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## **NFU Response to Consultation on the future of European Company Law**

### **Summary of main points**

- Employee participation should be an integral part of company law as well as the corporate governance agenda.
- There should be one common set of rules for employee involvement for all European company law acts. These should combine best practice from existing acts.
- The creation of shelf SEs should be explicitly banned, or rules ensuring employee involvement after activation of shelf SEs must be introduced.
- If a company is transformed to or from a European company structure, the best available rules on employee protection and involvement should apply.

### **General remarks**

NFU is generally positive towards a harmonised internal market and a comprehensive set of European company rules creating a level playing field. There should be one regulatory model that will cover any type of action and any type of resulting company; to have separate rules for employee involvement in SE companies, companies resulting from cross-border mergers and then again EPC's, makes the assessment of a restructuring process harder and less foreseeable for every part involved.

NFU's position is that the participation structure from the SE-Directive is preferable since it provides for a clear and stable framework for information and consultation, and as well as safeguards national provisions concerning participation rights. However, any such legislation must also take into account, and remedy, the uncertainties that currently exists in the SE-Directive regarding the creation of "shelf SEs". The lack of clear rules on this issue makes the legal framework less foreseeable since such regulations make it possible to circumvent the employees' guaranteed right to exert influence (see also question 11).

Any new legislation on European company structures that will cover establishments and/or subsidiaries in two or more Member States should provide for the setting-up of a European level works council in order to be consistent with existing European legislation.

It is of utmost importance that existing employees' rights are maintained when a national company is converted into a European structure or a European structure into a national company, when the level of existing employees' rights is higher than national requirements before the conversion. Vice versa, the legislation should provide for negotiations in order to increase the level after the conversion, if the then existing rights are less advantageous than national requirements.

NFU believes that good corporate governance is about developing the involvement of employees in the decision-making and strategic discussions on the future of the company. The principle of employee participation should, as NFU sees it, be an integral part of company law as well as the corporate governance agenda. Employees are key stakeholders in the companies, and they also often represent the link between the companies and their customers.

## **Specific remarks**

### **Question 6**

*Would you support that the EU's priority should be to improve the existing harmonised legal framework or, rather, to explore new areas for harmonisation?*

From an employee perspective, there are definitely gains to be made from certain harmonisation measures as regards the existing legal framework. NFU firmly believes that different pieces of legislation, with different contents regarding information and consultation of employees, can be confusing as well as impose unnecessary administrative burdens on companies.

For example, NFU would like to point to the possible benefits of harmonising the EWC Directive (2009/38/EC) and the Directive supplementing the Statute for a European company with regard to the involvement of employees (2001/86/EC). The primary objective should be to create a common set of rules, taking departure from a best practice view. This means that the European legislator should combine the best parts from both directives into a single set of rules, to ensure that all employees are treated equally, regardless of what company form their employer has chosen. This would lead to a more transparent system for employee involvement, and a more level playing field for companies. It is however of utmost importance, as mentioned above, that the leading star is "best practice". Such a harmonisation measure must not lead to the worsening of any rights for employees.

### **Question 11**

*Should existing EU company legal forms be reviewed?*

To NFU, one very important matter is the compulsory negotiation of employee involvement prior to the registration of an SE. This is of particular importance in relation to the discussion regarding the shelf SEs.

Article 12(2) of the SE Regulation states that “an SE may not be registered unless an agreement on arrangements for employee involvement pursuant to Article 4 of Directive 2001/86/EC has been concluded, or a decision pursuant to Article 3(6) of the Directive has been taken, or the period for negotiations pursuant to Article 5 of the Directive has expired without an agreement having been concluded”. Furthermore, paragraph 6 of the SE Directive stipulates: “information and consultation procedures at transnational level should nevertheless be ensured in all cases of creation of an SE” and Article 1 paragraph 2 states that “arrangements for the involvement of employees shall be established in every SE (...)”.

The possibility to create shelf SEs for future activation is contrary to the strict formulations in Directive 2001/86. Therefore, the creation of shelf SEs should be explicitly banned, and NFU urges the Commission to act on this issue swiftly.

If the creation of shelf SEs anyway should be considered to be in line with the Directive, NFU urges the Commission to further research the use and underlying drivers behind the creation of shelf SEs, and how the shelf SEs are perceived from an employee participation perspective in the various member states.

There must be good, objective and sound reasons to allow the formation of shelf SEs, and it must clearly counterbalance the negative aspect of the matter. The lack of clear rules on this issue makes the legal framework less foreseeable since such regulations makes it possible to circumvent the employees' guaranteed right to exert influence.

If the creation of shelf SEs should be considered to be in line with the Directive, then it is of utmost importance that there are rules governing the activation of these companies on a European level, and not leave it to the discretion of national courts. Activation of shelf SEs must be accompanied by rules on employee influence that, at least, are in line with the ones in the original Directive. Such rules must of course also be made valid retroactively for already existing shelf SEs.

#### **Question 16**

*What should be the consequences of a cross-border transfer of registered office?*

NFU of course believes that a transfer should not result in the loss of the pre-existing rights of shareholders, members, creditors and employees of the company, as it is formulated in the question. A protection of pre-existing rights must not, however, mean a limitation to the possibility to acquire new, and better, rights.

Pre-existing rights should form a floor; if a company transfers its seat to a country where the rights in any aspect are worse for the employees, the pre-existing ones must apply. If a



company, however, transfers its seat to a country where employees' rights are better looked after, the "new and better" rights must apply to the employees.

A country of origin principle in this respect opens up for abuse, and it must be ensured that the European rules on transfer of registered office does not create loopholes to circumvent national legislation on protection of, and rights for, employees.

## **About NFU**

Nordic Financial Unions (NFU) is the voice of the employees in the Nordic financial sectors. We are an organisation for co-operation between trade unions in the banking, finance and insurance sectors of the Nordic countries. Through our eight affiliated unions in Denmark, Sweden, Norway, Finland and Iceland we represent 160 000 members – a vast majority of the employees in the Nordic financial sectors.

Yours sincerely,

Nordic Financial Unions (NFU)

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