

# ***GROUP OF EXPERTS "SE"***

## **WORKING PAPER N° 1**

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# ***GROUP OF EXPERTS "SE "***

## **CONCLUSIONS OF THE EXPERT GROUP following the meeting of Directors General of Industrial Relations on 16 May 2003**

**27 June 2003**

### **INTRODUCTION**

At the request of the Council, the Commission set up an Expert Group composed of national experts and the social affairs counsellors in order to provide a forum for discussing the arrangements for the transposition of Directive 2001/86/EC into national legislation. Since the transposition involves provisions with a transnational dimension, the Expert Group has endeavoured to seek ways of avoiding any contradictions between the various national systems by exchanging information and co-ordinating the transposition work.

The Expert Group had informal status, and the role of the Commission has been limited to providing it with logistical support and helping to develop its ideas. The Commission has not sought to interfere with the transposition of the Directive at national level in any way, nor to intervene in the right of interpretation of the Court of Justice, or other courts concerned. The same applies to the experts in the Expert Group who, in their countries, are responsible, as the case may be, for producing draft legislation or monitoring discussions between the social partners as part of agreement-based transposition.

The Commission is extremely pleased with the work and achievements of the Expert Group, which has had an extremely fruitful exchange of views in a remarkable spirit of co-operation on the basis of 21 working documents presented either by the Commission or by the delegations. All the members of the Expert Group share this positive judgement. A total of 10 day's meetings were held, during which the main issues arising from the implementation of the Directive were extensively discussed. The consensual approach with the objective of simplifying what, in any event, will be a complex corpus of legal provisions allowed the Expert Group to draw the conclusions which follow.

Those conclusions are, in fact, simple reminders to all which are or will be involved in the legislative work leading to the implementation of the Directive in all countries concerned by it. They are by no means binding and do not in any way exonerate Member States from the responsibility of ensuring its correct transposition and application, as they do not exempt the Commission from its obligation to monitor that work.

Most of the issues below are rather complex. The conclusions must be read and interpreted in conjunction with all the Working Documents, which explain and develop them in detail. Those documents gathered a broad consensus amongst the Expert Group, although some of the detailed points referred to therein raise some reservations.

**The Commission's Services (EMPL/D/3) and  
The Members of the Expert Group**

## 1. Date of entry into force of the national laws

The 8 October 2004 should be a uniform date of entry into force of all the national measures transposing the Directive in the countries bound by it.

## 2. List of national provisions having a transnational scope (principal provisions) and of those having a purely national scope (accessory provisions)

Note: Some of the provisions quoted below have a double nature, as explained in the relevant working documents.

Directive	Contents of the provision	Type of measure
Article. 1	Fixing of a general obligation of definition of the arrangements for the involvement of workers in the SE	Principal provision
Art. 2.1 a) to d) and f) to k)	Definitions	Principal provision
Art. 2.1.e)	Determination of workers' representatives	Accessory provision
Art. 3.1	Obligation of creation of a Special Negotiating Body	Principal provision
Art. 3.2.a)	Composition of the SNB – criteria	Principal provision
Art. 3.2.b)	Method of election or of designation of the members of the SNB	Accessory provision
Art. 3.3	Tasks of the SNB	Principal provision
Art. 3.4	Voting rules within the SNB	Principal provision
Art. 3.5	Access to experts	Principal provision
Art. 3.6	Possibility for the SNB to decide not to open or to cancel negotiations. Consequences of such a decision	Principal provision
Art. 3.7	Obligation to finance the expenses of the SNB	Principal provision
Article. 4	Content of the agreement	Principal provision
Article. 5	Duration of the negotiations	Principal provision
Article. 6	Applicable legislation	Principal provision
Article. 7	Conditions for the compulsory application of the standard rules	Principal provision
Art. 8.1	Protection of confidentiality	Mixed provision
Art. 8.2	Withholding information clause	Principal provision
Art.8.3	"Tendency clause"	Principal provision
Art. 8.4	Appeal rights	Mixed provision
Article. 9	Principle of co-operation	Principal provision
Article. 10	Protection of workers' representatives	Accessory provision
Article. 11	Misuse of procedure	Principal provision
Article. 12	Compliance with the Directive	Accessory provision
Article. 13	Link with other provisions	Principal provision
Annex, 1 (except 1.b))	Standard rules on the establishment of a representative body	Principal provision
Annex, 1.b)	Method of election or designation of workers' representatives	Accessory provision
Annex, 2	Standard rules in the field of regards information and consultation	Provision principal
Annex, 3	Standard rules in the field of participation	Mixed provision

### **3. Effects of national provisions transposing the Directive in the European Economic Area**

The Directive will apply to all Member States of the EEA, which will therefore have to be taken into account by the national transposition laws. The same applies with the candidate countries joining the EU in the future. It would be advisable to avoid specific references to Member States in the national laws. General references ("the countries covered by the Directive") can be used, as required, thus avoiding the need to revise national laws each time the scope of the Directive is extended.

### **4. Application of national provisions where other Member States have not transposed the Directive**

An SE cannot be registered in a Member State which has not transposed the Directive. If a company shall be able to participate in the establishing of an SE, it is essential that the Member State in which the company is located, as well as all the Member States where all its concerned subsidiaries and establishments are located, have transposed the Directive. The incomplete transposition of the Directive will only have these effects if the insufficiency concerns fundamental elements of the legal framework of transposition, the absence of which prevents the exercise of the rights conferred by the Directive.

The late transposition of the Directive will have the above effects only if it prevents the normal negotiation process from being carried forward. This shortcoming can be considered corrected if the transposition is done in good time still allowing for the full participation in the negotiation process of the companies and their concerned subsidiaries or establishments in question.

### **5. The concept of "participating companies"**

The definition of "participating companies" is relevant for the purposes of the negotiation procedure and as a reference for applying the principle of the maintenance of acquired rights. There are different ways of establishing an SE, but all participating companies must have their registered office in the Community and have a cross-border dimension. Further, they must take part directly in the process of establishing an SE. Only a company the shareholders of which will become shareholders of the SE upon its establishment (see Regulation, Articles 29 for mergers, 33 for the SE-holding and 37 for transformation) or which will become itself shareholder of the SE (see Article 36 of the Regulation and applicable national provisions for the SE-common subsidiary) takes part directly in the process of establishing an SE and is therefore deemed to be a "participating company".

With regard to the SE-common subsidiary, in accordance with Article 2(3) of the Regulation, this way of forming an SE is accessible not only to companies within the meaning of Article 48 of the Treaty<sup>1</sup>, but also "to other legal bodies governed by public or private public law". Therefore, these "other legal bodies" have necessarily to be covered by the definition of "participating companies" referred to in the Directive with regard to the SE-common subsidiary.

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<sup>1</sup>Article 48 second subparagraph of the Treaty: "*Companies or firms*" means companies or firms constituted under civil or commercial law, including the co-operative societies, and other legal persons governed by public or private law, save for those which are non profit-making".

## **6. The concept of “subsidiary company”**

The Directive defines “subsidiary” by a reference to Directive 94/45/EC. It would therefore seem desirable that national transposition laws simply refer to the national provisions transposing Article 3 of Directive 94/45/EC. The Regulation does not have a definition of subsidiary and, for the purposes of the Regulation, national provisions which are adopted specifically for the SE or, in their absence, those applicable to public limited liability companies will determine whether or not a certain company is a subsidiary of another. It would however be advisable to promote a harmonisation of national definitions of subsidiary for the purposes of the Regulation, by assimilating this concept with that of the Directive. This can and must be done by using the faculty conferred to the Member States by Article 9 (c)(i) of the Regulation to adopt provisions specifically applicable to SEs in fields not covered by it.

It would also be advisable that the Member States clarify that subsidiaries and establishments under indirect control of participating companies through dominance links established outside the territory of the countries covered by the Directive are also taken into account.

## **7. The concept of “establishment”**

Since neither the Directive nor the Regulation contain an explicit definition of establishment, the Member States themselves should be free to define the notion, if they should wish to do so.

## **8. The concept of “concerned subsidiaries and establishments”**

For a company to be considered a “concerned subsidiary”, it must be regarded as a subsidiary of a participating company according to the law of the country where it has its registered office. The location of the participating company (on the same country or elsewhere) is irrelevant, as well as if there are direct or indirect links to it. The same conclusion can be drawn for “concerned establishments”.

Consequently, have to be regarded as "concerned subsidiaries or establishments":

- the "direct" subsidiaries of the participating companies governed or not by same national law;
- the "direct" establishments of the participating companies, located or not in the same Member State;
- the "indirect" subsidiaries of the participating companies (subsidiaries of "direct" subsidiaries of participating companies, subsidiaries of "indirect" subsidiaries), always provided that the a dominant influence link can be established between them according to Article 3 of Directive 94/45/EC;
- the "indirect" establishments of the participating companies (the establishments of the "indirect" subsidiaries of these companies).

They must however become subsidiaries or establishments of the SE upon its formation. It follows from the Regulation that in the case of merger and holding company, information must be given on the configuration and final perimeter of the group of which the SE will be the dominant company. It would seem very useful that national provisions are adopted in the same direction with regard to SE-common subsidiary and the transformation.

## **9. The concept of “employees”**

One can say that the essence of the right granted to the workers by the Directive is exercised in a collective way. Therefore, the "employee" notion is not used for the identification of a person on whom an individual right is conferred but mainly to the definition of the scope of the Directive.

Accordingly, and considering that in the context of this Directive the "employees" concept is not as important as in other cases, it seems to be acceptable that each Member State takes into account the existing definitions in national law as regards information, consultation and participation. In doing so, Member States must however respect other Community provisions notably the ones providing for non discriminatory treatment of certain categories of workers (part-time workers, workers under fixed-term contracts, possibly, in the future, temporary workers).

## **10. The method of calculating the number of employees employed**

The number of workers employed are important for determining the relative weight of the employees. With regard to the right to reconvene the special negotiating body (SNB), the percentage of 10% of the employees of the SE and of its subsidiaries and establishments required by Article 3(6) 4th subparagraph of the Directive, must be checked at the very moment of the presentation of the request. As regards the fixing of the percentages triggering the application of the subsidiary rules of the Annex (Article 7(2)), the calculation must be made at the moment when it is established that the negotiations have failed.

For the fixing of the geographical allocation of the seats in the SNB and for the fixing of the percentages making it possible to determine the voting methods within the SNB, it seems reasonable to consider the initial calculation, made when the procedure starts and which is subject to the communication mentioned in Article 3(1) of the Directive, valid through the whole period of operation of the SNB. This is without prejudice to a possible re-examination of the calculation following an acknowledged important change in the work force of the participating companies and their concerned subsidiaries and establishments which would entail a re-composition of the SNB. Such a revised calculation would then be used for the voting procedure within the recomposed SNB.

## **11. The definition of “employees’ representatives”**

It results from case-law on other Directives with the same definition and reference to national law that, on the one hand, each Member State must lay down in its national law a right of workers to be represented in the work place with a view to allowing them to exercise collectively their right to information and consultation and, on the other hand, that the choice of the forms and methods of the representation belongs to each Member State.

All Member States have taken measures to ensure worker representation and establish a system for the appointment of SNB members which is in keeping with their domestic representation arrangements and the role handed down to the trade union organisations in each country.

## **12. The definition of “information”**

The Directive defines what is meant by “information”. The Member States can choose between merely reproducing in the national provisions the definition of the Directive, or proceeding, while

taking inspiration from there, with clarifications on the content of information, for example, by way of a catalogue of data to be provided to the representatives, as well as of a precise definition of the moment and of the form by which these data must be provided.

It will be necessary to translate into national law the concept of “transnationality”, and to cover situations where for instance only one Member States is affected but the decision has been taken in another Member State.

### **13. The definition of “consultation”**

Member States have the choice of, either transcribing the definition of consultation into national law (by leaving to case law the task of specifying the delineation of this obligation on a case by case basis), or of specifying these details in the national transposition provisions in a more precise and detailed way. In view of the primordial place given to the autonomy of the negotiating parties under this Directive, the first option seems preferable. It seems also sufficient in order to ensure the effectiveness of the Directive, not only because the case law, national and European, will ensure that this concept is well applied, but also because the national provisions transposing the Annex of the Directive will constitute a natural, even if indirect, reference for negotiations.

Nothing seems to prevent Member States from unifying in their internal law the concepts of consultation which are relevant for the purposes of this Directive and for the purposes of Directive 2001/14/EC.

### **14. The definition of “participation”**

The definition of “participation” is important for three different purposes related to the protection of acquired rights. First, for determining the voting rules within the SNB and the majority required to reduce the existing participation level. Second, for determining the conditions for the application of the subsidiary provisions of the Annex in the event of failure of the negotiations. Lastly, for establishing the very content of the reference provisions on participation, i.e., to determine the participation arrangement which will be applicable to an SE in the event of failure of the negotiations, when the respective conditions are fulfilled (see Part 3 of the Annex).

The concept should be interpreted widely as follows.

- a) It covers all the systems known in the EU of influence on the part of the employees' representatives within the company (works councils, union representatives) or outside of the company (trade unions) in the election or the nomination of the members of the organs of public limited companies.
- b) It refers to all the known management systems of the public limited companies (monistic systems, with an Administrative Board, and dualistic systems, with a Board of Directors and a Supervisory Board). It does not make any difference as to the nature of the company in question (public or private).
- c) It disregards the origin of these practices (legal, by agreements, statutory), as well as of their binding or not binding nature; it is enough that they exist within the participating companies for them to be taken obligatorily into account for purposes mentioned above.

## 15. Creation, remit and functioning of the special negotiating body

### *Creation and operation of the SNB*

Determining the point at which the participating companies become obliged to set the SNB creation process in motion does not appear to pose any particular problem for the Member States. The same wording as used in Article 3(1) of the Directive ("*... as soon as possible after (...)*") will suffice. Depending on the national rules governing the creation of subsidiaries, certain clarifying details may be necessary for this specific case.

Information should be provided, not only to identify the participating companies and their subsidiaries and establishments and the number of workers they employ, but it would also be very useful to break down the number of workers employed in each country by entity (participating company or subsidiary or establishment of a participating company). This would facilitate voting within the SNB, the majorities required in the Directive also being dependent on the number of employees represented by each member of the SNB. It would also be useful for the participating companies to specify how many of their employees are covered by a participation system and what proportion they represent of their total employees. It should be noted that the information requirement covers all subsidiaries and establishments of the participating companies, whether or not if they are to become subsidiaries or establishments of the SE, and that the information must be supplied to all concerned by the subsequent negotiations, i.e. employees' representatives or, when there are none, to the employees themselves.

Each Member State must adopt "principal" provisions on the composition and distribution of seats on the SNB, which will apply to:

- any company participating in the formation of an SE which is planned to be registered within the country's national territory;
- all the participating companies' concerned subsidiaries and establishments, whether or not located within the country in question.

Each Member State must also adopt "accessory" provisions applicable to the concerned subsidiaries and establishments of participating companies within its territory, irrespective of whether the SE is registered within that country or elsewhere.

For transposing the rules on the geographical distribution of the seats, it would seem sufficient to use the same wording as Article 3(2)(a)(i).

In the case of SEs created by way of merger, the coexistence of "ordinary" and "additional" members and the importance of each member's representativeness in terms of votes within the SNB mean that national legislators will have to specify the conditions for entitlement to additional representation very carefully in order to ensure that the same employees are not represented twice over.

The system for electing or appointing the members of the SNB laid down in the Directive gives the Member States large freedom of action. However, the following facts and principles should be taken into account.

- The system adopted in this field has to be applicable to the creation of SEs in extremely diverse situations, in terms of the means of creation (merger, holding, etc.), the size of the companies concerned, or perhaps the structure of each of the participating companies and all their subsidiaries and establishments.

- In each Member State, the workers employed<sup>2</sup> by a participating company, by a subsidiary of a participating company, by an establishment of a participating company or of a subsidiary of a participating company, whether or not located in the same Member State<sup>3</sup>, must be taken into account. On the whole, all the employees must be covered and represented in the SNB.
- It is important to establish a link between the transnational representation level, i.e. the SNB, and the national level, represented by the participating companies and their subsidiaries and establishments. The need to maintain this link may influence the choices made by the national legislator in defining employees' representatives and establishing the procedures for electing or appointing them.
- The necessary direct link between the mandate of the SNB members and voting within the SNB means that it must be possible to determine at any time how many employees each member represents, as this is the only way of calculating the second majority referred to in Article 3(4) and (6) (majority of the employees represented). The problem of double representation referred to above also applies in this context. The initial basic data on the representativeness of members elected or appointed to the SNB should remain the reference for the latter's entire duration, unless a fundamental change in the geographical distribution of the seats makes a change in composition obligatory. In these circumstances, the change in the SNB's composition would be made in accordance with the "principal" provisions adopted by the Member State in which the future SE would have its registered office, as any variation in the proportion of employees in one country produces a corresponding variation in the others.

Note: The rules above are developed in Working Document n° 16, the consultation of which is indispensable.

### *The remit of the SNB*

The national implementing legislation must recognise the binding force of an agreement concluded under the Directive, i.e. it must recognise that the agreement between the SNB and the competent organs of the participating companies is binding on the entire group of companies within the SE, all the local management bodies and all the employees of the group of companies, irrespective of the Member State in which it is signed. The validity and binding force of an agreement concluded in one Member State under the rules of that State must also be recognised by all the other Member States concerned.

## **16. Content of the agreement**

The list which appears in Article 4(2) is indicative and does not limit the possibility for the parties to add other elements. All the elements which are mentioned in the list should however be treated in the agreement.

The national provisions transposing Article 4(2) could include a reference to the ways of dealing with changes occurring after the creation of an SE, namely through new negotiations or provisions of automatic adaptation of the agreed clauses. In order to make the negotiating parties aware of the risks, the national provisions should mention explicitly the situations which should entail an

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<sup>2</sup> In the sense used in point 3 of Working Paper No 10-Rev 1 (definition of "employee") and Working Paper No 11-Rev. 3 (method of calculating the number of workers employed).

<sup>3</sup> All to be understood in the terms analysed in the working papers dealing with Article 2(b), (c) and (d).

adaptation of the agreements, i.e. when there is a substantial change in the structure, in the workforce and/or the location of the SE. At least, those provisions should make a general reference to this issue.

In the case of an SE created by transformation, the Directive states that the agreement shall provide for at least the same level of all elements of employee involvement. The qualitative level of employee involvement has to be appreciated in a global way. It seems acceptable that the reduction in the intensity of participation as a result of the choice of a dualistic system instead of a monistic or of the reduction of the powers of the organ in which participation is exercised may be validly compensated by a strengthening of participation with regard to other elements. An agreement which is concluded in violation of Article 4(4) should be considered null and void and lead to application of the Annex of the Directive. The national implementation laws should provide for this explicitly.

## **17. Conditions for applying the standard rules**

It would be useful if the national transposition provisions clarify several aspects. For instance, it must result clearly from the implementation law that the standard rules apply to any SE registered in that country when an agreement has not been concluded and the other conditions laid down in Article 7 of the Directive are met. It should also be specified how to determine the moment at which the SNB shall exert its right to make the standard rules applicable and how it should do it. Moreover, the national provisions must determine when and how the SNB can choose the form of participation to introduce in the SE when there is no agreement and there are different forms of participation in the participating companies.

## **18. Misuse of procedures**

In the case of demonstrated misuse of the SE within the meaning of Article 11, the appropriate measures must be taken. If the misuse is brought to light by subsequent changes occurred within the structure or the perimeter of the SE and its subsidiaries and establishments, there should be an appropriate sanction (for example, an obligation to carry on the negotiation procedure provided for in Articles 3 to 7 of the Directive. A presumption of misuse should be introduced when changes occur during the first year of life of the SE.

## **19. Enforcement**

The national provisions which will ensure that the rights created by the Directive will be respected (sanctions, administrative or judicial procedures, etc.) are accessory provisions addressed to the persons and legal entities of the country in question. Taking into account however that some implementation provisions (in fact, most of them) will have to be respect everywhere, there is a need to ensure that those provisions on sanctions and on procedures cover breaches not only to provisions of the country in question but also of principal provisions of other countries.

## **20. Relations with other Community Directives**

In principle, the Directive precedes and rules our Directive 94/45/EC and the national provisions on participation, but does not rule out the application of the national provisions as regards information and consultation.

If the SNB has decided not to open negotiations or to terminate negotiations as mentioned in Article 3(6), Directive 94/45/EC will continue to apply. National rules on participation will remain applicable to the SE's subsidiaries, since this level is not treated in the Directive.

## **21. The Standard rules – the Annex of the Directive**

The interpretation which appears the most viable one and the most in line with the obscure wording of Part 3 is as follows:

### **A. The distribution of seats amongst Member States**

- It first of all rests with the representative body to proceed with the geographical distribution of the seats to which workers are entitled in the organ in question (Administrative Board or Supervisory Board); in doing this, the representative body has to respect a proportionality criteria in relation to the number of workers employed by the SE and its subsidiaries and establishments in the various Member States.
- If, as a result of that distribution, one or more Member States in which the SE and its subsidiaries and establishments employ workers does not have any representative, one of the seats distributed by the representative body in accordance with a proportionality criteria will be allocated, firstly, to the Member State where the SE has its registered office), secondly (if that Member State already has a representative), to the one employing more employees.
- Some members of the Expert Group consider that the seat which is reallocated should be one of those initially attributed to the Member State which has the highest number of seats. Other members think that, in the above mentioned situation, a new distribution between Member States in accordance with the proportionality criteria, but putting aside one seat for those Member States which will not be initially contemplated.

### **B. Distribution of seats within each Member State**

The Directive allows Member States to determine the allocation of seats it is given amongst the units (the SE and its subsidiaries and establishments) under its jurisdiction. Of course, such a possibility only exists when a Member State is given more than one seat. If a Member State opts to do so, the relevant provision will clearly be an "accessory" one.

### **C. Election or designation of the members**

The provisions which will govern the designation of employees' representatives in the board of the SE can have a principal or an accessory nature. If a Member State decides to have principal provisions in this field, should do it without prejudice to the existence of accessory provisions in other countries, which will then apply with regard to the designation of representatives coming from the countries in question. If a Member State opts for accessory provisions, it should also provide for principal provisions which will apply to the designation of representatives coming from countries which do not have accessory provisions.

# ***GROUP OF EXPERTS "SE "***

## **WORKING PAPER N° 2**

3 December 2001

### **DATE OF ENTRY INTO FORCE OF NATIONAL LAWS**

A possible divergence between the dates of entry into force of the various national measures transposing the Directive is likely to cause problems with regard to their effectiveness.

In fact, the national law<sup>4</sup> to which each company covered by the Directive is mainly dependent (that of the country where the SE is or will be located) can enter into force at a time when there is not yet a national transposition law in other Member States where are located the participating companies, their subsidiaries or their establishments. In this case, the entirety of the legal framework which is necessary for the rules laid down in the Directive to become fully effective is not yet in place and therefore the national law which has already entered into force remains not easily applicable in an effective way.

An example can illustrate this difficulty: let us imagine that a project is launched aiming at the establishment of a SE in a country which already has a law transposing the Directive, but comparable laws are missing in one or more (or even all) of the other countries where the participating companies, their subsidiaries and establishments are situated. The subsequent procedure provided for in the Directive (and in the national transposition law of the country of the future registered office of the SE), i.e., the establishment of a special negotiating body and all the subsequent steps, seem, in this case, impossible to implement, since this body will have to be composed (Articles 2.e) and 3.2.b)) of representatives elected or designated in accordance with the national laws and/or practices of each country where those companies and establishments are located.

The participating companies confronted with such a situation of absence of national transposition provisions in all the relevant countries would not be able to continue the process set up in the Directive and, consequently, to register the SE (see Article 12.2 and 3 of the SE Regulation).

In conclusion, a possible divergence between the dates of entry into force of the various national laws transposing the Directive would constitute a real problem the only viable solution of which consists in ensuring that all the national transposition laws enter into force on the same date.

In view of the way in which the Regulation and the Directive operate and the interdependent links between the two instruments, this date can only be the 8 October 2004. It is the date of entry into force of the Regulation (see Article 70<sup>5</sup>). The idea which prompted this deliberate choice of the

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<sup>4</sup>For convenience, "the national law" will be referred to, in this and in other working papers, to designate implementation measures, which can, obviously, include non legislative measures (for example, agreements between the social partners – see Article 14.1 of the Directive).

<sup>5</sup>The French version of the Regulation published in the OJ contains an obvious error since it mentions the date of 8 October 2001, contrary to all the other language versions, which refers 8 October 2004. This error will be the subject of *corrigenda*.

Council (in derogation from the usual rule according to which regulations enter into force immediately) was to allow, on the one hand, the adoption of legislative, administrative and other measures aimed at bringing national laws into conformity with the requirements of the Regulation and, on the other hand, the transposition of the Directive in all national laws. In view of the interdependence between the provisions of both instruments, neither of the two can come into practical application without the other being also applicable.

Consequently, a national law which would enter into force before the Regulation would remain ineffective until the moment when the latter becomes applicable. Conversely, a late entry into force of a national transposition law would have the consequences described above<sup>6</sup>.

The conclusion is therefore inevitable with regard to the choice of 8 October 2004 as a uniform date of entry into force of all the national measures transposing the Directive in the countries bound by it.

That does not prevent obviously the various national laws from being adopted at different times (as it is virtually inevitable). It would be enough to envisage co-ordinated periods of "*vacatio legis*", which ensure that these measures entry into force at the same moment.

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<sup>6</sup>This possibility and its legal consequences and practical effects will be the subject of a separate working paper.

# ***GROUP OF EXPERTS "SE"***

## **WORKING PAPER N° 3**

**3 December 2001**

### **THE DISTINCTION BETWEEN PRINCIPAL AND ACCESSORY PROVISIONS**

Each Member State will, in order to comply with the directive, have to adopt a number of provisions of two different types:

- provisions which are intended to apply to all SEs registered on its territory and which will have indirect effects on the whole SE and its subsidiary companies and establishments, including on those located in other Member States; provisions of this type will also apply, prior to the constitution of the SE, to participating companies, including to those located in other Member States<sup>7</sup>.
- provisions which will be solely applicable to any SE and any subsidiary and establishments of a SE located on its territory (and to their workers).

The provisions of the first type constitute the essential core of national implementation measures and the main source of the obligations imposed on SEs and companies covered by the Directive. They will be designated "principal provisions".

The provisions of the second type are instrumental in relation to those, and their scope is limited to the territory of the Member State in question. They will be designated therefore "accessory provisions".

The distinction between these two types of provisions constitutes the key to determining which, among the national provisions transposing the directive in the various Member States, are applicable in each case. A simple example enables us to better comprehend the importance of this distinction.

Company A, incorporated in France, wishes to constitute a SE through a merger with company B, incorporated in Germany, which it will absorb. Each one of these companies have various subsidiaries of which they hold more than 50% of the capital, as well as establishments: company A in Portugal and in Spain, company B, in Belgium, in Luxembourg and in Austria. The envisaged registered office of the future SE will be located in Milan. A negotiation process along the lines provided for in the Directive is carried on with workers' representatives, leading ultimately to an agreement which provides for the setting up of a European Works Council in the future SE, as well as the right for workers to designate a third of the members of the Administrative Board of the SE. This agreement opens the way to the registration the SE.

To achieve this, the national provisions implementing the Directive in all the Member States concerned should be applied: those of the Member States where the founding companies of the SE

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<sup>7</sup>See rule of conflicts of Article 6 –"Legislation applicable to the negotiating procedure".

are established, those of the Member State where the registered office of the SE will be situated, and also those of the Member States where the subsidiaries and establishments of the founding companies are established.

The bulk of the legal framework governing the negotiation process is given by Italian law (see Article 6 of the directive, according to which, except where otherwise provided for in the Directive, the legislation applicable to the negotiating procedure is that of the Member State in which the registered office of the SE will be located. Thus, it is in the Italian law that one will have found the rules making it possible to determine the number of members of the Special Negotiating Body (GSN) and the geographical allocation of seats within it. On the other hand, the form of election or of designation of those members will have been determined by the legislation of each Member State in which are located the founding companies and their subsidiaries and establishments(see Article 3.2.b)). The Italian law will also govern the whole process of negotiating and concluding an agreement. In the event of failure of negotiations, it will still be in the Italian law that one will find the provisions leading to the application of the standard rules which will apply to the SE and its subsidiaries and establishments as from registration.

The principal and accessory provisions (see third column of the table which follows) which have to be implemented by each Member State are, at least, the following ones (in relation to the provisions of the directive, indicated in the first column):

Directive	Contents of the provision	Type of measure
Article. 1	Fixing of a general obligation of definition of the arrangements for the involvement of workers in the SE	Principal provision
Art. 2.1 a) to d) and f) to k)	Definitions	Principal provision
Art. 2.1.e)	Determination of workers' representatives	Accessory provision
Art. 3.1	Obligation of creation of a Special Negotiating Body	Principal provision
Art. 3.2.a)	Composition of the SNB – criteria	Principal provision
Art. 3.2.b)	Method of election or of designation of the members of the SNB	Accessory provision
Art. 3.3	Tasks of the SNB	Principal provision
Art. 3.4	Voting rules within the SNB	Principal provision
Art. 3.5	Access to experts	Principal provision
Art. 3.6	Possibility for the SNB to decide not to open or to cancel negotiations. Consequences of such a decision	Principal provision
Art. 3.7	Obligation to finance the expenses of the GSN	Principal provision
Article. 4	Content of the agreement	Principal provision
Article. 5	Duration of the negotiations	Principal provision
Article. 6	Applicable legislation	Principal provision
Article. 7	Conditions for the compulsory application of the standard rules	Principal provision
Art. 8.1	Protection of confidentiality	Mixed provision <sup>8</sup>
Art. 8.2	Withholding information clause	Principal provision
Art.8.3	"Tendency clause"	Principal provision
Art. 8.4	Appeal rights	Mixed provision <sup>9</sup>
Article. 9	Principle of co-operation	Principal provision
Article. 10	Protection of workers' representatives	Accessory provision
Article. 11	Misuse of procedure	Principal provision
Article. 12	Compliance with the Directive	Accessory provision
Article. 13	Link with other provisions	Principal provision
Annex, 1 (except 1.b))	Standard rules on the establishment of a representative body	Principal provision
Annex, 1.b)	Method of election or designation of workers' representatives	Accessory provision
Annex, 2	Standard rules in the field of regards information and consultation	Provision principal
Annex, 3	Standard rules in the field of participation	Principal provision

<sup>8</sup> A distinction must be made here. The confidentiality provisions which will have been enacted by the Member State of the registered office of the SE will bind all workers' representatives, but the responsibility for the enforcement of those rules lies with all the Member States, as the choice of the measures sanctioning non-compliance with these (and other) obligations falls within the competence of each Member State.

<sup>9</sup> Paragraph 4 refers to the Member State where the registered office of the SE is situated.

# ***GROUP OF EXPERTS "SE"***

## **WORKING PAPER N° 4**

4 February 2002

### **Effects of national provisions transposing the Directive in the European Economic Area**

The Directive applies at the moment to the fifteen European Union Member States. Nevertheless, the Joint Committee of the European Economic Area is expected to reach a decision on the inclusion of a reference to the Directive in Annex XVIII of the Agreement on the European Economic Area (Safety and Health at Work, Labour Law and Equal Treatment for Men and Women). This will mean that the EEA Members who are not members of the EU (Norway, Iceland and Liechtenstein) will have to transpose the Directive into national law as well.

Following an identical procedure, the Regulation will also be applicable in the territory of the Member States of the EEA who are not Member States of the EU.

The main consequence of the extension of the geographical scope of those instruments to the Member States of the EEA Agreement will be:

- allowing for the participation of companies from those countries in the process of establishing an SE;
- allowing an SE to be registered in the territory of those Member States - in which case the national law of the country in question will apply for the purposes of both the Regulation and the Directive;
- obliging all national provisions implementing the Directive to take into account the participating companies and/or the subsidiaries and establishments of a participating company located in those countries, as well as their workers.

In future working documents, the expression "Member States" will therefore cover all the Member States of the EU plus Norway, Iceland and Liechtenstein.

# ***GROUP OF EXPERTS "SE"***

## **WORKING PAPER N° 5**

2 October 2002

### **Application of national provisions where certain Member States have not transposed the Directive**

In working document No 2 we have mentioned some of the problems which might arise if the national laws transposing the Directive do not enter into force at the same time. It might be useful to further explore what could be the effect if a Member State does not transpose the Directive in due time.

The following situations might occur (amongst others which the Group might wish to address):

#### ***1. The companies participating in the establishment of an SE intend to register it in a Member State which has not yet implemented the Directive***

Article 6 of the Directive ("Legislation applicable to the negotiation procedure") reads as follows:

*"Except where otherwise provided in this Directive, the legislation applicable to the negotiation procedure provided for in Article 3 to 5 shall be the legislation of the Member State in which the registered office of the SE is to be situated."*

The same principle (the relevance of the law of the Member State of the envisaged registered office of the SE) applies to other aspects (Company Law, etc.) surrounding the formation of an SE<sup>10</sup>.

The envisaged location of the registered office of the future SE is always known from the outset, as provided for in the Regulation<sup>11</sup>.

Article 12(2) of the Regulation reads as follows:

*"An SE may not be registered unless an agreement on arrangements for employee involvement pursuant to Article 4 of the Directive 2001/86/EC has been concluded, or a decision pursuant to Article 3(6) of the Directive has been taken, or the period for negotiations pursuant to Article 5 of the Directive has expired without an agreement having been concluded."*

The combined analysis of those provisions leads inevitably to the conclusion that, in the absence of a national legal framework implementing the Directive, no SE can be registered in that Member State.

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<sup>10</sup> See Article 15(1) of the Regulation.

<sup>11</sup> This issue will be dealt with when analyzing Article 6 of the Directive on the applicable law. See Regulation, Articles 20(1) a. and 21(e) for mergers, Article 32(2) for holdings and 37(3) for transformation.

**2. *The establishment of an SE is initiated with participating companies from different Member States, one of which (other than the one where the registered office of the SE will be located) has not yet implemented the Directive***

The conclusion here is not so obvious as in the first situation. At first sight, one could envisage allowing for the process of establishing the SE to continue, involving also, from a Company Law viewpoint, the participating companies and subsidiaries and establishments situated in a Member State which had not implemented the Directive. The sole legal consequence of the absence of an "accessory"<sup>12</sup> national law could then be to deprive workers in that country of the right to participate in the negotiation procedure. This was, *grosso modo* and *mutatis mutandis*, the solution agreed by the Working Group for the equivalent situation which could arise in the framework of the European Works Councils Directive<sup>13</sup>.

Nevertheless, this solution seems extremely difficult, if not impossible, to apply in the context of the SE. Different reasons lead to this conclusion.

The creation and composition of the SNB (Special Negotiating Body) depends on the number and proportion of workers employed in each Member State concerned. Two different ways of proceeding could be envisaged:

- the workers from the Member State in question could be taken into account when determining the geographical allocation of seats, in spite of the fact that, in the absence of any legal basis for electing or designating representatives, they would not be entitled to be represented in the SNB (Special Negotiating Body). Their seats would remain vacant.

Such an option would have the advantage of ensuring the coherence between the universe of workers represented and the available seats within the SNB<sup>14</sup>. It creates however a problem: the voting rules within the SNB would be distorted due to the absence of representatives from a section of the workforce. These voting rules are very much based on the proportionality criteria: for each deliberation, not only a given majority of members of the SNB is required, but also the same majority of the total workforce<sup>15</sup>. Such a double majority would then be impossible to achieve.

- these workers could be ignored for the above purpose: not only would they not be entitled to elect or designate their representatives, but also they would not be taken into consideration for the purpose of fixing the composition of the SNB.

This solution ensures coherence between the SNB and the totality of the workers it represents. Nevertheless, it completely distorts the operation of the Directive, which is very much based on the "before-after" principle. According to this principle, the weight of participation (the proportion of workers covered by any system of participation in relation to the overall workforce) is crucial for different purposes, *i.e.*, to determine the voting rules within the SNB<sup>16</sup> and the conditions for the application of Part 3 of the Annex<sup>17</sup>.

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<sup>12</sup> In the sense that is clarified in Working paper No 3.

<sup>13</sup> Under the condition that at least two of the Member States involved had already implemented the Directive (otherwise, the transnational dimension would lack).

<sup>14</sup> And this is crucial: see second bullet point below.

<sup>15</sup> See Articles 3(4) and 3(6).

<sup>16</sup> See Article 3(4).

<sup>17</sup> See Article 7(2) b and c.

There seems to be no way out of this dilemma, other than to make the participation of a participating company or a subsidiary or establishment of a participating company in the global process of establishing an SE dependant upon their coverage by a national law implementing the Directive.

In these circumstances, the conclusion below seems unavoidable.

**Conclusion** : Companies located in a Member State which did not transpose the directive cannot take part in the establishing of an SE; the SE can be created and the negotiating procedure referred to in the directive can be initiated, but only by companies located in Member States having a national framework of transposition of the Directive and of which all the concerned subsidiaries and establishments are also covered by a national transposition law. The legal basis which supports this conclusion is once again Article 12(2) of the Regulation.

This leads us therefore to the conclusion that it is impossible for a company to take part in the establishment of an SE when a national transposition law does not cover one or more of its components (i.e. one or more of its concerned subsidiaries or establishments)<sup>18</sup>.

This statement must be "nuanced" by the possibility that each participating company always have to exclude from the process of establishing an SE those of its subsidiaries and establishments which are not covered by a national transposition law. In order for the process to continue in complete accordance with the Directive, it will be enough for the participating companies not to abstain from including their components not covered by a national transposition law in the perimeter of the future SE.

The participating companies remain masters of this process. It is up to them alone to determine those of their assets (including their subsidiaries and establishments), which they wish to transfer to the SE. They are therefore in a position to define at any moment (at least until the SE is registered<sup>19</sup>) the perimeter of the group of which the future SE will be the dominant company or the transnational enterprise of which the future SE will have the central management.

### 3. *Incomplete transposition and late transposition*

The above conclusions also derive from the importance of legal certainty in the context of the establishment of an SE. The fulfilment of the formalities referred to in the Directive being a precondition for registration in the same way as those referred to in the Regulation (see Article 12(2)), it is crucial to draw up clear and univocal rules also with regard to the way in which the Directive applies.

This need for legal certainty brings us to the double question of incomplete transposition and of late transposition. In fact, the situation can be clear and the solution univocal if a Member State has not at all transposed the Directive at the time when, following the launching of the procedure for establishing an SE, the formalities referred to in the Directive must begin to be fulfilled. *Quid* if this lack is partial or if it is corrected at a later date?

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<sup>18</sup>Only concerned subsidiaries and establishments, i.e. subsidiaries and establishments of a participating company which will become subsidiaries and establishments of an SE at the time of its creation (see working Paper n° 6) are hit by the effects just mentioned. Other subsidiaries and establishments are not relevant for the purposes of the Directive.

<sup>19</sup> This power stops when the SE is registered. As regards mergers, Article 29, paragraph 1 a) and 2 a) of the Regulation states that a merger has *ipso jure* the consequences that all the assets and liabilities are transferred from the merging companies to the SE.

## Incomplete transposition

Concerning incomplete transposition, one must firstly take into account the fact that Community law contains no mechanism which makes it possible to declare in a positive, general and definitive way the conformity of a national law with a directive<sup>20</sup>. The Community institution which has the task of controlling the conformity of national law with Community law, the European Court of Justice, performs this task only when a case is submitted to it (by the Commission) and within the strict limits of the submission. A judgement of conformity on a specific aspect raised by the Commission does not prejudice in any way on other aspects. Moreover, such a judgement is never final (what is in conformity today might not be in conformity tomorrow, for example, due to the evolution of the case law of the Court).

Consequently, it would be useless to expect an absolute and guaranteed legal certainty. However, it seems important for Member States to specify to the best possible extent the minimum required for considering acceptable the participation of a company in the creation of an SE with regard to the issues above.

The incomplete transposition can in fact concern either the scope of the national measures (a more restrictive national scope than the one of the Directive), or the absence of transposition or the incorrect transposition of certain provisions of the Directive. How to distinguish, between those different shortcomings, those which are relevant for the effects mentioned above and those which are not?

Let us take some examples inspired of the practice of the Community litigation. The transposition of the Directive could be done in a given Member State by mean of a collective agreement without an *erga omnes effect*, and without other measures, in particular legislative, being taken to remedy this insufficiency. Certain sectors of activity covered by the Directive can therefore remain excluded from the scope of the national transposition measures.

A second example: the essential provisions of the Directive are transposed, but doubts remain concerning some instrumental provisions (protection of workers' representatives, appeals, sanctions, etc.).

It seems pertinent to establish, as a criterion allowing for the distinction between vital deficiencies and those which are not, the relevance of the practical consequences which derive from that. If a bad transposition of the Directive in a Member State is likely to affect the way in which the rules operate in a particular case, then the conclusion seems inevitable that the participating companies or their subsidiaries or establishments located in that Member State are not covered by a national transposition law. If it does not affect substantially the way in which the rights conferred by the Directive are exercised, then it will not be relevant.

In the first of the examples referred to above, the incomplete transposition of the Directive would be relevant only if one of the participating companies or one of their concerned subsidiaries or establishments belongs to a sector not included in the scope of the collective agreement, in which case it would not be possible for the workers in question to take part in the negotiation process nor to take them into account for the other effects referred to in the Directive (in particular those connected with the "before and after" mechanisms). On the other hand, if these entities are covered in a particular case by the national provisions, then the insufficiency would be not relevant.

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<sup>20</sup>For example, a mechanism identical to the one which exists in the constitutional law of some Member States providing for a preventive control of the constitutionality of the laws.

In the second example, the non-existence of insufficient provisions regarding the protection of workers' representatives, appeals or sanctions would be relevant only if this would make it impossible for the workers to exercise the rights which are conferred to them by the directive, i.e., if disputes arise during the process.

### Late transposition

This hypothesis refers to cases where the national measures would be non-existent at the moment when the processes of establishing an SE and the negotiation procedure provided for in the Directive are initially launched, but they are adopted and enter into force afterwards before the process comes to an end<sup>21</sup>.

Again, the criterion should be pragmatic. If the transposition is done at a moment which still allows for the fulfilment of all the formalities referred to in the Directive, then nothing seems to prevent the participating companies or their concerned subsidiaries and establishments covered by that law from joining the process of establishing an SE at that moment. This can be the case, for example, if the transposition arrives in time to allow for the creation of the Special Negotiating Body or for its re-composition according to those new elements before the conclusion and signature of the agreement<sup>22</sup>.

#### 4. *Measures to be taken*

In view of the need for legal certainty, it would be useful that the national transposition provisions specify the rules that we just have identified. These precise details will be addressed not only to the companies likely to be interested by the creation of SEs, but also, and above all, to the authorities responsible for controlling the legality of the process of establishing an SE, as the respect of the Directive constitutes a pre-condition of registration).

These rules can be summarised as follows:

- an SE cannot be registered in a Member State which has not transposed the directive;
- in order for a company to be able to participate in the establishing of an SE, it is essential that the Member State in which the company is located, as well as all the Member States where all its concerned subsidiaries and establishments are located, have transposed the Directive;
- the incomplete transposition of the Directive will only have the above effects if the insufficiency concerns fundamental elements of the legal framework of transposition, the absence of which prevents the exercise of the rights conferred by the Directive;
- the late transposition of the Directive will have the above effects only if it prevents the normal negotiation process from being carried forward. This shortcoming can be considered corrected if the transposition is done in good time still allowing for the full participation in the negotiation process of the companies and their concerned subsidiaries or establishments in question.

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<sup>21</sup>If they enter into force after the registration of the SE, they are not likely to influence the development of the process and all occurs therefore as if they were not existing.

<sup>22</sup>The problems of changes occurring within the participating companies and their concerned subsidiaries and establishments throughout the process leading to the establishment of an SE will be evoked again and in a more thorough manner in a separate working paper (on the creation, the composition, the distribution of seats and the operation of the SNB).

In view of the fundamental importance of the control of legality within the overall process of establishing an SE, the methods of translating these rules into national provisions will be analysed at a more advanced stage of the work of the Group of Experts.

It must be said that the refusal to register from an authority controlling the legality of the process of establishing an SE, on the grounds that the obligatory formalities resulting from the Directive were not fully complied with due to the absence of or a faulty transposition, does not affect in any way the sovereign powers of the national judge and of the European Court of Justice as regards the control of the application of Community law. Such a refusal can always be subject to administrative or judicial review, in accordance with the applicable national rules and procedures, including seizing of the European Court of Justice for a preliminary ruling. In this context, nothing distinguishes such a refusal of registration from any other administrative action which takes Community law into account.

# ***EXPERT GROUP "SE "***

## **WORKING PAPER N° 6**

2 October 2002

### **Definition of "participating companies" –Article 2 (b)**

#### **GENERAL**

Together with the notions of "subsidiary" and "concerned subsidiary or establishment", the notion of "participating companies" is crucial in the context of the present Directive.

In order to fully understand how the Directive operates, it is necessary to make a clear distinction between these three types of entities which are targeted therein as addressees of different obligations or which are taken into consideration in several places to determine the content and the scope of different rules of the Directive.

From a general viewpoint, the definition of "participating companies" is relevant for the purposes of the negotiation procedure and as a reference for applying the principle of the maintenance of acquired rights ("before-after" approach).

On the other hand, the notion of "subsidiary" concerns either the general provisions (for instance in relation to the definition of information and consultation or to the perimeter of the group composed of the SE and the subsidiaries which it controls), or the provisions applicable once the SE is established (especially those in the Annex).

Finally, the definition of "concerned subsidiary or establishment" is particularly relevant for determining the composition of the Special Negotiation Body (SNB).

Table I gives a precise indication of the different provisions in which these three types of entities are targeted.

#### **QUESTIONS TO BE ANALYSED**

- A) The direct participation in the establishment of an SE
- B) Entities covered by the concept of "companies"
- C) National systems of participation organised at group level

#### **A) The direct participation in the establishment of an SE**

It arises from the preceding table that the directive deals with a multiplicity of companies (as well as with other entities, as we will see below, under "B") which are involved in the establishment of an SE. Nevertheless, Article 2(b) of the Directive is clear: only companies taking part directly in the establishment of an SE are deemed to be "participating companies" within the meaning of the Directive.

In order to characterise clearly the concept of "direct participation", it seems useful to review the ways of establishing an SE as provided for in the Regulation. At the same time, that will enable us to clarify other elements which are relevant in this respect, in particular those referring to the "Community nationality" of the companies in question as well as to their cross-border dimension. Obviously, the Directive can be interpreted and applied only within the limits imposed by the Regulation, thus making the conditions prescribed therein impossible to circumvent in the context of the Directive.

### **The ways of establishing an SE**

Articles 2 and 3 of the Regulation allow for different ways of establishing an SE:

- by way of transformation into an SE of a public limited company formed under the law of a Member State and having its registered office and its central administration in the Community, as long as it has had for at least two years a subsidiary governed by the law of another Member State;
- by way of a merger between at least two public limited companies governed by the law of at least two different Member States and having their registered offices and their central administrations in the Community;
- by way of formation of a holding company by public or private limited companies having their registered offices and their central administrations in the Community and governed by the law of at least two Member States or having for at least two years at least a subsidiary or an establishment governed by the law of another Member State;
- by way of formation of an SE-common subsidiary by companies or other legal bodies, under the same conditions as for the SE-holding;
- by way of forming an SE-subsiary by an SE already established<sup>23</sup>.

The Statute allows therefore access to the SE to a rather broad universe of national companies. This universe varies according to the choice regarding the way of establishing an SE. However, all companies wishing to take part in the formation of an SE have to satisfy two criteria: to have their registered office in the Community and to have a cross-border dimension<sup>24</sup>.

### **Types of companies which can participate in the establishment of an SE**

Public limited companies are the type of company best suitable for the creation of an SE, under any of the four ways referred to above. Private limited companies can take part in the establishment of an SE-holding or of an SE-common subsidiary. Other companies and other legal bodies governed by public or private law have access to the SE only by way of establishing an SE-common subsidiary.

An SE can itself take part in the establishment of another SE, by merger, formation of a holding company or creation of common subsidiary. The Statute states the general principle of the assimilation of SEs to public limited companies governed by the law of the Member State where the SE has its registered office, for the purposes of the establishment of an SE<sup>25</sup>, except in the case of transformation, naturally.

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<sup>23</sup>We will not deal in this working paper with this specific way of establishing an SE, which will be treated at a later stage in a separate working paper.

<sup>24</sup>See Article 2 of the Regulation.

<sup>25</sup>Article 3(1) of the Regulation.

## **The registered office of the participating companies**

The Statute makes it possible only for truly European companies to create one SE. Indeed, the rule is that only companies formed under the national law of a Member State and which have their registered office and their central administration (*i.e.* their effective management centre) in the Community can take part in the establishment of an SE<sup>26</sup>.

Consequently, a company having its registered office or its central administration in a third country cannot in principle take part in the process of establishing an SE. This rule prevents third countries-based companies from using the SE as an instrument of direct penetration in the European market. However, the Regulation does not prevent them from becoming, thereafter, shareholders of an SE, *via* an acquisition of shares or even a take-over of an SE<sup>27</sup>.

This rule admits however an exception, in view of the legislation of certain Member States<sup>28</sup> which subjects to national law all companies registered on their territory, even if these companies have their central administration outside the Community. The Regulation admits the possibility for Member States of allowing a company which does not have its central administration in the Community to take part in the establishment of an SE. In this case, the company in question must satisfy an additional attachment criterion of an economic nature: its activity must present an effective and continuous link with the economy of the Member State in which it has its registered office<sup>29</sup>. Consequently, the Regulation requires that the company in question must be formed according to the law of a Member State and have its registered office in this same Member State as well as an effective and continuous link one with the economy of a Member State.

## **The cross-border element of the participating companies in one SE**

Apart from transformation, and due to the cross-border nature of the SE, all companies formed under the law of a Member State and having their registered office and their central administration in the Community may participate in the process of establishing an SE provided that two of them at least are governed by the law of at least two different Member States.

However, even if they are governed by the law of a single Member State, they can establish an SE-holding or an SE-common subsidiary, if each of two of them have had at least for two years a subsidiary governed by the law of another Member State or an establishment located in another Member State. It was the Commission's proposal of 1991 which introduced this possibility which gives greater flexibility to companies wishing to establish an SE, while preserving the cross-border character of the operation.

The cross-border element required for the transformation of a public limited company – formed under the law of a Member State and having its registered office and its central administration in

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<sup>26</sup>The Regulation does not require that the registered office designated by the statutes and the central administration of a company which takes part in the establishment of an SE are located in the same Member State, but only that both of them are located in the Community.

<sup>27</sup>In practice, a company based in a third country can establish an SE *via* one of its subsidiaries established in a Member State. *A fortiori*, two companies located in two different Member States which are subsidiaries of the same Japanese group, for example, can establish an SE.

<sup>28</sup>In particular, the United Kingdom, Ireland and the Netherlands, Member States with the "registered office system".

<sup>29</sup>Taken from the requirement of the General Program for the Removal of Restrictions on the Freedom of Establishment, adopted by the Council on 18 December 1961 (OJ of 15.01.1962) governing the cases where a company which has only its registered office in the Community could benefit from the freedom of establishment.

the Community - is that it has had for at least two years a subsidiary governed by the law of another Member State.

Table II summarises the aspects evoked above.

Consequently, the subsidiary company mentioned several times in the different paragraphs of Article 2 of the Regulation is not always a company directly participating in the establishment of an SE. Often, it appears therein as a precondition *sine qua non* allowing a company governed by the law of a Member State to take part directly in the establishment of an SE. It is the case of the subsidiary company referred to in paragraph 2(b) (for the SE-holding), in paragraph 3(b) (for the SE-common subsidiary) and in paragraph 4 (for the transformation).

The determining criterion which enables us to qualify a given company as "a participating company" within the meaning of the Directive is that of the future ownership of the capital of the SE. Only a company the shareholders of which will become shareholders of the SE upon its establishment (see Regulation, Articles 29 for mergers, 33 for the SE-holding and 37 for transformation) or which will become itself shareholder of the SE (see Article 36 of the Regulation and applicable national provisions for the SE-common subsidiary) takes part directly in the process of establishing an SE and is therefore deemed to be a "participating company".

Other subsidiaries of these participating companies, involved indirectly in the constitution process or even not involved at all, cannot be considered "participating companies" within the meaning of the Directive, which may regard them, possibly, as "concerned subsidiaries".

With regard to mergers, the direct participation is easy to determine: in any event, the participating companies have themselves to be governed by the law of different Member States.

In the cases of the SE-holding and the SE-common subsidiary, some doubts could arise from the fact that Article 2 of the Regulation mentions "*a subsidiary company governed by the law of another Member State*". Actually, the existence of this subsidiary company constitutes a simple condition of access to the SE through these two ways on the part of the participating companies. In these cases, the subsidiary company in question does not take part directly in the establishment of the SE and cannot therefore be deemed to be a "participating company" within the meaning of Article 2(b) of the Directive<sup>30</sup>.

Concerning the specific case of transformation, the intrinsic nature of this operation means that there is only one company formally involved in the establishment of the SE, *i.e.*, there is only one participating company: the public limited company formed under the law of a member State which transforms itself into an SE. There again, the existence of a subsidiary company as required by Article 2(4) of the Regulation constitutes only a precondition of the establishment of an SE by way of transformation. By no means the subsidiary company in question acquires by virtue of this the quality of "participating company"<sup>31</sup>.

## **B) Entities covered by the concept of "companies"**

The term "company" has a precise meaning, elaborated over the course of time by Company Law. The Regulation grasps this concept in its current legal signification<sup>32</sup>. One would be led to believe

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<sup>30</sup>It is nevertheless relevant for other purposes provided for in the Directive, insofar as it necessarily is a "concerned subsidiary" within the meaning of article 2(d). See working document n°...

<sup>31</sup>Idem.

<sup>32</sup>See Annexes I and II of the Regulation, which list the national companies of each Member State which are aimed

that the Directive would do likewise, but that would inevitably lead to a serious and insurmountable inconsistency related to the constitution of an SE-common subsidiary.

In fact, in accordance with Article 2(3) of the Regulation, this way of forming an SE is accessible not only to companies within the meaning of Article 48 of the Treaty<sup>33</sup>, but also "to other legal bodies governed by public or private public law".

These "other legal bodies" have necessarily to be covered by the definition of "participating companies" referred to in the Directive, otherwise the rules therein would be completely useless in the event that one or more of these legal bodies intervene directly in the process of establishing an SE.

### **C) National systems of participation organised at group level**

The third relevant question in relation to the definition of "participating companies" will hardly be mentioned. Only after having reviewed the way in which the negotiation referred to in Articles 3 to 6 of the Directive proceeds and having analysed Article 7 (on the conditions for the application of the standard rules referred to in the Annex) we will be in a position to give a complete and satisfactory solution to this problem.

Simplifying, the question can be summarised as follows: by introducing in the Directive the definition of "participating companies" for the purposes which appear in the left-hand column of the table on page 2 of this working paper, the Community legislator chose, amongst other things, to take these companies, and they alone, as a reference for the application of the "before and after" principle.

This has very important, even decisive, effects in particular concerning the way in which Articles 3(4) (voting rules within the SNB and determination of the highest system of participation, 7(2) (conditions for the application of Part 3 of the Annex) and 3(b) of the Annex (determination of the highest system of participation) apply. It results from this that only the participation systems existing within the organs of these participating companies are relevant for the aforesaid effects. However, in the majority of the Member States with participation systems applicable in the private sector, participation is organised at the level of the group of companies (See table III). This is the case in Germany, in Austria, in Denmark, in Norway, in Sweden and in Finland. Only in the Netherlands and in Luxembourg the reference level for the organisation of participation is each individually considered company.

The accumulation of a participation at the level of the companies and of a participation at the level of the group (within the controlling company) is envisaged:

- with specific rules for the controlling company of the group (Denmark, Austria);
- with the same mechanisms as for the companies: (Finland, France - public sector).

With regard to groups of companies, participation is organised within the controlling company:

- with specific rules (Germany - iron and steel industry-mines);

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at Article 2.

<sup>33</sup>Article 48 second subparagraph of the Treaty: "*Companies or firms*" means companies or firms constituted under civil or commercial law, including the co-operative societies, and other legal persons governed by public or private law, save for those which are non profit-making".

- with the same mechanisms as for the companies, by taking into account all the employees of the group (Sweden, Germany - law 52 and law 76)

The existence of a group is taken into account neither for the workforce nor for the participation mechanism:

- private sector or with public participation (Luxembourg);
- specific systems (the Netherlands)
- public sector (Spain, Ireland, Greece).

Thus, in the private sector, the national provisions generally take into account the existence of the groups, whether it concerns cumulating the participation at the level of the subsidiary companies and at the level of the controlling company, or organising the participation at the level of the head of the group. Only Luxembourg and the Netherlands consider only the companies.

On the other hand, the provisions envisaging the participation in public sector or the specific systems (the Netherlands) usually do not take into account the existence of the groups.

The question of whether or not subsidiary companies should be taken into account in the questions concerning the participation in the constitution of an SE therefore arise:

- As regards the relevant workforce: what is the workforce to take into account in the formulas in Article 3.4 of the directive ("participation covers x% of the overall number of employees of the participating companies") or 7.2 ("participation (...) covering x% of the total number of employees in all the participating companies")?

Article 2 (b) defines "participating companies" as "the companies directly participating in the establishing of an SE". Pursuant to this definition, only the workforce of the controlling company of a for example Swedish, Danish or German group should be taken into account, while evidently all the employees of the group in the country are concerned with this participation.

- As regards participation methods taken into account: what are the methods to take into account in the formulas in Article 3.4 of the directive ("the highest proportion existing within the participating companies") or 7.2 ("one or more forms of participation applied in one or more of the participating companies (...)") and ("if there was more than one form of participation within the various participating companies"), or still Part 3 subparagraph (b) in the Annex (the highest participation system)?

Article 2 (b) defines "participating companies" as "the companies directly participating in the establishing of an SE". Pursuant to this definition, only the methods of participation at the level of these companies would be taken into account.

For example, within the framework of a Luxembourg company taking part in the creation of an SE of which all activities and workforce are placed in a subsidiary company at the level of which the participation is exerted (1/3 of the SB), is the Luxembourg method of participation taken into account?

Another example, for Denmark and Austria, would we take into account the methods of participation at the level of the controlling company taking part in the establishing of an SE or of the subsidiary companies? Or of both?

- As regards consequences for national participation methods : what happens when there is participation only at the level of the controlling company of the group (Germany, Sweden) and this controlling company disappears by way of merger to an SE or when this controlling company is an SE?

This would mean that, without an interpretation effort, the participation systems existing at the level of the subsidiary companies in the countries mentioned above will not always be fully taken into account.

The solution for this problem will remain for the moment open, until the moment when the work of the Group will be more advanced and will provide us a more precise overall picture of the way in which the Directive operates.

**Table I – Participating companies - subsidiary and establishment - concerned subs. or establishment**

<b>PARTICIPATING COMPANIES</b>	<b>SUBSIDIARY / ESTABLISHMENT</b>	<b>CONCERNED SUBSIDIARY OR ESTABLISHMENT</b>
<b>Art. 2.d)</b> – Definition of concerned subsidiary or establishment		
	<b>Art. 2.f)</b> – Definition of representative body	
<b>Art. 2.g)</b> – Definition de SNB		
	<b>Art. 2.i)</b> - Definition of information	
<b>Art. 3.1</b> – Initiative to create a SNB	<b>Art. 3.1</b> – Information on the number of employees	
<b>Art. 3.2.a)</b> – Distribution of seats in the SNB		<b>Art. 3.2.a)</b> – Distribution of seats in the SNB
<b>Art. 3.2.b)</b> – Designation of the members of the SNB		<b>Art. 3.2.b)</b> – Designation of the members of the SNB
<b>Art. 3.3</b> – Determining the parties to the negotiations		
<b>Art. 3.4</b> – Reference companies for calculating the proportion of workers covered by systems of participation (for the purpose of establishing the voting rules within the SNB)		
<b>Art. 3.4</b> – Reference companies for determining the highest system for participation (to check if there has been a reduction in the participation rights)		
	<b>Art. 3.6</b> – Reconvention of the SNB	
<b>Art. 3.7</b> – Responsibility for the expenses of the SNB		
<b>Art. 4.1</b> – Obligation to negotiate in a spirit of co-operation		
<b>Art. 4.2</b> – Parties to the negotiations		
	<b>Art. 4.2.b)</b> – Content of the agreement (coverage)	
<b>Art. 7.1.b)</b> – Conditions for the application of the Annex		
<b>Art. 7.2</b> – Reference companies for calculating the proportion of workers covered by systems for participation		
<b>Art. 8.2 et 4</b> – Right to withhold information	<b>Art. 8.2</b> – Justification for withholding information	
<b>Art. 10</b> – Protection of employees' representatives	<b>Art. 10</b> – Protection of employees' representatives	
<b>Art. 12.1</b> – Enforcement		<b>Art. 12.1</b> – Enforcement
	<b>Art. 13.1 et 3</b> – Links with other provisions	
	<b>Ann. 1.a)</b> – Distribution of seats in the representative body	
	<b>Ann. 1.e)</b> – Nomination of members of the representative body	
	<b>Ann. 2.a)</b> – Competence of the representative body	
	<b>Ann. 2.e)</b> – Information to workers by the representative body.	
	<b>Ann. 3.b)</b> - Election or nomination of workers' representatives in the administrative or supervisory body	
<b>Ann. 3.b)</b> – Reference companies for determining the highest system of participation		

### Constitution methods of an SE

WAY OF ESTABLISHING AN SE	TYPES OF PARTICIPATING COMPANIES	REGISTERED OFFICE OF THE PARTICIPATING COMPANIES	CROSS-BORDER DIMENSION OF THE PARTICIPATING COMPANIES
<b>MERGER</b>	<ul style="list-style-type: none"> <li>•PLC</li> <li>•SE</li> </ul>	<ul style="list-style-type: none"> <li>•Registered office and central administration in EC <i>OR</i></li> <li>•Central administration outside the EC registered office in EC effective and continuous link with the economy of a MS</li> </ul>	At least two of them are governed by the law of different MS
<b>HOLDING</b>	<ul style="list-style-type: none"> <li>•PLC</li> <li>•plc.</li> <li>•SE</li> </ul>	<ul style="list-style-type: none"> <li>•Registered office and central administration in EC <i>OR</i></li> <li>•Central administration outside the EC registered office in EC effective and continuous link with the economy of a MS</li> </ul>	At least two of them: <ul style="list-style-type: none"> <li>•Are governed by the law of different MS <i>OR</i></li> <li>•Have had for at least two years a subsidiary governed by the law of another MS or an establishment located in another MS</li> </ul>
<b>COMMON SUBSIDIARY</b>	<ul style="list-style-type: none"> <li>•Civil or commercial law companies, including co-operative societies.</li> <li>•Other legal entities governed by private or public law</li> <li>•SE</li> </ul>	<ul style="list-style-type: none"> <li>•Registered office and central administration in EC <i>OR</i></li> <li>•Central administration outside the EC registered office in EC effective and continuous link with the economy of a MS</li> </ul>	At least each one of two of them: <ul style="list-style-type: none"> <li>•Are governed by the right of different MS <i>OR</i></li> <li>•Have had for at least two years a subsidiary governed by the law of another MS or an establishment located in another MS</li> </ul>
<b>TRANSFORMATION</b>	<ul style="list-style-type: none"> <li>•PLC</li> </ul>	<ul style="list-style-type: none"> <li>•Registered office and central administration in EC <i>OR</i></li> <li>•Central administration out side the EC registered office in EC effective and continuous link with the economy of a MS</li> </ul>	Has for at least two years a subsidiary governed by the right of another MS

**Table III - Methods of participation of the employees at the level of the group**

Germany	<p><u>Law 52 (up to 2000 employees)</u>: participation takes place at the level of the controlling company of the group if there is one. The number of members of the supervisory board (SB) depends on the capital of the company. The employees of the companies of the group are taken into account when designating representatives of the workforce.</p> <p><u>Law 76 (+ 2000 employees)</u>: participation takes place at the level of the controlling company of the group if there is one. The number of members of SB depends on the number of employees in the group. The employees of the companies of the group are taken into account when designating representatives of the workforce.</p> <p><u>Iron and steel industry-mines</u>: participation takes place in the companies of + 1000 empl. or, when they do not fulfil this requirement, when the group has + 2000 employees. In the companies, possibly heads of group, the SB is usually composed of 21 members (15 or 11 in the smallest ones), including 10 representatives of the employees and 1 neutral member; In the attached groups, SB includes 15 members of which 7 are employees' representatives and one a neutral member.</p>
Austria	<p>Participation also applies to the SB of the controlling company when it employs less than half of employees of the subsidiary companies (except insurance-banks or when its activity is limited to the administration of companies). At the level of the controlling company: when there is a representation of group, it nominates the representatives to the SB, otherwise, the work's council (WC) or the committee of work's councils (CWC) of the controlling and controlled companies elect these representatives in proportion of their workforce.</p>
The Netherlands	No specific provisions concerning the groups.
Luxembourg	The provisions apply to the company and do not take the groups into account.
Denmark	<p>In the presence of a group, the employees of the subsidiary companies nominate 1/3 of the members of the administrative board (AB) and, if the controlling company has more than 35 employees, 2 of its representatives have a seat in the AB. The total of the employees' representation lies between 3 and half of the AB. This is in addition to the participation up to a third of the AB in the companies of more than 35 employees.</p>
France	<p>For the delegation of the WC to the AB or SB: only the WC of the controlling company intervenes in the designation. Public sector: For the employed administrators' election, the list of the concerned companies comprises public-sector companies and their subsidiary companies of more than 200 employees.</p>
Spain	Public sector: No specific provisions concerning the groups.
Portugal	Non applied provisions.
Greece	"Socialised" sector: List of concerned companies, no specific provisions concerning the groups.
Ireland	Public sector: List of companies concerned, no specific provisions concerning the groups.
Finland	<p>Different thresholds of the participation: 150 employees for the companies, 500 employees for the groups. Same mechanism: according to agreement, otherwise 1 to 4 members forming ¼ seats.</p>

Sweden	In the event of group, participation takes place at this level and the representation must cover all the employees of the group.
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# ***GROUP OF EXPERTS "SE "***

## **WORKING PAPER N° 7**

17 June 2002

### **Definition of "subsidiary" –Article 2 (c)**

The definition of subsidiary is relevant for the purposes indicated in the central column of table I of Working Paper n° 6. The Community legislator decided to borrow to this end the definition of subsidiary arising indirectly from all the provisions of Article 3 of Directive 94/45/EC. This means that the definition of subsidiary in the Directive does not necessarily coincide with the one of the Regulation (which in fact contains no explicit definition of subsidiary). This aspect will be treated in item 2 of this working paper. We will also address the question of knowing whether or not indirect subsidiaries or establishments of participating companies of which the controlling links are established outside the EU must be taken into account for the purposes of the Directive.

On the occasion of the transposition of Directive 94/45/EC, the concept of "controlling undertaking" was discussed at length within the bodies charged with this task. In particular, the Group of Experts from national administrations created by the Commission in order to ensure a harmonious transposition of the directive made many efforts to try to prevent possible conflicts between national arrangements which were likely to be contradictory in this field. It ended up settling a number of problems, though others, because of their complexity, could not be solved definitively. The Group concluded that practice would help resolve those problems, in particular through the case law of the European Court of Justice. Nevertheless, the problems identified by the group of experts, as real as they were, did not emerge until now in a visible way in the practical application of the Directive.

In any event, it is useful to take the rich discussions then into account on this occasion, since, as the SE Directive refers to this other Community act with regard to the definition of subsidiary, problematic situations of the same type could occur here.

#### **1. Summary of the work of transposing Directive 94/45/EC**

##### *Article 3 of the Directive 94/45/EC - Definition of 'controlling undertaking'*

*1. For the purposes of this Directive, 'controlling undertaking' means an undertaking which can exercise a dominant influence over another undertaking ('the controlled undertaking') by virtue, for example, of ownership, financial participation or the rules which govern it.*

2. *The ability to exercise a dominant influence shall be presumed, without prejudice to proof to the contrary, when, in relation to another undertaking directly or indirectly:*

*(a) holds a majority of that undertaking's subscribed capital; or*

*(b) controls a majority of the votes attached to that undertaking's issued share capital; or*

*(c) can appoint more than half of the members of that undertaking's administrative, management or supervisory body.*

3. *For the purposes of paragraph 2, a controlling undertaking's rights as regards voting and appointment shall include the rights of any other controlled undertaking and those of any person or body acting in his or its own name but on behalf of the controlling undertaking or of any other controlled undertaking.*

4. *Notwithstanding paragraphs 1 and 2, an undertaking shall not be deemed to be a 'controlling undertaking' with respect to another undertaking in which it has holdings where the former undertaking is a company referred to in Article 3 (5) (a) or (c) of Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (6).*

5. *A dominant influence shall not be presumed to be exercised solely by virtue of the fact that an office holder is exercising his functions, according to the law of a Member State relating to liquidation, winding up, insolvency, cessation of payments, compositions or analogous proceedings.*

6. *The law applicable in order to determine whether an undertaking is a 'controlling undertaking' shall be the law of the Member State which governs that undertaking. Where the law governing that undertaking is not that of a Member State, the law applicable shall be the law of the Member State within whose territory the representative of the undertaking or, in the absence of such a representative, the central management of the group undertaking which employs the greatest number of employees is situated.*

7. *Where, in the case of a conflict of laws in the application of paragraph 2, two or more undertakings from a group satisfy one or more of the criteria laid down in that paragraph, the undertaking which satisfies the criterion laid down in point (c) thereof shall be regarded as the controlling undertaking, without prejudice to proof that another undertaking is able to exercise a dominant influence.*

The complexity of the problems analysed at the time forced the group of experts to take a careful approach vis-à-vis the problems that it had identified. This was also translated into the conclusions of the work, confirmed by the Directors General of Industrial relations of the Member States on 10 July 1995, on all the questions mentioned above (Item 4 of the conclusions):

4. *The concept of "controlling undertaking"*

*Concerning the assumptions in Article 3(2), the Working Party expressed a clear preference for applying the following hierarchy: c, b, a.*

*The Working Party had a long debate on the problem of implementing article 3 of the Directive, notably on possible divergences between Member states concerning its interpretation and application leading to possible contradictory court decisions.*

*Three solutions have been considered as working hypothesis:*

*The first one consists of limiting the relevant criteria to be used to designate the notion of control to those linked to financial participation (Article 3(2)). The Working Party has rejected this solution as being too restrictive and not compatible with the text of the Directive, because this solution takes no notice of the provision of Article 3 (1).*

*This is because this Article gives a definition of "controlling undertaking" which is broader than the definition under the three criteria set out in paragraph 2: "controlling undertaking" means an undertaking which can exercise a dominant influence over another undertaking (the controlled undertaking) by virtue, for example, of ownership, financial participation or the rules which govern it". Here, the "controlling undertaking" is understood in its broadest sense, the examples are given for guidance only and, in any case, the third example covers all imaginable forms of influence.*

*The second solution consists of establishing the same hierarchy in all the Member states between all possible criteria according to article 3, paragraphs 1 and 2, for the determination of the existence of a dominant influence.*

*Taking into account the huge diversity of all possible criteria, the Working Party has considered that it could prove to be rather complex to try to find the same hierarchy in all the countries. Furthermore, this would not exclude contradictory judicial interpretations.*

*The third solution consists of introducing a specific clause on the competence of national jurisdictions to rule on possible conflicts of law on the existence of a dominant influence, e.g., by giving an exclusive competence to the first jurisdiction the case would be brought to.*

*While considering that this solution could also be very complex, the Working Party decided to further analyse this problem, indicating that Member states should not apply solutions which would hamper the possibilities of a convergent approach. They should reflect on solutions which would not lead to a blocking situation in case of possible conflicts of law.*

Concerning the SE Directive, it would seem desirable that national transposition laws simply refer to the national provisions transposing Article 3 of Directive 94/45/EC.

## **2. Coincidence of the definitions of "subsidiary company" in the Directive and in the Regulation**

Unlike in the Directive, "subsidiary" is not defined anywhere in the Regulation. In accordance with Article 9 point c) of the Regulation "(...) an SE shall be governed (...) c) in the case of matters not regulated by this Regulation or, where matters are partly regulated by it, of those aspects not covered by it, by: i) the provisions of laws adopted by Member States in

implementation of Community measures relating specifically to SEs; ii) the provisions of Member States' laws which would apply to a public limited-liability company formed in accordance with the law of the Member State in which the SE has its registered office (...)".

This means that, for the purposes of the Regulation, national provisions which are adopted specifically for the SE or, in their absence, those applicable to public limited liability companies will determine whether or not a certain company is a subsidiary of another.

The national definitions of "subsidiary " vary according to the field in question (company law, taxation law, etc). The same occurs with the Community definitions <sup>34</sup>. It results from this that the Regulation does not prevent Member States from considering as subsidiary companies for the purposes of, for example, its Article 2 (concerning the forms of constitution of an SE), companies which will not be considered as such under the Directive.

An example: company A registered in France held 20 % of the capital of company X, registered in Ireland; company B, registered also in France, held equally 20% of the capital of company Y, registered in Ireland. According to Irish law, companies X and Y are considered to be subsidiary companies of companies A and B, respectively, which allows these latter to establish an SE by way of forming a holding company or a common subsidiary (see Articles 2(2)b and 3(2)b of the Regulation. However, according to Article 2c of the Directive, companies X and Y are not deemed to be subsidiary companies of companies A and B. The provisions of the Directive could therefore not be applied in a way which takes them into account.

Consequently, it would also be advisable to promote a harmonisation of national definitions of subsidiary for the purposes of the Regulation, even if it does not impose this explicitly, by assimilating this concept with that of the Directive. This can and must be done by using the faculty conferred to the Member States by Article 9 point c), sub-point i) of the Regulation to adopt provisions specifically applicable to SEs in fields not covered by it.

This would result in full coincidence between the definitions of subsidiary in both the Regulation and the Directive, the only way of ensuring the consistency of the system.

#### Controlling links established outside the EU

In this respect, the question arises as to whether the control links as mentioned in point 1 of this Working Paper must necessarily be contained in the Community territory. It is, first of all, clear that in order for a company or an establishment to be subject to the Directive, they must inevitably be governed by the law of a Member State of the EU.

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<sup>34</sup>For example, Second Directive 89/646/EEC, of 15 December 1989, and amending Directive 77/780/EEC, in OJ n° L 386 of 30/12/1989 p. 0001 –001 and the Seventh Council Directive 83/349/EEC of 13 June 1983 in OJ n° L 193 of 18/07/1983 p. 0001 –001 contain a definition of subsidiary company near (but not identical) with that of Directive 94/45/EC and of the directive On the other hand, for Council Directive 90/435/EEC, of 23 July 1990, OJ n° L 225 of 20.08.1990 p.6) a participation of at most 25% is enough for a company to be considered a subsidiary company of another.

But, should only direct subsidiaries of a participating company or of a subsidiary of a participating company governed by the law of one of the Member States of the EU be taken into account for the purposes of the Directive? Or, on the contrary, should we for those purposes also take into account the indirect subsidiaries of a participating company or of one of its subsidiaries governed by the law of a Member State, when the controlling links are established through an intermediate subsidiary located in a third-country?

The question arises in the same terms with regard to establishments.

Let us take an example: participating company A, located in Member State X, controls company B, located in Member State Y, as well as company Z, located in a third-country. Company Z controls in turn company B1, located in Member State Y. Companies B and B1 are both subsidiaries of the participating company A, but the controlling link with the latter is established outside the Community territory. Should it be taken into account in the same way as company B?

At first sight, one would be inclined to answer in the negative, simply due to the principle of the territorial application of the Directive, limited to the Community territory, as well as to the absence of an explicit provision in the Directive providing otherwise. Nevertheless, the combined analysis of the method of operation of the Directive and of the Regulation seems to lead ineluctably to the opposite conclusion.

In fact, when the Regulation lays down the various forms of establishing an SE, it does not in any way limit the taking into account of legal entities governed by third-countries' laws within the framework of this process. What it limits to the Community territory is just the quality of "participating company" (see the various paragraphs of Article 2 of the Regulation, which all refer to companies governed by the law of a Member State).

Nevertheless, once this quality is verified in relation to the participating companies, nothing seems to prevent the subsidiaries or establishments of these located in third-countries from being involved indirectly in the process. This involvement appears even to be inevitable in many cases, since the perimeter of the companies potentially interested in establishing an SE will very often transcend the Community territory.

When, for example, two companies from two different Member States decide to merge to establish an SE, they should be free to transfer to the future SE all their assets, located inside and outside the Community, including, therefore, their subsidiaries and establishments located outside the EU. The operation in itself is strictly a Community one, in that the participating companies are governed by the law of Member States, but this by no means prevents the underlying economic merger operation from transcending the borders of the EU. Otherwise, the scope of the Statute of the SE would be seriously limited as an instrument of international reorganisation of the activities of European companies (which in many cases cumulate this quality with that of world-wide companies or groups), and of the search for the competitiveness of those companies, which is played at world level.

Moreover, if this limit was imposed, the establishment of an SE would imply a preliminary separation between the Community and extra-Community activities of the companies potentially

interested in using the Statute, an operation without any kind of economic logic (or even impossible to carry out) and which would remove any interest in availing of the SE.

By those reasons, the subsidiaries of the participating companies located in third-countries will therefore be often involved in the process. If this is the choice of the participating companies, those third-country subsidiaries will appear for instance in the merger project referred to in Article 20 of the Regulation as a basis for the calculation of the share-exchange ratio. And they will become thereafter extra-Community subsidiaries of the SE, just like they previously so were of the participating companies.

However, these extra-Community subsidiaries and establishments do not intervene directly in the process of establishing an SE, otherwise than to determine the assets of each participating company. Neither will they be involved in the procedures referred to in the Directive: they are not subject to the law of a Member State, the only quality which would allow them (and would compel them) to intervene directly in those procedures. Therefore, it is not a question of extra-territorial application of Community law.

That being so, the simple fact that they will be taken into account for the purposes mentioned above in relation to the determination of the assets of the participating companies makes it necessary, for the same reasons mentioned above, to take into account the Community subsidiaries and establishments of those third-country companies integrated within the perimeter of the participating companies. Having said this, we are bound to conclude that those Community subsidiaries and establishments which are under indirect control of the participating companies through dominance links transcending the EU present, for the purposes of the Directive, no substantial difference as compared to the subsidiaries and establishments the control of which is established within the territory of the EU.

The Directive does not specify it. Therefore, it would be advisable, if this conclusion is accepted, to introduce a clarification in this respect in national provisions implementing the Directive.

# ***GROUP OF EXPERTS "SE"***

## **WORKING PAPER N° 8**

**10 April 2002**

### **The concept of "establishment"**

The "concerned establishment" is relevant for the effects mentioned in the third column of table I in Working Paper n° 6.

Neither the Directive nor the Regulation contain a definition of establishment. In Community law, as well as in other legal provisions, the establishment differs from the subsidiary company especially because of the absence of legal autonomy in relation to the company of which it forms part, i.e., of the absence of its own legal personality. For example:

<b>Directive 2000/12/EC relating to the taking up and pursuit of the business of credit institutions</b>	<b>Council regulation (EC) No 1346/2000 on insolvency proceedings</b>	<b>Directive 2002/14/EC establishing a general framework for informing and consulting employees in the European Community</b>
<i>Article 1.3</i>	<i>Article 2 h)</i>	<i>Article 2 b)</i>
"branch" shall mean a place of business which forms a legally dependent part of a credit institution and which carries out directly all or some of the transactions inherent in the business of credit institutions; any number of places of business set up in the same Member State by a credit institution with headquarters in another Member State shall be	"establishment" shall mean any place of operations where the debtor carries out a non-transitory economic activity with human means and goods.	b) "establishment" means a unit of business defined in accordance with national law and practice, and located within the territory of a Member State, where an economic activity is carried out on an ongoing basis with human and material resources;

regarded as a single branch;		
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It should be noted that the definition in the Directive for information and consultation was, in the Commission's amended proposal, re-worded: "a place of business with no legal personality, which is part of an undertaking and where a non-transitory economic activity is carried out with human means and goods;". At the end of the negotiations, however, the definition had changed to the wording which is quoted in the tableau.

In any case, since neither the Directive nor the Regulation contain an explicit definition of establishment, the Member States themselves should be free to define the notion, if they should wish to do so.

# ***GROUP OF EXPERTS "SE "***

## **WORKING PAPER N° 9**

20 June 2002

### **Definition of "concerned subsidiary or establishment" –Article 2 (d)**

According to Article 2 point d) of the Directive, "concerned subsidiary or establishment concerned" means:

*"a subsidiary or establishment of a participating company which is proposed to become a subsidiary or establishment the SE upon its formation".*

The concerned subsidiaries and establishments are especially relevant for the purposes of the distribution of the seats and the designation of the members of the SNB (Articles 3 paragraph 2 points a) and b)). In fact, even if the rules of the Directive translating the "before-after" principle<sup>35</sup> concern only the participating companies and not their subsidiaries and establishments<sup>36</sup>, these latter are taken into account by the Directive for the purposes of the composition of the GSN.

This unequal treatment seems logical. Concerning the safeguarding of acquired rights, which constitutes the principal aim of the provisions which reflect the "before-after" principle, the only relevant entities are those the systems of employee involvement of which can be challenged by the constitution of the SE, i.e., the participating companies<sup>37</sup>.

On the other hand, when it comes to negotiating an agreement on the arrangements for employee involvement in the future SE, it appears normal to allow to take part in this negotiation not only the representatives of the employees of the participating companies but also those of their subsidiaries and establishments, insofar as the implication mechanisms to be created will have a transnational dimension: they will concern the SE not only as a separate legal entity, but also as the central management of a company of transnational dimension or as the dominant company of a group of companies of

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<sup>35</sup>Especially Articles 3 paragraph 4 (reference for the calculation of the percentages of workers covered by participation systems in order to determine the voting rules within the SNB, as well as to determine the highest participation system in order to check if there were reduction of participation rights) and 7 paragraph 2 (idem concerning the application of Part 3 of the Annex in the event of failure of the negotiations).

<sup>36</sup>See working Paper n° 6-Rev1.

<sup>37</sup>See however Point C of Working Paper n° 6 paper ("Definition of participating companies") which mentions the problems which can arise from the existence of national systems of participation organized at the group level.

transnational dimension. Whence the need to associate from the beginning to the negotiation process the representatives of all the entities and parts interested in it.

It seems therefore important to apprehend well the concept of "subsidiary or establishment concerned".

This concept comprises three elements:

1. The basic concepts of "subsidiary" and "establishment"
2. The quality of controlled company (with regard to subsidiaries) or of ownership (with regard to establishments), in a direct or indirect way, in relation to a participating company
3. The vocation to become a subsidiary or an establishment of the SE upon its constitution.

These three aspects will be treated successively.

### **1. The basic concepts of "subsidiary" and "establishment"**

Obviously, the definitions of "subsidiary" and of "establishment" analysed in previous documents condition the concept of "concerned subsidiary or establishment". The considerations exposed in the Working Papers n° 7 and 8 are therefore valid and applicable to the definition of "concerned subsidiary or establishment".

### **2. The quality of controlled company (with regard to subsidiaries) or of ownership (with regard to establishments) in relation to a participating company; direct and indirect links**

For a company to be considered a "concerned subsidiary", it must, first of all, be regarded as a subsidiary of a participating company in accordance with the provisions which transpose Article 2 paragraph c) of the Directive (definition of subsidiary) in the law of the country where it has its registered office. The location the participating company is irrelevant for this purpose, as the dependence relationship can be established in relation to a participating company established either in the same Member State or in another Member State.

The same principle applies with regard to the concept of "concerned establishment", the dependence relationship having to be replaced by a ownership link (since the establishment does not have legal autonomy in relation to the company of which it forms part).

In both cases, both direct and indirect links are relevant on the same basis. Concerning the subsidiary company, this conclusion results from Article 3 of Directive 94/45/EC, to which refers Article 2 point c) of the SE Directive, and in particular paragraph 3 of this same Article 3.

Even if the Directive is not explicit, the same conclusion seem inevitable concerning establishments, in particular by the reasons evoked in the final part of the introduction to this Working paper (on the transnational dimension of the mechanisms of employee involvement to be created through the negotiation).

Consequently, have to be regarded as "concerned subsidiaries or establishments":

- the "direct" subsidiaries of the participating companies governed or not by same national law;
- the "direct" establishments of the participating companies, located or not in the same Member State;
- the "indirect" subsidiaries of the participating companies (subsidiaries of "direct" subsidiaries of participating companies, subsidiaries of "indirect" subsidiaries), always provided that the a dominant influence link can be established between them according to Article 3 of Directive 94/45/EC;
- the "indirect" establishments of the participating companies (the establishments of the "indirect" subsidiaries of these companies).

### **3. The vocation to become a subsidiary or an establishment of the SE upon its formation**

Not all the subsidiaries and the establishments of the participating companies in the meaning evoked previously are "concerned subsidiaries or establishments". Article 2 point d) adds an additional condition: in order for them to be considered as such, these subsidiaries and establishments must become subsidiaries or establishments of the SE upon its formation.

This additional condition is understandable: if this were not the case, then nothing would justify the participation of representatives of their employees in the negotiation process<sup>38</sup>. They take part in it only because they will be directly be covered by the implication mechanisms created as a result of the negotiation, since they will be integrated in the group headed by the future SE.

How to determine beforehand which are the subsidiaries and establishments of the participating companies which will become subsidiaries or establishments of the SE after its formation?

With regard to mergers and the SE-holding, the Regulation stipulates<sup>39</sup> that the constitution process begins with the elaboration and publication of a project for a merger or for establishing a holding company. One of the elements which have to be included in these projects consists in "information on the procedures by which arrangements for employee involvement are determined pursuant to Directive 2001/86/EC"(Article 20(1)i) applicable also to the constitution of a SE-holding<sup>40</sup>).

Moreover, these same provisions oblige the participating companies to include in the above-mentioned projects "the share-exchange ratio and the amount of any compensation ", as regards mergers, and a "report explaining and justifying the legal and economic aspects of the

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<sup>38</sup>See again the final part of the introduction to this Working Paper.

<sup>39</sup>Articles 20 and 32, respectively.

<sup>40</sup>See Article 32(2.)

formation and indicating the consequences for the shareholders and for the employees of the adoption of the form SE", as regards the SE-holding.

It results from this that the configuration and the final perimeter of the group of which the SE will be the dominant company have necessarily to appear in these initial reports. Therefore, the intention of the competent organs of the participating companies in this respect will be known from the beginning, and this will make it possible to distinguish between those of their subsidiaries and establishments which will become subsidiaries or establishments of the SE from those which will not become it.

With regard to the SE-common subsidiary and the transformation, the Regulation is much more laconic, with a total and partial reference, respectively, to the applicable national law. It would seem very useful that national provisions are adopted in the same direction of those evoked above in relation to mergers and the SE-holding.

Lastly, it is useful to point out the fact that the final configuration of the operation leading to the constitution of an SE, whatever its form, may well diverge from the promoters' initial intentions<sup>41</sup>. If, sometime during this process, a concerned subsidiary or establishment, in the meaning explained above, loses that quality due to the fact that it will no longer be a subsidiary or an establishment of the future SE, then it has to be excluded from the procedures referred to in the Directive. This aspect will be developed in a separate Working Paper, devoted to the changes occurred in the envisaged perimeter of the SE during the constitution process.

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<sup>41</sup>By example, as a result of the negotiations between the companies in question or of injunctions issued from the competition authorities competent in the field of mergers and acquisitions control.

# ***GROUP Of EXPERTS "SE "***

## **WORKING PAPER N° 10**

**20 June 2002**

### **Definition of "employee"**

Although the directive refers several times to "employees", it does not give any explicit definition of the term. To arrive at coherent interpretation and application, it seems useful to evoke the treatment of this concept in different situations governed by Community law.

Under Regulation 1408/71 on the co-ordination of the systems of social security, there is the following definition: an employee (or a worker) is an employed person affiliated to a social security system of the employees (see Article 1) or assimilated (the Court of Justice, judgement of December 1968 - 19/68 - of Cicco - Rec. 700).

As regards freedom of movement (Regulation 1612/68) there is no explicit definition in the text but there is a Community concept of "employed person" resulting from the judgements of the European Court of Justice <sup>42</sup>. Within this framework, an employed person is characterised by three elements:

- an economic activity, which excludes the simply voluntary activity, or the case of the person in social reintegration;
- remuneration, which can be exclusively in kind. It can be auxiliary, lower than minimum wages; it is enough that it exists;
- subordination; the term is not to be interpreted strictly, but makes it possible to distinguish the employed person of the self-employed worker, that which works for its own account, with its risks and profits. The Court of Justice underlines in all these judgements, that the concept has to be uniform throughout the Community.

The Directive on the insolvency of the employer (80/987/EEC) stipulates in its Article 2 (2), that it does not affect national law with regard to the definition of employees. Within that framework, there is no Community definition. The definition is carried out by national legislation.

It is useful to underline the fundamental difference between the quoted provisions and the SE Directive (as well as the European Works Councils Directive). As regards social security, freedom of movement and insolvency, European legislation creates individual rights for the

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<sup>42</sup>See judgement of 23/03/82 - 53/81 - Levin - Rec. 1035, judgement of 31/05/89 - 344/87 - Beltray - Rec. 1621 and others.

workers. It is therefore essential to know whether or not each individual is covered by that legislation.

The situation is different with regard to this Directive (as it was already the case for Directive 94/45/EC which did not contain any explicit definition of "workers" either). This directive refers to employees:

- when it defines the objective of the directive (information and the consultation of the employees, Article 1 (1));
- when it fixes the key to the geographical allocation of the seats in the SNB (reference to the percentage of 10 % or a fraction thereof in Article 3 paragraph 2, point a), indent i));
- when it fixes percentages making it possible to determine the methods of voting within the SNB (Article 3(4)) and to apply the subsidiary rules of the Annex (Article 7(2));
- in a number of other provisions (as regards representation etc).

One can say that the essence of the right granted to the workers by the Directive is exercised in a collective way. Therefore, the "employee" notion is not used for the identification of a person on whom an individual right is conferred but mainly to the definition of the scope of the Directive <sup>43</sup>.

Accordingly, and considering that in the context of this Directive the "employees" concept is not as important as in other cases, it seems to be acceptable that each Member State takes into account the existing definitions in national law as regards information, consultation and participation<sup>44</sup>.

This orientation is supported by two recent Community texts:

- the Directive on "transfers of undertakings", Article 2(1) point d) of which defines "employee" as "any person who, in the Member State concerned, is protected as an employee under national legislation on employment";
- the Directive on "information and consultation in the EC" (Directive 2002/14/EC), the Article 2, point d) of which is identical to the above-mentioned provision, with the addition of a reference to the national practice.

However, it is advisable to recall the limits to the discretion of the Member States in this field which are imposed on them by other Community texts, concerning in particular certain so-called

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<sup>43</sup>\* And also for other, clearly marginal, purposes. See, for example, the rule established in point a) of the Part 1 of the Annex, according to which only workers and of its subsidiary companies and establishments are themselves it to be members of the representation body.

<sup>44</sup> This means that for the purposes of the application of this Directive, in each Member State a "worker" will be deemed to be a person who is implicitly or explicitly considered as such in the national provisions transposing the Directive. This assertion does not seem contrary to what is stated in Article 6 in the Directive, which establishes the rule according to which the legislation applicable to the negotiation procedure is the legislation of the Member state in which the future SE will be registered. It is reasonable to consider that this provision is only applicable to the negotiation procedure.

"atypical" forms of work. It is the case of Clause 4 of the Annex to Directive 97/81/EC of 15 December 1997 (extending *erga omnes* the agreement concluded between the social partners at Community level on part-time work)<sup>45</sup>, which prohibits a less favourable treatment of part-time workers in relation to comparable full-time workers concerning conditions of employment. Paragraph 2 of this clause establishes the principle of "*pro rata temporis*".

Anticipating these rules, Directive 94/45/EC had already laid down, in its Article 2(2), the principle of the taking into consideration of part-time workers, while admitting adaptations at the time of its transposition, by means of a reference to national legislation and/or practices<sup>46</sup>.

As regards fixed-term contracts, governed by Directive 99/70/EC of 28.6.1990<sup>47</sup>, which extends *erga omnes* the agreement concluded in this field by the social partners at Community level, paragraphs 1 and 2 of Clause 4 of the Annex contain provisions identical to those mentioned before in relation to part-time workers. The text of the agreement is nevertheless more precise, insofar as it stipulates, in its Clause 7, the principle of the taking into account of fixed-term contract workers for the calculation of the workforce size thresholds conferring rights to the constitution of representative bodies for the purposes of informing and consulting employees.

Lastly, the recent proposal of the Commission on temporary work fixes principles identical to those referred to in the previous texts.

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<sup>45</sup>OJ n° L 14 of 20.12.1998, p.10.

<sup>46</sup>This was the subject of a joint statement Council/the Commission included in the minutes of the meeting of the Council, according to which these workers could be taken into account *pro rata temporis*. At the time, the Group of experts confirmed this orientation.

<sup>47</sup>OJ n° L 175 of 10.7.1999, p. 43.

# ***GROUP OF EXPERTS "SE "***

## **WORKING PAPER N° 11**

2 October 2002

### **The method of calculating the number of workers employed**

Contrary to Directive 94/45/EC (European works councils), this Directive contains no indication on to how to calculate the number of employees of the various relevant entities (the SE, its subsidiaries and establishments, the participating companies and their concerned subsidiaries and establishments).

This is no doubt explained by the absence of a general workforce size threshold in this Directive, which overshadowed the subject. Nevertheless, the method for calculating the number of employees employed is far from being trivial. It is of great importance for at least the following purposes:

- to fix the geographical allocation of the seats in the SNB (reference to the percentage of 10% or a fraction thereof in Article 3(2) point a), sub-point i));
- to fix the percentages making it possible to determine the voting methods within the SNB (Article 3(4) and (6));
- to fix the percentages triggering the application of the subsidiary rules of the Annex (Article 7(2));
- to determine the number of employees required to request the reconvention of the SNB in the case referred to in Article 3(6)).

The related provision of Directive 94/45/EC (Article 2(2)) stipulates the following:

*"For the purposes of this directive, the prescribed thresholds for the size of the workforce shall be based on the average the number of employees, including part-time employees, employed during the previous two years calculated according to national legislation and/or practice."*

At the time, the main difficulties of interpretation and of application of this provision concerned the way of calculating part-time workers (this issue is now solved<sup>48</sup> and regulated) and the reference date for the calculation of the number of workers employed during the two previous years<sup>49</sup>.

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<sup>48</sup>See working Paper n° 10.

<sup>49</sup>The national provisions transposing the Directive and the subsequent practice have stabilised on the date of the request for negotiation referred to in Article 5(1) of the Directive.

The question arises in a different way under this Directive, since it is not a question here of checking whether a threshold of the workforce which would open the right to obtain the launching of a negotiation process has been exceeded, but rather of determining the relative weight of the employees (in geographical terms or in terms of these employees being or not covered by a participation system), as well as to the very specific case of the possible reconvention of the SNB referred to in Article 3(6).

Therefore, the question here is not about an average of workers employed during a reference period. Besides, the Directive would not allow it. The calculation must be instantaneous and must consist on quantifying the number of employed employees.

The only question which can raise some doubts is to know at which moment the calculation is to be made, as regards the four situations mentioned in the beginning of this document.

With regard to the right to reconvene the SNB, it seems indisputable that the percentage of 10% of the employees of the SE and of its subsidiaries and establishments required by Article 3(6) 4th subparagraph of the Directive, must be checked at the very moment of the presentation of the request.

As regards the fixing of the percentages triggering the application of the subsidiary rules of the Annex (Article 7(2)), the calculation must absolutely be made the moment when the application of the Annex becomes inevitable, that is once it is established that the negotiations have failed<sup>50</sup>.

As for the other two situations mentioned here below, it would seem licit to consider that the moment should be the one which is pertinent in relation to the different aims:

- for the fixing of the geographical allocation of the seats in the SNB (reference to the percentage of 10% or fraction thereof in Article 3(2) item a), sub-point i)), the moment when the SNB is being established<sup>51</sup>;
- for the fixing of the percentages making it possible to determine the voting methods within the SNB (Article 3(4) and 6), the moment of each vote.

Nevertheless, such an orientation is likely to complicate too much the functioning of the SNB and the carrying out of the voting, in that it would be necessary to recalculate the number of employees before every vote, an operation which could clearly be complex and long.

Therefore, it seems reasonable to consider the initial calculation, made when the procedure starts and which is subject to the communication mentioned in Article 3(1) of the Directive, valid

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<sup>50</sup> It seems inevitable that an acknowledgement must be made of the break down of the negotiations, as this is the only way of legal control. This question will be treated at a later stage of the work. One could foresee choosing preferably the moment when the SE is registered, but that would create practical difficulties related to the fact that, if there is participation (or maybe in any case) prior steps would probably be proved necessary (information to the shareholders before the general assembly, possible transcription of the rules of participation to the statute of the SE in question, etc.)

<sup>51</sup>The question of changes occurring during the negotiation process is analysed in point 1.7 in Working Paper No 16. .

through the whole period of operation of the SNB, including for the purposes of voting. This is without prejudice to a possible re-examination of the calculation following an acknowledged important change in the work force of the participating companies and their concerned subsidiaries and establishments which would entail a re-composition of the SNB<sup>52</sup>. Such a revised calculation would then be used for the voting procedure within the recomposed SNB.

This orientation which consists of only taking into account changes which are so important that they entail the re-composition of the SNB, reconciles the need for efficiency and representativity of the SNB as well as the need to safeguard the practicability of the system.

Since the Directive does not contain any precise rules on this subject, which is very important for the smooth operation of the SNB, it would be desirable that national provisions specify these orientations.

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<sup>52</sup> See *infra*, 1.4 on the representativity of the SNB and 1.8 on changes occurred.

# ***GROUP OF EXPERTS "SE "***

## **WORKING PAPER N° 12**

3 October 2002

### **The definition of "employees' representatives" – Article 2 (e)**

According to Article 2 point e) of the Directive, "employees' representatives" are:

*"the employees' representatives provided for by national law and/or practice"*

This is a definition (or rather, a reference) which has become typical in Community labour law. It has literally remained unchanged more than a quarter of a century, going from directive to directive, from the original version of the Directive on "Collective Redundancies"<sup>53</sup>, to the recent Directive on information and consultation of workers in the European Community<sup>54</sup>, passing through the Directive on "Transfers of Undertakings"<sup>55</sup>, and the "European works councils" Directive<sup>56</sup>.

This provision deserves to be analysed from two different perspectives:

- its scope with regard to the obligations imposed on the Member States thereby, with respect both to the legal constraints as well as to the prerogatives which they enjoy when implementing this provision;
- the national practices of worker representation in the workplace, as well as the recent experience with regard to the transposition of the similar provision of Directive 94/45/EC.

#### What obligations are Member States obliged to fulfil?

With regard to the relevant provisions of the Directives referred to before, some controversial jurisprudential debates have taken place at Community level, in particular in connection with the Directives on "collective redundancies" and "transfer of undertakings". This concerns especially the cases of the Commission against the United Kingdom n° C-382/92 and C-383/92.

The result from that case-law is very clear in that, on the one hand, each Member State must lay down in its national law a right of workers to be represented in the work place (at

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<sup>53</sup>Directive 98/59/EC, of 20 July 1998, in OJ L 225 of 12.08.98 (which codifies Directives 75/129/EEC and 92/56/EEC).

<sup>54</sup>Directive 2002/14/EC of 11 March 2002, in OJ L 80 of 23.3.2002, p. 29.

<sup>55</sup>Directive 2001/23/EEC, of 12 March 2001, in OJ L 82 of 22.03.2001 (which codifies Directives 77/187/EC and 98/50/EC).

<sup>56</sup>Abundantly quoted in previous working papers.

a level which varies according to each Directive) with a view to allowing them to exercise collectively their right to information and consultation<sup>57</sup>; and, on the other hand, that the choice of the forms and methods of the representation belongs to each Member State.

### The employees' representatives in national practice

The freedom granted by the directive to the Member States arises ineluctably from the great diversity of the forms and levels of the representation which exists at the level of the Member States of the European Union. A harmonisation or even a simple alignment or co-operation between the Member States in this respect seems extremely difficult and, in any case, undesirable, since these very various forms of representation find their roots in the old history of more than one century of the labour movement, which, despite the radical internationalism which characterised it at certain times, has followed its course in a separate way in each country, influenced by particular national factors. The current laws and national practices reflect the development of each country, the relative strength existing in each one of them between the social partners, the balances that these could find among themselves, the different role and weight of collective bargaining, etc.

The annex of the Davignon Report gives us an accurate outline of this diversity:

#### 1. The two systems of worker representation

- In the agreement-based "single channel" system, the unions are the only, or at least the priority, channel of communication with the employer. Intervention is mainly by negotiation. In Sweden, Finland, Iceland, Ireland, United Kingdom representation is solely through the union delegates. There are also single or joint representation bodies, strengthening or supplementing the role of the union delegates in Norway, in Denmark, in Italy and sometimes in the United Kingdom. In the United Kingdom and Ireland, recognition of the unions by employers is voluntary, except in certain specific circumstances (collective redundancies for example).
- In the two-tier representation system, based on statutory requirements, representation of all the workers in a company is through an elected body, operating alongside the unions whose aims concern claims and collective bargaining. It essentially performs an information/consultation function. In Germany, Austria, Spain, Greece, Portugal, Liechtenstein and the Netherlands, this representative body is made up solely of employees. In France and Belgium it is chaired by the employer and in Luxembourg it takes the form of a joint council.

Except in Portugal, Norway and Luxembourg, where representation is at enterprise level, the lowest level of worker representation is the establishment, or technical-organisational unit.

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<sup>57</sup>And, we may add, to negotiate an agreement in accordance with this Directive.

Where there are several establishments within the same enterprise or legal entity, there is generally a specific co-ordination structure for the various forms of representation, but this is obligatory only in a minority of countries.

At group level, which is defined in terms of varying restrictiveness, France has the most advanced representation structure, through group committees. Elsewhere, this form of representation is more recent (Austria, Norway, Finland), subject to negotiation (Sweden), applicable to varying degrees (Germany, Netherlands, Italy), very limited (United Kingdom, Greece) or even non-existent.

table 2: the representations competent in economic matters

Country	Representation	Limit	Members	Chairman	Form of intervention			
					Inf°	Cons°	Codet	Négoc°
<b>Germany</b>	Betriebsrat Works council	5	elected	elected	xx	Xx	xx	x
<b>Austria</b>	Betriebsrat Works council	5	elected	elected	xx	Xx	xx	x
<b>Liechtenst.</b>	Betriebskommission Works council	50	elected	elected	x	X		
<b>The Netherlands</b>	Ondernemingsraad Works council	50	elected	elected	xx	Xx	x	x
<b>Spain</b>	Empresa committee Works council	50	elected	elected	x	X		x
<b>Portugal</b>	Comissões de trabalhadores Workers' Committee	-	elected	elected	x	x		x
<b>Greece</b>	Workers' Council	50 (20)	elected	elected	x	x		x
<b>France</b>	Comité d'entreprise Works council	50	elected + manage ment	employer	xx	xx		x
<b>Belgium</b>	Conseil d'entreprise Works council	100 (50)	elected + manage ment	employer	xx	xx		x
<b>Luxembourg</b>	Comité mixte d'entreprise Joint works council	150 (DP:15)	1/2 elected 1/2 manage ment	employer	xx	xx		x
<b>Denmark</b>	Samarbejdudvalg Cooperation committee	35 (Ds:5-6)	1/2 elected 1/2 manage ment	employer	xx	xx		x
<b>Norway</b>	Bedriftutvalg Works council	100 (DS: -)	1/2 elected 1/2 manage ment	alternating	xx	xx		x

<b>Italy</b>	RSU Unitary trade-union representation	15	2/3 elected 1/3 appointed	elected or appointed	x	x		xx
<b>The United Kingdom</b>	shop stewards (joined consultative com.)	- -	appointed (joint)	- (variable)	x (x)	(x)		xx
<b>Ireland</b>	shop stewards	-	appointed	-	x	x		xx
<b>Sweden</b>	Förtroendeman Union delegates	-	appointed	-	x	x	x	xx
<b>Finland</b>	Luottamusmies Union delegation	- (30)	appointed	appointed	x	x	x	xx
<b>Iceland</b>	Union delegates	5	appointed	-	x			xx

### The experience of the transposition of Directive 94/45/EC

The way in which the Member States have used their powers when transposing Directive 94/45/EC illustrates these remarks. It is useful to point out the choices made then, not only as a source of reciprocal information which can prove useful, but also since the probability is strong that the options taken by the Member States when they transpose this Directive will not deviate substantially from those taken at that time<sup>58</sup>. We will only mention the methods for designating the members of the Special Negotiating Body, but those relating to the European Works Council are more or less the same<sup>59</sup>.

The appointment of the representatives of the SNB is organised in each country in function and in correlation with the current representation structures of the country.

Belgium: Election by the members of the works council if there is one, or otherwise by the health and safety committee. Failing this, the joint committee may allow the trade union delegation to select the SNB members for Belgium.

Denmark: Election by the representatives of the co-operation committee, otherwise by the shop stewards, or failing that by the employees.

Germany: Appointment by the existing structures in the following order of priority: group committee, , works council (*Betriebsrat*), or works committee (*Betriebsausschuss*).

<sup>58</sup>Even if nothing obliges Member States to make the same choices this time, the options made in the past reflect the state of law and practice of worker representation in each country, a field where innovation is rare.

<sup>59</sup>The information which follows was taken especially from the Commission Report to the European Parliament and to the Council on application of the Directive on the establishment of a European works council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees (Council Directive 94/45/EC of 22 September 1994) - final Document COM(2000)188, of the 04.04.2000.

Greece: Election in the following order of priority: by the trade union organisations, in their absence by the works council, or failing that by the workers.

Spain: Appointment by joint agreement among the trade union representatives, who together form the majority of members of the works council(s), or the employee delegates where appropriate, or by agreement of the majority of the members of those councils and delegates.

France: Appointment by the trade union organisations from among the elected members of the works council or establishment council or from the trade union representatives in the group; in the absence of a trade union organisation in the group in France, election by the employees.

Ireland: Appointment or election by the employees, possibility of an agreement between central management and employees.

Italy: Appointment by the trade union organisations that have signed the collective agreement. Otherwise, agreement between the trade union organisations and the central management on the appointment of members.

Luxembourg : Appointment by the members of the workers' delegations.

Netherlands: Election by the highest-level council: group council, central council, works council; if not all the works councils are represented in these other councils, the appointment must be made jointly by the councils that are not represented and the group council; if some of the workers are not represented on the works council, they must be consulted on the choice of SNB members; in the absence of a works council, election by the employees.

Austria: Appointment by existing structures in the following order of priority: group committee, works council or works committee; trade union representatives may be appointed as SNB members even if they are not members of a committee or council.

Portugal: Appointment by joint agreement between, in order, the elected bodies and trade unions, between the elected bodies if no trade unions are represented in the undertaking or establishment, between the trade unions representing at least two thirds of the workers, or between the trade unions representing at least 5% of the workers; failing agreement, if no representatives are appointed, if there is no elected body or trade union, or if at least one third of the workers so request, the SNB members are directly elected by secret ballot, on the basis of lists presented by at least 100 or 10% of workers.

Finland: Organisation of an election by agreement; in the absence of an agreement, the election must be organised by the health and safety delegates and the most representative workforce delegates.

Sweden: Election by the trade union which has signed the collective agreement with the controlling undertaking; if there are several such unions they must negotiate an agreement

to organise the election; in the absence of agreement, the most representative union makes the appointment.

The United Kingdom: Election by a ballot of employees except where 'consultative committee' for information and consultation exists which may nominate members of SNB.

Hence, in all the countries which give the works council or elected representatives a major role in the representation of workers, notably as regards information and consultation of workers (or co-decision), it is they who appoint the members of the SNB. Thus the central role is vested in the works council (or central council or group council) in Germany, Austria, Denmark, Finland, France, the Netherlands and Belgium, while workforce delegates or shop stewards play a subsidiary role in Denmark and Belgium.

The trade unions play a central role in appointing members in Italy, Greece, Portugal and Spain, jointly with the works council.

But they also have an indirect role, either because the trade union organisations draw up the lists of candidates (France, Sweden), because they play an essential part in constituting the works council or group council, or because the members of the SNB must have been elected from the lists prepared by the trade union organisations (France) or appointed on a delegation basis (Belgium).

The trade union organisations also play an important role in Sweden, where elections are organised amongst the representatives of the unions which have signed the collective agreement applicable.

Because of the voluntary approach to representation in Ireland, the election system there is not grounded in already existing representation. Election by all employees may thus be replaced by an agreement signed by the employees and management of each undertaking concerned by transnational representation.

In the absence of the body chiefly responsible for appointing or electing SNB members, the Member States rely on various systems: either appointments are made by the workforce delegates (Belgium, Denmark) or the health and safety delegates (Belgium, Finland), or the members are appointed by agreement between the central management and the trade union organisations (Italy) or employees (Ireland), or they are elected by all the employees (France, Netherlands, Portugal). In Sweden, in the absence of a trade union bound by a collective agreement with the controlling undertaking, the local employees' organisation representing the greatest number of employees assumes responsibility for appointing the members.

Only three Member States have failed to provide for subsidiary mechanisms, namely Spain, Germany and Austria. In these countries workers have the right to establish representations, and it is their responsibility if there is no works committee. The threshold for the creation of such a committee is very low (five employees in Austria and Germany, and six in Spain).

Finally, it should be stressed that all Member States have taken measures to ensure worker representation and establish a system for the appointment of SNB members which is in keeping with their domestic representation arrangements and the role handed down to the trade union organisations in each country.

# ***GROUP Of EXPERTS "SE "***

## **WORKING PAPER N° 13**

20 June 2002

### **The definition of "information" –Article 2 (i)**

*"i) information", means the informing of the body representative of the employees and/or employees' representatives by the competent organ of the SE on 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 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; ;"*

For the first time in Community law, this Directive defines what is meant by information to workers. Neither the Directives of the 1970s (on Collective Redundancies and Transfers of Undertakings), nor Directive 94/45/EC (on European Works Councils) contain such a definition.

In turn, Directive 2002/14/EC concerning information and consultation of employees in the EC defines "information" as "the transmission by the employer to the employees' representatives of data in order to enable them to acquaint themselves with the subject matter and to examine it"<sup>60</sup>.

The reasons which explain this move from the silence in the first Directives to rather developed formulas, though not completely identical, in the more recent texts constitute the object of the first part of this working paper. Thereafter we will analyse the elements of this definition which are more connected with the particular features of the SE.

Under the Directives on "Collective Redundancies" and "Transfers of Undertakings", information was not defined. Nevertheless, in both cases, the content of the information

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<sup>60</sup>The Commission had proposed in its original proposal the following wording: "*transmission by the employer to the employees' representatives of information containing all relevant facts on the subjects set down in Article 4(1), ensuring that the timing, means of communication and content of the information are such as to ensure its effectiveness, particularly in enabling the employees' representatives to examine the information thoroughly and, where appropriate, prepare consultations*". It is important to stress the fact that the final text of the Directive is not in retreat in relation to the original proposal of the Commission: the missing part of the text ("ensuring that the timing, means of communication and content of the information are such as to ensure its effectiveness, particularly in enabling the employees' representatives to examine the information thoroughly and, where appropriate, prepare consultations") was quite simply moved to Articles 1 (2) and 4 (3) of the Directive.

that should be provided to workers' representatives was well specified (see Article 2(3) of the Directive on "Collective Redundancies" and Article 6(1) of the Directive on "Transfers of Undertakings")<sup>61</sup>. The list of the data to be provided, even if it is not exhaustive<sup>62</sup> clarifies the scope of the information obligation, thus making a definition nonessential.

The Directive 94/45/EC tackles this subject from a different angle: first of all, there is no question of specifying in detail the contents of the information obligation through a list comparable with that of the previous Directives. This would go against the voluntary approach, and the primacy given, to free negotiation between the parties concerned which constitutes the central element (and the most innovative one at that time) of that Directive. The intention was precisely to avoid too prescriptive and too restrictive provisions limiting the autonomy of the parties as would have been the case if a list of the data to provide to workers' representatives was laid down, either in a definition of "information", or in a material provision.

Thus, it was deemed sufficient, in relation to this particular case as with regard to many other elements of Directive 94/45/EC, to leave to the subsidiary rules of the Annex (applicable only in the event of failure of the negotiations between the parties concerned) the detail on the contents of the information obligation, which is made by the combination of the requirements of both subparagraphs of point 2 of the Annex.

Why then has the Community legislator moved away from this approach in this Directive, so close to the Directive on the European works councils, with regard to the delicate balance between the freely negotiated and the prescriptive? Why a definition of "information" in this text, while the same result could have been achieved (to specify the contents of the obligation in question) through the subsidiary provisions of the Annex?

The reply to this question, as to others connected with other substantive differences between the provisions of each one of those Directives, is found in the "Vilvoorde" case law, which is based on the concept of "effectiveness", thoroughly elaborated by the European Court of Justice.

This Community legislative technique, which consists of stating general principles rather than listing steps to be taken in order to fulfil the information obligation, leaves to Member States the choice between merely reproducing in the national provisions the definition of the Directive, or proceeding, while taking inspiration from there, with clarifications on the content of information, for example, by way of a catalogue of data to be provided to the representatives, as well as of a precise definition of the moment and of the form by which these data must be provided. Both ways of proceeding seem to be in conformity with the Directive.

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<sup>61</sup>With the degree of detail which was characteristic at the time: the Directive mentions the reasons for the envisaged redundancy or transfer, the number and the categories of the usually employed workers and to be dismissed, the selection criteria, the measures envisaged with regard to the workers, etc

<sup>62</sup>See the general reference to the obligation for the employer to provide "all relevant information" in Article 2(3) point a) of the Directive on "Collective Redundancies" and the use of the adverb "at least" in the article in Article 6(3) second subparagraph of the directive on "Transfer of Undertakings".

In addition, it will be necessary to translate into national law the concept of "transnationality" which appears in the Community definition of "information": "(...) on 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 (...)".

The first part of this reference is identical to the one in the Annex to Directive 94/45/EC (point 1a)). The second part is innovative and widens the scope of the concept, insofar as the questions which concern only one Member State will be considered transnational if the decision in question was taken elsewhere. For example, transnational restructuring which affects only one Member State (and possibly other countries outside the EU) would not be covered by Directive 94/45/EC but will fall within the scope of this Directive, provided that the decision in question was taken in a Member State other than the one where the effects of the decision are felt.

This definition of transnationality wider than the one of Directive 94/45/EC must be transposed into national law, possibly with further details.

# ***GROUP OF EXPERTS "SE "***

## **WORKING PAPER N° 14**

2 October 2002

### **The definition of "consultation" –Article 2 (j)**

- j) *"consultation", means the establishment of a dialogue and the 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;*

Contrary to what was the case with regard to the definition of information, definitions of "consultation of employees" were already known in Community law at the time of the adoption of this Directive. The Directives on "Collective Redundancies" and on "Transfer of Undertakings" lack such a definition, but Directive 94/45/EC defines "consultation" as "the exchange of views and establishment of dialogue between the employees' representatives and central management or any more appropriate level of management".

In turn, Directive 2002/14/EC concerning information and consultation of employees in the EC define "consultation" with a text which is very close to that of Directive 94/45/EC: *"the exchange of views and establishment of dialogue between the employees' representatives and the employer"*.

The Commission had proposed in its original proposal the following wording:

*"the organisation of a dialogue and exchange of views between the employer and the employees' representatives on the subjects set out in Article 4(1) (b) and (c):*

- *ensuring that the timing, method and content are such that this step is effective;*
- *at the appropriate level of management and representation, depending on the subject under discussion;*
- *on the basis of the relevant information to be supplied by the employer and the opinion which the employees' representatives are entitled to formulate;*
- *including the employees' representatives right to meet with the employer and obtain a response, and the reasons for that response, to any opinion they may formulate;*
- *including, in the case of decisions within the scope of the employer's management powers, an attempt to seek prior agreement on the decisions referred to in Article 4(1)(c)."*<sup>63</sup>

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<sup>63</sup>Here also (see the development of the draft Directive "information and consultation" with regard to the "information" concept –Working Paper n° 13) the text of the Council only moves some of the

The definition of "consultation" of this Directive is therefore considerably enriched in comparison with these other Community texts. It is therefore important to fully grasp the scope of this definition, especially as it is relevant for such important purposes as, for example, the interpretation of Article 4 of the directive ("Content of the agreement") or of the provisions of Part 2 of the Annex ("Standard rules for information and consultation").

The Community legislator has decided to deviate from what seemed to become a constant definition of consultation in Community labour law, in the search for clarity vis-à-vis questions which have systematically arisen within the application of the previous directives.

Doing so, the Directive avoids giving a detailed definition of consultation, for example, by fixing the successive stages of the process, by establishing time limits, etc. Just as for the definition of "information", it restricts itself to fixing the unquestionable principle of the meaningfulness of consultation (it must be made at a time, in a manner and with a content which allows the expression of an opinion which may be taken into account before the final decision).

Member States will now have the choice of, either transcribing the definition of consultation into national law (by leaving to case law the task of specifying the delineation of this obligation on a case by case basis), or of specifying these details in the national transposition provisions in a more precise and detailed way. In view of the primordial place given to the autonomy of the negotiating parties under this Directive, the first option seems preferable. It seems also sufficient in order to ensure the effectiveness of the Directive, not only because the case law, national and European, will ensure that this concept is well applied, but also because the national provisions transposing the Annex of the Directive will constitute a natural, even if indirect, reference for negotiations.

Nothing seems to prevent Member States from unifying in their internal law the concepts of consultation which are relevant for the purposes of this Directive and for the purposes of Directive 2001/14/EC, which are in substance, very close. This would of course be without prejudice to the different scopes of the two directives (one concerns the national or local dimension and the other the transnational dimension).

It is useful in this respect to revisit the working paper n° 21 of the Working Party "Information and Consultation" (transposition of Directive 94/45/EC).

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elements proposed by the Commission: the reference to the effectiveness of the consultation is found in Article 1 (2) and the other elements were moved to Article 4(4.)

# ***GROUP OF EXPERTS "SE "***

## **WORKING PAPER N° 15**

2 October 2002

### **The definition of "participation" – Article 2 (k)**

*k) "participation", means the influence of the body representative of the employees and/or the employees' representatives in the affairs of a company by way of:*

- *the right to elect or appoint some of the members of the company's supervisory or administrative organ, or*
- *the right to recommend and/or oppose the appointment of some or all of the members of company's supervisory or administrative organ.*

In Article 2 (h), the Directive contains a definition of "involvement of employees" which is useful to recall before analysing the definition of "participation":

*h) "involvement of employees", means any mechanism, including information, consultation and participation through which employees' representatives may exercise an influence on decisions to be taken within the company;*

When it appeared that certain concepts were not perceived in the same way everywhere in the European Union, the Davignon Group considered it to be necessary to specify clearly the meaning of those words and concepts, which it had to deal with during its work. Indeed, confusions were frequent in the meetings of the Community bodies and at other levels with regard to the scope of the concepts of "information", "consultation" and "participation". Also, a global term covering all these mechanisms was missing. This is why the Group decided, at the very beginning of its work, to rigorously specify the vocabulary in three working languages (French, English and German), which it did in Annex 2 of its final report in the following terms:

- *"Involvement (Beteiligung - Involvement) of workers means all arrangements allowing workers' representatives to take part in company decision-making processes with a view to ensuring the collective expression and permanent consideration of their interests in the context of decisions concerning the management and economic and financial development of the company.*
- *Information (Information - Information) of workers means the provision of information by the employer, with the possibility of questioning and critical examination by the workers' representatives.*

- *Consultation (Anhörung - Consultation) of workers means the possibility for workers' representatives, to express an opinion in respect of a decision or course of action envisaged by the employer.*
- *Participation (Mitbestimmung in den Unternehmensorganen - Participation) of workers means, strictly speaking, the presence of workers' representatives in the decision-making or supervisory bodies of the company (or other legal entity).*

*This document is concerned with the powers of workers and their representatives in the economic and social sphere and therefore does not cover health and safety, working conditions or social and cultural activities. Collective bargaining bodies and procedures, channels of communication between workers and the company management (direct or via the management structure) and profit-sharing and other company performance-related incentive schemes are also outside the scope of this document."*

This terminology was entirely taken up by the Council, which over the years had also been confronted with confusions arising from the different scope of the concepts in different countries. The concept of "involvement of employees" covers therefore within the framework of the directive, information, consultation and participation, such as they are defined thereafter.

Consequently, the definition of "participation" within the meaning of the Directive has less to do with an attempt to grasp a form of involvement of workers which has been developed in various European countries in rather different ways (and why would we do that?) than to find a way of identifying the above-mentioned forms of "participation" which the Directive was intended to defend and safeguard through a number of mechanisms laid down thereafter. The purpose of the definition is therefore only this protection and safeguard. Consequently, it has nothing conceptual<sup>64</sup> and is eminently pragmatic.

The definition of participation is relevant in particular for three different purposes related to the protection of acquired rights to participation<sup>65</sup>.

First of all, when it comes to determine the voting rules within the special negotiating body (SNB). When a participation system, as defined in this Article, is at stake within the framework of negotiations, the majority required to reduce the existing participation level is a triple qualified majority (as opposed to the normal rule of deliberation within the SNB, which

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<sup>64</sup>One could almost say as much of all the definitions that are found in the Directives which do not seek harmonisation, as is the case for the Community Labour Law Directives. The aim is not as much to harmonise a given reality apprehended by national laws of the EU Member States, as to find a common agreement on the realities which Community law intends to address. It is symptomatic in this respect that, until a few years ago, the definitions contained in the Community Directives shared the same article with those determining their scope. To some extent, these definitions were designed for that end and nothing more.

<sup>65</sup>It is also relevant for other clearly less important purposes (see for example, Article 10 – "Protection of employees' representatives").

is the absolute majority of its members and of the employees represented). This is what Article 3.4 stipulates.

Then, when it comes to determine the conditions for the application of the subsidiary provisions of the Annex in the event of failure of the negotiations. Article 7.2 of the Directive establishes a number of rules which constitute the key to determine whether or not the subsidiary provisions on participation (Part 3 of the Annex) shall be applied.

Lastly, when it comes to establish the very content of the reference provisions on participation, i.e., to determine the participation arrangement which will be applicable to an SE in the event of failure of the negotiations, when the respective conditions are fulfilled (see Part 3 of the Annex).

It is known that the protection system of acquired rights to participation designed by the Directive is based on the principle of comparison between the systems of involvement pre-existing the SE within the companies which establish the SE, and the one which must be introduced within the SE after its registration, in any case in the absence of an agreement providing otherwise. If there was participation before, with a certain intensity<sup>66</sup>, in terms of percentage of workers covered by such systems, then:

- the majorities (absolute or qualified) required within the SNB are determined according to the presence of such facts;
- the reference provisions on participation will apply or not, also according to the presence of these same facts.

Hence the importance of a precise definition of what one understands by "participation". It was of primary importance to determine well the reality pre-existing the establishment of the SE and to define well the system which would apply, where appropriate, to the SE.

This aim of full protection of the acquired rights to participation is quite obvious in the coverage of the definition.

a) It covers all the systems known in the EU of influence on the part of the employees' representatives within the company (works councils, union representatives) or outside of the company (trade unions) in the election or the nomination of the members of the organs of public limited companies<sup>67</sup>.

b) It refers to all the known management systems of the public limited companies (monistic systems, with an Administrative Board, and dualistic systems, with a Board of Directors and a Supervisory Board). It does not make any difference as to the nature of the company in question (public or private).

c) It disregards the origin of these practices (legal, by agreements, statutory), as well as of their binding or not binding nature; it is enough that they exist within the participating companies for them to be taken obligatorily into account for purposes mentioned above.

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<sup>66</sup>Variable according to the form of establishing the SE.

<sup>67</sup>See Working Paper n° 6–Definition of "participating companies".

d)) Lastly, it is applicable independently of the statute of the members who sit in the organs of a company by virtue of an act from the part of the workers or of their representatives; this means that included within the scope of the Directive are different forms and degrees of participation such as full membership and membership with less rights than those of the members designated by shareholders (for example, members having an observer status<sup>68</sup>)<sup>69</sup>.

The assertions in "c)" and "d)" raise some questions. Concerning the non-relevance of the origin of the practices and of their binding or non-binding nature (point "c)" above) which seems to be imposed by the general terms used in the definition, a doubt could emerge when reading attentively Article 7.2 a), which mentions "(...) *the rules of a Member State relating to employee participation in the administrative or supervisory body (...)*". This seems to exclude forms of participation which do not result directly from legal provisions (for instance participation based on collective agreements or, without legal imposition, from the statutes of the company in question).

In any case, such a restrictive interpretation does not seem allowed by the general (and generous) terms of the definition, which are coherent with the rest of Article 7 and with Article 3.4. It seems excessive to interpret the definition of participation and the other provisions mentioned in the light of a specific provision which targets a very particular case<sup>70</sup>.

The assertion in d) raises more serious doubts. One can rightfully wonder if the definition of "participation"<sup>71</sup> covers some forms of presence of workers' representatives in the organs of a company which confer on them a lower status than that of the members of these organs designated by shareholders.

The question is important, because if this form of participation (as observers) are taken into account, workers covered by such a system must be counted for the purposes of determining the voting rules within the SNB (Article 3.4) and to determine, if negotiations fail, whether or not part 3 of the Annex applies. (Article 7.2).

In favour of taking these forms of participation into account are the following arguments:

- the literal argument: there is nothing in the definition which allow us to limit it to cases where worker representatives have the same status as other members;

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<sup>68</sup>Nevertheless, membership is always required.

<sup>69</sup>See, nevertheless, the last subparagraph of the Annex.

<sup>70</sup>Logic rather imposes the opposite, that Article 7(2)a is interpreted in the light of other provisions in the Directive which refer to the same situation of transformation, namely Article 3.6, third paragraph. This provision is fully compatible and coherent with the definition of "participation" as interpreted above. We will come back to this issue in the Working Paper dealing with Article 7 in the Directive.

<sup>71</sup>And consequently in all provisions using this concept, namely Article 3.4 and 7.2.

- if we open the door for a discussion on the identity of the member's status, then there is a risk that other difficult debates will arise concerning other forms of differentiation (executive and non-executive members, etc.)

Against taking them into account are the following arguments:

- the model of participation in the Annex (part 3) mentions the identity of status (see last paragraph);
- even if we could envisage the co-existence of two concepts of participation (one for the purposes of Articles 3.4 and 7.2, the other for the purposes of the Annex), this could lead to situations where participation systems are excessively protected<sup>72</sup>.

Our Group of Experts should solve this question. Taking into account the importance of what is at stake, it is strongly advisable that we arrive to a common position in this regard.

In order to do that, it could be useful to check if the existing rules in some Member States conferring workers' representatives the right to be present at meetings of the companies' organs really give them the statute of members of those organs<sup>73</sup>. If this is not the case, the discussion loses much of its practical interest.

Finally, it seems obvious that an agreement providing for the presence of workers' representatives at meetings of the organs of the SE in an observer capacity must be considered a retreat as compared with possible situations existing within participating companies which confer to workers' representatives a statute of full members. This has practical consequences as regards the voting procedures within in the SNB.

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<sup>72</sup> For instance if only one participating company is governed by a system for participation which limits the role of workers' representatives to that of observers. In this case, where there is no agreement, the system which will govern the SE goes beyond the situation which existed before its creation.

<sup>73</sup> The membership of an organ of a company goes much beyond the simple right (and obligation) to participate in the meetings of that organ. It would also be useful to check if the right to attend the meetings is personal (a particular member of a works council, for instance, for a specific period) or if it concerns the representative body (a representative from the works council, for instance, who could change from meeting to meeting).

# ***GROUP OF EXPERTS “SE”***

## **WORKING PAPER No 16**

5 March 2003

### **Creation, remit and functioning of the special negotiating body — Article 3**

Article 3 governs:

- (1) the creation (paragraphs 1 and 2),
- (2) the remit (paragraph 3) and
- (3) the functioning (paragraphs 4 to 7) of the special negotiating body.

#### ***1. Creation of the special negotiating body (SNB) — Article 3 (1) and (2)***

There are various subjects to be covered under this heading:

- 1.1 Conditions giving rise to the obligation to constitute an SNB
- 1.2 The obligation to supply certain preliminary information
- 1.3 The representativeness of the SNB
- 1.4 The composition of the SNB: geographical distribution of members
- 1.5 The special case of SEs formed by way of merger
- 1.6 The system for electing or appointing the members of the SNB
- 1.7 Adjusting the composition of the SNB in the event of any changes.

All these points will be dealt with in turn.

##### ***1.1 Conditions giving rise to the obligation to constitute an SNB***

The obligation to set in motion the procedures to create an SNB is based on the participating companies as defined in Article 2(b). It arises immediately ("*Dès que possible*") upon publication of the draft terms of merger or creation of a holding SE or after agreeing a plan to form a subsidiary SE or transform a company under national law into an SE<sup>74</sup>. The situation generating the obligation therefore differs depending on the way in which the SE is formed. In the first two cases it is publication of the draft terms, and in the second two approval of the plan.

In the case of an SE formed through a merger, the procedures for publishing the draft terms are set out in Article 20 of the Regulation, while the planned merger itself is the subject of Article 19. Several of the provisions of these two Articles of the Regulation are relevant for the purposes of initiating negotiations as provided for in the Directive.

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<sup>74</sup> In the latter case, there is only one participating company within the meaning of Article 2(b).

To begin with, Article 20(1)(a) refers to the registered office proposed for the SE as an obligatory item for inclusion in the draft terms. Under Article 21(e) this information is also one of the particulars to be published in the national gazettes of the Member States to which the participating companies are subject. Taken in conjunction with Article 6 of the Directive, these provisions enable the principal legislation<sup>75</sup> applicable to the negotiating procedure<sup>76</sup> to be determined, as well as the precise moment at which the obligation on the management bodies of the participating companies to initiate the procedures to create the SNB, i.e. publication of the draft terms, begins.

The same obligations apply to the creation of a holding SE, the relevant provision (Article 32(2)) referring back to the above requirements in respect of indicating the proposed registered office for the SE. In this case too, the point at which the obligation to create an SNB arises is clearly specified as being the time of publication as prescribed in these provisions.

As regards the procedures for constituting an SE as a joint subsidiary or through conversion, the Regulation is rather more reticent, referring in the former case in full and in the latter in part to the applicable national legislation (that of the SE's future registered office<sup>77</sup>).

At all events, in the case of SEs created through conversion, the Regulation prohibits transfer of the registered office to another Member State at the time of the conversion<sup>78</sup>, thereby identifying which law is applicable (that to which the public limited-liability company being converted into an SE is subject). In this case, it is also obligatory under Article 37(4) and (5) to draw up draft terms of conversion and to take certain steps to publicise them. On this basis, the point at which the obligation to constitute an SNB commences can be clearly pinpointed. As provided for in Article 3(1) of the Directive, the decisive point in this respect is the approval of the conversion plan by the management or administrative organs of the company concerned.

Finally, in the case of creation of a joint subsidiary SE, the question is more difficult to resolve. This case is governed by the national provisions applicable to such operations in the country in which the SE plans to have its registered office. The formalities involved are generally much simpler than those referred to above. For example, there may be no obligation under the applicable legislation for any formal plan for the constitution of a subsidiary or any specific publication formalities. This being the case, how can the point at which the creation of an SNB becomes obligatory be determined?

Article 3(1) of the Directive provides the reply to this question in taking publication as the factor on which the obligation depends where mergers and holding SEs are concerned (both of which are subject to publicity formalities under the provisions of the Regulation referred to above) and approval of the plan by the administration or management bodies of the companies concerned in

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<sup>75</sup> Cf. Working Paper No 3.

<sup>76</sup> The aspects of creating the SE other than negotiation to establish the procedures for worker involvement will also be governed by the law of the Member State in which the future SE has its registered office (cf. Article 15 of the Regulation, which states: "*Subject to this Regulation, the formation of an SE shall be governed by the law applicable to public limited-liability companies in the Member State in which the SE establishes its registered office*").

<sup>77</sup> Again, see Article 15(1) of the Regulation.

<sup>78</sup> Cf. Article 37(3).

the case of conversion and joint subsidiary SEs. Even if the procedure for forming a subsidiary can be simplified, it always originates in a decision by the administrative or management bodies of the companies in question<sup>79</sup> (subject, where applicable, to approval by the general meeting). The lack of any specific formalities for the plan under the Regulation in no way undermines its status as a formal decision by the administrative or management bodies in question in accordance with the rules governing them (there would presumably be a requirement for such a decision to be included in the minutes of the administrative or management meeting at which the plan was approved)<sup>80</sup>. This identifies the point at which the plan is approved and consequently the point at which the obligation to create an SNB arises in the case of a joint subsidiary SE.

## **To conclude:**

**Determining the point at which the participating companies become obliged to set the SNB creation process in motion does not appear to pose any particular problem. The same wording as used in Article 3(1) of the Directive ("*... as soon as possible after (...)*") will suffice. Depending on the national rules governing the creation of subsidiaries, certain clarifying details may be necessary for this specific case.**

### *1.2 The obligation to supply certain preliminary information*

Among the "*necessary steps*" to be taken by the management or administrative organs of the participating companies with a view to starting negotiations, Article 3(1) of the Directive mentions "*(...)* *providing information about the identity of the participating companies, concerned subsidiaries or establishments and the number of their employees (...)*".

This is not the only information requirement incumbent on these bodies at the precise moment the SE is formed<sup>81</sup>: in the case of mergers, Article 20(1)(i) of the Regulation also requires them to include in the draft terms of the merger "*information on the procedures by which arrangements for employee involvement are determined pursuant to Directive 2001/86/EC*". The reference to Article 32(2) of the Regulation means that this provision also applies in the case of formation of a holding SE. For conversions, Article 37(4) provides for inclusion in the report of information on "*(...) the implications (...) for the employees of the adoption of the form of an SE*". The Regulation makes no provision in this respect for joint subsidiary SEs<sup>82</sup>.

What is the scope and content of the various information obligations, who benefits from them and what exemptions are admissible for the bodies of the participating companies concerned?

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<sup>79</sup> Or other entities, since the joint subsidiary SE may also be formed by "*other legal bodies governed by public or private law*" (Article 2(3) of the Regulation).

<sup>80</sup> In any case, the second subparagraph of Article 3(3) of the Directive (which provides for the SNB to be informed of the plan and the actual process of establishing the SE) also applies to the creation of a joint subsidiary SE, which would oblige the competent bodies of the participating companies to draw up a plan in this case too, at least for the purposes of this Article.

<sup>81</sup> At a later stage, the second subparagraph of Article 3(3) of the Directive also applies. See below.

<sup>82</sup> This does not, however, mean that obligations of this type are not applicable. This will depend on the national rules (or lack of them) the Member States decide to apply to the formation of a joint subsidiary SE, as the Regulation (Article 36) refers such cases entirely to the jurisdiction of the Member States.

Chronologically, the requirements of this type laid down in the above Articles of the Regulation have precedence over those of the Directive, as they have to be included in the draft terms of the merger, formation of a holding SE or conversion, and these obviously have to be drawn up and adopted prior to starting the negotiating process. This will therefore be taken as the first point for consideration, starting with mergers and holding SEs (Article 20(1)(i) and Article 32(2) of the Regulation).

Obviously, these provisions of the Regulation do not admit of transposal into national legislation. They have direct effect. Nevertheless, examining them should help to cast further light on the whole process.

### *Information obligations under the Regulation*

While there may be other recipients<sup>83</sup>, the information is evidently intended principally for the participating companies' shareholders. It is up to them, at their general meeting, to approve the planned merger ((Article 23(1) of the Regulation) or formation of a holding SE (Article 32(6) of the Regulation).

The inclusion of the requirement to inform shareholders of procedures under the Directive is fully justified by the importance of the subject in itself, but particularly where the negotiations could lead to rules on employee participation in the future SE's management/administrative bodies being introduced. In fact, this is one of the subjects of most interest to them, in that it deals with the composition of the SE's management/supervisory bodies, the balance of powers within the new entity, and sharing between the shareholders and the employees a prerogative as fundamental as appointing the directors of the new SE. Furthermore, the idea of participation may be new for some of them who have come from participating companies without such a system. This all goes to explain why the Regulation provides for shareholders of the participating companies to be informed right from the beginning of the process and, later (Article 23(2) in the case of mergers and Article 32(6) in the case of holding SEs) the possibility for the constitutive general meeting to reserve the right to make registration of the SE conditional upon its express ratification of the employee involvement arrangements decided in accordance with the procedure laid down in the Directive.

What information must be included in the draft terms of the merger or formation of a holding SE? Evidently, the management or administrative organs of the participating companies cannot be required to anticipate the results of negotiations which have not yet been initiated.

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<sup>83</sup> For example, experts operating on behalf of participating companies or other experts covered by Articles 22 and 32(4) of the Regulation. Such experts have access to the whole of the plan, as their role is precisely to examine and report on it to the general meetings. It is more questionable whether the information in question is also intended for third parties (such as the participating companies' creditors), in that they are excluded from the publicity obligation laid down in Articles 21 and 32(3) of the Regulation. This is important because the text of Article 20(1)(i) is very general, even ambiguous, and therefore has to be interpreted in the light of its rationale and the parties for whom the information is intended (see continuation of the text).

At first sight, it would appear that a purely descriptive indication of the procedural arrangements under national transposal legislation applicable to the definition of employee involvement in the future SE would suffice. At all events, this information would have to include the implications of the negotiations or their failure – in particular, where applicable<sup>84</sup>, with regard to the “participation” aspect (i.e. whether or not and to what extent the SE would then be governed by a participation system in accordance with the Annex to the Directive). However, given what is at stake and in the interests of clarity and transparency, it would seem wise to include in the draft terms an indication of the way in which the participating companies’ management bodies intend to run the negotiations, their objectives in so doing and the bounds within which they intend to keep the intended negotiations with the employees’ representatives. This appears to be the only way of ensuring that the shareholders are properly informed and therefore that the decisions of the general meetings are taken in full knowledge of the facts.

In the case of conversion of a public limited-liability company into an SE, Article 37(4) of the Regulation includes as a compulsory element of the report on the conversion plan “*indicating the implications for the shareholders and for the employees of the adoption of the form of an SE*”.

This rather vague wording naturally refers to the direct consequences of the change in the company’s status, in particular any change in the arrangements for employee involvement. Other consequences, such as those arising from the economic restructuring underlying the conversion, do not appear to be covered by this provision of the Regulation in that they are not necessarily linked to the operation<sup>85</sup>.

Such a restrictive interpretation does, however, limit substantially the information that has to be provided. When a national company is converted into an SE, the changes which could occur in the way in which workers and their representatives are involved in the company’s operation are severely restricted by a whole series of the Directive’s provisions<sup>86</sup>, which reduce to almost nil the autonomy of the parties to the agreement where the “participation” aspect is concerned and, in the event of failure of the negotiations, require that the existing system of participation in the company once converted into an SE is maintained. The stakes involved in the negotiations and in the conversion operation in general as far as the future of any existing participation system within the company in question is concerned are therefore reduced. Then there are the implications in terms of employee information and consultation, which could be significant<sup>87</sup>.

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<sup>84</sup> This would be the case where at least one of the participating companies was governed by such a system.

<sup>85</sup> Unlike the other channels for constituting an SE, which involve or bring about a reorganisation of the structure and activities of the undertakings concerned, the conversion here is “cosmetic” in that the only thing to change is the legal form of the company in question.

<sup>86</sup> Cf. in particular the third subparagraph of Article 3(6), Article 4(4) and Article 7(2)(a).

<sup>87</sup> Consider, for example, the conversion into an SE of the parent holding company of a Community-scale group of undertakings within the meaning of Directive 94/45/EC. Such a conversion could cause total upheaval in any existing transnational information and consultation system within that group of undertakings. Consider, too, the case of conversion into an SE of a public limited company subject to national law with subsidiaries and establishments in other countries, which is not covered by Directive 94/45/EC because staff numbers are below the set threshold. Conversion into an SE would normally involve setting up a transnational system for employee information and consultation (and, where

Finally, the Regulation lays down no requirement for information of shareholders in the case of joint subsidiary SEs, which is not surprising since this kind of operation would not normally require their authorisation (under national legislation applicable by virtue of Article 36 of the Regulation).

#### *Information requirements under the Directive*

The above-mentioned provision of information to shareholders is, as already observed, intended fundamentally to explain to them from the start of the process the implications of forming an SE in terms of employee involvement: the high likelihood that a transnational employee information and consultation system will be set up<sup>88</sup> (or an existing system within the participating companies adapted<sup>89</sup>), and, in some cases, the creation of a participation system within the SE.

This does not mean that there is no obligation to provide this type of information sooner or later to the employee representatives. Certainly, the Regulation makes no specific provision for this, but it would be difficult to imagine opening and concluding negotiations on arrangements for employee involvement in the future SE without the employees' representatives being fully versed in all aspects of the formation of the SE. In any case there is a requirement for adequate publicising of such information, at least where mergers and holding SEs are concerned, which means that the information in question (and all the other information referred to in the above-mentioned Articles of the Regulation) would be readily accessible to the employees' representatives.

The second subparagraph of Article 3(3) of the Directive does indeed provide for information on the “*plan and the actual process of establishing the SE, up to its registration*” to be supplied by the competent bodies of the participating companies to the SNB.

It would therefore seem logical for this information supplied to shareholders, and, presumably, other relevant information, to be included in the notice of initiation of the procedure to create the SNB. At the latest, this information would have to be included in the dossier to be given by the management bodies of the participating companies to the members of the SNB at its first meeting, in accordance with the second subparagraph of Article 3(3) of the Directive.

At all events, the information rendered obligatory by the Directive at this stage is that “*about the identity of the participating companies, concerned subsidiaries or establishments<sup>90</sup>, and the number of their employees*” (Article 3(1)).

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applicable, participation) which did not exist previously.

<sup>88</sup> At least where this will be an “inter-group” SE (i.e. one comprising economically independent companies), which would probably lead to a (new) transnational group being set up. In the case of “intra-group” SEs (i.e. those involving companies within the same group), new transnational employee information and consultation mechanisms would presumably be less likely. This type of intra-group reorganisation could, however, mean reorganising the existing arrangements.

<sup>89</sup> For example, where one or more of them have a European works council in accordance with Directive 94/45/EC and the conditions for non-application of this Directive as set out in Article 13(1) are met.

<sup>90</sup> All the subsidiaries within the meaning of Article 2(c), and all the establishments of the

What information, for whom and for what purpose?

Comparing this provision with the corresponding provision of Directive 94/45/EC will help to provide an answer to these questions, even if the formulation and context are different in the two cases.

Article 11(2) of Directive 94/45/EC provides that “*Member States shall ensure that the information on the number of employees referred to in Article 2(1)(a) and (c) is made available by undertakings at the request of the parties concerned by the application of this Directive.*”

The intention of this is to enable those entitled to the rights conferred by Directive 94/45/EC (workers in Community-scale undertakings and Community-scale groups of undertakings) to check whether they are, in fact, covered by the Directive and, if so, in what way they can exercise those rights. For this purpose, they must have access to information on the structure of the Community-scale undertaking or group of undertakings and on the number of workers employed by the various units of those undertakings and groups. As already recognised by the Court of Justice of the European Communities, this right exists before recognition of the existence of a Community-scale undertaking or Community-scale group of undertakings<sup>91</sup>.

Once they have this information, the employees in question or their representatives will be in a position to know whether or not they have the right to request negotiation in accordance with Article 5 of the above Directive. They will also be able subsequently to familiarise themselves fully with the extent and structure of the undertaking or group of undertakings in question, and thus to set up the SNB and undertake negotiations to establish a European works council in full knowledge of the facts.

This requirement for prior information is therefore pivotal among central management’s obligations and is intended to facilitate the exercise of rights under the Directive as well as the process of negotiation.

The above-mentioned provision of our Directive has similar scope, objectives and target public.

However, the information prescribed there is not intended to enable representatives to check whether or not they are covered by the Directive. The latter does not set thresholds in terms of number of employees, and negotiation (or subsidiary application of the Annex) is not dependent on the expressed will of those with rights under the Directive. It is compulsory and imperative from the moment at which the plan to form an SE comes into being.

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participating companies within the territory of the European Union and European Economic Area Member States are covered by this obligation, and not only those which will become subsidiaries and establishments of the future SE. Otherwise, reference would have been made to “the concerned subsidiaries or establishments”.

*\*TRANSLATOR’S NOTE: This footnote (translated from the French) applies to the French version of the Directive only. There is a discrepancy here between the French and English versions of the Directive, as the latter in fact does refer to “the concerned subsidiaries or establishments”.*

<sup>91</sup> Case C-62/99.

Otherwise, the information in question serves the same purpose as that provided for by Article 11(2) of Directive 94/45/EC: it plays an instrumental role in the creation of the SNB, in the negotiations themselves and, where applicable, in the application of the Annex in accordance with Article 7 of the Directive.

Precise identification of the participating companies and their subsidiaries and establishments, and exact specification of the number of workers they employ, first and foremost makes for good management of the process of setting up the SNB. The information is an essential basis for determining the composition of this negotiating body<sup>92</sup>, which varies according to the number of workers employed in the different Member States. It is also extremely important for fully understanding the internal and external negotiating context — internal, because the voting arrangements within the SNB can also vary according to the percentage of workers employed by participating companies covered by systems of participation<sup>93</sup>; external, because this same percentage affects the subsidiary application or non-application (in the event of failure of the negotiations) of the provisions of Part 3 of the Annex to the Directive and this is a decisive element in the negotiation<sup>94</sup>.

**It would also be very useful to break down the number of workers employed in each country by entity (participating company or subsidiary or establishment of a participating company), as this would facilitate voting within the SNB, the majorities required in the Directive also being dependent on the number of employees represented by each member of the SNB<sup>95</sup>.**

The light thus thrown on the rationale of this provision also clarifies the matter of who is intended to receive this information and precisely which information is concerned. If it is intended to facilitate the creation of the SNB and the subsequent negotiations, **it must obviously be supplied to all those concerned by the latter, i.e. the employees' representatives in the participating companies and subsidiaries and establishments concerned or, where there are no representatives, to the employees themselves<sup>96</sup>.** Once the SNB has been set up, these employees can then communicate the information to the representatives elected to it, who will need it in order to conduct their negotiations properly. Again, it would be logical for this information to be included in the dossier given to those representatives at the start of negotiations.

There are two further points to make concerning the scope of this information requirement. The first is that **it covers not only the concerned subsidiaries and establishments of the participating companies within the meaning of Article 2(d) of the Directive<sup>97</sup>, but also any**

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<sup>92</sup> See below, point 1.4.

<sup>93</sup> See Article 3(4) and point 1.6 of this document (“The system for electing or appointing the members of the SNB”).

<sup>94</sup> A further question is how to calculate the number of employees, at this point in the procedure or subsequently. This matter was dealt with in Working Paper No 11-Rev 1 (“The method of calculating the number of workers employed”).

<sup>95</sup> See below, point 1.6 and working paper No 11-Rev 1.

<sup>96</sup> Under Article 3(2) of the Directive, the SNB represents the employees of the participating companies and concerned subsidiaries or establishments.

<sup>97</sup> I.e. those of the subsidiaries and establishments of participating companies which will become

**other of these companies' subsidiaries or establishments, even if there are no plans at this stage for them to become subsidiaries or establishments of the SE once it is formed.** Why make such a provision if only the concerned subsidiaries and establishments are represented with the SNB and are covered by the negotiations? The only logical answer is to take into consideration the fact that the final configuration of the future SE together with its subsidiaries and establishments has not been definitively established at this stage and that it is therefore best to allow the employees' representatives to check whether all the subsidiaries and establishments which could be concerned within the meaning of the Directive are involved in the process<sup>98 99</sup>. It would then be useful to distinguish, amongst all subsidiaries and establishments, those which will be "concerned" according to the Directive.

The second point is that, in view of the influence the "proportion of employees covered by a participation system" has on the voting arrangements within the SNB and on the application of Part 3 of the Annex to the Directive, **it would seem very useful for the participating companies to specify how many of their employees are covered by a participation system and what proportion they represent of their total employees.** Even if it is not required under the Directive, this information would obviously help the negotiations along.

### *1.3 The representativeness of the special negotiating body*

It follows from the whole of Article 3(2) of the Directive that the SNB represents the employees of the participating companies and those of their subsidiaries and establishments concerned<sup>100</sup>. It would be useful on several counts to understand why the representativeness of the SNB is not restricted to the participating companies alone or why it has not been extended to all their subsidiaries and establishments rather than only those which are "concerned"<sup>101</sup>.

In order to understand this, we must begin with a certain number of premises which have always underlain debate on the SE. The first is the desire to give this typically European entity its own system for employee involvement, adding on to any national provisions which may already be applicable. The second is that, for the purposes of such a system, the SE is considered as an, if not European, at least necessarily transnational entity in that, while being a legal entity distinct and separate from its subsidiaries, because the latter are multinational<sup>102</sup>, it gives rise to an

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subsidiaries or establishments of the SE when it is formed.

<sup>98</sup> Cf. also the further justification given in point 1.3 below ("The representativeness of the SNB").

<sup>99</sup> **If the information must therefore cover all the subsidiaries and establishments of the participating companies (and not only the "concerned" subsidiaries and establishments), this does not necessarily mean that it must be communicated to the employees' representatives in the subsidiaries and establishments which are "not concerned".**

<sup>100</sup> The use in the French version of the text of the word "ou" at the beginning of Article 3(2) ("*... les travailleurs des sociétés participantes ou des filiales ou établissements concernés (...)*") is an obvious error, as demonstrated by the continuation of the same paragraph, in which it is clear that both the participating companies and their concerned subsidiaries or establishments contribute to the composition of the SNB.

<sup>101</sup> This aspect has already been touched upon in the introduction to Working Paper No 9-Rev 1 — definition of "concerned subsidiary or establishment".

<sup>102</sup> See the conditions for access to the status of SE, as defined in Article 2(2), (3) and (4) of the Regulation, which initially require the participation of at least two companies or establishments from at least two Member States in the formation of an SE.

economic entity covering several countries. The third is the Community legislator's concern to prevent the SE statute from being used to evade other national rules on employee involvement applicable to participating companies<sup>103</sup> or to erode such involvement.

For the purposes of defining a system of worker involvement in an SE, all these elements lead to the conclusion that not only the SE itself as a legal entity should be taken into account, but also the establishments and companies it controls, together with their establishments. According to the rationale of the legislator, everything proceeds as if, by becoming an SE, a company governed by national law becomes the parent company of a group of multinationals or of a multinational network of establishments for the purposes of worker involvement<sup>104</sup>. Irrespective of the means through which it is created, either an agreement or application of the Annex to the Directive, the resulting system of involvement for the SE covers not only the SE itself but also its subsidiaries and establishments<sup>105</sup>.

Against this background, it was essential to involve in the negotiations, through their representatives, those employees who would fall under the direct or indirect control of the future SE once it was formed. This explains why not only the employees of the participating companies are represented on the SNB, but also those of their subsidiaries and establishments which are likely to become subsidiaries and establishments of the SE. The negotiations affect them as much as the employees of the participating companies.

It is for the same reasons that subsidiaries and establishments of participating companies which will probably remain outside the control of the future SE are excluded. There would be no justification for including them in negotiations on arrangements for employee involvement which will never concern them.

The legitimacy of the involvement of employees' representatives of the participating companies and their concerned subsidiaries and establishments in defining the system of worker involvement in an entity which does not yet exist has itself been the subject of working discussions, within the Davignon Group in particular. The question has been raised as to whether such a system should be designed *a priori* by representatives acting outside any body representing the employees directly and immediately concerned. The Davignon Group resolved this by clearly opting for the principle of negotiation prior to formation of the SE. This would necessarily mean involving in the negotiations representatives of employees who would only be affected by the life of the SE in the future. Nevertheless, they would be affected, and therefore have a legitimate place as parties to the negotiation.

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<sup>103</sup> Particularly where they will disappear with the creation of the SE.

<sup>104</sup> This deliberate approach of the Community legislator does not raise specific problems vis-à-vis SEs formed through mergers, the formation of a holding company or conversion. In all cases, as soon as it comes into being, the SE becomes, simply through the rules governing its constitution (Article 2(2), (3) and (4) of the Regulation) a company controlling or owning subsidiaries or establishments in a country other than that in which it has its registered office. The formation of a joint subsidiary SE, however, raises some very difficult questions in this respect, which will be dealt with later.

<sup>105</sup> Furthermore, the SE itself will be subject to the national rules of the country in which it has its registered office in respect of information and consultation applicable to national public limited-liability companies and in respect of information and consultation of employees at national or local level (cf. Article 13(3) in this regard).

This slightly unconventional way of looking at representativeness and legitimacy means that certain precautions must be taken when interpreting the provisions governing the creation of the SNB and its subsequent operation. Since these two qualities are delimited by the diachronic link between a representative body negotiating for the future and those who will be affected in the future by the results of that negotiation, it is important that at all times the SNB should reflect as closely as possible the workforce of the future SE and its subsidiaries and establishments, and that its composition should be adjusted to any changes on the way, in particular any change to the original SE plan.

The first of these concerns is reflected in the provisions of the Directive dealing with the composition of the SNB and the appointment of its members<sup>106</sup>. The second raises issues which the Directive does not resolve explicitly and it is here that the considerations above and those to be dealt with later, particularly in point 1.7, are of special relevance.

#### *1.4 The composition of the SNB: geographical distribution of its members*

When transposing the Directive, it is up to the Member States to determine who is meant by the employees' representatives who will be members of the representative bodies provided for therein (Article 2(e)). This is a shared responsibility, in that the rules determining the composition and distribution of the special negotiating body (Article 3(2)(a) are to be established by the legislation of the country in which the registered office of the future SE will be situated (principal law), while the Member States have the ancillary responsibility of establishing the procedures for electing or appointing the members of the special negotiating body (Article 3(2)(a)) to be elected or appointed on their territory.

The shared responsibilities in this field and the fact that, as a result, there are two legal sources (principal law and ancillary provisions) for the criteria governing creation of these representative bodies means that consultation between the national legislatures is essential if conflicting rules are to be avoided<sup>107</sup>.

**Each Member State must therefore adopt “principal” provisions on the composition and distribution of seats on the special negotiating body, which will apply to:**

- **any company participating in the formation of an SE which is planned to be registered within the country's national territory;**
- **all the participating companies' concerned subsidiaries and establishments, whether or not located within the country in question.**

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<sup>106</sup> See below, points 1.5 and 1.6.

<sup>107</sup> This kind of consultation when transposing Directive 94/45/EC did, in fact, prevent any such conflicting national rules. This situation could arise, for example, if a Member State prescribed procedures for appointing members to the above-mentioned representative bodies for an SE registered or to be registered within its territory which would apply not only to the SE itself and its subsidiaries and establishments within the country, but also to those situated in other countries.

**Each Member State must also adopt “ancillary” provisions applicable to the concerned subsidiaries and establishments of participating companies within its territory, irrespective of whether the SE is registered within that country or elsewhere<sup>108</sup>.**

In this section, we will discuss the national provisions required on the composition and distribution of seats within the special negotiating body. Rules concerning the procedures for electing or appointing members to this representative body will be dealt with in point 1.5.

The rules set out in Article 3(2)(a)(i) of the Directive, governing the distribution of the SNB members by country, are taken largely from the corresponding rules in Directive 94/48/EC (Article 5(2)(b) and (c)).

The differences between the two sets of rules are as follows:

- The present Directive does not set an explicit minimum or maximum number of members of the SNB, in contrast to Article 5(2)(b) of Directive 94/45/EC: “*The special negotiating body shall have a minimum of three and a maximum of 17 members*”). However, the rules governing the make-up of the SNB (Article 3(a)) by their nature impose minimum and maximum limits (see below).
- The preponderance of the proportionality criterion in the SNB’s composition in relation to the number of employees represented, as is evident from Article 3(2)(a)(i). Directive 94/45/EC, on the other hand, gives overriding weight to geographical representation, in some cases to the point of underrepresentation of broad sectors of the employees concerned<sup>109</sup>.

These differences have arisen partly as a result of experience in applying Directive 94/45/EC and partly because of the increased negotiating stakes in the context of the present Directive, particularly as regards the sensitive issue of participation.

The 1994 legislator, who was, remember, breaking new ground in the field of transnational worker involvement, placed a deliberate emphasis on national representation, which often equates to representation of those on the periphery. The objective of Directive 94/45/EC was to align the existing employee information and consultation procedures within the transnational groups with the real decision-making centres, which would automatically improve the status of those on the periphery of these groups, often underprivileged in terms of employment volume. Hence the primacy of the “one representative per Member State” rule.

Over time, representatives of countries with higher employment volume in the groups covered by the Directive began to raise objections to this bias towards national representation at the expense of proportional representation. Despite having a mandate from thousands or, in some

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<sup>108</sup> See below, point 1.6.

<sup>109</sup> The Directive’s first criterion is that of national representation, irrespective of the number of workers employed in each country (just one is sufficient basis for a representative). Combined with a relatively low maximum membership (17 members), this could cause an imbalance in representation vis-à-vis the more “populated” Member States.

cases, tens of thousands of employees, they found themselves with an equal voice on the SNB to those representing a few dozen. And in those negotiations too, much was at stake.

Negotiation as provided for in the present Directive, however, will in certain cases also address the matter of participation, and this time in terms of deciding whether, and if so to what extent the participation systems in the participating companies should continue to exist. That all workers should be proportionally represented within the SNB was therefore considered essential for such crucial decisions to be taken legitimately<sup>110</sup>.

As a result, proportional representation is the first criterion for distributing seats within the SNB. This does not in any way exclude full application of the principle of national representation, however (at least one representative per Member State concerned).

In fact, under Article 3(2)(a)(i), the SNB members are to be elected or appointed on the basis of national portions of 10% or a fraction thereof of the total employees. The reference to a fraction of the 10% proportion ensures that all Member States in which the participating companies or their concerned subsidiaries or establishments employ workers, however few, are represented.

**In each Member State, the workers employed<sup>111</sup> by a participating company, by a subsidiary of a participating company, by an establishment of a participating company or of a subsidiary of a participating company, whether or not located in the same Member State<sup>112</sup>, must be taken into account.**

The geographical distribution of seats within the SNB can be illustrated more easily by way of an example. Suppose employment within the unit comprising the participating companies and their concerned subsidiaries and establishments were as follows:

Country	Number of workers *	Number of seats
France	21%	3
Portugal	20%	2
Spain	19%	2
Germany	11%	2
United Kingdom	10%	1
Belgium	9%	1
Iceland	5%	1

<sup>110</sup> The voting rules within the SNB also reflect this concern, in requiring a majority not only of the members of the SNB, but also of the employees represented by it, for any decision to be taken. The negotiations on these two points within the Council and the prominence given to proportional representation, both in the composition of the SNB and in the voting arrangements, did much to bring about the final consensus on the type of majority required for decisions to be taken (Article 3(4) and (6)) and on the conditions for application of the standard rules (especially Article 7(2)). These two aspects were the most difficult to negotiate in the final stage of the discussions, as reflected in the complexity of the relevant provisions. See below, point 3.1 and Article 7(2).

<sup>111</sup> In the sense used in point 3 of Working Paper No 10-Rev 1 (definition of “employee”) and Working Paper No 11-Rev. 3 (method of calculating the number of workers employed).

<sup>112</sup> All to be understood in the terms analysed in the working papers dealing with Article 2(b), (c) and (d).

Norway	4%	1
Sweden	1%	1
TOTAL	100%	14

\* Proportion of workers employed in the Member State in relation to the total number of workers

As things operate at the moment, with 18 countries covered by the Directive<sup>113</sup>, applying the rules of this provision<sup>114</sup> would result in an absolute maximum of 27 members of the SNB<sup>115</sup>. The arrival of new countries following the next enlargement of the European Union would increase that absolute maximum number by as many new seats<sup>116</sup>. However, in most cases this number would not be attained because there would be fewer countries concerned or a more proportionate distribution of employees among them than that shown in this rather extreme example.

**For transposition purposes, it would seem sufficient here simply to use the same wording as Article 3(2)(a)(i).**

### *1.5 The special case of SEs formed by way of merger*

In certain, in practice very limited, cases, the number and distribution of seats on the SNB established in accordance with the rules analysed in the above section can be adjusted on the basis of Article 3(2)(a)(ii) of the Directive, which provides for the possibility of electing or appointing a certain number of additional members.

This possibility, which also exists in Directive 94/45/EC, is not, in principle, justified in this Directive because the operation of the proportionality criterion should in itself be sufficient to ensure appropriate representation of the various entities within the SNB<sup>117</sup>, and to take due account of the weight of each country concerned in terms of employment.

The Community legislator nevertheless decided to provide for this possibility in the present Directive too, not to ensure any particular degree of proportionality (already fully guaranteed), but to enable specific factors arising where SEs are created through a merger to be taken into account. It is clear from this provision, the provision preceding it (giving

<sup>113</sup> The 15 European Union Member States and the three members of the European Economic Area which are not members of the EU (Norway, Iceland and Liechtenstein).

<sup>114</sup> The subsequent provision of the Directive (Article 3(2)(a)(ii), application of which is restricted to certain merger cases, could still increase the absolute maximum number of members of the SNB (see point 1.6 of this document).

<sup>115</sup> This would be a situation, verging on the absurd, but still theoretically possible, of between 91% and 99% of the employees of all the entities concerned being concentrated in a single Member State (ten seats on the SNB), and the remainder being distributed across all the other Member States (17 seats).

<sup>116</sup> Curiously enough, the absolute maximum number of SNB members resulting from application of the above rule is always equal to the number of Member States concerned by the Directive in the case in question plus 9.

<sup>117</sup> This was not the case with Directive 94/45/EC, which, as explained, took as its basis a simple geographical national representation criterion. The idea of appointing additional members is precisely to add the proportional representation aspect.

precedence to proportional representation) and those concerning voting within the SNB (Article 3(4) and (6)) and the conditions for applying the Annex (Article 7(2)) that special precautions were considered more necessary in this case than in the others to protect the interests likely to be affected.

The fact that the possibility of appointing additional members has been restricted solely to the situation in which a company participating in a merger which will disappear as an independent legal entity is not directly represented within the SNB is a good illustration of the particular risk which many associate with this means of forming an SE<sup>118</sup>. Even if it is not necessarily obvious from the text in question, it is intended to provide even more protection for cases in which a participating company governed by a participation system ceases to exist when the SE is created<sup>119</sup>.

The effect of this is increased representation of such companies within the SNB. A further consequence is that the composition of the SNB will not always be exactly proportional to the workforce employed in each country. The countries with participating companies to be wound up which have no direct representative according to the first criterion could be overrepresented<sup>120</sup>. However, this advantage is illusory. It would not give them the means of tipping the balance in their favour, because any decision would depend on approval by members representing the same majority of employees<sup>121</sup>.

In any case, in the final analysis the conditions and arrangements for applying the additional protection under this provision are quite strict and limited in practice. They can be summarised as follows:

- the SE must be formed through a merger;
- there must be one or more participating companies set to disappear as separate legal entities with the creation of the SE<sup>122</sup>, the employees of which do not have a direct representative on

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<sup>118</sup> The same concern is evident in various other provisions of the Directive, which employ specific solutions such as a lower percentage for mergers than for other forms of SE creation (25% rather than 50%) in Article 3(4) (voting arrangements) and Article 7(2) (conditions for applying Part 3 of the Annex).

<sup>119</sup> In fact, provided the other conditions are satisfied, additional members could be elected or appointed by employees of such participating companies even if they were not covered by participation rules. It seems clear, however, that the rationale behind the text is to protect participation practices within participating companies threatened by the formation of the SE.

<sup>120</sup> This is one of the reasons for the double majority required for taking decisions within the SNB (majority of members and majority of employees represented). Without this provision, in many cases the composition of the SNB would be exactly proportional to the workforce and a single majority would suffice (i.e. a majority of members would always represent a majority of employees). This would not always be the case because of the 10% portion system (a Member State with 11% of the workforce would have two members, as would a Member State with 20%) and because the representativeness of each Member State could differ as a result of differences in the election or appointment system. See below.

<sup>121</sup> It will be seen below that, whenever it comes to electing or appointing additional members, the representativeness of the “ordinary” members (in terms of employees represented) is reduced by the same amount.

<sup>122</sup> This means a participating company acquired in the case of merger by acquisition, or all the

the SNB by virtue of the proportional representation criterion alone and the rules governing election or appointment to be laid down in the national implementing legislation<sup>123</sup>;

- the election or appointment of such additional members must not mean that the employees concerned are represented twice over<sup>124</sup>;
- the appointment of such additional members must not lead to an increase of more than 20% in the number of SNB members appointed in accordance with subparagraph (i); if necessary, the additional seats will be allocated by decreasing order of the number of workers employed by the companies in question.

A practical example of an SE created by merger will help to illustrate the scope and limits of this provision<sup>125</sup>. Let us take the case of an SE created through merger by acquisition involving participating companies and their subsidiaries and establishments in five countries (Germany, Austria, Sweden, France and Spain).

The hypothetical configuration of the operation is as follows:

- Germany: two participating companies, including the acquiring company, and several subsidiaries and establishments; 20% of the total workforce;
- Austria: two participating companies (to be acquired), and several subsidiaries and establishments; 20% of the workforce;
- Sweden: two participating companies (to be acquired), and several subsidiaries and establishments; 20% of the workforce;
- France: two participating companies (to be acquired), and several subsidiaries and establishments; 20% of the workforce;
- Spain: two participating companies (to be acquired), and several subsidiaries and establishments; 20% of the workforce.

Under the proportional distribution rule laid down in Article 3(2)(a)(i) of the Directive, the SNB would be composed of two representatives from each of the countries in question (ten in total). In this hypothetical scenario:

- one of the German members comes from the participating company to be acquired and the other from a subsidiary;
- the two Austrians come from the participating companies (one from each);

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participating companies in the case of a merger forming a new company. Obviously, the acquiring company does not cease to exist with the creation of the SE, but itself becomes the SE.

<sup>123</sup> In other words, the representatives of the country in question do not come from the participating companies.

<sup>124</sup> It will be seen later in the document that, even if the representatives do not come from participating companies, they must still effectively represent the employees of such companies under the applicable national legislation. It is therefore essential to ensure that the SNB's voting rules, which provide for double absolute or qualified majorities (majority of SNB members and majority of the employees represented), do not lead to duplicated representation. This would falsify calculation of the latter majority because the employees in question would be counted twice.

<sup>125</sup> To fully understand all the conditions and implications of the rules on additional members, those of the rules on election or appointment of all members of the SNB must be borne in mind. These are analysed in the next section (point 1.6).

- the Swedish representatives are from the sectoral trade union, which, hypothetically, represents all the workers concerned in Sweden;
- the French and Spanish representatives are from different subsidiaries. None of them are from the participating companies<sup>126</sup>.

The situation as regards the right to appoint additional members in each country concerned would then look like this:

- in Germany, the acquiring company is not directly represented but, under the rules of subparagraph (ii), its employees would still not be entitled to appoint an additional member because the company would continue to exist (and would in fact become the SE); the other German participating company, on the other hand, which would cease to exist, is directly represented on the SNB, which means that its employees are not entitled to appoint an additional member either;
- the two Swedish participating companies would cease to exist with the merger but, even though the representatives are not from these companies, their employees will be represented on the SNB by the union representatives. Unless Swedish legislation provides otherwise, i.e. these representatives are deemed not to represent the employees of these companies<sup>127</sup>, there would therefore be no justification for additional Swedish members, as this would mean the employees concerned were represented twice over, which is prohibited under the second indent of subparagraph (ii);
- the two French and two Spanish participating companies would also cease to exist and their employees would not be directly represented within the SNB, which would, in principle, entitle them to appoint an additional member for each (four in total)<sup>128</sup>, provided that this did not entail duplicated representation.

This would mean that four additional members could be elected or appointed (two in France and two in Spain). The 20% maximum laid down in the first indent of subparagraph (ii), however, restricts the number of additional members in this case to two. According to the final clause of the same subparagraph, these two additional seats would be allocated to the two of the four companies in question with the most employees in each of the two countries in question<sup>129</sup>.

**The coexistence of “ordinary” and additional members and the importance of each member's representativeness in terms of votes within the SNB mean that national legislators will have to specify the conditions for entitlement to additional representation**

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<sup>126</sup> For example, because these are holding companies of subsidiaries and establishments in each of these countries, all employing a small number of workers.

<sup>127</sup> Which would be surprising given that, in a country like Sweden, trade unions tend to be organised by industrial sector rather than by company and are therefore generally representative.

<sup>128</sup> Reducing to the same degree the representativeness of the “ordinary” members in terms of number of employees represented.

<sup>129</sup> See the last paragraph of Article 3.2 a), according to which the additional seats are allocated to companies in different Member States by decreasing order of the number of workers employed by them.

**very carefully to ensure that the same employees are not represented twice over.** This aspect will be analysed in more detail in the next section.

### *1.6 The system for electing or appointing the members of the SNB*

On the basis of the rules just described, the number of members of the SNB and their geographical distribution can be determined.

For the actual allocation of these seats, reference must be made to another set of rules in each Member State defining who is understood by “employees' representative” for this purpose and the procedures for their election or appointment<sup>130</sup>.

The Directive lays down certain very general rules in this field:

- in contrast to the situation vis-à-vis the representative body referred to in the Annex to the Directive, in respect of which only the employees of the SE and its subsidiaries and establishments are eligible or can be appointed (Annex, point (a)), **parties external to the entities concerned (participating companies and concerned subsidiaries and establishments) can be members of the SNB<sup>131</sup>**;
- **Member States determine the method to be used for the election or appointment of the members of the special negotiating body who are to be elected or appointed in their territories** (Article 3(2)(b), first subparagraph);
- **as far as possible, the participating companies must be directly represented on the SNB**, within the limits, obviously, of the number of seats allocated per country;
- **employees in undertakings or establishments in which there are no employees' representatives through no fault of their own (reasons in connection with thresholds applying to representative bodies are excluded) have the right to elect or appoint their representatives in this body directly** (Article 3(2)(b), third subparagraph);
- **if the Member States so decide, internal or external trade union representatives may be members of the SNB.**

The Member States are therefore bound by these very general principles, which gives them enormous freedom of action. However, account should be taken of certain facts and principles which could influence these options.

The first is that **the system adopted in this field has to be applicable to the creation of SEs in extremely diverse situations**, in terms of the means of creation (merger, holding, etc.), the size of the companies concerned, or perhaps the structure of each of the participating companies and all their subsidiaries and establishments.

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<sup>130</sup> This aspect has already been discussed at length in Working Paper No 12 (definition of “employees' representatives”). Only a few further details have been added here.

<sup>131</sup> The second subparagraph of Article 3(2)(b) refers explicitly to this kind of situation.

Another factor which could affect the choices made at national level is the value of establishing a **link between the transnational representation level, i.e. the SNB, and the national level, represented by the participating companies and their subsidiaries and establishments**. The need to maintain this link may influence the choices made by the national legislator in defining employees' representatives and establishing the procedures for electing or appointing them.

Thirdly, **the necessary direct link between the mandate of the SNB members and voting within the SNB means that it must be possible to determine at any time how many employees each member represents, as this is the only way of calculating the second majority referred to in Article 3(4) and (6) (majority of the employees represented)**. The problem of duplicated representation referred to above also applies in this context.

As another factor, the possibility recognised in Article 3(2)(a)(ii) of **electing or appointing additional members in the case of mergers requires specific and careful treatment**.

Finally, it must not be forgotten that representation is a dynamic day-to-day process which does not stop with election or appointment. In other words, **any changes in the body of employees represented must, as a matter of principle, be reflected in their representation**. If, for example, the European representative has lost the national mandate (because his company is no longer a member of the group or as a result of elections at national level, etc.), does the European mandate still hold good? What if all or some of the national representatives who originally elected or appointed the representative concerned then lost their own national mandates? And if this should happen, how could the flow of information to the grass roots be maintained if representation links had been severed<sup>132</sup>? All these questions, already raised in respect of Directive 94/45/EC, have gained added weight with the link created by the Directive between exercise of the right to vote within the SNB and the representativeness of each of its members (the double majority issue already referred to several times).

On this basis, it would seem that national transposal legislation must answer the following questions:

- a) Who can be elected or appointed to the European bodies?
- b) How should the number of employees represented by each member of the SNB be determined and duplicated representation avoided?
- c) What specific rules are needed concerning the election or appointment of additional members?
- d) What responsibilities and links need to be established between the European representatives and the national representatives or the employees themselves?

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<sup>132</sup> This is a quite separate problem from that of changes within the entities concerned, which will be dealt with in section 1.7 of this working paper. The present section will look at the question of subsequent changes and how they affect the representation mandate, whereas the later section will deal with any changes to the composition of the SNB.

a) Who can be elected or appointed to the European bodies?

First and foremost, it would be best, in order to avoid all the complication of new procedures, for the Member States to base their procedures on companies' existing employee representation structures. This immediately calls to mind Directive 94/45/EC, so similar to the present Directive in the way in which it operates.

That being said, the Member States have complete freedom in this domain. They can regard as “employees’ representatives” for the purposes of the Directive European or national trade union organisations, trade union representatives, workforce delegates, establishment committee members, works council members, group works council members, ad hoc representatives or any other kind of representative. They can decide on whether the special negotiating body should be constituted through election or appointment, or a combination of both.

What is essential, however, is that **the representatives thus designated represent all the employees of the participating companies and their subsidiaries and establishments. The national representatives on the special negotiating body must genuinely represent all the employees of the various participating companies and subsidiaries and establishments in that country.** Without in any way compromising each Member State’s right to choose, we have attempted below to analyse the various options open in the light of the representativeness requirement, with the sole aim of identifying and finding solutions to any potential problems. This is a vital requirement for carrying out the voting within the SNB while respecting the double majority of the members and workers represented.

The general coverage of the members which are elected or designated in each country by the workers employed therein, does not necessarily imply that all workers can be elected for these purposes, or that they all participate in the same way in the election or designation procedures. In the framework of Directive 94/45/EC, for instance, it is often the case that the members of the SNB are designated amongst and by the workers of the biggest units in terms of employment. Nothing seems to prevent this in the context of the present Directive, as long as all workers are in the end represented by the members in the SNB.

Remember, to begin with, that **within one Member State there can be one or more participating companies which may or may not be in a relationship of dominance and subordination, together with various subsidiaries and establishments of these participating companies or participating companies in another Member State.**

i) The choice of European or national trade union organisations as “employees’ representatives” within the special negotiating body would therefore be likely to pose the following problems:

- Firstly, the Directive appears to give precedence to appointment of members to the special negotiating body by, or in agreement with, the representatives of the workforce of the participating companies and concerned subsidiaries and establishments<sup>133</sup>, while the organisational base of trade unions is often external and

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<sup>133</sup> Cf. the second subparagraph of Article 3(2)(b), according to which it is where there are no

their scope goes beyond the company, which could put them in a less suitable position to properly represent all the employees without some kind of corrective mechanism. It would therefore seem to make sense to have a broad general guideline to the effect that a trade union mandate should be based on genuine representativeness within the company.

- Secondly, the condition of general representativeness will, in fact, be very difficult to comply with where companies pursue very different activities but the country is restricted to a single representative on the special negotiating body. Looking at various agreements concluded under Directive 94/45/EC, we find that the choice of trade unions as negotiators has on occasion necessitated the presence of all the trade unions considered to be representative in a given country, which again cannot always be a satisfactory solution in that the number of national representatives may be more restricted. The difficulty presented by the Directive is, therefore, that trade union status, which in principle is an adequate guarantee of representativeness, may not suffice in these particular circumstances. If this is the chosen means of representation, it must therefore be adapted to the specific context of the Directive. Given that in the majority of cases, several trade unions could be considered representative of all the subsidiaries in a given country, this option would mean creating mechanisms enabling representatives to be selected from the various trade unions present. It would therefore be up to this selection mechanism to guarantee that the representatives were effectively capable of representing all the employees of the subsidiaries in a given country. An example of this kind of mechanism can be found in certain "EWC" agreements: if the number of candidates for the European representatives' seats for a given country (candidates put forward on the basis of local procedures by the representatives of the trade unions or employees) is greater than the number of seats allocated to that country, a vote by the employees' representatives or the employees themselves would have to be organised.

ii) The choice of national works council members to participate in the designation or selection of employees' representatives would appear to avoid the above problems.

- The existence of group works councils in some countries should further facilitate the task. As group works councils represent all the companies within the group at national level, they would seem ideal for electing or appointing the national representative(s) at European level.
- In the countries where no such body exists, the works councils or establishment committees could be selected as an alternative and the arrangements adapted to apply to big groups with a large number of units in each country. In this case, one or two members would have to represent 50 to 100 different subsidiaries or establishments in one Member State. There would therefore have to be rules allowing representatives to be elected or appointed to the SNB from among all the members

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employees' representatives in the company or establishment (through no fault of their own) but the employees may elect or appoint the members of the special negotiating body themselves.

of the national works councils concerned. This approach has been adopted in some “EWC” agreements.

- This method could, however, be inadequate in more complex situations where participating companies belong to distinct groups with complicated dominance/ownership relationships vis-à-vis certain cross-border subsidiaries or establishments<sup>134</sup>, etc. In this case, multi-stage appointment of national representatives to the SNB would normally be necessary, as direct appointment is company-based (e.g. creating a system through which the representatives appointed by the various independent companies appoint the members of the SNB themselves from among their own number).

b) How should the number of employees represented by each member of the SNB be determined and duplicated representation avoided?

Under the terms of Article 3(4) and (6) of the Directive, decisions by the SNB require a double majority – that of the members of the SNB and that of the employees represented<sup>135</sup>. On such occasions, it is therefore essential to be able to establish how many employees are represented by each member of the SNB.

It has been seen above that an essential prior step to creating the SNB is to calculate the size of the workforce of the participating companies and their subsidiaries and establishments, so that geographical distribution of the places on the negotiating body meets the proportional representation requirement<sup>136</sup>. It has also been concluded<sup>137</sup> that this initial calculation can be used for voting within the SNB.

What remains to be done to enable this second majority to be established during voting is to **determine how many employees correspond to each member at the time of his or her appointment or election.**

In view of the tight deadlines laid down by the Directive and the interest the participating companies will have in expediting the SE creation process, the period between initiating the process<sup>138</sup> and setting up the SNB will normally be quite short<sup>139</sup>. This will make the

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<sup>134</sup> Certain subsidiaries and establishments in one country may belong to participating companies located in other countries. They must not be excluded on this count, however, and the provisions of each Member State must cover them in the same way as the subsidiaries and establishments of national participating companies.

<sup>135</sup> In the cases subject to two-thirds qualified majority voting (second part of Article 3(4) and Article 3(6)) there is a further condition that the votes in favour must include those of representatives of employees in at least two different Member States.

<sup>136</sup> Point 1.4 above (“The composition of the SNB: geographical distribution of its members”).

<sup>137</sup> Point 1.3 of Working Paper No 11-Rev.1 (“The method of calculating the number of workers employed”).

<sup>138</sup> Publication of the draft terms of the merger or constitution of a holding SE, or adoption of the plan to constitute a subsidiary SE or to convert into an SE, which is also the point at which the obligation to supply the information referred to in Article 3(1) of the Directive, including that on the number of workers employed, takes effect. See above, points 1.1 and 1.2.

information enabling the representativeness of each SNB member to be determined more readily accessible, particularly if it is broken down by entity concerned (participating companies or their subsidiaries or establishments) from the outset.

If detailed information is available from the beginning, the representativeness of each member of the SNB in terms of number of employees would not appear difficult to determine. In the case of single-stage election or appointment<sup>140</sup>, the representativeness of each SNB member is calculated by dividing the total number of employees by the number of members elected or appointed in the country in question.

In the case of more complex election or appointment procedures<sup>141</sup>, involving two or more stages, the representativeness of each member may be different. Take, for example, a situation in which, in a given country, there are two participating companies, each with several subsidiaries and establishments, and subsidiaries and establishments of another participating company in another Member State. If this country has three or more seats on the SNB, each member will probably have to be elected or appointed by each of the three parties mentioned (both of the participating companies and their subsidiaries and establishments, and the subsidiaries and establishments of the foreign participating company). The number of employees they represent, however, may be different.

If the number of members allocated to the Member State in question is lower than the number of basic entities, a procedure involving two or more stages would seem inevitable. Initially, each entity would elect or appoint its representatives, and the next stage would be for these representatives to appoint the member(s) of the SNB from among their own number. Here too, the representativeness of each member may be different.

**In the final analysis, what is important is that it should be possible to determine how many employees each member of the SNB represents. This information would gain from being recorded in the minutes of the election or appointment procedure.**

Once this representativeness has been established, it is an easy matter to avoid representing the same employees twice over.

The Directive does not specify these details. They are left instead to the national transposal legislation, which will reflect the options chosen by each Member State.

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<sup>139</sup> Even if the six-month period (which may be extended up to one year in total) laid down in Article 6 of the Directive for completing the negotiations does not start to run until the SNB has been set up, the participating companies will want to fulfil their obligations under the Directive as quickly as possible so as to be able to constitute the SE definitively. This is particularly true in merger cases (which must take place quickly, so as not to increase the uncertainty which could exacerbate the risk inherent in such operations), but also applies to the other means of constituting an SE.

<sup>140</sup> Where the number of entities concerned in the country in question is limited and they are all within the same company or group of companies.

<sup>141</sup> For example, where a great many different units are concerned or they belong to different groups.

c) What specific rules are needed concerning the election or appointment of additional members?

The approach described in the section above also provides an answer to this question. As soon as the representativeness of the “ordinary” members of the SNB in a given country is known accurately, it is possible to check (1) whether a participating company which will cease to exist is directly represented; (2) whether that company’s employees are already represented by one of the “ordinary” members.

**If none of the members already elected or appointed is from the company concerned and there is appropriate provision in national law, the next step is to arrange for specific election or appointment of an employees’ representative from that company. In this case, national legislation would also have to provide for a mechanism for reducing the representativeness of the ordinary members to avoid duplicated representation.**

The example in point 1.5 of this paper concluded that additional members could be elected or appointed in France and Spain because the employees of the participating companies (which would cease to exist) in those countries were not directly represented on the SNB by the ordinary members. If provision is made for electing or appointing additional members to represent the employees of these participating companies, then provision must also be made to ensure that they are not represented by the “ordinary” members.

A question could be raised in this regard of knowing whether the related provisions are "principal" or "accessory". In other words, would it be the law of the country in which the SE will have its registered office which will determine the circumstances leading to the election or designation of additional members and their respective procedures (including the mentioned mechanism of reduction of the representativeness of the ordinary members) or, would this be determined by the "accessory" provisions of each Member State?

At first sight, the core of these provisions has clearly an accessory nature. Besides the objective facts (the establishing of an SE by way of merger and the disappearance of a participating company as an autonomous legal entity), all the other requirements preceding the election or designation of additional members follow directly from the accessory provisions which in each Member State govern the procedures for the election or designation of the members of the SNB. In fact, these provisions are the ones which allow verifying:

- if the workers of the company in question do not already have a direct representative;
- if the election or designation of an additional member does not entail a double representation of the workers in question.

It is also in the "accessory" provisions of each country that one will find the rules concerning the election and designation of the additional members, just as the mechanisms aiming at eliminating double representation.

On the other hand, every time there is a competition between several countries to obtain seats, the same accessory national provisions will be inefficient for avoiding exceeding the limit of 20% of additional members laid down in Article 3.2 a) ii) first indent, and for determining the geographical distribution of additional members.

This last circumstance leads us to the conclusion that the principal source of the election or designation of additional members, as of their geographical distribution, is still the law of the country where the SE has its registered office, just as for the ordinary members. Nevertheless, for the verification of the other two requirements mentioned above, concerning the direct non-representation and the double representation, there must be a reference in that same law to the accessory provisions in each Member State.

It will also be important, or at least very useful, to have an uniform concept of direct representation, in view of the possibility of having different conceptions, especially when the national provisions provide for the designation of trade union representatives external to the undertaking.<sup>142</sup> In certain countries, these representatives can be considered as general representatives of the whole workforce indistinctly, and this would exclude the possibility of designating additional members. In other cases, the contrary could occur.

In order to avoid these different interpretations and thus the different treatment of identical situations, it could be considered that the direct representation mentioned, at least implicitly, in the quoted provision in the Directive, implies a specific representation (to exclude this requirement, there has to be already a representative employed by the company in question or a representative, be it external, designated on an exclusive basis by the employees of this company).

The related provisions could be drafted as follows (this is a simple example):

Principal provision:

1. The members of the Special Negotiating Body are elected or designated in each Member State according to the methods envisaged in the relevant national provisions. The seats are distributed in proportion of the number of workers employed in each Member State by the participating companies and the concerned subsidiary or establishments, by allocating in respect of a Member State one seat per portion of employees employed in that Member State which equals 10%, or a fraction thereof, of the number of employees employed by the participating companies and the concerned subsidiaries or establishments in all the Member States taken together.

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<sup>142</sup> A frequent practice in the context of Directive 94/45/EC.

2. In the case of an SE established by way of a merger, additional members of the Special Negotiating Body will be elected or designated if, in accordance with the rules governing in each Member State the election or the designation of members of the Special Negotiating Body, the employees of one or more participating companies which, according to the project, will cease to exist as a separate legal entity are not specifically represented by members of the Special Negotiating Body employed by the companies in question or designated on an exclusive basis by the employees of the aforesaid companies.

Those additional seats are allotted to companies of different Member States referred to in the preceding subparagraph by decreasing order of the number of employees they employ. The number of additional members cannot exceed 20% of the number of members elected or designated in accordance with the 1st paragraph.

3. The right to elect or designate an additional member ceases to exist if, in accordance with the rules which in each country govern the election or the designation of the members of the Special Negotiating Body, that would involve a double representation of the employees of the companies in question. In this case, the additional seats in question, if any, are allotted to the following participating companies in terms of number of employees.

Accessory provision:

When, in accordance with the relevant provisions of the country of the envisaged seat of the SE, additional members of the Special Negotiating Body are elected or designated, the employees of the participating companies in question are represented only by those additional members.

d) What responsibilities and links need to be established between the European representatives and the national representatives or the employees themselves?

Can any change in the national mandates (new elections at national level, loss of the national mandate by the European representative) prejudice the mandate of the representatives on the SNB? This question is in a similar vein to that concerning the adaptation of the SNB to changes in the structure or size of the participating companies and their subsidiaries and establishments<sup>143</sup>. On the one hand, any changes in the population represented must in principle be reflected in the representation; the representative bodies must continue to be representative. On the other hand, the representative body must be reasonably stable. Companies and their representative bodies undergo constant change and development, even in the short term, and the SNB could find it difficult to operate if any change called into question the validity of

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<sup>143</sup> This aspect (change in the composition of the SNB following major changes in the configuration of the SE project) will be dealt with comprehensively in point 1.7 of this working paper. The present section deals solely with the specific case of changes in the basic conditions of the mandate.

negotiations already completed or the mandate of its members. The Directive does not specify any precise rules in this regard, although the principle of representativeness of the SNB is established by Article 3(2).

The same problem arises in the case of a representation body created by an agreement under Article 4 of the Directive, but here it is up to the parties to the agreement to deal with the problem and fix the duration of the representatives' mandates and the procedure for renegotiating the agreement ((Article 4(2) (b) and (h)). But there are no provisions on adapting the composition of the SNB to such changes, even though its mandate may last up to a year<sup>144</sup>, during which time major changes could occur.

Most important to remember in this specific context, however, is what has already been said concerning the voting procedures within the SNB. For each vote, there must be not only a majority of members of the SNB, but also a majority of the employees represented. In these circumstances, how can it be acceptable for European representatives, who may, for example, have lost their national mandate or who were appointed by national representatives who have lost their status as such, to participate in the vote? It would seem imperative to ensure at all times that the conditions on which the initial mandate of the SNB members was based are maintained, even at the expense of the coherence and continuity of the SNB. In any case, the relatively short life of the SNB (maximum of one year) puts the practical scope of the problem into perspective.

**There would therefore appear to be no alternative to the rule that the mandate of a representative on the SNB must always be linked to the national mandate(s) on which it is based. How this rule is transposed into national legislation depends on the Member State's choice, on an accessory basis, of procedures for electing or appointing members to the SNB.**

### *1.7 Adjusting the composition of the SNB in the event of changes<sup>145</sup>*

The question of changes in the configuration of the SE project throughout the negotiation process has already been raised on various occasions<sup>146</sup>.

At the start of this process, irrespective of how the SE is to be formed, the participating companies make choices concerning the extent of the operation and the various entities affected by it. One such decision is which of their subsidiaries and establishments will become subsidiaries and establishments of the SE. These choices must be derived clearly from the draft terms of the merger or formation of a holding SE under Articles 20 and 32 of the Regulation

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<sup>144</sup> See Article 6.

<sup>145</sup> The changes referred to are those during the negotiation period, i.e. prior to registration. Changes after registration, which, in our view, could mean having to reopen the negotiation procedure laid down in Articles 3 and 4 of the Directive, are a completely different matter. This is a problematic and complex subject which will be dealt with in the working paper on Article 11 of the Directive ("Misuse of procedures").

<sup>146</sup> See in particular point 1.4 above (on the representativeness of the SNB) and Working Paper No 9 (definition of "concerned subsidiary or establishment").

and, in the case of joint subsidiary SEs and conversions, under specific provisions transposing the Directive<sup>147</sup>.

At all events, the initial scope of the operation (i.e. the grouping constituted by the participating companies and their concerned subsidiaries and establishments) must necessarily be known before and during the process of setting up the SNB.

However, creating the SE may turn out to be a non-linear process, particularly in theoretically more complex cases (mergers and holding SEs). From the initial plan to completing the operation (i.e. registration of the SE), there is a long process to go through involving various bodies apart from the designers and promoters of the operation, such as the general meetings of the participating companies and, often, the competition authorities.

Sometimes the scope of the operation can be changed because of pressure from shareholders, conditions imposed by the competition authorities, etc. Some of the participating companies may decide or be forced to drop out of the process or to exclude certain of the subsidiaries or establishments they originally intended to bring to the SE.

In such cases, it seems inevitable for the changes to be reflected in the composition of the SNB. As a representative body, it has negotiating functions which are highly important or even decisive for the employees it represents. This is the reason for the precautions taken by the Community legislator in respect of the way the SNB is constituted and the conditions applying to its deliberations. The primacy of the proportional representation criterion and the double or even triple majorities required for certain decisions to be adopted seem completely incompatible with a situation in which some of the SNB members no longer represent anybody.

**If one or other of the initial components in the SE creation process is withdrawn, this will inevitably call into question the mandate given by the employees concerned to the member representing them within the SNB. If the change is very major, it could even lead to the SNB being completely re-formed, which may involve, for example, redistribution of the seats allocated to each Member State<sup>148</sup>. In these circumstances, the change in the SNB's composition would be made in accordance with the “principal” provisions adopted by the Member State in which the future SE would have its registered office, as any variation in the proportion of employees in one country produces a corresponding variation in the others<sup>149</sup>.**

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<sup>147</sup> See point 2 of Working Paper No 9 (definition of “concerned subsidiary or establishment”).

<sup>148</sup> This would seem inevitable where all the entities concerned situated in one Member State abandon the process. The representative(s) they had elected or appointed to the SNB would have to follow them. The same would apply if the number of employees concerned in a particular Member State were reduced because certain of the entities there pulled out (for example, if the proportion of employees in a Member State dropped from 21% to 19%, that country's seats on the SNB would be reduced from three to two).

<sup>149</sup> A reduction of a few percentage points in one country would necessarily mean a corresponding increase in the percentage of employees in all the other countries concerned which, if sufficient, would entitle them to more members on the SNB.

Obviously, the opposite is also true. Other entities may join the process mid-way, with the same consequences<sup>150</sup>.

**Changes in the configuration of the operation could also affect the additional members of the SNB, if they influence the conditions that led to their election or appointment<sup>151</sup>.**

What would happen in the case of a minor change which did not affect the geographical distribution of the SNB members<sup>152</sup>? One possibility would be to revise the existing mandates in each country affected by the changes. In the interests of a stable SNB and to avoid excessive complication, however, we would support the idea that such changes should be ignored<sup>153</sup>. Otherwise, there would be a risk of permanent destabilisation of the composition of the SNB, which would prevent it from working effectively.

**To conclude, the position put forward when discussing calculation of the number of workers employed<sup>154</sup> applies here, namely that the initial basic data on the representativeness of members elected or appointed to the SNB should remain the reference for the latter's entire (short) duration, unless a fundamental change in the geographical distribution of the seats makes a change in composition obligatory.**

## **2. *The remit of the special negotiating body – Article 3(3)***

Article 3(3) of the Directive, which in some ways overlaps with Article 4, describes the remit of the SNB, which is to negotiate and conclude an agreement with the competent bodies of the participating companies on the arrangements for employee involvement in the future SE.

**This provision corresponds to Article 5(3) of Directive 94/45/EC and raises no particular problems of interpretation.** Certain details can, however, be clarified.

Firstly, concerning the other party to the agreement, Article 3(3) refers to “*the competent organs of the participating companies*” without specifying which ones. This general formulation is justified by the fact that the companies have diverse forms of management and there is no need in the Directive itself to designate any particular body as responsible for conducting negotiations or concluding any agreement. **Depending on the system of governance of the companies in question, this could be done by the administrative board or board of directors, or by their executive bodies or representatives. The situation is also bound to arise of there being a**

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<sup>150</sup> At first sight, it would seem that the arrival of new participating companies should set the process right back to zero, at least in the case of mergers or holding SEs. This would be in the nature of this kind of operation. The later involvement of new subsidiaries or establishments of participating companies already involved in the project, on the other hand, should be possible without the whole process having to be started again from the beginning.

<sup>151</sup> See above, point 1.5.

<sup>152</sup> If the reduction in the proportion of employees in a Member State remained within the same 10% portion (e.g. dropped from 19% to 15%).

<sup>153</sup> This does not prejudice the argument in 1.7.d) concerning the European representatives' links with their base.

<sup>154</sup> See Working Paper No 11-Rev. 1.

**large number of negotiating partners<sup>155</sup>, which means that it may be advisable for only some of them or even external persons or entities to be appointed to conduct negotiations.**

Secondly, this is the only provision of the Directive to prescribe the form of the agreement. Article 4 makes no reference to it, although it is clear from the text that **the agreement must be in writing to be valid**. On the other hand, nothing, or very little, is said in the Directive about any other formalities to be observed when setting up the SNB, or throughout the negotiating period. **Given that completion of the procedures prescribed is a precondition for registration of the SE<sup>156</sup> and must therefore be verified by the competent authorities in this field, it would make sense for the national implementing legislation to specify other formalities considered necessary. This would ensure legal certainty, which would be in the interest of both parties<sup>157</sup>.**

Thirdly, the intrinsic value of such an agreement and its binding character require further clarification<sup>158</sup>. Being European in dimension, agreements concluded under Article 3(3) and Article 4 of the Directive are new-style agreements which do not fall within the traditional categories. They are intended to apply not only to the signatories, but also to the entire group of companies under the future SE, which means all the local management bodies and all the employees. Normally, under national law, an agreement in this field is binding by virtue of its status as a collective agreement. An agreement meeting certain criteria in respect of its signatories and object will apply to all the employees represented by or belonging to the signatory organisations. Where their signatories and object are concerned, agreements concluded under this Directive can certainly be assimilated to the collective agreement category. However, the parties negotiating the agreement are not the parties normally entitled to do so under national legislation, and the agreements cannot therefore claim to be collective agreements within the meaning of national law, and so do not have the same legal force. Furthermore, the agreements signed in one country are intended to be applied in various other countries.

It is therefore essential that an agreement signed in one country cannot be disputed in another. An agreement authorised as compatible with the law of one Member State must also be acceptable under the legal systems of the other Member States.

**The national implementing legislation must therefore recognise the binding force of an agreement concluded under the Directive, i.e. it must recognise that the agreement between the SNB and the competent organs of the participating companies is binding on the entire group of companies within the SE, all the local management bodies and all the employees of the group of companies, irrespective of the Member State in which it is signed. The validity and binding force of an agreement concluded in one Member State under the rules of that State must also be recognised by all the other Member States concerned.**

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<sup>155</sup> Neither the Regulation nor the Directive puts any limit on the number of participating companies, and there may therefore be many of them.

<sup>156</sup> See Article 12 of the Regulation.

<sup>157</sup> It would be helpful, for example, to impose a requirement for written and approved minutes of certain essential stages in the creation and life of the SNB (act of establishment, change of composition, important decisions, etc.).

<sup>158</sup> This aspect will be analysed fully in the working paper on Article 4 of the Directive.

Fourthly, the expression “involvement of employees within the SE” in the first subparagraph of Article 3(3) of the Directive, and in many other provisions, must be interpreted broadly. It covers the procedures for employee involvement in the company or the multinational group of which the SE is the dominant company<sup>159</sup>.

Finally, the second subparagraph of Article 3(3) of the Directive **requires the competent organs of the participating companies to inform the special negotiating body of the plan and the actual process of establishing the SE, up to its registration**. It is on the basis of this information that the SNB will be able, for example, to identify any need to change its composition following changes in the initial configuration of the SE creation project<sup>160</sup>.

### 3. *The functioning of the special negotiating body – Article 3(4) to (7)*

Paragraphs (4) to (7) of Article 3 of the Directive govern:

- voting arrangements within the SNB (paragraphs 4 and 6);
- arrangements for consulting experts (paragraph 5);
- relinquishment by the SNB of a system of employee involvement for the SE (paragraph 6);
- responsibility for the SNB’s expenditure (paragraph 7).

Each of these subjects is dealt with below.

#### 3.1 *Voting arrangements within the SNB*

Voting within the SNB is much more elaborate and complex than that within the corresponding body governed by Directive 94/45/EC, where a simple majority of members is more or less the general rule, the only exception being the decision not to proceed with negotiations, which requires the approval of two thirds of the members of the SNB<sup>161</sup>.

Under the present Directive, the situation is different:

- the general rule for voting is an absolute majority of the members of the SNB<sup>162</sup> combined with an absolute majority of the employees represented;
- for decisions reducing the existing participation rights within the participating companies, the rule is two thirds of the members from at least two Member States, combined with two thirds of the employees represented;
- the same applies to a decision by the SNB not to establish a specific system for employee involvement in the SE.

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<sup>159</sup> This aspect has been analysed in depth in point 1.3 of this document on the representativeness of the SNB.

<sup>160</sup> See point 1.7 of this document.

<sup>161</sup> Article 6(5) and Article 5(5) of Directive 94/45/EC.

<sup>162</sup> Which in itself is more stringent than the simple majority of members required by Directive 94/45/EC.

The reasons for the greater complexity of voting within the SNB compared with the system under Directive 94/45/EC have already been explained at some length<sup>163</sup>. They stem from the sensitivity of the SNB's function, particularly in the matter of participation. The Community legislator was clearly seeking to surround with maximum precautions any outcome of negotiations resulting in a lesser degree of employee involvement than that existing in the participating companies. It is this concern which has led to the rules governing deliberations within the SNB and it is also found in other provisions of the Directive which at first sight are among the most unfathomable<sup>164</sup>.

This, however, was the price to be paid for completion of the "SE" dossier. In the end, however impenetrable they may appear to the uninitiated, the rules have an internal logic which is quite easy to understand when seen in the light of the implications of negotiation for the survival of any existing participation systems in the participating companies.

a) The general rule of a double absolute majority

The main difficulty with this double absolute majority (i.e. a majority of the members of the SNB and a majority of the employees represented by them) is in making sure that data are available on the representativeness of each SNB member in terms of workers employed by the participating companies and their concerned subsidiaries and establishments from whom they draw their mandates. It was concluded earlier that the data on the workforce supplied at the beginning of the SE creation process could be used for voting within the SNB<sup>165</sup>. It was further concluded that the process of electing or appointing each of the SNB members would have to be organised in a way which would secure the required degree of individual representativeness subsequently<sup>166</sup>. Finally, representation must be flexible enough to enable the composition of the SNB to respond to major changes in the constellation of entities concerned by the creation of the SE, in a situation where decisions require a majority of the employees represented<sup>167</sup>.

**Provided that national legislation transposing the Directive incorporates these three aspects with adequate care, and the participating companies and the SNB act with prudence and diligence, the double majority required for each vote should not pose any serious problems.**

b) The triple qualified majority

In the circumstances covered by Article 3(4) (second part) and Article 6, decisions by the SNB require a majority of two thirds of its members, representing at least two thirds of the employees, which must include employees employed in at least two Member States. The

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<sup>163</sup> Cf. in particular point 1.4 above ("The composition of the SNB: geographical distribution of members").

<sup>164</sup> Examples are those concerning the composition of the SNB (Article 3(2)), those setting the conditions for application of the subsidiary provisions of the Annex (especially Article 7(2)) or again those concerning the link between the Directive and other provisions (Article 13).

<sup>165</sup> Cf. Working Paper No 11-Rev.1.

<sup>166</sup> See above, points 1.3 to 1.6.

<sup>167</sup> See above, point 1.7.

problem of concurrent majorities raises the same issues as the absolute majority, and therefore requires no further analysis here.

The conditions for applying the triple qualified majority rule laid down in Article 3(4) should, however, be explained<sup>168</sup>.

Where the SNB is to ratify an agreement with the competent organs of the participating companies which provides for reduced participation rights compared with the existing system within the participating companies offering the most rights, a triple qualified majority of two thirds is required where:

- participation covers at least 25% of employees of the participating companies, where the SE is to be established by way of merger;
- participation covers at least 50% of the employees of the participating companies, where the SE is to be established by way of creating a holding company or forming a subsidiary.

Conversion cases are not covered in this context, as Article 4(4) of the Directive prohibits an agreement resulting in a lower level of participation than that existing within the participating company (the company to be transformed into an SE).

Where the proportion of the workforce covered by the existing participation system of the participating companies is lower than the percentages indicated, then the SNB's decision requires a double absolute majority. It therefore follows that the general double absolute majority rule always applies where none of the participating companies has a participation system.

There are two comments to be made regarding application of the triple qualified majority rule in these cases, the first to explain why mergers are treated differently from holding companies and joint subsidiaries, and the second specifying what is meant by "*reduction of participation rights*".

If the creation of an SE is analysed solely from the point of view of its impact on existing participation systems within one or more of the participating companies, it emerges that transformations and mergers present a greater effective risk for the survival of these systems than do other means of SE creation.

In the first two cases (transformation and merger), the companies promoting the SE operation are, under Article 13(2) of the Directive, no longer subject to the national rules on participation. By converting itself into an SE, a company governed by national law and therefore by the national rules on participation evades those rules. The same applies to national companies covered by participation systems which form an SE by way of merger — if one acquires the other (or others), neither the acquiring company (the new SE) nor those which are acquired (which cease to exist as separate legal entities) are subject any longer to the national rules on participation; if the companies merge to create a new company (SE),

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<sup>168</sup> The other criterion for applying this rule will be analysed in point 3.3 below.

they cease to exist as legal entities and, under the same Article, the new company (the SE) is not subject to these national rules either.

In the case of holding or joint subsidiary SEs, the impact of creating the SE is less serious. The SEs thus created are still not subject to any national rules existing in the country in which they are registered<sup>169</sup>, but the participating companies continue to exist as separate legal entities and the applicability to them of the national rules on participation is not affected by the operation in any way<sup>170</sup>.

This means that the effect of “legal relocation” resulting from the creation of an SE threatens participation systems above all where the SE is formed through conversion or merger, because the participating companies either cease to exist or become the SE. This is not the case where the SE is formed by other means, even though it could be argued that, in becoming subsidiaries of a holding SE, the participating companies become the real decision-making centre, which seriously reduces the actual influence the employees’ representatives who continue to sit on the central bodies of such companies have on the course of affairs<sup>171</sup>.

In response to these differing degrees of risk, the Directive scales the “protection” it gives to participation systems according to the means through which the SE is formed. This differentiation can be seen in Article 3(4), which concerns us here<sup>172</sup>, and in Article 7(2) governing the conditions in which Part 3 of the Annex (on participation) applies in the event of breakdown of the negotiations. These two provisions were the cornerstone of the final compromise on the Directive.

The guiding idea behind the last round of debates within the Community bodies was the majority principle: in normal circumstances, if there were majority participation within the participating companies, then it deserved special protection. The provision under consideration for holding and joint subsidiary SEs reflects this approach, in that an agreement which would reduce participation does not require reinforced majority voting within the SNB where there is minority participation (covering less than 50% of the employees of the participating companies), but does where there is participation covering more than 50%.

The employees under consideration here are only those of the participating companies and not of their subsidiaries and establishments. This option makes sense in the context of the “before/ after” approach behind the whole Directive. If, for the purposes of protecting acquired rights, it is a matter of comparing the situation before the creation of the SE with the

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<sup>169</sup> Again, under Article 13(2) of the Directive.

<sup>170</sup> In the case of joint subsidiaries, this goes without saying. In the case of holding SEs, the participating companies become subsidiaries of the SE and Article 13(3)(b) specifies that the Directive shall not prejudice the participation provisions laid down by national legislation applicable to the subsidiaries of the SE.

<sup>171</sup> In the case of a joint subsidiary SE, which in this respect is the opposite operation to a holding SE, this restrictive effect is difficult to identify because it is the participating companies, within which the participation arrangements continue, which control the new SE. Nevertheless, these two situations are treated in the same way in the Directive, as the Community legislator did not wish to make even finer distinctions between them which would only lead to even more complication.

<sup>172</sup> And in Article 4(4) (see continuation of the text).

situation afterwards, logic demands that the point of reference should be the participating companies, as it is their participation systems which may be affected. However, restricting the comparison to the participating companies raises other problems, which have already been touched upon<sup>173</sup>, in connection with the participation systems organised at group level. These issues will be analysed exhaustively in the working paper on Article 7 of the Directive.

Having decided on this approach for situations considered “normal”, the legislator then looked at situations requiring reinforced protection because of the increased risk to the survival of the participation systems.

In cases of transformation, the Community legislator has not even allowed the possibility of a participation system in the SE inferior to the existing one within the participating company. This is prohibited categorically by Article 4(4). The matter is therefore not even considered in the context of voting arrangements within the SNB.

In the case of mergers, it was decided that the threshold for coverage by a participation system beyond which the two-thirds qualified majority rule applied should be 25%.

It remains to look at the concept of “*reduction of participation rights*” set down in Article 3(4) as a condition for applying the triple qualified majority rule. It is explained as: “*a proportion of members of the organs of the SE within the meaning of Article 2(k), which is lower than the highest proportion existing within the participating companies*”.

This means checking whether the draft agreement in question provides for a proportion of employees’ representatives on the administrative or supervisory body of the future SE<sup>174</sup> or of members of these bodies in whose appointment the SE employees or their representatives have a say<sup>175</sup>, which is lower than the highest proportion existing within the participating companies.

In this respect, the question can arise of determining the way of proceeding to this comparison between the situation pre-existing the constitution of the SE and the mechanisms which are being negotiated. Doubts can in fact occur when there are within the participating companies the two participation systems known in Europe: on the one hand, the German system of election or designation of a number or of a certain proportion of the members of the Administrative or of the Supervisory Board; on the other hand, the Dutch system of recommendation or of veto of the totality of the members of the Supervisory Board.

Both systems are not easily comparable in terms of qualitative intensity of the influence of employees in the decision-making process: should we give priority to the number of members representing the employees (and then, the Dutch system should always be considered the highest one, which would amount to saying that any agreement which does not reproduce it in the future SE should be considered in retreat in relation to the situation existing “before”)? Or should we give priority to the qualitative aspects of the representation (since electing or

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<sup>173</sup> See point 3 of Working Paper No 6 (definition of “participating companies”).

<sup>174</sup> The most common participation system in Europe, on the German model.

<sup>175</sup> The Dutch participation system.

designating a number of exclusive representatives seems more carrying, in terms of influence, than to recommend or to oppose the designation of all the members, mechanism which does not grant in fact any real exclusive representation)?

There is, it seems to us, a solution for this difficulty: it consists in taking as term of comparison that of the participation systems existing within the participating companies which is qualitatively identical to that which is to be negotiated to the SE. If negotiations are being oriented towards a system of participation of the German type, then it will be compared with the highest system of this type existing within the participating companies, by ruling out from this comparative exercise Dutch-type participation situations; if, on the contrary, a recommendation and veto system is being negotiated, then that arrangement should be compared with the situations existing within the participating companies which envisage this type of participation, other than with all the others.

This interpretation seems completely in line with the Directive and in particular with the final subparagraph of Article 3(4.) Let us recall the central aim of all these mechanisms (the protection of the acquired rights), which supports this position.

It does not regulate however all the possible situations of difficulty. *Quid* if the negotiated participation system is the Dutch and such a system does not exist within the participating companies? With what system should it then be compared and how? Or if the negotiated system envisages the election of representatives to the Supervisory Board of the SE and the participating companies, or some of them, have employees' representatives on the Administrative Board? Obviously, participation in the Administrative Board is more important than on the Supervisory Board. *Quid* still if the form of participation (election/designation or recommendation/veto) is the same before and after, the board in which it is exercised is the same, but it has less power in the SE than it had within the participating companies<sup>176</sup>?

It seems to us very difficult, or even abusive, to start making equivalence exercises between systems which are qualitatively different and to determine, for example, that to elect/designate half of the members would be equivalent to recommend/oppose the totality of the members, or that half of the members of the Supervisory Board would be equivalent to a third of the members of the Administrative Board, and so on. And on which basis could one do it, if the Directive does not provide for those types of comparative exercises?

The solution for those kinds of situations has consequently to be dictated on a case by case basis by the judicial authorities which may be seized for that purpose, in the light of the principles and of the objectives of the Directive, in particular that of the protection of the acquired rights.

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<sup>176</sup>For example, Article 39(2) of the Regulation allows Member States to envisage, in relation to the dualistic system, that the Administrative Board is designated by the General Meeting, in derogation from the general rule of this same article (and national laws endowed with a dualistic system), according to which it is designated by the Supervisory Board. One can very well conceive situations in which this faculty will be used.

In the same way that the various percentages giving rise to application of the triple qualified majority rule recur later in Article 7(2) (on the conditions for applying Part 3 of the Annex) the concept of "reduction of participation rights" also finds application outside the context of negotiated agreements, i.e. where the participation system to be applied within the SE is to be determined without an agreement. It is found in Part 3(b) of the Annex to the Directive, which makes provision precisely to this effect in stipulating that the proportion of members of the administrative or supervisory body of the SE must not be lower than the highest proportion in force in the participating companies.

This subject will be dealt with in more detail in the working paper concerning this provision of the Annex.

### 3.2 *Arrangements for consulting experts*

The possibility for the SNB to seek the assistance of experts during the negotiations is already recognised in Directive 94/45/EC in rather simple and limited terms: "For the purpose of the negotiations, the special negotiating body may be assisted by experts of its choice"<sup>177</sup>.

The corresponding provision of the present Directive is considerably more comprehensive. The following additions at least should be mentioned:

- the experts in question may be representatives of appropriate Community-level trade union organisations;
- at the request of the SNB, these experts may be present at negotiation meetings in an advisory capacity to promote consistency at Community level;
- the SNB may decide to inform the representatives of appropriate external organisations, including trade unions, of the start of the negotiations.

It is fairly obvious that the use of stronger formulae than those in Directive 94/45/EC is in response partly to certain problems experienced in negotiations on creating European works councils<sup>178</sup>, and partly to the wish expressed by the European trade union organisations to play a more active role in negotiations<sup>179</sup>.

Although the Community legislator has not completely satisfied the demands of the trade unions, which wanted a formal role in the negotiations (perhaps with full representatives on the SNB), their helpful contribution in the past has resulted in their explicit recognition in this Article.

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<sup>177</sup> Second subparagraph of Article 5(4) of Directive 94/45/EC.

<sup>178</sup> Some management bodies objected to the presence of experts at negotiation meetings, in our opinion without any legal basis. The present Directive clarifies this point.

<sup>179</sup> They had such a role in most of the procedures to set up European works councils, with obvious benefits which were also recognised by the companies in question.

### 3.3. Relinquishment by the SNB of a system of employee involvement for the SE

The possibility for the SNB to decide not to set up transnational employee involvement mechanisms is already recognised in Article 5(5) of Directive 94/45/EC in the following terms:

*“The special negotiating body may decide, by at least two thirds of the vote, not to open negotiations in accordance with paragraph 4, or to terminate the negotiations already opened.*

*Such a decision shall stop the procedure to conclude the agreement referred to in Article 6. Where such a decision has been taken, the provisions in the Annex shall not apply.*

*A new request to convene the special negotiating body may be made at the earliest two years after the abovementioned decision unless the parties concerned lay down a shorter period.”*

The differences between this wording and that of the present Directive (Article 3(6)) stem from the different background conditions of the negotiations.

- The triple two-thirds majority: this has already been explained in point 3.1.b) of this working paper and is attributable to the scale of the negotiating stakes covered by this Directive, with particular reference to the possible “participation” dimension.
- The non-application of this provision to cases of transformation into an SE. For obvious reasons, there are no equivalent circumstances in the context of Directive 94/45/EC.
- Reconvening the SNB requires a written request from at least 10% of the employees of the SE and its subsidiaries and establishments, or their representatives. This requirement has no parallel in Article 5(5) of Directive 94/45/EC. However, it is clear that the request to reconvene the SNB in order to set up a European works council must, like the initial request, be supported by at least 100 employees or their representatives. As the initial creation of the SNB is obligatory under the present Directive and does not depend on a specific request by the employees of the participating companies and their subsidiaries and establishments, it was necessary to introduce this kind of condition for submitting a new request following a decision not to proceed with the SNB, amongst other reasons in order to prevent abuse.
- In contrast to the situation under Directive 94/45/EC, failure of the negotiations following an SNB being reconvened does not trigger application of Article 7 or of the Annex to the present Directive. This radical solution was unavoidable, because the decision not to establish a system of employee involvement for the future SE is one of the factors to be taken into account by the participating company shareholders when deciding to set up the SE. It would be unreasonable to impose such a system subsequently, when the SE has already been formed.

### *3.4 Responsibility for the SNB's expenditure*

Article 3(7) of the Directive lays down rules on expenditure relating to the negotiation process, in identical terms to those applicable to an SNB formed under Directive 94/45/EC. There is no need for any particular observations or comments on this subject.

# ***GROUP OF EXPERTS "SE"***

## **WORKING PAPER N° 17**

23 June 2003

### **CONTENT OF THE AGREEMENT – Article 4 of the Directive**

The only difference in substance between Article 4 of this Directive and the corresponding Article 6 of Directive 94/45/EC, consists in the inclusion of the "participation" element (Article 4(2) point g). Other textual differences between the two provisions are not very important since they reflect formal modifications or another way of organising systematically the rules therein<sup>180</sup>.

Three subjects can be covered usefully within the framework of the analysis of this provision:

1. The content of the agreement: the autonomy of the parties
2. The form of the agreement
3. The special case of transformation

1. The content of the agreement: the autonomy of the parties

As it is the case under Directive 94/45/EC, there are almost no material limits to what parties can agree when they conclude an agreement under Article 4 of the Directive. Other types of limitations or, rather, conditions exist, but they are of a formal or a procedural nature. For example, an agreement envisaging an arrangement on participation of level a lower than the one existing within the participating companies requires a triple qualified majority, in derogation from the general rule of the double absolute majority within the SNB<sup>181</sup>.

But for the rest, and with the exception of the special case of transformation<sup>182</sup>, the autonomy of the parties is absolute, as indicated in the introductory words of paragraph 2 of Article 4<sup>183</sup> and

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<sup>180</sup>For example, the rules concerning the clauses concerning a procedure for informing and consulting employees, instead of establishing a European Works Council, which were the subject of a separate paragraph within Article 6 of Directive 94/45/EC, are now concentrated in point f) of Article 4(2). The marginal and not very frequent nature of the practice resulting from the application of Directive 94/45/EC certainly justifies that only a quick point is devoted to this possibility, very seldom exploited until now. Similarly, the voting rules within the SNB (Article 6(5) of Directive 94/45/EC) do not appear in Article 4 of this Directive, but have been moved to Article 3(4) and 6).

<sup>181</sup>See point 3.1.a) and b) of Working Paper n° 16.

<sup>182</sup>See point 3 of this Working Paper.

<sup>183</sup>"Without prejudice to the autonomy of the parties (...)".

reaffirmed in a conclusive way in paragraph 3<sup>184</sup>. Within the framework of the transposition of the Directive, it is important to preserve the freedom of negotiation which constitutes one of the fundamental principles of the Directive. Any restriction to this freedom introduced by the national laws not based on the Directive itself would therefore be unacceptable and contrary to its letter and spirit.

Such a question already arose under Directive 94/45/EC, based on what is today Article 137(1) of the EC Treaty. This legal basis provides for the establishment of minimum requirements at Community level. Consequently, more strict provisions, i.e., provisions more favourable to workers, are always admitted, as it is also recognised in paragraph 5 of this same provision of the Treaty.

Nevertheless, the analysis of the national provisions of transposition of Directive 94/45/EC shows that no Member State followed this path. The autonomy of the parties and the freedom of negotiation were respected to the same degree as in the Directive itself.

Limitations to contractual autonomy would, in any case, be even more difficult to accept under this Directive. It is relevant in this respect to recall the legal basis of the Directive, Article 308 of the EC treaty, a residual provision which confers to the Community a general competence for adopting appropriate provisions, *"if action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community and this Treaty has not provided the necessary powers, (...)"*.

Therefore, the negotiating parties can freely decide on the content of arrangements concerning each of the subjects mentioned in Article 4 paragraph 2 of the Directive. One of the main principles of the Directive consists in allowing the parties to define freely the rules which will bind them and Article 4 does not contradict this principle. As the Directive allows the parties not to conclude any agreement at all<sup>185</sup> it can not be interpreted as obliging them to define the clauses of the agreement in this or in that way. This is clearly stated in Article 4 paragraph 2, which, before enumerating the different elements of the agreement, states that *"Without prejudice to the autonomy of the parties, the agreement (...) shall specify (...)"*.

Therefore, we consider that the validity of an agreement cannot be challenged if it does not address one or more topics listed in Article 4 paragraph 2 of the Directive, at least if the ignored issues are not essential ones.

We are here very far from the establishment of minimum requirements at Community level allowing for provisions which are more favourable to the workers. The second recital of the preamble of the Directive mentions moreover the objective of the creation of a "uniform legal framework" with respect to the Regulation, but one could say the same concerning the Directive itself.

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<sup>184</sup> *"The agreement shall not, unless provision is made otherwise therein, be subject to the standard rules referred to in the Annex"*.

<sup>185</sup> See Article 3 paragraph 6.

One can therefore conclude that, apart from the special case of transformation, it would not be acceptable that Member States limit the freedom of negotiation as provided for in the Directive. The pure and simple transcription in the national provisions of the text of Article 4(2) is consequently strongly advised<sup>186</sup>.

This means that the list of points to be included in the agreement which appears in paragraph 2 is purely indicative and does not limit at all the possibility for the parties, either to ignore some of these elements validly, or to add others. The only possible consequence of such action would regard the voting rules within the SNB.

#### Changes occurred after the establishment of the SE

One of the subjects not mentioned in paragraph 2 and which would benefit from being treated within the framework of the negotiations concerns the adaptation of agreements to changes which occurred a later date within the universe of the SE and its subsidiaries and establishments. The experience of application of Directive 94/45/EC shows evidently that this is one of its main gaps.

In fact, at least at first sight, the rules of the Directive have been designed to apply only immediately before and at the moment when the SE is established. This static concept raises a number of problems for three main reasons:

- the SE will be a dynamic entity, which will go through changes (new mergers, acquisitions, disposal of some of its constituent parts, etc.); the question arises of predicting the impact of these changes on the system of employee involvement which had been conceived for the situation existing when the SE was initially established;
- once the SE is established and regardless of the form of its constitution (merger, holding, transformation, subsidiary) and of whether or not it has participation, it will never again be subject to national rules on participation which may apply to national companies in the country where the SE has its registered office;
- the SE will be a highly mobile entity: it will be able to change its registered office throughout the UE quite easily.

Therefore, there may be a need for the concerned parties to apply the rules of the Directive, which are designed mainly to protect the existing systems of participation, in a dynamic way and not only at the moment when the SE is established.

There are already two provisions in the Directive which address implicitly and partially this concern: Article 4.2.h) (on the content of the agreements), which states that the agreements should contain rules on its renegotiations, and Part 1.g) of the Annex (on a new negotiation 4 years after the representative body has been initially established). Nevertheless, these provisions do not address specifically the above mentioned problems.

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<sup>186</sup>At the time of the transposition of Directive 94/45/EC, the majority of the Member States followed this route.

The experience of applying Directive 94/45/EC shows that the resolution of thus type of problems is mainly done through agreements. The concerned parties may be better placed than national legislators to meet adequately to those challenges.

It could therefore be useful to include in the national provisions transposing paragraph 2 of Article 4, a reference to the ways of dealing with changes occurring after the creation of an SE, namely through new negotiations or provisions of automatic adaptation of the agreed clauses. In order to make the negotiating parties aware of the risks set out by these problems, it would be useful that the national provisions mention explicitly the three situations mentioned in Working Document n° 19 ("Misuse of Procedure") or, at least, that they refer in a general way the possibility for subsequent changes. This would constitute an alert to the negotiating parties on the possible occurrence of the changes.

The treatment of the changes occurred without misuse should be limited to this kind of reference, as the Directive does not go further than that.

## 2. The form of the agreement

Article 4 does not mention it, but Article 3(3) of the Directive is clear: the agreement concluded between the SNB and the competent organs of the participating companies must be in writing.

Neither does the Directive prescribe other formalities, pertaining, for example, to the determination of a sufficient majority within the SNB<sup>187</sup> or to the signatures. It seems nevertheless useful to have the original of the agreement signed by the representatives of the competent organs of all the participating companies as well as by all the members of the SNB or, at least by those of its members which approve it<sup>188</sup>. It would also add to legal certainty if the agreement should be incorporated or attached to the minutes of the meeting in question and if those minutes include a reference to the positions taken by all the members of the SNB or, in any case, to the favourable position of a sufficient majority of them (and of workers represented). It is up to national laws to fix the details of these formalities.

## 3. The special case of transformation

Article 4(4) of the Directive stipulates clearly in an imperative way that, in the case of transformation, it is not possible to reduce the level of workers' involvement, in all its elements, which exists within the company which is being transformed into an SE.

This insurmountable limit to the autonomy of the parties explains why Article 3(4), regarding the methods of voting within the SNB, does not deal with the transformation when it addresses the issue of the reduction of participation rights<sup>189</sup>. Thus point a) of part 3 of the Annex of the

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<sup>187</sup>Variable according to the clauses agreed (see Working Paper n° 16, point 3).

<sup>188</sup>As a means of demonstrating that there was a sufficient majority in favour, as required by Article 3 paragraph 4.

<sup>189</sup>And, following the same orientation, Article 3(6) third sentence forbids the SNB not to start negotiations or to close negotiations already started.

Directive, concerning the standard rules for the participation, stipulates that the system existing within the company which is being transformed into an SE undergoes no modification during this process.

As for the participation, things are clear: the agreement can only maintain or increase the level existing within the participating company. This is a necessary provision since, in accordance with Article 13(2) of the Directive, the national provisions which applied to the company being transformed into an SE do not apply to it henceforth.

This rule, seemingly simple, can raise practical difficulties of interpretation which should be analysed.

In fact, it does not seem to prevent in theory changes in the participation system occurring at the time of the transformation into an SE of a public limited liability company governed by such a system. It may happen, for example, that there is a change in the system of governance of the company, from the monistic system to the dualistic system or vice versa.

If the transformed company was governed by a monistic system and the SE has a dualistic one, it seems obvious that the influence of the employees' representatives will be reduced, even if their number or their proportion remains the same. In fact, the Administrative Board plays normally a much more important and active role in the management of companies than the Supervisory Board.

Even without any change of governance system, one can imagine situations of reduction of the qualitative weight of participation with the maintenance of its quantitative level. For example, the powers conferred in the statutes to the organ in which the employees will be represented can be more limited than what they were in the transformed company<sup>190</sup>.

The two evoked situations (but other examples could be quoted) reflect a real reduction in the intensity of the participation at the time of the transformation. The wording of Article 4(4) of the Directive is however formal: any agreement concluded between the competent organ of the participating company and the SNB has to envisage at least an equivalent level of involvement of employees.

These terms are broader than those used in Article 3(4) of the Directive to specify what is deemed to be a "reduction of the participation rights" (which is relevant for the determination of the methods of vote within the SNB). There, the only criterion is that of the proportion of members of the organs in question, other than any other weakening factor of those rights. Here, one must take into account not only the proportion of members but also

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<sup>190</sup>Article 39(2) of the regulation gives us a good example of such a situation. While providing for the general rule according to which members of the Administrative Board are designated by the Supervisory Board (the most current situation in the countries where the dualistic system dominates), this provision allows Member States to confer this power to the General Meeting or to allow the Statutes of the SE the possibility of doing so. If this faculty is used (and it will probably be), it may be that the employees' representatives in the Supervisory Board have, by virtue of this simple fact, their role considerably decreased.

other variables which can influence the way in which the employees' representatives are involved in the functioning of the company.

Therefore, situations such as those evoked fall necessarily within the scope of Article 4(4) of the Directive. Consequently, an agreement which reflects this type of weakening of the employee involvement would be contrary to this provision.

Nevertheless, the qualitative level of employee involvement has to be appreciated in a global way. It seems acceptable that the reduction in the intensity of participation as a result of the choice of the dualistic system instead of the monistic system or of the reduction of the powers of the organ in which participation is exercised may be validly compensated by a strengthening of participation with regard to other elements (for example, a higher proportion of representatives in the Supervisory Board of the SE as compared with the proportion existing before in the Administrative Board of the national company which is transformed into an SE).

This limit to the autonomy of the parties concerns not only participation but also information and consultation of workers ("*all elements of employee involvement*"). This amounts to saying that the agreement can only report the situation existing in this field within the participating company and reproduce it within the future SE.

The usefulness of this rule with regard to the dimension "information and consultation" is less obvious than it is for the "participation" element. In any event, the national provisions on information and consultation of workers must apply to the SE, in accordance with Article 13(3) a) of the Directive.

The transposition in national law of this provision of the Directive does not seem to raise any particular problems; a literal transcription seems sufficient and appropriate.

It remains however to analyse the consequences resulting from the conclusion of an agreement in violation of Article 4(4.) In general, such an agreement must obviously be considered null and void and, consequently, lead to application of the Annex of the Directive. The national implementation laws should provide for this explicitly.

# ***GROUP OF EXPERTS "SE"***

## **WORKING PAPER N° 18**

9 March 2003

### **CONDITIONS FOR APPLYING THE STANDARD RULES – Article 7 of the Directive**

#### Questions to be analysed:

1. Do the conditions for applying the standard rules of the Annex referred to in paragraph 2 of Article 7 also apply in the case referred to in Article 7(1)a)? In other words, if the parties limit themselves to agreeing to apply the Annex, without any precise details, do the conditions concerning the percentages still apply?
2. Can the participating companies decide not to apply the standard rules and, despite that, continue with the registration of the SE? (*question already discussed at the previous meeting*)
3. Article 7(2) a) (transformation): when applying this provision, shall only legally-based forms of participation, and therefore binding, be taken into account, or shall also those originating from collective agreements or situations *de facto* be included? (*the question was mentioned in Working Paper n° 15-Rev 1 – definition of "participation"*) What must be done to clarify the situation?
4. Article 7(2) b) and c): when calculating the percentages referred to in these provisions, shall we take into account only the employees from the participating companies or shall we also include the employees from their subsidiaries and establishments when the participation is organised at group level? (*the question was mentioned in Working Paper n° 6-rev 3 - definition of "participating companies"*).
5. Article 7(2) b) and c), second indent: at which moment and how shall the SNB exercise its right to make the standard rules applicable?
6. Article 7 last subparagraph: at which moment and how shall the SNB choose the form of participation to be introduced in the SE? And what is meant by "more than one form of participation"? How to reconcile this right granted to the SNB with the possibility for the Member States to define rules if no decision has been taken by the SNB? Are there any limits to this faculty conferred to Member States?

7. If a Member State makes use of the faculty referred to in Article 7(3), do the prohibition to register the SE provided for in Article 12(3) of the Regulation apply for all SEs, whatever the form of establishing it and even if there is no participation within the participating companies, or does it apply exclusively to the SEs concerned by Article 7(2) b) of the Directive?

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Article 7 of the Directive corresponds to the same provision of Directive 94/45/EC. Its wording is however much more complex, since paragraphs 2 and 3 are added, providing for additional conditions for the application of the standard rules laid down in the Annex.

These additional conditions make a distinction between the various forms of constitution of the SE (transformation, merger and holding/common subsidiary), as well as, concerning the last two cases, according to the relative weight of participation within the participating societies. The complexity of the provision results from these nuances.

A great deal has already been said on the *ratio* of this modulation (see especially point 3.1 of Working Paper n° 16-Rev 2). There are however certain specific points in the various paragraphs of Article 7 which cause some interpretation doubts.

1. Article 7(1) and (2) (in combination)

Concerning the application of paragraphs 1 and 2 of this Article, one can wonder if the conditions for the application of the standard rules of the Annex referred to in paragraph 2 also apply in the case referred to in Article 7(1) a)<sup>191</sup>. In other words, if the parties limit themselves to agreeing to apply the Annex without more precise details, do the conditions relating to the percentages still apply?

A literal interpretation would lead us to conclude at first sight that the additional conditions for applying the standard rules stipulated in paragraph 2 are fully cumulative with each of the two situations provided for in paragraph 1.

Then, if, at the end of the negotiations referred to in Article 3, instead of defining themselves the future mechanisms for employees' involvement, the parties limit themselves to referring to the Annex<sup>192</sup>, it would seem that it would apply nevertheless only if the additional conditions of paragraph 2 are also present.

Such an interpretation seems abusive since it can contradict the parties' wishes. In this particular case, the fact generating the application of the provisions of the Annex is the joint will of the parties to do so, i.e., an agreement between them. All occurs therefore as if negotiations led to a result, but the parties would be satisfied with the standard model of the Annex<sup>193</sup>.

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<sup>191</sup> Concerning paragraph 2, it seems obvious that they apply, see the continuation of the text.

<sup>192</sup> The situation, although rare, is not theoretical. Under Directive 94/45/EC, the only known case of application of the standard rules of the Annex resulted precisely from a similar decision.

<sup>193</sup> They can be more interested in doing so than under Directive 94/445/EC, in view of the tight

But, if the agreement is generating fact, then the correct interpretation of the will of the parties must prevail over any other consideration: did they want the concrete mechanisms of information, of consultation and, if any, of participation or did they want also to accept all the conditions for the application of these provisions? Unless there are explicit or implicit elements in the agreement in question making it possible to retain this second option, it seems to us that these additional conditions do not apply.

In any event, the parties which will decide to use this mechanism have all interest in clarifying their intentions in the text of the agreement.

## 2. Article 7(1) b) first indent

Another question which deserves examination is that of the exact scope of the expression "*that the competent organ of each of the participating companies decides to accept the application of the standard rules in relation to the SE and so to continue with its registration of the SE (...)*" in Article 7(2) b).

These terms can give the impression that the participating companies are in a position to decide in last resort if the SE will or will not have a participation system, even in situations where the application of the remaining part of Article 7 would impose it. Such an interpretation is also abusive.

A more attentive reading of this provision as well as the taking into account of all the elements of interpretation available (the spirit of the texts, the legislator's intention) guides us to the conclusion that this freedom of decision exists, indeed, at the psychological level, but not at the normative level.

The term "so" indicates clearly that such a choice by one or more participating companies is indissolubly associated with a renunciation of the constitution of the SE. The participating companies can indeed not accept participation, but only through such a renunciation.

One could always ask why this has been stated in this provision, if this ultimate power of the participating companies is in any event obvious. According to the Regulation, it always rests, in an exclusive way, with the general meetings or with other organs of those companies to decide to establish or not to establish the SE. It is the obvious nature of this power which in fact gives rise for certain interpretations according to which the power recognised to the participating companies in Article 7(2) b) aims at the exclusion of participation in an SE to be established.

The embroiled drafting of this provision contributes to that confusion. A close look to the preparatory deliberations of the Council makes us conclude however that, more than a legal rule, the Council wished to send a political message in order to strengthen the emerging consensus. In fact, one of the arguments used by the opponents of the compromise which was being shaped

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deadlines imposed on the negotiation and of the urgency in establishing the SE in a particular case. The parties would arrive to the same result by refraining from concluding an agreement, but then the participating companies should be obliged to wait the end of the six-month deadline for negotiations referred to in Article 5(1) of the Directive.

within the Council during the last two years of the debates consisted in arguing that it would not be suitable to impose participation to participating companies against their will, in particular in situations where participation was not dominant within them. The expression in question highlights the ultimate power of the participating companies do decide on this. This can certainly be criticised from a point of view of legislative technique, but it played an important role in the creation of the political conditions for the final adoption of the text.

In any event, the national transposition provisions will clarify the situation. It will rest with them to lay down the conditions for application of the standard rules in full accordance with Article 7 of the Directive, thus defining the legal framework which will apply to the SE governed by each national law. A good way to clarify the situation would consist in simply ignoring the political message contained in this provision of the Directive, *i.e.*, the words "(...) *to accept the application of the standard rules in relation to the SE and so (...)*".

### 3. Article 7(2) a)

In connection with Article 7(2) a) (transformation), one can wonder if only legally binding forms of participation must be taken into account, or if also those resulting from agreements or of *de facto* situations must be considered.

The question was mentioned in Working Paper n° 15 (definition of "participation" - Article 2 k)). We concluded then that it would be unduly restrictive to limit the protection granted in the Directive to systems of participation imposed by law. Were we to accept such a restrictive interpretation in the framework of the current provision, we would do it, moreover, precisely in the case which undeniably receives stronger protection in the Directive<sup>194</sup>, the case of transformation<sup>195</sup>. This would go against the spirit of the text.

When transposing this provision, it would therefore be useful to clarify the situation, by using for example for the transformation the broader terms which are used for the other forms of establishing an SE in points b) and c) of this same paragraph.

### Article 7(2) items b) and c)

In connection with the first indent of these provisions, the following question arises: with regard to the calculation of the percentages referred to in those provisions, must we take into account only the employees of the participating companies or also the ones of their subsidiaries and establishments, when the participation is organised at group level?

The question was tackled in point 3 of Working Paper n° 6 Rev 3 (definition of "participating companies" - Article 2 b)). We then mentioned the problems which can arise if only the employees of the participating companies are taken into account when the participation is organised the level of the group.

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<sup>194</sup>See point 3 of the Working Paper n° 17 and all the examples there evoked of increased protection of the participation systems in the case of an SE constituted by way of transformation.

<sup>195</sup>For the other forms of constituting an SE, b) and c) of this same paragraph refer to the forms of participation existing within the participating companies, which covers, without possible dispute, situations of conventional origin and situations *de facto*.

The problem can in fact occur in two different situations:

- When the participating company is not, itself, governed by a system of workers' participation in its social organs, but it is part of a group of companies with participation. Employees' representatives sit then at the Administrative Board or at the Supervisory Board of the mother company of the participating company.
- When participation is organised done at the level of the participating company, but covers also its subsidiary companies, thus benefiting also the employees of the latter.

In the first case, it seems possible to argue that one is in the presence of a situation in which *"one or more forms of participation applied in one or more of the participating companies"*, within the meaning of the first indents of point b) and c) of paragraph 2 of Article 7. The definition of "participation" which appears in Article 2 k) of the Directive consolidates this opinion, because as the word "company" is used therein in an abstract way.

As for the second situation, it seems more difficult to argue that it falls within the scope of the above mentioned provisions. These provisions mention explicitly *"the employees in all the participating companies"*. Unless it is concluded that it is possible to include among those the employees of their subsidiaries through recourse to a broad employment concept which would also cover "indirect" employment, such a conclusion would seem excessive.

Naturally, such an interpretation may give rise to well-founded doubts. It must nevertheless be recognised that if employees of the subsidiaries of the participating companies are not taken into account when they are the dominant company of a group governed by the participation, the protection for the systems of participation, which constitutes one of the declared objectives of the Directive, can be emptied of content.

The transposition of the Directive in national laws will perhaps clarify this question.

With regard to the second indent of Article 7(2) b) and c), the question arises of determining the moment at which SNB shall exert its right to make the standard rules applicable and how it should do it.

There too, the national transposition provisions should specify the way in which such a deliberation will take place. It seems obvious that there will be a moment towards the end of the negotiation process where an acknowledgement of failure will have to be made and that it is impossible for the parties to conclude an agreement. If the requirements are fulfilled, the SNB must then have the possibility of deliberating on the possible application of the standard rules of the Annex.

#### 4. Article 7(2) last subparagraph

If negotiations fail, if all the conditions for applying the standard rules are present and if there are, within the participating companies, different forms of participation within the meaning of

both indents of Article 2 k), it will be up to the SNB to choose amongst those forms the one that will govern the SE within the framework of the application of the standard rules.

Let us recall that the two forms of participation in question are of an essentially different nature: in one case, the employees or their representatives are entitled to elect or to designate a certain proportion of the members of the Administrative Board or of the Supervisory Board, those members representing exclusively the employees; in the second case, the employees or their representatives are entitled to recommend or oppose the designation of a part or of all the members of one of those boards<sup>196</sup>.

As they may be cases where there is no agreement and the standard rules themselves do not solve the issue, a mechanism had to be envisaged making it possible to choose the system to be established in the future SE.

After long discussions, the Council agreed finally on the rule according to which the decision belongs to the SNB. Other solutions envisaged at the time, such as that of the majority system<sup>197</sup> or that of the country of the seat<sup>198</sup>, were rejected, in the absence of sufficient support.

Determining when and how the SNB can choose the form of participation to introduce in the SE when the circumstances evoked above are present must obligatorily be a subject for the national provisions transposing the Directive. These provisions can, moreover, envisage subsidiary mechanisms which will apply in the absence of a deliberation of the SNB<sup>199</sup>.

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<sup>196</sup> In fact, in the unique known system alone of this type, the Dutch system, this recommendation and veto rights concern all the members of the Supervisory Board.

<sup>197</sup>With two possible versions: one would choose that of the two systems of participation which covers the largest number of workers of the participating companies or that which grants employees the most extended representation within the organs of a company.

<sup>198</sup>The system would then be the closest to that prevailing in the country where the SE is established.

<sup>199</sup>As often in Community Directives, requests from Member States which were not met (see previous note) transfigure themselves, in the framework of a compromise, in options which are left to them on a subsidiary basis in relation to the solution finally agreed.

# ***GROUP OF EXPERTS "SE"***

## **WORKING PAPER N° 19**

23 June 2003

### **MISUSE OF PROCEDURES – Article 11**

Article 11 of the Directive obliges Member States to take appropriate measures with a view to prevent the misuse of an SE for the purpose of depriving employees of rights to involvement or withholding such rights.

The issue of misuse of an SE is close, with regard to its constituent circumstances, to the one of changes occurred after the establishment of an SE concerning the structure or the perimeter of the undertakings and establishments it controls. In the majority of cases, such misuse will become palpable through subsequent changes, but not all changes can be characterised as misuse.

On the other hand, regardless of any demonstrated intentional misuse from the part of the participating companies, those subsequent changes may highlight the fact that the arrangements for employee involvement would be different if they were negotiated or applied as subsidiary rules taking into account those new circumstances.

It is therefore useful to characterise with precision those two situations and to distinguish the cases of misuse, which require specific mandatory rules according to Article 11 of the Directive. In the final part of point 1 of Working Document n° 17 ("Content of the agreement"), we have dealt with the question of changes occurred after the establishment of the SE without any misuse of procedure. Therefore, we will limit ourselves now to the question of how to deal with misuse in the meaning of Article 11 of the Directive.

As mentioned in point 1 of Working Document n° 17 ("Content of the agreement"), at first sight, the rules of the Directive have been designed to apply only immediately before and at the moment when the SE is established. This static concept raises a number of problems for three main reasons:

- the SE will be a dynamic entity, which will go through changes (new mergers, acquisitions, disposal of some of its constituent parts, etc.); the question arises of predicting the impact of these changes on the system of employee involvement which had been conceived for the situation existing when the SE was initially established;
- once the SE is established and regardless of the form of its constitution (merger, holding, transformation, subsidiary) and of whether or not it has participation, it will never again be subject to national rules on participation which may apply to national companies in the country where the SE has its registered office;

- the SE will be a highly mobile entity: it will be able to change its registered office throughout the UE quite easily.

Those circumstances may result from the normal evolution of the SE, regardless of any deliberate intention of the participating companies or of the management of the SE of taking advantage of the limits of the Directive with a view to circumvent its rules and principles. Those are the kind of situation mentioned in the Working Document n° 17. But other situations might arise which may indicate that there was such an intention. Here are some examples:

- First example: in order to avoid the application of subsidiary rules on participation, two companies governed by participation establish a SE, not directly, but through some of their subsidiaries not governed by participation, located in the same or in another MS. Therefore, participation is not introduced in that SE, which may then easily acquire a dominant position (or merge nationally) over their controlling companies without having to introduce participation.
- Second example: if a company from a Member State without participation rules or from a third country wishes to establish itself or operate in a participation country, it is obliged, up to now, to incorporate in this country and be subject there to the participation rules in force, like any other national company. The SE will give this company the possibility of (1) transforming itself into an SE (without participation) and then (2) transfer its registered office to the participation country, where it will not be subject to any kind of participation.
- Third example: a SE is established without participation just because at that moment there was no participation in the participating companies due to the fact that the national thresholds were not met. The SE may then increase freely its workforce and the one of its subsidiaries and establishments above these thresholds without being subject to participation. The same result may occur if the non application of the standard rules on participation was due to the fact that, at the time of establishing the SE, the percentages provided for in Article 7(2) were not fulfilled and the situation changes at a later stage.

These are examples of ways of establishing an SE which may fall within the scope of Article 11 of the Directive.

Article 11 allows Member States to take any necessary measure in order to prevent the misuse of an SE to deprive employees from their involvement rights. In fact, more than allowing for it, Article 11 obliges Member States to take those measures, as indicated by the use of the verb "shall"<sup>200</sup>.

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<sup>200</sup> It is not established, far from it, that all situations that could arise with regard to subsequent changes integrate the concept of intentional abuse, that is, of deliberate configuration of the initial operation of creating an SE in order to diminish or exclude the application of part 3 of the Annex. These changes can occur simply as a result of the normal evolution of the SE, not necessarily predictable from the beginning.

Different solutions could be envisaged for attaining that purpose, but it seems of utmost importance to ensure that all Member States answer to those challenges in the same way. Otherwise, companies and their employees would be discriminated according to the Member State where the participating companies are located and/or where the SE has its registered office.

A possible uniform solution for the above mentioned problems could consist in applying the principles and the mechanisms of the Directive (the "before after approach" and the protection of existing rights) not only at the moment of the establishment of the SE but throughout its life, i.e., each time that a substantial change in the structure (new acquisitions, new mergers, etc.)<sup>201</sup>, in the workforce and/or the location of the SE (through the transfer of the registered office) intervenes and alters the reference framework for negotiations<sup>202</sup>. This would only be the case when it has been demonstrated that the participating companies have specifically conducted the initial operation of establishing the SE with the purpose of depriving employees of involvement rights to which they would be entitled if that operation was conducted taking into account those changes.

This means that, once the misuse is proved, a new negotiation should take place if these three types of changes would, were they present at the time the SE was established, have led to a different solution with regard to the application of Part 3 of the Annex. This will be the case if Part 3 of the Annex did not apply at the moment when the SE was established because there was not initially any company with participation and then:

- one or more companies with participation are acquired or merge with the SE; or
- the number of workers employed by the SE or one of its subsidiaries increases above the participation threshold in the country concerned; or
- the new location of the SE resulting from a transfer of the registered office to a participation country would mean that the SE would have been subject to Part 3 of the Annex had it been established initially in that country.

If the new round of negotiations does not lead to an agreement, then the Annex should apply, but the "before-after" approach should be applied with reference to the moment where those new negotiations fail and with regard to the SE, its subsidiaries and establishments and not anymore with reference to the situation existing before the establishment of the SE and with regard to the participating companies.

The proof of the misuse should be provided according to the general rules in this field. Taking into account, however, of the predictable difficulty of such a proof, it seems useful to establish a presumption of misuse when the above mentioned changes occur shortly after the registration of the SE (say, during the first year of life of the SE). The SE proving to the contrary could obviously overrule that presumption.

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<sup>201</sup>In fact, this has been already implicitly recognised during the debates in the Council, leading to what is now Article 11 of the Directive.

<sup>202</sup> A mechanism similar to that one has been introduced in the draft Directive on the European Co-operative Society (Article 8(3)).

In translating these ideas in the text of the national laws implementing the Directive, care must be taken to devise simple and practical solutions and to avoid forcing SEs to live in a situation of permanent negotiation and legal uncertainty on the rules which might apply to them (some European companies simply acquire or sell subsidiaries every week or so)<sup>203</sup>.

To keep it simple, the ideal solution would be to have one provision providing for:

- a renegotiation in the above mentioned cases; and
- the dynamic application of Part 3 of the Annex if those negotiations fail.

This provision would have to be complemented with a specific provision related to Part 1(g) of the Annex (in order to apply these same principles to SE governed by the Annex), as well as an adaptation of Part 3 of the Annex.

A final remark: up to now, we have dealt only with situations where the misuse to which Article 11 refers manifests itself through subsequent changes. Such a misuse can however take place (and be demonstrated *a posteriori*) regardless of subsequent changes. Therefore, the relevant provisions should also mention this possibility (see paragraph 4).

This provision implementing Article 11 of the Directive could read as follows:

*"1. If, after the registration of the SE, substantial changes occur within the SE, its subsidiaries and establishments indicating that the operation of establishing the SE has been initially shaped with the purpose of depriving employees of involvement rights or withholding such rights, new negotiations shall take place. These negotiations shall be governed by the following rules:*

- a) they shall take place, at the request of the representative body or the employees' representatives of new subsidiaries or establishments of the SE;*
- b) Articles 3 to 7 apply mutatis mutandis, the references to participating companies being replaced by references to the SE, its subsidiaries and establishments, the references to the moment before the registration of the SE being replaced by references to the moment when negotiations fail and the term "special negotiating body" being replaced by "representative body".*

*2. Within the meaning of paragraph one, substantial changes mean a change:*

- *in the structure of the SE, its subsidiaries and establishments, or*
- *in the number of employees employed by the SE, its subsidiaries and establishments,*  
*or*
- *in the location of the registered office of the SE,*

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<sup>203</sup>By the way, this was one of the main reasons which lead the Davignon Group to set aside the full application of the "before-after approach" and to propose a uniform model of participation applicable to all SEs (in this case, these kinds of problems would not arise).

*which would have entailed, had these new elements been present before the SE was established and had negotiations held at that time failed, a different solution as regards the application of Part 3 of the Annex according to Article 7."*

*3. Without prejudice to proof to the contrary, the changes referred to in the previous paragraph presumptively indicate an intention to shape the operation of establishing the SE with the purpose of depriving employees of their involvement rights or of withholding such rights when they occur in the year following the registration of the SE.*

*4. The new negotiations provided for in paragraph 1 will also take place when it is manifested by means other than subsequent changes that the SE has been established to deprive employees of their involvement rights or of withholding such rights.*

The implementation of Part 1(g) of the Annex should include a provision as follows:

*"However, if the conditions referred to in Article ... (the previous provision) are met, these negotiations shall take place in the cases, at the time and under the conditions laid down in this latter provision."*

The implementation of Part 3 of the Annex should include a provision as follows:

*"In the cases referred to in Article... (the first provision above) and Article ... (the second provision above), the rules laid down in the subparagraphs above shall apply mutandis mutandis, the references to participation companies being replaced by references to the SE, its subsidiaries and establishments and the references to the moment before the registration of the SE being replaced by references to the moment when negotiations fail."*

# ***GROUP OF EXPERTS "SE"***

## **WORKING PAPER N° 20**

11 March 2003

### **RELATIONS WITH OTHER PROVISIONS –Article 13 of the Directive**

Article 13 of the Directive organises the relationship between the obligations arising from it and those arising from other Community Directives on involvement of the workers. These reports are, in certain cases, cumulative, in other cases, excluding.

Simplifying, and subject to the precise details *infra*, this Directive:

- precedes and rules out Directive 94/45/EC (European works councils)<sup>204</sup> and the national provisions on participation<sup>205</sup>;
- does not rule out the application of the national provisions as regards information and consultation<sup>206</sup>.

The plan is easy to understand: the object of this Directive being the definition of mechanisms of information, of consultation and of participation at the transnational level to be introduced in the SE and in the group of companies that it controls, the cumulative application of Directive 94/45/EC and of the national provisions on participation would be a duplication. On the other hand, other levels of information to and of consultation of the workers (national group, undertaking, establishment), which do not fall within the scope of this Directive, must remain applicable, not only to the SE itself but also to all its subsidiaries and establishments<sup>207</sup>.

The same thing concerning the participation, a subject which is regulated in this Directive. The national provisions in this matter would be redundant, if they applied to the SE. Nevertheless, they remain applicable to its subsidiaries<sup>208</sup>, since this Directive does not deal with what occurs at the level of these subsidiaries.

A precision is necessary concerning paragraph 1. Directive 94/45/EC does not apply to the SE in the case where the SE is a company of Community dimension or the controlling company of a group of companies of Community dimension, within the meaning of this

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<sup>204</sup>Paragraph 1.

<sup>205</sup>Paragraph 2.

<sup>206</sup>Paragraph 3a).

<sup>207</sup>It also is the case of Directive 94/45/EC which challenges by no means other levels of information and consultation – see Article 12 of Directive 94/45/EC.

<sup>208</sup>Paragraph 3b).

Directive. If it does not have one of these qualities, Directive 94/45/EC remains applicable (if, of course, it fulfils the requirements laid down there, for example as regards thresholds of manpower).

Two examples can help us to distinguish both situations. Let us imagine two companies controlling two groups of Community size companies, each one of them having a European works council, which merge to constitute an SE. If each group, i.e., all the subsidiaries and establishments of these two companies, are concerned in the operation and become subsidiaries or establishments of the SE, then the conditions of paragraph 1 are totally fulfilled and Directive 94/45/EC is no longer applicable.

But, if the merger concerns only some subsidiaries of these groups (for example, those in charge of the research activities, or those belonging to a sector, to a branch, to a product line or to a region), then the remaining parties, not concerned with the operation and which therefore will not be under the control of the SE resulting from the merger, will keep the right to continue having a European works council, possibly adapted according to the changes<sup>209</sup>.

Moreover, Directive 94/45/EC remains still applicable to the SE if the SNB took the decision referred to in Article 3(6), which consists in not opening negotiations or terminating negotiations already open. It is what Article 13(1) stipulates second subparagraph, in all logic, moreover, since in this case there will be no duplication.

Lastly, paragraph 4 aims other problems: those of the survival of the representation structures existing before the SE and which can, in absence of specific measures, disappear. The most obvious case which comes to mind is that of a central works council which would no longer have the existential base if the company in question disappears as an autonomous legal entity while merging with others to constitute an SE. The same effect could occur with a council of a national group, if the group is transformed into a network of establishments by the constitution of the SE.

Paragraph 4 enables the Member States to take the measures necessary to guarantee the maintenance of these representation structures. Taking up again the situations evoked above, Member States can for example assimilate the establishment or establishments of the SE located on its territory to a company concerning the application of the provisions envisaging the establishment of a central works council or of a council of the group.

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<sup>209</sup> Provided that the thresholds of manpower are respected.

# ***GROUP OF EXPERTS "SE "***

## **WORKING PAPER N° 21**

23 June 2003

### **STANDARD RULES – Annex of the Directive**

#### **Part 1: Composition of the body of the workers' representation**

We will only underline here the provisions which are materially different from those of the corresponding part of Directive 94/45/EC<sup>210</sup>:

- Point b) second subparagraph:

This subparagraph establishes the principle of the adaptation of the representative body to changes occurred in perimeter of the SE and its subsidiaries and establishments. These problems were evoked several times in other working documents<sup>211</sup>, which exempts us from further comments.

- Point e):

The geographical and proportional criteria for the distribution of the seats within the representative body are the identical to the ones provided for in Article 3(2)a), concerning the composition of the SNB. The comments made in connection with this provision are fully valid in the context of the representative body.

#### **Part 2: Reference provisions for information and the consultation**

1. Point a):

The competence of the representative body is broader than those conferred on European Works Councils. This point establishes a concept of "transnational questions" which goes much further than that that found point 1 of Part A of the annex to Directive 94/45/CE which requires that the question concerns at least two companies or establishments of the group located in two different Member States.

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<sup>210</sup>Other differences exist but they result from the different contexts of both directives and are, consequently, obvious.

<sup>211</sup>See, for example, point 1.8 of Working Document n° 16, point 1 of Working Document n° 17 and Working Document n° 19. The underlying questions are the same here.

This directive widens this "transnationality" concept. It is sufficient that the question concerns a Member State other than the one where the SE has its registered office or that it exceeds the powers of local management for it to fall under the competence of the representative body.

2. Point b) second subparagraph:

The obligation envisaged in this provision of deliverance to the representative body of the agenda of all the meetings of the organs (Administrative or Supervisory Board And Board of Directors), as well as of all the documents submitted to the General Meeting, constitutes an important innovation with substantial practical effects as compared to Directive 94/45/EC.

3. Point c) second subparagraph:

This provision has two great differences in relation to the relevant provision of Directive 94/45/EC: on one hand, it envisages the carrying out of a second meeting when the competent organ does not follow the opinion of the representative body; on the other hand, this meeting has as an objective stated in the Directive the search for an agreement between the two parties.

There is not there any obligation of result. In its judgement of 12 February 1985<sup>212</sup>, concerning similar terms of the "Collective Redundancies Directive", the European Court of Justice specified it, in particular in point 10 of the reasons:

*"(...) the directive does not affect the freedom of the employer to proceed or to carry out collective redundancies. Its only objective is to have these redundancies preceded by a consultation with the trade unions and by the information of the competent public authority (...)"*.

4. Point g):

This provision provides for the right for the members of the representative body to benefit from training leave without loss of wages.

### **Part 3: Reference provisions for the participation**

The provisions of the part 3 of the annex constitute the logical consequence of all the provisions of the Directive on negotiation<sup>213</sup> and on the conditions for the application of the standard rules<sup>214</sup>. The reasons which led the Council to choose as a reference model as

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<sup>212</sup>Judgement of the Court (fifth chamber) of 12 February 1985, case 284/83, Dansk Metalarbejderforbund and Specialarbejderforbundet i Danmark against H. Nielsen & Søn, Maskinfabrik A/S, in bankruptcy, preliminary ruling request: Højesteret - Denmark. 1985 case law p. 553 collection.

<sup>213</sup>Articles 3 to 6.

<sup>214</sup>Article 7.

regards participation the highest existing system within the participating companies were amply evoked in other working documents.

The obscure drafting of before last subparagraph of the text causes perplexities. It is far from constituting a good example of clarity. It is difficult in particular to distinguish at first sight, as one reads the successive sentences, the respective role of the representative body and the Member States with regard to the distribution of the seats in the Administrative or the Supervisory Board and the way in which the employees' representatives are designated.

The provision does not say neither who elects or designates the employees' representatives in the SE organs and how they are elected or designated. The only reference made therein consists in the faculty given to Member States of determining how the seats allocated to them (if more than one) are to be distributed amongst the different units.

The interpretation which appears the most viable one and the most in line with the letter of this provision is as follows:

A. The distribution of seats amongst Member States

- It first of all rests with the representative body to proceed with the geographical distribution of the seats to which workers are entitled in the organ in question (Administrative Board or Supervisory Board); in doing this, the representative body has to respect a proportionality criteria in relation to the number of workers employed by the SE and its subsidiaries and establishments in the various Member States.
- If, as a result of that distribution, one or more Member States in which the SE and its subsidiaries and establishments employ workers does not have any representative, one of the seats distributed by the representative body in accordance with a proportionality criteria will be allocated, firstly, to the Member State where the SE has its registered office), secondly (if that Member State already has a representative), to the one employing more employees.
- The seat which is reallocated will be, as decided by each Member State<sup>215</sup>, either one of those initially attributed to the a which has more than one (if any), or a seat which will be reserved for that purpose, in which case, the proportional distribution of seats will concern all but one seat.

B. Distribution of seats within each Member State

The Directive allows Member States to determine the allocation of seats it is given amongst the units (the SE and its subsidiaries and establishments) under its jurisdiction. Of course, such a possibility only exists when a Member State is given more than one seat. If a Member State opts to do so, the relevant provision will clearly be an "accessory" one.

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<sup>215</sup> The opinions of the members of the Expert Group on this issue are divergent, indicating that there will be different rules in different countries.

### C. Election or designation of the members

The Directive is completely silent on this. Therefore, it is possible that some Member States decide to charge the representative body of this task<sup>216</sup>, while others charge the employees of doing it<sup>217</sup>.

The Directive does not even say if those provisions are "principal" or "accessory" provisions.

In any event, one must consider that the provisions governing the election or the designation of the members must respect the result of the two preceding phases. This means that the provisions in question must state that the persons or the entities who will elect or designate those members will choose them in accordance with the geographical distribution of seats amongst Member States made by the representative body (Point A above), as well as, as the case may be, within a Member State (Point B above).

In the absence of any guidance in the Directive, one must conclude that those provisions may be considered either "principal provisions" or "accessory provisions". This requires a co-ordination between the national implementation laws.

In order to avoid possible conflicts of laws (positive or negative), the Expert Group agrees that Member States which will entrust the representative body with the competence to designate the employees representatives in the board of the SE, at the same time as a principal and an accessory provision, should do it without prejudice of the existence of a specific procedure for designating those representatives in a given country (accessory provision), regarding the representatives coming from that country.

On the other hand, Member States which consider that the designation of the representatives should be done in accordance with the accessory provisions of each country concerned, should entrust the representative body with the competence to designate the representatives coming from countries where there are no such accessory provisions.

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<sup>216</sup> This is the option resulting from the Swedish contribution.

<sup>217</sup> This is the option resulting from the German contribution.

# ***GROUP OF EXPERTS "SE"***

## **WORKING PAPER N° 22**

25 June 2003

### **CHECKLIST**

1. Is the envisaged date of entry into force of the national provisions of transposition of the Directive the 8 October 2004? (**WP 2**)
2. Did you respect the distinction between "principal provisions" and "accessory provisions", as indicated in the table in **WP 3**, and in other documents? Is the different scope of those provisions clear?
3. With regard to the scope of the national provisions of a "principal" type (**WP 4**):
  - a) do they cover the 28 countries concerned (the 25 Member States of the EU by 2004 and the 3 members of the EEA)?
  - b) did you use a generic formula ("countries covered by the Directive", "countries to which the Directive is addressed", "Member States of the EU and of the EEA"..., and pointing them out individually, if necessary, in the preamble of the law), in order to avoid revisions of the national provisions at the occasion of future enlargements?
4. Did you foresee principal provisions such as those indicated in **WP 5** concerning the effects of the non-transposition of the Directive in other countries, and for the late or incomplete transposition?
5. Did you clearly distinguish the concepts of "participating companies", "subsidiaries and establishments" and "concerned subsidiaries and establishments", in accordance with the table in **WP 6**?
6. Do you have a definition of "participating companies" identical to that of the Directive, with the precise details which appear in **WP 6**, in particular with regard to the extension of the concept of "company" in the case of an SE common subsidiary to "other legal bodies governed by public or private public law" (**point B**)?

7. Concerning the "subsidiary" concept, and that of "establishment", did you take into account the control links which are established outside the territory of the countries covered by the Directive? **WP 7**
8. Do you have a definition of "establishment" (specific or by reference)? **WP 8**
9. Did you use a definition of "concerned subsidiaries and establishments" which takes into account the direct and indirect links, and the other precise details which appear in **WP 9**?
10. Is it clear who are the workers covered by the national transposition provisions? Are part-time workers and fixed-term workers taken into account? **WP 10**
11. For the effects specified in **WP 11**, do you envisage a method of calculating the number of workers employed which is instantaneous and valid in the time according to the terms evoked in this WP?
12. Do you have accessory provisions indicating who are the workers' representatives, and the methods of their election or designation to the SNB and to the representative body? **WP 12**
13. Do you have a definition of "information" which is in conformity with (identical to?) the Directive, including concerning its transnational scope? **WP 13**
14. Idem concerning the definition of "consultation"? **WP 14**
15. Idem concerning the definition of "participation", with the precise details which appear in **WP 15**?
16. Did you stipulate that the obligations of information on the number of employed workers: (**WP 16, points 1.1 and 1.2**):
  - a) must be delivered from the beginning of the process?
  - b) cover all the participating companies, and all their subsidiaries and establishments?
  - c) are specified by entity?

- d) make a distinction between workers covered by a participation system and those who are not so, indicating the respective percentages?
17. Do you have principal provisions on the proportional geographical distribution of the members of the SNB, which take into account the number of workers employed in each country by a participating company or by a concerned subsidiary or establishment of a participating company (located or not in the same country)? **WP 16, point 1.4**
18. With regard to additional members of the SNB:
- a) did you follow the indications which appear in **point 1.5 of WP 16** concerning the possible existence of additional members (in the event of merger)?
  - b) are all the conditions mentioned in **points 1.5 and 1.6 of the WP 16** met?
  - c) is the relationship between "principal provisions" – "accessory provisions" clear, as indicated in **point 1.6 of WP 16**?
  - d) did you use a "direct representation" criterion close to the one indicated in sub-section c) of **point 1.6 of WP 16**?
19. Do you have accessory provisions on the methods for electing or designating the members of the SNB from your country which take into account all the aspects evoked in **point 1.6 of WP 16** and in particular:
- a) the need to ensure that all the workers are represented and that the representativity of each member of the SNB (how many workers he represents) is known?
  - b) the possible need to organise multiple-step designation procedures, in order to cover all the relevant entities?
  - c) specific procedures of election or of designation of the additional members, with, if necessary, a mechanism of reduction of the "ordinary" members' representativity?
  - d) are the provisions related thereto in line with the example given in **pages 25 and 26 of WP 16**?
20. Do you have principal provisions on the re-composition of the SNB in the event of a substantial change, limited to cases where changes lead to a new geographical distribution of the seats? **WP 16, point 1.7**
21. Do you stipulate that the agreement (**WP 16, point 2**):

- a) must be in writing?
  - b) other formalities which must govern the negotiations and the conclusion of the agreements with a view to facilitate the control of legality?
  - c) is recognised as being legally binding in all the countries?
22. Did you stipulate principal provisions on the voting rules within the SNB in accordance with the Directive, with the precise details which result from point 3.1 of WP 16, in particular with regard to the way of determining if there is reduction of the participation rights?
23. Do you have rules on experts, the SNB's renunciation of a transnational involvement system for the SE and the responsibility for the expenses of the SNB (point 3.2 to 3.4 of WP 16)?
24. With regard to the contents of the agreement (WP 17):
- a) do you give the necessary autonomy for the negotiating parties (except in the case of transformation)?
  - b) do you mention explicitly the need to envisage mechanisms of adaptation of the agreements to the changes occurring after the constitution of the SE?
  - c) do you have rules on transformation which take into account the precise details indicated in point 3 of WP 17?
25. With regard to the conditions of the application of the Annex (WP 18):
- a) do you state in an imperative way that the Annex applies if the participating companies register the SE without an agreement being concluded, in as far as the SNB did not renounce to a transnational involvement system for the SE (point 2)?
  - b) as regards transformation, do you cover situations of participation other than those of legal origin (point 3)?
  - c) do you take into account the details in that same point 3 relating to the systems of participation organised at group level?
  - d) do you determine at what moment and how the SNB can choose one of the participation systems when there is more than one (point 4)?

26. With regard to the misuse of procedures (**WP 19**):
- a) do you envisage new negotiations when misuse is illustrated by subsequent changes?
  - b) do you establish a misuse presumption?
  - c) do you cover other cases of misuse?
27. Are the relations between the transposition provisions of the Directive and those which transpose other Community Directives, as well as other national provisions on information, consultation and participation, organised in accordance with the rules laid down in Article 13 of the Directive? **WP 20**
28. Are parts 1 and 2 of the Annex transposed taking into account the precise details set out in **WP 21**?
29. Idem concerning part 3 of the Annex?