

## Worker involvement in the European Company (SE)<sup>1</sup>

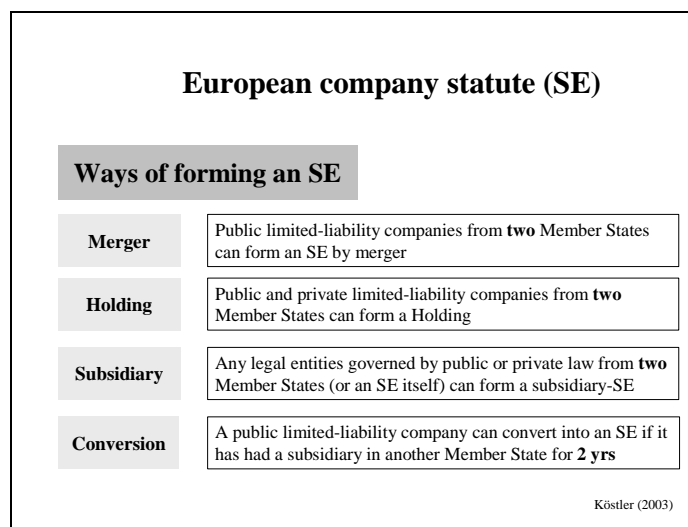
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On 8 October 2001, the EU Council of Ministers adopted the two interlinked legal instruments necessary for the creation of European Companies (SE):

- the Regulation on the European Company Statute (ECS / SE Regulation)<sup>2</sup> and
- the Directive supplementing the ECS with regard to the involvement of workers (SE Directive).<sup>3</sup>

This move represents a historic breakthrough (coming 31 years after it was first proposed by the Commission) and is a milestone with regard to the Europeanisation of worker involvement. The regulation and the national transpositions of the Directive will come into force **on 8 October 2004 in all 25 member states of the enlarged European Union, together with Iceland, Liechtenstein and Norway** as members of the European Economic Area.

From that moment, companies can opt **freely** for this European statute in four sets of circumstances (see graphic below).



<sup>1</sup> The paper uses the terms of the SE Directive: Worker *involvement* thus “means 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 h). *Participation* means the workers’ right to have an influence on the composition of the SE’s board (Art. 2 k).

<sup>2</sup> Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE), Official Journal L 294, 10/11/2001.

<sup>3</sup> Council Directive 2001/86 of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees, Official Journal L 294, 10/11/2001.

For the EU Commission the SE legislation mainly represents another significant step in the completion of the internal market by providing cross-border companies with more flexibility. The SE statute will permit **companies established in more than one member state** to merge and operate throughout the EU on the basis of a single set of rules and a unified management and reporting system. This could also lead to significant reductions in administrative and legal costs.

For a long time, the question of employee involvement in the SE has caused deadlock in the Council of Ministers. The compromise reached in 2000 is based on a **negotiated solution between the employer and the employee side** on the way to exercise information and consultation rights, as well as board-level participation in future SEs. However, if no agreement can be reached **obligatory standard rules** automatically apply. **SEs cannot be registered without an arrangement on the way employees are to be involved.**

The SE Directive not only provides for information and consultation rights but offers as well the **possibility to influence the composition of the administrative or supervisory board of the SE.** Through this board-level participation, representatives would gain better access to information before strategic decisions are taken concerning the SE, and consequently, they would have a better chance of influencing decisions. Although existing national rights on involvement will remain in force after the foundation of an SE, these could lose some of their strength, e.g. if the decision-making level is shifted away from the national to the SE level. For this reason, it is crucial to influence the highest-level SE organs in order to be able to bear a real influence on management decisions and defend employees' interests.

**Both, the ECS and the Directive leave a variety of choices open to the member states.** In addition, the ECS delegates to the national legislation in areas that are not regulated by the ECS (notably the national provisions for public limited-liability companies). Consequently, the concrete form an SE will take will be largely determined by the national level, and therefore, there will **not be a single SE law but rather 28 SE laws** which may differ significantly from each other. Moreover, considering the different ways of forming an SE and the innumerable possibilities for combinations of companies from different countries, probably **each SE will be unique in its own way.**

We can thus expect a variety of negotiated solutions on employee involvement reflecting the specific national and institutional backgrounds of the founding companies. We have to remember that there are no SE in existence to date, the transposition process over (which will determine the final shape of the SE legislation), and we do not know what kind of companies and how many of them will make use of this new business structure. For this reason, it would be very risky at this early stage of implementation of the SE-statute to attempt to draw up a checklist that details final checkpoints that must be taken into consideration when an SE is established. Therefore, **the following checklist is tailor-made to the real developments.** At this early stage, the focus is on the important aspects of the **transposition process** and outlines in a second section a few preliminary **key points** which are relevant when companies are (at least internally) exploring plans to set up an SE.

More information on the topic of the European Company (SE) and particularly on the state of affairs with regard to the transposition process can be found on the ETUI website on the SE under [www.seeurope-network.org](http://www.seeurope-network.org).

## CHECKLIST 1: Monitoring the national transposition processes of the SE-legislation

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The SE-legislation must be **transposed until 8 October 2004**. The following checklist provides an overview on the most important issues with regard to employee involvement in the European Company. It focuses largely on the key clauses contained in the SE-Directive which leave room for manoeuvre for the member states (MS). As a general rule, it is not necessary to transpose a regulation which has direct effect into national law. However - as already mentioned above - in the case of the SE statute, the regulation contains a number of so-called *member state options*. For this reason, the choices available, which have a strong bearing on the question of worker involvement in the SE, will be considered as well (Part A).

Most of the countries have started to take the necessary steps to incorporate the SE-laws into their national law. It is essential for trade unions to carefully monitor these processes for two main reasons, notably, and in order priority:

- to influence the national transposition legislation as regards the choices left open to the member states;
- to know in advance the exact wording and meaning of the national transposition laws in order to be well prepared if companies announce their plans to set up an SE.

**In this regard, it is not only crucial to ensure that the national transpositions are done in an appropriate way but also that they are completed by 8 October 2004.**

This is necessary firstly, because SEs cannot be established in countries which delay transposition, and secondly, as a company having subsidiaries and/or establishments within such a country cannot participate in the establishment of an SE (unless these parts of the company are kept out of the future SE framework). From the workers' standpoint, failure to transpose the SE Directive on time means that those workers with a long experience of strong worker participation could be formally denied the opportunity to provide for strong and meaningful worker participation in the SE, since they will be excluded for the time being from any kind of SE foundation process due to the absence of legal authority. Agreements with weak provisions for worker involvement could then determine the first phase of the establishment of SEs thereby setting low standards that might be difficult to overcome in future negotiations.

Apart from the monitoring of the transposition, it is furthermore of great importance at this moment to follow and take active part in the national discussions deriving from the necessity to incorporate the SE legislation into the national system of corporate governance.

## A. THE SE Regulation (SE statute)

The employees do not have a (legal) influence on the initial decision to set up an SE, nor can they ultimately prevent its establishment. Likewise, they cannot decide on the future structure of the SE: The SE's statutes will state whether it has a one-tier system (with an administrative board) or two-tier system (with a management board and a separate supervisory board). All MS must allow these two forms, however the Regulation does not oblige them to lay down specific measures if no provisions existed for one of the two forms previously.

### a) Two-tier system: Information rights of the supervisory board (SVB)

The SVB has the right to ask the management organ to provide information, which it needs for exercising its control function (Art. 41 III Regulation).

**Checklist:**

- ✓ MS should make use of their option to provide that this right is not only given to the SVB as a whole but to every single member of it.

### b) Two-tier system: Transactions requiring authorisation by SVB

The statutes of an SE must list the categories of transactions where the management has to get the authorisation from the SVB beforehand (Art. 48 I Regulation).

**Checklist:**

- ✓ MS should use their option to provide the SVB itself with the right to make certain categories of transactions subject to its authorisation.

### c) Conversion of a public limited-liability company having a participation regime

**Checklist:**

- ✓ MS should prescribe that the conversion of such a company depends on a prior favourable vote in the organ of the company to be converted within which employee participation is organised.
- ✓ This decision should be taken unanimously or at least by qualified majority (Art. 37 VIII Regulation).

## B. THE SE DIRECTIVE

The transposition of the SE Directive on worker involvement in the SE can be done either by law or via an agreement between the social partners. It seems that the majority of the countries have chosen the first option.

### 1. Special Negotiation Body (SNB)

#### a) Setting-up of the SNB

MS decide at which level of worker representation the management must inform of its plans to set up an SE (Art. 3 I). Moreover, MS determine the election/appointment procedure for the SNB members coming from their country (Art. 3 II b).

##### Checklist

- ✓ MS should provide that the highest national level of worker representation existing within this company + the represented national trade unions + the EWC (where existent) + the European Industry Federations are always informed by the companies on their intention to establish an SE. In case there is no national worker representation, the employees must be informed directly. Information should include:
  - the identity of the participating companies, concerned subsidiaries and establishments, and the number of employees (Art. 3 I);
  - the existing worker representatives;
  - the number of employees in each country (the total number and the numbers in each economic entity);
  - the number of employees covered by a participation regime and their proportion within the total number of employees.
- ✓ The national solution with regard to the question ‘How are the national SNB members appointed/ elected?’ should be in accordance with the “normal” domestic representation arrangements, e.g. the role given to trade union organisations.
- ✓ The transposition law should foresee the inclusion of female members in the SNB according to the proportion of female employees within the companies.
- ✓ MS shall make use of their possibility to provide that the SNB may include trade union representatives even if they are not employed in one of the involved companies (Art. 3 II b + consideration 19). It should be possible to nominate representatives from the European Industry Federations as well.

#### b) Budgetary rules

The basic principle is that the expenses of the SNB and the following negotiations are borne by the companies (Art. 3 VII). However, MS are given the right to lay down specific budgetary rules.

##### Checklist:

- ✓ MS must ensure that the SNB is given the necessary means for its functioning, including the costs for conference rooms, materials, interpretation, experts, office staff and accommodation and travelling of SNB members.
- ✓ MS shall not make use of their option to limit the funding of external expertise to one single expert (Art. 3 VII). Furthermore, MS should explicitly state that

the SNB might select representatives from national and/or European level trade union organisations as experts to assist it with its work (Art. 3 V).

## 2. Standard rules

MS must lay down standard rules on worker involvement that satisfy the provisions set out in the Annex of the Directive (Art. 7 I).

### a) **Opting-out-possibility**

MS may provide that, in the case of an SE set up through a merger, the provisions of the standard rules with regard to participation are not applied (Art. 7 III and consideration 9). However, in this case an SE can only be registered if the negotiating partners reach an agreement pursuant to Art. 4 Directive or if none of the participating companies had participation before (Art. 12 III SE Regulation). This might be the reason as well why first findings indicate that not many countries are likely to make use of this possibility.

**Checklist:**

- ✓ MS shall not “opt-out” with regard to the application of standard rules on participation.

### b) **Composition and rights of the representative body (= ‘SE Works Council’)**

Each MS can determine how its (national) seats within the RB will be allocated (Annex Part 1 b).

**Checklist:**

- ✓ The appointment or election procedure for the allocation of the national seats in the representative body should fit to the national system (it might include e.g. a right for trade unions to directly nominate one or more members).
- ✓ MS must lay down rules to ensure an adjustment of number and allocation of seats in case of changes occurring in the SE and its subsidiaries.
- ✓ As compared to the EWC Directive, it must be ensured that the MS use advanced information and consultation rights (especially with regard to the definition of information and consultation, and the competences and concrete rights of the representative body).

### c) **Budgetary rules for the representative body**

The basic principle is that the expenses of the representative body are borne by the companies (Annex Part 2 h). However, MS are given the right to lay down specific budgetary rules.

**Checklist:**

- ✓ MS must ensure that the representative body is given the necessary means to function well, including the resources for training, conference rooms, external experts, materials, interpretation and translation, office staff and accommodation and travelling of its members and the members of the select committee.
- ✓ MS shall not make use of their option to limit the funding of external expertise to one single expert. Moreover, MS should explicitly state that the representative body has the right to select representatives from national and/or European level trade union organisations as experts to assist it with its work.

**d) Appointment of 'worker board members'**

Each MS can determine the allocation of seats it is given within the administrative or supervisory organ (Annex Part 3 b).

**Checklist:**

- ✓ If a member state wants to make use of this option, it must be ensured that the allocation procedure fits to the national system (respecting e.g. existing rights of trade unions to directly nominate one or more board members).

**3. Confidentiality**

MS must provide that members of the SNB, the representative body and the experts assisting them are not allowed to reveal information, which has been given to them confidentially (Art. 8 I). MS have to provide that under certain circumstances the SE organs are not obliged to transmit information where this could seriously harm the functioning of the SE (Art 8 II). Moreover, they must make provision for administrative or judicial appeal procedures (Art. 8 IV).

**Checklist:**

- ✓ The national rules must not prevent the worker representatives from performing their duties. They must remain able to report back to the employees in a comprehensive and prompt manner.
- ✓ MS should make use of their possibility to prescribe that a prior administrative or judicial authorisation is needed when a company wants to withhold information. This requirement would make sure that the social dialogue within the SE cannot easily be 'bypassed'.
- ✓ In the few countries where this is relevant, MS should refrain from introducing exceptional provisions for companies "which pursue directly and essentially the aim of ideological guidance with respect to information and the expression of opinions" (Art. 8 III).
- ✓ MS must lay down appropriate provisions for administrative or judicial appeal procedures for workers' representatives if information is withheld or confidentiality demanded (Art. 8 IV).

**4. Other****a) Misuse of procedures****Checklist:**

- ✓ MS must ensure through appropriate means (including sanctions) that the SE cannot be misused to deprive workers of acquired rights or to withhold these rights from them (Art. 11).

**b) Right to renegotiate in case of structural changes in the SE****Checklist:**

- ✓ MS should foresee in their national transposition law a right to renegotiate on worker involvement if a substantial change in the structure occurs after the SE has been set-up (this situation is not regulated by the Directive). This is particularly important to reduce the danger of a loss of existing

national participation rights, e.g. if an SE merges with a company with a higher standard of participation rights. The transposition law should list the circumstances leading to a right to renegotiate. It is important to ensure that this right not only exists in SEs where an agreement has been concluded, but also in those where the standard rules have been applied or where no initial negotiations took place or these were aborted.

**c) Protection of worker representatives**

**Checklist:**

- ✓ MS must ensure that the members of the SNB, the representative body and supervisory or administrative board enjoy the same protection and guarantees as provided under national laws and/or practice (Art. 10).

**d) Compliance with the Directive**

**Checklist:**

- ✓ MS have to provide for appropriate measures (especially administrative or legal procedures) in the event that the SE management or the supervisory or administrative organ fail to comply with the Directive (Art. 12 + consideration 16)

**e) Maintenance of existing structures of worker representation**

The Directive allows MS to provide that existing structures of worker representation in participating companies, which will cease to exist, are maintained after the establishment of the SE (Art. 13 IV).

**Checklist:**

- ✓ In countries where this is relevant and could improve the information and communication between the European and the national level, the MS should make use of this option. In this case however, these MS should oblige the SE's management to nominate authorised and competent contact persons for these maintained national worker representatives, both at European and national level.

## Important points to consider when an SE will be established

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As already mentioned in the introduction, at this stage of implementation of the SE statute it is incredibly difficult to conclude final general points that must be considered. The experiences with EWCs are also of a limited support because of the basic differences in construction. Compared to the EWC procedure, the SE Directive has a different starting point. The establishment of an SE is linked to a mandatory demand for arrangements on worker involvement and the worker side does not have the right to decide to initiate the process. Moreover, on the issue of participation rights, the SE Directive introduces a new element into the negotiations.

Nevertheless, it is already now possible to highlight some important points that derive from the specific character and rules of the SE construction and the rules on worker involvement as laid-down in the SE legislation.

### Can any of the two parties have an interest in delaying and obstructing the negotiations?

It seems rather unlikely that this will happen. This is firstly because of the fact that the time frame the SE Directive foresees for the negotiations between the special negotiating body (SNB) and the management is extremely tight. Negotiations must be finished within six months after the creation of the SNB and might be extended – only if both parties agree - to a maximum of one year.

For the employer side it makes no sense to delay or obstruct negotiations because, on the one hand, it is likely that they want their SE to be established as fast as is possible and, on the other hand, they cannot register the SE until an arrangement on how to involve the employees is reached. Therefore it is in their interests to inform the workers in time and to support them in setting-up the SNB. They cannot avoid the involvement of the workers as, after six months or one year, if no agreement has been concluded the standard rules will apply automatically. If the company does not want this to happen they must reach an agreement earlier or abandon the whole SE project.

On the other hand, the workers have no time to lose. They cannot decide whether an SE shall be established or not, on its structure (one-tier or two-tier), and they cannot ultimately prevent its establishment. However, the formation of the negotiations is rather favourable for them, under the assumption that the SNB can act as a single actor and rather than being divided into several national interest groups. If e.g. participation rights existed before in at least one of the participating companies and irrespective of how many employees there were, participation can be extended to all employees of the SE if the SNB decides so. The company's only choice would be to accept this development or to abandon the whole SE project.

**Aborting negotiations, negotiating an agreement or applying the standard rules?  
What could be the general approach of the SNB towards the negotiations?**

The aim of the SNB should always be to obtain the best possible solution for all employees, including participation rights.

The SE Directive offers the possibility to make participation at company board level standard in companies with cross-border operations within Europe. It is of utmost importance to have influence at the top level of cross-border companies, especially in a multinational company such as the SE, i.e. the SE organs, in order to influence management decisions in the interest of workers in all countries. National rights may not sufficiently satisfy these needs.

For this reason, it would be desirable that SNBs would always try to get participation rights even if they did not exist in the participating companies before (although in such a case, the companies are not obliged to accept).

Moreover, it is crucial that the SNB always starts negotiations and does not abort them (Art. 3 VI Directive). Some employers might try to provoke this or try to convince the worker representatives that it will be better for both sides if the existing European Works Council remains in place (according to Art. 13 I Directive this would be the result of not opening or aborting negotiations). Such a decision would automatically prevent the workers from obtaining any participation rights. Besides this, the SE Directive offers certain improvements with regard to information and consultation (including a better definition of information and consultation rights) as compared to an EWC.

During the negotiations, preference should be given to reach an agreement with the employer side. The rights as provided in the standard rules may serve as a point of reference. However, it is advantageous not to fall below these rights in an agreement. If finally no acceptable agreement with the employers can be found, it would be the best if the SNB opts for the application of the standard rules (if possible, including participation rights).

SNB members have a certain responsibility not only to the workers of their country but also for those in the other countries because the outcome of the negotiations will affect the entire workforce of the newly founded SE. At a later stage this will also be true for the worker representatives on the supervisory or the administrative board of the SE. It is likely that not all countries would be able send a representative, therefore it is crucial that these workers' board members understand their role as representatives of all employees and not only those from their home country. In accordance with this approach, the ETUC has committed itself to "ensure a European mandating of workers' representatives to managerial or supervisory boards" (ETUC Action Programme adopted at the 10<sup>th</sup> Statutory Congress in Prague, 2003).

<b>What might be preconditions for a successful outcome of the process?</b>
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For obtaining the best result possible, it is of the utmost importance:

- The SNB must speak with one voice. This requires a prior internal agreement on the future structure of common interest representation and involvement preferably among all SNB members;
- In order to achieve this kind of commitment before management starts the official negotiation procedure, preparations should start as soon as possible.

Before management officially announces the creation of a SE, it is likely that the worker representatives and/or their trade unions are already dealing with the matter internally. In any case, they should start their own preparations for the application of the SE-legislation as soon as possible. It makes little sense to wait until the company has published the draft terms for the planned SE and is legally obliged to provide their employees with the necessary information.

Consequently, worker representatives should collect and compile the required information together as quickly as possible. This information should include: the foreseen establishment form (merger, holding, subsidiary or conversion); the structure of the SE (one-tier or two-tier); the legal seat of the SE; the participating companies, subsidiaries and establishments; the number of employees in the different countries; existing worker representatives and information on existing participation rights (including their percentage with regard to the total number of employees).

Moreover, to reach a united position and common demands for the future SNB members, the following points will be crucial:

- It is important to establish contacts to the colleagues in the other countries and/or the potential future SNB members;
- To inform the European level as well. UNI-Europa could serve as a coordinator for the establishment and organisation of cross-border links between worker representatives of the involved companies. An existing EWC could be a suitable framework too.
- It is particularly helpful to know the projected composition of the SNB, the number of workers in the different countries, the percentage of workers having participation rights in advance, in order:
  - a) to calculate the majority requirements in the SNB, and
  - b) to be acquainted with the specific rights offered by the standard rules, which can then serve as a point of reference with regard to the demands in the negotiations.
- Moreover, knowing the relevant provisions from the national transposition laws of the involved countries is important as well (especially the election or appointment procedures - in order to calculate how the national SNB seats will be distributed to the different countries - and existing budgetary rules).
- A good approach could be to draft a worker version of the SE agreement, which would allow workers to influence the agenda when negotiations with the employers start. The contents of an agreement laid out in Art. 4 II Directive represent the minimum content but room is available for individual needs and demands.

- The optimal situation would be if this coordination process was finalised before the official negotiations begin. UNI-Europa could support this by offering expertise and serving as a mediator between the different legitimate interests represented in the SNB.
- Training future SNB members in advance is also an important task. The companies should finance this. The training might include knowledge on the mechanisms and rights provided by the SE legislation and the different systems of worker involvement, and particularly of participation, in the concerned countries.

#### **What happens to an existing EWC?**

When an agreement has been found or the standard rules are applied, the EWC ceases to exist and is replaced by the new “SE Works Council”. As explained above, a solution in which an existing EWC remains in place in the SE is not desirable. However, the EWC can play a significant role in the preparation and the negotiation phase and also in the smooth implementation of the worker involvement arrangement. The cross-border contacts and experiences of the EWC and its members are of great value in reaching the best possible solution on worker involvement in the new SE possible. For this reason, it seems useful if the EWC remains in place until the “SE Works Council” takes up its work.

#### **What kind of companies can we expect to make use of the SE-regulation?**

At the moment it is anyone’s guess how many and which companies will establish as an SE, not least because there are no provisions on taxation advantages made in the statute. To date, only NORDEA’s management have officially announced their intention to set up an SE. Other companies will probably wait with their decision until they are sure of the outcome of the other key directives on European company law, i.e. the 10<sup>th</sup> Directive on cross-border mergers and the 14<sup>th</sup> Directive on the cross-border transfer of seat.

However, it might be of interest to the trade unions to make an assessment of which companies could find such a change attractive. At first glance they can be grouped as followed:

- Some European based companies might gain more prestige from being a European Company, particularly if they want to perform on overseas markets.
- In the case of a merger of equals, being an SE might be advantageous for integrating the different corporate cultures of the involved enterprises.
- Some multinationals could think about setting-up a kind of “sub-SE” which covers all their horizontal products and services, i.e. on the field of supplying. This could be related to the purpose of locating the seat of the SE in a different member state.
- In the current situation of ongoing mergers and acquisitions in some branches, like the banking and insurance sector, we can expect the establishment of SE’s, especially with the aim of pooling together a large number of local subsidiaries under a common roof.
- Foreign investors, particularly from overseas, might be interested to conduct their European businesses in one single governance structure, which is more familiar to their original system.