



**Workers' involvement in
the SE
Opting out of member
states in case of merger
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**Worker Involvement in the SE
"Opting out" of Member States in the event of mergers**

Since many questions have already been raised concerning the opt-out, i.e. the option for Member States to choose not to transpose into national law some of the standard rules set out in the Council Directive on worker involvement in the European Company in the event of a merger, we will try below to make the rather confusing legal provisions somewhat more transparent.

Firstly, there is:

The Council Directive supplementing the Statute for a European Company with regard to the involvement of employees (hereinafter "the Dir/SE");
and secondly:

the proposal for a Council Regulation on the Statute for a European Company (hereinafter "the Reg/SE").

Article 7 (3) of the Dir/SE states:

" 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."

The corresponding provision on the reference rule in Article 7 reads:

„Art 7 Standard rules²

In order to achieve the objective described in article 1³ 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.

¹Replaces working paper 2/1 from April 2001.

² Paragraph 1 is only included here in the interests of clarity

³ Note: of the Directive



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 5⁴, 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)(...)

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) (...)"

The regulations quoted show, firstly, that Member States which satisfy the preconditions under Article 7 (2) b) of the Directive are nevertheless not obliged to transpose into national law the reference rule referred to in article 7 of the Directive regarding mergers and therefore do not have to transpose even the minimum requirements for the participation of employees' representatives in the SE. However, this extremely far-reaching possibility is restricted as follows:

⁴ According to Article 5 of the Directive negotiations may last for up to six months or one year with the consent of the parties



Because in addition to the Directive, article 12.3 of the Reg/SE must be called into play. Article 12.3 of the Reg/SE reads:

- (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."

This means that in the event of a merger, an SE without any rules for participation may be registered only if none of the undertakings involved in the merger previously had such rules. If, for example, one of the firms involved in the merger had participation rules, but the other firm(s) involved in the merger did not, the SE may not be registered in any Member State where application has been made of the exception according to Article 7 (3) of the Directive previously mentioned. Since an SE resulting from such a merger may not be registered, this in practice means either that the merger has failed, or that the undertakings involved must decide to conclude an agreement in accordance with Article 4 of the Directive.

Example: Country X has "opted out".

Firms 1,2 and 3 want to establish an SE via a merger and to register it in country X. Rules for participation existed in Firm 1, but not in firms 2 and 3. Result: the SE cannot be registered in country X, unless there is a prior agreement in accordance with Article 4 of the Directive before the application for registration

Nevertheless it cannot be denied that there will still be instances, based on the reference rule, in which an SE can be registered without any participation rules. However, the provisions of Article 12.3 constitute an obstacle which should not be underestimated.

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