COUNCIL DIRECTIVE 2001/86/EC

of 8 October 2001

supplementing the Statute for a European company with regard to the involvement of employees

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 308 thereof,

Having regard to the amended proposal from the Commission [1],

Having regard to the opinion of the European Parliament [2],

Having regard to the opinion of the Economic and Social Committee [3],

Whereas:

(1) In order to attain the objectives of the Treaty, Council Regulation (EC) No 2157/2001 [4] establishes a Statute for a European company (SE).

(2) That Regulation aims at creating a uniform legal framework within which companies from different Member States should be able to plan and carry out the reorganisation of their business on a Community scale.

(3) In order to promote the social objectives of the Community, special provisions have to be set, notably in the field of employee involvement, aimed at ensuring that the establishment of an SE does not entail the disappearance or reduction of practices of employee involvement existing within the companies participating in the establishment of an SE. This objective should be pursued through the establishment of a set of rules in this field, supplementing the provisions of the Regulation.

(4) Since the objectives of the proposed action, as outlined above, cannot be sufficiently achieved by the Member States, in that the object is to establish a set of rules on employee involvement applicable to the SE, and can therefore, by reason of the scale and impact of the proposed action, be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary to achieve these objectives.

(5) The great diversity of rules and practices existing in the Member States as regards the manner in which employees' 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.

(6) Information and consultation procedures at transnational level should nevertheless be ensured in all cases of creation of an SE.

(7) 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.

(8) The concrete procedures of employee transnational information and consultation, as well as, if applicable, participation, to apply to each SE should be defined primarily by means of an agreement between the parties concerned or, in the absence thereof, through the application of a set of subsidiary rules.

(9) Member States should still have the option of not applying the standard rules relating to participation in the case of a merger, given the diversity of national systems for employee involvement. Existing systems and practices of participation where appropriate at the level of participating companies must in that case be maintained by adapting registration rules.

(10) The voting rules within the special body representing the employees for negotiation purposes, in particular when concluding agreements providing for a level of participation lower than the one existing within one or more of the participating companies, should be proportionate to the risk of disappearance or reduction of existing systems and practices of participation. That

[1] OJ C 138, 29.5.1991, p. 8.
[2] OJ C 342, 20.12.1993, p. 15.
[3] OJ C 124, 21.5.1990, p. 34.
[4] See page 1 of this Official Journal.

risk is greater in the case of an SE established by way of transformation or merger than by way of creating a holding company or a common subsidiary.

(11) In the absence of an agreement subsequent to the negotiation between employees' representatives and the competent organs of the participating companies, provision should be made for certain standard requirements to apply to the SE, once it is established. These standard requirements should ensure effective practices of transnational information and consultation of employees, as well as their participation in the relevant organs of the SE if and when such participation existed before its establishment within the participating companies.

(12) Provision should be made for the employees' representatives acting within the framework of the Directive to enjoy, when exercising their functions, protection and guarantees which are similar to those provided to employees' representatives by the legislation and/or practice of the country of employment. They should not be subject to any discrimination as a result of the lawful exercise of their activities and should enjoy adequate protection as regards dismissal and other sanctions.

(13) The confidentiality of sensitive information should be preserved even after the expiry of the employees' representatives terms of office and provision should be made to allow the competent organ of the SE to withhold information which would seriously harm, if subject to public disclosure, the functioning of the SE.

(14) Where an SE and its subsidiaries and establishments are subject to Council Directive 94/45/EC of 22 September 1994 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 [1], the provisions of that Directive and the provision transposing it into national legislation should not apply to it nor to its subsidiaries and establishments, unless the special negotiating body decides not to open negotiations or to terminate negotiations already opened.

(15) This Directive should not affect other existing rights regarding involvement and need not affect other existing representation structures, provided for by Community and national laws and practices.

(16) Member States should take appropriate measures in the event of failure to comply with the obligations laid down in this Directive.

(17) The Treaty has not provided the necessary powers for the Community to adopt the proposed Directive, other than those provided for in Article 308.

(18) It is a fundamental principle and stated aim of this Directive to secure employees' acquired rights as regards involvement in company decisions. Employee rights in force before the establishment of SEs should provide the basis for employee rights of involvement in the SE (the 'before and after' principle). Consequently, that approach should apply not only to the initial establishment of an SE but also to structural changes in an existing SE and to the companies affected by structural change processes.

(19) Member States should be able to provide that representatives of trade unions may be members of a special negotiating body regardless of whether they are employees of a company participating in the establishment of an SE. Member States should in this context in particular be able to introduce this right in cases where trade union representatives have the right to be members of, and to vote in, supervisory or administrative company organs in accordance with national legislation.

(20) In several Member States, employee involvement and other areas of industrial relations are based on both national legislation and practice which in this context is understood also to cover collective agreements at various national, sectoral and/or company levels,

HAS ADOPTED THIS DIRECTIVE:

SECTION I

GENERAL

Article 1

Objective

1. This Directive governs the involvement of employees in the affairs of European public limited-liability companies (*Societas Europaea*, hereinafter referred to as 'SE'), as referred to in Regulation (EC) No 2157/2001.

[1] OJ L 254, 30.9.1994, p. 64. Directive as last amended by Directive 97/74/EC (OJ L 10, 16.1.1998, p. 22).

2. To this end, arrangements for the involvement of employees shall be established in every SE in accordance with the negotiating procedure referred to in Articles 3 to 6 or, under the circumstances specified in Article 7, in accordance with the Annex.

Article 2

Definitions

For the purposes of this Directive:

(a) 'SE' means any company established in accordance with Regulation (EC) No 2157/2001;

(b) 'participating companies' means the companies directly participating in the establishing of an SE;

(c) 'subsidiary' of a company means an undertaking over which that company exercises a dominant influence defined in accordance with Article 3(2) to (7) of Directive 94/45/EC;

(d) 'concerned subsidiary or establishment' means a subsidiary or establishment of a participating company which is proposed to become a subsidiary or establishment of the SE upon its formation;

(e) 'employees' representatives' means the employees' representatives provided for by national law and/or practice;

(f) 'representative body' means the body representative of the employees set up by the agreements referred to in Article 4 or in accordance with the provisions of the Annex, with the purpose of informing and consulting the employees of an SE and its subsidiaries and establishments situated in the Community and, where applicable, of exercising participation rights in relation to the SE;

(g) 'special negotiating body' means the body established in accordance with Article 3 to negotiate with the competent body of the participating companies regarding the establishment of arrangements for the involvement of employees within the SE;

(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;

(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;

(j) 'consultation' means the establishment of dialogue and exchange of views between the body representative of the employees and/or the employees' representatives and the competent organ of the SE, at a time, in a manner and with a content which allows the employees' representatives, on the basis of information provided, to express an opinion on measures envisaged by the competent organ which may be taken into account in the decision-making process within the SE;

(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 the company's supervisory or administrative organ.

SECTION II

NEGOTIATING PROCEDURE

Article 3

Creation of a special negotiating body

1. Where the management or administrative organs of the participating companies draw up a plan for the establishment of an SE, they shall as soon as possible after publishing the draft terms of merger or creating a holding company or after agreeing a plan to form a subsidiary or to transform into an SE, take the necessary steps, including providing information about the identity of the participating companies, concerned subsidiaries or establishments, and the number of their employees, to start negotiations with the representatives of the companies' employees on arrangements for the involvement of employees in the SE.

2. For this purpose, a special negotiating body representative of the employees of the participating companies and concerned subsidiaries or establishments shall be created in accordance with the following provisions:

(a) in electing or appointing members of the special negotiating body, it must be ensured:

(i) that these members are elected or appointed in proportion to the number of employees employed in each Member State by the participating companies and concerned subsidiaries 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 concerned subsidiaries or establishments in all the Member States taken together;

(ii) that in the case of an SE formed by way of merger, there are such further additional members from each Member State as may be necessary in order to ensure that the special negotiating body includes at least one member representing each participating company which is registered and has employees in that Member State and which it is proposed will cease to exist as a separate legal entity following the registration of the SE, in so far as:

— the number of such additional members does not exceed 20 % of the number of members designated by virtue of point (i), and

— the composition of the special negotiating body does not entail a double representation of the employees concerned.

If the number of such companies is higher than the number of additional seats available pursuant to the first subparagraph, these additional seats shall be allocated to companies in different Member States by decreasing order of the number of employees they employ;

(b) 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. They shall take the necessary measures to ensure that, as far as possible, such members shall include at least one member representing each participating company which has employees in the Member State concerned. Such measures must not increase the overall number of members.

Member States may provide that such members may include representatives of trade unions whether or not they are employees of a participating company or concerned subsidiary or establishment.

Without prejudice to national legislation and/or practice laying down thresholds for the establishing of a representative body, Member States shall provide that employees in undertakings or establishments in which there are no employees' representatives through no fault of their own have the right to elect or appoint members of the special negotiating body.

3. The special negotiating body and the competent organs of the participating companies shall determine, by written agreement, arrangements for the involvement of employees within the SE.

To this end, the competent organs of the participating companies shall inform the special negotiating body of the plan and the actual process of establishing the SE, up to its registration.

4. Subject to paragraph 6, the special negotiating body shall take decisions by an absolute majority of its members, provided that such a majority also represents an absolute majority of the employees. Each member shall have one vote. However, should the result of the negotiations lead to a reduction of participation rights, the majority required for a decision to approve such an agreement shall be the votes of two thirds of the members of the special negotiating body representing at least two thirds of the employees, including the votes of members representing employees employed in at least two Member States,

— in the case of an SE to be established by way of merger, if participation covers at least 25 % of the overall number of employees of the participating companies, or

— in the case of an SE to be established by way of creating a holding company or forming a subsidiary, if participation covers at least 50 % of the overall number of employees of the participating companies.

Reduction of participation rights means 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.

5. For the purpose of the negotiations, the special negotiating body may request experts of its choice, for example representatives of appropriate Community level trade union organisations, to assist it with its work. Such experts may be present at negotiation meetings in an advisory capacity at the request of the special negotiating body, where appropriate to promote coherence and consistency at Community level. The special negotiating body may decide to inform the representatives of appropriate external organisations, including trade unions, of the start of the negotiations.

6. The special negotiating body may decide by the majority set out below not to open negotiations or to terminate negotiations already opened, and to rely on the rules on information and consultation of employees in force in the Member States where the SE has employees. Such a decision shall stop the procedure to conclude the agreement referred to in Article 4. Where such a decision has been taken, none of the provisions of the Annex shall apply.

The majority required to decide not to open or to terminate negotiations shall be the votes of two thirds of the members representing at least two thirds of the employees, including the votes of members representing employees employed in at least two Member States.

In the case of an SE established by way of transformation, this paragraph shall not apply if there is participation in the company to be transformed.

The special negotiating body shall be reconvened on the written request of at least 10 % of the employees of the SE, its subsidiaries and establishments, or their representatives, at the earliest two years after the abovementioned decision, unless the parties agree to negotiations being reopened sooner. If the special negotiating body decides to reopen negotiations with the management but no agreement is reached as a result of those negotiations, none of the provisions of the Annex shall apply.

7. Any expenses relating to the functioning of the special negotiating body and, in general, to negotiations shall be borne by the participating companies so as to enable the special negotiating body to carry out its task in an appropriate manner.

In compliance with this principle, Member States may lay down budgetary rules regarding the operation of the special negotiating body. They may in particular limit the funding to cover one expert only.

Article 4

Content of the agreement

1. The competent organs of the participating companies and the special negotiating body shall negotiate in a spirit of cooperation with a view to reaching an agreement on arrangements for the involvement of the employees within the SE.

2. Without prejudice to the autonomy of the parties, and subject to paragraph 4, the agreement referred to in paragraph 1 between the competent organs of the participating companies and the special negotiating body shall specify:

(a) the scope of the agreement;

(b) the composition, number of members and allocation of seats on the representative body which will be the discussion partner of the competent organ of the SE in connection with arrangements for the information and consultation of the employees of the SE and its subsidiaries and establishments;

(c) the functions and the procedure for the information and consultation of the representative body;

(d) the frequency of meetings of the representative body;

(e) the financial and material resources to be allocated to the representative body;

(f) if, during negotiations, the parties decide to establish one or more information and consultation procedures instead of a representative body, the arrangements for implementing those procedures;

(g) 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, and their rights;

(h) the date of entry into force of the agreement and its duration, cases where the agreement should be renegotiated and the procedure for its renegotiation.

3. The agreement shall not, unless provision is made otherwise therein, be subject to the standard rules referred to in the Annex.

4. Without prejudice to Article 13(3)(a), in the case of an SE established by means of transformation, the agreement shall provide for at least the same level of all elements of employee involvement as the ones existing within the company to be transformed into an SE.