



## Employee Participation in European Companies (SEs)

Checklist and Information for Employee  
Representatives and their Trade Unions

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## Introduction

On 8 October 2004, the **Regulation on the Statute for a European Company (Societas Europaea, SE)** came into force. Companies in the 25 Member States of the EU and in Liechtenstein, Iceland and Norway are thereby for the first time able to organise their business throughout Europe on the basis of uniform European rules. This new and genuinely European type of company presents opportunities not only to companies, but also to the employees of SEs. Alongside the SE Statute, the supplementary **Directive on the Involvement of Employees in an SE** was adopted. It creates a European umbrella and common framework for cross-border participation rights for employees of SEs throughout Europe. On the basis of the rules contained in this directive, employee representatives from the countries concerned and the management of the companies involved will negotiate to decide what form employee participation in the SE's decision-making process will take. If an agreement cannot be reached, standard rules which specify a legal standard come into force.

The SE legislation represents another building block in the development of European codified employee rights. Since the introduction of **European Works Councils** in 1994, employees in cross-border companies (with 1000 or more employees) have had information and consultation rights at European level. By March 2005, Member States must also have transposed the **Directive on Informing and Consulting Employees**, which will provide a minimum standard at national level across Europe for informing employees in a timely and appropriate fashion.

The Directive on the Involvement of Employees in an SE represents **progress** compared to existing **cross-border information and consultation rights** under the European Works Council Directive. It goes beyond this to include **participation rights** as an integral part of negotiations for the first time. By participation, the directive means influence over the composition of the highest-level SE bodies – that is, the supervisory board or administrative body. This can either be the right to delegate employee representatives to the board, or to recommend or reject the appointment of members of the board. Participation is already an important part of company working relations in many of the European Member States: in 21 of the 28 countries concerned there are already legal regulations, and participation rights are already widespread in 12 of them.

The European Company offers an opportunity within an SE to define participation in a European context and to make these rights available to more employees than was previously the case. The SE Directive offers employees access to the highest European level of a company, which means access to **information and influence in the place where the company's strategic decisions are taken and monitored**. Representing the interests of employees and at the same time taking joint responsibility for the company as a whole is a challenge which will be faced by employee representatives in the supervisory board or administrative body. Striking this balance, particularly in times of economic difficulty, is not always easy. Experience shows how important it is for the success of structural change in a company, for example, not to impose it on the employees, but rather to carry out the change in cooperation with them. Participation in the supervisory board or management body can help ensure that employees' interests are not the last to be actively represented in this kind of restructuring process.

**UNI-Europa** decided at its Regional Conference in Stockholm (19 - 21 May 2003) to draw up checklists and models for negotiations over involvement rights in SEs. The information, consultation and participation rights negotiated should be at least equivalent to those which can be applied under the SE Directive's standard rules. The **European Trade Union Confederation (ETUC)** also decided at its 10<sup>th</sup> Congress (26 - 29.05.2003 in Prague) to set an objective of achieving the highest possible level of involvement rights in SEs. Above and beyond this, the ETUC also wanted to adopt a European mandate for the future employee representatives in the supervisory boards and management bodies of SEs.

The **checklist** which follows was drawn up jointly by UNI-Europa and the European Trade Union Institute (ETUI). It is designed to provide support to employee representatives from affected companies and their trade unions for the steps necessary when a company makes it known that it wants to establish an SE. The **first chapter** is dedicated to these **specific points**. It is designed to help ensure that negotiations are successful from the employees' standpoint. To achieve this, it is important to be aware of the rights and procedure contained in the Directive. It is also essential that the employee representatives from the different countries concerned discuss among themselves which information, consultation and participation rights they want to have in the future SE and where they want to apply these rights.

The **second chapter** addresses the **rights contained in the standard rules**, since these are the minimum that can be required by the employees. The chapter also highlights **crucial points and issues** to be resolved **in the negotiations** with the management. Existing employee rights should continue to be protected in the future SE. This is a major priority of the SE Directive and its defined objective.

Finally, the **third chapter** consists of **short texts, tables and graphs** which give an overview of the most important issues regarding the SE legislation. In particular, it gives information on SEs themselves, existing forms of participation in Europe and the Special Negotiating Body (SNB) which represents employees in negotiations.

The checklist is designed to be continually improved. Practical experience of SEs being established could be a particularly valuable resource for a revised version, which is due to appear in the spring of 2005. Comments, additions and suggestions for improvement are therefore welcome.

Further information on the European Company (SE) can be found on the **ETUI website on worker participation in SEs** ([www.seeurope-network.org](http://www.seeurope-network.org)) and the **UNI-Europa website** (<http://www.union-network.org/unieuropeanews.nsf/EuropeanCompany>). This also contains the SE Checklist for the implementation process (May 2004), which can be downloaded.

## I. Checklist: Negotiations on Employee Involvement in European Companies (SEs)

### The Obligatory Procedure for Employee Involvement in SEs

**An SE cannot be established without an agreement having been reached on the issue of employee involvement.** This obligatory procedure has several stages: the first step does not have to be taken by the employees (as in the case of the creation of a European Works Council, for example), but by the company management which wants to establish an SE. After the plan to establish an SE has been disclosed, they must promptly provide **extensive information** to the employees or their representatives in all the companies affected. Associated with this is the request to the employees to set up a **“Special Negotiating Body” (SNB)**. The SNB consists exclusively of nationally recognised employee representatives from the companies concerned (see chapter on SNBs for details on set-up). **The SNB must be set up in the correct way because it is the only body (as opposed to an existing European Works Council, for example) which is authorised to speak on behalf of employees on issues of employee involvement.** The SNB is not the same thing as the later cross-border information and consultation body, the SE Works Council (SE-WC). An existing European Works Council will be replaced by an SE Works Council.

The negotiations between the management and the SNB can last up to **six months** (from the SNB being set up) and can be extended by a **maximum of six further months**, as long as both parties agree.

**The existing involvement rights to which employees are entitled on the basis of national legislation and/or company practice are not affected by the Directive.** Rights such as national works councils, for example, are therefore unaffected. The same does not apply to participation rights, however. Participation in the bodies of an SE replaces existing national participation rights. Subsidiaries of an SE, however, will continue to be subject to the national participation rights of the country in question.

#### There are three possible outcomes to negotiations:

##### 1. Conclusion of an agreement between the SE management and the SNB

The management and SNB conclude an agreement on how the SE's employees will participate in company decisions. These rights include cross-border information, consultation and (as far as agreed) participation rights. The parties have substantial leeway on the actual content of the agreement. It must, however, satisfy certain minimum standards (see Chapter II, Agreements).

##### 2. SNB decision not to open or to terminate negotiations

The SNB can decide by 2/3 majority to terminate ongoing negotiations with the company. Before they begin, it can also be decided not to open negotiations. In that case the employees will be entitled to the national information and consultation rights. The SE will then be subject to the **European Works Council Directive**, and thus a European Works Council can be set up.

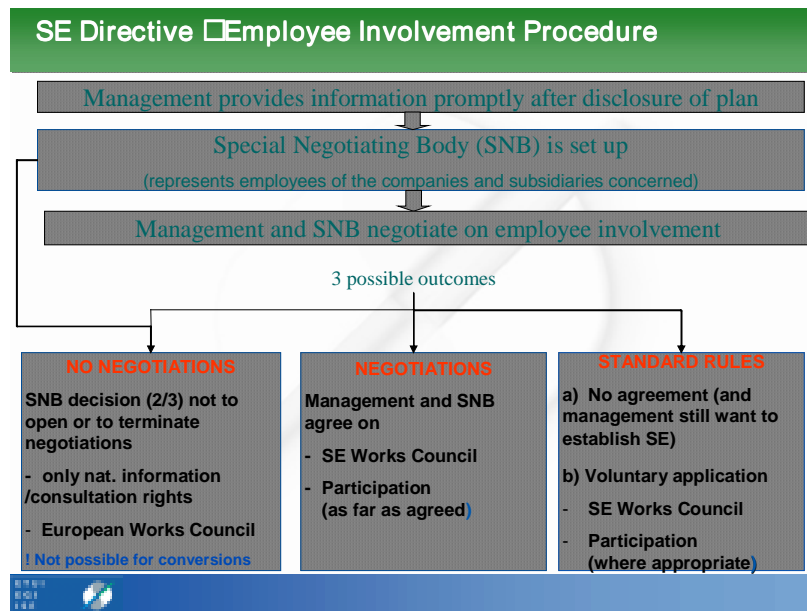
Even for this kind of decision to be taken, the SNB must first be set up. It is not possible for an existing European Works Council to take the decision. This option is also only allowed in the case of SEs established as mergers, holding companies or subsidiaries. Where an existing company is converted into an SE, the negotiations must be carried out fully. Involvement rights in the SE may not fall below the prior level.

### 3. Application of the standard rules

If the management and SNB fail to reach an agreement within the time specified, the standard rules defined in the annex to the Directive (for details see Chapter II, Standard Rules). These contain obligatory information, consultation and, where appropriate, participation rights. The standard can also be applied voluntarily if both parties desire it.

The application of the standard rules is the minimum which can always be demanded by the SNB. The management can in fact only prevent this by abandoning the SE project.

Diagram 1: Employee involvement procedure



## Checklist

The following checklist suggests some important points which may help ensure that negotiations between the Special Negotiating Body (SNB) and the management of the companies concerned result in a satisfactory outcome for all employees of the SE. The checklist covers the time period from the company's announcement of its intention to establish an SE through negotiations with the management. It must be emphasised once again that only the Special Negotiating Body is entitled to take decisions. The SNB is not the same as the later information and consultation body. The SNB's costs are covered by the companies involved (although the supplementary regulations in the national implementing legislation must be observed).

The employees cannot decide which type of structure the SE will have (one or two-tier; see Chapter III, Basic Information on SEs), and they cannot ultimately prevent an SE being established. The starting point in negotiations is nonetheless rather favourable to employees, as long as the SNB speaks with one voice and does not become divided into different national interest groups.

✓ **Prepare as early as possible for the negotiations**

Before the company management officially announces that an SE is to be established, the employee representatives and/or their trade unions will probably already have addressed the issue internally. They should certainly begin their own preparations for the application of the SE legislation as quickly as possible. There is little point in waiting until the company has published its plan to establish an SE and is legally obliged to provide the necessary information to its employees.

✓ **Compile necessary information**

The company management is obliged to provide employees with the necessary information without further request. In particular, the following information should be listed:

- Way in which the SE is to be established (merger, holding company, subsidiary or conversion);
- Structure of the SE (one or two-tier);
- Legal registered office of the SE;
- Companies and their subsidiaries and establishments affected;
- Number of employees in the different countries and constituent companies;
- Existing employee representations;
- Existing participation rights and types in the different countries and constituent companies (including the percentage of employees who previously had participation rights).

✓ **Assistance in the procedure from one or more experts**

## II. Content of the standard rules and agreements on employee participation in SEs

The future SNB members should solicit external expert assistance (e.g. on legal matters) at an early stage. The companies are obliged to pay the costs of at least one (permanent) expert for the SNB. The SE implementation legislation of the country where the future SE will have its registered office will determine whether further experts can be funded. The choice of expert is entirely at the discretion of the SNB. Experts can participate in negotiations in an advisory capacity if the SNB wishes.

### ✓ **Establish contacts with colleagues in the other countries / information at European level**

Contacts with employee representatives in other countries who will participate in negotiations should be established as soon as possible.

Structures already in existence such as a European Works Council can be a valuable resource in preparing for negotiations. For this reason, existing European Works Councils should not be disbanded until the SE Works Council has been set up.

European trade union organisations such as UNI-Europa can also play a coordinating role in establishing cross-border contacts between employee representatives. The SNB can agree with management for a representative to participate in negotiations in an advisory capacity.

### ✓ **Consider the (likely) composition of the SNB / identify potential SNB members from each country**

The number of representatives from each country depends on the percentage of the total future SE workforce from that country. Each country is entitled to at least one SNB member. The way in which these national representatives are chosen is a question of the respective national SE implementing legislation. It is therefore important to be aware of the rules in each of the countries concerned. This is also necessary in order to check later that the national SNB members are entitled to represent the employees from their country.

### ✓ **Choose the national representatives for the SNB**

Employee representatives in each country should take the necessary steps to nominate the SNB representatives for their country. The procedure is governed by respective national implementing legislations. Different members of the SNB may therefore be chosen in very different ways. Some Member States specify a deadline by which the national representatives must be nominated.

### ✓ **Calculate majorities in the SNB**

Decision-making in the SNB depends particularly on the way in which the SE is established and the nature of the decisions to be taken (cf. Chapter III, The SNB). The allocation of votes should be known in advance. In order to calculate the voting proportions, it is also important to know whether members from one country repre-

sent the same number of employees (this is a question of national implementing legislation).

✓ **Know the important provisions of national implementing legislation**

The Member States have leeway on many points when transposing the SE legislation (Regulation and Directive). By 8 October 2004, each country had to have adopted special implementing legislation which settled these points. Initially it is therefore important to know whether the implementing legislation has been finalised in all countries concerned.

In terms of establishing an SE, this means that in some matters the SE legislation of the country where the company is to have its registered office is applicable (e.g. on the regulations for financing the SNB). Other matters, however, are governed by the various national SE legislations in the countries concerned (e.g. nomination of national representatives to the SNB).

**Important points from the implementing legislation of the country where the SE has its registered office:**

- Specific rights and duties of the SNB:
  - Financing regulations: Which costs must be borne by the company? The most important point here is whether the company is only obliged to finance a single expert for the SNB.
  - Secrecy and confidentiality rules for the SNB and their experts.
- Standard rules:
  - Financing regulations for the SE-WC (in particular: are the companies only obliged to finance one expert?)
  - Is there a legal right to renegotiate in the case of structural changes after the SE has been established?
  - Did the Member State decide to implement the option whereby the standard rules on participation are not applicable in the case of a merger? (In this case, the SE can only be registered where an agreement is reached between both sides or where there was previously no participation in any of the companies).
- Legal options for cases where the Directive is not adhered to or is misapplied.
- Regulations on secrecy obligations.
- Regulations on the structure of SEs and their bodies (in particular the size, rights and duties of company bodies (and their members) on which employee representatives will sit).

**Important points from the implementing legislation of the countries involved:**

- Calculation of the number of employees from respective Member States.

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- Nomination of the national representatives to the SNB (including whether each national representative will represent the same number of employees on the SNB).
- Possibility of nominating national or European trade union representatives as SNB members, even if they are not employees of the company.
- Protection for the national employee representatives in the SNB.
- Standard rules:
  - SE-WC: appointment of national representatives to the SE-WC
  - Participation: regulations on the allocation of seats on the supervisory board/administrative body to representatives from that country.

### ✓ **Rights of national trade unions**

National trade unions should ensure that their rights are protected throughout the procedure. This applies in particular to the right to delegate representatives to the SNB and SE body. Whether such rights exist is a question of the national implementing legislation.

### ✓ **Verify figures relating to employees of the future SE**

The employee representatives should, as far as possible, verify the company's data on the employees in the various countries and carry out their own calculations on the composition of the SNB. They should subsequently monitor whether the relevant figures change significantly (e.g. through mergers of companies concerned). In particular, they should verify the data on existing participation rights.

The figures are particularly important when calculating:

- the geographical allocation of seats on the SNB;
- the voting majorities in the SNB;
- thresholds for participation.

Employees of both the companies in question and their subsidiaries and establishments are counted. The SE legislation does not define any more precisely who is considered to be an employee; this definition is left to the national SE legislation. However, employees with part-time or temporary contracts are counted. It is also important to know what is specified in the national SE legislation of the country where the future SE has its registered office on the timing of the calculation of employee numbers.

### ✓ **Preparation of future SNB members**

Preparation of future SNB members is another important task which should, in their own interests, be financed by the company. This could more specifically involve communicating information on the following:

- Mechanisms and rights under SE legislation
- National implementation of the SE legislation in the countries concerned
- Types of employee involvement in the countries concerned.

✓ **Preparatory meetings of SNB members before negotiations begin: joint demands for information, consultation and participation**

In order to be able to achieve a satisfactory outcome in negotiations, the SNB should meet internally beforehand. The aim of such a meeting is to complete the internal process of deciding demands, where possible before negotiations begin, in order to be able to appear united when dealing with the management and to speak with one voice.

The members of the SNB should agree on the joint demands in terms of information, consultation and participation rights which they want to be the basis of negotiations with management. Leeway for negotiation should also be discussed internally beforehand.

Where possible, all SNB members should be involved in order to prevent employees from one country being played off against those from another. The aim of the subsequent negotiations must be to achieve the best possible outcome for all the SE's employees. No employees should subsequently find themselves worse off than before.

The costs for the preparatory meeting should be borne by the company. This is also in their interest, in order to ensure smooth and efficient negotiations.

✓ **Take up negotiations, and *do not terminate them***

The SNB should always take up negotiations and see them through to the end. Some companies may try to provoke the termination of negotiations, or to persuade employee representatives that it would be better for both sides if an existing European Works Council simply continue its work. In this case, the SNB would not only categorically prevent itself acquiring any participation rights, but the SE's employees would also not be entitled to benefit from the improvements in cross-border information and consultation rights. The SNB can and should therefore always demand the application of the standard rules as a minimum.

✓ **Knowledge of specific rights under the standard rules**

## II. Content of the standard rules and agreements on employee participation in SEs

The employee representatives in the SNB should know their rights under the standard rules because, as previously stated, they can demand that these be applied as a minimum. These rights can therefore serve as basic demands for the purpose of negotiations. Deals which fall below this standard would be inadvisable.

## II. Content of the Standard Rules and Agreements on Employee Involvement in SEs

### Minimum Standards for Employee Involvement under the Standard Rules

If the management and the Special Negotiating Body (SNB) do not arrive at a joint written agreement on employee involvement, the standard rules from the Directive on Involvement of Employees in an SE apply. It is therefore not possible to establish an SE without cross-border employee involvement rights against the employees' wishes. **The minimum that the SNB can and should always demand is the application of the standard rules.** The management's only other option is to abandon the establishment of the SE.

**The rights contained in the standard rules are also important because the SNB can use them as the starting point for negotiations with the company. Voluntary agreements which fall below this standard are inadvisable.** For this reason negotiations should always be opened and should not be terminated under any circumstances. Some companies might try to provoke the termination of negotiations, or to persuade employee representatives that it would be better for both sides if an existing European Works Council simply continue its work. However, such a decision would automatically rule out the acquisition of any participation rights in the SE's company bodies. In addition to this, an **SE Works Council** has some improved information and consultation rights compared to a **European Works Council** (including an improved definition of information and consultation).

The following overview of the content of the standard rules is designed to demonstrate the rights to which the SNB is legally entitled.

### Overview of the most important rights under the standard rules

#### GENERAL REGULATIONS ON SE WORKS COUNCILS (SE-WCs)

- **Composition**
  - Only employees of the SE and its subsidiaries and establishments can be members of the SE-WC.
  - Each country in which the SE employs people delegates one representative per 10% (or part thereof) of the total number of employees in the future SE/SE group. Consequently every country concerned has at least one member on the SE-WC.

## II. Content of the standard rules and agreements on employee participation in SEs

- The election/nomination of the national representatives on the SE-WC takes place through employee representatives or direct election, depending on national rules.
- The number of members and the distribution of seats adjusted on the basis of any subsequent changes to the SE.
  
- **Central definitions** (improvement on the European Works Council Directive):
  - **Competence of the SE-WC**

“The competence of the representative body shall be limited to questions which concern the SE itself and any of its subsidiaries or establishments situated in another Member State or which exceed the powers of the decision-making organs in a single Member State.”
  - **Information**

“The informing of the body representative of the employees and/or employees' representatives by the competent organ of the SE [...] at a time, in a manner and with a content which allows the employees' representatives to undertake an in-depth assessment of the possible impact and, where appropriate, prepare consultations with the competent organ of the SE.”
  - **Consultation**

“The establishment of dialogue and exchange of views between the body representative of the employees and/or the employees' representatives and the competent organ of the SE, at a time, in a manner and with a content which allows the employees' representatives, on the basis of information provided, to express an opinion on measures envisaged by the competent organ which may be taken into account in the decision-making process within the SE.”
  
- Election of a **select committee** (from the members of the SE-WC, maximum three members).

## INFORMATION AND CONSULTATION RIGHTS OF THE SE-WC

- **Regular reports** from the competent SE organ on the progress of the business of the SE and its prospects.
- Right to be informed and consulted on this: **meeting** with the competent SE organ to be held **at least once a year**.
- Right to an **internal preparatory meeting** of the members of the SE-WC (without representation from the competent SE organ) prior to each meeting.
- **Access to documents**
  - Agendas of all meetings of the administrative/management and supervisory body,
  - Copies of all documents submitted to the general meeting of shareholders.
- **Topics for information and consultation** (list not exhaustive)
  - Structure of the SE.
  - Economic and financial situation of the SE.
  - Probable development of the business and of production and sales.

## II. Content of the standard rules and agreements on employee participation in SEs

- Situation and probable trends for employment.
  - Investments.
  - Fundamental changes of organisation.
  - Introduction of new working methods or production processes.
  - Transfers of production.
  - Mergers, cut-backs or closures of undertakings, establishments or significant parts thereof.
  - Mass redundancies.
- **Extraordinary information and consultation rights** where there are exceptional circumstances affecting the employees' interests to a considerable extent (in particular in the case of relocations, transfers, the closure of establishments or undertakings or mass redundancies).

SE-WC can demand an **additional meeting with the competent SE organ**

Right to a **further meeting with the competent SE organ** to attempt to reach an agreement in cases where the SE body decides not to act in accordance with the opinion of the SE-WC.

- The members of the SE-WC **inform the employee representatives** of the SE and its subsidiaries and establishments on the content and outcomes of the information and consultation procedures with the competent SE organ.

### OTHER SE-WC RIGHTS

- Entitlement to **time off for training without loss of wages**.
- **The SE bears the costs of the SE-WC**, that is the necessary financial and material resources in particular for the organisation of meetings (including interpreting costs, accommodation and travel expenses for members of the SE-WC and the select committee).
- The SE-WC (and the select committee) can be supported by an **expert of their choice**. Member States can restrict the SE's obligation to bear the cost of this to a single expert. The SE legislation of the country where the SE has its registered office is applicable.

### PARTICIPATION RIGHTS

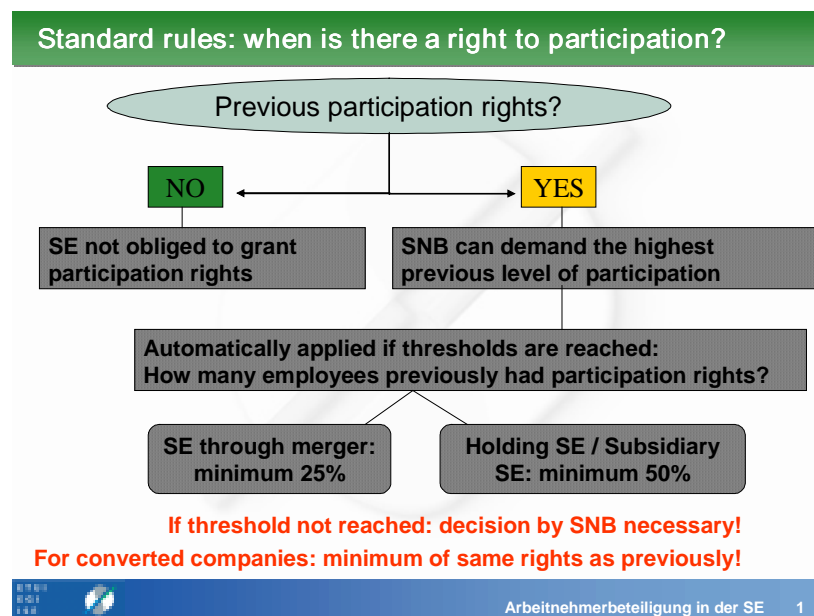
As in the case of information and consultation rights, the standard rules provide minimum standards for participation rights which are (only) applied if the two parties do not reach an agreement or voluntarily decide to apply the standard rules.

An SE is still not obliged to grant participation rights if no such rights existed previously in any of the companies concerned. In all other cases, however, the starting point favours the employees: if some of the workforce previously had participation rights

(whatever their number), the SNB can always demand that this standard be applied to all the SE's employees (by absolute majority).

Such a decision on the part of the SNB is not necessary if a certain threshold is exceeded in the number of employees who previously had participation rights: when an SE is established by a merger, the threshold is 25% of employees and in the case of SE holding companies or SE subsidiaries the threshold is 50 %. If fewer employees than this previously had participation rights, the standard rules are not automatically applied; in this case a decision by the SNB would be necessary (see also Figure 2). The management can only prevent the standard rules being applied by abandoning the project to establish an SE.

Diagram 2: Participation rights under the standard rules



The same type of participation applies in the SE as applied previously in the companies, that is either:

- the right to elect/nominate some of the members of the supervisory or management body, or
- the right to recommend and or reject the nomination of some or all of the members of the supervisory or management body (the “Dutch model”).

If more than one form of participation existed previously in the companies, the SNB will choose one of them (by absolute majority). The number of members to be delegated or recommended is based on the highest previous proportion among the companies concerned. The applicable figure is not the absolute figure (e.g. 3 of 12 seats) but rather the percentage (1/3 of the seats).

## II. Content of the standard rules and agreements on employee participation in SEs

The employees have no influence over whether their representatives sit on a supervisory or a management body. The issue of the SE's structure (one or two-tier) is decided in the SE's statute. This has no implications for the type and extent (e.g. 1/3 of seats) of participation. Existing participation rights should be extended as broadly as possible to all employees. Access to information and influence at the highest levels is particularly valuable in multinational companies like SEs for influencing management decisions in the interests of employees from all countries.

The SE Works Council decides on the **allocation of seats** in the management or supervisory body. Allocation is based on the proportion of employees employed in each Member State. The Member States decide the regulations for the allocation of the seats to which they are entitled.

All employee representatives or members of the SE's management or supervisory body recommended by them have **the same rights** (including voting rights) and the same **duties** as the representatives of shareholders.

In the case of a **conversion** into an SE there is no leeway: all participation rights which applied in the company must continue to be applied fully.

In the case of a reduction in participation rights contained in the standard rules, certain voting majorities must be observed (see Chapter III, The SNB). Reduction here means that an agreement is made to proportionally reduce influence over the composition of the SE's management or supervisory body (e.g. 1/4 of the seats instead of 1/3).

The following example demonstrates when the standard rules for participation apply.

**Example 1: Application of the standard rules for participation**

Companies concerned from:	Proportion of the total number of SE employees :	Previous participation rights?
Denmark	25 %	Yes
Netherlands	15 %	Yes
Estonia	15 %	No
Poland	45 %	No

In this example, more than 40% of the employees previously had participation rights\*. If the SE is to be established in the form of a **merger**, the standard rules for participation would automatically apply, since the necessary threshold of 25% of the total number of employees is exceeded. If the SE is to be a **holding company SE** or a **subsidiary SE**, the rules do not apply automatically because the higher threshold of 50% of the workforce for these types of SE has not been reached. In that case, a special decision of the SNB (by absolute majority) is necessary in order to apply the standard rules. In both cases there is therefore an opportunity to extend the participation rights held by some employees to all those employed by the SE. The SNB must also take a decision (also by absolute majority) on the *form* of participation they want: direct appointment of a proportion of the supervisory/management body members or the "Dutch model" with powers of recommendation or veto.

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(\* In the example, the simplified premise is that either all the employers from the company concerned in a given country have participation rights or none of them do. In reality this is not necessarily the case and calculations must be made accordingly.)

### **Content of Agreements on Employee Participation**

The employees and employers negotiate with the aim of reaching an understanding and producing a joint written agreement on the form that employee involvement in the SE will take. These negotiations can take up to six months, and can be extended by a further six months if both sides agree to it. After this time the standard rules on employee participation in European Companies automatically apply.

✓ **Effective use of negotiating time; no termination of negotiations**

The negotiating time of six (or a maximum of twelve) months is relatively short. It is therefore important to use the time available effectively to ensure the best possible agreement on employee participation in the SE. The SNB should not under any circumstances terminate negotiations with the management (or fail to begin negotiations in the first place, thereby “activating” the European Works Council Directive). Such a decision would mean automatically forgoing the improved information and consultation rights of an SE Works Council as compared to a European Works Council. It would also mean losing the chance to influence the composition of the management or supervisory body.

✓ **Maximum degree of information, consultation and participation rights**

The aim of negotiations should always be to achieve a maximum degree of involvement rights, in terms both of information and consultation rights and of participation rights. Because involvement rights will subsequently apply to all employees of the SE, the members of the SNB carry responsibility not only for the employees in their own country but ultimately for all the SE's employees. The first agreements are of particular importance because they will set a positive or negative precedent which will without doubt be referred to when later SEs are established.

✓ **Knowledge of the standard rules as a reference point for minimum demands**

The employee representatives in the SNB should be aware of their rights under the standard rules because their application can be demanded as a minimum (albeit only *as long as the SNB has not terminated negotiations*). The rights contained in the standard rules can therefore be used as a reference point for negotiating demands, which should never fall short of this standard. An important aspect of these legally guaranteed rights is the fact that participation rights (for the appointment of the SE's highest-level bodies) can be demanded for all employees, as long as at least some of the employees previously had participation rights. If this is not the case, the employees are not obliged to introduce participation rights in the SE alongside the obligatory information and consultation rights. However, even in such a case, the SNB should make efforts to convince the management to give such rights voluntarily.

## II. Content of the standard rules and agreements on employee participation in SEs

The SNB should in all cases be clear about previous participation rights in the companies concerned, the most important points being the number of employees who had these rights and the extent of them (e.g. 1/3 of the seats on the management or supervisory body).

Both negotiating parties have considerable leeway regarding the content of the agreement. The EU Directive does nonetheless stipulate some minimum requirements. The following summary is designed to give an overview of the central points which should be covered by the agreement. **The minimum legal requirements are shown by a \*.**

The minimum legal requirements on the individual points which are laid down in the standard rules can be seen in the summary in the previous section.

Special regulations apply for cases where an existing company is converted into an SE: here the negotiated agreement must ensure that the level of involvement rights in the SE is at least the same as previously existed in the company. An increase in rights is therefore possible; a reduction is not.

<b>Scope of Agreements</b>	
<p><b>Scope*</b></p>	<p>List of the companies, subsidiaries and establishments concerned where the agreement is applicable (including number of employees).</p> <p>It can also be decided to extend the agreement to companies and establishments which are not in a Member State (e.g. in Switzerland or the EU candidate countries Romania and Bulgaria).</p>
<p><b>Period of validity*</b></p> <ul style="list-style-type: none"> <li>• Beginning and end; possibility to terminate the agreement</li> <li>• <b>Important: the right to renegotiate</b> (information / consultation and participation) in the case of structural changes <u>after</u> the SE is established</li> </ul>	<p>A procedure for renegotiation is important in order to be able to react to structural changes <u>after</u> the SE is established (e.g. mergers, acquisitions of other companies). This can be particularly important in maintaining existing participation rights in the newly "acquired" company.</p>

<b>The SE Works Council (SE-WC)</b>	
<p><b>Level at which there is employee representation</b></p>	<p>It must be ensured that the SE-WC is established at the highest possible level (= the level at which strategic decisions are taken).</p>
<p><b>Composition*</b></p> <ul style="list-style-type: none"> <li>• <b>Number of members*</b></li> <li>• <b>Allocation of seats*</b> <ul style="list-style-type: none"> <li>- Geographical allocation</li> <li>- Appointment / nomination procedure</li> </ul> </li> </ul>	<p>The size should ensure that both of the following are possible:</p> <ol style="list-style-type: none"> <li>1) Proportional allocation of seats (standard rules: entitlement to 1 seat per 10%)</li> <li>2) Each country where the SE has employees should have at least one representative (see also Chapter II, Standard Rules).</li> </ol> <p>Where possible, extra seats should be negotiated in the case of a merger (as for the SNB) so that all companies involved in all countries have a voice in the SE-WC.</p> <p>The seats should be divided up proportionally between the Member States concerned (standard rules: 1 seat per 10%, see Chapter II, Standard Rules)</p> <p>The appointment or nomination of national representatives to the SE-WC is carried out according to <u>respective</u> national regulations.</p>

<ul style="list-style-type: none"> <li>• <b>Adjustment</b> of the composition of the SE-WC in the case of changes</li> <li>• <b>Duration of members' mandate</b></li> <li>• Establishment of a <b>select committee</b></li> <li>• Election of <b>alternate members</b> of the SE-WC and the select committee</li> <li>• <b>Decision-making</b> in the SE-WC</li> </ul>	<p>apply the standard rules on these points.</p> <p>The agreement must ensure that changes in the employment structure lead to adjustments in the composition of the SE-WC (e.g. in the case of changes in the geographical distribution of the SE's employees as a result of acquisitions).</p> <p>The select committee ensures the SE-WC's continuity between meetings. Its members must be members of the SE-WC (guaranteed by the standard rules, see Chapter II, Standard Rules).</p> <p>One alternate member for each member.</p> <p>Two forms are possible:</p> <ul style="list-style-type: none"> <li>- Each member has one vote.</li> <li>- Each member has as many votes as the number of employees they represent.</li> </ul>
<p><b>Powers and procedures for information and consultation*</b></p> <ul style="list-style-type: none"> <li>• Definition of information and consultation</li> <li>• Definition of competences</li> <li>• Information and consultation content, procedures and type</li> </ul>	<p>For both information/consultation and competences, the definitions from the SE Directive (which are an improvement on the European Works Council Directive) should be used.</p> <p>The minimum standard in this area should be the rights under the standard rules (also for the type of information and consultation). In addition to this, any issues which seem important in particular special cases can of course also be negotiated.</p> <p>The members of the SE-WC should have access to all the SE's subsidiaries and establishments.</p>
<p><b>Meetings with the competent organ*</b></p> <ul style="list-style-type: none"> <li>• Number of meetings with the competent SE organ</li> <li>• Right to extraordinary meetings in special circumstances</li> <li>• Internal SE-WC preparatory and follow-up meetings</li> <li>• Further internal meetings alongside meetings with the SE body</li> </ul>	<p>It would certainly be advisable to negotiate more than the one annual meeting (including an internal preparatory meeting) which is guaranteed under the standard rules. There should also be guaranteed continuous contact between meetings (e.g. through the select committee).</p> <p>Guaranteed under the standard rules (see Chapter II, Standard Rules).</p> <p>One preparatory meeting per meeting with the competent organ is guaranteed under the standard rules (see Chapter II, Standard Rules).</p> <p>Further opportunities for internal meetings can enhance the continuity of the SE-WC. At the very</p>





II. Content of the standard rules and agreements on employee participation in SEs

<ul style="list-style-type: none"> <li>• for employee representatives in the management or supervisory body</li> </ul>	<p>experts is at the sole discretion of the SE-WC.</p> <p>It should be possible for employee representatives on the management or supervisory body to get advice or to invite experts to meetings, where necessary.</p>
<p><b>Time off for training without loss of wages</b></p> <p>for members of the SE-WC and the employee representatives on the management/supervisory body</p>	<p>The standard rules guarantee the members of the SE-WC (only) the right to time off for training without loss of wages. The costs for this training should be borne by the SE.</p> <p>The employee side decides on the content and form of the training.</p>
<p><b>“Internal work and communication structures” between the SE-WC and the employee representatives on the management/supervisory body</b></p>	<p>Firm working contacts and a steady flow of information are very important for effective cooperation between the two European levels of employee representation in an SE. This could, for example, imply the employee representatives on the management/supervisory body being able to attend meetings of the SE-WC. Another possibility would be a meeting between the employee representatives on the management/supervisory body and the select committee before and after the meetings of the management/supervisory body. A joint meeting with the SE’s management could also be negotiated.</p> <p>The participation in SE-WC meetings of a representative from a European trade union organisation (without voting rights) could also be negotiated.</p> <p>The SE should make financial resources available for this.</p>
<p><b>Secrecy obligations</b></p>	<p>See Chapter III, Secrecy Obligations.</p>
<p><b>Protection of employee representatives</b></p>	<p>See Chapter III, Protection of Employee Representatives.</p>

### III. Information on Employee Involvement in SEs

#### Basic Information on European Companies (SEs)

##### APPLICABLE LAW

The legislation on European Companies consists of two connected texts:

- The **Regulation on the Statute for a European Company (SE-Reg)**<sup>1</sup> contains the legal provisions for the establishment of an SE (e.g. conditions of capital, registered office, legal basis, types of establishment, formation/structure of the SE, SE bodies and their respective competences).
- The issue of the way in which employees are involved in SE decisions is covered by the supplementary **Directive with regard to the Involvement of Employees in an SE (SE-Dir)**<sup>2</sup>.

Member States were obliged to transpose both texts into national law by 8 October 2004. EU regulations do not actually need to be transposed into national law as such, since they are directly applicable in all Member States as soon as they come into force. In the case of the SE-Reg, however, the Member States were responsible for enacting supplementary rules where the Regulation required it (“SE implementing legislation”).

The “SE project” has taken over 30 years to come to fruition. The original plan was to create completely independent shareholding legislation for SEs. Under that system, every SE – irrespective of the Member State in which it was established – would have been exclusively subject to European Community legislation. This ambitious goal was never realised because of differing opinions among the EU Member States. In many important areas, SEs are therefore subject to the national legislation of the country in which they have their registered office. This applies for the areas mentioned above, where the SE-Reg and SE-Dir explicitly grant the Member States leeway on decisions (yes/no?) and form (how?). In transposing both pieces of SE legislation into national legislation, each country must resolve the open questions for those SEs which will have their registered office there. In actual fact, there is therefore not one single SE law, but rather 28 (the EU-25 + Liechtenstein, Norway und Iceland).

The SE Regulation does not make provisions for certain areas, such as fiscal law, competition law and bankruptcy law. That means that in these areas, the SE is subject to the “normal” national and European legislation. In the areas where the SE legislation

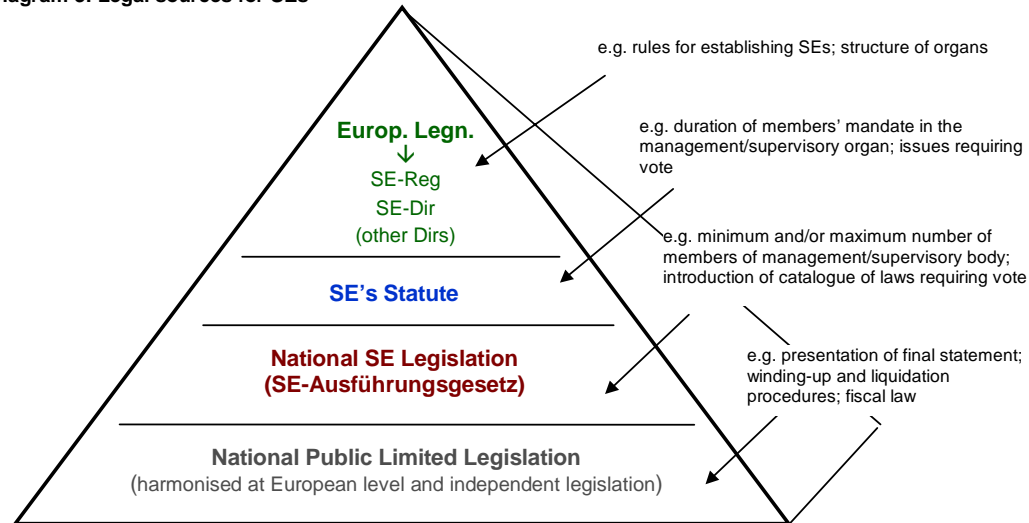
<sup>1</sup> Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE), Official Journal L 294 of 10.11.2001.

<sup>2</sup> Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees, Official Journal L 294 of 10.11.2001.

provisions are only partial, the legal provisions of the country where the SE has its registered office apply as for any other company established in that country.

The following diagram shows the various legal sources which apply to SEs in descending order.

Diagram 3: Legal sources for SEs



## WAYS OF ESTABLISHING AN SE

The SE Regulation provides four ways in which an SE can be established. There are differing requirements which must be fulfilled by the companies involved, depending on the type of establishment. Common to all four types is the fact that there must be a "cross-border aspect", that is to say, at least two of the companies involved must be subject to the legislation of different Member States (see Diagram 4).

### 1. SE established by a merger

Public limited companies (PLCs) from two Member States can establish an SE through a merger. This can happen through one PLC "incorporating" another; in this case the PLC which was taken over ceases to exist and the other PLC is re-registered as an SE. Alternatively, the two companies can establish an SE jointly; in this case, both companies cease to exist independently.

### 2. Holding company SEs

PLCs and Limited Companies (Ltds) can establish a joint holding company, as long as they are based in two different Member States.

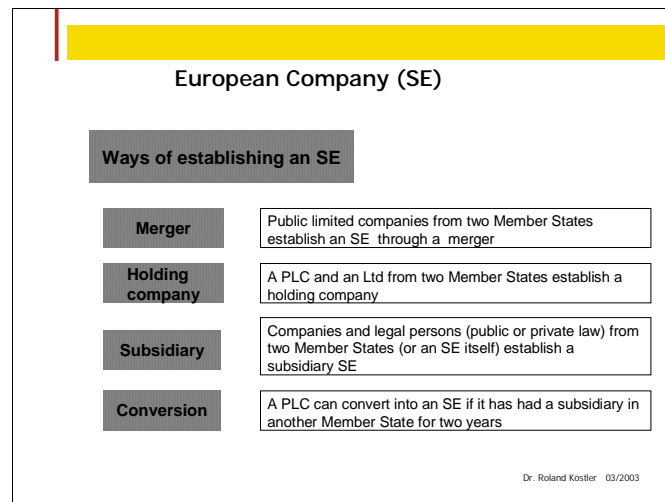
Diagram 4: Ways of establishing an SE

### 3. Subsidiary SEs

A joint subsidiary in the form of an SE can be established by companies and legal persons (public and private law), as long as they are based in two different Member States.

### 4. Conversions

The possibility of converting into an SE is available only to PLCs which have had a subsidiary in another Member State for at least two years.



In addition to this, the SE legislation makes it possible to **relocate** the **SE's registered office** to a different Member State without dissolving the SE and establishing a new company in the other country. However, it is not permitted to relocate the registered office in the case of a PLC converting into an SE. The registered office must remain in the country where the SE's head office is located.

Later in the process, the **SE itself** can establish other European Companies, e.g. in the form of a subsidiary SE.

## STRUCTURE OF SEs

European Companies will not only differ from each other in the way they are established and their respective applicable (supplementary) national legislations. A crucial decision which is enshrined in the SE's statute is the choice of structure. In Europe there are two types of structure: the one-tier system and the two-tier system. The SE can choose between these two basic types:

- In the **one-tier system** there is only a **management board**, which directs the SE's business. Its members are appointed by the annual general meeting. The Member State can decide that one or more Managing Directors are responsible for the day-to-day business. In this case, the management board consists of the **Managing Directors** (responsible for day-to-day business) and the **"non-managing" Directors**.

- b) In the **two-tier system** there are two separate bodies. On the one hand there is an **executive board**, which is responsible for the SE's business. On the other hand, there is a **supervisory body**, which monitors the executive board's handling of business. It does not have any power to carry out the SE's business. The members of the supervisory body are appointed by the annual general meeting. The supervisory body then appoints the members of the executive board. It is not possible to be a member of both bodies at the same time.

Irrespective of the Member State in which the SE is established, there must be a free choice between these two basic systems. This also applies in countries where only one of the two company systems was previously possible. These countries can make special provisions for SEs, but this is not obligatory.

The employees have no formal influence over the decision on which of the two systems is used in the SE. This is enshrined in the SE's statute and is not part of negotiations with the management. However, this decision is not without consequence, as it will determine where participation takes place: management board or supervisory body.

The following summary shows which public limited company system has been used previously in the different Member States.

**Table 1: National Structures for Public Limited Companies**  
1= One-tier system / 2= Two-tier system

AUSTRIA	2	LITHUANIA	1 + 2
BELGIUM	1	LUXEMBOURG	1
CYPRUS	1	MALTA	1
CZECH REPUBLIC	2	NETHERLANDS	2
DENMARK	1	POLAND	2
ESTONIA	2	PORTUGAL	1
FINLAND	1 + 2	SLOVAKIA	2
FRANCE	1 + 2	SLOVENIA	2
GERMANY	2	SPAIN	1
GREECE	1	SWEDEN	1
HUNGARY	2	UNITED KINGDOM	1
IRELAND	1	ICELAND	1
ITALY	1	LIECHTENSTEIN	1
LATVIA	2	NORWAY	1

## Participation Rights in Europe

The SE Directive (SE-Dir) enhances and improves information and consultation rights in cross-border companies (particularly compared to the European Works Council Directive). But the real “qualitative leap” lies in the fact that the SE-Dir for the first time defines participation rights in a European context and makes them a firm part of the negotiations between employee representatives and the management of the companies involved in a future SE. The Directive perceives participation as the possibility to influence the composition of the highest-level company bodies (supervisory body or management board).

For the purposes of negotiations, it is very important to know the existing participation rights in the countries where people are employed by the (planned) SE. On the one hand, this is important for the understanding of the employee representatives who make up the Special Negotiating Body (SNB) to negotiate collectively with the management. However, these national participation rights also serve as a starting point for the demands that the SNB can make. The basic principle is: if any employees previously had participation rights, these can be extended to all the SE’s employees. (For the details of the standard rules see Chapter II).

For this reason it seemed appropriate for this checklist to contain a summary of existing participation rights in the EU. The variety of participation types and practices has been widened further by the EU enlargement and the addition of ten new countries. In basic terms, the 28 states in which an SE can be established (the 25 EU Member States + Iceland, Liechtenstein and Norway) can be divided into three groups:

**a) Countries with an extensive system of participation rights governed by legislation or collective agreements**

Austria, Czech Republic, Denmark, Finland, Germany, Hungary, Luxembourg, (Netherlands), Norway, Sweden, Slovakia, Slovenia.

**b) Countries with low levels of participation rights (e.g. only in state-owned enterprises)**

France, Greece, Ireland, Malta, Poland, Portugal, Spain.

**c) Countries with no participation regulations**

Belgium, Cyprus, Estonia, Iceland, Italy, Latvia, Liechtenstein, Lithuania, United Kingdom.

With twelve countries in it, the group with the strongest participation systems is the biggest. Overall, there are participation regulations in 3/4 of the states (= 21 countries). There are only 9 states in which employee representation at company body level is virtually unknown. However, even in these countries there are usually at least a few cases of companies where employee representatives sit on the supervisory or management body.

Participation rights differ greatly from country to country because they are anchored in national industrial relations. Firstly there are differences in the forum where participation takes place: depending on the company structure in a given country, the employee representatives sit either on a management board or a supervisory body. In some countries, such as France and Finland, both systems exist in parallel (see Table 1 in Chapter III, Basic Information on SEs).

In those countries where a large number of private and state-owned enterprises are covered (the first group), there are two different cultures. In Germany, Austria and Slovenia, for example, participation is governed by legislation, whereas in the Scandinavian countries employee representation is governed by collective agreements (albeit also safeguarded by a legal framework).

The specific details of participation also vary according to the idiosyncrasies and legal provisions of national industrial relations. The type of participation varies in particular with regard to:

- **Thresholds, that is, the number of employees above which a company is obliged to grant participation rights**

These thresholds range from 25 employees in Sweden to 500, 1000 or even 2000 in Germany.

- **Proportion of employee representatives in the highest-level company bodies**

These range from single representatives (e.g. in Malta), to one third (e.g. in Denmark and Austria) to half of the members of the company body (in Slovenia and Germany). In Finland this decision is part of the agreement which is made between the employer and employees.

- **Election or nomination of employee representatives**

In the majority of countries, the employee representatives to the highest-level company bodies are appointed by general election of the company's employees (e.g. in Poland, Denmark and Ireland). In some countries, however, it is the trade unions who appoint all (e.g. Sweden and Spain) or some (e.g. Germany and Slovakia) of the representatives. In a third group of states, this right is held by the Works Councils (e.g. Austria and Slovenia).

- **Selection criteria for employee representatives**

In the majority of countries, employee representatives must be employed in the company. However, there are countries with other arrangements: in Germany, some of the representatives are not employees of the company. These external representatives are nominated by the trade unions.

- **Equality of employee and shareholder representatives**

Generally speaking, members of the supervisory or management body appointed by the employees have the same rights and duties as those appointed by the share-

holders in all countries. There are exceptions, for example in Sweden, where employee representatives cannot participate in decisions where the interests of their trade unions are affected (e.g. in the case of collective agreements).

There is a completely separate model in the **Netherlands**: there employees do not have direct representatives in the company's supervisory or management body. Dutch Works Councils do, however, have the right to propose candidates for the supervisory body and to reject the nomination of certain candidates. (The new members of the supervisory body are ultimately nominated by the supervisory body itself, as part of the "co-optation procedure"). The members of the supervisory body proposed by the employees are, however, independent in their mandate and not bound by any interests. They are also not allowed to be employees of the company.

Employee participation in supervisory bodies or management boards constitutes an important part of company industrial relations in many European countries. The differences across Europe will mean that participation will vary greatly among future SEs. The respective business cultures of the companies involved and the different national participation cultures will most probably have a heavy influence.

The European Company offers an opportunity to redefine participation in a company-specific and European context. SEs offer employees access to the highest levels of European Company. They will thereby gain prompt access to important information and influence where strategic decisions for the entire company are taken or monitored. This is particularly important in multinational companies like SEs, in order to be able to influence company management's decisions in the interests of the employees. National rights may no longer be able to achieve this sufficiently.

For this reason, the Special Negotiating Body (SNB) should always take the opportunity to extend existing participation rights to all the SE's employees and to put participation rights on the negotiating agenda if no such rights existed previously.

The following two tables give a summary of the participation rights in the 25 Member States of the EU.

Table 2a: Participation in the EU 15

Summary: Participation in the EU 15									
	Legal Basis for:		Number of E-reps	Appointment by:			Selection criteria: only E?	Structure of PLCs	
	state C	private C		TU	WC	Election			
Austria	●	●	1/3		●		●	2	
Belgium								1	
Denmark	●	●	1/3			●	●	1	
Finland	●	●	Agreement		●		●	1 2	
France	●		1/3 or 2-3 members			●	●	1 2	
Germany	●	●	1/3 – 1/2	● (TU seats)		●	● (apart from TU seats)	2	
Greece	●		2-3 members			●	●	1	
Ireland	●		(usually) 1/3			●	●	1	
Italy								1	
Luxembourg	●	●	(max.) 1/3	● (TU seats in iron/steel Cs)	●		●	1	
Netherlands	(●)	(●)	WC has right to recommend and oppose the appointment of supervisory body members						2
Portugal	●		1 member			●	●	1	
Spain	●		2 members	●				1	
Sweden	●	●	2-3 members	●			●	1	
UK								1	

\* Including privatised companies  
Abbr.: E= Employee / TU= Trade Union/ WC= Works Council; elected E-representatives; C= Company/ 1= one-tier structure / 2= two-tier structure

Norbert Kluge/ Michael Stollt, EGI (2004)

Table 2b: Participation in the new EU Member States

Summary: Participation in the new EU Member States								
	Legal basis for participation in:		Number of E-reps	Appointment by:			Selection criteria	Structure of PLCs
	state C	private C		TU	WC	Election		
Cyprus								1
Czech Republic	●	●	1/3			●	● in private Cs	2
Estonia								2
Hungary	●	●	1/3	Oblig. consult.	●		●	2
Latvia								2
Lithuania								1 2
Malta	●		1 member			●		1
Poland	●		(usually) 2/5			●		2
Slovakia	●	●	1/3 (private Cs) 1/2 (state Cs)	1 seat in state Cs		●		2
Slovenia	●	●	1/3 - 1/2 (C statute)		●		●	2

\* Including privatised companies  
Abbr.: E= Employee/ TU= Trade union/ WC= Works Council; elected E-representatives/  
C= Company/ 1= one-tier structure / 2= two-tier structure

Norbert Kluge/ Michael Stollt, EGI (2004)

## The Special Negotiating Body (SNB)

### COMPOSITION

The SNB represents the employees in negotiations with the companies concerned to achieve a written agreement on employee involvement in the future SE. It is set up as soon as the company managements make it known that they wish to establish an SE. The seats are divided up among the Member States in which the companies concerned employ people, proportionally according to the number of employees in each country: for every **10% (or part thereof)** of the total number of employees of the future SE/SE group, the country can delegate **one representative** to the SNB. Consequently, every country involved has at least one member on the SNB.

In the case of an SE established through a **merger**, provision is made for additional seats. This is to ensure that every country can delegate at least **one representative per company concerned**. The number of additional seats cannot, however, exceed 20% of the total original number.

The way in which the national SNB members are elected or nominated is laid down by the individual Member States. In this way, the Member States can also allow **trade union representatives** to become SNB members even if they are not employed by the company. The following example is designed to clarify the calculation and allocation of SNB seats.

#### Example 2: Geographical allocation of SNB seats

Companies A and B plan to establish a joint SE holding company. A has 7 000 employees (E), B has 3 000 E.

Country	E in Company A	E in Company B	Number of E per country	Proportion of SE E per country	SNB members
Italy	4 300	1 500	5 800	58 %	6
Hungary	1 200	900	2 100	21 %	3
France	1 440	550	1 990	19.9 %	2
Slovenia	60	50	110	1.1 %	1
total	7 000	3 000	10 000	100 %	12

Each country has one seat per 10% (or part thereof) of the total number of employees (10% is 1000 E in this example). In this case, the SNB will consist of 12 members. The allocation of the national seats is carried out according to respective national implementing legislation: for example, the issue of how the Slovenian representative is chosen will be decided by Slovenian SE legislation.

If the two companies in the example above chose to establish an SE through a **merger** (rather than establishing an SE holding company or SE subsidiary), the special rules for SEs

established through mergers would apply. These are designed to ensure that, where possible, one representative per company comes from each of the four countries. In the example above this is not a problem for Italy, France and Hungary, because they all already have at least two seats on the SNB. In these three countries at least one representative from Company A and one from Company B can be delegated.

Slovenia, on the other hand, is only supposed to delegate one member. In order for the Slovenian employees from both Company A and Company B to be represented, they would receive a second seat. The SNB would therefore consist of 12 + 1 members. The number of additional seats does not in this case exceed the maximum limit of 20% of the original number of members (in this case, with an original number of 12 members the 20% maximum limit would be 2.4 additional seats). Slovenia may therefore delegate a second member.

## DECISION-MAKING

An important issue for the work of the SNB is the voting majorities needed for certain decisions, and how these are calculated.

The SNB takes decisions by **double absolute majority**, as long as no other provisions have been laid down. This is achieved when the **majority of SNB members** vote in favour of the decision (each member has one vote) and this majority also represents an **absolute majority (that is, more than 50%) of the employees** of the future SE. A simple majority – i.e. more “yes” votes than “no” votes from those present – is not enough. Abstentions or the absence of members do not affect the number of votes necessary.

For some especially important decisions, a greater proportion of votes in favour is required. To achieve this “**super majority**”, those voting in favour must **(a)** be at least **2/3 of the SNB members**, **(b)** represent **2/3 of employees** and **(c)** come from **two different Member States**.

A “super majority” is needed for the following decisions:

- **Decision not to open negotiations or to terminate them.**

This decision always requires a “super majority”. In the case of a company converting into an SE, this decision is *not allowed if participation rights exist in the company*.

- **Reductions in existing participation rights**

Here a “super majority” is required if a certain proportion of the employees previously had participation rights (at least 25% of employees when an SE is established through a merger, and at least 50% in the case of SE holding companies and SE subsidiaries). Reduction implies here that a decision is to be taken to proportionally reduce influence over the composition of the SE’s management or supervisory body (e.g. only 1/4 of the seats instead of 1/3). It is advisable to make a comparison with the highest previous proportion in one of the companies concerned.

**NB.** It is not permitted to reduce existing involvement rights (including participation rights) in the case of a conversion into an SE.

**All other SNB decisions are taken by double absolute majority.** These include votes on the agreement with the management and on the voluntary application of the standard rules. The following example is designed to clarify the majorities required.

**Example 3: Majorities required in the SNB**

Companies concerned from	Proportion of the SE's employees	Members on the SNB	Previous participation?
Country A	25 %	3	Yes
Country B	20 %	2	No
Country C	55 %	6	No

For an absolute majority, at least 6 of the 11 SNB members must vote “yes”. These members must also represent more than 50% of the employees. If representatives from the same country vote differently, it is important to know how many employees each member represents. This is governed by the national implementing legislation. So, the question of whether both representatives from Country B represent 10% or whether one represents 7% and the other 13% is a question of national SE legislation.

For a “super majority” at least 2/3 of the votes are required, so in this case 8 votes. The votes from Country C alone would therefore not be enough, because alone they represent less than 2/3 of the employees, and also because the votes must come from at least two countries.

If a vote is taking place to reduce participation rights, the crucial factor is the way in which the SE is established. If the case above was of an SE established through a merger, a “super majority” would be necessary, because 25% of the employees previously had participation rights. In the case of an SE holding company or an SE subsidiary, on the other hand, an absolute majority would be sufficient because less than 50% of employees previously had participation rights.

The following diagram contains a summary of the majorities required, and Table 3 shows the individual requirements for each type of SE and decision.

**Diagram 5: Decision-making in the SNB**

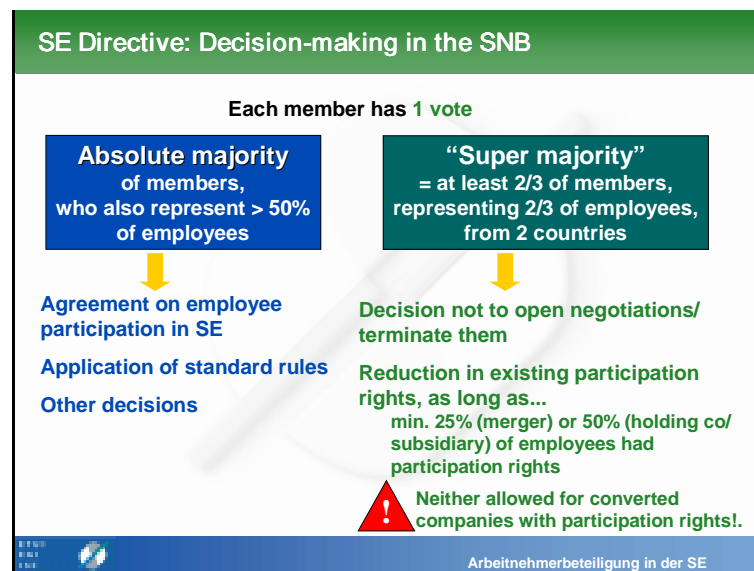


Table 3: Majorities required by type of establishment

**a) SE through merger**

E = employees / P = participation

E with P rights (as % of the total number of SE employees)	Negotiations	Agreement		Standard rules	
	Decision <u>not</u> to open negotiations or to terminate them	Decision to reduce existing P rights	All other decisions concerning the agreement	Decision to apply the standard rules on P	Decision to reduce existing P rights
0	Super majority	-	Absolute majority	- (no obligation for SE)	-
< 25	Super majority	Absolute majority	Absolute majority	Absolute majority	Absolute majority
25 – 50	Super majority	Super majority	Absolute majority	<b>Automatic application</b>	Super majority
> 50	Super majority	Super majority	Absolute majority	<b>Automatic application</b>	Super majority

**b) Holding company SE / Subsidiary SE:**

E with P rights (as % of the total number of SE employees)	Negotiations	Agreement		Standard rules	
	Decision <u>not</u> to open negotiations or to terminate them	Decision to reduce existing P rights	All other decisions concerning the agreement	Decision to apply the standard rules on P	Decision to reduce existing P rights
0	Super majority	-	Absolute majority	- (no obligation for SE)	-
< 25	Super majority	Absolute majority	Absolute majority	Absolute majority	Absolute majority
25 – 50	Super majority	Absolute majority	Absolute majority	Absolute majority	Absolute majority
> 50	Super majority	Super majority	Absolute majority	<b>Automatic application</b>	Super majority

**c) Conversion (PLC to SE):**

E with P rights (as % of the total number of SE employees)	Negotiations	Agreement		Standard rules	
	Decision <u>not</u> to open negotiations or to terminate them	Decision to reduce existing P rights	All other decisions concerning the agreement	Decision to apply the standard rules on P	Decision to reduce existing P rights
0	Super majority	-	Absolute majority	- (no obligation for SE)	-
> 0	<b>Not allowed!</b>	<b>Not allowed!</b>	Absolute majority	<b>Automatic application</b>	<b>Not allowed!</b>

## Secrecy Obligations and Protection of Employee Representatives

### SECURITY OBLIGATIONS

Members of the **Special Negotiating Body (SNB)** and the **SE Works Council** and the **experts** who support them are subject to secrecy obligations with regard to third parties. **However, this only applies to information which would constitute a company or trade secret and which is given to them by the company body with the explicit advice that it is confidential.**

This secrecy obligation cannot exist

- **within a body**  
(that is, between individual members of the SNB/ between individual members of the SE Works Council)
- **with regard to other employee representatives who are to be informed about the content and outcomes of consultation under the standard rules or the agreement**  
In this case, confidential information must be passed on as confidential. Employee representatives of the SE, its subsidiaries and establishments are also subject to secrecy obligations.
- **with regard to employee representatives on the supervisory or management bodies**  
They are (like all members of the supervisory or management body) already subject to specific secrecy obligations under the company law rules of the Regulation (Art. 49).
- **with regard to interpreters and experts brought in for assistance**  
These people are also already subject to a secrecy obligation.

The specific rules under the national implementing legislation of the Member State in which the SE has/will have its registered office should be consulted. Where appropriate, the necessary clarifications with regard to secrecy obligations should be anchored in the agreement.

It is permissible for the SE bodies (or the companies involved in establishing the SE) **not to divulge information** if its disclosure could be prejudicial to the company *on the basis of objective criteria*. Purely subjective fears are therefore not sufficient grounds.

In order to prevent abuse of these rights by company management to impede employee representatives in their work, the Member States are obliged to introduce **procedures** by which the employee representatives can check whether the SE bodies can refuse access to information or demand confidentiality in a given case.

## **PROTECTION OF EMPLOYEE REPRESENTATIVES**

The members of the SNB and the SE Works Council and the employee representatives on the SE supervisory/management body enjoy the same protection and the same guarantees in carrying out their activities as other employee representatives in their respective countries. This implies, for example, rules on protection against dismissal, on participation in the meetings of the body in question and on continued remuneration (for the duration of their absence from work).

The SE Directive therefore does not provide a single standard, but refers employee representatives to their national rights. This means that the level of protection can vary widely within a body. For this reason, the SNB can also try to negotiate the highest level of protection for all employee representatives in the agreement with the SE management.

## **Annex**