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CONSULTATION DOCUMENT

First phase consultation of Social Partners under Article 154 TFEU on the possible review of Directive 2001/86/EC supplementing the Statute for a European company with regard to the involvement of employees

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1. INTRODUCTION

The purpose of this document is to consult the social partners, in accordance with Article 154(2) TFEU, to obtain their views on the case for and possible direction of European Union action concerning the rules on employee involvement in the European Company (hereinafter ‘SE’).

Council Regulation (EC) No 2157/2001¹ (hereinafter ‘the Regulation’) establishes a Statute for a European company with a view to creating a uniform legal framework enabling companies from different Member States to plan and carry out the reorganisation of their business on a European scale. Council Directive 2001/86/EC² (hereinafter ‘the Directive’) supplements the Regulation concerning the involvement of employees³, and aims to ensure that creating an SE does not lead to a reduction of practices of employee involvement existing within the companies concerned.

As required under Article 15, the Commission issued on 30 September 2008 a report on the review of the Directive⁴. The report identified some issues that merit further consideration. However, given that the Directive is complementary to the Regulation, the Commission decided to consider the case and scope for revising both instruments after adoption of the report provided for in the Regulation.

On 17 November 2010, the Commission issued this report and an accompanying Commission Staff Working Document⁵. After identifying the main drivers and trends in the creation of SEs, the report highlighted a number of practical problems when setting up and running an SE some of which relate directly to the Directive. The accompanying Commission Staff Working Document supplemented the report with an inventory of SEs and an analysis of the way in which options in the Statute have been implemented in the different Member States. In the conclusions of the report the Commission acknowledged that *‘The European Company has made it possible for companies with a European dimension to transfer the registered seat cross-border, to better reorganise and restructure and to choose between different board structures, while maintaining the rights of employees to involvement and protecting*

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

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

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

⁴ COM (2008) 591

⁵ COM (2010) 676; SEC(2010) 1391

the interests of minority shareholders and third parties. The European image and supra-national character of the SE are other positive aspects of the SE.'

2. EMPLOYEES' INVOLVEMENT IN THE SE

2.1. Brief historical background

The Commission adopted in 1970 a first proposal for a Regulation on the SE which included provisions on the establishment of a European Works Council, on employee participation (1/3 representation for shareholders, 1/3 for employees and 1/3 for members co-opted by shareholders and employees) and on the conclusion of collective agreements. Following the comments made by the European Parliament and the European Economic and Social Committee, the Commission presented an amended proposal in 1975. It was not possible to reach the required unanimity partly due to the issue of employee participation and the discussions stalled in 1982.

In 1989, following adoption of the Single European Act in 1987, the Commission adopted a new proposal for a Regulation on the SE and a separate proposal for a Directive dealing with employee involvement. The Directive provided for two basic models of employee involvement to be chosen by agreement between employers and employees (participation in the bodies or establishment of a works council). However, the management and the employees could agree on a different solution provided certain minimum requirements were met. Following the opinions of the European Parliament and the Economic and Social Committee, the Commission presented an amended proposal in 1991. Once again, the required unanimity could not be reached mainly due to disagreement on employee involvement. Discussions stalled again in 1993.

Following the work of the group of experts led by Mr. Davignon⁶, the Council found a compromise solution on employee involvement and the Statute in 2000.

2.2. Main contents of the Directive

Before an SE can start operations, negotiations with employee representatives on employee involvement must be held⁷. The Directive regulates the procedures for these negotiations.

The fundamental principle and stated aim of the Directive is to secure employees' rights as regards involvement in company decisions. Employee rights in force before the establishment of SEs should provide the basis for employee rights of involvement in the SE (the 'before and after' principle). This aim is sought primarily by means of an agreement negotiated between the management of the companies concerned and the employees' representatives.

⁶ Group of experts 'European Systems of Worker Involvement'. Final Report. OPOCE 1997

⁷ According to the Regulation (Article 12(2)) '*An SE may not be registered unless an agreement on arrangements for employee involvement pursuant to Article 4 of Directive 2001/86/EC has been concluded, or a decision pursuant to Article 3(6) of the Directive has been taken, or the period for negotiations pursuant to Article 5 of the Directive has expired without an agreement having been concluded.*'

For the purpose of the negotiations, a special negotiating body (hereinafter ‘SNB’) representative of the employees must be created. Its main role is to negotiate the content of the right to employee involvement within the SE with the competent bodies in the participating companies. The negotiation may result in an agreement. However, a set of subsidiary rules apply if no agreement is reached by the deadline of six months (under certain circumstances one year) and, on behalf of the participating companies, their competent bodies decide to continue with the registration of the SE and, on behalf of the employees, the SNB has not decided either not to open negotiations or to terminate the ones already opened. These subsidiary rules may apply also if the negotiating parties so agree. The subsidiary rules deal with the composition of the body that represents employees, the content and procedures for information and consultation of employees and, eventually, employee participation in the board.

3. INVENTORY OF SEs

According to the report published by the European Foundation for the Improvement of living and working conditions (hereinafter ‘Eurofound’)⁸, as of 1st June 2010 a total of 588 SEs had been created⁹ of which 276 SEs (46% of the total) were registered in the Czech Republic and 133 were registered in Germany. 7 Member States had registered between 10 and 26 SEs, while in 12 Member States fewer than 10 SEs had been registered. Out of 588 SEs only 145 had more than 5 employees, and in the particular case of the Czech Republic, out of the 276 SEs set up only 20 had more than 5 employees.

Many SEs (160) were empty companies (i.e. with operations but without employees) or ‘shelf companies’ (i.e. ready-made companies which have fulfilled all the requirements for legal registration and can be bought by anybody). Even more SEs, which are likely to be operating, have very little information publicly available. Most are located in the Czech Republic and have been set up by activating a shelf company.

The above-mentioned publication by Eurofound reports that, as of 1 June 2010, according to the limited information available, out of the 145 SEs with operations and with at least five employees (‘normal SEs’) analysed, only 71 had set up an SNB. 61 had reached an agreement on employee involvement, half of which also had provisions on employee participation at board level. In 9 cases, the negotiations terminated or failed and in one case, the subsidiary rules were applied in the absence of agreement. In 9 SEs the employees decided not to set up a SNB.

4. ISSUES RELATING TO EMPLOYEE INVOLVEMENT IDENTIFIED BY THE COMMISSION

The three main problems raised by the above mentioned Commission and Eurofund reports can be summarised as follows:

⁸ Employee involvement in companies under the European Company Statute, European Foundation for the Improvement and working conditions, 2011

⁹ Source: European Company Data Base run by the ETUI. <http://www.worker-participation.eu/European-Company>.

4.1. The complexity of the procedure.

Several companies, legal advisors and business associations cited the complexity of the rules on employee involvement (in particular in Member States where the national legislation does not provide for a system of employee participation) and the fact that the negotiations on employee involvement had to be completed before registration of the SE as a negative driver for forming SEs. This opinion was not shared, however, by workers' organisations.

The SE's flexible rules on employee involvement in Member States where these matters are regulated by mandatory rules were seen as a positive driver.

The research carried out by Eurofound has confirmed that for a sample of ten SEs 'it took a great deal of effort to compile documentation on the subsidiaries, the number of employees and the existence of local employee representation. The companies had to make sure that no employees could challenge the validity of the SE on the basis that they had not been properly informed'. The research also highlighted, that, for the ten case studies chosen, 'the SE-specific process of negotiating employee involvement was not a hindrance in establishing an SE'¹⁰. It also found that 'against the background of the heterogeneity of national and local industrial relations in Europe, for a transnational company, the employee involvement has an added value since it creates a European level of interest representation and common transnational standards.' In any case, the application of the national rules implementing the Directive does not appear to have caused litigation in courts. Furthermore, no requests for a preliminary ruling to the European Court of Justice have been made so far.

4.2. The lack of legal certainty on certain aspects of the negotiation procedure

The Directive does not address certain aspects of the negotiation procedure nor certain situations. Some stakeholders found this to be a source of legal uncertainty. The following aspects were mentioned:

- In cases where no employees were eligible or want to be elected as a member of the SNB, negotiations cannot be started and the SNB cannot decide either not to open negotiations or to terminate the negotiations already opened.
- Although the Directive excludes in principle the application of the European Works Council Directive to SEs (Article 13), there is no provision governing the relationship between the Representative Body in the SE and the European Works Councils that might exist within the group of companies to which the SE belongs (at lower or higher level). The Directive does not govern the relationship between the national and transnational levels of information and consultation either.
- Although the Directive refers to the legislation of the Member State of the registered office to regulate the negotiation procedure, it does not explicitly address the method of calculating the number of workers.

¹⁰ These case studies largely reflect good practice cases according to the study. The SEs analysed were Allianz SE, BASF SE, Elcoteq SE, Fresenius SE, GfK SE, Hager SE, MAN SE, SCOR SE and STRABAG SE.

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

The following aspects were mentioned by some Member States with employee participation systems as well as ETUC:

- Regarding participation rights, the Directive does not regulate cases where changes occur in the SE after its registration. The issue of employee involvement in cases of structural changes to the SE or when activating SEs (SEs registered without employees or without operations that then become operational and hire employees) were singled out.
- The definition given in the Directive of participation does not acknowledge the participation at group level which is the level at which participation is exercised in certain Member States.
- In the absence of any limits set by the Directive, conversion of an SE into a public limited company (permitted by Article 66 of the SE Regulation) would be governed by the applicable national law. In some cases this could result in the loss or reduction of participation rights if the form of company adopted is not subject to employee participation or if the level of employee participation is lower.
- A Member State with an employee participation system and ETUC consider that a reduction in the size of the body in which participation is exercised may be considered a reduction of participation rights and that the size of the body should also be subject to negotiation.

5. AIM OF THE CONSULTATION

Under Article 154(2) TFEU, before submitting proposals in the Social policy field, the Commission must consult management and labour on the possible direction of Union action.

The Commission will examine the views expressed during this first phase, and will then decide whether there is a case for EU action. If the Commission decides that there is, it will launch a second-phase consultation of the social partners at EU level. That phase will cover the content of any proposal for action, in accordance with Article 154(3) TFEU.

The questions on which the Commission proposes to consult the social partners are as follows:

- (1) What is your opinion as regards the analysis contained in this paper regarding employee involvement in SEs? Are there any further issues that you consider should be added?
- (2) Do you think that the Commission should launch an initiative to amend the Directive in parallel with a possible review of the SE Statute? If so, what do you consider should be its scope?

- (3) Do you think that, apart from and/or instead of legislative measures, other action concerning employee involvement at European Union level merits consideration? If so, what form of action should be taken, and on which issues?
- (4) Would you consider initiating a dialogue under Article 155 TFEU on any of the issues identified in this consultation? If so, which?