ETUC response to European Commmission's 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

General remarks

European Companies (SE) represent a cornerstone in workers' involvement at transnational level. The SE Directive (Directive 2001/86/EC) linked to the SE statute (Regulation EC 2157/2001) has introduced for the first time participation rights for workers at board level. Negotiations must be carried out with a view to establish information and consultation procedure through the establishment of a SE works council.

In the view of the ETUC the European Company (SE) gives rise to new opportunities for both sides of industry. This is the first time that businesses are able to operate within a single legal body throughout Europe. But it is also the first opportunity for involvement of all SE employees subject to the same European standard of information, consultation and participation. This is the reason why the European trade union movement welcomed this new legislation in October 2001 as an historic step on the road to improved industrial democracy and civil society in Europe.

The ETUC wants to stress that the SE legislation represents a European form of corporate governance; it was not intended to be - and must not be allowed to become - an instrument putting national regulations in competition with each other. The current SE legislation in this sense represents a balanced compromise, reached after more than 30 years of intensive discussions between Member States, including the difficulty to organise the workers' voice within the SE. Employee involvement in the SE is an elementary part of the SE. Transnational arrangements on worker involvement are not a minor matter, but represent a key feature of the European Company (as expressed by the SE Directive). Equally, the SE legislation cannot be considered as an escape hatch for 'unwanted' national regulations.

The ETUC is very concerned that, whilst overemphasising the employee involvement criterion (employee involvement being presented as a key negative driver without making it clear that this thesis was based on a perception by a group of potentially biased interviewees and not on the legal reality), the 2010 consultation of the SE Regulation has underestimated the influence of genuine business reasons to explain the attractiveness or not of the SE in

specific national contexts. In its 2010 reply to the SE Regulation consultation the ETUC suggested possible areas for further investigation:

> "in particular the scale of activities of companies, which can be linked to the structure of national economies (e.g.: in some Member States, the predominance of SMEs without European activities might explain why companies do not consider to apply for the SE. Similarly, undertakings being branches of multinationals companies rather than head offices will seldom consider converting into an SE). The ETUC also regrets that the study fails to give concrete answers to the reason for the creation of shelf SEs, especially in the Czech Republic. Given the scale of the phenomenon, it is important to gather more material in particular to ensure that the objectives of the SE legislation are not being by-passed."

The ETUC welcomes that the Commission recognises in the consultation document the large proportion of shelf SEs as a problem; this is a step in the right direction. There is risk of serious abuse, which has to be tackled. Finally the ETUC underlines the need for a European company register. In their respective submission papers for the 2010 SE Regulation consultation the ETUC and BusinessEurope shared the view that there has to be a European registry for SEs (and this was backed by a broad range of contributors, including the Chambers, several researchers and lawyers). Unfortunately this shared point of view, bringing together the European social partners, was virtually neutralised in the European Commission's summary, by the phrase 'a few respondents proposed the creation of a European Register'.

In this first phase consultation the ETUC answers to 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?

According to the cover letter the European Commission has identified three problematic areas concerning the rules on employee involvement contained in the SE Directive, i.e.

a) the complexity of the procedure for employee involvement;

b) the lack of legal certainty concerning certain aspects of the negotiation procedure;

c) the concern that the use of the SE form could have an effect on the rights to employee involvement granted by national or EU law.

The complexity of the procedure for employee involvement

The ETUC cannot subscribe to the first part of the analysis (under a) that is to a large extent based on the findings of a study by Ernst&Young. This study had serious methodological flaws, which cast doubt on its conclusions (see the ETUC reply to the EU online consultation on the E&Y study: http://www.etuc.org/a/7286), plus it overvalues the importance of employee involvement as a negative driver for the establishment of SEs. As noted in earlier contributions the negative driver is not the employee involvement regime as such but rather the myths about participation in the SE. According to the 'before and after principle' there is no obligation to introduce participation rights, in cases where there is no participation previously. Many employers are probably not aware of the real meaning of the 'before and after principle'. A negative driver is therefore the prevailing lack of adequate information on the SE and missing national experience in many countries.

The ETUC has some indications that the SE rules have made life even easier for companies. And there is some proxy evidence in this regard collected during the earlier consultations. In different fora representatives of employers' organisations with practical experience in the field have asserted that employee involvement cannot be regarded as problematic. And in some replies to the SE Regulation consultation directly involved individual companies made quite balanced contributions. For instance, BP mentioned the administrative costs of the planned employee involvement, but admitted that these costs would also be encountered in the case of a cross-border merger under another jurisdiction. Allianz was very positive about the flexibility of the employee participation model and the European composition and identity of employee involvement. According to Allianz this opens the way to new participation models. Other companies confirmed that the SE provides flexibility regarding employee involvement. The Eurofound study referred to represents a well-informed and balanced analysis of employee involvement in the SE. It confirms the value of the existing mechanisms for employee involvement and that in practice "the SE-specific process of negotiating employee involvement was not a hindrance in establishing an SE" (already quoted by COM), an analysis we share.

The ETUC is against a simplification of the procedure. The existing mechanism is a balanced compromise that should not be put into question, as highlighted by the EU COM in 2008:

> „The Commission acknowledges the complexity of the procedure instituted by the Directive for employee involvement. However, it should be recalled that the adoption of the Directive was the result of a delicate compromise among Member States that took more than 30 years of negotiations to achieve." (COM(2008)591 final)

Employee involvement is not just a technical issue but is a key element of the SE (as stated in recital 3 of the SE Directive: „In order to promote the social objectives of the Community, special provisions have to be set, notably in the field of employee involvement, aimed at ensuring that the establishment of an SE does not entail the disappearance or reduction of practices of employee involvement existing within the companies participating in the establishment of an SE".

Also with regard to the costs and the timeframe of the negotiations the ETUC has replied at an earlier stage that even the Ernst&Young study dismisses itself the myth (albeit briefly) by acknowledging that the 6 months period is rarely reached or exceeded (p.241). This proves that both negotiating parties take their responsibilities very seriously and try to achieve an agreement within a reasonable timeframe.

The ETUC is of the opinion that if the worker involvement arrangements are to be more than just an empty commitment on paper then indeed a period of six months for the negotiations seems adequate. On the other hand, taking into account the fuzzy point of departure for negotiations within the SNB, a body with, in most cases, a very diverse composition, the lack of information about SEs and the fact that the diverging transposition laws of specific EU member states are usually only available in the national language, it may even be argued that the results achieved within six months are remarkable. The negotiation process is an indispensable stage to achieve tailor- made solutions, best suited to both parties. Practice shows that there is a clear preference in (future) SEs for reaching a tailor-made agreement, rather than simply applying the standard rules.

The lack of legal certainty concerning certain aspects of the negotiation procedure

The ETUC does subscribe to some of the problems raised under b. Cases where no employees are eligible or want to be elected as a member of the SNB can indeed be a problem, as negotiations cannot be started and the SNB cannot decide either not to open negotiations or to terminate the negotiations already opened. It is also of crucial importance that each

operating unit of a corporation is informed about the negotiations and the possibility to delegate a representative.

Clarification of this aspect of the procedure might be good for both sides. But basically the ETUC has noted a clear lack of experience in most countries with the negotiation procedures as described in the Directive.

In line with the recent notion in the EWC recast Directive the government of the relationship between the national and transnational levels of information and consultation has to be reconsidered. Also further clarification of the method of calculating the number of workers could contribute to simplification of the negotiation procedure.

The effect on the rights to employee involvement granted by national or EU law

The provided analysis in the consultation document and the effects mentioned by the European Commission can be supplemented by further worries. In the 2008 consultation the ETUC already came up with several key points:

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

The current procedure applies to the right to maintain the participation as before. However, there is no procedure for employee involvement emerging after establishment of the SE. It has to be considered how to provide a right for employees to call for negotiations to establish adequate participation rights also if there are no previous participation structures in place. At this stage we can add that there is a need to clarify the definition of structural changes and the range of participation especially for the standard rules. The experience with the 'before and after' principle has been that rights are frozen at the existing participation level, without taking into account the more dynamic inbuilt character of national rights and thresholds (to just give one example, related to the increase of the size of the workforce). Bearing this in

mind, the growth of SEs will lead and probably has already led to many companies not having participation, even after crossing national thresholds. This loophole in the SE legislation – regulating employee involvement only for the initial founding phase – could be closed by a more detailed definition of structural changes. An increase of the size of the workforce that in previous cases could lead to improved workers involvement must be seen as a new fact and therefore, be part of that more 'dynamic' definition of structural change. And for all structural changes it is clear that the fall back clauses relate to the new facts.

In a broader sense, information, consultation and involvement rights are often directly linked to the existence of a national legal entity. However, in practice there can be other reasons (at national group or branch level) to install representative bodies. The ETUC is in favour of a mechanism in the SE Directive that preserves such 'prospective national rights'.

As previously highlighted, more attention should be paid to the worrying phenomenon of shelf SEs. Shelf SEs – companies without economic activity or employees – may not serve to by-pass the rules on negotiations on employee involvement once the SE is 'activated' at a subsequent stage. For the ETUC, it is clear that the activation of shelf SEs that leads to the appearance and/or recruitment of a workforce should be perceived as a structural change which requires negotiations, under the same rules as at the time of the SE creation. The ETUC recommends in particular that activation of such SEs is more clearly defined as a structural change triggering the process of negotiations on employee involvement. The registers should have the duty to become active in such cases.

(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?

This consultation is limited to the SE Directive. However, important aspects concerning worker involvement are dealt with in the SE Regulation, subject to a possible revision as well. Both have to be seen as a single topic that should be dealt with together and the revision of the SE Regulation in particular has risks for workers' rights. Several ETUC-affiliates have suggested a joint audit of the Directive and the Regulation.

Based on a horizontal perspective of the SE legislation, the ETUC has several aspects that have to be taken on board in such an initiative, next to the points mentioned already under 1:

- the problematic positions of the EC and the ECJ with regard to the split of the registered office and head office; a position the ETUC strongly opposes as the risk of circumvention of employee participation rights through the setting up of 'letter box companies' would increase,

- the problems related to the poor registration of SEs and in particular to SEs who change over time,

- as only one quarter of the total SE number are today considered "normal SEs" in the sense that they have both employees and business activities, the existence of shelf SEs should be put into question,

- information to be provided to the Official Journal should include information related to employment figures and distribution of employees.

And even more importantly, the positive experiences with employee involvement in 'normal' SEs, show in ETUC's view the way forward: more democracy at the workplace makes the European Internal Market competitive in a socially responsible way, and therefore strong guarantees on worker participation should be a natural ingredient of any future initiatives regarding European Company Law.

(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?

The ETUC agrees with the opinion that amending the legislation cannot constitute the only appropriate response when the understanding of an existing text is inaccurate. Rather, the ETUC strongly encourages the Commission to reflect on how complete information on the mechanisms of the SE legislation as well as its potential benefits can be better communicated to stakeholders throughout the Union. The process of providing public information and greater transparency and disclosure can be improved without legal amendments and there is probably more urgency for the promotion and distribution of best practices related to employee involvement. An important driver, as already mentioned, seems to be the still prevailing lack of knowledge with regard to the SE. Here it would be desirable that the European Commission and employer organisations raise awareness of the real implications

of the SE. It should be realised what Social Europe can gain from statutory and high level workers' participation linked to the particular role of trade unions. Moreover, it should be a common interest to make a European legal framework more attractive for workers. Therefore the ETUC is convinced of the need to make full use of and improve the instruments providing rights to information, consultation and participation.

(4) Would you consider initiating a dialogue under Article 155 TFEU on any of the issues identified in this consultation? If so, which?

Before formulating a definite answer to this question the ETUC wants to reflect on the legal competences in this regard. In the EC synthesis of the consultation process of the SE Regulation there was no reference at all to activities within the framework of the European Social Dialogue. Neither was there any reference in the synthesis to the implicit and explicit joint positions of the ETUC and BusinessEurope. They shared for instance, as has been memorised, the view that there has to be a European registry for SEs. The European Social Partners still adhered in their contributions to the joint conclusion formulated in 2008, when the SE Directive was discussed in the European Social Dialogue.

The present diversity within the Member States regarding employee participation makes it necessary to create a European participation provision for any piece of EU company law dealing with the adoption of a European legal status or company's cross-border structural changes. The Lisbon Treaty offers a clear legal framework for enhancing employee participation as a part of the process of the implementation of the EU Charter of Fundamental Rights interpreted in the light of the Preamble to the TEU (5th recital) and TFEU Article 151.1.2. The SE legislation consists of two intertwined legal acts. The provisions of the Directive form (according to recital 19 of the Regulation) an indissociable complement to the Regulation and have to be applied concomitantly.

Therefore, the ETUC is of the opinion that any process leading to a revision or modification in the frame of the SE legislation has to be based on a horizontal and complete consultation of the social partners and this would speak in favour of an integral and overall consultation of both the Regulation and the Directive.

Continuing the dialogue on improving the SE rules (both the Directive and the Regulation) has to be based on the acknowledgement that "the compromise reached on employee

participation had been very thoroughly designed": this was already stated in the 2008 consultation and remains our position.

European Trade Union Confederation

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