



European Commission's Consultation

"Review of Directive 2001/86/EC supplementing the Statute for a European Company with regard to the involvement of employees" [C(2011) 4707 final]

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CEC European Managers Position September 2011

(1) What is your opinion as regards the analysis contained in this paper regarding employee involvement in SEs? Are there any further issues that you consider should be added?

On the complexity of the procedure:

Regarding the first issue identified by the European Commission, namely the complexity of the procedure to establish European Companies (hereafter SEs), and in particular the complexity of the rules on employee involvement, CEC maintains strong support to employee involvement in the process. In the framework of company law, this mechanism embodies the importance that the European social model gives to the social dialogue within companies. CEC objects to the perception of employee involvement being in general a negative driver for the establishment of an SE.

The SE Directive is fundamentally based on the idea of respecting the different national systems and the different practices in terms of employee involvement among the Member States.¹ The compromise that has ultimately been reached in Directive 2001/86/EC is in no way futile or incidental. In the contrary, it has been very thoroughly designed. Without it, the realisation of the SE statute would have been unthinkable. From CEC perspective, the procedural rules and guarantees in Directive 2001/86/EC continue to be an indispensable condition for the application and for any further advancement of the SE statute.

CEC does not flatly dispute that the Directive's requirements (especially information and the negotiation process) on employee involvement might be a certain deterrent to the establishment of an SE for those companies which are opposed to the idea of employee participation as a matter of principle. However, on a broader empirical basis CEC sees no convincing evidence for employee involvement being a significant hindrance for the establishment of an SE. Consequently CEC assents to the findings in the Eurofound study which are also mentioned in the consultation document.² CEC also shares the study's general conclusion that « this employee involvement is clearly an added value since it creates a European level of interest representation and common transnational standards ». In that sense CEC affirms its view of employee involvement being an integral part of a good corporate governance for an SE.

¹ Recital nr 5 of Directive 2001/86/EC: « The great diversity of rules and practices existing in the Member States as regards the manner in which employee's representatives are involved in decision-making within companies makes it inadvisable to set up a single European model of employee involvement applicable to the SE ».

² *Employee involvement in companies under the European Company Statute*, Eurofound, 2011.

In Member States where the national legislation does not provide for a system of employee participation, companies and business associations obviously see the rules on employee involvement as complex and burdensome. Nevertheless, CEC is convinced that there is limited correlation between the existence or non-existence of supervisory-level employee participation in national legislation, and the number of SEs that have been created so far. From CEC's viewpoint, numerous other factors contribute to the decision on whether or not to establish an SE, such as capital management or fiscal issues. Therefore, the weight of mental reservations against employee involvement in countries with little or no participation rights can not be precisely measured.

On the lack of legal certainty on certain aspects of the negotiation procedure:

Beyond issues in the method of calculating the number of workers participating to the negotiation process via the special negotiating body as highlighted by the Commission, CEC stresses the importance of ensuring a balanced participation of every category of employee in the process. As a category among employees, managers and executives often have difficulties to express their views and to be elected in the negotiation body. Indeed, this minority group of workers is not always represented at national level, and therefore cannot be represented at European level. To this extent, CEC suggests amendments to the Directive as detailed in Annex 1.

In addition to the three hypothesis identified by the Commission in its consultation document, CEC considers that the Directive does not address the situation where several SEs from the same group of companies are created simultaneously.³ Indeed, the Directive states that the creation of the SNB concerns the parent company and its subsidiaries. And yet the subsidiaries can also be transformed into an SE. Thus, the same workers are counted twice for two different structures of representation. Two solutions could therefore be envisaged to fix the situation:

- if the parent company decides to set up a single structure representing the workers for the whole SEs created within the same group, the Directive should allow to create only one special negotiation body. A single calculation of the whole workforce at European level would enable to create the SNB and would simplify the negotiation process.⁴ The Directive could provide for a redistribution of the voting rights by country within the new SNB to consider the effective number of employees in each of these countries.⁵

- if the structure representing workers is specific for each SE of the group, the Directive should allow to create a SNB for each SE, without taking into account the workforce of a subsidiary represented in another SNB. Thus, for the SNB of the parent company, the calculation of the workforce would take into account the workforce of the parent company plus the workforces of the subsidiaries which are not represented in a future SE.

³ This situation has been revealed for example by the negotiation within SCOR (France).

⁴ Example of the negotiation process between SCOR SE, SCOR Global Life SE, SCOR Global P&C SE.

⁵ For instance, instead of the rule "one representative = one voice", the French representatives could share 25% of the voting rights in the SNB if French workers represent 25% of the whole company's workforce at European level.

On the concern that the use of the SE form could have an effect on the rights to employee involvement granted under national or EU law:

. Looking at the issue of SEs registered without employees and without operations, called « shelf SEs», CEC shares the concern of ETUC and of some Member States regarding employee participation systems. CEC stresses that shelf SEs could become a way of “bypassing” one of the essential purposes of the Directive 2001/86/EC which is to negotiate on good-faith and without fore-ordained results on the levels of employee participation and on how to deal with pre-existing forms of employee involvement.

So far, the question whether the activation of a shelf SE that has been created without employees automatically leads to new negotiations is left to jurisdiction – with an unpredictable outcome for the employees. Therefore, no stable patterns in jurisdiction have emerged yet.

. More generally speaking, CEC views the notion of “structural changes” as a pre-requirement for reopening negotiations as too narrowly defined, even beyond the afore-mentioned case of the activation of a shelf-SE.

Indeed, considering the dynamic changes in many industries and the effects thereof on big corporations such as mergers, conversions, spin-offs etc, there is a real danger that both the efficiency and the legitimacy of an employee involvement scheme will gradually be « worn-off » over time.

Adapting business processes to a changing environment is vital for business success. This undisputed empirical rule should also apply to the structures of corporate governance including employee participation. Therefore, CEC calls on the Commission to have the widest possible definition of the notion of « structural changes », as well as to set up a reliable instrument that allows for occasional readjustments.

The situation where a significant purchase is reached during the negotiation process leading to the creation of an SE should also be envisaged by the Directive. To avoid a re-negotiation, the provisions for the creation and the management of the SNB should be revised in order to enable the future employees to express their opinion on the involvement of workers within the new SE (the SE after the definitive agreement on the purchase).⁶

(2) Do you think that the Commission should launch an initiative to amend the Directive in parallel with a possible review of the SE Statute? If so, what do you consider should be its scope?

CEC supports a review of the SE Statute and amendments to the Directive in order to address the issues identified by the Commission. From CEC’s perspective, sufficient time has been given to the identification and examination of good practices and shortcomings in the implementation of Directive 2001/86/EC by companies.

When carrying out this revision, the European Commission should have a closer look at four points:

- On the above-mentioned issue of shelf SEs, CEC calls on the Commission to amend the Directive in a way that there will be an automatism between the activation of a shelf SE and new negotiations. Such a rule will put an end to indecision of current case law and favour a commonly accepted system of employee involvement.

⁶ See the situation of the purchase of Revisio (Germany) by SCOR SA.

- CEC would like to draw the attention of the Commission on the lack of mandatory translation of the working documents and discussions to make sure meetings of the SNB and of the representative body go smoothly. A mandatory translation in the languages of the countries representing the majority of workers should be included in the provisions of Directive 2001/86/EC, or at least a translation in English, French and German.

- CEC recommends strengthening the « before and after principle », i.e. the principle that the representation of employees should generally not be lower than prior to the creation of an SE unless the special negotiating body opts for such a solution with a certain quorum.⁷ Indeed, several cases have been brought to light where companies used legal options in the national company law in order to reduce or abolish employee participation a few months before announcing a merge or transformation into an SE. CEC refuses to endorse such practice and asks the Commission to take appropriate measures to prevent such circumvention of the Directive on the involvement of employees. A new rule could be established that would state that the changes implying a drop of the representation of workers and occurring in the two years preceding the conversion into an SE are not taken into account.
 On the other side, CEC considers that the question of the conversion of an SE into a public limited company which could result in the loss or reduction of employees' involvement must be addressed along the same line as for the « before and after principle ». Employees' participation rights must be protected as much as possible, unless their reduction has been agreed by employees' representatives.

- CEC expresses concerns that the Directive lacks of protection regarding managers' participation rights in special negotiation bodies. Yet managers play a key role in the success of businesses. The Directive fails in ensuring efficient protection of specific categories in the group of employees, such as the category of managers and executives. The Directive should provide for the presence of experts from the European trade unions without restriction to one specific organization as it was the case for the SE agreements signed so far. Only the European organisations representing managers like CEC-European managers could be authorized to represent this category of workers in the whole European Union.
 Therefore, CEC suggests including some amendments in the content of Directive 2001/86/EC to strengthen the rights of managers in nominating and getting appointed among the employees representatives participating to the special negotiation body (see Annex 1). At least, the presence of a representative of managers and executives within the SNB would be positive from the CEC and its national member organisations' viewpoint.

⁷ Recital nr 7 of the Directive: « If and when participation rights exist within one or more companies establishing an SE, they should be preserved through their transfer to the SE, once established, unless the parties decide otherwise ». See also recital 3 and 18 of the Directive.

(3) Do you think that, apart from and/or instead of legislative measures, other action concerning employee involvement at European Union level merits consideration? If so, what form of action should be taken, and on which issues?

Generally speaking, CEC views participation and involvement of employee representatives as a valuable resource for organisational effectiveness through higher employee commitment and reduced transaction costs. Many companies therefore rightly go further than the employee information and consultation in schemes. The legislator at national and European level should therefore refrain from creating additional barriers to further employee involvement. Every action aiming at promoting employee involvement must be strongly supported by the EU institutions: studies, surveys, reports and other communication tools participating to the awareness raising and the dissemination of good practices. The development in the reports describing industrial relations in Europe of the part on “workers’ involvement”, illustrated in particular by the SE legislation, is also an important way of action.

In the context of the European public consultation on Corporate Governance, CEC reaffirmed its support to employee share ownership as a form of employees’ involvement in their company. CEC considers that the European Commission must continue promoting financial participation of employees, as such systems could lead to better governance and better economic performance. The Commission could work on a new recommendation calling the Member States to increase their efforts towards the implementation of legal and fiscal incentives to employee financial involvement.

Regarding another issue identified in the Commission’s consultation on Corporate Governance, namely the evaluation of the performance of the board, CEC believes that an increasing involvement of employees in this process could prove more efficient than external evaluation. Thus, CEC pushes for the promotion at EU level of a mandatory opinion from employees’ committees on the annual report of listed companies with such internal committees.

(4) Would you consider initiating a dialogue under Article 155 TFEU on any of the issues identified in this consultation? If so, which?

CEC is in favour of a dialogue on the issues identified by the European Commission, in particular on the question of the rules on employee involvement. Promoting the participation of every category of employees in the negotiation process, CEC suggests operating for a closer cooperation with EWC representation bodies. Indeed, EWC constitute models of a balanced representation between the different categories of employees, which enable every category to express its views and opinions. From CEC’s perspective, the issue of workers’ involvement in case of structural change affecting an SE or occurring during the activation of an SE is also essential and could be discussed.

Annex 1

Proposals of amendments to Directive 2001/86/EC

In order to preserve the rights of managers to take part in the negotiation on employees' involvement before the establishment of a European Company, CEC proposes the following amendments. Indeed, the creation of a European Company must not result in the weakening of any previous structure that included managerial staff in the decision-making process.

The aim is to come to a form of representation enabling managerial staff to be taken into account as a specific group of workers, leading to their mandatory representation within the special negotiation body.⁸

- **First amendment:**

CEC suggests including a new recital between recitals 9 and 10 of the Directive, as follows:

*« According to the principle of subsidiarity, Member States shall ensure a balanced representation of the different categories of employees within the special negotiating body ».*⁹

- **Second amendment:**

CEC suggests adding a 4th sentence in the section II, article 3, paragraph 2b, as follows:

*« Member States shall 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. [...] Such measures must not increase the overall number of members. **Member States ensure when electing or appointing members of the special negotiating body, that the categories of managerial staff, professionals and executives recognized and represented in the participating companies, subsidiaries and establishments are represented by at least one member in the group of negotiators [...]**».*

⁸ The specificity of managers has already been taken into account in the framework of the recast Directive 2009/38/EC which established new rules for European Works Councils. Indeed, the agreement on the EWC must take into account the need for a balanced representation of the different categories of employees: « Without prejudice to the autonomy of the parties, the agreement [on the detailed arrangements for implementing the information and consultation of employees] effected in writing between the central management and the special negotiating body shall determine: [...] the composition of the European Works Council, the number of members, the allocation of seats, taking into account where possible the need for balanced representation of employees with regard to their activities, category and gender, and the term of office; » (underlining added). Article 6, paragraph 2b of Directive 2009/38/EC of the European Parliament and of the Council of 6 May 2009 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, OJ L122, 16.5.2009.

⁹ A corresponding recital can be found in the Directive on European Works Councils: « In accordance with the principle of subsidiarity, it is for the Member States to determine who the employees' representatives are and in particular to provide, if they consider appropriate, for a balanced representation of different categories of employees ». Recital 20 of Directive 2009/38/EC.

- **Third amendment:**

CEC suggests adding a sentence in article 4, paragraph 2g:

« If, during negotiations, the parties decide to establish arrangements for participation, the substance of those arrangements including (if applicable) the number of members in the SE's administrative or supervisory body which the employees will be entitled to elect, appoint, recommend or oppose, the procedures as to how these members may be elected, appointed, recommended or opposed by the employees, their rights, *and the distribution of seats between the different categories of employees*».

- **Fourth amendment:**

CEC suggests adding one sentence in the standard rules set out in the annex of Directive 2001/86/EC (part 1, paragraph b):

« The election or appointment of members of the representative body shall be carried out in accordance with national legislation and/or practice. *Consequently, the different categories of employees recognised in the Member States should be taken into account* ».