Studies on the implementation of Labour Law Directives in the enlarged European Union

Directive 2001/86/EC supplementing the European Company with regard to the involvement of employees

SYNTHESIS REPORT

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Content

1. Formal aspects

A. General Considerations

All of the EU-25 countries have transposed Directive 2001/86/CE. This unanimity in transposition is accompanied, however, by a significant diversity in the three following aspects: a) technique used for transposition, b) intervention of social partners and other social groups or consultative bodies in the procedure to prepare the transposition draft law, and c) the date of entry into force of the transposition regulation.

a) Firstly, the technique used most generally for transposition has been a legal regulation passed by the regulation authority of each State. Normally, this regulation has taken the form of law, developed in some cases by regulations. Nevertheless, in other countries and according with the constitutional provisions, the transposition regulation has had other legal modalities such as Presidential Decree (Greece), Legislative Decree (Italy), *Legal Notice* (Cyprus) or Decree Law (Portugal). The only exception to this general rule whereby the general regulation to transpose the Directive is a State law can be found in Belgium. Transposition in this country was undertaken by collective agreement at State level which became legally binding by means of a Royal Decree.

   Neither has there been unanimity in the decision to dictate one or two provisions to regulate, jointly or separately, the right to involvement of employees in the SE (Directive 2001/86/EC) and the Statute of the European Company (Regulation 2157/2001/EC). Hence, the solutions adopted do not respond to a single formula. In this sense, transposition took place, in some Member States (Czech Republic, Estonia, France, Germany, Hungary, Luxembourg, Poland, Slovakia and United Kingdom) in a single manner, without prejudice to the fact that provisions of the Directive were later included in the body of typical labour legislation (for instance, the *Code du Travail* in France or Luxembourg). However, the transposition of both Community regulations, Directive and Regulation, was undertaken through separate legislative instruments in the most countries. Austria, Belgium, Cyprus, Denmark, Finland, Greece, Ireland, Italy, Latvia, Lithuania, Malta, Netherlands, Portugal, Slovenia, Spain and Sweden respond to this later model

b) In practically all EU-25 countries, transposition of Directive 2001/86/EC[i] was preceded by consultation, in most cases of a formal nature, although some have been carried out informally. The only exception to this rule has taken place in Slovakia, where the Directive was transposed by means of an emergency legislation with no consultation period with social partners. In one case, transposition has been adopted after an agreement between social partners (Italy). And in Belgium, the SE-Directive has primarily been transposed through a national collective agreement subsequent to formal consultation.

[i] Hereinafter: Directive, SE-Directive, Council SE-Directive and Community Directive

The consultation procedures have been undertaken pursuant to legislation regulating this issue in each country. However, this diversity may be categorised into two models. In the first model, two different consultation stages or sequences appear, even when, in some cases, the same organisations participate (an example of this model can be found in Cyprus, Spain and Latvia). The first stage corresponds to the preparation of a draft law and implemented through direct negotiation between the Ministry in charge of social issues (for instance, Ministry of Labour, Ministry of Employment or Ministry of Social Affairs), on one side, and representative trade union confederations and employers' organisations, on the other. At the second stage, the draft text for the transposition law is submitted to formal consultation with certain bodies (Economic and Social Council, in particular). In the second model, the intervention of social partners is articulated exclusively in one single stage. This can be undertaken informally by starting tripartite deliberations and negotiations (as in the case of Greece, Finland and Estonia), or formally, by submitting the draft law to the consultative body or bodies specialised in social and labour issues (Belgium, Lithuania, Malta or Netherlands).

Intensive social discussion has not accompanied the transposition of the SE-Directive. This rule has been broken in only one case: Germany has been the only Member State of UE-25 where transposition has led to a wider national debate.

c) Art. 14.1 SE-Directive 2001/86/EC orders the States to adopt the laws, regulations and administrative provisions necessary to comply with the Directive "no later than 8 October 2004" or, given the case, shall ensure by that date at the latest that "management and labour introduce the required provisions by way of agreement".

Only six Member States in EU-25 (Austria, Denmark, Finland, Hungary, Sweden and United Kingdom) transposed the Community regulation on time. The transposition of the remaining States does not follow a common pattern: existing delays may be grouped into three levels. Firstly, minimal delays, only a few days (Malta or Slovakia) or, in any case, less than three months (Belgium, Cyprus, Czech Republic, Germany, Luxembourg); secondly, middle-term delays, of up to twelve months (Estonia, France, Italy, Latvia, Lithuania, Netherlands, Poland); and finally, delays longer than one year (Greece, Portugal and Slovenia) and, even two years (Ireland and Spain).

B. Analytical comments

Austria.- The SE-Directive was transposed by means of Law 82/2004, amending Labor Constitution Act (*Arbeitsverfassungsgesetz* <ArvbVG>). Nevertheless, some of the provisions contained in the SE-Directive were transposed, also, by means of amendments to other national laws; specifically, the Labour and Social Security Courts Act (*Arbeits und Socialgerichtsgesetz)* and the Postal Service Constitution Act (*Betriefsverfassungsgesetz).*

Belgium.- The legal scheme on the involvement of employees in the *Societas Europaea*, established by SE-Directive, has been transposed by a combination of national collective agreements, statutory legislation and royal decrees. The hard core has been implemented by national collective agreement num 84 of 6 October 2004 (CCT), declared binding by the royal decree of 22 December 2004. The collective agreement for Directive transposition was

object to consultation with two consultative bodies (*Conseil Central de l´Economie* and *Conseil National du Travail).*

Nevertheless, legal scholars have indicated that a statute is required or a remedy for the loophole created by the rescinding or termination of collective agreement. So, two laws adopted after the transposition have complemented the national collective agreement: the law of 10 august 2005, *portant des measures d´accompagnement*, and the law of 17 September 2005, *portant des mesures diverses.* These statutes deal with matters beyond the bargaining powers of the social partners.

Cyprus.- The SE-Directive has been implemented by Law 277 (I)/2004, of 21 December. The draft act was discussed by a tripartite technical committee of the Labour Consultative Body and, after, by this Consultative Body. A general consensus of the contents of the transposition of the directive was reached by the social partners. Prior to the enactment of the law, no national regulations existed on the information and consultation of employees.

Czech Republic.- The SE-Directive has been transposed by Law 627/2004 of 14 December. The government and social partners drafted the bill, the chief aim of which was to harmonise the European statute of the SE with the Czech Business Code and Notarial Rules. Frictions between social partners were associated with the scope and level of worker representation.

Denmark.- The SE-Directive was implemented by Act num 281, of 26 April 2004. The law was prepared by the Ministry of Employment and trade union and employers' organizations were consulted.

Estonia.- The SE-Sirective was transposed by "the Involvement of Employees in the Activities of Community-scale Undertakings, Community-scale Groups of Undertakings and in European Companies Act" (TKS) of 12 January 2005. The Ministry of Social Affairs prepared the draft act, which was sent to the social partners to receive their opinion. There was no consensus on the draft, with controversies focussing on the elections of workers´ representatives to the special negotiating body and to the employees' body of representation.

Finland.- National implementation of the SE-Directive took place by making a new Act on Employee Involvement in European Companies, Law 758/2004 of 13 august 2004. The Law has been amended by the law implementing Directive 2003/72/EC supplementing the European Cooperative Society with regard to the involvement of employees. A *Preparatory Committee* had discussed the proposal thoroughly and the governmental proposal is based on the memorandum of this Committee working in a tripartite structure. The agreement of the tripartite committee was that the law was sufficient.

It must be said that the preparatory works (*travaux preparatoires*) are strong legal sources in the Finnish legal system. Particularly, government proposals have a strong interpretational value. Consequently, many of the main principles and definitions for the interpretation of the law can be found there. This means that when the government has, in its proposal on the reform implementing the directive, referred to the former government proposal as the guide in the interpretation, the governmental proposal may give clear indication of the premises for reading.

France.- Provisions regarding the SE-Directive have been transposed into French law by Law n. 842/2005, of 26 July, *pour la confiance et la modernisation de l´economie* (*Breton loi*). Article 12 of this law has introduced arts. L. 439-25 to L.439-50 in the *Code du Travail.* These legal precepts have, in turn, been developed by Decree n. 1369/2006, of 9 November, regarding the involvement of employees in the SE.

Germany.- Germany has implemented European legislation regarding both the European Company Statute and the Directive on the Involvement of Employees, through two separate pieces of legislation: the *SE-Ausführungsgesetz* SEAG (Act on implementation of the SE) and the SE-Beteiligungsgesetz SEBG (Act on the participation of employees in a European company). There has been consultation with unions and employees in advance. Both acts, the SEAG and the SEBG, were integrated into one single piece of legislation, the *Gesetz zur Einführung der Europäischen Gesellschaft* (SEEG), which was promulgated on 28 December 2004.

The legislative process was controversial. The opposition of the German Bundesrat against the transposition Law had to be overruled by the majority of the coalition of SPD and "Grüne" in the German *Bundestag*. The *Bundesra*t criticized mainly two points. On the one hand, the *Bundesra*t wanted the German legislator to make use of the option referred to in art. 7.3 SE-Directive. On the other hand, the German *Bundesrat* expressed its reservations about the provision in the transformation law transferring the German principle of codetermination into the one-tier-system without alternations or adoptions. In the opinion of the *Bundesrat* this provision is not in accordance with art. 14 of the German Constitution (*Grundgesetz*) as well as with European Law and does not comply with the before-after-principle of the Directive.

Greece.- The SE-Directive was implemented in Greece by Presidential Decree 91/2006, which was published in the Official Gazette on 4th May 2006. Presidential Decree is a form of legislation under Greek Law which ranks second after Parliamentary Statute. It is issued by the President of the Republic, upon proposal of the relevant Minister and after an opinion of the *Conseil d' Etat*, the highest administrative court in Greece.

The text was drafted by a tripartite committee of experts. The draft Presidential Decree was not submitted to the Economic and Social Council, despite the specific request of the latter expressed in its Opinion No. 138 (September 2005). In any case, the Decree did not attract much public attention and no public debate took place among the social partners.

Hungary.- Hungary transposed Regulation 2157/2001/EC and Directive 2001/86/EC by Act XLV of 24 May 2004, by unanimous vote in Parliament.

Prior to being submitted to the Parliament, the draft bill was discussed by the plenary meeting of the tripartite National Interest Reconciliation Council (*Országos Érdekegyeztető Tanács*, OÉT). The government accepted some minor proposals from the social partners. Nonetheless, there were more serious issues on which the session participants did not agree. According to the trade unions, the section of the Act containing definitions should designate trade unions as 'employee representatives' and works' councils should play a role only in the

absence of trade unions. The employers opposed this, and the government did not agree either.

Ireland.- Council Directive 2001/86/EC was transposed into Irish law by Statutory Instrument (S.I.) 623 of December 2006 (European Communities (European Public Limited-Liability Company) (Employee Involvement) Regulations 2006). Ireland engaged in a consultation process with the social partners and the enterprise agencies and the detailed observations received helped to inform the drafting of the Regulations transposing the Directive. The new law was also consulted with the *National Centre for Partnership and Performance (NCPP*), which is a publicly funded body and represents the social partners, reported on case study based project, sponsored by the European Commission, on information and consultation in fourteen public and private sector organisations. The results of this work were published as "Information and Consultation: A Case Study Review of Current Practice".

Italy.- The SE-Directive has been implemented in Italy by Legislative Decree 188/05 of 19 august 2005 supplementing "the Statute for a European company with regard to the involvement of employees".

Two profiles characterize this Legislative Decree. The first one concerns the legislator taking into account the Social Partners Agreement (SPA) of March 2005, which provides guidelines for the transposition elaborated by trade unions and employers' associations, with exclusion of some aspects related to sanctions. The second, introduced by the Legislative Decree for the first time in the Italian legal system, the definition of "employees' participation". The SPA is a very important sign of consensus from employers' associations and trade unions in favour of information and consultation rights. In particular, SPA suggests to the Government and to the Parliament the adoption of "a legislative act that, in accordance with the goals of the Directive, is in compliance with the social partners' agreement".

Latvia.- Council Directive 2001/86/EC has been transposed by Law "On European Companies, which was adopted on march 2005. The SE-Act is valid from 7 April 2005. Social partners at national level were consulted during the preparation of the law transposing the Directive. Prior to submission of the draft law to the Cabinet of Ministers it was approved by the National Tripartite Co-operation Council.

Lithuania.- Council Directive 2001/86 has been transposed by Act num. X-200 of 12 May 2005 (IEDMEC). The Draft Law was consulted with the Tripartite Council of the Republic of Lithuania, which agreed without any significant objections. The administrative sanctions for violations of the law were consolidated in the Administrative Penalties Act Government Decree num. 99, of 28 January 2003, regulates some taxation aspects related to the reimbursement of the costs of members of the special negotiating body and the SE-Works Council.

Luxembourg.- The SE-Directive has been transposed into Luxembourg Law by the Law of 25 August 2006, "by which the Statute of the European Company is completed with regard to the involvement of employees". The contents of the law have been incorporated into the *Code du Travail,* by means of Regulation of 22 December 2006, so the SE-Directive is now

included in L.441-1 to L.444-9 thereof. The draft law was submitted to consultation with four Chambers (Employment, Private Employees, Commerce and Trade), which formulated observations that, for the most part, were taken into consideration.

Malta.- The SE-Directive was transposed into Maltese law by means of Legal Notice (LN) 452 of October 2004, known as the Employee Involvement (European Company) Regulations of 2004. The substance of the Directive is implemented in regulations 3 to 17 and in the Schedule (Regulation 10).

The draft of the LN was sent to a tripartite board, known as the Employment Relations Board (ERB). No report was ever published about the consultation that took place. Moreover, since the process of drafting a LN involves long deliberations at the ERB by the social partners, when it is presented in Parliament for approval, it is hardly ever debated. Thus the transposition of the SE-Directive, either because of the process involved or because of its apparent irrelevance to Malta, did not generate any public or national debate

Netherlands.- The SE-Directive was transposed by the Involvement of Employees (European Companies) Act of March 2005 (*Wet rol werknemers bij de Europese vennootschap*). The Social and Economic Council (SEC), was consulted about the proposal for the bill, and adopted an affirmative advisory report. The Ministry of Social Affairs and Employment drafted a legislative proposal that was consulted with the EC.

Largely, the point of view of the Social Economic Council concurred with the proposal of the Ministry. On only two points the SEC advised to make another choice. These points concerned the restriction on the costs of external experts and the composition of the supervisory board. The government only followed the SEC on the last point. Furthermore, the SEC paid attention to the choice between a monistic or a dualistic corporate governance structure and the application of structure law on Dutch SE's.

Poland.- Poland transposed three European statutes – Council Regulation 2157/2001/EC, Directive 2001/86/EC and Council Regulation 2137/85/EEC - by the Act of European Economic Interest Grouping and European Company (EEIG/SE) of 19 May 2005 .The rules for involvement of employees in the SE were provided for in articles 58 – 121 of the Act.

The draft version was the subject of social consultation in the procedure established in the provisions included in the Trade Unions Act and Employers' Organs Act. The trade unions organizations expressed their favourable opinion.

Portugal.- Portugal transposed the SE-Directive through Decree-Law 215/2005, of 13th December, and did not entrust management and labour to define by agreement the measures required. Social partners participated in the preparation of the Decree-Law through the *Comissão Permanente de Concertação Social* (Standing Committee for Social Conciliation) and some slight modifications were introduced pursuant to it.

Slovakia.- The SE-Directive was transposed into Slovak law through Act no. 562/2004 of 9 September 2004, on the European Company and Amendment of some Acts. The Act was

drafted by the Government/Cabinet and was passed by the National Council of the Slovak Republic.

The draft Act was submitted for consultation to organisations representing employees (*Konfederácie odborových zväzov SR* - Confederation of Trade Unions of the Slovak Republic) and employers (*Asociácia zamestnávateľských zväzov a združení SR* - Federation of Employers' Associations of the Slovak Republic). These organisations either submitted no comments on the draft Act or had no comments to make. Nevertheless, there was no consultation on the draft Act by the Slovak economic and social agreement tribunal (*Rada hospodárskej a sociálnej dohody*), which is the national-level consultative and conciliation body of the Slovak government and the social partners.

The Act was prepared and passed in the urgent legislative procedure with aim to meet the transposition deadlines. Social partners criticized the government/cabinet for not consulting with them the wording of the Act in the procedure of to prepare the Act. However, on the other hand, concerning the content of the Act, employees' as well as employers' representatives (operating at national level) had no principal comments or objections to the Act.

Slovenia.- The transposition of the SE-Directive has been achieved by a specific legislative instrument – the *Participation of Workers in Management of the European Public Limited-Liability Company Act (ZSDUEDD*) – which was adopted by the National Assembly of the Republic of Slovenia on 2 March 2006. The proposal of the Act has been prepared by the Ministry for Labour, which performed a consultation with social partners before sending the proposal to the Parliament. The proposal has been dealt with at the Economic and Social Council, which is the representative body of social partners. No extensive debate arose in this regard.

Spain.- Council Directive 2001/86/EC has been transposed into Spanish legislation by Law 31/2006, of 18th October, regarding the involvement of workers in European Companies and Cooperatives (LITSE).

Prior to bringing it before Parliament, the draft law was the object of discussion and negotiation within the framework of tripartite social dialogue agreed in the Declaration on "Competitiveness, stable employment and social cohesion" of July 2004. However, no consensus was reached with regard to its content as a whole, with divergences between sides of the dialogue appearing with regard to certain aspects. Likewise, the Government submitted the draft law to preceptive consultation, amongst others with the Economic and Social Council.

Sweden.- Council Directive 2001/86/EC was implemented in Sweden through a new statutory law: Act SFS 2004/559 on the involvement of employees in European companies, of 10 June 2004.

The report on the Involvement of employees in European companies was presented one year earlier, proposing how to implement the Directive. The report was referred for consideration to social partners and relevant bodies. In addition, the legislative proposal was also referred

to the Council on Legislation (*Lagrådet*) to ensure that it was not in conflict with existing legislation.

United Kingdom.- SE-Directive has been implemented in Great Britain by Statutory Instrument 2004 No. 2326 (Regulations). In respect of Northern Ireland, its requirements were implemented by Statutory Regulation 2004 No. 417 – The European Public Limited-Liability Company Regulations (Northern Ireland). These are based on the GB Regulations but use different institutions for the enforcement of the Regulations. Unless otherwise specified, references in this document to 'the Regulations', or specific Regulations identified by number, are made in respect of the GB-wide European Public Limited-Liability Company Regulations 2004.

The Regulations did not simply implement the SE-Directive. They also contained a number of clauses changing domestic company law to take account of EC Regulation 2157/2001/EC of 8 October 2001 on the Statute for a European Company. As an EC regulation, this piece of legislation has direct effect in the UK as elsewhere in the European Union.

In line with UK practice, there was a period of consultation by the government before the Regulations came into effect. A consultative document was published by the Department of Trade and Industry in October 2003. This document also included a "draft regulatory impact assessment" providing the government's own expectation of the impact of the Directive. A total of 22 responses were received, most coming from professional advisers, such as lawyers and accountants, and bodies representing them, such as the Institute of Chartered Accountants in England and Wales. Both the main social partners – the Confederation of British Industry (CBI) and the Trade Union Congress (TUC) – responded to the consultative document.

2. General legal framework

2.1 Objective

1. The centrality of the employees' right to involvement in the establishment and working of a European company constitutes one of the principles set in the SE-Directive on this issue throughout its long preparation process. This principle has a double legal coverage. On the one hand, Council Regulation no 2157/2001 qualifies the right to involvement as an *indispensable complement* of the European company (EC) itself. On the other, art. 1.2 Council Directive 2001/86/CE establishes that "to this end, arrangements for the involvement of employees shall be established in every SE (...)".

   The right to involvement of employees in the scope of undertakings taking the form of a company does not, however, offer any novelties in practically any of the EU-25 Member States, the legal systems of which establish formulae for the right to involvement with regard to employers adopting measures of a labour nature, or with regard to the evolution and functioning of the undertaking. These formulae, however, do not follow a uniform pattern; quite the opposite, its main feature is diversity affecting both the application of the right to involvement and its substantial contents. The idea has been expressed quite clearly in section (5) of the Introduction to Directive 2001/86, by stating

that "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 (…).

Not only has this diversity made it impossible to establish a single model for involvement applicable to the SE. It is also at the origin of one of the main concerns sought by the SE-Directive when it comes to regulating the right to involvement in the sphere of the European company. This concern lies in the establishment of a network of measures that ensure the principle known as *before and after.* The Introduction to the SE-Directive mentions this principle in up to two occasions. Firstly, section (3) states that "in order to promote the social objectives of the Community, special provisions have to be set, notably in the field of employee involvement, aimed to ensuring that the establishment of an SE does n*ot entail the disappearance or reduction* of practices of employees involvement existing within the companies participating in the establishment of an SE (…)". Also, section (18) strongly states that "it is a fundamental principle and stated aim of this SE-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 (…).

2. Art. 1 of the SE-Directive, under the title "*Objective*", states two provisions. Firstly, the first section defines the scope of material implementation, which is "the involvement of employees in the affairs of European public limited-liability companies (*Societas Europaea,* hereinafter referred to as "SE"), as referred to in Council Regulation no 2157/2001". Secondly, as mentioned earlier, the second section regulates the establishment of rules of involvement "in every SE (...)".

   The transposition into national regulations of the two provisions mentioned has not given rise to any problems, and has been articulated through two means. In the first, national law incorporates these provisions directly and expressly (Belgium, Czech Republic, Cyprus, Estonia, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Poland, Portugal, Slovakia, Slovenia, and Spain). On the other hand, in the second, incorporation is done indirectly or implicitly (Austria, Denmark, Finland, France, Malta, Netherlands, Sweden and United Kingdom).

   Also, most of the national laws regulating the right to involvement expressly acknowledge, in their content, their nature as a development of Directive 2001/86/CE. Nevertheless, in some cases, this reference is contained, rather than in the body of the transposition regulation, in other places such as the Introduction (Cyprus), an Annex (Lithuania) or in the Explanatory Note to the implementing regulations made under the European Communities Act 1972 (United Kingdom). In any case, national provisions that do not mention their nature as a regulation transposing Community law are in the minority. Hungary and Sweden are an example of the latter.

3. Most of the transposition laws simply incorporate, as shown, the provisions contained in art. 1 of the SE-Directive. Besides this, only a few national laws (Denmark and Germany) have declared the validity of the before/after principle. The German SE-Act offers an excellent example of the establishment of this principle in regulation.

Following on the statements contained in the Introduction to the Directive, art. 1 of the German Law (SEBG) clarifies, in subparagraph 2, that "*the purpose of this Act is to safeguard the acquired rights of employees in a European company to participate in company decisions. The existing rights of participation in the companies establishing the European company shall be definitive in determining the nature of the employees' rights of participation in the European company*". Article 1, subparagraph 3, deals with the rules of interpretation of the SEBG assessing that "*the provisions of this Act and the agreement (...) shall be interpreted in such a way as to promote the European Community's aims of securing the involvement of employees in the European company*". Finally, subparagraph 4 extends the safeguard of acquired worker's rights in the before-after-perspective also to the phases after formation of a European Company, setting that "*the principles set out in subparagraphs (1) to (3) shall also apply to structural changes to an established European company, and to the effects of such changes on the concerned companies and their employees*".

2.2 Definitions

A. General considerations

1. Article 2 SE-Directive, with an aim that is not only pedagogical but essentially legal, provides the definition of the most important concepts or institutions that appear therein. Specifically, there are eleven definitions referring to: European company, participating companies, subsidiary, concerned subsidiary or establishment, employees' representatives, representative body, special negotiating body, involvement of employees, information, consultation and participation.

   A comparative analysis of the definitions stated by the SE-Directive regulation and national transposition laws gives rise to some interesting conclusions. Firstly, and probably the most significant, is the large correspondence existing between the former and the latter. However, this correspondence is not only formal or in name. The laws of EU-25 Member States do not only offer a notion of the eleven Community concepts; the definitions of the concepts provided by these laws correspond, substantially and literally, to the notions stated in the Directive.

   Without prejudice to what is stated below with regard to some terms in a few legal systems, some of the differences that may be detected are of minor importance, as occurs in the substitution of the conjunction *"and"* by conjunction *"or"* in defining, as per art. 2.i. SE-Directive, "information" (Finland or Latvia). And, in other cases, these differences are not only permitted by the Directive, but favoured or encouraged by it. This is the case for the concept *"employees' representatives"*, which art. 2.e. of the SE-Directive remits to national laws or practices, and is often contained in different provisions of the law transposing the involvement of employees in the SE (Austria, Belgium, Estonia, Greece, Latvia, Slovenia, Spain and Sweden). Moreover, except for Latvia and Sweden, omissions are limited in quantity and irrelevant from a qualitative perspective. In this sense and with some exception (Belgium), the national laws transposing the SE-Directive do not include the concept "European company" directly, making explicit or implicit reference to the notion that has legally developed Council Regulation 2157/2001.

2. Independent of the correct transposition of the definitions established in the aforementioned art. 2 of the SE-Directive, several national regulations (Germany, Hungary, Ireland, Lithuania, Netherlands and Poland) enlarge the catalogue of definitions, introducing new concepts based on the specific nature of their legal systems. The definition of certain terms included in a concept by means of a reference to Community provisions other than SE-Directive is not infrequent. In this sense, other national laws (Cyprus, Greece, Lithuania, Luxembourg, Malta, Poland, Portugal and Slovenia) refer to the provisions established in Directive 94/45/EC in order to provide legal content to the notion of *dominant influence,* which plays a basic role in the definition of "subsidiary" undertaking in the context of art. 2.c. but is not described therein.

   The decision of certain national laws (Ireland and Malta) to establish a closing clause in the chapter of definitions is especially interesting. This clause states that, in view of the possible omission that national law may have incurred in, or possible doubts in interpretation that may rise in the application of this law, any omitted concepts shall be substituted and the concepts discussed will be interpreted and implemented pursuant to SE-Directive provisions. In this sense, the Council Directive, which lacks in itself direct performance, may end up becoming either a substitution regulation or an integrating regulation.

B. Analytical comments

Belgium.- CCT 84 describes the representative body of the employees as an "*organe transnational représentant les travailleurs*". The SE-Directive does not refer to the epithet "cross-border". The notion is questionable, because not all *societas europaea* will have a cross border composition. On the other hand, the definition of "workers' involvement" contained in collective agreement n. 84 does not reiterate the descriptive definition of the SE-Directive. It opts for an enumerative definition. Employees' involvement is described as "information, consultation or participation". Thus, the contractual autonomy of the special Negotiating Body seems to be restricted in a way which is not in conformity with the SE-Directive. In theory, the SNB could opt for a system of workers' involvement which *does* affect the exercise of the managerial prerogative (co-determination).

Finland.- The definition of "consultation" lacks the phrase "*exchange of views*". "Participation" is similar to SE-Directive, with the exception that the national law has added the term "*or such management groups or equivalent bodies which together cover the company's profit units*". The Finnish law implementing the Directive enlarges the definition, so that it also covers representation of a management group or a corresponding body – covering all the profit-centres of the enterprise – as meant in the SE-Act on personnel representation in the administration of undertakings. This was done due to the peculiarities of the Finnish law in this context.

Germany.- Article 2.2. (5) SEBG includes the word *managemen*t, understanding "the body which is directly involved in the establishment of the companies participating in the European company, or of the European company itself, and which runs the affairs of the company and is entitled to represent it. This shall be the management or administrative body

in the case of the participating companies, and the management body or executive directors in the case of the European company".

In amendment to the EC definition of "involvement of employees", the German law uses the concept *rights of involvement*, which shall mean "*the rights accruing to the employees and their representatives in relation to information, consultation, participation and other forms of involvement. This may also include the exercise of these rights in a European company's group undertaking."* (art. 2.2. (9) SEBG). The last sentence is to be seen in the context of German codetermination laws.

Hungary.- The national law gives an extended definition for involvement of employees, as it adds: 'Employee involvement includes information and consultation of employees and the exercise of employee participation rights'. Also, a slightly different transposition can be found in the definitions of information and consultation. In both cases, the law splits up the definitions, and the last few lines about the modalities are placed in separate paragraphs.

The law also provides further definitions in excess of the list of the SE-Directive. Such definitions are: *management body* ("the Management Board or Administrative Board of the participating company, the management organ of a limited liability company or managing body of any other legal entity") and *workers employed in Hungary*, which is defined as persons employed within Hungary by a participating company, European company or branch or establishment thereof irrespective of whether the European company has its registered office in Hungary.

Ireland.- Regulation includes a number of additional interpretations for a range of other terms used in legislation, such as the use of: appointed (the appointment by employees in the absence of an election), court, expert (an individual who, from time to time, may be in a position in a corporate body or other body or organisation) or trade union (an organisation which holds a negotiation licence under Irish trade union law).

As mentioned earlier, the Regulation states that any word or expression which is used in the law and which is also used in the SE-Directive has the same meaning in the legislation as in the own Directive.

Latvia.- Definitions of "concerned subsidiary or establishment", "representative body", "special negotiating body" and "involvement of employees" have not been transposed.

Lithuania.- The IEDMEC introduces three new notions: *I) Central management,* under which a competent managing or administrative organ of a European company shall be understood; ii) *Management of another level*, i.e. the managing or administrative organ of the subsidiary of a European company or its establishment or the manager of a subsidiary of a European company and iii) *Competent organ of participating companies,* that means a negotiating body formed by the agreement of the managing or administrative organs of the participating companies for the purposes of negotiating the involvement of employees in decision making with the special negotiating committee.

Netherlands.-The national law contains a separate definition of *Dutch participating company,* which is described as a participating company with its statutory seat in the Netherlands. The definition of information is to a certain extent defined more broadly than in the Directive. Information has to be supplied on issues which concern the SE or one or more of its subsidiaries. However, in the definition there is no statement on the timeliness of information; this is prescribed only in the Annex. The definition of consultation is more limited than the definition in the SE Directive. The reason is that in the Netherlands the definition of consultation has been copied from the law on European Works Councils. Consultation is, according to article 1.1, described as *the dialogue and exchange of views between the European company and the SE Works Council or the employee representatives.* The obligation that dialogue and exchange of views should be established "at a time, in a manner and with a content which allows 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", has been left out from the definition as such, and has been included only in the Annex.

Finally, Dutch law contains the definition of "parent company" that is absent in the SE-Directive. A *parent company* is a company which is able to exercise direct or indirect control over another company, and is not itself a company over which another company is able to exercise direct or indirect control.

Poland.- Some differences between the Polish SE-Act and the SE-Directive in this scope should be underlined. The first one refers to the definition of "representative body", which does not indicate the purpose of setting up a representative body, contrary to what is established in the Directive. The second is with regard to the notion of "special negotiating body". While the SE- Directive includes the input of the current negotiation, the Polish SE-Act indicates the effect of negotiation, i.e. the concluding agreement relating to the rules of employee involvement.

On the other hand, national law introduces two new definitions: *Employee* and *identification data.* The latter is described as the name or firm of a participating company, subsidiary or establishment and the register office thereof, and whether they have an identification number or are registered in the register; additionally, the aforementioned identification number or the number in the register. The definition of employee is provided in Polish Labour Code (1974). According to art. 2 of this national law, an employee is a person employed under an employment contract or under a cooperative employment contract.

Portugal.-The Portuguese legislator used the expression *quantitative reduction of employees' participation rights.* The expression corresponds to art. 3.4, last paragraph, of the SE-Directive; *it est*, it means a proportion of members of the organs of the SE, within the meaning of participation, which is lower than the highest proportion existing within the participating companies.

Slovakia.- Slovak law does not use the term *participation*. Instead, it uses, in further text, a more descriptive word: "right to influence composition of European company's bodies and/or organs".

Sweden.- Swedish law does not offer a definition of the following terms: "Special negotiating body", "involvement of employees", "information" and "consultation". However, there is no doubt or confusion on what the SNB means in the Swedish SE-Act. Also, in section 10 of the Co-Determination in the Workplace Act (1976), the concept negotiation is used instead of consultation and it refers to the fact that there should be dialogue and discussion.

3. Provisions applicable to an SE registered in the member state

3.1 Field of application

From the point of view of its legal content, the SE-Directive establishes a basic distinction between two large groups or provisions: the "main" provisions and "accessory" provisions. The former group, "main" provisions, are applicable to any European company which has its registered office in a specific Member State and are legally effective in the SE organisation as a whole, its subsidiaries and establishments, including those outside the territory of the specific Member State. "Accessory" provisions, on the other hand, are applicable exclusively to subsidiaries and establishments of the SE (or a subsidiary or, given the case, the participating companies that constitute the SE) which are located in the territory of the Member State, the registered office thereof being located in a different Member State.

National laws have collected this essential differentiation between, on the one hand, "provisions applicable to European companies registered in each State member" and, on the other hand, "provisions applicable to establishments and subsidiaries located in each State member of European companies". Logically, the field of application of these two categories of provisions are different. In this section, we shall refer to main or principal provisions.

3.2 Negotiating procedure

3.2.1 Procedure responsibility

As has been reasoned earlier, and herein again, one of the principles that inspire the SE-Directive on the right to involvement of employees in an SE, is that these rights are considered to be an "indispensable complement" to the establishment of the SE itself. With the aim of facilitating strict compliance with this core principle, art. 3.1 SE-Directive establishes the responsibility for the negotiation procedure of the involvement of employees in the SE on the competent bodies of the companies participating in the establishment of the SE.

In accordance with the rule, all national laws provide, direct or indirectly, that the responsibility to establish the conditions and means necessary for the negotiation of the rights of involvement with employees' representatives is incumbent upon these bodies. Non-compliance with this duty on behalf of the competent bodies in the participating companies establishing the SE may be legally demanded, in all Member States, before the competent national courts. Furthermore, it may trigger specific responsibilities of an administrative nature, (Greece or Spain).

3.2.2 Start of procedure

A. General considerations

Art. 3.1 SE-Directive imposes upon the directing or administrative bodies of the participating companies in the establishment of the SE, once the merger or holding company establishment project is published, or after adopting a project to create a subsidiary or to become an SE, the duty to initiate procedures to open negotiations with employees' representatives *as soon as possible* in order to establish the rights to involvement. These procedures include communication of the information regarding the identity of the participating companies, subsidiaries or establishments affected, and the number of employees.

National laws repeat these provisions, often verbatim (Austria, Denmark, Italy, Luxembourg and Sweden) and, always, in an appropriate manner. Nevertheless, some countries complement these rules in three ways. On the one hand, uncommonly, some laws limit the maximum period during which the procedure must be started. In this sense, Spanish law stipulates that the procedure must start at forty-five days, counting from the publication of the project. The Polish legislator also introduces an additional and different provision, obliging the start of the negotiating procedure on the same day for all participating companies. On the other hand and more frequently, national laws (Belgium, Czeck Republic, Estonia, Luxembourg, Poland, Portugal, Slovenia and Spain) enlarge the catalogue of issues which must be communicated at the start of the procedure. Finally, some SE-Acts establish the possibility that, when no collective body exists to receive information, the addressees of information are all employees individually (Czeck Republic, Germany, Ireland, Lithuania, Slovenia and United Kingdom)

B. Analytical comments

Belgium.- National collective agreement no. 84 goes *beyond* the wording of the Directive by providing a more elaborate content of the information which is to be transferred to the workers' representatives. Thus, it adds that, besides the numbers of workers active in participating companies, the proportion of the workforce in these companies to the overall workforce needs to be conveyed. Futhermore, the Belgian law, in the line of the *Kühne and Nagel* and *ASD Anker* judgement, takes into account the obligations pending on the subsidiary companies to communicate information.

Estonia.- Information on the number of employees shall be presented by each Member State and information concerning all relevant undertakings and enterprises shall be indicated separately. If employees in participating companies have the right to participate, information shall also be provided on the form and extent of participation and the proportion of employees' representatives of the total number of employees in all the participating companies shall be indicated.

Ireland.- National Regulation requires the provision of information not only about the identity of the companies proposed to participate in the SE, the subsidiaries and, the number of employees in each company; it also adds information about the countries where the companies and subsidiaries are located in and the number of employees to be covered by any participation system.

Lithuania.- The managing or administrative organs of the participating companies and concerned subsidiaries or establishments shall inform in writing about the number of employees in each participating company, concerned subsidiaries and establishments thereof, and also the total number of employees in each Member State, the number of seats in the special negotiating committee for employees' representatives of each participating company, concerned subsidiary and establishment, and their distribution by different Member States and, finally, the participation rights in the participating companies. That is, the rights to appoint, elect or nominate the member of the administrative or supervisory organs: or, in other words, the rights to decide the proportion that, in the administrative or supervisory organ of such companies, the employees or their representatives are entitled to appoint, elect or nominate.

Luxembourg.- Besides the mentions contained in the SE-Directive, legislation in Luxembourg also requires that the information to be provided contains the number of employees affected, given the case, by a system of participation and the number of employees that are not covered by this system.

Poland.- Polish law adds one more element: identification data of participating company, concerned subsidiaries and establishments.

Portugal.- Besides the information referred in SE-Directive, Portuguese legislation imposes some additional obligations only to the participating company with the highest number of employees and for which the headquarters are situated in national territory; that is, to the participating company with the highest number of employees in general which, in addition, is established in Portugal. This company should: i) determine the total numbers of SNB members, as well as the Member States in which they should be elected or appointed, according to the number of employees of the participating companies, concerned subsidiaries and establishments, and the criteria related to the constitution and composition of the SNB referred in art. 7 of SE-Act, which implements art. 3.2 of SE-Directive; ii) inform the SNB of the plan and the actual process of establishing the SE up to its registration and iii) inform the other participating companies and the employees' representatives participating on the appointment or election of the SNB members out of the total number of SNB members, as well as the Member States in which they should be elected or appointed.

If the participating company with the highest number of employees is located in another Member State, the Portuguese legislation does not oblige any company to provide such information.

Slovenia.- The SE-Act requires explicitly that more extensive information is to be provided to employees' representatives than required by the SE-Directive itself. This additional information refers to the organisational structure of the participating companies, concerned subsidiaries and establishments and their distribution across the Member States, the details of the existing employees' representatives in these companies and, finally, the number of employees entitled to participate at the board-level of the companies.

Spain.- The SE-Act, on the one hand, limits the maximum period during which the procedure must be started, setting this period at forty-five days counting from publication of

the project. On the other, it enlarges the catalogue of issues which must be communicated at the start of the procedure; this catalogue extends on two issues, besides the identity of participating companies and the number of employees. Firstly, information must be provided regarding the "address proposed for the registered office". Secondly, when systems of participation are implemented in the participating companies, the administrative or supervisory body must provide information regarding the nature of these systems, the number of employees covered by them and the proportion that these employees represent with respect to the total number of employees in the participating companies.

3.2.3 Establishment and composition of the Special Negotiation Body

A. General considerations

1. In the legal structure of SE-Directive, the special negotiating body (SNB) is an essential piece with regard to the implementation of the employees' right to involvement since this body is appointed with the fundamental task of opening negotiations with the aim of providing a substantial or material content to those rights. Hence, the attention paid to it by the Community Directive; article 3 thereof deals not only with its creation as would appear from the unclear heading to this precept but also regulates other different issues, such as its roles and its functioning. In any case, and currently focussing the analysis on all issues regarding its creation, paragraph 2 of aforementioned art. 3 establishes a set of provisions regarding the composition of the SNB, its complexity being its standout feature.

   The field of implementation of the rules of this article is not uniform. Two provisions with different scope can be identified; the first, of a general nature, and the second, with implementation limited to the SNB of the SE formed by way of merger. Furthermore, provisions in the SE-Directive with regard to the establishment of the SNB are not homogenous with regard to their nature. Whilst some can be inscribed amongst the "main" provisions, others may, on the other hand, be inscribed within the "accessory" provisions. In this sense, and for example, the rules about the election or appointment of the member of SNB are "accessory provisions". Now, we shall analyse the first category only.

   The rules regarding the manner of distributing employees' representatives in the SNB are "main" provisions, showing a diverse legal regulation on this issue. In accordance with art. 3.2.a. i) SE-Directive, members of the SNB are distributed proportionally to the number of employees in each Member State in the participating companies, subsidiary companies and establishments such that, in each Member State, there "is one seat per portion of employees employed in that Member State which equals 10 or a fraction thereof of employees employed" throughout the Member States". As a special provision, applicable to an SE formed by way of merger, paragraph a) ii) establishes that, in this hypothesis, there are such further additional members from each Member State as may be necessary in order to ensure that the SNB includes "at least one member representing each participating company which is registered and has employees in that Member State", as long as, in accordance with the project, the company ceases to exist as a separate legal entity following the registration of the SE.

An exact implementation of this special provision requires making a number of complementary provisions. Firstly, SE-Directive establishes a maximum limit to the additional members of the SNB that may be elected or appointed with the aim of guaranteeing, in the case of an SE formed by way of merger, the presence of a representative of each registered participating company employing workers in the State concerned, in the SNB. This maximum limit is equivalent to "20 per cent of the number of members" elected or appointed initially. Secondly, in the case that the number of participating companies in the merger is higher than the maximum number of additional seats in the SNB, the members exceeding this limit will be allocated to companies in different Member States "by decreasing order of the number of employees they employ". Finally, the composition of the SNB "does not entail a double representation of the employees concerned" (last paragraph, art.3.2.a.ii).

The rules that have been explained above regulate the composition of the SNB in a very specific time sequence, which corresponds to the start of the procedure. Nevertheless, during the course of action of the SNB – which as will be reasoned below may continue for a whole year -, different difficulties may be encountered that alter some of the essential elements that have been considered and weighed up for the first establishment of the SNB. Community Directive does not formulate any provision that contemplates any sudden change to those essential elements.

2. The transposition laws closely follow – at times with slight differences (Germany) and at others literally, word-for-word (Finland, Ireland or Sweden) – both the general provision on the composition of the SNB stated in art. 3.2.a).i) of the SE-Directive, and the special provision and its limitations, applicable to SE established by way of merger exclusively, stated in the following paragraph, that is, art. 3.2.a).ii) of the SE-Directive. This is the manner followed by the legislations of Austria, Cyprus, Czech Republic, Denmark, Estonia, Finland, Ireland, Germany, Greece, Latvia, Lithuania, Luxembourg, Malta, Poland, Portugal, Slovakia, Slovenia, Spain and Sweden.

   National singularities focus, essentially, on two aspects of the legal scheme regarding the establishment and composition of the SNB. Firstly, with regard to the special rule applicable to the establishment of an SE by way of merger (Czeck Republic and Estonia). Secondly, with regard to the consequences of any changes or vicissitudes affecting the initial composition of the SNB (Belgium, Czeck Republic, Malta, Latvia, Poland, Slovenia, Spain, Sweden and United Kingdom). The role played by these singularities is to complement or develop the provisions established by the Coimmunity Directive, and do not lead to conflicting divergences.

   The legal provisions relative to the establishment and composition of the SNB are part of the imperative law in the wide majority of European national legislations; that is, it is a right that is not found in the provisions open to collective negotiation. The exception to this rule can be found in the Finnish legal system, which allows agreement to establish amendments to these provisions.

B. Analytical comments

Belgium.- The SE-Directive does not provide a scenario wherein the structure of the participating companies changes *pendente contractu contrahendo;* that is, during the bargaining process. Article 12 of the CCT provides, in this respect, and establishes that when the management or administrative bodies of the participating companies modify the draft constitution of the SE, in order to include new participating companies or concerned subsidiaries or establishments or to exclude certain subsidiaries or establishments included in the initial draft constitution, it must provide new information and a new SNB shall be established.

Czech Republic.- The number of employees for the constitution to the SNB and the distribution of their seats is calculated at the date of publishing a proposal for establishing a European company.

Finland.- The SE-Act transposes art. 3.2.ii. Community Directive and maintains that, if the number of seats on a special negotiating body allocated to Finnish participating companies is less than or equal to the number of participating companies, these seats shall be allocated among Finnish companies one at a time by decreasing order of the number of employees they employ. If the number of seats on a special negotiating body allocated to Finnish participating companies in accordance with section 5 is greater than the number of participating companies, one seat shall be allocated first to each Finnish company, and thereafter the remaining seats among the companies in proportion to the number of employees they employ. The provision would concern only the seats of the special negotiating body, not the election of such representatives of the personnel (election of the shop steward, for example). This is based on the idea of Article 3.2.b of the Directive guaranteeing that there is at least one representative from the participating company having personnel in the state.

However, employees can, by agreement, deviate from the provisions regarding the allocation of seats among Finnish companies. Wherever possible, the representation of all Finnish participating companies and groups of employees shall be secured by agreement. Here, representation must be guaranteed to all the participating Finnish companies and groups of personnel. The freedom to agree would concern all aspects of the election process (amount, fields, functions of the personnel taken into account). The SE-Act, in Section 8, mentions also that the representative does not have to be an employees of the company and that all groups have an equal right to take part of the agreement. This provision would apply to relationships between Finnish companies, when the European company is established elsewhere in the EEA, corresponding wiht Article 3.2.b of the Directive, maintaining that member States must determine the mode of election and nomination

Estonia.- In the case of an SE formed by way of merger, additional members shall be elected or appointed according to the legislation of the corresponding Member State if the participating company terminating its activities as an independent legal entity as a result of the merger is not represented through its member. The number of such additional members may not exceed 20 per cent of the number of the SNB. Therefore, if the number of participating companies which are not represented through a member in a SNB is less than 20 per cent of the number of members in the SNB, each participating company which is not

represented shall present one additional member. If the number of participating companies which are not represented through a member in a SNB is more than 20 per cent of the number of members in the SNB, the additional seats shall be divided between participating companies which are not represented. The division shall be made pursuant to the number of employees in participating companies. The division of additional seats shall be commenced from the largest participating company and shall be continued by decreasing order pursuant to the number of employees.

Greece.- Greek legislation establishes a special rule on the composition on the SNB. In this sense, there will be three representatives if the company has a work force of up to 300 employees, 5 for 301-1000 employees and 7 for 1001 or more employees. It is estimated that since most companies in Greece employ less than 300 persons, the SNB will be mostly composed of three members. If more than one company in Greece participates in a scheme of SE, the above representatives gather together to elect the members of the SNB who correspond to the share of Greek employees in the total number of employees of the SE. In these members, there is at least one representative from each participating company; this rule may not alter the total number of the SNB´ members.

Hungary.- Hungarian law transposes SE-Directive, stating that the SNB shall have at least 10 members. And also, legislation regulates the cases of removal of a member of the representative body and stipulates that the SNB shall be dissolved on the date of registration of the European company. In the context of SE-Act, "removal" means that the mandate of an SNB member shall cease if: i) he or she resigns; ii) the mandate expires; iii) he or she becomes entitled to exercise employer's rights at the European company or one of its subsidiaries or establishments and iv) the employment relationship ceases. In case of resignation, the member shall be replaced by the alternate member elected in the same Member State.

Italy.- The Legislative Decree provides, not only in the case of an SE constituted by way of merger, that the SNB shall include at least one member representing each participating company which has employees. This provision is subject to two limits: the first one is that the final composition of the SNB must not exceed the total number of the SNB members; the second one is that the inclusion must be done "if it is possible". These two limits are not provided by the Directive but come from the SPA and they are in conformity with it.

The "if it is possible" rule means a legislative preference to the participating company in electing or appointing members of the special negotiating body. The case of one participating company in one MS with very few employees and a concerned subsidiary with a higher number of employees and with only one seat for that Member State, is not regulated by the Legislator. We may only suppose that the proportional method of calculation shall apply in this case, based on the employees employed as provided by art. 3.2 (a) (i) (first part), or, on the other hand, the employees' representatives of each company (participating company and concerned subsidiary) shall negotiate an agreement.

Latvia.- If the number of employees of a founder company changes and such change affects the composition of a special negotiating body, the composition of the special negotiating

body shall be changed accordingly. The national law does not provide any rule in the case that the perimeter of the situation changes.

The SNB body shall be recognised as established when all of its members have been elected. In the case of an SE formed by way of merger, if the number of founder companies is higher than the number of additional seats available in the SNB, additional seats shall be allocated to the employees of the companies in which there are more employees.

Lithuania.- If the SE is established by way of merger and if the number of participating companies is higher than the number of additional seats, the additional seats (art. 3.a.ii) SE-Directive shall be allocated between the participating companies of different Member States with the highest number of employees. If a Member State is allocated more than one seat, the representatives of employees shall be appointed from different companies.

Lithuanian law does not contain the restriction to elect or to appoint a member of the SNB who is not an employee of the concerned company or establishment. There are no specific provisions on the recomposition of the SNB or leading to a new geographical distribution of seats in the event of substantial changes in the structure and number of employees in the subsidiaries, establishments or the establishments of the subsidiaries

Malta.- The regulation requires that an appropriate adjustment should be made to the composition of the SNB in two cases. Firstly, if the changes are made to the participating companies, concerned subsidiaries or establishments which result in an increasing or decreasing number of ordinary or additional members which employees would be entitled to elect or appoint under this regulation, the original appointment or election of members of the special negotiating body shall cease to have effect and those employees shall be entitled to elect or appoint the new number of members in accordance with the provisions of the SE-Act. Secondly, a member of the special negotiating body is no longer willing or able to continue serving as such a member, the employees whom he represents shall be entitled to elect or appoint a new member in his or her place.

Poland.- According to national law, the mandate of a member of the SNB who is an employee of a participating company, concerned subsidiary or establishment participating in forming the SE shall expire, on the one hand, in the case of termination of labour relationship or renouncing a function an, on the other hand, in the case of the death, renouncing a function or withdrawing recommendation by this organization. In this case, the rules concerning election of members of SNB are applied (arts. 65-66 of SE-Act).

Portugal.- In the case of an SE formed by way of merger, the SNB will have such further additional members from each Member State as may be necessary in order to ensure that it includes, at least, one member representing each participating company which is registered and has employees in that Member State. This rule is not applicable to participating companies to which belong other companies with other members on the SNB. A company belongs to another *in lato sensu*, according to the Portuguese Corporate Code (*Código das Sociedades Comerciais*), when there is a dominant relationship, which means that an undertaking can exercise a dominant influence over another undertaking. This dominant influence shall be presumed in relation to another undertaking which, directly or indirectly,

holds a majority of that undertaking's subscribed capital, or controls a majority of the votes attached to that undertaking's issued share capital, or can appoint more than half of the members of that undertaking's administrative, management or supervisory body. In *stricto sensu,* a company belongs to another when the last one holds 100 per cent of that undertaking's subscribed capital.

Slovakia.- Allocation of the seats in the SNB shall be done in a manner such that employees of each participating company, concerned subsidiary and concerned establishment are represented by, at least one direct representative/member of the SNB. If the European company is formed by way of merger and it is not possible to proceed so, the seats in the SNB shall be occupied in this way by each participating legal entity.

If the European company is formed by a way other than merger, and the number of participating legal entities is higher than the total number of seats determined for the representatives of the SNB, the seats shall be occupied in a manner that each direct representative shall represent all employees of legal entities with their registered seat in the SNB by decreasing order of the number of employees employed.

If the number of employees in the participating legal entities changes during the negotiations of the SNB with management organs in such way that allocation of seats does not correspond to these legal rules exposed, a new allocation of seats shall take place. New allocation shall be done in a way that minimally distorts the original composition of the SNB.

Slovenia.- In order to calculate the number of employees in the SE, account must be taken of the number of employees at the time of the publication of the proposal for the establishment of the SE. If changes occur in the structure or number of employees of participating companies, concerned subsidiaries or establishments during the functioning of the SNB as to make it necessary to change the composition of the special negotiating body, the SNB must be appropriately re-established. Management is obliged to immediately inform the SNB of such changes, whereas the provisions regarding the primary formation of the SNB apply *mutatis mutandis*.

Spain.- The Spanish law of transposition repeats the provision in art. 3.2.a. ii) Community Directive. However, it establishes one more limit to apply this rule. In the case that there is a representative who is not an employee of any of the participating companies amongst the elected or appointed members of a Member State, Spanish law establishes a presumptive rule according to which all participating companies employing workers in the State in question are represented in the SNB through the non-employed representative. This is, nonetheless, an *iuris tantum* presumption that may be overruled by way of an election or appointment act "that provides otherwise".

The national law formulates two provisions that contemplate changes on the SNB. The first hypothesis is a change in the size, composition or structure of the organisational units of the SE that affects "the number of seats" to be allocated in the SNB, "the distribution criteria" of the seats or "the representativity" of the body itself. In all cases, legislation conditions this new election to the mediation of one of the following two formal requirements: agreement of the SNB and a written request or petition signed by at least 10 per cent of the employees of

the participating companies and their concerned subsidiaries and establishments, belonging to at least two establishments located in different Member States. Modification in the composition of the SNB must be considered to be an imperative provision, given the concurrence of conditions for its application in form and content. The second hypothesis affects the loss of representative mandate at national level of an SNB member. As for the case above, the occurrence of this vicissitude is automatically associated to the reestablishment of the SNB. Together with this content requirement, a formal requirement has to concur: a request by at least 10 per cent of the employees or representatives of the companies and establishments "for which the member in question was elected or appointed to represent".

Sweden.- The distribution of seats shall be adjusted should the number of employees in the participation companies, subsidiaries or undertakings change significantly (i.e., that would affect the distribution of seats) during the time the negotiating body is active.

United Kingdom.- Regulation requires that appropriate adjustments should be made to the composition of the SNB, either if there are changes to the participating companies, which would alter their entitlement to seats, or if a member of the special negotiating body is no longer willing or able to serve.

3.2.4 The functions of SNB

A. General considerations

1. The basic and essential role of the SNB, which justifies its creation, is negotiating the content of the right to involvement of employees within the SE with the competent bodies in the participating companies which are responsible for the negotiation procedure. Paragraph 1, art. 3.3 SE-Directive so states it. In logical coherence with its basic role, the negotiation procedure concludes on agreement of the involvement of employees. On the other hand, and with the aim of reaching this objective, paragraph 2 of this precept imposes upon the competent body the duty to inform the SNB "of the plan and actual process of establishing the SE up to its registration".

   Negotiation of the agreement on involvement constitutes the typical role of the SNB, but not the only one. Furthermore, the SNB may adopt another two decisions that may be qualified as atypical, alternatives to each other and with regard to reaching an agreement. Firstly, the SNB may choose not to open negotiations with the competent bodies of participating companies to lay down an agreement on the involvement of employees (paragraph 1, art. 3.6 SE-Directive). Secondly, it may declare ongoing negotiations closed and submit to the provisions on information and consultation of employees in force in the Member States where the SE has employees (paragraph 1, art. 3.6). Nonetheless, in order to safeguard another of the principles of the legal regulation on the involvement of employees within the SE, the *"before-after"* principle, the SNB is banned from adopting any of these decisions when the SE is established by means of transformation and as long as a system for the participation of employees is applied in the company which is to be transformed (paragraph 3, art. 3.6). 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 (paragraph 2,

art. 3.6). Once reaching any of both decisions, the negotiation process is concluded. However, subsidiary provisions stated by national laws of transposition are not applicable.

In any case, the SNB can only be re-established when requested by, at least, 10 per cent of the employees or the representatives of the SE, its subsidiary companies and establishments, and only when, at least, two years have passed since the decision was adopted. However, this temporal requirement is only a stipulation, not an imperative provision, in such a way that the SNB and the competent body may agree to open negotiations prior to this term. Given the case that once negotiations are resumed, before or after the two-year period, an agreement is not reached, SE-Directive provides non-application of the subsidiary provisions (paragraph 4, art. 3.6).

2. The provisions explained earlier with regard to the roles that the SNB may play, have been transposed by the national legal systems with a similar wording and spirit than the Community regulation. Or, expressing the idea in other words, very few legislations add these provisions in a secondary or collateral manner (Malta and Spain) and, similarly, few introduce legal disruptions (Malta and Hungary) that, in any case, must always be considered as minor. The reason for this imitative transposition may be probably found in the limited margin conferred in this sense by arts. 3.3 and 3.6 of the Community Directive, which state clear and precise mandates and, in general, do not require complementary provisions for their legal performance.

B. Analytical comments

Hungary.- The national law slightly deviates the negative statement of the Directive in case of not opening or stopping negotiations 'none of the provisions of the Annex shall apply.' Instead, it states positively that "the provisions of the Labour Code shall apply to the information and consultation requirements in respect of the SE's workers employed within Hungary".

Malta.-. The words "determine by written agreement" established by paragraph 1, art. 3.3 SE-Directive are omitted in the national law.

In order to facilitate the negotiation procedures, the measures which the management of the participating companies is obliged to take shall include the provision of all the relevant information about the identity of the participating companies, concerned subsidiaries or establishments, their number of employees and any matters related thereto, to the employees' representatives of the participating company, its concerned subsidiaries and establishments, or if no such representatives exist, to the employees themselves. Such measures shall be taken within three weeks from the date of adoption of the project to create the SNB.

If this happens, the competent organs of the participating companies shall, as soon as reasonably practicable and in any event by no later than one month after the establishment of the special negotiating body, inform their employees and those of their concerned subsidiaries and establishments of the identity of the members of the special negotiating body.

Spain.- Spanish legislation has some provisions with regard to the development of negotiations started by the SNB that adds some rules to the SE-Directive. Firstly, it establishes the possibility that the SNB and competent bodies in the companies participating in the establishment of the SE adopt, by common agreement, specific provisions regarding the chair of deliberations "or, given the case, other procedures agreed during the development of joint meeting sessions". Thus, the parties enjoy the freedom to agree what they deem necessary for this issue, with the possibility, for instance, of appointing an external chairman or to establish a rotation system between both parties. Secondly, national law establishes with regard to the minutes of the meetings, an imperative mandate which provides that they will be signed "by a representative on behalf of each of the parties". In this sense, the expression "parties", designates the two parties attending negotiations: social and employers, represented by the SNB and the competent bodies in the participating companies, respectively.

3.2.5 The workings of the SNB

A. General considerations

1. The Community Directive states a set of provisions with regard to the workings of the SNB. From among this set, the most relevant provision is undoubtedly the first mentioned. However, the SE-Directive does not establish any provision for the SNB reaching agreements; quite the opposite, it provides two rules of a different nature. The first is conceived as the general rule; the second, as a special rule, the application of which is submitted to the closed list technique.

   By virtue of the general provision, the SNB reaches agreements by an "absolute majority of its members", which, in turn, must represent "the absolute majority of its employees". Each member has one vote. This general provision is modified in certain cases where the majority required is larger; specifically, a two-thirds majority of SNB members, representing in turn two-thirds of employees and including the votes of members representing employees in, at least, two Member States. SNB decisions for which the SE-Directive requires a larger majority are three. We have mentioned the two first ones earlier; *id est*: not opening negotiations in view of reaching an agreement of involvement, and terminating ongoing negotiations, agreeing to submit to provisions of information and consultation of employees in force in the Member States where the SE has employees (art. 3.6). We must now add one more: reduction in the employees' participation rights (paragraph 1, art. 3.4).

   In this sense, Community Directive has proceeded to regulate effective content to the notion of reduction of participation rights, understanding this to be the establishment of a proportion of members of the organs of the SE within the meaning of art. 2.k "that is lower than the highest proportion existing within the participating companies". Additionally, SE-Directive defines the two cases in which the reduction of participation rights are specified. Pursuant to the provision contained in paragraph 2, art. 3.4, the SNB will require a reinforced majority in the following two hypothesis of reduction of participation rights: i) in the case of an SE to be established by way of merger, "if participation covers at least 25 per cent of the overall number of employees of the participating companies" and, ii) in the case that an SE is 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".

Besides the provisions on reaching agreements, Council SE-Directive establishes other provisions with regard to the workings of the SNB. On the one hand, the SNB may decide to supply information to "the representatives of appropriate external organisations, including trade unions, of the start of the negotiations" (art. 3.5, *in fine).* On the other hand, the European regulation provides that, "for the purpose of negotiations, the SNB may request experts of its choice, for example representatives of appropriate Community level trade union organisations". The objective of the experts is "to assist the SNB with its work". Therefore, they may be present at negotiations meetings in an advisory capacity "to promote coherence and consistency at Community level" (art. 3.5). Finally, the Directive establishes two provisions regarding the costs of the SNB. The first has a material nature and its legal structure is open. Specifically, paragraph 1, art. 3.7 provides that expenses relating to the functioning of negotiations "shall be borne by the participating companies so as to enable the SNB to carry out its task in an appropriate manner". The second provision, however, has a formal nature as it enounces an option for the national systems In this sense and in accordance with paragraph 2 of the abovementioned article, the domestic laws "may lay budgetary rules regarding the operation" of the SNB. The Directive precept concludes by pointing out that national legislations may also limit funding to cover "one expert only".

2. The transposition of sections 4, 5 and 7, art. 3 of the Council SE-Directive by the Member States has responded to certain common principles, translating the different nature and scope of the provisions established in these precepts. First, the provisions regarding the SNB reaching agreements (art. 3.4), both the general and special rule in cases of reduction in the right to participation, define quite precisely both the cases and the legal consequences; thus, national legislations hardly have room for regulation. In this legal context, it isn't strange that most of the European legal systems have undertaken an almost literal transposition of the Community text. Only one legislation introduces some secondary-nature differences which can be explained from the singularities of the scheme for the right to participation of employees in its specific legal system. I refer to German legislation; to the SEEG.

   The nature of the legal statements contained in sections 5 and 7 of aforementioned art.3 of the SE-Directive are quite different. The internal structure of these provisions obeys to the more traditional legal principles of a directive; that is, it sets out to guarantee a specific useful effect, allowing national transposition laws to choose between several alternatives. The issues we are concerned with here are the presence of experts in the SNB and the expenses of running the SNB; these issues offer the most diversified legal treatment from national legislations.

   Nevertheless, this diversity is only moderate or relative, with convergences being more relevant than divergences. Firstly, most of the transposition laws have made use of the capacity established at the end of para. 2 art. 3.7, limiting the funding covered by participating companies of the SE to one expert, unless a more favourable agreement is

reached, which is sometimes established expressly (Belgium). Only a few countries have not had recourse to this option (Germany, Ireland, Latvia and Sweden).

On the other hand, and with regard to the expenses of the SNB being borne by the participating companies, the development of this provision in national legislations follows two basic models. In the first, participating companies must bear the running expenses that are *reasonable* (Ireland, Malta, Estonia and United Kingdom), *essential* (Netherlands), *necessary* (France and Sweden), *justified and necessary* (Hungary) or *appropriate* (Austria, Finland, Latvia, Luxembourg and Slovenia). The criteria to define reasonable, essential, necessary, justified and necessary or appropriate become, in this way, an assessment of the economic load imposed on these companies. On the other hand, in the second model, national laws list the different concepts that constitute the running expenses of the SNB; normally, this will be an indicative or open list (Belgium, Cyprus, Greece, Italy, Lithuania, Poland, Portugal Slovakia and Spain). Some transposition laws (Czeck Republic and Germany) include both models, establishing a general clause with a specific list of expenses that, in any case, shall be borne by the companies. The Community Directive does not establish a criterion to share these expenses between the participating companies. This omission is maintained in most national laws, with some exceptions (Poland and Portugal). Therefore, it is the companies' competence to agree the manner of distribution they deem appropriate; for instance, profit turnover volume or number of employees in each.

Lastly, and on a different note, only a few legislations establish additional rules on the organisation of the SNB. This reduced group includes Lithuania, Poland, Slovenia, Spain and United Kingdom.

B. Analytical comments

Austria.- The participating companies have to provide the operating requirements, appropriate to the size of the SE and the needs of the special negotiating body, free of charge. Also the administrative expenses for the proper completion of the tasks of the special negotiating body, especially the operating costs for the conference and preparation meetings, including the expenses for interpreters and the costs for at least one expert as well as the cost of room and board and the travel expenses for the members of the special negotiating body, have to be borne by the companies involved.

Belgium.-. CCT no 84 provides a right to preparatory meetings without the management of the participating companies. The holding of such a meeting is made subject to the approval of the management of the participating companies. This provision does not make the exercise of the freedom of assembly subject to managerial consent. Its scope is financial. In case of consent, management will undoubtedly have to bear the costs. Furthermore, it can be argued that consent cannot be denied in a discretionary, let alone an arbitrary, way. Such an attitude would go against the spirit of co-operation.

Denmark.- Article 3.7 of the SE-Directive is implemented by section 13(2) of the Danish Act that provides 'The participating companies shall bear the costs of negotiations and of the activities of the special negotiating body, including the cost of at least one expert'. This is the only budgetary rule on the SNB, see on the representative body below. As appears,

participating companies must pay for at least one expert under Danish legislation. Denmark has thus made use of the possibility to limit the funding to cover one expert only.

Germany.- As mentioned earlier, German law contains some particular features with regard to reaching agreements. The first of these affects the way to calculate the threshold value for the implementation of the special rule on reaching agreements. Pursuant to the SE-Directive, the two threshold values contemplated in art. 3.4 (25 per cent and 50 per cent) are calculated with regard to "the overall number of employees of the participating companies". German law, however, enlarges the business scope of calculation, affecting both participating companies and concerned establishments.

The second feature lays in the concept of the right to participation, which must include the exercise of these rights "in a European company's group undertakings". According to the German Codetermination Act of 1976 (*Mitbestimmungsgesetz* 1976), the employees of all subsidiaries are entitled to vote for some of the members of the holding company's supervisory organ. In so far the German provision corresponds with the legislative spirit of the Directive (the before after approach and the protection of existing rights) and is therefore compatible with Community Law.

The participating German companies are subject to *Mitbestimmungsgesetz* and, so, they are protected by the threshold values as participating companies. Finally, the German provision aims not only to the *reduction* of the proportion of employee representatives on the supervisory or administrative organ of the SE but includes any other restrictions of the right to elect, appoint, recommend or oppose members of the supervisory or administrative board.

Besides what we have stated above, German legislation develops art. 3.7 of the SE-Directive by a disintegration of both models. On the one hand, undertakings must finance the essential running expenses of the SNB. However, on the other, it defines the following, as the essential expenses regarding "premises, material resources, interpreters and clerical staff required for meetings", and "travel and subsistence expenses of the members of the special negotiating body".

Greece.- The national law indicatively enumerates the kinds of expenses that are covered by the participating companies: interpretation, travel, lodging and food expenses as well as printing and publication expenses concerning the results of the meeting.

Italy.- Unless otherwise agreed, the SE shall bear the cost of organising meetings and providing translation facilities and accommodation and travelling expenses of members of the SNB.

Lithuania.- The SNB shall have a right to convene in meetings before the start of negotiations with the competent organ of the participating companies or before each negotiating meeting with it. A meeting of this kind of the SNB may not last longer than a day. With the consent of the competent organ of the participating companies, the SNB may hold meetings more often and/or for a longer time. The participating companies shall provide premises and working tools for the meetings of the SNB and ensure translation and the proper organisation of the meeting. The meetings of the SNB shall be closed, unless decided

otherwise. Minutes shall be taken of the meetings of the SNB. The minutes of the meeting shall be signed by the chairperson of the meeting and the authorised member of the SNB.

All expenses related to the formation of the SNB and the participation of its members in the meetings of the committee or its negotiations with the competent organ of the participating companies shall be covered by the funds of the participating companies on their agreement. Such expenses shall include the costs of travel, health and life insurance, accommodation and allowances. The legislation provides a procedure for the reimbursement of these expenses.

Poland.- The Polish SE-Act stipulates that the companies participating in the establishment of the SE, convene the first meeting of the SNB within 14 days since the day of its creation. The objective of the meeting mentioned above is to elect the chairman of the SNB among its candidates and to adopt its rules of procedure.

The travel costs of the members of the SNB shall be borne by the participating company or the concerned subsidiary or establishment; this applies to both members who are employees and not employees of these companies, who were appointed or elected by employees of one of these organizational units. The remaining costs are borne by the participating companies in proportion to the number of employed workers, including workers employed by its subsidiaries and establishments.

Portugal.- The accommodation and travelling expenses must be paid accordingly to the system applicable in the subsidiaries or establishments where the employees' representatives work. Still, they can not treat any member of the SNB less favourably. The funding to cover the expert can be regulated by the rules applicable to the members from the same Member State. The participating companies support the expenses concerning the expert in proportion to their number of employees.

The costs referring to each member of the SNB are supported by the participating company they belong to or from which subsidiary or establishment they come from. If the member of the SNB does not belong to any participating company, subsidiary or establishment, the costs are supported by the participating companies which employees he represents in proportion to the number of their employees.

Slovakia.- Participating companies shall provide for sufficient financial funds, material sources and organisational preconditions for the appropriate performance of the tasks of the SNB and its members. Members of the SNB are entitled especially to compensation for their expenses. Participating companies shall in advance set aside (from the determined budget) relevant financial sources for compensation of costs needed especially for organisational arrangement of the negotiations of the SNB, such as translation costs, travel expenses, accommodation, allowances and costs for experts.

Spain.- Spanish law establishes some provisions with regard to the functioning of the SNB which go beyond the SE-Directive. Firstly, it confers to the SNB the capacity to pass internal regulations with regard to its own workings, such as appointing a chairman from amongst its members. Secondly, national law recognises the SNB the right to meet prior to any meeting

with the competent bodies of the participating companies, "without the presence thereof", a provision which has a consequence on the scheme of expenses of the SNB, as we will explain in the next paragraph. Thirdly, the SNB is obliged to supply information "on the process and the results of negotiation" to the trade unions that, in each Member State, have participated in the election or appointment of the members of the SNB. With regard to this duty of the SNB, national law does not establish a periodicity for providing information. The content of the information will deal with the process and the results.

National law specifies the minimum expenses that must be borne by the participating companies. It must cover expenses derived from the election or appointment of members of the SNB and expenses of the organisation of SNB meetings, including translation, allowance, accommodation and travel expenses of its members.

3.2.6 Duration of negotiations

1. The Council SE-Directive dedicates its fifth article to the duration of negotiations aimed at reaching an agreement on the involvement of employees. There are two provisions contained in this precept. The first is a general-scope provision, and the second provision allows the parties to repeal the former provision. Paragraph 1, art. 5 provides that negotiations "shall commence as soon as the special negotiating body is established and may continue for six months thereafter". Nevertheless, paragraph 2 declares that, by joint agreement, the parties may extend negotiations "up to a total of one year", from the establishment of the SNB.

2. Most of the national laws of transposition reproduce, often word-for-word (Czeck Republic, Greece, Sweden), the content of art. 5 of the SE-Directive, as mentioned earlier. Nevertheless, a few systems specify the *dies quo* from which the six-month term must be counted, established by SE-Directive as a general rule. In this sense, some domestic laws clarify that the date *a quo* coincides with "the first meeting of the SNB" (Belgium, Netherlands, Poland and Slovenia), expression which is equivalent to the expression used in the SE-Directive.

   However, this is not the only formula. German legislation establishes that the expression used in the Directive, the date of establishment of the SNB, refers to the date on "which the management bodies issue invitations to the constituent meeting of the SNB". Maltese law establishes that the date on which the six-month negotiation period starts to count is "one month after the date on which the last member of the SNB is elected or appointed. Finally, Spanish legislation states that, given the case that the SNB is not established on "grounds attributable to employees' representatives", having the employers' side complied with "their obligations towards the establishment" of the negotiating body, the six-month term will count "from the date on which the negotiating body could have been validly established".

3.2.7 The agreement on involvement

1. Once the SNB is established and within the period provided as ordinary or extraordinary duration, the social partners open negotiations aimed towards reaching an agreement regulating the involvement of employees in the SE. Pursuant to art. 4.1 Community

Directive, the parties shall negotiate "in a spirit of cooperation with a view to reaching an agreement on arrangements for the involvement of the employees".

All national laws transpose this mandate, sometimes literally and sometimes with slight alterations. For instance, sometimes the expression *spirit of cooperation* is substituted, adapting it to a language that is more suitable to the domestic legal traditions. In this sense, Hungary and Spain state that the parties must negotiate in *good faith*, a notion which is completely equivalent to the expression used in the Community regulation. In some systems, the transposition regulation does not expressly mention that the aim of negotiation is to reach an agreement (Sweden). In the application to this specific national context, this omission is not of substantial relevance because all the principal provisions of the SE-Act are with regard to this aim implicitly.

2. Article 4.2. of the Council SE-Directive states the issues that must be dealt with by the agreement on involvement, constituting what may be qualified as the "minimum content" of the agreement on involvement. A first group of these issues (for instance, scope of implementation of the agreement, the date of entry into force and duration thereof) has no other aim but to ensure the identity of the agreement as a regulating pact regarding the right to involvement. A second, larger group of issues, on the other hand, mentions aspects regarding the content of the agreement, such as the attributions and competences of the bodies of representation, financial and material resources assigned to this body or provisions on participation. In any case, neither group sets substantial provisions, as the SE-Directive's objective is not to set minimum rights but to ensure that the agreement regulates these issues. On the other hand, not all the issues mentioned in art. 4.2 have to be compulsorily included in the agreement. Specifically, it is compulsory to include: i) in any agreement of involvement, the issues established in sections a) and e); ii) the issues established in sections b), c), d) and e) are compulsory mentions, but alternative to the issue appearing in section f). It corresponds so to the agreement itself to decide the manner of involvement chosen freely: either by the body of representation, in which case the agreement must include the issues mentioned in sections b), c), d) and e), or by procedures of information and consultation, in which case the agreement includes only the references of section f); iii) finally, the obligation to include aspects stated in section g) is only effective in the case that the parties have agreed to establish arrangements for participation.

   Most of the national laws have transposed art. 4.2 of the SE-Directive mechanically. This mimesis can be seen in a double sense. On the one hand, and from a formal perspective, transposition is carried out following the model of the Community Directive; that is, reproducing the list of issues that may be included in the contents of an agreement on involvement, in a single provision and with same systematic order. On the other, and from a material perspective, the transposition copies the Community language with no significant alterations, adaptations or additions.

   Nevertheless, some of the transposition regulations do not rigorously follow this common pattern. A first group of laws break the formal unity of art. 4.2, dealing with the different issues that form the content of the agreement in different paragraphs or articles. In this sense, Germany deals separately with the contents of employee involvement (art.

4.2.g SE-Directive). Portuguese and Slovak legislations follow a similar criterion, including general references (sections a), c), d), e) and h) art. 4.2) in one article and in another, mentions to the body of representation and to the procedures of information and consultation, on the one hand, and to the right to participation, on the other (Portugal), or in a more limited manner, to the information and consultation procedures and the right to participation (Slovakia). Sweden separates the content into four articles, though the content in the articles follows the order of the content in art. 4.2 of the directive and almost the same wording is used.

A second group of laws undertake enlargements or adaptations in the list of mentions that the agreement must include. Within the additions, the following may be mentioned: the "date of conclusion" (Belgium), "the identification of the arranging parties" (Spain) and "the duration of the mandate of members of representative body and the effects that may be derived from modifications in size, composition or structure of the SE and its subsidiaries or in the composition of national bodies of employees' representation" (Spain). The Italian, Maltese and United Kingdom Regulations may be mentioned with regard to adaptations or amendments. The Italian Legislative Decree reformulates the wording of art. 4.2.g of the Council SE-Directive ("the procedures as to how these members may be elected, appointed, recommended, or opposed by the *employees* and their rights"), substituting it by the following: "the procedures as to how these members may be elected, appointed, recommended, or opposed by *the representative body or the employees' representatives*, and their rights". The Maltese LN adds a subsection to section h) of art. 4.2, by which the agreement must mention: "the date of entry into force of the agreement and its duration, cases where the agreement should be renegotiated, including the duty to renegotiate *on changes in worker involvement whenever a substantial change in the structure of the SE is foreseen* and the procedure for its renegotiation. Finally, the United Kingdom Regulations states that "the date of entry into force of the agreement and its duration, the circumstances, if any in which the agreement is required to be renegotiated and the procedure of its renegotiation"

3. Regardless of the freedom that the parties have, within a respect for the compulsory content, to negotiate what they deem most suitable to their interests, the SE-Directive adds a new rule that complements those mentioned until now. The function of this new provision is to set limits to the autonomy of the parties' intentions. In this sense and as we have pointed out before, one of the regulation principles of the Community Directive regarding the involvement of employees in the SE is the "before-after" principle. Without entering an explanation of the meaning and scope of the principle, what must be highlighted is that art. 4.4 of Directive provides a manifestation of this principle by establishing a clear limitation in the contractual freedom of the parties. Pursuant to this principle, in the case that the SE is established by way 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".

   National laws transpose this limiting provision word-for-word. The only singularity can be found in German legislation, which implements this provision not only in the case established by the SE-Directive, that is, in the creation of an SE by way of

transformation, but also in a second hypothesis; namely: "where the company switches from a dualistic to a monistic management structure, or vice versa".

4. One of the principles of the legal regulation of the involvement of employees is the close connection between the establishment of an SE and the employees' right to involvement. SE-Directive, following the model introduced by Directive 94/45/EC in its day, has articulated two ways by which to set the involvement of employees. On the one hand, the conventional path, represented by the negotiated agreement between the SNB and the competent bodies in the participating companies; on the other, the legal path, specified by way of measures of information, consultation and participation established by the national legislations of the Member States developing the standard rules set in the Directive itself. However, these paths are not in a state of parity with regard to implementation. On the contrary, the Community Directive has conferred preference to the implementation of the agreement over the legal system of involvement. This preference is stated in art. 4.3, by which "the agreement shall not, unless provision is made otherwise therein, be subject to the standard rules established in the Annex". Therefore, Council SE-Directive establishes the agreement, and not national law, as the instrument to repeal the general provision that determines non-application of standard rules when an agreement has been reached.

   Practically all national laws have transposed this provision literally. Only the Spanish law differs in this common direction, as it establishes the provision regulating the legal scheme of the representative body as the additional provision, not only when no agreement has been reached, which would not be reproachable, but, quite differently, when the agreement "contains no specific provisions therein".

5. One of the most relevant issues omitted in SE-Directive is with regard to the enforceability of the agreement on involvement. Most probably, this omission is the result of the significant heterogeneity which national legislations in the EU countries offer to tackle and deal with this issue. In this context, SE-Directive, as other Community regulations before it, especially Directive 94/45/EC, opts to silence the issue and not resolve it, which is equivalent to leave its treatment to national legislations and practices. Furthermore, besides this omission, and probably due to the aforementioned reason, the Community regulation does not establish formal requirements which the agreement on involvement shall be subject to compulsorily or under penalty of nullity.

   As a general rule, national transposition laws do not expressly define the scope of this agreement; hence, this is an issue that is referred to the current legislation in each Member State. However, and as an exception, some legislations bestow a general or *erga omnes* scope upon the agreement; that is, its implementation is binding to all establishments within the SE and its subsidiaries that are included in its scope of implementation, as well as their respective employees, during the period in which it is enforced (Poland and Spain).

   Apart from this, some national laws establish formal requirements such as the written form of the agreement (Lithuania, Portugal, Luxembourg, Poland, Spain or United Kingdom), the obligation to deposit the agreement at the administrative authority

(Portugal or Spain) or, finally, the requirement that the agreement is duly signed by the authorised person (Lithuania).

3.2.8 Legislation applicable to the negotiation procedure

Article 6 of SE-Directive establishes that, "except where otherwise provided in this Directive, the legislation applicable to the negotiation procedure provided in articles 3 to 5 shall be the legislation of the Member State in which the registered office of the SE is to be situated". This article is one of the main provisions and, given the mandatory nature with which it is stated (the legislation <...> shall be the legislation <...>), national transposition laws have no capacity for innovation. Its role is thus limited to act as a complement to the Community provision.

In this sense, Italian legislation provides that, if the SE is registered in Italy, the administrative office must coincide with the registered office. And following this complementary dimension, Greek legislation formulates three rules. Firstly, negotiations begin on the initiative either of the participating companies or of the special negotiating body. The petition is submitted either to SE's headquarters or to the participating companies. Secondly, negotiations take place in the place of siege or where the headquarters are located. Finally, the two parties, at the first meeting, will agree on the exact procedural rules of their meetings. If they do not agree, the way that their meetings take place will be recorded. The records will be signed by an authorized person from each of the two sides.

3.3 Standard rules

3.3.1 Field of implementation

1. Council SE-Directive has transferred the institutional architecture presented in Directive 94/45 to the sphere of the SE, establishing two axes for regulation, that are related univocally and not reciprocally: the second appears when the first has failed. These axes are collective agreement, analysed above, and accessory provisions, that play the role of supplementary rules. The legislation defining the scope of implementation of the standard rules is the national legislation of the country where the registered office of the SE is located. These provisions are active from the date of registry of this entity, once the circumstances that are expressly foreseen concur. Article 7 SE-Directive defines the field of application of the standard rules, stating a general rule and several special rules that are applicable to issues of participation.

   Under the general provision, standard rules are applied at the wish of the parties (*when the parties so agree,*<7.1.a>) or default on agreement (*no agreement has been concluded, <art. 7.1.c>*). This last cause, however, does not become active automatically. In addition, the simultaneous concurrence of two requirements is necessary. Firstly, the decision of the employers' at the participating companies to continue with the procedure to register the *societas europaea* and, hence, accept the implementation of the standard rule. The Directive, in this way, confers the managing bodies of these companies the capacity to reconsider the project of creating a transnational body, which is, therefore, established as a reversible project. The second requirement is that the SNB may decide by a special majority not to open or to terminate

negotiations already opened, and to rely on the rules on information and consultation of employees in force in the Member State where the SE has employees (art. 3.6 Directive).

Besides this general provision, Community Directive establishes special provisions for the implementation of standard rules regarding participation. The content of these second provisions is not uniform; they differ with regard to the modality used to establish the SE. Firstly, when the SE is established by way of transformation, standard rules are applicable if the company that is to be transformed was subject to a system of employee participation in its administrative or supervisory bodies, prior to registering as an SE (art. 7.2.a). In the case of an SE established by way of a merger, standard rules will be enforced when participation rights were applied in any of the participating companies prior to registration of the SE and as long as these rights affected, at least, 25 per cent of the total number of employees in all the participating companies. However, when this threshold is not reached, these standard rules may also be applied "if the special negotiating body so decides" (art. 7.2.b). With regard to the establishment of an SE by way of setting up a holding company or establishing a subsidiary, the rules that define the implementation or not of standard rules on participation, are similar to the case of a merger, with the sole difference that the threshold for the number of employees affected rises to 50 per cent of the total number of employees in all participating companies. A level that is equal or higher to this threshold activates standard rules on participation automatically; a lower level prevents their implementation, except when a decision is reached by the SNB otherwise (art. 7.2.c).

The last paragraph in art. 7.2.c of the SE-Directive states a closing clause that is applicable to all modalities in the establishment of the SE, except for establishment by way of transformation, with the aim of solving possible conflicts arising from preserving participation rights of a different nature. In that case, the special negotiating body shall decide which of the different forms of participation must be established in the SE. However, the Directive confers national transposition regulations the ability to set, in addition, the modality that is applicable when no negotiation decision is reached.

2. The regulation of provisions regarding the scope of implementation of the standard rules established in the Council SE-Directive has been transposed in a literal manner by practically all Member States. The only exception can be found in German legislation that, once again, modifies the functional scope to calculate the threshold values, established in sections b) and c) of art. 7.2. Whilst the SE-Directive calculates these values considering all the participating companies, the SEEG includes also the concerned subsidiaries. According to the *Mitbestimmungsgesetz,* the employees of all subsidiaries are entitled to vote for some of the members of the holding company's supervisory organ. The German legislator made use of the breadth left to the discretion of the Member States to compose codetermination in the SE into the prevalent practices of codetermination existing in Germany. In so far the German provision corresponds with the legislative spirit of the Community Directive (the before after approach and the protection of existing rights) and is therefore compatible with Community Law.

   Also, no Member State, with the exception of Greece, has used the *opting out* clause established in art. 7.3 of the SE-Directive. Therefore, in the case of an SE established by

way of merger, the standard rules established by legislation at the registered office of the European Company will be applicable.

3. Given the case that there is a number of forms of participation and the SNB has not chosen the applicable form, the last paragraph in art. 7.2 refers the solution of the conflict to the decision of national law, which may dictate a substitution rule. There has not been a uniform answer to this option. On the one hand, some national laws have used this capacity, introducing disparate criteria. In this sense, Finland, France and Sweden choose to place the election of the applicable participation system upon the participating companies' competences. The Hungarian law states the applicable system of participation to be the one that is more advantageous to employees. In Poland, it is the RB which decides, within 30 days since the day of registration of SE. And in the Czech Republic and Netherlands, the applicable participation system is the system established in the standard rules of the national law. However, the most common rule considers the applicable participation system to be the one established for the largest number of employees in the participating companies (Austria, Denmark, Germany, Latvia, Slovenia, Portugal and Spain). The other transposition laws have not implemented any rule.

3.3.2 The Representative Body

A. General considerations

1. In those cases where the causes that determine the implementation of standard rules concur, Annex 1 of SE-Directive provides the constitution of the Employees' Body of Representation (RB). Annex 1 and 2 focus the regulation of RB on three thematic areas: composition, competences and functioning.

   To start with the first area, Annex 1 states that the RB will be made up of employees within the SE and its establishments and subsidiaries, "elected and appointed by and amongst employees' representatives or, in the absence thereof, by the entire body of employees (section a). The election or the appointment of members of RB "shall be carried out in accordance with national legislation and/or practice" (para. 1, section b). Therefore and according to the last paragraph, section b), Annex 1, "each Member State shall lay down rules to ensure that the number of members of, and allocation of seats on, the RB shall be adapted to take account of changes occurring within the SE and its subsidiaries and establishments". Members of the RB are elected or appointed in proportion to the number of employees within the SE and its establishments and subsidiaries in each Member State, "with one seat for every 10 per cent or fraction thereof of the number of employees, per Member State" in all Member States (section e). The competent organ of the SE shall be informed of the composition of the RB (section f).

   Four years after its establishment, the RB will have to decide whether or not it starts negotiations in view of reaching an agreement on involvement and must communicate this decision to the competent body in the SE. In the case that the negotiating process is opened, the role of the negotiating agent falls upon the RB, which takes on the competences conferred by legislation to the SNB. (para. 1, section g). During the course of negotiations and until the conclusion thereof, the RB continues to fulfil its roles. If

negotiations are not opened, standard rules will continue to apply during the following four-year period (para. 2, section g). Nevertheless, the RB and the competent body of the SE may agree, by common consent and at any time.

From a general perspective, the competences of the RB are substantiated in the right to information and consultation, "limited to questions which concern the SE itself and any of its subsidiaries and establishments situated in another Member State or which exceed the competences of the decision-making organs in a single Member State" (Annex 2, section a).

In order to ensure the exercise of this competence, Annex 2 of SE-Directive grants the RB 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 of the progress of the business of the SE and its prospects" (para. 1, section b). Community Directive also imposes a duty to the latter, the competent body of the SE, to provide the former, the RB, both the minutes of the meetings of the administrative body, or given the case, the supervisory body, and "copies of all documents submitted to the general meeting of its shareholders" at least one month in advance (para. 2, section b). Annex 2 SE-Directive identifies, by means of an open list technique the issues that must be the object of joint analysis in the annual meeting between both bodies. Indeed, the list is made up of the following issues: "structure, 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, establishment of important parts thereof, and collective redundancies".

In addition to the above, Annex 2 establishes that the RB must also be informed in advance of those exceptional circumstances that affect the interests of employees considerably, especially in the events of relocations, transfers, the closure of establishments or undertakings, or collective redundancies (para. 1, section c). With the aim of receiving this information and being consulted on other issues, the RB has the right to meet, at their request, with the competent body of the SE or any other more adequate level of management with decision-making competences (para. 2, section c). Given the case that the management body decides not to follow the opinion expressed by the RB, the latter has the right to meet again with the competent body of the SE in view of reaching an agreement (para. 3, section c). In any case, these meetings do not affect the prerogatives of the competent organ (para. 4, section c)

The last issue relating to the RB which is regulated by SE-Directive is it functioning. In short, the aspects regarding the workings of the RB are the following: i) reaching agreements; ii) possibility of building a restricted council and the organisation and competences thereof; iii) appointment of experts; and, iv) financing of expenses regarding the workings of the RB.

The RB adopts its agreements by the majority of its members, with full competences to elaborate and approve its own internal working regulations (Annex 1, section d). "Where

its size so warrants", the RB shall elect a select committee (SC) from among its members, comprising at most three members (Annex 1, section c). Thirdly, the SE-Directive grants two rights to the RB and the SC: the right to meet prior to the meetings organised with the competent body of the SE (Annex 2, para. 2, section d) and the right to be assisted by experts of their choice (Annex 2, section f). SE-Directive acknowledges RB members the right to "time off for training without loss of wages" (section g). At the end, the mentioned Annex 2 provides some rules about financing the RB. On the one hand, it enounces a general rule according to which "the cost of the RB shall be borne by the SE, which shall provide the body's members with the financial and material resources needed to enable them to perform their duties in an appropriate manner (para. 1, section h). On the other hand, it develops this general rule, declaring that the SE, unless otherwise agreed, bear the cost of organising the meeting and providing interpretation facilities and the accommodation and travelling expenses of RB and SC members (para. 2, section h). Finally, the Directive repeats the same provision established for the expenses of the SNB: the Members States may lay down budgetary rules regarding the operation of the RB and, in particular, may limit funding to cover one expert only (para. 3, section h)

2. The legal structure of the standard rules that regulate the RB do not obey to a single criterion; quite the opposite, they respond to a plurality of criteria. With regard to a first group of provisions, the role sought by the SE-Directive is not the harmonisation but the unification of national legal systems. Hence, national transposition laws have no autonomy in regulation and are obliged to mechanically reproduce, in an almost literal manner, the specific mandates established in the SE-Directive. In a non-exhaustive manner, the following rules, amongst others, respond to this logic: sections e), f) and g) of Part 1 of the Annex, as well as sections b) and c) of Part 2 of the Annex. However, in other instances, the Council Directive seeks a convergence or approximation effect between the legal systems of Member States, which is the characteristic effect of Directives (or, at least, of a first generation of Community Directives). Nonetheless, the objective of convergence is not only articulated through the classic differentiation between means and aims; it is also articulated through a technique that is perhaps less complex, that may be denominated complementarity relationships, and is repeatedly used in national laws. Specifically, paragraph 2 section b) of Part 1 of the Annex constitutes a good example of the search for harmonisation by means of a more traditional path in Community Law. This paragraph states an aim (to 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), allowing the Member States to choose the means to achieve this aim: *"Member States shall lay down rules to ensure".* Pursuant to the second technique, the SE-Directive establishes a basic rule, which national regulations must complement, facilitating its legal application. Sections c) of Part 1 and g) of Part 2 of the Annex, illustrate in exemplary fashion this second technique of approximation to legislations. The basic rules established by these precepts are the election by the representative bodies of a select committee comprising at most three members, and the entitlement of members of the representative body to time off for training without loss of wages. However, both of these rules are formulated in an incomplete fashion, and it is the national legislations' competence to dictate complementary rules; that is, deciding in

what cases *the size* of the representative body justifies the election of a select committee (section c), Part 1), and to what extent is the representative body members' entitlement of this time off *necessary for the fulfilment of their tasks* (section g), Part 2). Finally, with regard to a third group of issues, the SE-Directive does not intend to subject them to a uniform regulation nor submit them to a principle of approximation; their aim is to preserve the national rule, with all of its consequences. Hence, the Community Directive refers the legal regulation of this specific issue to the full legal competence of the Member States.

The previous considerations offer a good method to examine the degree of suitability of national transposition laws to the rules established in Parts 1 and 2 of the Annex to SE-Directive. The purpose of the following observations is twofold. On the hand, we shall try to verify the degree of compliance of national laws to the objective of unification; on the other, we shall try to determine the way in which national legislations satisfy the useful effect required by the Directive or, given the case, complement the basic rules established by the Directive.

3. In general terms, the transposition of national legislations of Parts 1 and 2 of the Annex, comprising the Standard Rules, has been correct, with no irregularities detected that may be considered to be serious or severe. However, some omissions may be appreciated. Thus, Portugal and United Kingdom do not contemplate the right of members of the representative body to take time off for training without loss of wages. Latvia does not mention the SC. And Greece and United Kingdom do not ensure the adaptation of the composition and allocation of seats of the representative body to changes occurring in the SE, its subsidiaries and establishments.

   National laws do not establish a uniform duration of the representative body, varying from three (Hungary and Poland) to five years (Czech Republic and Luxembourg). The statistical average is four years (Austria, Netherlands, Portugal, Poland and Spain). Neither is the size of the representative body on which the establishment of the select committee depends, uniform. The legal options are very widespread. So, Hungary requires fifteen members, Portugal twelve, Denmark, France and Slovenia ten and Lithuania requires only six members. However, in most countries (Belgium, Cyprus, Czech Republic, Estonia, Finland, Germany, Italy, Latvia, Luxembourg, Malta, Netherlands, Slovenia, Slovakia, Spain, Sweden and United Kingdom), the transposition law avoids establishing a number of members of the RB from which to establish the SC, and so this decision lies on the RB itself.

   The number of legislations that have chosen not to establish rules regarding either the chairmanship of information and consultation meetings (Austria, Belgium, Cyprus, Czech Republic, Germany, Greece, Italy, Lithuania, Malta, Portugal, Slovenia, Spain and Sweden) or the finances of the functioning of the representative body (Cyprus, Malta, Sweden and United Kingdom) is also significant. The highest degree of convergence is with regard to the financing of experts. Practically all national regulations have made use of the capacity established in paragraph 3, section h), Part 2 of the Annex, limiting the financing by the SE to only one expert. The German law constitutes the only exception to this general rule.

B. Analytical comments

Belgium.- Practically all of the issues regarding the RB have not been regulated directly and with a general criteria by the collective transposition regulation; that is, by collective agreement n. 84. Article 54 of CCT thereof entrusts to the competence of a so-called collaboration protocol (*protocole de collaboration*), agreed bilaterally by the competent body of the SE and the RB or the SC, the regulation of these matters, amongst which are the following: chairmanship and the minutes of meetings, announcement of special meetings, transmission of reports, changes in structure or size of the SE, presence of experts at meetings, budget scheme, time off for training of RB members and translation costs. The internal rules of procedure of the RB may provide for rules governing the geographical breakdown of the mandates of the SC.

Czech Republic.- In the event that, in the course of the term of office of the employees' representative body, the increase of the number of employees of an SE in any Member State warrants the allocation of more seats to them, the necessary number of new seats shall be allocated in favour of the employees' representative from that Member State. The newly elected or appointed members of the employees' representative body shall represent, above all, the number of employees that have increased in the SE in that Member State. The term of office of the additionally elected or appointed members shall expire together with that of the employees' representative body.

In the event that, in the course of the term of office of the employees' representative body, the decrease of the number of employees of an SE in any Member State warrants the allocation of fewer seats, the term of office of the respective number of members of the employees' representative body representing employees from that Member State, shall end. The end of the term of office of a member of the employees' representative body, elected or appointed in the respective Member State, shall be decided by lottery. The employees' representative body shall inform the board of directors or management organs of the SE about its composition and any change thereof without unnecessary delay.

The members of the employees' representative body shall be entitled to time off for training and work in the employees' representative body for the essential and necessary period of time, unless serious operative reasons relevant to the SE preclude this, without loss of wages.

Estonia.- The RB shall adopt its rules of procedure. An SE shall compensate for any reasonable expenses relating to the activities of the RB and the select committee so as to enable the RB and the select committee to carry out their task in an appropriate and unhindered manner. The SE shall primarily compensate for the following expenses: i) expenses related to the organisation of meetings; ii) expenses related to the provision of translation services; iii) travel and accommodation expenses incurred by members; iv) expenses related to inviting at least one expert. The number of experts participating is not limited. The SE is obliged to compensate expenses related only to one expert. However, if it so considers, it may compensate for all experts. Also, insofar as this is necessary for the fulfilment of their tasks, the members of the RB shall be entitled to time off for training without loss of wages. At least 14 calendar days a year shall be ensured for training without loss of average wages.

France.- The RB is composed, on the one hand, by the management of the SE and, on the other and, by representative employees. In those cases where a change in the structure of the SE takes place, susceptible of "affecting the composition of the representative body or the modality of the employees' right to involvement", negotiations must be started to reach a new agreement. If an agreement is not reached, then the RB will be governed automatically by the standard rules. The SE must bear the expenses of the functioning of the representative body and its select committee, including organisation and translation of meetings as well as accommodation and travel expenses of the members of the representative bodies. The members of the representative body are entitled to time off for training in the same conditions as the members of the representative body existing in French undertakings: the Works Council (*comité d´entreprise*).

Germany.- Instead of "representative body", the SEBG uses the word "SE Works Council" (SEWC). This shall be composed of employees of the European company, its subsidiaries and establishments. The provisions concerning the constitution and the composition of the SNB shall apply *mutatis mutandis* with respect to the establishment of the EWC, subject to the proviso that the European company, its subsidiaries and establishments shall take the place of the participating companies, concerned subsidiaries and concerned establishments. The term of office of the members from within the country shall be four years, unless such term comes to an end prematurely owing to dismissal or for other reasons.

Hungary.- The law includes detailed rules for dissolving the RB. The possible reasons are: i) the European company is wound up without a legal successor; ii) its mandate expires; iii) its mandate is withdrawn and iv) the number of its members is reduced by over one third for any reason. Withdrawal of the representative body's mandate shall be put to the vote at the proposal in writing of at least 30 per 100 of the employees with voting rights. In the case of withdrawal and reduction of number of members a new representative body shall be elected within three months. The national law requires the representative body to elect a President and Vice-President. If there are at least 15 members in the representative body, it shall elect a SC. The President and two other members from different Member States compose the SC. The President and the two other members must be from different Member States. The SE-Act requires the body to adopt its own rules of procedure. Unless otherwise provided in these rules of procedure, decisions of the RB shall be taken by simple majority.

At the request of the RB, the European Company's Administrative/Management Board shall examine on at least an annual basis whether changes in the number of employees in individual Member States are in accordance with the '10 per cent rule'. If changes justify it, the RB may initiate a new election/appointment procedure, and at the same time the terms of office of current members from the given country terminate. The national law uses the singular form – member –, but it does not specify a procedure for the case when there is more than one member from the given country.

Italy.- The RB shall be composed of employees of the SE and its subsidiaries and establishments elected or appointed by the employees' representatives or, in the absence thereof, by the entire body of employees, *in a joint agreement with trade union organisations that sign the national collective bargaining*. If changes occur within the SE and its subsidiaries and establishments, the national law provides the followings rules: i) if

the SE has a new local productive unit in a Member State which was not included before in the SE: the employees of that productive unit must appoint or elect a member in the representative body; ii) if the SE closes a local productive unit in a Member State: the employees' representatives of the local productive unit end their term of office and the composition of the representative body changes with regard to the new structure following the forfeiture of the employees' representatives; iii) if the SE changes the distribution or occupational level in the SE, or in a subsidiary company, per portion at least equal to 10 per cent of the total occupational level of the SE: employees' representatives which operate in each Member State must be modified with regard to these changes.

The costs of the representative body shall be borne by the SE, which shall provide the body's members with the financial and material resources needed to enable them to perform their duties in an appropriate manner *and the training aimed to perform their duties*. In particular, the SE shall, unless otherwise agreed, bear the cost of organising meetings and providing interpretation facilities and the accommodation and travelling expenses of members of the representative body and the select committee.

Latvia.- The national law has transposed paragraph 2, section b), Part 2 of the Annex incorrectly. The SE-Directive establishes that the competent organ of the SE shall provide the RB with the agenda for meetings of the administrative, or, where appropriate, the management and supervisory body. Nevertheless, internal law declares that representatives of the administrative organs of a European company shall prepare a meeting agenda and inform the representative body about the agenda.

Members of the RB have the right to a paid educational leave in order to acquire knowledge that is necessary to fulfil the duties of the members of the representative body. The SE shall cover the expenses that are related to the functioning of the representative body. These expenses include the election of its members, the organisation of negotiations (premises, materials, staff, and translation), the trips of the members of this body (travel expenses and allowance expenses) and also the invitation of one expert.

Lithuania.- Instead of "representative body", the Lithuanian law uses the word "works council of European Company". If due to the changes in the structure of the European Company or the number of employees in the Member States or in its subsidiaries, establishments or the establishments of its subsidiaries it is necessary to increase the number of the members in the RB, the RB shall decide on the appointment (election) of an additional member, taking into consideration the opinion of central management. The opinion of central management is not binding. Having taken such a decision, the RB shall approach central management with a request to start the procedure for the appointment (election) of the new member(s) in accordance with the provisions of the Law.

At its first meeting, the RB shall elect the chairperson and a deputy chairperson by a majority vote of all its members. It shall also approve the rules of procedure. If the RB has more than six members, it shall elect a three-member committee that shall be responsible for the performance of the functions of the RB between their meetings. If possible, the members of the RB should be from different Member States.

The first and regular meetings of the RB shall be called by the central management. The first meeting must be called within 90 days. The SC shall have a right to hold extraordinary meetings. Having co-ordinated the venue and time of the meeting with central management, the chairperson of the RB shall ask central management in writing to call the meeting.

Netherlands.- If the SC has been created, the regulations of the RB should contain rules on the rights of this committee. In cases where the body can no longer be considered to be representative (that is when there have been lasting changes in the respective numbers of employees in the different Member States) the RB should change its composition within one year. As long as this change of composition has not yet taken place, the members from the respective countries are granted voting rights as if the change in composition had already taken place, by adjusting the number of votes of the respective members. The SE-works council informs the SE about its composition.

The competences of the RB are slightly broader than in the Annex of the SE-Directive. The competence is limited to questions which concern the SE itself, one or more of its subsidiaries or establishments or which exceed the powers of the decision-making organs in a single Member State. The difference with the Council SE-Directive is that the Directive uses the word *and*: the competence is limited to questions, which concern the SE itself, *and* one or more of its subsidiaries or establishments.

The SE and RB should hold a special meeting in the case of special circumstances. The chairman of this meeting is alternately a representative of the SE and a representative of the RB.

Poland.- The number of members of, and allocation of seats on, the RB shall be adapted to take account of changes occurring within the SE and its subsidiaries and establishments. It takes place every two years. If a considerable change in the number of employees employed in some of these units occurs, a competent organ of the SE requests the employees' representatives, and when there are none, the employees employed in particular Member States to appoint or elect the members of the body representative of the employees in the number defined by law. The members of the RB shall be entitled to time off for training without loss of wages. This training shall not exceed two months during the term of office. Remuneration during this training shall be calculated as for the time of annual leave. The SC is composed of one chairperson and two members with restriction that these persons shall represent different Member States. The SC is obliged to run the current affairs.

The RB or the SC can express their written opinion concerning issues being consulted during the meeting or within 14 days after its termination. The competent organ of SE, before taking decisions concerning the abovementioned opinion, shall examine any opinions; and it is obliged to inform an applicant of taking or not taking into account the opinion.

The Polish legislator prescribes the possibility of laying down rules on the chairing of information and consultation meetings contained in the Directive. The chair of information and consultation meetings is taken alternately by a chairperson of the RB or a member designated by a chairperson and a person designated by a competent organ of the SE.

The costs of the RB shall be borne by the SE, unless other rules to this regard were agreed by the competent organ and the representative body. The Polish legislator states that there is a possibility to limit funding to cover one expert only. But the SE-Act does not clarify who decides to introduce this limit. The national law states that if a representative body takes advantage of the aid of experts, the duty to bear costs is restricted to the aid of one expert only, unless the other rules of bearing costs were agreed by the competent organ and the representative body. As a consequence, it may be supposed that the same organs decide how many expert should be funded.

The annual budget is fixed by mutual agreement between the RB and the competent organ of the SE. In case the budget is not established by the end of the year preceding the budgetary year, the competent organ of the SE shall establish the budget of their own accord, although they are supposed to allocate a sum of money which is equal to the result of multiplying the number of members of the RB by the amount of three average remunerations in the business sector within three months preceding that particular year, published in the Office Journal of the Republic of Poland (*Monitor Polski*).

Portugal.- The number of members shall be re-evaluated at the end of each term of office (four years) in order to attend to possible modifications according to the criteria established for the constitution.

The SE must provide the financial resources needed for members of the RB to support their *operation costs*, as well as those of the SC, where applicable. Operation costs include the cost of organising meetings, providing interpretation facilities, accommodation and travelling expenses and funding for one expert. Another solution can be agreed by the representative body and the management or administrative organ of the SE. However, the SE must always support the costs necessary to pay one expert. The SE should also provide the material resources needed for the RB to enable it to perform its duties in an appropriate manner, including an appropriate space for the development of their activities and a notice board to provide information.

Accommodation and travelling expenses can be paid pursuant to the system applicable in the subsidiaries or establishments where the employees' representatives work. However, they can not treat any member of the representative body less favourably. The funding to cover the expert can be regulated by the rules applicable to the members from the same Member State. Participating companies support the expenses concerning the expert in proportion to their number of employees.

Slovenia.- As soon as the members of the RB have been appointed, the management of the SE shall convene *a constituent meeting* with the RB. At that meeting, the RB shall elect a chairperson and a deputy chairperson from among its members. The chairperson or, in their absence, the deputy chairperson, shall represent the RB as regards the decisions taken and shall report their decisions to the management of the SE.

The costs of the RB and the SC are to be borne by the SE, which is obliged to provide the members with the financial and material resources that they require in order to perform their tasks correctly. Except where agreed otherwise, the SE bears, in particular, the costs of

organising meetings, the provision of interpretation services and travel and accommodation expenses of the members of the Works Council of the SE and its committee. The SE also bears the expenses for one expert who may be invited to attend the Works Council of the SE or its committee.

Spain.- The RB adopts its agreements by the majority of its members, with full competences to prepare its own internal working regulations and with the capacity to elect a chairman. Spanish law does not specify under what circumstances the number of members of the RB may justify the election of a SC. However, two of the provisions established are a novelty. On the one hand, it acknowledges the right of other members of the RB to attend SC meetings, even when they are not an integral part of the SC but have been elected or appointed to represent employees who are "directly affected by the measures treated." On the other, it imposes on the SC the duty to regularly inform the RB of its actions and the result of its meetings.

In order to ensure the exercise of their competence, the SE-Act grants the RB 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 of the progress of the business of the SE and its prospects". The law also imposes a duty to the latter to provide the RB with the minutes of the meetings of the administrative body, or given the case, the supervisory body, and "copies of all documents submitted to the general meeting of its shareholders" at least one month in advance from the day fixed to have this meeting.

Lastly, Spanish legislation has a principle of legal symmetry between the SNB and the RB with regard to financing and to the scheme for renewal. All statements made above for the SNB can be repeated here with regard to the RB.

United Kingdom.- National law establishes some differences. Firstly, while the Annex states that in "exceptional circumstances … the representative body, or where it so decides, in particular for reasons of urgency, shall have the right to meet … the competent organ of the SE", these rights are implied rather than spelled out in Part 2 of the Schedule. It states that, in exceptional circumstances, "the representative body may decide for reasons of urgency, to allow the select committee to meet the competent organ and it shall have the right to meet a more appropriate level of management within the SE rather than the competent organ itself". However, the Schedule specifically provides the right to a second meeting in the event of management "not acting in accordance with the opinion expressed by the RB". And does not include a specific reference to the prerogatives of management being unaffected.

On the other hand, the members of the RB must not only inform employee representatives, but also the employees themselves, "if no such representatives exist".

3.3.3 Participation of employees

A. General considerations

1. The standard rules regarding the participation of employees are regulated in Part 3 of the Annex to the SE-Directive. The Community Directive differentiates between the scheme of participation depending on whether the SE has been established by transformation or

otherwise. In the former case, all aspects of employee participation implemented before registration of the SE shall continue to apply in the SE (section a). In all other cases, employees of the SE and its establishments and subsidiaries, or their bodies of representation, shall have the right to elect, appoint, recommend or oppose the appointment of a number of members of the administrative or supervisory body of the SE "equal to the highest proportion in force in the participating companies before registration of the SE" (section b). Secondly, and as established by the second paragraph of Part 3 of the Annex, "if none of the participating companies was governed by participation rules before registration of the SE, the latter shall not be required to establish provisions for employee participation".

The Directive specifies the rules with regard to the distribution of members of the administrative or supervisory body in the SE. In short, these provisions are: i) it corresponds to the RB to adopt the decision of allocating the seats that correspond to employees in the administrative or supervisory body amongst the employees' representatives in the different Member States, "according to the proportion of the SE´s employees" in each of them. ii) If the implementation of this proportional criterion gives rise to differences in the presence of representatives in the aforementioned bodies, the RB must redistribute the existing seats, providing one of the seats to the Member States that were not initially represented, especially to the State where the SE has its registered office, if not represented, or, otherwise, to the State employing the largest number of workers within those that were not represented initially. The SE- Directive provides that each Member State may "determine the allocation of the seats it is given within the administrative or supervisory body."

Finally, the last paragraph of part 3 of the Annex recognises to all members of the administrative body or, where appropriate, the supervisory body who have been elected, appointed or recommended by the RB or, depending on the circumstances, by the employees, the same rights and obligations as the members representing the shareholders.

2. The transposition of the standard rules regarding the employees' right to participation into the national law of EU countries has not presented problems of great importance. Indeed, several national laws (Cyprus, Estonia, Greece, Hungary, Ireland, Italy, Malta, Portugal, Slovakia, Spain and Sweden) have undertaken an almost literal transposition of Part 3 of the Annex to the SE-Directive.

   Without prejudice to the reasoning below, modifications or omissions are minor, in general terms. In this sense, some transposition laws (Greece and Sweden) have not included the last subsection of section a), Part 3 of the Annex; that is, the rule whereby "point b) shall apply *mutatis mutandi* to that end". In this chapter regarding slight alterations, the United Kingdom Regulations use a less prescriptive language in the transposition of section b), substituting the wording of the Directive ("according to the proportions of SE´s <...>") for another expression with a similar scope ("taking into account the proportion of employees of SE <...>"). Neither can the restriction on the position of RB representatives in the administrative or supervisory bodies of the SE, established with a similar content in the Finnish and Swedish legislations with the aim of

avoiding the appearance of conflicts of interest, be considered to be a conflicting rule with the last paragraph of Part 3 of the Annex. Pursuant to these legislations, these representatives may not be part "to a collective agreement, to an industrial action or any other questions" where the primary interest of employees may be in conflict with the interest of the SE. Also, this consent to Community requirements must be attributed to the French legislator's decision to define the reference criterion in order to determine the intensity of the right to participation and in the case of an SE established by a way other than transformation. Whilst the Directive exclusively mentions "to the highest proportion in force <...>", the *Code du Travail* refers to the "*proportion ou le nombre le plus elevé* <...>". Finally, the same conclusion may be reached of the aforementioned amendment in German legislation in order to reconcile the Community regulation with the particular features of the *Mitbestimmungsgesetz.* With regard to the allocation of seats on the administrative or supervisory organ, this national law considers not only the proportion of persons employed by the SE but also those employed by its subsidiaries and establishments.

Greater problems may arise from the provision included in Czech legislation whereby the rule of equality of rights and obligations between labour representatives and the stockholders of the SE administrative and supervisory bodies may also be the object of an agreement (*unless otherwise stipulated*). In my view, this rule must be qualified as a public order rule and, hence, excluded from being at the disposal of private autonomy.

3. In the style established in Parts 1 and 2 of the Annex, Part 3, herein examined, also contains clauses that open up to national legislations. Specifically, the last subsection of paragraph 3 establishes that "each Member State may determine the allocation of the seats it is given within the administrative or supervisory body". Therefore, national laws may complement the allocation criteria for the social members in the administrative and supervisory bodies.

   A relevant number of transposition laws (Austria, Denmark, Estonia, Finland, Germany, Hungary, Netherlands, Poland, Slovakia, Slovenia, Spain and Sweden) have used this option, stating the criteria to be applied with regard to the allocation of seats of national representatives in the aforementioned bodies. This, however, is not an option taken unanimously by all EU countries, with a nearly equally significant number of legislations that have decided not to set their own provisions on this issue (Belgium, Cyprus, Czech Republic, France, Greece, Italy, Latvia, Lithuania, Luxembourg, Malta, Portugal and United Kingdom).

   Most of the following observations are aimed, precisely, at highlighting the terms in which the different national transposition laws complement the Community regulation on this specific issue.

B. Analytical comments

Austria.- By way of transposition of the right of the Member States, as provided for in Part 3 (b) of the Annex, to decide on the distribution of seats allocated to it within the supervisory or administrative body, the employee representatives from Austria are appointed by the works councils and must themselves be members of a works council in Austria.

Finland.- Pursuant to the option contained in the SE-Directive, the Finnish legislation establishes the following rule with regard to the allocation of seats of national representatives on the administrative and supervisory bodies of the SE: "*An SE's employees employed in Finland have the right to appoint their representatives to the administrative or supervisory organ by agreement or election. If the employees cannot reach an agreement concerning the procedure to be followed, the occupational safety delegates representing the greatest number of workers and salaried employees shall jointly arrange an election or other selection procedure in such a way that all employees have the right to participate therein*".

Germany.- In Germany, the employee representatives on the European company's supervisory or administrative board who are allocated to companies within the country shall be determined by an elective body (so-called *Wahlgremium*), composed of persons representing the employees of the European company, its subsidiaries and establishments. The provisions applicable to the election of the SNB shall apply *mutatis mutandis* to the election procedure.

With the deliberate aim of making the right to participation established in the SE-Directive and in national legislation compatible, the standard rules set in the German transposition law establish the presence, in the administrative and supervisory bodies of the SE, of representatives from the so-called *Arbeitsdirektor* within the management, irrespective of whether the SE has a one-tier- or two-tier-system. The Personnel Director has the same rights and duties as the other members of the managing board (*Vorstand*).

SEBG has taken some precautions in the case that a participating company is codetermined according to the Coal and Steel Codetermination Act of 1951 (*Montanmitbestimmungsgesetz*), which provides a parity codetermination from 1000 employees upwards. In this hypothesis, where the supervisory board of one of the participating companies consists of an equal number of shareholder and employee representatives and a further member, "*an additional member* shall be elected to the supervisory or administrative board of the European company on the basis of a joint proposal from the shareholder and employee representatives." In so far, the German provision corresponds with the legislative spirit of the Directive (the before-after approach and the protection of existing rights) and is therefore compatible with Community Law.

Hungary.- There are two singularities in Hungarian legislation. Firstly, affecting the capacities of the RB with regard to the social representatives in the administrative and supervisory bodies of the SE. In this sense, the RB does not only have the position to nominate or recommend employees' board representatives, but it is also entitled to withdraw them from the board. This stipulation is analogous with the procedures applied in the nomination of members of the SNB and representative body, and in line with the national law on board representation. The second singularity refers to the criterion used by this regulation for the allocation of seats of employees' representatives in the aforementioned bodies. Pursuant to this legislation, they shall be distributed in proportion to a number of employees in the subsidiaries and other establishments.

Luxembourg.- The national transposition law establishes that employees' representatives in the administrative and supervisory bodies employed in Luxembourg will be elected by secret ballot by the *délégations d'entreprise* pursuant to the rules of proportional representation.

Netherlands.- The internal law contains a provision in the case that after allocation of the first seat to the employees in a Member State with the largest proportion of employees there is no representation of Dutch employees, the second seat will be allocated to Dutch employees. And the third and following seats will be allocated to employees from other Member States which are not yet represented.

Poland.- Polish legislation has introduced some amendments to the criteria established by the Council SE-Directive with regard to the allocation of representatives whereby if, as a result of the mentioned allocation, employees employed in one or more Member States do not have their representative in the administrative or supervisory body, the representative body shall determine the allocation of seats of representation to employees of these Member States in the following order: the criteria applicable in these cases are the following two. Firstly, in compliance with Community legislation, allocating a seat to employees employed in the Member State of the SE's registered office. The second criterion, introduced by the Polish legislator, is to give the seat to employees employed in the Members State with the highest level of employment.

On the other hand, the national transposition law states that the elections of the members representing employees in the SE's organs in Poland are direct and are undertaken by secret ballot of the assembly of staff of the establishment according to the adopted rules of procedure. The SE-Act names these rules as the work rules. These are rules which are adopted at the work establishment by an employer in agreement with the trade union active at the work establishment (art. 104 of the Polish Labour Code). Where the content of the work regulations is not agreed with the trade union active at the work establishment within a certain time set by the parties and also in the case where there is no trade union at a work establishment of a given employer, the work regulations shall be determined by the employer.

Slovenia.- Slovenian legislation establishes a similar provision than Polish legislation when allocating the seats of representatives in the case that no seat is allocated to the representatives of one or more Member States. In this hypothesis, it is necessary to ensure that a seat is granted to the employees from the Member State in which the SE will have its registered office. If a seat is already granted to this Member State under the former provision, the seat is to be granted to the Member State that does not have a seat allocated and with the highest proportion of employees.

Spain.– Pursuant to the provisions established in Community legislation, the Spanish transposition law states the proportionality of workers employed in each State as the criterion to allocate the seats of social representation in the administrative and supervisory bodies of the SE. Nevertheless, it states some special rules for the case in which the allocation following the above criterion entails differences in the representation of one or more Member States. In this case, the RB must proceed as follows: i) it must recognise one of the seats to the Member States that were not initially represented, especially to the State where

the SE has its registered office, if not represented; ii) otherwise, it shall give the seat or the seats to the States employing the largest number of workers within those that were not represented initially.

Sweden.- The Swedish legislation states that members for the seats on the administrative or supervisory body allocated to employees in Sweden shall be selected by the local trade unions in Sweden.

3.4 Common Provisions

3.4.1 Field of application

Section III of the SE-Directive is entitled *Miscellaneous Provisions*, and contains provisions regulating a heterogeneous group of issues with the common denominator that they are applicable to both the rules of involvement established through agreement and those implemented and exercised through standard rules. Specifically, these common provisions establish rules on the following four issues: reservation and confidentiality, protection of employees' representatives, spirit of cooperation and the consequence of the establishment of an SE to the detriment of the involvement of employees. All of these issues shall be examined herein.

3.4.2 Reservation and confidentiality

A. General considerations

1. Art. 8 of the Directive contains a complex structure. Specifically, this precept states two substantive or material provisions and an instrumental or adjective provision. Besides these provisions it also establishes a varied series of rules, the implementation of which is referred to the decision of the Member States.

2. The first of these substantive provisions is contained in art. 8.1 of the SE-Directive, which establishes the duty of members of the SNB, the RB and representatives exercising their duties in the framework of information and consultation procedures, as well as the experts appointed by them, not to reveal any information to third parties which has been given to them "in confidence". This obligation shall continue to apply after expiry of their terms of office; and non-compliance of it may carry with it responsibilities pursuant to national legislations and practices.

   The transpositions of this rule into national laws have a high level of legal coincidence. Most of them have undertaken the incorporation of this rule into national legislation in a similar fashion to the Community text, often using the same expression literally.

   Nevertheless, some particular features may be quoted. Leaving the most significant differences aside for the section containing analytical comments (for instance, France), I shall now comment those differences of a lesser importance. To this regard, those national legislations that enlarge the catalogue of recipients affected by confidentiality must be mentioned. In this sense, some legislations (Estonia, Lithuania and Poland) extend it to the translators participating in the work sessions of the SNB and the RB, or more simply, to those who have access to the information provided by the competent

bodies of the SE. The most peculiar to this regard is the Irish legislation, which enlarges the duty to members of the Labour Court, the Court's registrar, its staff or any expert appointed by the Court to mediate in the event of a dispute on confidentiality or otherwise of information provided by management.

3. The second substantive provision is established in para. 1, art. 8.2, whereby each Member State shall provide, in specific cases and under the conditions and limits laid down by national legislation, that the supervisory or administrative organ of an SE "is not obliged to transmit information where its nature is such that, according to objective criteria, to do so would seriously harm the functioning of the SE (…) or would be prejudicial to them".

   Three clear conclusions may be drawn from a simple reading, all of them easy to state. Firstly, the complex legal structure adopted by the written provision. On the one hand, it states the two basic elements of any legal rule: datum (information, the nature of which, may, according to objective criteria, harm the functioning of the SE or be prejudicial to it) and legal consequence (exemption of the competent organ of the SE from the general duty to provide information). However, on the other, both elements of this legal rule (datum and legal consequence) may be complemented and developed by national legislations. This may be assumed, with no room for uncertainty, from the literal sense of this precept, which starts by stating that "each Member State shall provide (...)".

   The second conclusion affects, precisely, the nature of this reference to national legislations or practices made by the SE-Directive. Indeed, this is not an open or unconditional reference; quite the opposite, this Community text limits, with some precision, the legal scenario of these legislations. On transposing this provision, national laws must consider that the possibility of exempting the competent body of their duty to inform employees' representatives has a limited nature; that is, it can only be done "in specific cases" and when the nature of the information, according to objective criteria, may seriously harm the functioning of the SE or be prejudicial to it.

   The third and last of these conclusions derives from the legal consequence established in the article, which simply establishes a rule that exempts the competent body of the SE from the duty to facilitate information that is established, in general and in a *contrario sensu* interpretation of art. 8.1 of the Community regulation.

   Only four legislations (Hungary, Portugal, Slovenia and Sweden) have not taken heed of this legal reference established by the SE-Directive. Or, in other words, most of the transposition laws have developed the conditions and limits applicable to the case where, due to the nature of the information, the competent body of the SE is exempt from providing the information to employees' representatives. However, the technique used by the national systems to this regard does not follow a common pattern. At least three large groups of laws may be identified, the second of these susceptible to opening a new and significant differentiation.

   The first group of legislations (Cyprus, Estonia, Italy, Malta, Lithuania, Poland, Slovakia and United Kingdom) simply reproduces the non-specific and open terms of the SE-

Directive literally, without providing further legal certainty to the case for which it is implemented. A second group of laws, however, does not repeat the contents of art. 8.2 of the Community law and incorporates some singularities aimed to strengthen the degree of legal certainty. Nevertheless, the intensity of these singularities is variable, and a three-level scale may be drawn up: minimum, middle and high. At the minimum level of this scale we find those legislations that use a generic and unspecific language that does not achieve their formal objective of developing the conditions and limits for implementation of this case. In this sense, Austria exempts the competent body of the SE from providing information that may influence "the political direction of the SE"; Finland substitutes the Community expression "*according to objective criteria"* by another one: "*particularly weighty reasons"*; Germany suspends the duty to inform with regard to "trade and business secrets" that may harm the functioning of the SE; Denmark suspends the same duty when the information "*would be detrimental or harmful to the company*" and, finally, France and Ireland exempt the body of the SE from the duty to inform when providing this information may seriously damage the company. At the middle level we find legislations that try to complement or complete the wide concepts found in the SE-Directive (Luxembourg and Spain), but establishing formulae that, although not as open than national laws at the minimum level, do not offer a list, even if only indicative, of the conditions and limits applicable to the exemption from the duty to provide information. Finally, at the high level we find a reduced number of legal systems (Belgium, Greece and Netherlands) with a political will to develop the mandate of the SE-Directive in effective manner. In the third, and last, group we may include those national regulations (Czech Republic or Latvia) that refer this issue to the provisions contained in their respective Commercial Codes, thus lacking a regulation that is exclusively applicable to the SE.

4. The instrumental or adjective rule is established in the first section of art. 8.4 of the SE-Directive. This precept provides that, in applying the substantive rules commented above, "Member States shall make provision for administrative or judicial appeal procedures which the employees´ representatives may initiate when the supervisory or administrative organ of an SE or participating companies demands confidentiality or does not give information".

   With the exception of Estonia, Finland and Slovenia, all other national laws have transposed this instrumental rule, although a variety of formulae have been used by the Member States. Actually, this variety translates faithfully the diversity of the bodies in charge of hearing and solving labour conflicts in each European country. Only Belgium and Italy have appointed a specific body to solve this specific conflict. In all other countries, this competence falls upon the body (or one of the bodies) with general competences to solve conflicts that take place either in the sphere of labour relations (Austria, Czech Republic, Cyprus, Denmark, France, Germany, Greece, Hungary, Ireland, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Portugal, Slovakia, Spain, Sweden and United Kingdom), such as labour inspection or labour courts, or in other spheres, such as the sphere of commerce (Poland).

5. The legal content of art. 8 of the SE-Directive does not finish with the substantive and adjective rules examined. This article also states a number of provisions for which implementation in practice is left to the single-handed decision of the Member States.

   Specifically, there are three provisions of this nature established in art. 8 of the Directive under examination. Firstly, paragraph 2, art. 8.2 establishes the possibility that the dispensation to supply information is subject to "prior administrative or judicial authorisation". Secondly, art. 8.3. allows Member States to implement special provisions in favour of SEs established in their territory "which pursue directly and essentially the aim of ideological guidance with respect to information and the expression of opinions" (*tendency clause*). However, this authorisation is subject to the condition that "on the date of adoption" of the SE-Directive such provisions exist in national legislation. Lastly, para. 2, art. 8.4 allows Member States to "include arrangements designed to protect the confidentiality of the information" due to the regulation of administrative and judicial procedures to hear and solve conflicts raised by employees' representatives against the decisions of the competent bodies of the SE to require confidentiality or to withhold information.

   The use of these options by national transposition laws has been very limited. Only three legislations have included one, or at the most two, of these three possibilities. The Austrian, German and Swedish legislations have included special provisions applicable to tendency or ideological SE (*tendenz clause*). Also, German law is the only transposition law that has included the possibility of subjecting the dispensation to supply information to the prior administrative or judicial authorisation, as established by paragraph 2, art. 8.2.

B. Analytical comments

Austria.- The Austrian legislator exercised the option laid down in art. 8.3, allowing particular provisions for SEs which pursue directly and essentially the aim of ideological guidance with respect to information and the expression of opinions, on condition that, on the date of adoption of this Directive, such provisions already exist in national legislation, in art. 249 ArbVG. Nevertheless, the transposition of art. 8.3 does not relate to all companies pursuing ideological objectives whose rights and liberties are protected under art. 132 *AVG,* but only to companies referred to in this article; *id est,* companies which directly pursue the aim of ideological guidance with respect to information and the expression of opinions. It therefore does not encompass the companies with "political, professional, organisational, religious, charitable, educational and scientific aims". There are also special provisions (the "ideological guidance" clause) for media companies applicable to media companies whose legal form is that of an SE.

Belgium.- Belgian legislation contains some interesting singularities. Firstly, with regard to the duty of confidentiality, CCT obliges the management bodies of the SE to highlight the confidentiality of any information, the dissemination of which may be prejudicial to the company, at the time of providing this information.

On the other hand, a regulation norm gives an exhaustive definition of what items constitute secret information. The approach is objective, since it excludes the managament's

assessment of the confidential nature of information. Specifically, SEs are exempt of providing, amongst other, information regarding the distribution margins, the evolution of unit sale prices, information on the share of costs per product and per undertaking, projects to establish new points of sale and scientific research.

In case of a *post factum* contestation of the confidential information, a special judiciary procedure has been introduced by the Law of 17 December 2005. The way in which the procedure has been organised does contain sufficient protection against the dissemination of the information alleged to be confidential *pendente lite.* The same law provides a penal sanction in a case of a violation of the obligation of secrecy.

Estonia.- At the request of employees' representatives, the management bodies are obliged to justify the confidential nature of the information provided. The obligation of confidentiality does not apply to: i) the communication between members of the SNB and experts and translators and ii) employees' representatives participating in an information and consultation procedure who communicate with translators and experts and employees' representatives of the SE located in Estonia, if the parties decided during negotiations to establish one or more information and consultation procedures instead of an RB.

Finland.- The administrative or judicial appeal prior authorisation has not been transposed in Finnish legislation. However, legislation maintains that "this information shall, however, be disclosed without delay once the grounds for the derogation from the obligation to provide information no longer exist. At the same time, the grounds for the procedure for derogation shall be clarified". A procedure like this is post-procedure and the reasons must be given only afterwards and, hence, we may doubt of its agreement with the SE-Directive.

France.- French legislation does not establish a specific legal scheme with regard to reservation and confidentiality for employees' representatives of the SE. The provisions applicable to them are the general rules on this issue for members of the Works Council and trade union representatives, contained in the *Code du Travail*. Pursuant to this regulation, these representatives are subject to a double and differentiated obligation: on the one hand, the obligation to discretion; on the other, the duty of professional secrecy. The latter, more restrictive, prohibits representatives from disseminating any information regarding issues connected to manufacturing procedures.

Germany.- Art. 8.3 of SE-Directive has been implemented by art. 39 SEBG, entitled "Establishments with political, religious, charitable and other aims" (*Tendenzunternehmen*). According to SEGB, these rules *"*shall not apply to European companies which, directly and predominantly: i) are engaged in the pursuit of political, coalition-related, religious, charitable, educational, scientific or artistic objectives; or ii) serve purposes of publishing or the expression of opinions covered" by *Grundgesetz*. The SE-Act adds that "information and consultation shall relate only to the full or partial compensation of employees for any financial disadvantages arising from the changes to the company or establishment concerned."

The exclusion of establishments with political, religious, charitable and other aims is in line with traditional practice in Germany as regards "co-determination" (employee participation

in management). Equivalent "ideological guidance" clauses are to be found in the Co-determination Act (*Mitbestimmungsgesetz*) and the One-Third Membership Act (*Drittelbeteiligungsgesetz*) [the Act on employees making up one-third of supervisory-board members]. The specific aim of Art. 8.3 of the SE-Directive is to maintain national traditions regarding the protection of the above-mentioned establishments. Therefore, art. 8.3 has been transposed into German law, in accordance with the Directive.

Greece.- Greek legislation gives **"**indicative" examples of issues that the employer may not give information to the RB or other representatives of employees. In this sense, the SE does not have an obligation to inform about: i) issues which are characterized as secrets by existing legislation, such as "bank secrets, attorney's privileges, issues of national importance, patents" and ii) data protected by the legislation about personal data

Italy.- Implementing art. 8.4 of the Council SE-Directive, the Italian legislator provides an administrative procedure by creating an independent body, named *Commissione Tecnica di Conciliazione* (CTC), aimed to judge the confidentiality or not of the information, and to decide the *criteria* of individuation of the information that is capable of endangering the functioning or the activity of the participating companies or of damaging them if disclosed. The CTC's members (three members in total) are appointed by: i):the representative body or by the employees' representatives involved within the information and consultation procedure; ii) the administrative board of the participating companies of the SE and iii) jointly by the parties. In case of disagreement on the appointment of the third member, this is drawn from a list of six names suggested beforehand. The CTC closes the procedure no later than 15 days from the demand.

Lithuania.- Members of the RB as well as members of the SNB shall have the right of access to information considered to be a commercial, industrial or professional secret only when it is necessary for the performance of their duties, upon presenting a written pledge not to divulge the secret.

Spain.- Spanish legislation has made the content of art. 8.2 SE-Directive more specific, providing a greater legal certainty to the cases where the general duty of companies to provide information to the bodies, as articulated by the involvement of employees, is repealed. Spanish law introduces three significant specifications. Firstly, information that is subject to the exception clause has to deal, exclusively, with industrial, financial or commercial secrets. However, activation of the exception clause does not occur only with the existence of these secrets. Secondly, the requirement is that the dissemination of these secrets harms, according to objective criteria, the functioning of the organisational units of the SE or is prejudicial to the financial stability thereof. Lastly, information related to the "volume of employment in the undertaking" is not susceptible to inclusion in the exception clause.

Sweden.- Article 8.2, first paragraph, Community Directive has not been implemented. The motivation in the proposition for not implementing it was that according to case law a possibility already exists to neglect information and negation in specific cases where it could seriously damage the business.

Furthermore, Swedish legislation has implemented art. 8.3. The national law states particular provisions for European companies, which pursue the aim of ideological guidance. The activities can be religious, scientific, artistic, otherwise non-profit oriented, co-operative objectives and trade-union and political objectives.

3.4.3 Spirit of cooperation

1. Under the inexpressive title "operation of the representative body and procedure for the information and consultation of employees", art. 9 of the SE-Directive establishes what may undoubtedly be considered as the basic principle to regulate the relationship between the competent body of the SE and employees' representatives, independent of whether this is undertaken through an RB or in the framework of an information and consultation procedure. This principle is no other than the *spirit of cooperation.*

2. Most of the national transposition laws have included the principle stated in art. 9 of the Directive. On occasions, the internal regulations use the same expression than the Community legislation; that is, the aforementioned spirit of cooperation (Austria, Cyprus, Czeck Republic, Greece, Ireland, Italy, Luxembourg, Malta and Slovenia). However, other laws accommodate the meaning of this principle to the internal legal language, using expressions that are completely similar in content for each specific legal system. In this sense, we have expressions such as *mutual trust* (Estonia) or *good faith* (Germany and Spain). Some regulations even duplicate the terms, adding to the term cooperation another term with a synonymous legal meaning. Thus, iterations are used such as *spirit of cooperation and collaboration* (Belgium), *cooperation and good faith (*Portugal), *cooperation, equality and good will* (Lithuania) or *mutual cooperation in accordance with the requirement of good faith and integrity* (Hungary).

   None of the Scandinavian countries (Denmark, Finland and Sweden) have included a similar provision in their transposition laws. However, this omission is not exclusive to this homogeneous group of legal systems. The same may be found in the regulation of such different legal cultures as France, Netherlands, Latvia, Slovakia and United Kingdom. In Poland, the requirement of cooperation is applicable to the relationships between the competent body of the SE and the RB, with no further extension, at least in a formal interpretation of Polish legislation, to relations between management and employees' representatives elected in the framework of information and consultation procedures.

3.4.4 Protection of employees´ representatives

1. The first paragraph of art. 10 SE-Directive establishes that the members of the SNB, the RB, employees' representatives in the administrative or supervisory bodies of the SE and, in short, employees' representatives exercising functions in the framework of information and consultation procedures have the right, during the exercise of their functions, to "the same protection and guarantees provided for employees' representatives by the national legislation and/or practice in force in their country of employment". The second paragraph of this article specifies the content of the guarantee, that is extended in particular "to attendance at meetings" of all representatives in SE (SNB, RB, under agreement, or administrative or supervisory organ) and "to the

payment of wages" for these representatives "during the period of absence necessary for the performance of their duties".

2. Except in one case, all the national laws transpose in a correct manner the guarantees recognised to employees representatives of SE in art. 11 Council SE-Directive; even, a large majority reproduces the term of the Directive in a strictly literal fashion. In Poland, the transposition law has acknowledged a higher and more intense level of protection to employees' representatives in the SE (or in the subsidiaries or participating companies) than the level established for representatives in undertakings of a domestic nature. Only Czech legislation stands out, insofar as the members of RB shall not enjoy advantages in the exercise of their functions.

3.4.5 Misuse of procedures

A. General considerations

1. Art. 11 of the SE-Directive obliges Member States to adopt the means necessary to avoid the establishment of an SE with no aim other than to deprive employees of the right to involvement they already enjoyed or of withholding this right. Pursuant to this precept, it is up to national regulations to make this guarantee effective, specifying the legal consequences of the misuse of the establishment of the SE in a way that is prejudicial to the right to involvement.

   We must highlight that art. 11 of the Directive adopts the classic and traditional legal structure of Directives. This precept states an aim or a result, which consists in preventing the misuse of an SE for the purpose of depriving the rights to involvement, granting Member States the freedom to select the suitable means to achieve and ensure the useful effect defined.

2. In view of the above, the transposition of art. 11 of Community Directive must respond to two essential criteria. The first with regard to the national laws' lack of freedom to decide whether or not to transpose this specific provision; they are obliged to transpose it on pain of frustrating the effective usefulness required by the Community legislator. Nevertheless, under the second criterion, national laws have a certain margin at their discretion in transposing art. 11, as they may choose, from among the means available, the means they consider to be more suitable to ensure the result sought by the Directive.

   At least in theory, the implementation of these two criteria should entail two consequences. On the one hand, national laws must transpose art.11; there is no margin for non-transposition. On the other, the transposition itself can not be limited to reproducing literally and mimetically the legal contents of art. 11 since art. 11 does not define the means to avoid misuse in the establishment of the SE; it only establishes an aim, which requires a necessary and inevitable means, instrument or measure to be satisfied.

   Nonetheless, several national laws have not expressly transposed this important guarantee established in art. 11 of the Directive. This is the case for Belgium, France, Greece, Hungary, Latvia, Netherlands and Slovenia. Furthermore, certain legislations have mechanically transposed the content of this article, thus frustrating also the useful

effect sought by it. This is the case for Cyprus and Malta. And the transposition made by the Czech Republic offers serious doubts about its conformity with SE-Directive. Finally, there are delicate problems with some national laws that provide, in a compulsory manner, that negotiations must be restarted in the hypothesis of misuse of procedure (Italy, Luxembourg and Lithuania).

B. Analytical comments

Austria.- The national law specifies the notion of misuse, saying that such a misuse especially derives from a modification of the SE's structure. In this case, art. 229 ArbVG requires repeated negotiations according to art. 228 ArbVG ("structural changes"). Due to this, the SNB has to reconvene and start over negotiations. For this negotiation, the RB has to be assembled accordingly to the new structure.

Belgium.- The Belgian social partners have indicated in their *Avis* nº 1492 that there is no need for complementary legislation to prevent *misuse* of an SE for the purpose of depriving employees of rights to employee involvement or withholding such rights. At present, the Belgian law does not provide sufficient and explicit substantial guarantees allowing judges to censor the exercise of such a managerial prerogative. Indeed, it is a common attitude of the Belgian Judicature not to enter into the merits of the exercise of the managerial prerogative.

Cyprus.- According to art. 19 of SE-Act, no SE may deprive employees of their right to participate in the company or deny them that right. This provision appears to conform with SE-Directive. Although, art. 19 of the national Law simply reiterates in fact the provisions of art. 11 of the SE-Directive, it is an important and broad statement which is backed by a criminal sanction as provided by art. 20 of the national Law. Its practical implications are not readily foreseeable at this time and it is not clear whether or not it will help to prevent misuse of the SE for the purpose of depriving employees of rights of involvement or participation.

Czech Republic.- The SE-Act stipulates that the Czech Register Office shall verify the establishment and composition of the SNB, and the course and outcomes of negotiations of an SE with registered business address in the national territory. Any potential conflict with the dictum of SE-Directive should lead to the refusal to enter an SE in the Register of Companies. However, it is not clear if such entry could be denied on the grounds of any failure whatsoever or only in the case of significant interventions in the rights of employees, as follows from the Directive.

The competent organ of the SE can break the obligation to notify the SNB of concrete information. The SNB, however, can demand this information in the frame of legal action in the same extent as Czech shareholders can.

The other provisions relevant to the prevention of the misuse of the SE for the purpose of depriving or withholding employees of theirs rights to involvement in the SE-Act were not applied.

Denmark.- Article 11 of SE-Directive is implemented by art. 44 of the Danish Act, that establishes the follow provisions: 1) If changes take place within the SE, its subsidiaries or establishments within two years of its registration, and applying the provisions of this Act would have led to a different result if those changes had been implemented before the establishment of the SE, new negotiations shall take place. In this case: i) negotiations shall take place at the request of the representative body or the employees' representatives in companies, subsidiaries or establishments which become part of the SE after its establishment, and ii) Part 2 of this Act shall apply *mutatis mutandis*, whereby: "the SE, subsidiaries and establishments" replaces "participating companies", RB or any body established with a view to implementing information and consultation procedures replaces SNB, and "the date of registration of the SE" is replaced by "where the negotiations end without reaching an agreement". 2) If it is shown that the changes referred to in paragraph (1) were not intended to limit employees' involvement, new negotiations shall not take place.3) If it can be determined on a basis other than changes within the SE after its establishment that the purpose of establishing the SE was primarily to limit employees' involvement, new negotiations shall take place.

Estonia.- If, after the registration of an SE, significant changes are made in the SE in connection with an undertaking or enterprise controlled thereby, and it may be concluded that, upon foundation of the SE, the objective was to deny employees the right of involvement or restrict the exercise of such rights, new negotiations shall be held. If an SE is founded with a purpose to deny employees the right of involvement or restrict the right, holding of negotiations is not restricted by the changes following the foundation of the SE.

Negotiations shall be initiated at the written request of the RB or the employees' representatives of new undertakings and enterprises controlled by an SE. In order to hold negotiations, arrangements for negotiations on the involvement of employees prescribed upon foundation of an SE shall be applied, having regard to the following: i) after registration of the SE, the participating companies are deemed to be the SE and its subsidiaries and establishments respectively; ii) the SNB is, after the registration of the SE, deemed to be the representative body of employees; and iii) the period prior to the registration of the SE is deemed to be a period preceding failure of negotiations.

The significant changes mean changes in the structure, number of employees or registered office of an SE, its subsidiaries and establishments if these had caused different application of standard rules according to provisions regulating employee participation. Unless proved otherwise, it is presumed that the significant changes indicate an intention to found an SE in a manner which denies employees the right of involvement or restricts the right if the significant changes occur within a year after the registration of the SE.

Finland.- If a significant change is implemented in an SE or in a subsidiary or establishment of an SE within a year following the SE's registration which would have meant more extensive employee involvement upon establishment of the SE, renegotiations shall be held on the arrangement of employee involvement. The renegotiation shall be made in such an order that should have been followed in case where the abovementioned change had been implemented before the registration of the SE.

The SE-Act establishes a control period after the establishment of the SE. If a decision with essential changes is made – and this could have been reason for more extensive representation –, new negotiations should be started. This provision concerns, for example, situations where the SE is established from subsidiaries and during the period the parent takes over the SE. This concerns also the situations where the SE is established in states with no system of representation and is then transferred to a state with this system, or an SE is established without participation because of certain criteria and the amount of employees is increased after that. The provision goes so far as to regulate the process of proving this (possibility to counterproof). New negotiations must not be effected if it is shown that there is a acceptable reason for the change and it was not possible to do that change before the establishment of the SE. This would guarantee reasonable decision-making also after the establishment and during the control-period.

Germany.- Article 43 SEBG implements Art. 11 SE-Directive, providing that: "A European company may not be misused for the purpose of depriving employees of participation rights or withholding such rights. Misuse shall be deemed to exist where, (…), changes in the structure of the European company take place within one year following its establishment which lead to employees being deprived of participation rights, or to such rights being withheld".

The national law includes a time limit of one year which states that if during that period there are substantial changes in the composition of the SE (without negotiations), it is up to the management to prove that the purpose of the change was not to deprive employees of their rights. After the deadline of one year only the presumption is dropped.

On the other hand, article 66.1 of the SE-Council Regulation could be a problem. According to it *"*an SE may be converted into a public limited-liability company governed by the law of the Member State in which its registered office is situated. No decision on conversion may be taken before two years have elapsed since its registration or before the first two sets of annual accounts have been approved".

At first sight, this provision seems to enable only a change of legal form. But the retransformation of an SE with codetermination (originally formed in Germany) later registered in United Kingdom into a public limited company could lead to a "flight from the codetermination", because neither the agreement on employee participation nor the participation by operation of law (standard rules for participation) would be applicable as long as the parties have not taken measures against this case in the agreement.

Nevertheless, there is no contradiction between art. 43 *SEBG* and art 66.1 of the SE Regulation. It is correct that an SE with employee participation may acquire a national legal form, following the transfer of its registered office to a Member State with no provision for participation rights, in order to deprive employees of such rights. However, such a procedure is still regarded as an abusive practice even two years after the establishment of an SE, and is subject to penalties (art. 45 *SEBG*). It is only the presumption rules, and thus the easing of the burden of proof in art. 43 *SEBG*, which apply for one year following the establishment of the SE.

Ireland.- The Irish legislation provides protection for participation rights to prevent an SE being misused for the purpose of depriving employees of rights to employee involvement or withholding such rights. The SE-Act achieves the intent of Article 11 by allowing a complaint to be referred to the Labour Court and by providing strong dispute resolution and enforcement procedures in cases where misuse of a company is suspected

Italy.- Implementing art. 11 SE-Directive, the Italian legislator provides that "*when, after the registration of SE, essential alterations arise in the SE, in participating companies or subsidiaries, aimed to deprive employees of rights to employee involvement, a new negotiation shall begin. This negotiation starts at the request of employees' representatives in subsidiaries or establishments of the SE and takes place following the procedure provided for in articles (...), having regard to the situation existing in the period when negotiation (...) started".*

Nevertheless, the appropriate measures provided by article 11 of the SE-Directive have to be implemented by a new negotiation. This provision seems to be very confusing since the provision of a new negotiation could represent a loophole for the workers' right to involvement, because it entrusts employees' representatives to take the necessary steps to start the negotiation, which is, in the Directive's idea, a step to be taken by the company. So, in case of no demand of a new negotiation by the employees' representatives, the misuse of procedures will not be sanctioned.

Luxembourg.- In the case that, within the year from the registration of the SE, the RB can legally prove that the SE has been established with the intention of withholding the right to involvement employees, a new negotiation must be started where this right is respected. The declaration of the misuse of procedures corresponds to labour courts.

Lithuania.- If shortly after the establishment of a European Company, essential changes take place in the European Company or in its subsidiaries, which clearly show that the purpose for the establishment of the European Company was to deprive the employees of the right to be involved in decision making, it is necessary to start new negotiations. Essential changes in a company means changes in the number of the employees of the European Company or its subsidiaries or changes in the manner of incorporation of the company which would have extended the rights of the employees to be involved in the management of the company if they had been implemented before the establishment of the European Company.

Malta.- Regulation 14 states that no person shall use an SE for the purpose of depriving employees of rights to employee involvement or withholding any such rights. No mention of a provision is made to the 'appropriate measures' which should be taken 'in conformity to the Community law.' So, national law is short in provision as regards appropriate measures.

Poland.- Polish legislation states that, when in the SE, its subsidiaries or establishments the considerable changes relating to the structure, number of employees, and in the case of the SE to the registered office too, have taken place after registration of the SE and the intent of the changes is to deprive or infringe the employees' rights in the sphere of involvement, negotiations so as to conclude the agreement on employees' involvement in changed conditions are continued. The representative body is entitled to demand that negotiations are

held. The provisions relating to the arrangements for the involvement of the employees within the SE are applied to the negotiations mentioned above. It should be underlined that the rights and obligations of the SNB are vested in the representative body and the rights and obligations of the participating companies are granted to the SE, its subsidiaries and establishments.

Spain.- Spanish law specifies the legal consequences of the wrongful use of the establishment of an SE to the detriment of the right to involvement.

This supposition is defined through a court ruling declaring that the operation establishing an SE, or the substantial changes undertaken in the SE once it is established, had the purpose of either depriving employees of their right to involvement or were detrimental to these rights. In any case, the production of a detrimental or harmful result on the involvement of employees is not enough; *animus nocendi* is required, as inferred by the use of the adverb "intentionally" in the regulation.

Once the legal sentence acknowledging this harmful intention is passed, and when the sentence is final, national law establishes the holding of a new negotiation, as long as the RB or the employees in the new establishments or subsidiaries of the SE so request it. Negotiation is subject to the general rules, although with the following three clarifications by which the references to these rules will be: i) participating companies must be understood as the SE and its establishments and subsidiary companies; ii) the moment prior to establishment of the SE will be the moment of the end of negotiations without agreement; and iii) SNB will be RB.

Sweden.- The national law states that the rules governing European companies may not be misused with the aim of removing or denying employees their rights to involvement. Where major changes occur within a year from the European company being established and are such that the employees should have gained more substantial influence if the changes where made before registering the company, the changes shall be considered to have been made with the aim of removing or denying employees their right to involvement unless the company can show that the changes were introduced for a different reason. A time frame of one year is set regarding major changes that occur within the year of the European company being registered.

United Kingdom.- Regulation states that an employee representative, or, if there is no representative, an employee, can complain to the Central Arbitration Committee (CAC), if he or she believes that a company is misusing an SE to deprive employees of their rights to employee involvement or to withhold rights from them. In the case of a complaint made before the SE has been registered, or within 12 months of its registration, the burden of proof is on the company that it did not misuse or intend to misuse the procedures. The CAC can require the company to take appropriate action to ensure that employees are not being deprived of their rights or having their rights withheld.

4. Provisions applicable to establishments and subsidiaries of the SE that are located in each member state

4.1 Field of application

As has been pointed out in the first pages of this report, SE-Directive and, therefore, transposition laws define two large types of rules or provisions, depending on the territorial scope of legal implementation. On the one hand are the "main" provisions, that are applicable to the European company as a whole, where the registered office is located in a specific Member State; their legal effects cover the organisational body of the SE and its subsidiaries and establishments, including those outside the territory of the specific Member State. On the other are the "accessory" provisions, which are applicable to the subsidiary companies and establishments that are located in the territory of a Member State exclusively, of an SE (or of a subsidiary or, given the case, of the participating companies of the SE) which has its registered office in a different Member State. Each and every one of the main provisions established in SE-Directive have been examined elsewhere in this report. We shall now analyse those provisions included in the second group of provisions, the "accessory" provisions.

4.2 Employees' representatives

A. General considerations

1. The SE-Directive uses the expressions "employees' representatives" or, simply "representatives" on different occasions. Thus, as an example, the term "employees' representatives" is used in sections (5), (11) and (12) of the introduction to the Community regulation, in arts. 2.e), 3.1, 3.2.b (last paragraph), 8.2 (paragraph 2), 9 (paragraph 2), 10 (paragraph 1), 12.1 and, lastly, in section e), Part 2 of the Annex. On the other hand, the term "representatives", although stated on less occasions, may be found for instance in art. 3.2.b (paragraph 1).

   Despite the frequency with which they are used, these expressions are not used with a single meaning; quite the opposite, a double meaning may be found which, in the legal context of the Directive, may be qualified as strict or original, in the first case, and derived in the second. On occasions, less frequently, the term adopts the strict or original meaning, coinciding with the express definition contained in art. 2.e); that is, "employees´ representatives means employees' representatives provided for by national law and/or practice". This is the meaning found in section (5) of the Introduction as well as art. 3.2.b (last paragraph) of the Council SE-Directive and in section e), Part 2 of the Annex. At other times, more frequently, this term is not used in the meaning expressly defined in art. 2.e), but is equivalent, in a derived form, to employees' representatives in the SE or its several company units (participating companies, concerned subsidiaries or establishments). This is the interpretation found when the term is mentioned in the Introduction to the Community regulation or in the remaining precepts of the Directive.

However, trying to provide a clearer legal content to the second of these meanings, the derived meaning, we may undoubtedly state that for the Community legislator, the term "employees' representatives" is a *synthesis term* comprising or grouping four clearly different institutions or manifestations of employee representation; these are: the negotiating body (SNB), the representative body (RB), the employees' representatives in the framework of information and consultation procedures and, finally, the members of administrative and supervisory bodies.

Throughout its articles, the SE-Directive, as seen earlier, states provisions of a different nature with regard to the competences and functioning of some, and not all, of these representation manifestations. This is the case for the SNB or the RB. However, the Directive does not offer any legal provision on the means by which these representatives access these specific representation institutions. It does not do so inasmuch as the Community Directive refers this issue to national legislations and practices. Undoubtedly, this is the case with regard to the SNB as established by art. 3.2.b, whereby "Member States shall determine the method to be used for the election or the appointment of the members (..)".

The decision of the Community legislator to grant full legal competences to national laws on this issue is due to the great diversity of rules and practices existing in the Member States with regard to the procedures to appoint representatives, making it impossible to establish a single and uniform model. The Community regulation maintains in this way a full effect, or if preferred, a maximum respect to the diversity of national procedures. The constant use of the expressions "election" and "appointment" in the Directive is a proof of this.

With regard to other issues, only two countries (France and Greece) have not made use of the possibility established by paragraph 2, art. 3.2.b SE-Directive. Czech legislation, although considering this possibilities, conditions it to a prior authorisation of the trade union in the affected SE. And, the legislation from Luxembourg, trade union representatives may be elected as long as these organisations are representative at general or sectoral national level and, furthermore, are undersigners of a collective agreement applicable in the concerned SE, subsidiary company or establishment. In Estonia and Netherlands, this presence of non-employed representatives in the SE is not stated expressly by their respective SE-Act; nevertheless, it may be implicitly deduced.

Slovenian SE-Act does not expressly state whether SNB members may or may not be persons, who are not employed within the concerned companies, it only states who may nominate the candidates (works councils, representative trade unions in a participating company, concerned subsidiary and branch and at least 50 employees in a participating company, concerned subsidiary and branch).

The remaining transposition laws, with the exception of Denmark, establish that the members of the SNB may include representatives of trade unions whether or not they are employees of a participating company or concerned subsidiary or establishment.

2. This study does not in any way intend to provide a substantive content to the term "employees' representatives" in the first of the meanings used in the SE-Directive. Such an analysis would greatly exceed the purpose of this report – and indeed the task entrusted – and would surely require consultation of many other sources besides the ones used here. The objective sought is different, focussing, precisely, on giving an account of how "employees' representatives" – understood in the derived meaning – are elected or appointed in regulations throughout the EU.

   Prior to starting this analysis, it wouldn't go amiss to carry out two preliminary observations that, together and simultaneously, intend to be observations with regard to method and content. The aim of the comments below is not to repeat, in all its breadth and complexity, the legal scheme of the national system of election or appointment of "employees' representatives" in the SE. With a more selective dimension, the aim is to highlight or emphasize the most singular aspects or most outstanding features of this scheme.

   In most national laws – and this is the second observation -, the procedures to elect or appoint employees' representatives are common to three of the four representation institutions in the SE in charge of specifying and articulating the right to involvement of employees; that is, for all bodies except employees' representatives in the administrative or supervisory body of the SE. Pursuant to this, we now inform that, unless clarified otherwise, the procedures studied below are valid for these three institutions.

B. Analytical comments

Austria.- Austrian members of the SNB and RB are appointed by a resolution of the works committee, of the works council (in the case where a works committee does not exist in a company), of the central works council (in enterprises) or of the group representative body (in corporate groups) (art. 218 ArbVG). This means that if there is a group representative body it is this body that appoints the Austrian members without any intervention from the other bodies. The only exception is if there are any (central) works councils within the corporate group which are not represented by the group representative body. In this case, the chairmen of those councils have to be invited to the meeting, in which the appointment of the members takes place. Insofar, they are counted as members of the group representative body (§ 218 Abs 3 ArbVG). Generally speaking, it is possible that certain companies do not have any of these bodies. If this is the case, this company would not be able to appoint members of the SNB or RB. However it is not very common, because it is very easy in Austria to instal a works council or other representative bodies.

The competent institution has to take into account that there should be at least one member representing each participating company which has employees in the Member State concerned. Such members may also include representatives of trade unions whether or not they are employees of a participating company or concerned subsidiary or establishment. The decision is taken in the presence of at least half the members and with a majority of those members' votes that represent an absolute majority of the employees in the group, enterprise and company. Every company involved should, as far as possible, be represented with at least one member in the SNB. The RB elects the members of the administrative or

supervisory body. If a company belongs to more than one group, the employees of this company should be represented in each group's SNB or RB.

Belgium.- Employees' representatives in the SE are appointed through a complex procedure in which a number of representation institutions can intervene one after the other. Belgian law establishes a cascade system. Firstly, priority is given to the works council (*conseils d´entreprise*). So, the employees' representatives of the participating companies, concerned subsidiaries and establishments are appointed by and amongst the members of this body, of the works council. Secondly and given the case that there are no Works Councils, the appointment in participating companies, concerned subsidiaries and establishments is made by and amongst the members of the work prevention and protection councils (*comités pour la prévention et la protection au travail*). When the former councils do not exist, the *Commission Paritaires* (a body at branch level of representatives of management and labour organisations) may authorise the trade union delegations of participating companies, concerned subsidiaries and establishments to appoint the employees' representatives of the SE. If no works council, work prevention and protection councils exist, and in the absence of authorisation from the joint committee, it corresponds to the workers of the participating companies, concerned subsidiaries and establishments to elect or appoint the representatives of the SE. In any case, the appointment of members may include a representative from the representative trade unions, regardless of whether this person is employed or not by the participating company, concerned subsidiary or establishment.

In a case of a multitude of participating companies, situated in Belgium, those companies without works councils, *comités pour la prévention or délégués syndicaux* will not have part in the vote at all. According to a grammatical reading of the provisions, only the companies with works councils or *comité pour la prévention et la protection* or with délégués syndicaux seem to have a vote. This might seem contrary to article 3. 2 SE-Directive. The problem can be solved, as the national report argues, by an interpretation in conformity with the SE-Directive. This article stresses the idea that the SNB should be a body *representative of the employees of the participating companies and concerned subsidiaries*. Therefore, it is important to apply the provision in a way which guarantees that the workers' representatives of all the companies are involved in the determination of the Belgian representation.

Cyprus.- The national Law provides that the representatives of the workers shall be elected by the existing trade union organizations. In the case where these organizations do not exist, it will be done by direct election on the part of the employees, such that the composition of the RB shall include at least one member from each participating company which has employees. The allocation of seats in the SNB or RB from within a member state where more than one participating company employs employees is not clear in the national Law, which only provides that both, SNB and RB, must include at least one member representing each participating company.

Czech Republic.- The members of employees' representatives of an SE shall be nominated by the national employees' representatives at a joint meeting. The Czech Labour Code identifies trade union organizations as employees' representatives. In the case that a trade union is not operating in an undertaking, employees have the right to establish a works council and select a representative for the area of work safety and security who can not

simultaneously be a member of the works council. Elections of works council members and the representative for the area of work safety and security can be held at the same time. The regulation does not allow the co-existence of union organizations, works councils and a representative for the area of work safety and security within one undertaking. Where there is no employees' representative in an SE, its subsidiary or establishment, the employees may elect a representative.

Employees may also be represented by a person not employed by the participating legal entity, subsidiary or concerned unit of the company if this person is authorised by, and represents - within the meaning of second paragraph of art. 3.2.b SE-Directive -, the trade union organization of these employees.

Denmark.- According to Section 9 of the SE-Act, employees' representatives of an SE are elected by and among the members of the works councils. If there are no works councils, they are elected by the shop stewards. Denmark has not made use of the possibility to include trade union representatives who are not employees in the concerned company. If this is requested before, the election of members from and among the works councils or shop stewards may be supplemented by representatives of groups who are not represented in the works councils or the group of shop stewards. There are no rules, apart from section 9 of the Danish Act, on employee involvement in SE-companies on the details of the election process or on how to solve possible conflicts over the election of members to the SNB. There is no case law. If a case comes up it will probably be decided with a view to ensuring proportional representation of the employees.

Estonia.- The Estonian legislation establishes two forms of employees' representatives. An employees' representative is: i) an employee of an undertaking who is elected by the members of a union of employees or ii) who is elected by a general meeting of employees who do not belong to a union of employees to represent the employees in labour relations with the employer. The trade union representative represents employees who are trade union members and the other representative represents employees who do not belong to a trade union. In order to represent both groups of employees, the representative of one group needs authorization from the other group.

Employees' representatives of the SE (or a participating company and a concerned subsidiary or establishment) shall be elected by the general meeting of employees. The procedure for the election shall be approved by the general meeting of employees. The election procedure shall ensure that all employees have the possibility to participate in the elections. If several participating companies and concerned subsidiaries or establishments are located in Estonia, a joint representation formed by the employees' representatives shall elect the employees' representatives of the SE.

The joint representation shall take the following conditions into account upon election of a representative or representatives of Estonia in an SE: i) if possible, each participating company is represented in the SNB through at least one member; ii) if the number of Estonian members in the SE is smaller than the number of participating companies located in Estonia upon foundation of the SE, the participating company employing the largest number

of employees is taken into account first. If Estonia has the right to elect additional members to an SE, these members shall be elected pursuant to the same procedure.

Finland.- Employees employed by an SE in Finland have the right to select a representative to the SNB by agreement or election. If employees cannot reach an agreement concerning the procedure, the occupational safety delegates representing the greatest number of workers and waged employees shall jointly arrange an election or other selection procedure in such a way that all employees have the right to participate therein.

If the number of seats on a SNB or RB allocated to Finnish participating companies is less than or equal to the number of participating companies, these seats shall be allocated among Finnish companies one at a time by decreasing order of the number of employees they employ. If the number of seats of both representations allocated to Finnish participating companies is greater than the number of participating companies, one seat shall be allocated first to each Finnish company, and thereafter the remaining seats among the companies in proportion to the number of employees they employ. If there are more participating entities than seats, the seats are distributed in order of the size of the entity.

France.- Employees' representatives in the SE are appointed by trade union organisations, either from among the employees elected in the last professional elections to the works council (*comité d'entreprise*) or from among the trade union delegates that work in the sphere of this council. In the absence of trade union organisations, these representatives are elected directly by the personnel rendering services in the concerned companies by secret ballot.

If there are more participating entities than seats and in one of them there are no trade union organizations, the *Code du Travail* (arts. R.439-6 and 4399-8) determine specific ratios in order to define the method for designating the representative.

Germany.- The employees' representatives of the SE are chosen by an elective body (*Wahlgremium*) drawn from the works council structure, taking into account the possibility of having central/group works councils covering several workplaces. The complex arrangements for choosing employees' representatives in Germany reflect the existing industrial relations systems, so it is no shock that these representatives are elected through the powerful works council systems.

German legislation regulates the election procedure in detail, establishing a complex scheme of rules for the composition of this elected body depending on the structure of the SE. Specifically, the national law differentiates between four hypotheses: i) Composition of the elective body in the case that only one group of companies from within the country is involved in the establishment of the SE: the elective body shall consist of the members of the group's works council (so-called *Konzernbetriebsrat*) or, where no such body exists, the members of the company works councils (*Gesamtbetriebsrat)* or, where no such bodies exist, the members of the works council (*Betriebsrat);* ii) Composition of the elective body in the case that only one company from within the country is involved in the establishment of the SE: the elective body shall consist of the members of the company works council (*Gesamtbetriebsrat)* or, where no such body exists, the members of the works council

(*Betriebsrat);* iii) Composition of the elective body in the case that only one establishment from within the country is involved in the establishment of the SE: the elective body shall consist of the members of the works council."; iv) Composition of the elective body in mixed cases. Where one or more groups of companies or non-affiliated companies are involved in the establishment of the European company, or where independent establishments are affected thereby, the elective body shall consist of the employee representatives at the group, company and establishment levels. Where, in these circumstances, there are no employee representatives, the members of the elective body (*Delegierte)* are the employees by means of a direct vote. The election shall be initiated and conducted by an election committee chosen at a meeting of the employees to which the management of the group, company or establishment issues invitations to attend.

Finally, election by means of a secret and direct ballot *(Urwalh*) is possible in the case that there are no employee representatives. In this case, the election shall be initiated and conducted by an election committee chosen at a meeting of the employees to which the management of the group, company or establishment issues invitations to attend. The election of the members of the special negotiating body shall be in accordance with the principles of proportional representation. The principles of majority voting shall be applied where only one nomination for election is submitted. Each nomination by the employees shall be signed by one twentieth of the employees who are entitled to vote, but by no less than three and no more than 50 persons who are entitled to vote; in establishments which normally have 20 or fewer employees entitled to vote, it shall be sufficient for the nomination to be signed by two persons who are entitled.

In all hypotheses referred, the elective body shall consist of no more than 40 members. When this maximum is exceeded, the number of members of the elective body shall be reduced using the d'Hondt seat distribution system. At least two thirds of the members of the elective body representing at least two thirds of the employees shall be present at the election. Each member of the elective body shall have as many votes as the number of employees they represent. Members shall be elected by a simple majority of the votes cast.

Greece.- The employees' representatives are elected by the undertaking level trade union. If there are no such unions, they are elected by the works council of the undertaking. If there is no such organ, they are elected directly by the company's employees. If more than one company in Greece participates in an SE scheme, the above representatives gather together to elect the members of the Special Negotiating Body corresponding to the share of Greek employees in the total number of employees of the SE. In these members, there is at least one representative from each participating company; this rule may not alter the total number of the Body's members. If there are more participating entities than the numbers of seats provided by art. 3.2.a.ii SE-Directive, the additional seats are allocated to the companies with the largest number of employees.

Ireland.- The members of SNB are appointed by employees, not by trade union representatives.. The Irish law covers this requirement and also states that those who are eligible to stand for election, when nominated by a trade union or an excepted body recognised by the participating company or by at least two employees, are i) an employee who has worked for a participating company, concerned subsidiaries or establishments in

Ireland for at least one year; ii) a trade union official or an official of an accepted body, regardless of whether this person is employed by the participating company or not. The members of RB are elected or appointed from their number by employees´ representatives, or in the absence by the entire body of employees.

Italy.- The Act known as "Workers Statute" (WS), of May 1970, recognised the right to trade union representation within undertakings employing more that 15 workers. Article 19 WS, in its original text, provided that in order to establish a trade union representative bodies (RSA), workers had to refer to the most representative trade union confederations at national level, or to the trade unions which had signed the collective agreement applied within the enterprise. This article was modified by a referendum (June 1995), so that in order to constitute an RSA, workers may only refer now to the trade unions which have signed the collective agreement applied in the undertaking.

In July 1993, a tripartite agreement among trade unions (CGIL, CISL and UIL), employers' associations (CONFINDUSTRIA, INTERSIND) and the Government has provided a new model of trade union representation in the workplace. So the Italian experience is characterized, at plant level, by the presence of the Trade union unitary representative body (RSU), linked, *de facto*, to CGIL, CISL and UIL. Two thirds of RSU members are elected and their seats are allocated proportionally to the number of workers' votes; one third is designated by the abovementioned trade unions and the seats distributed between trade unions representatives that have taken part in the election with a list of candidates. RSUs can subscribe collective agreements at plant level and they are entitled to the information and consultation rights provided by national collective bargaining and by the law. Hence, the Italian system, as argued by the national report, provides for a single channel of representation in the workplace with some aspects of the dual channel of representation, linked to the election mechanism of the two third of the representatives, although in trade unions lists.

The Italian Legislator has harmonized the procedure of election and appointment of the SNB and RB, who are elected or appointed by national employee' representatives. The transposition law provides that they are elected or appointed by the same procedure as the trade union representative body provided by WS (the RSU or RSA members) in agreement with trade unions that signed the existing collective agreements (in Italy, not all the companies are covered by collective agreements). With regard to this provision, the Legislative Decree specifies that this method can be used only for the "first phase of application". This formulation is not clear, because it suggests that a different regulation shall be applied for the future.

The Italian legislation establishes that members of the SNB can also include representatives of trade unions whether or not they are employed by a participating company or concerned subsidiary or establishment.

When there are no employees' representatives in the undertaking or in the establishment, trade unions that have signed the collective agreement applied to the companies participating in the SE have the right to elect or appoint the SNB members. The case of more participating entities than seats is not regulated by the Italian legislator.

Hungary.- The employees´ representatives are to be appointed by the works council (*Üzemi Tanács*, ÜT) of the establishment. Where there is a central works council (*Központi Üzemi Tanács*, KÜT) in place, this one appoints the representatives of SE. If there is more than one central works council, the employees´ representatives are appointed at a joint meeting of the central works councils. The national law requires that "every effort shall be made" to ensure that the employees of every participating company are represented on the special negotiating body. And also allows that a trade union member representing the employees who are not an employee of the participating company, subsidiary or establishment concerned may also be appointed to the special negotiating body.

Hungarian legislation provides 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 SNB. If a particular establishment does not have a works council, directly elected employee representatives are invited to the meeting of the existing ÜT of other establishment(s) to appoint SNB members. In this respect, these representatives are deemed to be members of the ÜT or KÜT.

Latvia.- National law recognises two types of employees' representatives: trade unions and authorised employees' representatives. The first ones are elected according to statute rules of the trade union. The second ones may be elected in an undertaking that employs five or more employees. Authorised employees' representatives shall express a united view with respect to the employer. The latter, the employer, is not required to deal with discordant opinions of different employees' representatives. Before consultations with an employer, trade unions and employees' representatives must agree on a common view.

Employees' representatives of the SE in Latvia shall be elected by both categories of employees' representatives or, in the absence thereof, by all employees according to the procedure for election of employees' representatives specified by the law. National law does not provide any rule un the case that there are more participating entities than seats.

Lithuania.- The employees' representatives (members of the SNB or the RB) shall be appointed by the institutionalised employees´ representatives and only in exceptional cases by employees themselves (in the general meetings) Where several participating companies, concerned subsidiaries are registered in Lithuania and there is one or more concerned establishment operating, these employees' representatives shall be appointed by a joint agreement of the employees or their representatives of all those companies and/or establishments.

If the national employees' representatives fail to appoint the members of the SNB or of the RB within 30 days of the provision of information, they shall be elected by secret ballot at a general meeting of the employees. The general meeting may be organised by any representative of the employees. The same procedure shall be applicable if the establishment or the company does not have employees' representatives. But in such a case, the general meeting of employees shall be called by the managing or administrative organ of the company or by the manager of the establishment.

Since the law does not differentiate, the representative to become a member of the SNB or of RB shall necessarily be an employee.

Luxembourg.- The electors of representatives of the SNB are members of the staff representation bodies, in their different categories (*delegation principal, delegation divisionnaire* or *delegation centrale*), rendering services in the SE or its company or economic units. Moreover, the representatives elected must meet one of the following three conditions: i) being a member of these representative bodies; ii) being an employee of the SE or of a participating company or concerned subsidiaries and establishments; or, iii) being a representative of a trade union organisation that holds general national or, given the case, sectoral representativity by signing a collective agreement applicable to the aforementioned companies. Employees' representatives in the RB are elected by the staff representation bodies, and must meet the condition of being an employee of the SE, a participating company or a concerned subsidiary or establishment. Finally, employees' representatives in the administrative or supervisory bodies of the SE are elected by the representative bodies by means of a secret ballot from among a list of employees of the company.

Malta.- Employees' representatives can be any Maltese employee employed in that participating company or in its concerned subsidiaries who are on a fixed-term or indefinite contract, and including part-time employees whose part-time employment is their principal employment with regard to which social security contributions are payable under the Social Security Act.

Moreover, Maltese legislators state that, if the management of that participating company so permits, a representative of a trade union who is not an employee of that participating company or its concerned subsidiaries or establishments, is entitled to stand as a candidate for election as a member of the special negotiating body in that ballot The national law struck a cautious note by inserting the proviso "if management so permits".

The members of the SNB or of the RB are elected by a ballot amongst and by eligible persons who satisfy the criteria explained above. In view of this, Maltese legislation regulates the ballot system in detail, with different rules depending on whether the election is for ordinary or additional members.

In relation to the election of *ordinary* members: i) if the number of members entitled to be elected is equal to the number of participating companies which have employees in Malta, there shall be separate ballots for the Maltese employees in each participating company; ii) if the number of members entitled to be elected is greater than the number of participating companies which have employees in Malta, there shall be separate ballots for the Maltese employees in each participating company and management shall ensure, as far as possible, that at least one member representing each participating company is elected and that the number of members representing each company is proportionate to the number of employees in that company; iii) if the number of members entitled to be elected to the special negotiating body is smaller than the number of participating companies which have employees in Malta, a single ballot shall be held in which all the employees of the participating companies shall be entitled to vote.

In relation to the ballot of *additional* members the management shall hold a separate ballot in respect of each participating company entitled to elect an additional member. In turn, management shall: i) appoint an independent ballot supervisor to supervise the running of the ballot of Maltese employees. In the case where there is to be more than one ballot, management may appoint more than one independent ballot supervisor each of whom shall supervise as many separate ballots as management may determine, provided that each separate ballot is supervised by a supervisor; ii) ensure that there is no interference from management with the carrying out of their functions; iii) comply with all reasonable requests made by a ballot supervisor for the purposes of, or in connection with, carrying out their functions.

Netherlands.- The Dutch employees' representatives are appointed by the works councils of the Dutch participating companies, their subsidiaries and establishments. If there are umbrella works councils that solely represent participating companies, their subsidiaries or establishments, these umbrella works councils appoint the members of the SNB. In the complete absence of works councils, the representatives will be elected by the employees in the participating companies, their subsidiaries or establishments. Lists of candidates for these elections can be proposed by unions and/or one or more individual employees who are not members of a union. If only one or some of the participating companies, subsidiaries or establishments has no works council, while others do, the employees in the companies without works councils have the right to be consulted on the composition of the SNB. This consultation procedure has not been elaborated. However and according to art. 1:5 of the SE-Act, they have the right to go to court if they are of the opinion that there has been a breach of law. In principle, every Dutch entity will send at least one representative, unless this has the effect that the total number of representatives will rise above the number stipulated in the Directive.

Poland.- The Polish legislator used the system based on appointment and, in the case when no such possibility exists, on election. The right to appoint members of the SNB was conceded to establishment-level trade union organizations. However, it does not concern all trade union organizations. The national law stipulates that, if employees of the participating company, concerned subsidiary or establishment are employed in Poland by one employer, the appointment of members of the SNB is performed by the representative union organization at work. Pursuant to legislation, a union organization becomes representative when it: i) is an organizational unit or a member of an upper-level union organization considered to be representative (i.e. which is the representative organization in the meaning of the Act on Tripartite Commission for Social-Economic Affairs) or ii) unites at least 10 per cent of the employees employed with an employer.

The candidates, which received the majority of votes in turn, enter the composition of the SNB. However, in the case when they have received equal number of voiceS, in turn, but the number of places to be occupied is smaller than the number of these candidates, the assembly of staff shall perform election among them again (article 67 paragraph 1-2 of the Act on EEIG and SE). In the case of not functioning, the representative union candidates are appointed by the assembly of staff.

When more than one representative union organization exists, all the organizations shall appoint members of the SNB. If the representative union organizations do not reach an agreement, these members are elected by an assembly of staff exclusively from among candidates reported by these organizations.

Portugal.- When the members of the SNB or the RB are to be elected or appointed in Portuguese territory, the following criteria are applicable: i) if there is, in the Portuguese territory, one or more participating companies or subsidiaries, the members are appointed by agreement between their workers' committees and the unions, or by the workers' committees when there are no unions; ii) if there is, in the national territory, one or more participating companies or subsidiaries and one or more establishments of another participating company or subsidiary, the members are appointed by agreement between their workers' committees and the unions, which should represent at least the employees of the mentioned establishments; this means that the employees of the establishments must be represented by the unions or workers' committee; iii) when there are no workers' committees, the members are appointed by agreement between the unions which represent together, at least, 2/3 of the employees of the participating companies, subsidiaries and establishments situated in national territory; and iv) when the previous situation is not applicable, the members are appointed by agreement between the unions each one representing 5 per cent of the employees of the participating companies, subsidiaries and establishments situated in the national territory.

In general, only the unions which represent 5 per cent of the employees of the participating companies, subsidiaries and establishments, situated in national territory, can participate in the appointment of employees' representatives. This rule allows one exception when each union, individually considered, does nor represent 5 per cent of the employees of the participating companies, subsidiaries and establishments situated in the national territory, but the unions altogether achieve that percentage. In this case, the unions can appoint one of them to represent all the others in the election of employees representatives.

When the previous criteria are not applicable or when requested by 1/3 of the employees (of the participating companies, subsidiaries and establishments), the members are elected in direct and secret suffrage from the candidates presented by at least 100, or 10 per cent, of the employees of the participating companies, subsidiaries and establishments, situated in national territory. The same way of election can occur when requested by 1/3 of the employees.

Portuguese legislation has made use of the prerogative given by the Directive, allowing representatives of trade unions that represent the employees of participating companies, subsidiaries and establishments to become members of the SNB regardless of whether or not they are their employees.

These criteria are also applicable to the election or appointment of the members who represent the employees in the management or supervisory organ of the SE.

Slovakia.- The national employees' representatives are: one or more trade unions and/or works council or works trustee. If the works council is active in the participating company or

concerned subsidiary or establishment, the works council shall appoint members of the SNB and of the RB. If the works council is not active in the participating company, concerned subsidiary or establishment, the trade union shall appoint the members. If more than one trade union is active in the participating company, concerned subsidiary or establishment, trade unions shall vote for members at their joint session. Each trade union shall have a number of votes determined proportionally to the number of employees who are its members.

Provided that there are no employees' representatives active in the participating company, concerned subsidiary or establishment, the employees themselves shall directly vote their employees' representatives of the SE from all employees of relevant participating company or concerned subsidiary or establishment.

If the European company is formed by a way other than merger, and the number of participating legal entities with registered seat in the Slovakia (SR) is higher than total number of seats determined for the representatives from this cpuntry, the seats shall be occupied in that way that each direct representative shall represent all employees of legal entities with their registered seat in the same country by decreasing order of their number of employees employed. These representatives shall represent also other employees from the SR each of these representatives shall represent other employees in the same proportion.

Slovenia.- The national law establishes that employees' representatives shall be elected to the special negotiating body by all employees *by secret ballot*. Works councils, representative trade unions in a participating company, concerned subsidiary and establishment and at least 50 employees in a participating company, concerned subsidiary and establishment are entitled to nominate candidates for membership of the special negotiating body. Hence, the Slovenian SE-Act guarantees that also the employees who are not formally organised may nominate candidates for membership of the SNB or of the RB, hereby providing the threshold of at least 50 employees. There is, however, no specific provision ensuring that, as far as possible, such members of the SNB from Slovenia should include at least one member representing each participating company which has employees in Slovenia. The national law does not provide any rule in the case that there are more participating entities than seats.

Spain.- In the Spanish system of industrial relations, there are two paths for the representation of employees' interests in undertakings: on the one hand, unit or elected representation, made up of works councils and personnel delegates and, on the other, trade union representations, made up of trade union sections and trade union representatives. Spain answers in this way, paradigmatically, to the *double channel* model of representation. The SE-Act acknowledges the condition of employees' representatives to both representations.

In the framework of accessory provisions, Spanish legislation opts for appointment as the procedure applicable to establishments located in Spain of the SE, its subsidiaries or participating companies. The appointment of employees' representatives to the SNB and the RB is subject to the following provisions: i) representatives will be appointed either by agreement of trade union representations that, as a whole, add up to a majority of the members in the works council or councils and staff delegates, or by a majority agreement

between unit representatives. Spanish legislation does not confer priority to any of these procedures. The representation of SNB members shall be as established by each appointment act. Whenever this is not specified, national law assumes that all those appointed in representation of employees in Spain, represent all of these employees; ii) the appointment of the SNB must fall on a staff delegate, member of the works council or a worker in any of the participating companies and concerned establishments and subsidiary companies, or on a trade union representative who is a member of the most representative trade union at state level or representative in the scope of the participating companies. On the other hand, appointment of the representatives of the RB must fall on an employee of the SE or its establishments or subsidiary companies who holds the seat of unit representative (staff delegate or member of the works council) or trade union representative (trade union delegate): iii) when more than one member of the SNB has to be appointed in representation of the workers employed in Spain, the law establishes that there is, amongst these members and "to the extent possible, as allowed by the number of members to be appointed", at least one representative of each of the participating companies with employees in Spain; iv) the appointment of additional representatives who, given the case, should join the SNB will be undertaken pursuant to the provisions established in paragraph i) and ii) above. In any case, the procedure must refer exclusively to the scope of the participating company that will disappear as a separate legal entity after the establishment of the SE; and v) to the effects of implementation of the provisions stated in paragraph i) and ii) above, workers employed in Spain by a participating company will be represented in the SNB when an employee of the company appointed in Spain is a member thereof. When amongst the representatives appointed in Spain there is a trade union representative who is not an employee of any of the participating companies, this representative will have the representation specified in the appointment act. If none is specified, the law assumes that all workers employed in Spain by the participating companies are represented in the SNB through this trade union representative.

The provisions examined with regard to appointment are also applicable to the employees' representatives who must join the administration and supervisory body in the SE when, by virtue of applicable legislation, it corresponds to each Member State to specify the manner of election or appointment of members of this body.

Sweden.- Members of SNB and RB are appointed by the local employees' organisations that are bound by collective agreements to the participating companies, concerned subsidiaries and establishments. Where there are several local employees' organisations bound by collective agreements and these cannot agree otherwise, priority shall be given to that organisation that represents the largest number of employees. This means that if an agreement cannot be reached, priority shall be given to the organisation that represents most employees.

If more than one member is to be appointed, the order set out in the Board Representation Act shall be followed. If more than 4/5 of the employees that are bound by a collective agreement belong to the same local employees' organisation, this organisation appoints all representatives. However if another organisation represents at least 1/20 of the employees bound by a collective agreement, this organisation gets to appoint a substitute. If none of the organisations represents more than 4/5 of the employees that are bound by a collective

agreement, each of the two local employees' organisations representing most employees that are bound by a collective agreement get to appoint a representative and a substitute. If three representatives are to be appointed, the largest of the two organisations gets to appoint two representatives and two substitutes.

Where none of the companies are linked by collective agreements, these members are appointed by employees' organisations representing the largest number of organised employees in the companies and establishments (if the local organisations cannot agree otherwise). Where no such organisation exists, members are selected by the employees of the participating companies.

United Kingdom.- In British legislation, there are two types of employee representative: i) trade union representatives, who normally take part as negotiators in the collective bargaining process on behalf of the employees involved . They could be external trade union officers; and ii) other employees of the company who are elected or appointed as employee representatives and obtain information about the terms and conditions of employees or the activities of the business which are particularly important for employees.

The mechanism for choosing UK members of the SNB and RB is by ballot of employees, unless there is a consultative committee, in which case it can appoint the UK members. The Regulation makes the management of the participating companies responsible for arranging the ballot, although they must appoint one or more independent ballot supervisors to supervise its conduct. Management must also, as far as reasonably practicable, consult with UK employees' representatives on the conduct of the ballot and publish the balloting arrangements in a way which, as far as reasonably possible, brings them to the attention of all employees. Employees who consider that the ballots have not been conducted in accordance with Regulations, can bring a complaint to the CAC, which has the power to make management modify its arrangements.

The issue of how UK employees should be grouped together for voting is also dealt with in the law. They are to vote in companies so that if the number of special negotiating body members to be elected is the same as the number of companies involved, each company elects one member. If the number of companies is less than the number of special negotiating body members, then, to the extent that it is practical, each company elects one member and the additional members are allocated in a way which takes into account the number of employees involved. If the number of companies involved is more than the number of special negotiating body members then, the largest company or companies each elects one member, and those smaller companies where there is no ballot, vote in one of the ballots for the larger companies. Where additional members are being elected, in respect of companies that will cease to exist because of a merger, they should be elected in separate ballots. All UK employees are entitled to vote. And also all employees may stand as candidates, as may trade union representatives who are not employees. But this second group can only stand if company management permits this.

4.3 Protection of employees´ representatives

A. General considerations

1. As we have already mentioned when analysing the common provisions, first paragraph of art. 10 SE-Directive establishes that the members of the SNB, the RB, employees' representatives in the administrative or supervisory bodies of the SE and, in short, employees' representatives exercising functions in the framework of information and consultation procedures have the right, during the exercise of their functions, to "the same protection and guarantees provided for employees' representatives by the national legislation and/or practice in force in their country of employment". Second paragraph of the same article specifies the content of the guarantee, that is extended in particular "to attendance at meeting" of all the representatives in the SE (SNB, RB, under the agreement or administrative or supervisory organ) and "to the payment of wages" for these representatives "during the period of absence necessary for the performance of their duties".

2. As we will verify immediately, most of the national laws (Austria, Belgium, Cyprus, Denmark, Estonia, Hungary, Germany, Italy, Latvia, Lithuania, Luxembourg, Malta, Slovakia, Spain, Slovenia or Sweden) transpose this set of guarantees in a mechanical manner; that is, they reproduce the terms of the Directive in a strict literal fashion. In Poland, the transposition law has acknowledged a higher and more intense level of protection to employees' representatives in the SE (or in the subsidiaries or participating companies) than the level established for representatives in undertakings of a domestic nature. In the UK the protection is provided by extending the protection against unfair dismissal and "detriment", which other employee representatives enjoy. Only Czech legislation stands out, insofar as the members of the RB shall not enjoy advantages in the exercise of their functions.

B. Analytical comments

Austria.- According to national legislation, employees' representatives are independent of employer's directives, protected from discrimination, they have the right to time off to perform their specific obligations and enjoy a more extensive protection against notice and dismissal. Merely, the entitlement of members of the SE works council to time off for training without loss of wages was explicitly codified in § 251 Abs 2 ArbVG.

Belgium.- A law of August 2005 has made legally effective the provisions established in CCT regarding the extension to employees' representatives in the SE (members of the SNB and of the RB, members representing the workers in the framework of an information and consultation procedure and workers' representatives in the supervisory board of the board of administration) of the guarantees established to the remaining employees' representatives that exercise representative functions in the undertakings located in the Belgian national territory.

Cyprus.- The members of the special negotiating body, of the representative body, any employees' representatives exercising functions under the information and consultation procedure and any employees' representatives in the supervisory or administrative organ of an SE who are employees of the SE, its subsidiaries or establishments or of a participating

company shall, in the exercise of their functions, enjoy the same protection and guarantees provided for employees' representatives by the Agreement on Workers' Representatives (Ratifying) Law of 1995. This national law ratified the 1971 ILO Convention on Workers' Representatives.

The protection referred shall apply in particular to attendance at meetings of the special negotiating body or representative body, any other meeting under the agreement referred or any meeting of the administrative or supervisory organ and to the payment of wages for members employed by a participating company or the SE or its subsidiaries or establishments during a period of absence necessary for the performance of their duties.

Czech Republic.- The SE-Act stipulates that members of the special negotiating body, employees' representative body and employees' representatives shall, in the extent provided by the Labour Code, enjoy protection against discrimination and disadvantage, as well as time-off with remuneration of their wage. However, members of the RB shall not enjoy advantages in the exercise of their functions.

An additional protection is provided only to members of trade unions. An employer is prohibited to terminate an employment contract with an employee, member of a trade union who is a representative, without prior consent of the relevant trade union. If the trade union does not agree, the employer, in order to terminate the employment contract, shall bring an action in court for termination of this contract

Estonia.- The SE-Act, implementing SE-Directive, provides for the guarantees of employees' representatives participating in involvement. The provisions concerning the guarantees prescribed for employees' representatives in the Republic of Estonia Employment Contracts Act (hereinafter TLS), apply to the guarantees of members of the SNB or RB and employees' representatives connected with the performance of informing and consulting duties and employees' representatives belonging to the supervisory or administrative board of an SE, and who are the employees of the SE or its subsidiaries and establishments or a participating company, provided that they are employed in Estonia. Employees' representatives specified afore shall be granted a period of absence to represent employees to the extent necessary for the performance of their duties arising from the act. Average wages shall be continued to the employees' representatives for the period of absence. The period of absence to represent employees depends on the extent necessary for the performance of duties. Specific hours for representing employees' at local level are prescribed by the national law.

National legislation prohibits termination of an employment contract with representatives of employees as a result of their lawful activities in representing the interests of the employees. Termination of an employment contract on the initiative of an employer with an employee who represents employees is permitted during the term of authority of the employee and for within one year after termination of the authorisation, only with the consent of the labour inspector of the location (residence) of the employer, except in some rare cases. A labour inspector shall justify to an employer in writing the reasons for granting or refusing to grant consent to the termination of an employment contract with a representative of employees. Before making the corresponding decision, the labour inspector shall submit a written

request to an organisation representing employees in order to obtain an opinion concerning the termination of the employment contract with the representative of employees, if such representative has been elected by the organisation representing employees. The organisation representing employees shall provide a written opinion within one week as of the date of the request. An employer who terminates an employment contract with a representative of employees is required to give advance notice to the representative in writing one month earlier than the general terms prescribed by the TLS.

Finland.- Protection means, firstly, protection against the termination of the employment contract of a shop steward or an elected representative. It applies to the protection against termination for members of special negotiating bodies and representative bodies, employees' representatives in connection with information and consultation procedures and members representing employees belonging to the supervisory or administrative organ of an SE, where these are employees of an SE, its subsidiaries or establishments or employees of a participating company working in Finland. An employer shall also release employees' representatives referred to in section 33 from normal work for such time as they require for participating in the meetings of a special negotiating body or representative body or in an information and consultation procedure, in order to negotiate the arrangement of employee involvement or to participate in the meetings of the SE's administrative or supervisory organs and for the directly related joint preparation of employees' representatives for the procedures referred to. Any consequent loss of earnings caused thereby shall be compensated. Any other release from work and compensation for loss of earnings shall in each case be agreed between the relevant employees' representative and employer. Participating companies are responsible for the costs of the functioning and negotiations of the SNB, including the reasonable cost of experts.

Ireland.- Ireland goes beyond the wording of the Directive here and has included strong protections for employees' representatives (a member of the SNB, a member of the representative body, an employees' representative performing functions under an information and consultation procedure, or an employees' representative in the supervisory or administrative organ of an SE) in the transposing Regulations. The Regulations provide for specific steps whereby a representative who believes he or she has been penalised may make a complaint to a rights commissioner. The rights commissioner's decision can be appealed to the Labour Court and both the decision of the rights commissioner and the Labour Court are enforceable by the Circuit Court. There is also provision for an employees' representative who is found to have been penalised under the legislation to receive compensation. Dispute Resolution procedures are also provided for in the Regulations.

France. - Employees' representatives within the SE have a protective legal status, modelled on the status of the members of the works council in national French law. The Labour Code stipulates that the members of the SNB, as well as the representatives of the SE works council "benefit from special protection established in chapter VI of this document". Therefore this article directly refers to the articles of the Code that are relative to the conditions for dismissal of personnel representatives (in internal French law).

The applicable regulations in this case are those that seek to protect the personnel representatives from dismissal to protect them from any pressurizing at the hands of their

employers. According to the regulations governing the protection of the works council members (in national French law), any dismissal of an employee representative requires both prior notice from the works council and the authorisation from a Labour inspector for this establishment. The same procedure is applicable to premature termination of a fixed term employment contract, which is possible in cases of misconduct on behalf of the employee, but also to the non-renewal of the fixed term employment contract, which includes a clause enabling the term to be deferred. If the employment contract termination (whether this is a fixed term or a permanent contract) of a works council member, at the initiative of the employer, has been initially authorised by the works inspector, but this authorisation is subsequently declared void by the employment minister or an administrative court, the employee in question will have the right to be reinstated in his position or a similar position. In order to benefit from this right, the employee must put in a request within two months. Therefore, in this case, the right to reinstatement takes precedent over the economic compensation rational for the prejudice caused to the employee by the dismissal. Moreover, this rational is a key feature of French legislation regarding dismissal. The reason for favouring reinstatement stems from the intention to effectively protect the elected works council member from any attempt at "employment blackmail".

Germany.- The national law implementing art. 10 SE-Directive, provides that, to carry out their tasks, the members of the SNB and RB, the employee representatives involved in any other manner in an information and consultation procedure and the employee representatives on the supervisory or administrative board of the European Company who are employees of the European Company, its subsidiaries and establishments, or of one of the participating companies, concerned subsidiaries or concerned establishments, shall enjoy the same protection and safeguards as the employee representatives under the laws and customs of the Member State in which they are employed. This shall apply in particular with regard to: i) employment protection; ii) participation in meetings of the respective representative bodies and iii) continued payment of wages.

Greece.- SE-Act recognises to the members of the body, the members of the representative body and any employees' representatives who exercise information and consultation functions or represent the employees in the supervisory or administrative organ of the SE the same protection offered to the trade union and works council's officials.

The national law also states that the protected persons will receive leave with payment for the time that they exercise their duties (the Decree includes the phrase "meetings etc." in brackets). Such a leave will also be given for their participation in conferences related to their functions, so long as they are held by organizations with "recognized work" or a confederation-trade union.

Hungary.- The provisions of the Labour Code concerning the members of works councils shall apply for the protection of members and alternate members of the special negotiating body and representative body employed within Hungary, employees' representatives participating in the information and consultation procedures and employee delegates represented on the Administrative or Supervisory Board.

The SE-Act transposes the second paragraph of Article 10 and establishes that the former employees' representatives, during the time-off for their service in the representative bodies, are entitled to a 'leave of absence' allowance (in Hungarian: *távolléti díj*). The Labour Code includes the rule of calculation of such an allowance, which is equivalent, in practice, to paying the regular wage for the individual concerned.

Ireland.- The normal workplace protection under national legislation is extended to all employee representatives involved in the SNB and in information, consultation and participation, in particular with regard to attendance at meetings of the SNB or the representative body and the payment of wages. In accordance with existing Irish labour legislation, these employee representatives are protected from dismissal or any unfavourable change to their conditions of employment or any other unfair treatment, including selection for redundancy, and from 'any other action prejudicial to his or her employment'.

Regulation 19 goes further. It provides employee representatives with the right to attend meetings of the SNB or the representative body and to: i) be provided with any reasonable facilities, depending on the needs, size and capacity of the company or SE and without impairing its operations, including time off to perform the duties of the representative function and ii) the payment of wages for any period of absence in connection with these duties.

Italy.- The Italian Legislator recognises the same protection and guarantees usually recognised to RSU members and Trade unions officials TO SNB members, representative body's members and employees' representatives in the administration or supervisory board carrying out their duties. Hence, they are protected against employer's acts such as dismissal and transfer, and it gives them the right to take paid time-off periods to perform their functions.

This protection involves the right to the payment of wages for members employed by a participating company or its subsidiaries or establishments during the period necessary for the performance of their duties in case of attendance to meetings of the SNB or representative body, or any other meeting of the administrative or supervisory board.

Para. 3, article 10 of the Legislative Decree provides that the parties shall define all the arrangements related to the functioning of the employee representative in the SE, in its subsidiaries or establishments or participating companies.

Latvia.- The same rights and duties that are specified in the Labour Law for authorised representatives of employees shall be applicable to members of a special negotiating body, members of a representative body and employees' representatives during the fulfilling of the duties of information and consultation. Members of the SNB, RB and employees' representatives shall be granted vacation so that they may fulfil the duties of information and consultation, maintaining the average earnings for this time period.

Lithuania.- The contracts of employment of employees' representatives may not be terminated during the exercise of their functions at the initiative of the employer without the consent of the employees' representative (i.e., trade union body or works council) that

appointed them. If these members were elected by a meeting or conference of the employees, the territorial office of the State Labour Inspectorate shall have the right to give its consent to their dismissal.

The employees' representative body must take a decision as to whether to satisfy the employer's application for consent to the dismissal within 14 days from the receipt of said application and shall submit its consent or refusal to dismiss an employee in writing. If the representative body of employees fails to reply to the employer within this period, the employer shall be entitled to terminate the employment contract. The employer shall be entitled to contest the refusal to give consent to the dismissal in court. The court may reverse such a decision if the employer proves that this decision substantially violates his interests. An employee, who has been dismissed from work in violation of the requirements of consent, must be reinstated in his former position by a decision of the labour dispute resolution body.

Luxembourg.- The Labour Code provides that the members of a special negotiating body, representative body and employee representatives performing their duties in the framework of an information and consultation procedure, as well as employee representatives sitting on the supervisory or governing body of a European company (SE) that are employees of the SE, its subsidiaries or establishments or of a participating company, and that are employed in Luxembourg, enjoy the protections and guarantees applicable to any representative (protection against dismissal for staff representatives).

These same representatives are entitled, under an agreement with the establishment manager or his/her representative, to leave their workplaces with no reduction in salary insofar as necessary to carry out the functions assigned to them. Within the limits of these functions, the establishment manager must allow them the necessary time off and pay for this time as working time. The duration of training leave may not be counted against that of annual paid leave; it is treated as working time. Training leave must be granted by the establishment manager on request to representatives wishing to follow approved training courses, every year, within the framework of a list established by common consent by the employers' organizations and the most representative trade unions at national level.

Malta.- Malta Regulation 13 states that members of the SE in exercising the functions of their duties enjoy the same protection and guarantees provided for employees' representatives in the Employment and Industrial Relations Act (EIRA 2002). This Act does not recognise as a 'good and sufficient' cause' for an employer to dismiss the employee 'who at the time of dismissal was a member of a trade union, or is seeking office as, or acting or has acted in the capacity of an employees' representative'.

Moreover, Regulation 13 states that the protection and guarantees shall apply in particular to attendance at meetings of the employer and employees' representatives and to the payment of wages for members employed by a participating company or the SE or its subsidiaries or establishments during a period of absence necessary for the performance of their duties.

Netherlands.- The national transposition law has reformed the Dutch Civil Code, in the sense that the provisions on protection of employees´ representatives (including provisions

on dismissal) are extended to members, candidate members and former members of the SNB, the representative body or an information and consultation procedure.

Poland.- The employer shall not serve notice or not terminate employment contract on the members of the SNB, the members of the representative body and any employees' representatives in the supervisory or administrative organ of an SE in the course of their mandate or within one year period after its expiration without a permission of the trade union organization active at the work establishment represented by the employee. If the employee is not represented by the trade union organization active at the work establishment, the permission is granted by the regional labour inspector with territorial competence for the employer's registered office. The same procedure is applied when the employer serves notice to change the terms of employment or pays to the disadvantage of the employee

Portugal.- According to the SE-Act, the general rules regarding the protection of employees' representatives in the Portuguese framework are also applicable in the context of an SE. In this sense, the Labour Code starts by previewing a general principle of non discrimination. It prohibits and considers null and void any agreement or employer's act (*e.g.* lay-off, transfer) that in any way harms the employee due to the exercising of rights regarding participation in collective representation structures.

These employees benefit from a credit of hours equal to the one given to Workers' Committees' members (25 hours per month) to perform properly the duties that have been assigned to them, which counts as time of effective service, including salary. However, they can not accumulate credits for hours when they are members of more than one collective representation structure. They also benefit from a paid credit of time to attend meetings with the SE, its management or supervisory organ, as well as preparatory meetings, including travelling time. Other absences of these employees to perform their duties and that exceed the credit of hours are considered justified absences and count as time of effective service, except for purposes of salary.

These employees can not be transferred without their consent, except when such transfer is a result of the total or partial moving of the establishment in which they render services. When that occurs, prior notification is required to the structure of which they are members. Finally, protection is also provided for in cases of disciplinary proceedings and lay-off in several ways.

Slovakia.- Article 55 (1) of the SE-Act transposes art. 10 SE-Directive nearly verbatim. What is missing under this translation is the wording "who are employees of the SE". The wording of the Slovak law is also problematic: "concerned subsidiaries or concerned establishment" as these are defined as subsidiary establishments, which are proposed to become subsidiary establishments of the European company, and not those which are already a subsidiary/establishment of a European company.

The content of this guarantee refers, firstly, to the protection against discrimination and the right for paid leave under the conditions determined under the Labour Code. Paid leave shall be provided by the participating legal entity with its registered seat in the Slovakia, and also

if the European company has or shall have its registered seat in the territory of a different Member State.

Slovenia.- As regards the protection of employees' representatives, the SE-Act refers to the Worker Participation in Management Act and the Employment Relationship Act. So, members of the SNB or RB are protected by the general Slovenian provisions on protection of workers' representatives.

In this sense, an employee representative may not without the consent of the workers' council: i) be assigned to another work post or another employer and ii) be included among any redundancies. Also, the employer may not terminate the employment contract during the entire period of their term of office and another year after its expiry.

Spain.- The Spanish transposition law formulates two specific guarantees. Firstly, these representatives are entitled to paid leaves needed to attend the meetings of the SNB, the RB, the administrative or supervisory body of the SE, or meetings held in the framework of negotiated procedures of information and consultation. Regardless of this, members of the SNB, the RB and administrative or supervisory body of the SE are entitled to a sixty-hour paid credit per annum to exercise their functions. This credit is added to the credit that may correspond in the case that these members accumulate, additionally, the condition of unit or trade union representative.

Sweden.- The level of protection is the same as for other trade union representatives which prescribes that representatives: i) shall not be given poorer working and employment conditions due to their position; ii) shall have right to take time off to perform their tasks as representative; iii).In case of notice due to lack of work the representative shall be given priority to continue work.

The rules about the protection of employees' representatives are incorporated in the Trade Union Representatives Act of 1974. But this Act is only applicable for those trade unions bound by a collective agreement.

United Kingdom.- Regulations 42 and 43 deal with unfair dismissal in connection with the procedures established by the Regulations, and make it clear that the protection applies not only to employee representatives and candidates, but also to individual employees who are taking some other part in the procedure, such as voting in the ballot or have expressed a view on the procedures, such as "indicating that he did or did not support the coming into existence of a special negotiating body". In the case of employees who consider that they have been unfairly dismissed or have suffered detriment because of their activities, they have the right to take their case to an Employment Tribunal.

With regard to the right to paid leave, the Regulations cover the issue in three steps. First, the national law states who has the right to "reasonable time off during … working hours". These are in line with the categories listed in the Directive and also include candidates to these positions. Second, regulation 40 states that they should be paid "the appropriate hourly rate" and establishes how this should be calculated. Finally, regulation 41 states that where

individuals feel that time off has been unreasonably refused on not paid as appropriate, they have the right to take that complaint to an Employment Tribunal.

4.4 Other topics

National legislations do not usually establish rules regarding the legal efficiency of agreement on involvement negotiated between the SNB and the competent body of the SE. In the absence of specific provisions, the legal performance of these agreements is, thus, subject to the general rules in force in each specific system of labour relations.

The Portuguese and Spanish laws transposing the SE-Directive are the exception to this general trend. The former states that the agreement concerning the creation of a representative body or an information and consultation procedure concluded according to the legislation of another Member State where the headquarters of the SE are situated, obliges the subsidiaries and establishments situated in Portuguese territory, as well as its employees. Spanish law establishes that those agreements "oblige all" the establishments of the SE and its subsidiary companies included in their scope of implementation and located in Spanish territory, as well as its employees, during the time they are enforced. Hence, national law confers the same performance to all the agreements: general or *erga omnes.* Also, this legislation enounces a public territorial order clause in view of the agreements we are dealing with here, establishing that the validity and performance thereof must not, in any case, infringe or alter the competence of negotiation, information and consultation that Spanish legislation grants to the works councils, staff delegates and trade union organisations, "as well as any other representative body created for collective negotiation"

5. Compliance with the SE-Directive

A. General considerations

Article 12 SE-Directive sets a double provision for Member States, which are closely linked between them. On the one hand, and generally, it entrusts Member States to ensure that the management of establishments of an SE and the supervisory or administrative organs of subsidiaries and of participating companies, as well as employees' representatives and employees themselves abide by the obligations laid down by this Directive, "regardless of whether or not the SE has its registered office within its territory" (art. 12.1). On the other, more specifically, this precept of the Community regulation also orders Member States to establish "appropriate measures in the event of failure to comply" with the Directive, ensuring the existence of "administrative or legal procedures available to enable the obligations deriving from this Directive to be enforced" (art. 12.2).

Pursuant to the aforementioned, the SE-Directive confers to the EU Member States a wide scope with regard to the limitation and implementation of suitable measures to face possible non-compliance by the management bodies of the SE, of the obligations established by the Directive. There are two general theoretical models in the transposition of art. 12.1 of the Directive. On the one hand, a model that may be qualified to have a dual manner, specified by the implementation of both administrative and judicial procedures. On the other, the unit model, expressed in the implementation of a single procedure, of an either administrative or judicial nature.

Examination of the national transposition laws shows the inexistence of a dominating model. In the first group of countries that have opted for the dual model we find Austria, Cyprus, Estonia, Germany, Greece, Malta, Portugal, Slovakia, Slovenia, Spain or United Kingdom. However, there are some national laws that respond to the unit model, choosing either the judicial (Belgium, Czech Republic, Denmark, France, Ireland, Hungary, Luxembourg, Netherlands and Sweden) or the administrative procedure exclusively (Finland, Italy, Latvia and Lithuania).

On the other hand, several legal systems entrust Labour Inspection with the role of supervising compliance of the obligations laid down by the Directive (Belgium, Estonia, Greece, Luxembourg, Malta, Portugal, Slovakia and Spain). Nonetheless, not many legal systems qualify as offences certain behaviours aimed to withhold or hinder the right to involvement exercised by the employees rendering services to an SE (Cyprus, Finland, Germany and Slovenia). In this last country, the criminal code defines certain breaches of the workers right of information and consultation as a criminal activity.

B. Analytical comments

Austria.- ArbVG specifies management behaviour that can be punished in an administrative way. Amongst others, non-compliance of the following obligations: to give the information that has to be included in the written request to form the special negotiating body, to change the formation of the SNB if there is a change of structure with the participating companies, to establish the SNB, to inform the SNB about the formation of an SE, to summon a meeting of the SNB two years after a resolution to abandon it, to inform employees' representatives on all affairs concerning the SE or its subsidiaries, to reject the establishment of the SNB at the works council, if the board of management refuses to do so and to continue with the structures of employee representation in participating companies which will cease to exist as a separate legal entity. The administrative sanctions might amount to € 2,180.

According to ASGG, it is also possible to take legal actions against those who counteract the above stated legal norms.

Belgium.- The representative organisations of workers and employers have competences with regard to conflicts arising out of collective agreements (Law on collective Agreements). Furthermore, this has been specifically confirmed by the Law of 17 September 2005.

Cyprus.- According to art. 20 of the national Law, whosoever breaches the provisions of the national Law shall be guilty of a criminal offence and if convicted shall be sentenced to a prison sentence of up to 2 years or a maximum fine of CYP20,000 (i.e. approximately EUR 35,430).

Estonia.- Competence of the Labour Inspectorate in exercising state supervision is limited, compared to Article 12.1 of the Directive. The Labour Inspectorate can exercise state supervision only in cases where the SE's registered office is situated in its territory except in electing members of the SNB and the RB. Therefore, state supervision is not exercised for example in confidentiality of information, in informing local employees´ representatives, as well as in guarantees of employees´ representatives.

In addition to state supervision exercised by the Labour Inspectorate and extra-judicial proceedings concerning the misdemeanours conducted by the Labour Inspectorate, there is a special right of employees' representatives, (members of the SNB and of the RB of employees and employees' representatives) if , during the negotiations, the parties decide to establish one or more information and consultation procedures instead of a RB, to recourse to courts in order to resolve disputes arising from the confidentiality of information and refusal to transmit information, as well as the right of recourse to courts to resolve disputes arising from the misuse of an SE.

Finland.- Supervision is delegated to the Ministry of labour. The system is based on the Act on Personnel Representation in the Administration of Undertakings (725/1990, Personnel act). It would cover all obligations of the employer in this law and the agreements established on the basis of the law. The obligation to release information before establishment would also be covered by this system. Before establishment, fulfilment of the obligations would be sanctioned by non-registration. The system of "conditional imposition of a fine" (*it est*: default fine system, order to do something under penalty) was established on the basis of "national discretion" and aims to the effective implementation of the obligations deriving from the Directive.

Greece.- The SE-Act states that the employers are prohibited from taking or omitting any act with the purpose of inhibiting the employees from exercising their rights and in particular: i) influencing them by threats of dismissals or other means; ii)) supporting certain candidates in getting elected and iii) intervening by any means in the electoral procedure of the members of the body, of the representation organ or influencing the expert of the employees. The national law provides for administrative fines of 1,000 to 3,000 € to be imposed by the Labour Inspectorate for each illegal act.

As for civil law sanctions, Greek labour law does not give the right to a trade union or a works council or, generally, to any workers' representative to go to courts in order to compel the employer to negotiate. The idea that bargaining or consultation could take place by a court decision is considered foreign to Greek law. The workers' representatives may of course file a complaint to the Labour Inspectorate seeking a penalty against the employer and may go to the courts seeking damages for torts (violation of collective labour law)

Hungary.- The Hungarian law stipulates that the representative body may bring the case before the Labour Court if the European company's Administrative/Management Board fails to act in accordance with the procedures laid down in the Act. In such a case, the court acting in first or second instance shall issue a decision by non litigious procedure within 15 days. If the court finds that the rules of procedure have been breached, it shall order the correct implementation or repetition of the procedures concerned. There is another juridical appeal procedure: if the company has not provided the required information to the special negotiating body, the representative body or the employees' representative, the Court of Registration, at the request of employees' representative body, may order it to do so.

Ireland.- Regulation provides that any dispute with regard to the SNB, the negotiations, interpretation or operation of the agreement, the interpretation or operation of the standard rules, the protection of employee representatives and, at last, any complaint by an employee

or his representative regarding the use of the SE to deprive employees of their involvement rights or the withholding of those rights can be referred to the Conciliation Service of the Labour Relations Commission (LRC) for mediation after all internal dispute resolution procedures have failed to resolve the dispute and on to the Labour Court if intervention by the LRC cannot find a solution acceptable to both parties. The Court may make a written recommendation to the disputing parties. The Labour Court can also make a determination which is legally binding. On the other hand, disputes regarding confidential information can be referred direct to the Labour Court for determination.

Italy.- SE-Act regulates two aspects: the first one regards employees' representative's violation of the obligation not to reveal any information which has been given to them in confidence; the second one regards a reticent employer who does not give the information.

In the first case the sanction applicable to the SNB, representative body members and their experts is an administrative sanction that consists in the payment of a sum from €1,033.00 to €6,198.00. In the second case the sanction applicable to the supervisor or administrative board of the SE or of the participating companies is the institution of an independent body appointed to settle the dispute. In case of disagreement on the obligations, the dispute is defined within 30 days by the Ministry of Labour that, if non compliance with the obligations is assessed, shall order the fulfilment of the same obligation. National law provides that arrangements for the creation of this body and the designation of its members are left to the parties. This independent body is chaired by a person chosen by agreement of the parties. In the event of non compliance with the judgment of the independent body by the employer, the Legislative Decree provides administrative sanctions from €5,165.00 to €30,988.00.

Latvia.- State Labour Inspection is the main institution responsible for supervision and monitoring of the implementation of labour legislation in Latvia. The officials of the Inspection have the rights: i) to carry out examination, control and investigation at the undertakings; ii) to request the information necessary in order to verify that the requirements of labour legislations are observed; iii) to take decisions regarding matters of employment legal relationships and to issue warnings and orders to employers and iv) to impose, in accordance with the procedures prescribed for the examination of administrative violations, administrative sanctions on employers.

In practice, the employees' representatives may inform State Labour Inspection if the employer breaks the law. The Inspection may intervene only if the breach is indisputable, for example, the employer refuses to disclose no information to employees' representatives. However, if there is a dispute about the scope of confidential information the employees' representatives have to apply to the civil court where the procedure could be very time consuming.

Lithuania.- On November 2005**,** the Code of Administrative Penalties of the Republic of Lithuania was amended with the aim of incorporating breaches to legislation regarding the right to involvement of employees of an SE. The violation of the guarantees of employees' representatives provided in the SE-Act carries a fine for employers or their representatives

from 400 Litas (approx 115 EUR) to 1000 Litas (approx. 290 EUR). Repeated violation shall be penalized with an administrative fine of up to 2000 Litas (approx. 580 EUR).

Violation of the obligation to initiate negotiations or to organize the creation of the RB carries a fine for employers or their representatives from 500 Litas (approx. 145 EUR) to 2000 Litas (approx. 580 EUR). Repeated violation shall be penalized with an administrative fine of up to 2500 Litas (approx. 725 EUR).

On the other hand, the law establishes the responsibility for violations of the guarantees of employees' representatives and violation to initiate negotiations or to organise the creation of the RB. Other possible infringements are not expressly covered, as for instance, the violations of information and consultation procedures, misuse of the procedures, refusal to grant statutory rights to the SE-Works council or its committee or non-observation of the standard rules.

The breach of the duty of confidentiality by employees' representatives constitutes an offence both in civil liability, under general terms of law, and in disciplinary liability.

Luxembourg.- According to the Labour Code, the Labour and Mines Inspectorate is responsible for overseeing the application of provisions on employees' participation rights in an SE. Anyone intentionally obstructing the establishment, free designation of members or regular operation of a special negotiating body, a representative body or an agreement on an information and consultation procedure is liable to a fine of €251 to €10,000. Anyone intentionally obstructing the free designation of employee representatives on the governing or supervisory body of an SE is liable to the same penalties.

The same applies to anyone who, by reason of the duties assigned on this account, favours or discriminates against a full or alternate member of a special negotiating body, a representative body or an employee representative within the framework of an agreement on an information and consultation procedure. Should the offence be repeated within four years of a final conviction, the penalties provided in paragraph 2 will be increased to double the maximum amount; furthermore, a prison sentence of 8 days to 3 months may be handed down.

The courts in the labour jurisdiction are competent to listen and solve, amongst others, any litigations in connection with the appointment of employees' representatives, the implementation of agreements on involvement, the implementation conditions and content of the standard rules, the functioning of the representative bodies (SNB and RB), as well as the information and consultation procedures and, finally, the statute and protection of employees' representatives.

Malta.- Maltese Regulations states that any person who fails to comply with any obligation imposed on such person under these regulations shall be guilty of an offence and shall, on conviction, be liable: i) to a fine (*multa)* of not less than 10 liri[ii] and not more than fifty liri

[ii] Malta Lira is equivalent to circa 2.33 Euro

for every employee of all the participating companies, concerned subsidiaries or establishments in relation to a failure by the competent organ of the SE, of the participating company or concerned subsidiary as the case may be, to comply with any requirements provided for in these regulations and ii) in relation to any other offence, a fine (*multa*) of not less than five hundred liri and not more than five thousand liri.

Maltese Regulations do not refer to the Industrial Tribunal as the institution with the jurisdiction to impose these penalties. In the absence of such a reference the jurisdiction of imposing such fines falls on the Civil Court.

Netherlands.- The relevant court is the Enterprise chamber (*Ondernemingskamer*) of the Amsterdam court. Every interested party may apply to this court to request that the provisions are adhered to. The SNB and RB may not be condemned to bear the costs of a procedure. The SNB and RB may request the Enterprise chamber to end their duty of confidentially, on the ground that, after consideration of the relevant circumstances, this duty is unreasonable.

When information is refused to the SNB, its members or the SE-works council, these may request the court to oblige the other party to supply the desired information, on the ground that, after consideration of the relevant factors, the refusal to supply the information is unreasonable.

Portugal.- Portuguese legislation classifies the offences that entail infractions into very serious, serious and minor. The following are very serious infractions: the infringements of SNB creation rules, of the agreement which created a representative body (or an information and consultation procedure) related with information, consultation and meeting rights, of the standard rules, of the representative body's rights, of the annual report presentation and subsequent meeting, of the information and consultation rights of the representative body in exceptional circumstances and also of the financial and material resources applicable both to SNB and the representative body. The following are serious infractions: the infringement of negotiations with a view to determine the involvement of employees, the opposition to the presence of experts in these negotiation meetings, the disregard of the rules of the agreement which created a representative body (or an information and consultation procedure) related with the financial and material resources and, amongst others, of the meeting procedures applicable to exceptional circumstances. Finally, infringement of the obligation imposed to the management or supervisory organ of the SE to send a copy of the agreement to the relevant service of the ministry responsible for labour issues, constitutes a minor infraction.

The infringement of employees' representatives' protection rules or of the obligation to communicate information or undertake consultation mistakenly invocating that it could harm or seriously affect the operation of the undertaking or establishment constitutes a serious infraction.

When information, consultation or participation rights are violated, employees' representatives can use the judicial general procedure to file a suit against employers asking the court to condemn them to supply the information they had been denying or to conduct the consultation or participation they are obliged to. However, the absence of a specific

procedure of an urgent nature, as regulated for collective redundancies, dismissal of employees' representatives or work accidents, makes it difficult to receive information or conduct consultation in appropriate and useful timing.

Slovakia.- Labour Inspection is authorized to perform random controls/monitoring of compliance with labour law provisions. If the Labour Inspection finds any breach of labour law provisions, it can penalize an employer breaching this provision. Employees or their representatives may also contact the Labour Inspection and object to the breach of labour law. Inspection should review such a motion and decide on appropriate sanctions.

Employees or their representatives as well as employers may seek their right before general civil courts. Labour law lawsuits are considered to be general civil lawsuits. The result of such a lawsuit can be, especially, an obligation of an employer/company (or employee/representative) to do something or cease to do something. Also, compensation for loss or damage, if it was caused by the breach of law, can be provided by the courts decision.

Slovenia.- The labour inspectorate supervises the implementation of laws governing the participation of workers in management, which include the act transposing Directive 2001/86/EC into Slovenian law. The SE-Act provides a fine of at least 5 million SIT (i.e. about 20,000 EUR) for a participating company or an SE for a violation if *its management*: i) does not communicate the information regarding the plans of establishing an SE, communicates incorrect or incomplete information or does not communicate the information in due time; ii) does not communicate the information regarding the change of the number of employees, communicates incorrect or incomplete information or does not communicate the information in due time; iii) in violation of standard rules on information and consultation, does not inform and consult annually or communicates incorrect or incomplete information or does not communicate the information in due time and iv) in violation of standard rules on information and consultation in exceptional cases, does not inform and consult in exceptional circumstances or communicates incorrect or incomplete information or does not communicate the information in due time.

A *responsable person* of a company who commits any of these acts may also be held liable to a fine of at least SIT 500 000 (i.e. 2000 EUR). It is not specifically stated in the SE-Act that this applies regardless of whether or not the SE has its registered office within the Slovenian territory.

Spain.- Spanish legislation defines as a labour infractions with regard to the right of involvement of employees in European companies "the actions or omissions of the different responsible subjects against" provisions of the law of transposition, as well as against "its development provisions, the provisions of other Member States enforced in Spain, agreements held pursuant to these provisions, and against "legal clauses in collective agreements that complement the rights acknowledged in them".

This legislation also classifies failures to comply with the rights to involvement in the SE as serious, and very serious. These are the following: i) actions and omissions that prevent the start and development of negotiations with employees' representatives with regard to provisions regarding the rights to involvement; ii) actions and omissions that prevent the

functioning of the SNB, the RB or, given the case, the information and consultation procedures as established in legal terms or by agreement; iii) actions and omissions that prevent the effective exercise of the rights to involvement, including abuse in qualifying the information provided as confidential, and abuse in qualifying information as secret in order to legally withhold information from the representatives; iii) decisions adopted in the framework of the SE-Act that involve direct or indirect discrimination due to gender, nationality, origin, race, ethnic group, marital status, religion or beliefs, political ideas, sexual orientation, language and adhesion or not to a trade union, its agreements or the exercise of trade union activities; and iv) wrongful establishment of an SE with the purpose of depriving employees of the rights to involvement they were already entitled to, or withholding them.

The social jurisdiction has a general competence to know and to resolve "any litigious issues that appear in the application" of SE-Act This general attribution has the following two exceptions. Firstly, where there are plans to impugn administrative sanctions, these cases are the competence of the contentious-administrative courts. Secondly, substantiation of lawsuits regarding the position and activities of employees participating in the decision-making and supervisory organs of the SE, are the competence of the civil courts.

Sweden.- The dominating model in Sweden is of a judicial nature. The negotiating body and the representative body may acquire rights, assume obligations and bring Actions before a court of law or other authority (Section 64). Legal proceedings in connection with the Act shall be brought before the Labour Court as the first instance (Section 69).

United Kingdom.- The individual who originally brought the complaint can also ask the Employment Appeal Tribunal to impose a penalty on the company for an amount not exceeding £75,000 for its failure to comply.

The main mechanism for dealing with complaints is the Central Arbitration Committee (CAC), which is an independent tribunal with statutory powers and is appointed to resolve collective disputes about the establishment and operation of information and consultation arrangements. Complaints may be taken to the CAC where it is considered that the following circumstances apply: i) the failure of a company to provide information when it first takes the decision to set up an SE; ii) a SNB has not been set up or not set up correctly; iii) balloting arrangements for the election of UK members of the special negotiating body are defective; iv) a consultative committee does not have the right to appoint members of the special negotiating body or has appointed them incorrectly; iv) the SNB has taken a decision incorrectly or has failed to publish that decision correctly; v) information has unreasonably been described as confidential and viii) information is being unreasonably withheld.

The procedures of the CAC require a complaint to be in writing and the CAC will make the enquiries "it sees fit and give any person it considers has a proper interest in the complaint or application an opportunity to be heard". Declarations from the CAC are also in writing with reasons and have the force of a High Court declaration (Court of Sessions in Scotland). Where it seems that the two sides might reach a conciliated agreement, the CAC should refer the issue to the Advisory, Conciliation and Arbitration Service (ACAS) – an official

conciliation body. If the two sides cannot agree, the issue returns to the CAC for resolution. Appeals on points of law go to the Employment Appeal Tribunal.

The CAC is also the body to which complaints are made that the company has failed to meet its obligations under either an agreement or the standard rules on employee involvement. If a member of the employee representative body, or, where there is no such body, an information and consultation representative, or an employee, considers that the company is not complying with the terms of the agreement or the standard rules, he or she can make a complaint to the CAC. If the CAC agrees, it makes an order stating the steps to be taken, the date of failure, and the time limit, within which the company must comply. The individual who originally brought the complaint can also ask the Employment Appeal Tribunal to impose a penalty on the company for its failure to comply. However, the CAC cannot require the company to reverse its actions.

The Regulations also contain provisions relating to the protection of individuals who are SNB or RB members. Claims under those provisions can be brought before an Employment Tribunal (ET). ETs are judicial bodies established to resolve disputes between employers and employees over individual employment rights.

6. Link between the SE-Directive and other provisions

1. Article 13 SE-Directive provides some rules with the finality to organise the link between the Directive itself and other European standards. In this sense, firstly, it establishes that when an SE is a Community-scale undertaking or a controlling undertaking of a Community-scale group of undertakings, specific provisions of both national legislation and legislation of the Member States shall not apply to them or their subsidiaries (paragraph 1, art. 13.1). However, this general rule shall not apply when the SNB has decided by agreement not to open negotiations or to terminate ongoing negotiations (paragraph 2, art. 13.1). Secondly, provisions on the participation of employees established by national legislation and/or practice, other than those implementing SE-Directive, shall not apply to the SE included in the scope of implementation the Directive (art. 13.2). Thirdly, SE-Directive shall not prejudice: i) the existing rights to involvement of employees other than participation in the bodies of the SE as enjoyed by employees of the SE and its subsidiaries and establishments, provided by national legislation and practice in the Member States; and ii) the rights to participation of employees in the bodies of subsidiaries of the SE laid down by national legislation and practice (art. 13.4). Finally, SE-Directive gives to the Member States the option to take the necessary measures to guarantee that the structures of employee representation in participating companies which will cease to exit as separate legal entities are maintained after the registration of SE.

2. The article here examined does not show transposition problems, inasmuch as the incorporation into national law is undertaken, usually, in a literal manner (Austria, Finland, Italy, Malta, Spain and United Kingdom). Nevertheless, several national laws have not exerted the option contained in art. 13.4 (Greece, Italy and United Kingdom),

and therefore do not include any measures aimed to guarantee, after SE registration, the maintenance of employee representation structures in the participating companies that cease to exist as differentiated legal entities. In Portugal, the transposition of this precept has been undertaken partially, omitting a section thereof (art. 13.2). And in Slovenia, the national law has omitted the transposition of all the rules of art. 13

7. Effects of transposition on the internal laws of member states

A. General considerations

1. Almost unanimously, national reports declare the impossibility to define the effects of legislation regarding the SE on internal laws. Actually, this is an obvious conclusion considering the limited amount of time passed since the transposition of the SE-Directive into European legal systems. This also explains the complete lack of case law references with regard to the application and interpretation of the legal scheme for the *societas europeae.*

2. Nevertheless, some of the national reports mention, at least, the impact of the transposition law in their internal law. More specifically, these reports state that this impact may be appreciated, at least, in two differentiated legal spheres: in Labour Law strictly (United Kingdom or Czech Republic) and in Company Law (Czech Republic, Germany, Hungary or United Kingdom). The purpose of the observations that follow is, in short, to explain these influences.

B. Analytical comments

Cyprus.- Prior to the transposition of SE-Directive, no law or regulation existed in Cyprus for the consultation and information of workers and employees and for their involvement or participation in European companies or SEs. However, it should be noted that central management of business undertakings do consult and inform workers on matters which concern them, albeit not on such a broad scope of issues as envisioned in the Directive, with the possible exception of Community-scale undertakings which have a European Works Council in operation. Such consultation processes would take place where local statute law applied, such as in the case of collective redundancies and during the merger and transfer of business undertakings, or during negotiations for the renewal of Collective Agreements between the trade unions and the employers' associations in specific sectors of economic activity or where it was so agreed between the management and the employees of a particular business undertaking.

The transposition of SE-Directive into national law should be seen as part of a larger package of reforms of national labour law undertaken by the Cyprus government in order to harmonize the laws of Cyprus with the *acquis communitaire*.

Czech Republic.- In addition to adopting an SE-Act, it was necessary to harmonize the requirements and content of that directive with the legal regime of the Czech Labour Code especially in the field of negotiating the involvement of employees of an SE. It was also necessary to harmonize the directive transposed into the SE Act with the legal regime of the

Business Code and the Notarial Order of the Czech Republic. In this connection, the Czech Ministry of Justice issued in 2005 has implemented a Decree, on the documents to be presented to the notary so as to obtain certification for the relocation of the registered address of an SE and for establishing an SE by way of merger.

Estonia.- Transposition of the Directive into Estonian law has certainly had an impact on the development of national law. Labour law did not know the concept of involvement of employees. Transposition of the Directive into Estonian law has created a legal basis for the employees´ right to be informed, consulted and, given the case, to participate in activities of the SE. Legal regulation on the involvement of employees has most certainly benefited in a better understanding of the involvement of employees and to stressing the importance of promoting the social dialogue in the undertakings.

Transposition of the Directive has influenced the national procedure of electing the employees´ representatives. The national model on the election of employees' representatives – where the representative was elected by the employees belonging to a trade union and by the employees not belonging to a trade union and in order to represent both groups, the representative needs the authorisation from the other group – provided for by the TUIS, was not followed by the TKS. Nevertheless, the new legal regulation can be a challenge to employers, as well as to employees.

Germany.- The introduction into national law of employee involvement in SE has caused a significant national debate on an issue that relates primarily to the Regulation rather than to the Directive: the implications of introducing a new form of corporate governance. This concern seems to have been greatest when a one-tier system of a single board has been introduced into a country like Germany where two-tier boards, with supervisory and management boards, have provided the sole corporate governance structure up to now.

According to the Council Regulation, the SE can choose between two systems for the administration of the public companies limited by shares: a supervisory organ and a management organ (two-tier system) or an administrative organ (one-tier-system) depending on the form adopted in the statutes. A member state is obliged to introduce special rules for the alternative system for SE which is resident in that member state. Thus, the companies can choose a suitable and efficient system of corporate governance.

The main focus of the national debate is the question whether to use the introduction of the European Company Regulation to make a major change to national company law and also to give national companies the right to choose between a one-tier and a two-tier system or not.

The German employers' organisations have used the debate on the introduction of the SE legislation as an opportunity to launch a renewed attack on the German system of codetermination. They claim that in light of intensified competition in an increasingly globalised economy, EU enlargement and recent European-level developments in company law, there is an urgent need to 'modernise' the German codetermination model, in other words, to reduce employee representation rights in order to remain competitive.

Greece.- The national law creates a problem in practice. The whole structure of trade union movement and collective bargaining negotiations in Greece concentrates on national, sectoral or professional levels. Enterprise level unions and enterprise level collective bargaining is quite limited. The national law of transposition repeats the provisions of the trade union law and the works councils. However, the existence of these provisions for many years has not provided results at the enterprise level. Individual employers are scared of the idea of having company level trade unionists "messing around" in their business and trade unionists prefer the high level, high profile negotiations with employers' federations. As for individual employees, despite the fact that the law provides considerable protection for unionizing efforts, they do not take the initiative to create trade unions or works councils either because they are afraid of the employee's reactions or because they do not believe in the effectiveness of the institutions or because of both of these reasons.

The Decree does not provide for a compulsory procedure which will be initiated in case that a SE is going to be created and that there is neither an enterprise trade union nor a works council (which, as we saw, is the case for the vast majority of Greek companies). Indeed, it refers to an ad hoc election among the company's employees but it can be expected that such elections will not be held at the (non-unionised) employees' initiative. This expectation is based on the experience of, for instance, the law on collective dismissals where a provision for the election of ad hoc representatives has remained more or less dormant in labour practice.

In conclusion, if the Directive is interpreted as imposing on the States an obligation not only to provide an opportunity for employee consultation and involvement when an SE is going to be created but also that this consultation and involvement does indeed take place (an interpretation about which I have strong doubts), then one may say that the Decree does not take enough measures to ensure that there will be workers' representatives involved (for instance, by assigning to the national confederation of Greek workers the responsibility to hold such elections in a given company).

Hungary.- The Act of 2006, that has reformed the Act on Business Associations, brought about several changes, such as introducing the option of one-tier corporate governance and re-regulation of employees' mandatory representation in Supervisory Boards. A sort of deregulation is emerging both in the one-tier system and in the board level representation.

By default, the law prescribes a two-tier corporate governance system with a separate board of executive officers and a supervisory board. However, it contains the option of the one-tier corporate governance system: the company charter of a public limited company (*nyilvánosan működő részvénytársaság*") may contain provisions to combine management and supervisory functions in a single board of directors. The legal regulation of board level representation in the monistic system is limited to a single sentence prescribing that "in the case of public limited companies controlled by the one-tier system, the procedures for exercising the rights of employees to supervise the company's management shall be laid down in an agreement between the board of directors and the works council in accordance with the articles of association". Given that in line with the relevant EU directive, the Hungarian legislation produced a fairly specific and detailed regulation concerning employee representation in the

SE, in the case of monistic corporate governance the summary language of the Hungarian company law on employees' representation is surprisingly inadequate.

The new company law did not change the main features of board level representation of employees in the two-tier system. At companies with at least 200 full-time employees one-third of the Supervisory Board must consist of employee representatives. They are nominated by the Works Council from among the employees, but prior to nomination the Works Council is required 'to listen to the opinions' of company trade unions.

Slovenia.- The SE-Directive has had a particular effect on business law in the Republic of Slovenia as well, since, on the basis of the provisions of the SE Regulation, the Companies' Act enacted, in addition to the two-tier system of management, a one-tier system of management together with issues of the participation of workers, and it did so not just for SEs, but also for national companies. This change, which required considerable expert work and thorough discussion, partly explains the delay in the implementation of the Directive by the Republic of Slovenia.

United Kingdom.- The transposition of the SE-Directive means that UK employees for the first time may now have a right to participate in company decision-making at board-level. This is a sharp break with the past, although a number of conditions must be present for this right to be exercised; most notably the company itself must voluntarily decide to set up an SE and in practice at least 25 per 100 of the employees must already have a right to board-level participation.

Since 1998 the UK has also been involved in a broader reform of company law, which potentially could have included some of the ideas of employee involvement found in the Directive. However, by 2000, at the latest, the government had made it clear that it was not intending to fundamentally change the balance between shareholders and other 'stakeholders' – such as employees or local communities. Instead the government took up the "enlightened shareholder value" view of the duties of directors, proposed by the majority of those involved in the company law review process. A White Paper in 2005 made it clear that the government agreed that "the basic goal for directors should be the success of the company for the benefit of its members [shareholders] as a whole; but that to reach this goal the directors would need to take a properly balanced view of the implications of decisions over time and foster effective relationships with employees, customers and suppliers, and in the community more widely". The company law reform debate, which finally produced the Companies Act 2006, was therefore largely separate from any discussion of the transposition of the Directive, although the TUC did seek to make links.

8. Epilogue: SE with and without employees

On 8th June 2007, and according to the information provided by SEEurope[iii], a total of 73 established *societas europeae* may be counted in the EU-25, with another 9 companies in the

[iii] www..seurope-network. org

process of being established. Also, 16 companies have publicly stated their wish to establish themselves as SEs.

Besides these figures, that in the short term will place the total number of SEs in just above one hundred, the most outstanding information of these statistics is the record of the existence of a significant number of established and registered SEs that are 'employee-free'. Against the idea defended throughout the long process to pass the SE-Directive regarding the impossibility of establishing an SE without the right to involvement (*pas de société sans implication*), reality has contradicted this thesis.

Without entering into a discussion of the regular nature or not of this type of SE, an issue which has given rise to an intense debate in the German scientific doctrine, it is important to stress the possible use of this figure, the 'employee-free' SE, with the perspective of paralysing the implementation of the employees' right to involvement at a later stage.

And, as highlighted by the Dutch report, it is rather easy to circumvent employee involvement with the creation of a European Company. When participating companies without employees create a new SE, for example by way of merger, there is no employee involvement in that SE. In that case the participating companies aren't obliged to establish a Special Negotiation Body. After the creation of such an 'employee free' European company, that company may establish subsidiary SEs. These subsidiary SEs are also 'employee free'. When these SEs do not exploit any activities, they can be sold to other parties, who want to use the legal form of the SE. By using this practice, employee involvement will be circumvented. In Germany there are experiences with these so called *Vorrat* SEs.[iv] One can doubt whether the directive in its present form sufficiently covers this issue.

[iv] T. Blanke, *Vorrats-SE ohne arbeitnehmerbeteiligung,* Düsseldorf: Hans Böckler Stiftung 2005.

Tables of correspondence
Austria

Transposition of the Directive 2001/86/EC into the Labour Constitution Act (ArbVG) and the Social Security Courts Act (ASGG)

Content	Articles in the Directive	National implementing provisions
Objective	1	none
Definitions	2	§210
Creation of a special negotiating body	3.1	§215
	3.2 a	§216
	3.2 b	§217
	3.3	§225
	3.4	§221
	3.5	§220
	3.6	§227
	3.7	§224
Content of agreement	4	§230
Duration of negotiations	5	§226
Legislation applicable to the negotiation procedure	6	§208
Standard rules	7	§232
	Annex part 1. a)	§233 Abs 1
	Annex part 1. b)	§ 234 Abs 1, §233 Abs 2
	Annex part 1. c)	§236
	Annex part 1. d)	§235
	Annex part 1. e)	§233 Abs 1
	Annex part 1. f)	§ 234 Abs2
	Annex part 1. g)	§243
	Annex part 2 a)	§ 239
	Annex part 2 a)	none
	Annex part 2 b)	§240
	Annex part 2 c)	§241
	Annex part 2 d)	§ 235 Abs 4
	Annex part 2 e)	§242
	Annex part 2 f)	§ 235 Abs 4
	Annex part 2 g)	§251 Abs2
	Annex part 2 h)	§238
	Annex part 2 a)	§239
	Annex part 3	§§244-247
Reservation and confidentiality	8	§250
Operation of the representative body and procedure for the information and consolation of employees	9	§214
Protection of employees' representatives	10	§251
Misuse of procedures	11	§229
Compliance with this directive	12	§253, § 50Abs2 ASGG
Link between this Directive and other provisions	13	§ 227 Abs 4;§ 228 Abs 5

Belgium

Transposition through the Collective agreement nr 84 of 6 October 2004 (CA), complemented by two statutory instruments: a) *Loi portant des mesures diverses* (17 September 2005) ; b) *Loi portant des mesures d'accompagnement* (10 August 2005)

Content	Articles in the Directive	National implementing provisions
Objective	1	Article 1 and 2 of the Collective Agreement
Definitions	2	Article 3 Collective Agreement
Creation of a special negotiating body	3.1	5 § 1 CA
	3.2 a	6 and 8 CA
	3.2 b	9 CA
	3.3	15 CA
	3.4	19 CA
	3.5	16 CA
	3.6	17 CA
	3.7	18 CA
Content of agreement	4	21, 22, 23, 24 CA
Duration of negotiations	5	20 CA
Legislation applicable to the negotiation procedure	6	Article 4 to 7 Loi mesures d'accompagnement
Standard rules	7	25 and 26 CA
	Annex part 1. a)	27 § 1 CA
	Annex part 1. b)	28 CA
	Annex part 1. c)	34 CA
	Annex part 1. d)	40 CA
	Annex part 1. e)	27 § 2 CA
	Annex part 1. f)	30 CA
	Annex part 1. g)	33 CA
	Annex part 2 a)	32 CA
	Annex part 2 b)	36 an 37 CA
	Annex part 2 c)	38 CA
	Annex part 2 d)	54 CA
	Annex part 2 e)	39 CA
	Annex part 2 f)	41 CA
	Annex part 2 g)	42 CA
	Annex part 2 h)	43 CA
	Annex part 3	44-50 CA
Reservation and confidentiality	8	Article 8 Loi mesures d'accompagnement
Operation of the representative body and procedure for the information and consolation of employees	9	51 CA
Protection of employees' representatives	10	Article 9 Loi mesures d'accompagenement
Misuse of procedures	11	No transposition
Compliance with this directive	12	Article 10 Loi mesures d'accompagenments Articles 25 to62 Law on Collective Agreements

Cyprus

Transposition by Law 277 (I)/2004, of 21 December

Content	Articles in the Directive	National implementing provisions
Objective	1	Arts. 1 & 4
Definitions	2	Art. 2
Creation of a special negotiating body	3.1	Art. 5(1)
	3.2 a	Art. 6
	3.2 b	Art. 7
	3.3	Art. 8(1)
	3.4	Art. 8(4)
	3.5	Arts. 8(2) and 8(3)
	3.6	Arts. 8(5) and 8(6)
	3.7	Art. 8(7)
Content of agreement	4	Art. 9
Duration of negotiations	5	Art. 10
Legislation applicable to the negotiation procedure	6	Art. 4
Standard rules	7	Art. 11
	Annex part 1. a)	Art. 12 (a)
	Annex part 1. b)	Art. 12(d)
	Annex part 1. c)	Art.12 (c)
	Annex part 1. d)	Art. 12 (b)
	Annex part 1. e)	Art. 12 (e)
	Annex part 1. f)	Art. 12(f)
	Annex part 1. g)	Art.12 (f) & (g)
	Annex part 2 a)	Art. 13(1)
	Annex part 2 b)	Art. 13(2), (3)
	Annex part 2 c)	Art. 13(4), (5)
	Annex part 2 d)	Art. 13(6)
	Annex part 2 e)	Art. 14(1)
	Annex part 2 f)	Art. 14(2)
	Annex part 2 g)	Art. 14(3)
	Annex part 2 h)	Art. 14(4)
	Annex part 3	Art. 15
Reservation and confidentiality	8	Art. 16
Operation of the representative body and procedure for the information and consultation of employees	9	Art. 17
Protection of employees' representatives	10	Art. 18
Misuse of procedures	11	Art. 19
Compliance with this directive	12	Art. 20
Link between this Directive and other provisions	13	Art. 4

Czech Republic

Transposition through the Act No. 627/2004 (SE Act) and the Act No. 513/1991

Content	Articles in the Directive	National implementing provisions
Objective	1	Art. 1, par. 1; Art. 46, par. 1 (SE Act)
Definitions	2	Art. 46, par. 2-5, Art. 63 (SE Act)
Creation of a special negotiating body	3.1	Art. 47 (SE Act)
	3.2 a	Art. 48 (SE Act)
	3.2 b	Art. 47 (SE Act)
	3.3	Art. 49 (SE Act)
	3.4	Art. 51 (SE Act)
	3.5	Art. 49 (SE Act)
	3.6	Art. 52 (SE Act)
	3.7	Art. 49 (SE Act)
Content of agreement	4	Art. 54, 55 and 63 (SE Act)
Duration of negotiations	5	Art. 49 ; Art. 53, par. 1 (SE Act)
Legislation applicable to the negotiation procedure	6	Art. 47, par. 2 (SE Act)
Standard rules	7	Art. 53, par. 2-7 (SE Act)
	Annex part 1. a)	Art. 56, 57 and 58 (SE Act)
	Annex part 1. b)	Art. 56, 57 and 58 (SE Act)
	Annex part 1. c)	Art. 56, 57 and 58 (SE Act)
	Annex part 1. d)	Art. 56, 57 and 58 (SE Act)
	Annex part 1. e)	Art. 56, 57 and 58 (SE Act)
	Annex part 1. f)	Art. 56, 57 and 58 (SE Act)
	Annex part 1. g)	Art. 59, par. 2 and 3 (SE Act)
	Annex part 2 a)	Art. 59, par. 1 (SE Act)
	Annex part 2 b)	Art. 61, 62 (SE Act)
	Annex part 2 c)	Art. 61, 62 (SE Act)
	Annex part 2 d)	Art. 61, 62 (SE Act)
	Annex part 2 e)	Art. 61, 62 (SE Act)
	Annex part 2 f)	Art. 61, 62 (SE Act)
	Annex part 2 g)	Art. 60 (SE Act)
	Annex part 2 h)	Art. 60 (SE Act)
	Annex part 3	Art. 64 (SE Act)
Reservation and confidentiality	8	Art. 50, par. 1, 2, 3 and 5; Art. 55, par. 5 (SE Act)
Operation of the representative body and procedure for the information and consolation of employees	9	Art. 194, par. 4 and 5; Art. 201 (Business Code)
Protection of employees' representatives	10	Art. 49, par. 3; Art. 50, par. 4 (SE Act)
Misuse of procedures	11	Art. 50, par. 3 (SE Act)
Compliance with this directive	12	Art. 6 and 50, par. 3 (SE Act)
Link between this Directive and other provisions	13	Art. 52 (SE Act)

Denmark

Transposition by the Act no 281 of 26.4.2004 on employee involvement in SE-companies (SEL)

Content	Articles in the Directive	Section in the Danish SEL
Objective	1	Not explicitly transposed
Definitions	2	2
Creation of a special negotiating body	3.1	3, 4, 5
	3.2.a (i)	6, 8
	3.2 a (ii)	7, 8
	3.2 b	9
	3.3	10, 11
	3.4	14, 15
	3.5	13(1)
	3.6	16
	3.7	13(2)
Content of agreement	4	17, 18
Duration of negotiations	5	12
Legislation applicable to the negotiation procedure	6	1
Standard rules	7	19, 20, 32
	Annex part 1. a)	21(1)
	Annex part 1. b)	21(3) and (4)
	Annex part 1. c)	21(5)
	Annex part 1. d)	21(6)
	Annex part 1. e)	21(2) and 23
	Annex part 1. f)	22
	Annex part 1. g)	24
	Annex part 2 a)	20
	Annex part 2 b)	25
	Annex part 2 c)	26
	Annex part 2 d)	26(6)
	Annex part 2 e)	27
	Annex part 2 f)	28
	Annex part 2 g)	29
	Annex part 2 h)	30, 31
	Annex part 3 a)	32, 33(1), 34-40
	Annex part 3 b)	32, 33(2), 34-40
Reservation and confidentiality	8	41, 42
Operation of the representative body and procedure for the information and consolation of employees	9	Not transposed
Protection of employees' representatives	10	43
Misuse of procedures	11	44
Compliance with this directive	12	45, 46
Link between this Directive and other provisions	13	Not explicitly transposed

Estonia

Transposition by "the Involvement of Employees in the Activities of Community-scale Undertakings, Community-scale Groups of Undertakings and in European Companies Act" (TKS) of 12 January 2005

Content	Articles in the Directive	National implementing provisions
Objective	1	Art. 1
Definitions	2	Art. 1, 16 (2), (3) and (4)
Creation of a special negotiating body	3.1	Art. 16 (1) and (5)
	3.2 a	Art. 17, 18
	3.2 b	Art. 19
	3.3	Art. 20
	3.4	Art. 21 and 22
	3.5	Art. 23
	3.6	Art. 24 and 25
	3.7	Art. 26
Content of agreement	4	Art. 27
Duration of negotiations	5	Art. 28
Legislation applicable to the negotiation procedure	6	No provisions
Standard rules	7	Art. 29 and 30
	Annex part 1. a)	Art. 31 (1)
	Annex part 1. b)	Art. 31 (5)
	Annex part 1. c)	No provisions
	Annex part 1. d)	Art. 31 (6)
	Annex part 1. e)	Art. 31 (3) and(4)
	Annex part 1. f)	Art. 31 (7)
	Annex part 1. g)	Art. 31 (8)
	Annex part 2 a)	Art. 32 (1)
	Annex part 2 b)	Art. 32 (2) (3) (4) (5)
	Annex part 2 c)	Art. 32 (6)
	Annex part 2 d)	Art. 32 (7)
	Annex part 2 e)	Art. 32 (10)
	Annex part 2 f)	Art. 32 (11)
	Annex part 2 g)	Art. 32 (12)
	Annex part 2 h)	Art. 32 (13)
	Annex part 3	Art. 33
Reservation and confidentiality	8	Art. 34
Operation of the representative body and procedure for the information and consolation of employees	9	No provisions
Protection of employees' representatives	10	Art. 35
Misuse of procedures	11	No provisions
Compliance with this directive	12	Art. 36 The Law on Administrative Penalties Art. 41^3
Link between this Directive and other provisions	13	No provisions in the Law but the other acts remain effective.

Finland

Transposition through the Act on Employee Involvement in European Companies, Law 758/2004 of 13 august 2004

Table of correspondence		
Content	**Articles in the Directive**	**National implementing provisions**
Objective	1	1, 2
Definitions	2	3
Creation of a special negotiating body	3.1	4,5,6,7, 8,9,10, 11, 12, 13, 14, 15 (mixed)
	3.2 a	“
	3.2 b	“
	3.3	“
	3.4	“
	3.5	“
	3.6	“
	3.7	“
Content of agreement	4	9, 16, 17
Duration of negotiations	5	12
Legislation applicable to the negotiation procedure	6	
Standard rules	7	18, 19
	Annex part 1. a)	20
	Annex part 1. b)	21
	Annex part 1. c)	
	Annex part 1. d)	20
	Annex part 1. e)	20
	Annex part 1. f)	20
	Annex part 1. g)	22
	Annex part 2 a)	23
	Annex part 2 a)	23
	Annex part 2 b)	24
	Annex part 2 c)	25
	Annex part 2 d)	26
	Annex part 2 e)	26
	Annex part 2 f)	26, 27
	Annex part 2 g)	27
	Annex part 2 h)	27
	Annex part 2 a)	23
	Annex part 3	28, 29, 30
Reservation and confidentiality	8	31, 32
Operation of the representative body and procedure for the information and consolation of employees	9	
Protection of employees’ representatives	10	33, 34
Misuse of procedures	11	36
Compliance with this directive	12	37, 38, 39
Link between this Directive and other provisions	13	35

France

Provisions regarding the SE have been transposed into French law by Law n. 842/2005, of 26 July, *pour la confiance et la modernisation de l´economie* . Article 12 of this law has introduced arts. L. 439-25 to L.439-50 in the *Code du Travail.* These legal precepts have, in turn, been developed by Decree n. 1369/2006, of 9 November, regarding the involvement of employees in the SE.

Content	Articles in the Directive	National implementing provisions
Objective	1	
Definitions	2	Art. L.439-25 (Code du travail)
Creation of a special negotiating body	3.1	Art. L.439-31, L.439-26, L.439-29, L.439-30
	3.2 a	Art. L. 439-27, art. L. 439-28
	3.2 b	Art. L. 439-29 et art. L. 439-30
	3.3	Art. L.439-26, L.439-32, L.439-33
	3.4	Art. L.439-33 al.3
	3.5	Art. L. 439-31 al. 5
	3.6	Art. L.439-33 al. 2
	3.7	Art. L.439-31 al. 4
Content of agreement	4	Art. L.439-32 al.1
Duration of negotiations	5	Art. L.439-31 al. 2
Legislation applicable to the negotiation procedure	6	
Standard rules	7	Articles L.439-34 à L.439-50
	Annex part 1. a)	Art. L. 439-35 al. 1
	Annex part 1. b)	Art. L. 439-29 al. 1, L. 439-30, L. 439-32 al. 1 b, L. 439-34, L. 439-37, L. 439-38 ; art. L. 439-50 al. 1, al .2
	Annex part 1. c)	Art. L. 439-35 al. 4
	Annex part 1. d)	Art. L. 439-41 al. 1
	Annex part 1. e)	Art. L. 439-27 al. 1, L. 439-36
	Annex part 1. f)	(Inutile puisque le dirigeant de la société siege au Comité de la SE)
	Annex part 1. g)	Art. L. 439-26, art. L. 439-48 al. 1 et al. 2
	Annex part 2 a)	Art. L. 439-25 al. 2
	Annex part 2 b)	Art. L. 439-39 al. 1 et al. 3
	Annex part 2 c)	Art. L. 439-39, al. 6 et al. 7
	Annex part 2 d)	(Inutile car le dirigeant de la SE ou son représentant preside le Comité, cf. Art. L. 439-35 al. 4)
	Annex part 2 e)	Art. L. 439-35 al. 5
	Annex part 2 f)	Art. L. 434-40 al. 1
	Annex part 2 g)	Art. L. 434-10 et art. L. 434-40 al. 3
	Annex part 2 h)	Art. L. 439-40
	Annex part 3 a)	Art. L. 439-42 alinéa 1 a
	Annex part 3 b)	Art. L. 439-42 alinéa 1 b.
Reservation and confidentiality	8	Art. L.439-36
Operation of the representative body and procedure for the information and consolation of	9	Art. L.439-34

Content	Articles in the Directive	National implementing provisions
employees		
Protection of employees' representatives	10	Art. L.439-47
Misuse of procedures	11	Art. L.439-32 al.2
Compliance with this directive	12	
Link between this Directive and other provisions	13	

Germany

Germany has carried the transposition through the SE-Beteiligungsgesetz SEBG (Act on the participation of employees in a European company)

Content	Articles in the Directive	National implementing provisions SEBG
Objective	1	1, 3
Definitions	2	2
Creation of a special negotiating body	3.1	4
	3.2 a	5.1, 5.2, 5.3
	3.2 b	7, 6, 8, 9, 10, 11
	3.3	4.1, 13
	3.4	15
	3.5	14
	3.6	16
	3.7	19
Content of agreement	4	21
Duration of negotiations	5	20
Legislation applicable to the negotiation procedure	6	3
Standard rules	7	22, 34
	Annex part 1. a)	23.1
	Annex part 1. b)	23.1-23.3
	Annex part 1. c)	23.4
	Annex part 1. d)	24.1
	Annex part 1. e)	23.1 (3)
	Annex part 1. f)	23.1 (3)
	Annex part 1. g)	26
	Annex part 2 a)	27
	Annex part 2 b)	28,
	Annex part 2 c)	29
	Annex part 2 d)	
	Annex part 2 e)	30
	Annex part 2 f)	32
	Annex part 2 g)	31
	Annex part 2 h)	33
	Annex part 3 a)	35.1
	Annex part 3 b)	35.2, ,36, 37, 38
Reservation and confidentiality	8	39,41
Operation of the representative body and procedure for the information and consolation of employees	9	40
Protection of employees' representatives	10	42
Misuse of procedures	11	43
Compliance with this directive	12	44,45,46, and the following changes of the German Arbeitsgerichtsgesetz (ArbGG): § 2.a.1 Nr. 3d, § 10, § 82 and § 83.3
Link between this Directive and other provisions	13	47

Greece

Transposition by Presidential Decree 91/2006, published on 4th May 2006.

Content	Articles in the Directive	National implementing provisions
Objective	1	1
Definitions	2	2
Creation of a special negotiating body	3.1	3.1
	3.2 a	3.2a
	3.2 b	3.2b,c
	3.3	3.3
	3.4	3.4
	3.5	3.5
	3.6	3.6
	3.7	3.7
Content of agreement	4	4
Duration of negotiations	5	5
Legislation applicable to the negotiation procedure	6	6
Standard rules	7	7
	Annex part 1. a)	1.a
	Annex part 1. b)	1.b
	Annex part 1. c)	1.c
	Annex part 1. d)	1.d
	Annex part 1. e)	1.e
	Annex part 1. f)	1.f
	Annex part 1. g)	1.g
	Annex part 2 a)	2.a
	Annex part 2 b)	2.b
	Annex part 2 c)	2.c
	Annex part 2 d)	2.d
	Annex part 2 e)	2.e
	Annex part 2 f)	2.f
	Annex part 2 g)	2.g
	Annex part 2 h)	2.h
	Annex part 3	3
Reservation and confidentiality	8	8
Operation of the representative body and procedure for the information and consolation of employees	9	9
Protection of employees' representatives	10	10
Misuse of procedures	11	11
Compliance with this directive	12	11
Link between this Directive and other provisions	13	12

Hungary

Transposition of the SE-Directive into the Act XLV of 2004

Content	Articles in the Directive	National implementing provisions
Objective	1	Preambulum, 15
Definitions	2	18
Creation of a special negotiating body	3.1	19
	3.2 a	20
	3.2 b	21,22, 24
	3.3	23
	3.4	29
	3.5	27
	3.6	29, 30
	3.7	28
Content of agreement	4	15, 31
Duration of negotiations	5	26
Legislation applicable to the negotiation procedure	6	–
Standard rules	7	16
	Annex part 1. a)	35
	Annex part 1. b)	21 22
	Annex part 1. c)	39
	Annex part 1. d)	39
	Annex part 1. e)	20
	Annex part 1. f)	36
	Annex part 1. g)	42
	Annex part 2 a)	43
	Annex part 2 b)	44, 45
	Annex part 2 c)	45
	Annex part 2 d)	45, 46
	Annex part 2 e)	47
	Annex part 2 f)	40
	Annex part 2 g)	33
	Annex part 2 h)	40
	Annex part 3	48, 49, 50
Reservation and confidentiality	8	32,
Operation of the representative body and procedure for the information and consolation of employees	9	15
Protection of employees' representatives	10	32
Misuse of procedures	11	–
Compliance with this directive	12	32, 34, 45, Annex
Link between this Directive and other provisions	13	15, 17

Ireland

Transposition by Statutory Instrument (S.I.) 623 of December 2006 (European Communities (European Public Limited-Liability Company) (Employee Involvement) Regulations 2006.

Content	Articles in the Directive	National implementing provisions
Objective	1	Part 2 of Statutory Instrument (S.I) 623 of 2006 – Regulation 3
Definitions	2	Regulation 2
Creation of a special negotiating body	3.1	Regulation 4
	3.2 a	Regulation 5(3) to 5(8)
	3.2 b	Regulation 6 and 7
	3.3	Regulation 8 (1), 8 (2) and 8 (3)
	3.4	Regulation 9
	3.5	Regulation 10
	3.6	Regulation 11
	3.7	Regulation 12
Content of agreement	4	Regulation 16
Duration of negotiations	5	Regulation 14
Legislation applicable to the negotiation procedure	6	Regulation 3
Standard rules	7	Regulation 15 and Schedule 1
	Annex part 1. a)	Schedule 1 Part 1 (2)
	Annex part 1. b)	Schedule 1 Part 1 (4) and 1(5)
	Annex part 1. c)	Schedule 1 Part 1 (6)
	Annex part 1. d)	Schedule 1 Part 1 (7)
	Annex part 1. e)	Schedule 1 Part 1 (3)
	Annex part 1. f)	Schedule 1 Part 1 (8)
	Annex part 1. g)	Schedule 1 Part 1 (9)
	Annex part 2 a)	Schedule 1 Part 2 (11)(1)
	Annex part 2 b)	Schedule 1 Part 2 (11) (2), 11 (3) and 11 (4)
	Annex part 2 c)	Schedule 1 Part 2 (12)
	Annex part 2 d)	Schedule 1 Part 1 (7) and 13 (1)
	Annex part 2 e)	Schedule 1 Part 2 (13)(2)
	Annex part 2 f)	Schedule 1 Part 2 (14)(1)
	Annex part 2 g)	Schedule 1 Part 2 (14)(3)
	Annex part 2 h)	Schedule 1 Part 2 (14)(2)
	Annex part 3	Schedule 1 Part 3
Reservation and confidentiality	8	Regulation 18, 20, 21,22 and Schedule 2
Operation of the representative body and procedure for the information and consolation of employees	9	Regulation 16
Protection of employees' representatives	10	Regulation 19, 20, 21, 22 and Schedule 2
Misuse of procedures	11	Regulation 19, 20, 21, 22 and Schedule 2
Compliance with this directive	12	Regulation 20, 21,22 and Schedule 2
Link between this Directive and other provisions	13	Regulation 23

Italy

Transposition by the Legislative Decree 19th August 2005, n. 188

Article of the Directive transposed by	D. Lgs. 188/05
1 par. 1	1 par. 1
1 par. 2	1 par. 2
2 lett. a)	2 lett. a)
2 lett. b)	2 lett. b)
2 lett. c)	2 lett. c)
2 lett. d)	2 lett. d)
2 lett. e)	2 lett. e)
2 lett. f)	2 lett. f)
2 lett. g)	2 lett. g)
2 lett. h)	2 lett. h)
2 lett. i)	2 lett. i)
2 lett. j)	2 lett. l)
2 lett. k)	2 lett. m)
3 par. 1	3 par. 1
3 par. 2 lett.a – i)	3 par. 2 lett.a – 1)
3 par. 2 lett.a – ii)	3 par. 2 lett.a – 2, 3)
3 par. 2 lett.b)	3 par. 2 lett.b), c)
3 par. 3	3 par. 3
3 par. 4	3 par. 4, 5
3 par. 5	3 par. 6
3 par. 6	3 par. 7, 8, 9, 10
3 par. 7	3 par. 11
4 par. 1	4 par. 1
4 par. 2 lett. a)	4 par. 2 lett. a)
4 par. 2 lett. b)	4 par. 2 lett. b)
4 par. 2 lett. c)	4 par. 2 lett. c)
4 par. 2 lett. d)	4 par. 2 lett. d)
4 par. 2 lett. e)	4 par. 2 lett. e)
4 par. 2 lett. f)	4 par. 2 lett. f)
4 par. 2 lett. g)	4 par. 2 lett. g)
4 par. 2 lett. h)	4 par. 2 lett. h)
4 par. 3	4 par. 3
4 par. 4	4 par. 4
5 par. 1	5 par. 1
5 par. 2	5 par. 2
6	6
7 par. 1 lett. a)	7 par. 1 lett. a)
7 par. 1 lett. b)	7 par. 1 lett. b)
7 par. 2 lett. a)	7 par. 2 lett. a)
7 par. 2 lett. b)	7 par. 2 lett. b, 1-2)
7 par. 2 lett. c)	7 par. 2 lett. c, 1-2)
7 par. 2 lett. c) cpv	7 par. 3
7 par. 3	Not implemented
8 par. 1	8 par. 1
8 par. 2	8 par. 2
8 par. 3	Not implemented
8 par. 4	8 par. 3;4 lett. a) - b);5;6
9	9
10	10 par. 1, 2, 3

Article of the Directive	transposed by	D. Lgs. 188/05
11		11 par. 1, 2
12 par. 1		12 par. 1
12 par. 2		12 par. 2
13 par. 1		13 par. 1
13 par. 2		13 par. 2
13 par. 3 lett. a-b		13 par. 3 lett. a-b
13 par.4		Not implemented
Annex standard rules part. 1, par. 1		Annex part. 1, par. 1
Part 1 par. 1 lett. a)		Part 1 par. 1 lett. a)
Part 1 par. 1 lett. b)		Part 1 par. 1 lett. b) and c)
Part 1 par. 1 lett. c)		Part 1 par. 1 lett. d)
Part 1 par. 1 lett. d)		Part 1 par. 1 lett. e)
Part 1 par. 1 lett. e)		Part 1 par. 1 lett. f)
Part 1 par. 1 lett. f)		Part 1 par. 1 lett. g)
Part 1 par. 1 lett. g)		Part 1 par. 1 lett. h) and par. 2
Annex standard rules part. 2, par. 1		Annex part. 2 par. 1
Part 2 par 1 lett. a)		Part 2 par 1 lett. a)
Part 2 par 1 lett. b)		Part 2 par 1 lett. b), c) and d)
Part 2 par 1 lett. c)		Part 2 par 1 lett. e), f) and g)
Part 2 par 1 lett. d)		Part 2 par 1 lett. h)
Part 2 par 1 lett. e)		Part 2 par 1 lett. i)
Part 2 par 1 lett. f)		Part 2 par 1 lett. l)
Part 2 par 1 lett. g)		Part 2 par 1 lett. m)
Part 2 par 1 lett. h)		Part 2 par 1 lett. n) and par. 2
Annex standard rules part. 3 par. 1 lett. a)		Annex part. 3 par. 1 lett. a)
Part 3 par. 1 lett. b)		Part 3 par. 1 lett. b), par. 2, par. 3 and par. 4

Latvia

Transposition by the Law On European Companies, published on 7 April 2005 (*Latvijas Vēstnesis*)

Content	Articles in the Directive	National implementing provisions
Objective	1	Art. 1
Definitions	2	Art. 1, 16 (2), (3) and (4)
Creation of a special negotiating body	3.1	Art. 16 (1) and (5)
	3.2 a	Art. 17, 18
	3.2 b	Art. 19
	3.3	Art. 20
	3.4	Art. 21 and 22
	3.5	Art. 23
	3.6	Art. 24 and 25
	3.7	Art. 26
Content of agreement	4	Art. 27
Duration of negotiations	5	Art. 28
Legislation applicable to the negotiation procedure	6	No provisions
Standard rules	7	Art. 29 and 30
	Annex part 1. a)	Art. 31 (1)
	Annex part 1. b)	Art. 31 (5)
	Annex part 1. c)	No provisions
	Annex part 1. d)	Art. 31 (6)
	Annex part 1. e)	Art. 31 (3) and(4)
	Annex part 1. f)	Art. 31 (7)
	Annex part 1. g)	Art. 31 (8)
	Annex part 2 a)	Art. 32 (1)
	Annex part 2 b)	Art. 32 (2) (3) (4) (5)
	Annex part 2 c)	Art. 32 (6) and (7)
	Annex part 2 d)	Art. 32 (8) and (9)
	Annex part 2 e)	Art. 32 (10)
	Annex part 2 f)	Art. 32 (11)
	Annex part 2 g)	Art. 32 (12)
	Annex part 2 h)	Art. 32 (13)
	Annex part 3	Art. 33
Reservation and confidentiality	8	Art. 34
Operation of the representative body and procedure for the information and consolation of employees	9	No provisions
Protection of employees' representatives	10	Art. 35
Misuse of procedures	11	No provisions
Compliance with this directive	12	Art. 36 The Law on Administrative Penalties Art. 41^3
Link between this Directive and other provisions	13	No provisions in the Law but the other acts remain effective.

Lithuania

Transposition of the Directive 2001/86/EC into Law no X-200 on the Involvement of Employees in Decision-Making in European Companies.

Content	Articles in the Directive	National implementing provisions
Objective	1	1
Definitions	2	3
Creation of a special negotiating body	3.1	9
	3.2 a	10
	3.2 b	11
	3.3	9 (1), 9 (2), 19
	3.4	15
	3.5	14 (4)
	3.6	15
	3.7	14
Content of agreement	4	18,19
Duration of negotiations	5	17
Legislation applicable to the negotiation procedure	6	2 (1)
Standard rules	7	20
	Annex part 1. a)	21 (1)
	Annex part 1. b)	21 (2)-21 (10)
	Annex part 1. c)	25 (3)
	Annex part 1. d)	25 (1)
	Annex part 1. e)	21 (1)
	Annex part 1. f)	23
	Annex part 1. g)	33
	Annex part 2 a)	4 (2)
	Annex part 2 b)	29
	Annex part 2 c)	30
	Annex part 2 d)	26
	Annex part 2 e)	32
	Annex part 2 f)	27
	Annex part 2 g)	8 (1)
	Annex part 2 h)	20
	Annex part 3	31
Reservation and confidentiality	8	7 (also Article 47 of the Labour Code)
Operation of the representative body and procedure for the information and consolation of employees	9	6 (also Article 40 of the Labour Code)
Protection of employees' representatives	10	8 (also Article 134 of the Labour Code)
Misuse of procedures	11	6 (1)
Compliance with this directive	12	34 (also Article 41-9 Code of Administrative Penalties)
Link between this Directive and other provisions	13	-

Luxembourg

Transposition through the Law of 25 August 2006 and the Regulation of 22 December 2006, the latter in order to incorporate to the *Code du Travail*

Content	**Articles in the Directive**	**National implementing provisions: Code de Travail**
Objective	1	L. 441-1
Definitions	2	L. 411-2
Creation of a special negotiating body	3.1 et 3.2a	L. 442-1 (1) et L. 442-1 (2)
	3.2b	L. 442-2
	3.3	L. 442-3
	3.4	L. 442-3 (3)
	3.5 et 3.6	L. 442-3 (4) et (5)
	3.7	L. 442-3 (7)
Content of agreement	4	L. 442-4
Duration of negotiations	5	L. 442-3(2)
Legislation applicable to the negotiation procedure	6	L. 441-2
Standard rules	7	L. 443-1 ; L. 443-2 ; L. 443-3 ; L. 443-4 ;
		L. 443-5 ; L. 443-6
	7(2)	Art. L. 443-1.(2)
	7 (3)	Option not used
Reservation and confidentiality	8 Art. 8 §1	L. 444-2
	Art. 8 § 2 al 1	par Art. L. 444-1.
	Art. 8 § 2 al. 2	No transposition (faculté laissée aux Etats
	Art. 8 § 3 :	idem, No transposition
	Art. 8 § 4	Art. L. 444-6. (1) l'article 441-2
Operation of the representative body and procedure for the information and consolation of employees	9	L. 444-1
Protection of employees' representatives	10 (§1 plus 2)	L. 444-3
Misuse of procedures	11	L. 444-5
Compliance with this directive	12	L. 444-6; L. 444-9
Link between this Directive and other provisions	13	L. 444-7 ; L. 444-5 (2) L. 444-8
	Annex Part 1	L. 443-2 ; L. 443-3;
	Annex Part 2	L. 443-4; L. 433-5
	Annex Part 3	L. 443-5:; L. 443-6

Malta

Transposition by means of Legal Notice (LN) 452 of October 2004, known as the Employee Involvement (European Company) Regulations of 2004

Content	Articles in the Directive	National implementing provisions
Objective	1	Not specifically transposed
Definitions	2	2
Creation of a special negotiating body	3.1	3 (1)
	3.2 a	3 (2) 4
	3.2 b	5 (1) to (8)
	3.3	3 (3) (4)
	3.4	6 (1) (2) (3) (4)
	3.5	6 (5)
	3.6	7
	3.7	5(9) 6(6)
Content of agreement	4	8 (1) (3) (4) (5) (6)
Duration of negotiations	5	8 (2)
Legislation applicable to the negotiation procedure	6	9
Standard rules	7	10
	Annex part 1. a)	Schedule 10 1 (a)
	Annex part 1. b)	Schedule 10 1 (b)
	Annex part 1. c)	Schedule 10 1(c)
	Annex part 1. d)	Schedule 10 1 (d)
	Annex part 1. e)	Schedule 10 1 (e)
	Annex part 1. f)	Schedule 10 1 (f)
	Annex part 1. g)	Schedule 10 1 (g) and 2
	Annex part 2 a)	Schedule 10 3 (a)
	Annex part 2 a)	Schedule 10 3 (a)
	Annex part 2 b)	Schedule 10 3 (b)
	Annex part 2 c)	Schedule 10 3 (c)
	Annex part 2 d)	Schedule 10 3 (d)
	Annex part 2 e)	Schedule 10 3 (e)
	Annex part 2 f)	Schedule 10 3 (f)
	Annex part 2 g)	Schedule 10 3 (g)
	Annex part 2 h)	Schedule 10 3 (h)
	Annex part 2 a)	-
	Annex part 2 a)	-
	Annex part 3	Schedule 10 4 (a) (b)
Reservation and confidentiality	8	11
Operation of the representative body and procedure for the information and consolation of employees	9	12
Protection of employees' representatives	10	13
Misuse of procedures	11	14
Compliance with this directive	12	15 17
Link between this Directive and other provisions	13	16

The Netherlands

Transposition through the Involvement of Employees (European Companies) Act of March 2005 (*Wet rol werknemers bij de Europese vennootschap*)

Content	Articles in the Directive	National implementing provisions
Objective	1	No implementation needed
Definitions	2	1 :1, 1:2, 1:3, 1:26
Creation of a special negotiating body	3	1:4, 1:8, 1:9, 1:10, 1:11, 1:13, 1:13, 1:14, 1:15, 1:16, 1:34
Content of agreement	4	1:18
Duration of negotiations	5	1:17
Legislation applicable to the negotiation procedure	6	1:7
Standard rules	7	1:20, 1:21
Reservation and confidentiality	8	1 :4,
Operation of the representative body and procedure for the information and consolation of employees	9	1:5, 1:12, 1:26, 3:2
Protection of employees' representatives	10	1:4
Misuse of procedures	11	No implementation
Compliance with this directive	12	1:5
Link between this Directive and other provisions	13	1:6
	14	3:2, 1:1
	15	No implementation needed
	16	No implementation needed
	Annex 1	1:9, 1:22, 1:23, 1;24, 1:34
	Annex 2	1:4, 1:26, 1:27, 1:28, 1:29, 1:30
	Annex 3	1:31, 1:32, 1:33

Poland

Transposition through the Act of European Economic Interest Grouping and European Company (EEIG/SE) of 19 May 2005

Content	Articles in the Directive	National implementing provisions
Objective	1	1 point 3
Definitions	2	2 point 6 and 8;58
Creation of a special negotiating body	3.1	60-61
	3.2 a	62;64
	3.2 b	63;65-70
	3.3	71paragaraph1 and 2; 72;80
	3.4	75-76
	3.5	71paragraph3-4
	3.6	81
	3.7	73-74
Content of agreement	4	82-83
Duration of negotiations	5	77
Legislation applicable to the negotiation procedure	6	-
Standard rules	7	84-86
	Annex part 1. a)	87
	Annex part 1. b)	88-89
	Annex part 1. c)	93
	Annex part 1. d)	92
	Annex part 1. e)	90
	Annex part 1. f)	91
	Annex part 1. g)	95
	Annex part 2 a)	96
	Annex part 2 a)	-
	Annex part 2 b)	97
	Annex part 2 c)	98-100;103
	Annex part 2 d)	101;102paragraph1
	Annex part 2 e)	104
	Annex part 2 f)	102paragraph1
	Annex part 2 g)	105
	Annex part 2 h)	106
	Annex part 2 a)	-
	Annex part 2 a)	-
	Annex part 3	107paragarph 1 and3;108-111
Reservation and confidentiality	8	112-115
Operation of the representative body and procedure for the information and consolation of employees	9	78
Protection of employees' representatives	10	116-119
Misuse of procedures	11	120-121;133
Compliance with this directive	12	-
Link between this Directive and other provisions	13	-

Portugal

Transposition through Decree-Law 215/2005 of 13th December

Content	Articles in the Directive	National implementing provisions
Objective	1	1; 2.1
Definitions	2	4 (also 451and 496 of the Labour Code[v])
Creation of a special negotiating body	3.1	8.1; 6
	3.2 a	7.1 to 7.5
	3.2 b	7.7; 38; 39
	3.3	16.3; 9.c)
	3.4	11; 4.i)
	3.5	12; 13.3
	3.6	15; 20.1; 36.1; 36.3; 36.6
	3.7	35.1.a) and c); 35.5 to 35.9
Content of agreement	4	13.1; 16; 17; 18; 36.7
Duration of negotiations	5	14
Legislation applicable to the negotiation procedure	6	5.1
Standard rules	7	20
	Annex part 1. a)	22.1; 40
	Annex part 1. b)	22.2; 21.2
	Annex part 1. c)	23.1
	Annex part 1. d)	23.2
	Annex part 1. e)	21.1
	Annex part 1. f)	22.3
	Annex part 1. g)	36.2; 36.7
	Annex part 2 a)	24.1
	Annex part 2 b)	24.2; 24.3; 25; 26
	Annex part 2 c)	27
	Annex part 2 d)	23.3; 23.4
	Annex part 2 e)	28
	Annex part 2 f)	23.5
	Annex part 2 g)	No
	Annex part 2 h)	35.2 to 35.9
	Annex part 3	29; 30; 31; 32
Reservation and confidentiality	8	34 (also 458 to 460 of the Labour Code)
Operation of the representative body and procedure for the information and consultation of employees	9	33
Protection of employees' representatives	10	44 (also 454 to 457 of the Labour Code)
Misuse of procedures	11	No
Compliance with this directive	12	5.2; 37
Link between this Directive and other provisions	13	3

[v]Regarding the identification of national employees' representatives (art. 2.1.e)).

Slovakia

Transposition through Act no. 562/2004 of 9 September 2004, on the European Company as well as the amendment of other Acts

Content	Articles in the Directive	National implementing provisions
Objective	1	1 35
Definitions	2.a	1
	2.b	37 (1)
	2.c	Article 66a of Act no. 513/1991 Coll., Commercial Code
	2.d	37 (1)
	2.e	Article 11a of Act no. 311/2001 Coll., the Labour Code
	2.f	36 (2)
	2.g	36 (3)
	2.h	36 (1)
	2.i	36 (4)
	2.j	36 (5)
	2.k	36 (1)
Creation of a special negotiating body	3.1	37 (3)
	3.2 a	37 (1) 38 (1) 38 (3) 38 (4)
	3.2 b	38 (2) 38 (5) 38 (6) 38 (7) 38 (8) 38 (9) 38 (10) 38 (11)
	3.3	39 (1)
	3.4	40
	3.5	39 (2) 39 (4)
	3.6	41
	3.7	39 (3)
Content of agreement	4	39 (1) 42
Duration of negotiations	5	43 (1)
Legislation applicable to the negotiation procedure	6	37 (2)
Standard rules	7	43 (2) – (7)
	Annex, Part 1.a	45 (1)
	Annex, Part 1.b	45 (3) 45 (4) 46
	Annex, Part 1.c	47 (2)
	Annex, Part 1.d	47 (1)
	Annex, Part 1.e	45 (2)
	Annex, Part 1.f	45 (5)

Content	Articles in the Directive	National implementing provisions
	Annex, Part 1.g	48 (2) 48 (3)
	Annex, Part 2.a	48 (1)
	Annex, Part 2.b	50 (1) 50 (2) 51 (1)
	Annex, Part 2.c	50 (3) 51 (2) 51 (3) 51 (4)
	Annex, Part 2.d (voluntary)	not transposed
	Annex, Part 2.e	50 (4)
	Annex, Part 2.f	39 (2) 44
	Annex, Part 2.g	49 (1)
	Annex, Part 2.h	49 (2) 49 (3)
	Annex, Part 3	52 53
Reservation and confidentiality	8	54 (3) 42 (2)
Operation of the representative body and procedure for the information and consolation of employees	9	missing (only partially in Art. 36 (5) and through transposition of Part 2 of the Annex
Protection of employees' representatives	10	55 (1) 55 (2) 42 (2)
Misuse of procedures	11	35 44 (2)
Compliance with this directive	12	simple fact of the Directive transposition into national law by generally valid and binding Act Act no. 125/2006 Coll. on Labour Inspection Clause 9 of the Labour Code
Link between this Directive and other provisions	13	existence of the separate Act governing European company 35 (1) 48 (3)
	13.1 13.2	existence of the separate Act governing European company 35 (1) 48 (3)
	13.3 13.4	N/A
	14	Clause IV. of the Act
	15,16,17	N/A

Slovenia

Transposition through the Participation of Workers in Management of the European Public Limited-Liability Company Act (ZSDUEDD) adopted by the National Assembly on 2 March 2006

Content	Articles in the Directive	National implementing provisions
Objective	1	1
Definitions	2	3
Creation of a special negotiating body	3.1	4 (1,2)
	3.2 a	4(3), 5, 6
	3.2 b	8
	3.3	9 (1,2), 16(1)
	3.4	12 (1,2), 13(1,2)
	3.5	10
	3.6	14
	3.7	11
Content of agreement	4	9(2), 16, 17
Duration of negotiations	5	9 (3,4)
Legislation applicable to the negotiation procedure	6	15
Standard rules	7	18
	Annex part 1. a)	19 (1), 20(1)
	Annex part 1. b)	21 (1,2), 22
	Annex part 1. c)	21(3)
	Annex part 1. d)	21(4)
	Annex part 1. e)	20(2)
	Annex part 1. f)	21(5)
	Annex part 1. g)	23
	Annex part 2 a)	24-29
	Annex part 2 a)	19 (2)
	Annex part 2 b)	24
	Annex part 2 c)	25
	Annex part 2 d)	20 (3,4)
	Annex part 2 e)	26
	Annex part 2 f)	27
	Annex part 2 g)	28
	Annex part 2 h)	29
	Annex part 3	30-34
Reservation and confidentiality	8	36
Operation of the representative body and procedure for the information and consolation of employees	9	35
Protection of employees' representatives	10	37
Misuse of procedures	11	38 and 39
Compliance with this directive	12	2 and 38
Link between this Directive and other provisions	13	14 (1)

Spain

Transposition of Directive 2001/86/EC by Law 31/2006, of 18th October.

Content	Articles in the Directive	National implementing provisions
Objective	1	1
Definitions	2	2
Creation of a special negotiating body	3.1	4;5
	3.2 a	7
	3.2 b	14.2 ; 14.3
	3.3	8.1
	3.4	9.1;9.2
	3.5	9.5; 9.6
	3.6	8.2;8.3
	3.7	9.6
Content of agreement	4	8.1;11.1;11.2; 11.3
Duration of negotiations	5	10.1
Legislation applicable to the negotiation procedure	6	3.1
Standard rules	7	14
	Annex part 1. a)	15.1; 15.2
	Annex part 1. b)	16.1; 19
	Annex part 1. c)	18.2
	Annex part 1. d)	17.4
	Annex part 1. e)	16.2
	Annex part 1. f)	16.3
	Annex part 1. g)	15.3; 15.4
	Annex part 2 a)	17.1
	Annex part 2 b)	17.2
	Annex part 2 c)	17.3
	Annex part 2 d)	17.4; 18.3
	Annex part 2 e)	18.7
	Annex part 2 f)	18.4
	Annex part 2 g)	18.5
	Annex part 2 h)	18.6
	Annex part 3 a)	20.1
	Annex part 3 b)	20.2; 20.4; 20.5
Reservation and confidentiality	8	22; 36.4
Operation of the representative body and procedure for the information and consolation of employees	9	25
Protection of employees' representatives	10	23
Misuse of procedures	11	20.3; 26
Compliance with this directive	12	2.12; 3.5; 10 bis[vi]; 33-38
Link between this Directive and other provisions	13	Add. Prov. 1.1-1.4

[vi] Ley sobre Infracciones y Sanciones en el Orden social (LISOS). Law on the infrigements and sanctions in the social sphere.. Royal Legislative Decree 5/2000.

Sweden

Transposition through statutory law: Act SFS 2004/559 on the involvement of employees in European companies, of 10 June 2004

Content	Articles in the Directive	Sections in National legislation SFS 2004:559	Degree of implementation
Objective	1	No equivalent section	No
Definitions	2	5	Partially
Creation of a special negotiating body	3.1	6	Fully
	3.2 a	8-9	Fully
	3.2 b	7, 11-15	Fully
	3.3	22	Fully
	3.4	24-25	Fully
	3.5	23	Fully
	3.6	21, 26	Fully
	3.7	27	Fully
Content of agreement	4.1-	28-30	Partially
	4.2	28-30	Fully
	4.3-4.4	31	Fully
Duration of negotiations	5	20	Fully
Legislation applicable to the negotiation procedure	6	4	Fully
Standard rules	7	32-35	Partially
Annexes	Annex part 1	36-44 and 53	Fully
	Annex part 2	45-52, 54	Fully
	Annex part 3	55-63	Fully
Reservation and confidentiality	8	3, 66	Partially
Operation of the representative body and procedure for the information and consolation of employees	9	No equivalent section	No
Protection of employees' representatives	10	65	Fully
Misuse of procedures	11	67	Fully
Compliance with this directive	12	68-70 in 2004:559 and section 4 in 2004:703	Fully
Link between this Directive and other provisions	13		

United Kingdom

Transposition through Statutory Instrument 2004 No. 2326, of 13 September 2004

Content	Articles in the Directive	National implementing provisions
Objective	1	1, 17
Definitions	2	3, 16
Creation of a special negotiating body	3.1	18,21
	3.2 a	21,26
	3.2 b	23,24,25,26
	3.3	20,28,18
	3.4	29
	3.5	29
	3.6	30
	3.7	29
Content of agreement	4	27,28
Duration of negotiations	5	27
Legislation applicable to the negotiation procedure	6	17
Standard rules	7	32
	Annex part 1. a)	Schedule3 Part 1 (1)
	Annex part 1. b)	Schedule3 Part 1 (1)
	Annex part 1. c)	Schedule3 Part 1 (2)
	Annex part 1. d)	Schedule3 Part 1 (3)
	Annex part 1. e)	Schedule3 Part 1 (1)
	Annex part 1. f)	Schedule3 Part 1 (4)
	Annex part 1. g)	Schedule3 Part 1 (5)
	Annex part 2 a)	Schedule3 Part 2 (1)
	Annex part 2 b)	Schedule3 Part 2 (2,3)
	Annex part 2 c)	Schedule3 Part 2 (2,3,4)
	Annex part 2 d)	Schedule3 Part 2 (5)
	Annex part 2 e)	Schedule3 Part 2 (6)
	Annex part 2 f)	Schedule3 Part 2 (7)
	Annex part 2 g)	Not specifically transposed
	Annex part 2 h)	Schedule3 Part 2 (8)
	Annex part 3	Schedule3 Part 3
Reservation and confidentiality	8	37,38
Operation of the representative body and procedure for the information and consultation of employees	9	Not specifically transposed
Protection of employees' representatives	10	39, 40, 41, 42, 43, 44, 45, 46
Misuse of procedures	11	35
Compliance with this directive	12	19, 22, 23, 25, 31, 33, 34, 35, 36, 37, 38, 47, 48, 49, 50, 51, 52
Link between this Directive and other provisions	13	53, 54

Abbreviations

ArvbVG	*Arbeitsverfassungsgesetz*, SE-Act of Austria (Employee Involvement)
CAC	Central Arbitration Committee (Institution of United Kingdom)
CCT	*Convention collective núm. 84*, SE-Agreement of Belgium (Employee Involvement)
EC	European Company
LITSE	*Ley sobre implicación de los trabajadores en las sociedades anónimas y cooperativas europeas*, SE-Act of Spain (Employee Involvement)
LN	Legal Notice (Statutory of Malta)
RB	Employee Body of Representation
RSU	*Rappresentanza sindacale unitaria* (Representative Body of Italia)
SC	Select Committee
SE	*Societas Europeae*
SEBG	*Beteiligunsgesetz*, SE-Act of Germany (Employee Involvement)
SE-Directive	Council Directive 2001/86/EC, supplementing the Statute for a European company with regard to the involvement of employees
SEEG	*Gesetz zur Einführung der Europaischen Gesellschaft,* SE-Act Germany (Statute and Employee Involvement)
SI	Statutory Instrument with regard to European Public Limited-Liability Company, SE-Regulation of Ireland (Employee Involvement)
SNB	Special Negotiating Body
TSK	*Üleühenduselise ettevotja ja üleühenduselise ettevotjate grupi ja Europa äriü tegevusse töötajate kaasamise seadus*, SE-Act of Estonia (Statute and Employee Involvement