

## **European Trade Union Institute (ETUI)**

### **Corporate Governance and Company Law News (March 2009)**

Topics: European Private Company (SPE), 14th Company Law Directive; Corporate Governance Forum; Communication from the Commission on the review of the SE Directive; Number of SEs; European Court of Justice.

#### **European Private Company (SPE)**

On 10 March the European Parliament adopted a report on the European Private Company (SPE) to complement the Commission's proposal, which was full of shortcomings. The European Parliament's report, adopted by a huge majority (578 votes in favour), contains a number of important improvements, such as an obligation for the SPE to demonstrate a cross-border component, the creation of a European central register and an obligation to produce a solvency certificate.

Another significant improvement compared with the Commission's proposal are the provisions regarding workers' board-level participation. While the Commission proposal virtually ignored workers' participation rights, the Parliament's report is much more focused on ensuring that such rights are not undermined. The text contains substantial provisions in Art. 34 and Art. 38, including a reference to the conduct of negotiations aimed at reaching agreement on employee involvement with reference to the SE directive. Although difficult to follow in detail the broad majority in favour of the compromise in the EP plenary brought workers' participation back onto the European political agenda; it had previously been considered as something primarily of technical interest. It can be expected that work on the SPE will make strong progress under the Swedish presidency in the second half of 2009.

#### **Links:**

- [Provisional text of the Parliament report](#)
- [More information regarding the SPE](#)
- [ETUC position, press release](#)

#### **14th Company Law Directive**

Also on 10 March the European Parliament adopted a report on the 14th Company Law Directive for the cross-border transfer of the registered office of limited companies (2008/2196(INI)). The purpose of the 14th Directive is to make it easier

for companies to move across borders. The resolution invites the Commission to submit a legislative proposal to the EP by the end of March 2009.

The 14th Company Law Directive is likely to be an important instrument for safeguarding workers' participation rights in the future. In this regard, Point 5 of the resolution deals with the rules on workers' participation. Thus, the wording of the following section is of particular concern to European trade unions:

'Employee participation shall be governed by the legislation of the host Member State.

However, the legislation of the host Member State shall not be applicable:

- a) where the host Member State does not provide for at least the same level of participation as operated in the company in the home Member State, or
- b) where the legislation of the host Member State does not give employees of establishments of the company situated in other Member States the same entitlement to exercise participation rights as enjoyed by such employees before the transfer.

In these cases, the provisions of Article 16 of Directive 2005/56/EC should apply accordingly.'

The European trade unions (ETUC) want the European Commission to bring forward a proposal for the 14th Company Law Directive soon, since it is overdue.

**Links:**

- [Provisional text of the European Parliament's report](#)
- [Information regarding the 14th company law directive](#)

## **Corporate Governance Forum**

The European Corporate Governance Forum held its last meeting on 17 February 2009. Generally speaking, the financial crisis has seriously disrupted the activities of the Corporate Governance Forum. One important topic has been executive remuneration. In this context the role of employees/stakeholders was also discussed in the Forum. Since opinions diverge on this topic, the outcome of the Forum's Statement on Directors' Remuneration will be interesting.

**Links:**

- [Commission page on the Forum](#)
- [Further information regarding the Forum](#)

## **Communication from the Commission on the Review of the SE Directive**

In September 2008 the Commission presented a Communication on the review of Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees (COM(2008)591 final).

Generally, the Commission agrees with the view taken by the European trade unions that, in fact, there is no reason to revise the SE directive because too little practical experience has been accumulated so far. However, the Commission has recognised a problem in the high number of SEs established without employees and, consequently, without any negotiations on employee involvement. Against this background, the Commission has stated its concern that many member states have not adopted measures to avoid misuse of the provision when transposing the Directive into national law. Furthermore, the Commission recalls that adoption of the Directive was the result of a delicate compromise that took more than 30 years of negotiations to achieve. The Commission will decide at the end of 2009, in light of a review of the SE Regulation, whether the SE directive should be reviewed.

In this context the Commission called for tenders for a ‘study of the operation and impacts of the Statute for a European Company’ in 2008 (MARKT/2008/19/F). The contract for the study (for which also a consortium of three organisations applied, among them SEEurope network experts) was awarded to Ernst & Young.

### **Links:**

- [Communication from the Commission](#)
- [Further information on the European Company](#)

## **European Companies (SE) – SE Factsheet Database**

Since its introduction in October 2004, the number of SEs has increased steadily year by year. By March 2009 some 350 companies had been founded in the form of a Societas Europaea. However, this rather impressive total should not blind observers to the fact that many SEs do not conform to the standard definition, for they are, in their overwhelming majority, SEs without any employees (‘empty SEs’) and/or not even a specific business purpose (‘shell SEs’). This development represents a potential threat to worker involvement rights in an SE. In this regard, it has to be borne in mind that mechanisms for securing employee rights to information, consultation and participation are guaranteed only at the moment of founding of SEs. It is accordingly difficult to negotiate workers’ rights at a later point in time, when the company has recruited its employees. In this respect, the existing mechanisms of the SE Directive do not represent a sufficient guarantee. The Commission has in fact acknowledged this shortcoming in its recent communication on the revision of the SE.

By March 2009 an agreement on worker involvement had been concluded in no more than 41 out of the total of roughly 300 SEs. Particularly the agreements of the larger

SEs are in general in line with good 'EWC practice' and on certain points they go beyond what is legally foreseen in the SE Directive. In 21 SEs out of the 41 where agreements on worker involvement have been signed, the rights enshrined in the agreement include board-level participation, thereby adding an important dimension for workers' voice in company decision-making. By March 2009 around 75 employee board members originating from 9 countries (AU, BE, DK, FR, DE, IT, NL, PL, UK) representing the interests of the workforce on SE supervisory or administrative boards. A fundamental innovation introduced by the SE legislation is the transnational component of participation at board level. In a number of SEs (e.g. Allianz SE, BASF SE and MAN Diesel SE) employee representatives from several countries sit on the board and represent the interests of the whole workforce in Europe.

**Links:**

- [Key data on more than 350 SEs: SE Factsheets Website](#)
- [ETUI Benchmarking Working Europe \(chapter: Worker Participation\)](#)

**Cartesio Decision ECJ (C-210/06)**

On 16 December the Cartesio decision of the European Court of Justice (ECJ) was published. The decision contains two big surprises concerning the interpretation of freedom of establishment in the EC Treaty (Art. 43, 48 EC). The first surprise was that the court did not overrule its 'Daily Mail' decision, which allows member states to restrict the transfer of the central administration of a company abroad.

The second surprise was the obiter dictum statement that freedom of establishment also covers the possibility of a company converting itself into a company governed by the law of another member state (para 111–113). The consequences of this obiter dictum for board-level participation rules have not been finally clarified. However, there are good reasons for saying that the obiter dictum applies only if national law completely forbids any kind of transfer of seat to another member state. As long as one form of transfer is allowed under national law, the requirements of Art. 43, 48 EC are met.

**Link:**

- [ECJ press release](#)