

Chapter 3

From a European blueprint to national law

Lionel Fulton

1. Introduction

It is now more than 10 years since October 2001 when the European Union finally adopted two pieces of legislation allowing a European Company (SE), rather than a company governed by national laws, to be created for the first time. The legislation, which came after years of debate and difficult political wrangling (see Chapter 2), was set to come into effect three years later on 8 October 2004. It was to cover not just the Member States of the EU, which by that stage had increased to 25, but also Iceland, Liechtenstein and Norway, which together with the EU Member States make up the European Economic Area. It was later extended to the two states, Romania and Bulgaria, which joined the EU in January 2007.

This chapter looks at how the 30 states of the EEA have implemented this EU legislation, in particular, how the EU directive that provides for the involvement of employees has been transformed into national law. It finds that, although there are large areas where national legislation closely follows the EU-wide model, there are other areas where there are important differences between countries. The chapter is largely based on the texts of national implementing legislation, as well as on the information provided by the national SEEUROPE Network correspondents. It could not have been written without their input.¹

1. It also draws on an earlier examination of the national implementation legislation “Anchoring the European Company in National Law”, by Lionel Fulton (2006), and the material on worker-participation.eu website on the national transposition of the directive (see References). Other major studies on the transposition of the legislation are the Synthesis Report on Directive 2001/86/EC by Fernando Valdés Dal-Ré(2008), and the study on the operation and the impacts of the Statute for a European Company (SE) Final report, by Ernst & Young (2009), in particular Appendix 1.

2. A delayed introduction

The two pieces of legislation on the European Company, adopted by the EU in October 2001, had different legal forms. One, on the statute for a European Company (Council Regulation 2157/2001/EC), was a Regulation, and as such has direct legal force – it did not need to be implemented by countries to come into effect. The other, on the involvement of employees (Council Directive 86/2001/EC), was a Directive. This means that in each country it needs to be incorporated into national law – to be transposed – before it has legal effect in that country.

Both the Regulation and the Directive were due to come into force on 8 October 2004 but in practice there was considerable delay. By the original date only eight of the 28 states which should have transposed the SE Directive had in fact done so (see Table 1). These were four Nordic states – Denmark, Finland, Iceland and Sweden, two of the new Member States – Hungary and Slovakia, together with Austria and the UK.

Another five states – Belgium, Cyprus, the Czech Republic, Germany and Malta – transposed the legislation between the 8 October deadline and the end of 2004. Belgium is in this category, despite the fact that unions and employers reached a collective agreement on implementation on 6 October, before the deadline. However, it was only made legally binding by royal decree on 22 December 2004 more than two months later.

In the course of 2005 another 11 states transposed the SE Directive into national law, six in the first half of the year – Estonia, Latvia, Lithuania, the Netherlands, Norway, and Poland – and five in the second half – France, Italy, Liechtenstein, Luxembourg, and Portugal, although in the case of Liechtenstein the legislation, which was adopted in November 2005, only came into effect when it was published in February 2006.

However, by the start of 2006, more than a year after the SE Directive should have been implemented at national level, there were still four states – Greece, Ireland, Slovenia and Spain which had not done so. Slovenia finally adopted national legislation in March 2006, Greece in May 2006, Spain in October 2006 and Ireland was the last of the original 28 to transpose the Directive, doing so in December 2006 – more than two years after the original deadline. Of the two new states joining the EU in January 2007, Bulgaria passed appropriate legislation in June 2006,

well before its accession but in Romania legislation was only passed in February 2007, coming into force in March 2007.

It is unclear how this staggered start has influenced the subsequent creation and distribution of European Companies. But the lack of legal certainty, for example in the selection of members of the special negotiating body (see below) in countries that had not transposed the directive, may have contributed to the slow take-up of this legal form (see Chapter 1).

In theory, only the Directive on employee involvement needed national legislation; the Regulation on the statute of a European Company has direct effect. But in practice, only two Member States, Italy and Malta, appear not to have also introduced new national legislation or amended existing laws to take account of the changes to company law resulting from the Regulation.

In the great majority of cases, countries chose the legislative route to implement the employee involvement directive, rather than seeking to do so through a collective agreement. There was some consultation with unions and employers in all Member States (although both unions and employers in Slovakia complained that their involvement was too limited), but only two, Belgium and Italy, have clearly based their implementation on an agreement between the two sides (and both of these have followed up the original agreement with legislation).

In Belgium the collective agreement of 6 October 2004 was implemented by a royal decree on 22 December 2004. This said simply that the agreement would be legally binding and made the minister for employment responsible for implementing the decree. In addition, two further laws, one dealing primarily with confidentiality, the protection of employee representatives and supervision and the sanctions, the other with the judicial process, were passed on 10 August 2005 and 17 September 2005 respectively. Because of the involvement of the courts, these were issues which could not be regulated by the agreement.

In Italy a joint opinion was agreed by unions and employers on 2 March 2005. The legislative decree, which followed on 19 August 2005, essentially repeated the wording of the joint opinion but in certain areas, such as the penalties to be applied for failure to comply where the opinion called for 'appropriate sanctions', the decree spelled out the extent of the penalties, which range from €1,033 to €30,988.

Table 1 SE directive on employee involvement: incorporation in national law*

Country	Name of legislation	Date of incorporation
Austria	82. Bundesgesetz: Änderung des Arbeitsverfassungsgesetzes, des Bundesgesetzes über die Post- Betriebsverfassung und des Arbeits- und Sozialgerichtsgesetzes	15 July 2004
Belgium	Arrêté royal rendant obligatoire la convention collective de travail n° 84 du 6 octobre 2004, conclue au sein du Conseil national du Travail, concernant l'implication des travailleurs dans la société européenne Koninklijk besluit waarbij algemeen verbindend wordt verklaard de collectieve arbeidsovereenkomst nr. 84 van 6 oktober 2004, gesloten in de Nationale Arbeidsraad, betreffende de rol van de werknemers in de Europese vennootschap	22 December 2004
Bulgaria	Закон за информиране и консултиране с работниците и служителите в многонационални предприятия, групи предприятия и европейски дружества	30 June 2006
Cyprus	Act No 277(1) of 2004 supplementing the Statute for a European company with regard to the involvement of employees with a view to enhancing employees' rights to participate in management and decisions concerning the European public limited-liability company (SE)	31 December 2004
Czech Republic	Zákon č 627/2004 Sb. ze dne 11. listopadu 2004 o evropské společnosti	11 November 2004
Denmark	Lov om medarbejderindflydelse i SE-selskaber	26 April 2004
Estonia	Üleühenduselise Ettevõtja, Üleühenduselise Ettevõtjate Grupi ja Euroopa Äriühingu Tegevusse Töötajate Kaasamise Seadus	12 January 2005
Finland	Laki henkilöstöedustuksesta eurooppayhtiössä (SE) (758)	13 August 2004
France	LOI n° 2005-842 du 26 juillet 2005 pour la confiance et la modernisation de l'économie Décret n° 2006-1360 du 9 novembre 2006 relatif à l'implication des salariés dans la société européenne et modifiant le code du travail	25 July 2005 9 November 2006
Germany	SE-Beteiligungsgesetz (SEBG)	22 December 2004
Greece	ΠΔ 91/2006 - ΦΕΚ 92/Α/4.5.2006 Για το ρόλο των εργαζομένων στην Ευρωπαϊκή Εταιρία Presidential Decree 91/2006	4 May 2006
Hungary	2004. évi XLV. törvény az európai részvénytársaságról	24 May 2004
Iceland	Lög um Evrópufélag: 2004 nr. 26	27 April 2004
Ireland	European Communities (European Public Limited-Liability Company) (Employee Involvement) Regulations 2006, SI No. 623 of 2006	14 December 2006
Italy	Decreto Legislativo 19 agosto 2005, n. 188 Attuazione della direttiva 2001/86/CE che completa lo statuto della società europea per quanto riguarda il coinvolgimento dei lavoratori	19 August 2005

Table 1 (cont.)

Country	Name of legislation	Date of incorporation
Latvia	Eiropas komercsabiedribu likums	24 March 2005
Liechtenstein	Gesetz vom 25. November 2005 über die Beteiligung der Arbeitnehmer in der Europäischen Gesellschaft (SE-Beteiligungsgesetz; SEBG)	25 November 2005
Lithuania	Lietuvos Respublikos Įstatymas dėl darbuotojų dalyvavimo priimančioms sprendimams Europos bendrovėse	12 May 2005
Luxembourg	Loi du 25 août 2006 1. complétant le statut de la société européenne (SE) pour ce qui concerne l'implication des travailleurs et 2. modifiant la loi modifiée du 6 mai 1974 instituant des comités mixtes dans les entreprises du secteur privé et organisant la représentation des salariés dans les sociétés anonymes	25 August 2005
Malta	Regolamenti ta' l-2004 dwar Involvement ta' l-Impejgati (Kumpannija Ewropea	22 October 2004
Netherlands	Wet van 17 maart 2005 tot uitvoering van richtlijn nr. 2001/86/EG van de Raad van de Europese Unie van 8 oktober 2001 tot aanvulling van het statuut van de Europese vennootschap met betrekking tot de rol van de werknemers (Wet rol werknemers bij de Europese vennootschap)	17 March 2005
Norway	Forskrift om arbeidstakernes rett til innflytelse i europeiske selskaper	1 April 2005
Poland	Ustawa z dnia 4 marca 2005 r. o europejskim zgrupowaniu interesów gospodarczych i spółce europejskiej	4 March 2005
Portugal	Decreto-Lei n.º 215/2005 de 13 de Dezembro	13 December 2005
Romania	HOTARARE nr. 187 din 20 februarie 2007 privind procedurile de informare, consultare si alte modalitati de implicare a angajatilor in activitatea societatii europene	20 February 2007 Entered into force 7 March 2007
Slovakia	Zákon z 9. septembra 2004 o európskej spoločnosti a o zmene a doplnení niektorých zákonov	9 September 2004
Slovenia	Zakon o sodelovanju delavcev pri upravljanju evropske delniške družbe (SE) (ZSDUEDD)	10 March 2006 Entered into force 17 March 2006
Spain	Ley 31/2006, de 18 de octubre, sobre implicación de los trabajadores en las sociedades anónimas y cooperativas europeas	18 October 2006 Entered into force 1 November 2006
Sweden	Lag (2004:559) om arbetstagarinflytande i europabolag	10 June 2004
UK	Statutory Instrument 2004 No. 2326 – The European Public Limited-Liability Company Regulations 2004	13 September 2004

Note: * The texts of the national implementation measures as well as a large number of English translations are available at <http://ec.europa.eu/social/main.jsp?catId=707&langId=en&intPageId=212>

3. Discussions and debates

Although there was considerable delay in transposing the Directive in many states, it seems clear that this was not the result of substantial national debates on the substance of the Directive.

There seems to have been only one country, Germany, where the introduction into national law of employee involvement in European Companies sparked a significant national debate. Elsewhere, the discussions were largely technical, with three main issues emerging: the role of the unions in relation to other employee representatives; the costs and resources involved, particularly for time off; and – with an issue that relates primarily to the Regulation rather than the Directive – the implications of introducing a new form of corporate governance. This last concern seems to have been greatest where a one-tier system of a single board was introduced into countries where two-tier boards, with supervisory and management boards, previously provided the sole corporate governance structure.

Hungary provides an example of where the role of unions in relation to other employee representatives became a subject for discussions. In the consultation with unions and employers, the unions called for the local union representatives to be accepted as the normal form of representation, with works councils only being involved, if a union was not present. However, the government rejected this approach in favour of representation through the works council. In Portugal too, the unions were initially concerned that employee representation would be solely through works councils. However, following the election of a socialist government in February 2005, the legislation was changed, to allow the unions a much greater influence. In Spain, the employers' organisations opposed the suggestion in the draft bill – subsequently included in the legislation – that union representatives who were not employed by the companies involved could be members of the special negotiating body. This they saw as 'foreign to our model of industrial relations'. Employers in Belgium also raised similar concerns.

On costs, Spanish employers objected to the clause in the draft bill that gives those elected to represent employees in a future European Company the right to 60 hours' paid time off per year to carry out their functions. They saw this as overly generous. In Luxembourg, a similar point was raised but from a different point of view. The chamber of employees

in the private sector wanted the right to training extended to substitute employee representatives, while also complaining about the proposal that the employers should only be compelled to pay for a single external expert to advise the employees' side. The chamber wanted the same number of experts as there were companies involved. Concerns about the reimbursement of travel and accommodation emerged in the discussions in Lithuania, where the legislation finally passed states that 'the amount of such expenditure and the procedure for its reimbursement shall be established by the government'.

The introduction of the possibility of a single board of management into states that had previously only permitted a two-tier structure of management and supervisory boards was also the subject of some discussion. It was raised in Austria and the Netherlands and in Slovenia it became a major issue as the government decided to use the introduction of the European Company Regulation to make a major change to national company law. This gave Slovenian companies the right, for the first time, to choose between a one and a two-tier system.

These three issues – the role of unions, costs and resources and single or two-tier boards – do not constitute an exhaustive list of the issues raised in the process of national implementation. Other issues taken up have included the tax implications of companies moving their head offices (Sweden); the precise definition of consultation (Netherlands); the mechanism for dealing with disputes over potential misuse (Norway); and the potential removal of a national body representing employees at the top of a company (France).

Despite these particular concerns the overwhelming impression of the transposition process in most countries has been the distinct lack of interest in the issue. If the process has been delayed, it has not been because major national disagreements took time to resolve, rather that governments did not give the issue particularly high priority.

The one country which is an exception, where the transposition of the Directive on employee involvement in European Companies led to a wider national debate, was Germany. Here the main employers' organisations, the BDA and the BDI, used the need to transpose the SE Directive to call for major changes in the existing German system of employee participation at board level. In a report published in November 2004, the employers argued that the German system of employee involvement

needed to be ‘fully renewed’ (BDA/BDI 2004: 27). Much of the debate on the Directive’s transposition in the Parliament and the press focussed on these criticisms.

The then German government rejected the employers’ immediate demands but in July 2005 it set up a ‘Commission on the Modernisation of Co-determination’, whose remit was to produce ‘proposals for the further development of German employee involvement at board level, which is both modern and suitable for Europe’. The Commission, which was composed of three representatives each of the employers and the employees and three independent academic members, was unable to reach an agreed conclusion. The three academic members presented their own proposals in December 2006, which suggested a number of adjustments to the existing system but concluded that there was no need for fundamental change (Kommission zur Modernisierung der deutschen Unternehmensmitbestimmung 2006). This has not led to any new legislative proposals.

4. The contents of the legislation – who represents employees?

In transposing the SE Directive the EEA countries have to a large extent reproduced its wording in their own national legislation. But in a number of areas the Directive had to be adapted to national conditions and in some others there are significant differences in the approach taken by countries.

One of the key areas where a distinctive national choice had to be made is in the selection of the special negotiating body (SNB) – the body representing employees that negotiates the terms of future employee involvement with the management of the planned European Company.

The Directive itself says that ‘Member States shall determine the method to be used for the election or appointment of the special negotiating body who are to be elected or appointed for their territories.’ It goes on to give Member States the option of permitting trade union representatives who are not employees of the companies involved to be full members of the SNB. What is interesting is not just the choices that countries have made in these two areas but also how they relate to their existing industrial relations systems.

Looking at the choice of SNB members it is possible to divide the countries into three broad groups, although some countries straddle the boundaries. The groups are:

- where the SNB members are chosen by works councils or similar bodies;
- where they are chosen by the unions; and
- where they are directly elected by employees.

There are seven countries (see Table 2) where SNB members are chosen by works councils or similar bodies. In Germany, Austria and the Netherlands and to a lesser extent Hungary, there are complex rules to take account of the company and group structures for works council representation. In Belgium the employee members of the works council or health and safety council normally make the choice but the fall-back is the union delegation. This reflects the fact that the works council or health and safety committee, while elected by all employees, are union bodies to the extent that only unions can nominate their members.

Table 2 Selection of SNB members by works councils or similar bodies

Country	Method of choosing SNB members
Austria	Chosen by the works council structure, taking account of the possibility of having central/group works councils covering several workplaces.
Belgium	Chosen by the employee members of the works council. If no works council then chosen by the employee members of the health and safety committee which has similar powers to the works council in smaller workplaces. If no health and safety committee then chosen by union delegations.
Germany	Chosen by electoral body drawn from the works council structure, taking account of the possibility of having central/group works councils covering several workplaces.
Hungary	Chosen by the works council structure, taking account of the possibility of having central/group works councils covering several workplaces.
Liechtenstein	Wording is simply that SNB members will be chosen by the existing employee representation, which should be elected where there are 50 or more employees.
Luxembourg	Chosen by employee delegates.
Netherlands	Chosen by the works council structure, taking account of the possibility of having central/group works councils covering several workplaces.

There are 17 countries, the largest group, where SNB members are chosen by unions, normally the local union organisation. Included in this group are four Central and Eastern European states, the Czech Republic, Latvia, Lithuania and Slovakia, where the legislation refers to ‘employee representatives’ rather than specifically unions but in practice in the vast majority of cases it will be the local union body that fulfils this role.

The precise mechanism by which the union selects the candidates varies from country to country (see Table 3) and there are also varying arrangements for dealing with situations where several unions may be present. In France and Spain, the results of the most recent works council election are the basis for this decision. In Poland, on the other hand, it is hoped that the unions will agree. But where they do not there is an election for SNB members on the basis of competing lists. In Denmark and Italy the existing structures that represent all employees – the ‘co-operation committee’ in Denmark and the RSU in Italy – make the choice. But as these are essentially union bodies, these countries have been included under the union heading.

Table 3 Selection of SNB members by trade unions

Country	Method of choosing SNB members
Cyprus	Elected from existing trade union organisations which represent employees.
Czech Republic	Wording refers to ‘employee representatives’, which in most cases means the local union, as there are relatively few works councils.
Denmark	Chosen by ‘co-operation committee’ which represents all employees but whose employee members are trade union representatives.
Finland	Wording says ‘by agreement or elections’ but in most cases will be through agreement with the unions.
France	Chosen by unions from among the elected works council members or the appointed trade union delegates on the basis of union results in the most recent elections.
Greece	Chosen by union structure in company; only if there are no unions are they chosen by works council.
Iceland	Elected by union representatives.
Italy	Chosen by the trade union representative body in the company, normally the RSU, which is two-thirds elected by all employees and one third appointed by the unions.
Latvia	Employees can decide that they wish to be represented by ‘existing employees’ representatives’, rather than electing representatives especially for this task. In practice existing representatives will normally be union representatives.

Table 3 (cont.)

Country	Method of choosing SNB members
Lithuania	Appointed by 'employees or their representatives'. In most cases employee representatives will be union representatives as a works council can only be set up where there is no existing union organisation.
Norway	Chosen by local trade union bodies provided they represent two-thirds of employees and the unions agree.
Poland	Chosen by the local union. If there are several unions they should agree on the members and where they cannot agree there is an election based on union lists.
Portugal	Chosen through agreement between works council and unions, or by the unions if they represent two-thirds of employees.
Romania	Chosen by legally established unions. If there is no union they are chosen by employee representatives.
Slovakia	Appointed by employee representatives. These can be the local union body or the works council (less likely).
Spain	Chosen by the unions that together have a majority on the works council.
Sweden	Chosen through agreement between unions that have collective agreements with the company.

Portugal theoretically provides for joint decision-making between both the works council and the union. But, in practice, most works councils only exist in large companies where unions are strong. Portugal has, therefore, also been included in the list of states where the union makes the choice.

There are six states – Bulgaria, Estonia, Ireland, Malta, Slovenia and the UK – where the SNB members are directly elected by the workforce (see Table 4), although in three of these, there are also alternatives.

In Bulgaria, SNB members should be elected at a general meeting of all employees, or if not all can attend – because of shift patterns, for example – by a meeting of representatives of all employees. However, this meeting can decide to transfer its right to elect the SNB members either to the trade union structures or to other existing employee representatives, provided they have previously been elected at a general meeting with the support of two-thirds of those present.

In the case of Ireland, the legislation allows for both election and appointment of SNB members. The election procedure is set out in some detail, indicating who can stand and who can nominate – two employ-

Table 4 Selection of SNB members by direct election

Country	Method of choosing SNB members
Bulgaria	Elected at a general meeting of all employees, although the meeting can decide to transfer its rights to choose SNB members either to the union or to other elected employee representatives.
Estonia	Elected at general meeting of all employees or, where there are several companies, by delegates elected at general meetings.
Ireland	Elected or appointed to represent employees.
Malta	Elected by ballot of all employees.
Slovenia	Elected by all employees in a secret ballot.
UK	Elected by employees unless there is an existing 'consultative committee'. In most cases this consultative committee will not exist.

ees, or a recognised union or similar body. But where SNB members are 'appointed' by the employees, the legislation is less precise as to how this should be done. It states, only the 'basis on which that appointment is made may ... be such as is agreed by them [the employees] with the participating companies'.

In the UK, instead of elections, SNB members can be appointed by a 'consultative committee'. But this must be a body that represents all employees, consists only of employees of the company, and whose normal functions include information and consultation. In most UK companies, including larger ones, these bodies do not exist, so in most cases UK members of SNBs will be directly elected.

The complex arrangements for choosing SNB members in these 30 states by and large reflect their existing industrial relations systems. It is no surprise, for example, that it is the unions that choose the SNB members in Cyprus, Iceland, Norway and Sweden, as it is the unions that provide employee representation in all these states. Similarly, it is no shock that SNB members are elected through the powerful works council systems in Germany and Austria.

However, there are some states, where it can be argued that the existing industrial relations practices are not fully reflected in the legislation on employee involvement in European Companies, to the disadvantage of the unions.

In Estonia, the existing situation at national level is that employee representation is through unions if it exists at all. However, rather than giving the right to choose SNB members to existing employee representatives, that is the union, and allowing direct election as a fall-back – the path followed in Latvia – the legislation provides only for direct elections.

In Hungary, unions and works councils co-exist in the national system and have widely overlapping rights on information and consultation and while nominations to company supervisory boards at national level are made by the works council, it must take the views of the union into account. However, the legislation on European Companies states only that ‘the member(s) of the special negotiating body shall be appointed by the works council’ or central works councils if these exist. The local unions have no role.

In Ireland, trade unions are the main channel for employee representation, as the official Code of Practice on employee representatives published by the Labour Relations Commission (LRC) indicates.² However, this position is not reflected where SNB members are directly elected by employees, although where they are appointed (see above) it may be.

In Malta existing domestic legislation says that for the purposes of information and consultation in the case of redundancies and transfers the ‘employee representative [...] means the recognised union representative’ (Employment and Industrial Relations Act 2002, Article 2) and the level of union membership is relatively high at 48% of all employees (The Malta Government Gazette 2010). Despite this the legislation on employee involvement in European Companies provides only for an employees’ ballot to choose SNB members.

The final example of this trend is in the UK, where, as in Malta, recognised unions are the normal channel for consultation on redundancies and transfers. Here too the European Company legislation provides for a ballot of employees to choose the SNB members, unless there is an existing ‘consultative committee’. The local union organisation, even if

2. Although the Code of Practice is not itself legally binding, its provisions can be taken into account by the courts, and it defines employee representatives as individuals ‘formally designated employee representatives for that undertaking or establishment by a trade union [...]’ (Labour Relations Commission 1993).

it represents the vast majority of employees cannot, in contrast, choose the SNB members.

One final point should be made on the method for selecting SNB members. This is that the arrangements set out in Tables 2 to 4 above reflect the normal situation, where there is a works council or a local union organisation. However, in all states these bodies become much less common as workplace size falls. This is not of major concern in domestic industrial relations which are dominated by medium-sized and larger organisations.

However, in European Company negotiations, where every state with employees must be represented, no matter how small the number, employee representatives from smaller workplaces can play a disproportionate role. The result may be that on some SNBs the bulk of members may not be chosen under the normal provisions set out in the Tables but rather under each state's fall-back provisions. In every case this is some form of direct election by all employees.

A second issue where countries could make a choice on SNB members was in deciding whether they could include union representatives who were not employees.

Just under half of the states – 14 out of 30 – state specifically in the legislation that union representatives, who are not employed by the companies involved, can be full members of the SNB. They are Austria, Belgium, Czech Republic, Germany, Hungary, Ireland, Italy, Malta, Luxembourg, Poland, Portugal, Slovakia, Spain and the UK. In the case of both Malta and the UK this is provided that management agrees. The situation for Italy is somewhat unusual as the legislation specifically says that SNB members do not have to be employees of the company involved, but they are elected from the trade union representative body, which normally consists of company employees. In Germany, if there are more than two German members of the SNB, then every third member must be a representative of a trade union that has members in the company.

There are three countries – Denmark, Liechtenstein and Norway – where the legislation specifically restricts SNB membership to company employees. And there are a further 13 countries – Bulgaria, Cyprus, Estonia, Finland, France, Greece, Iceland, Latvia, Lithuania, Netherlands, Romania, Slovenia and Sweden – where the legislation itself is not specific.

However, in at least four of them – Finland, France, Iceland, and Sweden – the existing arrangements make it very unlikely that the SNB would include members who were not employed by the companies involved.

5. Experts

The SE Directive gives SNB members the right to be assisted by external experts and this provision has been included in the legislation passed by all countries. The wording in the Danish legislation is fairly typical, repeating the wording in the SE Directive that ‘for the purposes of the negotiations, the special negotiating body may request assistance from experts of its choice’.

However, the issues that vary between countries are whether trade union bodies are specifically referred to in relation to experts and the number of experts that the company or companies involved can be compelled to pay for.

In a majority of states – 17 out of 30 – the legislation refers specifically to trade unions. In 15 of these – Belgium, Bulgaria, Czech Republic, Denmark, Estonia, Finland, Germany, Greece, Hungary, Ireland, Italy, Luxembourg, Romania, Slovenia and Spain – the reference, as in the Directive, is to union bodies at European level. In the Icelandic legislation it is to unions at European Economic Area level (Iceland is in the EEA not the EU) and in Norway – also in the EEA not the EU – the reference is simply to unions.

There are, however, 12 states that refer to experts but make no specific mention of European-level trade unions providing this expertise. These are Austria, Cyprus, France, Malta, Latvia, Liechtenstein, Lithuania, Netherlands, Poland, Portugal, Slovakia and the UK.

This leaves Sweden, which refers to experts being present who ‘promote coherence and consistency’ at EU level – the reason given in the SE Directive for having EU level union organisations involved – but not to specifically to having union experts.

The position is more clear-cut on paying for experts. Most countries – 22 of 30 – limit the costs borne by the company or companies to a single external expert. The eight that do not impose this limit are:

Bulgaria, where the legislation gives the SNB the right to ‘request experts of its choice’ and where ‘any expenses relating to the functioning of the special negotiating body shall be borne by the participating companies’;

Finland, where ‘reasonable costs’ for the services of experts should be met;

Germany, where the company should cover ‘the expenses incurred in connection with the establishment and activities’ of the SNB;

Hungary, where the company is liable for ‘justified necessary expenditure’;

Ireland, where the situation is similar to that in Bulgaria, and the SNB has a right to ‘engage experts of its choice’, and ‘reasonable expenses relating to [its] functioning shall be borne by the participating companies’;

Latvia, where ‘any expenses relating to the functioning of the SNB ... ensuring appropriate conditions’ should be borne by the company (this is unlike the situation for the representative body set up after the creation of a European Company, where there is a clear limit of one expert);

Netherlands, where costs which are ‘reasonably necessary’ are borne by the company but only where the participating companies are notified of the costs in advance; and

Sweden, where the text states that expenses are borne by the company ‘to the extent required’ to enable the SNB to carry out its tasks ‘in the appropriate manner’, but where the government has also made it clear that, while it did not propose to impose a limit, in normal cases it would be reasonable to have only one, although in special circumstances there might be more.

6. Structural changes and misuse

One of the concerns expressed in the discussion on the SE Directive was that the procedure might be misused to reduce the rights of employees to be involved at board level. In particular, there were fears that a European Company could be set up by companies from countries with very limited or no employee involvement at board level – meaning that these

rights would be limited in the new European Company, but then new companies could be brought in from countries where board-level rights were more extensive. The employees from the companies brought in later could lose their rights as a result.

The SE Directive therefore included the following wording: ‘Member States shall take appropriate measures in conformity with Community law with a view to preventing the misuse of an SE for the purpose of depriving employees of rights to employee involvement or withholding such rights’.

Most countries have included wording referring to action to be taken against misuse of the European Company in this way. Out of the overall total, 19 include provisions along these lines. These are Austria, Cyprus, Denmark, Estonia, Finland, Germany, Greece, Iceland, Ireland, Italy, Liechtenstein, Lithuania, Luxembourg, Malta, Norway, Poland, Spain, Sweden and UK. In addition France and the Netherlands have tackled the problem of potential misuse by a wider reference to major structural changes after the European Company has been set up (see below).

Only nine states – Belgium, Bulgaria, Czech Republic, Hungary, Latvia, Portugal, Romania, Slovakia and Slovenia – do not appear to have dealt explicitly with the issue of this sort of misuse, although the Portuguese legislation contains a general reference to not violating the procedures and the Slovenian legislation provides for penalties, when information and consultation does not take place, or does not take place within due time. It is perhaps significant that the Czech Republic, which has the largest number of SEs of any EEA state (see Cremers and Carlson in this book), and where many have been set up without employees or employee involvement, did not include dealing with a misuse of procedures in this way in its implementing legislation.

Several of the states referring to misuse include a time limit, generally of one year, which states that if during that period there are substantial changes in the composition of the European Company, it is up to the company to prove that the purpose of the changes was not to deprive employees of their rights. The wording in the Icelandic legislation provides an example of this: ‘if such a change occurs within a year of registration of the SE, the burden of proof that the grounds for the change are other than those specified in paragraph 1 [intending to deprive employees of their rights] shall lie with the SE’. The other states including similar provisions are Austria, Denmark (two years), Finland, Liechtenstein, Nor-

way, Sweden and the UK. In Luxembourg the legislation includes a one-year limit but no reversal in the burden of proof.

The other issue is how to deal with later structural changes which are not simply an attempt to misuse the legislation but which nevertheless have a major impact on the composition of the company and potentially on participation rights.

Part of the solution in the SE Directive is the requirement to include the 'cases where the agreement should be renegotiated and the procedure for its renegotiation' in the content of the agreement and all of the countries include clauses along these lines in their national implementing legislation.

However, this leaves the issue up to the negotiating parties and six countries have put in greater safeguards:

Austria – the SNB should be convened at the request of 10% of the employees or their representatives or if the body representing employees within the European Company call for it, when there have been significant changes in the structure of the European Company which 'have a bearing on ... participation rights';

France – if there are substantial structural changes after the creation of an SE which would have a substantial effect on the involvement of employees, there should be new negotiations;

Germany – where there are structural changes likely to lead to a reduction in participation rights then a renegotiation should take place;

Malta – the agreement should include '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';

Liechtenstein – new negotiations should take place when there are structural changes that reduce the participation rights of employees; and

Netherlands – the agreement should include the circumstances in which a new agreement should be negotiated as well as a procedure for doing this, including how it should be adapted to changes in the structure of the European Company and the number employed, as well as the impli-

cations of not concluding a new agreement. If the agreement does not include these provisions, or if the period before renegotiation is longer than two years, then there should be renegotiation if 20% of all employees or their representatives in Europe request it.

7. The standard rules

In order to provide a fall-back position if the negotiations between management and the SNB fail to reach an agreement, the SE Directive includes a set of standard rules. These cover both the arrangements for the overall body representing employees, and the arrangements for employee involvement at board level where pre-existing rights to board-level involvement mean that this is legally required.

In both cases there are some differences between countries in how the national representatives on these bodies are chosen.

The arrangements for the overall body representing employees – often referred to in the national legislation as the representative body³ – show least variation. In 26 of the 30 states the representative body is elected in the same or a very similar way to the SNB. These are Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Italy, Liechtenstein, Lithuania, Luxembourg, Netherlands, Norway, Poland, Portugal, Romania, Slovakia, Slovenia, Spain and Sweden. In Italy and Luxembourg there are some differences in the wording, and in Hungary and Poland the option of having external union representatives as members, possible in the SNB, is excluded.

The exceptions are the UK, where the SNB appoints the representative body, and Ireland, Latvia and Malta, which have not drawn up detailed national rules on the issue but have essentially repeated the generalised wording of the Directive.

The position is slightly more varied when it comes to choosing employee representatives at board level. Just under half of the states, 14, have said that the mechanism for choosing the individuals representing employees in their countries should be the same as for choosing the national mem-

3. It is also given other names, for example, the SE Works Council in Austria and the employees' council in Sweden.

bers of the SNB. These are Austria, Belgium, Cyprus, Estonia, Finland, Germany, Iceland, Liechtenstein, Lithuania, Netherlands, Norway, Portugal, Spain and Sweden.

Three – the Czech Republic, France and Slovakia – have chosen to use the method already followed nationally to select employee representatives at board level. In all three cases this is an election by all employees.

Another three, Denmark, Luxembourg and Poland, have written into the legislation that the method should be an election.

Finally, nine Member States – Bulgaria, Hungary, Greece, Italy, Latvia, Malta, Romania, Slovenia and the UK – have not fixed a national method for making the choice, but left the selection in the hands of the representative body in the European Company. In Hungary there is a further condition that representative body members themselves may not take up a board-level post. In Ireland, in contrast it is the Irish members of the representative body who choose the employee board level representatives from Ireland, but they can only choose them from among themselves.

There are clearly other areas of difference between the transposition legislation of the 30 states examined, although these are generally less significant and a lack of space prevents them being explored.

However, it is worth pointing to one area where all 30 have taken a common line. This is the possibility of opting out of all arrangements that provide for employee involvement at board level. The price of doing so is that no European Companies, where previously there had been employee involvement at board level, could be registered in a country that had opted out (see Article 12.3 of the Regulation on the European Company Statute). This option was included in the SE Directive at the insistence of the then Spanish government. However, no EEA country has made use of it. Clearly, the concerns that some countries may have had about increased employee involvement have been outweighed by the need to allow European Companies to be set up within their borders.

8. Conclusions

In many ways the most important fact about the transposition is that it actually took place. Although there was some delay, at the end of the

process there are now structures that allow a European Company to be set up with employee involvement from across the European Economic Area (EEA). Given that some of the SEs that have been established have been major multinationals with operations in many of EEA's 30 states, this is an important development.

In most countries transposition was seen as essentially technical and did not generate wide debate. The debate on the issue in Germany reflects the much greater importance of employee board level in that country, where it is seen by many as an essential part of a consensus-based approach to economic and industrial relations problems. This view was confirmed by the academics who reported on employee participation in an official review set up as a consequence of the debate on the SE.

In many ways the SE is a national and European hybrid, with European elements being added to existing national structures to create an entity that can operate across Europe, and this can be clearly seen in the national implementation of the SE Directive. Much is common across all 30 sets of legislation, sometimes simply copied out from the directive, but particularly on the issue of employee representation – the choice of SNB members and the operation of the standard rules – it is existing national practices that dominate. Where works councils are the main form of employee representation nationally, it is they who choose the SNB members and the representative body. Where unions play the key role in national structures, they also decide who represents their countries' employees within the SE. The main exceptions to this rule are where national legislation gives primacy to elections in choosing employee representatives for the SE.

Experience of SEs since transposition has thrown up a number of problems which national legislation does not satisfactorily deal with, in particular the large number of SEs which have been set up without employees. This is particularly evident in the Czech Republic but also occurs elsewhere. If there are no employees, then, by definition, most of the SE Directive, which depends on negotiations with employee representatives, cannot apply. The provisions in the Directive that deal with misuse potentially provide some protection against the threats to employee rights posed by this development. However, it is unfortunate that almost a third of all states, including the Czech Republic, do not include adequate clauses on misuse in their national transposition and that others have limited the protection – normally to just one year.

This is a weakness that a minority of states have addressed in their transposition legislation. They have included provisions allowing negotiations to be reopened if there are changes in the SE which have an impact on employees' rights. However, in most cases the right to ensure effective employee information, consultation and participation only exists when the SE is initially set up.

As an SE can be set up anywhere in the EEA and can subsequently develop to include employees from across Europe, a gap in the protection of employee involvement rights in one country can in time affect these rights in other states. The chain of protection is only as strong as its weakest link.

However, the problem here is not that national legislation has implemented the terms of the SE Directive inadequately. It is that the wording of the Directive fails to deal with the issue. This is a question for European rather than national legislators.

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