



**Employee involvement in the
SE
Working paper No. 7
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**Transposition of the directive on worker involvement in the
European Company [SE] into national law**

The directive supplementing the statute for a European Company with regard to the involvement of employees has to be incorporated by member states into national law by 8 October 2004 at the latest, or, by this date, member states have to ensure that social partners have set up the necessary legal requirements by agreement [Art. 14.1]. In a number of cases, the directive requests member states, to shape certain provisions in national legislation. In other cases the Directive the directive provides member states with the possibility of incorporating or not certain regulations. Such cases will be clarified below.

**Election or appointment of members of the Special Negotiating
Body**

Art. 3.2.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

Member states determine in detail the method to be used for election or appointment of members of the Special Negotiating Body, as who can propose candidates and who elects or appoints. This is particularly important if there are several committees [Works Council, Company Works Council, Group Works Council in Germany, "comité d'entreprise" and "comité de groupe" in France]. Member states must establish how the committees co-operate in terms of the election or nomination. Since the number of seats available on any one Special Negotiating Body is limited, it can happen that worker representations from various companies participating in the foundation of the SE have to share a representative. The transposition law must establish how, in such a case, employee representatives together carry out the election or appointment of a



member of the Special Negotiating Body. Member states do this in accordance with their national laws and practice. Member states will also have to establish how to proceed in terms of election or appointment to the Special Negotiating Body when no employee representation exists.

Composition of the Special Negotiating Body

Art. 3.2.b: 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.

On the one hand, Member States shall ensure, that from each company participating in the creation of the SE which has employees in the Member State concerned, there is at least one worker representative in the special negotiating body. On the other hand; however, such measures must not increase the overall number of members. This can be understood only in conjunction with art. 3.2.i, regulating the distribution of seats on the Special Negotiating Body for companies participating in the formation of the SE. According to this article, for each 10% or fraction thereof of the total number of employees in all member states there is one seat on the Special Negotiating Body. When an SE is formed, it can happen that not all participating companies are entitled to their own seats, for example, when, from any one country, a large company with many employees and several small companies with few employees participate in the formation of an SE.

The total number of members on the Special Negotiating Body may not, however, be increased by these measures, which means, that member states may not create any additional seats beyond the total number of members of the Special Negotiating Body. They can only make provision for an alternative sharing out, beyond the strict application of the proportionality principle, of the existing seats allocated to the employees of the companies from any one country.

Art.3.2.b

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.

Members can provide that even such trade union representatives who are not employees of one of the companies participating in the formation of the SE, full-time union representatives for example, are elected or nominated to the Special Negotiating Body. This article has also been included, because in many member states full-time union representatives are members of supervisory councils. Member states can provide for such a provision but they are not obliged to do so. Care must be exercised to ensure that this provision is integrated into national transposition law.



Costs of the Special Negotiating Body

Art. 3.7

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.

Member states can institute special rules for the financing of the work of the Special Negotiating Body. However, these rules must be in accordance with the principle that " 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 tasks in an appropriate manner". National transposition law must respect this general principle. Member states may, however, "limit the funding to cover one expert only" (Art. 3.7.2, last sentence). This rule does is copied from the EWC directive. In transposing the EWC directive into national law, most member states have made use of the discretionary provision and have granted the Special Negotiating Body the right to cover the expense of one expert only. In the opinion of the ETUC, member states are well advised to make not use of this discretionary provision when transposing the directive worker involvement in the SE. The issues at stake in the formation of the SE are more complicated, the negotiation time shorter so that experts with different backgrounds will be necessary in order to bring negotiations to a successful and swift conclusion.

Application of the standard rules

Art. 7.2.c 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.

Participation, according to art. 2.k "means "the right to elect or appoint some of the members of the company's supervisory or administrative organ", as is the case in most of the countries with participation, 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". The latter is the case in the Netherlands, where the supervisory council renews itself by cooptation. In the first case, workers directly elect or appoint representatives, in the second case workers are represented indirectly. It may happen when an SE is created that both forms of participation, the direct and the indirect one, exist in one of the participating companies.



Art. 7.2.c deals with such a situation, but must be seen in conjunction with standard rules, art. 3.b. Art. 7.2.c does not provide the special negotiating body with unlimited possibilities of choice, if there are different forms of participation.

If the negotiations on worker involvement in the SE lead nowhere, and the other conditions are met, [see working paper 5], then the standard rules on employee participation [information, consultation and participation] apply. The standard rules on participation are explained more fully in Part 3 of the SE directive appendix. According to this, "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 members of the administrative or supervisory body of the SE". The number of members of the supervisory or administrative body who can be elected or nominated, or whose nomination can be recommended or rejected, corresponds "to the highest proportion in force in the participating companies concerned before the registration of the SE". (see part 3.b)

As a first step, the Special Negotiating Body must establish in which of the companies participating in the creation of the SE, the highest proportion of worker representatives on the supervisory council or administrative board exists. This proportion is relevant for the number of worker representatives in the supervisory or administrative body of the SE. It may happen that in one of the participating companies workers are entitled to elect one third of the members of the supervisory council and to recommend the election of one third in another company. The share is the same, in one case the representation is direct, in the other case indirect. In such cases the Special Negotiating Body must then decide which form of participation it wants.

What is meant if the Directive says that Member States may provide for special rules in case the special negotiating body has not reached a respective decision. Such rules can, for example, provide that, in countries which have only direct representation on the supervisory council or administrative board, the possibility of recommending or rejection nomination of a proportion of the members of the supervisory council or administrative board is excluded. And similarly the other way round, so that in countries which have only indirect representation [Netherlands], the possibility of direct representation is excluded. However, both of these apply only in cases where the Special Negotiating Body has not reached any decision. The recommendation is that the SNB always takes a respective decision, which primes over a paragraph in national transposition law.



Art. 7.3:

“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” (opting out).

This refers to the case provided for in Art. 7.2, section b, where an SE is formed as a result of a merger. Only in such a case can member states provide that the reference provisions for participation in Part III of the annex [not however, the standard rules on information and consultation in Parts I and II of the annex] do not apply. Such a decision by member states may however result in an SE formed by means of a merger not being able to be registered in this member state. We refer to working paper 2 explaining more in detail the opting out.

Reservation and confidentiality

Art 8.1 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 rules relating to reservation and confidentiality are laid down in Article 8 of the Dir/SE. Art. 8.1 concerns the obligation of members of the Special Negotiating Body, the representative body and the supporting experts, not to reveal any information which has been given to them in confidence.¹ Member states are obliged to incorporate such provisions in their national transposition act. A clarification imposes itself: worker representatives, no matter at which level; are no “third persons” and not concerned by art. 8.2. They are themselves bound by confidentiality rules. To stop the exchange of confidential information, say between the member of the body representing workers and other worker representatives would undermine the principle of information and consultation and run contrary to the objective of the Directive/

Art.8.2 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

¹ Please note that there is an inconsistency in the English text. The German and French text says that members of the special negotiating body or the representative body and the supporting experts are not authorised to reveal any information **to third persons** which has been given to them in confidence. The notion “to third persons” is missing in the English version. It is of utmost importance to correct the English text, as the notion “are not authorised to reveal **to third persons** any information which has been given to them in confidence” does not hinder communication between let's say the representative body and national worker representatives. Such national representatives, themselves bound by national confidentiality rules, are no third persons in the meaning of the Dir./SE.



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."

Art. 8.2 concerns the reservation of information by the administrative body of the SE or a participating company and means that company management shall be entitled not to transmit certain information to the representative body of workers. Member states have to incorporate this into national law. Member States can make use of the possibility of making the secrecy of information "subject to prior administrative or judicial authorisation" (Art. 8.2.2)

In order to limit potential damage care should be taken that member states use the above mentioned option and make the possibility not to transmit information subject to prior administrative or judicial authorisation. In such a procedure company management must give evidence, based on objective criteria, why it does not want to disclose certain information and judicial or administrative authorities could make an objective verification.

Art 8.3:

"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."

Art 8.3 relates above all to media companies, but can be used only by those member states who already had the relevant regulations in their national legislation at the time of adoption of the SE directive [2001]. Only three member states were in this position: Germany, Austria and Sweden. What do these special regulations involve? Certainly not exempt media companies entirely from the scope of application of the Dir/SE and also not the exclusion of media companies from the entire area in which the standard rules apply. It can refer solely to the reservation and confidentiality of information.

Art. 8.4:

"Such procedures may include arrangements designed to protect the confidentiality of the information in question."

Member states **must** provide procedures, either administrative or judicial, by means of which employees can examine whether information is or is not justifiably kept secret. They **can**, on the other hand, decide rules for such administrative or judicial procedures, in order to ensure the confidentiality of the relevant information, and to ensure that the



employees are made aware of the respective information only after the court's decision in their favour, not however already during the judicial procedure. In a certain manner, art. 8.3. and 8.4 tries to repair the damage that potentially may occur through the other provisions of art. 8.

Link of the Dir/SE directive to other regulations

Art.13.4: " 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 rights named in paragraph 3 of Article 13 are " 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". Article 13.3 ensures that rights to be involved [information, consultation and eventual participation rights] arising from national legislation of member states are not affected by the formation of the SE which is created by way of merger

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.

If an SE is formed as a holding company or subsidiary of several companies, then a further European level is created, in addition to the existing structures of worker involvement. National structures of worker involvement remain in existence.

It is different for an SE formed by means of a merger Companies participating in this type of SE cease to exist as independent legal entities after the registration of the SE.

With the dissolution of the companies, the structures for employee involvement at company level also disappear: for example, the "Comité de groupe" or the group works council. Art. 13.4 opens up a *possibility* to keep such worker representations in existence. Member states should therefore absolutely make use of the possibility offered in Art 13.4, as thereby communication within an SE can be considerably improved.

Standard rules

Part 2.d: Member States may lay down rules on the chairing of information and consultation meetings.

Member States can lay down rules who chairs the joint meeting between representative body of workers and competent body (management) of the SE. French Government for example can say that the joint meetings for



the purpose of information and consultation, according to national practice in France, are chaired by the CEO. His authority then only refers to chairing the meeting. Whether the chair of meetings between the body representing workers and the competent organ of the SE should be determined in advance is certainly a matter under consideration. The rule for joint meetings should be to decide by mutual agreement who chairs and to have rotation. From the ETUC perspective the member states should not use the option in art 2.d

Part 2.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 accomodation 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.

Member states can institute special rules for the financing of the work of the Representative Body. However, these rules must be in accordance with the principle that members of that body have to be supplied "with the financial and material resources needed to enable them to perform their duties in an appropriate manner". National transposition law must respect this general principle. Member states may, however, "limit the funding to cover one expert only" (Art. 3.7.2, last sentence). This rule does is copied from the EWC directive. In transposing the EWC directive into national law, most member states have made use of the discretionary provision and have granted the Special Negotiating Body the right to cover the expense of one expert only. In the opinion of the ETUC, member states are well advised to make not use of this discretionary provision when transposing the directive worker involvement in the SE. The issues at stake in the formation of the SE are more complicated, the negotiation time shorter so that experts with different backgrounds will be necessary in order to bring negotiations to a successful and swift conclusion.

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