



Country report: (3) Transposition Process

Hungary

**The Hungarian Transposition of the European Company (SE) Statute and the
Directive on Employee Involvement in the SE**

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Hungary transposed both Regulation 2157/2001/EC and Directive 2001/86/EC by means of Act XLV of 2004 by unanimous vote in Parliament on 24 May 2004. The Act was promulgated on 28 May 2004 and will come into effect on 8 October 2004. Hungary seems to have chosen the legislative mode of transposing the Directive on employee involvement in the SE rather than via an agreement between the social partners.

Prior to being submitted to the Parliament, however, the draft bill was discussed by the plenary meeting of the tripartite National Interest Reconciliation Council ([Országos Érdekegyeztető Tanács](#), OÉT) on 27 February 2004. The plenary meeting's decision sent the proposal back to the joint session of the Economic and Legal Committees of the Council, which then held a second round of debates on the bill.

This relatively early adoption can be explained by the fact that the Hungarian legislature usually has a long summer break, and inclusion of the debates in the Parliament's autumn agenda would have jeopardised appropriate preparations, first of all by the courts of registration, by 8 October 2004. This is the first time EU regulations have been transposed at the same time as the "old" member states: previously, legal harmonisation had meant the en masse transposition of existing EU legislation.

Basically, the government's approach was to create a favourable business climate, establishing the simplest possible rules for setting up and running companies, in particular the headquarters of SEs, in Hungary. As the political state secretary at the justice ministry stressed in his Parliamentary speech, "in this case national rules constitute an issue of competitiveness", as effective and flexible rules may have a favourable impact on incoming foreign investment and thus on job creation in the context of the Single European Market. He also stressed that transposition of the European Company Statute would be a useful experience in view of future development of Hungarian company law.

As far as the directive on employee involvement is concerned, the government's draft bill relied heavily on the rules established by the earlier transposition of the European Works Council directive, and also made reference to those sections of the Labour Code of 1992 which regulate the functioning of works councils, as well as certain aspects of trade union functioning within companies, and to existing board-level employee representation laid down in company law (CXLIV Act of 1997 on Business Companies).

Relevant regulations on domestic companies

By and large, Hungarian company law follows the logic of the relevant German legislation, and thus the customary form of corporate governance for domestic companies is the two-tier system. Along with the Management Board, a Supervisory Board must be established at all joint stock companies and at limited liability companies above a certain size. The role of the Supervisory Board, however, is limited to monitoring management activities on behalf of the shareholders. Thus, the legal entitlements of Hungarian supervisory boards are rather weak; nonetheless, if specifically authorised by the shareholders' meeting, the Supervisory Board can make decisions on the appointment, dismissal and remuneration of the Management Board, and approve any other legally binding agreement concluded by the management.

In companies with over 200 employees one-third of the Supervisory Board must consist of employee representatives, who are delegated by the company's works council or central works council following consultations with the company trade union. Any employee can be delegated, and the law does not rule out delegation of a manager who is in a position to hire, fire and sanction employees (to exercise employer's rights). Such board-level representation is obligatory in both state-owned and private companies, and the rights and duties of employee delegates are basically the same as those of members elected by the shareholders (Act CXLIV of 1997, Article 36).

Works councils were introduced in the Labour Code of 1992. In Hungarian dual representation statutory works councils were integrated into a national industrial relations system based on decentralised workplace-level bargaining, traditionally carried out by workplace unions. No wonder the new institution met the fierce opposition of union confederations at top-level political negotiations. As a result of political compromises between the government and the social partners, the responsibilities of works councils and workplace trade unions became rather confused in Hungarian labour law. In the course of the 1990s, unions developed a controversial relationship with works councils: at the majority of companies, unions have come to dominate works councils or have made them largely redundant. Recent surveys show that works councils operate only in larger companies where there is also a workplace trade union organisation, and they do not function as an institutionalised channel of employee representation at non-unionised firms. The union-works council relationship took a new turn in the period between 1998 and 2002 when the right-wing government reinforced the legal position

of works councils, which was seen by the unions as an attempt to weaken them. After winning the 2002 elections, however, the Hungarian Socialist Party-led coalition – which enjoys the support of a large number of important unions – repealed the amendment of the Labour Code that had extended the rights of works councils in the face of trade union protests. On the other hand, the amendment created almost complete overlap between the responsibilities of works councils and those of workplace trade unions (see András Tóth, Youcef Ghellab and László Neumann, 'Works councils examined', EIRO, <http://www.eiro.eurofound.eu.int/2004/01/feature/hu0401106f.html>)

In 2003 Hungary completed the transposition of Council Directive 94/45/EC on European Works Councils in a very controversial fashion. The relevant articles of the amended Labour Code make no reference to the role of company unions either in the setting up or in the actual operation of SNB and EWC. The law only authorises works councils (or central work councils) to delegate representatives of Hungarian employees to SNBs and EWCs, or in the absence of a works council, it calls for direct elections. At a meeting of the National Interest Reconciliation Council, the national tripartite body, trade unions approved the draft proposal and did not criticise the planned legislation in the press either (see András Tóth and László Neumann, Hungarian transposition of Council Directive 94/45/EC on the establishment of the European Works Council, *European Works Councils Bulletin*, Issue 46 (July/August 2003): pp. 14–18).

SE Statute

The first part of Act XLV of 2004, which regulates the setting up, internal organisation, headquarter-relocation and winding up of European Companies is fairly concise. Basically, the nature of the EU regulation made it possible to deal with only the most essential issues: as Regulation 2157/2001 EC applies directly in the member states, it must be applied together with the Hungarian law supplementing the European law. First, the Hungarian Act establishes the scope of the regulation and procedures for registering European companies in Hungary. As for setting up European companies, the law regulates both mergers and the establishment of holding companies, with particular attention to the protection of the interests of minority shareholders who do not want to maintain their stake in the new company, as well as of creditors of predecessor companies.

Obviously, the regulation of internal organisation is a novelty in

Hungary. As to the shareholders' meeting, the single Hungarian rule stipulates that at least five per cent of the shareholders are required to call for a shareholders' meeting, unless the company statute specifies a lower threshold. The law also specifies measures for both one-tier and two-tier corporate governance systems (the one-tier form did not previously exist in Hungary).

In the one-tier system the majority of the members of the Administrative Board must be independent persons. The law provides a list of all sorts of relationships with the company in respect of which a person is not considered independent. If the company statute creates a position for a CEO, the person filling this position must also be independent. The company statute may set up a number of different committees, but the creation of an Audit Committee with at least three members is compulsory. Members can only be independent members of the Administrative Board and they are elected by the Administrative Board itself. Therefore, employee representatives can be members of this body only if they are already members of the Administrative Board. The Audit Committee inherited part of the basic functions of the Supervisory Board as specified by Hungarian law, namely to comment on/adopt the annual report, to make proposals for the appointment and fees of the company auditor, and to evaluate and comment on the system of financial reporting at the company. However, the company statute may lay down a broader assignment for the Audit Committee, just as it may for the Supervisory Board in domestic companies.

The two-tier system of corporate governance includes both a Management Board of three to 11 members and a Supervisory Board with at least three members. The latter body may be elected by the shareholders provided that the company statute permits it.

The law specifies procedures for relocating company headquarters from Hungary to another member state and the other way around. Winding up a European Company is basically subject to Hungarian bankruptcy law. The closing section of the Act amends many domestic laws (from the Civil Code to different tax laws) in order to accept the European Company as a domestic actor by making the would-be SE subject to the relevant Hungarian laws.

Directive on employee involvement

The second, fairly lengthy part of Act XLV of 2004 is the transposition of the Directive, and includes a detailed regulation on employee involvement. As to the scope of this part of the Act, it equally affects SEs with headquarters in Hungary and the representation of Hungarian employees in an SE with headquarters abroad. The law rules out application of the stipulations of Hungarian company law on board-level representation and introduces the procedure of elaborating the channels of worker representation through the Special Negotiating Body (SNB) and opens up the possibility of not beginning or of stopping such negotiations in line with the directive. The general rules require cooperation “in good faith and fairness” on the part of both company boards and management, as well as of employee representative bodies.

Similarly to the Directive, the Hungarian law lays down definitions. As the Directive allows the definition of ‘employee representatives’ in the same way as national law and/or practice, the Hungarian law recognises only members and substitute members of works councils as employee representatives. Nonetheless, in Hungary there is a parallel structure of statutory workplace-level works councils and of company-level unions. (The latter are not only entitled to bargain with employers, but also authorised to consult with the employer on a wide range of issues.) As with transposition of the European Works Council Directive, this Act does not recognise any role for union representatives. Company trade unions are completely left out even if no works council exists at the company or at a particular workplace.

The detailed rules are the same as those adapted by transposition of the EWC directive. As far as the creation of an SNB is concerned, its members representing employees in Hungary are to be appointed by the works council (Üzemi Tanács, ÜT) of the establishment. Where there is a central works council (Központi Üzemi Tanács, KÜT), the latter appoints the members of the SNB. If there is more than one central works council, the members of the SNB are appointed at a joint meeting of the central works councils. If a particular establishment does not have a works council, the employee representatives are invited to the meeting of the existing ÜT (KÜT, joint meeting of KÜTs) of other establishment(s) to appoint SNB members. In this respect, these appointees are deemed to be members of the ÜT or KÜT. As for the election of such employee representatives, the management of the establishment without a ÜT or KÜT is required to inform employees about the election. The election committee, directly elected by the employees, decides on the rules of elections, including those on how the votes will be counted, and sets the date. All employees are entitled to vote (active election right), but only those

employees can be elected who have been employed at the employer in question for at least six months (passive election right). It is the duty of the employer to present the list of employees who have active and passive election rights five days in advance of the elections. The Act adopted the validity criteria as specified for works council elections by Article 51/A of the Labour Code. (The election is considered valid if more than half the employees with an active election right have participated, save employees on sick leave, maternal leave or unpaid leave, or performing military service or posted to another workplace for a period longer than one week.) Invalid elections are to be repeated within 30 days. The second round is deemed to be valid if more than one third of employees vote. The winner is the person who receives the greatest number of votes.

As a rule, members of the SNB must be employees of the company: the only exception made by the preamble of the Directive reads as follows: 'Member states should be able to provide that representatives of trade unions may be members of a negotiating body regardless of whether they are employees of a company participating in the establishment of an SE.' At this point the wording of the Hungarian transposition is rather strange: "A trade union member (!) [author's note: that is, in contrast to the union itself, as the Directive intends] representing the employees may be appointed who is not an employee of the company, subsidiary company or establishment concerned" (Article 21 (4)). As we have already seen, by default the right of appointment belongs to the works council or central works council, therefore this passive use of the verb ("may be appointed", that is, at the invitation of a works council) practically prevents trade unions from sending delegates to the SNB. It is difficult to understand why the Hungarian text tries to authorise a member instead of the organisation.

Trade union rights are also partly curtailed in relation to the regulations on trade union advisers. The law stipulates that "in the course of the negotiations, in order to assist its work, the SNB may use experts, on request, including representatives of Community-level trade unions; the adviser may participate in the negotiations without voting rights". It is up to the SNB to invite representatives of European trade union federations. The law, however, is silent on the representatives of national trade unions. Otherwise, the Act is quite generous concerning advisors: their number is not limited and the company must bear any "reasonable and justifiable" costs. Apart from requiring the company to bear the costs, the Hungarian Act stipulates that delegated employees are entitled to time-off to carry out their duties. During that period, they are entitled to a so-called 'away-from-the-workplace fee' [távolléti díj]: their monthly wage as specified by the labour contract, topped up by their regular wage bonuses.

The confidentiality issue is regulated in line with the Directive. If the company refuses to divulge information, claiming that it is confidential, an appeal may be filed at the court of registration. Other sorts of conflict between the company and employee representatives, including the SNB, can be settled by the labour courts since the law classifies such conflicts as labour disputes. Protection of employee representatives is in line with the similar regulations of the Labour Code on the protection of works council members and company law stipulations for board level employee representatives.

The Act transposes the so-called “standard rules” of the Annex of the Directive which are to be applied unless the SNB and the company management agree on different rules or procedures for employee representation. Unfortunately, the Act designates these rules as ‘optional rules’ [választható szabályok], which is a rather misleading translation. Concerning the composition of this permanent employee representative body, the Act applies the same rules as those developed for the delegation of SNB members. This means that works councils have a crucial role while trade unions are once more left out. As regards the winding up of the delegation and the recall of SNB members the Hungarian legislation adopted some of the rules and procedures introduced earlier for similar situations in works councils and also applied in the case of European works councils.

As far as the ‘standard rules on information and consultation’, the ‘standard rules on participation’ and the ‘contents of the agreement’ (parts 2, 3 and 4 of the Annex) are concerned, by and large the Hungarian law follows the provisions of the Annex paragraph by paragraph, but adds more detailed rules in line with domestic rules or practices whenever the Directive calls for member states to do so. For example, if the company management does not adhere to the above-mentioned regulations, the employee representative body is entitled to file the case at the labour court, which has to make a decision in a non-litigious procedure within 15 days. Other supplementary rules follow the transposition of the European Works Council directive. One such regulation requires that at least once every calendar year the management of the European Company should inform the employee representatives on the progress of the business and its prospects and consult on these matters, providing the required documentation 15 days prior to the meeting. The information provided shall relate in particular to:

- a) the structure, economic and financial situation of the undertaking or group of undertakings;
- b) the probable development of the business and of production and sales;
- c) the situation and probable trend of employment;

- d) investments (investment programmes);
- e) substantial changes in organisation;
- f) mergers;
- g) the introduction of new working methods or production processes;
- h) the relocation of undertakings, establishments or significant parts thereof and transfers of production;
- i) the cutting back or closure of undertakings, establishments or significant parts thereof;
- j) collective redundancies;
- k) decisions concerning the social responsibility of the European Company.

This enumeration is almost identical to the required consultative agenda of the EWC.

Moreover, the law adds further procedural rules and deadlines based on existing domestic regulations, or, presumably, tries to utilise information and consultation experiences. One such regulation requires the termination of the mandate of the employee representative if in the meantime he or she has been promoted to a managerial position with powers to exercise employer's rights. In line with the directive, one paragraph grants the employee representative body and the select committee the right to hold separate meetings without representatives of the Management or the Administrative Board prior to engaging in negotiations with company representatives (Article 46).

Social dialogue concerning the bill

At the joint session of the Economic and Legal Committees of the National Interest Reconciliation Council the government representative accepted some minor proposals from the social partners. At the request of the employers to specify the operational costs they would be expected to bear, a reference was included to the Labour Code stipulation on the costs of works councils. Also, the recommended information and consultation agenda of the employee delegates was extended by a further item: "decisions concerning the social responsibility of the European Company".

The trade union side proposed that representatives not only of 'Community-level trade unions' could be invited as experts to the SNB, but also of (domestic) 'trade union federations'. Although the government representative accepted this claim at the joint session, in the end the law failed to stipulate it.

One proposal from the employers' side was rejected by both the trade unions and the government: in relation to business confidentiality the employers wished to cancel the stipulation allowing trade union representatives not employed by the company to be members of the SNB.

Nonetheless, there were more serious issues on which the session participants could not agree. According to the trade unions, the section of the Act containing definitions should designate trade unions as 'employee representatives' and works councils should play a role only in the absence of trade unions. The employers opposed this, and the government did not agree either. In its argument, the government stressed that the information and consultation rights specified in the bill coincided more with the rights of Hungarian works councils than with those of the trade unions. Furthermore, the same concept was applied in the course of transposition of the European Works Council Directive. Consequently, this issue could be settled only by a comprehensive revision of the Labour Code, with political considerations taken into account.

Following the joint session of the Economic and Legal Committees of the National Interest Reconciliation Council the government submitted the bill to the Parliament. The MPs proposed only minor technical amendments, the majority of which were accepted, and the Act was passed unanimously.

Commentary

The Hungarian legislation considered the company law considerations of transposition a competitiveness issue, and so adopted a minimalist approach. The Hungarian Act supplementing the EC regulation on the SE Statute is as concise as possible, although it had to introduce the one-tier corporate governance system, a brand-new feature in Hungarian company law. The Act invented the Audit Committee, similar to the Supervisory Board of the two-tier system, in order to ensure compatibility with other laws and institutions.

Obviously, the government wants to make use of the experience obtained while working on transposition, and in March 2004 the expert group of the Ministry of Justice issued a paper on the new concept of company law and procedures of courts of registration for debate. By and large, it outlines future legislation on deregulation and makes it possible for company statutes to opt for new tools to meet various needs. Among other things, it proposed the optional one-tier

system and the possibility of setting up a German-style Supervisory Board with strong decision-making powers. The paper also questions the very existence of board-level employee representation and proposes the revision of its rules. (Legislation on new company rules is expected in the second half of 2005.)

As for employee involvement, the Hungarian transposition practically copied the wording of the transposed European Works Council Directive. Therefore similar to the transposition of the EWC directive, the most controversial issue of the Act transposing Council Directive 2001/86 EC is the total neglect of workplace-level unions, either in the setting up or in the operation of SNBs and of the employee representative body defined by the standard rules. As with European Works Councils, this Act too authorises works councils (central works councils) to delegate representatives for Hungarian employees, or in the absence of a works council it calls for direct elections. Although union confederations realised this shortcoming of the bill and tried to oppose it in the draft, in the end they failed to turn the tide. Employer and government representatives successfully argued that there were similar provisions in the transposition of the EWC directive which had been approved by the trade union confederations the previous year, when they seemed not to be aware of the importance of the European representation structures.

Another interesting feature of the Act is that it avoids repeating the provisions of Hungarian company law on employee board-level representation; nonetheless, in line with the Directive, it requires at least the same level of involvement as in predecessor companies. Yet, in the merger of smaller companies it may happen that the board of a European Company employing more than 200 persons does not include employee delegates at all. Hungarian unions and works councils have to understand this and undertake the responsibility to fight for the level and quality of employee involvement in the negotiations between the SNB and the company management. On the other hand, this legal solution, offered by the Directive itself, may signal a possible deregulatory approach for the future development of Hungarian labour legislation, which will rely on a negotiated way of shaping the new employee representative body rather than on defining mandatory bodies and/or board delegates.

In the context of a negotiated way of shaping institutions, assurance of the genuine representation of workers and the presence of the trade union federations is a crucial issue. It is regrettable that in the course of transposition the national trade union federations were not given the possibility to have their experts in the SNB, and the presence of the trade union representatives was regulated in a restrictive way. At the same time, the Hungarian transposition was a genuine effort to achieve a good solution and sometimes came up with innovative solutions in order

to guarantee genuine employee representation. In this respect, the detailed rules of information and consultation, as well as of judicial remedies in case of breaches of the law, are of paramount importance.