

**Workers' involvement in
the SE
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Changes in the structure of the SE after the conclusion of an agreement

The following question was put to the ETUC in connection with the formation of a European public limited company (SE) and negotiations on worker involvement in an SE:

"What happens when an SE swallows up a German undertaking that has more extensive participation rights than apply in the SE ? (...) Negotiation recommendations should contain a stipulation to the effect that new negotiations must be held when an undertaking with more extensive participation rights is swallowed up."

We would like to take this question as an opportunity to clarify in principle what happens when an SE in which a participation agreement has been negotiated "swallows up" another undertaking with more extensive participation settlements. In order to clarify this unequivocally, it is necessary not only to look at the individual cases of the formation of an SE, but also to specifically highlight the relationship that exists between the SE and the undertaking with the more extensive participation settlement. Although an undertaking is said to "swallow up" another, that may mean different things: an absorbing or transferring merger as well as a takeover.

FIRST EXAMPLE

SE Harmonia is the result of a merger. It has 8,000 employees, including 3,000 in Belgium, 4,000 in the Netherlands and 1,000 in Germany. The head office of the SE is in Belgium. The SE founders have decided on a

dualistic corporate model with a board of management and a supervisory council. An agreement specifies that the employees be given a third of the seats on the supervisory council of 12 people.

SE Harmonia wants to take over the German undertaking Accordia AG, which has three enterprises with 800, 300 and 1,200 employees respectively and is subject to the co-determination law of 1976. There is equal representation on the supervisory council. SE Harmonia merges with Accordia AG into a new SE, Tremonia. In this case, a special negotiating body must be formed from new in order to negotiate employee involvement in the SE. If the negotiations regarding participation are unsuccessful, art. 7.2.b, first indent, applies. At least 25% of the total number of employees in all the participating companies (in our case even 100%) were covered by participation. Without any further vote of the SNB, the employees of Tremonia SE are given as many seats on the supervisory council or administrative board as they are entitled to according to the most extensive model of the companies involved in the formation of the SE. The most extensive model is the equal representation in Accordia AG. Thus, nothing changes in terms of the "quality" of the co-determination.

SECOND EXAMPLE

SE Harmonia wants to incorporate Accordia AG by means of an absorbing merger. Absorbing merger means that Accordia AG is dissolved (and with it the participation in the undertaking) and is taken up in SE Harmonia. In this case, the employees of Accordia AG would, in future, be represented by the body representing the employees in the SE. They would take part in the elections to this body and in the election of the 4 employees' representatives to the supervisory board of SE Harmonia. The equal representation on the supervisory board is lost however. Participation is weakened.

It must, however, be pointed out that such a weakening of participation because the absorbing undertaking has either no participation model at all or has a weaker one, is also already possible today outside of SEs. Consider, for example, the takeover of Mannesmann by Vodafone.

Art. 11 of the Directive/SE, however, stipulates that the Member States must take appropriate steps in line with the Community legal provisions "with a view to preventing the misuse of an SE for the purpose of depriving employees of rights to employee involvement or withholding such rights".

THIRD EXAMPLE

SE Harmonia has been formed as a holding company. The holding company encompasses a German PLC with 2,500 employees (equal representation), a German GmbH (limited liability company) with 1,100 employees (one third participation in the supervisory council), a British PLC with 10,000 employees (no worker participation in the administrative board) and a French SE with 1,800 employees (also no worker participation in the administrative board). The SE founders have decided on a dualistic corporate model with a board of management and a supervisory council. An agreement specifies that the employees be given a third of the seats on the supervisory council of 12 people.

SE Harmonia takes over the majority of shares in the German undertaking Accordia AG, which has three establishments with 800, 300 and 1,200 employees respectively and is subject to the co-determination law of 1976. There is equal representation on the supervisory council. The takeover of the majority of shares by the holding SE-Harmonia makes Accordia AG a subsidiary of the SE. Nothing changes for the employees of Accordia AG in terms of their participation settlement. Accordia AG continues to be subject to the national (in this case German) co-determination regulations. The Directive/SE expressly does not affect "the provisions on participation in the bodies laid down by national legislation and/or practice applicable to the subsidiaries of the SE" (Art. 13.3.) The undertaking continues to exist together with all participation settlements. The employees of Harmonia AG can, in future, however, also take part in the elections for the employees' representatives to the supervisory board of SE Harmonia. They gain an additional level of participation co-determination.

CONCLUSION

In case an SE takes over another undertaking with more extensive participation rules than those existing in the SE, less participation is not automatically the consequence. All depends from the circumstances of the takeover or merger.