standard rules for participation is transposed, **in accordance with the Directive** by Schedule 2 Part 3 of the Regulations.

Paragraph (a) of the Annex is repeated almost word for word in sub-paragraph (1) of Part 3 of the Schedule, although the word “transformation” in the Directive, is replaced by

"conversion" in the Regulations. There are also minor changes in the wording of the last sentence of the paragraph.

Paragraph (b) of the Annex, dealing with the right of employees in legal entities which formerly had participation to have a level of participation equal to the highest level existing beforehand, is transposed by sub-paragraph (2) of Part 3 of the Schedule.

Paragraph (c) of the Annex, on the fact that there is no need to introduce participation, if it did not exist before, is not repeated in Part 3 of the Schedule. However, regulation 21 (3) makes it clear that the standard rules on participation "only apply" in specific circumstances.

Paragraph (d) of the Annex, on the allocation of seats, is transposed by sub-paragraph (3 (a and b)) of Part 3 of the Schedule. However, whereas the wording of the Directive states that the representative body shall decide on the allocation of seats "according to the proportion of the SCE's employees in each member state", the Schedule to the Regulations is less prescriptive. It states that the representative body shall decide on the allocation of seats "taking into account the proportion of employees of the SCE employed in each Member State". The Schedule also does not include anything covering the wording, "Each Member State may determine the allocation of the seats it is given within the administrative or supervisory body".

Paragraph (e) of the Annex, on employee representatives having the same rights as other members of the administrative or supervisory board, is transposed by sub-paragraph (3 (c)) of Part 3 of the Schedule.

Part 3 of the Schedule, also includes a further provision in sub-paragraph (4) on employee participation in general and section meetings which is dealt with in section VII of this report.

IV Other Common provisions

a. Confidentiality of information

Article 10 is transposed, **in accordance with the Directive**, by regulations 26 and 27 of the Regulations.

Article 10.1, on the obligation not to reveal information given in confidence, is transposed, **in accordance with the Directive**, by regulation 26 (1 to 4). Regulation 26 (5) exempts from this obligation any information disclosed through a "protected disclosure" under Section 43A of the Employment Rights Act 1996. (This is the section of the Act which protects "whistleblowers".)

Article 10.2, allowing an SCE not to transmit information that would seriously damage it, is transposed, **in accordance with the Directive**, by regulation 27 (1). The UK has not taken up the option in the second paragraph of Article 10.2 of making this dispensation subject to prior authorisation, although subsequent challenges are provided for in the rest of regulation 38 (see below).

The UK was not able to take up the option provided in Article10.3 of providing particular rules for "ideological" SEs, as such rules do not exist for national cooperatives.

Article 10.3, on provision for appeal procedures, is transposed, **in accordance with the Directive**, by regulations 26 (6, 7 and 8) and 27 (2, 3 and 4). Regulation 26 (6, 7 and 8) deals

with appeal procedures where an individual, given material in confidence, believes it is not reasonable for management to require the material to be kept confidential. Regulation 27 (2, 3 and 4) deals with appeal procedures where management refuses to provide information, arguing it would seriously damage it to transmit it. In both cases the appeal is to the Central Arbitration Committee (CAC). The CAC is a permanent independent body with statutory powers, which describes its main function as being "to adjudicate on applications relating to the statutory recognition and derecognition of trade unions for collective bargaining purposes, where such recognition or derecognition cannot be agreed voluntarily". [11] CAC decisions are taken by a three-person panel with one member representing employers, one employees and an independent chair. As yet, there have been no cases on confidentiality relating to SCEs.

In terms of the whether the confidentiality provisions are the same as those for national bodies, it is important to point out that in the UK there is not statutory structure for permanent employee representation at the workplace similar to the works councils which exist in many other EU states. Representatives of "recognised" trade union, have a right to information related to collective bargaining, subject to certain conditions (see Trade Union and Labour Relations Consolidation Act 1992 (TULRCA): Section 181). This information can then be disclosed more widely in the course of collective bargaining. However, the requirement on employers to provide this information is limited by section 182 of TULRCA. This states that an employer can decline to give the information on the grounds: of national security; that the information has been obtained in confidence; that it relates specifically to an individual; or that it would cause "substantial injury" to the employer's undertaking. As with the SCE Regulations, complaints over an employer's failure to disclose go to the CAC (TULRCA: Section 183).

The main comparable piece of UK legislation is this area is the Information and Consultation of Employees Regulations 2004 (Statutory Instrument 2004 No. 3426) which implemented Directive 2002/14/EC. Regulations 26 and 27 of the SCE Regulations are essentially the same as regulations 25 and 26 of the Information and Consultation of Employees Regulations 2004 (ICE 2004). The principal difference in wording between the two is that while the ICE 2004 Regulations refer to the "employer" the SCE Regulations refer to an "SCE, subsidiary of an SCE, participating legal entity, concerned subsidiary or participating individual".

b. Protection of employees' representatives

Article 12, on the protection of employees' representatives, is transposed, **in accordance with the Directive** by regulations 28 to 35. Regulations 31 to 35 transpose the first paragraph of Article 10, on protection, and regulations 28 to 30 transpose the second paragraph of Article 10 on time off.

Regulations 31 and 32 deal with unfair dismissal in connection with the procedures established by the Regulations, and make it clear that the protection applies not just to employee representatives and candidates, but also to individual employees who are taking some other part in the procedure, such as voting in the ballot (regulation 31 (6g)), or have

[11] CAC website

expressed a view on the procedures, such as "indicating that he did or did not support the coming into existence of a special negotiating body" (regulation 31(6d)).

Regulations 33 and 34 deal in a similar way with detriment (action damaging to the employee short of dismissal).

In both cases employees who consider that they have been unfairly dismissed or have suffered detriment because of their activities in connection with the procedures established by these Regulations have the right to take their case to an Employment Tribunal. Regulation 31 (4) and 33 (4) specifically make it clear that these protections do not apply when an employee has breached the confidentiality provisions set out in regulation 26.

Regulation 35 provides that the provisions of the Employment Tribunal Act 1996, which allow for conciliation in conflicts between employees and employers (Section 18), should be amended to allow also for conciliation in conflicts related to these Regulations.

Regulations 28 to 30, on the right to paid time off, cover the issue in three steps. First, regulation 28 states who has the right to "reasonable time off during … working hours". These are in line with the categories listed in the Directive and also include candidates to these positions. Second, regulation 29 states that they should be paid "the appropriate hourly rate" and establishes how this should be calculated. Finally, regulation 30 states that where individuals feel that time off has been unreasonably refused or not paid as appropriate, they have the right to take that complaint to an Employment Tribunal.

In terms of the whether employee representatives exercising functions under the SCE Regulations enjoy the "same protection and guarantees" as those provided for employees' representatives by "national legislation and/or practice" (Article 12), it is important to point out that in the UK there is not statutory structure for permanent employee representation at the workplace similar to the works councils which exist in many other EU states. Union representatives perform some of the same roles in the UK but they have no specific protection. However, individual members of unions have protection against victimisation by their employer. They have the right not to suffer detriment – have action short of dismissal taken against them (TULRCA: Section 146), the right not to be dismissed because of membership of a trade union (TULRCA: Section 152) and the right not to be selected for redundancy for that reason (TULRCA: Section 153). A trade union representative of a "recognised" union has the right paid time off, although the amount and the conditions under which it is taken should be "reasonable in all the circumstances" (TULRCA: Section 168)

The SCE Regulations also have in substance the same wording covering protection and time off as the Information and Consultation of Employees Regulations 2004 (Statutory Instrument 2004 No. 3426) which implemented Directive 2002/14/EC. Regulations 28 to 34 of the SCE Regulations are essentially the same as regulations 27to 34 of the Information and Consultation of Employees Regulations 2004 (ICE 2004). The principal difference in wording between the two is that while the ICE 2004 Regulations refer to an employee who is "(a) a negotiating representative; or (b))an information and consultation representative" the SCE Regulations refer 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 of a supervisory or administrative organ; (e) a candidate in an election in which any person elected will, on being elected, be such a

member or a representative; or (f) a participant in general meetings or section or sectorial meetings of the SCE".

Overall, it is clear that the Regulations **meet the requirements of the Directive** in this regard and employee representatives exercising their functions under in relation to SCEs enjoy the "same protection and guarantees" as those provided for employees' representatives by "national legislation and/or practice"

c. Spirit of co-operation
Article 11, on the requirement for the representative body and management to work together "in a spirit of co-operation", and for the same to apply to "cooperation between the supervisory or administrative organ of the SCE and the employees' representatives in conjunction with a procedure for the information and consultation of employees", is not specifically transposed, in the UK Regulations.

d. Misuse of procedures
Article 13, on the misuse of procedures, is transposed, **in accordance with the Directive**, by regulation 24. This states in regulation 24 (1) that an employee representative, or, if there is no representative, an employee can complain to the CAC, if he or she believes that a participating legal entity, individual or SCE is misusing an SCE to deprive employees of their rights to employee involvement or to withhold rights from them. In the case of a complaint made before the SCE has been registered, or within 12 months of its registration, the burden of proof is on the respondent (participating legal entity, individual or SCE) that it did not misuse or intend to misuse the procedures. The CAC can require the participating legal entity, individual or SCE to take appropriate action to ensure that employees are not being deprived of their rights or having their rights withheld.

V Provisions applicable to work centres and participating legal entities in the territory of the Member State (accessory provisions)
a. Sphere of implementation
Regulation 4 (3) states that the specific UK arrangements for the election or appointment of members of the special negotiating body will apply in relation to the UK members of the special negotiating body "regardless of where the registered office is, or is intended to be, situated".

b. Identification of national employees' representatives
Employees' representatives (Article 2.e) are defined by part of regulation 3 (1).

This identifies two types of employee representative:

- trade union representatives, who normally take part as negotiators in the collective bargaining process on behalf of the employees involved – the Regulations do not state that they must be employees– they could be external trade union officers; and
- other employees who are elected or appointed as employee representatives and get information about the terms and conditions of employees or the activities of the business which are particularly important for employees. (Employee representatives who just deal with health and safety issues do not fall into this category.)

c. Appointment of employees' representatives in the special negotiating body and representative body

Article 3.2b, on the mechanism for choosing members of the special negotiating body, is transposed, **in accordance with the Directive**, by regulations 12 to 15. The mechanism for choosing UK members of the special negotiating committee is by ballot of employees (regulation 12 (1)), unless there is a consultative committee, in which case it can appoint the UK member or members of the special negotiating committee (regulation 14).

The balloting arrangements are set out in detail in regulation 12 (2 and 3). They make the management of the participating legal entities responsible for arranging the ballot, although they must appoint one or more independent ballot supervisors to supervise its conduct. Management must also, as far as reasonably practicable, consult with UK employees' representatives on the conduct of the ballot and publish the balloting arrangements in a way which, as far as reasonably possible, brings them to the attention of all employees. Employees who consider that the ballots have not been conducted in accordance with the Regulations can bring a complaint to the CAC, which has the power to make management modify its arrangements (regulations 12 (4 and 5)).

The issue of how UK employees should be grouped together for voting is also dealt with in regulation 12 (3). They are to vote grouped by employer so that if the number of special negotiating body members to be elected is the same as the number of employers involved, each group employed by the same employer elects one member. If the number of employers is less than the number of special negotiating body members, then, as far as practical, each group employed by the same employer elects one member and the additional members are allocated in a way which takes account of the number of employees involved. If the number of employers involved is more than the number of special negotiating body members then, the largest groups working for the same employer each elect one member, and those smaller groups where there is no ballot, vote in one of the ballots for the larger employers. Where additional members are being elected, in respect of legal entities that are to merge (Article 3a (ii) of the Directive), they should be elected in separate ballots (regulation 12 (3 (3 (b))). All UK employees are entitled to vote.

In response to the second paragraph of Article 3.2b, the UK regulations state that all employees may stand as candidates, as may trade union representatives who are not employees. But this second group can only stand if management permits this(regulation 12 (3 (3 (d))) .

Regulation 13 sets out in detail the framework within which the ballot must be conducted, in particular the role of the ballot supervisor. It also states that all the costs relating to the ballot, including the cost of the ballot supervisor, are to be borne by management.

Regulation 14 deals with the arrangements where the UK employees' representatives on the special negotiating body are to be appointed by a consultative committee. For this to happen, the consultative committee must pass a number of tests:

- part or all of its normal functions must be information and consultation, defined as receiving information from management on issues of significant importance to employees, and being consulted by management about this information;
- it must not be subject to interference from management;

- it must represent all the employees of the entity concerned; and
- it must be made up only of employees.

If it passes these tests, it can appoint the UK members of the special negotiating body, and, as with members elected by ballot, these may be either employees or trade union representatives who are not employees. But again, this second group can only be appointed if management permits this.

Regulation 14 also sets out the possibility of a complaint to the CAC if management, employee representatives or employees themselves, feel that a consultative committee has chosen the members of the special negotiating committee, where it did not have the right to do so.

Annex Part 1 b has not been reflected in specific UK arrangements. Schedule 2, Part 1 (1) (c and d), which transposes this part of the Directive simply states that "the members of the representative body shall be elected or appointed by the members of the special negotiating body; and the election or appointment shall be carried out by whatever method the special negotiating body decides". As already noted above (see III b.), this solution, while in accordance with the Directive, potentially presents problems.

d. Protection of employees' representatives
See IVb.

VI Rules applicable to SCEs established exclusively by natural persons or by a single legal entity and natural persons
Article 8 of the Directive, on SCEs established exclusively by natural persons or by a single legal entity and natural persons, is transposed, **in accordance with the Directive**, by regulations 5 and 6 and Schedule 1 of the Regulations.

Article 8.1, stating that the directive continues to apply in the normal way to SCEs established exclusively by natural persons or by a single legal entity and natural persons if they employ at least 50 employees in at least two member states, is not reproduced in the Regulations. However, regulation 5, which sets out when the normal arrangements under the Directive do **not** apply has the same effect.

Article 8.2, which sets out minimum employee thresholds, is transposed, **in accordance with the Directive**, by regulation 5. The Regulations do not, however, specifically restate that the employee involvement in the SCE and its subsidiaries and establishments will be governed by national laws.

In fact, in the UK, employees in undertakings with fewer than 50 employees have only limited employee involvement rights. There is no right to board-level representation and few rights to information and consultation (see Introduction.)

Article 8.3, which deals with the arrangements which apply if an SCE is initially below the 50-employee threshold and subsequently expands, is transposed, **in accordance with the directive**, by regulation 6 and Schedule 1.

Regulation 6 (3) sets out the employments conditions – over 50 and in two members states – that are required. Regulation 6 (4) sets out the requirements for the request for negotiations to be valid – asked for by at least a third of the total workforce. However, the regulation also specifies that the request must be in writing and specifies the names of the employees making it. It does, however, permit the request to be either a single request, or a series of requests made over six months.

Schedule 1 transposes, **in accordance with the directive**, the words "the provisions of Articles 3 to 7 shall be applied, *mutatis mutandis*" (Article 8 (3) of the Directive). Its 15 paragraphs replace regulations 7 to 21 of the Regulations. The wording is essentially the same throughout, although references to the initial formation of an SCE found in regulation 7 are not found in Schedule 1. 1., as the Schedule relates to an SCE which has already been set up. Other than this, the key change is that references to participating legal entities and participating individuals have been replaced by references to the SCE.

VII Participation in the general meeting or section or sectoral meetings

Article 9 of the Directive, on participation in the general meeting or section or sectoral meetings, is transposed, **in accordance with the directive**, by a number of provisions included in the Regulations.

Regulation 17 (2 (h)) deals with the arrangements which apply when employee participation in these meetings is included in an agreement between the SNB and management (Article 9.1 of the Directive). It states in these circumstances that the agreement should contain: "the substance of those arrangements, including (where appropriate) the number of employees or representatives who will be entitled to participate, the procedure as to how they are to be elected, appointed, recommended or opposed, and their rights".

Article 9.2, on the conversion of a cooperative which already has employee representation in the general or section or sectoral meetings, **is not specifically transposed**. To some degree this is logical as there currently is no mechanism in UK law that specifically provides for employee participation in general meetings, although there is nothing to prevent employees participating in general meetings where they are also members. There may, however, be some UK cooperatives which provide this right as part of their own articles of association and it is not clear whether this right would be protected. Regulation 17 (4) deals with participation at general and similar meetings in an SCE formed by conversion, although the reference is not direct and **it relates only to cases where an agreement is reached**. It states that "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 cooperative to be converted into an SCE."

Regulation 21 (5), covers the situation where no agreement has been reached, and it is not a conversion, but there is a participating cooperative with such participation in general or other similar meetings (Article 9.3). In this case the rules that apply for such participation are either those which have been agreed or they are the rules in the cooperative with the highest proportion of participation.

As already noted, there is no specific UK legislation on cooperatives. The closest applicable legislation is the Industrial and Provident Societies Act 1965 (IPSA 1965). IPSA 1965 requires that the society's rules should provide for "the mode of holding meetings, the scale and right of voting, and the mode of making, altering or rescinding rules" but it does not

spell out what they must contain. It is for the registering authority, currently the Financial Services Agency, to decide whether the body is a bona fide cooperative. The FSA has confirmed that there would be nothing to stop a cooperative, registered under IPSA 1965, including in its rules a provision that employee representatives could participate in general or sectional meetings with voting rights. There is no evidence that this has occurred and certainly there is no requirement to do this. But, as Michael Cook at the FSA states, "policy does not preclude this". However, it could only be done on "a voluntary basis".

VIII Legal procedures and compliance

a. Legal procedures

Mechanisms to ensure compliance with the procedural elements of the Directive as set out in Article 14 are found throughout the Regulations, which transpose these requirements **in accordance with the Directive**.

As already noted, the main mechanism for dealing with complaints about the operation of the Regulations is by referring the issue to the CAC. Complaints may be taken to the CAC where it is considered that the following circumstances apply. The references in *italics* refer to the paragraphs of Schedule 1 which apply when negotiations are being conducted with an existing SCE which has passed the employment threshold:

- the failure of a participating individual or legal entity to provide information when it first takes the decision to set up an SCE (regulation 8 (1)) *(Schedule 1 2.(1))*;
- a special negotiating body has not been set up or not set up correctly (regulation 11 (1)) *(Schedule 1 5.(1))*);
- balloting arrangements for the election of UK members of the special negotiating body are defective (regulation 12 (4) *(Schedule 1 6.(4))*);
- a consultative committee does not have the right to appoint members of the special negotiating body or has appointed them incorrectly (regulation 14 (6)) *(Schedule 1 8.(6))*;
- the special negotiating body has taken a decision incorrectly or has failed to publish that decision correctly (regulation 20 (1)) *(Schedule 1 14.(1))*);
- procedures have been misused to deprive employees of their rights to employee involvement (regulation 24 (1));
- information has unreasonably been described as confidential (regulation 26 (6));
- information is being unreasonably withheld (regulation 27 (2)).

The procedures of the CAC require a complaint to be in writing and the CAC will make the enquiries "it sees fit and give any person it considers has a proper interest in the complaint or application an opportunity to be heard" (regulation 36 (1 and 2)). Declarations from the CAC are also in writing with reasons and have the force of a High Court declaration (Court of Sessions in Scotland) (regulation 36 (3, 4 and 5)). Where it seems that the two sides might reach a conciliated agreement, the CAC should refer the issue to the Advisory, Conciliation and Arbitration Service (ACAS) – an official conciliation body. If the two sides cannot agree, the issue returns to the CAC for resolution (regulation 39). Appeals on points of law go to the Employment Appeal Tribunal.

Provisions in existing contracts, either of employment or of some other sort, which would prevent an employee bringing a case to the CAC are void, although an individual can reach an agreement to halt proceedings after they have started (regulation 40).

Where individual employees consider that they have not been given appropriate paid time off as a member of a special negotiating body, or other body linked to the Regulations, or have been unfairly dismissed or suffered detriment, they have recourse to an Employment Tribunal (regulations 30, 32 and 34). Appeals on points of law go to the Employment Appeal Tribunal.

As with complaints to the CAC, provisions in existing contracts, either of employment or of some other sort, which would prevent an employee bringing a case to an Employment Tribunal are void, although an individual can reach an agreement to halt proceedings or not to continue them, provided certain conditions are met – essentially that either there has been conciliation between the two sides or that a compromise agreement has been reached, where the employee has had independent competent advice (regulation 41).

b. Enforcement of an agreement or the standard rules on employee involvement

The CAC is also the body to which complaints are made that the SCE or participating legal entity or individual has failed to meet its obligations under either an agreement or the standard rules on employee involvement (regulation 22 (1)). If a member of the employee representative body, or, where there is no such body, an information and consultation representative, or an employee, considers that the SCE or participating legal entity or individual is not complying with the terms of the agreement or the standard rules, he or she can make a complaint to the CAC (regulation 22 (1 and 2)). If the CAC agrees, it makes an order stating the steps to be taken, the date of failure, and the time limit, within which the SCE or participating legal entity or individual must comply (regulation 22 (5)). The individual who originally brought the complaint can also ask the Employment Appeal Tribunal to impose a penalty on the SCE or participating legal entity or individual for its failure to comply (regulation 22 (6)). However, the CAC cannot require the SCE or participating legal entity or individual to reverse its actions.

The maximum penalty that can be imposed by the Employment Appeal Tribunal is £75,000 (approximately €110,000 at the exchange rate applying during most of the first half of 2007) (regulation 23) and it should take account of the circumstances of the failure to implement the agreement.

VII Other issues

Article15.1, which indicates that undertakings that are Community-scale undertakings in the sense of Directives 94/45/EC and 97/74/EC (the European Works Council Directives) are not subject to EWC rules if they become SCEs, is transposed, **in accordance with the Directive**, by regulation 42. This amends the UK legislation on EWCs, stating that the legislation does not apply in this case, unless the SCE special negotiating body has taken the decision not to open negotiations with management or to terminate them.

Article 15.2, which states that existing national legislation or practice on participation in board-level bodies does not apply in the case of an SCE, does not need to be transposed in the UK, as there is no such national legislation or practice, although regulation 43 (2) states that the protection of existing rights (see below) does not extend to participation rights.

Article 15.3, which states that existing rights to employee involvement, other than participation should not be prejudiced, is transposed, **in accordance with the Directive**, by regulation 43 (1), which states that existing rights remain unaffected.

3. Practical application

I. Jurisprudence
There have been no cases in the UK relating to this Directive.

II Measures set out by national law to ensure that the cooperatives covered abide by the obligation laid down by the Directive
As already noted, one of the notable aspects of the Directive, is that cooperatives or individuals themselves must take the initiative to become SCEs. There is therefore no requirement to establish a widespread system of inspection to ensure that all cooperatives comply with the Directive.

In contrast to the Regulations relating to the European Company, neither these Regulations nor the Regulations relating to the application of the SCE Regulation in the UK (1435/2003) require "Employee Involvement Declarations" to be completed by representatives of both management and the Special Negotiating Body. Instead, the UK Regulations which apply Regulation 1435/2003 in the UK (The European Cooperative Society Regulations 2006) state only that a body proposing to register as an SCE in the UK must send to the registrar a "statutory declaration … [which] must confirm compliance in respect of the SCE with … the requirements for formation under the EC Regulation and these Regulations" (regulation 9 (3)). (The bodies which register SCEs are the Financial Services Authority in Great Britain and Registrar of Credit Unions for Northern Ireland in Northern Ireland.)

The obligation to provide a statutory declaration provides a mechanism for meeting the requirements of the Directive as the SCE Regulation 1435/2003 states in Article 11 that:

> "An SCE may not be registered unless an agreement on arrangements for employee involvement pursuant to Article 4 of Directive 2003/72/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."

However, the procedure seems less clear cut than the requirement under the UK Regulations implementing the SE Directive for an Employee Involvement Declaration to be submitted as part of the documentation to the Companies Registrar. A conversation with the official responsible for the registration of SCEs in the Financial Services Authority revealed that the intention is to develop the procedure for registering SCE in tandem with the first application.

In addition the European Cooperative Society Regulations also state that "if it appears to the competent authority that the statutes of an SCE are in conflict with the arrangements for employee involvement it may direct the SCE to amend its statutes, within such period as may be specified in the direction, to the extent that is necessary to resolve that conflict" (The European Cooperative Society Regulations 2006, regulation 32 (1))

One potentially controversial point is what happens when a SCE is established with no employees and when it is therefore not possible to reach an "employee involvement agreement". The UK government raised this in its consultation process and some respondents considered that it was possible that SCEs without employees would be formed in the UK. The UK government therefore concluded that "in such situations it would be impractical to require SCEs that have no employees to conclude the employee involvement arrangements before registering in the UK. In this situation the Regulations would not be applicable."[12]

Other issues of enforcement are set out in Section 2.2 VI on legal procedures and compliance.

III. Position of employers' and trade union organisations
The issue of European Cooperative Societies has not been of major concern to either employers' organisations or to trade unions.

Neither the main employers' body, the Confederation of British Industry (CBI), nor the trade union confederation, the Trades Union Congress (TUC) submitted responses to the consultation document published in March 2006. In addition, interviews with representatives of both of these bodies made it clear that the issue had low priority.

4. Effects of implementation

I. As regards the situation prior to transposition
The transposition of the Directive means that UK employees for the first time may now have a right to participate in cooperatives' decision-making at board-level. This is a sharp break with the past, although a number of conditions must be present for this right to be exercised – most notably management must voluntarily decide to set up an SCE and in practice at least 25% of the employees must already have a right to board-level participation.

II. Connections with other legal reforms
The transposition of the Directive is intimately linked to the changes made to UK law to take account of European Regulation (EC) No 1453/2003 – The European Cooperative Society Regulations 2006 (Statutory Instrument 2006 N. 2078) but not to other legislation.

In its consultation document the UK government raised the possibility of using the SCE Regulation and Directive as an opportunity to introduce a wholesale consolidation of existing legislation on cooperatives. However, it rejected this as disproportionate and time-consuming.[13]

[12] The European Cooperative Society: Summary of responses, July 2006, HMT, DTI

[13] "Another option is to take the opportunity to seek to consolidate the national law on cooperatives and then apply the various options under the EC Regulation on the basis of the new national legal regime. It could go as far as creating a national law on cooperatives in the UK. This would be a complex and impractical way of giving effect to the EC Regulation. It would require amendment of the relevant legislation including that relating to IPSs and would involve primary legislation or a Regulatory Reform Order. It would be the subject of further consultation and have an impact far wider than a measure giving effect to the EC Regulation." European Cooperative Society: A consultative document, Annex D, March 2006, HMT, DTI

III. Impact on labour relations: action strategies of social agents; development of national regulation

As yet no SCE has been registered in the UK. As a result, it cannot be said that the legislation has had any effect on industrial relations.

IV. Statistical information on impact

There is no statistical information on the impact of this Directive. (Some figures on the numbers, employment levels and activities of cooperatives are provided in Part 5 section II of this report.)

5. Assessment of the results of implementation

I. Legal transposition

The Regulations have in almost all cases accurately transposed the requirements of the Directive.

The areas where the UK transposition seems most open to question are:

- the failure to include in the transposition of the standard rules on the composition of the representative body "rules to ensure that the number of members of, and allocation of seats on, the representative body shall be adapted to take account of changes occurring within the SCE and its subsidiaries and establishments" (Annex Part 1 (b));
- the failure to include in the standard rules for information and consultation a specific entitlement to paid time off for training (Annex Part 2 (g)); and
- the failure to include the duty on management and the representative body to work together "in a spirit of co-operation" in the Regulations (Article 11);
- the failure to ensure that where a cooperative already has employee representation in the general or section or sectoral meetings this right is protected, where an SCE is created by conversion and there is no employee involvement agreement (Article 8.2).

The UK has also not taken up what could be described as the opt-out option provided by Article 7.3 of the Directive. As the government's own consultation document pointed out, "However, when qualified by Article 11(3) of the EC Regulation, use of this option by a Member State would effectively prevent any SCE (formed by whatever means) to register in that country unless there are no participation rights in any of the participating entities or a voluntary agreement has been made which provides for participation if it previously existed in the participating companies. DTI does not therefore propose to make use of this option."[14]

[14] European Cooperative Society: A consultative document, March 2006, HMT, DTI

At the same time, the Regulations do not take up any of the options in the Directive which could be seen as making it more complicated or more costly for companies. Examples include:

- the lack of any reference to appropriate Community level trade union organisations, or the need promote coherence and consistency in transposing Article 3.5;
- confirming that there is no need to pay the expenses of more than one expert (regulation 18 (6) and Schedule 2 Part 2 (8) transposing Article 3.7 and Annex Part 2 (h));
- not fixing rules on employee participation in the absence of a decision on this by the Special Negotiating Body (Article 7.2);
- leaving it to the Special Negotiating Body to appoint or elect members of the representative body (Schedule 2 part 1 (1) c and d) transposing Annex Part 1 (b));
- not taking up the option of laying down rules on the chairing of information and consultation meetings (Annex Part 2 (d));
- not taking up the option of determining the allocation of seats in the administrative or supervisory body (Annex Part 3 (d));
- not making a decision of management to withhold information subject to prior authorisation (Article 10.2);
- limiting the maximum penalty which can be imposed for a failure to abide by the terms of the agreement or the standard rules to £75,000, equivalent to around €110,000; and
- not taking specific measures to guarantee structures of employee representation which cease to exist because an SCE has been established (Article 15.4).

The extension beyond the terms of the Directive to require renegotiations where subsequent changes affect employee participation, found in the legislation of some Member States, is also not taken up in the UK legislation.

One thread which runs through the Regulations is the need for information to be provided to employees rather than or as well as unions or employee representatives. Examples include:

- requiring management to inform employees, if there are no employee representatives, of its plans for the creation of an SCE (regulation 7 transposing Article 3.1);
- a requirement for management to inform employees of the identity of the members of the Special Negotiating Body (regulation 10 (5)) rather than the Special Negotiating Body informing external organisations, including unions, of the start of negotiations (Article 3.5); and
- requiring the representative body to inform employees, if there are no employee representatives, of the outcomes of its procedures (Schedule 2 Part 2 (6) transposing Annex Part 2 (e)).

On the elements of the Directive specifically dealing with arrangements for UK employees, the main point at issue is who represents employees. As the UK does not have a clear statutory structure similar to works councils, as found in other member states, particular solutions have to be found, and the role of unions becomes crucial.

Employee representatives (Article 2.1e) can either be trade union representatives, including external officials, who are normally involved in collective bargaining, or other employees who have a representative function (regulation 3 (1)). This broadly reflects the current reality shown by the most recent major study of employment relations in the UK. This found that half of all employees worked in establishments with recognised unions, while 5% of workplaces had 'stand-alone' non union representatives.[15]

The Regulations take a much more restrictive approach on the choice of members of the Special Negotiating Body (regulations 12 to 15 transposing Article 3.2b). They must be elected by ballot unless there is a consultative committee meeting a number of conditions, which can then appoint the members. It is not clear how far existing joint consultative committees, which are not statutory bodies but which cover 39% of workplaces, either directly or indirectly, would meet these conditions. This is because many do not cover all employees – to meet the conditions they must cover them all – and many will also have a full-time union official as a member – to meet the conditions they must consist entirely of employees. The likelihood must be that in most cases a ballot will be held.

The Regulations also limit the right of the employees as to who they can choose as their representative on the Special Negotiating Body. External union representatives can be chosen – but only if management agrees to their presence ((regulations 12(3) (d) (ii) and 14 (2) (b) (ii)).

As already noted there are no specific UK rules on the choice of UK representatives for the representative body. This is left entirely to the Special Negotiating Body.

II. Application

It is too soon to provide an extensive picture of the application of the directive, as no SCEs have been registered. There are suggestions that SCEs could possibly be set up between UK agricultural cooperatives – perhaps in the area of pigs or milk products – and cooperatives outside the UK. The countries mentioned are Denmark, the Netherlands and Ireland. However, these are simply possibilities at this stage.

It is, however, possible to provide more concrete, although still incomplete, information on cooperatives currently operating in the UK. Figures produced in 2006 by Cooperatives UK, which describes itself on its website as "the central membership organisation for co-operative enterprise throughout the UK", indicate that there is "verifiable evidence of over £22.5 billion turnover in the co-operative sector. We estimate that the actual turnover of the sector may be in excess of £30 billion"[16]. Cooperatives primarily operate in the

[15] Inside the Workplace: Findings from the 2004 Workplace Employment Relations Survey, by Barbara Kersley, Carmen Alpin, John Forth, Alex Bryson, Helen Bewley, Gill Dix, Sarah Oxenbridge; Routledge 2006 (pages 118 and 125)

[16] Connecting the Co-operative Movement: Performance and Statistical Review 2005

retail/consumer, wholesale, agricultural, fishing and housing sectors, as well as clubs and credit unions (cooperatively owned and generally small financial bodies which make loans to their members). In addition there are some worker cooperatives.

In terms of numbers, the Financial Services Authority registered 8,322 Industrial and Provident Societies in 2004, although these bodies are not the only form that cooperatives can take.

In terms of employment, the consumer sector is the largest. Cooperatives UK estimated total employment in the consumer cooperative sector as 102,300 employees in January 2006, in around 40 cooperatives. In contrast the Association of British Credit Unions, which represents the overwhelming majority of credit unions, had 740 members employing 732 staff. A group of 80 agriculture cooperatives in Scotland has 2,363 employees. And 397 worker cooperatives had 1,340 employees. There were no figures for employment in housing cooperatives, clubs or credit unions. The biggest single employer in the cooperative sector is the Cooperative Group, which, as well as food stores, operates a bank, an insurance business, funeral branches, travel agents, pharmacies and farms. It has 68,000 employees.

There are no precise figures for total employment in cooperatives in the UK, but a generous estimate would be 150,000. This is a considerable number, but it accounts for only 0.6% of total UK employment.

6. Conclusions

The possibility in the Directive for employees to participate at board level in cooperatives marks a sharp break with UK practice, although it requires the management to take the initiative and only occurs under certain conditions. The expectation that very few UK cooperatives would take this initiative, combined with the small size of the cooperative sector, probably explains why the Directive was introduced with very little debate or comment in the UK.

The Directive was transposed on time and its transposition is largely in accordance with the Directive, although the UK government was clearly concerned to avoid adding to the requirements placed on business and it discarded any options which might have increased the complexity of its implementation. The main areas where the transposition appears not to have been entirely faithful to the Directive are in the guarantee of training for representative body members and in providing for the composition of the representative body to change to reflect future changes in the structure of the cooperative.

In future problems may also be presented by the arrangements for the composition of the representative body under the standard rules, as this is left entirely to the Special Negotiating Body.

There is no experience with the operation of the Directive, as no UK-registered SCE has been established.

So far there is no indication that the Directive has had any effect on UK industrial relations and given the small size of the cooperative sector in the UK, it is unlikely that it will.

7. Recommendations

7.1 At Community level

The fact that an SCE can be legally set up without employees and could subsequently acquire them without giving them any rights to be involved in decision-making seems a weakness in the Directive. The most obvious mechanism to avoid this would be to require a new agreement to be signed if there was a substantial change in the situation of the SCE. This would also need to be backed up with standard rules in the case of a failure to agree.

7.2 At national level

It seems perverse that while employees are in principle allowed to choose external union representatives as members of the Special Negotiating Body, they can only exercise this right if management agrees. This situation could be rectified by amending the Regulations to remove the phrase "if the relevant employer so permits" in regulation 12 (3) and the phrase "if the participating individual or the participating legal entity in respect of which the consultative committee exists so permits" in regulation 14 (2).

The fact that there are no rules for the selection of members of the representative body under the standard rules may also present problems in the future. One solution would be to amend the Regulations so that members of the representative body were chosen in the same way as members of the Special Negotiating Body. This is the wording which has been adopted in the implementing legislation in a number of other Member States.

Bibliography

- Connecting the Co-operative Movement: Performance and Statistical Review 2005
- Inside the Workplace: Findings from the 2004 Workplace Employment Relations Survey, by Barbara Kersley, Carmen Alpin, John Forth, Alex Bryson, Helen Bewley, Gill Dix, Sarah Oxenbridge; Routledge 2006
- The European Cooperative Society: A consultative document, March 2006, HMT, DTI
- The European Cooperative Society: Summary of responses, July 2006, HMT, DTI
- Final Regulatory Impact Assessment on the European Cooperative Society, August 2006, HMT, DTI

Annex I: National implementation legislation and Correspondence table

- Statutory Instrument 2006 No. 2059 The European Cooperative Society (Involvement of Employees) Regulations 2006

Content	Articles in the Directive	Regulations
Objective	1	No equivalent section – objective stated in Explanatory Note; Arrangements to apply to all SCEs covered by regulation 4
Definitions	2	3
Creation of a special negotiating body	3.1	7
	3.2 a	10
	3.2 b	12-15
	3.3	9 and 17 (1)
	3.4	18 (1-3)
	3.5	18 (5)
	3.6	19
	3.7	18 (6)
Content of agreement	4.1-4.2	16 (1-2), 17 (2)
	4.3-4.4	17 (3) and 17 (4)
Duration of negotiations	5	16 (3)
Legislation applicable to the negotiation procedure	6	4
Standard rules	7	21 (1-4)
Annex	Annex part 1	Schedule 2 Part 1
	Annex part 2	Schedule 2 Part 2
	Annex part 3	Schedule 2 Part 3
SCEs established by natural persons	8	5, 6 and Schedule 1
Participation in general meetings or section or sectoral meetings	9	17 (2 (h)) and 21 (5)
Reservation and confidentiality	10	26 and 27
Operation of the representative body and procedure for the information and consultation of employees	11	Not transposed
Protection of employees' representatives	12	28-35
Misuse of procedures	13	24
Compliance with this directive	14	8 (1), 11 (1), 12 (4), 14 (6), 20 (1), 24 (1) 26 (6), 27 (2) and in Schedule 1 2. (1), Schedule 1 5. (1), Schedule 1 6. (4), Schedule 1 8. (6), Schedule 1 14. (1) and 36 to 41, plus 22 and 23. (In addition, remedies available to individuals who have not benefited from the appropriate protections are provide in regulations 30,

Content	Articles in the Directive	Regulations
		32 and 34)
Link between this Directive and other provisions	15	42 and 43