

**EXPLANATORY MEMORANDUM TO
THE INFORMATION AND CONSULTATION OF EMPLOYEES REGULATIONS
(NORTHERN IRELAND) 2005**

2005 No. 47

- 1.1 This Explanatory Memorandum has been prepared by the Department for Employment and Learning (“the Department”) and is laid before Parliament by Command of Her Majesty.
- 1.2 This memorandum contains information for the House of Lords Select Committee on the Merits of Statutory Instruments.

2. Description

- 2.1 The Information and Consultation of Employees Regulations (Northern Ireland) 2005 establish a right for employees, or their representatives, to be informed and consulted by their employer on matters prescribed by the Regulations. The Regulations implement the EC Directive on Informing and Consulting employees (2002/14/EC) (“the EC Directive”). The Regulations apply to undertakings with 150 or more employees from 6 April 2005, to those with 100 or more employees from 6 April 2007, and to those with 50 or more employees from 6 April 2008.

3. Matters of special interest to the Select Committee on Statutory Instruments

- 3.1 During the current period of suspension of the Northern Ireland Assembly this Statutory Rule is required to be laid before Parliament under the negative resolution procedure (see paragraph 7(3) of the Schedule to the Northern Ireland Act 2000 (2000 c.1)). The enabling power, which is contained in Section 43 of the Employment Relations Act 2004 (“the 2004 Act”), came into force on 16 September 2004. The powers contained under section 2(2) of the European Communities Act 1972 are not considered sufficiently wide to cover all aspects of the agreed framework.
- 3.2 The provision for the imposition of civil penalties on employers contained in regulations 22 and 23 is similar to that in regulations 21 and 22 of the Transnational Information and Consultation of Employees Regulations 1999 (SI 1999/3323) and uses those earlier Regulations as a precedent. The Department considers that the power to include this enforcement mechanism is contained in section 43(3) and (5) of the 2004 Act. Section 43(3) expressly enables the Department to make provision for the enforcement of the obligations in the Regulations while section 43(5) expressly provides for the Department to make any provisions that appear

to it to be necessary or expedient for the purpose of implementing the EC Directive. In that connection, Article 8 of the EC Directive provides that Member States must provide appropriate measures in the event of non-compliance with the Directive by, inter alia, employers and ensure that adequate administrative or judicial procedures are available for enforcing the obligations that derive from the Directive (Article 8.1); Member States must also provide for adequate sanctions to be applicable in the event of infringement which must be effective, proportionate and dissuasive (Article 8.2).

- 3.3 The following paragraphs explain the content of the regulations 22 and 23 in more detail. Where the Industrial Court upholds a complaint against an employer for breach of a negotiated agreement or the standard information and consultation provisions, the person who brought it may then apply to the High Court for a penalty to be imposed (regulation 22(6)). The High Court is required to impose a penalty on the employer, unless satisfied by the employer that the reason for the failure was beyond his/her control or there was some other reasonable excuse (regulation 22(7)).
- 3.4 The maximum amount of any penalty imposed on an employer by the High Court is £75,000 (regulation 23(2)). This figure mirrors the maximum penalty set in the Transnational Information and Consultation of Employers Regulations 1999 mentioned above (which implemented the European Works Council Directive 94/45EC), and was part of a framework agreement between the Government, CBI and TUC for implementing the EC Directive. In setting the amount of any penalty, the High Court must take account of all relevant factors, including: the gravity and duration of the failure, the reason for it, the number of employees affected by it, and the size (in terms of the number of employees) of the undertaking (or the group of undertakings in the case of an agreement covering more than one undertaking). When imposing a penalty, the High Court must issue a notice specifying the amount of the penalty, the date by which it must be paid and the failure and period to which the penalty relates. Penalties are payable to the Department, and are required to be paid into the Consolidated Fund.
- 3.5 Regulation 24 has the effect that where the only remedies available for infringement of rights under Parts I to VI are by way of application or complaint to the Industrial Court, no other remedies are available for infringement of those rights.

4. Legislative Background

- 4.1 The Regulations give effect to the EC Directive on Informing and Consulting Employees (Directive 2002/14/EC). Article 1 of the Directive states that its purpose is to establish a general framework setting out minimum requirements for the right to information and consultation of employees in

the European Community. The Directive applies – at the choice of Member States - to Community undertakings with 50 or more employees in a Member State, or establishments with 20 or more employees in a Member State. The UK has chosen to apply the Directive to undertakings with 50 or more employees.

- 4.2 The practical arrangements for information and consultation must be defined and implemented in accordance with national law and industrial relations practices in individual Member States in such a way as to ensure their effectiveness. Article 4 of the Directive sets out the subject-matter, timing and method for informing and consulting employees, but Article 5 permits Member States to leave employers and employees to reach agreements on information and consultation that establish provisions which are different from those referred to in Article 4.
- 4.3 Article 6 requires Member States to provide for the protection of confidential information, and Article 7 for the protection of employees' representatives. Article 8 requires appropriate measures, adequate administrative or judicial procedures, and adequate sanctions to be put in place to ensure effective enforcement of the rights in the Directive. Article 9 clarifies the relationship between this Directive and other rights to information and consultation. Article 10 allows Member States to phase in application of their legislation over a period of three years. Article 11 requires member States to transpose the Directive by 23 March 2005.
- 4.4 The practical arrangements are left to Member States to determine, and the Department wishes to ensure that the resulting Regulations make use of this flexibility. A transposition note is attached.
- 4.5 The Commission's proposal for a Council directive was published in December 1998, and was the subject of an Explanatory Memorandum dated 15 January 1999 (13099/98). The House of Commons European Scrutiny Committee considered the proposal to be "legally and politically important" and cleared it (Report No 27, item 19679, session 98/99). The House of Lords European Union Committee did not formally report on it (Progress of Scrutiny 5/2/99 session 98/99). Further Explanatory Memoranda were submitted in November 2000 and June 2001. Both were cleared by the scrutiny committees.
- 4.6 The power to make regulations in Northern Ireland to implement the Directive is contained in Section 43 of the Employment Relations Act 2004. This power was provided for in GB legislation because of the then risk that the equivalent Northern Ireland enactment, the Employment Relations Order (Northern Ireland) 2004, might not have been made in time to implement the Directive by the required transposition deadline. During the Bill's passage through Parliament, issues surrounding information and consultation were

debated (most notably in the House of Commons on 14 January 2004, in Standing Committee D on 24 February 2004; and in the House of Lords on 29 April 2004 and in Grand Committee on the 15 and 16 June 2004). Additionally, the Department for Trade and Industry (DTI) submitted a Memorandum to the Delegated Powers and Regulatory Reform Committee who reported, on 6 May 2004, that including a power in the Bill to make Regulations was “not inappropriate”.

5. Extent

- 5.1 The Information and Consultation Directive applies to the UK as a whole. These implementing Regulations apply to Northern Ireland only. The corresponding GB regulations are the Information and Consultation Regulations 2004 (S.I.2004/3426),

6. European Convention on Human Rights

- 6.1 Barry Gardiner, MP, Minister for Employment and Learning has made the following statement regarding Human Rights: “In my view, the provisions of the Information and Consultation of Employees Regulations (Northern Ireland) 2005 are compatible with the Convention rights”.

7. Policy background

- 7.1 The Directive aims to give employees across the European Community new rights to be informed and consulted on an ongoing basis about developments in the organisations they work for. The Government supports the objectives behind the Directive, and considers that where employers and employees work together in this it can benefit both the company and the employees. It believes that genuine ongoing consultation can help to develop a climate of trust and cooperation that can make implementing business decisions easier, as well as ensuring that employees are treated fairly and informed about decisions affecting their future.
- 7.2 Unlike many other European countries the UK does not already have a general information and consultation legislative framework in place. Existing statutory arrangements are limited to specific topics, such as collective redundancies, transfers of undertakings, and transnational issues. Although research suggests that many firms in the UK already inform and consult their employees, to some the concept of information and consultation may be new. Though the legislation only applies to around 2% of NI firms, these firms employ approximately two thirds of NI employees.
- 7.3 In developing the policy Government has been mindful of the particular nature of the UK economy, and was keen to give employers and employees the flexibility to agree arrangements that suit their individual needs. For

example, Part III of the Regulations sets out a procedure for negotiating agreements, rather than imposing specific rules on the content and scope of information and consultation. The Regulations also allow employers and employees to agree that any existing agreements on information and consultation will continue to apply where they meet certain minimum standards. Information and consultation can take place either with employee representatives or directly with employees, and such representatives are protected against unfair dismissal or some other detriment. The UK has also made use of the flexibility provided for in Article 10 of the Directive to phase-in gradually the new obligations, thus providing smaller firms, who are less likely to have existing consultation arrangements, with a longer preparation period. Part VI of the Regulations implements the requirements of Article 8 concerning enforcement.

- 7.4 The Department has consulted when drafting the regulations and when preparing explanatory guidance. The Department published a discussion paper, *High Performance Workplaces: The role of employee involvement in a modern economy*, in July 2002, which was based on a GB discussion document that issued around the same time, to help establish the context in which the new legislation would be introduced and obtain views on the approach to implementation that should be adopted. In light of responses to those consultations, the Government negotiated and agreed with the CBI and the TUC a framework for implementing the Directive. This framework was published in NI for consultation in September 2003 together with draft Regulations and a draft UK-wide Regulatory Impact Assessment in the consultation document, *High Performance Workplaces: Informing and Consulting Employee*. The Northern Ireland respondents indicated broad support for the objectives outlined in the consultations and did not identify any new negative impacts beyond those mentioned in the UK wide Regulatory Impact Assessment.

8. Impact

- 8.1 A UK-wide Regulatory Impact Assessment (RIA) was completed and can be obtained on the Department for Trade and Industry's website at www.dti.gov.uk. The RIA had previously been submitted by the DTI to the Joint Committee on Statutory Instruments along with the GB Information and Consultation Regulations 2004.
- 8.2 The RIA states that some public sector bodies will qualify as undertakings and so will fall within the scope of the legislation. The public sector can be estimated to account for around 4% of the total costs and benefits to employers (although this estimate does not include public corporations and nationalised bodies, which are usually included in the public sector).

9. Contact

- 9.1 Valerie Reilly at the Department for Employment and Learning – telephone 028 9025 7560 or e-mail valerie.reilly@delni.gov.uk - can answer any queries regarding the Regulations.

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