

SER Advisory Report on Employee Involvement in the European Company

20 June 2003

The Regulation on the European Company Statute and the Directive on Employee Involvement in the European Company are not clear and consistent on all points. It is therefore the task of the Dutch legislature to make sure that the legislation it draws up for the introduction of the European Company as a new legal form in Dutch law is clear and well thought through.

This is one of the main conclusions of an Advisory Report by the SER to the Dutch government on employee involvement in the European Company.¹ The European Company (also called the *Societas Europaea*, or SE) is a new legal form that must be incorporated into Dutch law before 8 October 2004.

The SER's Report was drawn up in response to a request for advice from the Minister of Social Affairs and Employment. The request specifically asked for the SER's comments on ten proposed guidelines for new legislation based on the EU Directive on Employee Involvement in a European Company. In its Report, the SER unanimously concurs with the Government's proposed guidelines and is in favour of Dutch legislation being, as far as possible, in line with the European Work Councils Act, which takes a similar approach to employee involvement as the Directive.

Relationship between the Directive and the Regulation

The Employee Involvement Directive is closely related in content to the Regulation for the European Company Statute, which regulates the management structure of the SE. Although the Government did not ask the SER for advice in respect of the Regulation, the SER believes that, in drafting the legislation, the Government will need to make sure that regulations governing the management structure of the SE are carefully coordinated with regulations governing employee involvement in the SE. In its Report, the SER draws attention to a number of questions and issues that arise from this close relationship between the Directive and the Regulation and that will need to be addressed. On some of these points, the SER's opinion is unanimous and on others divided.

Management structure and employee participation in the SE

Founders of an SE can choose between a monistic management structure (in which there is only an administrative organ) and a dualistic management structure (in which there is both a management organ and an independent supervisory organ). According to the Directive, the issue of employee participation in an SE (i.e., the influence employees can exert on the composition of the SE's administrative or supervisory organ) should form part of the negotiations between the founders and the employees, the parties being free to make any agreements they wish. Providing that they enter into an agreement on such matters, the SER as a whole considers statutory provisions for defining the specific tasks and powers of the administrative or supervisory organ to be unnecessary.

However, if no agreement is entered into, **a part of the SER** (the union representatives and the Crown-appointed members) considers it important for the administrative organ,

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or the supervisory organ of an SE of a particular size, to be given material tasks and powers that not only further the efficient functioning of management and supervision, but also facilitate employee participation in the sense mentioned above. In the dualistic system, the SE's supervisory organ should accordingly be given the power to appoint and dismiss members of the management organ and to veto major management decisions; powers that, according to these SER members, are fully in line with the Dutch 'structure regime',² in which similar considerations are relevant. In the monistic system, in which there is only an administrative organ, decisions on important matters should be made by the administrative organ as a whole, and not delegated to some subset of the administrative organ's membership.

Another part of the SER (the employers' representatives) are of the opinion that the Regulation on the European Company Statute itself stipulates which rules and guarantees are necessary for a good management structure within the SE. Consequently, they see no need for the Dutch legislature to enact additional regulations. These members consider additional Dutch legislation to be *a fortiori* wholly undesirable, in that it may make the Netherlands less attractive as a place in which to establish an SE. Furthermore, the Regulation views an SE as a 'normal' Dutch NV (company limited by shares): the legislature should not, therefore, impose stricter requirements on an SE than are imposed on a normal NV. Since, under Dutch law, the structure regime does not apply to an SE, it would also be undesirable to have certain elements of the structure regime apply to a dualistic SE. These SER members also feel there is no reason to impose additional requirements on decision-making by the administrative organ of the monistic SE when neither the Regulation itself nor Dutch legislation applicable to a normal NV do so.

Group exemptions

The SER also considered the issue of exemptions for subsidiaries of group companies, specifically a subsidiary of an SE which, on the basis of an agreement between founders and employees, applies the Dutch structure regime (or some comparable participation scheme). The issue of exemption arises because subsidiaries of a normal Dutch structure regime company are exempt. The SER was divided on this point. **One part of the SER** (the union representatives and the Crown-appointed members) considers full exemption to be undesirable, since it would mean that Dutch employees would have to give up their employee participation rights in the SE's Dutch subsidiaries in exchange for employee participation rights in the SE. The Dutch employees would have to share those rights with employees of the SE's foreign subsidiaries, whose interests may differ;

² In a 'normal' Dutch NV (company limited by shares) and BV (private company with limited liability), the establishment of a supervisory organ is optional. For 'large' Dutch NVs and BVs to which the structure regime applies, the establishment of a supervisory organ is compulsory. By law, the compulsory supervisory organ in these 'structure regime companies' has certain powers. If the structure regime is applied in its full form, the supervisory organ has the power to veto major management decisions, to appoint members of the Board of Management of the company, and to adopt the annual accounts. Through the works council or central works council, employees, like the Board of Management and the shareholders, can exert influence on the composition of the supervisory organ of a structure regime company. The works council or central works council can put forward candidates for the supervisory organ or raise serious objections against a proposed appointment. See SER: *The Functioning and Future of the Structure Regime* (2001/02 E), an abstract of the SER advisory report *Het functioneren en de toekomst van de Structuurregeling*, January 2001. [Abstract in PDF format](#); [Press Release](#).

at the same time, employees at the foreign subsidiaries would be able to keep their 'own' system of employee participation. Full exemption would therefore lead to an inequitable situation. However, in the context of the group policy of an SE, this part of the SER would find partial exemption from the structure regime for Dutch subsidiaries acceptable. **Another part of the SER** (the employers' representatives) is in favour of exemption for an SE as a whole (i.e., including all subsidiaries), providing that the SE applies the structure regime (or some comparable degree of employee participation), on the grounds that an SE should not be subject to stricter requirements than those to which a Dutch company applying the structure regime on a voluntary basis would be subject. Any exemption scheme should take into account that if an SE applies the structure regime, it will be on the basis of voluntary agreements between founders and employees. This part of the SER stresses that it is not only desirable that an SE should be able to implement a group policy, but also that the Netherlands should be an attractive place in which to establish an SE.