

## **European Company Statute: TUC Response**

### **Implementation of the European Company Statute: The European Public Limited-Liability Company Regulation 2004**

#### **Transfer of an SE to another Member State**

Article 8(7) provides that before an SE can transfer its registration from one Member State to another, it requires a certificate from the competent authority. This is subject to the SE being able to show that it has provided adequate protection for the interests of creditors and other right holders. Member States may extend this protection to liabilities incurred after the publication of the transfer proposal but before the transfer itself takes place. The TUC agrees with the DTI's proposals to adopt this option.

#### **Public interest**

Article 8 (4) allows Member States to provide that competent authorities may oppose the transfer of an SE or the participation of a merging company to form an SE on public interest grounds. The TUC supports the DTI's proposals to implement this option.

#### **Amending the statutes to reflect employee involvement**

Article 12 (4) allows Member States to provide that the management or administrative organ of an SE may amend the statutes where they conflict with the agreed employee involvement arrangements without recourse to a general meeting. The TUC supports the DTI's proposal to adopt this option.

#### **Additional protections**

Article 34 provides that Member States may adopt provisions to protect shareholders, creditors and employees in companies promoting the formation of a holding SE. The TUC would instinctively support protection for employees and creditors in companies promoting the formation of a holding SE, and would therefore disagree with the DTI's proposal not to take up this option. Clearly it would be important to understand how this would work in practice, and we would like to see information on the various options for this outlined by the DTI.

#### **Conversion to SE conditional on vote in employee participation organ**

Article 37(8) provides that Member States may make the conversion of a PLC to an SE conditional upon a qualified majority or unanimity in employee participation organ. The explanation given (para 3.33) for not taking up this option is that formal employee participation on the board does not exist within PLCs in the UK. However, the Government is in the process of implementing the Information and Consultation Directive, which gives employees the right to be consulted on a range of issues, including the 'recent and probable developments of the undertaking's activities and economic situation'. The conversion of a PLC to an SE would clearly be an important 'development of the undertaking's activities and economic situation', and the TUC believes that employees would therefore automatically have the right to be consulted under the terms of this legislation. This would mean that conversion of an existing

PLC to an SE would be conditional upon the company consulting its employees with a view to reaching agreement.

The TUC would welcome confirmation of this point. In addition, we believe the need to consult employees about the conversion of a PLC to an SE should be included in Government guidance produced on both the Information and Consultation legislation and the European Public Limited-Liability Company Regulations 2004, and would welcome confirmation that this will happen.

### **Rights of supervisory boards**

Article 39(2) of the Directive provides for a Member State to permit (or require) management boards to be appointed in the normal way, rather than by supervisory boards in two-tier companies. The UK proposal is to permit this. The TUC is concerned that this may permit UK-based SE to undermine established appointment rights in companies, based elsewhere in Europe and having two-tier boards, which are subsequently taken over.

Similar concerns exist over the proposal not to permit the supervisory body powers to require that certain transactions should be subject to its authorisation (article 48 (1)), nor to determine categories of such transactions at national level (48(2)). Again there is a concern that this may act to remove existing powers of supervisory boards in companies taken over subsequent to the formation of the SE.

### **No of members of management and supervisory organs**

Articles 39(4) and 40 (3) provide that Member States may stipulate maximum and minimum numbers of members of the management and supervisory organs respectively in a two tier system. The UK Government argues that applying the current UK requirement that PLCs have at least two directors to a two-tier regime means that a management and supervisory organ should be required to have a minimum of one member each. The TUC believes that one member is insufficient to facilitate the effective operation of either the management or supervisory organs. If consistency with existing law is being sought, it would make more sense to require a minimum of two members for each organ. This would also be more consistent with requirement that in a one-tier system the administrative organ would consist of at least three members where employees participation is determined according to the Directive.

### **Provision for two-tier system in PLC law**

Article 39(5) provides that Member States may adopt appropriate measures where there is no current provision for two-tier boards for PLCs. Although UK company law makes no specific provision for two-tier boards, the Government argues that there is nothing in UK law that prevents a company from setting itself up with a two-tier system, and therefore does not intend to include any specific measures on this.

The TUC believes that while it may be the case that nothing in UK law prevents companies from setting themselves up with a two-tier board system, the fact that no specific provisions on this exist makes it much harder in a practical sense and therefore much less likely that firms will do so. The lack of

provisions for two-tier boards may also deter UK companies from becoming SEs. If there are advantages in becoming an SE – which is presumably the basis of the Regulation in the first place – this could put UK companies at a disadvantage in relation to their European competitors, who may find it more straightforward to set up as an SE because of their greater familiarity with the two-tier board system.

There is also the question about how UK corporate governance guidance – in particular the Combined Code of Corporate Governance – would apply to a two-tier board system. For example, it is important to consider how the Combined Code provisions on independence of non-executive directors would apply in a two-tier board system, especially where employee participation was determined according to the Directive. One possibility would be to apply a different definition of ‘independence’ in a two-tier board system, based on being independent of management, rather than the company. The DTI should issue guidance on this; failure to do so would show how accepted corporate governance standards could be adapted to apply to a two-tier system could again put UK companies in an unfavourable position in relation to their European counterparts.

#### **Each member of supervisory organ entitled to receive information**

Article 41(3) allows Member States to provide that each member of the supervisory board is entitled to require information from the management board in order to carry out their duties. The UK Government does not propose to adopt this, arguing that the supervisory board should agree collectively what information it requires. However, there are times when different board members may have genuinely different requirements in terms of the amount and type of information they need. For example, the Chair of the supervisory board might be expected to peruse more information than other members. The TUC believes that for the supervisory board to function effectively, it is important that individual members are able to receive the information that they believe they need. This would supplement, not replace, decisions made on a collective basis about information that the supervisory board as a whole wishes to receive.

#### **Trade union representatives**

Proposed Regulation 21 (3) d (ii) suggests that trade union representatives who are not employees may only be candidates for an SNB “if the management of that participating company so permits”. This is not acceptable, and represents a step backwards from the provision in the *Transnational Information and Consultation of Employees Regulations 1999*, in which UK SNB candidates must be “any UK employee, or UK employees’ representative, who is an employee of or an employees’ representative in, the Community-scale undertaking” (emphasis added). If trade union officials have a right to stand as SNB representatives for negotiating European Works Councils, there is no justification for making this subject to management approval for SNBs negotiating the establishment of a European Company.

This proposed restriction is repeated in Regulation 23(2)(b)(ii), where even if a consultative committee covering the entire workforce nominates a trade union

official who is not an employee to the SNB, this is subject to the permission of the management.

Members of SNBs must have the right to reasonable time off and facilities such as office, telephone, fax and email, to perform their functions and duties as SNB members. This must include the right to meet members and representatives of the workforce in order to feed back information and decisions from SNB meetings.

### **Penalties**

With regards to enforcement, the TUC agrees that the CAC should be the appropriate body to hear complaints over failure to comply with agreements (or standard rules) on employee involvement. However, the limit of £75,000 for any penalty for failure to comply with remedies seems too low to present any serious deterrent. The maximum fine should be related to turnover or market capitalisation, and should represent a significant percentage of either figure.

### **Information and Consultation structures**

Where information and consultation structures already exist in the component parts of a prospective *SE* (for example, European Works Council(s)), they should remain in place until replaced by agreement of all sides in the new European company.