

Chapter 11

The workers' voice in SE agreements

Edgar Rose

1. Introduction

The SE as a form of association continues to exercise an astonishing attraction for German companies.¹ Altogether 103 of the total of 219 'normal' SEs – in other words, SEs with employees and activities – in Europe have their seat in Germany as of mid-August 2012.² All these SEs came into being in the space of seven years. Employee representatives have played an important role in this wave of establishment. This is because, in accordance with Art. 2 para. 2 of the SE Directive 2001/86/EC, every foundation requires an agreement on employee participation between employee representatives and the relevant managements of the companies concerned. This SE agreement should ensure, according to § 1 of Germany's Law on employee involvement in a European company transposing the directive (Gesetz über die Beteiligung der Arbeitnehmer in einer Europäischen Gesellschaft, hereafter SEBG), the right of employees to participate in enterprise decision-making. This contribution presents the most important results of some research³ into the contents of a total of 44 German SE agreements on employee participation.

We shall analyse the research results here primarily from the standpoint of whether the standard of participation foreseen in the subsidiary requirements⁴ of SEBG (§§ 23–38) could be applied – or even improved upon – in the negotiations on SE agreements. Employee representatives are often in a comparatively favourable negotiating position at the

-
1. See the contribution by Köstler in this volume.
 2. ETUI ECDB data, 2012.
 3. The complete research results may be found in Rose and Köstler (2011).
 4. These are the provisions which, as a rule, apply as required by law if the negotiations on an SE agreement fail.

founding of an SE. This is because the participating companies take the initiative to found an SE and seek to reach an SE agreement with the employee representatives for their draft terms. This differs significantly from the establishment of a European Works Council at an existing company, where it is generally the employees' side that seeks an agreement. Of course, even if the negotiations on an SE agreement fail, an SE can still be founded. In that event, there is employee involvement in accordance with §§ 22 para. 1 and 34 para. 1 SEBG 'as required by law' based on the standard statutory requirements. It can be assumed, however, that enterprises are reluctant to launch the new company with failed negotiations on an SE agreement for the sake of their image and desired corporate identity. It can therefore be expected that the contents of SE agreements are often more favourable for the employees' side than the standard statutory requirements. In what follows we shall discuss whether that is the case and how it manifests itself.

2. The general structure of employee participation

The research was based on the 44 German SE agreements that could be found in the Hans Böckler Stiftung's⁵ archive of company agreements up to and including 2010. No particular selection was made. In all instances a special negotiating body (SNB) was formed to represent the employees' side in accordance with Art. 3 para. 2 SE Directive 2001/86/EC. In two cases, however, the SNB and the relevant bodies of the companies concerned agreed nothing except that there would be no employee' participation at all at the SE level. Thus 42 SE agreements remained for further evaluation.

In the vast majority of other instances the formation of an SE Works Council is provided for in the SE agreements under examination. Under German law, the SE Works Council is the representative body responsible for employee information and consultation within the meaning of Art. 4 para. 2 b) SE Directive 2001/86/EC. Only half of the SE agreements further stipulate that seats on the SE's supervisory board shall be at the disposal of employee representatives. In a few exceptional cases, instead of an SE Works Council, an existing employee representative body takes care of information and consultation or the employees are

5. See: http://www.boeckler.de/index_betriebsvereinbarung.htm

involved directly. Apart from these exceptions the analysis distinguishes two *typical* variants of employee representation in the SE today:

- single-track employee representation by the SE Works Council alone;
- dual-track representation by the SE Works Council *and* employee representatives on the supervisory board.

Before considering these two typical categories in more detail in the following sections we shall look briefly at the exceptions, in which an SE Works Council is not formed. There are individual instances in which existing employee representation bodies – for example, national works councils – are entrusted with information and consultation in the SE. Consequently, in some SEs the international composition of the representation body is not guaranteed. In a few other cases direct participation on the part of the employees is provided for. They include a clearly unlawful case in which the agreement only provides for information but no consultation with the workers.

Together, these cases in which, although an SNB has been duly established at the founding of an SE, no functioning employee representation body has materialised at the SE level make up a not insignificant proportion. However, it must be considered that in Germany several SEs have been established in small or medium-sized companies with only a few employees. Although this was not examined in more detail, we can assume that it was in these small SEs that no SE Works Council was formed.

3. Typical contents of SE agreements

In the single-track variant, provisions on the SE Works Council work take up significant space in the agreements. Needless to say there are no regulations on employee representatives in the supervisory board in this category. In the dual-track representation variant, with both the SE Works Council and employee representatives on the supervisory board, an SE agreement is often divided into five parts:

- (i) preamble;
- (ii) general provisions, in particular on the scope of the agreement;
- (iii) regulations on the SE Works Council;

- (iv) regulations on the employee representatives in the supervisory board;
- (v) final provisions on the legal validity of the agreement (for example, with regard to period of validity, termination and amendment) and on dispute procedures.

There is not always a preamble. In other cases, the preamble runs to several pages, in which the company philosophy is extensively set forth. The general provisions are sometimes combined with the – also general – final provisions.

The majority of SE agreements adhere closely to the structure and partially even to the wording of the subsidiary legal provisions in the SE legislation. Obviously, in the negotiations on an SE agreement, as a rule the text of the law or a draft based on the text of the law is used as the basis for negotiations. In such a case the agenda is limited to a list of certain points in which one or both parties intends to deviate from the subsidiary legal provisions. These empirical findings are remarkable but not surprising. Following the structure of the legal provisions may facilitate negotiations and reduce negotiation costs. Moreover, both parties know that if the negotiations fail they will have to revert to precisely the standard statutory provisions of §§ 23–38 SEBG as the basis for future work. It is therefore reasonable to start out from these legal fall-back provisions and to measure the success of the negotiations by the extent to which specific improvements can be managed. Even though not surprising, these observations underline the strong relevance of the standard statutory provisions in the negotiation of SE agreements. As in the case of the European Works Council, worker participation in the SE takes place almost always by virtue of the agreement and not by virtue of the law. The agreements, however, are strongly influenced by the subsidiary legal regulations. The legislator, so to speak, also has a seat at the table. This should be taken into account in future legislative procedures.

It should also be mentioned, however, that there are a considerable number of SE agreements whose contents barely refer to the standard statutory provisions. These includes both agreements that fall well short of the legal standards and also some that afford employee representation bodies at the SE level rights that go far beyond normal information and consultation.

4. Regulations on the SE Works Council

Regulations on the SE Works Council take up most room in most SE agreements. In cases in which larger groups of companies were already active cross-border before an SE was established, as a rule the SE Works Council takes the place of the already existing European Works Council. In the case of smaller SEs, in contrast, generally speaking there was previously no European level of employee representation. In particular, we shall present the research results that brought to light striking deviations in the SE agreements from the contents of the subsidiary legal provisions.

4.1 Composition of the SE Works Council

No other issue has been regulated in SE agreements as substantively and diversely as the composition of the SE Works Council. The main question in this respect concerns from which countries in which the SE is located representatives should be sent to the SE Works Council and how many of these representatives. Sometimes the total number of members of the SE Works Council is also limited.

Among the extremely diverse regulations on the composition of the SE Works Council only a few refer to the subsidiary legal provision in the SEBG (§ 23 para. 1 with § 5 para. 1 SEBG). The following examples illustrate the variety of regulations. Many regulations are very specific and simple, in that they lay down a precise number of representatives in the SE Works Council for all countries in which the SE is located. Other regulations contain a sliding scale which provides for one, two, three or more representatives in the SE Works Council depending on the number of employees an SE has in a country. Some agreements deviate even from the statutory standard that every country in which the SE has employees is represented in the SE Works Council. In such cases there are thresholds, according to which, for example, a certain number of employees must work in a country before it receives a seat on the SE Works Council. Or several countries are grouped together and are jointly allocated a representative.

When it comes to the composition of the SE Works Council two principles are discernibly in conflict. On one hand, every effort is made to allocate a seat in the works council to every country in which there are

employees. On the other hand, it is considered – with a view to ensuring that the works council is truly representative – that countries with a large number of employees have more seats at their disposal. In other words, in this instance it is not so much a question of conflicts of interest between the SNB and the relevant managements, as the difficulty of treating all groups of employees fairly. The fact is that if both principles are to be fully satisfied, in many cases the SE Works Council would have to be very big. This is opposed by the relevant managements in the enterprises concerned in order to limit the costs of SE Works Council activities.

4.2 Appointment of representatives in the SE Works Council

When it comes to determining how individuals are to be appointed to the SE Works Council, by contrast, the standard statutory regulation in the SEBG (§ 23 para. 1 with § 7 para. 1 SEBG) is often used. Accordingly, it depends on the different national regulations whether and how SE Works Council members from the relevant countries are elected or appointed. That means that the members of the same SE Works Council are, in many countries, directly elected by the employees, while in other countries they are appointed by the employee representation body.

In a number of SE agreements, however, it is laid down how SE Works Council membership is to be determined uniformly for all countries. Sometimes the employees directly elect their representatives in the SE Works Council, but more usually it takes place in several steps, with priority being given to the appointment of national employee representation bodies and only exceptionally – for example, in their absence – do direct elections come into play.

4.3 Competences of the SE Works Council

Another problem in respect of which SE agreements often deviate from the subsidiary legal provisions is the question of the SE Works Council's competences. These competences are laid down very concisely and comparatively liberally in the standard regulations in § 27 SEBG. This regulation corresponds almost exactly to the formulation in the annex to the SE Directive 2001/86/EC, which says: "The competence of the representation body shall be limited to questions which concern the SE itself

and any of its subsidiaries or establishments situated in another Member State or which exceed the powers of the decision-making organs in a single Member State'.

The range of competence thus laid down for the SE Works Council is thus broader than that of the European Works Council (EWC) under the old, but also the new law. For the European Works Council it is provided that 'at least two' establishments or enterprises must be affected in different member states. Also, the regulations on the European Works Council do not contain the sentence according to which the SE Works Council shall have competence if a particular matter exceeds the authority of decision-making bodies at the level of individual member states.

A considerable number of SE agreements take up the 'at least two' formulation from the EWC legislation. This entails the danger that the SE Works Council's competences will be disputed if only one location is affected by management measures, even if it is located in a different member state from the management itself. In individual cases competences have been narrowed even further, based on the demand that the SE Works Council be competent with regard to transnational matters only 'insofar as these matters do not fall within the competence of national employee representation bodies'. This can create problems in the case of dual competences. In practice, it is not unusual that both national and European bodies can be competent with regard to a particular measure, for example, in the case of a reduction in capacity that leads to closures in two countries. Naturally, these fall within the competence of the national employee representation body. According to the regulation cited, the conclusion could be drawn that the participation of the SE Works Council is unnecessary.

Otherwise, there are SE agreements that extend the sphere of competence in comparison to the standard statutory provisions. For example, in one case, the SE Works Council has competence over matters that directly affect only one establishment in the SE's home country, if this may have cross-border consequences.

4.4 Functioning of the SE Works Council

SE agreements generally contain a substantial section concerning the structure of the SE Works Council (chair, committees), the conduct of

meetings (frequency, participation, duration) and issues concerning the passing of resolutions.

The formation of an ‘executive committee’ is generally provided for in order to carry out the day-to-day business of the SE Works Council and to coordinate its activities. Such regulations are modelled on the subsidiary provision in § 23 para. 4 SEBG for SE Works Councils by act of law that elect a three-member executive committee. However, many SE agreements provide for a larger executive committee. Several SE agreements also deviate from the law in laying down the committee’s tasks, duties and rights in more detail.

With one exception, all the SE agreements we looked at provide that SE Works Councils shall be purely employee bodies. Only employee representatives are entitled to vote. The chair is also in the hands of the employees. Only in one case do meetings of the committee take place under the chairmanship of a management representative. In this instance, there is not even a right to additional separate meetings of the employee representatives. Generally, however, SE agreements ensure that the SE Works Council can meet in the absence of management. Sometimes, it is expressly laid down under what conditions the management can participate in meetings of the SE Works Council (without voting rights). Clearly, meetings without management are the rule and joint meetings the exception.

Meetings of the SE Works Council are expensive because of the travel and translation costs. However, if there is to be fruitful cooperation in the SE Works Council, it is important that meetings are held several times a year. The number of annual meetings is a usual point of conflict in the negotiation of an SE agreement. The relevant regulations are extremely diverse. For SE Works Councils by act of law the subsidiary provisions in §§ 28 para. 1 and 24 para. 2 SEBG provide that, at least once a year, there shall be a meeting for the purpose of regular information and consultation by the management, as well as further meetings with the agreement of the management. In around half the SE agreements the employee side has been able to obtain two or more regular meetings a year, which can sometimes be supplemented by extraordinary meetings, with an upper limit. Particularly advantageous is a single regulation according to which one of three regular annual meetings serves the purpose of allowing additional representatives to participate from countries not regularly represented in the SE Works Council.

In many SE agreements there are special, sometimes rather complex provisions on the passing of resolutions. These differ considerably from the regulations provided for in § 24 para. 3 SEBG for SE Works Councils by act of law. In § 24 para. 3 sentence 2 SEBG it simply says that the SE Works Council as a rule shall pass its resolutions by a majority of those present. Many SE agreements deviate from this, however, with various forms of weighted voting or 'double majorities'.

Such complex forms of decision-making arise from the fear that majorities may emerge that have the backing of only a minority of the employees. This is closely connected to the regulations concerning the composition of the SE Works Council. When it comes to composition an effort is generally made to provide access to the SE Works Council even to countries with a relatively small number of employees. Often, this cannot be compensated by a correspondingly higher number of seats from the enterprise's core countries, since otherwise the SE Works Council will simply become too large. Instead, the rules on decision-making are established which, for example, grant each member of the SE Works Council votes in proportion to the number of employees they represent.

4.5 Regular information and consultation

Information and consultation by the SE management is the key function of the SE Works Council. Accordingly, this issue is regulated in SE agreements in detail. Almost all agreements distinguish between the regular information and consultation procedure and the procedure for extraordinary circumstances. Thus, these agreements follow the distinction provided for in the SEBG and in the annex to SE Directive 2001/86/EC (part 2b and c).

Related to information and consultation rights, four aspects are dealt with in particular detail. This concerns the questions:

- by whom,
- how often,
- based on what documents, and
- on what issues

the SE Works Council is to be informed and consulted.

On the first point, most SE agreements provide that the central management of the enterprise conduct the information and consultation. From time to time it is specifically emphasised that a responsible member of management – for example, a board member – must be personally present.

On the second point, most SE agreements lay down that there will be regular information and consultation at each regular meeting of the SE Works Council (see 4.4 above). With a few exceptions this means that an information and consultation procedure shall take place regularly (at least once, twice or even three times a year). In a few other cases the SE Works Council meets twice a year, but it is only informed on one occasion.

The regulations on the third point diverge significantly. Many merely require that the ‘requisite documents’ are made available. Others specifically list a number of enterprise-specific reports and accounts. It is also often laid down that documents be provided ‘in good time’, before joint meetings. Some agreements specify a deadline (one or two weeks before joint meetings). An internal preparatory meeting of the SE Works Council without the management to study and discuss the given information is included in several agreements. It is also generally possible to bring in an external expert during preparations.

In many SE agreements regulations concerning the topics on which the management regularly has to inform and consult the SE Works Council adhere closely to the standard statutory provision in § 28 para. 2 SEBG. Sometimes, individual issues (for example, equal opportunities, training and further training) are added to the 10 statutory points. In several SE agreements it is emphasised that the list of issues may be extended, by consensus (rarely unilaterally on the demand of the employee side).

4.6 Information and consultation in extraordinary circumstances

The provisions contained in SE agreements on information and consultation in extraordinary circumstances are unlikely to play much of a role for many SE Works Councils over the years simply because such conditions rarely arise. When it does happen, however, the relevant regulations must prove their quality under enormous stress.

Characteristically, five points in particular are regulated in SE agreements:

- (i) What extraordinary circumstances oblige the SE management to inform and consult the SE Works Council exceptionally?
- (ii) Precisely whom is informed and consulted?
- (iii) When should information be given?
- (iv) What is the consultation procedure?
- (v) What are the consequences if the enterprise management does not want to take notice of the views of SE Works Council?

With regard to the first point few SE agreements differ significantly from the subsidiary legal regulation in § 29 para. 1 SEBG. The formula 'extraordinary circumstances that affect the interests of employees to a considerable extent' is even included in many SE agreements word for word. In several agreements, however, the formula is cut down a little, emphasising that the effects must be cross-border or affect employees in at least two countries. As in § 29 para. 1 SEBG a list of specific extraordinary circumstances that unequivocally entail an obligation to provide information is generally included. In several instances the statutory list is extended to include 'mergers, legal restructuring or demergers'. No doubt that this extension is a significant improvement under German law since the legal act itself is considered an extraordinary circumstance triggering the participation of the SE Works Council.

Concerning which committee is to be the addressee of information and consultation under extraordinary circumstances, again, there is considerable regulatory diversity in SE agreements. First of all, it is established whether the SE Works Council as a whole or the executive committee is to be informed. Then it is laid down whether the consultation session takes place automatically or only on request. Many SE agreements include the possibility of switching the addressee between information and consultation. For example, one regulation provides that the executive committee, after being informed on extraordinary circumstances, can convene the whole SE Works Council for the purpose of consultation.

Under extraordinary circumstances, such as the threat of establishment closures, if the SE Works Council is to exert influence it is often decisive that it is informed of the planned measures at an early stage. In the standard statutory provision § 29 Abs. 1 SEBG it says merely that infor-

mation must be given in good time. What this means can be understood from the definitions in § 2 para. 10 and 11 SEBG, according to which information must be provided at a time that makes it possible for employee representatives to examine the expected effects in detail and, if necessary, to prepare for a consultation with the management of the SE. The consultation must then enable the SE Works Council to come up with a position on the planned measures that can be taken into consideration within the framework of the SE's decision-making process. Overall, then, the SE Works Council must be informed in sufficient time to allow it at least three procedural steps before the conclusion of the decision-making process in the SE: detailed examination, drafting a position and discussing the position in dialogue with decision-makers.

SE agreements also frequently contain the formulation of information concerning extraordinary circumstances 'in good time'. Here, too, the definitions from § 2 para. 10 and 11 SEBG assist in interpretation. Despite that, the key point that the taking of a position must be enabled early enough for it to be possible to take it into consideration in decision-making is expressly included in the text of many SE agreements. Individual SE agreements go beyond the law. For example, in one case the development of alternative concepts by the SE Works Council before the final decision is made possible. This process surely requires more time than the mere drafting of a position.

Point 4 concerns the organisation of the consultation procedure. During consultation the SE Works Council is supposed to be able to present their arguments and alternative ideas to the SE management. That is why in § 2 para. 11 SEBG consultation is defined as the establishment of a dialogue between the SE Works Council and the SE management. It can be assumed that a serious exchange of views must allow each side to have a chance to speak at least twice. If the participants are only able to present their position once it is almost inevitable that there will be misunderstandings or that questions will remain open. Accordingly, the subsidiary regulation in § 29 para. 4 SEBG provides that at any rate if there is disagreement a second attempt must be made.

Only a few SE agreements contain regulations on the quality of consultation. This includes, first and foremost, stipulations that a representative with decision-making authority or a board member must be available in person for the consultation. This ensures that the SE Works Council's positions in fact reach the ears of the decision-makers. Some SE agree-

ments grant the SE Works Council a period of one to two weeks after the joint information and consultation meeting – also in extraordinary circumstances – to develop a position. In some cases, the enterprise management promises to respond in writing to the SE Works Council's position. Thus in a small number of instances it is expressly laid down in the procedural regulations that in the course of dialogue each side will have repeated opportunities to put its points across.

In many SE agreements there is a special rule covering cases in which the enterprise management, in extraordinary circumstances, decides not to act in accordance with the position of the executive committee or the SE Works Council. The employee representation body is then generally given another opportunity to put its point of view. The model in this respect is the standard statutory provision in § 29 para. 4 SEBG that provides in this instance for another meeting of the SE Works Council with the management for the purpose of reaching agreement. By no means all SE agreements contain such a regulation. Where it is lacking it can be a serious disadvantage for SE Works Councils formed on the basis of an agreement, in particular in situations of extreme conflict. To the extent that such a regulation exists there is generally a demand for another personal meeting. In individual cases only a written procedure is provided for. In one instance, it is expressly laid down that the enterprise management should refrain from all measures or even planning steps while the participation procedure is still under way. That can serve as a model arrangement because this provision could improve the SE Works Council's chances – if need be, in court – of obtaining injunctive relief against premature measures on the part of the management. In Germany, this legal option is otherwise unresolved and subject to considerable dispute.

4.7 Further rights

Two SE agreements provide for rights for the SE Works Council that go far beyond information and consultation and indeed recall the codetermination rights of a German works council. These are, to be sure, special cases.

A number of other SE agreements contain so-called 'rights of initiative', in which a short list of (usually) four topics is laid down. Sometimes the topics are characterised as exemplary. In all instances initiatives are concerned that the SE Works Council and the enterprise management

can take up only jointly, in other words, on the basis of consensus. The prevalent topics concerning which joint guidelines can be developed are:

- equal opportunities;
- health and safety;
- data protection;
- training and further training.

In any case, such regulations make it clear that the abovementioned topics fall within the SE Works Council's competence. But one can hardly speak of 'rights' pertaining to the SE Works Council since 'initiatives' can only be taken up jointly with the enterprise management – in the event of a disagreement there is no resort to law to have them implemented. However, if the enterprise management were to reject negotiations on the agreed topics from the outset, that could not be reconciled with the principles of trust-based cooperation. Nevertheless, the SE Works Council is unable to exact agreement on 'guidelines' on one of the topics.

4.8 Bases of the SE Works Council's activities

In most SE agreements the financial basis, as well as the material and personnel provisions of the SE Works Council's activities are regulated in detail. Often the subsidiary provisions of §§ 31-33 SEBG are taken over, but with significant amendments. For example, when it comes to who bears the costs many SE agreements take their arrangements from the general clause in § 33 SEBG, according to which the costs arising from the formation and activities of the SE Works Council and of the executive committee shall be borne by the SE. In many SE agreements, however, individual points are specified beyond that. This includes, for example, the more detailed regulation of the bearing of costs related to training events, translation or experts. Often limits are laid down, according to which, for example, translation shall be restricted to three specified 'working languages' or the maximum number of experts who may be brought in. If these limits are not too narrow, however, such regulations have the advantage that clarity and reliability are established concerning the resources available to the SE Works Council. Now and then, however, one encounters evidently inadequate regulations, for example, one instance in which SE Works Council members' training entitlements are limited to three days a year.

The bases of the SE Works Council's activities that are not regulated in the SEBG for SE Works Councils by act of law or only fragmentarily include SE Works Council members' entitlements to be released from normal work and access rights. Almost all SE agreements contain specific regulations concerning the release of SE Works Council members from their normal work so that they can exercise the duties of their office. In a clear majority of cases a regulation is adopted in accordance with Germany's Works Constitution Law. Consequently, release entitlements apply not only to SE Works Council meetings, but to the carrying out of all requisite tasks. No distinction is drawn on the basis of the country of origin of a given SE Works Council member. Often, SE Works Council members are granted right of access to the SE's establishments. Sometimes, however, significant restrictions are made. For example, only access to establishments of the country from which the SE Works Council member comes is allowed.

5. Regulations on employee representatives in the supervisory board

Half of the SE agreements under examination contain regulations according to which employee representatives are entitled to a certain number of seats on the SE supervisory board. Further analysis shows that among the supervisory boards with employee representation there are both parity-based bodies, in which employee representatives occupy half the seats, and others with one-third participation. Whether a model (and which one) of worker participation in the supervisory board is laid down is a key question that arises at the founding of an SE. Decisive in this respect, however, is the particular model in place in the SE's predecessor company.⁶

5.1 Composition of the supervisory board

Three variants can be discerned in the SE agreements. In some agreements it is expressly laid down that there shall be no employee representation in the supervisory board. Under one-third participation there are usually three employee representatives out of nine members of the

6. See Köstler in this volume.

supervisory board or two out of six. There is even a three-person supervisory board with one employee representative. The supervisory boards based on parity among the cases under examination generally consist of 12 members, so that there are six representing the employees' side.

This finding is not surprising. German company law provides for exactly these three variants. In companies with below 500 employees there is no employee participation in the supervisory board. Up to 2000 employees there is one-third participation (one-third of the members of the supervisory board are employee representatives) and in the case of companies with over 2000 employees there is parity based participation (half of the members of the supervisory board are employee representatives). At the founding of an SE, according to § 21 para. 6 SEBG the level of participation may not fall below that of the predecessor company. And indeed this has been the case. The level of employee representation in the supervisory board was maintained.

However, the parties to the SE agreement are free to decide whether and how they will take account of future changes in the number of employees in the SE and its affiliates when it comes to the composition of the supervisory board. Whether, in other words, when the threshold of 500 or 2000 employees is exceeded one-third participation or parity-based participation should be instituted, as is regulated for German companies, arises solely from the SE agreement. There are thus fears that regulations in SE agreements may prevent employee representation in the supervisory board, even if the workforce increases.

There are certainly regulations touching on this issue. In some SE agreements at smaller companies it is expressly laid down that there shall not be worker participation in the supervisory board or that the supervisory board shall exclusively comprise shareholders' representatives. In one case, it is stated that even in future no right will be afforded to employees to elect or appoint members of the supervisory board. In other agreements, which provide for one-third participation in the supervisory board, it is expressly emphasised that even in the future this one-third share for employee representatives will be maintained. Regulations according to which the composition of the supervisory board can be altered if the workforce increases (or diminishes) are very rare. One possible way would be renegotiation when the workforce exceeds the 500 or 2000 threshold. But often there are clauses that explicitly state that an increase in the workforce alone provides no ground for renegotiation

of the SE agreement. Only in one instance is it clearly regulated that the composition of the supervisory board shall be parity-based if the threshold of 2000 employees is exceeded.

Companies' efforts, at the founding of an SE, to enshrine the existing model of employee participation in the supervisory board for the long term and to avoid changing its composition in the event of an increase in the workforce, requisite under German law, is thus clearly discernible in a number of SE agreements.

5.2 Selection of employee representatives on the supervisory board

There are a variety of regulations in SE agreements concerning which employee representatives shall be considered for membership of the supervisory board and by whom it will be decided which people shall represent the employees in the supervisory board.

In some enterprises only members of the SE Works Council may be members of the supervisory board. In a larger number of cases all SE (including affiliates) employees can be considered for membership of the supervisory board as employee representatives. In supervisory boards based on parity, besides employees, there are also representatives of the relevant trade unions. It is usually laid down how many seats can be occupied by the trade unions.

In contrast to the case of worker participation by act of law under § 36 para. 3 SEBG, in most SE agreements the SE Works Council is afforded a key role in determining which people shall be assigned to the supervisory board. Often only the SE Works Council selects the supervisory board members on the employees' side. However, there are also models in which national employee representation bodies participate in the selection of employee supervisory board members. In one instance, a primary election by the employees is provided for.

6. Conclusion

It was not the aim of this research to evaluate individual SE agreements as more or less advantageous. The knowledge of the background and structures of the relevant establishments and managements needed for a critical discussion is not available. Obviously, there are some agreements that fall significantly short of trade unions' minimum requirements. That is due primarily to the fact that in by no means all cases were the trade unions involved in the negotiation process. Occasionally, companies afford the SE Works Council surprisingly far-reaching participation rights. In most cases, however, it became apparent that in SE agreements in comparison to the standard statutory regulations of the SEBG there are both advantageous provisions for the employees' side and advantageous provisions for the employers' side. Finally, it remains to be asked whether regulations that comparatively favour the employees predominate and in which areas they are typically found.

The goal of SE participation law is to strengthen employee representation at the European level to the advantage of dependent employees. Many of the SE agreements under investigation make a valuable contribution to this by providing a solid basis on which SE Works Councils may exert influence. In companies in which employee representatives sit on the supervisory board this is evident particularly from the fact that it is predominantly the SE Works Council that plays the key role in deciding who shall take up the supervisory board seats on behalf of the employees. Thus the role of the SE Works Council is significantly outstripping that of its predecessor, the European Works Council (EWC).

On other points, too, SE agreements have often managed to negotiate better conditions for the SE Works Council than is provided for with regard to the SE-WC by act of law. This concerns especially the frequency of SE Works Council meetings, the size of the executive committee and certain other important bases of activities, such as entitlements to training and release from normal duties. In many cases, for example, beyond what the law allows, two regular meetings of the SE Works Council per year are provided for. On this point, too, many SE Works Councils are better off than EWCs, which are usually formed in accordance with German law and as a rule have only one regular meeting a year.

On the other hand, as the analysis has shown, there are many examples of SE agreements falling short of the legal standards laid down for SE

Works Councils by act of law on individual or several points. For example, in comparison to the law, in SE agreements the consultation procedure for extraordinary circumstances is often curtailed and thus further negotiations in the event of disagreement are renounced. Clearly it was more natural to the negotiators on the employee side to obtain the best possible resources for the general working of the SE Works Council than to extend participation rights for certain instances of conflict.

Overall, however, in the great majority of cases current practice with regard to concluding SE agreements in Germany has made it possible to considerably enhance employee representation at European level.

References

- Archive of establishment agreements, Hans Böckler Stiftung. Available at: http://www.boeckler.de/index_betriebsvereinbarung.htm (Accessed 25.07.2012)
- ETUI ECDB (2012) A. Carlson, M. Kelemen and M. Stollt, Overview of Current State of SE Founding in Europe, Update: 1 June 2012. http://www.worker-participation.eu/content/download/4578/61599/file/SE_Currentstateupdated-figure-1-06-2012-final-web.pdf [Accessed 25.07.2012]
- Rose, E. and R. Köstler (2011) Mitbestimmung in der Europäischen Aktiengesellschaft (SE), Schriftenreihe der Hans Böckler Stiftung, Frankfurt am Main: Bund-Verlag.