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COMMISSION OF THE EUROPEAN COMMUNITIES

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COMMUNICATION FROM THE COMMISSION

on the review of Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees

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1. INTRODUCTION

Council Regulation (EC) No 2157/2001¹ (hereinafter “the Regulation”) establishes a Statute for a European company (hereinafter “SE”) with a view to creating a uniform legal framework enabling companies from different Member States to plan and carry out the reorganisation of their business on a Community scale. Council Directive 2001/86/EC² (hereinafter “the Directive”) supplements the Regulation as far as the involvement of employees³ is concerned, with the aim of ensuring that the establishment of an SE does not entail the reduction of practices of employee involvement existing within the companies participating in the creation of the SE.

As required by Article 15 of the Directive, in this Communication the Commission is reviewing the application of the Directive with a view to proposing any necessary amendments.

In preparation for this review, the Commission commissioned a report by independent experts and addressed to the Member States and to the European Social Partners a questionnaire together with the draft report.

2. TRANSPOSITION OF THE DIRECTIVE

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 transposing the Directive into national legislation. The group held meetings between December 2001 and June 2003 during which the main issues arising from the implementation of the Directive were extensively discussed⁴.

Despite this preparatory work, only six Member States transposed the Directive within the deadline established in the Directive (8 October 2004), and it took more than two years for the necessary measures to be in place in all Member States⁵. As for the quality of implementation, the abovementioned report prepared by the

¹ Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE), OJ L 294, 10.11.2001, p. 1.

² Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees, OJ L 294, 10.11.2001, p. 22.

³ Involvement of employees means any mechanism, including information, consultation and participation, through which employees’ representatives may exercise an influence on decisions taken within the company (Article 2(h) of the Directive).

⁴ The working papers of the Group can be found at:

⁵ http://ec.europa.eu/employment_social/labour_law/docs/2007/merged_working_papers_en.pdf

http://ec.europa.eu/employment_social/labour_law/docs/new_general_table_en.pdf.

independent experts⁶ shows that several issues deserve further clarification or verification by the Commission (cf. point 3.6 below).

3. THE CONTENT OF THE DIRECTIVE

3.1. The main principle

The fundamental principle and stated aim of the Directive is to secure employees' 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). This aim is sought primarily by means of an agreement negotiated between the management of the companies concerned and the employees' representatives. In the absence of agreement within a six-month period (which can be extended to up to 12 months by agreement), the Directive establishes a set of subsidiary rules. Furthermore, employees' representatives may decide not to open negotiations or to terminate negotiations already opened, and simply rely on the rules on information and consultation of employees in force in the Member States where the SE has employees.

3.2. The negotiation procedure

The legislation applicable to the negotiation procedure is that of the Member State in which the registered office of the SE is to be situated.

As for the start of negotiations, it is the responsibility of the management of the companies participating in setting up an SE to take the necessary steps as soon as it has been decided to establish the SE.

For the purpose of the negotiations, a special negotiating body (hereinafter "SNB") representative of the employees has to be created. The SNB's members are to be elected or appointed in proportion to the number of employees employed in each Member State by the participating companies and their subsidiaries and establishments. The method to be used for electing or appointing the members to be elected or appointed in their territory is left up to Member States. The Directive addresses the situation at the moment the negotiations start, but does not provide for cases in which changes occur in this initial situation before the negotiations end. Notwithstanding this, several Member States have adopted provisions in order to deal with such changes⁷.

The essential role of the SNB is negotiating the content of the right to employee involvement within the SE with the competent bodies in the participating companies. However, it may also decide not to open negotiations or terminate negotiations already ongoing. While the principle governing the adoption of decisions by the SNB is a double absolute majority (absolute majority of its members representing an absolute majority of the employees), if the SNB decides not to open negotiations or terminate any negotiations already opened, a triple qualified majority is needed (two

⁶ The final report can be found at:
http://ec.europa.eu/employment_social/labour_law/docs/2008/synthesis_report86_en.pdf.

⁷ BE, CZ, ES, LV, MT, PL, SI, SE, UK.

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). This triple majority is also needed (with certain additional conditions) when the outcome of the negotiations is a reduction of participation rights.

The expenses relating to the negotiations are borne by the participating companies. Most Member States have included a test of reasonableness of such expenses, while others have included an indicative list of expenses to be covered by the participating companies.

The SNB may request the assistance of experts of its choice for the purposes of the negotiations. Most of the national laws have limited to one the number of experts to be funded by the participating companies, as allowed by the Directive; only a few⁸ have not included any such limitation.

3.3. The content of the agreement

One of the main principles of the Directive consists in allowing the parties to define freely the rules which will bind them as far as employees' involvement is concerned. The only limit to the autonomy of the parties is laid down for the case of an SE established by means of transformation by Article 4(4): the agreement has to 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.

In order to assist the negotiating parties, the Directive has included a list of items to be addressed in the agreement. On the other hand, Article 4(3) of the Directive makes it clear that unless the agreement provides otherwise, it is not subject to the standard rules.

An agreement validly concluded under the rules of the Member State of registration is binding on the entire group of companies within the SE, all the local management bodies and all the employees of the group.

3.4. The standard rules

3.4.1. Conditions for the application of the standard rules

The standard rules apply only in a subsidiary manner, i.e. (a) if the negotiating parties so agree, or (b) if no agreement has been concluded by the deadline of six months (under certain circumstances one year) and, on the part of the participating companies, their competent bodies decide to continue with the registration of the SE and, on the part of the employees, the SNB has not decided either not to open negotiations or to terminate negotiations already opened.

Moreover, as far as the standard rules on employee participation are concerned, the Directive establishes a minimum percentage of workers covered by participation (25% in the case of a merger and 50% in the case of a holding or subsidiary) for the standard rules to apply. However, even if those percentages are not reached, a decision by the SNB to apply the standard rules suffices.

⁸ DE, IE, LV, SE.

3.4.2. *The composition of the body representative of employees*

According to Part 1 of the Annex containing the standard rules, the Representative Body (hereinafter “RB”) is composed of employees of the SE and its subsidiaries and establishments elected or appointed by the employees’ representatives in proportion to the number of employees employed in each Member State by the participating companies and their subsidiaries and establishments. It is through the RB that employees will exercise their rights to involvement in the SE.

In principle, the RB has a transitory nature, because four years after its establishment it has to decide whether to open negotiations on concluding an agreement or to continue to apply the standard rules.

3.4.3. *Information and consultation*

As far as information and consultation are concerned, the competence of the RB is limited to questions of a cross-border nature. In order to exercise this competence, the RB has the right to hold a meeting with the competent body of the SE at least once a year on the basis of regular reports drawn up by the competent organ on the evolution of the business of the SE. The topics for the meeting include the following: the structure, the economic and financial situation, the probable development of the business and of production and sales, the situation and probable trend of employment, investments, and substantial changes concerning organisation, introduction of new working methods or production processes, transfers of production, mergers, cut-backs or closures of undertakings, establishments or important parts thereof, and collective redundancies. In addition to the regular reports and the information provided during the abovementioned meeting, the RB is entitled (a) to receive information when there are exceptional circumstances that affect employees’ interests to a considerable extent; (b) to request the holding of an extraordinary meeting in order to be informed and consulted; and (c) to express an opinion; a further meeting can be requested if this opinion is not followed by the SE.

3.4.4. *Employee participation*

As for employee participation, the standard rules provide in the main that the level of participation in the SE is determined by the level of participation in the participating companies before the SE was established. Therefore, if none of the participating companies was governed by participation rules before the SE was registered, the latter does not have to establish provisions for employee participation.

3.5. **Reservation and confidentiality, spirit of cooperation and protection of employees’ representatives**

The Directive lays down the duty of members of the SNB and the RB and the experts appointed by them not to reveal any information given to them “in confidence”. This obligation continues after their term of office expires.

It also provides that, in specific cases, the management body of an SE is not obliged to transmit information if, according to objective criteria, transmission of the information may seriously harm the functioning of the SE or be prejudicial to it.

It is a basic principle of the Directive that, as far as the involvement of employees is concerned, the relationship between the employees' representatives and the competent body of the SE is governed by the spirit of cooperation.

Similarly to other Directives dealing with employee involvement in companies' decisions, employee representatives enjoy, in the exercise of their functions, the same protection and guarantees provided for employees' representatives by the national law in their country of employment. This guarantee covers, in particular, attendance at meetings and payment of wages during the period necessary for the performance of their duties.

3.6. Misuse of procedures

The Directive obliges Member States to adopt the means necessary to avoid the establishment of an SE with the aim of depriving employees of the right to involvement they already enjoyed or of withholding this right. According to the abovementioned independent expert report, several Member States have not adopted any such measures. The Commission deems this to be a matter of concern.

4. ISSUES RAISED BY MEMBER STATES AND EUROPEAN SOCIAL PARTNERS IN THE CONSULTATION

4.1. General

The vast majority of Member States and the European Social Partners consider that, for the time being, the Directive does not require amendment or clarification. Given the virtual lack of experience in applying the national provisions transposing the Directive, more time is needed before it can be established whether amendments are necessary. However, a few issues have been raised that the Commission considers deserve further attention.

4.2. Employee participation at group level

Some Member States and the ETUC have requested that the Directive be clarified as regards the issue of employee participation at group level. Indeed, in certain Member States employee participation is exercised also at group level, i.e. the employees in the subsidiaries have participation rights in the controlling company.

The Directive in Article 3(4) second subparagraph, 7(2) and point (b) of Part 3 of the Annex considers the level of employee participation within the participating companies (i.e. the companies directly participating in establishing an SE, according to Article 2(b)) as a reference for the application of the 'before and after' principle as regards employee participation. It follows from this that only the participation systems existing within the organs of these participating companies would be relevant for application of the 'before and after' principle. Therefore, a literal interpretation of the abovementioned provisions could result in employees of companies enjoying participation rights at group level being deprived of these participation rights after the SE has been created — due to the fact that the company in which they work is not a participating company within the meaning of the Directive but merely a subsidiary of a participating company.

Moreover, when determining the workforce to be taken into account for the purposes of calculating the percentages under Articles 3(4) and 7(2), the Directive also refers to the employees in the participating companies subject to a participation system. As a result, employees of a subsidiary having participation rights at the level of the controlling company might not be counted for the purposes of calculating percentages.

4.3. Changes occurring within the SE after its creation

Some Member States have raised the issue of the Directive not containing provisions to deal with changes occurring within the SE after its establishment. The issue of SEs registered without employees or without operations⁹ and the fate of employees' involvement when the SE starts operations and engages employees has been particularly pointed out.

According to recital 18 the 'before and after' principle 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". Indeed, Part 1 point B of the Annex to the Directive states that Member States must "ensure that the number of members of, and allocation of seats on, the representative body shall be adapted to take account of changes occurring within the SE and its subsidiaries and establishments". Furthermore, the autonomy of the negotiating parties allows them to make provision for mechanisms that take into account changes in the SE. However, as far as employee participation rights are concerned, the Directive does not provide for any such mechanism that would cater for the situation where, for instance, an SE with a few (or none) employees at the moment of its establishment increases its workforce subsequently or where an SE subject to employee participation transfers its registered office and is absorbed by a company of a different type without participation (or with less participation). In these situations employee participation rights could be lost or reduced.

Community law has already dealt with the issue of subsequent domestic mergers, (Article 16(7) of Directive 2005/56/EC¹⁰) by obliging the company resulting from the merger to ensure that employees' participation rights are protected for a period of three years. To this end the rules on employee participation in the company resulting from a cross-border merger should be applied *mutatis mutandis*.

4.4. Employees' participation rights when an SE converts to a public limited company

Germany and the ETUC have pointed out that in the absence of any limitation in the Directive, the conversion of an SE into a public limited company (permitted by Article 66 of the SE Regulation) could result in the loss or reduction of participation rights if the form of company adopted is not subject to employee participation or if the level of employee participation is reduced.

⁹ More than half of the SEs for which data are available did not have employees at the moment of registration. Source: http://www.worker-participation.eu/european_company/se_companies.

¹⁰ Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies, OJ L 310, 25.11.2005, p. 1.

Community law has already dealt with a similar issue, (Article 16(6) of Directive 2005/56/EC) by obliging such a company to take a legal form allowing for the exercise of participation rights.

4.5. The complexity of the procedure for the involvement of employees

Some Member States have pointed to the need to simplify and harmonise the procedures established by the different Directives concerning information, consultation and participation of employees.

BusinessEurope considers that the overly complicated and structured provisions around employee participation and the creation of the Special Negotiating Body have been a substantial obstacle impeding companies in making greater use of the European Company Statute. In its view, greater flexibility is needed so as to strengthen the negotiating autonomy of the social partners at company level, and in so doing allow for agreed solutions tailored to the needs of the company and its employees.

4.6. Other issues

Germany considers that the term “all elements of employee involvement” as referred to in Article 4(4) and Part 3(a) of the Annex should be given a broad interpretation and also include, for example, the number of employee representatives on the supervisory or administrative board.

The ETUC, while considering that it is too early to revise the Directive, highlights the following issues: (a) the size of the organ where participation is exercised should not be excluded from the negotiations; (b) in order to ascertain the level of participation for the purposes of applying the ‘before and after’ principle, account should be taken not only of the participation rights exercised in practice but also of the participation rights granted by national legislation but not exercised in practice; (c) employees’ representatives within the SE should be given a uniform level of protection; (d) the RB should be involved, at least, at the same time as information and consultation is required by national law; (e) representation of the particular interests of younger employees and of disabled employees should be ensured at European level.

5. CONCLUSIONS

The Directive has been operational throughout the EU only since 2007. According to official data¹¹, 146 SEs had been registered by mid-June 2008. Only 13 Member States had SEs registered in their territory, and of these only two (Germany and the Czech Republic) had registered more than 10. According to the majority of Member States and the European social partners there is a lack of practical experience applying the Directive. The Commission agrees with them that it is too early to revise it now.

¹¹ Supplement to the Official Journal of the European Union. <http://www.ted.europa.eu/>

The Commission acknowledges the complexity of the procedure instituted by the Directive for employee involvement. However, it should be recalled that the adoption of the Directive was the result of a delicate compromise among Member States that took more than 30 years of negotiations to achieve.

This Communication has identified some issues that deserve further consideration. However, taking into account that the Directive is complementary to the Regulation and that the Regulation is due for review at the end of 2009, the Commission will at that time consider the appropriateness of revising both instruments and the scope of any such revision.

In the meantime, the Commission will monitor the correct implementation of the Directive, and will continue to promote exchange of best practices and to enhance capacity-building of all stakeholders by way of seminars, training courses, studies and financial support for projects submitted by employer and employee representatives¹².

¹² The Commission promotes several actions with these aims, in particular under budget heading 04.030303 — Information, consultation and participation of the representatives of undertakings.