EXPLANATORY MEMORANDUM TO THE

EUROPEAN PUBLIC LIMITED-LIABILITY COMPANY REGULATIONS 2004

2004 No. 2326

This explanatory memorandum has been prepared by the Department of Trade and Industry and is laid before Parliament by Command of Her Majesty.

2 Description

2.1 The European Public Limited-Liability Company Regulations 2004 create the legal framework in Great Britain for a new form of company, the European Company or 'Societas Europaea' (SE). The new form of company will be a European public limited liability company with a minimum share capital of 120,000 Euros registered in one of the Member States. Its use will be entirely voluntary.

3 Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

4 Legislative Background

4.1 The Regulations are made under section 2(2) of the European Communities Act 1972. They make provision in relation to Council Regulation 2157/2001 on the Statute for a European Company ("the EU Regulation") in respect of those articles of the EU Regulation that permit or oblige Member States to enact measures in their national law. The EU Regulation (which, like the SI, comes into force on 8 October 2004) is directly applicable and establishes the basic structure of the SE and the methods of forming an SE. On many matters, it applies to SEs the national legislation applicable to public companies in the Member State where the SE is registered. For example, GB company law applicable to capital maintenance and to winding up, liquidation and insolvency is invoked by Articles 5 and 63 respectively of the EU Regulation. Article 9 of the EU Regulation sets out the law and other provisions applicable to an SE and the respective priority in which they apply. Article 2 of the EU Regulation sets out the different ways in which an SE may be formed. The Regulations do not need to implement these articles. However, they do need to implement the Member State options and requirements referred to above. They also provide, as set out in Article 68 of the EU Regulation, for the effective application of the Regulation in GB such as requiring that documentation relating to the new procedures for registering an SE be filed at Companies House and conferring appropriate powers on the Registrar of Companies.

4.2 The Regulations also implement Council Directive 2001/86/EC ("the EU Directive") supplementing the Statute for a European company with regard

to the involvement of employees. Part 3 of, and Schedule 3 to, the Regulations implement the EU Directive. A transposition note is attached at Annex A.

4.3 The Commission's first formal proposal for an ECS was made in 1970. Its 1975 proposal was the subject of an Explanatory Memorandum submitted by the Department on 27 June 1975. Further Explanatory Memoranda were submitted by the Department on subsequent proposals on 19 October 1989, 10 July 1991, 19 March 1998, 27 April 1998, 23 November 1998 and 19 February 2001. Debates were held in the House of Commons on 17 June 1976 and 22 October 1990. The EU Regulation was finally adopted by Member States on 8 October 2001.

5 Extent

5.1 The Regulations apply to Great Britain.

6 European Convention on Human Rights

6.1 Gerry Sutcliffe, Parliamentary Under Secretary of State for Employment Relations, Competition and Consumers, has made the following statement regarding Human Rights:

> "In my view the provisions of the European Public Limited-Liability Company Regulations 2004 are compatible with the Convention rights.".

7 Policy background

7.1 The ECS potentially offers benefits to GB companies by creating an additional, harmonised framework under which they will be able to engage in restructuring involving companies from other Member States. A GB company wishing to take over a company from another Member State, or wishing to establish a joint venture with a company in another Member State, might find it easier to reach agreement with the overseas company if it decided to form a joint holding company or joint subsidiary in the form of an SE. A GB public company wishing to operate in several Member States simultaneously might consider that there were presentational advantages in adopting the SE status and form. The name of an SE will be preceded or followed by "SE" and only SEs will be permitted to include the abbreviation SE in their name. An SE will be able to transfer its registered office to another Member State without the winding up of the SE or the creation of a new legal person.

7.2 Previous consultation on the ECS was undertaken in 1989, 1992 and 1997. Details of the 2003/2004 consultation exercise are set out in paragraph 38 of the Regulatory Impact Assessment at Annex B. There was a total of 22 responses to the 2003 consultative document. There has been little media interest in the Regulations.

8 Impact

8.1 A Regulatory Impact Assessment is attached to this Memorandum.

8.2 There is no impact on the public sector.

9 Contact

9.1 Peter Brower at the Department of Trade and Industry - telephone 020 7215 0224 or e-mail peter.brower@dti.gov.uk - can answer any queries regarding the Regulations.

ANNEX A

TRANSPOSITION NOTES

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

The Directive sets out the employee involvement arrangements that will govern the European Company ("Societas Europaea" or "SE"), covering employee information, consultation and, in certain circumstances, participation on the board of the SE. In the first instance these arrangements are to be freely negotiated between the management and representatives of the employees. If a voluntary agreement (pursuant to Article 4 of the Directive) is not reached and the decision to rely on national information and consultation rules is not taken (Article 3.6 of the Directive), and the management wants to continue with the registration of the SE, standard rules drawn up by the Member State in which the SE is to register will apply. Employee participation on the board of the SE would only be required if it exists within one of the companies forming the SE, and if certain other requirements are met.

The transposition of the employee involvement Directive into the national legislation of Member States has been assisted by a working group, made up of experts from each of the Member States that met regularly in Brussels over an 18-month period to June 2003. The working group has discussed the various provisions and practicalities of transposing the Directive in detail, with a view to arriving at a common understanding of the Directive's requirements and coordinating implementation where appropriate and reaching some agreement on the provisions requiring similar transposition in all countries.

Article	**Objectives**	**Implementation**
1	Sets out purpose of the Directive, which is to govern the involvement of employees in SEs and the procedure for establishing those arrangements.	No implementation required.
2	Sets out the definitions of the terms used in the Directive.	The terms used in the Regulations have the same definitions as Article 2. Additional terms are defined in the Regulations.
3	Sets out the procedure for the creation of a Special Negotiating Body and how that body will operate.	Implemented by regulations 16 – 26, 29 (Article 3.4), 30 (Article

		3.6) and 31.
4	Sets out the requirements for the employee involvement agreement.	Implemented by regulations 27 – 28.
5	Sets out when negotiations should commence and the duration of those negotiations.	Implemented by regulation 27(3).
6	Sets out which legislation is applicable to the negotiation procedure.	Implemented by regulation 18.
7	Sets out the circumstances in which the standard rules contained in the Annex are applicable.	Implemented by regulation 32.
8	Provides for confidentiality provisions, provision of information by the competent organs and allows Member States to use existing national legislation where it fulfils the requirements of the Directive.	Implemented by regulations 37 and 38.
9	Provides for operation of the representative body and procedure for the information and consultation of employees.	Implemented by regulation 27.
10	Provides for the protection of employees' representatives.	Implemented by regulations 39 – 46.
11	Provides for the prevention of misuse of SE procedures for the purpose of depriving employees of rights or withholding rights.	Implemented by regulation 35.
12	Sets out provisions to ensure compliance with the Directive.	Implemented by regulations 33 – 36.
13	Sets out the links between this Directive and other existing legislation.	Implemented by regulations 53 and 54.
14	Provides that the Directive be implemented by 8 October 2004.	Subject to Parliamentary approval, the Directive will be implemented by 8 October 2004.
15	Indicates that the Directive should be reviewed no later than 8 October 2007.	No implementation required until 2007.
16	Provides that the Directive entered into force on 8 October 2001.	No implementation required.
17	Indicates that the Directive is addressed to the Member States.	No implementation required.
Annex – Parts 1, 2 & 3	Sets out the standard rules for the composition of the body representative of the employees, information and consultation, and employee	Implemented by Schedule 3.

	participation.	

Full Regulatory Impact Assessment

Corporate Law and Governance Directorate

The European Company Statute

The European Public Limited-Liability Company Regulations 2004

September 2004

http://www.dti.gov.uk/cld

Purpose and intended effect of measure

The objective

1. The European Company Statute (ECS) creates a legal framework for a new form of company, the European Company or 'Societas Europaea' (SE). The ECS consists of an EU Regulation setting out the core company law framework and an accompanying EU Directive that specifies the employee involvement arrangements that would apply to an SE. The new form of company - which will be a European public limited liability company registered in one of the Member States with a minimum share capital of EUR 120,000 and having legal personality - will be available to commercial bodies with operations in more than one Member State. Its use will be voluntary. The EU Regulation states that it "will permit the creation and management of companies with a European Dimension, free from the obstacles arising from the disparity and the limited territorial application of national company law". New domestic legislation - the European Public Limited-Liability Company Regulations 2004 - facilitating the operation of the SE (see paragraph 7 below) will apply in Great Britain.

2. The ECS potentially offers benefits to GB companies by creating an additional, harmonised framework under which they will be able to engage in restructuring involving companies from other Member States. A GB company wishing to take over a company from another Member State, or wishing to establish a joint venture with a company in another Member State, might find it easier to reach agreement with the overseas company if it decided to form a joint holding company or joint subsidiary in the form of an SE. A GB public company wishing to operate in several Member States simultaneously might consider that there were presentational advantages in

adopting the SE status and form. The name of an SE will be preceded or followed by "SE" and only SEs will be permitted to include the abbreviation SE in their name.

Background

3. There are five methods of forming an SE set out in the EU Regulation, as follows:-

i) by the merger of PLCs provided at least two of them are governed by the laws of different Member States;

ii) by the formation of an SE as a holding company for public or private limited companies from at least two different Member States;

iii) by the formation of an SE as a subsidiary of companies (or firms or other legal bodies) from at least two different Member States;

iv) by the transformation of an existing PLC which has, for at least two years, had a subsidiary in another Member State;

v) by the formation of subsidiary SEs where an SE is the parent.

4. The EU Regulation provides that once an SE has been formed, by any method, it may transfer its registered office from one Member State to another without the winding up of the SE or the creation of a new legal person. In addition, an SE may convert to a PLC although not for at least two years (or before the first two sets of annual accounts have been produced). Conversion to a PLC would not result in the winding up of the company or the creation of a new legal person.

5. The accompanying EU Directive sets out requirements for the information, consultation and participation of employees ("employee involvement") in European Companies. All SEs must have employee involvement arrangements. These will always cover information and consultation, and may cover employee participation on the board in certain circumstances (in particular, if it existed within one or more of the participating companies). Before registration of the SE is possible, provision for employee involvement in the SE must be agreed.

6. The EU Regulation was adopted by Member States on 8 October 2001 and comes into force on 8 October 2004. It is free-standing and will be directly applicable throughout the European Economic Area (EEA), ie Norway, Iceland and Liechtenstein and the 25 Member States of the EU. In addition, on many matters, it applies to SEs the national legislation applicable to public companies in the Member State where the SE is registered. For example, GB company law applicable to capital maintenance and to winding up, liquidation and insolvency is invoked by Articles 5 and 63 respectively of

the EU Regulation. Article 9 of the EU Regulation sets out the law and other provisions applicable to an SE, and the respective priority in which they apply.

7. The EU Regulation lays down a number of Member State options and new domestic legislation - the European Public Limited-Liability Company Regulations 2004 - sets out the options adopted. The Regulations also provide, as set out in Article 68 of the EU Regulation, for the effective application of the EU Regulation in GB such as requiring that documentation relating to the new procedures for registering an SE be filed at Companies House. The Regulations also set out the sanctions and penalties for contraventions of the EU Regulation. The Regulations - which also come into force on 8 October 2004 - also implement the EU Directive.

Risk assessment

8. In the context of both the existing law and the law as amended by the Regulations there is no perceived hazard or situation which would lead to any harm or detriment to any individual, company or organisation.

Options

9. As noted above, the EU Regulation is directly applicable throughout the EEA. All Member States need to provide for its effective application within their territory. In addition, all Member States need to implement the EU Directive. There are, at least in theory, four different options open to GB in implementing the Directive and Regulation and these are set out below.

Do nothing

10. This is not an option at all. Not implementing the EU Directive would lead to the Government facing infraction proceedings. It would also mean that companies which wished to take advantage of the ECS would not be sure of the law that applied to them and whether they had to comply with the requirements of the EU Directive. Whilst the EU Regulation is directly applicable, companies would be unsure which, if any, of the 31 Member State options in the EU Regulation applied. Moreover, there are also requirements in the EU Regulation for Member States to enact certain measures. One such provision is in Article 8(7) which requires the interests of creditors to be protected before a competent authority issues a certificate allowing an SE to transfer to another Member State. This article has been implemented by requiring SEs to make a statement of solvency. Not implementing these requirements would also lead to the Government facing infraction proceedings. Finally, there is the obligation in Article 68 on Member States to make the EU Regulation effective. As noted in paragraph 7 above, one such requirement in the Regulations is that which provides for SEs to file the appropriate forms at Companies House. Without such a requirement, SEs could not be registered. As registration is a necessary step in creating an SE, failure to provide for it in a Member State would effectively nullify the EU Regulation in that State.

Implement the Directive and those parts of the Regulation requiring implementation but none of the 31 Member State options in the EU Regulation

11. Whilst this option would fulfil the obligations placed on the Government, it would be unhelpful to companies wishing to form (or convert to) and register an SE in GB. Some of the options increase flexibility and reduce burdens placed on companies. One such example is the Member State option in Article 2(5) which allows a company to participate in the formation of an SE when its head office is not in the Community.

Implement the Directive and those parts of the Regulation requiring implementation and all of the 31 Member State options in the EU Regulation

12. This option would also fulfil the obligations placed on the Government but again would be unhelpful to companies wishing to form (or convert to) and register an SE in GB. Some of the options decrease flexibility and impose burdens on companies. One such example is the Member State option in Article 7 which allows Member States to impose the requirement that the registered office and the head office must be in the same place (ie in addition to the requirement that they must be in the same Member State).

Implement the Directive and those parts of the Regulation requiring implementation and some of the 31 Member State options in the EU Regulation

13. This option would again fulfil the obligations placed on the Government and would be the most helpful and least burdensome to companies wishing to form (or convert to) and register an SE in GB. Following this approach means adopting those Member State options which provide additional flexibility but not adopting those options which impose additional burdens. In some cases, the approach adopted has been to align the provision in the EU Regulation with the existing law set out in the Companies Act 1985 such as providing that SEs must have a minimum of two directors but not prescribing a maximum number. The 31 Member State options are set out in Annex A.

14. The principal option in the EU Regulation, as far as GB is concerned, is that set out in Article 39(5). Under this option, a Member State may adopt appropriate measures in relation to SEs where no provision for a two-tier system is made in its plc law. While the Companies Act 1985 dictates neither a one-tier or two-tier board, its provisions generally assume that all powers to run the company are vested in a single board of directors. However, there is nothing in law that presently prevents PLCs incorporated in GB from adopting articles under which the powers that are granted are divided between two tiers of directors, one exercising management

functions and the other exercising a supervisory role in relation to those functions. Special provision for two-tier boards might create greater certainty in respect of what the law required of SEs since less consideration would need to be given to the interaction between the EU Regulation, existing company law and the new Regulations. However, creating special provision for the board structure of SEs would be prescriptive and less flexible. Following consultation the Regulations have been amended to make clear how the references to directors which appear in legislation called up by the EU Regulation will apply to members of two-tier SEs. These amendments are made by virtue of Article 68 of the EU Regulation as provision appropriate to ensure the effective application of the EU Regulation. They do not seek to provide a new and comprehensive code for the regulation of two-tier boards.

Benefits

15. Since forming an SE will be entirely voluntary, only those companies which perceive that there is likely to be a real benefit will consider forming, or converting to, an SE. The potential benefits to companies are set out in paragraph 2 above. However, quantification of the economic benefit is not possible, not least because it is not possible to assess the likely take-up of SEs registered in GB either by GB companies or by companies from other Member States. There are no environmental benefits.

16. It is possible that there will be social benefits. Companies adopting the SE vehicle will, under the EU Directive, have to embrace employee involvement. Economists have argued that information and consultation, together with other types of employment relations practices, acts to align better the interests of companies and workers, thus improving a company's performance, through lower employee turnover and higher productivity[1]. By being consulted, employees may feel more committed to the organisation and may feel more secure in their jobs. As the benefits of information and consultation will depend very much on the circumstances of the company, the flexibility of options is likely to mean a greater chance of realising benefits. Companies and employees will be able to agree their employee involvement arrangements, taking into account their unique requirements and existing set of arrangements.

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[1] See David L. Levine and Laura D'Andrea Tyson "Participation, Productivity and the Firm's Environment" in *Paying for Productivity. A Look at the evidence*, Blinder A.S for a review of the literature pre-1990; Olaf Hubler "Works Councils and Collective Bargaining in Germany: the Impact on Productivity and Wages" *IZA Discussion Paper no 322* – July 2001; Ralf Dewenter, Kornelius Kraft and Jorg Stank "Co-determination and Innovation" http://www.vwl.uni-essen.de/dt/wipol/Codetermination.pdf, Satoshi Nakano "Management Views of European Works Councils: A preliminary Survey of Japanese Multinationals" *European Journal of Industrial Relations* Volume 5 Number 3 pp307-326 1999; and John Addison, Claus Schnabel and Joachim Wagner "Works councils in Germany: their effects on establishment performance" *Oxford Economic Papers* 53 (2001) pp659 to 694.

Business sectors affected

17. All business sectors are affected since any company may form or convert to an SE if it fits the criteria set out in Article 2 of the EU Regulation (referred to in paragraph 3 above). Any two GB companies, public or private, may promote the formation of a holding or subsidiary SE as long as each company has its registered office within the Community and both have had a branch or subsidiary in another Member State for at least two years. In addition, public companies which fit this criteria may convert to an SE. The resulting SE must have a minimum share capital of EUR 120,000. It is estimated that there are less than 5,000 companies registered in GB which have an equivalent amount of share capital in sterling[2]. A public company which has its registered office within the Community may form an SE by merger as long as the other company involved is governed by the law of a different Member State and the resulting SE has a minimum share capital of EUR 120,000. There are over 13,000 public companies registered in GB[3] and given that the minimum share capital of a public company in GB is £50,000 all such companies could, potentially, merge with another company in the Community to form an SE.

Equity and fairness

18. The ECS is voluntary and only those companies which perceive that there is an advantage to them will consider forming, or converting to, an SE. In the light of this, the principal issue of equity and fairness, in theory at least, is whether the restriction of some methods of forming SEs to public companies, together with the requirement to have a minimum share capital of EUR 120,000, might be seen as a barrier to small companies operating across EU borders. It is important to note that private companies can form SEs under the EU Regulation – it is simply that not all the possible methods are available to them. Moreover, the minimum share capital requirement reflects a general distinction in EU law between the treatment of public and private companies. However, in this context, it is worth noting that the European Commission is considering whether there is justification for the creation of a new form of European Private Company, along the lines of the European Company Statute.

Costs

19. Since adoption of the SE form is voluntary, no economic costs will be **imposed** on any company. It is reasonable to assume that, in the event that

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[2] Source: Dun & Bradstreet. This figure includes all companies which have a subsidiary in another Member State regardless of their share capital and may therefore be an over-estimate. Companies intending to promote the formation of an SE, or convert to an SE, may be unable to raise sufficient share capital (the minimum share capital of an SE Is EUR 120,000).

[3] Source: Companies House. The figure of 13,000 includes some companies which will also feature in the group of 5,000 referred to earlier in paragraph 17.

a company chooses, voluntarily, to become an SE, the resulting benefits to it will outweigh the costs. Such costs would include, where necessary, the setting up of employment involvement structures. There are no social or environmental costs.

20. The principal costs incurred by a company where there would not be **any** benefits would be in the case where a company investigated the possibility of, but ultimately decided against, becoming an SE. In respect of those companies that could convert to an SE, there would appear to be three stages in this process. Firstly, it would seem likely that a senior employee would consider whether there was a case for conversion to an SE. If this was thought to be a viable proposition then the issue is likely to be put to the company's board. If the company's board were to be persuaded of the viability of the SE form then it is likely that legal advice would be sought. The cost of such legal advice would clearly vary on a case by case basis and be determined, at least initially, on the type and extent of the advice sought by the company.

21. Any attempt to cost the above exercise is fraught with difficulties. However, in respect of the first stage, the cost of a manager spending two days (sixteen hours) considering whether there was a case for conversion to an SE is estimated to be around £400[4]. If it is assumed that 20% of the 5,000 companies referred to in paragraph 17 above undertook this exercise the cost to GB business would be £400,000. In respect of the second stage, a company board of 12 members considering the issue for two hours would represent a further 24 hours of costs with an estimated total cost of £600[5]. If it is assumed that 10% of those 5,000 companies undertook this exercise the cost to GB business would be £300,000. Trying to assess legal costs is even more difficult since, as noted above, they would clearly vary on a case by case basis. However, the cost of a solicitor spending one day (eight hours) considering whether a company might benefit from adopting the SE form is estimated to be £2,400[6]. If it is assumed that 5% of the 5,000 companies undertook this exercise the cost to GB business would be £600,000.

22. It seems highly unlikely that companies will merge with others simply to become an SE. What may happen is that where, say, a GB registered company intended to merge with a German company both companies would consider whether the resulting company should be an SE. In other words, the possibility of forming an SE would be considered as part of the merger process and if this additional option was considered to be the cheapest option, or would result in greater flexibility, it is likely that it would be adopted. The only costs incurred by the companies concerned would be

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[4] In 2003, the average hourly pay, excluding overtime, of a manager/senior official in Great Britain was £19.28. The cost of a manager's time, including non-wage costs and overheads is estimated at 30% of wage costs. The hourly cost of a manager's time is, therefore, £19.28 x 1.3 = £25.06. Source: New Earnings Survey (NES) 2003.

[5] The same figures as denoted in footnote 4 above have been used in estimating the costs of members of the board.

[6] This is based on a very rough estimate of hourly fees of £300 (excluding VAT).

similar to those identified in paragraph 21 above, ie where adoption of the SE form was considered (in this case by a minimum of two companies) but ultimately rejected.

Employee involvement

23. In the event that companies decided to use an SE as the vehicle for a merger it is likely that the principal additional costs would come from the employee involvement arrangements. However, the voluntary nature of becoming an SE, as well as the many different circumstances of the companies involved make it very difficult to come up with an estimate of the overall costs. Some illustrative costs are set out below which are based on the merger of two companies of a similar size, one in GB and the other in another EU country, intending to register as an SE in GB. Costs may be higher if there are more than two companies involved. The examples used below assume that there are no subsidiaries and all the employees of each company are located in each of their two respective Member States.

24. For the purpose of agreeing arrangements for employee involvement, a Special Negotiating Body (SNB), made up of employee representatives from the participating companies and any "concerned" subsidiaries, **must** be established. Any expenses relating to the functioning of the SNB, and to the negotiations in general, must be borne by the participating companies (this may include the cost of up to one "expert" to assist the SNB). The SNB and management have 6 months, extendable to 12 months, in which to reach a voluntary agreement on employee involvement under Article 4 of the EU Directive. There are three possible outcomes:-

i) the SNB and the management draw up a voluntary agreement for employee involvement under Article 4; or

ii) the SNB takes the two-thirds majority decision under Article 3.6 of the EU Directive to rely on the national Information and Consultation rules already in force in the Member State in which the SE has employees[7] (this option is not available where the SE is to be formed by transformation or the company previously had employee participation); or

iii) no voluntary agreement is reached by the end of the negotiating period and the Article 3.6 decision is not taken but the participating companies still wish to go ahead and register the SE. In such a case, certain standard "fallback" rules of the Member State in which the SE wishes to register will apply.[8] The rules provide for the establishment of a representative body (similar to a European Works

[7] All Member States are required to have such rules from March 2005 as a result of the Information and Consultation Directive**.** However, some companies may already have some form of information and consultation arrangements in place. The Department published in July 2004 revised draft regulations to implement the directive in Great Britain, which can be found at http://www.dti.gov.uk/er/consultation/draftregs.pdf

[8] These rules must comply with the requirements in the Annex to the EU Directive.

Council) to be informed and consulted by the management of the SE on the subjects set out in the annex and, where there was employee participation on the board of one of the companies forming the SE, such participation would apply in the case of the board of the SE.

Ballots to elect SNB members and number of SNB representatives

25. A ballot must be conducted to elect SNB representatives for the GB employees. Separate ballots may need to be conducted in each Member State where the participating companies or subsidiaries have employees although this will not always be the case. In some Member States (such as Germany), existing works council members may simply be appointed as SNB members and no ballots would be held.

26. The cost of conducting a ballot to elect the GB SNB members is estimated to be around £13,650[9]. There would be no additional balloting cost in the other Member States where the works council is used to nominate its SNB members.

27. The rules for the composition of the Special Negotiating Body (SNB) depend on a variety of factors including the number of participating companies or "concerned" subsidiaries and in how many Member States the employees are located and in what proportion etc. The method of determining the number of SNB members in the EU Directive implies that there will always be a minimum of 10 SNB members and currently, with the 28 countries of the EEA covered by the EU Directive, an absolute maximum of 37.

Costs of a special negotiating body meeting

28. Assuming that the participating companies have a total of 50,000 employees, an SNB might have 10 employee representatives and 6 management representatives. The costs of this meeting would include the opportunity cost of the workers' and employers' time, travel costs, the cost of the venue and interpreter costs. It is estimated that the costs for one meeting would be about £23,000[10].

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[9] This is the cost for a ballot in GB only. For full details of a breakdown of this figure, see the annex of "Implementation of the Regulations on European Works Councils – Regulatory Impact Assessment". Source: http://www.dti.gov.uk/er/emp-ria.pdf

[10] The cost of worker time is taken to be £115 per day and the cost of management time is £200. This is based on earnings information multiplied by 1.3 to take into account non-wage costs. Source: New Earnings Survey 2003. It is assumed that each worker and each manager needs to dedicate two days per meeting. It is estimated that travel will cost £10,000, interpretation £5,000 and the venue £3,000. This is based on the findings of the study by T Weber, P Foster and K Levent Egriboz entitled "Costs and Benefits of European Works Councils Directive" Employment Relations Research Series No 9 http://www.dti.gov.uk/er/emar/camp.pdf. It is assumed that the costs are evenly distributed between the companies (ie in the two company example, the GB company would therefore pay half of this cost).

Illustrative costs

29. Three cases, where both companies have information and consultation processes in place, are set out below:-

i) case 1 - the two merging companies are satisfied with their respective information and consultation arrangements and do not choose to have a transnational body (in effect, an European Works Council (EWC)) in addition to their existing national information and consultation structures;

ii) case 2 - the two merging companies want a transnational body in addition to their existing national information and consultation structures and they can reach a voluntary agreement to this effect;

iii) case 3 - the two merging companies want a transnational body in addition to their existing national information and consultation structures but they cannot reach a voluntary agreement and so go down the fallback route.

30. **Case 1.** It is assumed that it takes two SNB meetings for the representatives to take the decision under Article 3.6 of the EU Directive to rely on the national information and consultation rules already in place in their own countries (ie to agree not to supplement their existing agreements). This would cost about £46,000.

31. **Case 2.** It is assumed that it takes 4 SNB meetings to come to a voluntary agreement, at a cost of £92,000. The voluntary agreement is such that each company in the merger has to make some changes to its existing information and consultation agreements, equivalent to having one or more meetings of a transnational consultative committee a year. This will cost about £64,000[11] each year.

32. **Case 3.** It is assumed that failure to reach a voluntary agreement is time consuming and could take 6 to 8 SNB meetings, with a cost of about £140,000 to £180,000. The information and consultation structure set up under the fallback arrangements is likely to be quite similar to that in case 2.

Participation at board level

33. If one of the merging companies already has worker participation on the company board, there will need to be at least the same level of participation on the SE board (unless the SNB take a two-thirds majority decision to reduce, or even abolish, employee participation in the new SE).

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[11] This is the estimated cost of an ordinary EWC meeting, based on the findings of *Costs and Benefits of the European Works Councils Directive,* Tina Weber et al., 1999, Employment Relations Research Series No. 9. See link: http://www.dti.gov.uk/er/emar/camp.pdf

Since there is no tradition of employee participation in GB, the possible costs involved have been estimated using the German model as an example.

34. The maximum percentage of representatives is likely to be 50% of the board as this is the maximum that applies in Germany; it is doubtful that this percentage would be exceeded. In this example it is assumed that there are two worker representatives on the board of the company in the non-GB company and that the SNB decides that there should be four – two from each country. This would mean an extra two worker representatives attending maybe 12 meetings per year, which take up one day of each representative's time.[12] The cost of travel has been included, but not interpreter and venue costs (since these costs will already have been included). It is estimated that this will cost about £15,000 per year.

35. In Germany, a proportion of the employee representatives on the boards of companies may be full time union representatives who are paid by the company for this purpose. If this model were followed for SE boards, there would be no opportunity costs to companies of employee time for these representatives.

36. It is sometimes argued that worker participation on boards can slow down decision-making and hence reduce companies' competitive edge. However, evidence from Japanese companies with works councils in Germany does not show this to be the case.[13] Accordingly**,** no costs have been factored in for longer decision-making processes.

37. Once the employee involvement arrangements have been put into place, compliance is likely to follow similar rules and procedures to those set out in the Transnational Information and Consultation of Employees (TICE) Regulations, which implement the European Works Council Directive. There will therefore be costs to employers if a complaint is brought before the Central Arbitration Committee (CAC) or an Employment Tribunal.

38. The costs of appearing at the CAC is estimated to be £4,713[14] and consists of the average cost of a CAC case together with the cost of 2 days of management time and 1 day of employee representative time. The costs of appearing at an Employment Tribunal are £2,910 and consist of £2,000 for the employer and £910 for the Employment Tribunal Service and Acas.[15]

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[12] It is assumed that the GB worker representative needs one day to read the papers, travel to and attend the meeting. Costs of consulting employees are already included in the costs of extra information and consultation.

[13] Source: S Nakano "Management Views of European Works Councils: A Preliminary Survey of Japanese Multinationals" 1999 European Journal of Industrial Relations Volume 5 Number 3 pages 307-326.

[14] This includes the cost to the CAC of £4,198 and the cost to the employer of around £515.

[15] Sources: Findings from the 1998 Survey of Employment Tribunal Applications, Employment Tribunal Service annual accounts and information provided by Acas.

Small firms' impact test

39. The key point is that adoption of the SE form will be voluntary and no costs will be imposed on small firms. Although the minimum share capital of an SE will be EUR 120,000, it will nevertheless be open to smaller companies to form an SE if the other companies involved can provide sufficient share capital. The test for small firms will be the same as that for all companies, ie only those that perceive that there is an advantage to them will consider forming, or converting to, an SE. Against the background of the voluntary nature of the ECS, the Small Business Service did not comment on the Regulations.

Competition assessment

40. The Regulations will affect all markets since formation of an SE is not restricted to any particular sector. This legislation will not **impose** additional costs - either set-up or ongoing - on any companies nor restrict the ability of companies to choose the price, quality, range or location of their products. It is anticipated that the Regulations will not affect competition, either positively or negatively. However, it is possible that the legislation will have an effect on market structure since the formation of SEs by merger may (but not necessarily will) lead to a smaller number of GB registered companies although this could be off set by the creation of subsidiary or holding SEs registered in GB. The number of companies registered in GB would not, of course, be affected by the ability of public companies to convert to SEs. It seems unlikely that SEs registered in GB will have a competitive advantage over companies registered in GB.

Enforcement and sanctions

41. Enforcement of existing company law and legislation dealing with the involvement of employees (such as European Works Councils) - which are both subject to criminal penalties for non-compliance - is the responsibility of the Department of Trade and Industry. As a result, the Department is the authority responsible for the bringing of court proceedings in respect of the offences provided for in the Regulations. Some of the offences in the Regulations carry criminal penalties and which, with two exceptions, involve (only) the imposing of fines. The exceptions relate to any person who makes a false statement in documents sent to the Registrar or the Secretary of State; and a member of an SE who makes a statement on the solvency of the SE without having reasonable grounds for the opinion expressed in that statement. These two offences carry a penalty of imprisonment as well as a fine. The offences carrying penalties of fines (only) apply to SEs or companies with one exception which concerns a person who uses, when not entitled to do so, the abbreviation "SE".

Consultation

42. A consultative document - "Implementation of the European Company Statute: The European Public Limited-Liability Company Regulations 2004" -

which included a draft of the Regulations - was issued in October 2003 and placed on the Department's website. It was also sent to all organisations that had responded to the Department's previous consultations on this issue (both the EU Regulation and the EU Directive) and other organisations known to have an interest in the ECS. The Department also consulted the Department for Constitutional Affairs, the Office of the Lord President, the Inland Revenue and, in Northern Ireland, the Department of Employment and Learning and the Department for Enterprise, Trade and Investment. It also held meetings prior to the publication of the consultative document with the Law Society, Confederation of British Industry, Trades Union Congress and Takeover Panel. On 8 July 2004, the Department placed on its website a document setting out the results of the consultation and which highlighted the changes that had been made to the Regulations following consultation. The document - which included revised draft Regulations - was also sent to all respondents to the October 2003 consultative document.

Monitoring and review

43. The Department will keep the ECS under review. If, in the light of experience, it proves necessary to amend the domestic legislation this could be done by making further regulations under section 2(2) of the European Communities Act 1972.

Summary and recommendation

44. There is clearly a need for the European Public Limited-Liability Company Regulations 2004 in order to provide for the introduction of the new corporate vehicle, the European Company.

Ministerial declaration

45. **I have read the Regulatory Impact Assessment and I am satisfied that the benefits justify the costs.**

Gerry Sutcliffe,
Parliamentary Under Secretary of State for
Employment Relations, Competition and Consumers,
Department of Trade and Industry
7th September 2004

Contact point

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Annex A

Member State Options in the EU Regulation

Article	Description of Member State option	Intention to adopt option (Yes/No)
2(5)	Companies with head office outside Community may form SEs	Yes
7	Head office may be required to be in same place as registered office	No
8(2)	Additional forms of publicity of proposal by SE to transfer to another Member State	Yes
8(5)	Additional protections for minority shareholders in SE proposing to transfer to another Member State	No
8(7)	Extension of protection of creditors in respect of liabilities incurred before transfer to another Member State	Yes
8(14)	Competent authorities may oppose transfer of SE to another Member State on public interest grounds	Yes
12(4)	Management or administrative organ of SE may amend statutes where in conflict with employee involvement arrangements	Yes
19	Competent authorities may oppose participation of merging company on public interest grounds	Yes
24(2)	Additional protections for minority shareholders in merging company	No
31(2)	Reports by acquiring company where SE is to be formed by merger may not be necessary in certain circumstances	No
34	Additional protection for minority shareholders, creditors and employees in companies promoting the formation of a holding SE	No
37(8)	Conversion of PLC to SE may be subject to a vote (qualified majority or unanimity) of the employee participation organ	No
39(1)	Managing director or directors shall be responsible for current management under the same conditions as PLC	No
39(2)	Members of management organ may be permitted or required to be appointed or removed by general meeting on same terms as PLC	No
39(3)	Time limit may be imposed on supervisory organ member serving on management organ in the event of a vacancy	No
39(4)	Minimum and/or maximum number of members of management organ may be fixed	Yes in respect of min. No in respect of max
39(5)	Appropriate measures may be adopted in relation to SEs where there is no provision for two-tier system in PLC law	No
40(3)	Number of members of supervisory organ (or a	Yes in respect

	minimum and/or maximum number) may be stipulated	of min. No in respect of max
41(3)	Each member of supervisory organ be entitled to require information from the management organ	Yes
43(1)	Managing director or directors shall be responsible for day-to-day management under the same conditions as PLC	No
43(2)	Minimum, and where necessary, a maximum number of members of the administrative organ may be set	Yes in respect of min. No in respect of max
43(4)	Appropriate measures may be adopted in relation to SEs where there is no provision for one-tier system in PLC law	No
48(1)	Supervisory organ may make certain categories of transaction subject to authorisation	No
48(2)	Categories of transactions may be required to be indicated in an SE's statutes	No
50(3)	PLC rules may be applied to supervisory organ's quorum and decision-taking where there is employee participation	No
54(1)	First general meeting of SE may be held at any time in the 18 months following incorporation	Yes
55(1)	Smaller proportion of shareholders than 10% may request convening of general meeting of SE if that proportion applies in PLC law	No
56	Smaller proportion of shareholders than 10% may request items to be put on agenda of general meetings of SE if that proportion applies in PLC law	Yes
59(2)	A simple majority of votes may amend SE's statutes where at least half of an SE's subscribed capital is represented at its general meeting	No
67(1)	Member States not within Euro zone may make SEs subject to same law as PLCs as regards expression of capital	Yes
67(2)	Member States not within Euro zone may require accounts of SEs to be published in national currency under same conditions as for PLCs	No