STATUTORY INSTRUMENTS

2007 No. 2974

The Companies (Cross-Border Mergers) Regulations 2007

PART 4

EMPLOYEE PARTICIPATION

CHAPTER 1

APPLICATION OF THIS PART

Application of this Part

22.—(1) Subject to paragraph (2), this Part shall apply where the transferee company is a UK company and where—

(a) a merging company has, in the six months before the publication of the draft terms of merger, an average number of employees that exceeds 500 and has a system of employee participation, or

(b) a UK merging company has a proportion of employee representatives amongst the directors, or

(c) a merging company has employee representatives amongst members of the administrative or supervisory organ or their committees or of the management group which covers the profit units of the company.

(2) Chapters 4 and 6 to 9 shall apply to a UK merging company, its employees or their representatives, regardless of whether the transferee company is a UK company.

(3) This Part applies to Northern Ireland with the modifications contained in Schedule 2.

CHAPTER 2

MERGING COMPANIES AND THE SPECIAL NEGOTIATING BODY

Duty on merging company to provide information

23.—(1) As soon as possible after adopting the draft terms of merger (see regulation 7), each merging company shall provide information to the employee representatives of that company or, if no such representatives exist, the employees themselves.

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

(a) identifying the merging companies,

(b) of any decision taken pursuant to regulation 36 (merging companies may select standard rules of employee participation), and

(c) giving the number of employees employed by each merging company.

(3) When a special negotiating body has been formed in accordance with regulation 25, each merging company must provide that body with such information as is necessary to keep it informed

of the plan and progress of establishing the UK transferee company until the date upon which the consequences of the cross-border merger take effect (see regulation 17).

Complaint of failure to provide information

24.—(1) An employee representative or, where no such representative exists, any employee may present a complaint to the CAC that—

(a) a merging company has failed to provide information as required by regulation 23; or

(b) the information is false or incomplete in a material particular.

(2) Where the CAC finds the complaint well-founded it shall make an order requiring the company to disclose information to the complainant specifying—

(a) the information in respect of which the CAC finds that the complaint is well-founded and which is to be disclosed to the complainant; and

(b) a date (not being less than one week from the date of the order) by which the company must disclose the information specified in the order.

The special negotiating body

25.—(1) Subject to regulation 36 (merging companies may select standard rules of employee participation), each merging company shall make arrangements for the establishment of a special negotiating body.

(2) The task of the special negotiating body shall be to reach an employee participation agreement with the merging companies (see Chapter 3).

(3) The special negotiating body shall be constituted in accordance with regulation 26.

Composition of the special negotiating body

26.—(1) Employees of merging companies registered in each EEA State (including the UK) shall be given an entitlement to elect one member of the special negotiating body, in accordance with these Regulations, for each 10% or fraction thereof which employees of merging companies registered in that State represent of the total workforce of the merging companies. These members shall be the "constituent members".

(2) If, following an election under paragraph (1), the members elected to the special negotiating body do not include at least one constituent member in respect of each merging company, the employees of any merging company in respect of which there is no constituent member shall be given an entitlement, subject to paragraph (3), to elect an additional member to the special negotiating body.

(3) The number of additional members which the employees of the merging companies are entitled to elect under paragraph (2) shall not exceed 20% of the number of constituent members elected under paragraph (1) and if the number of additional members under paragraph (2) would exceed that percentage the employees who are entitled to elect the additional members shall be—

(a) if one additional member is to be elected, those employed by the merging company not represented under paragraph (1) having the highest number of employees; and

(b) if more than one additional member is to be elected, those employed by the merging companies registered in each EEA State that are not represented under paragraph (1) having the highest number of employees in descending order, starting with the company with the highest number, followed by those employed by the companies registered in each EEA State that are not so represented having the second highest number of employees in descending order, starting with the company (among those companies) with the highest number.

(4) Each merging company shall, as soon as reasonably practicable and in any event no later than one month after the establishment of the special negotiating body, inform their employees of the outcome of any elections held under this regulation.

(5) If, following the election of members to the special negotiating body under this regulation—

(a) changes to the merging companies result in the number of members which employees would be entitled to elect under this regulation either increasing or decreasing, the original election of members of the special negotiating body shall cease to have effect and the employees of the merging companies shall be entitled to elect the new number of members in accordance with the provisions of these Regulations; and

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

Complaint about establishment of special negotiating body

27.—(1) An application may be presented to the CAC for a declaration that the special negotiating body has not been established at all or has not been established properly in accordance with regulation 25 or 26.

(2) Where it is alleged that the failure is attributable to the conduct of the merging company, an application may be presented under this regulation by—

(a) a person elected under regulation 26 to be a member of the special negotiating body; or

(b) an employee representative or, where no such representative exists in respect of the company, an employee of the company.

(3) Where it is alleged that the failure is attributable to the conduct of the employees or the employee representatives, an application may be presented under this regulation by the merging company.

(4) The CAC shall only consider an application made under this regulation if it is made within a period of one month from the date or, if more than one, the last date on which the merging companies complied or should have complied with the obligation to inform their employees under regulation 26(4).

(5) Where the CAC finds an application made under paragraph (2) well-founded it shall make a declaration that the special negotiating body has not been established at all or has not been established properly and the merging companies continue to be under the obligation in regulation 25.

(6) Where the CAC finds an application made under paragraph (3) well-founded it shall make a declaration that the special negotiating body has not been established at all or has not been established properly and the merging companies no longer continue to be under the obligation in regulation 25.

CHAPTER 3

NEGOTIATION OF THE EMPLOYEE PARTICIPATION AGREEMENT

Negotiations to reach an employee participation agreement

28.—(1) In Chapters 3 and 5 the merging companies and the special negotiating body are referred to as "the parties".

(2) Subject to regulations 31 (decision not to open or to terminate negotiations) and 36 (merging companies may select standard rules of employee participation), the parties are under a duty to negotiate in a spirit of cooperation with a view to reaching an employee participation agreement.

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

(a) for the period of six months starting with the day on which the duty commenced or, where an employee participation agreement is successfully negotiated within that period, until the completion of the negotiations;

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

The employee participation agreement

29.—(1) The employee participation agreement must be in writing.

(2) Without prejudice to the autonomy of the parties, the employee participation agreement shall specify—

(a) the scope of the agreement;

(b) if, during negotiations, the parties decide to establish arrangements for employee participation, the substance of those arrangements including (if applicable) the number of directors of the UK transferee company which the employees will be entitled to elect, appoint, recommend or oppose, the procedures as to how these directors may be elected, appointed, recommended or opposed by the employees, and their rights; and

(c) the date of entry into force of the agreement, its duration, the circumstances, if any in which the agreement is required to be re-negotiated and the procedure for its re-negotiation.

(3) The employee participation agreement shall not be subject to the standard rules of employee participation (see regulation 38), unless it contains a provision to the contrary.

Decisions of the special negotiating body

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

(2) Subject to paragraph (3) and regulation 31 (decision not to open or to terminate negotiations), the special negotiating body shall take decisions by an absolute majority vote.

(3) Where at least 25% of the employees of the merging companies have participation rights, any decision which would result in a reduction of participation rights must be taken by a two thirds majority vote.

(4) In paragraph (3), reduction of participation rights means that the proportion of directors of the UK transferee company who may be elected or appointed (or whose appointment may be recommended or opposed) by virtue of employee participation is lower than the proportion of such directors or members in the merging company which had the highest proportion of such directors or members.

(5) The special negotiating body must publish the details of any decision taken under this regulation or under regulation 31 (decision not to open or to terminate negotiations) in such a manner as to bring the decision, so far as reasonably practicable, to the attention of the employees whom they represent and such publication shall take place as soon as reasonably practicable and, in any event no later than 14 days after the decision has been taken.

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

(7) The merging companies shall pay for any reasonable expenses of the functioning of the special negotiating body and any reasonable expenses relating to the negotiations that are necessary

to enable the special negotiating body to carry out its functions in an appropriate manner; but where the special negotiating body is assisted by more than one expert the merging companies are not required to pay such expenses in respect of more than one of them.

Decision not to open or to terminate negotiations

31.—(1) The special negotiating body may decide, by a majority vote of two thirds of its members, representing at least two thirds of the employees of the merging companies, including the votes of members representing employees in at least two different EEA States, not to open negotiations pursuant to regulation 28 (negotiations to reach an employee participation agreement) or to terminate negotiations already opened.

(2) Following any decision made under paragraph (1), the duty of the parties set out in regulation 28 to negotiate with a view to establishing an employee participation agreement shall cease as from the date of the decision.

Complaint about decisions of special negotiating body

32.—(1) A member of the special negotiating body, an employee representative, or where there is no such representative in respect of an employee, that employee may present a complaint to the CAC if he believes that the special negotiating body has taken a decision referred to in regulation 30 or 31 and—

(a) that the decision was not taken by the majority required by regulation 30 or 31; or

(b) that the special negotiating body failed to publish the decision in accordance with regulation 30(5).

(2) The complaint must be presented to the CAC—

(a) in the case of a complaint under paragraph (1)(a) (required majority), within 21 days of publication of the decision of the special negotiating body;

(b) in the case of a complaint under paragraph (1)(b) (failure to publish decision), within 21 days of the date by which the decision should have been published.

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

CHAPTER 4

ELECTION OF UNITED KINGDOM MEMBERS OF THE SPECIAL NEGOTIATING BODY

Ballot arrangements

33.—(1) The UK members of the special negotiating body shall be elected by balloting the UK employees.

(2) The UK merging company must arrange for the holding of a ballot of those employees in accordance with the requirements of paragraph (3).

(3) The requirements referred to in paragraph (2) are—

(a) in relation to the election of constituent members of the special negotiating body under regulation 26(1), that—

(i) if the number of members which UK employees are entitled to elect to the special negotiating body is equal to the number of UK merging companies, there shall be separate ballots of the UK employees in each UK merging company;

(ii) if the number of members which the UK employees are entitled to elect to the special negotiating body is greater than the number of UK merging companies, there shall

be separate ballots of the UK employees in each UK merging company and the directors shall ensure, as far as practicable, that at least one member representing each such merging company is elected to the special negotiating body and that the number of members representing each UK company is proportionate to the number of employees in that company;

(iii) if the number of members which the UK employees are entitled to elect to the special negotiating body is smaller than the number of UK merging companies—

(aa) the number of ballots held shall be equivalent to the number of members to be elected;

(bb) a separate ballot shall be held in respect of each of the merging companies with the higher or highest number of employees; and

(cc) it shall be ensured that any employees of a merging company in respect of which a ballot does not have to be held are entitled to vote in a ballot held in respect of one of the other merging companies;

(b) that in relation to the election of additional members under regulation 26(2) the directors shall hold a separate ballot in respect of each UK merging company entitled to elect an additional member;

(c) that in a ballot in respect of a particular UK merging company, all UK employees employed by that merging company are entitled to vote;

(d) that in a ballot in respect of a particular UK merging company, any person who is immediately before the latest time at which a person may become a candidate—

(i) a UK employee employed by that company; or

(ii) if the directors of that company so permit, a representative of a trade union who is not an employee of that company,

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

(e) that the directors must, in accordance with paragraph (7), appoint an independent ballot supervisor to supervise the conduct of the ballot of UK employees but may instead, where there is to be more than one ballot, appoint more than one independent ballot supervisor in accordance with that paragraph, each of whom is to supervise such of the separate ballots as the directors may determine, provided that each separate ballot is supervised by a supervisor;

(f) that after the directors have formulated proposals as to the arrangements for the ballot of UK employees and before they have published the final arrangements under sub-paragraph (g) they must, so far as reasonably practicable, consult with the employee representatives on the proposed arrangements for the ballot of UK employees; and

(g) that the directors must publish, as soon as reasonably practicable, the final arrangements for the ballot of UK employees in such manner as to bring them to the attention of, so far as reasonably practicable, all UK employees and the employee representatives.

(4) Any UK employee or employee representative who believes that the arrangements for the ballot of the UK employees do not comply with the requirements of paragraph (3)(a) to (e) or that there has been a failure to satisfy the requirements of sub-paragraph (f) or (g) may, within a period of 21 days beginning on the date on which the directors published, or should have published, the final arrangements under sub-paragraph (g), present a complaint to the CAC.

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

(6) An order under paragraph (5) shall specify the modifications to the arrangements which the directors are required to make and the requirements they must satisfy.

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

Conduct of the ballot

34.—(1) The directors must—

(a) ensure that a ballot supervisor appointed under regulation 33(3)(e) carries out his functions under this regulation and that there is no interference with his carrying out of those functions from the directors; and

(b) comply with all reasonable requests made by a ballot supervisor for the purposes of, or in connection with, the carrying out of those functions.

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

(a) supervises the conduct of the ballot, or the separate ballots he is being appointed to supervise, in accordance with the arrangements for the ballot of UK employees published by the directors under regulation 33(3)(g) or, where appropriate, in accordance with the arrangements as required to be modified by an order made as a result of a complaint presented under regulation 33(4);

(b) does not conduct the ballot or any of the separate ballots before the directors have satisfied the requirement specified in regulation 33(3)(g) (publication of final arrangements for ballot) and—

(i) where no complaint has been presented under regulation 33(4), before the expiry of a period of 21 days beginning on the date on which the directors published the arrangements under regulation 33(3)(g); or

(ii) where a complaint has been presented under regulation 33(4), before the complaint has been determined and, where appropriate, the arrangements have been modified as required by an order made as a result of that complaint;

(c) conducts the ballot, or each separate ballot so as to secure that—

(i) so far as reasonably practicable, those entitled to vote are given the opportunity to vote;

(ii) so far as reasonably practicable, those entitled to stand as candidates are given the opportunity to stand;

(iii) so far as reasonably practicable, those voting are able to do so in secret; and

(iv) the votes given in the ballot are fairly and accurately counted.

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

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

(a) any of the requirements referred to in paragraph (2) was not satisfied with the result that the outcome of the ballot would have been different; or

(b) there was interference with the carrying out of his functions or a failure by the directors to comply with all reasonable requests made by him with the result that he was unable to form

a proper judgement as to whether each of the requirements referred to in paragraph (2) was satisfied in the ballot.

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

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

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

(a) if there has been a single ballot or an ineffective ballot report has been published in respect of every separate ballot, the outcome of the ballot or ballots shall have no effect and the directors shall again be under the obligation in regulation 33(2) (directors to hold ballot for election of special negotiating body);

(b) if there have been separate ballots and sub-paragraph (a) does not apply—

(i) the directors shall arrange for the separate ballot or ballots in respect of which an ineffective ballot report was published to be re-held in accordance with regulation 33 and this regulation; and

(ii) no such ballot shall have effect until it has been re-held and no ineffective ballot report has been published in respect of it.

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

Representation of employees

35.—(1) Subject to paragraph (2), a member elected in accordance with regulation 26(1), shall be treated as representing the employees for the time being of the merging company whose employees were entitled to vote in the ballot in which he was elected.

(2) If an additional member is elected in accordance with regulation 26(2) and (3), he, and not any member elected in accordance with regulation 26(1), shall be treated as representing the employees for the time being of the merging company whose employees were entitled to vote in the ballot in which he was elected.

CHAPTER 5

STANDARD RULES OF EMPLOYEE PARTICIPATION IN A UK TRANSFEREE COMPANY

Merging Companies may select standard rules of employee participation

36. The merging companies may choose, without negotiating with the special negotiating body, the employee representatives or the employees, that a UK transferee company shall be subject to the standard rules of employee participation in regulation 38 (the standard rules of employee participation) from the date upon which the consequences of the cross-border merger take effect (see regulation 17).

Application of the standard rules

37.—(1) Notwithstanding regulation 36 (merging companies may select standard rules of employee participation), the standard rules of employee participation shall apply to a UK transferee company in circumstances where paragraph (2) applies and where—

(a) the parties agree that they should; or

(b) the period specified in regulation 28(3) (duty to negotiate employee participation agreement) has expired without the parties reaching an employee participation agreement and—

(i) the merging companies agree that they should; and

(ii) the special negotiating body has not taken any decision under regulation 31 either not to open or to terminate the negotiations referred to in that regulation.

(2) This paragraph applies where before registration of the UK transferee company, one or more forms of employee participation existed in at least one of the merging companies and either—

(a) that participation applied to at least one third of the total number of employees of the merging companies, or

(b) that participation applied to less than one third of the total number of employees of the merging companies but the special negotiating body has decided that the standard rules of employee participation should apply.

(3) Where the standard rules of employee participation apply and more than one form of employee participation existed in the merging companies, the special negotiating body shall decide which of the existing forms of participation shall apply in the UK transferee company and shall inform the merging companies accordingly.

(4) In circumstances where—

(a) the standard rules of employee participation apply, more than one form of employee participation existed in the merging companies and the special negotiating body has failed to make a decision in accordance with paragraph (3); or

(b) one or more form of employee participation existed in the merging companies and the merging companies have chosen, without any prior negotiation, to be directly subject to the standard rules of employee participation,

the merging companies shall be responsible for determining the form of employee participation in the UK transferee company.

The standard rules of employee participation

38.—(1) The employee representatives of the UK transferee company, or if there are no such representatives, the employees, shall have the right to elect, appoint, recommend or oppose the appointment of a number of directors of the transferee company, such number to be equal to the number in the merging company which had the highest proportion of directors (or their EEA equivalent) so elected or appointed (subject to regulation 39).

(2) Subject to paragraph (3), the employee representatives, or if there are no such representatives, the employees, shall, taking into account the proportion of employees of the transferee company formerly employed in each merging company, decide on the allocation of directorships, or on the means by which the transferee's employees may recommend or oppose the appointment of directors.

(3) In making the decision set out in paragraph (2), if the employees of one or more merging company are not covered by the proportional criterion set out in paragraph (2), the employee representatives, or if there are no such representatives, the employees, shall appoint a member from one of those merging companies including one from the United Kingdom, if appropriate.

(4) Every director of the transferee company who has been elected, appointed or recommended by the employee representatives or the employees, shall be a full director with the same rights and obligations as the directors representing shareholders, including the right to vote.

Limit on level of employee participation

39. Where, following prior negotiation, the standard rules of employee participation apply, the UK transferee company may limit the proportion of directors elected, appointed, recommended or opposed through employee participation to a level which is the lesser of—

(a) the highest proportion in force in the merging companies prior to registration, and

(b) one third of the directors.

Subsequent domestic mergers

40.—(1) A transferee company resulting from a cross-border merger that operates under an employee participation system shall ensure that employees' rights to employee participation shall not be affected before the end of the period of three years commencing on the date on which the consequences of the cross-border merger have effect (see regulation 17) by any order made by the court under section 899 of the Companies Act 2006(**1**) (court sanction for compromise or arrangement) for the purposes of—

(a) a reconstruction of the company or the amalgamation of the company with another company (see section 900 of that Act (reconstruction or amalgamation of company)), or

(b) a merger involving a public company (see sections 902 and 903 and Chapter 2 of Part 27 of that Act).

(2) For the purposes of this regulation, any subsequent order made by the court under section 900(2) of the Companies Act 2006 has effect as if it were an order made under section 899 of that Act.

CHAPTER 6

CONFIDENTIAL INFORMATION

Duty of confidentiality

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

(2) In this regulation a person referred to in paragraph (1) to whom information or a document is entrusted is referred to as a "recipient".

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

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

(5) No action shall lie under paragraph (3) where the recipient reasonably believed the disclosure to be a protected disclosure within the meaning given to that expression by section 43A of the 1996 Act(**2**).

(6) A recipient may apply to the CAC for a declaration as to whether it was reasonable for the company to require the recipient to hold the information or document in confidence.

(**1**) 2006 c.46.
(**2**) Section 43A was inserted into the 1996 Act by the Public Interest Disclosure Act (c.23), section 1.

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

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

Withholding of information by the transferee or merging company

42.—(1) Neither a transferee company nor a merging company is required to disclose any information or document to a person for the purposes of this Part where the nature of the information or document is such that, according to objective criteria, the disclosure of the information or document would seriously harm the functioning of, or would be prejudicial to the transferee company or merging company.

(2) Where there is a dispute between the transferee company or merging company and—

(a) where a special negotiating body has been appointed or elected, a member of that body; or

(b) where no special negotiating body has been elected or appointed, an employee,

as to whether the nature of any information or document is such as is described in paragraph (1), the transferee company or merging company or a person referred to in sub-paragraph (a) or (b) may apply to the CAC for a declaration as to whether the information or document is of such a nature.

(3) If the CAC makes a declaration that the disclosure of the information or document in question would not, according to objective criteria, be seriously harmful or prejudicial as mentioned in paragraph (1), the CAC shall order the transferee company or merging company to disclose the information or document.

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

(a) the information or document to be disclosed;

(b) the person or persons to whom the information or document is to be disclosed;

(c) any terms on which the information or document is to be disclosed; and

(d) the date before which the information or document is to be disclosed.

CHAPTER 7

PROTECTION FOR EMPLOYEES AND MEMBERS OF SPECIAL NEGOTIATING BODY, ETC.

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

43.—(1) An employee who is—

(a) a member of a special negotiating body;

(b) a director of a transferee company; or

(c) a candidate in an election in which any person elected will, on being elected, be such a director or member,

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, director or candidate.

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

Right to remuneration for time off under regulation 43

44.—(1) An employee who is permitted to take time off under regulation 43 is entitled to be paid remuneration by his employer for the time taken off at the appropriate hourly rate.

(2) Chapter 2 of Part 14 of the 1996 Act (a week's pay) shall apply in relation to this regulation as it applies in relation to section 62 of the 1996 Act.

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

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

(a) the average number of normal working hours calculated by dividing by twelve the total number of the employee's normal working hours during the period of twelve weeks ending with the last complete week before the day on which the time off is taken; or

(b) where the employee has not been employed for a sufficient period to enable the calculation to be made under sub-paragraph (a), a number which fairly represents the number of normal working hours in a week having regard to such of the considerations specified in paragraph (5) as are appropriate in the circumstances.

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

(a) the average number of normal working hours in a week which the employee could expect in accordance with the terms of his contract; and

(b) the average number of normal working hours of other employees engaged in relevant comparable employment with the same employer.

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

(7) Any contractual remuneration paid to an employee in respect of a period of time off under regulation 43 goes towards discharging any liability of the employer to pay remuneration under paragraph (1) in respect of that period, and conversely, any payment of remuneration under paragraph (1) in respect of a period goes towards discharging any liability of the employer to pay contractual remuneration in respect of that period.

Right to time off: complaints to employment tribunals

45.—(1) An employee may present a complaint to an employment tribunal that his employer—

(a) has unreasonably refused to permit him to take time off as required under regulation 43; or

(b) has failed to pay the whole or any part of any amount to which the employee is entitled under regulation 44.

(2) An employment tribunal shall not consider a complaint under this regulation unless it is presented—

(a) before the end of the period of three months beginning with the day on which the time off was taken or on which it is alleged the time off should have been permitted; or

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

(3) Where an employment tribunal finds a complaint under this regulation well-founded, the tribunal shall make a declaration to that effect.

(4) If the complaint is that the employer has unreasonably refused to permit the employee to take time off, the tribunal shall also order the employer to pay to the employee an amount equal

to the remuneration to which he would have been entitled under regulation 44 if the employer had not refused.

(5) If the complaint is that the employer has failed to pay the employee the whole or part of any amount to which he is entitled under regulation 44, the tribunal shall also order him to pay to the employee the amount which it finds is due to him.

Unfair dismissal of employee

46.—(1) An employee who is dismissed shall be regarded as unfairly dismissed for the purposes of Part 10 of the 1996 Act if the reason (or, if more than one, the principal reason) for the dismissal is one specified in paragraph (2).

(2) The reasons are that the employee—

(a) took, or proposed to take, any proceedings before an employment tribunal to enforce any right conferred on him by these Regulations;

(b) exercised, or proposed to exercise, any entitlement to apply or complain to the CAC or the Appeal Tribunal conferred by these Regulations or exercised or proposed to exercise the right to appeal in connection with any rights conferred by these Regulations;

(c) acted with a view to securing that a special negotiating body did or did not come into existence;

(d) indicated that he did or did not support the coming into existence of a special negotiating body;

(e) stood as a candidate in an election in which any person elected would, on being elected, be a member of a special negotiating body or a director of a UK transferee company;

(f) influenced or sought to influence by lawful means the way in which votes were to be cast by other employees in a ballot arranged under these Regulations;

(g) voted in such a ballot;

(h) expressed doubts, whether to a ballot supervisor or otherwise, as to whether such a ballot had been properly conducted; or

(i) proposed to do, failed to do, or proposed to decline to do, any of the things mentioned in sub-paragraphs (e) to (h).

(3) Paragraph (1) does not apply where the reason (or principal reason) for the dismissal is that in the performance, or purported performance, of the employee's functions or activities he has disclosed any information or document in breach of the duty in regulation 41 (duty of confidentiality), unless the employee reasonably believed the disclosure to be a protected disclosure within the meaning given to that expression by section 43A of the 1996 Act.

(4) For the purposes of paragraph (2)(a) it is immaterial—

(a) whether or not the employee has the right or entitlement; or

(b) whether or not the right has been infringed,

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

Unfair dismissal of member of special negotiating body, etc.

47.—(1) An employee who is—

(a) a member of a special negotiating body;

(b) a director of a transferee company; or

(c) a candidate in an election in which any person elected will, on being elected, be such a director or member,

who is dismissed shall be regarded as unfairly dismissed for the purposes of Part 10 of the 1996 Act if the reason (or, if more than one, the principal reason) for the dismissal is one specified in paragraph (2).

(2) The reasons are that—

(a) the employee performed or proposed to perform any functions or activities as such a member, director or candidate; or

(b) the employee or a person acting on his behalf made or proposed to make a request to exercise an entitlement conferred on the employee by regulation 43 (right to time off work) or 44 (right to remuneration for time off work).

(3) Paragraph (1) does not apply in the circumstances set out in paragraph (2)(a) where the reason (or principal reason) for the dismissal is that in the performance, or purported performance, of the employee's functions or activities he has disclosed any information or document in breach of the duty in regulation 41 (duty of confidentiality), unless the employee reasonably believed the disclosure to be a protected disclosure within the meaning given to that expression by section 43A of the 1996 Act.

Subsidiary provisions relating to unfair dismissal

48.—(1) In section 105 of the 1996 Act (redundancy as unfair dismissal) in subsection (1)(c) (which requires one of a specified group of subsections to apply for a person to be treated as unfairly dismissed)(**3**)—

(a) for "(2A) to (7J)" substitute "(2A) to (7K)", and

(b) after subsection (7J) insert—

"(7K) This subsection applies if the reason (or, if more than one, the principal reason) for which the employee was selected for dismissal was one specified in—

(a) paragraph (2) of regulation 46 of the Companies (Cross-Border Mergers) Regulations 2007 (read with paragraphs (3) and (4) of that regulation); or

(b) paragraph (2) of regulation 47 of the Companies (Cross-Border Mergers) Regulations 2007 (read with paragraph (3) of that regulation).".

(2) In section 108(**4**) of the 1996 Act (exclusion of right: qualifying period of employment) in subsection (3) (cases where no qualifying period of employment is required)(**5**)—

(a) omit the word "or" at the end of paragraph (n); and

(b) after paragraph (o) insert—

"or

(p) regulation 46 or 47 of the Companies (Cross-Border Mergers) Regulations 2007 applies.".

Detriment

49.—(1) An employee has the right not to be subjected to any detriment by any act, or deliberate failure to act, by his employer, done on a ground specified in paragraph (2).

(2) The grounds are that the employee—

(**3**) Section 105 has been amended on a number of occasions to specify additional circumstances in which an employee dismissed by reason of redundancy is to be regarded as unfairly dismissed.
(**4**) Section 108(1) was amended by S.I. 1999/1436, article 3.
(**5**) Section 108(3) has been amended on a number of occasions to specify additional cases in which no qualifying period of employment is required.

(a) took, or proposed to take, any proceedings before an employment tribunal to enforce any right conferred on him by these Regulations;

(b) exercised, or proposed to exercise, any entitlement to apply or complain to the CAC or the Appeal Tribunal conferred by these Regulations or exercised or proposed to exercise the right to appeal in connection with any rights conferred by these Regulations;

(c) acted with a view to securing that a special negotiating body did or did not come into existence;

(d) indicated that he did or did not support the coming into existence of a special negotiating body;

(e) stood as a candidate in an election in which any person elected would, on being elected, be a member of a special negotiating body or a director of a UK transferee company;

(f) influenced or sought to influence by lawful means the way in which votes were to be cast by other employees in a ballot arranged under these Regulations;

(g) voted in such a ballot;

(h) expressed doubts, whether to a ballot supervisor or otherwise, as to whether such a ballot had been properly conducted; or

(i) proposed to do, failed to do, or proposed to decline to do, any of the things mentioned in sub-paragraphs (d) to (h).

(3) It is immaterial for the purposes of paragraph (2)(a)—

(a) whether or not the employee has the right or entitlement; or

(b) whether or not the right has been infringed,

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

(4) This regulation does not apply where the detriment in question amounts to dismissal.

Detriment for member of special negotiating body, etc.

50.—(1) An employee who is—

(a) a member of a special negotiating body;

(b) a director of a transferee company; or

(c) a candidate in an election in which any person elected will, on being elected, be such a director or member,

has the right not to be subjected to any detriment by any act, or deliberate failure to act, by his employer, done on a ground specified in paragraph (2).

(2) The ground is that—

(a) the employee performed or proposed to perform any functions or activities as such a director, member or candidate; or

(b) the employee or person acting on his behalf made or proposed to make a request to exercise an entitlement conferred on the employee by regulation 43 (right to time off work) or 44 (right to remuneration for time off work).

(3) Paragraph (1) does not apply in the circumstances set out in paragraph (2)(a) where the ground for the subjection to detriment is that in the performance, or purported performance, of the employee's functions or activities he has disclosed any information or document in breach of the duty in regulation 41 (duty of confidentiality), unless the employee reasonably believed the disclosure to be a protected disclosure within the meaning given to that expression by section 43A of the 1996 Act.

(4) This regulation does not apply where the detriment in question amounts to a dismissal.

Detriment: enforcement and subsidiary provisions

51.—(1) An employee may present a complaint to an employment tribunal that he has been subjected to a detriment in contravention of regulation 49 or 50.

(2) The provisions of section 49(1) to (5)(**6**) of the 1996 Act shall apply in relation to a complaint under this regulation.

Conciliation

52. In section 18 of the Employment Tribunals Act 1996 (conciliation), in subsection (1) (which specifies the proceedings and claims to which the section applies)(**7**)—

(a) omit the word "or" at the end of paragraph (r); and

(b) after paragraph (s) insert—

"or

(t) under regulation 45 or 51 of the Companies (Cross-Border Mergers) Regulations 2007.".

CHAPTER 8

COMPLIANCE AND ENFORCEMENT

Disputes about operation of an employee participation agreement or the standard rules of employee participation

53.—(1) Where—

(a) an employee participation agreement has been agreed; or

(b) the standard rules of employee participation apply,

a complaint may be presented to the CAC by a relevant applicant who considers that the transferee company has failed to comply with the terms of the employee participation agreement or, where applicable, the standard rules of employee participation.

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

(3) In this regulation—

"failure" includes failure by means of an act or omission,

"relevant applicant" means—

(a) a special negotiating body; or

(b) in a case where no special negotiating body has been elected or appointed, or has been dissolved, an employee representative or employee of the transferee company.

(4) Where the CAC finds the complaint well-founded it shall make a declaration to that effect and may make an order requiring the transferee company to take such steps as are necessary to comply with the terms of the employee participation agreement or, where applicable, the standard rules of employee participation.

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

(a) the steps which the transferee company is required to take;

(**6**) Subsection (3) was amended by the Employment Rights (Dispute Resolution) Act 1998 (c.8), section 1(2)(a).
(**7**) 1996 c.17. Section 18(1) has been amended on a number of occasions to specify additional proceedings and claims to which the section applies.

(b) the date of the failure; and

(c) the period within which the order must be complied with.

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

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

(8) Regulation 55 (penalties) shall apply in respect of a penalty notice issued under this regulation.

(9) No order of the CAC under this regulation shall have the effect of suspending or altering the effect of any act done or of any agreement made by the transferee company or merging company.

Misuse of procedures

54.—(1) If an employee representative, or where there is no such representative in relation to an employee, an employee, believes that a transferee company or merging company is misusing or intending to misuse the transferee company or the powers in these Regulations for the purpose of—

(a) depriving the employees of that merging company or the transferee company of their rights to employee participation; or

(b) withholding such rights from any of the people referred to in sub-paragraph (a),

he may make a complaint to the CAC.

(2) A complaint must be made to the CAC under paragraph (1) before the date upon which the consequences of the cross-border merger take effect (see regulation 17) or within a period of 12 months after that date.

(3) The CAC shall uphold the complaint unless the respondent proves that it did not misuse or intend to misuse the transferee company or the powers in these Regulations for either of the purposes set out in sub-paragraph (a) or (b) of paragraph (1).

(4) If the CAC finds the complaint to be well-founded it shall make a declaration to that effect and may make an order requiring the transferee company or merging company to take such action as is specified in the order to ensure that the employees referred to in paragraph (1)(a) are not deprived of their rights to employee participation or that such rights are not withheld from them; and

(5) If the CAC makes a declaration under paragraph (4), the complainant under paragraph (1) may, within the period of three months beginning with the day on which the decision is made, make an application to the Appeal Tribunal for a penalty notice to be issued.

(6) Where such an application is made, the Appeal Tribunal shall issue a written penalty notice to the transferee company or merging company requiring it to pay a penalty to the Secretary of State in respect of the failure unless satisfied, on hearing representations from the transferee company or merging company, that the failure resulted from a reason beyond its control or that it has some other reasonable excuse for its failure.

(7) The provisions in regulations 53(8) to (9) and 55 shall apply to the complaint.

Penalties

55.—(1) A penalty notice issued under regulation 53 (disputes) or 54 (misuse of procedures) shall specify—

(a) the amount of the penalty which is payable;

(b) the date before which the penalty must be paid; and

(c) the failure and period to which the penalty relates.

(2) No penalty set by the Appeal Tribunal under this regulation may exceed £75,000.

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

(a) the gravity of the failure;

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

(c) the reason for the failure;

(d) the number of employees affected by the failure; and

(e) the number of employees employed by the undertaking.

(4) The date specified under paragraph (1)(b) above must not be earlier than the end of the period within which an appeal against a decision or order made by the CAC under regulation 53 or 54 may be made.

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

(a) the period during which an appeal may be made has expired without an appeal having been made; or

(b) such an appeal has been made and determined,

the Secretary of State may recover from the transferee company or merging company, as a civil debt due to him, any amount payable under the penalty notice which remains outstanding.

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

(7) Any sums received by the Secretary of State under regulation 53, 54 or this regulation shall be paid into the Consolidated Fund.

Exclusivity of remedy

56. Where these Regulations provide for a remedy of infringement of any right by way of application or complaint to the CAC, and provide for no other remedy, no other remedy is available for infringement of that right.

CHAPTER 9

MISCELLANEOUS

CAC proceedings

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

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

(3) Where a transferee company or merging company has its registered office in England and Wales—

(a) a declaration made by the CAC under these Regulations may be relied on as if it were a declaration or order made by the High Court in England and Wales; and

(b) an order made by the CAC under these Regulations may be enforced in the same way as an order of the High Court in England and Wales.

(4) Where a transferee company or merging company has its registered office in Scotland—

(a) a declaration or order made by the CAC under these Regulations may be relied on as if it were a declaration or order made by the Court of Session; and

(b) an order made by the CAC under these Regulations may be enforced in the same way as an order of the Court of Session.

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

(6) An appeal lies to the Appeal Tribunal on any question of law arising from any declaration or order of, or arising in any proceedings before, the CAC under these Regulations.

Appeal Tribunal: location of certain proceedings under these Regulations

58.—(1) Any proceedings before the Appeal Tribunal under these Regulations, other than appeals under paragraph (u) of section 21(1) of the Employment Tribunals Act 1996(**8**) (appeals from employment tribunals on questions of law), shall—

(a) where the registered office of the transferee company or merging company is situated in England and Wales, be held in England and Wales; and

(b) where the registered office of the transferee company or merging company is situated in Scotland, be held in Scotland.

(2) In section 20(4) of the Employment Tribunals Act 1996 (the Appeal Tribunal)—

(a) for "2004 and" substitute "2004,"; and

(b) after "Regulations 2006" insert "and regulation 58(1) of the Companies (Cross-Border Mergers) Regulations 2007".

Appeal Tribunal: appeals from employment tribunals

59. In section 21(1) of the Employment Tribunals Act 1996 (circumstances in which an appeal lies to the Appeal Tribunal from an employment tribunal)—

(a) omit the word "or" at the end of paragraph (s); and

(b) after paragraph (t), insert—

"or

(u) the Companies (Cross-Border Mergers) Regulations 2007.".

ACAS

60.—(1) If on receipt of an application or complaint under these Regulations the CAC is of the opinion that it is reasonably likely to be settled by conciliation, it shall refer the application or complaint to the Advisory, Conciliation and Arbitration Service ("ACAS") and shall notify the applicant or complainant and any persons whom it considers have a proper interest in the application or complaint accordingly, whereupon ACAS shall seek to promote a settlement of the matter.

(2) If an application or complaint so referred is not settled or withdrawn and ACAS is of the opinion that further attempts at conciliation are unlikely to result in a settlement, it shall inform the CAC of its opinion.

(3) If—

(a) the application or complaint is not referred to ACAS; or

(b) ACAS informs the CAC of its opinion that further attempts at conciliation are unlikely to result in a settlement,

the CAC shall proceed to hear and determine the application or complaint.

(**8**) Section 21(1) has been amended on a number of occasions to specify additional proceedings and claims to which the section applies.

Restrictions on contracting out: general

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

(a) to exclude or limit the operation of any provision of this Part of these Regulations other than a provision of Chapter 7 (protection for employees and members of special negotiating body) (but see regulation 62); or

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

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

Restrictions on contracting out: Chapter 7 of this Part

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

(a) to exclude or limit the operation of any provision of Chapter 7 of this Part of these Regulations; or

(b) to preclude a person from bringing any proceedings before an employment tribunal under that Chapter.

(2) Paragraph (1) does not apply to any agreement to refrain from instituting or continuing proceedings before an employment tribunal where a conciliation officer has taken action under section 18 of the Employment Tribunals Act 1996 (conciliation).

(3) Paragraph (1) does not apply to any agreement to refrain from instituting or continuing before an employment tribunal proceedings within section 18(1) of the Employment Tribunals Act 1996 if the conditions regulating compromise agreements under these Regulations are satisfied in relation to the agreement.

(4) For the purposes of paragraph (3) the conditions regulating compromise agreements are that—

(a) the agreement must be in writing;

(b) the agreement must relate to the particular proceedings;

(c) the employee must have received advice from a relevant independent adviser as to the terms and effect of the proposed agreement and, in particular, its effect on his ability to pursue his rights before an employment tribunal;

(d) there must be in force, when the adviser gives the advice, a contract of insurance, or an indemnity provided for members of a profession or professional body, covering the risk of a claim by the employee in respect of loss arising in consequence of the advice;

(e) the agreement must identify the adviser; and

(f) the agreement must state that the conditions in sub-paragraphs (a) to (e) are satisfied.

(5) A person is a relevant independent adviser for the purposes of paragraph (4)(c)—

(a) if he is a qualified lawyer;

(b) if he is an officer, official, employee or member of an independent trade union who has been certified in writing by the trade union as competent to give advice and authorised to do so on behalf of the trade union; or

(c) if he works at an advice centre (whether as an employee or as a volunteer) and has been certified in writing by the centre as competent to give advice and authorised to do so on behalf of the centre.

(6) But a person is not a relevant independent adviser for the purposes of paragraph (4)(c) in relation to the employee—

(a) if he is, is employed by or is acting in the matter for the employer or an associated employer; or

(b) in the case of a person within paragraph (5)(b) or (c), if the trade union or advice centre is the employer or an associated employer.

(7) In paragraph (5)(a), a "qualified lawyer" means—

(a) as respects England and Wales, a barrister (whether in practice as such or employed to give legal advice), a solicitor who holds a practicing certificate, or a person other than a barrister or solicitor who is an authorised advocate or authorised litigator (within the meaning of the Courts and Legal Services Act 1990(**9**)); and

(b) as respects Scotland, an advocate (whether in practice as such or employed to give legal advice) or a solicitor who holds a practising certificate.

(8) A person shall be treated as being a qualified lawyer within paragraph (7)(a) if he is a Fellow of the Institute of Legal Executives employed by a solicitors' practice.

(9) For the purposes of paragraph (6) any two employers shall be treated as associated if—

(a) one is a company of which the other (directly or indirectly) has control; or

(b) both are companies of which a third person (directly or indirectly) has control,

and "associated employer" shall be construed accordingly.

Amendments to the Employment Act 2002

63. In the Employment Act 2002(**10**) at the end of each of the following Schedules—

(a) Schedule 3 (tribunal jurisdictions to which section 31 applies for adjustment of awards for non-completion of statutory procedure);

(b) Schedule 4 (tribunal jurisdictions to which section 32 applies for complaints where the employee must first submit a statement of grievance to employer); and

(c) Schedule 5 (tribunal jurisdictions to which section 38 applies in relation to proceedings where the employer has failed to give a statement of employment particulars),

there is inserted—

"Regulation 51 of the Companies (Cross-Border Mergers) Regulations 2007 (detriment in relation to special negotiating body or employee participation)".

Amendments to the Employment Appeal Tribunal Rules 1993

64.—(1) In rule 2(1) of the Employment Appeal Tribunal Rules(**11**) 1993, after ""the Information and Consultation Regulations" means the Information and Consultation of Employees Regulations 2004;" insert—

""the 2007 Regulations" means the Companies (Cross-Border Mergers) Regulations 2007;".

(2) In rules 3(1)(d), 3(3)(d), 4(1)(e), 5(c) and 7(1)(e), after "or regulation 35(6) of the Information and Consultation Regulations" insert "or regulation 57(6) of the 2007 Regulations".

(3) In rule 16AA after "or regulation 22(6) of the Information and Consultation Regulations" insert "or regulation 53(6) of the 2007 Regulations" and after "regulation 33(4) of the 2004

(**9**) 1990 c.41.
(**10**) 2002 c.22.
(**11**) S.I. 1993/2854.

Regulations or regulation 22(4) of the Information and Consultation Regulations" insert "or regulation 53(4) of the 2007 Regulations".

(4) In rules 26 and 31(1)(c) omit "or" before "regulation 22 of the Information and Consultation Regulations" and after insert "or regulation 53 the 2007 Regulations".

(5) In the Schedule, on the Heading of Form 1A, omit "or" before "regulation 35(6) of the Information and Consultation Regulations" and after insert "or regulation 57(6) of the Companies (Cross-Border Mergers) Regulations 2007".

(6) In the Schedule—

(a) on the Heading of Form 4B, in the heading, after "regulation 22 of the Information and Consultation Regulations" insert "or regulation 53 of the Companies (Cross-Border Mergers) Regulations 2007"; and

(b) in paragraph 5, after "regulation 22 of the Information and Consultation Regulations" and before "(*delete which does not apply)*." insert "or regulation 53 of the Companies (Cross-Border Mergers) Regulations 2007".