May 1997

Group of Experts
"European Systems of Worker Involvement"
(with regard to the European Company Statute and the other pending proposals)

FINAL REPORT

CONTENTS

I. THE INSTITUTIONAL, ECONOMIC AND SOCIAL BACKGROUND

1. The Expert Group's work is set against an institutional, economic and social background which has a major bearing on it.
The development of this background includes elements which are conducive to the success of the task entrusted to the Group.

2. It is therefore important to provide a brief description of the background and its development.

Institutional background

3. The discussions within the institutions of the European Union on the proposal for a European Company Statute since 1970
have been marked by the difficulties inherent in any attempts to create a new entity under Community law, which is different and
additional to similar entities provided for by national law.

4. Despite the undeniable interest which the creation of such an entity had for European enterprises wishing to adapt their
structures to the increasingly transnational nature of their activities, discussions were held up by the specifically Community
nature of the rules which had to govern this new type of company.

5. Against this background, the main obstacles relating to company law were resolved, often by resorting to references to
national law. However, this method did not prove viable for the main element of controversy, relating to the system of worker
involvement in the European Company.

6. In fact, on this very point, discussions on the proposal for a European Company Statute were and are dependent on the
conditions and limits with which the European Union has been confronted when establishing rules on information, consultation
and participation of workers at Community level.

7. Generally, the European Union has been able to overcome the differences between Member States on information and
consultation of workers. Community law today lays down a certain number of rules in this field, which are largely consensual.
By contrast, the simple mention of rules on worker participation in company bodies, even in the context of optional instruments
(which include the European Company Statute), has never achieved the required majority within the Council.

8. In fact, it was paradoxally in the context of optional instruments such as the European Company Statute that the need for
rules of this type was more vigorously affirmed by Member States with participation systems, as they feared the weakening of
their systems as soon as a new type of company which was exempt from these rules became available to undertakings.

9. Despite efforts to approximate the various positions (those who did not want a European Company without participation and
those who were against the export of national participation models), it was inevitable that progress would be blocked.

10. More recently, the new round of discussions opened up by the Commission Communication of 14 November 1995 has
again revealed the need to get over this conflict and re-examine the question of worker involvement in the European Company
from a new angle. It was on this basis that the Group of Experts took up its work.

Economic and social background

11. As shown by the evidence of 25 years of debate on the subject, the proposal for a European Company Statute combines
various fundamental issues which are both economic and social.

12. From the economic point of view, the Statute has been conceived as a tool to allow European enterprises, especially those
operating in several Member States, to unify their organisational structures and adapt to the increasingly transnational dimension
of their activities.

13. The European Company Statute is indeed regarded as a major contribution to exploiting more fully the potential of the
European internal market and hence to making the European economy more competitive internationally.

14. The potential benefits of creating European Companies are nowadays even clearer than when the first proposals were
produced, mainly as a result of:

- the completion of the internal market;
- the imminent start of Economic and Monetary Union;
- the progress of the phenomenon of internationalisation and concentration of undertakings, associated with increased
- competition for capital,
- the increasing gap between economic reality and legal reality as far as companies with a European dimension are
- concerned, and the resulting complexity, particularly in terms of taxation and decision-making structures.

15. Regarding the need for a European Company, which it is not the task of the Group of Experts on "European systems of worker involvement" to assess, reference may be made to the work done by the Advisory Group on Competitiveness (Ciampi Group).

16. But the European Company Statute also attracts passionate debate on essential social questions, especially the degree of worker involvement in company affairs .

17. For a long time this debate focused on a controversy concerning the exercise of power within the undertaking and the role of workers' representatives. Furthermore, the endless discussions on this subject did not keep up with the developments which had occurred since the presentation of the Commission's first proposals, in the direction of effective involvement of workers' representatives in the decision-making process within companies, through so-called "participation" arrangements as well as other routes.

18. These developments concern all aspects of, and all parties involved in, industrial relations in Europe. One of the most visible consequences brought about by the internationalisation of the markets and by globalisation is the need to optimise all economic and social resources within national economic systems. This common objective can only be pursued through co-operation between all actors involved.

19. Globalisation of the economy and the special place of European industry raises fundamental questions regarding the power of social partners within the company. The type of labour needed by European companies - skilled, mobile, committed, responsible, and capable of using technical innovations and of identifying with the objective of increasing competitiveness and quality - cannot be expected simply to obey the employers' instructions. Workers must be closely and permanently involved in decision-making at all levels of the company.

20. As recognised by the Ciampi report, a concerted approach to work organisation within the company will improve industrial relations, increase worker participation in decisions, and is likely to lead to an improvement in product quality. The latter aspect is an essential factor in boosting competitiveness within the European economy.

21. In this new context, the legal form which involvement may assume is only a secondary aspect of the present debate on worker involvement in a modern, skill-enhancing enterprise.

22. Furthermore, at a time when there is considerable public interest in questions relating to "Social Europe", the continuation of a blockage over questions of worker involvement in a Community Law company is likely to be particularly detrimental to the smooth operation and the image of the European Union during a period which is decisive for its development.

The terms of reference of the Group of Experts

23. Following the requests and proposals from the Council of Ministers, European Parliament, Economic and Social Committee and European Trade Union Confederation for the establishing of a group of experts, the European Commission drew up the following terms of reference:

1.Analysis and assessment of systems of participation in company bodies in Member States of the European Union and of their equivalence with other forms of involvement of workers' representatives in the decision-making process within undertakings.

2.Assessment of the risk of national systems getting round the requirements by using the European Company without an appropriate social element.

3.Type of rules to be applied to the European Company?
- a) Legislation, or priority for negotiation?
- b) In the event of priority for negotiation:
  - Who will be involved in negotiations? The European works council? National works councils? Trade unions?
  - Others?
  - When must negotiations take place?
  - What will be the consequences of not reaching an agreement? Application of subsidiary rules or prohibition of the creation of a European Company?

Composition of the Group

24. The Group of Experts met under the chairmanship of Mr Etienne Davignon, President of the Société Générale de Belgique and former Vice-President of the European Commission.

25. The other members of the Group are:

- Mr Ernst Breit, former President of the German Trade Union Confederation (DGB) and of the European Trade Union Confederation;
- Mrs Evelyne Pichot, consultant in European industrial relations, rapporteur for the Group of Experts;
- Professor Silvana Sciarra, specialist in Comparative and European Labour Law at the University of Florence and the European University Institute, Florence;
- Mr Rolf Thüsing, member of the Executive Board of the Confederation of German Employer's Associations (BDA) and Vice-President of the UNICE Social Affairs Committee;
- Professor Alain Viandier, specialist in Company Law at the Faculty of Law, University of Paris V.

26. Mr Fernando Vasquez, official of the European Commission (DG V/D/2) acted as secretary to the Group.

27. Technical assistance was provided by DG V/D and DG XV/D, which were also represented at all meetings.

Organisation of work

28. The Group's activities were based on the data available, making new consultations unnecessary.

29. The opinions expressed by members of the Group were regarded as their personal opinions. In fact, in a bid to find a solution which was acceptable to all parties involved, and in order to ensure an independent approach free of the constraints associated with institutional discussions, the Group as a whole, and its members as individuals, acted without any commitments to any institution or organisation. In this context, the members of the Group have left aside their preferences on specific questions, in order to arrive to a final report which they could jointly endorse and support.

30. The Group maintained a link with the European Parliament's Social Affairs Committee.

31. The Group held nine meetings in Brussels between November 1996 and April 1997, concentrating in turn on the following
questions:

- the procedure to be adopted in the search for a solution;
- national systems of worker participation and involvement;
- company structures and approaches to creating European Companies;
- the place of negotiation;
- the problems posed by the creation of a European Company in different cases;
- the architecture of possible solutions;
- the organisation of negotiations;
- reference rules;
- examination of the final report.

II. APPROACH AND PROPOSALS RELATING TO THE EUROPEAN COMPANY STATUTE

The approach employed by the Group of Experts

A selective working method

32. Having analysed the situation, and in order to relaunch a credible discussion on the European Company, the Group believed it was necessary to adopt an approach likely to lead to a useful contribution. This caused it to focus its analysis and conclusions on the essential questions likely to achieve progress in the debate, without attempting to be exhaustive.

33. This basic approach led the Group, first of all, to select the most important forms in which European Companies could be established from those referred to in the documents being discussed. In this connection, the Group successively tackled the specific questions raised with regard to worker involvement by the different ways in which a European Company can be formed (holding company, merger or joint subsidiary).

34. In these three cases:

- the European added value of the European Company can be readily determined at a critical time when markets, currencies and capital are becoming Europeanised:
- the European Company involving companies from a number of Member States makes provision for the performance of new tasks or the organisation of operations on a European scale;
- the worker involvement issues raised by the setting up of the European Company can be identified and examined in practical terms by comparing the "before" and "after" situations in the companies involved, on the basis of different scenarios and assumptions.

35. The possibilities for setting up a European Company by transforming a national company, which have given rise to particular concern, have not been examined by the Group.

36. This decision can be justified on both economic and political grounds. An instrument limited to the three above-mentioned cases remains of interest to businesses seeking a more coherent structure for their European operations. On the other hand, the fear that businesses might wish to transform themselves into European Companies just to evade the requirements of national law are no longer realistic.

37. Analysis of each of the above-mentioned three ways in which a European Company can be set up covered hypotheses which do not take account of the number of workers employed.

38. Initially, the Group looked at whether differentiated solutions could be devised, depending on the number of employees, but came to the following conclusions:

- the national thresholds for worker representation and involvement vary considerably, and the ways in which these thresholds are calculated vary according to the different arrangements for worker involvement. In particular, the scope of these thresholds varies according to the nature and level of the arrangements in question: information and consultation at establishment, enterprise or group level, or participation in the company bodies;
- the European Company Statute is optional;

- the question of possible exceptions for small companies requires additional examination by the European institutions.

39. The Group therefore considered that its job at this stage was to identify solutions which could be applied whatever the number of employees involved.

The search for a system tailored to needs and acceptable to all parties

40. The Group's considerations included to the following elements, which became the guiding principles underlying all discussions and the solutions adopted:

a) The diversity of existing systems in the countries of Europe and the specific nature of participation systems rule out the possibility of a general harmonisation in this field. Annex III to this report contains a detailed description of all the different systems of worker involvement, clearly revealing the difficulties facing any attempt at harmonisation.

b) In view of this diversity the Group agrees that the best and most appropriate way of establishing the system of worker involvement for each SE can be sought through negotiation.

c) The solution to be applied to each individual European Company as regards worker involvement should take account of the capacity to intervene of the workers' representatives within the participating companies prior to the establishing of the European Company.

d) The fact that the European Company is at the same time both European and optional makes it possible to envisage a situation in which the new entity has its own particular system of worker involvement, regardless of the country in which the European Company is established and the number of workers employed; this should concern the entire entity constituted by the European Company and its subsidiaries and establishments, which means that it must necessarily be transnational.

e) Adoption of the new framework for worker involvement in the European Company makes it necessary to clarify the relationship between this framework and other rules in force in this area in the country where the European Company is located. The Group felt it was necessary to prevent duplication or the overlapping of employees' representative bodies with similar responsibilities. It therefore proposes excluding the application of national provisions of identical aim and scope to the system introduced for the European Company. This implies that:

- rules specific to the European Company prevail over national rules on transnational worker information and consultation which might apply to the European Company as the controlling undertaking;
- rules aimed specifically at the European Company also prevail over national rules on participation in any bodies which might exist in the country in which the European Company is established.

f) A distinction must be made between the company level and the subsidiary or establishment level. The identity and internal organisation of establishments does not basically depend on the legal form of the company. Even subsidiaries or establishments belonging to a European Company will remain or be made fully subject to national law in the country in which they are located. This means that national arrangements and procedures apply to such subsidiaries and establishments as regards information and consultation, and also, where applicable, worker participation. The European Company will

have to be just as neutral as national companies are today in considering the differences between these arrangements, and there is no need for regulation or adjustment.

g) The fears that have been expressed with regard to the weakening of national participation systems must be taken into account by the system of worker involvement envisaged for the European Company, whilst taking care not to attach importance to them which is out of all proportion. In this connection it is necessary to bear in mind the following considerations:

- the optional nature of the European Company;
- the fact that the rules envisaged for the European Company relate to the transnational level and do not affect other rules on worker involvement, which remain subject to national law;
- the place given to negotiations in the proposals;
- the nature of the reference rules applicable in the absence of an agreement and the fact that these establish a standard system applicable to every European Company, anywhere in the European Union, when negotiations fail.

The decision to give priority to negotiations

41. As there is no ideal system for worker involvement, the most efficient one being that best suited to the parties concerned and the particular conditions in which it is required to operate, the Group considers it indispensable to encourage the social partners to draw up negotiated solutions for worker involvement in the European company.

42. The proposals of the Group on a system of reference rules specific to the European Company and unique within the European Union would not be adequate if negotiations were not given priority, in that they make it possible to:

- take account of the diverse national industrial relations systems and systems for worker involvement in companies;
- ensure the coherence between the systems in force in the participating companies before the establishing of the European Company and that which will apply to the European Company once established;
- tailor the method of involving workers to the method used for setting up the European company (holding company, merger, joint subsidiary) and to the specific conditions of the enterprise or sector;
- encourage a favourable social climate, worker involvement being an important condition for the improvement of company competitiveness.

43. Having made this choice, the Group recognises the difficulty in drawing up a complete set of rules which makes provision for every hypothesis and meets every need. This is why it is so important for the parties involved to negotiate the system which suits them and which corresponds most closely to national culture and the company concerned.

44. The procedure consists in fixing the objective and leaving it to the negotiating partners to determine the methods to be used to achieve it, but making arrangements for the situation in which the parties fail to achieve the objective.

45. The Group has carefully examined the possibility of the failure of negotiations and has decided on the application of reference rules in such cases, so that the priority given to negotiations does not lead to legal insecurity or the possible blocking of the establishing of the European Company.

46. In fact, the composition and responsibilities of a company's governing bodies are important elements in its structure. They must be clearly prescribed as a function of the type of company, in the interests of legal certainty and clarity vis-à-vis external parties, especially creditors and investors. This must be borne in mind when considering participation of workers' representatives in European Company bodies. Failure to negotiate an agreement on participation in the European Company must not preclude incorporation as a European Company, since this would have the effect of removing the owners' right to decide on the company's legal form and transferring it to the workforce.

The negotiation procedure envisaged

47. The Group considered the practical procedures for negotiation that would give concrete form to the priority accorded to negotiation and could be brought into effect depending on the progress made towards setting up a European Company, whatever the number of employees concerned.

48. The problem of negotiations must be regarded in the light of the manner in which the European Company is being set up. The Expert Group therefore considered the different stages which might be involved in the creation of a European Company depending on its nature: proposal, submission to boards, approval by general meetings, registration.

Schedule for negotiations

49. The Group carried out an in-depth analysis of whether negotiations should take place before or after the European Company acquires its legal personality (through registration).

50. The conclusion was that it would be preferable to make provision for negotiations as early as possible, in order to:

- ensure, wherever possible, continuity with the participating companies' systems for involving workers already in place before the establishing of the European Company;
- avoid, to the extent possible, the uncertainty and vacuum arising from the absence of a negotiated solution at the moment when the European Company becomes operational, which would in any event require the implementation of a provisional scheme;
- provide security for both shareholders and workers as regards the arrangements for their involvement in the future European Company;
- ensure direct involvement in negotiations of the main parties concerned, i.e. representatives of workers in the participating companies.

51. However, holding negotiations before the registration of the European Company poses two types of problem: first of all, the problem of whether the competent bodies of the participating companies can enter into agreements binding the future European Company; secondly, the risk that prolonged negotiations might delay the process of establishing the European Company, particularly in the case of a merger or constitution of a holding company.

52. The Group concluded that these problems were surmountable. Regarding the first, the representatives of the participating companies may, during the period leading up to registration of the European Company, carry out acts which bind that Company. Any agreement entered into by these representatives is automatically validated or confirmed by the act establishing the European Company.

53. The risk of a delay or excessive complexity resulting from negotiations at the same time as the European Company is being established is excluded if the establishing of the

European Company is not made dependent on the prior conclusion of an agreement on worker involvement procedures.

54. Consequently, the Group feels that the negotiating procedure could be organised as follows:

a) negotiations should start when the management boards/boards of directors of the participating companies adopt a proposal for a merger/constitution of a European Holding Company/establishing of a joint subsidiary, and decide to convene their general meetings;

b) if any agreement is concluded before the general meetings which will discuss the project of establishing the European Company, such agreement is submitted to those meetings, with a view to its incorporation as necessary into the statute of the future European Company; if no such agreement is reached, negotiations continue. The authority to adapt the statute of the European Company to the resulting agreement or, should negotiations fail, to the reference rules, should rest with the management board/board of directors or the supervisory board of the European Company;

c) negotiations may continue for three months after the general meetings, subject to their extension by joint agreement between the parties and provided that they do not last for more than one year in total. The organisation of a new general meeting with a view to presenting the results of the negotiations even when these go beyond the reference rules as regard participation of workers in the management board or the supervisory board does not seem necessary if the shareholders' representatives in these boards have accepted these results;

d) after the general meetings, the further procedures relating to the various legality verifications, shareholdings, publicity etc. aswell as the registration of the European Company should continue, regardless of whether or not negotiations are completed;

e) if, at the time of registration, an agreement has been concluded, it should apply; if no agreement has yet been concluded, the reference rules on information and consultation should apply, with the negotiating body having to assume, on a provisional basis, the powers allocated by those rules to the transnational representation of workers in the European Company and its subsidiaries and establishments; furthermore, if meetings of the management or supervisory body take place, two members of the negotiating body should be invited to attend in an advisory capacity;

f) at the end of the normal negotiating period or that resulting from an extension decided jointly between the parties, and if an agreement has not been concluded, the reference rules should apply, without prejudice to a subsequent agreement.

Conduct of negotiations

55. The formal process of concluding an agreement could be based on the principles set out below.

Subject and scope of negotiations

56. The first principle which must govern negotiations is complete freedom for the parties and the absence of any minimum requirements.

57. The Group discussed at length the advisability of establishing minimum requirements for negotiations, concluding that negotiations are the best way of allowing the parties to

identify solutions suited to each national system and each European Company, and that it is therefore important to avoid any impediment to the independence of the parties. The absence of constraints is all the more justified in that the existence of the reference rules ensures a situation of equilibrium between the negotiating parties.

58. The second principle is the transnational dimension of negotiations. This results in a transnational make-up of the negotiating body representing the employees (which must cover all workers in the companies participating in the setting-up of the European Company) and in a transnational scope for the information, consultation and participation arrangements (which must cover the entire European Company and its subsidiaries and establishments, without prejudice to the independence of the parties).

Negotiating parties

59. Identifying the employers' negotiators does not cause any problems. They are the competent bodies of the companies participating in the establishing of the European Company or their duly authorised representatives.

60. Identifying the workers' representatives gives rise to two questions: the composition of the negotiating body, and the procedures for appointing its members.

61. As far as geographical and proportional criteria for the composition of representation are concerned, it would be appropriate to place more importance on the proportional criterion, possibly by the weighting of votes, than on the geographical criterion, which had enjoyed a large measure of priority in the context of European works councils.

62. In discussing this point, the Group took account of the possible presence of one or more European works councils when setting up a European Company. Various scenarios were analysed, indicating the variety of possible situations, notably the case where not every participating enterprise has a European works council. It therefore seemed difficult in practice, during initial negotiations or subsequently, to give a formal mandatory role to European works councils. This issue should be subject to further examination by the European institutions.

63. Workers' representatives must be appointed in accordance with national practices and procedures.

64. These practices and procedures determine the role to be given to national and European trade union organisations. The workers' representatives are entitled to call upon the services of experts of their own choice and, in this connection, to contact the European trade union organisations.

Negotiation procedures

65. The negotiation process could be based on the principles set out below.

66. Negotiations are to be conducted in good faith with a view to reaching an agreement. Without prejudice to the
independence of the parties, they may cover:

- the scope of the intended agreement;
- the composition, number of members and allocation of seats on the body representing the workers of the European Company and its subsidiaries and establishments, which will

discuss with the competent body of the European Company the arrangements for its involvement and the duration of its members' terms of office;
- the responsibility and proposed procedure for the provision of information to and consultation of the transnational body representing the workers of the European Company and its subsidiaries and establishments;
- the frequency of the meetings devoted to information and consultation;
- the financial and material resources to be allocated to the transnational body representing the workers of the European Company and its subsidiaries and establishments;
- if during the negotiations the parties decide to establish one or more information and consultation procedures instead of working through a representative body, the methods for putting that procedure into effect;
- the procedures for worker participation in the competent European Company bodies;
- the duration of the agreement and the procedure for its amendment.

67. This list is purely indicative, having regard to the independence of the parties and their complete freedom to determine the content of the agreement.

68. If no agreement is reached by the deadline laid down (either the initial deadline or that resulting from the extension of the negotiating period as jointly agreed between the parties), the reference rules would apply systematically and immediately.

69. Fresh negotiations could start after a certain length of time (to be specified), provided that a certain degree of stability of the system applicable is ensured in all cases.

The rules applicable in the absence of an agreement

70. These rules relate to worker participation and the transnational dimension of worker information and consultation in the European Company, as the national dimension of information and consultation is covered by national statutory provisions or agreements.

71. These reference rules have been drafted by the Expert Group with a view to:

- demonstrating the benefits of negotiations for both parties,
- proposing a method of involvement which would appear to be practicable in all situations,
- submitting a balanced solution for all the partners concerned, especially those who have expressed concerns about the possible risk of the weakening of national participation systems.

72. The forms of worker involvement – information, consultation and participation – proposed in the reference rules and the various levels of involvement must be seen as a whole, thus permitting a coherent approach.

Competence of workers' representatives

73. Competence in respect of transnational issues could be expressed as follows:

"the competence of the workers' representation shall cover matters which are of concern to the European Company itself or at least two subsidiaries or establishments located in at least two different Member States or which exceed the powers of the local decision-making bodies."

Transnational representation of workers

74. The formula used for the negotiating body could also be used for the representation of employees in the absence of an agreement. This body had be constituted on the basis of geographical and proportional criteria and its members appointed in accordance with national procedures and practices.

Information and consultation

75. Taking account of existing Community law on this subject, the rules designed to ensure the involvement of workers' representatives within the European Company, as defined in the Annex, could be as follows:

a) the European Company management board (companies with a two-tier management structure) or board of directors (those with a single-tier structure) shall inform the workers' representatives regularly and, in any event, in good time of matters liable to have significant repercussions on their situation, of the progress of the European Company's business and that of its subsidiaries and establishments, and of future prospects;

b) the workers' representatives may ask the management board or the administrative board to provide information or details in the most appropriate form on any question significantly affecting the affairs of the European Company or its subsidiaries and establishments and may have sight of all documents laid before the general meeting of shareholders;

c) they may deliver an opinion on these questions and may meet the management board or administrative board of the European Company with a view to reaching agreement on questions which significantly affect workers' interests;

d) they shall also receive in good time the agenda of the meetings of the management board or administrative board of the European Company and shall have the right to ask for further information enabling them to deliver an opinion on any matter on the agenda which may significantly affect the interests of the workers of the European Company or its subsidiaries and establishments;

e) the representatives of the workers in the European Company shall inform the representatives of the workers in its subsidiaries and establishments of the content and results of the information and consultation procedures;

f) in implementing these procedures, the competent body of the European Company and the workers' representatives shall work together in a spirit of cooperation with a view to reaching an agreement and with due regard for their reciprocal rights and obligations.

Participation

76. Only seven Member States of the European Union have rules which make provision for participation of workers' representatives in the various company bodies (management board, supervisory board). This question was therefore the most difficult to deal with, in view of the gap between the different situations in the European Union.

77. The Group did not adopt the following option, which would involve proposing two schemes:

- one for establishing a European Company where at least one of the participating companies had a participation scheme;

- the other for establishing a European Company where the participating companies did not have a participation scheme.

78. This solution would freeze the present situation, which would not be realistic and would introduce unacceptable discrimination between companies wishing to establish a European Company.

79. Similarly, the Group did not adopt the option of inviting a workers' delegation to attend some or all meetings of the European Company bodies (management board, supervisory board) as observers. The Group wished to pose the question of participation in clear terms and attempt to give a reply to it. This is essential if the Group is to comply with its terms of reference and make a useful contribution.

80. In seeking a solution, consideration was of course given to the optional nature of the European Company. Participating companies choosing the European Company to do so completely freely. Similarly, the provisions on this subject in the reference rules should not reduce the attractiveness of negotiations, which clearly remain the priority option.

81. The Group proposes that workers' representatives should be members of the management board or supervisory board with full status.

82. It would not appear to be logical for workers to cease to be represented in a company body when it becomes a European Company, except as the result of negotiations. The Member States which have not included provisions of this type in their legislation are therefore asked to make a major effort.

Number of workers' representatives

83. The Group proposes that workers' representatives account for a fifth of the members of the management board or supervisory board, with a minimum of two members.

84. The important thing is for these bodies to work in a harmonious and responsible manner. This level of representation is significant and is therefore conducive to the adopting of responsible positions, taking full account of the well-being and future of the company. However, where Member States and companies are not familiar with this way of operating, it should not give rise to excessive concerns regarding the ability of these bodies to assume their responsibilities in full.

Workers' representatives: attendance in an advisory capacity or with the right to vote?

85. The Group discussed this question in great depth.

86. The fact of the matter is that efficient boards hold few votes. The relevance of the points of view expressed is decisive, and a sign of the influence exercised by the member of the management or supervisory board in question.

87. Attendance in an advisory capacity, which of course means that the representatives would have their positions recorded in the minutes and would participate fully in debate, would constitute a more progressive stage in the process of change which Member States without a participation scheme must embark upon.

88. The Group, whilst appreciating this view, did not adopt this possibility, preferring to have equal status between members of the management or supervisory board, with a view to

their sharing the responsibility for taking decisions on equal terms. In a nutshell, this means that we attach the utmost importance to the principle of "same rights and same duties".

Other recommendations

89. The rules proposed must be supplemented in particular by rules on:

- protection of workers' representatives;
- financial and physical resources to be allocated to negotiating and representative bodies;
- the right to consult experts;
- circulation of information and protection of the confidentiality of certain information.

90. These rules, which are necessary for the proper functioning of the system envisaged, will apply to the negotiating and implementation phases of any agreement, as well as to the rules applicable in the absence of an agreement.

91. The need to ensure the independence of employees' representatives, the ban on employers exercising an influence over how they perform their duties, and the fundamental guarantees such as protection against dismissal or any substantial and discriminatory changes in their employment contract, were particularly emphasised. Special attention must be devoted in particular to situations where members of management or supervisory boards may be deprived of the right to benefit from certain rules on the protection of workers' representatives.

92. In view of the fact that Community law already includes a number of rules of this type, and as these issues are not contentious, the Expert Group feels that the drafting of such rules will not pose any major problems.

III. CONCLUSIONS

93. Our task was a particularly complex one, as debates on the European Company Statute in recent years had been characterised by a lack of willingness to come to a conclusion leading to deadlock.

94. The Group first of all asked itself whether, in those circumstances, it could make a contribution to relaunching the debate. It therefore focused its attention on clearly identified avenues of approach which it felt could be useful, thus dispensing with the option of presenting an exhaustive legal text.

a) An analysis of the economic environment led the Group to consider only the scenario in which a European Company is founded by companies from at least two Member States. The advanced state of completion of the internal market testifies – if this is necessary - to the need to fill the gap in company law.

b) On this basis, the Group took three procedures into account:

merger between two companies
creation of a holding company
creation of a joint subsidiary.

As things stand, these three possible ways of establishing a SE correspond to the scenarios likely to be of most interest to the parties concerned.

c) The Group was struck by the diversity of national models for worker information, consultation and participation. This diversity reflects the variety of practical situations and cultures which it is difficult to harmonise. We therefore opted for a different approach which was likely to overcome this major obstacle.

Clear priority has therefore been given to a negotiated solution tailored to cultural differences and taking account of the diversity of situations.

Concrete proposals have been made concerning the organisation of negotiations with a view to achieving success within time limits which are consistent with the establishing of the new company. Negotiating procedures are balanced so as to allow each party to defend its interests, without any of them being able to stand in the way of the establishing of a European Company.

In order to achieve this objective, the Group has laid down reference rules, to apply only where negotiations have not succeeded. These reference rules cover both "information and consultation" and worker participation in the management or supervisory board.

We felt that this latter provision was necessary in order to take account of the fact that national legislation in some countries gives workers this right and it would be inappropriate to take it away when a European company is being established. This proposal obviously would not have been made if the European Company Statute had not been optional.

95. The path we are opening up is therefore that of negotiations in good faith between the parties concerned, with a view to identifying the best solution in each case, without imposing minimum requirements; the European Company offers a new legal option which is consistent with the existence of a genuine Internal Market.