

Frequently Asked Questions (FAQ) on the European Company

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What is a European Company (SE)?

A European Company (SE) is a public limited-liability company which is governed by Community law directly applicable in all member states.

It may only be set up within the territory of the European Community. The conditions for this are laid down in two pieces of legislation: The *Regulation on the Statute for a European Company (SE)* (EC 2157/2001) and the *Directive supplementing the Statute for a European Company with regard to the involvement of employees* (2001/86/EC). Both were adopted by the Council in October 2001.

It is not an obligation for companies to establish an SE but an option.

What does SE mean?

SE is the abbreviation for *Societas Europaea* which is the (formal) Latin name for "European Company". Every company established under the European Company Statute must be preceded or followed by the **abbreviation "SE"**.

From when on is it possible to set up an SE?

The SE Regulation entered into force on **8 October 2004**. By that time EU member states were required to have transposed the Directive into national law. Since that day companies may establish an SE.

How can a European Company (SE) be established?

An SE can be set up in four ways:

- by **merger** of two or more existing public limited-liability companies,
- by formation of a **holding** company by two or more public or private limited-liability companies,
- by formation of a **subsidiary** by two or more companies,
- by **transformation** (conversion) of an existing public limited-liability company

All types of formation share a **cross-border element**: they must always involve companies from **at least two different EU member states**. In the case of a transformation, the company must have had a subsidiary in another member state for at least two years.

The SE must be registered in the same member state in which the **administrative head office** is located.

What are the (expected) advantages of setting up a European Company?

In the eyes of the Commission, the European Company Statute (ECS) “will mean in practice, that companies established in more than one member state will be able to merge and operate throughout the EU on the basis of a single set of rules and a unified management and reporting system. They will therefore avoid the need to set up a financially costly and administratively time-consuming complex network of subsidiaries governed by different national laws. In particular, there will be advantages in terms of significant reductions in administrative and legal costs, a single legal structure and unified management and reporting systems.” The Ciampi Report estimates that savings in terms of administrative costs may be up to €30 billion per year.

Moreover, this new business form may have a value in publicity terms, as it indicates that this company is a “real European undertaking” thereby possibly removing e.g. psychological barriers.

However, this optimistic view is not shared by everyone. Indeed, the attractiveness of the ECS might be reduced because it de facto does not provide for one uniform European corporate form. In all matters that are not regulated by the Regulation, the SE will be governed by the company law provisions of the member state in which the SE is registered. Consequently, there will not be a single SE law but 28 SE laws which may diverge significantly from each other.

What is the relation between the Regulation on the European Company Statute (ECS) and the Directive on employee involvement in the SE?

As the title already suggests, the Directive represents a supplement to the ECS with regard to the involvement of employees. **No SE can be set up without an arrangement for involvement of the employees.**

Did the new EU member states have to adopt this new legislation as well?

Yes. The ten new member states (**Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovak Republic, Slovenia**) which joined the EU in May 2004 had to transpose the Directive, just like the other member states, **before October 2004.**

As **Bulgaria** and **Romania** will join the EU by 2007 at the earliest, companies from these two countries will not yet have the option to set up SEs.

In contrast to this, companies coming from the (non-EU) countries of the *European Economic Area* – i.e. **Iceland, Liechtenstein and Norway** – do have the right to establish SEs. Therefore, these states had to adjust their national legislation as well.

What is understood by “involvement of employees”?

The Directive understands involvement of employees as “any mechanism, including **information, consultation and participation**, through which employees’ representatives may exercise an influence on decisions to be taken within the company” (Art. 2 Dir).

Information stands for the informing of the employees’ representatives on matters which concern the SE (or which concern one of its subsidiaries in another member state or which exceed the powers of the decision-making organs in a single member state). The timing of the information and the manner in which it is supplied must be appropriate and its content adequate.

Consultation signifies the right of the employees’ representatives to express their opinion on measures planned by the SE. The timing, manner and content of this consultation must be such as to ensure that the opinion can be taken into account in the decision-making process.

Participation means the right to elect or appoint some of the members of the SE’s supervisory board (in two-tier systems) or administrative body (in one-tier systems). It may also signify the right to recommend or oppose the appointment of some or all members of these company boards.

What does the procedure look like?

The procedure is similar to that for which provision is contained in the European Works Council (EWC) Directive. Instead of prescribing detailed provisions on how employees have to be involved, the Directive provides for an agreement negotiated between the participating companies and a **special negotiating body** representing the employees. Additionally, it provides for obligatory **standard rules** in cases where the negotiating partners fail to reach an agreement.

There is one major difference with the EWC procedure: **No initiative by the employees is needed**. In fact, it is the management or administrative bodies of the participating companies which have to take the necessary steps to **start – as soon as possible – negotiations** with the representatives of the companies' employees on arrangements for the involvement of employees in the SE.

What is the special negotiating body (SNB)?

The SNB represents the employees in the negotiations with the participating companies in order to reach a written agreement on the involvement of employees in the coming SE. It is created after the companies' managements have announced their plans to establish an SE.

The SNB can request that experts of its choice assist it in its work. In this context, the Directive explicitly mentions the representatives of Community-level trade union organisations.

Who sits on the SNB?

According to Art. 3 II of the Directive, the seats are allocated proportionally among the member states in which the participating companies have employees: **for every 10%** (or fraction thereof) of the total number of employees of the future SE/SE group, the country has the right to send **one member** to the SNB. Thereby, all countries concerned will have at least one representative on the SNB.

In the case of a merger, there are additional seats (but not more than 20% of the total number) to ensure that – if possible – all involved companies are represented in the SNB.

It was up to the member states to decide how their SNB members are elected or appointed. Furthermore, the member states could provide in their national transposition law that **representatives of trade unions** are allowed to become SNB members even if they are not employees of the company (Art. 3V Dir).

What is the “representative body” (RB)?

The representative body is the information and consultation body of the SE (an “SE Works Council”). It is composed solely of employees of the SE. Its composition, rights and financial resources are defined either in the agreement between the SNB and the participating companies or in the standard rules. If the SNB decides not to open or to abort the negotiations, there can be a European Works Council instead of an RB.

How long do negotiations on employee involvement take?

Negotiations are expected to start as soon as possible after the companies embark on plans to set up an SE. They may take up to **six months** and can be extended up to a **total of one year** (after the establishment of the SNB) **if** both parties agree (Art. 5 Dir). For comparison: The EWC Directive allows a time frame of three years maximum.

What can be the result of the negotiations?

There are three possible scenarios:

(1) The SNB decides not to open or to terminate negotiations.

In this case, the national rules on information and consultation of employees enter into force and there will only be a **European Works Council** (Art. 13 I Dir). This option is **not possible in the case of a transformation into an SE** (Art. 3 VI Dir).

(2) The SNB and the competent organs of the participating companies conclude an agreement according to Art. 4 Directive on the involvement of employees in the SE.

The partners have in principle autonomy with regard to the content of the agreement.

(3) The SNB and the competent organs of the participating companies fail to come to an agreement within the time-frame or agree voluntarily on the application of the Standard rules (Dir 7 I).

What is the content of an agreement under Article 4 Dir?

The two parties have a considerable autonomy with regard to the content of the agreement. Nevertheless, the Directive (Art. 4 II Dir) lays down some minimum requirements like

- the scope of the agreement,
- the composition, number of members and allocation of seats on the representative body (RB)
- the functions and the procedure for the information and consultation of the RB,
- the frequency of meetings
- the financial and material resources of the RB
- the date of entry into force and the duration of the agreement.

If the parties have decided to establish board-level participation, the agreement must define the number of employee board members, the procedure for their election or nomination and their rights.

Consequently, the parties can agree to raise or to reduce existing participation rights. In the case of a transformation alone, the agreement must ensure at least the same level of all elements of employee involvement as before (Art. 4 IV Dir).

When are the standard rules applied?

The standard rules are applied if negotiations between the SNB and the competent organs of the participating companies fail. The standard rules cannot be rejected by the participating companies: either all companies accept them or they have to dispense with the SE altogether.

If the SNB has decided not to open or to abort negotiations, the standard rules are not applied. On the other hand, the two parties may decide on a voluntary basis to apply the standard rules.

Furthermore, the **standard rules for participation** are compulsory only if at least one of the companies was previously governed by participation rules. They are automatically introduced when at least 25% (merger SE) or 50% (holding/subsidiary SE) of the employees previously had participation rights (Art. 7 II Dir). If this threshold is not met, the SNB can decide to apply them anyway.

What is the content of the standard rules?

The standard rules regulate information, consultation and participation. The member states must lay down standard rules which are in line with the standard provisions defined in the Directive's Annex. The standard rules of the country in which the SE is to be headquartered will be applied.

The Directive contains general provisions on the standard rules (thereby limiting the options of the member states):

- Part I: composition of the representative body (RB)
- Part II: information and consultation
- Part III: (board level) participation

Overview of the main provisions:

(Part I) An RB is created for information and consultation. Its members are appointed or elected in accordance with the national legislation and practice. **For every 10%** of the total number of employees (or fraction thereof), a member state has the right to send **one member to the RB**. Thus, all countries concerned will have at least one representative in the RB. The RB is to form a select committee from among its members. After four years, the RB examines whether negotiations on an agreement (Art. 4 Dir) are to be opened or whether the standard rules should stay in force.

(Part II) The standard rules foresee the right to be **informed and consulted** on the basis of regular reports drawn up by the competent organ on the progress of the SE's business and its prospects. The RB receives the agenda of the Supervisory Board or Board of Directors' meetings and a copy of all documents submitted to the general meeting of its shareholders. There must be at least one annual meeting with the competent organ. In exceptional circumstances (e.g. in the case of relocations, transfers, collective redundancies), the RB can demand an extraordinary meeting. If the competent organ thereafter decides not to act in line with the RB's recommendations, the latter may request a further meeting in order to seek an agreement.

The workers' representation is entitled to a preparatory meeting prior to each meeting with SE management.

The RB has the right to ask for support through experts of its choice. These costs and the general costs of the RB are borne by the SE. Many member states have limited the funding obligation of the company to a single expert. The members of the RB have the right to time off for training without loss of wages.

(Part III) Participation: in the case of an SE established by transformation, all prior participation rules remain applicable to the SE. In all other cases, the employees are entitled to elect or appoint some board members. Their number is equal to the highest proportion existing before in one of the companies. Their selection is made by the RB (according to the proportion of the SE's employees in each member state). However, the member states could determine the allocation procedure for the seats on the administrative or supervisory board given to employee representatives from their country. The board members

appointed by the employees must have the same rights and duties as those that are appointed by the shareholders.

What are the decision-taking majorities within the SNB?

In general, the SNB takes its decisions (e.g. to conclude an agreement) by an absolute majority of its members which must also represent the majority of the employees. Each member has one vote.

However, if the decision should lead to a **reduction of participation rights**, a **double 2/3 majority** is required, i.e. at least 2/3 of the SNB members representing 2/3 of the employees. Moreover, the votes must come from at least two different countries. These high requirements are needed only when participation covered 25% (merger) or 50% (holding/subsidiary) of the employees. (Reduction of participation rights means a proportion of board members which is lower than the highest proportion existing within the participating companies)

A double 2/3 majority is also needed if the SNB decides not to open or to terminate negotiations.

Who pays the costs of the special negotiating body (SNB) and the representative body (RB)?

Costs of both these bodies have to be borne by the SE. With regard to the SNB's and the RB's right to request experts to assist them with their work, most member states limited funding to one expert.

What is the relation to the European Works Council Directive?

An SE can have either a European Works Council, or a representative body (RB) but not both. An EWC is established only if the SNB decides not to open or to abort negotiations. In all other cases an RB is created as the transnational information and consultation body of the SE.

What happens to national information, consultation and (board-level) participation rights?

The SE Directive does not touch on national information and consultation rights. The "SE Works Council" (representative body) does not replace an existing national works council or trade union representation. Instead it creates an **additional level** of transnational information and consultation rights. In general,

this is also the case for board-level participation rights. If, for example, an SE is set up in the form of a newly founded holding SE on top of the national subsidiaries the board representation in the national subsidiaries remains untouched. However, if a national subsidiary ceases to exist as a legal entity the board-level participation ceases as well. In this case national information and consultation rights might be affected, for example, if a central or group works council had existed previously. The member states had the option to lay down a provision in their transposition laws that these representation structures be maintained after the registration of the SE.

Another exception is the **transformation** of a national public limited company into an SE. Here the participation scheme on the SE board replaces the former national representation scheme.

Is there a risk of losing existing participation rights? Can the SE be misused to avoid participation rights?
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The Directive tries to ensure that the establishment of an SE is not misused to evade participation or other involvement rights. The Directive states that the “member states shall take appropriate measures with a view to preventing the misuse of the European Company for depriving employees of rights to employee involvement or withholding such rights”. Most member states have included wording along these lines in their national SE law.

Moreover, an SE set up by **transformation** must ensure at least the same level of all elements of employee involvement as before (Art. 4 IV Dir).

In the other cases, there are three scenarios where participation rights might be lost or reduced:

1. If the SNB decides not to open or to terminate negotiations.
2. If, in the agreement, the SNB agrees not to introduce or to reduce existing participation rights,
3. If, in the case of application of the standard rules, the SNB decides not to include, or to reduce, existing participation rights.

However, the Directive is not very clear with regard to **what happens once the SE has been established**. Consequently, there might be a danger that participation rights could be lost at a later time - e.g. if an SE without board-level participation were to acquire another company having participation. Some countries have included a time period (generally one year) within which an SE must prove, on the introduction of substantial structural changes, that the intention was not to deprive employees of their rights (see also the question on structural changes).

Some companies have tried to register themselves as **an SE without having any employees at the time of foundation** and therefore with no need to set up an SNB. The problem is that at a later stage employees might be transferred into this “shell (employee-free) company” without the need to start negotiations. Besides the fact that this would be considered in many cases as a misuse of the

Directive (with the corresponding legal consequences) there are also strong legal concerns about whether the registration of employee-free SEs is in accordance with the provisions laid down in the SE statute. The Regulation clearly states that an SE may not be registered unless an agreement on employee involvement has been concluded (or unless the SNB decides not to start or to abort the negotiations). In any case, an SNB needs to be established. An SE cannot be set up without any negotiations taking place simply because there were no employees. This is also the conclusion of a legal opinion commissioned by the German Hans Böckler Foundation. In Germany, a district court for this reason recently refused to allow the entry of an **employee-free SE** in the register of companies.

Will there be new negotiations in the case of structural changes?

This is a crucial question, particularly, for example, if an SE without board-level participation later on acquires a company which does have employee representation on its board. The Directive prescribes that the agreement concluded between SNB and management must describe the cases in which the agreement should be renegotiated and the procedure for its renegotiation (Art. 4 I h Dir). Therefore the SNB should pay attention to this point in order to be able to react to important structural changes. In addition, some of the member states have inserted rules in their national transposition laws that explicitly state that the employee side can ask for a renegotiation of the agreement if there are substantial structural changes after the creation of the SE which have had a considerable effect on employee involvement.