Chapter 15
National participation rights in an EU perspective: the SE rules as a key safeguard

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1. Introduction

'In order to promote the social objectives of the Community, special provisions have to be set, notably in the field of employee involvement, aimed at ensuring that the establishment of an SE does not entail the disappearance or reduction of practices of employee involvement existing within the companies participating in the establishment of an SE' (SE Directive, recital 3). Here, in a few words, is the fundamental rationale explaining why the European legislator had to come up with innovative rules for setting up employee involvement mechanisms in a European company, namely to ensure that workers will not lose their pre-existing rights. Those who argue that the provisions of the Directive would deter the formation of SEs because of their so-called 'complexity' (Ernst & Young 2009: 46, 114; BusinessEurope 2010: 2) deny that this 'complexity' was the minimum requirement for taking up the challenge of a single Europe-wide company legal status that would respect the variety of national industrial relations [henceforth IR] systems. Amongst the numerous components of IR systems that vary from one country to another, one proved to be the most problematic to regulate and the most controversial issue, namely employee representation at board level (for example, Sasso 2009: 287).

Indeed, one cannot understand the lengthy process which eventually led in 2001 to the European Company Statute (see Schwimbersky/Gold in this volume) without fully considering what a challenge it was to cope with the institutional diversity which best characterised board-level employee representation [henceforth BLER] in Europe. What is more, 'diversity' has here a twofold meaning: 'diversity' of institutional settings among countries that have enacted provisions for BLER and 'diversity' between countries with BLER rights and those without any similar dis-

posal. As diversity is coupled with the fact that institutional settings are not static but changing, there were legitimate reasons for the European legislator to adopt a flexible approach in regulating BLER in SEs. In Section 2 of this chapter we propose to account for this situation by presenting both the state-of-the-art of BLER rights in European countries and the most significant trends of the past few years.[1]

This flexible approach, first put forward by the experts group of the Davignon report[2] and eventually anchored in the SE Directive, rests on two principles: a 'negotiated solution tailored to cultural differences and taking account of the diversity of situations' (Group of experts 1997: 17) when it comes to employee involvement and especially BLER arrangements; and a 'before and after' principle according to which pre-existing BLER rights should be safeguarded while there is no obligation to agree on BLER provisions if none existed prior to the establishment of the SE. Such an approach led observers to conclude that 'this specific regulation is not about any kind of European "harmonisation" but about the preservation of nationally institutionalised rules and standards' (Villiers 2006: 187). Although some loopholes in the SE Directive have been identified (see chapter by Sick), these rules, thanks to the protection they offered to national systems, were seen as a satisfactory compromise, to such an extent that it was expected that they would serve as a guideline for future legislation. We will see in Section 3 that the political and legislative projects have in fact shifted since the adoption of the SE statute and rather tend to favour regulatory competition which, as opposed to the initial SE spirit (see recital 3 above), puts national worker rights under pressure.

2. National board-level employee representation rights across Europe

'The great diversity of rules and practices existing in the Member States as regards the manner in which employees' representatives are involved in decision-making within companies makes it inadvisable to set up a single European model of employee involvement applicable to the SE' (SE Directive, recital 5). The following sections are aimed precisely at

1. This part mostly relies on the update of more detailed information provided in Conchon (2011).
2. Whose recommendations in this area were greatly inspired by the earlier adoption of the EWC Directive in 1994.

shedding light on this diversity by revealing the facts and trends about BLER at national level.

2.1 Institutional diversity as distinctive feature

No less than 18 countries in the European Economic Area (17 of the 27 EU Member States plus Norway) grant employees the right to be represented on the board of their company in a deliberative rather than a merely consultative manner, in other words, with the right to vote. This alone contradicts some commonplace prejudices according to which BLER would be a German exception (Brink 2010: 643) or limited to only ten or so countries (Henssler 2011: 1). Instead, we can distinguish between three groups of countries in the European Economic Area:[3]

- a group of 14 countries with broad BLER rights applying both in the public and the private sectors: Germany and Austria, but also the Scandinavian countries (FI, NO, SE, DK), the central European countries, including the Visegrád Four (HU, PL, CZ, SK) and Slovenia, two of the Benelux countries (LU, NL) and France;
- a group of 4 countries from south Europe (ES, GR and PT) with the exception of Ireland, where BLER rights are limited to state-owned companies;
- a group made up of the remaining 12 countries with no BLER rights at all.

This 'inter'-diversity between countries with and without BLER rights is coupled with the 'intra'-diversity of institutional settings prevailing in the 18 EEA countries having provisions for BLER, as shown in Table 1.

Kluge and Stollt (2009) best analysed this 'intra'-diversity when establishing that national settings vary according to four factors: the characteristics of the company subject to BLER; the characteristics of its board; the appointment modalities of board-level employee representatives [henceforth BLEReps]; and the manner in which BLER rights are implemented.

3. It is meaningful to focus our attention on the European Economic Area here given that the European Company Statute is not only available to companies located in the EU but to the larger EEA.

Table 1 **Board-level employee representation in the European Economic Area**

	Regulation in the		Scope	Number of BLEReps	Nomination by		Appointment mechanism	Eligibility criteria	CG structure
	Public sector	Private sector*			TU	WC			
AT	•	•	Ltd>300 Plc	1/3		•	By WC	WC mbrs	D
BE									M
BG	•	•							M or D
CY	•	•							M
CZ	•	•	Plc>50 SOE**	1/3–1/2	Agreement mgt/TU-WC		Vote	E (or ext. TU in Plc)	D
DE	•	•	Ltd, Plc>500	1/3–1/2	•	•	Vote	E + ext. TU	D
DK	•	•	Ltd, Plc>35	1/3 (min. 2-3 mbrs)	No legal procedure		Vote	E. only	M or D
EE									D
ES	•		SOE>1000 (>500 in MS)	1- 3 mbrs	By TU entitled to participate			No restrictions	M
			Savings banks	5%-15%	By E. at general assembly		By the general assembly	Mbrs of E. at general assembly	
FI	•	•	Ltd, Plc>150	1/4 (max. 4) or as agreed	Agr. between personnel groups		Vote if no agr.	E. only	M or D
FR	•	•	SOE Plc	1 mbr-1/3	•		Vote	E. only	M or D

	Regulation in the		Scope	Number of BLEReps	Nomination by		Appointment mechanism	Eligibility criteria	CG structure
	Public sector	Private sector*			TU	WC			
GR	•	•	SOE	1-2 mbrs	In fact by TU		Vote	E. only	M
HU	•	•	Plc, Ltd>200	D: 1/3 M: by agr.	Consulted	•	By AGM	E. only	M or D
IE	•		SOE	1/3	•		Vote	E. only	M
IS									M
IT									M or D
LI									M
LU	•	•	SOE Plc>1000	3 mbrs-1/3	Vote by employee delegation			E. only (TU in MS)	M or D
LV									D
MT									M
NL	•	•	'structuur' Plc, Ltd>100	Max. 1/3		•	By AGM	No E., nor TU	M***or D
NO	•	•	SOE>30 Ltd, Plc>30	1 mbr–1/3 +1			Vote	E. only	M
PL	•	•	SOE privatised C.	2-4 mbrs–max. 2/5	No restrictions		Vote	No restrictions	D
PT	•		SOE	Defined in by-laws	By 100 or 20% of E.		Vote	E. only	M or D
RO									

	Regulation in the		Scope	Number of BLEReps	Nomination by		Appointment mechanism	Eligibility criteria	CG structure
	Public sector	Private sector*			TU	WC			
SE	•	•	Plc, Ltd>25	2- 3 mbrs	Appointment by TUs			'should' be E.	M
SI	•	•	Plc, Ltd>50	D: 1/3-1/2 M: 1/3		•	By the WC	E. only	M or D
SK	•	•	Plc>50 SOE	D: 1/3–1/2	•		Vote	E. only	D
UK									M

Note: * Including privatised companies (State holding < 50% of the capital).
** SOEs are mentioned apart when regulated by specific law (i.e. differing from that of Plc/Ltd).
*** Dutch companies have been able to choose the monistic structure since January 2013.

CG = Corporate Governance
SOE = state-owned enterprises
WC = works council
E = employees
Mgt= management
Ltd = private limited companies
MS = metal sector
TU = trade unions
Ext. = external
Plc = public limited companies
C = company
Mbrs = members
Agr.= agreement
AGM = annual general meeting of shareholders
M = monistic structure (a single board of directors)
D = dualistic structure (a management board and a supervisory board)

Sources: HBS and ETUI (2004), SDA and ETUI (2005), Kluge (2005: 170), Kluge and Stollt (2006: 83-85), Büggel (2010), Fulton (2011), updated by Conchon in 2012. The updating exercise would not have been possible without the invaluable assistance of the members of the SEEurope network (for information on the SEEurope experts network see http://www.worker-participation.eu/European-Company/SEEurope-network). We would thus like to take the opportunity to thank them all for their support and patience..

Characteristics of the company determining the right for employees to be represented on the board vary from one country to another according to: the company's ownership (only state-owned companies or also private sector companies); the company's legal status (the scope of BLER law might cover both public and private limited liability companies or be restricted to Plcs, as in CZ, FR, LU and SK); and the size of the company. In a few countries, legal provisions do not state any workforce threshold for the law on BLER to apply (e.g. Austrian Plcs and a majority of state-owned companies). In most countries, however, minimum thresholds apply. These may be low (from 25 to 50 employees in CZ, DK, NO, SE, SI, SK), medium (from 50 to 500 employees in Austrian Ltd, FI, HU, NL) or high (more than 500 employees in ES, LU, DE).

As for the characteristics of the board, two elements have to be considered. The first element concerns the corporate governance structure which could follow the monistic model (a single board of directors exercising both supervisory and managerial functions) or the dualistic model (a management board in charge of the running of the company and a supervisory board responsible for monitoring). In fact, the convergence in national company law owing to the extension of the choice between the two models in countries where previously only one existed is diluting the distinctiveness of this feature (Hopt and Leyens 2004). The second element rests in the number or proportion of seats allocated to BLEReps which varies from a minimum of one seat (in ES, FR, GR, NO) up to half of the board (in CZ, DE, SI and SK). The most frequent proportion of BLEReps is rather one-third of the board (e.g. in AT, DK, HU, NL).

The modalities governing BLEReps' appointment also vary across the 18 countries, depending on whether they are directly appointed by trade unions or elected by the workforce, and if the annual general meeting of shareholders has a final say in the validation of their appointment (e.g. in HU, NL and German companies in the iron, coal and steel industry). Countries can also be divided into three groups according to the eligibility criteria in force. In a first group gathering the majority of countries, only employees are eligible for board seats, although this does not mean that they cannot also be trade unionists, which in fact often happens, especially in countries where trade unions are involved in the nomination of candidates (e.g. in FR, IE, SE or SK). In the second group, some or all BLEReps' seats are 'reserved' for external trade union representatives, as in large German companies (with more than 2,000 employees and more than 1,000 employees in the iron, coal and steel industry)

and Luxembourgian companies in the iron and steel industry. The third group only comprises the specific Dutch case where BLEReps cannot be employees of the company nor trade union officers. As a consequence, board representatives proposed by the works council often come from academia or the political sphere.

Finally, national BLER rights also vary according to the manner in which they are implemented. In the great majority of countries, legal provisions are automatically applicable as soon as the company fulfils the legal criteria. In some countries, especially the Nordic ones, an initiative from the employee-side is needed to trigger the application of BLER provisions such as in Denmark where an initial yes/no vote has first to take place among the workforce (similar provisions in NO).

2.2 A moving landscape: recent developments at national level

On top of the inter- and intra-diversities, another element that characterises BLER rights is the fact that this is a changing institution. The past few years have seen some developments in several European countries which have been either to the detriment or in favour of BLER rights.

Two phenomena have been particularly prejudicial to national BLER rights: the, sometimes drastic privatisation of public sector companies, on one hand; and the revision of national company law aimed at introducing possibilities for companies to choose their corporate governance structure, which often went along with a weakening, if not a withdrawal, of BLER rights on the other hand.

In countries where BLER rights are limited to state-owned companies, privatisations have had direct consequences, leading to the elimination of employees' seats on the board, of privatised companies, a trend which is especially noticeable in Malta, Poland, Ireland, Greece and Spain. In the last three, although the process may have begun some years ago,[4] the crisis has acted as a catalyst for a speeding-up and widening of privatisation, not least because they have been one of the numerous policies

4. The Irish national telecommunication and airlines companies (now Eircom and Aer Lingus) were for instance respectively privatised in 1999 and 2006 (Kluge and Vitols 2010: 11-12).

which have conditioned the troika's financial support[5] to Greece and Ireland. Reform of the banking sector in Spain has not waited for the June 2012 European bailout to start since restructuring in the savings banks sector was launched in mid-2009 with the result of reducing the number of Cajas de Ahorros from 45 in December 2009 to 12 in March 2012 (CECA 2012). While Malta used to be considered a country with BLER rights (e.g. Kluge and Stollt 2006), these rights completely faded away as a consequence of privatisations, combined with the application of a political will and absence of trade union reaction (Debono and Tabone 2005). As a mere mathematical consequence, as the number of state-owned companies decreases, so does the number of employee representatives sitting on the board. In Poland, the increase in privatisations is leading to a dramatic fall in the number of BLEReps, from 618 in November 2009 to 392 two years later.[6] What is more, the Polish Ministry of State Treasury submitted a bill in January 2010 aimed at reforming the corporate governance of privatised firms, including the elimination of BLER rights in these companies, a project which was opposed by the trade unions (TUAC 2010: 3). In fact, no progress has been made in the legislative process and the bill has stalled because of other major disagreements on its content and governmental shifts towards other sensitive projects, such as the pension reform.

In contrast to Poland, in the Czech Republic a government bill with consequences for BLER did go through the entire legislative process and was eventually adopted in March 2012.[7] Reforming the Czech Companies Act, this law intends to introduce, inter alia, the possibility for Plcs to freely choose between the monistic and the dualistic corporate governance structure. It also offers Plcs the possibility to have a worker-free board. Indeed, none of the previous legal provisions for BLER have been repeated in the new Act which implies that, on its entry into force in January 2014, Plcs will no longer be obliged to have employee representatives on their board. Similar plans took place in Hungary and Slovenia where the introduction of the monistic system in company law in 2006 led, although not to the complete elimination of BLER rights, to their

5. See the respective economic adjustment programmes agreed between the national authorities and the so-called troika (European Commission, International Monetary Fund and European Central Bank) in 2010 for Ireland and 2010 and 2012 Greece (DG Economic and Financial Affairs 2010, 2011, 2012).
6. According to the database of the Polish Ministry of Treasury available at http://nadzor.msp.gov.pl/portal/nad/import/6.
7. Act 90/2012 Coll. on commercial companies and cooperatives.

weakening. While Hungarian BLER rights are guaranteed by law in the dualistic structure, they are subject to an agreement between the board of directors and the works council, free of any minimum standards (Neumann 2006). Slovenian employees enjoy weaker representation rights on the board of directors than on the supervisory board, and the new Companies Act introduced a threshold of a minimum of 50 employees for BLER (applicable to both dualistic and monistic structures), while there was none before (Hojnik 2008). The weakening of BLER rights as a consequence of the introduction of the monistic structure is not systematic but is rather the result of political choice since contrary examples exist. Act No 275 of 6 June 2011, which will allow Dutch companies to opt for a monistic structure,[8] does not weaken works councils' rights to propose board members.

The overall picture of BLER rights in Europe would look pretty gloomy if there were no counter-examples of attempts to reinforce them on the initiative of some political actors and trade unions.

On the political actors' side, proponents of BLER can be especially identified in DE, FR and IT. In spring 2010, two German parliamentary groups, the SPD and Die Linke, submitted proposals for an extension of BLER rights,[9] including, among other things, a lowering of the threshold. After a public hearing organised in May 2011 by the Bundestag committee on labour and social affairs,[10] a vote took place on November 2011 which, however, ended in the rejection of both proposals (being opposed by the FDP and the CDU/CSU). Although the plenary session of the Bundestag on 28 June followed this vote by rejecting both demands, they stimulated the debate, especially on the topical issue of German operating companies registered under a foreign legal form and thus escaping national BLER rights. In France, the 2012 presidential elections were an interesting opportunity to (re-)discover the positioning of the different political parties as regards BLER. It appeared that 4 out of the 10 candidates suggested extending BLER to the entire private sector (excluding candidate Nicolas Sarkozy), François Hollande being

8. The date of entry into force of this law is still to be determined for it is conditional to the adoption of some further amendments being currently discussed at Parliamentary level. January 1, 2013 is said to be a most probable date by national experts.
9. See Deutscher Bundestag Drucksache 17/2122 and 17/1413.
10. Which was an interesting occasion for industrial relations actors (the DGB trade union and the BDA and BDI employers' organisations) to express their standpoint. See Bundestag Ausschussdrucksache 17(11)501.

one of them.[11] Further steps have been taken since his election with the publication of a 'social roadmap' elaborated after the organisation of a 'great social conference' gathering French industrial relations actors at the beginning of July. The proposed plans include two points particularly worth mentioning: the announcement of a government bill by the end of 2012 on the regulation of remuneration policies through, inter alia, the participation of employee representatives on companies' remuneration committee; the wish to open a dialogue at national level dealing with the extension of employee representation in boardrooms.[12] More indirect political action is currently to be seen in Italy where the Senate commission on labour and social affairs introduced an article into the government bill on the reform of the labour market which contains provisions aimed at enhancing employee involvement. Among these is the obligation for the government to adopt a decree in the next 9 months to open up the possibility – but not the obligation – for Italian Plcs and SEs with more than 300 employees and having a dualistic corporate governance structure to have BLEReps. After a vote of confidence in the Camera (Italian Chamber of Deputies), the bill was adopted on 28 June with no change.[13] Changes are therefore expected in the coming months.

On the trade union side, recent and/or renewed demands for the extension or creation of BLER rights have been formulated in at least six countries: LU, NL, FR, NO, DE and UK. In the two Benelux countries, the unions have called for more BLER rights, either asking for a reduction of the applicable threshold, as demanded by the Luxembourgian LCGB and OGBL trade unions, or for a higher proportion of BLEReps, as demanded by the Dutch Christian Union in 2007. In France, some trade unions have been claiming for an extension of BLER rights in the private sector for decades (CFE-CGC and CFTC) and were joined some years ago by one of the two biggest trade unions, the CGT. One can assume that the arrival of Mr Hollande as French President might help them in realising their projects. In March 2007, the Norwegian LO confederation addressed its demand for more BLER rights to the government, which sub-

11. On page 36 of his presidential programme available at http://www.parti-socialiste.fr/projet.
12. See on pages 5 and 15 of the social roadmap (in French): http://www.gouvernement.fr/sites/default/files/dossier_de_presses/feuille_de_route_grande_conference_sociale_pdf.pdf.
13. See Art. 4, (62) f, Act 92/2012 'Disposizioni in material di riforma del mercato del lavoro in una prospettiva di crescita'.

sequently issued a Green Paper including some other proposals. After debates, the subsequent White Paper published in August 2011 eventually rejected a lowering of the threshold but considered the suggestions for simplified procedures when establishing BLER at group level and for a requirement for employers to regularly survey employees' wish to be represented on boards. These two suggestions were recently supported by the Norwegian Parliament,[14] beginning in June 2012. In Germany, the DGB has supported and promoted the codetermination model for years and recently renewed its claim for a lowering of the threshold for parity BLER and for application of BLER in companies operating in DE but registered abroad,[15] demands that were backed by the SPD in its abovementioned proposal. The TUC has been claiming not BLER as such but employee representation in large companies' remuneration committees since the mid-1990s (TUC 1995), and has gained support from key actors in recent years, including the Treasury Committee of the House of Commons (2009) and the independent 'High Pay Commission' (2011). Despite these recommendations and the fact that this point was included in the public consultation it conducted in 2011, the State Department for Business, Innovation and Skills eventually rejected such a proposal[16] which, however, has not prevented the TUC and other supporters of this demand to maintain their position (see TUC 2012).

3. Regulating employee participation at European level: securing or threatening national rights?

The highly diverse and changing landscape that characterises BLER rights in Europe sheds light on the European legislator's choice for enabling flexibility when determining the employee involvement mechanisms in SEs. Because of the inter-diversity between countries with and countries without BLER rights, the search for harmonised provisions, such as the preliminary attempt to impose the German model of BLER in the European Company Statute[17] could only lead to a dead-end. Because

14. See the minutes of the 7 June 2012 plenary session at http://www.stortinget.no/no/Saker-og-publikasjoner/Publikasjoner/Referater/Stortinget/2011-2012/120607/ (with reference to recommendation 333S.)
15. See the report from the DGB 19th Congress of May 2010, point J 'Mitbestimmung'.
16. See Vince Cable's speech at the Social Market Foundation on 24 January 2012, http://www.bis.gov.uk/news/speeches/vince-cable-executive-pay-remuneration-2012.
17. See the first European Commission's proposal in 1970.

of the intra-diversity among the 18 countries with BLER rights, the first attempts to impose a single (German) model or the choice between four different models of employee involvement[18] did not fairly respect the other systems. Given that institutional settings are not static but rather changing, as we have seen, European law-making actors had barely any other possibility than to come up with a regulation which would respect this diversity, while guaranteeing that existing national BLER rights would remain untouched. This challenge was met through a legal innovation: the creation of the 'before and after' principle.

'It is a fundamental principle and stated aim of this Directive to secure employees' acquired rights as regards involvement in company decisions. Employee rights in force before the establishment of SEs should provide the basis for employee rights of involvement in the SE (the "before and after" principle)' (SE Directive recital 18). The 'before and after' principle is seen as the guardian of national rights as long as the SE Directive's standard rules apply (i.e. when the special negotiating body [SNB] and the management so agree or when they fail to reach an agreement within the timeframe). These standard rules state that, in the case of an SE established by conversion, pre-existing BLER rights, if any, continue to apply. In all other cases, the higher level pre-existing BLER rights[19] are safeguarded, provided that they covered at least 25% of SE employees in case of an SE formed by way of merger or at least 50% of SE employees in case of the creation of a holding company or joint subsidiary. If the management and SNB reach an agreement, both parties can freely decide on its content. However, the legislator has introduced another protection to pre-existing national BLER rights by requiring a qualified two-third majority of SNB members to decide to reduce or eliminate them.[20] It required the formulation of this set of rules for a political compromise to be found and for the SE Statute to be adopted in 2001. This success paved the way for two other pieces of European company law whose provisions dealing with BLER were greatly inspired by the SE rules: the European Cooperative Society Statute in 2003 and

18. The 1989 Commission's proposal opened the possibility for future SEs to opt either for the German, French, Dutch or Scandinavian model.
19. In the SE Directive, the 'higher' BLER rights are those equal to the highest proportion of BLEReps in force before the registration of the SE.
20. This qualified majority is required in situations in which the pre-existing BLER rights covered at least 25% of employees (in case of the constitution by a merger) or 50% (in case of the formation of a holding company or of joint subsidiaries).

the Directive 2005/56/EC on Cross-Border Mergers of limited liability companies (henceforth CBM).

At this point, European observers and IR actors might have thought that the SE rules, as a successful and difficult compromise, would have served as guidelines for future EU legislation tackling the BLER issue. A detailed analysis of the CBM Directive and of on-going debates surrounding EU company law in fact draws a different picture and instead reveals a new trend in favour of regulatory competition which offers ways to circumvent national BLER rights.

The CBM Directive contains provisions aimed at safeguarding pre-existing BLER rights in companies participating in the merger if the company resulting from the merger is registered in a country providing no or lower BLER rights. At first sight, these safeguard mechanisms look very similar to the SE ones.[21] However, there are slight but meaningful differences between the two, which has led some experts to talk about a 'cutting back' in the CBM Directive compared to the SE Directive (Cremers and Wolters 2011: 8; Van het Kaar 2011: 196). One is the fact that the 'before and after' principle of the standard rules applies if at least 33% of employees (25% in the SE Directive) previously enjoyed BLER rights. Moreover, a threshold of 500 employees enjoying BLER rights has been introduced as one of the potential points of departure for opening negotiations on BLER (compared to the lack of a threshold in the SE Directive). Finally, companies that have adopted a monistic corporate governance structure can restrict the proportion of board-level employee representatives to one-third of the board (there is no such restriction in the SE Directive).

If the provisions of the CBM Directive are loosely inspired by the SE rules, the European Commission proposal for a European Private Company (henceforth SPE[22]) Statute in 2008 did not mention the SE rules at all, although it has consequences for BLER rights. With a view to fostering the internal market and because the minimum capital requirement of the SE (€120,000) combined with the fact that an SE cannot be created from scratch could prevent SMEs from adopting the SE Statute, European institutions started thinking in the early 2000s about a new

21. Not least because the CBM Directive makes references to the SE Directive.
22. Acronym for Societas Privata Europaea.

statute specifically targeted towards private-limited liability companies. The Commission came up with a proposal in 2008 according to which such SPEs could be created *ex nihilo* and freely decide their country of registration, i.e. they could freely decide the national company law to which they would be subject. As BLER rights pertain to company law, this would have implied that the choice of the SPE Statute would have allowed companies to escape national BLER regimes by registering in BLER-free countries. Several Member States strongly reacted against this opportunity for 'regime shopping', putting their national rights under pressure[23] and none of the 8 subsequent political compromises submitted to the Council achieved consensus. Although the last political compromise of May 2011 incorporated provisions resembling to those of the SE Directive, it did not achieve unanimity as, like in the CBM Directive, provisions were far less protective: by introducing a threshold of 500 employees enjoying higher BLER rights to trigger negotiations on BLER arrangements, the proposal would have threatened the national BLER rights of the 8 countries with lower thresholds applying to limited companies.[24]

SPE statute or not, it is already possible for companies to circumvent national BLER rights thanks to the combination of two EU rights: the freedom of establishment set out in Art. 49 of the Treaty; and the right of a company to locate its registered office and its real seat in two different Member States, as confirmed by European Court of Justice case law.[25] As a consequence, a company which chooses to register in a BLER-free country and to conduct its real business activities in a country usually providing employees with the right to sit on boardrooms will, however, not be subject to BLER rights. In practice, Sick and Pütz (2011) found that 43 large companies operating in Germany do not comply with German BLER rights and so far have the right to do so because they have foreign legal status. This competition between national regulatory frameworks has raised such concerns that it triggered debates on the need for a Directive regulating the cross-border transfer of registered office (the

23. Regime shopping thanks to the SPE statute as proposed in 2008 was also permitted because of the lack of requirement for a cross-border component, a lack of minimum capital requirement and the possibility for a SPE to locate its registered office and real seat in different Member States.
24. AT, DK, FI, HU, NL, NO, SE and SI (see table 1).
25. Especially the following ECJ rulings: Daily Mail (C-81/87, 27 September 1988); Centros (C-212/97, 9 March 1999); Überseering (C-208/00, 5 November 2002); Inspire Arts (C-167/01, 30 September 2003), Sevic Systems Ag (C-411/03, 13 December 2005), Cadbury-Schweppes (C-196/04, 12 September 2006); Cartesio (C-210/06, 16 December 2008).

so-called potential 14th Directive). After some preliminary consultations and assessments, the Commission decided in 2007 that there was in fact no need for an EU legislative proposal. However, threats to national rights are so great that they prompted the European Parliament to call for European action on this matter, a call which has been repeated three times[26] without, up to now, having being duly considered by the European Commission. Such a strategy to circumvent national rights through the adoption of the SE statute is not possible because of the obligation for an SE to have both its registered and real seat in the same country.[27]

4. Conclusion

The European Company statute is the first piece of EU law containing provisions aimed at regulating BLER. Although it took 30 years to end up with a final compromise, both the SE Regulation and the SE Directive have been welcomed by IR actors as a satisfactory set of rules providing for enough guarantees to respect existing national IR systems. Several elements in the SE Directive are indeed aimed at safeguarding national BLER rights: the 'before and after' principle driving the standard rules; the requirement for not less than a two-thirds qualified majority at the SNB to decide for no or weaker BLER rights in the SE; the obligation to have both the registered office and the real seat in the same country.

This 'no export, no escape' compromise (Davies 2003: 87), according to which EU law shall not impose BLER in countries without such provisions at national level but shall prevent a reduction of rights in countries with BLER provisions, is being challenged. Instead of replicating the SE rules which so far best respect the inter- and intra-diversity of institutional BLER settings prevailing across Europe, law-makers at EU level seem to favour the less protective principle of regulatory competition. By putting national frameworks in competition with each other and enabling companies to shop among the least stringent legal frameworks (including on BLER), either through a still pending SPE statute or the absence of regulation of cross-border transfer of seats, the European

26. See European Parliament's resolutions in March 2006 (P6_TA(2006)0088), March 2009 (P6_TA(2009)0086) and February 2012 (P7_TA(2012)0019).
27. On the contrary, the last version of the proposal for an SPE statute in May 2011 followed the regulatory competition approach by required an SPE to locate its registered and real seats 'in the European Union', i.e. not in the same Member State.

legislator has opened door for a possible race to the bottom. At the time of writing (June 2012), there are sound arguments to agree with Van het Kaar in saying that 'SE legislation can be considered the temporary pinnacle of employee involvement at the European level' (Van het Kaar 2011: 200).

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