



**Employee involvement in  
the SE  
Working paper No. 4/2  
Employees' representative  
body or EWC  
Brussels, 21.11.2001**

**Employee Representation in the  
European Company<sup>1</sup>  
Either the Employees' Representative Body<sup>2</sup>  
or the European Works Council  
A weakening of the employees' and their representatives'  
information and consultation rights ?**

October 2001, after 30 years' discussion, the Council Regulation on the Statute for a European Company (SE) and the Council Directive supplementing the Statute for a European Company with regard to the involvement of employees were adopted. As shown below, that will have a number of effects related to the creation of a European Works Council within the SE. In this context, Article 13 of the Council Directive supplementing the Statute for a European Company with regard to the involvement of employees (hereafter referred to as the Dir/SE), which reads as follows, is decisive:

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/EC extending the said Directive to the United Kingdom, the provisions of these

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<sup>1</sup> On the one hand there is the Council Regulation on the Statute for a European Company (SE) and, on the other, the Council Directive supplementing the Statute for a European Company with regard to the involvement of employees. The two texts are indissociably linked. This working paper only deals with the Directive, which is the document containing the relevant proposals. Both texts are quoted in the version adopted by Council.

<sup>2</sup> The representative body is the body representative of the SE's employees (see Article 2(f) of the Dir/SE) ie. the SE employee representatives

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.

The first sentence of Article 13(1) provides that the Directive on the establishment of a European Works Council (hereafter "EWC") does not apply, with the effect that a European Works Council cannot be established in a European Company (hereafter "SE").

The exception is where the special negotiating body (hereafter the "SNB") of the SE decides not to open negotiations or to terminate negotiations already opened. In that case, a European Works Council may be established (see the second sub-paragraph of Article 13(1)).

Therefore, as intended by the European legislator, an SE can have either a European Works Council, or a representative body – not both.

That raises a doubt on the consistency of the legislation in the light of the rights to involvement of employees in Community-scale undertakings or groups of undertakings, since under the SE Directive, the SE can have one body or the other but not the two together. To determine whether that

entails a weakening of the rights of employees and employee representatives within an SE, EWC and SE information and consultation procedures are compared as far as possible in the chart below:<sup>3</sup>

<b>EWC-Directive Negotiation and agreement rules</b>	<b>Dir/SE Negotiation and agreement rules</b>
<p><b>Composition of the SNB</b> 1 member per each Member State with one or more establishments; additional members in proportion to the number of employees in the establishments; minimum 3 maximum 17 (Article 5(2) b and c))</p>	<p><b>Composition of the SNB</b> Cf. working paper No. 3/2 (SE)  [Oct.2001]</p>
<p><b>SNB rights</b> Agreement covering the establishment of a European Works Council(s) or arrangements for information and consultation (Article 5(3))</p>	<p><b>SNB rights</b> Agreement for the involvement of employees within the SE – Article 3(3)</p>
<p><b>Content of agreement – Article 6</b> Scope of the agreement;  composition, number of members of the EWC;  allocation of seats and term of office;  functions and procedure for information and consultation of the EWC;  venue, frequency and duration of meetings of the EWC;  financial and material resources to be allocated to the EWC;     duration of the agreement and procedure for its re-negotiation.   Joint decision with central</p>	<p><b>Content of agreement – Article 4</b> Scope of the agreement;  composition, number of members of representative body;  allocation of seats;  functions and procedure for information and consultation of the representative body;  frequency of meetings of the representative body;  financial and material resources to be allocated to the representative body;  date of entry into force of the agreement,  its duration and procedure for re-negotiation,  joint decision to establish one or more</p>

<sup>3</sup> Passages are not always quoted verbatim – generally only the essential is indicated.

management to establish one or more information and consultation procedures instead of a EWC, and procedures for employees' representatives.	information and consultation procedures instead of a representative body and arrangements for implementing those procedures;  joint decision to establish arrangements for participation, including the number of members in the SE's administrative or supervisory body which the employees will be entitled to elect, appoint, recommend or oppose
<b>Duration of negotiations</b> Up to 3 years <sup>4</sup>	<b>Duration of negotiations</b> 6 months, extension possible by joint agreement up to 1 year (Article 5)
<b>Subsidiary requirements</b> Apply where: - the central management and the special negotiating body so decide, or - the central management refuses to commence negotiations within six months of the request - after three years from the date of this request, they are unable to conclude an agreement as laid down in Article 6 and the special negotiating body has not taken the decision provided for in Article 5(5). <sup>5</sup> ..	<b>Standard rules</b> Apply where - the parties so agree; or - no agreement is concluded by the deadline <sup>6</sup> in Article 5, and: - the competent organ of each of the participating companies decides to accept application of the standard rules in relation to the SE and so to continue with registration of the SE <sup>7</sup> ; and - the SNB has not taken the decision provided in Article 3(6). <sup>8</sup>
<b>Content of subsidiary requirements</b>	<b>Content of standard rules</b>
Election or appointment in accordance with national legislation and/or practice (1(b))	Election or appointment in accordance with national legislation and/or practice (Part 1(b))
Competence of the EWC: information and consultation on the matters which	Competence of the representative body: questions which concern the SE itself

<sup>4</sup> This must be concluded accordingly from the third indent of Article 7(3).

<sup>5</sup> Article 5(5): decision, by at least two-thirds of the votes, not to open negotiations or to terminate the negotiations already opened.

<sup>6</sup> 6 months or, by joint agreement, up to 1 year.

<sup>7</sup> In absence of such an agreement, an SE cannot be registered.

<sup>8</sup> Decision, by at least two-thirds of the votes, not to open negotiations or to terminate the negotiations already opened; furthermore, in the case of transformation, merger, or establishment of an SE through a holding or a subsidiary, there are certain exceptions as regards the applicability of standard rules (see Article 7(2)). The details of those exceptions will not be considered here since they go beyond the scope of this paper: a separate working paper will be established for the exceptions.

<p>concern the Community-scale undertaking or Community-scale group of undertakings as a whole or at least two of its establishments or group undertakings situated in different Member States. (1(a))</p> <p>EWC entitled to meet with the central management once a year, to be informed and consulted, on the basis of a report drawn up by the central management, on the progress of the business of the Community-scale undertaking or Community-scale group of undertakings and its prospects. The local managements shall be informed accordingly.</p> <p>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 organization, 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. (Point 2 of the subsidiary requirements).</p> <p>Meeting for information and consultation to take place as soon as possible in case of exceptional circumstances.<sup>9</sup></p>	<p>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 (Part 2(a))</p> <p>Representative body 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 on the progress of the business of the SE and its prospects; competent organ of the SE to 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; the meeting relates 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 (Part 2(b) of the standard rules)</p> <p>The representative body is entitled to information in case of exceptional circumstances and has the right to meet at its request the competent organ of the SE to be informed and consulted, as well as the right to a further meeting with the competent organ of the SE with a view to seeking agreement if the competent organ decides not to act in accordance with</p>
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<sup>9</sup> For details, see point 3 of the subsidiary requirements annexed to the EWC Directive.

<p>Right of the EWC to inform the representatives of the employees of the establishments of the content and outcome of the information and consultation; right to be assisted by experts of its choice; EWC to be provided with the necessary financial and material resources (Points 5 to 7 of the subsidiary requirements).</p>	<p>the opinion of the representative body.<sup>10</sup></p> <p>Right of the representative body to 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; right to be assisted by experts of its choice; SE to provide the necessary financial and material resources, right to time off for training without loss of wages (Part 2 (d) to (h) of the standard rules)</p>
<p><b>Definitions in the EWC Directive</b></p>	<p><b>Definitions in the SE Directive</b></p>
	<p><b>Involvement of employees:</b> any mechanism, including information, consultation and participation, through which employees' representatives may exercise an influence on decisions to be taken within the company (Article 2(h))</p>
	<p><b>Information:</b> Information 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 (Article 2(i))</p>
<p><b>Consultation</b> The exchange of views and establishment of dialogue between employees' representatives and central management or any more appropriate level of management (Article 2(1)(f))</p>	<p><b>Consultation</b> 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; time, manner and content must allow 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 (Article 2(j))</p>

<sup>10</sup> For details, see part 2c of the standard rules in annex to the Dir/SE.

	<p><b>Participation<sup>11</sup></b>  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, appoint, recommend or oppose members (Article 2 (k))</p>

It must be observed that the EWC and SE Directives are very similarly formulated as regards training, the rights of the SNB and the right to information and consultation of employee representatives. Both directives provide the possibility for the SNB and management to conclude an agreement on information and consultation of employee representatives.<sup>12</sup> Both directives prescribe virtually almost the same minimum content for that agreement.

Both Directives provide that, under certain conditions, standard rules<sup>13</sup> are to apply in the event negotiations fail.

The obligations for management under the Dir/SE go beyond those set out in the EWC Directive in so far as SE standard rules require management to inform the SE employee representatives<sup>14</sup> on a regular basis and to provide them with the documents submitted to the – at least annual – general meeting of its shareholders.

Although the EWC Directive subsidiary requirements require a meeting to take place as soon as possible in case of exceptional circumstances, while the SE Directive's standard rules merely call for a meeting to be held, without specifying "as soon as possible", that "deficiency" is compensated by the fact that under the Dir/SE, in case of exceptional circumstances, the parties must seek agreement.<sup>15</sup> Therefore, under the standard rules of the Dir/SE the employees' representatives and management must meet and seek to reach agreement, while under the subsidiary requirements of the EWC Directive there is no reference at all to an agreement.

Under the standard rules, as under the subsidiary requirements, the two bodies have the right to inform the employees' representatives in the establishments and, where appropriate, to be assisted by experts of their choice. Both bodies are also entitled to the necessary financial and material resources.

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<sup>11</sup> Stipulated in certain cases, see the text of the Dir/SE. This comparison does not cover the participation rules under the Dir/SE since there are no such rules in the EWC Directive. Participation rules will be covered in the working paper to be drawn up on standard rules.

<sup>12</sup> The EWC or the representative body, as the case may be.

<sup>13</sup> Called "Subsidiary Requirements" in the EWC Directive.

<sup>14</sup> = representative body.

<sup>15</sup> Note: this can only refer to an agreement on the effects, procedures, etc..

Contrary to the EWC Directive, which does not define the meaning of the term "information",<sup>16</sup> the Dir/SE gives a definition, specifying simultaneously that the representative body must be allowed to undertake an in-depth assessment of the possible impact.

The definition of the term "consultation" in the Dir/SE goes well beyond that of the EWC Directive: in the Dir/SE it is expressly stated that the consultation must be such as to allow the representative body, respectively the employees' representatives, to express an opinion which may be taken into account in the decision-making process.<sup>17</sup>

In summary, the fact that the European legislative body responsible for the directive has prescribed that a European Company can have either a representative body or a European Works Council but not the both together does not weaken the rights to involvement of employees and their representatives.

That conclusion is also true in the case of agreements reached under the SE Directive since the SNB<sup>18</sup>, which is responsible under the SE Directive for negotiating such agreements with management, can certainly turn to account the negotiating experience acquired under the EWC Directive by contacting the employee representatives participating in EWCs with a view to obtaining assistance, exchange of experience, etc.

It has to be pointed out that the comparison made above refers to information and consultation only. The respective rules in Dir/SE are clearer and better. In addition, Dir./SE contains rules on participation that are not included in the EWC-Directive. If no representative body is formed in the SE, if only a European Works Council continues to exist, no participation rules will apply to the SE, which is of course a weakening of workers rights. The Special Negotiating Body should try all possible means to create a representative body in the SE and to get participation rights. Thorough preparations will be necessary for the Special Negotiating Group and the negotiations itself will be tough. It may well happen that company management intends maintaining the existing European Works Council to get rid, wherever possible, of participation. A good preparation of the Special Negotiating Body is necessary in order to get participation rights.

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<sup>16</sup> It is well-known that the ETUC has requested such a definition in the context of the revision of the EWC Directive.

<sup>17</sup> In the context of the revision of the EWC Directive, the ETUC has requested a similar extension of the definition of the term "consultation".

<sup>18</sup> European Industry Federations and national trade unions, together with workplace representatives, can certainly give many help. The SNB in the SE should not fail to use this opportunity. The SNB can also ask the ETUC for advise.