Directive 2001.86.EC

What is understood by «**European Company**»?

The reality is the result of the combination of two legal diplomas, different though linked, the Regulation 2157/2001, 8 October 2001 that establishes the rules of the European Company Statute and the Directive 2001/86/EC, 8 October 2001, the Directive that foresees employees' involvement.

Despite this connection between the legal acts there is, since the beginning, a formal and objective difference. While the first instrument is a regulation, i.e., a legal instrument that implies an immediate application, the Directive is a legal instrument that needs to be transposed into each one of the national realities covered by the E.U. Each country has to have, via a national legal act, to regulate the matters within the allowed requirements of the Directive.

Regulation establishes all the formalities and ways to constitute a SE, such is a legal act that establishes the technical ways to constitute an European Company, the conditions needed, organization way, bodies and functioning ways, etc.

- The Directive foresees the employees' involvement being a condition «sine qua none» for the process to constitute an SE and so that it can be developed, this because this subject has to be regulated in a way to allow its registration – a constitution element of a company.

The European Company is seen as an internal market improvement instrument, through the abolition of several obstacles at internal level. At legal level it is characterized by the attenuating of the national legislations, for that reason it was not the legislator's intention that, in such a significant step, the employees were no longer involved, but that the acquired rights cannot, in any case, be limited.

- **Regulation 2157/2001, 8 October 2001 –**

Regulation establishes all the modalities and formalities needed to the constitution of an SE. this is, all the necessary steps, emphasizing the establishment of the employees' involvement which is regulated by the Directive and that will be covered later on in a chapter dedicated to the Directive on the employees' involvement in a more detailed way.

The regulation starts by presenting a reason for its existence, the fact of being seen as a development instrument of the internal market, and once again we stress, through the abolition of several obstacles at European level, at legal level it is characterized by the attenuation of the national legislations.

Such aim is achieved through what is designated by SE – European Company.

The regulation presents as ways to constitute an SE, the following:

- Merger
- Holding
- Subsidiary
- Transformation

These are subordinated to several principles that frame several dispositions of the Regulation, namely, the fact of SE are constituted by shares to what are fixed a minimum value; the suitable supervisory and administration bodies, according the systems applied in Europe – Monist and dualist Systems.

The Regulation establishes also as geographical field of application, the European Union countries. It has to be added that, as already mentioned, this instrument is imperative in his matter.

The SE headquarters are required to be within European Union space, being after established rules to ask for the company's transference.

The European companies are designated by «SE» and have legal personality.

From the document analysis we can find references to, as a compulsory aspect, the option «opting out» (option that will be taken care in a more detailed way in the chapter dedicated to the analysis of the Directive that foresees the employees' involvement) in the constitution of an European Company.

- Directive 2001/86/EC 8 October 2001
(employees' involvement)

Only in the event of creating and SE the Directive foreseeing the employees' involvement will be applied for safeguarding the rights of the involved employees.

This new reality «SE» requires the employees' involvement that assumes three forms:

- Information
- Consultation
- Participation

Following what has been previously mention, the Directive establishes the employees' involvement that should be understood in close relation to the Regulation that creates the SE, based in the principle that the first one establishes minimums.

In what concerns the consultation national systems, these remain, only being added to those this new mechanism.

- **Coverage and Concept –**

The text of the Directive starts by trying to clarify the concepts and the terminology and starting forthwith the determination of its coverage:

The Directive is applied exclusively to the European Companies, so called «limited liability company» that the Directive itself defines as:

«Companies constituted within the community territory under the form of a European limited liability company; SE is a company with the capital dived in shares. Each shareholder is responsible only up to the limit of the capital he/she invested (*Regulation CE 2157/2001*).

What is understood by:
Participating companies – the companies that constitute the company itself.

Subsidiary – it remits to the Directive that institutes the European Works Councils.

Subsidiary or interested establishment – it is a subsidiary that was part of a participating company that would become a subsidiary or establishment of the SE since the moment of its' constitution.

Workers' representation – on this aspect the issue raised is focused on knowing, facing the national legislations, the workers' representatives.

Representation body – the body result of the negotiation.

Special negotiation body (SNB) – it is the body that will carry on with the debate that will result in the institution of the SE and in the establishment of the employees' involvement.

- **Ways of Involvement –**

This involvement can be in the form of:

Information;

Consultation;

Participation.

It has to be noted that the two first concepts are concepts that carried over the EWC's Directive however, there is, on the legislator's side, the evident concern to assure the useful effect of the concepts.

Information – understood as the mere transmission of knowledge. It is possible, however, to see that there is, on the legislator's side, the concern so that this information can have a useful effect.

Consultation – it is clearly better defined that in other instruments. And the useful effect is guaranteed in a clear way.

Participation – there is not, in our opinion, a real definition of the concept but the establishment of ways such as the right to elect, or appoint, members of the supervisory body or of the administration body of the SE, the right to recommend, or regulate the designation of some or all the members of the supervisory body or of the administration body.

Note: the decision on the structure of the SE, being either a monist system with an administration board or dualist with a supervisory body, it is taken by the competent authorities of the participating companies. The SE structure is not part of the negotiation between the SNB and the competent authorities. The SNB has to negotiate the number of representatives. The SNB has to negotiate and establish, by agreement, the way how the employees' representatives will be then elected.

- **Process –**

The initiative lies with the management or administration bodies of the participating companies.

Once overcome the phase of the approval's elaboration or the project's publication, on the part of the management or administration bodies, it is up to those to establish contact with the employee's representatives.

It would raise the question of the workers being dependent of the employers – this conclusion is not correct once, and has already been referenced, for a perfect understanding of this frame that is why the Regulation institutes the European Company. It establishes that, and for such constitution to be possible, it is necessary to register the company, and this registration is dependent on the issue related to the employees' involvement and it has to be right away solved and defined.

Like this, **the employer is obliged to transmit the following information, on a minimum base but obligatory**:

Information on:

- The participating companies;
- Subsidiaries;
- Interested establishments;
- The number of workers.

It has to be added that, on the opposite to what happened in some cases, namely in what concerns the European works councils, employers are interested in having an expeditious process.

To negotiate the future body of employees' involvement it is constituted a Special Negotiation Body – SNB, representative of all the participating companies, subsidiaries and interested establishments.

The SNB is the competent body to negotiate the final agreement or to determine what would be the most suitable way to end the first phase of negotiations.

These are, no doubt, some of the most complicated rules established by the Directive and they respect to the SNB's constitution. The rules of the election of the members respect the national practices of each one of the Directive's transposing state.

SNB is composed according the essential rule:

«**Each involved country must have a representative**», this is the rule that bases the Directive itself in this phase. The determination of the number of representatives must be proportional to the number of workers.

Once established this general rule the Directive establishes the methodology allowing each state to have plus one representative per portion of 10%, or portion of this value, based in the number of workers employed by the participating companies and their subsidiaries, or interested establishments in all the member states, on the whole.

In what concerns the data collection on the number of workers there is any obstacle once the Directive establishes as a requirement this information to be transmitted with the approval and the publication of the SE's project, according what is foreseen.

In the event of merger it is also added the requirement that all the participating companies have to be represented. In that sense the Directive foresees the use of deputy members.

Like this it has to be attributed a seat to each one of the participating companies, if such is not represented automatically in the end of the first operation, however, the Directive establishes limits to this rule and such means that the number of additional representatives cannot exceed 20%.

- **Election –**

Rule: it is the function of the member states to establish how their members should be elected.

One note, quite innovative, that deserves to highlighted, is linked to the possibility to include trade union officials, either being member or not from the participating company, subsidiary or interested establishment.

The SNB has to determine how the employees' involvement should take place and it has to written down in the agreement.

- **Decisions –**

The SNB decides upon ***absolute majority of its members meaning also absolute majority of the workers, and each member has one vote***. There is here a novelty also in what concerns what is previously legislated. In this case, besides counting the votes, it has also to verify the sense of representatives' vote what can restrict, in a way, the freedom to vote.

Exceptions: if negotiations lead to a quantitative reduction of participation, the decision has to be taken by 2/3 of the members representing 2/3 of the workers and to the votes of the workers of two member states. The standard to determinate the reduction of rights is based on the text of the Directive itself:

«*the right to elect or appoint members of the company's supervisory or administrative organ of the SE;*

The right to recommend or regulate the appointment of some or all of the members of the supervisory or administrative organ.»

In the event of not initiate negotiations or terminate negotiation already initiated should be applied the same valuation, not being applied, however, such disposition in the event of a company constituted by transformation already exists a participation right in the company to transform.

In this case the SNB will only be convened upon written request of 10% of the SE workers, its subsidiaries or concerned establishments, completed a minimum period of 2 years since the decision, except if there is an agreement between the parts in that sense.

Note: the voting system is similar to the one instituted for the EWC's Directive. The novelty, within this Directive, is the qualitative vote.

- **Functioning –**

The Directive establishes the obligation of the participating companies to cover the SNB financing expenses, within reasonability.

- **Content of the Agreement –**

The Directive establishes, in our opinion, several minimum criteria concerning the coverage, composition, functions, meetings and dates.

Negotiations start immediately after the constitution of the SNB and last for 6 months.

In the case of the present Directive there is a direct and immediate interest of the managements to institute and that the involvement procedure is resolved so that they can proceed with the registration.

- **Standard rules –**

The Directive presents a set of rules that should be understood as guaranty minimum. These standard rules are applied in three situations:

- When the parties so agree;
- If, by the deadline of 6 months, negotiations are not concluded, due to:
    - The competent organ of each one of the companies decides to accept the application of the standard rules, proceeding with registration;
    - The SNB does not decide to suspend negotiations;
    - Or if they have not renounced.

With the following particularities:

Being established particularities for each one of the possible ways to constitute an SE.

Opting out – article 7, No 3 – the member states have the possibility to legislate in the sense that the rules on participation, regulated by part 3 of the annex, namely point 2, on the issue of merger, are not applied.

However, this rule has to be, also, analyzed together with what is foreseen by the Regulation, article 12 No 3:

«*In order for an SE to be registered in a Member State which has made use of the option referred to in Article 7(3) of Directive 2001/86/EC, either an agreement pursuant to Article 4 of the Directive must have been concluded on the arrangements for employee involvement, including participation, or none of the participating companies must have been governed by participation rules prior to the registration of the SE.»*

Such is almost impossible having in mind the differences of the national systems and the present European company structure.

- **Confidentiality –**

The Directive consecrates the principle of confidentiality in the matters transmitted with such condition.

However, the Directive leaves room for the member states to, when transposing it, allow the in specific cases and according the limits and conditions imposed by the legislation, supervisory

or administrative organ of an SE or a participating company within its territory, is not obliged to transmit information that, and obeying to objective criteria, can block the SE functioning.

It has to be underlined the fact that in this case it is only presented to us the «possibility» to cause the above mentioned circumstances.

- **Protection of the employees' representatives –**

Once again it is raised the issue related to the rights that we should include: the inclusion of benefits, result of the task of being a shop steward or a member of the workers' council.

- **Implementation –**

The Directive foresees, also, that the implementation must be established by the transposition law of each member state.

- **Standards Rules –**

It establishes rules for the above mentioned cases.

«the parties so agree; or by the term of 6 months no agreement has been concluded:

The competent organ of each of the participating companies decides to accept the application of the standard rules in relation to the SE and so to continue with its registration of the SE, and

- the special negotiating body has not taken the decision to suspend negotiations

Or renounced»

Adding a certain number of minimum set of rules:

✓ **Members of the organ**

Such deserves, right away, from our side a first note regarding the fact that, in the standard rules, is not refereed the possibility of the members of the participation organ to be from outside of the participating companies, filial or concerned establishments. This is for sure an element to consider.

✓ **Election**

How members are elected or appointed is established by the national legislations.

✓ **Functioning**

It has been created the possibility to constitute select committees when the members of representation organ decide that such is appropriate.

Functioning is ruled by an internal regulation.

It establishes, as a minimum, a meeting per year, as it happened with the Directive that instituted the EWCs, on the ordinary matters related to the SE functioning.

The allocation of seats stresses what has been previously mentioned, being attributed one seat per portion of 10% or fraction of such value.

✓ **Information and Consultation**

The matters target of the analysis of the Representation Organ are the ones related to the SE, matters related to filial or concerned establishments. The matters have to be transnational.

The matters to be dealt at the meetings are refereed by the Directive by way of example.

The diploma does not exclude the possibility to have extraordinary meetings, for such the interest of the employees has to be affected and, specially, in the event of dislocation, transference, closure of an establishment or company, the Representation Organ has to be always informed and when it decided it can meet based in urgent motifs.

The select committee has the right to meet, upon its' request, with the SE competent body which expenses may be limited, by the transposition law, to a single expert, or at any other most suitable level with the SE management with power to decide by itself so that it can be informed and consulted on the significant measures on behalf of the workers.

It is also allowed the participation of experts, to be chosen by the Representation Organ, as training of the members of the Representation Body, with losing wage.

In what concerns participation, standard rules summarize what has been established in the content of the text.

Directive 2002.14.EC

- The Objective -

This booklet aims to present a simplified analysis of the Directive.

As a first approach we would like to stress that the manifest objective of this Directive is, essentially, to define the delimitation of the minimum to apply on the rights of information and consultation to all the EU members.

This Directive seeks to create a relative minimum frame regarding rights and procedures on:

Workers' Information
&
Consultation

Note: Regarding the relation employers / workers' representatives, within the companies located in the different member states, this directive does not establish any restriction unless the one concerning the number of workers of a company so that it has to be subjected to the application of the rules of this community instrument, but it has to be analysed jointly with other dispositions relative to the rights of information and consultation consecrated already at EU level.

-Matters -

This Directive, in what concerns to the extent of application of the rights there consecrated, it embraces subjects that concern and involve companies with headquarters within the national space of each member state, in one of three views:

⇨ Information on the recent evolution and the probable evolution of the activities of the company or the establishment and its economic situation.

⇨ Information and consultation on the situation, the structure and the probable evolution of employment in the company or establishment and on the eventual anticipation measures foreseen, namely in case of threaten for the employment.

⇨ Information and consultation on the decisions susceptible of developing substantial changes at level of the work organisation or the labour agreements, including the ones foreseen by the community dispositions referred in the no. 1 of the article 9.

Note: There is, however, the need to make a correction here, because and according with the extent of Directive are not susceptible, in a first analysis, to be covered by it issues that are framed to be debated within the workers' representative body EWC - European Works Councils or of any information and consultation procedure (both instituted according the laws that transposed the Directive 94/45/EC into the different internal legislation and now this the new European Works Councils Directive «Recast» - 2099/38/EC).

This way, the privileged place for debate, and consequent information and consultation, of European matters of transnational nature, are the referred EWC. Nevertheless, it is not completely out of line, and having in mind the involved entities and the interveners in the process of information and consultation, that the information and consultation foreseen in Directive 2002/14/EC include matters also to debate within the European works council. This because in spite of the creation of special mechanisms for the effect (EWCs) the issues can implicate, also, consequences at national level, within each member state.

- Who has the right to information and consultation? -

- The workers' Representatives!

- Who has the duty to inform and consult? -

- The companies' representatives, so that they can answer for the acts!

- Legitimacy -

After the definition of what are the cases that can be involved, or susceptible to be a Directive's objective, it has to be analysed who has **legitimacy to intervene** in the procedure of information and consultation. Such situation is left for the national legislation.

Note: This is one of the matters that raises the largest divergence, because at European level, and according with some legislation, the workers' representatives are the trade unions, through their shop stewards, or the workers' committees, and to this respect, and in what concerns its constitution, there are differences from country to country.

There are situations that, and because of the systems already instituted in the national legislation, where nothing new is created, this because there are already bodies instituted with such rights, to what is added what is foreseen by the Directive 2002/14/EC; on the other hand, systems exist where the rights foreseen in the directive will be granted to bodies that didn't have such rights yet, as it is the Portuguese case. In Portugal it was privileged, at the time of the transposition for the internal law of the directive 2002/14/EC, the shop stewards.

In what it concerns the employers, in principle and having in mind the matters in analysis, in our opinion, should not be the intermediate leaderships the active subjects in the transmission of information and in the workers' consultation procedure. It seems us far too much evident that should intervene, on the part of the companies, who has responsibility for the acts.

- Time of the Acts -

This is exactly one of the aspects where it is necessary a clearer planning. It has to be stressed out that there are **two moments** and **two actions** that should be initiated by the employers and by the workers. We have a first moment that seeks the information and a second moment seeking the consultation. It will be, without a doubt, necessary a space of time to allow to develop these two stages of the same process, allowing both the analysis of the information and the data gathered, the search of solutions, as well as the accomplishment of the consultation phase, without allowing the process to be prolonged for too much time, that can implicate disastrous consequences for sure, for both intervening subjects, due to the delay, by «dragging» the process.

These are two phases of the process that cannot be mixed. Any of them has to be carried out before the facts take place in order to allow it to have a useful effect.

While that, and regarding the concept of information, such was never object of great controversy, the same did not happen with what is designated by consultation.

The phase of consultation and the concept itself were, and mainly in what concerns the EWC's Directive, target of a major debate, being, inclusive, motif for some legal actions. Nowadays,

such has been improved having in mind the new European Works Councils' Directive («Recast»).

So, there are:

- Two moments / Two rights:

➲ Information & Consultation

Note: these rights do not emerge as acquired rights, once to be exercised is essential they were requested.

- Rights -

Consecrated rights: Information & Consultation

The Directive itself presents us with a definition of both concepts. However, it won't just from that definition that it will be obtained a materialisation of the content of the rights there consecrated.

Let us begin, then, for the concept of **information**:

This concept has never raised great problems and it has always been understood as the mere transmission of knowledge. Though, this Directive adds something more. It adds that the information is given in a moment, in way and with content susceptible to allow the workers' representatives to analyse the subjects and to prepare, if it the case, an appropriate exam.

It will be, essentially, on the basis of the composition of the procedure that we will proceed to the analysis of the whole potential of this concept.

The determination of the information is essential. Not only in what concerns to the transmitted data, but also when it happens. The information will have to be transmitted in a way to be analysed and to allow the interveners to be consulted, if such is required.

Here, and in the sense of what was already expressed, emerge the issue to know the moment when information happens. From a merely legislative point of view, we are able to understand the construction presented in the Directive, not quantifying the necessary time, letting it open to the member states to concretise such.

Not forgetting, however, that it will be necessary to have the adequate time in order to allow an analysis, and consequent consultation, appropriate of the rendered information.

When such period of time doesn't exist, it has to be defined according objective principles: the time strictly necessary to analyse the documents, to formulate and to present an opinion on it and, if decided in that sense, to develop a consultation process.

The **consultation's concept**. The Directive 2002/14/EC is scanty in the presented concept, but extremely elucidating in what respects to the presented process. For that reason in this phase of the process it is expected the interveners to act in representation of the company should be the people having an effective power to decide. We underline, at once, the alert in the sense that arguments as "the decision is not up with us and as such it is not valid" are not sufficient because it is demanded, on the part of the companies, not the presence of the intermediate leadership but directly the responsible directors for the acts and with power to decide.

⊙ The purpose of consultation: it should cover the matter's subject of information. However, this situation may lead to a new configuration, because if during what it is understood as consultation new matters or new subjects are presented, on which there is any information, it will lead to the need of repetition of the whole process.

We underline, therefore, and aiming a quick process, the need of the transmission, immediately, all of the information and complementary data in a way to cover all of the views and points of the raised issue.

In the phase of the consultation are possible two acts consubstantiated in the formulation of opinions, on the part of the workers' representatives and in the accomplishment of a meeting.
That is the reason why it is important a prepared and well-grounded analysis. An opinion, a simplistic analysis, is not enough. It becomes necessary to make available the appropriate means to the accomplishment of those activities.
We cannot forget that the workers' representatives can be accompanied by experts, being both subject to the same confidentiality rules.
It is up to the employer to present a well-founded answer. Just some paragraphs or simplistic arguments, on the part of the employers, are not, also, enough under the condition of the developed acts are not considered as a true consultation.
That answer should be based in a formal document, not being enough the mere transmission of it during a meeting.
A final remark: despite the fact of consultation is not binding, which definitely is not, it should aim an agreement point.

In summary: the workers' representatives are entitled to be informed, that is, to be given information and data concerning the set of foreseen matters. After which, a period of time should be followed to allow them to analyse carefully the information received. If they intend, the workers' representatives will be able to give an opinion, that should be analysed having in mind the principle of a join action and which rejection has to be well grounded.

- The exercise of the rights of information and consultation should include:

a) the information about the recent evolution and the probable evolution of the activities of the company or establishment and its economic situation.
b) the information and the consultation about the situation, the structure and the probable evolution of the employment in the company or establishment and on the eventual anticipation measures foreseen, namely in case of threaten for employment.
c) the information and the consultation on the decisions susceptible to cause substantial changes at level of the organisation of the work or of the labour agreements, including the ones covered by the community dispositions referred in the no. 1 of the article 9.
There are, in this aspect, three groups of matters that are susceptible to be covered:

✓ Matters of the economic area on which can be requested information (on this group of matters is not possible consultation);
✓ Matters on employment (where it is possible information and consultation);
✓ Matters on work's organisation and labour agreements (where it is possible information and consultation).

Note: it is not excluded, in a clear way, the possibility of, in these groups of matters to include information and consultation on the intention to carry through a collective redundancy, Lay Off, mergers.

Despite the procedures of information and consultation, of its own, the present Directive doesn't exclude the possibility of such matters be subject of information and consultation (Directive 2002/14/EC), because such emerges in a previous phase to the decision taken.

Once again we reiterate what has been already stated in due time: EWCs deal with matters of transnational extent, that is, matters, subjects or measures with origin in certain member state and have repercussion in another member state of the E.U. Once assumed the transnational character of an issue such will be debated within the EWC; all the remaining ones can be included by the Directive 2002/14/EC.

- Who can ask for it?

The entities with competence to intervene, concerning information and consultation, are different from member state to member state.

- Who has the Initiative?

It is putted, now, the question to know on whom the duty relapses to develop the process of information and consultation. Will such duty belong to the employer or to the workers' representatives?

It is general understanding, and even based in the compared law, that it should be, in first place, the employer to start the process, once the employer is in better position to have a good knowledge of the situation and of its own intentions, with the possibility of the workers, whenever they understand is opportune, to request near the employer information regarding matters susceptible to information and consultation.

Such it is what the authors of the present document designated for mitigated competence:

It is, in principle, up to the employer to develop and to supply information;
It is up to the workers, whenever they think is necessary, to request information;
It is up to the workers' representatives to request the consultation, through a petition;
It is up to the employer to present its opinion on what has been presented by the workers' representatives.
This process represents the rights of information and consultation, but no participation!

☞ **Where can be asked for?**

Everything that has been here presented will be applicable to small, medium and big companies and establishments, however such will not be applicable, to very small companies and small companies and the establishment with less than 20 workers.

☞ **Will exist the possibility of such matter to be regulated through an agreement?**

This is, in our understanding, one of the possibilities that, without a doubt, should be taken into consideration, since it is assured the establishment and transposition of the basic principles within this frame.
In fact, the Directive 2002/14/EC allows the social partners, at different levels, to agree on how it will be implemented on workers' information and consultation.

The Directive promotes, and recognises, the agreements at the most different levels, as regards to information and consultation, as well as the promotion of these agreements by

collective bargaining, so much at company level as branch level. Such needs to be articulated with what is regulated at the different national legislation on this matter.

Reiterating what has been previously stated, this directive consecrates minimum requirements that, and according with the spirit and framing of this instrument, cannot be excluded, but can be developed and extended.

☞ **Is there the possibility of experts to intervene?**

Both parts can be accompanied by experts.
Note: it is not foreseen that the expenses resulting from the experts' intervention are supported by the companies.

- Confidentiality -

In what concerns the confidentiality of the information received by the workers, the Directive consigns its regulation, to the member states, being these, however, forced to respect the defined limits by this instrument. It only can classified as confidential the information that fills in the following requirements:

¬ To respect the limits stipulated by the national legislation, as well as
¬ To respect a legitimate interest of the company
¬ The information will have to be transmitted with the express mention of its confidentiality.

It will be the conjugation of these assumptions that will allow the characterisation of an information as confidential, and the classification of certain confidential information cannot be subject to the free will of the one who transmits it.

☞ To whom is applied?

This confidentiality is also applied to the workers' representatives, experts and third persons. Being able to, however, and once authorised by the workers' representatives, to publish such information to the remaining workers that will be, also, subject to identical confidentiality.

It has to be added the limitation imposed in the sense that any information and consultation will not be carried out since it can be able to, and having in mind objective criteria, affect seriously or to harm the operation of the company or of the establishment.

The Directive establishes, still, that the member states must provide means, judicial or administrative, in order to allow control forms in the cases that the employer classifies certain information as confidential or if he doesn't supply information. This subject, in particular, raises some difficulties, because also in this matter, great differences exist within the E.U.

The confidentiality reservation is a safeguard hypothesis, on the part of the employers, in the development of the process of workers' information and consultation, that is why it is important the establishment of ways of control, in order to avoid situations as those where the employer uses such a granted ability to hide certain acts, classifying the matters as confidential.

- Sanctions - Processes -

This Directive leaves margin for the member states to exercise the sanctioning power, in order to adopt measures to allow to guarantee the effectiveness of the Directive.

- Relation Inter - norms -

This Directive establishes, in a clear way, that the process here instituted doesn't prejudice:

The process of Information and Consultation in the scope of the Directives 94/45/EC that institute the European Works Councils and now in the scope of the Directive «Recast» 2009/38/EC.
The process of Information and Consultation instituted by the Directive 98/59/EC, on collective redundancies. It seems very clear that, and in what concerns the figure of collective redundancies, it exists with the Directive 2002/14/EC the compulsoriness that, and even before a process of collective redundancy be instructed, this has to be preceded by a process of information and consultation created and developed in the scope of the information and consultation rights instituted by this Directive.
There are two clear and different moments: it appears a process of information and consultation (in a previous moment to the development of a process of collective redundancy) and another process of information and consultation developed already in a subsequent phase, that is, when the intention to proceed with a collective redundancy is rendered (this process developed within the Directive 98/59/EC. We have two different moments, two phases also different and which, in anyway, do not exclude mutually.
This directive still doesn't get confused with the process of information and consultation that is developed in a process of transfer of companies, acting in a previous moment to the decision taken. In other words, the arguments presented for the processes of collective redundancy are appropriately invoked, also, for the processes of transfer of companies. In both cases we have to act in prior moment to the decision taken.

Directive 2005.56.EC

This Directive emerges, as it is quite clear from the preamble, having as goal to facilitate the cross-border mergers of limited liability companies, longing for to safeguard the potential of the single market.

Just as is referred by the Directive, which analysis now begins, it has as target to facilitate and to promote the cross-border mergers limited liability companies, of different Member States-members, facilitating procedures.

In order to facilitate the operations of cross-border mergers, it is opportune to foresee, unless the Directive provides otherwise, that each company taking part in a cross-border merger, and each third party concerned, remains subject to the provisions and formalities of the national law that will be applicable in the case of a national merger.

None of the provisions and formalities of national law, to which reference is made in this Directive should introduce restrictions on freedom of establishment or on the free movement capital, save where these can be justified in accordance with the case-law of the Court of Justice and in particular by requirements of the general interest and are both necessary for, and proportionate to, the attainment of such overriding requirements.

For the development of this such goal such will have to be based on a common project of merger, with the same conditions for each one of the companies involved in that project, i.e., containing the minimum content of that project. During that process, the common draft terms of cross-border mergers and the completion of the cross-border merger are to be publicised for each merging company via an entry in the appropriate public register, but before a report was elaborated on the merging project. The common draft terms of the cross-border merger are to be approved by general meeting of each of those companies.

In order to facilitate the operations of cross-border mergers, it should be provided that monitoring of the completion and legality of the decision-making process in each merging company should be carried out by the national authority having jurisdiction over each of those companies, whereas monitoring of completion and legality of the cross-border merger should be carried out by the national authority having jurisdiction over the company resulting from the cross-border merger. The national authority in question may be a court, a notary or any other competent authority appointed by the Member State concerned. The national law determining the date on which the cross-border merger takes effect, this being the law to which the company resulting from the cross-border merger is subject, should also be specified.

In order to protect the interest of members and others, the legal effects of the cross-border merger, distinguishing as to whether the company resulting from the cross-border merger is an acquiring company or a new company, should be specified. In the interest of legal certainty, it should no longer be possible, after the date on which a cross-border merger takes effect, to declare the merger null and void.

Employees' rights other than rights of participation should remain subject to the national provisions referred to in Council Directive 98/59/EC of 20 July 1998 on collective redundancies, Council Directive 2001/23/EC of Council of 12 March 2001 on the safeguarding of employees'

rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses, Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework of informing and consulting employees in the European Community and Council Directive 2009/38/EC on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees.

INFORMATION AND CONSULTATION

This Directive doesn't move away the application of remaining Directives on Employees' Information and Consultation in several occasions, trying to guarantee the employees' involvement, and for such purpose it should be articulated with those Directives, according with the following:

Directive 2002/14/EC - Directive on Information and Consultation at national level - the employees, and their representatives, according with the national law transposing the Directive must be informed and consulted, before the decision to merge, as provided in the Directive or the national Law, eventually, in the event of not existing a transposition of the Directive for already be consecrated a larger level of information and consultation in the Member State. So that the «target» of the Directive can be informed and consulted, i.e., in a way that the ones included by Directive can issue an opinion and that it can be taking into consideration, if is that the case.

Directive 2009/38/EC - Directive establishing the European Works Councils or Procedure in community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees, this Directive is to be applied to cross-border operations, i.e., to operations or acts with implications, or affecting, in more than one Member State, within the European Union. In these cases the body established should be informed or consulted (usually a EWC).

Directive 2001/23/EC - Directive on the safeguarding of the employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses. This Directive assumes, also, the development of a process of information and consultation in a way to safeguard the maintenance of the employees' rights in case of a merger.

Directive 2001/86/EC - Directive supplementing the Statute for a European company with regard to the involvement of employees. The Directive that we are analysing in this work remits, with the due adaptations, to the Directive 2001/86/EC, once it intends that the principles provided in the Directive to be applied to safeguard the employees' involvement in the merger process.

Directive 2005/56/EC - Step by Step

- Application -

The present Directive shall apply to mergers of limited liability companies formed in accordance with the law of a Member State provided, at least, two of those companies, are governed by the laws of different Member States and having their registered office, central

administration or principal place of business within the Community, hereinafter referred as: designated for:

"Cross-border mergers"

We have, like this, as initial factors or requirements, decisive for the application of this Directive:

An objective element:

- ***The merging companies have to be formed as a limited liability company in the member State where the company is located;***

and

- ***They have to have their registered office, central administration or undertaking within the UE territory;***

and

- ***To involve, at least, two of those companies societies governed by laws of different Member States.***

And what a limited liability company should understand?

a) One of the companies referred in the article 1 of the Directive 68/151/CEE

b) and also:

- A company with share capital;
- With legal personality;
- Possessing separate assets which alone serve to cover its debts;
- Be subjected under the national law governing it to conditions concerning guarantees such as are provided for by Directive 68/151/EEC, for the protection of the interests of members and others.

What we should understand as a **merger**?

Incorporation

«*One or more companies, on being dissolved without going into liquidation, transfer all their assets and liabilities to another existing company, the acquiring company, in exchange for the issue to their members of securities or shares representing the capital of that other company and, if applicable, a cash payment not exceeding 10 % of the nominal value, or, in the absence of a nominal value, of the accounting par value of those securities or shares»*

A merger by incorporation means that an existent company will «incorporate» one or more companies, already existent. These last ones will disappear and it will be maintained just one company, the incorporating company.

Constitution of a new company

«*Two or more companies, on being dissolved without going into liquidation, transfer all their assets and liabilities to a company that they form, the new company, in exchange for the issue to their members of securities or shares representing the capital of that new company and, if applicable, a cash payment not exceeding 10 % of the nominal value, or in the absence of a nominal value, of the accounting par value of those securities or shares*»

In this case a new entity emerges, composed by the assets and liabilities of the companies that constitute it, those companies are dissolved, without going into liquidation.

Transfer

«*A company, on being dissolved without going into liquidation, transfers all its assets and liabilities to the company holding all the securities or shares representing its capital*»

There is a transfer, of one company to another (holder of the totality of the securities shares representing its capital). The company, which is dissolved without going into liquidation moves all of its assets and liabilities to the company that we will designate by «dominant company».

Note:

Despite the present Directive, apparently, only allows the constitution of companies by merger, for incorporation or through the constitution of a new company, since the cash payment doesn't exceed the 10% of the nominal value or, in the absence of the nominal value, of the accounting par value of those securities or shares of the company resulting from the merger. The Directive also saves this rule, because it allows that such value to be exceeded in the event of the legislation of a Member State member allow payment of such amount in cash, in the cases above identified, superior to 10% of the nominal value or, in the absence of the nominal value, of the accounting par value of the shares or those securities representing of the capital of the cross-border resulting from the cross-border merger. In these cases, the present Directive is also applied.

If until so far we have been talking of the cases where the Directive is applied, we will approach the cases in which its application can be excluded.

The first exception is referred to the possibility of the Member States to decide not to apply this Directive:

- To cross-border mergers involving a co-operative society even in the cases where the latter would fall within the definition of a limited liability company;
- And also, the present Directive shall not apply to cross-border mergers involving a company the object of which is the collective investment of capital provided by the public, which operates on the principle of risk-spreading and the units of which are, at the holders' request, repurchased or redeemed, directly or indirectly, out of the assets of that company. Action taken by such a company to ensure that the stock exchange value of its units does not vary significantly from its net asset value shall be regarded as equivalent to such repurchase or redemption.

What are the conditions, whose verification is necessary, so that a cross-border merger is possible?

The involved companies have to fit in the concept of «*limited liability company*»;

That exists a will of integrating a merger's project;

That the companies can be merged within the terms of the national law of the concerned Member States. It will be the national law of each Member State, where each company is located, that will determine the provisions and formalities to proceed (namely in what concerns to process of decision making on the merger, to the protection of the merging companies' creditors, debenture holders and the holders of securities or shares, as well as of employees - other than the ones regarding the participation right, within the terms of the Directive itself).

Note: a Member State may enable its national authorities to oppose a given internal merger on ground of public interest shall also be applicable to a cross-border merger.

Procedure

- Project

The first step will be the elaboration, by the management or administrative organ **of each one of the merging companies, of a common draft project of cross-border merger.** This common project will include, at least:

i. the form, name and registered office of the merging companies and those proposed for the company resulting from the cross-border merger;

ii. the ratio applicable to the exchange of securities or shares representing the company capital and the amount of any cash payment;

iii. the terms for the allotment of securities or shares representing the capital of the company resulting from the cross-border merger;

iv. the likely repercussions of the cross-border merger on employment;

v. the date from which the holding of such securities or shares representing the company capital will entitle the holders to share in profits and any special conditions affecting that entitlement;

vi. the date from which the transactions of the merging companies will be treated for accounting purposes as being those of the company resulting from the cross-border merger;

vii. the rights conferred by the company resulting from the cross-border merger on members enjoying special rights or on holders of securities other than shares representing the company capital, or the measures proposed concerning them;

viii. any special advantages granted to the experts who examine the draft terms of the cross-border merger or to members of the administrative, management, supervisory or controlling organs of the merging companies;

ix. the statutes of the company resulting from the cross-border merger;

x. where appropriate, information on the procedures by which arrangements for the involvement of employees in the definition of their rights to participation in the company resulting from the cross-border merger are determined;

xi. information on the evaluation of the assets and liabilities which are transferred to the company resulting from the cross-border merger;

xii. dates of the merging companies' accounts used to establish the conditions of the cross-border merger.

- **Publication**

The common draft terms of the cross-border merger shall be published in the manner prescribed by the laws of each Member State in accordance for each of the merging companies at least one month before the date of the general meeting, which is to decide thereon.

It should be also published in the national gazette of the Member States where are located the different merging companies, the following particulars:

- the type, name and registered office of every merging company;
- the register and the respective number of the entry in that register;
- the arrangements made for the exercise of the rights of creditors and of any minority members of the merging companies and the address at which complete information on those arrangements may be obtained free of charge.

- **Report**

Equally, the management or administrative organ of each of the merging companies shall draw up a report intended for the members explaining and justifying the legal and economic aspects of the cross-border merger and explaining the implications of the cross-border merger for members, creditors and employees. Independent experts that can be natural persons or legal persons will elaborate this report.

One or more independent experts, appointed for that purpose at the joint request of the companies by a judicial or administrative authority in the Member State of one of the merging companies or of the company resulting from the cross-border merger or approved by such an authority, may examine the common draft terms of cross-border merger and draw up a single written report to all the members.

The merging companies shall make available, to the experts, the information that they consider necessary to elaborate the report.

Neither an examination of the common draft terms of cross-border merger by independent experts nor an expert report shall be required if all the members of each of the companies involved in the cross-border merger have so agreed.

- **Project's approval**

In the case of this possibility has not been used, the report shall be made available to the members and to the representatives of the employees or, where there are no such representatives, to the employees themselves, **not less than one month before the date of the general meeting that will decide on the common project's approval.**

We should mention that the report would only be made available to the employees themselves if by any chance there were no employees' representatives. As for this aspect, we think that it is important not to forget the articulation of the present Directive with the Directives 2002/14/EC and 2009/38/EC, in what concerns each company individually considered and the processes of information and consultation provided in the terms of the referred normative instruments.

In case of existing an opinion of the employees' representatives, and the management or administrative organ one of the merging companies has received it and if it has been emitted in accordance with the respective national law, this opinion should be attached to the elaborated report.

The general meeting of each of the merging companies shall decide on the approval of the common draft terms of cross-border merger. However, it may reserve the right to make implementation of the cross-border merger conditional on express ratification by it of the arrangements decided on with respect to the participation of employees in the company resulting from the cross-border merger.

The laws of a Member State need not require approval of the merger by the general meeting of the acquiring company whenever, in the quality of social organ, have the power to bind the company, what turns any irregularity occurred not opposable to third parties save, if the company proves that those third parties were aware of the irregularity.

Scrutiny of the legality

- **Regarding each one of the merging companies:**

In each Member State concerned the competent authority shall issue, without delay to each merging company subject to that State's national law, a certificate conclusively attesting to the proper completion of the pre-merger acts and formalities.

However, previously, each Member State shall designate the court, notary or other authority competent to scrutinise the legality of the cross-border merger as regards that part of the

procedure, which concerns each merging company subject to its national law. This authority shall in particular ensure that the merging companies have approved the common draft terms of cross-border merger in the same terms and, where appropriate, that arrangements for employee participation have been determined as provided by the present Directive.

- **Regarding to the conclusion of the merger:**

Once again each Member State will designate the designate the court, notary or other authority competent to scrutinise the legality of the cross-border merger as regards that part of the procedure that concerns the completion of the cross-border merger and, where appropriate, the formation of a new company resulting from the cross-border merger where the company created by the cross-border merger is subject to its national law.

Each merging company shall submit to the referred competent authority the certificate above described within six months of its issue together with the common draft terms of the cross-border merger approved by the general assembly of the respective company.

Only after the merger will entry into effect. Member State law to whose jurisdiction the company resulting from the cross-border merger is subject will determine the date on which the cross-border merger takes effect.

- **Publicity**

Each merging company shall submit to the public register in accordance with the law of the Member State which jurisdiction the company was subject. Each law of the Member States to whose jurisdiction the merging companies were subject shall determine, with respect to the territory of that State, the arrangements, for publicising completion of the cross-border merger in the public register in which each of the companies is required to file documents.

As for the company resulting from the cross-border merger shall be registered in accordance with the national law of the Member State to which the company is subject.

The registry for the registration of the company resulting from the cross-border merger shall notify, without delay, the registry in which each of the companies was required to file documents that the cross-border merger has taken effect

Deletion of the old registration, if applicable, shall be effected on receipt of that notification, but not before.

- **Consequences of the cross-border merger**

A cross-border merger carried out by **Incorporation** or **Transfer**, and from the date it takes effect on, will have the following consequences:

I. all the assets and liabilities of the company being acquired shall be transferred to the acquiring company;
II. the members of the company being acquired shall become members of the acquiring company;

III. the company being acquired shall cease to exist.

In the cases of cross-border merger carried out by the constitution of a new company will have, and from the date it takes effect on, the following consequences:

A. all the assets and liabilities of the merging companies shall be transferred to the new company;
B. the members of the merging companies shall become members of the new company;
C. the merging companies shall cease to exist.

The rights and obligations of the merging companies arising from contracts of employment or from employment relationships and existing at the date on which the cross-border merger takes effect shall, by reason of that cross-border merger taking effect, be transferred to the company resulting from the cross-border merger on the date on which the cross-border merger takes effect.

It is glimpsed a certain parallelism here with previous community normative instruments, that aim, as the present Directive, to assure the maintenance of the employees' rights, i.e., of the current conditions from their employment contracts and from employment relationships, which will be transferred for the company resulting from the cross-border merger.

- The employees' participation -

The company resulting from the cross-border merger can only be registered if it has been reached an agreement on the employees' participation terms, or if the relevant organs of the merging companies choose without any prior negotiation to be directly subject to the standard rules for participation, or once reached the end of the period for negotiation without an agreement, or if none of the merging companies have been regulated by participation rules before the registration of the company resulting from the cross-border merger.
The statutes of the company resulting from the cross-border merger cannot, in any way, be with what has been agreed on the employees' involvement.

So, in order to know which is the applied law, or even if the company resulting from the cross-border merger will have, or not, regulated the employees' participation, it will have to be observed certain requirements, similarly to what happens with the participation right provided by the SE directive.

According with the terms of article 16 of the present Directive, the rule to apply infers that the company resulting from the cross-border merger will be submitted to the eventual dispositions on the employees' participation of the Member State of the respective registered office.

However, such is not applied, if:

- At least, **one of the merging companies** has in the six months before the publication of the draft terms of the cross-border merger, an average number of **employees that exceeds 500 and is operating under an employee participation system,** meaning this

the capacity to influence exercised by the employees' representative body and/or their representatives the activities of the company through:

1. the right to elect or appoint some of the members of the company's supervisory or administrative organ; or

2. the right to recommend and/or oppose the appointment of some or all of the members of the company's supervisory or administrative organ.

- If the applicable national law to the company resulting from cross-border merger:

- provide for at least the same level of employee participation as operated in the relevant merging companies, measured by reference to the proportion of employee representatives amongst the members of the administrative or supervisory organ or their committees or of the management group which covers the profit units of the company, subject to employee representation, or
- provide for employees of establishments of the company resulting from the cross-border merger that are situated in other Member States the same entitlement to exercise participation rights as is enjoyed by those employees employed in the Member State where the company resulting from the cross-border merger has its registered office.

Like this it is tried to, at least apparently to safeguard the participation right and the eventual loss of it.

To the exceptions, will be applied the rules of the Member States and also, though with the necessary adaptations, some of the rules provided in the SE Regulation and in the Directive 2001/86/EC regulating the employees' involvement in the SE.

- Constitution and Composition of the SNB -

In that sense a special group of negotiation should be constituted, designated by SNB that will allow the negotiation of the participation right between employees and employers.

When establishing the project of a cross-border merger, the management or administrative organs of the merging companies shall give information on the identity of the merging companies and the number of employees, to initiate negotiations with the employees' representatives of those companies on the employees' involvement and the right of participation within the company resulting from the cross-border merger.

For such effect, and in the event of the relevant organs of the merging companies have chosen without any prior negotiation to be directly subject to the standard rules for participation, will be constituted a Special Negotiation Body, hereafter identified as SNB.

This SNB, constituting a representative special negotiation group of the employees of the merging companies, will be constituted according a rule: "**Each involved country should have a representative**", in order to assure that those members are chosen or designated in

proportional number to the number of employed employees in each Member State by the merging companies, being attributed, to each Member State, a seat for each fraction of 10%, or fraction of this value, of the number of employees employed by the merging companies in all the Member States, considered as a whole.

Assuring that there are so many additional members for each Member State as many as necessary to assure that the SNB includes, at least, a member that represents each merging company and that it has employees in that Member State, since the number of those additional members is not superior to 20% of the total of the designated members and that the composition of the SNB doesn't have, as consequence, a double representation of the employees.

It is from this principle that the Directive departures, in this concrete case, by establishing several limitations.
In the case of a merger it is still added the requirement that all the merging companies have to be represented. In this sense the Directive establishes the resource to additional members.

Like this and as it has been stressed, it has to attributed to each merging company one seat, in the event of that company is not represented in the end of the first operation. However, the Directive provides limits to this rule, meaning that the number of additional seats cannot exceed 20%.

- Way of Election -

The Member States shall determinate the way of election, or appointment, of the SNB members, to be elected or appointed in its territory and also to undertake the necessary measures to assure that, whenever possible, there is amongst the members of the group, at least, one representative of each merging company having employees in the Member State territory.

The laws of the Member States can provide that, among the members of the group, can be equally, included trade unions' representatives, despite being, or not, employed in one of the merging companies, or an undertaking concerned.

The Member States shall provide that the employees of the companies, or undertakings, where there are no employees' representatives, for strange reasons to their will, have the right to elect or appoint members to the SNB.

The SNB determines how will be the employees' involvement within the company resulting from the cross-border merger, which is done by a written agreement between this body and the competent organs of the merging companies.

- Deliberations -

The SNB decides ***by the majority, representing the majority of the employees, each member is entitled to one vote.*** There is here a novelty, too, in what concerns what was previously legislated. In this case, besides the votes' counting there is, also, the need to verify the meaning of the vote of the representatives, which can restrict, in a certain way, the freedom of vote.

Exceptions: The SNB has the right to decide, by a majority of two thirds of its members representing at least two thirds of the employees, including the votes of members representing employees in at least two different Member States, not to open negotiations or to terminate negotiations already opened.

If the result of the negotiation leads to a limitation of the proportion of employees' representatives in the administrative organ of the company resulting from the cross-border merger, it will be required a majority of two thirds of the SNB's members, representing, at least, two thirds of the employees, including votes from the employees employed in two Member States, minimum, if the participation covers, at least, 33% of the total number of employees of the merging companies.

There is a limitation of the participation rights if the proportion of members of the organs of the company resulting from the cross-border merger, in the terms of the "participation" concept, understood as the right of to choose or to designate some of the members of the supervisory or the administrative organ, or the right to appoint and/or to reject the designation of some or all of the members of the supervisory or of the administrative organ of the company, is inferior to the highest proportion in the merging companies.

If, following prior negotiations, standard rules for participation apply and notwithstanding these rules, the Member States may decide to limit the proportion of employee representatives in the administrative organ of the company resulting from the cross-border merger. However, if in one of the merging companies' employee representatives constituted at least one third of the administrative or supervisory board, the limitation may never result in a lower proportion of employee representatives in the administrative organ than one third.

- Functioning –

The SNB may request the support of experts of its choice, for instance, representatives of the appropriate trade union organisations at Community level. These experts can be present at the negotiation meetings, playing a consultative role, upon request of the SNB, if necessary to promote the coherence and the compatibility at level of the Community. The SNB can decide to inform the representatives of the appropriate external organisations, including the trade union organisations of the beginning of the negotiations.

The expenses concerned with the functioning of the SNB and, in general, of the negotiations, are supported by the merging companies, so that the SNB can accomplish its mission completely (the Member States can limit the financing to the covering of the expenses of a single expert).

- Confidentiality -

The Member States shall determine that the SNB members, the representative organ, as well as the experts assisting them, are not authorised to reveal to third parties information that has been transmitted to them as confidential.

This obligation is applicable regardless of the place where those persons are, and even after the term of the respective mandates.

Each Member State shall determine that, in specific cases and according with the conditions and limits fixed by the national law, the supervisory or the administrative organ is not complied to communicate information that, for its nature and according objective criteria, can be susceptible to seriously obstruct the operation of the company.

- The Agreement -

The negotiations initiate as soon as the SNB is constituted and continue during the following six months. This period can be extended, if the parts agree on that, beyond the six months up to one year, in total, counting from the institution of the SNB.

Exception: the relevant organs of the merging companies have the right to choose without any prior negotiation to be directly subject to the standard rules for participation referred to in article 16, paragraph 3(h), as laid down by the legislation of the Member State in which the company resulting from the cross-border merger is to have its registered office, and to abide by those rules from the date of registration.

The competent organs of the merging companies and the SNB should negotiate within a co-operation spirit in order to reach an agreement on the employees' involvement in the company resulting from the cross-border merger.

The reached agreement establishes its extent of application.

If during the negotiation process the parts decide to establish a participation arrangement, the fundamental elements of such including, if it the case, the number of members of the administrative organ or the supervisory of the company resulting from the cross-border merger that the employees will be entitled of elect, to designate, to recommend or to reject, the procedures according which the members can be chosen, designated or rejected by the employees, and their rights.

The agreement shall also include the date on which the agreement takes effect and its duration, the cases where the agreement shall be renegotiated and the renegotiation process.

As such, the SNB can:

- To decide not to initiate or even to end negotiations already open (for majority of two thirds of their members since representing the two thirds of the employees

and, at least, two different Member States). In this case the rules to be applied to the employees' participation will be applied the ones from the Member State where will be located the registered office of the company resulting from the cross-border merger;

- If the SNB decides not to open negotiations or to end the ones already opened and it does not invoke the dispositions of the Member State of the registered office of the company to constitute will be applied the standard dispositions of the Member State of the registered office of the company to constitute if, at least, one third of the employees had participation right previously;

- Agree on the employees' involvement and their participation rights;

- Agree on a reduction of rights - the negotiations can lead to a quantitative reduction of the participation rights (votes of two thirds of the members of the SNB, representing, at least, two thirds of the employees, including the votes of the employees employed in two Member States, minimum, if participation covers, at least, 33% of the total number of employees of the merging companies);

- Agree on the application of the standard dispositions limiting the number of the employees' representatives in the supervisory or the administrative organ, however if in one of the merging companies the employees' representatives constitute one third of the supervisory or administrative organ, the limitation cannot be inferior to one third;

- Not reach an agreement, or to let to end the period foreseen for the negotiations and to reach an agreement, in these cases will be applied the standard dispositions of the Member State of the registered office of the company to constitute;

- The SNB can, also, if before registration, one or more form of participation were applied to one or more companies, including, less than 33% of the total number of the employees of the group of the merging companies, to decide to apply the standard dispositions. In this case the SNB will decide which form will be adopted in the company resulting from the cross-border merger.

The standard dispositions will be applied, still, if before the registration, one or more participation forms were applied in one or more companies, including, at least, 33% of the total number of the employees of the group of the merging companies;

The parts can, also, agree on the application of the standard rules; it can also take place if the competent organs decide so if an agreement is not reached and the competent organs accept its application.

The Member States are entitled to choose for not transposing into their national law the participation standard dispositions provided by the Directive 2001/86/EC. If is this the case, if it is not possible to reach an agreement on the participation right and some of the companies had already participation right, previously, the company resulting from the cross-border

merger cannot be registered in that Member State, except if there is an agreement or none of the merging companies had participation previously.

-Employees' Protection -

The members of the SNB, the employees' representatives participating in the supervisory or administrative organ of the company resulting from the cross-border merger and that are employed by it, or one of the merging companies, have protection and identical warranties as the ones provided to the employees' representatives by the national law of the country employing them. Such is applied, in particular, to the meetings of the SNB or in any other meeting of the supervisory or administrative organ, as well as regarding the payment of the remuneration of the members during the necessary absence periods to the exercise of their functions.

- Scrutinity of the legality -

The Member State having, in its territory, the management of the undertakings of one company resulting from the cross-border merger and merging companies and the respective employees, shall assure that the management of the company and its employees comply with what is stipulated by Community law. It also shall take the necessary measures for the disrespect, making available administrative and judicial processes that allow the execution of the obligations resulting from it.

The Member States shall take the necessary measures to guaranty that the employees' representation structure of the merging companies and that stop existing while legal and autonomous entities are maintained after the registration of the company resulting from the cross-border merger.

- Standard Rules -

The employees of the company resulting from the cross-border merger, branches and establishments are entitled of elect, designate, recommend, and to oppose to the designation of a number of members of the supervisory or administrative organ of the company resulting from the cross-border merger equal to the highest of the proportions in force in one of the merging companies before registration.

If any of the companies had participation rules before registration, this is not obliged to establish dispositions as regards to the employees' participation.

Directive 2009.38.EC

The new EWC directive 2009/38/EC entered into force on 5 June 2009. The starting point of the revision was the employees' right to receive information about the activities of the company and about its plans for the future to give feedback regarding the above issues to have discussions where feedback is given at such time as will allow the opinion of employees to be considered in the decision-making to discuss issues with those management representatives who are responsible for the decisions.

European Works Councils

EWCs have their legal basis in an EU directive which has been transposed into the different national legislation, in different countries. The current EWC directive in force is Directive 2009/38/EC which was adopted in 2009.

The abbreviation EWC comes from the words European Works Council. It is a body consisting of employees. EWCs are a part of the European system for employee participation. EWCs enable employees to take part in the decision-making process of the company by receiving information and by giving feedback regarding that information. In short, the EWC is about information and consultation. In the background is the Charter of Fundamental Rights of the European Union and its Article 27 which stipulates that this is one of the basic rights of employees. On the basis of this article, the workers of an undertaking and their representatives must be ensured of adequate and timely information within the provisions mention in the article.

The concept of information:
Information means that employee representatives are given all the necessary data at such time, in such fashion and with such content as are appropriate to enable them to acquaint themselves with the subject matter and prepare for consultations with the management.

Primarily this means a written report of the most important issues which must be submitted to employee representatives well in time before the meeting. This makes it easier to prepare for meetings. In addition it would be advisable to agree on written quarterly or semi-annual reports concerning certain financial matters.

Information is followed by consultation.

The concept of consultation:
Consultation is the other half of EWCs' core activity. After the corporate management has provided employee representatives with a written report on the issues subject to consultation, the representatives must have adequate time and information in order to express their opinion to the management. According to the provisions of the current directive, information and consultation should occur in two separate meetings.

Both information and consultation apply of course in particular to any exceptional circumstances

Which undertakings and business units are in the scope of EWC activity:

EWC activities cover all undertakings and units controlled by a group of undertakings in the area of the EU and the EEA. The undertaking must have at least 1 000 employees within the Member States and at least two group undertakings must each have at least 150 employees in different Member States.

An undertaking is obliged to give to the employee representatives, when they so request, a complete list of all those establishments where the undertaking has significant activity and, for all those units, a breakdown of the number of employees, shareholder information, and the names and addresses of employee representatives.

Which countries are in the scope of EWC activity?

Legally, the EWC directive applies to EU member states and countries in the EEA, i.e. in addition to actual EU Member States, it also applies to Norway, Iceland and Liechtenstein.

The Directive does not oblige EU applicant countries to come into the sphere of EWC activity, however, it is possible to involve them in this activity either as full members or as observers. This can be agreed between the EWC and the undertaking. Countries outside of Europe, such as Russia, can also be granted observer status – however, this also must be agreed between the EWC and the undertaking.

The composition of a EWC

The law stipulates that a EWC shall consist of one (1) representative for each Member State. In addition, there shall be one (1) representative per portion of employees employed in a Member State amounting to 10% or a fraction thereof, of the number of employees employed in all the Member States taken together. Member States here mean those countries that are covered by EWC activities and also countries of the EEA, if the company operates in such countries. The Directive states that the European Works Council shall be composed of employees of the Community-scale undertaking or group of undertakings elected or appointed from their number by the employees' representatives or, in the absence thereof, by the entire body of employees. In the absence of employee representatives, EWC representatives shall be elected by direct ballot by the entire body of employees from among their number.

The composition of the EWC must in all cases be representative and be such that it meets the requirements set for a EWC. This means that there must be an adequate number of representatives in proportion to the number of employees in each Member State.

Matters that are not dealt with in a EWC

The EWC is not meant to deal with such national issues which do not even indirectly involve more than just one country.

Relationship between EWC procedure and national procedure

If the EWC agreement does not contain provisions on how national cooperation negotiations are to be linked to the EWC procedure, transnational issues which imply significant changes in work arrangements or contractual relations must be discussed both in the national cooperation negotiations and in the EWC.

Transnational and national procedures may take place either simultaneously or consecutively. If the order of procedures has not been specifically agreed, it is the obligation of the company to ensure that the informing and consulting of employees takes into consideration the objectives of informing and consultation as well as possible, while taking due note of the special requirements of the situation at hand.

Employee representatives are supported by a EWC Coordinator appointed by trade unions. The coordinator can offer information about best practices in EWC work and can warn about likely obstacles. S/he is familiar with the current European practices and has contacts with the actors of different European trade unions. If need be, the coordinator will also be able to find contacts in unions operating in another country who can talk to the employee representative with his/her own language.

It is important to have a good working relationship with your coordinator -this will allow you to take up any issue that is on your mind, whether big or small.

How to establish a EWC

The EWC negotiations can be initiated either by the employees or the management of a company.
In case the management takes the initiative, employees should get in touch with their union without delay to ensure that the negotiations proceed according to rules and regulations.

Establishing a EWC will improve the employees' possibilities to get more extensive information about the company.
If the request to initiate negotiations comes from the employees, the request to start EWC negotiations shall come from at least two countries. The request must be backed by at least 100 employees in total. This requirement is met, even if there is just one employee (or an employee representative) from one country, putting forward this request together with employees (or employee representatives) from another country, as long as there are in total enough employees behind the request. The request can be put forward by the employees as a group, or, as is customary, by their representatives.

What is the objective of EWC negotiations?

The objective of EWC negotiations is to draft an agreement about EWC activity to be implemented in the company and about the practices relating to this.

The Special Negotiating Body

The Special Negotiating Body is established for the negotiations. The objective of the SNB is to conclude a EWC agreement together with the employer. The SNB must have at least one employee representative from each EU/EEA country where the company has a unit.

Members of the SNB often become representatives in the EWC proper, so it is important for this reason also that all the countries are on board from the very beginning. It is advisable to use available experts, such as representatives of trade unions, when putting together an SNB because at this stage both the employee representatives and the management representatives often have a lot of questions on their mind.

The employer shall bear the expenses arising from the selecting of SNB members, the negotiations by the SNB in order to reach a EWC agreement as well as costs incurred from the use of experts needed in these negotiations.

Selection of the negotiators or SNB members

It will happen according the different national legislations of the member states on this issue.

Employees must choose as their representative at least one member from every EU/EEA Member State where the company has an establishment. One representative shall be allocated per portion of employees in a Member State amounting to 10%, or a fraction thereof, of the number of employees employed in all the Member States taken together. The size of the Special Negotiating Body is not restricted -it is defined on a case-by-case basis. The mandate of the SNB representatives will last throughout the negotiations.

There are different experts that can be appointed by European trade union federations and/or trade unions:

1) An expert who is appointed to help during the negotiations for an agreement.

2) A coordinator i.e. an expert whose task it is to participate continuously and actively in the EWC activities of the company and otherwise monitor the operations of the company.

3) Experts who are used in EWC meetings to introduce issues relating to a specific theme and/or to activate discussion. Examples of experts in this category would be lawyers, economists or trade union officials who can help with issues relating to their area of expertise.

The task of the EWC coordinator and expert is to support EWC activities. EWC coordinators especially have extensive know-how and experience about EWCs, best practices and legislation.

The coordinator is an expert on the labor law and negotiation practices of the company's domicile.

The EWC agreement can contain a clause about the use of experts which will guarantee the participation of an expert in the EWC's work. This will allow the EWC to be supported by a person whose EWC expertise will benefit the EWC's work.

Another key requirement is that the agreement must entail provisions on the use of a coordinator and at least one expert in the work of the EWC.

The coordinator is responsible for giving advice and providing guidance to employee representatives in the EWC and ensuring high-quality EWC activity. The coordinator can also inform representatives about best practices in EWC work and give advice and support with difficult issues. The coordinator usually comes from the country where the company has its domicile.

Announcement of EWC negotiations

The Special Negotiating Body must inform the central management of the Community-scale undertaking or group of undertakings, the management of undertakings under the control of the Community-scale group of undertakings or the management of local units of the community-scale undertaking and the competent European workers' and employers' organizations of its composition.

Negotiation process, the negotiations should take place within a spirit of cooperation.

The EWC negotiation process:

1 – The request is made to initiate the negotiations (the request is made by at least 100 employees or their representatives from two different countries, or the negotiations are initiated by the central management of the company);
2 - European organizations are notified of the invitation to negotiate;
3 - The SNB is established, the size of the SNB is determined and the members are selected;
4 - The SNB puts together the negotiation objectives of employees and draws up a draft Agreement;
5 - EWC negotiations are held:
The Employee representatives must have the opportunity to meet and consult without the representatives of central management being present and if necessary, simultaneous interpretation shall be provided in these meetings and also if necessary, documents shall be translated into the languages needed. Employee representatives have the right to use experts of their choice;
6 - Negotiations are concluded:

- An EWC agreement is reached and it is approved by the SNB;
- No agreement is reached, and it is noted that the subsidiary requirements of the law have entered into force;
- Two thirds of the members of the SNB decide that no EWC shall be established.

(Unless otherwise agreed, a waiting period of two (2) years must lapse before new negotiations can commence. Subsidiary requirements shall not enter into force.)

7 - EWC activity begins:

- ➔ The date of the first EWC meeting is set for the same year;
- ➔ The SNB is dissolved;
- ➔ EWC representatives are appointed (they may be the same as in the SNB);
- ➔ The EWC is established.

How do negotiations normally proceed?

The negotiating parties' understanding and knowledge about EWC activity and the overall willingness of central management and employees to cooperate are likely to have an impact on how smoothly the negotiations proceed.

Negotiations may not exceed three years. Unless an agreement is concluded within three (3) years following the start of negotiations, the subsidiary requirements of the law will enter into force.

What should be decided about the number of representatives?

In principle, each country where the undertaking operates should be represented. Additional representatives may be elected in proportion to the number of employees. A Works Council usually comprises 15-30 representatives but it should not be made too large in proportion to the size of the company. Employees should agree on the number of representatives that they will aim for before negotiations with the management begin. Experience has shown that EWCs where a great majority of employees come from one country do not function as well as those EWCs where broad-based representation has been sought.

If a country or a pair of countries dominates the work of the EWC, other countries may be left without any representation or their motivation to participate in the activity may be weak. In such circumstances the EWC can no longer serve its prime purpose, i.e. group-wide information and consultation.

Which issues are covered by information and consultation?

Information and consultation are the key elements of EWC work and they can include information about development and outlook regarding in particular the structure of the group, economic and financial situation, probable development of the business activity, production and sales, the situation and probable trend of employment, investments, substantial changes concerning organization, introduction of new working methods or production processes, transfers of production, mergers, cut-backs or closures of undertakings, establishments or important parts thereof and collective redundancies.

The list can be complemented by other issues if raised by employees to be taken up on the agenda.

In principle, information shall be given on all strategic matters which may involve at least two countries in the future. There are also issues which are considered transnational irrespective of the number of countries involved – issues which are important to European workers because they may affect the employees to a considerable extent or they may involve transfers of operations between member states.

Documents relating to important measures shall be available to the representatives in advance so that they have time to form an opinion on the matters at hand. The documents shall also be translated into all the necessary languages.

In order to ensure a smooth operation of the EWC it is important that the employee representatives shall meet both before and after the meeting at a national level. The purpose of the pre-meeting is to discuss the joint view of the employees. The topic of the debriefing meeting is how to report to national employee representatives. In order to be able to stay in contact, the EWC representatives should have access to up-to-date means of communication such as the telephone, email, the Internet and possibly their own discussion forum on the Internet.

What should be agreed concerning transnational matters?

The law defines transnational matters as matters concerning the entire Community-scale undertaking or group, or at least two undertakings or establishments of the group, or as matters which have or may have a significant impact on the position of employees irrespective of the number of member states. The definition of these matters is of key importance especially in so-called exceptional situations when it has to be considered whether a matter is transnational, i.e. whether it should be discussed in the EWC or not. When defining transnational matters, one must take into consideration both the extent of possible impact as well as the relevant level of representation of management and employees.

Situations shall be considered transnational when the decision and its effects take place in the same country but may eventually be reflected in another member state within the sphere of EWC activity (e.g. a change in the working methods in one country, if this would sooner or later have an impact on other countries as well).

The number of ordinary meetings taken per year

According to the subsidiary requirements the Works Council has the right to meet at least once a year. In addition, employee representatives shall have the possibility to meet without the management before and after the joint meeting.

The number of EWC meetings should be agreed on and written into the EWC agreement.

Preparing for meetings

All EWC meetings (ordinary EWC meetings, meetings organized in exceptional circumstances as well as Select Committee meetings) are efficient only if they have been prepared well.

Responsibility for the costs of EWC activity

The company shall bear the costs of all EWC related activities, not only the meeting costs.
The employer will also reimburse any other costs arising out of the EWC activity within the group.

The Select Committee and its composition

The EWC representatives shall appoint a Select Committee from among themselves. The task of the Select Committee is to coordinate the activities of the EWC, and it can only comprise employee representatives. The chair of the Select Committee must also be an employee representative. The committee shall have the possibility to exercise its activities on a regular basis.

According to the subsidiary requirements of the law, the Select Committee shall comprise at most five (5) members.

Other working groups

In addition to the Select Committee, other committees or working groups may also be established. They can be either permanent or temporary. Setting up a permanent committee or working group may be sensible, if the company has in its operations a specific permanent challenge or an objective which should be discussed by employees and central management together.

Informing those who are represented

All participants to the meeting are obliged not to disclose confidential information to people outside the company. However, the confidentiality rules do not prevent giving information to the coordinator of the EWC. Even if there are external participants in the employees' internal meeting, the obligation of central management to give information shall not be restricted. The internal meetings of employees are needed to provide employee representatives with the possibility of discussing issues freely

Employee representatives have the right to inform other employee representatives, or if no such representatives have been selected, employees directly, about the content and the results of the information and consultation process.

This right may only be restricted by the confidentiality rule.

What is confidential information?

The agreement should contain clear provisions regarding the right and the obligation of EWC representatives to distribute the information that they have been given to national employee representatives. The agreement must also clearly mention the right of employee

representatives and all other employees to approach the EWC representatives and the Select Committee. The agreement must make it clear that EWC representatives have the right and the obligation to inform employees at local and/or national level. This will strengthen national and European unity and is in accordance with the requirements of EWC legislation.

Exchanging of information between employee representatives

Already from the SNB stage onwards, employee representatives should exchange email addresses and create a network for information exchange. EWC representatives should have to a joint discussion forum on the Internet to make communication easier. The lack of a common language may hamper direct contacts between EWC representatives. Communication in between EWC meetings therefore remains very much the responsibility of the Select Committee.

The law stipulates that members of the employees' negotiating body have to keep confidential information obtained in connection with the cooperation procedure relating to business and trade secrets of the group of undertakings or the undertaking, information relating to the financial position of the group of undertakings or the undertaking, the said information not being public information according to other legislation, and the dissemination whereof would probably be prejudicial to the group of undertakings or the undertaking or any of their business partners or contracting parties, and information relating to the security of the group of undertakings or the undertaking and the corresponding security system, the dissemination whereof would be prejudicial to the group of undertakings or the undertaking or their business partners or contracting parties.

One of the preconditions for confidentiality is that the management of the group of undertakings or the undertaking have indicated to the persons bound by the obligation of confidentiality what information is considered as business and trade secrets. The obligation of confidentiality shall continue during the entire duration of the contract of employment of the employee and his representative, and the expert's confidentiality obligation shall continue after termination of the task of the expert.

Transnational Agreements

INTRODUCTION

During this work, carried out within the project «Information and Consultation – To Meet and Explore Concrete Needs», namely during its preparation and main-event's phases, we were fortunate, and got the possibility, to approach the theme of the **Transnational Agreements**, bringing to light several concrete cases that, due to space reasons we will not mention into detail but we invite the readers to watch the presentation of the different cases in the YouTube channel (IC into a New Dimension), in the Facebook page of the project (https://www.facebook.com/intoanewdimension?ref=h) and also at the Internet page (http://icnewdimension.sima.org.pt) where you also can have access to other material such as presentations.

Result of our already extensive experience and the needs felt by our partners we think that such justifies our effort in disseminating these instruments, promoting their role, extolling their potential, sharing experiences. Like this we will be, on the one hand, promoting new ways of social dialogue and, on the other hand, exploring new ways of employees' information and consultation, though in different levels.

The companies' growing international dimension, the mobility of the inputs, lead to the increasing of the international integration and the searching for solutions are the source of the so called «Transnational Agreements».

This establishes the relation between the employees, the relations of the company and the community where the company is located as well with the business partners that are exhorted to comply with the applicable laws being also well visible the corporate social responsibility of the company.

As for the nomenclature, we came across with a wide diversity of denominations:

- Framework agreements;
- Codes of conduct;
- Joint declaration/statement;
- Among others.

The importance of these instruments has been quite significant that it deserves a special attention from the community, a Transnational Company Agreement means: «an agreement comprising reciprocal commitments the scope of which extends to the territory of several States and which has been concluded by one or more representatives of a company or group of companies on the one hand, and one or more workers' organisations on the other hand, and which covers working and employment conditions and/or relations between employers and workers or their representatives» (European Commission 2008).

Here we have to stress the two most used typologies: the European framework agreements that, by rule, are applied only within the European scene, and they can cover, or not, countries outside the European Union territory (the big issue is if they should, or should not, include the candidate countries) and they have to be applied to more than one member state and

concluded by companies and the employees' representatives, and the international framework agreements that are applied to countries outside the European space.

Usually the promotors and the interveners also depend on the dimension (European or international) of these instruments being possible to come across with the respective international or European federations.

There is also here the variant of the code of conduct usually imposed and where it can be, or not, consulted the employees' representatives but where there is not a formal agreement, the initiative, by rule, and the signature is the company's responsibility (DAIMLER, COINDU).

In the present work we will focus more on the transnational company agreements (TCA) as a developed characteristic of social dialogue in the multinational companies. They give answers on a voluntary basis agreed between the company and the employees' organizations / representatives on issues related with anticipation of change and restructuring, training, mobility, health and safety, equality and other matters.

Articulation of information and consultation and the transnational agreements deserve a special attention once, emerging from a voluntary basis and resulting from an agreement between the company and the employees and/or their representatives, are based in the mutual recognition of the needs and procedures to be applied in the company. We can even stress that this is information and consultation at another level.

We shall point out that in the frame the European Works Councils assume a particular importance and the national structures should not be neglected and should be involved, though their involvement level varies.

These agreements are being more and more significant through the decades and for that reason it is important to underline their importance (though after 2008 there has been a decrease and their future it is nowadays uncertain despite some slight increase in this matter), the possibility to articulate these instruments with the remain information and consultation instruments, their application in the peripheral countries and/or small and medium dimension countries.

It is recognized their relevance because they play a positive role in the identification and development, implementation of the agreed solutions. They are also a platform to develop social dialogue at international level.

An example of such is the NOKIA case, a company with a world code of conduct that, despite the changes through the years, still keep the same principles. It consecrates some basic principles such as the prohibition of discrimination and the child labour and forced labour, promoting equality of opportunities to all the employees.

During the work developed by this project, emerged the possibility of the framework agreements to include only candidate countries. This question has been raised and deserves our attention. This because, in our opinion nothing prevents such. Nothing shall not prevent countries such as Montenegro, Serbia, Albania and Macedonia, and companies located in those countries to conclude a framework agreement.

Potentialities would be many even because like that they could establish better labour relations, social relations, betting on those regions' characteristics allowing a better matching of such to those. It would be still a European Framework Agreement, i.e. a TCA, or even an international agreement.

Another issue has been raised, in an original way, linked to companies resulting from the application of Directive 2005/56/EC and the Framework Agreements because these companies are, usually, small companies but that are present in more than one country and nothing, from a theoretical point of view, prevents such though some additional practical difficulties may be raised.

An international agreement or an international framework agreement (IFA) is an agreement negotiated between the multinational companies and the global trade unions' federations that represent employees at global level and per activity sector. These agreements have as goal to promote and monitoring the fundamental labour levels through the multinational's companies in particular in areas such as freedom of association and the access to collective bargaining, but also of the good labour relations and decent working conditions (source: Papadakis K., Shaping Global Industrial Relations, ILO, Geneva, 2011, p. 2).

Why a transnational agreement?

As already underlined this is the way that many multinational companies use to, in a consensual way, agree on a set of measures, namely, on training, health and safety at work, anticipation of restructuring measures, information and consultation going beyond what is foreseen in the directives, among others and like that to assure their application within the whole company, assuring the harmonization of the conditions.

It is a way for companies to deal with the globalization in a balanced way, promoting dialogue and trust within the company, as at the same time increase the integration and deal with concrete aspects of the company and special conditions.

There are some examples that intend to go beyond and include the standardization of information and consultation procedures, compensations (as in the case of company KEMET) and also way of profit sharing.

Transnational agreement Vs Code of Conduct

As already refereed these transnational agreements assume different names, amongst which we point out the so called «Codes of Conduct» that are different from the other ones due their unilateral character in opposition to the bilateral character of the transnational agreement.

These are characterized by the initiative, content, and obligation to apply in the company, though their content can be debated with the workers and / or their representatives. The unilateral character often present in these agreements is pointed out, by many, as an exclusion factor of the category of transnational agreements that, as already mentioned, is characterized by the bilateral character.

We have the case of COLEP, a Portuguese company, part of the Portuguese group RAR, and it has what is called of Code of conduct linked to their own values and principles. For the company, its code of conduct is something applied to all, despite the plant and country where the company is located. It includes a set of principles linked to the trade union respect, the respect for the colleagues, religion, etc., it also refers the prohibition of child labour, among other matters. Some of the matters are included because there is a wide range of cultures. Mainly based on respect, trust and justice.

Besides regulating the relations within the company, this is very useful once many clients working with the company demand and carry out social audits so that it can be certified as a supplier, checking if COLEP complies with the different standards that for them, as a client, are essential.

Another example of a Portuguese company that is internationalized – SODECIA – the company has a code of conduct consecrating a set of recommendations and common rules to the whole group and that promotes communication within the company, underling the importance of communication not only between the supervisors as well between the employees and the company. Employees' information and consultation is, as such, something well incorporated and happens on a regular basis.

Despite this unilateral character, its content when agreed with the workers and/or their representatives, as well the objective inherent to the initiative, support, no doubt, a transnational agreement.

Transnational agreements raise several issues, pertinent ones, linked namely with the interveners (the actors), their legitimacy and role, the transparency of these agreements, their implementation and the effects they will produce. All these questions deserve a careful attention.

Let's see:

⇒ The actors

If on the one side we have the company, it should be represented by someone with power to represent the company, duly mandated, and like that protecting eventual arguments used as for instance «I do not have power for such».

For that reason, in most of the cases, it is the company's central management that is intervening.

In what concerns the workers' side, there are several situations that should bear in mind and that are linked to the interveners' legitimacy.

1 – The agreement is negotiated and subscribed by a group of workers representing the workforce of the company, from the different countries covered. In this case can be questioned how they have been elected or appointed to, on other people's behalf, agree and

subscribe an agreement. If such is not duly protected there is the risk to make impossible its application.

2 – The agreement is negotiated and subscribed by the trade unions representatives, from the different trade unions structures present at the company, in the different countries involved. Will they be dully mandated to negotiate something that exceeds the national coverage, the collective bargaining at national level? This can be an obstacle besides being closely linked to the issue of implementation of the agreement in national territory, to what should be added the issue of the non- unionized workers.

3 – The agreement is negotiated and subscribed by the European works council. In this case several issues are raised linked not only to the fact to know whether this competence exceeds, or not, the competences and the objective of this body and also with the fact that it can be seen as a misuse of the rights of the local trade unions that will be, like that, excluded from the right assisting them.

4 – The agreement is negotiated and subscribed by the European trade union federations that, duly mandated, represent the affiliated structures. The European works council may, or may not, participate. Once again it is raised the issue related to the agreements' implementation at national level once it has to be, necessarily, included in the national collective bargaining if they want them to be applied.

We think that, no doubt, the articulated involvement of European works councils, national entities and European/International federations is essential. Tough it is a more difficult process not involving the national workers' representation structures raises more doubts even due to the respect for Directive 2002/14/EC and in what concerns matters included, besides establishing that it can be agreed on those, on a case by case situation (the case of TAP that recently initiated the process of privatization).

⇒ Transparency of the agreement

This question assumes more and more importance especially in what concerns how these agreements, their content, are divulged, near companies and workers, by the parts.

Having into consideration the repercussion of these agreements, or that might have, it is urgent their correct diffusion, such will allow, no doubt, the access of all to these agreements. Its knowledge is the keystone of the relation and will allow their good implementation within the company.

It is frequent to find situations of companies and/or workers that do not know at all the agreements' content or event its existence. On the other hand, there are companies that promote the agreement, its' content, with several dissemination actions near the workers such is the example of NOKIA and COLEP.

On the other hand we face also imbalance situations between the countries because if in a certain EU country there are companies promoting their agreements as well the knowledge of the content, the same company in a candidate country, for instance, does not do that, stressing the imbalance and differences amongst the interveners.

We can conclude, for that reason, that it is essential to promote transparency of the agreement or we will be promoting imbalance laying in the lack of knowledge and the arbitrariness within the company and/or group of companies.

Parts should, for that reason, assure such transparency and there for its applicability.

Lack of knowledge continues to be, in many cases, a problem that in our understanding despite thinking that there has been an evolution in that sense.

⇒ Applicability

An issue closely linked to the previous one, the applicability of the TCA is one of the most focused questions when covering this theme. The application of the agreements at national level has a significant role in a way that such is linked not only with the transparency of the agreement as also with the capacity of the parts to apply the content of the agreement.

Knowledge is important, as already stressed, but its application in the territory of the different member states is also very important because the existence of an agreement has to guarantee also its' viability and its' consistent application to all the company's units, even with the goal to promote integration at international level.

Applicability is, consequently, linked to the parts' representativeness at national level. More representative, higher possibility to guaranty the agreements' applicability, especially in what concerns its' inclusion in the national collective bargaining.

This is a very sensitive questions and has been raising, on the parts' side, some concern by the fact that, locally and nationally, they cannot apply the content of the agreement due to the lack of representativeness of some of the national local workers representation structures, this because of the unwillingness of some companies in applying its' content. This seems, and having into consideration the voluntary basis of these agreements and the fact that they look for solutions at international level, quite paradoxical and it is being questioned how a local management can miss the compromise internationally assumed.

The production of effects, at national level, is linked to the integration of the agreement in the collective bargaining because only like that, and legally, can claim its application and the enforcement of the agreed solutions. Only like that its' content can produce effects, at local level, complying the parts to enforce the agreement. If such does not happen, its' applicability and the respect for what has been agreed will depend on the will and availability of the parts.

According with the work carried out near the partners and other counterparts, we can draw up a scenario where on the one side we will have the pros and in the other side, the cons of these agreements and the process leading to the conclusion of these agreements:

Pros:

I. These agreements are a vehicle to deal with globalization in a balanced way;
II. Promoting an environment of trust and dialogue,
III. Strengthening social dialogue and
IV. Promoting stability,

V. Increases European integration,
VI. Leading with concrete aspects, concrete needs of the companies.

On the other hand, we have the Cons:

I. The counterparts state that such instruments are not useful,
II. Resulting, even, in a negative impact in the national collective bargaining structures;
III. The same happens regarding the local management versus the central management of the companies that, as such, may conflict for coming to realize that, locally, it is been withheld the power to act according the national characteristics.

As already mentioned the multinational company KEMET has a global code of conduct that it is, according the counterpart's opinion, very basic because consecrates elementary principles such as the respect for the human rights, environmental concerns, equal opportunities. They suggest, as such, that having into consideration the global character of such instrument, would be convenient to include matters such as flexibility, rules for collective bargaining as a way to harmonize the procedures applied to the whole group. Interesting would also be to include matters on how to overcome crisis and that were able to apply on a case by case situation. If we have into consideration the universe to which this code of conduct is applied makes all the sense, according the counterparts' opinion, to enlarge the content aiming to promote the harmonization of rules and behaviours.

However, as the company does not have a EWC (European Works Council) instituted they have a problem once it is more difficult to coordinate actions. They also stress the fact that it might lead to a loss of flexibility at national level, due to the local and national characteristics despite the respect for the different national legislations and for the collective bargaining.

One of the examples that we can point out that supports another approach is the case of SN – Siderurgia Nacional (Steel company) – this company, on the contrary to the others, does not have a code of conduct or any other such instrument because the company does not see the advantage in having one once they have a collective agreement at company level, debated and agreed with the workers' representatives and it consecrates the principles of the company and a proximity culture between the company and the workers; as such it does not see the need to have two instruments and like that it is not necessary to transpose it into the national collective bargaining so that it can produce legal effects at national level and they meet the national characteristics.

This is, no doubt, a very interesting approach, especially we have into consideration the tradition and the experience of the company in what concerns the regulation of the relations between the company, its' workers and other counterparts and also concerning the obstacles that might be created to a transnational company's agreement.

If we take into consideration company COINDU, a Portuguese company mainly within the car sector, already present over the world and nowadays it operates in Romania and Germany.

The company does not have a code of conduct but a manual with good environmental practices containing advices, practices on the use of natural resources, reduction of pollution, among others, that should be followed by the workers and service providers.

The company considers these instruments as very important ones because they are, in their opinion, a good vehicle to harmonize practices making them more consistent. Despite not being considered as a priority, nowadays the company does not excludes the possibility to have a code of conduct if the conditions are gathered.

⇒ Information and consultation and the Transnational company agreements

Employees' Information and consultation plays increasingly an important role in the development of the companies, anticipating and dealing with change, especially in the search for solutions to face crisis' situations.

Many support that the transnational company agreements, in every form assumed, are the ideal place to agree and include matters that can go beyond the considered more elementary rights. Namely, the inclusion of rules related to employees' information and consultation, both at European level, even for the cases where it is instituted a EWC, as at national level, advocating a harmonization of procedures, always having into consideration the respect for the national practices and legislation on this.

Within the territory of the European Union the information and consultation instruments and the TCA are not separated and we think that is relevant to analyse different situations:

⇒ Transnational agreements and the wide application within the territory of the European Union

⇒ Transnational agreements involving European countries, with different possibilities

We will not focus the possibility, due to their particularities, of the international framework agreements.

However, we think that it is important to make reference to the codes of conduct and their articulation with the information and consultation mechanisms.

We shall start by the analysis of the first situation:

⇒ Transnational agreements within the territory of the European Union

These are the preferential mechanisms where the interlocutors are the national entities (Directive 2002/14/EC) and the EWC – if they are constituted. We see the EWC, having into consideration the practice developed by some of these bodies going beyond just information and consultation, they have here a significant role in the negotiation and conclusion of the agreement, always helped by the European federations, even due to legitimacy reasons.

In our opinion, and having into consideration the Directive 2002/14/EC itself, and even because the useful effect can be questioned, the national structures should be always involved either through the involvement of the representative within the EWC, or directly through the information and consultation mechanism of the national structures. We think that this body should not supersede to the rest. In the interest of all, and trying to safeguard the interests, characteristics and particular aspects of all, should take an active role in the development of these instruments.

Even because in certain realities the incorporation of the TCA's content into the national legislations or in the collective bargaining is fundamental as a way to overcome the often known issue of legitimacy.

There is also another reality – SE (European Company), through the Directive on the employees' involvement, that we think that its' role is quite similar to the one refereed to the EWCs, only with a single remark to the cases where it is present the participation right as a reinforcement so that certain situation are consecrated, or in the case of the codes of conduct it can be a way to counter them or to influence them.

Another reality that has been brought into the light within this project is the possibility of the framework agreements to companies that are the result of cross borders mergers and also in this case and from a theoretical point of view, and despite the hypothesis not so explored, such do not represent an obstacle because there is the possibility to have a TCA not being limited by the number of workers of the company.

⇒ Transnational agreements covering countries in Europe

On this we have different realities to consider:

There countries that despite not being a member of the European Union that have transposed the EWC Directive (Liechtenstein, Norway, Iceland). Within this frame multinational companies are a reality though in the Liechtenstein we are referring mainly to the bank sector.

A special note: in the event of the process is initiated in one of these countries it should be articulated with Directive 2002/14/EC in what it consecrates on information and consultation at national level.

The hypothesis that theoretical can be raised is the transnational agreement extended to the candidate countries (Albania, Macedonia, Montenegro, Serbia and Turkey). As it is know there is the priority to involve all the EU candidate countries in the EWC but such depends on the company, even within this project and in the case of Macedonia has been reported the opposition of multinational, however there cases of others where such is well accepted.

Facing this scenario, marked by the free will of the companies, where Directives only are binding from the moment of integration, and whose process is not developed at the same time the voluntary aspect assumes a special importance.

Despite such, we think that it is still important the role played by the social partners in these processes even to lead to awareness and adaptation of them to the national legislations and the communitarian rules.

In the codes of conduct, as stressed, initiative depends on the employers and the signature is only their responsibility.

There are still other examples of involvement, or not, of the social partners. The diversity of realities is such that once again we would like to call the attention to the cases presented at the conference of the project that took place in Lisbon.

However, if we restrict ourselves to the matters foreseen in the employees' information and consultation Directives, and even when the stipulations emerge resulting from the initiative of the employers and entitled as a code of conduct, they still have to be subjected to information and consultation in the same terms as the ones prior refereed.

As a conclusion, there is a relation of the Directives on the employees' information and consultation with the transnational agreements, very close in certain cases.

A final note goes to the TCAs in the candidate countries because nothing prevents such only that they have to follow, in certain aspects, some characteristics that characterize the agreements signed within the EU, involvement of the social partners and even the European federations. As it clear there is the potential for these countries to integrate, in these instruments, matters or patterns that exist in the EU. Of course that and stating the case reported by Macedonia, the difficulties felt are much higher than the ones felt in the countries where those companies have their headquarters. But still exists, in reality, a wide area for development of these realities through the involvement of the actual partners of the member states.