



**Worker involvement in
the SE
Negotiation non worker
involvement in the SE
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Negotiations on workers involvement in the European Company

Arts. 3 – 6 of the “Council Directive supplementing the Statute for a European Company with regard to the involvement of employees” (subsequently called: Council Directive on involvement of employees or Dir/SE) explain the procedure to follow during negotiations on workers involvement in the European company: who is responsible for starting negotiations, who negotiates on both sides, how is the special negotiating body composed, what is the timetable for negotiations, what is the agenda of negotiations and what are the standard rules in cases of negotiations failing to produce a result.

Starting negotiations

Who is responsible for starting negotiations?

Who is responsible for starting negotiations? Art.3.1 stipulates that it is up to “ the management or administrative organs of the participating companies” to “take the necessary steps (...) to start negotiations with the representatives of the companies’ employees”. No special request from the employees is necessary for the opening of negotiations. The responsibility rests entirely with the management of the companies participating in the setting up of a European Company. Management is obliged to take the initiative and to approach workers representatives. Management has no possibility to delay the start of negotiations.

Art. 3.1 of the Dir/SE clearly defines at which point of time management has to take the initiative: “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”, management shall take the necessary steps. At the earliest possible moment after publishing the draft

¹ Replaces Working Paper No.3 march 2001.



terms for creating a European Company, management has to approach the workers representatives.

Management of the companies participating in creating a European Company has no interest either in delaying negotiations. No European Company can be registered without a solution for workers involvement (through negotiations or through application of the standard rules).

For more details concerning the publication of draft terms of reference for setting up a European Company, one has to refer to the Council Regulation on the Statute for a European Company (SE) (Re/SE), Art. 20, 21 (draft terms of merger), Art. 32.2, 32.3 (draft terms for the formation of the holding SE), Art. 37.5 (draft terms of conversion). These articles indicate the particulars any draft term shall include and where the draft is to be published. A draft term of merger has to be published in the national gazette of any member state where a company participating in the mergers is registered. The draft terms for the formation of the holding SE and for the conversion "shall be publicised in the manner laid down in each Member State's" national law (Art. 32.3 and 37.5 Re/SE). No indication is given on the publication of the draft terms for the subsidiary SE.

Management has to take the necessary steps

It is thus up to the management or the administrative organs of the participating companies to "take the necessary steps (...) to start negotiations" (Art. 3.1 Dir/SE) What are the necessary steps? The first necessary step is to inform the employees' representatives of the participating companies. Every management informs the workers representatives of its own undertaking on the plans to set up a European Company and request to nominate members for the special negotiating body. This very first information has to be accompanied by "information about the identity of the participating companies, concerned subsidiaries or establishments, and the number of their employees" (Art. 3.1 Dir/SE) This information is different from the draft terms of merger/holding company/subsidiary and has to be given in any case in order to permit workers representatives to gain a clear picture on the future SE and to compose the SNB. The information mentioned in Art. 3.1 has to be precise and complete, otherwise it would be impossible to compose a special negotiating body.

Art. 3.1 Dir/SE obliges the management of the participating companies to take the necessary steps with the representatives of the companies' employees, but does not say whom management has to contact in order to take the necessary steps.

Example

Companies A, B and C decide to merge into a European Company. All three companies have a European Works Council, company A and B have



a Comité de groupe or Konzernbetriebsrat (Group Works Council) respectively, company C has trade union delegations in three of its establishments and no workers representation at all in its fourth establishment.

The Directive leaves it open to national transposition law to define which level of workers representation has to be informed by management. The most logic approach would be to take the necessary steps, i.e. to inform the European Works Council and the highest national workers representation (in our example the group works council). If there is no central workers representation, all existing workers representations have to be informed. If there is no workers representation at all, the employees themselves have to be informed.

Wouldn't it be sufficient to approach just the European Works Council? No, as the Directive puts much emphasis on the need to have at least one workers representative from any country where one of the participating companies is active in the special negotiating body. Not always all the countries are represented in a European Works Council.

The Special Negotiating Body

Next step after the initial communication from management is the creation of a special negotiating body. A special negotiating body is already mentioned in the EWC-Directive. The composition of the SNB who has to negotiate on workers involvement in the SE is different.

Art. 3.2. a – b of the Dir/SE gives the particulars. There is one representative per country in which the participating companies have employees, there are additional representatives according to the size of the workforce and there are some special provisions in the case of an SE created by way of merger.

Composition of the SNB

The first principle to be taken into consideration is thus: any country in which the participating companies have employees is entitled to send at least one representative into the SNB. The language of the Directive is somewhat complicated, but this is the basic message. Art. 3.2.a.i Dir/SE says that members of the SNB are appointed or elected "by allocating in respect of a Member State one seat per each portion of employees employed in that Member State which equals 10% or a fraction thereof".

The first and most important step for the calculation of how many members can be nominated to the SNB is thus to determine the overall number of employees of the future SE. The task should be rather easy, as management of the participating companies is obliged to give the respective information for their companies. By adding the figures workers representatives get the overall manpower of the future SE. For 10% or a fraction thereof one representative can be sent into the SNB.



Example

Companies A and B decide to create an SE-holding. Company A has 3000, company C 4000 employees, which makes a total of 7000 employees for the SE. For every 10% (700) or fraction thereof one seat is allocated per country in the SNB.

Country	Company A	Company B	Total per country	Seats in the SNB
Belgium	1000	500	1.500	21% = 3 seats
France	30	90	120	1,7% = 1
Spain	5000	320	5320	76% = 8
Luxemburg	40	20	60	0,85% = 1
Total				13

Composition of the SNB if the SE is created by way of merger

There are special provisions in the case a European Company is created by way of merger. Further additional members from each Member State may be nominated to the SNB to ensure that the SNB includes from every member state at least one representative per company that is participating in the merger and has employees in the respective country (Art. 3.2.a.ii Dir/SE). There is however a ceiling for such additional members. Their number shall not exceed 20% of the number of "regular" members of the SNB.

Let's take the example we have just given above and let's imagine companies A and B merge into a European company. First step in composing the SNB is then the same procedure as explained above, with exactly the same results.

Example, step I

Companies A and B decide to merge into a SE. Company A has 3000, company C 4000 employees, which makes a total of 7000 employees for the SE. For every 10% (700) or fraction thereof one seat is allocated per country in the SNB.



Country	Company A	Company B	Total per country	Seats in the SNB
Belgium	1000	500	1.500	21% = 3 seats
France	30	90	120	1,7% = 1
Spain	5000	320	5320	76% = 8
Luxemburg	40	20	60	0,85% = 1
Total				13

Step II

Is every company represented in the SNB? Belgium employees are entitled to nominate three representatives to the SNB; no difficulty to have employees from company A and B. France however is entitled to 1 seat in the SNB. According the Art. 3.2.a.ii, France will get a second seat to insure that representatives from both companies, A and B, have a seat in the SNB. Spain is entitled to 8 seats, no difficulty to consider both companies. Luxemburg is entitled to one seat only, according to Art. 3.2.a.ii, one additional seat is given to Luxemburg.



Step III

There are thus 13 seats and 2 additional seats. The number of additional seats does not exceed 20% (= 2,6) of "regular" members. The SNB has in total 15 members.

Country	Company A	Company B	Total per country	Seats in the SNB	Additional Seats in the SNB	Total
Belgium	1000	500	1.500	21% = 3 seats	None	
France	30	90	120	1,7% = 1	1 additional seat	
Spain	5000	320	5320	76% = 8	None	
Luxemburg	40	20	60	0,85% = 1	1 additional seat	



Total				13	2	15
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What happens, if the number of additional members exceeds by 20% the number of "regular" members of the SNB? A choice has to be made. Not all companies will be able to send employee representatives to the SNB. The choice is made according to the following principal: additional seats are allocated by decreasing order of the number of employees.

Example
Companies A, B, C, D, E and F decide to merge and to create a European Company. The distribution of employees is the following:

Company	Employees in Germany	Employees in France	Employees in the UK	Total
A	1.000	10.000	4.000	15.000
B	900	900	3.000	4.800
C	800	800	2000	3.600



D	600	7000	1.000	8.600
E	500	6000	5000	11.500
F	500	5000	9000	14.500
Total employees	4.300	29.700	24.000	58.000
Seats in the SNB	7,4 % of employees = 1 seat	51,2% of employees = 6 seats	41,37%% of employees = 5 seats	12
Additional Seats in the SNB according to Art. 3.2.a.ii Dir/SE	1	Nil	1	2
Total seats	2	6	6	14 seats



in the SNB				
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Is every company participating in the merger represented in the SNB? There are six companies altogether. The French employees have six seats in the SNB; there should thus be no need to send additional representatives. The UK employees have five seats; they need one additional representative to cover all six companies. One additional representative given to them does not exceed 20% of the number of members. German employees have 1 seat in the SNB. In order to cover all companies, they would need five additional representatives. This would exceed the total of 20%. Just one additional seat is possible. This additional seat will be given to the company with most employees, unless there is already a representative coming from this company, in which case the employees from the company with the second biggest number of employees are entitled to nominate an additional representative.

One might argue, that French and British representatives heavily dominate the SNB. The composition of the SNB corresponds, however, to the composition of the workforce. German employees represent 7,4% of the employees, 2 seats in the SNB corresponds to that share.

Election or appointment of SNB-members

Member States determine the method to be used for election or appointment of the members of the SNB. Member States "may provide that such members may include representatives of trade unions whether or not they are employees of a participating company" (Art. 3.2.b Dir/SE)

Representatives of Trade Unions can thus become member of the SNB, if such a provision is incorporated into national law transposing the Directive on workers involvement in the SE.

Task of the SNB

The task of the SNB is to negotiate with the competent organs of the participating companies and to determine "by written agreement, arrangements of the involvement of employees within the SE". (Art. 3.3. Dir/SE)

The arrangements the SNB shall determine are arrangements for

- Information
- Consultation
- Participation

Experts to assist the SNB



For the purpose of negotiations, the SNB “may request experts of its choice”, for example representatives of European Industry Federations. (Art. 3.5 Dir/SE) The right to call in experts is a right any SNB disposes. This right has to be mentioned in any national transposition law. It’s of course up to the decision of every SNB to use or not to use this right (for this reasons the Directive says “the SNB may request” experts). Such experts may, at the request of the SNB, be present at the negotiating table. The decision whether to bring an expert along with to the negotiating table or not is up to the SNB.

The SNB may decide to inform European Industry Federations on the start of negotiations. (Art. 3.5 Dir/SE)

Obligations of the competent authorities vis-à-vis the SNB

The competent bodies of participating companies have a series of obligations vis-à-vis the SNB. They “shall inform the special negotiating body of the plan and the actual process of establishing the SE, up to its registration” (Art.3.3 Dir/SE) and they “shall negotiate in a spirit of cooperation with a view to reaching agreement on arrangements for the involvement of the employees within the SE” (Art. 4.1 Dir/SE)

Timetable for negotiations (Art. 5)

Negotiations “shall commence as soon as the special negotiating body is established” (Art. 5.1 Dir/SE). As soon as all the members of the SNB are know, negotiations have to start. They may continue for six months. SNB and competent bodies of participating companies may jointly decide to prolong negotiations for further six months. (Art.5.2 Dir/SE)

The agreement

The agreement has to be concluded in writing and has to specify a series of points:

The scope

For the sake of clarity, the scope of the agreement should be mentioned. There is no choice as such concerning the scope, all employees of the future SE have to be covered.

Composition, number of members and allocation of seats on the representative body

The representative body is the body for information and consultation of workers. Its composition, the number of its members, the allocation of seats have to be mentioned in any agreement. The SNB is free to choose the composition, the size and the way in which seats are allocated.



The functions of the Representative Body and the procedure for information and consultation

Financial and material resources allocated to the representative body

Substance of arrangements on participation, including the number of members in the SE's administrative or supervisory body

Procedure for renegotiation of the agreement (Art. 4.2 Dir/SE)

The legislation applicable to the negotiation is the legislation of the member state in which the registered office of the SE will be located. (Art. 6 Dir/SE)

Negotiations on information and consultation

These negotiations will not be much different from those on the creation of a European Work Council. Here we there the main topics to be solved are: composition of the representative body, its rights, the topics for information and consultation, links with national representatives, role of experts, working facilities for members of the representative body, frequency of meetings with the competent authority of the SE, frequency of meetings among the workers representatives. The SNB in a European Company, however, has to be even more attentive than an SNB negotiating the creation of a European Works Council. A European Works Council may work with three meetings a year; a workers representation within an SE certainly needs more than that.

Negotiations on participation

Art. 4.2.g Dir/SE stipulates that "if during negotiations the parties decide to establish arrangements for participation", such arrangements shall include "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".

The decision on the structure of the SE, whether it will be a monistic structure with a board of Directors or a dualistic structure with a board and a supervisory council, is taken by the competent authorities of the participating companies. The structure of the SE is no part of negotiations between SNB and competent authorities. What the SNB has to negotiate is the number of employee representatives within the given structure. What the SNB has to negotiate and to fix in an agreement as well is the way in which the employee representatives, lets say in a supervisory council, are elected. The workers representative body could for example nominate them. And they could be elected in a general election of all employees (very expensive procedure!). Once the SNB has reached agreement with the competent authorities on how many members workers are entitled to



elect to the lets say supervisory council, these members have the same rights as the other members elected by shareholders.

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