

Workers' involvement in the SE
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Confidentiality for Special negotiating body, body representing the employees, experts according to Dir/SE and Reg/SE

Article 8 of the Directive/SE governs discretion and confidentiality. Article 8.1 states, "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." ¹

The duty of confidentiality applies to the members of the special negotiating body, the members of the body representing the employees and to the experts who assist them. It means that information given in confidence to the aforesaid employees' representatives and their experts by the competent body of the SE (or, in the case of the special negotiating body, by the competent bodies of the companies participating in the setting up of the SE) must not be passed on to third parties.

This provision does not apply to all the information received by the employees' representatives of an SE, but only to information that has been expressly described as confidential. Art.8.1 does not mention the source of the information that eventually has to be treated confidentially.

¹ Please note that there is an important technical error in the English version of Dir/SE. Whereas the other language versions "provide that members of the special negotiating body or the representative body, and experts who assist them, are not authorised to reveal any information **to a third party** which has been given to them in confidence", the English version of the text omits the notion of "a third party".

It can only be the competent body of the SE or the competent bodies of the companies participating in the creation of the SE. The competent body has to say explicitly to worker representatives and experts supporting them that certain information is confidential.

The competent body of the SE cannot declare just any information to be confidential. Preamble No. 13 emphasises that, “the confidentiality of sensitive information” should be guaranteed. We are thus speaking of “sensitive information”.

Members of the special negotiating body or the body representing workers are requested to respect confidentiality vis-à-vis which group of persons? Confidentiality does not apply among members of the SNB or the Body representing workers. In case the management of one of the companies participating in the setting up of the SE reveals information to one of the SNB-members and requests confidentiality, this information can still be transmitted to all SNB-members. The confidentiality rule in art. 8.1 does not concern the internal communication of SNB-members. The same applies to the communication among members of the body representing workers. In case the local management of an SE-subsiidiary reveal confidential information to somebody sitting in the body representing workers, who is maybe from the very same company, the information can still be transmitted via appropriate channels to the rest of the body representing workers.

Confidentiality does not apply either to the experts assisting the employees’ representatives. They are expressly included in the scope of the confidentiality provision. This also means that all information must be given to the experts. The fact that information has been described as confidential by the competent body of the SE does not constitute grounds for withholding it from the experts as they are themselves bound by the confidentiality rule.

Confidentiality, according to the spirit of Art. 8.1 of the Directive/SE means that it is not permitted “to reveal” to third parties “any information which has been given (...) in confidence”. The national employees’ representatives of the SE are themselves subject to – national – confidentiality regulations. They cannot therefore be regarded as third parties within the meaning of the directive.

The duty of confidentiality exists “wherever the persons referred to may be”. No matter where the members of the SNB or the body representing workers are in a given moment, they have to respect the confidentiality rule.

The duty of confidentiality continues to apply “even after the expiry of their terms of office”. i.e. employees’ representatives in a special negotiating body must continue to preserve the “confidentiality of sensitive information” even after an agreement has ended and the special negotiating body has been dissolved. The same applies to members of the bodies representing the employees after the end of their terms of office and to the experts assisting them after their task is completed.

Article 8.2 gives the supervisory or administrative organ of the SE the possibility of keeping information secret and not passing it on to the employees’ representatives at all. “In specific cases and under the conditions and limits laid down by national legislation,” information does not have to be forwarded “where its nature is such that according to objective criteria, to do so would seriously harm the functioning of the SE”.

Art. 8.2 apparently contains a technical error. Whereas art. 8.1 rules the obligations for worker representatives in a special negotiating body or a body representing workers, art. 8.2 out of sudden mentions that the supervisory or administrative organ may keep information secret. In conjunction with art. 8.4 it becomes clear that information is meant, that is given by the supervisory or administrative body to worker representatives. It is, however, the competent body of the SE, its management, which is responsible for transmitting information to the worker representatives of the SE, and not the supervisory or administrative body. There is apparently a technical error in art. 8.2, which is copied almost literally from the EWC-Directive. Art. 8.2 has to be read like saying that the competent body of the SE, the management, has the right in certain cases not to transmit information to worker representatives.

This right does apply only vis-à-vis the body representing workers or the SNB. It does not apply vis-à-vis worker representatives in the supervisory council or body, which have the right to get all the information they need for their supervising function.

Even vis-à-vis the body representing workers, management cannot withhold just any information. This is only permitted “in specific cases”, in exceptional circumstances and not as current practice.

Conditions and limits for not transmitting information are “laid down by national legislation” of the country where the SE is registered. If national legislation makes such dispensation subject to prior authorisation of judicial authority, the competent body of the SE has to respect the same obligation.

Only such information can be withheld which, if made known, "according to objective criteria" (i.e. criteria that is verifiable and comprehensible) "would **seriously** harm the functioning of the SE (...) or its subsidiaries and establishments or would be prejudicial to them". The mere fact that disclosing certain information would be prejudicial to the functioning of an SE is insufficient grounds for the supervisory or administrative body of that SE to withhold it. The disclosure of information must result in a **serious** harm or prejudice to the interests of the SE.

The Member States may "make such dispensation" from the duty of information and consultation "subject to prior administrative or judicial authorisation". In certain Member States such a provision exists already. It is recommendable to make general use of it at least for the SE, in order to limit the potential damage linked to art. 8.2

Employees' representatives in the supervisory or administrative body

Art. 49 of the Regulation/SE defines the confidentiality to be observed by employees' representatives in the supervisory or administrative body of the SE as follows:

"The members of the SE's bodies shall be under a duty, even after they have ceased to hold office, not to divulge any information which they have concerning the SE the disclosure of which might be prejudicial to the company's interests, except where such disclosure is required or permitted under national law provisions applicable to public limited-liability companies or is in the public interest."

The supervisory or administrative body is a statutory body of the SE. Worker representatives in such bodies have, like all the other members, to respect certain rules, how to deal with information they obtain during their mandate. Members of the supervisory or administrative body have to supervise and control the SE's management, their function gives them far reaching rights to be informed, a confidentiality rules makes thus sense.

Art. 49 Reg/SE stipulates that members of the supervisory or administrative body are not allowed to transmit certain information, but does not stipulate vis-à-vis which group of persons.

Art. 49 Reg/SE certainly does not apply towards the other members of the supervisory or administrative body and applies in to a limited degree only vis-à-vis the body representing workers, which is entitled to be informed on all important developments of the SE and is itself bound by confidentiality. The body representing workers receives the agenda of all meetings of the supervisory or administrative body and is informed

anyway at least on the topics that are discussed. In how far art. 49 limits the communication between worker representatives in a supervisory or administrative body and the workers themselves, has to be decided from case to case. In certain situations (for ex in case of rumours on a takeover or imminent closure already running around), the interests of the company may well demand the disclosure of information.