

THE EUROPEAN COMPANY – PROSPECTS FOR WORKER BOARD-LEVEL PARTICIPATION IN THE ENLARGED EU

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HOW TO USE THE BOOKLET - EDITORS' REMARKS

The purpose of this booklet is above all practical: it is intended for everyone who needs information about the European Company (Societas Europaea, SE) and existing systems of worker board-level participation in the 25 EU countries and Norway. The EU Council of Ministers adopted the EU Regulation on the European Company Statute (EC 2157/2001) in October 2001, along with the accompanying EU Directive on employee involvement in the SE (2001/86/EC)¹. The Regulation's date of entry into force was 8 October 2004, by which time the Directive had to be transposed into national law in all 25 EU member states, plus Norway, Liechtenstein and Iceland as members of the European Economic Area. Since that day companies have been able to opt for this new European corporate form voluntarily.

The decision to establish a European Company requires no official involvement from the workers' side but is an initiative of the employer involving the highest organs of the company. However, once a company has – at least unofficially – announced its interest in setting up an SE the workers and their trade unions need to prepare themselves. The SE Directive takes worker involvement within cross-border companies one step further. On the basis of obligatory negotiations, the employer and worker representatives from the countries involved have to negotiate an agreement on how the workers will be involved in the future SE. The scope of these negotiations not only includes transnational information and consultation rights but also opens up the possibility for the workers to obtain the right to elect or nominate some of the members of the SE's administrative or supervisory board.

This booklet sets out to ensure that opportunities for worker representation at boardroom level are used. The negotiations will bring together people from very different backgrounds. For the success of the negotiations with the employer side it is of crucial importance that the worker representatives manage to speak with a single voice. One important precondition for achieving this is that the worker representatives from the countries involved, supported by their trade unions, follow a European approach and are aware of the different industrial relations backgrounds of the countries involved. While this challenging situation is already well known in the context of European Works Councils, the SE adds a new “chapter”, notably the differing national systems of participation at board level. This important process of gaining mutual knowledge will continue after the SE has been established.

For the purpose of this second edition of our SE booklet all contributions have been thoroughly revised and we have added new articles and overviews to increase its usability. The present publication is the outcome of two projects. In 2003, the European Trade Union Institute carried

¹ The texts of these documents can be found in the Annex.

² Within the framework of the project ten country and ten practitioner reports have been prepared by experts and worker representatives from the new member states. The compilation of these reports and the publication on the EU-15 systems are available at www.seeurope-network.org.

out a project together with the Hans Böckler Foundation and other partner organisations in which information about national systems of worker board-level participation in the EU-15 countries was pooled. In 2005, the SDA, ETUI-REHS and the ETUC, together with eight national partner organisations conducted a follow-up project entitled “PRESENS – Prospects for board-level representation of workers under the European Company Statute in the new EU member states”. The idea was not only to find out more about the national systems of board-level participation in the ten new member states and to increase the awareness of the SE Directive within the trade unions. PRESENS was also intended to create a “platform for listening and learning from each other”. At two transnational “exchange seminars”, practitioners from both the EU-15 countries and the new member states was given the possibility to listen to the experiences and stories of their colleagues.²

Both projects have been supported by the European Commission within the framework of its budget line on “information, consultation and participation of representatives of undertakings” (04.03.03.03, formerly B3-4003). The importance the EU Commission attaches to the further development of worker involvement rights is expressed by Armindo Silva. In his introductory remarks he underlines that with the European Company worker board-level participation has been recognised for the first time in European legislation. It represents an essential element of modern corporate governance contributing to the successful management of structural change. John Monks, General Secretary of the ETUC, emphasises in his contribution the political significance for the European trade union movement of worker participation in the SE.

The introductory section on the SE, providing information on “What is a European Company?”, was written by company lawyer Roland Köstler. It is followed by an assessment of the outcomes of the national transposition process of the SE Directive prepared by Lionel Fulton of the UK-based Labour Research Department. The economist Martin Wenz has added a contribution which focuses on the taxation aspects of the SE. His article which includes answers to Frequently Asked Questions (FAQs) sheds more light on this important and complex issue.

The British journalist and economist Robert Taylor has provided us with an overview of the development of board-level participation within the different national industrial relations systems in Europe, and has also distilled brief member state profiles on the basis of the country reports written within the first project. The PRESENS project enabled us to complete the picture on board-level participation in the EU with an overview article and short country reports on the situation in the ten new EU member states, written by the editors.

We are grateful to the experts who provided us with country reports³ and to all those trade unionists and worker representatives who contributed to the success of the project by participating in the seminars and the final conference.

Norbert Kluge
ETUI-REHS

Michael Stollt
SDA / ETUI-REHS

Brussels, February 2006

³ The list of country experts can be found in the Annex.

**SYSTEMATIC SOCIAL DIALOGUE AS A
CONSTITUENT ELEMENT OF EUROPEAN
CORPORATE GOVERNANCE**



SYSTEMATIC SOCIAL DIALOGUE AS A CONSTITUENT ELEMENT OF EUROPEAN CORPORATE GOVERNANCE

Systematic dialogue between companies' management and workers and their representatives has grown into a constituent element of corporate governance in Europe. In the past it developed in response to workers' claims for a greater degree of involvement in companies' decision-making. Against the current background of intensive restructuring in response to global competition and technological pressure it represents an important asset for dealing successfully with the need to anticipate and manage change at company level.

Social dialogue at company level takes place amidst a variety of national systems and practices anchored in resistant historic traditions and governed by different legal frameworks. However, recent years have witnessed a wider recognition of the principle that workers' information and consultation rights are inherent to the core values of the European Social Model as well as a progressive convergence towards models ensuring workers' direct involvement in company management across the EU. Such trends have been greatly helped by EU legislation which was propped up by the Internal Market and the growing transnational dimension of companies encouraged by it. The need to create a level playing field within the Internal Market while safeguarding the workers' rights as established in more protective legal frameworks, proved a powerful driver for the consolidation and expansion of such rights particularly as regards worker's representation and involvement in decision making at company level.

In a first step in the 1970's two EU Directives introduced an obligation to inform and consult workers or their representatives in the case of collective dismissals and transfers of undertakings. These formal guarantees in situations of crisis and major change had a big impact particularly in those countries with a tradition of voluntary industrial relations and later in the member states that joined the Union in 2004. But the decisive step in this field was given in 1994 with the Directive 94/45 that introduced the

European Work Councils in big companies with establishments in more than one member state. EWCs were conceived as permanent bodies for the information and consultation of workers adapted to the transnational nature of such companies.

The basic concept embodied in this Directive consists in privileging the free negotiation between management and workers in what concerns the concrete definition of the instruments of information and consultation. Only if and when such negotiation fails, it is compulsory to apply a set of standard subsidiary rules.

This concept is at the source of the considerable success of the Directive in the years following its entry into force. The EWCs have actively contributed to extend the role of social dialogue at company level and most have become involved in real negotiations on a wide range of topics including gender equality, health and safety and training. Now some 750 large transnational companies have EWC's, covering an estimated 13 million of employees, with more than 10,000 representatives involved.

It was the same concept of primacy to negotiation, supplemented by compulsory rules in the case of failure, which helped to free the way for the negotiations on the European Company Directive after 1995. In the context of this Directive, that came to adoption in 1997¹, this became known as the "before and after" principle. If and when participation rights exist within one or more companies establishing a European

¹ Directive 2001/86/EC of 8 October 2001.

Company (Societas Europaea – SE), they should be preserved through their transfer to the newly established entity, unless the parties decide otherwise. The concrete procedures of participation should be defined primarily by means of an agreement between the parties, or in the absence of agreement, through the application of a set of standard subsidiary rules.

With Directive 2001/86 employee board-level participation has been recognized for the first time in the European legislation. While the purpose of the Directive is not to expand workers' participation rights, but rather to preserve them, it does create a dynamic process through which the establishment of SEs may provide the opportunity for more advanced formulas of workers' involvement.

The “before and after” principle is also embodied in Article 14 of the Directive on Cross-Border Mergers that has been recently agreed by the Council and the Parliament². This Article establishes the rules for the corporate governance of entities resulting from mergers of companies established in more than one member state. In particular it sets similar rules to those applying to the European Company in what regards workers' board-level participation when at least one of the merging companies is large and is working under a participation system, and the national law applicable to the company resulting from the cross-border merger does not provide for at least the same level of employee participation as operated in the relevant merging companies.

It is significant that the negotiations leading to Directive 2005/56 have just taken two years, after the Commission has set out its last proposal, while the agreement on the European Company took more than thirty years to materialize. It can therefore be concluded that the EU has established a broad consensus on the set of principles that should rule the board-level participation of employees in cases of conflict between different national systems. The application of the EU Directives does not extend the scope of board-level participation of employees; neither does it impose a single model of participation. This is a matter for national law to innovate and adapt. Instead, it protects existing levels of participation and puts the emphasis on management and workers' responsibility to jointly negotiate and cooperate within the enterprise. This objective is fully consistent with the subsidiarity principle and makes good sense, in the face of the growing call for flexibility in managing the consequences of globalisation and technological change.

The European Commission is set to continue to support the development and modernisation of systematic dialogue between companies' management and workers and their representatives. At the same time, it will step up efforts to simplify the legislative “acquis” in order to make it more accessible to business, social partners and citizens, and therefore more effective, in line with the “Better Legislation” strategic initiative. And it will ensure strict enforcement of the transposition and correct application of EU Directives in the national legal order.

In 2005, several concrete actions were launched that confirm the pursuit of these objectives in several fronts:

- The opening of 9 infringement procedures, by means of reasoned opinions, for non-transposition of the Directive 2002/14 (information and consultation); and of 6 infringement procedures, for non-transposition of the Directive 2001/86 (European Company);
- The launch of the second phase of the consultation of social partners on the revision of Directive 94/45 (EWC);
- A study to examine the extent to which it is necessary and feasible to extend the application of the Directive 2001/23 to cross-border transfers of undertakings.

During 2006, the Commission intends to explore the possibilities to simplify and codify the multiple provisions related to the information and consultation that are now dispersed over several EU Directives. It will also examine together with all relevant stakeholders the question of whether it is useful and feasible to envisage an optional legal framework at EU level for transnational collective negotiations between companies' management and workers' representatives.

The Commission will also continue to provide financial and technical support to the exchange of information and good practice in the field of information, consultation and participation of workers at company level. This has proved crucial in order to build up the know-how necessary for workers' representatives to play an active role in the

² Directive 2005/56/EC of 26 October 2005.

emerging European Works Councils, after the Directive 94/45 came into force. Nowadays an effective identification, exchange and promotion of good practice in EWCs is still necessary in order to create the conditions for an effective involvement of workers' representatives in the new member states and to improve the functioning of EWCs, as the social partners at EU level have recognized in a recent joint statement.

With the expansion of the legislative activity of the EU in the field of information, consultation and participation of workers, the objectives of joint partnership projects became more diversified. In particular, the Commission prioritises joint projects having the European Company as subject of study and exchange of information. Now that the legislative framework is established in most member states, it is necessary to monitor its application and verify how companies and workers have dealt with the apparent complexity of the consultation mechanisms, so that lessons can be learnt. Companies have been slow to use the European Company option since it became available in October 2004 and only a few have been created. Particularly relevant examples are the SEs established by Strabag and Brenner Basistunnel, in the construction sector, and by Elcoteq in the electronics sector. But other large transnational companies, such as Allianz, are envisaging their transformation into SE and have announced their plans.

It is in this context that the project developed in 2003/04 by ETUI and the Hans Böckler Foundation on “Prospects for board-level representation under the European Company Statute” takes all its significance. The booklet that was issued as an outcome of the project has now become a fundamental source of information for practitioners on the complex matter of board-level participation systems in the EU and more particularly on the mechanisms leading to the SE. Given the success of this first venture, it was only natural that the Commission lent its support to the PRESENS project, with its aim of extending the coverage of the situation of board-level participation systems into the new 10 member states of the EU. To the extent that companies established in these countries become increasingly involved in transnational operations that call for jointly agreed systems of board-level participation, this booklet will prove a precious tool for trade union officials, experts and managers that are called to play an active role in such operations.

Moreover, it may also serve as a useful reference for academics and policy officers who, in the national administrations, work on the modernisation of national law and

use the wealth of experience in other EU member states as a basis for their reflections.

Finally, it is my sincere wish that these and other joint projects and publications on this topic will strengthen the rationale for board-level worker participation in the EU, as an essential component of modern corporate governance, if the challenge to anticipate and manage structural change in the benefit of all is to be successfully met.

**WORKER INVOLVEMENT IN THE EUROPEAN
COMPANY: ANOTHER STEP TOWARDS
REALISING SOCIAL EUROPE**



WORKER INVOLVEMENT IN THE EUROPEAN COMPANY: ANOTHER STEP TOWARDS REALISING SOCIAL EUROPE

Europe seeks to develop a proper regime of corporate governance which anchors companies within the society. Companies should contribute to the creation of wealth for society as a whole and should not only serve to maximise the short-term profits of their shareholders and managers. Therefore, not only shareholders, but also workers, other citizens and the community at large have an interest in the good governance of companies. An important contribution of the European Union to realising corporate social responsibility is the establishment and maintenance of a well-balanced corporate governance framework by legislation which respects different systems of worker involvement and, at the very least, safeguards existing provisions at national level.

According to the objectives of the Lisbon strategy we need companies and investors who feel responsible for an orientation towards long-term value creation and which are built on high productivity and the creation of innovative goods and services. We believe that this is what makes European economies competitive. Without any doubt, Europe cannot compete with low wage countries on the market of labour intensive products assembled by less qualified employees.

The success of this strategy requires a high level of commitment on the part of the workforce. Only work relations built on trust can facilitate good results also in an economic perspective. We need a different approach from the American “shareholder model” – we need one that aims at finding a balance between the different interests involved and looks at the labour force as human capital and therefore as a partner in business. Consequently, a corporate governance model that motivates capital and labour to agree on the key elements of the company’s policy and management strategy will certainly perform better in the long run. It is

precisely by means of such a model that polarisation within the company will be prevented, as well as polarisation between society and the company. It introduces stability and enables an orientation towards long-term goals.

The legislation on worker participation in the European Company (SE) (2001/86/EC; 2157/2001), in force since October 2004, as well as the Directive on cross-border mergers (the so-called 10th Directive of European company law, which has to be transposed into national law by December 2007, 2005/56/EC) provide the protagonists on both sides of industry with the opportunity to set up a qualified transnational representation of workers and to realise benefits by involving them in monitoring and influencing management decisions. In interaction with the relevant provisions of the other main EU Directives on information and consultation, the EWC Directive (94/45/EC) and the so-called information and consultation Directive (2002/14/EC),¹ and together with the collective bargaining policies of the trade unions, workers should take the opportunity to develop a joint European policy of interest representation which is at the same time reconciled with the economic objectives of companies.

In accordance with the ETUC action programme, adopted at the 10th statutory congress (26–29/05/2003, Prague), ETUC is seeking to ensure that a high level of worker participation will be realised in the SE and, together with the European

¹ Not to forget to mention the Directives on collective redundancies (75/129/EEC) and transfer of undertakings (77/187/EEC; 2001/23/EC), as well as the Statute and Directive on the European Cooperative Society (2003/72/EC; 1435/2003) which also establish or safeguard workers’ rights.

industry federations, is developing an understanding of a “European mandating” of worker representatives on administrative or supervisory boards. In this regard, ETUC is closely following the developments to be observed in the first SEs to be established, such as STRABAG Bauholding SE and Elcoteq SE, or in the process of establishment, such as Allianz SE, NORDEA SE or a possible Suez SE.

Coming from different origins it is likely that no SE will look like another. Case by case, it is therefore up to the negotiators to achieve an agreement on worker involvement which combines a possible “SE works council”, which is legally more powerful than an EWC, with substantial representation at board level. This presupposes a common understanding of what it means to be involved in steering a transnational company. Because of different traditions in national labour relations the trade unions and worker representatives involved are challenged to find a common position for the negotiations. They have to understand that in the majority of cases worker participation in the organs of the SE is not at the disposal of the management but is a legal right. More than ever before, trade unions are requested to take a European perspective if the new opportunities are to be used in a proper way for the benefit of their members.

“The Xth Congress commits the ETUC to: [...]”

- **Develop, with the European Industry Federations, a common strategy for the practical implementation of worker participation in the European Company (SE), and ensure European mandating of workers’ representatives to managerial or supervisory boards)**
- **Ensure that a high level of worker participation will be guaranteed in the European Company and that there will be no possibility of opting out”**

ETUC Action Programme, adopted at the 10th Statutory Congress (26-29/05/2003, Prague), p. 25

This booklet is designed to provide basic information on the SE, as well as on existing systems of board-level participation in the EU-25 (plus Norway). Specifically, this second edition includes information on board-level provisions in the new EU member states. It should help in the search for common ground when negotiations take place and an agreement on worker involvement in the up-coming SE needs to be worked out. Moreover, it is easy to anticipate an increase in

the number of companies organised across national borders, besides SEs, through the application of other relevant European company law provisions, such as the EU merger Directive. In nearly every case worker rights are involved, or, in addition to this and more challenging, the development of new European structures is needed. The European trade unions will make every effort to provide substantial support. Well-functioning, obligatory worker participation at different levels, from the workplace up to the boardroom, makes comprehensible on the ground what the European Social Model could mean in practice.

**WHAT IS A EUROPEAN
COMPANY (SE) ?**



WHAT IS A EUROPEAN COMPANY (SE) ?

Diagram 1

EUROPEAN COMPANY STATUTE (SE)

OVERVIEW OF THE EUROPEAN COMPANY STATUTE

Regulation on the Statute for a European Company and Directive with regard to the involvement of employees (of 08.10.2001/ Transposition: 3 years)

Individual forms

Choice of system and organs

Employee involvement

We will start by describing the individual forms the SE can take and steps involved, and will then look at the choice of system and the resulting issues for the organs of the company. Finally, we will look at employee involvement in the SE (agreements and standard rules).

FORMATION AND TRANSFER OF REGISTERED OFFICE

GENERAL REGULATIONS

Commercial companies may be set up within the territory of the European Community¹ in the form of European public limited-liability companies (hereinafter referred to as SEs) under the provisions laid down in the Council Regulation on the Statute for a European Company (hereafter referred to as the Regulation) (Regulation, Art.1, Para.1).

The SE is a company whose capital is divided into shares and which constitutes a legal person. The capital of the SE is quoted in euro and must be at least EUR 120,000.

The **registered office of the SE** must be located in the European **Community** in the same member state in which the **head office** is located. A member state may in addition impose on SEs registered in its territory the obligation of locating their head office and their registered office in the same place (Regulation, Art. 7). Once the **registered office** of an SE has been established, it may be **transferred** to another member state. Such a transfer may not result in the winding up of the SE or in the creation of a new legal person (details are provided after the description of the basic forms under point 5 below).

¹ To be more precise: The European Economic Area, i.e. the EU member states plus Norway, Iceland and Liechtenstein.

The name of an SE must be preceded or followed by the **abbreviation “SE”** (Regulation, Art. 11). Every SE is registered in the member state in which it has its registered office, in a register designated by the law of that member state (Regulation, Art. 12, Para. 1). An **SE may not be registered unless an agreement on arrangements for employee involvement** pursuant to Article 4 of the Directive has been concluded. Or, to put it simply, unless one of the exceptional situations exist (Regulation, Art. 12, Paras. 2 & 3). Details are provided below in the chapter on “Employee Involvement”. What is important is that the statutes of the SE must not conflict at any time with the arrangements for employee involvement. If necessary, the statutes have to be amended after an agreement has been reached (Regulation, Art. 12, Para. 4).

TYPES OF COMPANY

Diagram 2

EUROPEAN COMPANY STATUTE (SE)

WAYS OF FORMING AN SE

Merger	Public limited-liability companies from two member states can form an SE by merger
Holding	Public and private limited-liability companies from two member states can form a Holding
Subsidiary	Any legal entities governed by public or private law from two member states (or an SE itself) can form a subsidiary-SE
Conversion	A public limited-liability company can convert into an SE if it has had a subsidiary in another member state for 2 yrs

Article 2 of the Regulation, lays down in detail what types of company may be involved in the formation of an SE. As can be seen from diagram 2, there is, to some extent, a descending order involved:

Whereas formation by merger is only available to public limited companies², in the case of the other forms, private limited-liability companies³ and even companies and firms within the meaning of Paragraph 2 of Article 48 of the EU Treaty as well as other legal bodies governed by public or private law may be involved. What all types of formation have in common is a **cross-border element**: at least two of the founding companies must be governed by the law of different member states. This applies to some extent even in cases where it is merely the legal form that is being altered. This so-called transformation is restricted to public limited-liability companies, but is only possible if for a period of at least two years the company concerned has had a subsidiary company governed by the law of another member state (Regulation, Art. 2, Para. 4).

1. Merger

This mode of establishment - as already mentioned - is only permitted for public limited-liability companies and is familiar in both variants from national conversion law:

- the **merger can take the form of the acquisition** of an entire public limited-liability company by another or
- it can take the form of a **new company resulting from a merger** of both public limited-liability companies to form an SE (cf. Regulation, Art. 2, Para. 1, Art. 17).

Thus, depending on the approach taken, there can be problematic consequences for the national public limited-liability companies responsible for setting up the SE. In the one case, following registration and completion of the merger, the national public limited-liability company ceases to exist (Regulation, Art. 27, 29, Para. 1). In the other case, the two national public limited-liability companies that are merging both cease to exist (Regulation, Art. 29, Para. 2; on the subsequent creation of the SE see Regulation, Art. 17, Para. 2).

According to Art. 29, Para. 4 of the Regulation, the rights and obligations of the participating companies on terms and conditions of employment arising from

² For this, see list in the Annex to the Regulation, Official Journal L 204/19 (the wording of this document can be found in the Annex of this booklet)

³ Annex II Official Journal L 204/20 (the wording of this document can be found in the Annex of this booklet)

national law, practice and individual **employment contracts** or employment relationships that exist at the date of registration of the SE are **transferred to that SE upon its registration**.

The individual steps in a formation of an SE through merger are presented in box 1:

Box 1

STEPS IN A MERGER (ACQUISITION AND NEW FORMATION)

- The management or administrative organs of the merging companies draw up draft **terms of merger** (Regulation, Art. 20)
These include:
 - the name and registered office of each of the merging companies together with **those proposed for the SE**
 - the **statutes** of the SE (thus also the decision as to whether it is to have a **one-tier** or **two-tier** structure)
 - information on the **procedures** by which arrangements for **employee involvement** are determined
- **Publication** of the draft terms of the merger
- **Commencement of negotiations** with the representatives of the companies' employees on arrangements for the **involvement of employees** in the SE (Directive, Art. 3, Para. 1) by the **management** or administrative organs of the companies involved (up to six months or one-year)
- **Examination** of the draft terms and report to all the shareholders
- Agreement or standard rules (Directive, Arts. 4 , 7)
- The **General Meetings** of each of the merging companies approve the draft terms of merger (Regulation, Art. 23)
- Examination of the legality of the agreement (Regulation, Arts. 25, 26)
- Registration of the SE (Art. 27) and cessation of the merging companies

2. Holding

Public limited-liability companies and private limited-liability companies formed under the law of a member state that have their registered office and head office within the Community may promote a formation of a Holding SE provided that at least two⁴ of them

- a) are governed by the law of different member states or
- b) have for at least two years had a subsidiary company governed by the law of another member state or a branch situated in another member state (Regulation, Art. 2, Para. 2).

In Art. 32 of the Regulation, in which the requirements for the formation of a Holding SE are laid down, it is explicitly stated that the companies promoting the formation continue to exist. However, one should be aware that the **Holding SE represents a new entity**, which to some extent is **superordinate to the companies forming it**. Formally speaking, national employee rights to involvement remain both at plant level and also in the organs of the companies which, after the Holding has been set up in, only continue to exist as subsidiaries (cf. also Directive, Art. 13, Para. 3). In practical terms, however, central decisions are likely to be made at the level of the Holding and take effect from there. The individual steps in the formation of a Holding SE are presented in box 2:



⁴ This should be taken literally.

Box 2

STEPS IN THE FORMATION OF A HOLDING SE

- The management or administrative organs of the companies promoting the formation of a Holding SE draw up draft **terms for the formation** (Regulation, Art. 32, Para. 2)
These include:
 - A **report** explaining and justifying the legal and economic aspects of the formation and indicating the implications for the shareholders and for the employees of the adoption of a Holding SE
 - **Particulars** (Regulation, Art. 32, Para. 2 with reference to Art. 20)
 - name and registered office (Art. 20, Para. 1a)
 - statutes (Art. 20, Para. 1b)
 - details of the procedures for concluding the agreement to honour employee involvement
 - the minimum proportion of shares to be contributed
- **Publication** of the draft terms (1 month) (Regulation, Art. 32, Para. 3)
- **Commencement** of negotiations with the representatives of the companies' employees on **arrangements for the involvement of employees** (Directive, Art. 3, Para. 1) (up to six months or 1 year)
- **Examination** of the draft terms of formation and written report for the shareholders (Regulation, Art. 32, Para. 4)
- **Agreement** or standard rules (Directive Arts. 4 and 7)
- **General meetings** of each company promoting the operation approve the draft terms of formation of the Holding SE and the agreement on employee involvement (Regulation, Art. 32, Para. 6)
- Examination of the legality of the holding formation (Directive, Art. 33)
- Registration of the SE (Art. 16)

3. Subsidiary SE

In Section 4 of the Regulation there are only two articles directly related to this: Article 35 refers to the general regulation laid down in Article 2, Para. 3, and Article 36 refers to the regulations on setting up a subsidiary in the form of a public limited-liability company under national law. According to this, companies and firms within the

meaning of Article 48, Para. 2 of the EU Treaty and other legal bodies governed by public or private law formed under the law of a member state with registered offices and head offices within the Community may form a **subsidiary SE by subscribing for its shares**, provided that at least two of them

- a)** are governed by the law of a different member state or
- b)** have for at least two years had a subsidiary company governed by the law of another member state or a branch situated in another member state.

The individual steps involved in setting up a subsidiary SE are summarised in box 3:

Box 3

STEPS TOWARDS SETTING UP A SUBSIDIARY SE

- **Agreement** on a plan for the establishment of a subsidiary SE (see Directive, Article 3)
- **Commencement** of negotiations with the representatives of the companies' employees on arrangements for the **involvement** of employees in the SE (up to six months or one-year) (Directive, Article 3, Para. 1)
- **Report** on establishment/ split
- Examination
- **Agreement** or standard rules (Directive, Arts. 4 & 7)
- Submittal of **registration**
- **Registration**

Setting up of a subsidiary SE by an SE

According to Regulation, Article 3, Para. 1, the SE itself is one of the legal persons entitled to establish an SE under Regulation, Article 2, Paras. 1 to 3. Article 3, Para. 2 even allows the SE itself to set up one or more subsidiaries in the form of SEs.

4. Conversion/change of legal form

This mode of establishment was controversial right up to the end, as there are special problems associated with it. A public limited-liability company formed under the law of a member state, which has its registered office and head office within the Community, may be transformed into an SE if for at least two years it has had a subsidiary company governed by the law of another member state

(Regulation, Art. 2, Para. 4); in other words existence of a branch in another member state is not sufficient. Of crucial significance for such cases is the fact that Article 37, Para. 3 expressly states that the **registered office** of the company **may not be transferred** from one member state to another **at the same time as the conversion is effected**.

Box 4 once again provides an overview of the process involved:

Box 4

STEPS TOWARDS CONVERSION INTO AN SE

- The management or administrative organ draws up draft terms of conversion
These include a report that:
 - explains and justifies the legal and economic aspects of the conversion and
 - indicates the implications for the shareholders and employees of the adoption of the form of an SE.
- Commencement of negotiations with the representatives of the companies' employees on arrangements for the **involvement of employees** in the SE (up to six months or one-year) (Directive, Article 3, Para. 1)
- Publication of the terms of conversion (at least one month before the General Meeting)
- Examination of the terms
- Agreement on employee involvement (in terms of competencies, at least the same level must be provided for as prior to the conversion (Directive Art. 4, Para. 4)
- General meeting agrees to conversion and approves the statutes
- Registration as an SE

5. Transfer of registered office

Part of the idea of a European Company is that its supra-national, European legal form should mean that it is easy for it to transfer its registered office within the Community. It should, however, be pointed out that the **registered office of the SE** must be located within the Community in the same member state as its **head office**. In addition, a member state may impose on SEs registered in its territory the obligation of locating

their head office and their registered office in the same place (Regulation, Art. 7). Article 8 of the Regulation, provides detailed requirements related to transfer of the registered office of an SE from one member state to another. In Art. 80, Para. 1, the crucial legal implications of such a transfer are explicitly stated: it does not result in the **winding up of the SE or in the creation of a new legal person**. This means that it is not possible to wind up the SE and uncover undisclosed reserves and there is no need for the relevant national procedures to be used to set up a new legal person across the border. Box 5 provides an overview of the details:

Box 5

STEPS TOWARDS TRANSFER OF REGISTERED OFFICE

- Transfer proposal with details of:
 - the proposed new registered office
 - the proposed statutes of the SE including, where appropriate, its new name
 - any implications that transfer may have for employee involvement
 - the proposed transfer timetable
- A report drawn up by the management or administrative organ explaining
 - the legal and economic aspects of transfer and
 - the implications of the transfer for shareholders, creditors and employees
- An opportunity for shareholders to examine the report (within two months at the earliest), decision to transfer by General Meeting
- “Deregistration” in original location
- “New registration” in new member state

CONSTRUCTION AND ORGANS

Every SE initially has a **General Meeting of shareholders** (Regulation, Art. 38 a) and, in addition to this, a decision is made via the statutes (which therefore can, depending on the circumstances, be further changed at a later date as a result of amendments to the statutes), as to **whether or not the SE has a two-tier** (Management Board and Supervisory Board) **or one-tier** (Administrative Board) system. Such a choice already exists, for example, in France and Italy. In addition, in Art. 39, Para. 5 and Art. 43, Para. 4, the Regulation provides for a member state, in implementing the Regulation, to adopt the appropriate measures in relation to SEs where no provision is made for the one or the other model under the national system applicable on its territory.

Section III of the Regulation (Art. 38 ff.) starts with regulations on the two-tier system, followed by regulations on the one-tier system (Regulation, Art. 43 ff.) and then the rules common to both systems (Art. 46 ff.). These will be briefly explained in the next section.

1. TWO-TIER SYSTEM

The unique feature of the two-tier system is the distribution of company management and supervision functions across two organs.

Management organ

In the Regulation, (Art. 39) the term “management organ” is used for the **management** of the SE and, in Para. 1 of Art. 39, it is stated that the management organ is responsible for managing the SE.

Members of the management organ are appointed and removed by the supervisory organ (Regulation, Art. 39 Para. 2). There is a possibility then provided for in the Regulation for member states to require or permit the statutes to provide that the members of the management organ are appointed and removed by the General Meeting.

Supervisory organ

The supervisory organ **supervises the work of the management organ**. It may not itself exercise the power to manage the SE (Regulation, Art. 40, Para. 1). The

members of the supervisory organ are appointed by the General Meeting (Regulation, Art. 40, Para. 2), whereby the Directive provides for any employee participation arrangements determined pursuant to the Directive not to be affected by this.

The **number of members of the supervisory organ** or the rules for determining it are laid down in the statutes (Regulation, Art. 40, Para. 3). A member state may, however, stipulate the number of members of the supervisory organ for SEs registered within its territory or a minimum and/or maximum number.

The other provisions of the Regulation applying to the two-tier system are relatively brief:

- The management organ reports to the supervisory organ at least once every three months on the progress and foreseeable development of the SE's business.
- In addition to the regular information, the management organ promptly passes the supervisory organ any information on events likely to have an appreciable effect on the SE.
- The supervisory organ can require the management organ to provide information of any kind which it needs to exercise supervision. However, member states may provide that each member of the supervisory organ is also entitled to this facility.
- The supervisory organ may undertake or arrange for any investigations necessary for the performance of its duties.
- Each member of the supervisory organ is entitled to examine all the information submitted to it. To this one should add that, of course, the form is also dependent on the extent of the information; particularly as outwith meetings, written or electronic information is the only possibility.

The supervisory organ elects a chairman from among its members, but if half of the members of the supervisory organ are appointed by the employees, only a member appointed by the General Meeting of shareholders may be elected chairman.

2. ONE-TIER SYSTEM

According to Regulation Art. 43, Para. 1, sentence 1, the **administrative organ manages the SE**. What is interesting is that a member state may provide that the managing director or managing directors are responsible for the day-to-day management under the same conditions as for public limited-liability companies that have registered offices within that member state's territory. Here one can see

the differentiation under Anglo-American law between internal and external directors or the traditional French general director (PDG). In the case of such a “division of labour”, what is important is the question of which decisions have to affect the entire administrative organ (see under point 3.: Rules common to both systems - Transactions requiring the authorisation of the management organ).

The number of members of the administrative organ or the rules for determining it are, once again, laid down in the SE's statutes. However, a member state may set a minimum and, where necessary, a maximum number of members (Regulation, Art. 43, Para. 2).

When it comes to the **election of the members** of the administrative organ, the same provisions apply as in the case of the supervisory organ under the two-tier system - namely that the appointment is made by the General Meeting. Here too, this applies without prejudice to any employee participation arrangements (Regulation, Art. 43, Para. 3).

The other provisions of the Regulation applying to the two-tier system are particularly brief:

- The administrative organ **meets at least once every three months** at intervals laid down by the statutes to discuss the progress and foreseeable development of the SE's business (Regulation, Art. 44, Para. 1).
- Each member of the administrative organ is entitled to examine **all the information** submitted to it (Regulation, Art. 44, Para. 2).
- The administrative organ elects a chairman from among its members. If half of the members are appointed by employees, only a member appointed by the General Meeting of shareholders may be elected chairman (Regulation, Art. 45).

3. RULES COMMON TO BOTH SYSTEMS

Internal rules

With regard to the so-called internal rules, few provisions are laid down in the common rules (see Art. 50):

- in order to be **quorate** at least half of the members must be present or represented
- for **decision-taking** a majority of the members must be present or represented

- where there is no relevant provision in the statutes, the chairman of each organ has a casting vote in the event of a tie. There should be no provision to the contrary in the statutes, however, where half of the supervisory organ consists of employee representatives.

Transactions requiring authorisation by the supervisory organ or a decision by the administrative organ, Regulation, Art. 48

During the development of the rules for SEs, a variety of different approaches were adopted on this; at one stage a so-called minimum catalogue of transactions requiring authorisation was drawn up. Now, however, Article 48 provides for a mixed approach:

- In the **SE's statutes** a list is made of the categories of transactions requiring authorisation of the management organ by the supervisory organ in the two-tier system, or an express decision by the administrative organ in the one-tier system (Para. 1, sentence 1).
- Member states may, however, provide that in the two-tier system the supervisory organ may itself **make certain categories of transactions subject to authorisation**.
- Finally, member states may **determine the categories of transactions which must at least be indicated in the statutes** of SEs registered within its territory (Regulation, Art. 48, Para. 2).

Duty of confidentiality, liability

The Regulation formulates the duty of confidentiality of individual organs as follows:

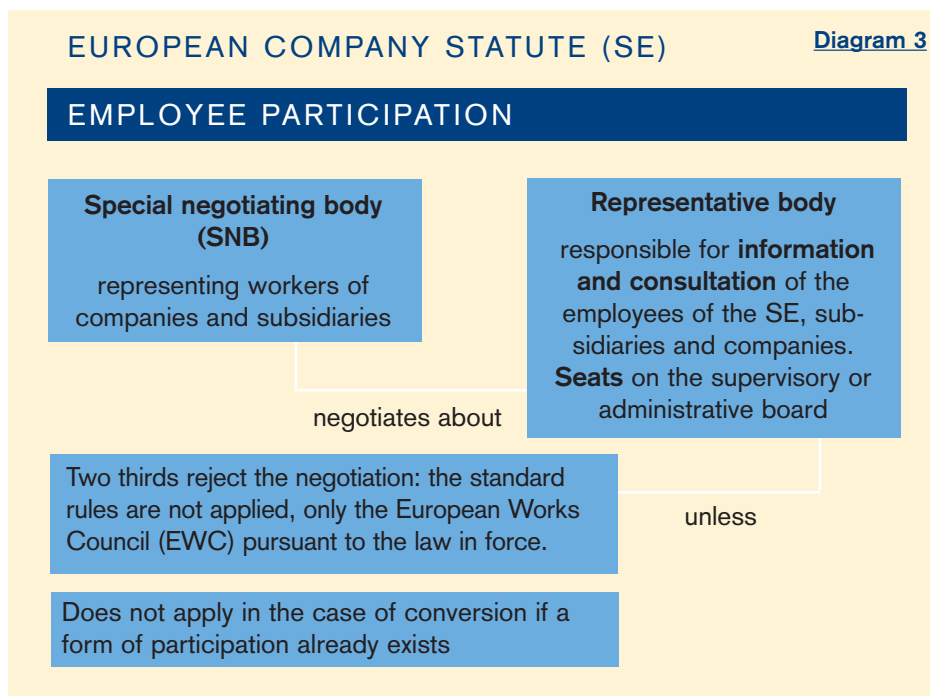
“The members of an SE's organs shall be under duty, even after they have ceased to hold office, **not to divulge** any **information** which they have concerning the SE, the disclosure of which might be **prejudicial to the company's interests**, except where such disclosure is required or permitted under national law provisions applicable to public limited-liability companies or is in the public interest.” (Regulation, Article 49).

In the Directive on involvement of employees in the SE, Article 8 and Part 2 of the standard rules provide for special confidentiality regulations with regard to the representative body of the employees in the SE.

INVOLVEMENT OF EMPLOYEES

The Directive of October 2001 supplementing the Statute for a European Company with regard to the involvement of employees is based on the idea **of free negotiations during the founding phase** of the SE. However the Directive provides, in Article 7 (in various variants related to the various types of formation), for **standard rules on employee involvement**, with individual provisions in the Annex on:

- Part 1 Composition of the representative body of the employees
- Part 2 Standard rules for information and consultation
- Part 3 Standard rules for participation



1. CREATION AND COMPOSITION OF A SPECIAL NEGOTIATING BODY

Where **the management or administrative organs** of the participating companies **draw up a plan for the establishment of an SE**, they take the **necessary steps** as soon as possible - including providing information about the identity of the participating companies, concerned subsidiaries or establishments, and the number of their employees - **to start negotiations** with the representatives of the companies' employees on arrangements for the involvement of employees in the SE (Directive, Art. 3, Para. 1).

There is thus no need at this stage for the employees to submit a request - the initiative and responsibility are solely in the hands of the managers intending to set up an SE. Negotiations should start as soon as possible following publication of the planned SE.

The starting point for composition of the body is the principle that **each country** in which the companies involved have employees should have **at least one representative** on the special negotiating body. Box 6 provides the details:

Box 6

COMPOSITION OF THE SPECIAL NEGOTIATING BODY (DIRECTIVE, ART. 3, PARA. 2A)

- Calculation of the total number of employees in the future SE/SE group
- SEs established other than by way of merger:
For each 10%, or fraction thereof, there is one seat allocated per member state
- Establishment by way of merger:
Further additional members from each member state as may be necessary in order to ensure that the special negotiating body includes at least one member representing each participating company that will cease to exist following registration of the SE
 - an upper limit of 20 per cent of the "regular" members and
 - the composition of the body must not entail double representation of the employees concerned

2. FURTHER POINTS RELATING TO THE SPECIAL NEGOTIATING BODY

The member states determine the methods to be used for the election or appointment of the members of the special negotiating body who are to be elected or appointed in their territories (Directive, Art. 3, Para. 2b). This section of the Directive contains important provisions related to **membership of trade union representatives in the special negotiating body**:

member states may provide that the body includes representatives of trade unions, **whether or not they are employees of a participating company** or concerned subsidiary or establishment.

Another improvement on the comparable passages in the European Works Council Directive, is the possibility of bringing in experts provided for in Article 3, Para. 5 of the Directive.

- The **special negotiating body** may **decide** to inform the **representatives of appropriate external organisations**, including **trade unionists** of the start of the negotiations.
- For the purpose of the negotiations, the special negotiating body may request **experts** of its choice, for example representatives of appropriate Community-level **trade union organisations**, to assist it with its work (at the request of the special negotiating body, these experts may be present at negotiations in an advisory capacity).
- According to Article 3, Para. 7 of the Directive, any expenses relating to the functioning of the special negotiating body are borne by the participating companies so as to enable the special negotiating body to carry out its task in an appropriate manner. Here the member states again have some room for manoeuvre by limiting the refunding of costs related to external expertise to a single expert.

3. NEGOTIATIONS ON PARTICIPATION

Diagram 4

EUROPEAN COMPANY STATUTE (SE)

EMPLOYEE PARTICIPATION

DETAILS ON NEGOTIATIONS ON PARTICIPATION (I):

STAGE 1: 2/3 OF THE VOTES

- ▶ representing at least 2/3 of the workers
- ▶ and workers from at least two states
- ▶ decision: not to start or to cancel negotiations



ZERO OPTION = ONLY EWC

STAGE 2: AGREEMENT ACCORDING TO ART. 4 DIR/SE

STAGE 3: AT LEAST STANDARD RULES

- ▶ if no agreement between the parties
- ▶ if no agreement reached before the deadline fixed and the governing bodies of the companies approve the continuation of the procedure.

Negotiations **commence as soon as the special negotiating body has been established** and may continue **for six months** thereafter. The parties may **decide by joint agreement** to extend negotiations up to a **total of one year** from the establishment of the special negotiating body (Directive, Art. 5). This underlines how different the negotiating situation is here (compared with European Works Councils), because - as already mentioned - it is not possible (as in the case of EWCs) for the management to play for time, for without adherence to the negotiating procedures, registration of the SE cannot take place. In Art. 4, Para. 1, the Directive requires the negotiating parties to negotiate in a spirit of co-operation with a view to reaching an agreement on arrangements for the involvement of the employees within the SE.

There are three scenarios:

(1) Only European Works Council

The special negotiating body can, with a vote of **two-thirds** of the members representing at least two-thirds of the employees including the votes of members representing employees employed in at least two member states, decide **not to open or to terminate** negotiations and to rely on the rules on information and consultation of employees in force in the member states where the SE has employees.

- Where such a decision is made, none of the provisions of the Annex apply, and instead (Directive, Art 13, Para. 1) the regulations on European Works Councils apply.
- This option not to open negotiations does not apply to companies formed by conversion or change in legal form if there is a system of participation in the company concerned.

(2) Agreement under Art. 4 Directive

The special negotiating body and the competent organs of the participating companies reach an agreement on arrangements for the involvement of the employees within the SE. Here, initially, there is **autonomy of the parties with regard to the individual details of the agreement**. One **exception**, however, is the case of formation of an SE by means of **transformation**. According to Article 4, Para. 4 of the Directive, the agreement must provide for at least the same level of all elements of employee involvement as those existing within the company to be transformed.

Otherwise Article 4, Para. 2, lists what the agreement must contain:

a) The scope of the agreement

b) The **composition**, the **number** of members and **allocation of seats** on the representative body which will be the discussion partner of the competent organs of the SE in connection with arrangements for the information and consultation of the employees of the SE and its subsidiaries and establishments

c) The functions and the procedure for the **information and consultation** of the representative body

d) The **frequency of meetings** of the representative body

e) The **financial and material resources** to be allocated to the representative body

f) The arrangements for implementing the one or more information and consultation procedures for cases where, during negotiations, the parties decide to establish such procedures instead of a representative body

g) The **substance of arrangements** for participation for cases where the parties decide to establish such arrangements, including (if applicable) the **number of members in the SE's administrative or supervisory body** which the employees will be entitled to elect or appoint and the rights of such members

h) The **date of entry into force** of the agreement and its duration, as well as the **procedure for renegotiation of the agreement**

According to Article 3, Para. 4 of the Directive, the special negotiating body takes decisions by an absolute majority of its members, provided such a majority also represents an absolute majority of the employees.

If, however the result of the **negotiations would lead to a reduction of participation rights**, the majority required for a decision to approve such an agreement is the votes of **two-thirds** of the members of the special negotiating body, representing at least two-thirds of the employees, provided the votes of members representing employees in at least two member states are included

- in the case of an SE to be established by way of **merger**, if participation covers at least **25 per cent** of the overall number of employees of the participating companies, or
- in the case of an SE to be established by the creation of **a holding company** or by forming a **subsidiary**, if participation covers at least **50 per cent** of the overall number of employees of the participating companies.

Reduction of participation rights, according to the definition of the Directive (Article 3, Para. 4, end), means a **proportion of members of the organs of the SE** which is lower than the highest proportion existing within the participating companies. For a negotiation situation involving for example a German company and employee representatives this would mean that if the Law on Co-determination of 1976 applied to the company in Germany, an agreement could only be concluded below the level of half the seats on the supervisory or administrative board of the SE if this special two-thirds decision was taken in the case of exceeding the employee threshold of 25 or 50 per cent, depending on the particular category of formation. From these remarks on decision-taking it becomes clear how crucial an event the first meeting of the special negotiating body is.

The standard rules in the Annex do not apply to the agreement unless the agreement itself provides otherwise (Directive, Art. 4, Para. 3).

(3) Standard rules

In the introductory remarks of this chapter, we already drew attention to the particular form that employee involvement takes in the present regulations on the SE: on the one hand there is autonomy to conclude agreements, although this is severely restricted in the case of formation by transformation and, on the other hand, is - or can be – supplemented by standard rules in the case of certain constellations listed in detail in Art. 7 of the Directive.

In diagram 4 the final stage was launched with the question “at least standard rules?”. We will look at this in greater detail prior to examining the special standard rules for participation (i.e. according to the definitions of terms under Art 2 k of the Directive, the influence of the body representative of the employees and/or of the employees’ representatives in the affairs of a company by way of the composition of the supervisory board or administrative organ of the SE).

The initial constellation is described in box 7:

Box 7

STANDARD RULES? (DIRECTIVE, ART. 7, PARA. 1)

- a) The parties can agree to this
or
 - b) The special negotiating body does not decide to terminate negotiations but
 - by the deadline laid down for negotiations to be completed no agreement has been concluded and
 - the competent organs of **each** of the participating companies decide to accept the application of the standard rules to the SE and so to continue with the registration of the SE
- If not all companies agree, formation of the SE has failed
- As further criteria apply to Part 3 of the standard rules (participation), this therefore means **standard rules** on:
- Part 1 Representative body
 - Part 2 Information and consultation

For **Part 3 of the standard rules** - the section referring to participation - there are, as has already been said, **further criteria contained** in Article 7, Para. 2 providing for differentiation **according to the individual forms** in which SEs are set up. Diagram 5 summarises these details:

Diagram 5

EUROPEAN COMPANY STATUTE (SE)

EMPLOYEE PARTICIPATION

DETAILS ON NEGOTIATIONS ON PARTICIPATION (II):

THE STANDARD RULES ONLY APPLY:

- in the case of **conversion**, where participation rights already exist
- in the case of **mergers** (unless member- states use **opt-out**) :
 - ▶ where a participation right already existed, extending to at least 25% of the workers
 - ▶ where a participation right already existed, covering less than 25% of the workers and the special negotiating body makes a decision on this subject
- in the case of the creation of an SE by way of a **holding** or a **subsidiary**
 - ▶ where a participation right already existed, extending to at least 50% of the workers
 - ▶ where a participation right already existed, covering less than 50% of the workers and the special negotiating body makes a decision on this subject

According to Article 12, Para. 3 of the Regulation, **one requirement for registration** of an SE is that an **agreement on employee involvement** should have been concluded **or** that **none of the participating companies** have been governed by **participation rules** prior to the registration of the SE. In other words, if regulations on participation apply to one of their participating companies, then in the case of a merger, even if a member state has made use of the opt-out, an agreement is necessary unless all the employees involved did not previously have participation rights (see also Part 3 of standard rules b, Para.2).

In the case of establishment of an SE by setting up a holding company or a subsidiary, and the possible **coincidence of different forms of participation**, a provision is made at the end of Article 7, Para. 2 c for the special negotiating body to decide which is to be introduced into the SE.

This situation should not be confused with Part III b of the standard rules for participation, according to which employees have the right to elect a number of members of the administration or supervisory organ. There the **number of members (seats) allocated is based on the highest proportion in force in the participating companies** before registration of the SE. In other words, in the case of a German company with more than 2,000 employees, 50% of seats on the supervisory board are for employee representatives, and in the case of an Austrian company, one-third. In this case the maximum relevant share would be 50%.

In the case of forms of participation under the standard rules for establishment of a holding company or a subsidiary, there is a **difference between election or appointment** of members of the organ or recommendation or rejection of their appointment.

4. CONFIDENTIALITY

The Directive lays down that member states should ensure that members of the special negotiating body or the representative body, and any experts who assist them, should not be authorised to reveal to third parties any **information which has been given to them in confidence**.

By contrast, the **duty of confidentiality of members of the organs of the SE can be found in Article 49** of the Regulation (disclosure of information which might be prejudicial to the company's interests). It is feasible that practical problems, or even conflicts, could arise here.

5. RELATIONSHIP OF THIS DIRECTIVE TO OTHER REGULATIONS / MISCELLANEOUS

Misuse of procedures

Here Article 11 of the Directive requires member states to take appropriate measures to prevent the misuse of an SE for the purpose of depriving employees of rights to employee involvement or withholding such rights. And once again, Point 18 of the Recitals in the Directive should be mentioned: in the case of **structural changes in an existing SE** and for the companies affected by structural change processes, there must be a right to negotiations. Otherwise the sequence of processes involved in establishment of an SE could result in employees being denied participation rights.



Protection of employees

Article 10 of the Directive provides for members of the special negotiating body, members of the representative body, any employee representatives exercising functions under the information and consultation procedure and any employee representatives in the supervisory or administrative organ of an SE who are employees of the SE, to enjoy the same protection and guarantees provided for employees representatives by the national legislation and/or practice in force in their country of employment. This applies in particular to attendance at meetings

of the special negotiating body or representative body, any other meeting of the administrative or supervisory organ and to the payment of wages for members employed by a participating company during a period of absence necessary for the performance of their duties.

Link between the Directive and other provisions

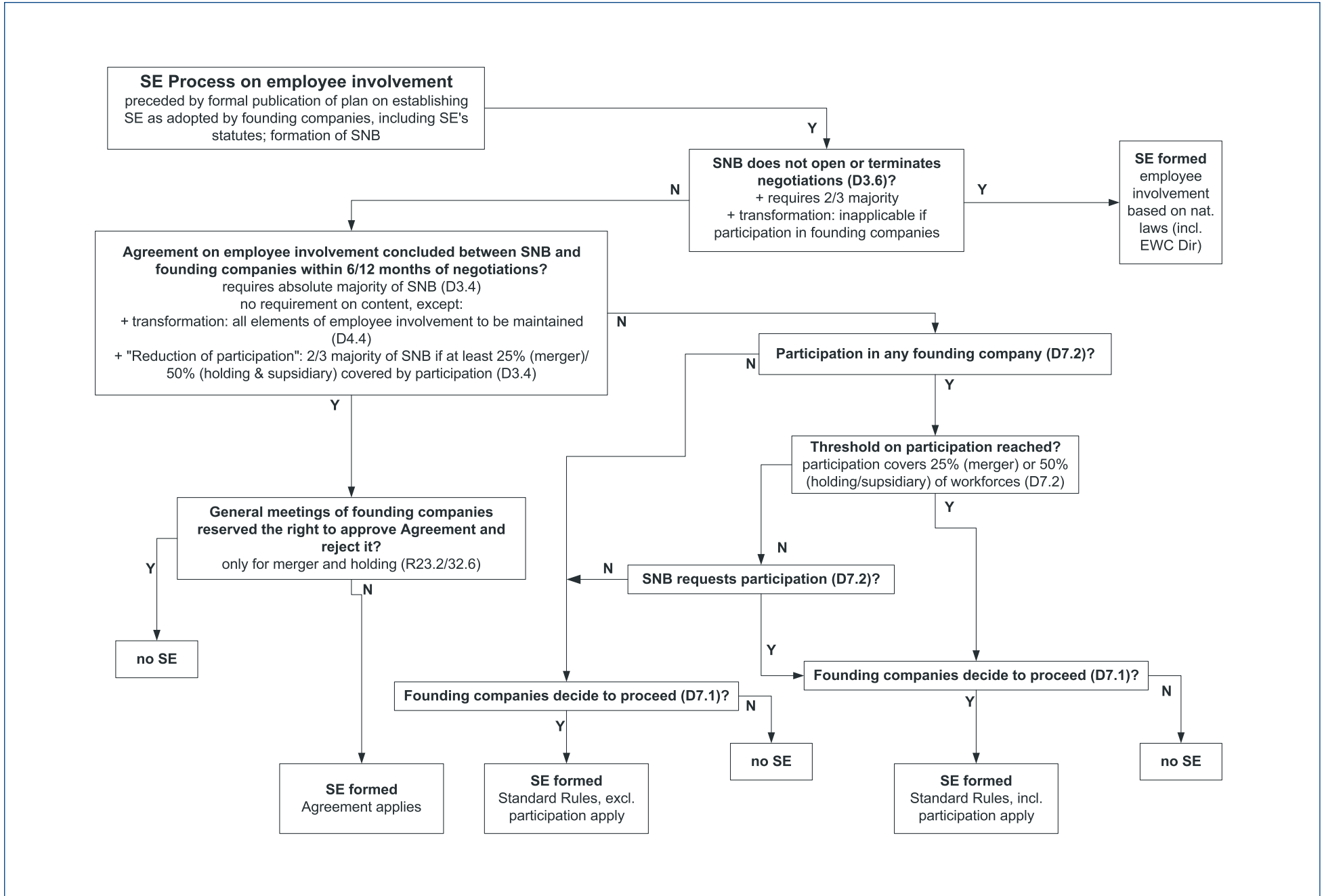
Finally, some comments should be made on Article 13, which deals with the link between the Directive on employee involvement and other European or national forms of participation.

Differentiation has to be made between:

- **SEs or subsidiaries of an SE** that are Community-scale undertakings or controlling undertakings of a Community-scale group of undertakings within the meaning of the 1994 European Works Council Directive (or the 1997 Directive extending this to the United Kingdom) **are not subject to the provisions of these Directives** and the provisions transposing them into national legislation. To put it simply, the SE is a separate construction for information, consultation and participation. If, however the special negotiating body decides in accordance with Article 3, Para 6 not to open negotiations, then the European Works Council Directives and the provisions transposing them into national legislation apply. In such a case, in other words, a lack of negotiating skills would result in the more “watered-down” rights based on the European Works Council Directives applying to companies or corporate groups operating on a Community-wide basis.
- **Provisions on the participation of employees in company bodies provided for by national legislation and/or practice do not apply to an SE.** The provisions in the Regulation, the Directive and the provisions transposing these into national legislation have precedence over national regulations on participation in the organs of an undertaking.
- The Directive does **not affect the existing rights to involvement of employees provided for by national legislation and/or practice** in the member states as enjoyed by employees of the SE and its subsidiaries and establishments, with the exception of participation in the organs of the SE (Directive, Art. 13, Para. 3a). For a German works council in a German company e.g., the company constitution still applies (the particular problem of mergers will be dealt with below).

- Provisions on **participation in the bodies** laid down by national legislation and/or practice applicable to the **subsidiaries of the SE are not affected by the Directive**. If, for example, an SE was set up as a holding in the Netherlands, employee involvement in the supervisory board of a subsidiary in Germany would not be affected, so long as employee numbers were in accordance with the relevant legislation.
- The question of the **termination of separate legal entities** in the national context in the **case of mergers** is a particular problem. According to the German Company Constitution Act e.g., the company works council/economic committee requires the company to include a national legal entity. In the case of a merger, if this company became part of another company, this might well no longer be the case. That is why Article 13 of the Directive, in order to **preserve the relevant rights**, provides for member states to take the necessary measures **to guarantee** that the **structures of employee representation** in participating companies are maintained after registration of the SE. Thus the continued existence of the company works council/economic committee can be achieved by the relevant national legislation. What is likely to be crucial, however, is that there should also be a guarantee that these employee representatives have made available to them a negotiating partner from the management of the SE or at least an authorised competent representative with decision-making powers.

FLOWCHART: SE NEGOTIATIONS AND OUTCOMES – UNI-EUROPA, RÖTHIG: 2003



**ANCHORING THE EUROPEAN COMPANY
IN NATIONAL LAW**



ANCHORING THE EUROPEAN COMPANY IN NATIONAL LAW

In October 2001 the European Union finally adopted two pieces of legislation allowing a European Company¹, rather than a company governed by national laws, to be created for the first time. The legislation, which came after years of debate and difficult political wrangling, was set to come into effect three years later on 8 October 2004. It was to cover not just the member states of the EU, which by that stage had increased to 25, but also Iceland, Liechtenstein and Norway, which together with the EU member states make up the European Economic Area.

This report examines the progress that had been made by the beginning of December 2005 on implementing the legislation in the 28 EEA states. It finds that, while much progress has been made, there are still some states that are lagging behind. It also looks at how the legislation that provides for the involvement of employees has been implemented. Here it finds that although there are large areas where national legislation closely follows the EU-wide model, there are other areas where there are important differences between member states.

The report draws on the texts of national implementing legislation, as well as on the information provided by the national SEEUROPE Network correspondents (www.seeurope-network.org). It could not have been written without their input.

PROGRESS SO FAR

The two pieces of legislation on the European Company, adopted by the EU in October 2001, had different legal forms. One, on the Statute for a European Company², was a Regulation, and as such has direct legal force – it does not need to be implemented by member states to come into effect. The other, on the

involvement of employees³, was a Directive. This means that in each country it needs to be incorporated into national law – to be transposed – before it has legal effect in that member state.

Both the Regulation and the Directive were due to come into force on 8 October 2004 but at that date only nine of the 28 states which should have transposed the Directive had in fact done so (see Table 1). These were four Nordic states – Denmark, Iceland, Sweden and Finland, two of the new member states – Hungary and the Slovak Republic, together with Austria, the UK and Belgium. (In Belgium unions and employers reached a collective agreement on 6 October which was made legally binding by royal decree on 22 December 2004.)

A further four states – Malta, the Czech Republic, Germany and Cyprus – transposed the legislation between the 8 October deadline and the end of 2004. And between January and November 2005 another nine did the same. This means that by December 2005 there were only six of the 28 states – Greece, Ireland, Liechtenstein, Luxembourg, Slovenia and Spain which had not transposed the Directive. Of these six remaining states, all but two – Ireland and Slovenia – had published draft proposals, which were at various stages of the national consultation and legislative process.

¹ Known also by its Latin abbreviation SE

² Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE)

³ Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees

In theory, only the Directive on employee involvement needs national legislation; the Regulation on the Statute of a European Company has direct effect. But in practice, almost all member states have also introduced new national legislation to take account of the changes to company law resulting from the Regulation, allowing for European Companies to be established.

Of the 22 states which had transposed the Directive by the start of December 2005 only two, Italy and Malta, appear not to have introduced detailed legislation to adapt their national systems to the new requirements of the Regulations.

Of the six that had not transposed the Directive by that date, two, Greece and Spain, had by that stage already passed domestic legislation linked to the Regulation on the European Company Statute. Two others, Liechtenstein and Luxembourg, have produced draft legislation on the Regulation and Ireland and Slovenia seem certain to do the same.

Most states which have implemented or introduced legislation on both the European Company Statute and employee involvement have done so through two separate pieces of legislation; only nine – Hungary, the UK, the Slovak Republic, the Czech Republic, Germany, Cyprus, Poland, Latvia and France – have included the detailed rules on both in a single legislative instrument. However, the difference between the two approaches is not significant, as even where both aspects are covered by the same document, the European Company Statute element and the employee involvement element are dealt with in separate sections. In the Slovak Republic, for example, Paragraphs 1 to 34 of the Act on European Companies deal with the issues covered in the Regulation, while Articles 35 to 55 deal with the involvement of employees.

In the great majority of cases, member states have chosen the legislative route to implement the employee involvement Directive, rather than seeking to do so through a collective agreement. There has been some consultation with unions and employers in all member states (although both unions and employers in the Slovak Republic complained that their involvement was too limited), but only two, Belgium and Italy, have clearly based their implementation on an agreement between the two sides (and both of these have followed up the original agreement with legislation).

In Belgium the collective agreement of 6 October 2004 was implemented by a royal decree on 22 December 2004. This said simply that the agreement would be legally binding and made the minister for employment responsible for implementing the decree. In Italy a joint opinion was agreed by unions and employers on 2 March 2005. The legislative decree, which followed on 19 August 2005, essentially repeated the wording of the joint opinion but in certain areas, such as the penalties to be applied by failure to comply where the opinion called for “appropriate sanctions”, the decree spelled out the extent of the penalties, which range from EUR 1,033 to EUR 30,988.

Table 1: European Company: incorporation into national law

<i>Country</i>	<i>Legislation</i>	<i>Date adopted</i>
Transposed on time*		
Denmark	Employee involvement	26 April 2004
	European Company	6 May 2004
Hungary	Single piece of legislation	24 May 2004
Iceland	Employee involvement	27 April 2004
	European Company	17 May 2004
Sweden	European Company	10 June 2004
	Employee involvement	10 June 2004
Austria	European Company	24 June 2004
	Employee involvement	15 July 2004
Finland	European Company	13 August 2004
	Employee involvement	13 August 2004
UK	Single piece of legislation	6 September 2004
Slovak Republic	Single piece of legislation	9 September 2004
Belgium	European Company	1 September 2004
	Employee involvement	Collective agreement of 6 October 2004 Implemented by Royal Decree 22 December 2004

Transposed after 8 October 2004*

Malta	Employee involvement	22 October 2004
Czech Republic	Single piece of legislation	11 November 2004
Germany	Single piece of legislation	22 December 2004
Cyprus	Single piece of legislation	31 December 2004
Estonia	European Company Employee involvement	10 November 2004 12 January 2005
Poland	Single piece of legislation	4 March 2005
Netherlands	European Company Employee involvement	17 March 2005 17 March 2005
Latvia	Single piece of legislation	24 March 2005
Norway	European Company Employee involvement	4 March 2005 1 April 2005
Lithuania	European Company Employee involvement	29 April 2004 12 May 2005
France	Single piece of legislation	13 July 2005
Italy	Employee involvement	19 August 2005
Portugal	European Company Employee involvement	4 January 2005 20 October 2005

Legislation on European Company but not employee involvement

Greece	European Company Employee involvement	25 October 2005 Under discussion at end November 2005
Spain	European Company Employee involvement	14 November 2005 Draft bill published 25 November 2005. Parliament has been asked to treat proposals as matter of urgency

Not yet transposed

Ireland	Likely to be a single piece of legislation	No text published – intention is to have completed process by end March 2006
Liechtenstein	Likely to be two pieces of legislation	Text for both published for consultation 15 February 2005. First reading in Parliament October 2005
Luxembourg	Likely to be two pieces of legislation	Text on European Company published on 9 June 2004; draft bill for employee involvement published 21 January 2005. Consultations con- tinuing and legislation unlikely in first half of 2006
Slovenia	Likely to be two pieces of legislation	European Company legislation has become part of a wider discus- sion on reforming compa- ny law, delaying progress

DEBATES AND DELAYS

There has clearly been some delay in transposing the Directive, despite the fact that the final text was agreed in October 2001. Less than a third of EEA states transposed the Directive on time, and it was only in March 2005 that more than half had done so. However, the delay has not been the result of substantial national debates on the substance of the Directive.

* Listed by date of the transposition of the Directive

There seems to have been only one country, Germany, where the introduction into national law of employee involvement in European Companies has sparked a significant national debate. Elsewhere, the discussions have been largely technical, with three main issues emerging: the role of the unions in relation to other employee representatives; the costs and resources involved particularly for time off; and – with an issue that relates primarily to the Regulation rather than the Directive – the implications of introducing a new form of corporate governance. This last concern seems to have been greatest where a one-tier system of a single board has been introduced into a country where two-tier boards, with supervisory and management boards, have provided the sole corporate governance structure up to now.

Hungary provides an example of where the role of unions in relation to other employee representatives became a subject for discussions. In the consultation with unions and employers, the unions called for the local union representatives to be accepted as the normal form of representation, with works councils only being involved, if a union was not present. However, the government rejected this approach in favour of representation through the works council. In Portugal too the unions were initially concerned that employee representation would be solely through works councils. However, following the election of a socialist government in February 2005, the draft legislation was changed, and it now allows the unions a much greater influence. In Spain, where the legislation was still under discussion at the end of 2005, the employers' organisations were opposed to the suggestion in the draft bill that union representatives who were not employed by the companies involved could be members of the Special Negotiating Body. This they saw as "foreign to our model of industrial relations". Employers in Belgium also raised similar concerns.

On costs, Spanish employers objected to the clause in the draft bill that gives those elected to represent employees in a future European Company the right to 60 hours' paid time off for training. They saw this as overly generous. In Luxembourg, another state where the process of implementation had still not been completed by the end of 2005, a similar point was raised but from a different point of view. The chamber of employees in the private sector wanted the right to training extended to substitute employee representatives, while also complaining about the proposal that the employers should only be compelled to pay

for a single external expert to advise the employees' side. The chamber wanted the same number of experts as there were companies involved. Concerns about the reimbursement of travel and accommodation emerged in the discussions in Lithuania, where the legislation finally passed states that "the amount of such expenditure and the procedure for its reimbursement shall be established by the government".

The introduction of the possibility of a single board of management into states that had previously only permitted a two-tier structure of management and supervisory boards has also been the subject of some discussion. It has been raised in Austria and the Netherlands and in Slovenia it has become a major issue as the government has decided to use the introduction of the European Company Regulation to make a major change to national company law. This will give Slovenian companies the right, for the first time, to choose between a one and a two-tier system.

These three issues – the role of unions, costs and resources and single or two-tier boards – do not constitute an exhaustive list of the issues raised in the process of national implementation. Other issues taken up have included the tax implications of companies moving their head offices (Sweden); the precise definition of consultation (Netherlands); the mechanism for dealing with disputes over potential misuse (Norway); and the potential removal of a national body representing employees at the top of a company (France).

Despite these particular concerns the overwhelming impression of the transposition process in most member states has been the distinct lack of interest in the issue. If the process has been delayed, it has not been because major national disagreements took time to resolve, rather that governments did not give the issue particularly high priority.

The one country which is an exception, where the transposition of the Directive on employee involvement in European Companies has led to a wider national debate, has been Germany. Here the main employers' organisations, the BDA and the BDI, used the need to transpose the Directive to call for major changes in the existing German system of employee participation at board level. In a report published in November 2004, the employers argued that the Germany system of employee

involvement needed to be “fully renewed”⁴. Much of the debate on the Directive’s transposition in the Parliament and the press focussed on these criticisms.

The then German government rejected the employers’ immediate demands but it set up a “Commission on the Modernisation of Co-determination”, whose remit is to produce “proposals for the further development of German employee involvement at board level, which is both modern and suitable for Europe”. The new government has agreed that the Commission should continue with its work.

THE CONTENTS OF THE LEGISLATION – WHO REPRESENTS EMPLOYEES?

In transposing the Directive the member states of the EEA have to a large extent reproduced its wording in their own national legislation. But in a number of areas the Directive had to be adapted to national conditions and in some others there are significant differences in the approach taken by member states.

One of the key areas where a distinctive national choice had to be made, is in the selection of the Special Negotiating Body (SNB) – the body representing employees that negotiates the terms of future employee involvement with the management of the planned European Company.

The Directive itself says that “member states shall determine the method to be used for the election or appointment of the special negotiating body who are to be elected or appointed for their territories.” It goes on to give member states the option of permitting trade union representatives who are not employees of the companies involved to be full members of the SNB. What is interesting is not just the choices that member states have made in these two areas but also how they relate to their existing industrial relations systems.

Looking at the choice of SNB members in the 25 countries for which a text is available – the 22 states that have transposed the Directive plus draft legislation from Liechtenstein, Luxembourg and Spain – it is possible to divide the countries into three broad groups, although some countries straddle the boundaries.

The groups are:

- where the SNB members are chosen by works councils or similar bodies;
- where they are chosen by the unions; and
- where they are directly elected by employees.

There are seven countries (see Table 2) where SNB members are chosen by works councils or similar bodies. This group includes two states, Liechtenstein and Luxembourg, where the legislation is still in draft form. In Germany, Austria and the Netherlands and to a lesser extent Hungary, there are complex rules to take account of the company and group structures for works council representation. In Belgium the works council or health and safety council normally makes the choice but the fallback is the union delegation. This reflects the fact that the works council or health and safety committee, while elected by all employees, are union bodies to the extent that only unions can nominate their members.

Table 2: SNB members are chosen by works councils or similar bodies

<i>Country</i>	<i>Comments</i>
Austria	Chosen by the works council structure, taking account of the possibility of having central/group works councils covering several workplaces
Belgium	If no works council then chosen by the health and safety committee which has similar powers to the works council in smaller workplaces. If no health and safety committee then chosen by union delegations.
Germany	Chosen by electoral body drawn from the works council structure, taking account of the possibility of having central/group works councils covering several workplaces
Hungary	Chosen by the works council structure, taking account of the possibility of having central/group works councils covering several workplaces

⁴ Mitbestimmung Modernisieren – Bericht der Kommission Mitbestimmung: BDA BDI Page 27

Liechtenstein (draft legislation)	Wording is simply that SNB members will be chosen by the existing employee representation, which should be elected where there are 50 or more employees
Luxembourg (draft legislation)	Chosen by employee delegates
Netherlands	Chosen by the works council structure, taking account of the possibility of having central/group works councils covering several workplaces

There are 15 countries, the largest group, where SNB members are chosen by unions, normally the local union organisation. Included in this group are four Central and Eastern European states, the Czech Republic, Latvia, Lithuania and the Slovak Republic, where the legislation refers to “employee representatives” rather than specifically unions but in practice in the vast majority of cases it will be the local union body that fulfils this role.

The precise mechanism by which the union selects the candidates varies from country to country (see Table 3) and there are also varying arrangements for dealing with situations where several unions may be present. In France and Spain (where the legislation is still in draft form), the results of the most recent works council election are the basis for this decision. In Poland, on the other hand, it is hoped that the unions will agree. But where they do not there is an election for SNB members on the basis of competing lists. In Denmark and Italy the existing structures that represent all employees – the “co-operation committee” in Denmark and the RSU in Italy – make the choice. But as these are essentially union bodies, these countries have been included under the union heading.

Portugal theoretically provides for joint decision-making between both the works council and the union. But, in practice, most works councils only exist in large companies where unions are strong. Portugal has, therefore, also been included in the list of states where the union makes the choice.

Table 3: SNB members are chosen by unions

Country	Comments
Cyprus	Elected from existing trade union organisations which represent employees
Czech Republic	Wording refers to “employee representatives”, which in most cases means the local union. A works council can only be set up if there is no union
Denmark	Chosen by “co-operation committee” which represents all employees but whose employee members are trade union representatives
Finland	Wording says “by agreement or elections” but in most cases will be through agreement with the unions
France	Chosen by unions from among the elected works council members or the appointed trade union delegates on the basis of union results in the most recent elections
Iceland	Elected by union representatives
Italy	Chosen by the trade union representative body in the company, normally the RSU, which is two-thirds elected by all employees and one third appointed by the unions
Latvia	Employees can decide they wish to be represented by “existing employees’ representatives”. Although Latvian law provides for elected “authorised representatives”, in practice existing representatives will be union representatives
Lithuania	Appointed by “employees or their representatives”. In most cases employee representatives will be union representatives as a works council can only be set up where there is no existing union organisation and legislation permitting works councils to be set up at all was only passed in October 2004
Norway	Chosen by local trade union bodies provided they represent two-thirds of employees and the unions agree

Poland	Chosen by the local union. If there are several unions they should agree on the members and where they cannot agree there is an election based on union lists
Portugal	Chosen through agreement between works council and unions, or by the unions if they represent two-thirds of employees
Slovak Republic	Appointed by employee representatives. These can be the local union body or the works council. In most cases they will be the union body
<i>Spain (draft legislation)</i>	<i>Chosen by the unions that together have a majority on the works council</i>
Sweden	Chosen through agreement between unions that have collective agreements with the company

There are only three states, Estonia, Malta and the UK, where the SNB members are directly elected by the workforce (see Table 4). In the case of the UK there is an alternative of appointing SNB members through a “consultative committee”. But this must be a body that represents all employees, consists only of employees of the company, and whose normal functions include information and consultation. With no requirement in the UK for such a body to be set up, in most cases UK members of SNBs will be directly elected.

Table 4: SNB members are directly elected

Country	Comments
Estonia	Elected at general meeting of all employees or, where there are several companies, by delegates elected at general meetings
Malta	Elected by ballot of all Maltese employees
UK	Elected by employees unless there is an existing “consultative committee”. In most cases this consultative committee will not exist

The complex arrangements for choosing SNB members in these 25 states by and large reflect their existing industrial relations systems. It is no surprise, for example, that it is the unions that choose the SNB members in Cyprus, Iceland, Norway and Sweden, as it is the unions that provide employee representation in all these states. Similarly, it is no shock that SNB members are elected through the powerful works council systems in Germany and Austria.

However, there are four states, the three with direct elections plus Hungary, where it can be argued that the existing industrial relations practices are not fully reflected in the legislation on employee involvement European Companies, to the disadvantage of the unions.

In Estonia, the existing situation at national level is that employee representation is through unions if it exists at all. However, rather than giving the right to choose SNB members to existing employee representatives, that is the union, and allowing direct election as a fallback – the path followed in Latvia – the legislation provides only for direct elections.

In Hungary, unions and works councils co-exist in the national system and have widely overlapping rights on information and consultation and while nominations to company supervisory boards at national level are made by the works council, it must take the views of the union into account. However, the legislation on European Companies states only that “the member(s) of the Special Negotiating Body shall be appointed by the works council” or central works councils if these exist. The local unions have no role.

In Malta existing domestic legislation says that for the purposes of information and consultation in the case of redundancies and transfers the “employee representative ... means the recognised union representative”⁵ and the level of union membership is high at 62% of all employees. Despite this the legislation on employee involvement in European Companies provides only for an employees’ ballot to choose SNB members.

⁵ Employment and Industrial Relations Act December 2002 – Section 2 Definitions

The final example of this trend is in the UK, where, as in Malta, recognised unions are the normal channel for consultation on redundancies and transfers. Here too the European Company legislation provides for a ballot of employees to choose the SNB members, unless there is an existing “consultative committee”. The local union organisation, even if it represents the vast majority of employees cannot, in contrast, choose the SNB members.

One final point should be made on the method for selecting SNB members. This is that the arrangements set out in Tables 2 to 4 above reflect the normal situation, where there is a works council or a local union organisation. However, in all states these bodies become much less common as workplace size falls. This is not of major concern in domestic industrial relations which are dominated by medium-sized and larger organisations. But in European Company negotiations, where every state with employees must be represented, however small the number, employee representatives from smaller workplaces can play a disproportionate role. The result may be that on some SNBs the bulk of members may not be chosen under the normal provisions set out in the Tables but rather under each state’s fallback provisions. In every case this is some form of direct election by all employees.

A second issue where member states could make a choice on SNB members was in deciding whether they could include union representatives who were not employees. Just over half of the states where a text has been analysed – 13 out of 25 – have stated specifically in the legislation that union representatives, who are not employed by the companies involved, can be full members of the SNB. They are Austria, Belgium, Czech Republic, Germany, Hungary, Italy, Malta, *Luxembourg (draft)*, Poland, Portugal, the Slovak Republic, *Spain (draft)* and the UK. In the case of both Malta and the UK this is provided that management agrees. The situation for Italy is somewhat unusual as the legislation specifically says that SNB members do not have to be employees of the company involved, but they are elected from the trade union representative body, which normally consists of company employees. In Germany if there are more than two German members of the SNB then every third member must be a representative of a trade union that has members in the company.

There are three countries – Denmark, *Liechtenstein (draft)* and Norway – where the legislation specifically restricts SNB membership to company employees. And

there are a further nine countries – Cyprus, Estonia, Finland, France, Iceland, Latvia, Lithuania, Netherlands and Sweden – where the legislation itself is not specific. However, in at least four of them – Finland, France, Iceland, and Sweden – the existing arrangements make it very unlikely that the SNB would include members who were not employed by the companies involved.

EXPERTS

The Directive gives SNB members the right to be assisted by external experts and this provision has been included in all 25 texts examined. The wording in the Danish legislation is fairly typical, repeating the wording in the Directive that “for the purposes of the negotiations, the special negotiating body may request assistance from experts of its choice”.

However, the issues that vary between countries are whether trade union bodies are specifically referred to in relation to experts and the number of experts that the company or companies involved can be compelled to pay for.

On specific references to trade unions in the section of the legislation on experts, the 25 states are evenly divided. Twelve make no mention of trade unions. These are Austria, Cyprus, France, Malta, Latvia, *Liechtenstein (draft)*, Lithuania, Netherlands, Poland, Portugal, the Slovak Republic and the UK

This is matched by the 12 countries that do refer to unions. In ten of the 12 states – Belgium, Czech Republic, Denmark, Estonia, Finland, Germany, Hungary, Italy, *Luxembourg (draft)* and *Spain (draft)* – the reference, as in the Directive, is to union bodies at European level. In the Icelandic legislation it is to unions at European Economic Area level (Iceland is in the EEA not the EU) and in Norway – also in the EEA not the EU – the reference is simply to unions.

This leaves Sweden, which refers to experts being present who “promote coherence and consistency” at EU level – the reason given in the Directive for having EU level union organisations involved – but not to specifically to having union experts.

The position is more clear-cut on paying for experts. Most member states – 19 of the 25 – limit the costs borne by the company or companies to a single external expert.

The six that do not impose this limit are:

- Finland, where “reasonable costs” for the services of experts should be met;
- Germany, where the company should cover “the expenses incurred in connection with the establishment and activities” of the SNB;
- Hungary, where the company is liable for “justified necessary expenditure”;
- Latvia, where “any expenses relating to the functioning of the SNB ... ensuring appropriate conditions” should be borne by the company (this is unlike the situation for the representative body set up after the creation of a European Company, where there is a clear limit of one expert);
- Netherlands, where costs which are “reasonably necessary” are borne by the company but only where the participating companies are notified of the costs in advance; and
- Sweden, where the text states that expenses borne by the company “to the extent required” to enable the SNB to carry out its tasks “in the appropriate manner”, but where the government has also made it clear that, while it did not propose to impose a limit, in normal cases it would be reasonable to have only one, although in special circumstances there might be more.

STRUCTURAL CHANGES AND MISUSE

One of the concerns expressed in the discussion on the Directive was that procedure might be misused to reduce the rights of employees to be involved at board level. In particular, there were fears that a European Company could be set up by companies from countries with very limited or no employee involvement at board level – meaning that these rights would be limited in the new European Company, but then new companies could be brought from countries in where board-level rights were more extensive. The employees from the companies brought in later could lose their rights as a result.

The Directive therefore included the following wording:

“Member states shall take appropriate measures in conformity with Community law with a view to preventing the misuse of an SE for the purpose of depriving employees of rights to employee involvement or withholding such rights”.

Most member states have included wording referring to action to be taken against misuse of the European Company in this way. Of the 25 texts examined, 17 include provisions along these lines. These are Austria, Cyprus, Denmark, Estonia, Finland, Germany, Iceland, Italy, Malta, *Liechtenstein (draft)*, Lithuania, *Luxembourg (draft)*, Norway, Poland, *Spain (draft)*, Sweden and UK. In addition France and the Netherlands have tackled the problem of potential misuse by a wider reference to major structural changes after the European Company has been set up (see below). Only six states – Belgium, Czech Republic Hungary, Latvia, Portugal and the Slovak Republic – do not appear to have dealt explicitly with the issue of this sort of misuse, although the Portuguese legislation contains a general reference to not violating the procedures.



Several of the states referring to misuse include a time limit, generally of one year, which states that if during that period there are substantial changes in the composition of the European Company, it is up to the company to prove that the purpose of the changes was not to deprive employees of their rights. The wording in the Icelandic legislation provides an example of this: “if such a change occurs within a year of registration of the SE, the burden of proof that the grounds for the change are other than those specified in paragraph 1 [intending to deprive employees of their rights] shall lie with the SE”. The other states including similar

provisions are Austria, Denmark (two years), Finland, *Liechtenstein (draft)*, Norway, Sweden and the UK. In Luxembourg the draft legislation proposes a one-year limit but no reversal in the burden of proof.

The other issue is how to deal with later structural changes which are not simply an attempt to misuse the legislation but which nevertheless have a major impact on the composition of the company and potentially on participation rights.

Part of the solution in the Directive is the requirement to include the “cases where the agreement should be re-negotiated and the procedure for its renegotiation” in the content of the agreement and all of the member states include clauses along these lines in their national implementing legislation.

However, this leaves the issue up to the negotiating parties and six member states have put in greater safeguards:

- Austria – the SNB should be convened at the request of 10% of the employees or their representatives or if the body representing employees within the European Company call for it, when there have been significant changes in the structure of the European Company which “have a bearing on ... participation rights”;
- France – if there are substantial structural changes after the creation of an SE which would have a substantial effect on the involvement of employees, there should be new negotiations;
- Germany – where there are structural changes likely to lead to a reduction in participation rights then a renegotiation should take place;
- Malta – the agreement should include “the duty to renegotiate on changes in worker involvement whenever a substantial change in the structure of the SE is foreseen, and the procedure for its renegotiation”;
- *Liechtenstein (draft)* – new negotiations should take place when there are structural changes which lead to a reduction in the participation rights of employees; and
- Netherlands – the agreement should include the circumstances in which a new agreement should be negotiated as well as a procedure for doing this, including how it should be adapted to changes in the structure of the European Company and the number employed, as well as the implications of not concluding a new agreement. If the agreement does not include these provisions,

or if the period before renegotiation is longer than two years, then there should be renegotiation if 20% of all employees or their representatives in Europe request it.

THE STANDARD RULES

In order to provide a fallback position if the negotiations between management and the SNB fail to reach an agreement, the Directive includes a set of standard rules. These cover both the arrangements for the overall body representing employees, and the arrangements for employee involvement at board level where pre-existing rights to board-level involvement mean that this is legally required.

In both cases there are some differences between member states in how the national representatives on these bodies are chosen.

The arrangements for the overall body representing employees – often referred to in the national legislation as the representative body⁶ – show least variation. In 22 of the 25 states the representative body is elected in the same way or in a very similar way to the SNB. These are Austria, Belgium, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Hungary, Iceland, Italy, *Liechtenstein (draft)*, Lithuania, *Luxembourg (draft)*, Netherlands, Norway, Poland, Portugal, the Slovak Republic, *Spain (draft)* and Sweden. In Italy and Luxembourg there some difference in the wording, and in Hungary and Poland the possibility of having external union representatives as members, possible in the SNB, is excluded.

The exceptions are the UK, where the SNB appoints the representative body, and Latvia and Malta, which have not drawn up detailed national rules on the issue but have essentially repeated the generalised wording of the Directive.

The position is slightly more varied when it comes to choosing employee representatives at board level. Just over half of the states, 14, have said that the mech-

⁶ It is also given other names, for example, the SE works council in Austria and the employees' council in Sweden

anism for choosing the individuals representing employees in their countries should be the same as for choosing the national members of the SNB. These are Austria, Belgium, Cyprus, Estonia, Finland, Germany, Iceland, Liechtenstein (draft), Lithuania, Netherlands, Norway, Portugal, Spain (draft) and Sweden.

Three, the Czech Republic, France and the Slovak Republic, have chosen specifically to use the method already followed nationally to select employee representatives at board level. In all three cases this is an election by all employees.

Another three, Denmark, *Luxembourg (draft)* and Poland, have written into the legislation that the method should be an election.

And five member states, Hungary, Italy, Latvia, Malta and the UK, have not fixed a national method for making the choice, but left the selection in the hands of the representative body in the European Company. In Hungary there is a further condition that representative body members themselves may not take up a board-level post.

There are clearly other areas of difference between the transposition legislation of the 25 states examined, although these are generally less significant and a lack of space prevents them being explored.

However, in conclusion it is worth pointing to one area where all 25 have taken a common line. This is the possibility of opting out of all arrangements that provide for employee involvement at board level. The price of doing so is that no European Companies, where previously there had been employee involvement at board level, could be registered in a country that had opted out (see Article 12.3 of the Regulation on the European Company Statute). This option was included in the Directive at the insistence of the then Spanish government. However, no member state has made use of it. Clearly, the concerns that some member states may have had about increased employee involvement have been outweighed by the need to allow European Companies to be set up within their borders.

**TAXATION OF THE EUROPEAN COMPANY
(SOCIETAS EUROPAEA, SE) - KEY TAX
ISSUES AND FAQs ON SE TAXATION**



TAXATION OF THE EUROPEAN COMPANY (SOCIETAS EUROPAEA, SE) – KEY TAX ISSUES AND FAQs ON SE TAXATION

Agenda

1. Introduction
2. SE tax law
3. Tax aspects – an overview
4. Residence and tax liability
5. Formation
6. Transfer of seat
7. Running an SE
8. Tax planning aspects
9. FAQs on SE taxation
10. Prospects

1. INTRODUCTION

In adopting the Statute on the European Company (Societas Europaea, SE), the European legislator has fulfilled the legal requirements to complete and realize the internal market for companies with regard to legal forms of business organization. As a result of the existence of the SE, European companies and groups are given the opportunity to structure, reorganize and combine their pan-European operations, to transfer their corporate seat and to adapt their organizational structure throughout the European Union (EU) and the European Economic Area (EEA) without prohibitive legal obstacles. Companies are therefore able to make use of the freedom of establishment, guaranteed under the EC Treaty and the EEA Agreement, without limitations.

Financially costly and complex networks of subsidiaries, governed by the different corporate laws of the member states, may be avoided; efficient management structures may be realized; and cross-border mergers of companies from different mem-

ber states, as well as cross-border transfers of corporate seats, may be allowed without the costs and difficulties encountered in the dissolution and new foundation of legal entities. Moreover, the competitiveness of European companies should be enhanced, tax obstacles overcome and foreign direct investments in Europe attracted. Companies from the United States or Japan will be able to employ the SE for their operations in Europe, enabling them to use a corporate vehicle with a European corporate culture and identity, as well as European corporate goodwill. However, whether the introduction of the European Company will be a successful realization of one of the most important and prestigious European legislative measures on company law depends not least on its tax treatment. The following remarks examine the various key tax aspects and issues regarding the SE and also focus on frequently asked questions (FAQs) on SE Taxation¹.

2. SE TAX LAW

Unlike the proposals for an SE Statute in 1970 and 1975² and partially also in 1989 and 1991³, neither the adopted Statute nor any other existing provision contain a special tax regime regarding the SE⁴. However, Council Directive 2005/19/EC of 17 February 2005 amending the Merger Directive (Amendment Directive) contains a provision regarding the tax treatment of a cross-border transfer of the corporate seat of an SE or a Societas Cooperativa Europaea (SCE) from one EU member state to another. Thus, an SE is – in principle – treated and subject to tax like any other national public limited company operating throughout the EU

¹ Regarding the various tax issues relating to the SE see also the special issue of European Taxation, guest-edited by Martin Wenz, 'Societas Europaea: Flagship for Company Law – Catalyst for EC Tax Law?', European Taxation 44 (2004), pp. 1–45.

and/or the EEA; that is, the current mosaic of numerous tax regulations is left untouched by the SE Statute, as is the fiscal sovereignty of the different member states. This may be welcomed since the SE is a European legal form of business organization rather than an individual tax planning tool, a preferential tax incentive or a political instrument regarding tax competition or tax coordination within the Community. Therefore, any kind of distortions in the internal market and of discrimination against an SE compared to national public limited companies and vice versa should be prevented, not least from the perspective of European Community and national constitutional laws.

However, the absence of tax provisions in the SE Statute has nevertheless been extensively criticized, also by the European Commission⁵. Although the SE gives European companies and groups the legal opportunity to structure, reorganize and combine their pan-European operations, to transfer their corporate seat and to adapt their organizational structure throughout the EU and the EEA, a suitable tax framework is also needed to overcome existing tax obstacles and to prevent unacceptable tax costs. This is all the more true, as it is the SE rather than the various national legal forms of business organization that offers European companies and groups the particular possibility to operate across borders on a Community scale. To be specific, an SE is potentially subject to the 28 national tax regimes of the 25 EU, as well as the three EEA member states. It is potentially also subject to the numerous intra EU and the several intra-EEA tax treaties and to the provisions that have already – at least partially – transformed the three EC Directives on direct taxation⁶ into national tax laws. The fundamental freedoms – including the several decisions of the European Court of Justice (ECJ) and the EFTA Court based thereon – that are contained in the EC Treaty and in the EEA Agreement, respectively, apply to the SE as well. Regarding the three EEA member states, the applicability of the fundamental freedoms⁷ is all the more important as the EC Directives on direct taxation – whether or not they correspond to or are at least in conformity with the fundamental freedoms laid down in the EC Treaty – apply only to an SE that is incorporated under Community law and resident in an EU member state.

3. TAX ASPECTS – AN OVERVIEW

Several aspects of taxation have to be analysed and discussed with regard to the tax treatment of an SE. First of all, issues regarding the residence as well as the

scope of the personal tax liability of an SE have to be scrutinized. Second, the tax treatment of the different cross-border ways of forming an SE as well as the cross-border transfer of the registered office of an SE from one member state to another have to be analysed. Third, the tax issues regarding the running of an SE operating throughout the Community and the relationships of an SE to its shareholders have to be examined. Altogether, these aspects may be the basis for certain tax planning measures that have their origin in the Community-wide legal and economic flexibility and mobility of an SE, on the one hand, and in the various differences of the various national tax systems and tax authorities, on the other.

In all these different situations the SE that was set up and – as the case may be – the companies forming the respective SE and/or the different shareholders involved have to be considered as the three possible levels of taxation. The relevant types of taxes are: corporate tax, trade tax, income tax, capital transfer tax, stamp duty, real property transfer tax and VAT. However, issues regarding the tax assessment of an SE in more than one member state, as well as matters concerning indirect taxation are not discussed.

4. RESIDENCE AND TAX LIABILITY

In the absence of a special tax regime for the SE there is also no concept of European residence as regards the SE or other European or national legal forms of business organization. Therefore, an SE may only be resident in one or more

² Both proposals contained tax provisions concerning the formation of a holding SE, the determination of the tax residence of an SE, the conditions for transferring the tax residence of an SE across borders without tax consequences and a scheme to offset losses of foreign Permanent Establishments and Subsidiaries from the domestic profits of an SE in the state of residence.

³ Both proposals contained a single fiscal provision concerning a scheme to offset losses of foreign Permanent Establishments from the domestic profits of an SE in the state of residence.

⁴ See Recital No. 20 of the SE Statute according to which the SE Statute does not cover the tax treatment of an SE.

⁵ See Communication from the Commission to the Council, the European Parliament and the Economic and Social Committee: 'Towards an Internal Market without tax obstacles – A strategy for providing companies with a consolidated corporate tax base for their EU-wide activities' of 23 October 2001, COM(2001) 582 final, p. 18.

member states of the EU or the EEA according to the criteria laid down in the national tax regimes and – as the case may be – according to the separate criteria of the respective bilateral tax treaty. Likewise, an SE is subject to unlimited taxation on its worldwide income only in its member state (or states) of residence, although it may be also subject to limited taxation concerning several sources of income in other states.

5. FORMATION

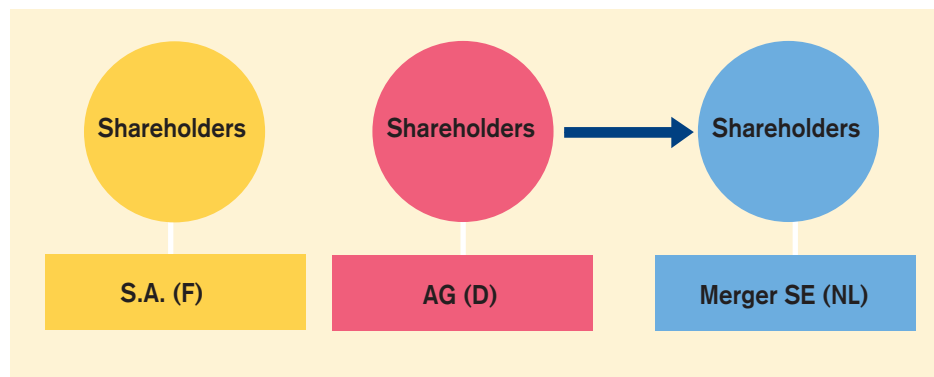
The SE Statute provides for four different ways of setting up a European Company (numerus clausus):

- merger;
- holding;
- subsidiary; and
- transformation.

5.1. Merger SE

An SE with its registered and head office in an EU or EEA member state may be formed by means of a legal merger of at least two existing public limited companies formed under the national corporate laws of at least two different member states, with registered offices and head offices within the EU or the EEA (see Figure 1).

Figure 1: Formation of a Merger SE



The various tax aspects of the creation of an SE by means of a cross-border merger from the perspective of the transferring and the receiving company, the former also having a Permanent Establishment in another member state, as well as from the perspective of their shareholders have to be analysed comprehensively. On the basis of the provisions of the Merger Directive, the formation of a Merger SE is – subject to certain conditions – treated tax neutrally by way of a tax deferral – on the level of the participating companies, on the level of the SE and on the level of their shareholders – that does not result in a full disclosure of the built-in gains, on the one hand, and also safeguards the financial interests of the affected member states, on the other.

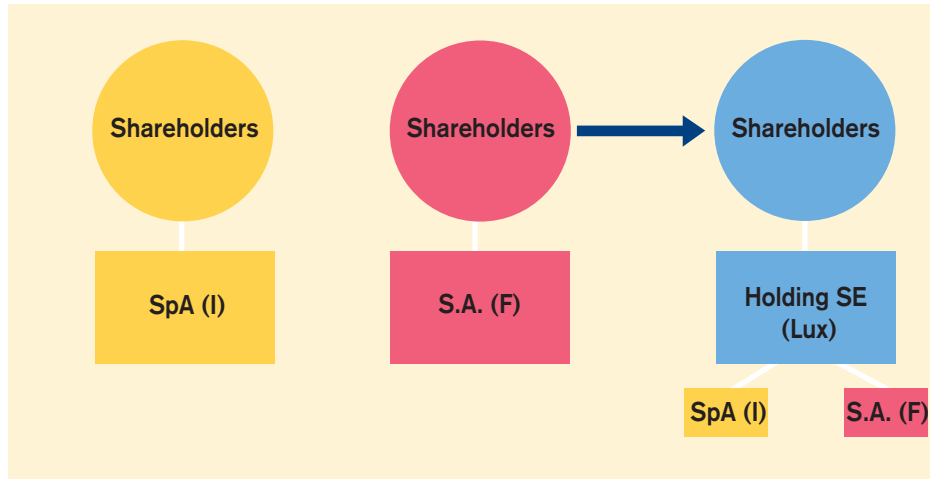
5.2. Holding SE

Alternatively, an SE may be formed as a parent holding SE by promotion of at least two existing public or private limited companies with registered offices and head offices within the EU or the EEA formed under the national corporate laws of at least two different member states or having a subsidiary governed by the law of or a branch situated in another member state for at least two years (see Figure 2). Also, the formation of a Holding SE is – subject to certain conditions – treated tax neutrally by way of a tax deferral on the level of the participating companies, on the level of the SE and on the level of their shareholders.

⁶ Council Directive 90/434/EEC of 23 July 1990 on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different member states, Official Journal L 225, 20 August 1990, p. 1 et seq. (the Merger Directive); Council Directive 90/435/EEC of 23 July 1990 on the common system of taxation applicable in the case of parent companies and subsidiaries of different member states, Official Journal L 225, 20 August 1990, p. 6 et seq. (the Parent-Subsidiary Directive); Council Directive 2003/49/EC of 2 June 2003 on a common system of taxation applicable to interest and royalty payments made between associated companies of different member states, Official Journal L 157, 26 June 2003, p. 49 et seq. (the Interest-Royalty Directive)

⁷ For a Norwegian perspective on that issue, see also Thor Leegaard, 'Impact of the European Economic Area Agreement on Direct Taxation: A Norwegian Perspective', *European Taxation* 42 (3) (2002), pp. 114–117.

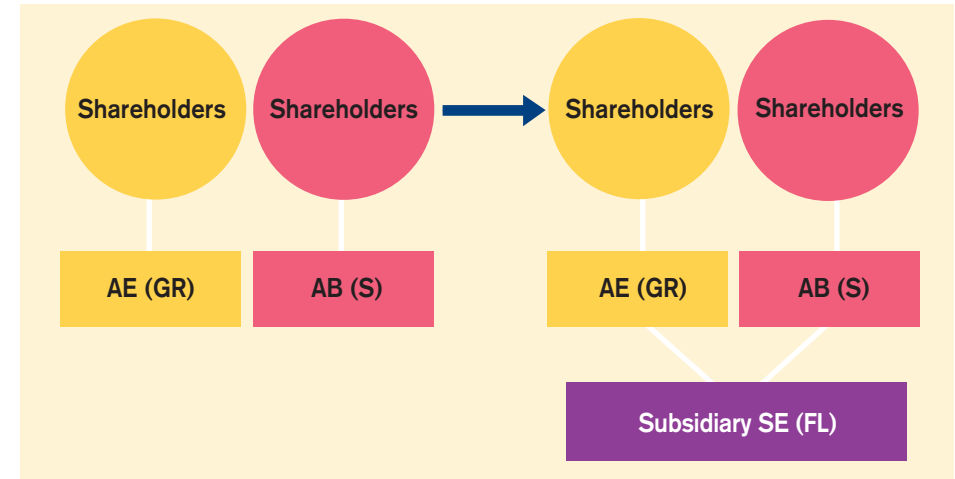
Figure 2: Formation of a Holding SE



5.3. Subsidiary SE

An SE may also be formed as a joint subsidiary by means of subscription for its share capital by at least two existing companies or firms within the meaning of Art. 48 (2) of the EC Treaty or Art. 34 (2) of the EEA Agreement with registered offices and head offices within the EU or the EEA formed under the national laws of two different member states or having a subsidiary governed by the law of or branch situated in another member state for at least two years. An SE itself may also set up a single Subsidiary SE (see Figure 3). Likewise, the formation of a Subsidiary SE is – subject to certain conditions – treated tax neutrally by way of a tax deferral on the level of the participating companies, on the level of the SE and on the level of their shareholders.

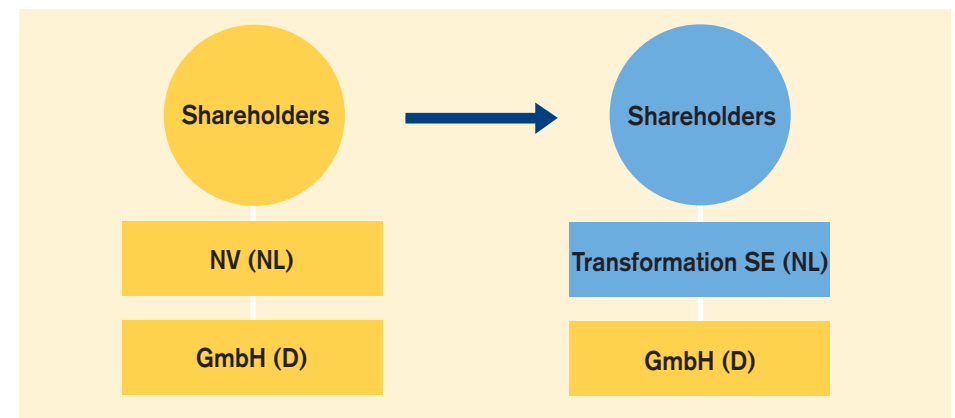
Figure 3: Formation of a Subsidiary SE



5.4. Transformation SE

An SE may be formed by conversion into an SE of an existing public limited company, formed under the law of a member state, whose registered office and head office is within the EU or the EEA and which has had a subsidiary in another member state for at least two years (see Figure 4). Also the formation of a Transformation SE is treated tax neutrally.

Figure 4: Formation of a Transformation SE



6. TRANSFER OF SEAT

According to the SE Statute, an SE may transfer its registered office to another member state of the EU or the EEA without losing legal personality. Thus, such a transfer will not result in the winding up of the respective SE in the state of emigration (outbound transfer of seat) nor in the creation of a new legal person in the state of immigration (inbound transfer of seat). However, it is not possible for an SE to transfer exclusively its registered office or its head office to another member state as both have to be located within the same member state. In these cases the respective SE either has to re-establish its head office in the member state in which the registered office is still situated or it has to transfer its registered office to the member state in which its head office is henceforth located. If an SE fails to regularize its position in that way, the member state in which the registered office of the SE is situated must put in place measures to ensure that the respective SE is liquidated.

With regard to the tax aspects of an SE (including its shareholders) that transfers its corporate seat across borders (outbound and inbound), a tax neutral outbound and inbound transfer of seat is possible, if a Permanent Establishment remains in the outbound state where the respective SE was previously incorporated.

7. RUNNING AN SE

There are numerous tax issues regarding the running of an SE operating throughout the Community in different member states of the EU and the EEA, respectively, and concerning the various relationships of an SE to its shareholders and stakeholders. In the absence of a special tax regime for the SE, the tax position of an SE will be in principle no different from that of any national public limited company of a member state operating comparably throughout the Community, even though it is the legal form of the SE in particular that will be exposed to the tax issues typical for cross-border activities. Therefore, specific tax problems of an SE are primarily based on the fact that SEs also have to deal with the uncoordinated national tax regimes of the 25 EU and three EEA member states. These include especially problems of balancing domestic profits with foreign losses sustained by branches and subsidiaries across borders, the levy of source state withholding taxes on dividends, interest and royalties, the adjustments of transfer prices between associated parties that are resident in different member states, the limitation of thin capitalization of foreign sub-

sidaries, the application of Controlled Foreign Companies regimes and certain issues regarding company re-organizations across borders.

8. TAX PLANNING ASPECTS

As mentioned before, the SE is an original European legal form of business organization and should not to be regarded as an individual tax planning tool. Nevertheless, as the SE disposes of certain specific characteristics (for example, formation of an SE by means of a cross-border merger or transfer of the corporate seat of an SE to another member state of the EU or the EEA), it may be used also for tax planning purposes as long as the various national tax regimes differ as much as they do at present. Among other things, the following tax advantages may be realized in connection with a cross-border merger and/or transfer of the corporate seat:

- use of a more comprehensive network of bilateral tax treaties;
- use of the credit versus exemption system to prevent international double taxation;
- possibility to offset losses of foreign Permanent Establishments or Subsidiaries from domestic profits in the state of residence of an SE;
- avoidance of 5% add-backs on dividends from foreign or domestic subsidiaries;
- avoidance of withholding taxes on received dividends, interest or royalty payments;
- tax neutral transfer of assets across borders between different Permanent Establishments of an SE;
- avoidance or use of more generous thin capitalization provisions;
- reduction of tax burden of future income and capital gains; and
- avoidance of Controlled Foreign Companies regimes.

9. FREQUENTLY ASKED QUESTIONS (FAQS) ON SE TAXATION

(1) ARE THERE ANY DIFFERENCES IN TAX TREATMENT BETWEEN SES AND OTHER PUBLIC LIMITED COMPANIES UNDER NATIONAL LAW?

In principle, European as well as national legal forms of business organisation are subject to the same national, European and international laws of taxation without differences. However, a different tax treatment of an SE is possible according to its specific legal structure and/or in the case of a transfer of its seat across borders.

(2) DOES THE SE FRAMEWORK CONTAIN A SPECIAL TAX REGIME? HOW FAR IS IT NECESSARY TO GIVE SES THEIR OWN TAXATION FUNDAMENT AT EU LEVEL TO MAKE THEM RUN BETTER? WILL IT COME? IF YES, IN WHAT TIME PERSPECTIVE?

In general, the SE Statute does not contain any provisions on tax law, although the different proposals for an SE Statute in 1970, 1975, 1989 and 1991 contained various or at least one fiscal provision on the tax treatment of an SE. According to a Study by Deloitte in 2004, no discriminatory legislative tax laws should be adopted to improve the fiscal status of an SE compared to similar national legal forms of business organisation. However, a suitable tax framework is needed to solve existing cross-border problems of an SE. Therefore, the Council Directive 2005/19/EC of 17 February 2005 amending the Merger Directive (Amendment Directive) contains a provision with regard to the tax treatment of a cross-border transfer of the corporate seat of an SE – or a Societas Cooperativa Europaea (SCE) – from one EU member state to another.

(3) WHAT IS THE EXACT MEANING OF THE PHRASE THE “SE IS DESIGNED AS TAX-NEUTRAL”?

As mentioned before, the SE Statute does not contain any provisions on tax law. With regard to the intention of the “SE being tax neutral”, this means that there should be no discrimination between European and national legal forms of business organisation. Furthermore, according to the provisions of the Merger Directive and the Amendment Directive, an SE gives European companies and groups the possibility of a tax neutral formation across borders and a tax neutral transfer of its corporate seat throughout the EU.

(4) WHAT MAKES SES ATTRACTIVE FROM A TAX PERSPECTIVE? ARE THERE ANY TAX PLANNING ASPECTS?

An SE may be used for tax planning purposes because of several tax advantages with regard to its specific legal structure and/or its ability to transfer its corporate seat across borders. One of the tax advantages is the use of a more comprehensive network of tax treaties and the use of the credit versus exemption system to prevent international double taxation. Furthermore, an SE may contain the possibility to offset losses of foreign Permanent Establishments or Subsidiaries from domestic profits in the state of residence of the respective SE. Other tax planning aspects result from the avoidance of 5% add-backs on received dividends from foreign or domes-

tic subsidiaries and of withholding taxes on dividends, interest and/or royalty payments within an SE Group. An SE may also be used for tax neutral transfer of assets across borders between different Permanent Establishments of an SE. Furthermore, the SE is an appropriate instrument for the avoidance or the use of more generous thin capitalization provisions. Other tax advantages are the reduction of the tax burden of future income and capital gains and the avoidance of Controlled Foreign Companies legislation.



(5) DO SE PROVISIONS MAKE EUROPE MORE ATTRACTIVE FOR FOREIGN INVESTMENT? HOW FAR COULD NATIONAL TAX OBSTACLES BE OVERCOME BY FORMATION OF AN SE?

Because of the legal and economic advantages of an SE as such, the different possibilities to use an SE on a European level and the different tax treatment of an SE according to its specific legal structure across borders, the SE Statute makes Europe a much more attractive location for foreign direct investments from overseas.

(6) WHICH EXISTING EU DIRECTIVES CONCERNING TAXATION HAVE TO BE RESPECTED BY AN SE?

The relevant EU Directives concerning taxation respected by an SE are the EC Parent–Subsidiary Directive (including Amendments), the EC Merger Directive (including Amendments), the EC Interest-Royalties Directive (including Amendments) and the EC Mutual Assistance Directive (including Amendments).

(7) FROM A TAXATION POINT OF VIEW HOW IS THE SE RELATED TO OTHER EU DIRECTIVES ON COMPANY LAW? E.G. THE 10TH DIRECTIVE ON CROSS-BORDER MERGERS? E.G. THE 14TH DIRECTIVE ON CROSS-BORDER TRANSFERS OF SEAT?

The SE is the European Model and Basis for all future Directives on company law (European compromise). It comprises cross-border aspects, aspects of Corporate Governance and aspects of co-determination. Therefore, one may say that European Company Law is SE Law.

(8) WHICH TYPES OF TAXES ARE CONCERNED?

According to the various national laws of taxation of the 25 EU and the three EEA member states, all kinds of taxes are concerned, for example, taxation of income and capital gains, taxation of substance and taxation of transfers of all kinds.

(9) WHAT TAXATION ISSUES ARE TO BE CONSIDERED WHEN FORMING AN SE?

The cross-border formation of a Merger SE is treated tax neutrally, on the level of the foundation companies (if a Permanent Establishment remains in the respective outbound states), on the level of their shareholders and on the level of the SE. An SE may also be formed tax neutrally as a Holding SE; at the level of the shareholders of the foundation companies and at the level of the SE the formation is treated tax neutrally. With regard to the Subsidiary SE there are also no taxation issues concerning the level of the foundation companies and the level of the SE. Furthermore, in the case of a Transformation SE formation takes place tax neutrally at the level of the converting company, the SE and at the level of the shareholders.

(10) WHAT ARE THE TAXATION ISSUES WHEN RUNNING AN SE? E.G. BALANCING PROFITS AND LOSSES IN DIFFERENT EU MEMBER STATES. IS ONLY ONE NATIONAL TAX REGIME APPLICABLE TO ALL PARTS OF THE SE IN OTHER EU MEMBER STATES?

The tax issues regarding the running of an SE are the determination and taxation of income and capital gains of an SE, the taxation of profits of foreign Permanent Establishments of an SE, the taxation of dividends, interests and royalties of an SE Group, transfer pricing issues of an SE Group and the cross-border balancing of profits and losses of an SE entity or Group. Further tax issues are the tax consolidation of an SE Group, thin capitalisation issues within an SE Group, the application of Controlled Foreign Companies Legislation regarding non-active subsidiaries of an SE and the taxation of the shareholders of an SE.

(11) WHAT ARE THE TAXATION ISSUES WHEN TRANSFERRING THE SEAT OF AN SE?

In accordance with the Amendment Directive, the transfer of seat of an SE across borders (including its shareholders) is treated tax neutrally. In this case there is no taxation at all, either in the outbound state or in the inbound state. However, it is necessary that a Permanent Establishment of the transferring SE remains and is subject to tax in the outbound state.

(12) HOW FAR COULD THE INTRODUCTION OF THE SE INCREASE THE ATTRACTIVENESS AND COMPETITIVENESS OF EUROPEAN ECONOMIES?

The aim of the SE is the completion of the European Internal Market. The introduction of the SE therefore increases the cross-border mobility and flexibility of companies and groups within the EU and the EEA, tax competition within the EU and the EEA, the tax attractiveness of EU and EEA member states and the tax competitiveness of EU and EEA member states.

10. PROSPECTS

With the adoption of the SE Statute, the EU and EEA member states unanimously undertook the first and – to a certain extent – decisive step to introduce one of the most important and prestigious legislative measures of European company law. However, in accordance with the concept of the internal market, the SE Statute is only a legal framework, rather than a fully consistent statute that takes into consideration cross-border situations in particular. Therefore, it is the responsibility of the member states to undertake additional and no less decisive steps in order to introduce a suitable tax framework (also) regarding the SE to overcome the still existing tax obstacles and to prevent unacceptable tax costs throughout the Community. This should not be misunderstood as unacceptable demands for preferential tax treatment of the SE compared to other legal forms of business organization that may result in an artificial increase in the use of the SE and – among other things – give rise to further distortions within the internal market. Therefore, European as well as national tax policy should neither focus on tax avoidance fears nor adopt restrictive or adverse tax measures. European and national tax policy should rather focus on the completion of the European internal market also in tax matters.

**“TAKING RESPONSIBILITY IN AN SE” -
A NEW CHALLENGE FOR WORKERS
FROM DIFFERENT CULTURAL
AND POLITICAL BACKGROUNDS**



“TAKING RESPONSIBILITY IN AN SE” – A NEW CHALLENGE FOR WORKERS FROM DIFFERENT CULTURAL AND POLITICAL BACKGROUNDS

The cause of industrial democracy in Europe has a long history. Indeed, in some countries it can be traced back to the early days of the industrial revolution. Public discussions on what kind of representation workers should have inside the business enterprises which employ them were often stimulated by many of the continent's trade union movements. But from the beginning, important differences of opinion existed between European nation states on the active and positive role that workers might play in company affairs.

In European countries such as the United Kingdom and those in Scandinavia, trade unions secured important legal protections from governments so they were free to develop as collective bargainers through agreed negotiations with employers on the improvement of the wages and conditions of their members. But the demand for direct employee representation on company boards was not a priority for such trade unions. They believed that they should not become involved in the decision-making of firms at the highest level because they feared that such a move would compromise their independence and autonomy as organisations that genuinely represented the demands and aspirations of employees. Moreover, they wanted to avoid as far as possible any intrusion by the state into workplace relations. The unions in the United Kingdom and in Scandinavia may have had different traditions but they all agreed that the best way to advance the interests of workers was through voluntary agreements and not the imposition of comprehensive legal rights.

Trade unions pointed out that to have employee representatives on company boards would bring about a genuine conflict of interest between capital and labour. They argued that unions needed to represent the specific needs and aspirations of employees and not the wider concerns of the firm as a whole. Inevitably, they

pointed out, there could often be a difference of opinion between employers and their workers over sensitive issues such as plant closures, the laying off of workers and company restructuring that could make an adverse impact on the position of employees. Such issues would place board-level employee representatives in an impossible position, it was argued.

Instead many trade unions, especially in Scandinavia, wanted to make themselves strong and effective workplace institutions outside the boardroom so that they could exercise influence and power over company decision-making without having to share the burdens and responsibilities of shareholders and the owners of publicly listed firms.

But in other European countries, most notably in Germany during the 1920s, the trade union movement took a different view. While the trade unions in that country were also supporters of voluntary collective bargaining, they also believed that workers needed to secure a direct and often equal say over the affairs of the companies that employed them. Through a process of co-determination – it was argued - organised labour would gain a substantial part in the running of modern firms, making them both democratic as well as entrepreneurial. Many trade unions in Germany, especially after the end of the Second World War, believed such an ambitious objective should become an important part of a much wider programme of workplace democracy which would lead eventually to the creation of a planned market economy where organised labour came to exercise a dominant control.

* Update December 2005: Michael Stollt / Norbert Kluge

However, such a view was never really accepted by trade unions in most other European countries with the exception of Austria. In democratic southern Europe, in particular, where industrial relations were usually characterised by a tradition of conflict and trade unions saw themselves involved in a class war with organised capital the idea of German-style co-determination was normally criticised as an unacceptable form of class collaboration. Trade unions in southern Europe and also in France believed they were very much vanguard organisations who existed in order to represent workers in struggle. Their aim was to challenge the power and authority of employers and not work in cooperation with them. Such a view was also shared by the trade unions in Portugal and Spain after the end of Fascist rule in those two countries.

In reality, the public debate over employee representation on company boards suffered from widespread indifference, neglect and confusion among many trade unions across Europe. For much of the 20th century it rarely became a predominant or urgent issue on most trade union agendas outside Germany and Austria. It is true that in the immediate aftermath of the Second World War some genuine advances appeared to have been made towards the establishment of employee representation on company boards in a number of countries. The victory of democracy in 1945 unleashed a widespread and popular mood of hope that workers could create a more socially just and equitable society, of which industrial democracy would be a part.

Trade union movements at that time were keen to insist that workers should demand and exercise a much greater degree of power and authority over the economy of their countries than they had done in the past. In Italy, for example, the country's new constitution of 1946 actually laid down that it was “the worker's right to cooperate in company management, according to the mode and limits established by law”. The preamble to the French constitution for the Fourth Republic stated that “every worker, through his/her delegates, has the right to participate in the collective determination of working conditions and the management of companies.”

In practice, however, little progress was achieved in turning such aspirations into reality in either France or Italy. It is true that governments in some European democratic countries agreed in principle to introduce forms of direct employee representation onto the boards of state-owned enterprises and public service agencies. But it was not until the end of the 1960s that the debate on the future of industrial

democracy came to the forefront of the trade union agenda. After Italy's so-called “hot” autumn of 1969 and the “events” in France in the early summer of 1968 it seemed as though organised labour was on the march across much of western Europe. The cause of worker participation and even worker control of the means of production became fashionable and many trade unions began to demand direct access to company decision-making in the name of social justice and the right of labour to power in the workplace in a capitalist society that they believed to be in terminal crisis. The upsurge of industrial militancy through the widespread use of strikes and other forms of industrial disruption precipitated a more fundamental discussion about what the role of workers should be in democratically organised economies.

As a result, the public debate on a proposal to provide the opportunity for employee representation on the boards of private companies that operated across national borders grew in intensity and importance after 1970. In 1972 the European Commission drew up draft legislation in the form of the so-called fifth Directive on company law. This declared a bold objective; that all companies employing 500 or more workers should be required to establish two-tier board structure very much on the lines of West Germany's system of co-determination. Under the draft Directive the company's management board would be responsible for the day to day running of the enterprise but it would be appointed and over-seen by a supervisory board to which it was ultimately responsible and that body would contain up to a third of its members as representatives from the company's employees.

Inevitably such an ambitious plan ran into formidable opposition from many companies who launched intensive lobbying on the Commission and European Community member states calling for its rejection. Over the next eleven years the fifth Directive went through innumerable drafts and revisions as the Commission attempted to reach a flexible compromise that would accommodate the concerns of those who feared such a measure would threaten the market economy and provide trade unions with too much control over a company's commercial operations .

However, the European Commission would not retreat from the general principle that those people who were to be substantially affected by decisions made by social and political institutions must be involved in the making of those decisions. In 1973 it even asserted that “employees are increasingly seen to have interests

in the functioning of enterprises which can be as substantial as those of shareholders and sometimes more so”. It concluded that the decision-making structures to be established within the proposed European Company needed to reflect that undeniable fact.

A strong emphasis was placed by the European Commission from the very beginning of the discussions in the 1970s on the demand that employee representatives needed to be present as active participants on company boards as an integral part of a much wider employee participation system that affected all levels of the enterprise. This general principle was becoming widely acknowledged at that time in the domestic legislation of the majority of European Community member states.

It is true that the Commission came to realise that it would not be possible to impose a rigid German-style two-tier company board system across western Europe and especially in those countries where existing company law required corporate governance through the operation of only one board to run and supervise the enterprise and not two. Instead, it was suggested that firms under the proposed Directive could choose from five different structures at company level in order to meet the aim of providing employees with direct representation in their decision-making processes.

However even the absence of an inflexible and comprehensive blueprint laying down the exact form that employee representation needed to take on company boards was not enough to win over the Commission’s critics who continued to oppose any legally-driven move that would insist on the statutory enforcement of employee representatives on the boards of large companies operating in Europe. In 1983 the whole issue was shelved with no prospect of an end to the deadlock on the proposed legislation.

The Commission’s early attempt in the 1970s to establish employee representation on company boards at European level failed not only because of the fierce resistance of many companies, especially those with their headquarters based in the United States but also because of the sharp division of opinion that emerged on the merits of the proposal among national states. The United Kingdom led by its prime minister Margaret Thatcher after 1979 was strongly opposed to any measure that proposed an extension of worker or trade union power in the running of either

national or transnational-based enterprises. But many other member governments privately also agreed with her at that time.

On the other hand, trade unions in West Germany feared that the more flexible options being proposed by the European Commission would threaten to undermine their more robust co-determination system and provide a means of escape for those German companies that wanted to weaken or marginalise worker participation on their own boards.

The new European Company (SE) Statute with its accompanying Directive on employee involvement that came into force in October 2004 put an end to the impasse that halted the proposals made nearly thirty years ago. But of course, the mere passage of legislation on employee participation in newly formed enterprises to be designated as European Companies that are governed by new laws that transcend national systems can only be the beginning and not the end of what still promises to be a prolonged, complicated and difficult process of adjustment as such new enterprises come into being under the terms of the Statute. Indeed, it is possible to argue that the Statute will not bring about the transnational systems of employee participation at board level that earlier enthusiasts always envisaged, or at least such an outcome will not be achieved for a very long time.



The dominant reason for this is that many of the basic arguments over the issue of employee representation on company boards that were made back in the 1970s still remain highly relevant. The national differences that existed at that time have not gone away. Indeed, in some countries they have grown into more formidable obstacles to any advance to employee representation at board level.

But the whole thrust of the current Statute appears to be aimed very much at the protection of existing forms of employee boardroom participation where they exist by law in individual member states. As Professor Paul Davies at the London School of Economics has pointed out: “Employee participation through the company board is mandatory only where such participation is a substantial feature of the national laws applying to the companies which form the European Company.” One of the primary objectives of the legislation is to try and prevent an undermining of existing national provisions on board-level employee participation rather than further the wider cause of employee representation in the proposed new European Companies. Clearly the new Statute reflects a different mood in Europe than that which existed in the 1970s when industrial democracy was seen by many trade unions as part of a bold programme designed to further the interests of workers. Today there is greater caution and moderation and more understanding and recognition of the difficulties of implementation caused mainly by national differences that are a product of ideology and tradition.

This is why the way ahead on the use of the European Company Statute looks uncertain and problematic for many trade unions and workers. Understandably some of them would like to use the opportunity that may be opening up to them through the new legislation to strengthen their role in the decision-making processes of the enterprise. But on the other hand, many may fear, though wrongly, that those employers who are interested in the establishment of European Companies will seek either to substitute or challenge trade unions by trying to introduce other forms of collective association that are either dominated or even sponsored by management.

The European Trade Union Confederation is well aware of this apparent danger. At its 2003 Congress in Prague delegates agreed to press for the development of a common strategy that aims to strengthen the position of trade unions in the new company structures and ensure that those employee representatives who are man-

dated and elected by employees are included on either the company’s managerial or supervisory boards.

However, resistance to the inclusion of employee participation in the European Company Statute has proved to be fierce and widespread over the years and the opposition has not been confined simply to employers. Indeed, many trade unions across the European Union still acknowledge that they face genuine difficulties as they attempt to reconcile their own traditions, attitudes and practices of employee representation in company level decision-making within their own countries to the requirements of a Statute that seeks to transcend national frontiers and differences.

It is true that the diversity and flexibility of approach towards employee participation between most member states is recognised in the actual wording of the European Company Statute. Critics who suggest that its purpose is to spread the German system of co-determination across the different systems of corporate governance applicable elsewhere are mistaken, even if the German system has exercised a substantial influence over the wider thinking that was behind the drafting of the legislation.

On the other hand, the European Company Statute is trying to protect existing forms of employee representation in companies that are already operating in different member states. Its avowed intention is not to either undermine or water down what already works in practice at national level. But the legislation also seeks to ensure that there are common obligations involved in its implementation. Perhaps inevitably these look narrowly limited and hard to define. The outcome therefore will depend on how workers’ participation within the European Company is jointly negotiated between employers and employee representatives and the outcome of this process will depend on what existing employee participation laws allow in individual member states.

What is also very clear from the European Company Statute is that its intention is not to replace or substitute existing systems of employee participation at boardroom level in member states. Its authors have been anxious from the beginning to ensure that the proposed European corporate level of employee representation is an addition to what is already being practised and not an alternative. They have been understandably anxious to encourage forms of flexibility, pluralism and experimentation that go with and not against the current of mainstream national state based tra-

ditions of industrial relations. Indeed, the European Company Statute has sought to reconcile a commitment to a strong system of employee board representation with the diversity of practice that exists within most member states. As a result, voluntary agreements that are reached jointly between the management and employee representatives on the structure of employee participation at corporate level take precedence over the Directive's own rules.

The wording of the European Company Statute may often seem opaque and complex and as a result its development is likely to prove to be slow and difficult. But its underlying objective is certainly radical and far-reaching in its potential. The important question, however, is whether it is relevant or not to the realities of the new kind of European enterprise that is envisaged for the 21st century. In the long term the evolution of the new European Company in the globalising world economy is going to provide an important and challenging test of the underlying resilience and adaptability in the so-called European social market model that is now coming under sustained attack from those who want to Americanise the European Union's political economy and impose a neo-liberal economic agenda that downgrades and limits the rights of workers as well as the concept of any social dialogue between employers, unions and employees.

This wider context within which the European Company Statute needs to be assessed was emphasised by the 1997 group on worker involvement chaired by Etienne Davignon, which first revived the serious debate over industrial democracy that led to the passing of the new legislation in 2001. As it explained; “One of the most visible consequences brought about by the internationalisation of markets and by globalisation is the need to optimise all economic and social resources within national economic systems. This common objective can only be pursued through cooperation between all the actors involved.”

This comment reflects an important change of direction in the purpose of the legislation compared with that of thirty years ago. During the 1970s the arguments in Europe over employee representation at company board level were focussed very much on organised labour's own perspectives. It was seen then as an important advance for the cause of industrial democracy in providing robust worker rights in the firm based on recognised principles of representation. Not enough of the debate at that time was concerned with either the commercial and competitive

needs or demands of enterprises themselves. But now the attitude of employers has become crucial for the success or failure of the European Company Statute in practice.

As a result, trade unions themselves who favour the development of direct worker representation at enterprise level will have to argue and negotiate their case with the business community on grounds that will aim to improve corporate performance and workplace modernisation rather than what it will do to further the cause of social justice. It is therefore the market case for industrial democracy that has to be made at European as well as nation state level if the new legislation is going to make any real impact on the way companies go about reaching their business decisions.

Indeed, the initiative for the establishment of a European Company lies solely in the first instance with employers and not their employees or with trade unions. It is they who will be required under the law to initiate negotiations on what arrangements they intend to establish in the involvement of their employees in the decision-making processes of the new undertaking. The special negotiating body that has to be formed for this purpose will require to have at least one employee representative from each country in which the company will be involved. But it was for each member state's existing regulations to decide what methods should be used for the election or appointment of the members of that special negotiating body. This has provided national governments with considerable room for manoeuvre on how they implement the Statute in their own countries. They had to decide whether trade union representatives should be included even if they are not employees of a participating company and they also determined whether to limit the funding of external expertise to the special negotiating body and the “SE works council” to a single expert.

The strength of the new Statute lies not only in its flexibility but in its recognition that it is part of a much wider programme of workplace change that links up legal entitlements at European level to voluntary collective negotiations between social partners within companies in nation states. The European Works Council Directive which is already in existence and the Directive on employee information and consultation rights at national enterprise level that has been introduced in stages since March 2005 are also both essential ingredients in what could turn out to be an enlightened and progressive way forward inside modern companies in strengthening employee representation behind the mutual objective of corporate success.

The most effective advance under the European Company Statute is most likely to emerge out of existing workplace structures which are at present centred around consultative works councils and collective bargaining institutions. Almost all EU-15 countries except for the United Kingdom and Ireland already have works councils or similar consultative bodies in existence in their industrial relations systems. In the ten new member states, the picture looks different. In the majority of these countries workplace representation at shop-floor level is performed by trade unions. Only in Hungary and Slovenia have a significant number of works councils been established and co-exist with trade union representation (double-channel representation). A special case is the Czech Republic where a works council can only exist as long as no trade union has been founded. While those legally based institutions may differ in the powers and responsibilities they enjoy and the role they exercise among employees and in regard to employers, they are now a firmly embedded institutional presence for workers and trade unions in most large and medium-sized enterprises in both the private and public sectors across much of western Europe. Even in France, where union density remains low, the enterprise committees are a crucial feature of workplace life. The new EU Directive on information and consultation is likely to have an impact particularly in countries such as Ireland and the UK where no formal information and consultation procedures have existed so far.

Of course, works councils are not vibrant bodies in every country. Many find it often difficult to sustain themselves in the face of worker indifference and company neglect. They are seen at their best where they are under the effective control of union workplace representatives. But their recent development suggests that such consultative bodies are important in workplace modernisation and job restructuring. They reflect the new realities of human resource management as firms move away from being hierarchical and disciplined organisations with a centrally controlled command structure. In the new world of paid work organisation the emphasis is on establishing flatter systems of decision-making centred around work teams and employee networks and clusters of expertise. The emphasis is on the common dissemination of information to all employees through representative but also directly accountable institutions that are often flexible and consensual.

The relevance of the European Company Statute is in what it proposes for employee representations. It fits into this existing system of workplace decision-making. This does not mean that the arrival of employee boardroom representation in what-

ever form it will take under the legislation will bring an end to all differences of opinion between managers and employees, let alone between shareholders and employees. But the historic compromise of capital and labour within the revived European social market model that is now being envisaged through the concerted legislative programme being introduced by the European Commission can provide a framework for partnership. However corporate outcomes will depend very much on how the new proposed companies can thrive and advance in a highly competitive global economy of the future.

Early trade union fears that worker representatives on company boards would mean their isolation at the top of a pyramid of corporate power now appear to be groundless. Indeed, it is the establishment of strong and permanent links between those employee board representatives and the works council consultative process that will ensure the most effective form of participation for workers in the new European Companies. Their ultimate success, however, will depend on building the structures from the bottom up and not from the top down. This poses a real intellectual challenge to the trade unions and workers as well as to the employers. It implies driving through a kind of cultural revolution inside the modern firm that turns it into much more of a community that can accommodate mutual interests.

The majority of European Union member states may continue to provide, in their own domestic legislation, for some forms of company board-level representation for employees through legally-enforceable regulation. The national differences in approach to the issue which were highlighted back in the 1970s remain and they are explicitly recognised in the new legislation.

The UK is one of the few EU-15 countries that still lacks any laws at all that at least provide for a legal minimum in the development of worker board-level participation. Indeed, in the United Kingdom the general existence of resilient and effective forms of worker representation at board level and even in information and consultation systems outside the board remains limited although there is nothing to prevent a company and its employees from developing democratic structures of employee representation if they wish to do so.

But many other European countries maintain what are rather weak and restricted forms of employee representation at company board level. In Greece, Portugal,

Ireland and Spain, for example, board-level employee representation is confined almost exclusively to public sector or state-owned enterprises. Moreover, while it is true that consultative works councils below board-level representation exist in Belgium and Italy neither of those two countries has more than a handful of companies outside the state sector that have boardroom employee participation.

In contrast, the most advanced model of employee representation at board level in companies still remains that of Germany. Despite growing opposition among many of the country's employers to what they see as the labour market rigidities of the German model, there is nowadays less criticism of the general existence of the co-determination system. Co-determination is “oriented towards cooperation and is therefore incompatible with any form of confrontational ideology. Where it functions in accordance with the idea of cooperation, it is in equal measure a means of social integration and effective corporate leadership, combining as it does social responsibility with economic reason.” These conclusions from the 1998 report of a co-determination commission (set up by two German foundations each of which was close to one of the social partners: the Bertelsmann Foundation and the Hans Böckler Foundation) remain valid in the current debate on a suitable German system of board-level participation.

Perhaps one of the most effective systems of employee representation at board level can be found today in Sweden. Up until the early 1970s the trade union movement in that country did not seek such an advance. It believed it should use its impressive collective strength to further the interests of workers through national agreements negotiated with employer associations and voluntary action in the workplace. The law – as in the United Kingdom – was seen as a secondary means of exercising worker power and authority. But there was then an important strategic change of attitude in the Swedish trade union movement, which decided to press for national legislation to achieve its objectives.

The 1973 Act on employee board representation, rewritten in 1987, was resisted at first by Sweden's employers. But for the past twenty years it has brought about a significant modernisation of the country's corporate governance. The success of the legislation has stemmed from the strong workplace trade unionism upon which boardroom worker representation has been built. As the traditional importance of national and sector-wide bargaining went into decline in Sweden during the 1980s

and 1990s, company-based and workplace activism grew more important.

A survey carried out by the trade unions in 1998 found an extraordinary level of satisfaction at the impact of employee board representation in Swedish enterprises. Over 60 per cent of managing directors and chief executives polled said they believed such participation contributed to a positive climate for cooperation in their enterprises and nearly as many added that it had improved worker understanding of decisions reached by the board. Worker representation at board level also seems to have made it easier for employers to win worker support for difficult decisions.

For their part, trade union activists said they were well pleased by how the system was working. They believed that board representation was of strategic importance in supporting workplace trade unionism. Most also did not think companies made decisions outside the board to avoid employee participation in them while only a handful felt that workers found the issues raised on boards were complicated or difficult to understand.

It is no coincidence that the Swedish system of employee representation at company board level has evolved during a period when the country's firms have gone through radical restructuring, massive technical innovation and modernisation to face the relentless challenge of open global markets. Indeed, the Swedish example ought to be a useful example for those who believe worker representation in companies can strengthen and not obstruct necessary change in competitive firms.

The same is also true for the similar system that operates in Denmark. As in Sweden, the initiative for such a reform came initially from the country's federation of trade unions in the middle of the 1960s. Employee representation at board level was first established under a 1973 law that covered many companies whether publicly or privately owned. The Danish experience suggests employee participation is now well established in many firms at the highest level. It has recently been estimated that 60 per cent of the country's workforce are now employed in enterprises which have board-level employee representatives. Over two thirds of companies employing more than 200 have them although only a fifth for enterprises with fewer than 200 employees do so. As in Sweden, Danish employee boardroom representation is an integral part of a resilient and active workplace trade unionism. The positive influence from the trade unions in the Nordic region has stemmed from a decentralising of their structures. This has helped them to establish a successful

system of rights and practices in companies administered by a cadre of impressive workplace activists.

Just as crucially, the evolution of employee participation at boardroom level in the Nordic region reflects the progressive and modernising tendency of its trade unionism. Too often the whole issue of worker participation has been judged in relative isolation from the culture and evolution of the modern firm. The success of the flexible and negotiated system in Sweden and Denmark as well as Finland stems from the way in which it has embraced the agenda for work restructuring and innovation. The dynamic for adaptation in companies in the face of increasingly competitive and open product markets has become predominant. As a result, a growing number of companies have taken the initiative in establishing, through negotiated agreement and cooperation, new working practices with their own employees that emphasise joint decision-making and promote more participative arrangements.

The arrival of board-level employee representatives in private sector companies is therefore increasingly seen by Nordic region employers as an added competitive advantage for them and not a threat to the future of their commercial operations. But of course this system has grown up from below, from a consensual commitment to social partnership in the firm and to more collaborative forms of corporate governance that seek to minimise or even eradicate conflicts of interest in the company. The reasons for its apparent success reflect the underlying strength of the so-called Nordic model of industrial relations.

But the positive strengths of the system are by no means confined to a handful of small countries in northern Europe or to Germany and Austria. The introduction of employee participation at board level in companies may carry positive consequences for other European market economies with different traditions. Indeed, the change can be seen as an important part of a revolution in business culture. In the future, if firms wish to prosper, modernise and innovate in competitive markets they will have to win the active consent of their employees. This means that companies will have to give a higher value than in the past to the people who work for them through the funding of higher quality training programmes, the provision of more generous wage and non-wage benefits and most important of all displaying a stronger commitment to human development strategies that are based on the fostering of mutual trust, commitment and loyalty between workers and their firms. The Davignon report

explained this process; “Globalisation of the economy and the special place of European industry raises fundamental questions regarding the power of social partners within the company. The type of labour needed by European companies – skilled, mobile, committed, responsible and capable of using technical innovations and of identifying with the objective of increasing competitiveness and quality – cannot be expected simply to obey the employers’ instructions. Workers must be closely and permanently involved in decision-making at all levels of the company.”

The European Company Statute and its accompanying Directive on worker involvement must therefore be seen in this wider perspective. It is an integral part of a much more inclusive development in the reorganisation of the world of paid work in Europe so that the continent will be able to challenge its international competitors, most obviously the United States, through a more effective and productive use of labour in the new high technology, high skilled sectors of the post-industrial economy. In other words, the legislation should not be regarded as an intrusive and cumbersome system of time-consuming litigation designed to handicap European enterprises. On the contrary, it may turn out to be one of the basic preconditions for the success of European-wide entrepreneurialism based on negotiated common agreements between firms and their employees on strategic corporate objectives and the means of achieving them through joint decision-making or at least a robust form of worker participation.

But it is also important to recognise that there are opposing trends in Europe today that could threaten the development of employee participation on company boards at both national and European level.

Ireland in recent years has developed its own increasingly substantial form of social partnership and the country’s government has encouraged employee participation in state-owned companies and agencies. Under legislation passed in 1977 Ireland’s trade unions, staff associations and other designated bodies were given the legal right to nominate candidates for election as worker representatives to the boards of the country’s state-owned bodies. However, such laws did not extend to the dominant private sector of the Irish economy where employee involvement at board level has been left to voluntary agreement between the social partners. As a result no prominent Irish-based private companies have worker representation on their boards. But the Irish government is now committed to a privatisation programme as

it moves wholly or in part state-owned enterprises to the competitive market place. As a result, employee representation is threatened or being eradicated.

Developments across many other European states are also throwing a serious question mark over the future of worker participation at board level in companies. In Spain and Greece for example, there has also been a transfer of publicly owned enterprises into the private sector. As a result there has been a tendency to either abolish or water down existing worker participation at board level.

The arrival of ten more countries into the European Union's membership in May 2004, mainly from central and north eastern Europe, has added to the diversity of approaches to employee participation at board level in companies as in so many other aspects of industrial and economic life. Just as there is no coherent and single model in the previous European Union, nor is there any uniformity in approach among the new member states. Almost all of them had been ruled by Communist governments between the end of the Second World War and 1990 and their industries were under direct authoritarian state control despite rhetoric about worker democracy. But in the 1990s a range of responses emerged on employee representation inside newly privatised companies.

No doubt, the German system was influential in some cases. In the Czech Republic, Hungary, Slovenia and the Slovak Republic the boardroom employee participation was introduced by law into both private and public enterprises. In Poland the worker self-management act of 1981 still applies to state-owned companies. If one of these companies is privatised, employee board representation has to be introduced. But there is no direct legal provision for board-level employee representatives in private companies in Poland, and the same is true of Malta and Cyprus. In the Baltic states there is no provision for worker representatives on the executive boards of companies.

National differences can also be found in the number and the method of election of board-level employee representatives. In the Czech Republic, Hungary and the Slovak Republic, for example, up to a third of the board members are elected from the workforce. But in Poland the statutory maximum proportion can go as high as 40 per cent. Moreover, in some of the new member states works councils are responsible for the elections to board level and in others the trade unions.

But the gap between the law and the rhetoric and the reality of life in existing enterprises remains enormous in most of the new member states. The experience of employee boardroom participation has been short-lived and limited to only a few workers and companies. Ideologically, many employers and their workers are uninterested in developing such forms of employee representation. They believe such an approach is a threat to the success of the market economy.

However, the introduction of the European Company Statute may make a real difference. The resulting cross-border influences could stimulate greater enthusiasm among employees and trade unions in the development of a more vigorous enterprise-based activism. Undoubtedly trade unions in central and north eastern Europe face a formidable challenge to their power and influence as they seek to negotiate under the new legislation. It may well be that the arrival of employee board representation in the European Company will bring about a responsive approach with the building of works councils and other workplace institutions afterwards.

But there are a number of other important underlying trends that are common across the rest of the European Union which also obstruct further progress to employee board-level participation. We can see the increasing importance of medium and small firms in the development of the new post-industrial economies in Europe. It is hard to visualise such enterprises making much use of the European Company Statute.

Moreover, the strategic shift in paid employment away from the manufacturing sector to a diverse private services sector is increasing the area of the labour market that often lies beyond the large corporations. The new kinds of paid work – such as self-employment, agency jobs and part-time and temporary employment – will also make it hard to develop the concept of employee representation on company boards. The new system presupposes a permanent and full-time labour force in the enterprise. Worker participation in enterprise decision-making suggests the need for stable, loyal and committed employees. In the more fragmented and more insecure world of paid work across European countries such a labour force may prove much harder to retain and nurture.

On the other hand, the trend towards greater economic and social convergence inside the European Union should not be overlooked. The integration of markets, the

continuing waves of corporate mergers and acquisitions, the spread of technological innovation across borders, the dynamics of open trade and investment flows – all point to a greater unity that could encourage firms to establish European Companies to further their activities. Moreover, although it is premature to speak of the emergence of a European labour force, there are signs in many professional and managerial jobs as well as in construction, retail and catering of such a development.

National differences are not going to be easily eroded and not least in the way in which companies organise their internal structures within the law. Many employers may believe that they need to pursue an American shareholder model of operation and lose interest in a wider perspective that includes the stakeholder or worker perspective. But we can find already enough examples in European countries that suggest employee participation at company board level can provide a commercial and competitive advantage.

It is difficult, however, not to avoid reaching a rather cautious conclusion. There is still a very long way to go before we can see the emergence of a regime of European firms complete with systems of corporate governance that involve employee board-level participation. The complexity of the new European Company Statute law reflects an understandable sensitivity to national differences. This is why it is unlikely that any uniform or comprehensive system of employee participation on company boards across the European Union is likely to develop in the immediate years ahead.

Thirty years ago there were far greater ambitions inside the Commission and elsewhere on the need to establish a mandatory and unitary system of employee board-level participation on the grounds of social justice and worker advance. At that time the forces of labour seemed determined to gain co-equality with those of capital but this is no longer the case. It is perhaps therefore not unsurprising that the details of the new Statute have so far failed to catch the popular imagination. But trade union attitudes need to change. Old resistances to partnership and collaboration with firms must be abandoned. If trade unions are to establish a future for themselves in the new Europe they will need to recognise that they must not only come to terms with globalisation but realise that they have to support and develop new forms of industrial democracy inside the firm that are in the mutual interest of workers and shareholders.

The European Company Statute is only a part but a very important one of a revival in trade unionism at European level that makes it relevant and necessary for future prosperity and security. However, this does not mean we should or can ignore the diversity of national traditions and practices. Nor does it imply that trade unions should abandon their principles about industrial democracy.

In the long run the creation of different levels of employee activism inside companies is a democratic right that cannot be surrendered. That view was well expressed in the British government-commissioned inquiry into industrial democracy chaired by the Oxford historian Alan Bullock in 1977. As his report argued at that time; “The fears expressed in the nineteenth century in face of proposals to give more people the right to vote did not stop short of the subversion of the constitution and the dissolution of society. Once the franchise was extended, however, the fears were forgotten and the Reform Acts were seen as essential to the country’s stability and prosperity. We believe that over 100 years later an extension of industrial democracy can produce comparable benefits and that our descendants will look back with as much surprise to the controversy which surrounded it as we do to that which surrounded the extension of the political suffrage in the nineteenth century.”



1960s

The debate on the European Company dates back to the beginning of the sixties. The topic was e.g. discussed at an **International Congress of Notaries** in Paris in **1960**. In **1965**, the **French government** issued a memorandum proposing to introduce legislation on a European Company by means of a treaty among the EC member states. This proposal was taken up by the **Commission** which, in **1966**, published a **memorandum** in support of this idea.

1970

Commission proposal to the Council of Ministers for an SE

On the basis of a draft proposal issued in 1966, in 1970 the Commission published a first proposal on the Statute for a European Company. This provided for:

- **obligatory two-tier structure of SE** (management board and supervisory board)
- **European Works Council** (information, consultation and some **co-determination rights**)
- board-level representation of employees (**1/3 of board members elected by employees, 2/3 by shareholders**)
- possibility of concluding (European) **collective agreements** between the SE and the represented trade unions on working conditions in the SE

OJ C 124, 10.10.1970

1975

(Revised) Commission proposal

With regard to the involvement of employees, the most significant change was the proposal for a **1/3 parity**: 1/3 of the board members to be appointed by the **employees**, 1/3 by the **shareholders** and the last 1/3 to be elected **jointly by the employees and the shareholders**. COM (75) 150 final

1988

Memorandum of the Commission on the SE Statute This memorandum followed the initiative to complete the internal market. In order to revive the deadlocked SE debate, the Commission dropped the idea of having one obligatory participation system for all SEs. Instead companies were to be given the **choice between different participation systems**.

EC Bulletin 3/88

1989

Commission proposal

In this new proposal, the SE legislation was for the first time split into a Regulation and a Directive supplementing it and dealing with employee involvement. Companies now had the choice between a single-tier and a two-tier structure. The Directive allowed **a choice between four different systems of board-level representation** (a “German”, a “Scandinavian”, a “French” and a “Dutch” model). If negotiations between the employees and the management failed, the **final decision would lie with the management**. It was left up to member states to choose which (some or all) of the four models they were prepared to accept for SEs registered in their country.

OJ C 263, 16.10.1989

1991

(Revised) Commission proposal

Member states could now prescribe for the SEs in their territory the choice of a particular company structure (single-tier or two-tier). The system of workers' involvement was slightly modified. If negotiations between management and employees on compulsory employee participation failed, a decision would be taken by the **Shareholders' meeting** on the basis of reports from the two negotiating partners.

Council Regulation: OJ C 176, 8.07.1991

Council Directive: OJ C 138, 29.05.1991

1994

Directive on European Works Councils (EWC)

Like the ECS, the EWC Directive remained in a state of **deadlock for 25 years**. The compromise finally found in 1994 was based on the principle of **free negotiations** on information and consultation between the management and employee representatives from the different countries in which the company has employees (the so-called special negotiating body). In the event of failure of these negotiations, **obligatory standard rules** (subsidiary requirements) would apply. This new procedure used for the EWC was very important for the ongoing discussion on workers' involvement in the SE.

Council Directive 94/45/EC, OJ L 254, 30.09.1994

1997

Davignon report

In order to overcome the blockade in the Council of Ministers with regard to the ECS, the Commission convened a **“High-level expert group on workers’ involvement”**, the so-called Davignon group which, in its final report (published in May 1997), concluded that the national systems of workers’ involvement were too diverse, making general harmonisation impossible. The report therefore proposed that priority should be given **“to a negotiated solution tailored to cultural differences and taking account of the diversity of situations”**.

Should negotiations fail, **standard rules** would apply.

2000

Adoption of the European Company Statute at the Council in Nice

The Davignon report had a positive impact on the drafting of a solution acceptable to all 15 member states. Even so, it was another three years until the more than 40-year-long debate on the SE came to an end. At the EU Council in Nice (Dec. 2000) the **Regulation on the ECS** and the **Directive on workers’ involvement in the SE** were finally adopted. The latter prescribes **free negotiations on information, consultation and (board level) participation** between the competent organs of the participating companies and a special negotiating body (composed of employee representatives from the different countries involved). In the event of failure of these negotiations, **obligatory standard rules** apply.

Member states must transpose the Regulation and the Directive by **October 2004**.

Council Regulation 2157/2001, OJ L 294

Council Directive 2001/86/EC, OJ L 294/22, 10.11.2001

2004

Entry into force of SE legislation

The **SE legislation entered into force on 8 October 2004** thereby enabling companies to opt for this new corporate form. However, only 9 countries managed to meet the 8 October deadline for the transposition of the SE Directive, thereby preventing employees from their country from participating in negotiations in upcoming SEs. In the overwhelming majority of countries the considerable delay was not caused by substantial national debates on the substance of the Directive but rather by an apparent lack of interest in the issue.

2005

Adoption of Cross-Border Mergers Directive

On 26 October 2005 the Council of Ministers formally adopted the so-called **10th Directive on cross-border mergers of limited liability companies**.

The aim of this Directive, which enters into force in December 2007, is to make mergers across European borders substantially easier. At present such mergers are a very expensive, lengthy and, in some countries, practically impossible undertaking. With regard to the safeguarding of existing participation rights in the situation of a merger across borders a solution was ultimately decided on which in most cases refers to the mechanisms of the SE Directive and by and large upholds its participation standard.

Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies OJ L 310/1, 25.11.2005

2006

Since October 2004 up to January 2006, at least **13 “pioneering” European Companies (SE)** have been registered in different member states. The most prominent examples are the electronic manufacturing services company Elcoteq and the construction company Strabag. Another four companies are on their way to becoming an SE, among them the Nordic financial services group Nordea and the largest German insurance and financial services company Allianz AG. Although no “run on the SE” is yet discernible interest in this new company form seems to have increased. By the beginning of 2006, **22 of the 28 countries had transposed the Directive** on worker involvement in the SE. Transposition laws are still missing from Greece, Ireland, Liechtenstein, Luxembourg, Slovenia and Spain.

For further information on the European Company (SE), worker participation and company law issues visit www.seeurope-network.org.



INFO BOXES: INDUSTRIAL RELATIONS IN THE 25 EU MEMBER STATES AND NORWAY

	POPULATION	UNION DENSITY RATE	DOMINANT/PRINCIPAL LEVEL OF COLLECTIVE BARGAINING	COLLECTIVE BARGAINING COVERAGE	WORKPLACE REPRESENTATION	BOARD-LEVEL PARTICIPATION	COMPANY BOARD STRUCTURE
AUSTRIA	8,185,000	35%	sector	98–99%	works council	yes: state-owned and private companies	dualistic
BELGIUM	10,364,000	56%	national	> 90%	trade union and works council	no	monistic
CYPRUS	780,000	70%	sector	60–70%	trade union	no	monistic
CZECH REPUBLIC	10,241,000	25–30%	company	25–30%	trade union <i>or</i> works council	yes: state-owned and private companies	dualistic
DENMARK	5,432,000	74%	sector	77%	trade union	yes: state-owned and private companies	monistic/dualistic (hybrid system)
ESTONIA	1,332,000	17%	company	20–30%	trade union (or <i>authorised workplace representatives</i>)	no	dualistic
FINLAND	5,223,000	71%	national	90%	trade union	yes: state-owned and private companies	monistic or dualistic
FRANCE	60,656,000	10%	company	90%	trade union and works council	yes: state-owned/privatised companies	monistic or dualistic
GERMANY	82,431,000	23%	sector	70%	works council	yes: state-owned and private companies	dualistic
GREECE	10,668,000	27%	national + sector	60–70%	trade union (and works council)	yes: state-owned companies	monistic
HUNGARY	10,006,000	20%	company	40%	trade union and works council	yes: state-owned and private companies	dualistic
IRELAND	4,016,000	36%	national	50–60%	trade union	yes: state-owned companies	monistic
ITALY	58,103,000	34%	sector	90%	trade union	no	monistic or dualistic

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- CIA – The World Factbook, <http://www.cia.gov/cia/publications/factbook/index.html>

INFO BOXES: INDUSTRIAL RELATIONS IN THE 25 EU MEMBER STATES AND NORWAY

	POPULATION	UNION DENSITY RATE	DOMINANT/PRINCIPAL LEVEL OF COLLECTIVE BARGAINING	COLLECTIVE BARGAINING COVERAGE	WORKPLACE REPRESENTATION	BOARD-LEVEL PARTICIPATION	COMPANY BOARD STRUCTURE
LATVIA	2,290,000	20%	company	10–20%	trade union (and authorised workplace representatives)	no	dualistic
LITHUANIA	3,596,000	16%	company	10%	trade union (or works council)	no	monistic or dualistic
LUXEMBOURG	469,000	34%	sector + company	70–80%	works council	yes: state-owned and private companies	monistic
MALTA	398,000	63%	company	50%	trade union	yes: state-owned companies	monistic
NETHERLANDS	16,407,000	22%	sector	80%	works council (and trade union)	yes: state-owned and private companies	dualistic
NORWAY	4,593,000	70-75%	sector	70–77%	trade union	yes: state-owned and private companies	monistic (or hybrid system)
POLAND	38,635,000	15%	company	40%	trade union	yes: (formerly) state-owned companies	dualistic
PORTUGAL	10,566,000	30%	sector	70–80%	trade union (and works council)	yes: state-owned companies (law is not implemented)	monistic
SLOVAK REPUBLIC	5,431,000	35%	company + sector	40%	trade union and/or works council	yes: state-owned and private companies	dualistic
SLOVENIA	2,011,000	41%	national and sector	95–100%	trade union and works council	yes: state-owned and private companies	dualistic
SPAIN	40,341,000	15%	sector + company	80%	works council (and trade union)	yes: state-owned companies	monistic
SWEDEN	9,002,000	78%	sector	> 90%	trade union	yes: state-owned and private companies	monistic
UNITED KINGDOM	60,441,000	30%	company	< 40%	trade union	no	monistic

Sources:

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WORKER PARTICIPATION AT BOARD LEVEL -
***TOUR D'HORIZON* ACROSS**
THE EU-15 COUNTRIES AND NORWAY



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Austria

Austria has a long tradition of employee representation in the workplace that dates back to the creation of works councils under legislation passed in 1919. In public companies the works council was able to delegate two of its members to the company’s administrative board, where they enjoyed the same rights and duties as other board members. In 1934 a law was passed to establish works assemblies in enterprises. These were meant to deal with matters of common interest in the company and not issues that were on the collective bargaining agenda.

Today the system of employee representation in Austria is regulated under a Labour Code that first came into force in 1974. Under that measure workers have the right to representation comprising a third of the members of the supervisory board. Supervisory boards are obligatory in all joint-stock companies, in limited-liability companies and in private foundations with more than 300 employees, in cooperative societies (with more than 40 employees) and in all mutual insurance associations and savings banks. It is estimated that there are 1,500 companies in Austria that now have supervisory boards on which employee representatives sit. As many as 400,000 workers are employed in those enterprises. This amounts to 15 per cent of the country’s entire workforce.

Under Austria’s 1974 Works Constitution Act a company’s works council may delegate one member to the supervisory board for every two members who are elected by the representatives of the employers. Workers are not entitled to more than a third of the seats on the supervisory board nor on the company’s committees. The supervisory board must consist of at least three shareholders’ representatives. Its total size may range between 7 to 20 shareholder representatives.

The worker members of the supervisory board must be taken from the elected members of the company’s central or single works council and they enjoy full vot-

ing rights. Trade union representatives cannot be delegated to join the supervisory board although they can be elected onto a company’s works council. The board-level employee representatives must be protected from discrimination or restrictions and they must also be granted paid time-off from their jobs in order to perform their supervisory board duties. An adequate balance between blue and white-collar workers must be established among the employee representatives on the supervisory board. No restrictions cover the rights to co-determination or decision-making by the employee representatives. They have unlimited voting rights on issues of economic importance.

But the employee representatives, like the rest of the supervisory board, are obliged by the law to perform their duties with the interest of the company as a whole in mind. This means they need to take into account the views of shareholders and the general public as well as the employees when making decisions. On the other hand, this does not prevent them from defending the interests of employees. This can lead to potential conflict of opinion between those of the worker director’s duties towards the company and those to employees when it comes to the need to maintain commercial confidentiality. However, employee representatives are allowed to pass on a limited amount of company information to the works council as long as this is covered by the rights to information and disclosure laid down under the 1974 Act that is deemed necessary to represent employees’ interests. Annual works assemblies are held in firms as well. The works councils are dominated by the trade unions and they act as intermediaries between the employer and employees. In Austria those bodies are not only highly

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effective in the dissemination of information and consultation in the enterprise but they are also involved in a range of workplace issues such as the day to day business of the firm, cases of individual dismissal and changes in working practices. A special feature of the Austrian system is the obligatory list of business transactions which may be submitted for approval by the management board or managing director only after the consent of the supervisory board has been obtained, e.g. acquisitions, sales and closure of plants, investment, the start and discontinuation of lines of business and types of production or the definition of the general principles governing business policies.

Austria has a highly developed system of industrial relations based on the concept of social partnership. It retains strong trade unions and employer associations as well as effective works councils in all enterprises employing five or more workers.

Belgium

Worker representation does not exist on the executive boards of Belgian private companies. The system of corporate governance is based on a single administrative board that is either elected or appointed exclusively by the company’s shareholders.

As in other European countries, the works council system is highly developed in Belgium by law. The works council is jointly made up of employee and employer representatives and it is mainly a means for ensuring a regular flow of information and consultation within the firm. In addition, trade union shop steward committees also exist in the companies and these work in close cooperation with the works councils, which the trade unions dominate. But Belgium does have employee board-level participation in some parts of its public sector, most notably in the state railway company where 3 out of 23 members of its administrative board are nominated by the trade union and elected by the workforce.

Denmark

Denmark went through a relatively turbulent period of change in its industrial relations system in recent years. Traditionally the country has had a highly intricate and robust social partnership between employers and trade unions with a minimum role played by the state and by the legal process. Its main emphasis was on

the negotiation of voluntary collective agreements and the use of conciliation and arbitration to resolve differences. But in recent years there has been a clear shift towards decentralisation from industry or sector level to that of the enterprise, mainly under the influence of employers who have sought to achieve much greater flexibility in the management of their business operations.

As in other European Union member states legislation enabling employee representation at board level in both private and public companies was passed in 1973. It covered all such enterprises that employed more than 50 workers and enabled employees to elect at least two representatives to the board and up to a third of the board whatever its size. The proportion was raised to one third of all board members. Further changes were made to the legislation in 1987 which laid down such companies are now covered by its provisions if they employ 35 or more workers and up to half the number who are elected by the shareholders with a minimum of two. However, prior to the decision to include board members elected by the employees an initial vote must take place in which at least half of the company’s employees vote in favour of this right (the vote takes place if at least 10% of the workforce has asked for it).

All employee representatives in Denmark are elected for four year terms as board members directly by the workforce. Such a system is only part of a much wider diversity of worker representative bodies in the company. In addition to trade union workplace committees, many enterprises employing 35 or more workers in Denmark also have joint cooperation committees which are made up of equal numbers of employee representatives and managers. These bodies may not deal with issues that involve collective bargaining but they do have a wide range of responsibilities in the company. These include the provision of financial and production information about company operations, working conditions, training, job restructuring and personnel questions.

The existence of the joint cooperation committees outside company boardrooms dates back to 1947 in Denmark. Subsequent legislation has modified or changed some of the details of how the system operates. But it has won considerable support from companies, trade unions and employees. The experience of such a vibrant and consensual approach to decision-making in companies made the advance to employee board representation more acceptable and credible.

The support for board-level employee representatives can be found in a study carried out between 1995 and 1999 by Copenhagen business school on the role of board-level employee representatives in Danish companies. It found as many as

60 per cent of workers in the country were working in enterprises with board-level employee representatives. Two thirds of firms employing 200 or more had such representation on their boards and one in five of the smaller enterprises with fewer than 200 workers on their pay-rolls. The most remarkable finding in the survey concerned the priorities held by the employee board members on what the company they worked for should regard as the most important. All those involved in the survey were asked to name what they believed to be the crucial considerations when making large and long-term decisions for the future of the enterprise. Employee board members said that markets were the key factor in determining what the company should do, followed by innovation. The next consideration did concern the firm’s employees. This was deemed a more important factor than attitudes to the wider society and the shareholders, which was the lowest issue of concern. What is so surprising about this order of priority is that it proved to be the same as those listed by the board members elected by the shareholders. Although the actual results were not exactly the same in the importance attached to each priority, the fact is that the Danish survey found a convergence of opinion on the company boards examined between employee and shareholder board-level representatives. Apparently a strong common interest is shared in companies about what needs to be done to improve performance. Such a finding strengthens those who believe the advance of board-level employee representatives in companies has a beneficial impact on business operations. Far from adopting a defensive and reactive attitude, board-level employee representatives see the strategic importance of pressing for policies that reflect market conditions and the need for innovation. The Danish example is another positive sign that the concept of employee representation on private sector company boards makes good business sense.

Finland

Finland is one of the few European countries which already have experience of both of the possible structures for an SE: one-tier and two-tier. Historically Finland has had until very recently a highly centralised and corporatist industrial relations system with a strong state in alliance with powerful trade union federations and employer associations to administer the political economy. But until recently there was also a contrary tradition of industrial conflict between employers and employees. Somehow Finland was able to reconcile a corporatist with an adversarial system.

As a result, worker participation at company board level was slow to gain support. Indeed, the very concept of industrial democracy was not well developed in Finland until 1979, mainly because the country’s trade unions and employer associations were unenthusiastic about such a development.

It was only in that year that a law was passed that provided for the creation of co-determination structures in commercial undertakings. This measure formalised the rights of employees to information, negotiation and co-determination at board level in private enterprises employing more than 30 workers. Under the law there must be a maximum of between one and four employee representatives but they should constitute no more than a quarter of the company board members.

The workers themselves are entitled to elect their own representatives directly but they can also be elected through recognised trade union structures. But the 1979 legislation was not concerned with giving employees a direct influence in the decision-making of companies at board level. Its main intention was to encourage greater co-operation between management and employees outside the board decision-making process and to improve the working environment by collective agreement at enterprise level. It was not until 1990, however, a specific law was passed in Finland that provided for the direct election of worker representatives to the boards of private companies which employ more than 150 workers. This law is implemented through an agreement between the company and its workforce. Under this agreement, both sides must decide together on which company board the workers should be represented and also on the number of employee representatives. Basically, employees may sit on a variety of boards: the supervisory board, the board of directors or the management group. Such a binding agreement may of course be concluded – on a voluntary basis – in companies with a workforce of less than 150. The personnel groups supporting the agreement must represent at least the majority of the employees.

If no agreement can be reached, two personnel groups representing at least 50 per cent of the employees, may demand the application of statutory minimum requirements. The law gives the employees the right to send representatives to one or more administrative boards. But in this case, the employer and not the workers can decide on what executive body the employee representatives can sit. Under the legislation there is a maximum of four employee representatives on the board of the company depending on its size.

The employee representatives are nominated by the personnel groups. If these do not agree on common representatives, election must take place. The candidates

in these elections are nominated by the personnel groups. Employee representatives must always come from the employees in the company involved and not from trade union officials and others who are not employed by the firm.

Employee representatives basically have the same rights and duties as the other members on the board involved. However, they are not entitled to participate in making the decisions on the election, dismissal or contract terms of the management, the personnel's terms of employment, or industrial action. Furthermore, the agreement provides for a restriction on the voting rights of employee representatives.

Employee representatives are released from their regular work for the board meetings as well as for the necessary preparatory work. They are compensated for their relevant expenses and receive a fee for attending meetings outside their normal working hours.

A survey carried out in 2001 of employee representatives in Finland's metal and electronic industry found that the majority were satisfied with the increased cooperation achieved between management and labour but argued that the practical work of representatives on the board of directors needed to be encouraged.

However, employee representation at company board level still remains underdeveloped in Finland. More than half of the firms in the country that employ between 150 and 200 workers have no employee representation in their structures at all. As many as a third of the larger enterprises lack such representation as well.

France

Until very recently France had no law that specifically requires or provides for employee representation at board level in private sector companies. This reflected the country's strong syndicalist traditions that tended to emphasise the commitment in many trade unions to the cause of workers' control of industry and worker participation. Although trade union membership remains very low, at no more than 8 per cent of the French workforce, the often trade union dominated enterprise committees in most firms remain an established and important institution in workplace life. It is those organisations that are a prominent feature of internal governance in the firm.

But lack of interest historically in employee representation at board level in France was also apparent among employers. In part, this reflected their determination to maintain an undisputed right to manage and the elitist character of their class

backgrounds. French employers by tradition have sought to protect and advance their power in the workplace. As a result, the country's system of industrial relations was based more on conflict than consensus.

The limited advance of employee representation at board level was also a consequence of the specific capital structure of French firms. More than elsewhere in Europe they have been dominated both by the influence of the state and the direct control of the banks, who established close and stable relations between management and shareholders to the exclusion of worker interests.

The obstacles in France to the creation of board-level participation in privately owned or publicly listed companies are therefore formidable. Until recently company law tended to encourage single, unitary boards of directors rather than a dual system on the German model with a division between administrative and supervisory boards. But under a 2001 law more flexibility is being encouraged in the way in which companies organise their decision-making processes.

Under the Statutes of joint stock companies it is possible but not compulsory to provide for the election of board members by the firm's employees through the enterprise committees. Moreover, only employees of the company are eligible. The proportion so elected must not make up more than a third of the entire board. But the ultimate power on whether such a system is acceptable lies with the company's shareholders who, at an extraordinary general meeting, can cancel such participation.

Under a 1994 law the annual shareholders meeting must discuss whether or not employees are entitled to board representation where employees hold more than 5 per cent of the capital. However, under another law passed in 2001 it is possible for employee representatives to be elected to the board of directors where they hold at least 3 per cent of the company's share capital. In practice, there are few joint stock firms that have employee representatives on their boards. But in this case they serve as representatives of the employee shareholders. This is fundamentally different from having the right of participation in one's capacity as employee of a company. Employee board members in the private sector must not only be employed by the company but are also not allowed to have another mandate as a member of the company's enterprise committee.

But the position in France's public sector is different. As a result of a law passed in 1983 employee representation at board level was introduced into state-owned enterprises. The number of representatives elected depends on the size of the organisation concerned. Three can be elected in those bodies that employ

between 200 and 1,000 workers. For larger enterprises up to a third of the board's members can be elected from among employees. They are not paid any salary for their service but nor are they expected to take overall responsibility for the governance of the firm unlike the other board members.

However, the public sector in France has been reduced substantially since 1986 under governments of both right and left with the movement of companies into the private sector. Nevertheless, board-level participation has not been abolished in case of privatisation. Depending on the size of the board, the Statutes of the company must reserve two or three seats to the employee board members. However, the advance of private ownership into what was formerly state-controlled enterprise has expanded the importance of shareholder value. A wave of mergers and acquisitions as well as the growth in the pressures imposed by globalisation have all strengthened the position of capital at the expense of labour in corporate governance. Perhaps inevitably, as a result, France's company structure has moved more closely towards the so-called Anglo-Saxon model in recent years.

On the other hand, the system of worker representation below board level remains substantial in many French companies. The country has a well developed system of works councils or employee committees for all enterprises employing 50 or more workers. Under the 1946 law such committees were to be informed and consulted about the management and general situation of the enterprise and were given training facilities to enable them to perform their duties effectively. They were also given the right to appoint delegates (generally two) to attend board meetings. These representatives are selected from among the elected employee committee members (not from among the local trade union representatives nominated to the employee committee by their trade union). This representation right is obligatory for all companies that have a board, irrespective of whether they are state-owned or privately-owned. However, the employee committee delegates only have a right of discussion; they have no voting rights at board meetings.

The 1982 so-called Auroux laws went on to strengthen workplace institutions within the enterprise, especially the committees who have the power to manage the company's welfare and cultural activities. In addition, employee delegates have to be elected in establishments employing 11 or more workers, who can present individual or collective grievances to management as well as raise issues concerning pay, labour discipline, health and safety questions and matters that concern collective agreements.

Trade union members can also establish their own separate workplace organisations in enterprises that employ 50 or more workers. In addition, France has health, safety and working conditions committees made up of 3 to 9 employee representatives as well as group committees covering a group of commercial undertakings.



Germany

The most formal and advanced system of worker representation at company board level is to be found in Germany. It is a two-tier system with a management board that is responsible for the day-to-day running of the firm; and a supervisory board to appoint and control management.

Therefore the supervisory board has a number of specific responsibilities laid down in the law. Primarily, the members of the company's administrative board must be appointed by the supervisory board. Further responsibilities include comprehensive rights to supervise and scrutinize management procedures, the right to inspect company books and reports and to inspect and approve the company's annual statement of accounts. In addition, the supervisory board can commission the auditors of the firm, employ outside experts to help them in their task, and call a general meeting if the interests of the company require this. More importantly, the supervisory board has the power under the law to approve a company's important investment decisions and large-scale restructuring measures and closures. It is

also needed to approve of company mergers, acquisitions and disinvestments as well as taking loans out above a specific size. The law lays down that the supervisory board shall establish such a catalogue of transactions; however, the exact contents depend on the wishes of the majority on the supervisory board.

The supervisory board is composed of representatives from the shareholders and the workforce. The employee representatives must be elected directly by the workforce themselves or by delegates who are elected from the workforce.

According to the two major co-determination laws (Acts of 1951 (1956), 1976, see below) the trade union representatives can propose representatives on the supervisory board who are not employees of the company. But only unions with members in the company are entitled to make proposals for these seats. All of the workers’ representatives have the same rights and responsibilities on the supervisory board as the shareholder representatives. They are also covered by the same codes of confidentiality in the conduct of their affairs on the board. The law protects them from discrimination or obstruction as they go about their business.

They are allowed to serve four year terms.

Although its origins date back to the early part of the last century and the Weimar Republic, it was not until 1951 that co-determination by law was first introduced. The German trade unions at that time had achieved the political power to establish legal rights to co-determination in the basic industries of coal and iron and steel. The system introduced in those two sectors remains the model of co-determination that the trade unions in Germany would like to see used in other industries. The law provided for parity of representation for workers and shareholders on the supervisory boards of firms in coal and iron and steel. Under its provisions trade unions and works councils nominate half the places on the company’s supervisory board. The chair of the board is independent (neutral): that is, from neither the employee nor the shareholder side. The supervisory board has the power to appoint the management board, responsible for the day to day running of the enterprise. This includes the appointment of the company’s labour director who sits on the administrative board. He cannot be appointed against the vote of the employee representatives.

Over the next twenty-five years the trade unions tried to extend the co-determination system from coal and iron and steel to other sectors but they did so without success. Already in 1952 a further law was introduced that made provision for employee representation at board level. However they were to account for only up to a third of members of a company’s supervisory board. This law still applies

today in all enterprises of between 500 and 2000 workers and was revised in 2004 as the new “Law on the one-third participation of workers’ representatives on the supervisory board” (Drittelbeteiligungsgesetz). Comparing its standard of workers’ representation with the standards defined in the other two acts it is understandable that German trade unions are not particularly satisfied with this form of workers’ interest representation. The legal provisions under the 2004 (formerly 1952) Act are designed more to advance the information and consultation rights of the works council than to establish co-determination. The employee representatives must come from among the employees in the firm. External trade union representatives are eligible only if more than two seats on the supervisory board are reserved for employees and only if they were proposed by the workforce or the works council.

The real advance in the expansion of co-determination took place in 1976 under the Social Democratic/Liberal coalition government. The 1976 Act extended the principle of parity in employee representation to the supervisory boards of all private firms that employed 2,000 or more workers across all industries and services. But compared with the provisions of parity within the 1951 Act it was a much weaker form of co-determination. A significant difference from the co-determination law for the coal and iron and steel industry (1951) is that here the chair of the supervisory board always comes from the shareholder side and possesses a casting vote in the event of a tie. Moreover, one place among the worker representatives must be reserved for the representative of the firm’s executives.

Contrary to the 1951 Act the employee representatives on the supervisory board do not have specific veto rights in the appointment of the labour director.

The exact size of representation on the supervisory board is set out in the law. It must consist of 12 members in firms employing between 2,000 and 10,000 workers. Of the six employee representatives, four must be proposed by and from among the workers in the enterprise and the other two by the trade unions. The other board sizes are 16 members (10,000-20,000 workers) or 20 members (more than 20,000 workers).

According to ongoing observations conducted by the Hans Böckler Foundation, in 2004 a total of 746 enterprises were covered by the co-determination act of 1976, in comparison with 709 companies in 1992.

The strength of the German co-determination system also derives from its strong links to the works council system and the trade unions. German employers were for a long time strong opponents of the principles of co-determination. Although

co-determination has become more and more entrenched in the larger German companies the fundamental debate has never ceased. This is remarkable given the fact that in practice co-determination in Germany does not reflect a single and uniform model of employee representation. Indeed, the evolution of the system has always been in line with the uneven development of companies in highly competitive product and consumer markets, both within Germany and internationally.

Greece

Greece has had no tradition of board-level participation for employees in their companies. Historically the country’s industrial relations system was characterised by adversarial attitudes between capital and labour while governments were not interested in encouraging the advance of worker participation in companies through the use of the law. Moreover, the Greek economy was dominated by small and medium-sized enterprises in the private sector and such firms displayed no interest in establishing forms of corporate governance that they believed were irrelevant to their business operations.

However, after 1981 when PASOK the Socialist party was elected into government, legislation was passed that provided for direct board-level participation for workers who were employed in state-controlled and public sector utility companies and in former private firms that were brought into state ownership. Under its provisions a labour supervisory council was established for each of the enterprises involved. This was made up of 27 members of which nine represented the employees, nine the government and the remaining nine came from other stakeholders such as local councils, technical and economic chambers and various public bodies.

The law was modernised in 1996 to establish a more flexible form of boardroom representation. Under this reform company employees were entitled to two elected representatives on the boards of the state-owned companies. These board-level employee representatives are elected through a general ballot. Only employees are eligible. The employee board members have the same rights and duties as the other board members. However, in the late 1990s Greece started to move parts of its public sector into private ownership, mainly through the development of joint private-public enterprises. These developments have inevitably undermined the board-level participation of workers that was always confined to the public sector. Such worker participation is now confined to those enterprises that

are still under the majority control of the state. These are e. g. the companies that own the electricity system and the postal services and the national bank.

But the country’s industrial structure of small firms and a substantial number of self-employed workers has ensured that even works councils, enterprise unions and other forms of employee representation below company board level remain under-developed.

Ireland

The system of corporate governance in Ireland is very similar to that of the United Kingdom. Its private sector companies operate with a single tier board structure and they are concerned exclusively to meet the interests of shareholders. There has been no tradition of employee representation at company board level. Nor are works councils part of the Irish industrial relations system in the private sector of the economy.

But the picture is different in the public sector. In 1977 the Worker Participation (State Enterprises) Act was passed. This gave employees in seven state-sponsored commercial companies the right to elect up to a third of the members of their boards for periods of three years. Only employees of the company concerned are eligible. It was made clear that the work participation structure envisaged had to be based on existing trade union structures. But at the same time it was not envisaged there would be any move away from the single board system of corporate governance.

A review of the legislation ten years later led to the introduction of a further measure in 1988. This provided for the creation of sub-board consultative arrangements in a wider number of state agencies and companies. The new law was highly flexible in what form the proposed consultation mechanisms ought to take. But it did set out some basic provisions of their functions.

Trade unions, staff associations or other designated bodies, recognised for collective bargaining purposes, were given the exclusive right to nominate candidates for election as board-level employee representatives (so called worker directors). All employees, including those who are working part-time, are entitled to vote in the election of these board-level representatives. Once elected the worker representatives have the same rights and duties on the board as ordinary company directors, who are generally appointed by the government.

However, the government was reluctant to extend or impose participation legislation onto Ireland’s private sector if it proved impossible to stimulate such a development through encouragement and the negotiation of partnership arrangements.

There are now an estimated 54 employee representatives on over 20 state-controlled boards in Ireland. A few of the former state companies, which have been privatised, continue to have worker representatives still sitting on their boards. Initially, managers in the state-owned enterprises were hostile and suspicious at the creation of board-level employee representatives, who were often excluded from key decision-making and important company sub-committees such as finance. For their part, many board-level employee representatives felt uncomfortable in dealing with financial issues and called for more access to training. Originally there was some concern that board-level employee representatives could pose a challenge to existing collective bargaining and industrial relations structures. But with their sole right to nominate representatives to the board, the trade unions have been able to maintain a dominant role in the process.

The future of worker board-level participation in Ireland’s state enterprises is now in some doubt. The privatisation of state assets has brought the whole system of employee board-level participation into question. As many as 4 out of the 11 original companies covered by the legislation have now moved into the private sector. As a result they have lost their worker representation system.

But a survey of board-level employee representatives in Ireland carried out in 2002 found that as many as 96 per cent of respondents said they had a positive experience as board-level employee representatives. They believed their role gave them greater insights into the operations of the companies they work for. Over three quarters said the system had helped to improve industrial relations while 62 per cent added that it had helped in the development of the partnership approach in the company. On the other hand respondents were split half and half in their opinion as to whether they were “only tolerated” or “fully accepted” by management.

Italy

The wide gap between rhetoric and reality on the question of worker participation at company board level is never more pronounced than it is in Italy. According to article 46 of the country’s 1949 constitution it is recognised that employees have the right to take part in “the management of enterprises with the resources and within the limits laid down by the law.” But that provision has not led to any such arrangements coming into existence in Italian firms in over half a century outside the cooperative sector.

Indeed, the law plays only a limited role in Italy on the issue of employee representation at boardroom level. The workers’ committees and other active shop-floor bodies were

established through the negotiated process of collective bargaining and multi-union agreements with employers and not by the legislative route. Employer hostility or indifference on the one hand and conflicts between the unions on the other has ensured a very limited development of board-level employee representatives on company boards. It was only in the early 1970s that the first legal rights to information and consultation were introduced and then only in the face of strong resistance from the companies. They made up only a small part of the much wider worker offensive that developed after the country’s so-called hot autumn in 1969.

It is true that the Italian government tried to interest trade unions and employer associations in developing a system of co-determination at board level on the model of West Germany. But this failed to make any progress. The adversarial approach to industrial relations was preferred to any attempt at the creation of industrial democracy. Indeed, the tradition of conflict and confrontation in Italy has ensured little advance for notions of employee representation on company boards. There are some voluntary participation systems in some firms such as the airline Alitalia and Zanussi, the white goods firm that is part of the Swedish-owned Electrolux, but these are very much the exception. In some public sector enterprises such as the postal services and ENI state holding company worker representatives were elected onto their respective management committees.

However, the reform of the public services and the privatisation drive of the 1990s in Italy have undermined these developments. The trade unions, which had already been sceptical of such participation, came to the conclusion that the presence of worker representatives on management boards in state-owned companies being moved to the private sector or undergoing restructuring was quite ineffective in influencing what happened.

It seems unlikely that any progress can be expected under the present centre-right Italian government. However, an advance may be coming in information and consultation rights for employees in small companies.

However, trade unions appear to be increasingly changing their traditionally negative attitude to worker representation at company board level, adopting a more open and pragmatic approach, as seen in the debate on the transposition of the European Company legislation. On the other hand, the country’s leading employer association - Confindustria - remains sceptical about any moves that provide for the direct representation of employees on company boards at national or European level.

Luxembourg

Luxembourg's system of industrial relations is close in its form to that of France but it is based on a much more conciliatory approach. The Duchy has a mixed system of employee representation at company board level, provided for under a law passed in 1974. It covers both private enterprises that employ 1,000 or more workers who have been with the firm for over three years and all other companies where the state holds at least 25 per cent of the capital or where the company has been given a state concession in its main field of activity.

In the large private firms employee representation must account for a third of the board of directors in a unitary board. In the public sector where the state holds at least a quarter of the capital one employee is elected to the administrative board for every 100 workers employed. There must be a minimum of three employee representatives but no more than a third of the board can come from the workforce. White and blue collar employee representatives must be selected separately and in proportion to the number employed in each group in the company. These board-level employee representatives must be appointed from among the company's employees who are working in the company for not less than two years. But the system is different in the iron and steel industry. In that sector the most representative national trade unions are entitled to directly appoint three board-level representatives who do not have to be employed by the company.

The employee representatives have the same rights and obligations as their fellow directors and their length of tenure remains the same as well. However, they may find have their representation revoked by employees or in the case of the iron and steel industry by trade unions. Board-level employee representatives are not allowed to be members of more than two company boards at the same time.

Luxembourg, like most European countries, also has a well-developed system of enterprise employee committees in establishments employing 15 or more workers.

The Netherlands

The Dutch system of employee representation at company board level is both unusual and complex. Indeed, its critics argue that it does not amount to direct worker participation in corporate decision-making at all. The Netherlands after 1945 developed a fairly comprehensive works council structure in companies and this remains important in the dissemination of information and consultation.

Employee representation on company boards remains under-developed in the Netherlands and its existence is closely linked to the existing works council system. The legislation covers both public and private companies that employ a minimum of 100 employees and have capital – including reserves – of at least EUR 16 million. These undertakings are required by the 1971 Law to form a supervisory board of at least three people.

The Dutch system of worker participation at board level differs significantly from the systems in operation elsewhere in other European countries. Moreover, such members are not seen as employee representatives. They are required to take an interest in the affairs of the company as a whole and not be beholden to the workforce.

On 1 October 2004 a new law on supervisory boards in larger companies took effect in the Netherlands and has brought considerable changes in employee board-level participation. The supervisory board now nominates candidates when a vacancy arises, who are then appointed by the general meeting of shareholders. The works council has the right to propose candidates up to a maximum of one-third of the seats (the other candidates are proposed by the general meeting of shareholders). The supervisory board is de facto obliged to accept these nominations. If the general meeting rejects a nomination the procedure starts again. The general meeting of shareholders has also gained a new right to dismiss the entire supervisory board. The term of office cannot be longer than four years, although members can be re-elected.

A specific feature of the Dutch system is its emphasis on the fact that supervisory board members are not permitted to represent the interests of a single stakeholder, be it the shareholders, a bank or the employees. As a result, neither company employees nor trade union representatives involved in collective bargaining in the company can be elected onto the supervisory board. Consequently, board members proposed by the works council (under the former legislation) have mainly been academics or politicians who are mindful of employee interests.

The powers of the company's supervisory board are substantial. The supervisory board not only appoints and dismisses the members of the management board but it also has a veto right on practically all important strategic decisions. Its members have legal powers to approve any increase or reduction in the company's share capital. They need to approve mergers, acquisitions and investments of a value of at least a quarter of the equity capital. They are also required to approve any major change in working conditions in the company and in collective dismissals. The board is also involved in the preparation of the company's annual accounts.

An important restriction of the Dutch system is that it applies fully only to companies

which have the majority of their employees in the Netherlands. A mitigated system applies to international groups a majority of whose employees work outside the Netherlands, irrespective of whether their head office is in the Netherlands or elsewhere. Moreover, the legal obligations on worker participation do not apply to international holding companies, but only to holding companies of companies with their seat in the Netherlands (called subholdings) and only in a weaker form.

Portugal

Corporate governance in Portugal is based on the model of a single company board which is responsible to shareholders. There is no law on the country’s statute book that provides for employee representation at board level in privately owned companies. In theory the workers’ commission, the Portuguese equivalent of a works council, may agree as a social partner to negotiate representation on a company board. But in practice this has never happened.

Employee representation on the boards of wholly state-owned enterprises and other public entities is guaranteed, however, under the country’s democratic 1976 constitution that followed the end of Fascist rule in Portugal. This was followed by the introduction of specific legislation that was passed in 1979 and 1984 and gave employees the right to elect one representative to the board of directors and the Council of Auditors.



Board-level employee representatives must be elected by a majority of employees in the company and all employees have the right to participate in the vote. The candidates must be employed by the firm in question. They must be nominated by the workers’ commission and/or by 10 per cent of the labour force or 100 workers.

The employee representatives hold their positions for three years but there is nothing to prevent them from standing again for re-election. Their rights and duties as board members are exactly the same as those of all the other board members. However, this legislation on employee board-level participation in the public sector has never been implemented. As a result of this very few board-level employee representatives have been installed in reality.

In the early years of democracy in the 1970s the Portuguese government carried through a vast programme of nationalisation of the country’s industrial base. But since 1989 many of the public corporations have been moved into the private sector by successive governments. As a result in theory less than 2 per cent of the workforce in 2000 are now estimated to be actually covered by the laws requiring employee representation on the governing bodies of public enterprises. Finally, in 1999 further legislation was passed that abolished the right for employee representatives to be elected to the boards of public-owned enterprises. As a result there is no comprehensive legal entitlement in Portugal any longer for employee company board representation.

What worker representation remains in the country’s companies is mainly concentrated outside their boardrooms. In Portugal the system of works councils is advanced in comparison with other systems in the European Union. The workers’ commission remains the most important representative body in the workplace with the legal right to receive information about corporate strategy and planning, the company finances, the organisation of production and personnel management issues.

Management has to give the company’s workers’ commission prior notice before carrying out plant closures, any move to liquidate the company or to reduce the size of its labour force. Legislation in Portugal also now provides for the election of workplace-based trade union committees by employees which can become a central organisation within the company as a result.

The limited character of employee representation at company board level reflects the general outlook of the trade unions. They prefer to strengthen their role through the development of autonomous workplace institutions like the workers’

commissions rather than by insisting on employee representation on company boards. There is no immediate prospect of any change of attitude at the national level. Indeed, the supporters of board-level employee representatives find themselves very much on the defensive as the current government seems keen to remove what employee board-level participation continues to survive in some companies.

Spain

Spain’s system of employee representation in corporate governance has been shaped by the experiences of General Franco’s authoritarian regime which ran the country between 1939 and 1976. Although a worker participation law was passed in 1962, it was widely criticised as “pure propaganda”. The corporatist structures that dominated Spain’s industrial relations tended to ensure that power and authority in the workplace remained exclusively in the hands of employers. Certainly the promotion of trade union and individual worker rights were not part of the Franco workplace agenda although a rigid, corporatist system was imposed on employers and employees.

However Spain’s 1978 democratic constitution that followed the end of the country’s dictatorship makes it clear that the state is under an obligation “to promote the participation of all citizens in economic life”. Two years later workers were guaranteed information and consultation rights, the right to participate in the management of the country’s social services. At the same time they were also obligated to cooperate with employers in improving productivity.

Since 1995 firms employing more than 100 workers and smaller enterprises involved in dangerous activities have been required to establish health and safety committees with parity of representation between management and workers. But no legal provision exists in Spain that requires a permanent presence of employees on company boards in the private sector. Nor are there any co-decision rights in the firm between employer and employees, except for the fixing of holiday periods. Any moves to worker representation in corporate governance have to be made through voluntary negotiation in collective bargaining.

However, in 1986 a national agreement was made between the government and the UGT trade union federation that provided for trade union representation in state-owned enterprises that each employ more than 1,000 workers. Under this agreement unions can participate in management either through holding minority

representation at board level or through the creation of an information and control committee where management and unions hold equal representation. Workers through their unions also sit on the boards of Spain’s saving banks. The two most representative trade unions, CCOO and UGT, are entitled to send one representative each to sit on the boards of the banks.

By contrast the private sector companies in Spain are firmly under the control of either shareholders or family owners. Trade union efforts to advance the cause of worker participation at board level in private firms failed to make much progress during the 1980s through collective bargaining. The works councils that exist in Spain have not been brought into the decision-making processes of companies either. Moreover, the degree of consultation in the private sector remains limited. In 1999 as many as 88 per cent of companies did not discuss work related problems with their employees while 72 per cent failed to consult them on work organisation issues. It seems that the arrival of democracy in Spain has not made of an impact on the country’s authoritarian corporate culture and practices.

In fact, the trade unions in Spain have found it difficult to overcome the legacy of the past. Without the establishment of a framework of legal rights to worker participation, they have struggled to develop permanent and robust systems of workplace participation through negotiation with employers. The absence of law has meant that genuine forms of worker participation have been vulnerable to high unemployment, neo-liberal policies to make labour more flexible and corporate strategies that seek to drive down labour costs. This has tended to make the Spanish unions defensive and passive in their attitude to the issues of boardroom worker representation.

Moreover, the widespread use of temporary employment contracts as well as the dominance of employment in fragmented and small firms in agriculture, retail, hotels and construction has not helped unions to develop a credible programme for worker participation. The dependence of corporations on financing through the banking system coupled with the persistence of an aggressive neo-liberal strategy by employers has added to the obstacles in developing systems of worker participation at board level. Unless the Spanish government legislates to make such representation compulsory on companies, it seems most unlikely the present authoritarian methods of corporate governance are going to change very dramatically.

On the other hand, there has been a wide-ranging debate in Spain on the need for company law reform, mainly aimed at improving the position of shareholders

and institutional investors in particular and ensuring greater transparency in business activities. But this development suggests Spain is developing a neo-liberal approach towards the reform of corporate governance. The question of employee representation on company boards is hardly discussed or even mentioned.

This is causing particular problems for those parts of the state sector which are being moved into the hands of private owners. As a result of such privatisation Spain is experiencing a decline in what limited worker participation exists. As a result the trade unions are taking a renewed interest in a demand for a compulsory participation law. Whether the change in government in April 2004 will have a significant impact on this question remains to be seen. At least, the new socialist government did not make use of the so-called “opt-out-clause” contained in the European Company legislation (which was originally introduced on the demand of Spain).

Sweden

The democratisation of working life in Sweden has a long history that goes back to the inter-war years. Its development has always reflected the impressive growth of a strong and progressive trade union movement in alliance with Social Democratic governments that have ruled the country for all but nine years since 1932. The elaborate system of social corporatism that was developed in Sweden through the highly centralised organisations representing employers and trade unions has tended to emphasise the importance of voluntary collective bargaining without resort to the use of prescriptive legal rights imposed by the state.

It was not until 1973 and 1975 that legislation was passed that introduced company board representation for worker representatives. The shift away from voluntary negotiated agreements to the use of legislation marked an important change of direction in the industrial relations strategy of Sweden’s trade union movement. It aroused considerable opposition from employers and it was only after 1982 that agreement was reached that began to put the legislation into action.

But from the beginning the new laws – one for co-determination at the workplace and the other on board representation – provided employer associations and trade unions with considerable autonomy and flexibility in the way that employee representation at company board level should be designed. A great deal is left to the initiative and creativity of local officials and company managers. Indeed, the open-

ended nature of the worker participation laws has produced a considerable diversity in the range of structures and procedures.

But the legislation was rewritten in 1987 as the Board Representation Act. The far-reaching measure is designed to provide employees with the opportunities for using their knowledge and influence in company activities. It covers not only joint-stock companies and limited liability companies but also banks, mortgage institutions, insurance companies and economic associations who employ 25 or more workers. Employees in such enterprises are entitled to two representatives on the board of directors and one alternate for each member. But companies that employ an average of at least 1,000 employees in Sweden are required to have three worker representatives on their board of directors. The most common size of the board in Swedish companies is seven members, two of whom are employee representatives. Because all rights to co-determination, participation and negotiation at the workplace are distributed to the trade unions, which, by law, are responsible for the conclusion of collective agreements within the company, only the members of a trade union have the right to elect their representatives on the boards. The decision to appoint employees’ board representatives is taken by a local trade union which is bound to the company by a collective agreement. If as many as 80 per cent of the employees covered by the collective agreement belong to the same trade union, that organisation can appoint all the employees’ representatives. If this is not the case the two seats have to be shared among the most representative trade unions in the firm. In practice unions have little problem in reaching agreement on the appointment of employee representatives. But the law requires that those representatives are employees of the company concerned. It is very unusual for full-time trade union officials from outside the company to be appointed onto its board as employee representatives. Under the law an employee representative is allowed to serve a term that does not exceed four financial years. Only the body that has appointed the employee representatives can dismiss them.

The law makes it clear that the employee representatives on the company board do not participate in decisions that concern the collective bargaining agreement. Nor are they involved in industrial action or other matters where a union organisation at the workplace has a material interest which may conflict with the interests of the company.

Indeed, it is not an exaggeration to argue that the relative decline in the power and influence of Sweden’s trade unions at the national level as social partners has been paralleled by a revitalisation of their organisations in the workplace.

The development of joint decision-making in Swedish companies is in tune with the country’s tradition of collective bargaining and social partnership. Moreover, the legislation of the 1980s was developed in line with the voluntary and negotiated approach to workplace change. Research does not suggest employee representation on company boards has altered the power relationship between managers and employees but it has helped in ensuring active cooperation and consent to work modernisation.

United Kingdom

There is no legal requirement in the United Kingdom, either in legislation or a formalised code of practice, that the country should have a two tier structure for companies, including a supervisory board. All enterprises in the country are formed and managed for the explicit benefit of shareholders alone. Under existing company law the directors run the firm in the shareholders’ interest. No formal position exists in law that entitles employee representatives to have seats on the company board. However, British companies are legally required to inform and consult employee representatives under European Union regulation although this falls far short of worker participation on company boards. A recognised union is entitled to prior information from an employer if it involves a company dismissing 20 or more workers within 90 days. It has a similar legal right in cases of health and safety and occupational pension schemes.

What limited law there is in UK concerns only the right of workers to information and consultation, and that is mainly limited to questioning which is directly related to employment, collective redundancies and transfers of undertakings from the public to the private sector. But even that practice is not widespread in the country. A 1998 survey of more than 3,000 workplaces found almost three out of every five of them had no worker representation existing at all and this was true of as many as 90 per cent of workplaces which lacked trade union membership. Employee representation at board level is not the subject of major public discussion in Britain’s trade unions at the moment. Their main focus is the way in which the EU Directive on information and consultation was transposed into UK law. The country’s employers remain hostile to the concept and they opposed the European Company Statute on the grounds that it is incompatible with the culture of British enterprises. The British government continues to show little obvious enthusiasm for the concept either.

Norway

by Inger Marie Hagen, researcher at Fafo Institute for Applied Social Science, Oslo

In principle, the Norwegian model resembles the single-tier structure, but the provisions relating to corporate assemblies contain elements of a dual-tier system: a corporate assembly (not to be confused with the board of directors) must be established in companies with more than 200 employees. The general assembly elects two-thirds of the corporate assembly’s members, while one-third of members are elected by the employees. The corporate assembly elects all members of the board of directors, but legal regulations ensure that the employees may elect one-third of the board members (and at least two members). In addition to electing the board, the corporate assembly makes decisions on investments and restructuring which will significantly affect the workforce. However, if agreement can be reached with the majority of employees or with trade unions covering at least two-thirds of the employees, the company may choose not to establish a corporate assembly. A survey from 2003 indicates that only about 25 per cent of all companies with more than 200 employees have established a corporate assembly. These provisions are important because such an agreement gives the employees the right to elect an additional member of the board of directors and makes employee representation compulsory in these companies.

In any other form of company, employee board-level participation is not automatic: employees must make a written request to the employer, signed by half the employees concerned, or after a vote in favour by a majority of employees. Such a vote may be initiated by the works council or by one or more company-level trade unions. The company is obliged to implement board-level participation when the legal preconditions are met, that is, they may not refuse employee representation on company boards.

As a rule, if the company is a legal entity in its own right (in either the public or the private sector), employees will enjoy the right to board representation. The legal basis for employee board-level participation is formed by a number of laws and the Act on limited companies provides the basis for representation arrangements. In companies with fewer than 30 employees, the representation rights of employees can be established on a voluntary basis in the company statutes or collective agreement. In companies with 30 to 50 employees, the employees

may demand one representative on the board, together with an observer and two deputies, regardless of the size of the board. In companies with more than 50 employees, the employees have the right to elect one-third of board members (on application). Regardless of size of board, employees are entitled to at least two representatives. If the company is part of a larger corporation the same rules apply and the employees may demand board representation at corporate/enterprise level.

The board-level employee representatives are elected by and from among all employees. Workers’ representatives must have been employed full- or part-time in the company for at least one year prior to election. They may not be members of the corporate assembly or employee representatives in more than one company. This rule is not applicable to positions on different decision-making bodies in a group of enterprises. As a rule, there are no differences between employee board representatives and other representatives, with one important exception: employee representatives may not be removed/dismissed by the general assembly. Their term of office is two years, like the rest of the board, and their mandate is renewable. Board-level employee representatives enjoy special protection against dismissal in the Basic Agreement. They receive the same remuneration as other board members and it is not uncommon, although no figures are available, for employee representatives to donate (part of) their board fee to the local trade union.

Approximately half of private sector employees work in companies with more than 30 employees. Although there is no official information on what proportion of employees are represented on company boards, a recent survey conducted by Fafo estimates that one-third of companies with 30–50 employees have employee representatives and two-thirds of companies with more than 50. All in all, employees in about half of all companies with more than 30 employees have demanded representation. Size and collective agreement seem to be the most important variables in determining the presence of employee representatives on the board: for example, in companies with more than 200 employees and a collective agreement the figure is about 90 per cent. For the public sector it can be assumed that employees are represented on most boards where the legal framework or collective agreement provide such a right.

Fafo’s survey shows overwhelming support for the current legislation among both managers and the representatives themselves. The fact that a number of companies do not have worker board-level participation does not seem to be

connected to management resistance. The survey also tried to measure the level of influence. With no historical and very few international data for comparison, drawing conclusions is risky, however, it seems that “a few have a great deal of influence, a few none at all and the majority come somewhere in the middle”. Even if there is no formal connection between trade unions and board-level representation, Fafo’s survey shows that approximately half of the representatives consider themselves to be union representatives – more than half of them hold some sort of shop steward position. However, in some trade unions (and mostly unions outside LO) this “mixture” of positions is highly controversial. Fafo’s findings, however, indicate that the “mixture” is important for the level of influence achieved by the employee representatives. This seems especially important in larger companies/corporations, where combining leadership of the workplace branch and board membership is a powerful way of organising trade union activities. Also, managers seem to prefer this combination, as this makes information procedures easier and less time consuming. Fafo’s study clearly shows that close, informal and frequent meetings between the partners increase employee representatives’ influence at board level. And the level of influence acquired through the coordinating body connected to the collective agreements increases if the shop steward also has board membership.

The right to workers’ participation is mainly found in the different Basic Agreements covering the different sectors in Norway. In the private sector, the Agreement states the different rights to information and consultation in relation to shop stewards. These coordinating bodies may take different forms. In addition, the Agreements also state that a works council is obligatory if the company has more than 100 employees. The works council consists of management representatives and shop stewards from different trade unions (if more than one trade union is represented in the company), although all employees are entitled to vote in the election of works council members and (although this is not usual) a non-member could be elected. The different Agreements in the public sector do not include works councils; here information and consultation (and, on certain issues, negotiations) are conducted through the coordinating bodies. In addition to the collective agreement, the Act on the working environment states that all companies/workplaces with more than 50 employees must establish a working environment committee with equal management and employee representation. The Act on the working environment, the different Acts on board representation and the different collective agreements are the three foundations of worker’s par-

ticipation in Norway. Even if the rights are, by international comparison, fairly extensive, it is important to note that not all Norwegian employees are covered. Company size is very important, especially in the private sector. Fifty per cent of the workforce is found in companies with less than 30 employees. In this context, representative participation rights are found only in Agreements and the union density rate is somewhere around 40 per cent. Size is less important in the public sector participation rights are more closely connected to the Agreements. In the public sector union density is somewhere around 80 per cent.

The worker's participation framework is very stable: since 1982, there has been no major increase or decrease in participation rights. There is a strong consensus on participation issues among the social partners in Norway, dating back to the first Basic Agreement in 1935. However, it is important to note that, while the framework is stable, the principal justification offered for the “Norwegian participation” model is its favourable effect on productivity, rather than the importance of industrial democracy.

MAP: BOARD-LEVEL PARTICIPATION RIGHTS IN THE 28 COUNTRIES APPLYING THE EUROPEAN COMPANY (SE) LEGISLATION

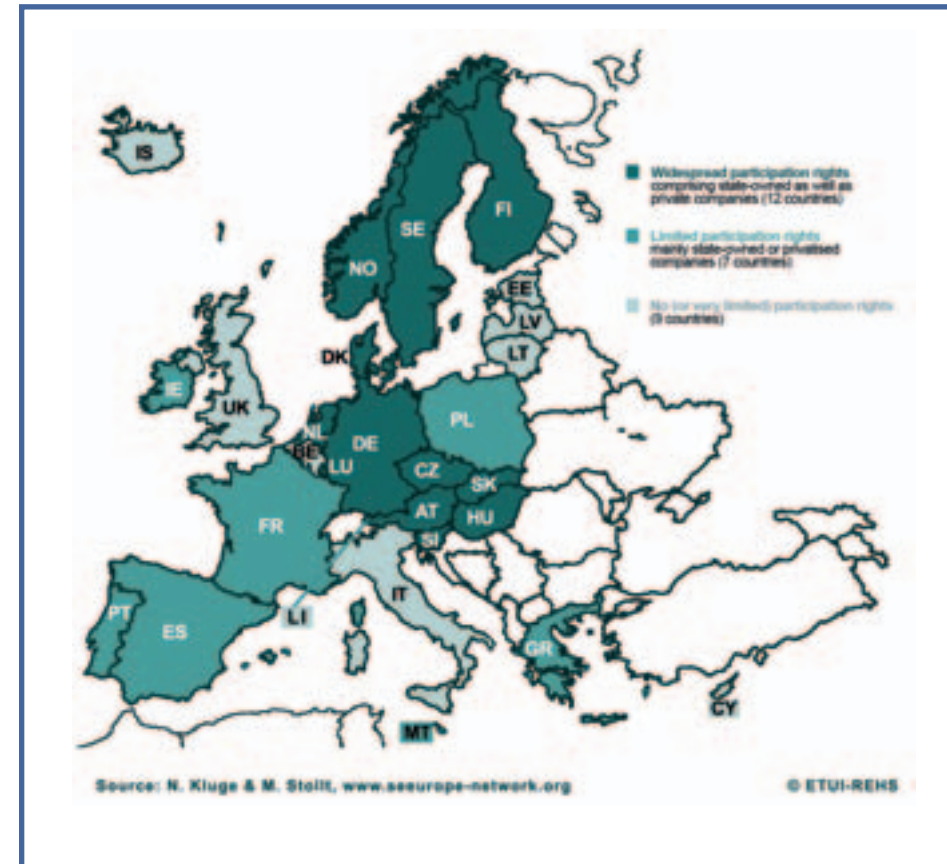


TABLE: WORKER BOARD-LEVEL PARTICIPATION IN THE EU-25 – BY NORBERT KLUGE AND MICHAEL STOLLT (JANUARY 2006)



	LEGISLATION ON BOARD-LEVEL PARTICIPATION	CRITERIA	NUMBER OF WORKERS' REPRESENTATIVES ON THE COMPANY'S BOARD	NOMINATION OF CANDIDATES	VOTE BY EMPLOYEES / APPOINTMENT	ELIGIBILITY CRITERIA FOR WORKERS' REPS ON THE BOARDS	STRUCTURE OF RELEVANT COMPANIES
AUSTRIA	yes	limited liability C > 300 and JSC	1/3 of SVB	appointment by WC		only members of WC (having active voting rights, i.e. only E)	D
BELGIUM	no						M
CYPRUS	no						M
CZECH REPUBLIC	yes	JSC > 50E and state-owned C	1/3 of SVB	private C: TU/WC, E (10%), management state-owned C: electoral regulations established by employer in agreement with TU	vote	private C: E and external TU officials state-owned C: only E	D
DENMARK	yes	C > 35 E	1/3 of board (at least 2 members)	no legal procedure	vote	only E	M/D (hybrid system)
ESTONIA	no						D
FINLAND	yes	C > 150 E	agreement between employer and personnel groups on <u>number of representatives</u> (max. 4 members / 25% of number of other members) and <u>choice of board</u> (employer may ultimately decide between SVB, board or management groups)	by personnel groups in WC procedure	vote if no agreement between personnel groups	only E	M+D (choice) SVB optional if stock capital > EUR 80,000)
FRANCE	yes	a) state-owned C (> 50% of capital, and subsidiaries) b) privatised C c) private JSC (voluntary) d) C where a board and a WC exists	a) 200-1000 E: 3 members of SVB/board >1000 E: 1/3 of SVB / board b) 2 members if SVB/board < 15 members; if >15: 3 members c) max. 1/3 of SVB/board d) WC representatives (in general 2) can participate in the board meetings (no voting right, only advisory say)	a) E b) E c) E d) Selected from among the elected WC members	a) vote b) vote c) vote	a) only E b) only E c) only E (and no other mandate) d) only E	M+D (choice)

Legend:

TU = trade union
WC = works council / elected worker representatives
E = employees

C = companies
JSC = joint stock companies
SVB = supervisory board

MB = management board
M = monistic model (board of directors: board)
D = dualistic model (management board and supervisory board)

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GERMANY	yes	a) C 500-2000 E b) C > 2000 E c) C in the iron, coal and steel industry (> 1000E)	a) 1/3 of SVB b) 1/2 of SVB (chairman is appointed by shareholder reps. in the SVB; in the event of a tied vote, the chair's vote is decisive) c) 1/2 of SVB (plus a "neutral external person"; chairman is appointed by shareholder reps. in the SVB) + de facto: 1 member of MB (blocking minority in appointment of labour director)	a) WC, E (10% or 100) b) E (20%), TU have right to nominate 2/3 candidates c) some by WC, some by TU	a) vote b) direct vote or vote by delegates assembly (if more than 8000 E) c) appointment by General Meeting of shareholders	a) only E (for not less than 1 year) b) only E (for not less than 1 year) / TU nomination for the TU seats c) only E (for not less than 1 year)/ TU nomination for the TU seats / extra members: neither E nor TU officials	D
GREECE	yes	state-owned C	2-3 board members (right to withdraw this right if < 50% public capital)	by law: E de facto: TU fractions	vote (appointment by the minister responsible)	only E	M
HUNGARY	yes	JSC + limited liability C > 200 E	1/3 of SVB	WC (duty to ask opinion of TU)		only E	D
IRELAND	yes	20 state-owned C and agencies some privatised C	mostly 1/3 of board but ranging from 1 to 5 directors	TU, bodies recognised for collective bargaining	vote	only E (for not less than 3 years)	M
ITALY	no						M+D (choice)
LATVIA	no						D
LITHUANIA	no						M+D (choice)
LUXEMBOURG	yes	a) C > 1000 E b) state-owned C (min. 25% of capital); C with a state concession	a) 1/3 of board b) 1 director per 100 E (min. 3 members, max. 1/3 of board)	appointment by staff representatives iron and steel industry: the most representative national TU have the right to directly appoint three directors		only E (for not less than 2 years) (exception: iron and steel industry)	M
MALTA	yes	10 mainly state-owned C	1 member of board of directors	TU	vote	no restrictions	M

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THE NETHERLANDS	yes	C where equity capital > 16 Mio. € + existence of a WC + > 100 E incl. subsidiaries (some exceptions)	max. 1/3 of SVB	WC	appointment by General Meeting of shareholders	no E	D
POLAND	yes	privatised C (former state owned C) [state-owned C continue to be governed by 1981 Act on workers' self-management]	a) if state holds > 50% of shares: 2/5 of SVB b) if state holds < 50% of shares: 2-4 members of SVB (depending on SVB's size) Additionally in privatised C > 500 E: 1 member of MB	E, TU	vote	no restrictions	D
PORTUGAL	yes	state-owned C (only if 100% public capital) but: law has very rarely been implemented!	1 member of board (but: law is not implemented) 1 member of council of auditors (implemented only in some C)	[WC/ E (10% or 100)]	[vote]	[only E]	M
SLOVAK REPUBLIC	yes	JSC > 50 E and state-owned C	private C: 1/3 of SVB state-owned C: 1/2 of SVB	E (10%), TU in state-owned C: 1 SVB member directly nominated by TU	vote	only E	D
SLOVENIA	yes	JSC with a SVB (= practically all JSC)	1/3 - 1/2 of SVB (defined in statutes of C) Additionally in JSC > 500 E: 1 member of MB	SVB members: appointment by WC MB member: proposal by WC (appointment by shareholders)		no restrictions	D
SPAIN	yes	26 state-owned C, 46 saving banks	2 members	the two most representative TU can designate one representative each			M
SWEDEN	yes	most C > 25 E	< 1000 E: 2 members > 1000 E: 3 members (but never majority) of board	appointment by TU (with which collective agreement concluded)		should be E (no formal obligation)	M
UK	no						M

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**WORKER PARTICIPATION AT BOARD LEVEL
IN THE NEW EU MEMBER STATES:
OVERVIEW AND BRIEF COUNTRY REPORTS**



WORKER PARTICIPATION AT BOARD LEVEL IN THE NEW EU MEMBER STATES: OVERVIEW AND BRIEF COUNTRY REPORTS

In May 2004, ten new member states joined the European Union, enlarging the membership to 25 countries. The Central and Eastern European countries (CEEC) – Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, the Slovak Republic and Slovenia – together with Malta and Cyprus have added new facets to the existing economic, political and socio-cultural diversity of Europe. From the beginning of the accession process in 1993 at the Copenhagen summit, the (prospective) new member states had to prepare themselves by incorporating the provisions of Community law, the so-called *acquis communautaire*, into national legislation.

Among these EU laws were the three most important EU Directives on worker participation:

1. the Directive on the establishment of European Works Councils, to be transposed by the date of accession;
2. the Directive on employee involvement in the European Company (SE Directive), by October 2004;
3. the Directive on information and consultation of employees, by March 2005.

Meanwhile, one year after the entering into force of the SE legislation almost all of the ten new member states have adopted national laws implementing the SE Regulation and the SE Directive. As a consequence, companies are now able to establish European Companies in almost all of the 28 countries applying the SE legislation.

THE LEGAL BACKGROUND

With EU enlargement the existing variety of national systems of **worker board-level participation (BLP)** has undoubtedly further increased. However, from a legal point of view we can identify – as was the case in the EU of 15 member states (EU-15) – three main country groups:

1. Countries with widespread experience of BLP in the sense that rules exist for both state-owned and privately-owned companies.
2. Countries with limited experience of BLP where only (formerly) state-owned companies are covered.
3. Countries with no experience of BLP at all (with a few exceptions).

Four of the ten new member states belong to the first group: Hungary, Czech Republic, Slovak Republic and Slovenia. In the EU-25 this represents the largest group, with 11 member states (plus Norway). Poland and Malta belong to the group with experience mainly limited to the public sector (EU-25: 7 countries). No such experience exists in Cyprus, Estonia, Latvia and Lithuania (EU-25: 7 countries).

However, as in the case of the EU-15, a comparison of the new EU countries reveals significant differences. Legislation on board-level participation in the eight Central and Eastern European countries (CEEC) only began to be passed in 1990 within the framework of the wide-ranging transformation of their political and economic systems. The ways these countries approached the establishment of a post-communist national system of industrial relations and worker participa-

tion varied significantly one from country to another, however. Therefore we cannot speak of a uniform model in the new EU countries. These different approaches are also reflected in the prescribed company board structure (essentially for joint stock companies and limited liability companies): remarkably, seven of the eight CEEC have decided to introduce a two-tier (dualistic) system¹ of corporate governance which clearly distinguishes the management function from the monitoring and supervisory function. Lithuania is currently the only CEEC allowing both a one-tier and a two-tier structure. Cypriot and Maltese companies are governed by a single board of directors. From this it follows that in the new member states extended forms of worker board-level participation can mainly be found on supervisory boards at present.

What companies are covered by board-level participation?

In the **Slovak Republic**, **Slovenia**, the **Czech Republic** and **Hungary**, legal provision is made for BLP in both state and private sector companies. The criteria as to which companies are affected by these laws are very different, however. The key criterion in **Hungary** is the number of employees: in joint stock companies and in limited liability companies with above 200 employees there is an entitlement to have worker representatives on the supervisory board. The regulations in the **Czech Republic** and the **Slovak Republic** encompass on the one hand state enterprises (whatever their size) and, on the other, joint stock companies with over 50 employees. In **Slovenia**, finally, BLP is obligatory in joint stock companies which have a supervisory board (which is the case for almost all of them).

In **Poland** several laws co-exist. The Act on workers' self-management of 1981 still applies to state-owned companies. In view of ongoing privatisation the Polish legislator has stipulated that, when a state-owned company is converted, BLP must be introduced. This rule applies even when the state's holding falls below 50%. Apart from these cases, there is no general legal obligation to ensure participation at board level in private firms. **Malta** and **Cyprus**, similarly, have no legal provisions on BLP in the private sector. Maltese legislation does nevertheless stipulate that worker representatives should sit on a number of boards of state enterprises. The same practice is to be found in **Cyprus**, albeit without a legal basis, at least in certain state enterprises (or ones with state holdings): in this case, the government has voluntarily included a number of formerly high-rank-

ing trade union officials in the management team. In practice, after taking their new position they do not consider themselves as trade union representatives on the board. In **Estonia**, **Latvia** and **Lithuania** there is as yet no legal basis for involving worker representatives in the executive bodies of companies. In this respect they constitute exceptions among the new EU member states.

How many worker representatives does the law provide for at board level?

In countries that have BLP, the number of worker representatives is determined by the overall size of the board. In **Hungary**, the **Czech Republic** and the **Slovak Republic**, workers may make up 1/3 of the board, while in state-owned Slovakian companies half of the members are appointed by the workforce. **Slovenia** allows for anything between a minimum of 1/3 and a maximum of half of the posts (laid down in the company's articles of association). In the latter case, however, the chairman – who is always appointed by the shareholders – holds the casting vote. The statutory level of participation in **Poland** is 2/5; this proportion may be altered if the state relinquishes the majority of its holdings, however (the workforce then nominates between two and four members, depending on the size of the board). In **Malta's** state-owned enterprises there is only ever one – elected – staff representative sitting on the board. Both **Poland** and **Slovenia** have laws stipulating that, in addition to the representatives on the supervisory board, companies in excess of a certain size must second a full-time workforce representative to the management board. Employees in Slovenian firms with over 500 staff possess this right, as do workers in privatised Polish enterprises of the same size. In **Slovenia** it is the prerogative of the works council to nominate this *labour director*, who is then formerly appointed by the shareholders' assembly.

However, as is the case in the EU-15 countries, nowhere are workers in a position ultimately to prevent decisions being taken (unless the shareholder-side is divided).

¹ Under the monistic model there is only a board of directors/administrative board; the dualistic model entails the existence of a management board and a separate supervisory board.

What is the formal role of the trade unions?

The formal influence of trade unions in the nomination or appointment procedure of board-level employee representatives by and large reflects the national system of workplace interest representation. However, it is necessary to look at the whole system of interest representation, of which BLP is only a part. Potentially, trade unions gain from BLP if the protagonists at this level are clearly committed to other levels of interest representation, at the workplace as well as with trade union representation at local or at company level. **Hungary** and **Slovenia** were the only countries to introduce at an early stage (1993 and 1992 respectively) a dual channel form of interest representation, with a works council elected by the entire workforce as well as representation by a workplace trade union organisation. In both countries it is the legal responsibility of the works council to appoint the worker representatives on the board, although in **Hungary** the workplace trade unions must first be consulted. Employee representatives in the other **CEEC** with BLP are directly elected. These are for the most part countries where mainly trade unions have the responsibility for representing the interests of the workforce. Here, not only the trade unions but also the employees themselves have the right to put forward candidates. In the **Czech Republic**, for example, the company trade union or the works council (where existing), or 10% of employees and also the management have the right to propose candidates.

In some countries, such as **Hungary** and the **Slovak Republic**, only employees of the company may sit on the board. In other member states no such restrictions exist. In **Slovenia**, for instance, works councils can nominate “external” trade union officers as their representatives. In the **Slovak Republic**, the members of trade unions represented in the workplace are allowed to directly allocate one of the seats on the supervisory board as they see fit. This right only applies to state-owned companies, however.

LEGISLATIVE PROVISIONS AND SOCIAL REALITY: BLP IN PRACTICE

Looking ahead to negotiations on worker participation in the SE, the legal situation in the new member states provides a point of reference from which to begin when seeking to agree on a common position and to find negotiated solutions with the employers. Nevertheless, the gap between legislation and social reality must not be ignored: the existence of basic legal provisions does not automatically imply that the laws are being actively implemented on the ground. Although it is not a totally unknown aspect of industrial relations in the new EU member states, experience of BLP is comparatively recent and confined solely to certain types of company. Very different sets of workers are covered by interest representation at board level according to the laws in different countries. If, as in Poland's case, only privatised enterprises are compelled to ensure worker participation at board level, the range of experience and the significance of representation at this level remains extremely limited. Another important factor limiting the scope of BLP is the very small size of most companies in the CEEC, as legislation mainly covers incorporated companies (joint-stock and/or public limited liability companies). Alongside the legal conditions, the competences of the supervisory body as a whole play an important role in the influence of board-level employee representatives. The competences of a Hungarian supervisory board are, for example, limited to giving recommendations (if its rights are not extended by the company statutes).

Historical experiences an obstacle to the introduction and functioning of BLP?

As already mentioned, whether and how BLP rules were introduced in CEEC was part of the much larger political and economic system change that took place at the beginning of the 1990s. An experience common to most CEEC was worker self-management. In communist regimes this rejected any possible divergence of interests between capital and labour. Although companies were officially self-managed by the workers their de facto influence in important company decisions remained weak. The fact that worker self-management was rather ideological than real may constitute an obstacle to the introduction of a modern worker participation regime based on the idea of social dialogue between employers and

employee representatives. Also, some trade unions still suffer from their former links to communist regimes. Apparently, they have not always been able to improve their reputation in the meantime. Consequently, they have increasingly lost members over the past 15 years. On the other hand, outside state-owned enterprises (whose number is ever falling) observers also note an aversion on the part of industry to the exercise of influence by workers in this manner, since it is deemed to conflict with the recently introduced and warmly welcomed principles of a market economy. However, this combination of adverse conditions, often quite understandable in view of the historical background, can surely be no justification for depriving workers and trade unions of their legitimate rights, simply by ignoring them. The Slovakian trade union confederation, for instance, estimates that some 25% of companies are breaking the law, in that the number of employees elected to the supervisory board is below the statutory level. Similarly in Slovenia, the law on participation has not been implemented in full by any stretch of the imagination: fewer than half of the companies concerned have actually appointed a labour director.



The hope is that the introduction of cross-border standards for participation in European Companies will improve opportunities for workers to participate and help to stabilise employee/employer relations overall. Workforce BLP has the potential to compensate at least in part for the current deficiencies in interest

representation which exist in almost all CEEC, both at company level (workplace trade unions/works councils) and at sectoral level (binding effect of collective agreements). Whether this potential is exploited also depends on workers' attitudes to collective interest representation: it is often necessary to overcome their long-standing scepticism concerning bodies that uphold employees' rights.

BLP and privatisation

An experience common to most of the new member states is ongoing privatisation. While this process is not unfamiliar in the EU-15 countries, its extension and impact have been much greater in the new member states. In Poland, for example, in the period 1990–2003 more than 7,000 enterprises underwent privatisation, that is, 80% of their total number in 1990. Inevitably, in countries in which BLP is limited to the public sector this represents a threat to participation rights at board level. Of the ten new member states Malta in particular is affected by this as the number of companies with BLP continues to shrink because of ongoing privatisation (as is the case in the EU-15 in, for example, Greece and Ireland). The Polish case is different: here BLP was *introduced* in companies being privatised. The idea was partly to compensate workers for the loss of previous participation rights and partly to involve employees, thereby enhancing consensus during this tough “period”. A problematic feature of the Polish system remains the fact that once the state has sold all its shares the new private owners are not obliged to maintain BLP.

Exercising a mandate as a worker representative on the company board: exchange of experiences

Within the framework of the PRESENS² project several “exchange seminars” were organised at which board-level employee representatives from the new member states discussed with their “practitioner colleagues” from EU-15 states, as well as trade union officials and academics, their experiences of exercising a mandate in a company boardroom. Although these cases represent only a small

² For more information on the PRESENS project see description in the Annex.

part of reality and are far from being representative, the results (published in a separate publication)³ provide a variety of interesting insights into the real practice of BLP in the new member states. The reports of the practitioners showed strong similarities in their work, irrespective of country of origin. All took a pragmatic approach to their task, being well aware of the opportunities but also the limitations of influencing company decisions. They consider themselves as representing the interests of the workforce, but also of the company.

Many board-level employee representatives emphasised in their reports that it was often they who brought social issues and aspects onto the agenda of board meetings – something also observed in several studies in EU-15 countries. The practitioners are faced with problems many of their colleagues in the EU-15 member states also know very well, such as the challenge of reconciling the provision of information to their colleagues and respecting business confidentiality, the enormous amount of information provided at board meetings and the importance (and often lack) of adequate training measures. The case studies presented at the seminar also provided strong arguments that BLP not only helps the workers but also creates added value for the company. Or as one board-level employee representative puts it: “We are bound by a common aim, namely the prosperity of the company.” In this respect it was interesting to see that in some cases a mutual learning process took place. Mistrust on the part of the shareholders and the other board members gradually disappeared once the worker representatives had taken up their responsibilities on the board and trust was gradually built up. In the case of a privatised Polish company, the external investor even decided to increase the number of board-level employee representatives by appointing employees as its representatives on the supervisory board.

The reports from the “micro-level” also reveal that effectiveness in representing workers’ interests also requires interaction between the different levels of interest representation. Cooperation between the works council (where one exists), the trade unions and the members of the supervisory board was seen as crucial in successful interest representation. Strong links with local trade unions seem to be advantageous and are common practice in most countries. Often there is a direct link between the existence of a (strong) union at the workplace and the realisation of legal participation rights, including board-level representation. Although not

always strong in legal terms, trade unions often have great de facto influence on the appointment of worker representatives. This mainly takes place by promoting the election of trade union candidates to the board.

The seminars also revealed the possible advantages trade unions can obtain from this level of interest representation. Particularly the acquisition of an important source of information and the possibility of bringing forward its own ideas can help a trade union to respond adequately and to strengthen its position in the company. This seems to be particularly the case if the different levels of interest representation are interwoven (for example, if a board-level employee representative is also a prominent member of the local trade union organisation).

³ Download at www.seeurope-network.org/homepages/seeurope/presens/publications.html

COUNTRY REPORTS¹

Cyprus

The national corporate governance system in Cyprus assigns companies operating on the basis of the one-tier system an administrative organ (board) in which management and supervisory functions converge.

In Cyprus there are no legal rules concerning worker board-level participation. Neither in corporate governance legislation nor in industrial relations legislation has there been any formal right of worker participation at board level, and consequently it has never been compulsory in either the private or the state-owned sector.

However, in state and semi-state companies the government may give seats on the administrative board to high-level trade union officials, mainly from the confederations. This practice is not enshrined in the law, but rather a tradition of public management. Indeed, after being appointed they frequently act largely as independent personalities. Currently, the only case of workers or their representatives being able to nominate a member to a company board is in the semi-government sector, namely the Human Resources Development Authority (Arxi Anaptyxis Anthropinou Dynamikou), which deals with the funding of training and human resource activities.

Although Cyprus has no tradition of labour participation at board level, it does have a tradition of social dialogue and tripartite cooperation on a voluntary basis. In that broad sense it is possible to say that worker participation exists in Cyprus, mainly taking the form of collective bargaining and the participation of labour representatives in tripartite bodies and committees. At the workplace, Cyprus has one-channel interest representation through the trade union structure. Cyprus has one of the highest union density rates in the EU, amounting to approximately 70% of its workforce.

¹ Compiled by Michael Stollt and Norbert Kluge. Based on reports prepared by experts involved in the PRESENS project: Prospects for board-level representation of workers under the European Company Statute in the new EU member states (see expert list in the Annex). The full version of the county reports, including 10 expert and 10 practitioner reports, can be downloaded from the SEEurope website: <http://www.seeurope-network.org/home-pages/seeurope/presens/publications.html>.

Czech Republic

Czech legislation on corporate governance is largely based on the German/Austrian model, the so-called two-tier system which involves both a management board and a separate supervisory board in the decision-making process. Workers are entitled to send representatives to supervisory boards in both state-owned and private companies.

In the **private sector**, in joint-stock companies with more than 50 employees one-third of the supervisory board is elected by the employees. Theoretically, the company statutes can also provide for a larger number (up to 50%) or grant board-level participation rights in companies with fewer than 50 employees. The supervisory board supervises the management board's activities and the company's general activities. Its members have the right to inspect all documents and records dealing with company activities, and review accounts and the balance sheet. Where company interests so require, the supervisory board is authorised to convene the general assembly and to submit to it any measures it proposes to take. The consent of the supervisory board is required for the acquisition or alienation of property exceeding one-third of the company's own capital. The powers of the supervisory board can be extended by the company statutes: for example, they can provide that the board elects and removes members of the management board.

Board-level employee representatives are elected directly by the employees. Candidates may be either employees or members of trade union organisations present in the company, who do not necessarily need to be company employees. Candidates for supervisory board membership (or for removal from membership) can be proposed by the trade union, the works council (where one exists) or by at least 10% of the employees. Even the management board is allowed to propose candidates.

In **state-owned companies** worker board-level participation is mandatory, irrespective of the number of employees. The state enterprise's organs consist of the director responsible for day-to-day management and the supervisory board monitoring the director's decisions and enterprise activities. As in the private sector, employees are entitled to nominate one-third of the board members.

In state-owned companies, the electoral regulations are established by the employer in agreement with the local trade union organisation. Only employees are eligible to become board-level employee representatives.

Irrespective of the sector of activity, the board members elected by employees

have the same rights and duties as the other members, who are elected by the general assembly (in joint-stock companies) or appointed by the state (in state enterprises).

There is no formal relationship between supervisory board members elected by the employees and the local trade union organisation or works council. Links can be established, however, when an employee elected to the supervisory board is also a trade union official.

A specific right to employee representation in company management exists in the **banking sector**. In addition to the mandatory one third representation on the supervisory board, the Act on Banks states that employees must also be represented on the management board.

Until 2001, workplace representation in the Czech Republic took place solely through company unions, where they existed. The new legislation introduced a mixed system which allows the establishment of a works council in companies where there is no local union organisation. However, if subsequently a trade union organisation is set up the works council must be dissolved. It appears that this rule has contributed to a situation in which few works councils have been set up. The existing workplace representatives have to be informed and consulted on a number of issues. However, only the union can conclude collective agreements, which is particularly important as in the Czech Republic collective bargaining mainly takes place at company level.

Estonia

In Estonia, public limited (joint-stock) companies must have both a management and a supervisory board. Consequently, all public limited companies have a two-tier management structure. In private limited companies a supervisory board need be established only if the share capital exceeds EEK 400,000 (ca. EUR 25,000) and the management board has less than three members or if it is prescribed by the company statute.

Estonian law does not provide employees with a right to elect or appoint representatives to the management board and/or the supervisory board. Although theoretically possible, in practice no trade union or employer has agreed to deal with this question in a collective agreement. The national-level social partners hold different positions on this issue: whereas the employer organisation ETTK takes the view that the presence of employees on supervisory boards would

merely obstruct its smooth functioning, the Confederation of Estonian Trade Unions (EAKL) is in favour of employee participation at board level. Based on the assessment that the existing compulsory information and consultation procedures do not operate effectively in practice, EAKL argues that this right would help to ensure that employees are aware of decisions which affect their interests (such as collective redundancies, a transfer of an enterprise, and so on). Although the debate on board-level participation has halted for the time being it may arise once more in the planned reform of Estonian collective labour relations.

Estonia has a one-channel system of employee workplace representation, in other words, the trade unions. In practice, collective labour relations are most developed at enterprise level and the number of collective agreements at national or branch level is not significant. At enterprise level, employees participate in labour relations via shop stewards who are usually elected in companies with a trade union. The Estonian Trade Unions Act (2000) lays down provisions on information and consultation procedures on a number of issues. Thus, the obligation to inform and consult employees is only effective where there is a trade union organisation. However, as the reputation of the trade unions is still suffering from their close ties to the Communist Party during the Soviet period few employees are still trade union members. The right of information and consultation is therefore guaranteed for only a few employees. In addition, information and consultation of employees is a relatively new area in employment relations in Estonia and requires additional knowledge and skills on the part of both trade unions and employers. As a result, information and consultation has not yet developed into a well-functioning and common practice.

Hungary

By and large, Hungarian corporate law takes the relevant German legislation as model, and thus the customary form of corporate governance for domestic undertakings is the two-tier system. A supervisory board must be established at all joint-stock companies and at limited liability companies above a certain size, regardless of whether they are state-owned or private.

By default, however, the powers of Hungarian supervisory boards are rather weak. They may monitor managers' actions and act as a body on behalf of the shareholders, but they tend to meet fairly infrequently. It is up to the sharehold-

ers' meeting whether it extends the competences of the supervisory board. The usual business of supervisory boards is limited to holding meetings once or twice a year for the approval of all important reports put on the agenda of the shareholders' meeting (including the annual financial report) and business plans, and exercising some control over the organisation by requiring information and inspections or reviewing the books and company documents. The main entitlement of the supervisory board is to call a shareholders' meeting if it views the management's actions as contravening the law, the company statutes or a decision of the shareholders' meeting, or if it considers them harmful to the interests of the company or the shareholders.

In companies with at least 200 full-time employees one-third of the supervisory board must be employee representatives. Such board-level participation is obligatory in both **state-owned and private companies**, regardless of whether the business operates as a joint stock company or a limited liability company. Employee representatives are nominated by the company's works council or central works council, but prior to nomination the works council is obliged "to listen to the opinion" of company trade unions. The shareholders' meeting is obliged to appoint the works council's nominees if they meet the legal criteria. In practice, employee representatives on the supervisory board are local trade union leaders and/or the chair of the (central) works council, or their deputies. The personal overlap between board representation and other company-level channels of employee representation provides representatives with a certain legal security (against dismissal, discrimination, and so on), which is otherwise not guaranteed by company law.

The rights and duties of employee delegates are basically the same as those of other non-employee supervisory board members elected by the shareholders. There is, however, one extra entitlement for employee representatives: should the supervisory board fail to reach a consensus, the shareholders' meeting must be informed about the minority position of the workers' representatives. In turn, the employee representatives are obliged to inform the "community of employees" through the works council about all issues, with the exception of those restricted by business confidentiality.

Remuneration of board members is not regulated by the law, but the relevant decision of the shareholders' meeting is usually guided by the principle of member equality. Nonetheless, remuneration practices vary widely across companies. The appointment procedure and everyday functioning of employee representa-

tives is in line with Hungary's dualistic system of workplace industrial relations. In 1992 statutory works councils were introduced. Originally they were strongly opposed by the trade unions because they feared a weakening of their position. Several changes in the Labour Code since then have led to a situation in which the responsibilities of works councils and workplace trade unions have become rather confused in Hungarian labour law. In the course of the 1990s, unions developed a controversial relationship with works councils: at the majority of companies unions made a successful bid to dominate works councils or render them largely redundant. Recent surveys show that works councils operate only in larger companies where workplace trade union organisations are in place, and they do not function as an institutionalised channel of employee representation at non-unionised firms.

In practice, personal overlap prevails, not only between trade union leaders and works council members, but also between board members and other channels of employee representation. On the other hand, if neither a union nor a works council exists at a company, there is nobody to oversee effective implementation of the law. While in theory the establishment of board-level participation is automatic, in practical terms no state agency (labour inspectorate, court of registration) is in a position to monitor company practices in this regard.

Although board-level participation is not a key element of Hungarian industrial relations it represents an additional channel of representation which may support the functioning of company trade unions and works councils.

Latvia

Latvian company legislation by and large provides for a two-tier structure, with a management board and a supervisory board. However, like its neighbours Latvia has no legal requirement nor any significant practice of worker participation at board level.

After Latvia's independence in 1991, trade unions experienced a sharp fall in influence and membership. Nowadays, they represent roughly 20% of the workforce (membership in the public sector is much higher than in the private sector). The conclusion of collective agreements is mainly limited to the enterprise level as there is still hardly any dialogue at sectoral level and none at regional level. Theoretically, sectoral agreements can be extended where the employers subject to the agreement employ more than 60% of all employees in the sector. In prac-

tice, however, there is no sectoral agreement which meets the criterion. Also, the number of collective agreements concluded at enterprise level remains low: they only cover approximately 20% of Latvian employees.

Although the direct election of “authorised employee representatives” by the workforce has been possible since 2002, the main channel for employee interest representation at the workplace remains the trade unions. Where there is both a trade union and an authorised employee representative in the same company, only the trade union has the right to conclude a collective agreement. Both trade unions and authorised employee representatives have the right to be informed and consulted on a number of issues, including the company’s economic situation and social affairs and decisions which concern the interests of employees and which may substantially affect wages, working conditions and employment. In practice, workplace social dialogue mainly takes place where unions are strongly represented, which de facto leaves a large proportion of Latvian employees without any interest representation at all.

Lithuania

Lithuanian company law nowadays allows enterprises to choose between a one-tier (administrative board) or a two-tier (management board and supervisory board) structure. There is no legal right for workers to be represented on the board or supervisory board of a company (this applies to both state-owned and private companies). Several factors hinder the establishment of board-level participation. To the majority of Lithuanians, it is still to some extent considered a restriction of the employers’ initiative and a foreign body or even a hindrance in a market-oriented economy. The rather negative experiences with such collective rights in the socialist past mean that among employees there is still little interest in reviving them. Moreover, the experience with introducing such rights during the early stages of transition (1990–1994) was not successful. At that time, the Law on State Enterprises established the right of employees to elect up to two-thirds of the members of the supervisory board. However, their presence on the supervisory boards of state enterprises could not prevent abuses, corruption and manipulation in the early stages of privatisation. Consequently, the right was abolished again. Since those days no debate has developed on introducing a modern form of worker board-level participation.

The Lithuanian system of industrial relations is strongly oriented towards the

enterprise level. Although legally allowed also at national, sectoral or regional level, collective bargaining mainly takes place at company level. The number of employees covered by collective agreements, however, is relatively low, which is also the case for trade union membership density. Workplace representation in Lithuania until recently followed the single-channel approach with an exclusive right of representation of all workers for enterprise-level trade unions. This meant that in the absence of trade unions there was no collective representation at all. In November 2004, a Law on Works Councils was adopted that allowed their establishment in enterprises without trade unions. The existing system can now be described as single-channel representation with a supplementary channel for non-unionised workplaces. If a trade union is established in an enterprise, it enjoys exclusive rights of representation of all workers and no works council can be established. In Lithuania, worker representatives have the legal right to information and consultation about the general situation in the enterprise, dismissals of employees on economic or technological grounds and restructuring of the workplace. On a few questions (such as modification of internal work regulations) the consent of the workers’ representatives is required.

Malta

Under Maltese company law the only recognised corporate structure is the one-tier system: the two-tier structure has never been recognised. Companies are governed by a board of directors which manages the business and exercises all corporate powers.

In Malta, at present 10 companies provide for worker board-level participation, of which six are state owned. The remaining four companies are privately owned: three by the General Workers’ Union (GWU), the largest trade union on the island, and the other by the Labour Party. There are 12 elected representatives to the board of directors (so-called worker directors).

Where board-level participation was introduced it was done in a number of different ways. In the case of a number of corporations owned by the government and the University of Malta the right is based on legislation. In some companies, however, the relevant provision can be found in the collective agreement, while in others an agreement was reached and is still in place.

Only company employees are entitled to become board-level employee representatives. In general they are directly elected by the employees. On appoint-

ment, board-level employee representatives have the same rights and duties (including remuneration) as the other directors.

Historically, worker board-level participation dates back to the 1970s when the newly elected government vowed to take a new economic direction and adopt a new form of industrial relations in which worker participation was to play a leading role. The original concept, involving board-level employee representatives, was inspired by the socialist ideology of worker self-management. However since those days worker participation at board level has increasingly come under pressure. At the shipyard Malta Drydocks, for example, by 1975 all eight directors were to be elected by the workers (self-management system). In 1997, however, the number of elected employee representatives was reduced to four (half the board) and in 2000 to a single representative. Recently, three companies abolished the employees' right to elect board-level employee representatives as part of their privatisation process (Drydocks among them).

Maltese industrial relations law follows the British system of industrial relations, with the shop steward representing the trade union at shop-floor level and collective bargaining being conducted at enterprise level. Within the current industrial relations system – based on conflict and negotiation – board-level participation has apparently never really functioned properly in Malta. Consequently, the idea of board-level employee representatives has been regarded with suspicion by both management and employees.

Poland

In Poland, the main criterion for having worker participation at board level is form of company ownership. Board-level representation is legally required only in the public sector.

The transformation of the political system in Poland brought about numerous economic changes which in turn led to fundamental changes in the way employees were involved in company decision-making. When a company was privatised the employees were given the right to acquire, free of charge, up to 15% of the shares held by the State Treasury. However, the Privatisation Act (1992,1996) also introduced a right of employee representation on the supervisory board for **formerly state-owned enterprises** transformed into a commercial company, with the State Treasury as single shareholder (process of commercialisation). According to this legislation, the staff in such companies nominate two fifths of

the supervisory board members. Once the State Treasury has sold more than 50% of the shares, the number of employee representatives on the board can be reduced. However, as long as the state remains a shareholder the company is obliged to keep a minimum of employee representatives on the board (2–4 members depending on board size).

Polish legislation foresees a two-tier structure for joint-stock companies, whereas limited liability companies are only required to establish a supervisory body if their starting capital exceeds PLN 500,000 (about EUR 125,000) and the number of shareholders is greater than 25. The supervisory board monitors all aspects of the company's operations. The powers of the supervisory board also include suspension – on good grounds – of some or all members of the management board. The supervisory board members are appointed and removed by the general meeting. Employee-nominated supervisory board members are elected in a general and direct ballot by the employees. As the law does not distinguish between different kinds of supervisory board members the rights of employee representatives are the same as those of other board members (including remuneration).

If a “commercialised” (privatised) company has more than 500 employees, the staff are entitled to elect one member of the management board, in addition to its representation on the supervisory board (this right is retained by the employees even after more than half the shares have been sold by the State Treasury). It is worth noting that in the period 1990–2003 more than 7,000 state-owned enterprises (that is, 80% of all state-owned enterprises as of 1990) underwent privatisation. At the end of 2003, there were about 700 single-shareholder companies of the State Treasury (with the state being the only shareholder). Added to that should be the – difficult to estimate – number of entities in which the State Treasury retains shares or stock. The right to elect representatives to the supervisory board was intended to partly compensate employees for their loss of participation rights before companies underwent the commercialisation process. The **remaining state-owned enterprises** (not yet privatised/commercialised) are still governed by the 1981 Act on workers' self-management, introduced as a reaction to the disastrous results of enterprise management under the planned economy. The act grants extensive rights to employees, mainly via an employees' council (elected by the staff) which has fairly extensive controlling rights and also appoints the manager of the company. As the number of state-owned enterprises is continuously shrinking, so too is the number of enterprises with worker self-

management.

In **enterprises other than state-owned or “commercialised” (formerly state-owned) companies** there are no legal grounds for employees to claim participation rights in the management of their workplace. Also in companies that underwent “direct privatisation” – that means where all assets were sold directly – the new (private) owner was not obliged to introduce board-level participation. Moreover, when companies were taken over entirely by new owners the newly acquired rights to board-level participation were often abolished. Nevertheless, in so-called welfare pacts signed between trade unions and the new private owners the unions were in some cases given the right to delegate representatives to the supervisory board.

The trade union structure in Poland is fairly decentralised. In order to have a real say in matters affecting the employees, the branch or national trade unions must establish company organisations. On the other hand, employees often form single-company trade unions that cover the operations of only one employer. Workplace representation generally takes place through the local trade unions (single channel). However, in the majority of workplaces (especially in smaller companies) there is no representation at all. Currently, there are no general legal regulations securing for employees the right to information and consultation. This situation will change after the legislation implementing EU Directive 2002/14 comes into force. The trade unions are very apprehensive with regard to the EU Directive on information and consultation procedures. They are afraid of losing their monopoly at the workplace and that employers could promote the establishment of “union-free works councils” in order to weaken the position of the trade unions in the company.

Slovak Republic

In the Slovak Republic worker board-level participation covers both the state-owned and the private sector.

The main criterion is whether a supervisory board exists or not. This is the case for every **state-owned company**, regardless of size and activity. Only those that are engaged in activities in the public interest, and in whose company statutes this is laid down, have no supervisory board and consequently no worker representation at board level (for example, railways, post office).

The workers are entitled to elect half the members of the supervisory board in

state-owned companies. The chairman cannot be an employee, however. The employees elect their representatives in a direct vote. If there is trade union representation at the company, it has the right to nominate one board-level representative.

In state companies the supervisory board decides on profit distribution and settlement of losses; can recommend management dismissals; submits reports on the merger or division of the company; submits a financial report every six months or annually; approves the appointment of the auditor, credits, loans, transfer of company property and the allocation of company property to the general manager, “procurist” or other person authorised by the enterprise to use it or to deal with various matters.



In the **private sector**, a supervisory board is compulsory only in joint-stock companies with fixed assets of at least SKK 1 million (ca. EUR 25,000). If the company has more than 50 employees in full-time employment, one-third of the members of the supervisory board are elected by the employees. However, the company statute can lay down a higher number (max. 50%) to be elected by the employees and also decide to introduce worker board-level participation voluntarily where the threshold of 50 employees is not met.

In private companies the supervisory board audits the extraordinary and consolidated annual accounts and the planned profit distribution or settlement of losses

and presents a report to the general assembly. It also designates a representative to act in tribunals and other organs in cases involving members of the board of directors. Supervisory board members are authorised to view all accounts and documents concerning the activities of the company, and oversee whether the accounts reflect the facts and whether company operations are conducted in accordance with the law, the company statute and the decisions of the general assembly. Moreover, the supervisory board approves the ordinary, extraordinary and consolidated financial reports.

In both **state-owned and private companies**, the right to present candidates for the election of the board-level employee representatives lies with the local trade union organisation but it is also possible to stand for election if one obtains the approval of a minimum of 10% of the employees. This new legislation came into force in 2000 and eliminated problems caused by the fact that existing legislation did not deal with the proposal of candidates. In many cases this had resulted in situations in which the management board, which organised the elections, also decided on the candidates. Only employees of the company can be elected to the supervisory board as worker representatives. Once appointed, they have the same rights and duties as the other board members, including the same remuneration, as laid down in the company statutes.

Slovakian industrial relations in the workplace have for a long time been conducted through a single channel, with the unions as the only organisation entitled to represent workers' interests in enterprises. Since 2002, however, it has been possible to set up a works council in the absence of a trade union. One year later, the law was enhanced such that a works council could henceforth be set up whether or not there was a local trade union organisation, if requested by 10% of the workforce. The two bodies now have more or less the same status and share information and a few joint decision-making rights (where the consent of employee representatives is needed). However, only the trade union can conclude collective agreements with the company management. Collective bargaining in the Slovak Republic takes place at the sectoral and enterprise levels and covers a comparatively high number of employees.

Slovenia

In Slovenia, employee involvement is based on Article 75 of the Constitution of 1991 which guarantees workers the right of co-determination. On this basis, the

Act on the participation of workers in management (APWM) was passed in 1993, providing a variety of participation rights, individual and collective, including information and consultation rights and board-level participation.

Modern Slovenian company law was largely inspired by the German model, but other European legislation was also taken into consideration. The Slovenian Companies Act opted for a two-tier structure, with a management body and a separate supervisory board. However, discussions are presently going on in Slovenia to allow also the one-tier structure with a single board of directors. Employees have the right to participate in the supervisory board, if there is one, regardless of whether the company is **state-owned or private**. According to the Companies Act, a supervisory board is obligatory only in joint-stock companies in any of the following cases:

- if the company's subscribed capital is above SIT 410 million (approx. EUR 1.7 million);
- if the company employs more than 500 employees;
- if the company has been established progressively (the founders of the company must raise the necessary capital by selling shares);
- if the company's shares are traded on the stock exchange;
- if the company has more than 100 shareholders.

In practice there are (almost) no joint-stock companies without a supervisory board.

Board-level employee representatives are elected – and recalled – by the company's works council. The persons selected do not have to be company employees. Their number is determined by the company statute, but may not be lower than one-third or higher than one half of all members of the supervisory board. Before 2001, the law even foresaw workers' representatives making up half the board members for companies with more than 1,000 employees. This rule was judged a breach of the constitutional principle of equality by the Slovenian Constitutional Court, however, and was therefore changed. The chairman of the supervisory board is always a representative of the shareholders and has a casting vote in the event of a tie. Workers' representatives on the supervisory board have the same rights and duties as the representatives of the owners and participate fully in decision-making.

In addition to representation on the supervisory board, the works council is also entitled to propose a labour director in companies with more than 500 employees. The labour director is a full member of the management board and formally

appointed by the supervisory board (or in the absence of a supervisory board, by the shareholders). In companies with fewer than 500 workers a labour director may be appointed by mutual agreement of employer and employees. The labour director represents employees' interests in human resource management and social matters.

Slovenia has a dual channel system of employee interest representation at company level through works councils (possible in companies with more than 20 employees) on the one hand and trade union representation on the other. These two forms are institutionally and functionally separate: while trade unions have a so-called “conflict function” (collective bargaining, infringement of rights), works councils have rather a “cooperative function” and are not entitled to resort to strike action, for example.

Slovenia – like many other Central and Eastern European Countries – had a period of worker self-management. This communist ideology, which neglected differences between the interests of labour and capital, did not survive the change to a pluralistic, parliamentary democracy. In 1988, the Act on United Labour of 1976 – which regulated worker self-management – was abolished and a new company law was passed.

Theoretically, the Slovenian system of workers' participation is one of the most advanced in the world, guaranteeing workers a wide range of participation rights. In practice, however, the law has been implemented slowly and infringements of workers' rights are still numerous, while workers are often unaware of their rights and of enforcement mechanisms. Implementation of the APWM is a facultative possibility and not a duty. This means that a first initiative from the worker side (probably from the trade union) is required to “activate” the participation rights provided by the legislation. This fact also has consequences for the question of board-level participation which is linked to the works council's right to nominate the board-level employee representatives: Where there is no works council there cannot be worker representatives on either the management or the supervisory board.

ANNEX



COUNTRY EXPERTS

The detailed country reports on board-level representation in the EU member states can be downloaded at www.seeurope-network.org

Project “Prospects for participation and co-determination under the European Company Statute in the EU-15” (2003)

Austria	Wolfgang Greif	International Secretary, Gewerkschaft der Privat-angestellten (Union of Salaried Private Sector Employees)
Belgium	Luc Triangle	Centrale Chrétienne des Métallurgistes de Belgique (CCMB) / Chairman of the Select Working Party of the “Company Policy Committee” of the EMF (European Metalworkers Federation)
Denmark	Peter Dragsbæk	Trade union official, CO-industri (Central Organisation of Industrial Employees in Denmark)
Finland	Jari Hellsten	Legal adviser SAK (Central Organisation of Finnish Trade Unions)
France	Patrick Roturier	Syndex, Paris
Germany	Dr Roland Köstler	Head of economic law division of the Hans Böckler Stiftung, Düsseldorf (Foundation of the German Trade Union Confederation)
Greece	Dr Christos A. Ioannou	CIRN (Centre of Industrial Relations and Negotiations), Athens University of Economics and Business / OMED (Organisation for Mediation and Arbitration), Athens
Ireland	Kevin O’Kelly Pat Compton	Researcher at University of Limerick Irish Worker Directors’ Group
Italy	Dario Ilossi	Expert at SindNova / FEMCA CISL, International Department
Luxembourg	Marc Feyerisen	Magistrat à la Cour Administrative, Luxembourg
The Netherlands	Joan Bloemarts	Labour and company law adviser FNV (Dutch Trade Union Confederation)
Portugal	Reinhard Naumann	Researcher at CIES/ISCTE (Centro de Investigação e Estudos de Sociologia, Lisbon)
Spain	Dr Armando Fernández Steinko	Researcher at Universidad Complutense de Madrid
Sweden	Roger Nilsson	Trade union official, Svenska Metall
UK	Lionel Fulton	Researcher at Labour Research Department, London

Project “PRESENS - Prospects for board-level representation of workers under the European Company Statute in the new EU member states” (2005)

Cyprus	Dr Christos A. Ioannou	CIRN (Centre of Industrial Relations and Negotiations), Athens University of Economics and Business / OMED (Organisation for Mediation and Arbitration), Athens
Czech Republic	Denisa Heppnerová	Legal Adviser, Czech-Moravian Confederation of Trade Unions (CMKOS)
Estonia	Dr Merle Muda	Researcher, University of Tartu (Faculty of Law, Chair of Labour and Social Security Law)
Hungary	Dr László Neumann	Researcher, National Employment Office – Research Unit and Institute of Political Science, Hungarian Academy of Sciences
Latvia	Agnese Puntuža	Project manager, Latvian Construction Workers’ Union
Lithuania	Dr Tomas Davulis	Assistant Professor, Vilnius University (Law Faculty)
Malta	Dr Charmaine Grech	Researcher, General Workers’ Union Malta
Poland	Jakub Stelina	Researcher, Gdansk University (Chair of Labour Law)
Slovak Republic	Peter Ondruška Peter Krajčír	Legal advisor, KOZ SR (Confederation of Trade Unions of the Slovak Republic) Member of supervisory board of Slovnaft
Slovenia	Janja Bedrač	Researcher, University of Maribor (Law Faculty)

FREQUENTLY ASKED QUESTIONS (FAQ) ON THE EUROPEAN COMPANY

MICHAEL STOLLT (JANUARY 2006)

WHAT IS A EUROPEAN COMPANY (SE)?

A European Company (SE) is a public limited-liability company which is governed by Community law directly applicable in all member states.

It may only be set up within the territory of the European Community. The conditions for this are laid down in two pieces of legislation: The *Regulation on the Statute for a European Company (SE)* (EC 2157/2001) and the *Directive supplementing the Statute for a European Company with regard to the involvement of employees* (2001/86/EC). Both were adopted by the Council in October 2001.

It is not an obligation for companies to establish an SE but an option.

WHAT DOES SE MEAN?

SE is the abbreviation for *Societas Europaea* which is the (formal) Latin name for “European Company”. Every company established under the European Company Statute must be preceded or followed by the **abbreviation “SE”**.

FROM WHEN ON IS IT POSSIBLE TO SET UP AN SE?

The SE Regulation entered into force on **8 October 2004**. By that time EU member states were required to have transposed the Directive into national law. Since that day companies may establish an SE.

HOW CAN A EUROPEAN COMPANY (SE) BE ESTABLISHED?

An SE can be set up in four ways:

- by **merger** of two or more existing public limited-liability companies,
- by formation of a **holding** company by two or more public or private limited-liability companies,
- by formation of a **subsidiary** by two or more companies,

- by **transformation** (conversion) of an existing public limited-liability company

All types of formation share a **cross-border element**: they must always involve companies from **at least two different EU member states**. In the case of a transformation, the company must have had a subsidiary in another member state for at least two years.

The SE must be registered in the same member state in which the **administrative head office** is located.

WHAT ARE THE (EXPECTED) ADVANTAGES OF SETTING UP A EUROPEAN COMPANY?

In the eyes of the Commission, the European Company Statute (ECS) “will mean in practice, that companies established in more than one member state will be able to merge and operate throughout the EU on the basis of a single set of rules and a unified management and reporting system. They will therefore avoid the need to set up a financially costly and administratively time-consuming complex network of subsidiaries governed by different national laws. In particular, there will be advantages in terms of significant reductions in administrative and legal costs, a single legal structure and unified management and reporting systems.” The Ciampi Report estimates that savings in terms of administrative costs may be up to EUR 30 billion per year.

Moreover, this new business form may have a value in publicity terms, as it indicates that this company is a “real European undertaking” thereby possibly removing e.g. psychological barriers.

However, this optimistic view is not shared by everyone. Indeed, the attractiveness of the ECS might be reduced because it de facto does not provide for one uniform European corporate form. In all matters that are not regulated by the Regulation, the SE will be governed by the company law provisions of the member state in which the SE is registered. Consequently, there will not be a single SE law but 28 SE laws which may diverge significantly from each other.

WHAT IS THE RELATION BETWEEN THE REGULATION ON THE EUROPEAN COMPANY STATUTE (ECS) AND THE DIRECTIVE ON EMPLOYEE INVOLVEMENT IN THE SE?

As the title already suggests, the Directive represents a supplement to the ECS with regard to the involvement of employees. **No SE can be set up without an arrangement for involvement of the employees.**

DID THE NEW EU MEMBER STATES HAVE TO ADOPT THIS NEW LEGISLATION AS WELL?

Yes. The ten new member states (**Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovak Republic, Slovenia**) which joined the EU in May 2004 had to transpose the Directive, just like the other member states, **before October 2004.**

As **Bulgaria** and **Romania** will join the EU by 2007 at the earliest, companies from these two countries will not yet have the option to set up SEs.

In contrast to this, companies coming from the (non-EU) countries of the European Economic Area – i.e. **Iceland, Liechtenstein** and **Norway** – do have the right to establish SEs. Therefore, these states had to adjust their national legislation as well.

WHAT IS UNDERSTOOD BY “INVOLVEMENT OF EMPLOYEES”?

The Directive understands involvement of employees as “any mechanism, including **information, consultation and participation**, through which employees’ representatives may exercise an influence on decisions to be taken within the company” (Art. 2 Dir).

Information stands for the informing of the employees’ representatives on matters which concern the SE (or which concern one of its subsidiaries in another member state or which exceed the powers of the decision-making organs in a single member state). The timing of the information and the manner in which it is supplied must be appropriate and its content adequate.

Consultation signifies the right of the employees’ representatives to express their opinion on measures planned by the SE. The timing, manner and content of this consultation must be such as to ensure that the opinion can be taken into account in the decision-making process.

Participation means the right to elect or appoint some of the members of the SE’s supervisory board (in two-tier systems) or administrative body (in one-tier systems). It may also

signify the right to recommend or oppose the appointment of some or all members of these company boards.

WHAT DOES THE PROCEDURE LOOK LIKE?

The procedure is similar to that for which provision is contained in the European Works Council (EWC) Directive. Instead of prescribing detailed provisions on how employees have to be involved, the Directive provides for an agreement negotiated between the participating companies and a **special negotiating body** representing the employees. Additionally, it provides for obligatory **standard rules** in cases where the negotiating partners fail to reach an agreement.

There is one major difference with the EWC procedure: No **initiative by the employees is needed**. In fact, it is the management or administrative bodies of the participating companies which have to take the necessary steps to **start – as soon as possible – negotiations** with the representatives of the companies’ employees on arrangements for the involvement of employees in the SE.

WHAT IS THE SPECIAL NEGOTIATING BODY (SNB)?

The SNB represents the employees in the negotiations with the participating companies in order to reach a written agreement on the involvement of employees in the coming SE. It is created after the companies’ managements have announced their plans to establish an SE. The SNB can request that experts of its choice assist it in its work. In this context, the Directive explicitly mentions the representatives of Community-level trade union organisations.

WHO SITS ON THE SNB?

According to Art. 3 II of the Directive, the seats are allocated proportionally among the member states in which the participating companies have employees: **for every 10%** (or fraction thereof) of the total number of employees of the future SE/SE group, the country has the right to send **one member** to the SNB. Thereby, all countries concerned will have at least one representative on the SNB.

In the case of a merger, there are additional seats (but not more than 20% of the total number) to ensure that – if possible – all involved companies are represented in the SNB.

It was up to the member states to decide how their SNB members are elected or appointed. Furthermore, the member states could provide in their national transposition law that **representatives of trade unions** are allowed to become SNB members even if they are not employees of the company (Art. 3V Dir).

WHAT IS THE “REPRESENTATIVE BODY” (RB)?

The representative body is the information and consultation body of the SE and is the discussion partner of the competent SE organ (an “SE Works Council”). It is composed solely of employees of the SE. Its composition, rights and financial resources are defined either in the agreement between the SNB and the participating companies or in the standard rules. If the SNB decides not to open or to abort the negotiations, there can be a European Works Council instead of an RB.

HOW LONG DO NEGOTIATIONS ON EMPLOYEE INVOLVEMENT TAKE?

Negotiations are expected to start as soon as possible after the companies embark on plans to set up an SE. They may take up to **six months and** can be extended up to a **total of one year** (after the establishment of the SNB) **if** both parties agree (Art. 5 Dir). For comparison: The EWC Directive allows a time frame of three years maximum.

WHAT CAN BE THE RESULT OF THE NEGOTIATIONS?

There are three possible scenarios:

(1) The SNB decides not to open or to terminate negotiations.

In this case, the national rules on information and consultation of employees enter into force and there will only be a European Works Council (Art. 13 I Dir). This option is not possible in the case of a transformation into an SE (Art. 3 VI Dir).

(2) The SNB and the competent organs of the participating companies conclude an agreement according to Art. 4 Directive on the involvement of employees in the SE.

The partners have in principle autonomy with regard to the content of the agreement.

(3) The SNB and the competent organs of the participating companies fail to come to an agreement within the time-frame or agree voluntarily on the application of the Standard rules (Dir 7 I).

WHAT IS THE CONTENT OF AN AGREEMENT UNDER ARTICLE 4 DIR?

The two parties have a considerable autonomy with regard to the content of the agreement. Nevertheless, the Directive (Art. 4 II Dir) lays down some minimum requirements like

- the scope of the agreement,
- the composition, number of members and allocation of seats on the representative body (RB)

- the functions and the procedure for the information and consultation of the RB,
- the frequency of meetings
- the financial and material resources of the RB
- the date of entry into force and the duration of the agreement.

If the parties have decided to establish board-level participation, the agreement must define the number of employee board members, the procedure for their election or nomination and their rights.

Consequently, the parties can agree to raise or to reduce existing participation rights. In the case of a transformation alone, the agreement must ensure at least the same level of all elements of employee involvement as before (Art. 4 IV Dir).

WHEN ARE THE STANDARD RULES APPLIED?

The standard rules are applied if negotiations between the SNB and the competent organs of the participating companies fail. The standard rules cannot be rejected by the participating companies: either all companies accept them or they have to dispense with the SE altogether.

If the SNB has decided not to open or to abort negotiations, the standard rules are not applied. On the other hand, the two parties may decide on a voluntary basis to apply the standard rules.

Furthermore, the **standard rules for participation** are compulsory only if at least one of the companies was previously governed by participation rules. They are automatically introduced when at least 25% (merger SE) or 50% (holding/subsidiary SE) of the employees previously had participation rights (Art. 7 II Dir). If this threshold is not met, the SNB can decide to apply them anyway.

WHAT IS THE CONTENT OF THE STANDARD RULES?

The standard rules regulate information, consultation and participation. The member states must lay down standard rules which are in line with the standard provisions defined in the Directive's Annex. The standard rules of the country in which the SE is to be headquartered will be applied.

The Directive contains general provisions on the standard rules (thereby limiting the options of the member states):

- Part I: composition of the representative body (RB)
- Part II: information and consultation
- Part III: (board level) participation

Overview of the main provisions:

(Part I) An RB is created for information and consultation. Its members are appointed or elected in accordance with the national legislation and practice. **For every 10%** of the total number of employees (or fraction thereof), a member state has the right to send **one member to the RB**. Thus, all countries concerned will have at least one representative in the RB. The RB is to form a select committee from among its members. After four years, the RB examines whether negotiations on an agreement (Art. 4 Dir) are to be opened or whether the standard rules should stay in force.

(Part II) The standard rules foresee the right to be **informed and consulted** on the basis of regular reports drawn up by the competent organ on the progress of the SE's business and its prospects. The RB receives the agenda of the Supervisory Board or Board of Directors' meetings and a copy of all documents submitted to the general meeting of its shareholders. There must be at least one annual meeting with the competent organ. In exceptional circumstances (e.g. in the case of relocations, transfers, collective redundancies), the RB can demand an extraordinary meeting. If the competent organ thereafter decides not to act in line with the RB's recommendations, the latter may request a further meeting in order to seek an agreement.

The workers' representation is entitled to a preparatory meeting prior to each meeting with SE management.

The RB has the right to ask for support through experts of its choice. These costs and the general costs of the RB are borne by the SE. Many member states have limited the funding obligation of the company to a single expert. The members of the RB have the right to time off for training without loss of wages.

(Part III) **Participation**: in the case of an SE established by transformation, all prior participation rules remain applicable to the SE. In all other cases, the employees are entitled to elect or appoint some board members. Their number is equal to the highest proportion existing before in one of the companies. Their selection is made by the RB (according to the proportion of the SE's employees in each member state). However, the member states could determine the allocation procedure for the seats on the administrative or supervisory board given to employee representatives from their country. The board members appointed by the employees must have the same rights and duties as those that are appointed by the shareholders.

WHAT ARE THE DECISION-TAKING MAJORITIES WITHIN THE SNB?

In general, the SNB takes its decisions (e.g. to conclude an agreement) by an absolute majority of its members which must also represent the majority of the employees. Each member has one vote.

However, if the decision should lead to a **reduction of participation rights**, a **double 2/3 majority** is required, i.e. at least 2/3 of the SNB members representing 2/3 of the employees. Moreover, the votes must come from at least two different countries. These high requirements are needed only when participation covered 25% (merger) or 50% (holding/subsidiary) of the employees. (Reduction of participation rights means a proportion of board members which is lower than the highest proportion existing within the participating companies)

A double 2/3 majority is also needed if the SNB decides not to open or to terminate negotiations.

WHO PAYS THE COSTS OF THE SPECIAL NEGOTIATING BODY (SNB) AND THE REPRESENTATIVE BODY (RB)?

Costs of both these bodies have to be borne by the SE. With regard to the SNB's and the RB's right to request experts to assist them with their work, most member states limited funding to one expert.

WHAT IS THE RELATION TO THE EUROPEAN WORKS COUNCIL DIRECTIVE?

An SE can have either a European Works Council, or a representative body (RB) but not both. An EWC is established only if the SNB decides not to open or to abort negotiations. In all other cases an RB is created as the transnational information and consultation body of the SE.

WHAT HAPPENS TO NATIONAL INFORMATION, CONSULTATION AND (BOARD-LEVEL) PARTICIPATION RIGHTS?

The SE Directive does not touch on national information and consultation rights. The "SE Works Council" (representative body) does not replace an existing national works council or trade union representation. Instead it creates an **additional level** of transnational information and consultation rights. In general, this is also the case for board-level participation rights. If, for example, an SE is set up in the form of a newly founded holding SE on top of the national subsidiaries the board representation in the national subsidiaries remains untouched. However, if a national subsidiary ceases to exist as a legal entity the board-level participation ceases as well. In this case national information and consultation rights

might be affected, for example, if a central or group works council had existed previously. The member states had the option to lay down a provision in their transposition laws that these representation structures be maintained after the registration of the SE. Another exception is the **transformation** of a national public limited company into an SE. Here the participation scheme on the SE board replaces the former national representation scheme.

IS THERE A RISK OF LOSING EXISTING PARTICIPATION RIGHTS? CAN THE SE BE MISUSED TO AVOID PARTICIPATION RIGHTS?

The Directive tries to ensure that the establishment of an SE is not misused to evade participation or other involvement rights. The Directive states that the “member states shall take appropriate measures with a view to preventing the misuse of the European Company for depriving employees of rights to employee involvement or withholding such rights”. Most member states have included wording along these lines in their national SE law.

Moreover, an SE set up by **transformation** must ensure at least the same level of all elements of employee involvement as before (Art. 4 IV Dir).

In the other cases, there are three scenarios where participation rights might be lost or reduced:

1. If the SNB decides not to open or to terminate negotiations.
2. If, in the agreement, the SNB agrees not to introduce or to reduce existing participation rights,
3. If, in the case of application of the standard rules, the SNB decides not to include, or to reduce, existing participation rights.

However, the Directive is not very clear with regard to **what happens once the SE has been established**. Consequently, there might be a danger that participation rights could be lost at a later time - e.g. if an SE without board-level participation were to acquire another company having participation. Some countries have included a time period (generally one year) within which an SE must prove, on the introduction of substantial structural changes, that the intention was not to deprive employees of their rights (see also the question on structural changes).

Some companies have tried to register themselves as **an SE without having any employees at the time of foundation** and therefore with no need to set up an SNB. The problem is that at a later stage employees might be transferred into this “shell (employee-free) company” without the need to start negotiations. Besides the fact that this

would be considered in many cases as a misuse of the Directive (with the corresponding legal consequences) there are also strong legal concerns about whether the registration of employee-free SEs is in accordance with the provisions laid down in the SE statute. The Regulation clearly states that an SE may not be registered unless an agreement on employee involvement has been concluded (or unless the SNB decides not to start or to abort the negotiations). In any case, an SNB needs to be established. An SE cannot be set up without any negotiations taking place simply because there were no employees. This is also the conclusion of a legal opinion commissioned by the German Hans Böckler Foundation. In Germany, a district court for this reason recently refused to allow the entry of an **employee-free SE** in the register of companies.

WILL THERE BE NEW NEGOTIATIONS IN THE CASE OF STRUCTURAL CHANGES?

This is a crucial question, particularly, for example, if an SE without board-level participation later on acquires a company which does have employee representation on its board. The Directive prescribes that the agreement concluded between SNB and management must describe the cases in which the agreement should be renegotiated and the procedure for its renegotiation (Art. 4 I h Dir). Therefore the SNB should pay attention to this point in order to be able to react to important structural changes. In addition, some of the member states have inserted rules in their national transposition laws that explicitly state that the employee side can ask for a renegotiation of the agreement if there are substantial structural changes after the creation of the SE which have had a considerable effect on employee involvement.

COUNCIL REGULATION (EC) NO 2157/2001 OF 8 OCTOBER 2001 ON THE STATUTE FOR A EUROPEAN COMPANY (SE)

OFFICIAL JOURNAL L 294 , 10/11/2001 P. 0001 - 0021

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 308 thereof,

Having regard to the proposal from the Commission¹,

Having regard to the opinion of the European Parliament²,

Having regard to the opinion of the Economic and Social Committee³,

Whereas:

(1) The completion of the internal market and the improvement it brings about in the economic and social situation throughout the Community mean not only that barriers to trade must be removed, but also that the structures of production must be adapted to the Community dimension. For that purpose it is essential that companies the business of which is not limited to satisfying purely local needs should be able to plan and carry out the reorganisation of their business on a Community scale.

(2) Such reorganisation presupposes that existing companies from different Member States are given the option of combining their potential by means of mergers. Such operations can be carried out only with due regard to the rules of competition laid down in the Treaty.

(3) Restructuring and cooperation operations involving companies from different Member States give rise to legal and psychological difficulties and tax problems. The approximation of Member States' company law by means of Directives based on Article 44 of the Treaty can overcome some of those difficulties. Such approximation does not, however, release companies governed by different legal systems from the obligation to choose a form of company governed by a particular national law.

(4) The legal framework within which business must be carried on in the Community is still based largely on national laws and therefore no longer corresponds to the economic framework within which it must develop if the objectives set out in Article 18 of the Treaty are to be achieved. That situation forms a considerable obstacle to the creation of groups of companies from different Member States.

(5) Member States are obliged to ensure that the provisions applicable to European companies under this Regulation do not result either in discrimination arising out of unjustified different treatment of European companies compared with public limited-liability companies

or in disproportionate restrictions on the formation of a European company or on the transfer of its registered office.

(6) It is essential to ensure as far as possible that the economic unit and the legal unit of business in the Community coincide. For that purpose, provision should be made for the creation, side by side with companies governed by a particular national law, of companies formed and carrying on business under the law created by a Community Regulation directly applicable in all Member States.

(7) The provisions of such a Regulation will permit the creation and management of companies with a European dimension, free from the obstacles arising from the disparity and the limited territorial application of national company law.

(8) The Statute for a European public limited-liability company (hereafter referred to as "SE") is among the measures to be adopted by the Council before 1992 listed in the Commission's White Paper on completing the internal market, approved by the European Council that met in Milan in June 1985. The European Council that met in Brussels in 1987 expressed the wish to see such a Statute created swiftly.

(9) Since the Commission's submission in 1970 of a proposal for a Regulation on the Statute for a European public limited-liability company, amended in 1975, work on the approximation of national company law has made substantial progress, so that on those points where the functioning of an SE does not need uniform Community rules reference may be made to the law governing public limited-liability companies in the Member State where it has its registered office.

(10) Without prejudice to any economic needs that may arise in the future, if the essential objective of legal rules governing SEs is to be attained, it must be possible at least to create such a company as a means both of enabling companies from different Member States to merge or to create a holding company and of enabling companies and other legal persons carrying on economic activities and governed by the laws of different Member States to form joint subsidiaries.

¹ OJ C 263, 16.10.1989, p. 41 and OJ C 176, 8.7.1991, p. 1.

² Opinion of 4 September 2001 (not yet published in the Official Journal).

³ OJ C 124, 21.5.1990, p. 34.

- (11)** In the same context it should be possible for a public limited-liability company with a registered office and head office within the Community to transform itself into an SE without going into liquidation, provided it has a subsidiary in a Member State other than that of its registered office.
- (12)** National provisions applying to public limited-liability companies that offer their securities to the public and to securities transactions should also apply where an SE is formed by means of an offer of securities to the public and to SEs wishing to utilise such financial instruments.
- (13)** The SE itself must take the form of a company with share capital, that being the form most suited, in terms of both financing and management, to the needs of a company carrying on business on a European scale. In order to ensure that such companies are of reasonable size, a minimum amount of capital should be set so that they have sufficient assets without making it difficult for small and medium-sized undertakings to form SEs.
- (14)** An SE must be efficiently managed and properly supervised. It must be borne in mind that there are at present in the Community two different systems for the administration of public limited-liability companies. Although an SE should be allowed to choose between the two systems, the respective responsibilities of those responsible for management and those responsible for supervision should be clearly defined.
- (15)** Under the rules and general principles of private international law, where one undertaking controls another governed by a different legal system, its ensuing rights and obligations as regards the protection of minority shareholders and third parties are governed by the law governing the controlled undertaking, without prejudice to the obligations imposed on the controlling undertaking by its own law, for example the requirement to prepare consolidated accounts.
- (16)** Without prejudice to the consequences of any subsequent coordination of the laws of the Member States, specific rules for SEs are not at present required in this field. The rules and general principles of private international law should therefore be applied both where an SE exercises control and where it is the controlled company.
- (17)** The rule thus applicable where an SE is controlled by another undertaking should be specified, and for this purpose reference should be made to the law governing public limited-liability companies in the Member State in which the SE has its registered office.
- (18)** Each Member State must be required to apply the sanctions applicable to public limited-liability companies governed by its law in respect of infringements of this Regulation.
- (19)** The rules on the involvement of employees in the European company are laid down in Directive 2001/86/EC⁴, and those provisions thus form an indissociable complement to this Regulation and must be applied concomitantly.
- (20)** This Regulation does not cover other areas of law such as taxation, competition, intellectual property or insolvency. The provisions of the Member States' law and of Community law are therefore applicable in the above areas and in other areas not covered by this Regulation.
- (21)** Directive 2001/86/EC is designed to ensure that employees have a right of involvement in issues and decisions affecting the life of their SE. Other social and labour legislation questions, in particular the right of employees to information and consultation as regu-

lated in the Member States, are governed by the national provisions applicable, under the same conditions, to public limited-liability companies.

- (22)** The entry into force of this Regulation must be deferred so that each Member State may incorporate into its national law the provisions of Directive 2001/86/EC and set up in advance the necessary machinery for the formation and operation of SEs with registered offices within its territory, so that the Regulation and the Directive may be applied concomitantly.
- (23)** A company the head office of which is not in the Community should be allowed to participate in the formation of an SE provided that company is formed under the law of a Member State, has its registered office in that Member State and has a real and continuous link with a Member State's economy according to the principles established in the 1962 General Programme for the abolition of restrictions on freedom of establishment. Such a link exists in particular if a company has an establishment in that Member State and conducts operations therefrom.
- (24)** The SE should be enabled to transfer its registered office to another Member State. Adequate protection of the interests of minority shareholders who oppose the transfer, of creditors and of holders of other rights should be proportionate. Such transfer should not affect the rights originating before the transfer.
- (25)** This Regulation is without prejudice to any provision which may be inserted in the 1968 Brussels Convention or in any text adopted by Member States or by the Council to replace such Convention, relating to the rules of jurisdiction applicable in the case of transfer of the registered offices of a public limited-liability company from one Member State to another.
- (26)** Activities by financial institutions are regulated by specific directives and the national law implementing those directives and additional national rules regulating those activities apply in full to an SE.
- (27)** In view of the specific Community character of an SE, the "real seat" arrangement adopted by this Regulation in respect of SEs is without prejudice to Member States' laws and does not pre-empt any choices to be made for other Community texts on company law.
- (28)** The Treaty does not provide, for the adoption of this Regulation, powers of action other than those of Article 308 thereof.
- (29)** Since the objectives of the intended action, as outlined above, cannot be adequately attained by the Member States in as much as a European public limited-liability company is being established at European level and can therefore, because of the scale and impact of such company, be better attained at Community level, the Community may take measures in accordance with the principle of subsidiarity enshrined in Article 5 of the Treaty. In accordance with the principle of proportionality as set out in the said Article, this Regulation does not go beyond what is necessary to attain these objectives,

⁴ See p. 22 of this Official Journal.

HAS ADOPTED THIS REGULATION:

TITLE I. GENERAL PROVISIONS

Article 1

1. A company may be set up within the territory of the Community in the form of a European public limited-liability company (*Societas Europaea* or SE) on the conditions and in the manner laid down in this Regulation.
2. The capital of an SE shall be divided into shares. No shareholder shall be liable for more than the amount he has subscribed.
3. An SE shall have legal personality.
4. Employee involvement in an SE shall be governed by the provisions of Directive 2001/86/EC.

Article 2

1. Public limited-liability companies such as referred to in Annex I, formed under the law of a Member State, with registered offices and head offices within the Community may form an SE by means of a merger provided that at least two of them are governed by the law of different Member States.
2. Public and private limited-liability companies such as referred to in Annex II, formed under the law of a Member State, with registered offices and head offices within the Community may promote the formation of a holding SE provided that each of at least two of them:
 - (a) is governed by the law of a different Member State, or
 - (b) has for at least two years had a subsidiary company governed by the law of another Member State or a branch situated in another Member State.
3. Companies and firms within the meaning of the second paragraph of Article 48 of the Treaty and other legal bodies governed by public or private law, formed under the law of a Member State, with registered offices and head offices within the Community may form a subsidiary SE by subscribing for its shares, provided that each of at least two of them:
 - (a) is governed by the law of a different Member State, or
 - (b) has for at least two years had a subsidiary company governed by the law of another Member State or a branch situated in another Member State.
4. A public limited-liability company, formed under the law of a Member State, which has its registered office and head office within the Community may be transformed into an SE if for at least two years it has had a subsidiary company governed by the law of another Member State.
5. A Member State may provide that a company the head office of which is not in the Community may participate in the formation of an SE provided that company is formed under the law of a Member State, has its registered office in that Member State and has a real and continuous link with a Member State's economy.

Article 3

1. For the purposes of Article 2(1), (2) and (3), an SE shall be regarded as a public limited-liability company governed by the law of the Member State in which it has its registered office.
2. An SE may itself set up one or more subsidiaries in the form of SEs. The provisions of the law of the Member State in which a subsidiary SE has its registered office that require a public limited-liability company to have more than one shareholder shall not apply in the case of the subsidiary SE. The provisions of national law implementing the twelfth Council Company Law Directive (89/667/EEC) of 21 December 1989 on single-member private limited-liability companies⁵ shall apply to SEs *mutatis mutandis*.

Article 4

1. The capital of an SE shall be expressed in euro.
2. The subscribed capital shall not be less than EUR 1 200 000.
3. The laws of a Member State requiring a greater subscribed capital for companies carrying on certain types of activity shall apply to SEs with registered offices in that Member State.

Article 5

Subject to Article 4(1) and (2), the capital of an SE, its maintenance and changes thereto, together with its shares, bonds and other similar securities shall be governed by the provisions which would apply to a public limited-liability company with a registered office in the Member State in which the SE is registered.

Article 6

For the purposes of this Regulation, “the statutes of the SE” shall mean both the instrument of incorporation and, where they are the subject of a separate document, the statutes of the SE.

Article 7

The registered office of an SE shall be located within the Community, in the same Member State as its head office. A Member State may in addition impose on SEs registered in its territory the obligation of locating their head office and their registered office in the same place.

⁵ OJ L 395, 30.12.1989, p. 40. Directive as last amended by the 1994 Act of Accession.

Article 8

1. The registered office of an SE may be transferred to another Member State in accordance with paragraphs 2 to 13. Such a transfer shall not result in the winding up of the SE or in the creation of a new legal person.

2. The management or administrative organ shall draw up a transfer proposal and publicise it in accordance with Article 13, without prejudice to any additional forms of publication provided for by the Member State of the registered office. That proposal shall state the current name, registered office and number of the SE and shall cover:

- (a) the proposed registered office of the SE;
- (b) the proposed statutes of the SE including, where appropriate, its new name;
- (c) any implication the transfer may have on employees' involvement;
- (d) the proposed transfer timetable;
- (e) any rights provided for the protection of shareholders and/or creditors.

3. The management or administrative organ shall draw up a report explaining and justifying the legal and economic aspects of the transfer and explaining the implications of the transfer for shareholders, creditors and employees.

4. An SE's shareholders and creditors shall be entitled, at least one month before the general meeting called upon to decide on the transfer, to examine at the SE's registered office the transfer proposal and the report drawn up pursuant to paragraph 3 and, on request, to obtain copies of those documents free of charge.

5. A Member State may, in the case of SEs registered within its territory, adopt provisions designed to ensure appropriate protection for minority shareholders who oppose a transfer.

6. No decision to transfer may be taken for two months after publication of the proposal. Such a decision shall be taken as laid down in Article 59.

7. Before the competent authority issues the certificate mentioned in paragraph 8, the SE shall satisfy it that, in respect of any liabilities arising prior to the publication of the transfer proposal, the interests of creditors and holders of other rights in respect of the SE (including those of public bodies) have been adequately protected in accordance with requirements laid down by the Member State where the SE has its registered office prior to the transfer.

A Member State may extend the application of the first subparagraph to liabilities that arise (or may arise) prior to the transfer.

The first and second subparagraphs shall be without prejudice to the application to SEs of the national legislation of Member States concerning the satisfaction or securing of payments to public bodies.

8. In the Member State in which an SE has its registered office the court, notary or other competent authority shall issue a certificate attesting to the completion of the acts and formalities to be accomplished before the transfer.

9. The new registration may not be effected until the certificate referred to in paragraph 8 has been submitted, and evidence produced that the formalities required for registration in the country of the new registered office have been completed.

10. The transfer of an SE's registered office and the consequent amendment of its statutes shall take effect on the date on which the SE is registered, in accordance with Article 12, in the register for its new registered office.

11. When the SE's new registration has been effected, the registry for its new registration shall notify the registry for its old registration. Deletion of the old registration shall be effected on receipt of that notification, but not before.

12. The new registration and the deletion of the old registration shall be publicised in the Member States concerned in accordance with Article 13.

13. On publication of an SE's new registration, the new registered office may be relied on as against third parties. However, as long as the deletion of the SE's registration from the register for its previous registered office has not been publicised, third parties may continue to rely on the previous registered office unless the SE proves that such third parties were aware of the new registered office.

14. The laws of a Member State may provide that, as regards SEs registered in that Member State, the transfer of a registered office which would result in a change of the law applicable shall not take effect if any of that Member State's competent authorities opposes it within the two-month period referred to in paragraph 6. Such opposition may be based only on grounds of public interest.

Where an SE is supervised by a national financial supervisory authority according to Community directives the right to oppose the change of registered office applies to this authority as well.

Review by a judicial authority shall be possible.

15. An SE may not transfer its registered office if proceedings for winding up, liquidation, insolvency or suspension of payments or other similar proceedings have been brought against it.

16. An SE which has transferred its registered office to another Member State shall be considered, in respect of any cause of action arising prior to the transfer as determined in paragraph 10, as having its registered office in the Member States where the SE was registered prior to the transfer, even if the SE is sued after the transfer.

Article 9

1. An SE shall be governed:

- (a) by this Regulation,
- (b) where expressly authorised by this Regulation, by the provisions of its statutes or
- (c) in the case of matters not regulated by this Regulation or, where matters are partly regulated by it, of those aspects not covered by it, by:
 - (i) the provisions of laws adopted by Member States in implementation of Community measures relating specifically to SEs;
 - (ii) the provisions of Member States' laws which would apply to a public limited-liability company formed in accordance with the law of the Member State in

which the SE has its registered office;

(iii) the provisions of its statutes, in the same way as for a public limited-liability company formed in accordance with the law of the Member State in which the SE has its registered office.

2. The provisions of laws adopted by Member States specifically for the SE must be in accordance with Directives applicable to public limited-liability companies referred to in Annex I.
3. If the nature of the business carried out by an SE is regulated by specific provisions of national laws, those laws shall apply in full to the SE.

Article 10

Subject to this Regulation, an SE shall be treated in every Member State as if it were a public limited-liability company formed in accordance with the law of the Member State in which it has its registered office.

Article 11

1. The name of an SE shall be preceded or followed by the abbreviation SE.
2. Only SEs may include the abbreviation SE in their name.
3. Nevertheless, companies, firms and other legal entities registered in a Member State before the date of entry into force of this Regulation in the names of which the abbreviation SE appears shall not be required to alter their names.

Article 12

1. Every SE shall be registered in the Member State in which it has its registered office in a register designated by the law of that Member State in accordance with Article 3 of the first Council Directive (68/151/EEC) of 9 March 1968 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community⁶.
2. An SE may not be registered unless an agreement on arrangements for employee involvement pursuant to Article 4 of Directive 2001/86/EC has been concluded, or a decision pursuant to Article 3(6) of the Directive has been taken, or the period for negotiations pursuant to Article 5 of the Directive has expired without an agreement having been concluded.
3. In order for an SE to be registered in a Member State which has made use of the option referred to in Article 7(3) of Directive 2001/86/EC, either an agreement pursuant to Article 4 of the Directive must have been concluded on the arrangements for employee involvement, including participation, or none of the participating companies must have been governed by participation rules prior to the registration of the SE.
4. The statutes of the SE must not conflict at any time with the arrangements for employee

involvement which have been so determined. Where new such arrangements determined pursuant to the Directive conflict with the existing statutes, the statutes shall to the extent necessary be amended.

In this case, a Member State may provide that the management organ or the administrative organ of the SE shall be entitled to proceed to amend the statutes without any further decision from the general shareholders meeting.

Article 13

Publication of the documents and particulars concerning an SE which must be publicised under this Regulation shall be effected in the manner laid down in the laws of the Member State in which the SE has its registered office in accordance with Directive 68/151/EEC.

Article 14

1. Notice of an SE's registration and of the deletion of such a registration shall be published for information purposes in the Official Journal of the European Communities after publication in accordance with Article 13. That notice shall state the name, number, date and place of registration of the SE, the date and place of publication and the title of publication, the registered office of the SE and its sector of activity.
2. Where the registered office of an SE is transferred in accordance with Article 8, notice shall be published giving the information provided for in paragraph 1, together with that relating to the new registration.
3. The particulars referred to in paragraph 1 shall be forwarded to the Office for Official Publications of the European Communities within one month of the publication referred to in Article 13.

TITLE II. FORMATION

Section 1. General

Article 15

1. Subject to this Regulation, the formation of an SE shall be governed by the law applicable to public limited-liability companies in the Member State in which the SE establishes its registered office.
2. The registration of an SE shall be publicised in accordance with Article 13.

⁶ OJ L 65, 14.3.1968, p. 8. Directive as last amended by the 1994 Act of Accession.

Article 16

1. An SE shall acquire legal personality on the date on which it is registered in the register referred to in Article 12.

2. If acts have been performed in an SE's name before its registration in accordance with Article 12 and the SE does not assume the obligations arising out of such acts after its registration, the natural persons, companies, firms or other legal entities which performed those acts shall be jointly and severally liable therefor, without limit, in the absence of agreement to the contrary.

Section 2. Formation by merger

Article 17

1. An SE may be formed by means of a merger in accordance with Article 2(1).

2. Such a merger may be carried out in accordance with:

- (a) the procedure for merger by acquisition laid down in Article 3(1) of the third Council Directive (78/855/EEC) of 9 October 1978 based on Article 54(3)(g) of the Treaty concerning mergers of public limited-liability companies⁷ or
- (b) the procedure for merger by the formation of a new company laid down in Article 4(1) of the said Directive.

In the case of a merger by acquisition, the acquiring company shall take the form of an SE when the merger takes place. In the case of a merger by the formation of a new company, the SE shall be the newly formed company.

Article 18

For matters not covered by this section or, where a matter is partly covered by it, for aspects not covered by it, each company involved in the formation of an SE by merger shall be governed by the provisions of the law of the Member State to which it is subject that apply to mergers of public limited-liability companies in accordance with Directive 78/855/EEC.

Article 19

The laws of a Member State may provide that a company governed by the law of that Member State may not take part in the formation of an SE by merger if any of that Member State's competent authorities opposes it before the issue of the certificate referred to in Article 25(2). Such opposition may be based only on grounds of public interest. Review by a judicial authority shall be possible.

Article 20

1. The management or administrative organs of merging companies shall draw up draft terms of merger. The draft terms of merger shall include the following particulars:

- (a) the name and registered office of each of the merging companies together with those proposed for the SE;
 - (b) the share-exchange ratio and the amount of any compensation;
 - (c) the terms for the allotment of shares in the SE;
 - (d) the date from which the holding of shares in the SE will entitle the holders to share in profits and any special conditions affecting that entitlement;
 - (e) the date from which the transactions of the merging companies will be treated for accounting purposes as being those of the SE;
 - (f) the rights conferred by the SE on the holders of shares to which special rights are attached and on the holders of securities other than shares, or the measures proposed concerning them;
 - (g) any special advantage granted to the experts who examine the draft terms of merger or to members of the administrative, management, supervisory or controlling organs of the merging companies;
 - (h) the statutes of the SE;
 - (i) information on the procedures by which arrangements for employee involvement are determined pursuant to Directive 2001/86/EC.
2. The merging companies may include further items in the draft terms of merger.

Article 21

For each of the merging companies and subject to the additional requirements imposed by the Member State to which the company concerned is subject, the following particulars shall be published in the national gazette of that Member State:

- (a) the type, name and registered office of every merging company;
- (b) the register in which the documents referred to in Article 3(2) of Directive 68/151/EEC are filed in respect of each merging company, and the number of the entry in that register;
- (c) an indication of the arrangements made in accordance with Article 24 for the exercise of the rights of the creditors of the company in question and the address at which complete information on those arrangements may be obtained free of charge;
- (d) an indication of the arrangements made in accordance with Article 24 for the exercise of the rights of minority shareholders of the company in question and the address at which complete information on those arrangements may be obtained free of charge;
- (e) the name and registered office proposed for the SE.

⁷ OJ L 295, 20.10.1978, p. 36. Directive as last amended by the 1994 Act of Accession.

Article 22

As an alternative to experts operating on behalf of each of the merging companies, one or more independent experts as defined in Article 10 of Directive 78/855/EEC, appointed for those purposes at the joint request of the companies by a judicial or administrative authority in the Member State of one of the merging companies or of the proposed SE, may examine the draft terms of merger and draw up a single report to all the shareholders.

The experts shall have the right to request from each of the merging companies any information they consider necessary to enable them to complete their function.

Article 23

1. The general meeting of each of the merging companies shall approve the draft terms of merger.
2. Employee involvement in the SE shall be decided pursuant to Directive 2001/86/EC. The general meetings of each of the merging companies may reserve the right to make registration of the SE conditional upon its express ratification of the arrangements so decided.

Article 24

1. The law of the Member State governing each merging company shall apply as in the case of a merger of public limited-liability companies, taking into account the cross-border nature of the merger, with regard to the protection of the interests of:

- (a) creditors of the merging companies;
- (b) holders of bonds of the merging companies;
- (c) holders of securities, other than shares, which carry special rights in the merging companies.

2. A Member State may, in the case of the merging companies governed by its law, adopt provisions designed to ensure appropriate protection for minority shareholders who have opposed the merger.

Article 25

1. The legality of a merger shall be scrutinised, as regards the part of the procedure concerning each merging company, in accordance with the law on mergers of public limited-liability companies of the Member State to which the merging company is subject.
2. In each Member State concerned the court, notary or other competent authority shall issue a certificate conclusively attesting to the completion of the pre-merger acts and formalities.
3. If the law of a Member State to which a merging company is subject provides for a procedure to scrutinise and amend the share-exchange ratio, or a procedure to compensate minority shareholders, without preventing the registration of the merger, such procedures shall only apply if the other merging companies situated in Member States which do not

provide for such procedure explicitly accept, when approving the draft terms of the merger in accordance with Article 23(1), the possibility for the shareholders of that merging company to have recourse to such procedure. In such cases, the court, notary or other competent authorities may issue the certificate referred to in paragraph 2 even if such a procedure has been commenced. The certificate must, however, indicate that the procedure is pending. The decision in the procedure shall be binding on the acquiring company and all its shareholders.

Article 26

1. The legality of a merger shall be scrutinised, as regards the part of the procedure concerning the completion of the merger and the formation of the SE, by the court, notary or other authority competent in the Member State of the proposed registered office of the SE to scrutinise that aspect of the legality of mergers of public limited-liability companies.
2. To that end each merging company shall submit to the competent authority the certificate referred to in Article 25(2) within six months of its issue together with a copy of the draft terms of merger approved by that company.
3. The authority referred to in paragraph 1 shall in particular ensure that the merging companies have approved draft terms of merger in the same terms and that arrangements for employee involvement have been determined pursuant to Directive 2001/86/EC.
4. That authority shall also satisfy itself that the SE has been formed in accordance with the requirements of the law of the Member State in which it has its registered office in accordance with Article 15.

Article 27

1. A merger and the simultaneous formation of an SE shall take effect on the date on which the SE is registered in accordance with Article 12.
2. The SE may not be registered until the formalities provided for in Articles 25 and 26 have been completed.

Article 28

For each of the merging companies the completion of the merger shall be publicised as laid down by the law of each Member State in accordance with Article 3 of Directive 68/151/EEC.

Article 29

1. A merger carried out as laid down in Article 17(2)(a) shall have the following consequences ipso jure and simultaneously:
 - (a) all the assets and liabilities of each company being acquired are transferred to the acquiring company;
 - (b) the shareholders of the company being acquired become shareholders of the acquiring company;

- (c) the company being acquired ceases to exist;
 - (d) the acquiring company adopts the form of an SE.
- 2.** A merger carried out as laid down in Article 17(2)(b) shall have the following consequences ipso jure and simultaneously:
- (a) all the assets and liabilities of the merging companies are transferred to the SE;
 - (b) the shareholders of the merging companies become shareholders of the SE;
 - (c) the merging companies cease to exist.
- 3.** Where, in the case of a merger of public limited-liability companies, the law of a Member State requires the completion of any special formalities before the transfer of certain assets, rights and obligations by the merging companies becomes effective against third parties, those formalities shall apply and shall be carried out either by the merging companies or by the SE following its registration.
- 4.** The rights and obligations of the participating companies on terms and conditions of employment arising from national law, practice and individual employment contracts or employment relationships and existing at the date of the registration shall, by reason of such registration be transferred to the SE upon its registration.

Article 30

A merger as provided for in Article 2(1) may not be declared null and void once the SE has been registered.

The absence of scrutiny of the legality of the merger pursuant to Articles 25 and 26 may be included among the grounds for the winding-up of the SE.

Article 31

- 1.** Where a merger within the meaning of Article 17(2)(a) is carried out by a company which holds all the shares and other securities conferring the right to vote at general meetings of another company, neither Article 20(1)(b), (c) and (d), Article 29(1)(b) nor Article 22 shall apply. National law governing each merging company and mergers of public limited-liability companies in accordance with Article 24 of Directive 78/855/EEC shall nevertheless apply.
- 2.** Where a merger by acquisition is carried out by a company which holds 90 % or more but not all of the shares and other securities conferring the right to vote at general meetings of another company, reports by the management or administrative body, reports by an independent expert or experts and the documents necessary for scrutiny shall be required only to the extent that the national law governing either the acquiring company or the company being acquired so requires.
- Member States may, however, provide that this paragraph may apply where a company holds shares conferring 90 % or more but not all of the voting rights.

Section 3. Formation of a holding SE

Article 32

- 1.** A holding SE may be formed in accordance with Article 2(2).
A company promoting the formation of a holding SE in accordance with Article 2(2) shall continue to exist.
- 2.** The management or administrative organs of the companies which promote such an operation shall draw up, in the same terms, draft terms for the formation of the holding SE. The draft terms shall include a report explaining and justifying the legal and economic aspects of the formation and indicating the implications for the shareholders and for the employees of the adoption of the form of a holding SE. The draft terms shall also set out the particulars provided for in Article 20(1)(a), (b), (c), (f), (g), (h) and (i) and shall fix the minimum proportion of the shares in each of the companies promoting the operation which the shareholders must contribute to the formation of the holding SE. That proportion shall be shares conferring more than 50 % of the permanent voting rights.
- 3.** For each of the companies promoting the operation, the draft terms for the formation of the holding SE shall be publicised in the manner laid down in each Member State's national law in accordance with Article 3 of Directive 68/151/EEC at least one month before the date of the general meeting called to decide thereon.
- 4.** One or more experts independent of the companies promoting the operation, appointed or approved by a judicial or administrative authority in the Member State to which each company is subject in accordance with national provisions adopted in implementation of Directive 78/855/EEC, shall examine the draft terms of formation drawn up in accordance with paragraph 2 and draw up a written report for the shareholders of each company. By agreement between the companies promoting the operation, a single written report may be drawn up for the shareholders of all the companies by one or more independent experts, appointed or approved by a judicial or administrative authority in the Member State to which one of the companies promoting the operation or the proposed SE is subject in accordance with national provisions adopted in implementation of Directive 78/855/EEC.
- 5.** The report shall indicate any particular difficulties of valuation and state whether the proposed share-exchange ratio is fair and reasonable, indicating the methods used to arrive at it and whether such methods are adequate in the case in question.
- 6.** The general meeting of each company promoting the operation shall approve the draft terms of formation of the holding SE.
Employee involvement in the holding SE shall be decided pursuant to Directive 2001/86/EC. The general meetings of each company promoting the operation may reserve the right to make registration of the holding SE conditional upon its express ratification of the arrangements so decided.
- 7.** These provisions shall apply mutatis mutandis to private limited-liability companies.

Article 33

1. The shareholders of the companies promoting such an operation shall have a period of three months in which to inform the promoting companies whether they intend to contribute their shares to the formation of the holding SE. That period shall begin on the date upon which the terms for the formation of the holding SE have been finally determined in accordance with Article 32.

2. The holding SE shall be formed only if, within the period referred to in paragraph 1, the shareholders of the companies promoting the operation have assigned the minimum proportion of shares in each company in accordance with the draft terms of formation and if all the other conditions are fulfilled.

3. If the conditions for the formation of the holding SE are all fulfilled in accordance with paragraph 2, that fact shall, in respect of each of the promoting companies, be publicised in the manner laid down in the national law governing each of those companies adopted in implementation of Article 3 of Directive 68/151/EEC.

Shareholders of the companies promoting the operation who have not indicated whether they intend to make their shares available to the promoting companies for the purpose of forming the holding SE within the period referred to in paragraph 1 shall have a further month in which to do so.

4. Shareholders who have contributed their securities to the formation of the SE shall receive shares in the holding SE.

5. The holding SE may not be registered until it is shown that the formalities referred to in Article 32 have been completed and that the conditions referred to in paragraph 2 have been fulfilled.

Article 34

A Member State may, in the case of companies promoting such an operation, adopt provisions designed to ensure protection for minority shareholders who oppose the operation, creditors and employees.

Section 4. Formation of a subsidiary SE**Article 35**

An SE may be formed in accordance with Article 2(3).

Article 36

Companies, firms and other legal entities participating in such an operation shall be subject to the provisions governing their participation in the formation of a subsidiary in the form of a public limited-liability company under national law.

Section 5. Conversion of an existing public limited-liability company into an SE**Article 37**

1. An SE may be formed in accordance with Article 2(4).

2. Without prejudice to Article 12 the conversion of a public limited-liability company into an SE shall not result in the winding up of the company or in the creation of a new legal person.

3. The registered office may not be transferred from one Member State to another pursuant to Article 8 at the same time as the conversion is effected.

4. The management or administrative organ of the company in question shall draw up draft terms of conversion and a report explaining and justifying the legal and economic aspects of the conversion and indicating the implications for the shareholders and for the employees of the adoption of the form of an SE.

5. The draft terms of conversion shall be publicised in the manner laid down in each Member State's law in accordance with Article 3 of Directive 68/151/EEC at least one month before the general meeting called upon to decide thereon.

6. Before the general meeting referred to in paragraph 7 one or more independent experts appointed or approved, in accordance with the national provisions adopted in implementation of Article 10 of Directive 78/855/EEC, by a judicial or administrative authority in the Member State to which the company being converted into an SE is subject shall certify in compliance with Directive 77/91/EEC⁸ mutatis mutandis that the company has net assets at least equivalent to its capital plus those reserves which must not be distributed under the law or the Statutes.

7. The general meeting of the company in question shall approve the draft terms of conversion together with the statutes of the SE. The decision of the general meeting shall be passed as laid down in the provisions of national law adopted in implementation of Article 7 of Directive 78/855/EEC.

8. Member states may condition a conversion to a favourable vote of a qualified majority or unanimity in the organ of the company to be converted within which employee participation is organised.

⁸ Second Council Directive 77/91/EEC of 13 December 1976 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent (OJ L 26, 31.1.1977, p. 1). Directive as last amended by the 1994 Act of Accession.

9. The rights and obligations of the company to be converted on terms and conditions of employment arising from national law, practice and individual employment contracts or employment relationships and existing at the date of the registration shall, by reason of such registration be transferred to the SE.

TITLE III. STRUCTURE OF THE SE

Article 38

Under the conditions laid down by this Regulation an SE shall comprise:

- (a)** a general meeting of shareholders and
- (b)** either a supervisory organ and a management organ (two-tier system) or an administrative organ (one-tier system) depending on the form adopted in the statutes.

Section 1. Two-tier system

Article 39

1. The management organ shall be responsible for managing the SE. A Member State may provide that a managing director or managing directors shall be responsible for the current management under the same conditions as for public limited-liability companies that have registered offices within that Member State's territory.

2. The member or members of the management organ shall be appointed and removed by the supervisory organ.

A Member State may, however, require or permit the statutes to provide that the member or members of the management organ shall be appointed and removed by the general meeting under the same conditions as for public limited-liability companies that have registered offices within its territory.

3. No person may at the same time be a member of both the management organ and the supervisory organ of the same SE. The supervisory organ may, however, nominate one of its members to act as a member of the management organ in the event of a vacancy.

During such a period the functions of the person concerned as a member of the supervisory organ shall be suspended. A Member State may impose a time limit on such a period.

4. The number of members of the management organ or the rules for determining it shall be laid down in the SE's statutes. A Member State may, however, fix a minimum and/or a maximum number.

5. Where no provision is made for a two-tier system in relation to public limited-liability companies with registered offices within its territory, a Member State may adopt the appropriate measures in relation to SEs.

Article 40

1. The supervisory organ shall supervise the work of the management organ. It may not itself exercise the power to manage the SE.

2. The members of the supervisory organ shall be appointed by the general meeting. The members of the first supervisory organ may, however, be appointed by the statutes. This shall apply without prejudice to Article 47(4) or to any employee participation arrangements determined pursuant to Directive 2001/86/EC.

3. The number of members of the supervisory organ or the rules for determining it shall be laid down in the statutes. A Member State may, however, stipulate the number of members of the supervisory organ for SEs registered within its territory or a minimum and/or a maximum number.

Article 41

1. The management organ shall report to the supervisory organ at least once every three months on the progress and foreseeable development of the SE's business.

2. In addition to the regular information referred to in paragraph 1, the management organ shall promptly pass the supervisory organ any information on events likely to have an appreciable effect on the SE.

3. The supervisory organ may require the management organ to provide information of any kind which it needs to exercise supervision in accordance with Article 40(1). A Member State may provide that each member of the supervisory organ also be entitled to this facility.

4. The supervisory organ may undertake or arrange for any investigations necessary for the performance of its duties.

5. Each member of the supervisory organ shall be entitled to examine all information submitted to it.

Article 42

The supervisory organ shall elect a chairman from among its members. If half of the members are appointed by employees, only a member appointed by the general meeting of shareholders may be elected chairman.

Section 2. The one-tier system

Article 43

1. The administrative organ shall manage the SE. A Member State may provide that a managing director or managing directors shall be responsible for the day-to-day management under the same conditions as for public limited-liability companies that have registered offices within that Member State's territory.

2. The number of members of the administrative organ or the rules for determining it shall be laid down in the SE's statutes. A Member State may, however, set a minimum and, where necessary, a maximum number of members.

The administrative organ shall, however, consist of at least three members where employee participation is regulated in accordance with Directive 2001/86/EC.

3. The member or members of the administrative organ shall be appointed by the general meeting. The members of the first administrative organ may, however, be appointed by the statutes. This shall apply without prejudice to Article 47(4) or to any employee participation arrangements determined pursuant to Directive 2001/86/EC.

4. Where no provision is made for a one-tier system in relation to public limited-liability companies with registered offices within its territory, a Member State may adopt the appropriate measures in relation to SEs.

Article 44

1. The administrative organ shall meet at least once every three months at intervals laid down by the statutes to discuss the progress and foreseeable development of the SE's business.

2. Each member of the administrative organ shall be entitled to examine all information submitted to it.

Article 45

The administrative organ shall elect a chairman from among its members. If half of the members are appointed by employees, only a member appointed by the general meeting of shareholders may be elected chairman.

Section 3. Rules common to the one-tier and two-tier systems

Article 46

1. Members of company organs shall be appointed for a period laid down in the statutes not exceeding six years.

2. Subject to any restrictions laid down in the statutes, members may be reappointed once or more than once for the period determined in accordance with paragraph 1.

Article 47

1. An SE's statutes may permit a company or other legal entity to be a member of one of its organs, provided that the law applicable to public limited-liability companies in the Member State in which the SE's registered office is situated does not provide otherwise. That company or other legal entity shall designate a natural person to exercise its functions on the organ in question.

2. No person may be a member of any SE organ or a representative of a member within the meaning of paragraph 1 who:

(a) is disqualified, under the law of the Member State in which the SE's registered office is situated, from serving on the corresponding organ of a public limited-liability

company governed by the law of that Member State, or

(b) is disqualified from serving on the corresponding organ of a public limited-liability company governed by the law of a Member State owing to a judicial or administrative decision delivered in a Member State.

3. An SE's statutes may, in accordance with the law applicable to public limited-liability companies in the Member State in which the SE's registered office is situated, lay down special conditions of eligibility for members representing the shareholders.

4. This Regulation shall not affect national law permitting a minority of shareholders or other persons or authorities to appoint some of the members of a company organ.

Article 48

1. An SE's statutes shall list the categories of transactions which require authorisation of the management organ by the supervisory organ in the two-tier system or an express decision by the administrative organ in the one-tier system.

A Member State may, however, provide that in the two-tier system the supervisory organ may itself make certain categories of transactions subject to authorisation.

2. A Member State may determine the categories of transactions which must at least be indicated in the statutes of SEs registered within its territory.

Article 49

The members of an SE's organs shall be under a duty, even after they have ceased to hold office, not to divulge any information which they have concerning the SE the disclosure of which might be prejudicial to the company's interests, except where such disclosure is required or permitted under national law provisions applicable to public limited-liability companies or is in the public interest.

Article 50

1. Unless otherwise provided by this Regulation or the statutes, the internal rules relating to quorums and decision-taking in SE organs shall be as follows:

(a) quorum: at least half of the members must be present or represented;

(b) decision-taking: a majority of the members present or represented.

2. Where there is no relevant provision in the statutes, the chairman of each organ shall have a casting vote in the event of a tie. There shall be no provision to the contrary in the statutes, however, where half of the supervisory organ consists of employees' representatives.

3. Where employee participation is provided for in accordance with Directive 2001/86/EC, a Member State may provide that the supervisory organ's quorum and decision-making shall, by way of derogation from the provisions referred to in paragraphs 1 and 2, be subject to the rules applicable, under the same conditions, to public limited-liability companies governed by the law of the Member State concerned.

Article 51

Members of an SE's management, supervisory and administrative organs shall be liable, in accordance with the provisions applicable to public limited-liability companies in the Member State in which the SE's registered office is situated, for loss or damage sustained by the SE following any breach on their part of the legal, statutory or other obligations inherent in their duties.

Section 4. General meeting**Article 52**

The general meeting shall decide on matters for which it is given sole responsibility by:

- (a) this Regulation or
- (b) the legislation of the Member State in which the SE's registered office is situated adopted in implementation of Directive 2001/86/EC.

Furthermore, the general meeting shall decide on matters for which responsibility is given to the general meeting of a public limited-liability company governed by the law of the Member State in which the SE's registered office is situated, either by the law of that Member State or by the SE's statutes in accordance with that law.

Article 53

Without prejudice to the rules laid down in this section, the organisation and conduct of general meetings together with voting procedures shall be governed by the law applicable to public limited-liability companies in the Member State in which the SE's registered office is situated.

Article 54

1. An SE shall hold a general meeting at least once each calendar year, within six months of the end of its financial year, unless the law of the Member State in which the SE's registered office is situated applicable to public limited-liability companies carrying on the same type of activity as the SE provides for more frequent meetings. A Member State may, however, provide that the first general meeting may be held at any time in the 18 months following an SE's incorporation.

2. General meetings may be convened at any time by the management organ, the administrative organ, the supervisory organ or any other organ or competent authority in accordance with the national law applicable to public limited-liability companies in the Member State in which the SE's registered office is situated.

Article 55

1. One or more shareholders who together hold at least 10 % of an SE's subscribed capital may request the SE to convene a general meeting and draw up the agenda therefor; the

SE's statutes or national legislation may provide for a smaller proportion under the same conditions as those applicable to public limited-liability companies.

2. The request that a general meeting be convened shall state the items to be put on the agenda.

3. If, following a request made under paragraph 1, a general meeting is not held in due time and, in any event, within two months, the competent judicial or administrative authority within the jurisdiction of which the SE's registered office is situated may order that a general meeting be convened within a given period or authorise either the shareholders who have requested it or their representatives to convene a general meeting. This shall be without prejudice to any national provisions which allow the shareholders themselves to convene general meetings.

Article 56

One or more shareholders who together hold at least 10 % of an SE's subscribed capital may request that one or more additional items be put on the agenda of any general meeting. The procedures and time limits applicable to such requests shall be laid down by the national law of the Member State in which the SE's registered office is situated or, failing that, by the SE's statutes. The above proportion may be reduced by the statutes or by the law of the Member State in which the SE's registered office is situated under the same conditions as are applicable to public limited-liability companies.

Article 57

Save where this Regulation or, failing that, the law applicable to public limited-liability companies in the Member State in which an SE's registered office is situated requires a larger majority, the general meeting's decisions shall be taken by a majority of the votes validly cast.

Article 58

The votes cast shall not include votes attaching to shares in respect of which the shareholder has not taken part in the vote or has abstained or has returned a blank or spoilt ballot paper.

Article 59

1. Amendment of an SE's statutes shall require a decision by the general meeting taken by a majority which may not be less than two thirds of the votes cast, unless the law applicable to public limited-liability companies in the Member State in which an SE's registered office is situated requires or permits a larger majority.

2. A Member State may, however, provide that where at least half of an SE's subscribed capital is represented, a simple majority of the votes referred to in paragraph 1 shall suffice.

3. Amendments to an SE's statutes shall be publicised in accordance with Article 13.

Article 60

1. Where an SE has two or more classes of shares, every decision by the general meeting shall be subject to a separate vote by each class of shareholders whose class rights are affected thereby.

2. Where a decision by the general meeting requires the majority of votes specified in Article 59(1) or (2), that majority shall also be required for the separate vote by each class of shareholders whose class rights are affected by the decision.

TITLE IV. ANNUAL ACCOUNTS AND CONSOLIDATED ACCOUNTS**Article 61**

Subject to Article 62 an SE shall be governed by the rules applicable to public limited-liability companies under the law of the Member State in which its registered office is situated as regards the preparation of its annual and, where appropriate, consolidated accounts including the accompanying annual report and the auditing and publication of those accounts.

Article 62

1. An SE which is a credit or financial institution shall be governed by the rules laid down in the national law of the Member State in which its registered office is situated in implementation of Directive 2000/12/EC of the European Parliament and of the Council of 20 March 2000 relating to the taking up and pursuit of the business of credit institutions⁹ as regards the preparation of its annual and, where appropriate, consolidated accounts, including the accompanying annual report and the auditing and publication of those accounts.

2. An SE which is an insurance undertaking shall be governed by the rules laid down in the national law of the Member State in which its registered office is situated in implementation of Council Directive 91/674/EEC of 19 December 1991 on the annual accounts and consolidated accounts of insurance undertakings¹⁰ as regards the preparation of its annual and, where appropriate, consolidated accounts including the accompanying annual report and the auditing and publication of those accounts.

TITLE V. WINDING UP, LIQUIDATION, INSOLVENCY AND CESSATION OF PAYMENTS**Article 63**

As regards winding up, liquidation, insolvency, cessation of payments and similar procedures, an SE shall be governed by the legal provisions which would apply to a public limited-liability company formed in accordance with the law of the Member State in which its registered office is situated, including provisions relating to decision-making by the general meeting.

Article 64

1. When an SE no longer complies with the requirement laid down in Article 7, the Member State in which the SE's registered office is situated shall take appropriate measures to oblige the SE to regularise its position within a specified period either:

(a) by re-establishing its head office in the Member State in which its registered office is situated or

(b) by transferring the registered office by means of the procedure laid down in Article 8.

2. The Member State in which the SE's registered office is situated shall put in place the measures necessary to ensure that an SE which fails to regularise its position in accordance with paragraph 1 is liquidated.

3. The Member State in which the SE's registered office is situated shall set up a judicial remedy with regard to any established infringement of Article 7. That remedy shall have a suspensory effect on the procedures laid down in paragraphs 1 and 2.

4. Where it is established on the initiative of either the authorities or any interested party that an SE has its head office within the territory of a Member State in breach of Article 7, the authorities of that Member State shall immediately inform the Member State in which the SE's registered office is situated.

Article 65

Without prejudice to provisions of national law requiring additional publication, the initiation and termination of winding up, liquidation, insolvency or cessation of payment procedures and any decision to continue operating shall be publicised in accordance with Article 13.

Article 66

1. An SE may be converted into a public limited-liability company governed by the law of the Member State in which its registered office is situated. No decision on conversion may be taken before two years have elapsed since its registration or before the first two sets of annual accounts have been approved.

⁹ OJ L 126, 26.5.2000, p. 1.

¹⁰ OJ L 374, 31.12.1991, p. 7.

2. The conversion of an SE into a public limited-liability company shall not result in the winding up of the company or in the creation of a new legal person.
3. The management or administrative organ of the SE shall draw up draft terms of conversion and a report explaining and justifying the legal and economic aspects of the conversion and indicating the implications of the adoption of the public limited-liability company for the shareholders and for the employees.
4. The draft terms of conversion shall be publicised in the manner laid down in each Member State's law in accordance with Article 3 of Directive 68/151/EEC at least one month before the general meeting called to decide thereon.
5. Before the general meeting referred to in paragraph 6, one or more independent experts appointed or approved, in accordance with the national provisions adopted in implementation of Article 10 of Directive 78/855/EEC, by a judicial or administrative authority in the Member State to which the SE being converted into a public limited-liability company is subject shall certify that the company has assets at least equivalent to its capital.
6. The general meeting of the SE shall approve the draft terms of conversion together with the statutes of the public limited-liability company. The decision of the general meeting shall be passed as laid down in the provisions of national law adopted in implementation of Article 7 of Directive 78/855/EEC.

TITLE VI. ADDITIONAL AND TRANSITIONAL PROVISIONS

Article 67

1. If and so long as the third phase of economic and monetary union (EMU) does not apply to it each Member State may make SEs with registered offices within its territory subject to the same provisions as apply to public limited-liability companies covered by its legislation as regards the expression of their capital. An SE may, in any case, express its capital in euro as well. In that event the national currency/euro conversion rate shall be that for the last day of the month preceding that of the formation of the SE.
2. If and so long as the third phase of EMU does not apply to the Member State in which an SE has its registered office, the SE may, however, prepare and publish its annual and, where appropriate, consolidated accounts in euro. The Member State may require that the SE's annual and, where appropriate, consolidated accounts be prepared and published in the national currency under the same conditions as those laid down for public limited-liability companies governed by the law of that Member State. This shall not prejudice the additional possibility for an SE of publishing its annual and, where appropriate, consolidated accounts in euro in accordance with Council Directive 90/604/EEC of 8 November 1990 amending Directive 78/60/EEC on annual accounts and Directive 83/349/EEC on consolidated accounts as concerns the exemptions for small and medium-sized companies and the publication of accounts in ecu¹¹.

TITLE VII. FINAL PROVISIONS

Article 68

1. The Member States shall make such provision as is appropriate to ensure the effective application of this Regulation.
2. Each Member State shall designate the competent authorities within the meaning of Articles 8, 25, 26, 54, 55 and 64. It shall inform the Commission and the other Member States accordingly.

Article 69

Five years at the latest after the entry into force of this Regulation, the Commission shall forward to the Council and the European Parliament a report on the application of the Regulation and proposals for amendments, where appropriate. The report shall, in particular, analyse the appropriateness of:

- (a) allowing the location of an SE's head office and registered office in different Member States;
- (b) broadening the concept of merger in Article 17(2) in order to admit also other types of merger than those defined in Articles 3(1) and 4(1) of Directive 78/855/EEC;
- (c) revising the jurisdiction clause in Article 8(16) in the light of any provision which may have been inserted in the 1968 Brussels Convention or in any text adopted by Member States or by the Council to replace such Convention;
- (d) allowing provisions in the statutes of an SE adopted by a Member State in execution of authorisations given to the Member States by this Regulation or laws adopted to ensure the effective application of this Regulation in respect to the SE which deviate from or are complementary to these laws, even when such provisions would not be authorised in the statutes of a public limited-liability company having its registered office in the Member State.

Article 70

This Regulation shall enter into force on 8 October 2004.

This Regulation shall be binding in its entirety and directly applicable in all Member States.
Done at Luxembourg, 8 October 2001.

For the Council
The President
L. Onkelinx

ANNEX

ANNEX I

PUBLIC LIMITED-LIABILITY COMPANIES REFERRED TO IN ARTICLE 2(1)

BELGIUM:

la société anonyme//de naamloze vennootschap

DENMARK:

aktieselskaber

GERMANY:

die Aktiengesellschaft

GREECE:

συνώνυμη εταιρεία

SPAIN:

la sociedad anónima

FRANCE:

la société anonyme

IRELAND:

public companies limited by shares

public companies limited by guarantee having a share capital

ITALY:

società per azioni

LUXEMBOURG:

la société anonyme

NETHERLANDS:

de naamloze vennootschap

AUSTRIA:

die Aktiengesellschaft

PORTUGAL:

a sociedade anónima de responsabilidade limitada

FINLAND:

julkinen osakeyhtiö//publikt aktiebolag

SWEDEN:

publikt aktiebolag

UNITED KINGDOM:

public companies limited by shares

public companies limited by guarantee having a share capital

ANNEX II

PUBLIC AND PRIVATE LIMITED-LIABILITY COMPANIES REFERRED TO IN ARTICLE 2(2)

BELGIUM:

la société anonyme//de naamloze vennootschap,

la société privée à responsabilité limitée//besloten vennootschap met beperkte aansprakelijkheid

DENMARK:

aktieselskaber,

anpartselskaber

GERMANY:

die Aktiengesellschaft,

die Gesellschaft mit beschränkter Haftung

GREECE:

ανώνυμη εταιρία

εταιρία περιορισμένης ευθύνης

SPAIN:

la sociedad anónima,

la sociedad de responsabilidad limitada

FRANCE:

la société anonyme,

la société à responsabilité limitée

ANNEX

IRELAND:

public companies limited by shares,
public companies limited by guarantee having a share capital,
private companies limited by shares,
private companies limited by guarantee having a share capital

ITALY:

società per azioni,
società a responsabilità limitata

LUXEMBOURG:

la société anonyme,
la société à responsabilité limitée

NETHERLANDS:

de naamloze vennootschap,
de besloten vennootschap met beperkte aansprakelijkheid

AUSTRIA:

die Aktiengesellschaft,
die Gesellschaft mit beschränkter Haftung

PORTUGAL:

a sociedade anónima de responsabilidade limitada,
a sociedade por quotas de responsabilidade limitada

FINLAND:

osakeyhtiö
aktiebolag

SWEDEN:

aktiebolag

UNITED KINGDOM:

public companies limited by shares,
public companies limited by guarantee having a share capital,
private companies limited by shares,
private companies limited by guarantee having a share capital

COUNCIL DIRECTIVE 2001/86/EC OF 8 OCTOBER 2001 SUPPLEMENTING THE STATUTE FOR A EUROPEAN COMPANY WITH REGARD TO THE INVOLVEMENT OF EMPLOYEES

OFFICIAL JOURNAL L 294 , 10/11/2001 P. 0022 - 0032

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 308 thereof,

Having regard to the amended proposal from the Commission¹,

Having regard to the opinion of the European Parliament²,

Having regard to the opinion of the Economic and Social Committee³,

Whereas:

(1) In order to attain the objectives of the Treaty, Council Regulation (EC) No 2157/2001⁴

(4) establishes a Statute for a European company (SE).

(2) That Regulation aims at creating a uniform legal framework within which companies from different Member States should be able to plan and carry out the reorganisation of their business on a Community scale.

(3) In order to promote the social objectives of the Community, special provisions have to be set, notably in the field of employee involvement, aimed at ensuring that the establishment of an SE does not entail the disappearance or reduction of practices of employee involvement existing within the companies participating in the establishment of an SE. This objective should be pursued through the establishment of a set of rules in this field, supplementing the provisions of the Regulation.

(4) Since the objectives of the proposed action, as outlined above, cannot be sufficiently achieved by the Member States, in that the object is to establish a set of rules on employee involvement applicable to the SE, and can therefore, by reason of the scale and impact of the proposed action, be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary to achieve these objectives.

(5) The great diversity of rules and practices existing in the Member States as regards the manner in which employees' representatives are involved in decision-making within companies makes it inadvisable to set up a single European model of employee involvement applicable to the SE.

(6) Information and consultation procedures at transnational level should nevertheless be ensured in all cases of creation of an SE.

(7) If and when participation rights exist within one or more companies establishing an SE, they should be preserved through their transfer to the SE, once established, unless the parties decide otherwise.

(8) The concrete procedures of employee transnational information and consultation, as well as, if applicable, participation, to apply to each SE should be defined primarily by means of an agreement between the parties concerned or, in the absence thereof, through the application of a set of subsidiary rules.

(9) Member States should still have the option of not applying the standard rules relating to participation in the case of a merger, given the diversity of national systems for employee involvement. Existing systems and practices of participation where appropriate at the level of participating companies must in that case be maintained by adapting registration rules.

(10) The voting rules within the special body representing the employees for negotiation purposes, in particular when concluding agreements providing for a level of participation lower than the one existing within one or more of the participating companies, should be proportionate to the risk of disappearance or reduction of existing systems and practices of participation. That risk is greater in the case of an SE established by way of transformation or merger than by way of creating a holding company or a common subsidiary.

(11) In the absence of an agreement subsequent to the negotiation between employees' representatives and the competent organs of the participating companies, provision should be made for certain standard requirements to apply to the SE, once it is established. These standard requirements should ensure effective practices of transnational information and consultation of employees, as well as their participation in the relevant organs of the SE if and when such participation existed before its establishment within the participating companies.

¹ OJ C 138, 29.5.1991, p. 8.

² OJ C 342, 20.12.1993, p. 15.

³ OJ C 124, 21.5.1990, p. 34.

⁴ See page 1 of this Official Journal.

(12) Provision should be made for the employees' representatives acting within the framework of the Directive to enjoy, when exercising their functions, protection and guarantees which are similar to those provided to employees' representatives by the legislation and/or practice of the country of employment. They should not be subject to any discrimination as a result of the lawful exercise of their activities and should enjoy adequate protection as regards dismissal and other sanctions.

(13) The confidentiality of sensitive information should be preserved even after the expiry of the employees' representatives terms of office and provision should be made to allow the competent organ of the SE to withhold information which would seriously harm, if subject to public disclosure, the functioning of the SE.

(14) Where an SE and its subsidiaries and establishments are subject to Council Directive 94/45/EC of 22 September 1994 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees⁵, the provisions of that Directive and the provision transposing it into national legislation should not apply to it nor to its subsidiaries and establishments, unless the special negotiating body decides not to open negotiations or to terminate negotiations already opened.

(15) This Directive should not affect other existing rights regarding involvement and need not affect other existing representation structures, provided for by Community and national laws and practices.

(16) Member States should take appropriate measures in the event of failure to comply with the obligations laid down in this Directive.

(17) The Treaty has not provided the necessary powers for the Community to adopt the proposed Directive, other than those provided for in Article 308.

(18) It is a fundamental principle and stated aim of this Directive to secure employees' acquired rights as regards involvement in company decisions. Employee rights in force before the establishment of SEs should provide the basis for employee rights of involvement in the SE (the "before and after" principle). Consequently, that approach should apply not only to the initial establishment of an SE but also to structural changes in an existing SE and to the companies affected by structural change processes.

(19) Member States should be able to provide that representatives of trade unions may be members of a special negotiating body regardless of whether they are employees of a company participating in the establishment of an SE. Member States should in this context in particular be able to introduce this right in cases where trade union representatives have the right to be members of, and to vote in, supervisory or administrative company organs in accordance with national legislation.

(20) In several Member States, employee involvement and other areas of industrial relations are based on both national legislation and practice which in this context is understood also to cover collective agreements at various national, sectoral and/or company levels,

HAS ADOPTED THIS DIRECTIVE:

SECTION I. GENERAL

Article 1

Objective

1. This Directive governs the involvement of employees in the affairs of European public limited-liability companies (*Societas Europaea*, hereinafter referred to as "SE"), as referred to in Regulation (EC) No 2157/2001.

2. To this end, arrangements for the involvement of employees shall be established in every SE in accordance with the negotiating procedure referred to in Articles 3 to 6 or, under the circumstances specified in Article 7, in accordance with the Annex.

Article 2

Definitions

For the purposes of this Directive:

(a) "SE" means any company established in accordance with Regulation (EC) No 2157/2001;

(b) "participating companies" means the companies directly participating in the establishing of an SE;

(c) "subsidiary" of a company means an undertaking over which that company exercises a dominant influence defined in accordance with Article 3(2) to (7) of Directive 94/45/EC;

(d) "concerned subsidiary or establishment" means a subsidiary or establishment of a participating company which is proposed to become a subsidiary or establishment of the SE upon its formation;

(e) "employees' representatives" means the employees' representatives provided for by national law and/or practice;

(f) "representative body" means the body representative of the employees set up by the agreements referred to in Article 4 or in accordance with the provisions of the Annex, with the purpose of informing and consulting the employees of an SE and its subsidiaries and establishments situated in the Community and, where applicable, of exercising participation rights in relation to the SE;

(g) "special negotiating body" means the body established in accordance with Article 3 to negotiate with the competent body of the participating companies regarding the establishment of arrangements for the involvement of employees within the SE;

(h) "involvement of employees" means any mechanism, including information, consultation and participation, through which employees' representatives may exercise an influence on decisions to be taken within the company;

⁵ OJ L 254, 30.9.1994, p. 64. Directive as last amended by Directive 97/74/EC (OJ L 10, 16.1.1998, p. 22).

(i) “information” means the informing of the body representative of the employees and/or employees' representatives by the competent organ of the SE on questions which concern the SE itself and any of its subsidiaries or establishments situated in another Member State or which exceed the powers of the decision-making organs in a single Member State at a time, in a manner and with a content which allows the employees' representatives to undertake an in-depth assessment of the possible impact and, where appropriate, prepare consultations with the competent organ of the SE;

(j) “consultation” means the establishment of dialogue and exchange of views between the body representative of the employees and/or the employees' representatives and the competent organ of the SE, at a time, in a manner and with a content which allows the employees' representatives, on the basis of information provided, to express an opinion on measures envisaged by the competent organ which may be taken into account in the decision-making process within the SE;

(k) “participation” means the influence of the body representative of the employees and/or the employees' representatives in the affairs of a company by way of:

- the right to elect or appoint some of the members of the company's supervisory or administrative organ, or
- the right to recommend and/or oppose the appointment of some or all of the members of the company's supervisory or administrative organ.

SECTION II. NEGOTIATING PROCEDURE

Article 3

Creation of a special negotiating body

1. Where the management or administrative organs of the participating companies draw up a plan for the establishment of an SE, they shall as soon as possible after publishing the draft terms of merger or creating a holding company or after agreeing a plan to form a subsidiary or to transform into an SE, take the necessary steps, including providing information about the identity of the participating companies, concerned subsidiaries or establishments, and the number of their employees, to start negotiations with the representatives of the companies' employees on arrangements for the involvement of employees in the SE.

2. For this purpose, a special negotiating body representative of the employees of the participating companies and concerned subsidiaries or establishments shall be created in accordance with the following provisions:

(a) in electing or appointing members of the special negotiating body, it must be ensured:

(i) that these members are elected or appointed in proportion to the number of employees employed in each Member State by the participating companies and concerned subsidiaries or establishments, by allocating in respect of a Member State one seat per portion of employees employed in that Member State which

equals 10 %, or a fraction thereof, of the number of employees employed by the participating companies and concerned subsidiaries or establishments in all the Member States taken together;

(ii) that in the case of an SE formed by way of merger, there are such further additional members from each Member State as may be necessary in order to ensure that the special negotiating body includes at least one member representing each participating company which is registered and has employees in that Member State and which it is proposed will cease to exist as a separate legal entity following the registration of the SE, in so far as:

- the number of such additional members does not exceed 20 % of the number of members designated by virtue of point (i), and
- the composition of the special negotiating body does not entail a double representation of the employees concerned.

If the number of such companies is higher than the number of additional seats available pursuant to the first subparagraph, these additional seats shall be allocated to companies in different Member States by decreasing order of the number of employees they employ;

(b) Member States shall determine the method to be used for the election or appointment of the members of the special negotiating body who are to be elected or appointed in their territories. They shall take the necessary measures to ensure that, as far as possible, such members shall include at least one member representing each participating company which has employees in the Member State concerned. Such measures must not increase the overall number of members.

Member States may provide that such members may include representatives of trade unions whether or not they are employees of a participating company or concerned subsidiary or establishment.

Without prejudice to national legislation and/or practice laying down thresholds for the establishing of a representative body, Member States shall provide that employees in undertakings or establishments in which there are no employees' representatives through no fault of their own have the right to elect or appoint members of the special negotiating body.

3. The special negotiating body and the competent organs of the participating companies shall determine, by written agreement, arrangements for the involvement of employees within the SE.

To this end, the competent organs of the participating companies shall inform the special negotiating body of the plan and the actual process of establishing the SE, up to its registration.

4. Subject to paragraph 6, the special negotiating body shall take decisions by an absolute majority of its members, provided that such a majority also represents an absolute majority of the employees. Each member shall have one vote. However, should the result of the negotiations lead to a reduction of participation rights, the majority required for a decision to approve such an agreement shall be the votes of two thirds of the members of the special negotiating body representing at least two thirds of the employees, including the

votes of members representing employees employed in at least two Member States,
 - in the case of an SE to be established by way of merger, if participation covers at least 25 % of the overall number of employees of the participating companies, or
 - in the case of an SE to be established by way of creating a holding company or forming a subsidiary, if participation covers at least 50 % of the overall number of employees of the participating companies.

Reduction of participation rights means a proportion of members of the organs of the SE within the meaning of Article 2(k), which is lower than the highest proportion existing within the participating companies.

5. For the purpose of the negotiations, the special negotiating body may request experts of its choice, for example representatives of appropriate Community level trade union organisations, to assist it with its work. Such experts may be present at negotiation meetings in an advisory capacity at the request of the special negotiating body, where appropriate to promote coherence and consistency at Community level. The special negotiating body may decide to inform the representatives of appropriate external organisations, including trade unions, of the start of the negotiations.

6. The special negotiating body may decide by the majority set out below not to open negotiations or to terminate negotiations already opened, and to rely on the rules on information and consultation of employees in force in the Member States where the SE has employees. Such a decision shall stop the procedure to conclude the agreement referred to in Article 4. Where such a decision has been taken, none of the provisions of the Annex shall apply. The majority required to decide not to open or to terminate negotiations shall be the votes of two thirds of the members representing at least two thirds of the employees, including the votes of members representing employees employed in at least two Member States. In the case of an SE established by way of transformation, this paragraph shall not apply if there is participation in the company to be transformed.

The special negotiating body shall be reconvened on the written request of at least 10 % of the employees of the SE, its subsidiaries and establishments, or their representatives, at the earliest two years after the abovementioned decision, unless the parties agree to negotiations being reopened sooner. If the special negotiating body decides to reopen negotiations with the management but no agreement is reached as a result of those negotiations, none of the provisions of the Annex shall apply.

7. Any expenses relating to the functioning of the special negotiating body and, in general, to negotiations shall be borne by the participating companies so as to enable the special negotiating body to carry out its task in an appropriate manner.

In compliance with this principle, Member States may lay down budgetary rules regarding the operation of the special negotiating body. They may in particular limit the funding to cover one expert only.

Article 4

Content of the agreement

1. The competent organs of the participating companies and the special negotiating body shall negotiate in a spirit of cooperation with a view to reaching an agreement on arrangements for the involvement of the employees within the SE.

2. Without prejudice to the autonomy of the parties, and subject to paragraph 4, the agreement referred to in paragraph 1 between the competent organs of the participating companies and the special negotiating body shall specify:

- (a) the scope of the agreement;
- (b) the composition, number of members and allocation of seats on the representative body which will be the discussion partner of the competent organ of the SE in connection with arrangements for the information and consultation of the employees of the SE and its subsidiaries and establishments;
- (c) the functions and the procedure for the information and consultation of the representative body;
- (d) the frequency of meetings of the representative body;
- (e) the financial and material resources to be allocated to the representative body;
- (f) if, during negotiations, the parties decide to establish one or more information and consultation procedures instead of a representative body, the arrangements for implementing those procedures;
- (g) if, during negotiations, the parties decide to establish arrangements for participation, the substance of those arrangements including (if applicable) the number of members in the SE's administrative or supervisory body which the employees will be entitled to elect, appoint, recommend or oppose, the procedures as to how these members may be elected, appointed, recommended or opposed by the employees, and their rights;
- (h) the date of entry into force of the agreement and its duration, cases where the agreement should be renegotiated and the procedure for its renegotiation.

3. The agreement shall not, unless provision is made otherwise therein, be subject to the standard rules referred to in the Annex.

4. Without prejudice to Article 13(3)(a), in the case of an SE established by means of transformation, the agreement shall provide for at least the same level of all elements of employee involvement as the ones existing within the company to be transformed into an SE.

Article 5

Duration of negotiations

1. Negotiations shall commence as soon as the special negotiating body is established and may continue for six months thereafter.

2. The parties may decide, by joint agreement, to extend negotiations beyond the period referred to in paragraph 1, up to a total of one year from the establishment of the special negotiating body.

Article 6

Legislation applicable to the negotiation procedure

Except where otherwise provided in this Directive, the legislation applicable to the negotiation procedure provided for in Articles 3 to 5 shall be the legislation of the Member State in which the registered office of the SE is to be situated.

Article 7

Standard rules

1. In order to achieve the objective described in Article 1, Member States shall, without prejudice to paragraph 3 below, lay down standard rules on employee involvement which must satisfy the provisions set out in the Annex.

The standard rules as laid down by the legislation of the Member State in which the registered office of the SE is to be situated shall apply from the date of the registration of the SE where either:

- (a) the parties so agree; or
- (b) by the deadline laid down in Article 5, no agreement has been concluded, and:
 - the competent organ of each of the participating companies decides to accept the application of the standard rules in relation to the SE and so to continue with its registration of the SE, and
 - the special negotiating body has not taken the decision provided in Article 3(6).

2. Moreover, the standard rules fixed by the national legislation of the Member State of registration in accordance with part 3 of the Annex shall apply only:

- (a) in the case of an SE established by transformation, if the rules of a Member State relating to employee participation in the administrative or supervisory body applied to a company transformed into an SE;
- (b) in the case of an SE established by merger:
 - if, before registration of the SE, one or more forms of participation applied in one or more of the participating companies covering at least 25 % of the total number of employees in all the participating companies, or
 - if, before registration of the SE, one or more forms of participation applied in one or more of the participating companies covering less than 25 % of the total number of employees in all the participating companies and if the special negotiating body so decides,
- (c) in the case of an SE established by setting up a holding company or establishing a subsidiary:
 - if, before registration of the SE, one or more forms of participation applied in one or more of the participating companies covering at least 50 % of the total number of employees in all the participating companies; or
 - if, before registration of the SE, one or more forms of participation applied in one or more of the participating companies covering less than 50 % of the total number of employees in all the participating companies and if the special negotiating body so decides.

If there was more than one form of participation within the various participating companies, the special negotiating body shall decide which of those forms must be established in the SE. Member States may fix the rules which are applicable in the absence of any decision on the matter for an SE registered in their territory. The special negotiating body shall inform the competent organs of the participating companies of any decisions taken pursuant to this paragraph.

3. Member States may provide that the reference provisions in part 3 of the Annex shall not apply in the case provided for in point (b) of paragraph 2.

SECTION III. MISCELLANEOUS PROVISIONS

Article 8

Reservation and confidentiality

1. Member States shall provide that members of the special negotiating body or the representative body, and experts who assist them, are not authorised to reveal any information which has been given to them in confidence.

The same shall apply to employees' representatives in the context of an information and consultation procedure.

This obligation shall continue to apply, wherever the persons referred to may be, even after the expiry of their terms of office.

2. Each Member State shall provide, in specific cases and under the conditions and limits laid down by national legislation, that the supervisory or administrative organ of an SE or of a participating company established in its territory is not obliged to transmit information where its nature is such that, according to objective criteria, to do so would seriously harm the functioning of the SE (or, as the case may be, the participating company) or its subsidiaries and establishments or would be prejudicial to them.

A Member State may make such dispensation subject to prior administrative or judicial authorisation.

3. Each Member State may lay down particular provisions for SEs in its territory which pursue directly and essentially the aim of ideological guidance with respect to information and the expression of opinions, on condition that, on the date of adoption of this Directive, such provisions already exist in the national legislation.

4. In applying paragraphs 1, 2 and 3, Member States shall make provision for administrative or judicial appeal procedures which the employees' representatives may initiate when the supervisory or administrative organ of an SE or participating company demands confidentiality or does not give information.

Such procedures may include arrangements designed to protect the confidentiality of the information in question.

Article 9

Operation of the representative body and procedure for the information and consultation of employees

The competent organ of the SE and the representative body shall work together in a spirit of cooperation with due regard for their reciprocal rights and obligations.

The same shall apply to cooperation between the supervisory or administrative organ of the SE and the employees' representatives in conjunction with a procedure for the information and consultation of employees.

Article 10

Protection of employees' representatives

The members of the special negotiating body, the members of the representative body, any employees' representatives exercising functions under the information and consultation procedure and any employees' representatives in the supervisory or administrative organ of an SE who are employees of the SE, its subsidiaries or establishments or of a participating company shall, in the exercise of their functions, enjoy the same protection and guarantees provided for employees' representatives by the national legislation and/or practice in force in their country of employment.

This shall apply in particular to attendance at meetings of the special negotiating body or representative body, any other meeting under the agreement referred to in Article 4(2)(f) or any meeting of the administrative or supervisory organ, and to the payment of wages for members employed by a participating company or the SE or its subsidiaries or establishments during a period of absence necessary for the performance of their duties.

Article 11

Misuse of procedures

Member States shall take appropriate measures in conformity with Community law with a view to preventing the misuse of an SE for the purpose of depriving employees of rights to employee involvement or withholding such rights.

Article 12

Compliance with this Directive

1. Each Member State shall ensure that the management of establishments of an SE and the supervisory or administrative organs of subsidiaries and of participating companies which are situated within its territory and the employees' representatives or, as the case may be, the employees themselves abide by the obligations laid down by this Directive, regardless of whether or not the SE has its registered office within its territory.

2. Member States shall provide for appropriate measures in the event of failure to comply with this Directive; in particular they shall ensure that administrative or legal procedures are available to enable the obligations deriving from this Directive to be enforced.

Article 13

Link between this Directive and other provisions

1. Where an SE is a Community-scale undertaking or a controlling undertaking of a Community-scale group of undertakings within the meaning of Directive 94/45/EC or of Directive 97/74/EC⁶ extending the said Directive to the United Kingdom, the provisions of these Directives and the provisions transposing them into national legislation shall not apply to them or to their subsidiaries.

However, where the special negotiating body decides in accordance with Article 3(6) not to open negotiations or to terminate negotiations already opened, Directive 94/45/EC or Directive 97/74/EC and the provisions transposing them into national legislation shall apply.

2. Provisions on the participation of employees in company bodies provided for by national legislation and/or practice, other than those implementing this Directive, shall not apply to companies established in accordance with Regulation (EC) No 2157/2001 and covered by this Directive.

3. This Directive shall not prejudice:

- (a) the existing rights to involvement of employees provided for by national legislation and/or practice in the Member States as enjoyed by employees of the SE and its subsidiaries and establishments, other than participation in the bodies of the SE;
- (b) the provisions on participation in the bodies laid down by national legislation and/or practice applicable to the subsidiaries of the SE.

4. In order to preserve the rights referred to in paragraph 3, Member States may take the necessary measures to guarantee that the structures of employee representation in participating companies which will cease to exist as separate legal entities are maintained after the registration of the SE.

Article 14

Final provisions

1. Member States shall adopt the laws, regulations and administrative provisions necessary to comply with this Directive no later than 8 October 2004, or shall ensure by that date at the latest that management and labour introduce the required provisions by way of agreement, the Member States being obliged to take all necessary steps enabling them at all times to guarantee the results imposed by this Directive. They shall forthwith inform the Commission thereof.

2. When Member States adopt these measures, they shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. The methods of making such reference shall be laid down by the Member States.

Article 15**Review by the Commission**

No later than 8 October 2007, the Commission shall, in consultation with the Member States and with management and labour at Community level, review the procedures for applying this Directive, with a view to proposing suitable amendments to the Council where necessary.

Article 16**Entry into force**

This Directive shall enter into force on the day of its publication in the Official Journal of the European Communities.

Article 17**Addressees**

This Directive is addressed to the Member States.

Done at Luxembourg, 8 October 2001.

For the Council
The President
L. Onkelinx

(b) The election or appointment of members of the representative body shall be carried out in accordance with national legislation and/or practice.

Member States shall lay down rules to ensure that the number of members of, and allocation of seats on, the representative body shall be adapted to take account of changes occurring within the SE and its subsidiaries and establishments.

(c) Where its size so warrants, the representative body shall elect a select committee from among its members, comprising at most three members.

(d) The representative body shall adopt its rules of procedure.

(e) The members of the representative body are elected or appointed in proportion to the number of employees employed in each Member State by the participating companies and concerned subsidiaries or establishments, by allocating in respect of a Member State one seat per portion of employees employed in that Member State which equals 10 %, or a fraction thereof, of the number of employees employed by the participating companies and concerned subsidiaries or establishments in all the Member States taken together.

(f) The competent organ of the SE shall be informed of the composition of the representative body.

(g) Four years after the representative body is established, it shall examine whether to open negotiations for the conclusion of the agreement referred to in Articles 4 and 7 or to continue to apply the standard rules adopted in accordance with this Annex.

Articles 3(4) to (7) and 4 to 6 shall apply, mutatis mutandis, if a decision has been taken to negotiate an agreement according to Article 4, in which case the term “special negotiating body” shall be replaced by “representative body”. Where, by the deadline by which the negotiations come to an end, no agreement has been concluded, the arrangements initially adopted in accordance with the standard rules shall continue to apply.

Part 2: Standard rules for information and consultation**The competence and powers of the representative body set up in an SE shall be governed by the following rules.**

(a) The competence of the representative body shall be limited to questions which concern the SE itself and any of its subsidiaries or establishments situated in another Member State or which exceed the powers of the decision-making organs in a single Member State.

(b) Without prejudice to meetings held pursuant to point (c), the representative body shall have the right to be informed and consulted and, for that purpose, to meet with the competent organ of the SE at least once a year, on the basis of regular reports drawn up by the competent organ, on the progress of the business of the SE and its prospects. The local managements shall be informed accordingly.

The competent organ of the SE shall provide the representative body with the agenda for meetings of the administrative, or, where appropriate, the management and supervisory organ, and with copies of all documents submitted to the general meeting of its shareholders.

ANNEX**STANDARD RULES**

(referred to in Article 7)

Part 1: Composition of the body representative of the employees

In order to achieve the objective described in Article 1, and in the cases referred to in Article 7, a representative body shall be set up in accordance with the following rules.

(a) The representative body shall be composed of employees of the SE and its subsidiaries and establishments elected or appointed from their number by the employees' representatives or, in the absence thereof, by the entire body of employees.

The meeting shall relate in particular to the structure, economic and financial situation, the probable development of the business and of production and sales, the situation and probable trend of employment, investments, and substantial changes concerning organisation, introduction of new working methods or production processes, transfers of production, mergers, cut-backs or closures of undertakings, establishments or important parts thereof, and collective redundancies.

(c) Where there are exceptional circumstances affecting the employees' interests to a considerable extent, particularly in the event of relocations, transfers, the closure of establishments or undertakings or collective redundancies, the representative body shall have the right to be informed. The representative body or, where it so decides, in particular for reasons of urgency, the select committee, shall have the right to meet at its request the competent organ of the SE or any more appropriate level of management within the SE having its own powers of decision, so as to be informed and consulted on measures significantly affecting employees' interests.

Where the competent organ decides not to act in accordance with the opinion expressed by the representative body, this body shall have the right to a further meeting with the competent organ of the SE with a view to seeking agreement.

In the case of a meeting organised with the select committee, those members of the representative body who represent employees who are directly concerned by the measures in question shall also have the right to participate.

The meetings referred to above shall not affect the prerogatives of the competent organ.

(d) Member States may lay down rules on the chairing of information and consultation meetings. Before any meeting with the competent organ of the SE, the representative body or the select committee, where necessary enlarged in accordance with the third subparagraph of paragraph (c), shall be entitled to meet without the representatives of the competent organ being present.

(e) Without prejudice to Article 8, the members of the representative body shall inform the representatives of the employees of the SE and of its subsidiaries and establishments of the content and outcome of the information and consultation procedures.

(f) The representative body or the select committee may be assisted by experts of its choice.

(g) In so far as this is necessary for the fulfilment of their tasks, the members of the representative body shall be entitled to time off for training without loss of wages.

(h) The costs of the representative body shall be borne by the SE, which shall provide the body's members with the financial and material resources needed to enable them to perform their duties in an appropriate manner.

In particular, the SE shall, unless otherwise agreed, bear the cost of organising meetings and providing interpretation facilities and the accommodation and travelling expenses of members of the representative body and the select committee.

In compliance with these principles, the Member States may lay down budgetary rules regarding the operation of the representative body. They may in particular limit funding to cover one expert only.

Part 3: Standard rules for participation

Employee participation in an SE shall be governed by the following provisions

(a) In the case of an SE established by transformation, if the rules of a Member State relating to employee participation in the administrative or supervisory body applied before registration, all aspects of employee participation shall continue to apply to the SE. Point (b) shall apply mutatis mutandis to that end.

(b) In other cases of the establishing of an SE, the employees of the SE, its subsidiaries and establishments and/or their representative body shall have the right to elect, appoint, recommend or oppose the appointment of a number of members of the administrative or supervisory body of the SE equal to the highest proportion in force in the participating companies concerned before registration of the SE.

If none of the participating companies was governed by participation rules before registration of the SE, the latter shall not be required to establish provisions for employee participation.

The representative body shall decide on the allocation of seats within the administrative or supervisory body among the members representing the employees from the various Member States or on the way in which the SE's employees may recommend or oppose the appointment of the members of these bodies according to the proportion of the SE's employees in each Member State. If the employees of one or more Member States are not covered by this proportional criterion, the representative body shall appoint a member from one of those Member States, in particular the Member State of the SE's registered office where that is appropriate. Each Member State may determine the allocation of the seats it is given within the administrative or supervisory body.

Every member of the administrative body or, where appropriate, the supervisory body of the SE who has been elected, appointed or recommended by the representative body or, depending on the circumstances, by the employees shall be a full member with the same rights and obligations as the members representing the shareholders, including the right to vote.



PARTICIPATION AND REPRESENTATION OF EMPLOYEES AT BOARD LEVEL, AND THE OPPORTUNITIES OFFERED BY THE SE - EUROPEAN COMPANY, IN THE NEW EU-MEMBER STATES (PROJECT PRESENS: 12/2004-12/2005)

As well as the former EU-15 member states, the 10 new member states must **enable companies to set up a European Company** on their territory as from 8th October 2004. It is important to emphasize the new potential for employee involvement coming from the SE Directive, not only in terms of transnational information and consultation rights, but also in opening the possibility to monitor management decisions. The SE-legislation provides worker representatives in an SE with **the right to sit in company boardrooms (board-level representation)**.

In 2003, the Hans Böckler Foundation (Germany), SYNDEX (France) and the European Trade Union Institute - together with their partners the Labour Research Department (GB) and Sindnova (Italy) - carried out a project which pooled information about systems of board-level representation of workers throughout the 15 EU member states at three transnational seminars and in 15 country reports.

A first glance on the existing national laws to the issue in the new member states shows nearly the same level of diversity as in the first 15. But there is a notable **lack of information about real practices and the meaning of worker involvement concerning the new member states**. When European Companies are set up, it can be assumed that some will either take their seat in one of the new member states, or parts of the SE will be located on their territories. It is therefore important that the real situation and the possible existing links to European legislation should be examined in more detail by organising and evaluating an exchange of experiences. The PRESENS project was the first to take **a pan-European approach to board-level participation** that will include the new member states.

The project aimed

- to improve awareness of the SE Directive in the new member states,
- to improve knowledge of national systems and cultures regarding worker participation at board level and to create a platform for exchange between “old” and “new” member states
- to develop an ongoing process of improving and increasing knowledge on the topic to a fixed group of experts coming specifically from the new member states.

Therefore, the project aimed to give space for listening and learning from each other, not only among concerned actors in the new member states.

The project took place from December 2004 to December 2005. It consisted of two seminars concentrating on exchange of national law and practice, one seminar to develop expert resources on the SE in the trade unions of the new member states, and a final conference in Bratislava.

The knowledge gathered is now available electronically in country reports and in executive summaries that were translated into the languages of the new member states and was also used to create a new publication which adds to and enhances existing material in the publication, “The European Company: Prospects for board-level representation” (Brussels and Düsseldorf, 2004), especially by including information on the new member states.

The project was carried-out by the **Social Development Agency** (Brussels) together with its partners **European Trade Union Confederation (ETUC)**, **European Trade Union Institute for Research, Education and Health and Safety (ETUI-REHS)**, **Chamber of Labour** (Austria), **CMKOS** (Czech Republic), **General Workers' Union** (Malta), **Hans Böckler Foundation** (Germany), **Lo-skolen** (Denmark), **MSZOSZ** (Hungary), **KOZ SR** (Slovak Republic) and **Solidarnosc** (Polen).



The project is funded by the European Commission.

Project title: Prospects for board-level representation of workers under the European Company Statute in the new EU member states

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Further information on the project and on worker participation can be found at www.seeurope-network.org



Taking the opportunity – Worker participation at board level in the European Company (SE)

SEEurope is a project conducted by the European Trade Union Institute for Research, Education and Health and Safety (ETUI-REHS) and co-funded by the Hans Böckler Foundation

SEEurope is a project conducted by an **internationally composed network of researchers** under the leadership of the ETUI-REHS (Brussels).

SEEurope produces a **mix of country reports and articles on specific topics** in this context. The information on the website is regularly updated and expanded. The research and monitoring is conducted with a view to **meeting the needs of all practitioners** in Europe involved in the founding of an SE and in the policy debate on participation issues in their countries.

Firstly, the project observes the **transposition** of the European legal obligations into national law which were required to be completed by end of October 2004.

Equal importance is given to **observing companies** which are **establishing an SE**.

Moreover, **SEEurope** offers information on relevant recent **debates and measures on the European and/or global level**.

SEEurope pursues a twofold aim:

- To **monitor** the implementation of coming European Companies (Societas Europaea, **SE**). The relevant European legislation (**SE** Statute together with the **SE** Directive on worker participation) provides for compulsory worker involvement. By offering the opportunity to influence management decisions, the

establishment of an SE opens up a new form of cross-border responsibility for workers and their trade unions;

- To **develop the interface** between worker involvement in company decision-making and shaping of the future **European Social Model** (e.g. in shaping of European labour market, European training and employment promotion practices, promotion of women and improvement of socially responsible management practice) for the purposes of future research.

Further, **SEEurope** seeks to improve workers' negotiating position by offering **information on existing systems of board-level participation** in an effort to promote a better understanding among worker and trade union representatives. Accordingly, **SEEurope** sees its role as to take part in the process of ongoing political communication on these issues conducted within the ETUC sphere.

More information: www.seeurope-network.org

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SOCIAL DEVELOPMENT AGENCY (SDA)

The SDA is an association sans but lucratif (asbl), this is a not-for-profit organisation recognised under Belgian law. It was established in May 2004. The purpose of the agency is “to promote Europe’s social dimension in a globalised world”. It is working under the umbrella of, and is supported by the ETUC.

The SDA staff includes those who formerly ran the Infopoint project for the ETUC with the support of the European Commission. The Infopoint project is now managed by the SDA and will remain at the centre of its activities.

The Social Developing Agency

- participates in and carries out specific projects relating to social issues
- promotes activities relating to social dialogue
- promotes the international dimension of social dialogue
- develops advisory services and assistance for European Works Councils and workforce representatives in SEs (European Companies)
- disseminates results and experiences in the area of social dialogue
- undertakes public relations activities in the field of social dialogue
- organises expert networking systems.

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EUROPEAN TRADE UNION INSTITUTE FOR RESEARCH, EDUCATION AND HEALTH AND SAFETY (ETUI-REHS)

The ETUI-REHS was formed in April 2005 from the merger of three existing trade union institutes. Through its expertise, scientific publications, reviews and training programmes, the ETUI-REHS provides European trade unions with the tools to participate in the European debate and to contribute actively to achieving Social Europe.

The Research Department of the ETUI-REHS focuses on socio-economic issues and industrial relations. As a link between the European trade union movement and academia, it conducts and promotes research on topics of strategic importance for the world of labour, organised in three programme areas:

- The world of labour and the modernisation of trade unions
- The Europeanisation of workers’ representation
- European employment and social policies

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RECENT SDA AND ETUI-REHS PUBLICATIONS ON WORKER PARTICIPATION



Lionel Fulton – Filling in the Gaps. The Practicalities of Workplace Information and Consultation in the EU, SDA 2005, 49p.

The publication is an attempt to help trade unionists and employee representatives in countries with no tradition of workplace information and consultation bodies (particularly the UK and Ireland) to make the most of their new information and consultation rights under Directive 2002/14/EC.

The publication looks at how such rights are put into practice in seven countries with different experiences in this area (Belgium, France, Germany, Hungary, Italy, Slovenia and Sweden), concentrating on three key topics: available information and how it is used; relationships between trades unions and 'works councils'; and 'practicalities and resources'.



Simon Cox – Your New EWC Agreement. What's In – What's Not? SDA 2005, 93p.

This publication is a guide for negotiating and renegotiating EWC agreements in the interests of workers. It is written in an explanatory 'user friendly' style designed to help workplace representatives and trade union officers define their positions during negotiations and ensure that they have examined the main possibilities and consequences of a new agreement before they sign. The text is enhanced with

graphics giving key statistics from the SDA's EWC agreement database. It also includes text-boxes highlighting relevant parts of the Directive. Available in English, German, Italian and French.

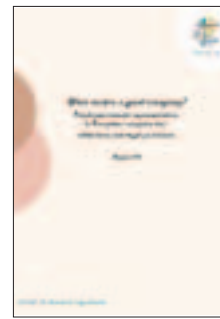
These publications can be downloaded free of charge from the SDA website www.sda-asbl.org. If you wish to receive one of the SDA publications by post, please contact the SDA at the following email address: sda-asbl@etuc.org



Sigurt Vitols: Prospects for trade unions in the evolving European system of corporate governance, Report 92, ETUI-REHS and HBS 2005, 40 p.

Even though the US neo-liberal economic model is currently regarded by many as dominant, this assumption may be proved false by the future performance of Europe's stakeholder economies. An examination of individual countries in the European Union reveals facts that speak against the supposed superiority of the US model in terms of economic

performance. The strongest economies can be found, by and large, in those countries where employees enjoy strong rights of representation in company boardrooms, a finding that contrasts strongly with the prevailing opinion that co-determination impairs economic performance.



Janja Bedrač: What makes a good company? Employee interest representation in European company law: reflections and legal provisions, Report 94, ETUI-REHS 2006, 75 p.

Involvement of workers' representatives is crucial for sound corporate governance, promising both improved economic performance and fulfilment of the Lisbon strategy. This report presents an overview of European company law and its relationship to European law on employee involvement. Thanks

to Janja Bedrač's compilation, trade unionists will find it easier to orient themselves and to identify legal reference points in this relevant and decisive debate.

These publications can be downloaded free of charge from the ETUI-REHS website at www.etui-rehs.org/workers_participation. For the prices of printed copies please contact us at the following email address: research@etui-rehs.org