

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

* Listed by date of the transposition of the Directive

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.

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

<i>Country</i>	<i>Comments</i>
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.