

## **GMB Response on DTI Consultation on Implementation of European Company Statute (SE)**

The GMB is Britain's fourth largest trade union with over 600 000 members employed in all sectors of the UK economy working for both private and public employers. The GMB has membership in many companies both UK and European that may be in a position to form a European Company (SE). At present the GMB is involved in over one hundred UK and European companies that have active European Works Councils.

### **Overview**

In this document we have used the term UK rather than GB as it is our belief that this legislation should apply equally to all European Companies in the UK whether they be registered in England, Scotland, Wales or Northern Ireland. We also believe that where separate regulations need to be applied such as in Northern Ireland they should apply from the same date.

The GMB believes that the move towards European Companies (SEs) will be gradual at first, but may well take off in the future for both inward investment and future joint ventures. With this in mind we believe that the UK government should take a positive approach to European Companies and encourage new SEs to set up and invest in the UK.

It is our belief that strict but transparent controls of SEs are in the interest of both the UK and Europe. To enable this happen we should build on some of the lessons and experiences of the last few years, to ensure that UK registered companies have adequate controls, effective corporate governance and proper information and consultation procedures for employees in place.

The recent public concerns about UK companies include problems of reward for failure, excessive directors' pay and pensions and inadequate information to employees and representative trade unions. This should not be repeated in SEs registered in the UK.

It is our belief that transferring some of the better practices from companies registered in other European states would greatly assist in providing better corporate governance and accountability to all stakeholders, including shareholders, employees and local communities in which the companies are based.

The GMB is of the view that employee participation undertaken correctly can be an asset to a company. We would point to the success of the DTI partnership Fund which has supported 160 projects in under 4 years improving industrial relations and company productivity through working together with employees.

Therefore we strongly believe that the DTI approach to employee involvement in SEs needs to be rethought on a more balanced basis.

## **The Consultation document**

### **Regulation 16 Duty of participating companies to provide information**

The GMB believes that companies setting up European Companies (SEs) must provide adequate information for the setting up of a Special Negotiating Body (SNB) and provide that information early enough for it to have relevance to the employee and their representatives.

This information must be readily available to representative trade unions and where necessary the appropriate European Trade Union Federation. Where an existing national works council/negotiating committee and/or European Works Council (EWC) are in being they must be provided with adequate information at an early stage.

Where an EWC is already in place this should remain in place until it is replaced by agreement of all sides in the new European company.

### **Regulation 19 Composition of SNB**

The GMB is happy with the formula set out in the document for establishing the composition and representation on the Special Negotiating Body (SNB).

### **Regulation 19 and 20 Complaints about information establishment of an SNB**

We believe that the Central Arbitration Committee (CAC) is the correct body to hear complaints on the establishment of an SNB and provision of information needed in setting up an SNB. However, it is important that the CAC has the power not only to impose sanctions on companies that do not provide information, but they must be able to require the company to provide the information and the ability to enforce disclosure when it does not happen.

### **Regulation 21 Balloting Arrangements**

It is important that where a ballot takes place that both officers of a recognised trade union and/or the appropriate European Trade Union Federations have the right to stand in these elections. The management must not have the right of veto over these nominations.

The management should not have the right of veto on who stands for election to an SNB once an agreement on the qualifications have been reached. Providing a nomination complies with these agreed rules it should be valid.

Where a ballot takes place this must be subject of independent supervision and scrutiny as stated in the document.

### **Regulation 23 Appointment of UK members of consultative committees**

We are strongly of the view that the same rules that apply to SNB members and EWC members under the European Works Council Directive are applied to SEs registered in the UK. Where trade unions have representation rights on existing works councils and/or negotiating committees these works councils or negotiating committees should have the right to appoint members without the need to ballot.

### **Regulation 31 Disputes about operation of an Employee involvement agreement or standard rules on employee involvement.**

It is our belief that competent and representative bodies for taking complaints to the CAC must include representative trade unions, European Trade Union Federations and European Works Councils.

### **Regulation 32 Penalties**

it is important that the CAC has the power not only to impose sanctions on companies that do not comply with orders, but they must be able to require the company to comply with CAC orders and instructions. We are concerned that the proposed limit of £75 000 may be too low to be effective remedy on rogue companies.

### **Regulation 34 Confidential Information and Breach of Duty**

The GMB accepts that from time to time information will be given to SNB members, worker directors and trade union officials that will be confidential and could harm the company if it was in the public domain or in the public domain too early. Under these circumstances we understand the need for confidentiality and confidentiality clauses.

However, these clauses must not restrict and compromise employee representatives from undertaking their role and duties as an employee representative. These clauses must not be drawn so tightly that it prevents SNB members, worker directors and trade union officials discussing these issues amongst themselves or seeking legal advice from other senior trade union officers or trade union lawyers.

### **Regulation 35**

Information is vital to employee representatives and must be provided freely and where it is confidential it must still be provided to employee representatives but as confidential We are concerned that management should not be allowed to abuse their duties and withhold information or refuse to consult. Companies obligations to consult and the rights of workers to be consulted in confidence should be clearly stated in Stock exchange rules. Therefore preventing managers from seeking to hide behind "stock market sensitivity" where this is not justified.

### **Regulation 36 and 38 Protection of members of Special Negotiating Bodies (SNB)**

It is important that members of SNBs have the right to reasonable time off and adequate facilities such as office, telephone, fax and email to enable them to perform their functions and duties as SNB members. This must also include the right to meet members and representatives of the workforce to feed back information and decisions from SNB meetings.

### **Regulation 39-42 Unfair dismissal and detriment.**

It is important that members of the SNB are protected from unfair dismissal and detriment while undertaking their duties as a member or candidate for an SNB.

### **Small and Private Companies**

The proposed regulations requires that companies forming an SE must have a minimum share value of €120 000 (£84 000). As UK public companies under UK law require a minimum share value of £50 000. This would indicate that a large proportion of UK public companies could form a European Company if they wished to. We do not see that setting the valuation of European companies at €100 000 is a problem for small companies at this stage.

We would welcome the European Commission's proposal to look at legislation for private companies. This study could also look at the issues of smaller companies and any benefits and disadvantages that have occurred through exclusion of companies under the €120 000 capitalisation rule.

### **Costs of forming a European company**

The consultation document identifies a number of costs for those companies that decide to consider forming an SE. These are :

Legal costs	£2400
Management costs	400
Board Costs	<u>600</u>
Total	£3400

We believe that this is a very minor cost for companies this size and the cost may be even less as the costs of both the management and board meeting time may be dissipated in the cost of combining the business with that of other business in the same meeting.

The estimated costs comparison for setting up a European company for UK companies in the consultation document is exaggerated. To show this without showing any positive benefits of a European Company is also misleading.

We believe that by applying the figure for an individual company at £3 400 and multiplying by 5% (250) of UK companies that qualify and could form a European Company. Produces a cost to those companies £0.85m. We believe that this is a perfectly acceptable voluntary cost of setting up a European Company.

It is also our view that costs used in the consultation document compared with the company costs of undertaking mergers and joint ventures and are not prohibitive at all.

### **Costs and comparison of Employee Involvement in an SNB**

The consultation document believes that the principal additional cost would come from employee involvement yet offer no figures on the cost of employee involvement to quantify this statement.

The document then goes on to cost conducting a ballot for SNB members in the UK at £13 650. There would not be a cost in other member states, as they would be able to appoint members from existing works councils. It then goes on to estimate the cost of a meeting of the SNB at £24 000

Using these costs the consultation document gives three cases based on a company employing 50 000 employees.

**Case 1:** Two SNB meetings and agree to continue with existing national information and consultation rights and national agreements.

Cost is for two meetings at: £48 000

**Case 2 :** Four SNB meeting are required to reach a voluntary agreement which changes some existing agreements and requires one or more transnational meetings per year costing £64 000 per year.

Cost for four meetings at : £88 000

**Case 3 :** Six to eight SNB meeting and parties fail to agree at a cost of between £143 000 to £190 000. Interim fallback arrangements are applied similar to case 2 . This gives a cost of conducting a ballot of £13 650 and the maximum cost of eight meetings at : £190 000.

Note : All cost are based on figures in consultation document.

The GMB strongly disputes the way the figures and costs are shown as expensive. No positive connotations are included of the benefits of employee involvement and participation is put into the document.

In the worst case scenario the cost is £190 000 + £24 000 for a ballot totalling £214 000. Assuming that the company has 50 000 employees then the cost per employee is only £4.28

In the best case agreement is reached in two meetings at £48 000 and there is no need to ballot as there is already a representative UK negotiating committee. Total cost is £48 000 and the cost is reduced to 96pence per employee.

We would also like to point out that employee participation can well have a positive effect on companies and industrial relations. It is therefore quite possible, that having set up an SNB from the different member states in which the company or joint venture operates, that discussion in the SNB could lead to a number of on going savings which would include changes to production, new product, or product range simplification and manufacturing and logistical efficiencies. These could far outweigh the minimal investment of 96pence per employee.

**The GMB strongly believes that the DTI approach to employee involvement in SEs needs to be rethought on a more balanced basis.**

### **Supervisory Boards and Employee Involvement**

The document states in Annex D section 29 that there is no tradition of employee participation the UK and therefore use costs based upon the German model of Codetermination. We believe the use of these cost are satisfactory. However, we would like to point out that the DTI operates a Partnership Fund (which the GMB is very supportive) to improve employee involvement and improve efficiency of UK companies.

We would remind you of the success of the Partnership Fund in that it has assisted 160 projects and spent some £5m in less than four years on worthwhile projects creating employee forums and participation bodies in UK work places.

*“Many organisations in Britain have realised the potential of a partnership approach to develop the productivity and job satisfaction of the workforce and are now reaping the rewards. But there are many others, not yet aware of the benefits, which are falling behind through their failure to adopt new ways of working”. The Fund will be making more organisations aware of the benefits of partnership by supporting projects to spread best partnership practice more widely”.*

Source DTI web site Jan 2004

The GMB believes that we should build on this success of the Partnership Fund and should encourage companies that wish to form European Companies to consider two tier boards along the German codetermination model.

We believe that two tier boards with a supervisory board with employee or trade union representation (codetermination) are a potentially important asset to companies and are valued by existing companies that have them. Experience of this system in Germany and other EU states that operate similar systems should not be lost.

We are of the view that where an existing company already operates a system of employee involvement, whether of the German supervisory codetermination system or the Scandinavian system of individual elected employee representatives on the board, that employee representation should be maintained in the new European Company (SE).

The GMB is of the view that the German codetermination system with between 33% and 50% employee representation on a supervisory board is the better of the two systems and when there is a choice of method of representation this is our preferred method. Although we are not against the Scandinavian method of one or two employee representatives elected to the single tier board, we are concerned that one or two employee directors can become isolated from the rest of the board, especially if they are in disagreement with the rest of the board.

We would also wish to extend the right that members of the board or supervisory boards could include both employees of the companies and full-time trade union employees of representative trade unions for SE registered in the GB and Northern Ireland.

### **Election Employee Representation at Board level**

It is our view that where there is existing employee representation on the board and/or a European Works Councils, these employee representative bodies must be consulted as part of the process for setting up an SE and an SNB.

It is important that European company SNB's are set up properly with adequate information being provided to both the employees and their representative trade unions. This would include the appropriate European Trade Union Federation who may act as the employee co-ordinating body.

It is important that the employee representatives on the SNBs have adequate access to appropriate experts to assist them with their negotiations. Officers of both representative trade unions and European Trade Union federations should be classed as experts for this purpose.

We note that the consultation document estimates the additional cost of two extra UK board representatives would be £15 000 per year (section 30). The GMB believes that this is a minimal cost compared with the benefits to the company as a whole, based on a company with 50 000 employees the cost per employee would be 3pence per employee per year.

We note that the consultation document recognises that in section 32 there is no evidence from Japanese companies with Works Councils in Germany to show that worker participation slows down decision making and reduces the company's competitive edge.

In fact the evidence is the opposite with German companies some of the most productive in Europe, using high tech production systems and the largest exporter of all the EU member states.

### **European works Councils (EWC)**

It is possible that there may already be one or more EWCs within the existing companies that are proposing to form a new European Company. Under these circumstances all members of the existing EWC(s) should be informed of and involved in the development of the proposals and be allowed to comment on the proposal both directly and through their employee representatives, Trade Union or European Trade Union Federation officers.

Where one or more EWCs are already in place they should remain in place and not be disbanded until they are replaced unless this is agreed to by all parties that are part of the new European Company.

### **Corporate Governance**

Lack of corporate governance has been an ongoing concern in UK companies since the early nineties. There has also been growing concern at high level of directors' reward packages since the early 1990s which led to two special reports the Cadbury and Greenbury reports on corporate governance, and their recommendations. However despite these reports and numerous changes to company corporate governance, directors' pay and rewards have continued to rise and grow. This resulted in the DTI consultation on "Rewards for Failure" in 2003

The GMB welcomed the opportunity of responding to the DTI Consultation on "Rewards for Failure". We also point out there are fewer problems of excess company director's pay and corporate governance problems in those European Companies registered in other EU states that have two tier boards modelled on the German codetermination model with worker participation on supervisory boards. The GMB believes this is another good reason not only for adopting, but

promoting employee representation on European Companies (SE) based in the UK.

## **Other issues**

### **Share Capital and Accounts**

Under Regulation 3.13 it proposes to allow UK European Companies to report and express accounts in sterling. We believe that in the interests of clarity of information and consultation for non-UK workers, accounts should be expressed in Euros or in Euros and Sterling should be specified.

### **Subsidiaries Registered outside the European Economic Area**

Regulation point 3.14 referring to Art.7 on registration of company outside of member states. We have concerns that this regulation could be used for registering subsidiary companies outside of European companies outside the European Economic Area (EEA) and transferring their European employees to these subsidiaries based outside the EEA and therefore diluting their statutory employment rights

## **In Conclusion**

The GMB believes that the UK should :

- Adopt the European Directive on European Companies (SEs) in full.
- Encourage the registering of SEs in the UK.
- SEs should be encouraged to adopt worker participation.
- The German Codetermination system is the GMB preferred model of worker participation,
- Where existing companies have worker participation in an existing member state this should be extended into the new SE.
- Where representative Trade Unions have negotiating rights they should be allowed to nominate employee representatives from existing works councils or negotiating committees to the SNB.
- Employees, Trade Union officers or officers from European Trade Union Federations should be eligible to sit on company supervisory boards.
- Trade Union officers or officers from European Trade Union Federations should be allowed as experts at SNB meetings.
- SNB and Worker directors should be covered by employment protection legislation to enable them to undertake their duties.
- Adequate information and consultation rights must be provided to Employees, Trade unions officers or officers from European Trade Union Federations.
- Where an existing national works council/negotiating committee and/or EWC are in being they must be provided with adequate information at an early stage.
- The CAC is the appropriate regulator and dispute body in the UK.

- The CAC must have adequate powers of sanction and enforcement against companies that do not comply.
- All balloting must be undertaken and overseen by an independent organisation.
- Confidentiality clauses must not prevent SNB members, worker directors and trade union officials from performing their role as employee representatives.
- The maximum penalty of £75 000 for companies that do not comply with CAC decisions is too low and should be raised
- Accounts should be expressed in Euros or Euros and Sterling but not just sterling.

Note: In this document we have used the term UK rather GB as it is our belief that this legislation should apply equally to all European Companies in the UK whether they be registered in England, Scotland, Wales or Northern Ireland.

Charles King  
GMB research  
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email [charles.king@gmb.org.uk](mailto:charles.king@gmb.org.uk)

tel. 020 8971 4229

ANNEX A

MEMBER STATE OPTIONS IN THE REGULATION

Article	Description of Member State option	Intention to adopt option (yes/no)	Paragraph of consultative document in which option is described. Regulation of SI in which option is referred to (where it is proposed to adopt option)	Comments by consultees. Please indicate whether you agree with proposal to adopt (or not to adopt) Member State option. Please add any other comments you would like to make
2(5)	Companies with head office outside Community may form SEs	No	Paragraph 3.9	Agree.
7	Head office may be required to be in same place as registered office	No	Paragraph 3.14	Agree
8(2)	Additional forms of publication of proposal to transfer	Yes	Paragraph 3.18 Regulation 51	Agree
8(5)	Additional protections for minority shareholders in transferring SE	No	Paragraph 3.18	Agree
8(7)	Extension of protection in Article 8(7) to liabilities incurred before transfer	Yes	Paragraph 3.18 Regulation 52	Agree
8(14)	Competent authorities may oppose transfer of SE on public interest grounds	Yes	Paragraph 3.18 Regulation 53	Agree
12(4)	Management or administrative organ of SE may amend statutes where in conflict with employee involvement arrangements	Yes	Paragraph 3.20 Regulation 54	This should only take place after consultation with employee representatives
19	Competent authorities may oppose participation of merging company on public interest grounds	Yes	Paragraph 3.27 Regulation 55	Agree

24(2)	Additional protections for minority shareholders in merging company	No	Paragraph 3.27	Agree
31(2)	Where a merger by acquisition is carried out by a company which holds shares conferring 90% or more of the voting rights, reports do not have to be produced	No	Paragraph 3.27	Agree
34	Additional protection for minority shareholders, creditors and employees in companies promoting the formation of a holding SE	No	Paragraph 3.31	Agree
37(8)	Conversion of PLC to SE may be conditioned upon a qualified majority or unanimity in employee participation organ	No	Paragraph 3.33	Disagree : We believe Employee representatives should be consulted before conversion to a SE
39(1)	In a two-tier system, a managing director or directors may be responsible for current management under the same conditions as PLC	No	Paragraph 3.45	Agree
39(2)	Members of management organ may be permitted or required to be appointed or removed by general meeting on same terms as PLC	Yes. Permit but not require	Paragraph 3.45 Regulation 56	Agree
39(3)	Time limit may be imposed on supervisory organ member serving on management organ in the event of a vacancy	No	Paragraph 3.45	Agree
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	Paragraph 3.45 Regulation 57	Agree : In the case of SE with a supervisory board. The supervisory board must have a minimum of two directors including one employee representative.

39(5)	Appropriate measures may be adopted in relation to SEs where there is no provision for two-tier system in PLC law	No	Paragraph 3.45	Disagree : Introduction of employee participation and supervisory board should be encouraged.
40(3)	The number of members of a supervisory organ (or a minimum and/or maximum number) may be stipulated	Yes in respect of min. No in respect of max	Paragraph 3.45 Regulation 58	Agree: In the case of SE with a supervisory board. The supervisory board must have a minimum of two directors including one employee representative.
41(3)	Each member of supervisory organ be entitled to receive information	No	Paragraph 3.45	Disagree: It is important that all members of supervisory organ receive adequate and the same information
43(1)	In a one-tier system, a managing director or directors may be responsible for day-to-day management under the same conditions as PLC	No	Paragraph 3.46	No view
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	Paragraph 3.46 Regulation 59	Agree: Where a single tier board include an employee representative it should have a minimum of three directors including one employee members.
43(4)	Appropriate measures may be adopted in relation to SEs where there is no provision is made for one-tier system in PLC law	No	Paragraph 3.46	No view
48(1)	In a two-tier system the supervisory organ may be authorised to make certain categories of transaction subject to authorisation	No	Paragraph 3.49	No view
48(2)	Categories of transactions may be required to be indicated in an SE's statutes	No	Paragraph 3.49	No view
50(3)	PLC rules may be applied to supervisory authority's quorum and decision-taking where there is employee participation	No	Paragraph 3.49	No view

54(1)	First general meeting of SE may be held at any time in the 18 months following incorporation	Yes	Paragraph 3.38 Regulation 60	Agree
55(1)	Smaller proportion of shareholders than 10% may request convening of general meeting of SE if that proportion applies in PLC law	No	Paragraph 3.38	Disagree: The SE should take a lower percentage if that already applies to the company in an existing state.
56	Smaller proportion of shareholders than 10% may require items to be put on agenda of general meetings of SE if that proportion applies in PLC law	No	Paragraph 3.38	Disagree: The SE should take a lower percentage if that already applies to the company in an existing state.
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	Paragraph 3.38	This should only apply if votes are cast. Abstentions should be recorded as abstentions and not cast in favour of the motion by chair's proxy.
67(1)	Member States not within Euro zone may make SEs subject to same law as PLCs as regards expression of capital	Yes	Paragraph 3.13 Regulation 61	Agree : However, account must also be published in Euros.
67(2)	Member States not within Euro zone may require accounts to be published in national currency under same conditions as for PLCs	Yes	Paragraph 3.13 Regulation 62	Disagree: The SE accounts must also be published in Euros or Euros and Sterling.

**PRINCIPAL PROVISIONS IN REGULATION REQUIRING MEMBER STATES TO ENACT MEASURES**

Article	Description of requirement placed on Member States	Measure proposed in SI to implement requirement	Paragraph of consultative document in which requirement and proposed measure is described. Regulation of SI which refers to proposed measure	Comments by consultees. Please indicate whether you agree with proposed measure to implement requirement. Please add any other comments you would like to make
8(7)	Before competent authority issues certificate allowing SE to transfer to another Member State, SE needs to show in respect of liabilities incurred before publication of transfer proposal that the interest of creditors etc have been protected	SE to make a statement of solvency	Paragraph 3.18  Regulation 67	Agree
12(4)	Measures to be introduced ensuring that statutes of SE do not conflict with employee involvement arrangements	Secretary of State may issue a direction to the SE to amend its statutes. Direction is enforceable in the courts	Paragraph 3.20 Regulation 71	Agree
64	Where SE is in breach of Article 7 requiring registered office and head office to be in the same Member State, measures to be introduced including judicial remedies and liquidation	Secretary of State may issue a direction to the SE requiring it to comply with Article 7 - the direction is enforceable in the courts. Secretary of State may also petition the court for the SE to be wound up	Paragraph 3.57 Regulation 68	Agree

68(2)	Member States to designate competent authorities for the purposes of Articles 8, 25, 26, 54, 55 and 64	The Secretary of State for Trade and Industry is to be the competent authority in respect of Articles 8, 54, 55 and 64. The court is to be the competent authority in respect of Articles 25 and 26	Implementation of Article 68(2) is referred to in paragraph 3.58 and in Regulation 70. Further information can be found, as follows:  Paragraph 3.18 (Article 8) Paragraph 3.27 (Article 25) Paragraph 3.27 (Article 26) Paragraph 3.38 (Article 54) Paragraph 3.38 (Article 55)	Agree
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## OTHER ISSUES RELATING TO THE REGULATION ON WHICH COMMENTS ARE SOUGHT

Issue	Comments
Do you have any comments on Regulation 72 of the draft SI at Annex B under which it is proposed that the records of a GB registered company which ceases to exist or an SE which transfers its registered office to another Member State shall be retained at Companies House for a period of twenty years? In particular, do you agree with the proposed period? (A company will cease to exist as a result of it merging with another company to form an SE.)	Agree : it is important that records of both UK and UK registered companies appear at the appropriate companies house and when they cease to exist within the UK the accounts should be a matter of public record for 20 years.
Do you have any comments on the draft forms to be filed at Companies House which are to be included in Schedule 3 to the draft Statutory Instrument at Annex B? Consultees will wish to note, in particular, the proposed requirements for directors of companies (or members of SEs) and, in some cases, solicitors to sign the relevant forms).	No view
Do you have any other comments on the draft Statutory Instrument at Annex B?	<b>Please see attached paper</b>

Charles King  
GMB research  
08 January 2004

email [charles.king@gmb.org.uk](mailto:charles.king@gmb.org.uk)  
tel. 020 8971 4229

