II

(Preparatory Acts)

ECONOMIC AND SOCIAL COMMITTEE

Opinion of the Economic and Social Committee on the 'European Company Statute'

(98/C 129/01)

On July 8 1997 the Economic and Social Committee, acting under Rule 23(2) of its rules of procedure, decided to draw up an opinion on the 'European Company Statute'.

The Section for Industry, Commerce, Crafts and Services, which was responsible for preparing the Committee's work on the subject, adopted its opinion on 5 November 1997. The rapporteur was Mr Boussat and the co-rapporteur Mr Schmitz.

At its 350th plenary session of 10 and 11 December 1997 (meeting of 11 December) the Economic and Social Committee adopted the following opinion by a majority with 116 votes in favour, 3 against and 11 abstentions.

1. **Background**

1.1. The European company statute has been the subject of successive proposals over a period of more than two decades. The statute should facilitate cooperation between firms in the Member States with a view to the development of the EU market. It must therefore be attractive to the business world whilst taking account of the significant differences which may exist between Member States.

2. **Structure of instruments**

2.1. The draft European company statute is based on a regulation and a directive.

2.2. Three dimensions are dealt with: the statute's place in company law, the tax provisions and worker participation.

2.3. This constitutes a coherent whole. The basic link between the two instruments is very clear.

2.3.1. Certain provisions of the regulation regarding the powers of the European company's decision-making bodies need to be examined.

2.3.2. The same is true of actions requiring the authorization of the supervisory board or discussion by the board of management [Article 72 of the proposal of 16 May 1991 ([1])]. The list of these actions will affect the level of worker participation in the European company.

2.4. The tax provisions need to be clarified, particularly with regard to double taxation and tax consolidation. At all events the Committee will be asked to issue an additional opinion on the whole of the European company statute (regulation and directive). The opinion will look, inter alia, at competition problems.

2.5. To sum up:

2.5.1. The provisions currently envisaged or to be spelt out in detail in the regulation render some of the

([1]) OJ C 176, 8.7.1991, p. 40.

provisions destined to appear in the other instrument, the directive, rather uncertain. The provisions currently envisaged or to be spelt out in detail in the regulation render some of the provisions destined to appear in the other instrument, the directive, rather uncertain. The text of the Luxembourg Presidency's proposed compromise for the proposal for a directive, which is based on the Davignon report, thus has to be approached with some caution in view of the uncertainties inherent in the draft regulation.

2.6. In more general terms, the European company statute's social dimension is inseparable from the economic and legal dimensions dealt with in the regulation. This would be contrary to the spirit of the Treaty's provisions on economic and social cohesion.

2.7. It is with these reservations in mind that we embark on discussion of the proposed Luxembourg compromise.

3. **General comments**

3.1. The proposed compromise based on the Davignon report is a good basis for relaunching the stalled discussions on the worker participation provisions of the European company statute.

3.2. There is thus some merit in the view of the Davignon group and the Luxembourg Presidency that the establishment of a European company should be authorized only for trans-frontier reasons, (establishment of a European company via restructuring must be banned. There is a danger that a European company which was the product of a merger might be able to evade its participation obligations).

3.3. The aim is not to transpose the particular participation model of only one or a few Member States to the rest of the Community. At the same time it must not be possible to circumvent worker participation in the event of merger with the aid of a Community legal instrument. Workers in a Member State with a participation system should not suffer a loss of rights deriving from Europe's inability to provide for involvement at a level beyond that of mere information and consultation [1].

3.4. An approach based on consensus emphasizing negotiation is to be welcomed, providing that it respects the autonomy of the social partners.

3.5. It is important that there be free agreement on the solutions best suited to the needs of firms and their employees in the light of their socio-economic culture. A significant harmonization process is incompatible with very diverse national practices based on different decision-making systems.

3.6. The Committee welcomes the proposal of the Davignon group that the arrangements for worker participation should be arrived at by negotiation. The Committee also feels that there should be a reference provision in the event that negotiations fail. One problem, however, is that it is very difficult to take account of all the diverse practices existing in the majority of Member States.

3.7. Imposing excessively demanding reference provisions on companies which in many Member States do not practise worker participation runs the risk of deterring companies from opting for the European company statute. Consequently they would not benefit from the statute's legal and fiscal provisions, and at the same time workers would be deprived of the opportunity possibly to obtain by negotiation the development of social relations with regard to their involvement in companies' strategic decisions. Companies would be receiving unequal treatment compared with other companies from those countries where worker participation is an established part of the local culture.

3.8. The reference in the Presidency's draft to Directive 94/95 is generally welcomed.

3.8.1. The Committee points out however that this directive deals with worker information and consultation, whilst the European company compromise deals with information, consultation and participation. Moreover the directive on the European works council covers large companies with more than 1000 employees, whilst the compromise concerns all companies regardless of their size.

3.8.2. The fact that the Presidency's proposed compromise sets out to regulate both participation and information and consultation questions appears problematic. The Committee would like to see a clear separation between these two areas. For this reason thought needs to be given to the possibility of treating the questions of information and consultation of the European company works council separately, in the reference provisions.

3.9. The problem of SMEs thus needs further study. Bearing in mind the specific characteristics and the size of SMEs, the procedures will have to be simplified in their case. Another subject requiring thought is the application of the statute to other forms of European enterprise, such as associations, cooperatives and mutual societies. Committee opinion 698/96 [2] advocated a separate decision for these enterprises. The Committee draws the Council's attention to the need to draw up a special statute for these firms rapidly; examination of this special statute should proceed in parallel with that of the proposed European company statute.

[1] ESC opinion: OJ C 212, 22.7.1996, p. 36.

[2] OJ C 212, 22.7.1996, p. 40.

4. **Negotiation**

4.1. In the light of the above, thought needs to be given to the negotiation arrangements. The principle of negotiation needs to be reinforced.

4.2. The Luxembourg presidency's proposals on the negotiating arrangements are inadequate. The Committee doubts whether the negotiating rules proposed by the Luxembourg Presidency will be sufficient to ensure that real negotiations take place. There is a danger that one or other of the parties to the negotiation might from the outset have no interest in any other solution than that proposed by the reference provisions.

4.2.1. The reference to the directive on works councils, which, with regard to both the timetable and the negotiating procedure could compromise the progress of the negotiations is inappropriate.

4.3. Social conditions, which are particularly complex in some Member States, make it necessary to consider other approaches taking greater account of local social customs. This, applies both to firms with a strong tradition of participation and to countries without any tradition of this kind. The Committee stresses in this context that the participation arrangements must not be limited to representation on the management or supervisory board.

4.4. In order to reinforce the negotiation procedure the Committee proposes that:

4.4.1. In accordance with national practices not only worker representatives from firms, but also the representative trade unions from the firm in question and the relevant European trade union associations should have the right to negotiate on behalf of workers. For the purposes of implementing the directive the procedure for appointing the members of this specific negotiating body would be established under national law whilst respecting the autonomy of the social partners.

4.4.2. If negotiations threaten to break down an arbitration procedure may be brought into play. The purpose of arbitration would be to propose a solution based as far as possible on rules applying in the firms in question. An arrangement of this kind has the virtue of flexibility and the advantage of facilitating more appropriate solutions in individual cases than would be achieved by simply applying the reference provisions. The autonomy of the negotiating partners would be unaffected by the arbitration procedure. The arbitrator would be chosen by companies' social partners.

5. **Reference provisions**

5.1. The Luxembourg Presidency's draft compromise proposes that in the event of a breakdown of negotiations reference provisions be applied concerning the establishment within the firm of a system of participation.

5.2. Doubts have been expressed in the Committee as to the reference provisions and two schools of thought are discernible, as follows:

— Those coming from countries where participation or similar systems (bipolar decision-making in firms, Scandinavian board model with legal representation of workers) are the rule feel that the proposed optional European company statute system could offer companies a way of circumventing the rule. They are thus in favour of the reference provisions put forward in the proposed compromise. Some even favour a stronger participation system than that proposed.

— Those coming from countries where worker involvement is based to a greater or lesser extent on the provision of information to, and consultation of, workers (unitary decision-making in firms) feel that the draft European company statute must as far as possible respect the pluralism of national social practices.

5.3. The Committee feels that maximum account can be taken of these two schools of thought by ensuring as far as possible, via introduction of the additional guarantees proposed in point 4.4, that the reference provisions are not resorted to too hastily.

6. **Conclusion**

6.1. Worker participation is a sensitive subject. Every effort must therefore be made to ensure that solutions are not imposed on the parties concerned against their will. The Economic and Social Committee feels that, with the help of the proposals contained in this opinion, the Luxembourg compromise proposal's emphasis on negotiated solutions can be reinforced.

6.2. The information and consultation procedure is a communications process. Participation is more delicate. It requires the involvement of all partners. This cannot be done by decree. This will require examination of the detailed arrangements for the negotiation and reference provisions contained in the appendix.

6.3. However, the ESC assumes that the bipolar and unitary systems are not by definition immutable. The ESC considers that the introduction of the European company statute could be an opportunity to develop new synergies by negotiation.

Brussels, 11 December 1997.

The President
of the Economic and Social Committee
Tom JENKINS

APPENDIX

to the opinion of the Economic and Social Committee

The following amendment, which received at least a quarter of the votes cast, was defeated in the course of the debates.

Point 5.2

Replace the first line with:

'The reference provisions have been approached by the Committee from different starting points:'

Then start the first and second indent with the words:

'— Some members coming from'

and delete the text between brackets in the first indent '(bipolar ... workers)'; and in the second indent '(unitary decision-making in firms)'; and in the first indent change the words 'participation or similar systems' into 'participation via workers' seats in the management or supervisory board'.

Reason

The present text seems too strong in suggesting 'block' positions of the members based on their national background; it seems more prudent to speak about 'some' members.

The text between brackets is confusing: the differences lay not so much in the monistic or dualistic board systems existing in different Member States, and present as an option in the proposed European Company Statute, but in the difference whether the system of participation makes use of workers' seats in the respective management or supervisory bodies or not. This is better formulated by the text proposed for the first indent, and by deleting the text between brackets.

Result of the vote

For: 34, against: 67, abstentions: 16.
