

Chapter 1

A big hit or a flop? A decade of facts and figures on the European Company (SE)

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1. Introduction

When the European Company (*Societas Europaea*, SE) legislation entered into force in October 2004, expectations differed on its future. Whereas, for example, then European Commissioner Frits Bolkestein highlighted the enormous potential (see Chapter 12 by Cremers in this volume), many commentators expected it to be a non-starter, being very complicated and representing an unsatisfactory compromise instead of a breakthrough in European company law. Against the prevailing sceptical expectations, the developments of the past few years can be described as fairly dynamic. Between October 2004 and August 2012 a total of 1,379 SEs were set up in the 30 countries of the European Economic Area (EEA). At the same time the SE can still be considered a ‘niche company form’, especially when compared to the total of 21 million companies in the EU-27 non-financial business sector alone (data from Eurostat 2011: 32). Moreover, the majority of SEs are concentrated in a few countries, first and foremost the Czech Republic and Germany.

The SE primarily represents an EU internal market project and, only in the second instance, a field of European social policy. The main aim of the SE statute (Council Regulation 2157/2001/EC) has always been, from the first discussions in the 1960s, to provide companies operating across European borders with more flexibility and to make it easier to operate. Nevertheless, the adoption of the SE legislation in October 2001 also gave new momentum to the interest representation of employees at European level. Indeed, the rules laid down in the accompanying SE Directive on the involvement of employees (Council Directive 2001/86/EC) can be considered a milestone in the field of European regulation, also with regard to employee involvement.

Based on the latest data from the ETUI's European Company (SE) Database (ETUI 2012) at the time of writing, this chapter looks at how the SE has been implemented in practice. This includes a compact analysis of the quantitative development of SE founding over the past years, the geographical distribution, the number of employees and sectors of activity and the form of foundation. Moreover, the article investigates the extent to which companies have used the new flexibility offered by the SE, notably the free choice of the corporate governance system (monistic or dualistic), the possibility of cross-border mergers and the option to transfer the SE's registered seat. Finally, the chapter looks at the implementation of the SE Directive's provisions on employee involvement.

A key challenge for analysing SE practice remains the difficult data situation. Unfortunately, there is, as yet, no central registry for SEs. This situation is aggravated by the fact that the EU legislators have failed to include adequate information procedures in the SE legislation, especially with regard to worker involvement. According to Art. 14 (1) SE Regulation, notice of an SE's registration and of the deletion of such a registration shall be published for information in the Official Journal of the EU. The information provided on Tenders Electronic Daily (hereafter: TED) – the online version of the Supplement to the Official Journal – is fairly limited, however. The SE Regulation prescribes only that the notice 'shall state the name, number, date and place of registration of the SE, the date and place of publication and the title of publication, the registered office of the SE and its sector of activity'. This means in particular that no information is available on employment and worker involvement issues. This shortcoming is all the more striking as Art. 12 (2) SE Regulation makes clear that the existence of an arrangement on employee involvement (agreement or application of the standard rules), or a decision of the special negotiating body (hereafter: SNB) not to open or to abort negotiations must be presented to allow the SE's registration. Moreover, it must be noted that it is unclear how strict the national rules on registration and compliance are (Cremers, Kluge and Stollt 2010: 27). As a consequence of the profound gap with regard to publicly available information, monitoring how the SE Directive's procedures are implemented in practice turns out to be rather difficult.

For ten years, the ETUI has sought to fill this lack of information with its research on SEs. Following the entry into force of the SE legislation, it has been collecting and issuing on an on-going basis information on registered and planned SEs through its European Company Database

(ECDB – formerly: SE Factsheets), available online since 2008 at <http://ecdb.worker-participation.eu>. The objective of the database is to provide information for a quantitative and qualitative analysis of the use of the SE Statute and in particular the implementation of the SE Directive.

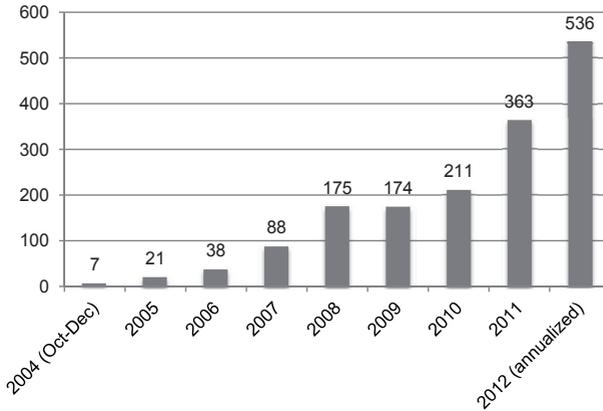
Due to the abovementioned information gaps, significant publication delays and incompleteness of information available in the Official Journal, the ECDB team searches for additional information mainly in national company registers. This information is supplemented for example by information from national gazettes, various websites for company information, stock exchanges, press releases, internet enquiries and also through researchers in the SEEurope Network who try to find out more about specific SEs, for example, by contacting the company and/or trade unions.³ As a result, the ECDB contains data on a much higher number of SEs than the Official Journal (European Union 2012). A search within the TED archives, for example, displayed 1,080 results on 15 August 2012; included in this search result are not only some 23 European Cooperatives (SCE), 39 European Economic Interest Groupings (EEIG), but also numerous corrections, deletions and duplicate announcements (European Union 2012).⁴ Today, the ECDB represents the most extensive, continuously updated SE database on European Companies, and is widely used and referred to in research and also in official EU documents.⁵

2. Quantitative development and geographical distribution

By 15 August 2012, the ECDB provided information on 1,379 European Companies. Figure 1 shows that the SE had a relatively slow take-off during the first years following the entry into force of the SE legislation

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3. ECDB information is compiled by Anders Carlson, Melinda Kelemen and Michael Stollt with support from the SEEurope Network. The network, under the leadership of the ETUI, involves legal, economic and industrial relations experts from all EU member states (for more information see <http://seeurope.worker-participation.eu>).
 4. There is often a considerable delay between an SE's incorporation in the national registry and its appearance on TED. Moreover, while all SEs registered should appear on TED, this is not always the case. Also problematic for continuous monitoring is that documents are only accessible publicly for five years on TED.
 5. For example, the facts and figures contained in the staff working document of the EU Commission's 2010 report on the SE Statute rely on ECDB data for 2009 and 2010 (SEC (2010) 1391 final 17.11.2010).

Figure 1 Number of new SE registrations, 2004–2012

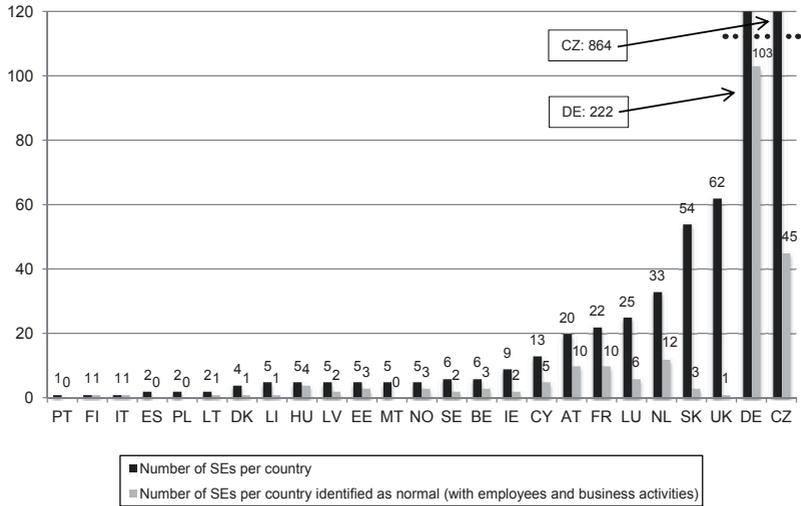


Source: ETUI (2012). Figures include 33 SEs which, subsequent to registration, have been deleted from the register or transformed into a national company form.

in October 2004. It is not surprising that, at the beginning, a certain reluctance prevailed towards a completely new company form where no experience existed and a number of legal questions were still open. Another factor was the delayed implementation of the SE Directive in a number of countries (see Fulton in this volume). Between 2007 and 2008, the number of new SE registrations doubled (from 88 to 175). In the following two years the trend levelled off. In 2011, the number of SE registrations rose sharply again, with 363 newly set-up SEs (+72 per cent as compared with the previous year). For 2012, another peak can be expected, as by 15 August 2012 335 new SEs had already been registered, which would result in an annualized figure of 536 SEs for 2012 (+48 per cent). The latest SE boom can be attributed largely to developments in a single country: 75 per cent of all SEs set up between January 2011 and August 2012 have their registered seat in the Czech Republic. In Germany, as a contrasting example, the number of new SEs has remained fairly stable and levelled off to between 30 and 40 new SEs per year.

SEs can currently be found in 25 of the 30 countries of the European Economic Area (EEA). An important observation when looking at the SE and its impact is the very unbalanced distribution of SEs between the different countries (Figure 2). The Czech Republic (63 per cent) and Germany (16 per cent) host by far the highest share of the overall number of

Figure 2 Geographical distribution of registered seats



Source: ETUI (2012).

SEs. Besides these two countries, significant SE home countries are the United Kingdom, Slovakia, the Netherlands, Luxemburg, France, Austria, Cyprus and Ireland. The TOP-10 SE countries together are home to approximately 95 per cent of all SEs.

In its work on the SE, the SEEurope Network distinguishes between different types of SE so as to better describe the diversity of SEs, which evolved quickly after October 2004. The categorisation allows a distinction between SEs depending on whether the company has operations and employees (*normal SE*) or operations but no or very few (≤ 5) employees (*micro/empty SE*). SEs where there is not enough information for classification (for example, on employees) are referred to as *UFO SEs*. This group also contains so-called *shelf SEs* which were set up without any operations or employees.⁶ From an employee involvement perspec-

6. The ECDB recently stopped separately disclosing the number of shelf SEs. First, if a shelf SE is sold/activated, usually a new shelf SE is created. As a consequence, the total number of shelf SEs has remained fairly stable over time. Second, in practice it has become increasingly difficult for the ECDB to track and clearly identify shelf SEs and, even more so, to find clear evidence of and information on subsequent activation.

tive, the normal SEs are of course the main focus of interest. At the same time, collection of information on initially employee-free SEs is crucial to be able to follow up on whether they subsequently acquire employees.

By 15 August 2012, only 219 SEs (16 per cent) had been identified by the ECDB as normal SEs in the sense that they are known to have both business activities and more than 5 employees. Germany is home to almost half of the identified normal SEs (103), followed by the Czech Republic (45) and the Netherlands (12). But especially in the Czech Republic, the number of normal SEs is likely to now be significantly higher as a result of the evolution of originally employee-free SEs.⁷

The large differences in SE numbers registered in individual countries indicate how cautious one must be in generalizing SE trends across Europe. The total of 1379 SEs as such could be interpreted as proof of a certain acceptance of the new company form. Nonetheless, even in Germany and the Czech Republic the number of SEs is almost negligible, especially compared to the total amount of new company registrations. For example for Germany, Eurostat indicates for 2009 a total of 297,000 newly founded enterprises and for the Czech Republic 115,000. Overall in 2009, approximately 2.5 million enterprises were established in the 22 EU Member States on which this data was available (Eurostat 2012).

In general terms the SE's impact on the company landscape in Europe therefore remains limited. However, some 'SE hotspots' have evolved that deserve a deeper look also because of the SE's impacts on worker involvement. The reasons for the (non-) success of the SE and the analysis of the effects on employee involvement must therefore be analysed, first, from a national perspective (see Part II in this book): for example, whether the SE is considered problematic or simply is largely ignored because no real development has (yet) occurred in a given country. Moreover, possible impacts vary significantly between countries, depending on national worker involvement rights. From an employee involvement perspective one has to keep in mind that even employees from countries where no SEs are registered can nevertheless be concerned by an SE foundation, especially in larger multinational companies.

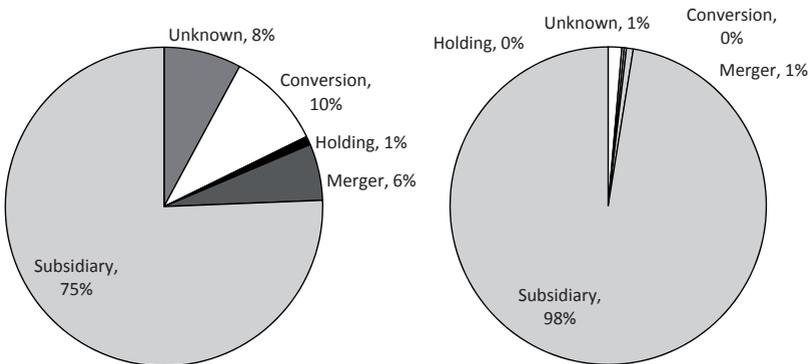
7. Most Czech SEs are set up as employee-free shelf companies by specialised providers. Later on, the shelf SEs are sold to customers that wish to establish businesses quickly. As often little is known about the further development of the workforce after sale they have to be classified in the database as UFO SEs. For more information see also Cremers and Carlson in this volume.

3. Forms of foundation

The SE Regulation provides four different modes of SE establishment: merger, holding, subsidiary and conversion (SE Regulation, Art. 2). Depending on the type selected, different requirements exist for the companies concerned. All four modes of formation share the necessity of a cross-border element, namely that at least two of the companies involved must be subject to the legislation of different EEA countries. Moreover an SE itself can set up further SEs as subsidiaries (SE Regulation, Art. 3). The form of foundation can also be important for employee involvement, for example with regard to the calculation of the threshold triggering the applicability of the standard rules on participation.

Analysis of the form of foundation leaves no room for doubt about the preferred way for registering an SE: 1,043 SEs (75 per cent) have been set up by way of subsidiary, 136 (10 per cent) by conversion, 79 (6 per cent) by merger and only 12 (1 per cent) by creating a new holding company (Figure 3). For 109 (8 per cent) SEs the form of foundation is unknown. For the Czech Republic the picture is even clearer: Basically all (98 per cent) SEs registered there have been set up by way of newly created

Figure 3 SE foundations by type, total and in the Czech Republic



Source: ETUI (2012).

subsidiaries. The dominance of subsidiary SEs can largely be attributed to the creation of SE shelf companies. Two ways can be distinguished: whereas, for example, in Germany the founding of new shelf SEs is often done by companies registered in two different EEA countries (creation of a joint subsidiary), in the Czech Republic it is the SE itself which ‘gives birth’ to further SEs (SE subsidiary). The advantage of the latter method is that, once an SE has been created, it can serve as a kind of ‘incubator’ and can create further subsidiary SEs, in which case no cross-border requirement is necessary.

If the analysis is limited to the 219 SEs identified as normal a different picture emerges. Here, conversion is the most frequent form of foundation (42 per cent), followed by subsidiary SEs (35 percent), merger SEs (20 per cent) and holding SEs (3 per cent). A large proportion of normal subsidiary SEs, again, were originally created as inactive companies and subsequently activated by acquiring employees.

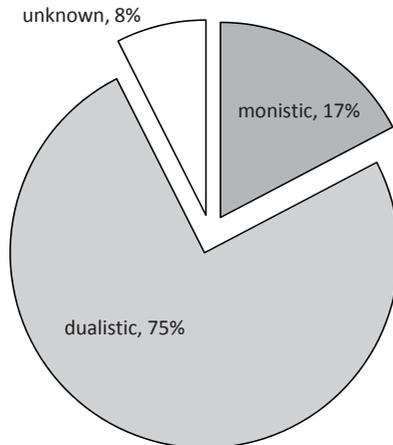
The prevalence of subsidiary SEs represents a creeping threat to worker involvement rights. It has to be borne in mind that mechanisms for securing employee rights to information, consultation and participation are guaranteed only at the moment of founding of SEs. The important question thus is: What happens once a formerly employee-free SE starts having employees? The SE Directive lacks clarity in this respect. Some countries, such as Austria, have introduced a more detailed definition in their national transposition laws, triggering renegotiations in case of major changes in the SE. But the large majority of countries have simply copied the inadequate rules of the SE Directive (see Fulton in this volume). As a consequence, the definition of changes considered to constitute a structural change remains disputed (for example, Ernst & Young 2009: 265; Köstler 2005: 339). In the absence of a clear rule in the SE legislation, a German court stated that when an employee-free SE later acquires employees it has to start negotiations (OLG Düsseldorf, 30.3.2009, I-3 Wx 248/08). So even if the setting up of an SE without employees is a common practice, this does not free the SE from the requirement to commence negotiations once it starts having employees. In practice, however, there have already been several cases of employees being deprived of their involvement rights through the activation of a formerly inactive SE (Stollt and Kluge 2011: 186).

4. Corporate governance – choice of the board system

In Europe, two different corporate governance systems can be found: (1) the monistic system, with a single administrative board (board of directors) directing the company's business and (2) the dualistic system with, on one hand, a management board responsible for the day-to-day business and, on the other hand, a supervisory board monitoring the management board. So far, the choice of board system has largely depended on the legal provisions in the different countries. Only in some EEA countries did companies already have the choice of selecting – under certain circumstances – between the monistic and dualistic models (for example, in France, Finland, Hungary and Italy). In contrast, an SE can freely choose between a monistic or dualistic board structure. This also applies to countries where such a choice does not (yet) exist for national company forms.

Overall, the picture reveals a clear prevalence of SEs governed by a dualistic board structure (Figure 4). Of the 1,379 SEs, 75 per cent have a supervisory board and a management board, compared to only 17 per cent with a monistic board structure. For 8 per cent of SEs the board structure is unknown.

Figure 4 Board structure of registered SEs (n=1379)



Source: ETUI (2012).

Of course, one has to take into consideration the uneven distribution of SEs throughout Europe. Four out of five SEs are registered in Germany and the Czech Republic which belong to the group of countries where national public limited companies must have a two-tier system of corporate governance. Table 1 provides a breakdown with regard to the corporate governance system for the 10 countries hosting the most SEs.

Table 1 SE board structure in the 'TOP 10' SE countries

Country	Total SEs	Dualistic SEs	Monistic SEs	Unknown	Changes after registration
CZ	864	842	19	3	17
DE	222	104	87	31	3
UK	62	2	15	45	0
SK	54	48	5	1	1
NL	33	10	17	6	0
LU	25	4	21	0	0
FR	22	6	15	1	1
AT	20	5	15	0	1
CY	13	3	7	3	0
IE	9	1	5	3	1
	1324	1024	205	95	24

Source: ETUI (2012).

Analysis points to a path dependency with regard to the corporate governance system. In eight of the ten countries the majority of SEs have opted for the 'traditional' national board system. This is especially the case for the Czech Republic where 97 per cent of SEs have stayed with the well-known two-tier system. In the Netherlands, in contrast, more than half of the SEs have a monistic system, hitherto unknown in Dutch corporate governance.⁸ The share of monistic SEs is even higher in Austria: Only five of the 20 Austrian SEs have opted for the traditional

8. National companies in the Netherlands will, however, be able to choose between the monistic and the dualistic structure, probably starting in January 2013.

separation into a management and a supervisory board, whereas 15 SEs decided that an administrative board was more suitable for them. Also in Germany, a remarkable 87 of the 222 SEs have chosen a monistic instead of a dualistic board system (for more information on Germany, Luxembourg and the Netherlands see the national case studies in this volume).

Although in the majority of cases the free choice of the board system was obviously not the driver for the SE project, the picture shows that a significant number of companies have made use of this new flexibility created by the SE legislation, above all in Austria, the Netherlands and Germany. Whether the choice of the board was the key motive for setting up the SE cannot be concluded from the data but many companies have explicitly mentioned this motive in their public documents. In the meantime, some 24 SEs have changed their corporate governance structure subsequent to SE registration.

5. Cross-border mobility: transfer of registered seat and cross-border merger

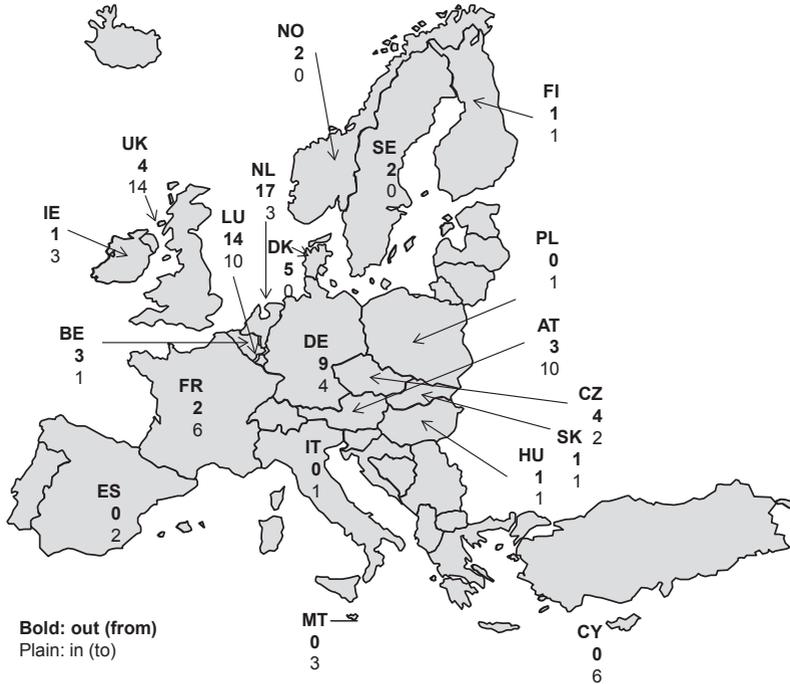
The idea of the SE is to provide the company with a large degree of flexibility and mobility within the European internal market. For this reason, the SE can transfer its registered seat to a different EEA member state. This transfer of seat results neither in the winding up of the SE nor in the creation of a new legal entity (SE Regulation, Art. 8). Three restrictions have to be kept in mind:

- (i) The registered office must remain in the country where the SE's head office is located. That means that the head office (administrative seat) must also be relocated.
- (ii) The SE Regulation does not allow the transfer of seats outside EU/EEA territory (for example, to the Cayman Islands or to Switzerland). In this case the SE is dissolved.
- (iii) A public limited liability company which converts into an SE is not allowed to transfer its registered office at the same time as the conversion is effected (SE Regulation, Art. 37). The legislation thereby wants to ensure that the transfer of seat is not used to 'escape' from an existing participation arrangement. Once the SE is established it can, however, move its seat to another country (the participation arrangement will continue to exist).

The ECDB also allows the tracking of SE transfers of seat. The data reveal that SEs have started to use this specific flexibility with regard to cross-border mobility: Between October 2004 and August 2012, around 5 per cent (69) of the currently registered SEs have migrated to another EEA country, sometimes immediately after their registration. Figure 5 shows the outbound and inbound transfers per EEA country. Hence, the highest net inflow (incoming SEs minus outgoing SEs) can be observed for the United Kingdom (+10 SEs), Austria (+7), Cyprus (+6) and France (+4). On the other hand, the highest net outflows have occurred in the Netherlands (-14), Denmark and Germany (-5). Luxembourg is the most dynamic place with a total of 24 SE transfers of seat, of which 14 were outbound and 10 inbound. Surprisingly, the Czech Republic with its total of 864 SEs only accounts for six transfers of seat (-2). The motives usually remain unknown as they are in general not published by the companies (and even if they were, there would be no certainty that the company publicly declares the real drivers).

Of the 69 currently registered SEs that have transferred their seat, at least 22 belong to the group of normal SEs. As of this date, no case is known where the transfer of seat has resulted in a reduction or withholding of participation rights. This does, however, not exclude that employees in such SEs might experience different treatment compared to a national public limited company in the new host country in the future (especially if the SE's workforce grows above a national participation threshold). Whereas employee participation apparently seems not to have constituted an important driver for SE mobility, at least in some cases tax reasons are likely to have played an important role. For example, Cyprus – one of the countries with the most SE inbounds – also has one of the lowest corporate tax rates (10 per cent) in the EU. This view is also taken by the Ernst & Young study which concludes: 'Some SEs will be established in the Member States with the most suitable tax regime and there will be tax competition among the Member States. Thus an SE may benefit from tax optimisation due to the ease of the cross-border transfer of the registered office' (Ernst & Young 2009: 238) Also, several contributions in the EU Commission's consultation on the functioning of the European Company Statute in 2010 highlight taxation as one of the key motives (see inventory of consultation papers contained in Cremers, Kluge and Stollt 2010: 10–32). Further research would be desirable to investigate deeper the extent to which the SE is systematically used as a vehicle for tax and other kinds of undesired regime hopping. Although such a development might not represent a legal abuse of the SE legisla-

Figure 5 Transfer of seat of SEs



Source: ETUI (2012).

tion, it would certainly undermine the SE’s creditability and reputation. Flexibilisation and simplification should certainly not be considered an aim or a value for its own sake.

Another new possibility created by the SE is that it does not need to have legal entities in every country it operates in. It can also work with establishments/branch offices instead by merging national legal entities into the parent (SE) company. This can be realised at the moment of foundation (merger SE) and/or also later on (and irrespective of the original form of foundation).

The ECDB notes that 43 normal SEs were set up by way of a merger between public limited companies from different countries. It is not possible to distinguish the cases where the cross-border merger was the key incentive to form the SE from the cases where the company decided (for

different possible reasons) to realise their SE founding in the form of a merger. In any case it is likely that, at least in a number of cases, this possibility was an important incentive for the SE project.

SE founding has so far been only rarely used as a tool for cross-border mergers within or between large companies with employees in many European countries. Basically all larger SEs have preferred not to immediately merge (all) their national subsidiaries into the new SE parent company. Instead, usually only the parent company was transformed into an SE and the national subsidiaries continued to exist as separate legal entities. However, later on an SE can still merge its national subsidiaries into the SE parent company. The latest developments – for example, in some SE subsidiaries of Allianz SE – indicate that this merging practice of subsidiaries may increase in the future.

The absence of a legal entity can have an impact on national rights: for example, if a national subsidiary ceases to exist as a legal entity the board-level participation in the subsidiary also ends. There is then only participation in the parent (SE) company. Also, other national rights granted to the unions and/or works councils that require the existence of a national legal entity may be threatened. Indeed, such a concern comes from France. Here, the trade unions in particular have expressed their concern with regard to the fact that some French involvement rights are directly connected to the existence of a national legal entity in France (Rehfeldt and Voss 2011: 22).

6. Number of employees and sectoral distribution

Today, more than 700,000 employees are estimated to work in European Companies (SEs) or one of their concerned subsidiaries or establishments.⁹ About half of the total SE staff headcount is contributed by eight SEs with more than 10,000 affected employees.

These figures should be considered rough estimates, as the estimation of SE employment figures is very difficult with the existing data, for several reasons. First, as already mentioned, the SE Regulation does not require the publication of employment data. Also in national registries,

9. Of course this represents only a tiny part of the EU27's workforce of about 225 million employees.

this information is usually not available (let alone up-to-date). Second, most SEs have been set up by way of a subsidiary and therefore had no employees at the moment of founding. For many, this is likely to have changed in the meantime. A study ordered by the European Commission estimated in 2009 that 20 per cent of the SEs included in the study changed the number of their employees during the first fiscal year after the SE's creation by 50 or more employees (Ernst & Young 2009: 205).

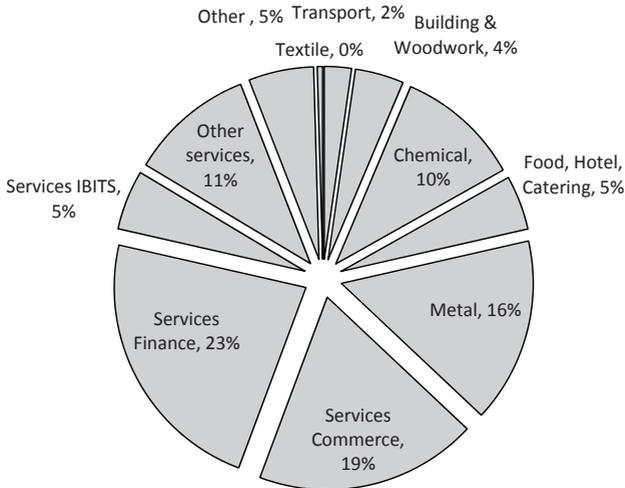
In addition, for the purpose of employee involvement, the concept of *concerned* subsidiaries and their employees is relevant. For example, an SE (serving as a holding or as the mother company of a group) may formally have no or very few employees. But in the context of the SE Directive the employees of concerned subsidiaries or establishments (which are to become a subsidiary or establishment of the SE upon its formation, but keep their original legal form) also have to be taken into consideration.¹⁰ This information, however, is usually available where access to an SE agreement on employee involvement exists. In many cases, it is not possible to clearly identify from the outside which subsidiaries 'belong' to an SE and should be counted in the calculation of the employees concerned by establishment of the SE. It is likely that a number of employee-free SEs have been registered by national registries without any negotiations on employee involvement, although there had been employees in one or more concerned subsidiaries. To mention just one example: For the Czech company EUROCAPITAL GROUP SE, according to the Business Register (RES) maintained by the Czech Statistical Office (CZSO), it is not known how many employees the SE has. The SE owns a number of other companies registered in the Czech Republic. According to RES, at least one of its subsidiaries has a workforce of 2000–2499 employees and – according to its website – is also operating in other countries. It is not known whether an SNB has been set up in this case and whether employees of concerned subsidiaries have been correctly taken into account. The rather large total size of the workforce in this example shows that in such cases a significant amount of workers may indeed have been deprived of their rights as provided by the SE Directive.

10. Article 3 (2a) provides that 'in electing or appointing members of the special negotiating body, it must be ensured: that these members are elected or appointed in proportion to the number of employees employed in each Member State by the participating companies and concerned subsidiaries or establishments.'

The state of data with regard to registered SEs is best with regard to Germany, in part because in many cases an SNB was set up. This allows much better monitoring of whether the rules of the SE Directive have been respected. Here also a more detailed breakdown by SE company size is possible (see Köstler in this volume). In contrast, the situation is particularly problematic for Czech SEs, the large majority of which started as shelf companies with no employees and were afterwards sold. What happens in the company after activation usually remains unknown. It should once again be pointed out how problematic this is for safeguarding worker involvement rights.

The fact that most SEs have been set up by way of a newly established subsidiary also creates difficulties with regard to their grouping by sector of activity. Especially in the case of activated shelf SEs, the initial registrations in the commercial register often have little to do with what one can identify when the companies show up on the internet. Providing a reliable picture of all of the SEs is not possible with the data available. Figure 6 therefore concentrates on the 219 normal SEs identified so far, where the state of data is more reliable and com-

Figure 6 Sectoral distribution of normal SEs (n=219)



Source: ETUI (2012).

plete. It shows that 58 per cent of these SEs have been set up in the service sector, mostly within financial services (23 per cent) and commercial services (19 per cent). A considerable number of normal SEs can also be found in the metal (16 per cent) and the chemical (10 per cent) sectors.¹¹ In contrast, in some sectors – such as the transport and textile industries – very few SEs have been registered so far.

7. Negotiations on worker involvement

As mentioned earlier, Art. 12 (2) SE Regulation conditions the SE's registration to the prior existence of an arrangement on employee involvement (agreement or standard rules) or a decision of the special negotiating body (SNB) not to open or to abort negotiations. Also, Recital 6 of the SE Directive is very clear in this respect: 'Information and consultation procedures at transnational level should (...) be ensured in all cases of creation of an SE'. Within the limits of the before-and-after-principle this is also the case for previously existing participation rights. This de facto means that at least an SNB has to be set up in all companies that want to register as an SE (only the SNB can take decisions on behalf of the workforce, not, for example, an already existing EWC).

In contrast, ECDB data show that an SNB was not set up in most of the currently registered 1,379 SEs. Only in about 8 per cent of cases is the setting up of an SNB known to have taken place. The key reason for this low number lies in the high share of SEs set up by way of a subsidiary SE which, by definition, have no employees at the moment of founding and where it is technically not possible to form an SNB. The picture looks a bit better if one concentrates on the 219 identified normal SEs. In 105 cases (48 per cent) an SNB was set up (Table 2).¹² This nevertheless points to a worrying lack of implementation of the mandatory rules of the SE Directive in practice to the detriment of worker rights (Table 2).

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11. Some companies are operating in several sectors simultaneously. The sectoral classification used in the database has been created with a view to companies by the area of interest of the different European Trade Union Federations that coordinate European works council (EWC) and SE activities. For details on the NACE codes distributed over the sector of activity groups see http://www.ewcdb.eu/sector_of_activity.php
 12. In the remainder of the normal companies either no SNB has been set up (47) or information on employee involvement is not available (68). For most of the latter cases it is, however, very unlikely that negotiations have taken place.

Table 2 Establishment of SNBs in normal SEs and results of negotiations

Establishment of SNBs in normal SEs (total: 219 + 1 empty/micro, see note below)			Outcome where an SNB was established (total: 105)			Content of arrangement on employee involvement (total: 87)	
Yes	No	No information	Agreement signed	Negotiations not opened or aborted	Standard rules applied	Information and consultation rights – representative body (72) – I+C procedure only (12) – no information (3)	Participation rights – supervisory board (39) – administrative board (7)
105	47	68	85	18	2	87	46

Note: The table includes one SE classified as an empty/micro SE where, due to the existence of employees in relevant subsidiaries, an agreement on information and consultation rights has been negotiated and a representative body was set up. The column 'Content of arrangement on employee involvement' includes rights provided by agreement or by application of the standard rules.

Source: ETUI (2012).

As is well known, there are three possible outcomes of the negotiations:¹³

1. SNB decision not to open or to terminate negotiations
2. Conclusion of an agreement between management and SNB
3. Application of the standard rules

In 85 of the 105 cases where an SNB was set up the two negotiating parties managed to conclude a tailor-made agreement on employee involvement. In another 18 cases the SNB decided not to open or to abort negotiations. The latter companies typically have up to a few hundred employees, with the exception of two bigger companies where the SNB decided to rely on national information and consultation rights only. Only in two companies were the standard rules applied.

A total of 72 of the 87 SEs where either an agreement was reached or the standard rules apply established a proper representative body (SE works council, employee committee or similar platform). In contrast, in 12 SEs

13. See also chapter by Sick in this volume.

the information and consultation rights are provided by an arrangement for information and consultation only, that is, without a formal body being set up. In some cases the rights have been transferred to the highest-level works council within the group or the arrangement provides only for written briefings. The common feature of these companies is that they mostly have fewer than 2,000 employees. For the remaining three SEs the situation is unknown.

A positive impact can be noticed in companies where a European works council already existed. In all 17 cases an SNB was set up and transnational information and consultation rights were maintained afterwards through an SE representative body or the retention of the existing EWC. As the EWC Directive only applies to companies with at least 1,000 employees, this group includes only larger SEs, mostly with several thousand (or even tens of thousand) employees in several countries.

In 46 SEs the workforce not only has the right to transnational information and consultation but also to participation in the SE's supervisory or administrative board. Only in a single case was the result not laid down in an agreement but based on the application of the standard rules. The geographical distribution reveals that 36 of the 46 SEs have their registered seat in Germany, 6 in France, 2 in Austria and 1 in Hungary and Cyprus (originally registered in Norway). Against the background of the country of origin it is not surprising that only seven of these SEs have a monistic board. Only in two cases has the board structure changed as a consequence of the conversion into an SE from a dualistic into a monistic structure, thereby including for the first time participation rights in an administrative board in Germany and Austria. The SE regulation ensures that the employee board-level representatives will have the same rights and obligations as the members representing the shareholders, irrespective of whether the SE has a monistic or dualistic structure. The concrete powers of the board depend largely on the country where the SE is registered and the SE's statutes. Formally, the employee side does not have a say in the choice of the board system, as this decision is taken by the general meeting of shareholders and is not part of the negotiations between the management and the employee representatives.

Complementary data from the European Worker Participation Competence Centre reveal that by August 2012, about 140 employee representatives have been sitting on the supervisory or administrative boards of SEs. In many cases the SE has led to an internationalisation

of the board, thereby indirectly spreading participation rights in Europe. The employee board-level representatives overall come from 11 different countries. Around 75 per cent of them are Germans, which can be explained by the high number of SEs with participation rights headquartered in Germany and the frequent concentration of the workforce in the home country.

In all SEs with participation rights, these rights already existed previous to the SE founding. To our knowledge in not a single case was the share of employee representatives lowered, which would have required a qualified vote of the SNB and would have been not allowed in the case of an SE set up by way of conversion (Art. 3 SE Directive).

Based on their individual agreement, these SEs will in the future develop further their own standard of participation, as the SE is no longer subject to national legislation on participation. National employee thresholds for participation, for example, do not play a role once the SE has been set up (unless the agreement itself lays down thresholds: see for an analysis of existing agreements in this respect Rose and Köstler 2011: 22–27). This has, at least for some German companies, been a key motive for founding the SE (Keller and Werner 2011).

8. Conclusions

The evaluation of the first years of SE founding reveals an ambiguous picture. A total of more than 1,379 SEs registered since October 2004 – of which some 698 were set up in the past 20 months alone – confirms a certain attractiveness and acceptance of the new supranational company form. On the other hand, SE founding is concentrated in a few countries. Obviously, the SE is not assessed in the same way everywhere and in many countries it is still not considered an attractive choice for groups and companies intending to (re)organise their transnational business across Europe.

Moreover, a lot of ‘SE users’ were probably not the entrepreneurs the European legislator had in mind when establishing the SE statute. The SE Regulation refers in its preamble to ‘companies the business of which is not limited to satisfying purely local needs’, which ‘should be able to plan and carry out the reorganisation of their business on a Community scale’. The widespread practice of founding SEs without any cross-bor-

der element gives rise to doubt about whether this practice corresponds to the intention and objectives of the SE legislation.

As for the motives, the decision to set up an SE can be seen as the individual result of a series of considerations a company makes when analysing the business case for a new company. Many companies have stated in their public announcements that the European image and/or identity of the SE was an important factor, as it better reflects the European activities (or ambitions) of the company and therefore would strengthen its European identity, thereby also influencing the customer and market perception of their company. However, in practice this seems to represent rather an 'auxiliary motive' and not the key driver (Cremers, Kluge and Stollt 2010: 9). A greater role can be attributed to the enhanced cross-border mobility of the SE, first and foremost the possibility to transfer the registered office to another EEA member state and the simplification of cross-border mergers. How important these SE features will be in future remains to be seen. With the entry into force of the 10th company law directive in December 2007, the SE faces a serious competitor for the realisation of cross-border mergers (van het Kaar 2011: 196). At least for the time being, however, the SE still holds a certain 'monopoly' on simplifying cross-border transfers of seat. Moreover, the SE's flexibility with regard to corporate governance (monistic or dualistic system) seems to constitute an important factor, at least in some countries.

The question about the role of employee participation has been disputed, especially for the case of Germany where the SE statute has in some cases been used by companies for 'freezing' the existing participation status and reducing (or 'freezing') the size of the supervisory board. The reasons for the impressive success of the SE in the Czech Republic have long remained largely unexplained. In recent years, however, it became obvious that the SE has developed into an alternative company form, mostly for national Czech enterprises. Although employee involvement seems to play no significant role in the Czech case the development threatens existing involvement rights (see Cremers and Carlson in this volume).

As already stated, the SE legislation bears the potential for strengthening employee involvement rights in Europe. Overall, however, ECDB data reveal a mixed balance with regard to employee involvement. Only in a fraction of SEs has a special negotiating body (SNB) been set up and negotiations on employee involvement taken place. Although this can largely be attributed to the fact that most SEs were set up without

any employees at the origin, this development bears severe risks for employee involvement. Prior to the adoption of the SE legislation, the conversion of an existing public limited company into an SE was considered the most risky form of foundation with regard to the protection of worker involvement rights. For this reason the SE Directive contains several clauses specifically designed for the case of a conversion (see Art. 3 (6), Art. 4 (4) and Part III (a) of the standard rules). In practice it is now rather the subsidiary SE which represents the greatest threat to worker involvement rights. This is certainly one of the most important and urgent fields where the SE legislation needs to be improved (see also Chapter 12 by Cremers in this volume on the revision process).

Despite the above-described problems, the SE has nevertheless some potential for positive developments in the field of worker involvement. On the positive side, there are some 87 SEs in which an arrangement on transnational information and consultation rights has been concluded, often for the first time. In 46 SEs, the workforce is also represented in the supervisory or administrative board. In many cases the employee board-level representatives for the first time come from different EEA countries, thereby bringing new impulses to European industrial relations. Especially if one abandons a bird's eye view and looks at individual companies in which an agreement on employee involvement has been concluded positive developments often become visible (see Part III of this volume). Indeed, every SE is unique, as is its agreement.

References

- Cremers J., N. Kluge and M. Stollt (2010) 'Worker participation: a 'burden' on the European Company (SE)? A critical assessment of an EU consultation process', Brussels. Available at: <http://bit.ly/f3OMVX>
- Ernst & Young (2009) Study on the operation and impact of the Statute for a European Company (SE). Final Report, 9 December 2009, Brussels.
- ETUI (2012) The European Company (SE) Database – The online SE inventory of the ETUI. Available at: <http://ecdb.worker-participation.eu> [Accessed 15 August 2012]
- European Union (2012) TED (Tenders Electronic Daily). The online version of the Supplement to the Official Journal of the European Union. Available at: <http://ted.europa.eu> [Accessed 15 August 2012]

- Eurostat (2012) Online statistical databases. Eurostat business demography statistics. Available at: <http://bit.ly/Mt8jky> [Accessed 15 August 2012]
- Eurostat (2011) Key figures on European business with a special feature on SMEs, Brussels.
- Keller B. and F. Werner (2011) 'New Forms of Employee Involvement at European Level – The Case of the European Company (SE)', *British Journal of Industrial Relations*, 05/2011. Doi: 10.1111/j.1467-8543.2011.00860.x
- Köstler R. (2005) 'Mitbestimmung', in Theisen M.T. and M. Wenz (ed.) *Die Europäische Aktiengesellschaft*, Stuttgart: Schäffer-Poeschel, 331–376.
- Rehfeldt U. and E. Voss with V. Pulignano, M. Kelemen, V. Telljohann, L. Neumann, L. Fulton, D. Mester, K. Schütze and P. Wilke (2011) *Employee involvement in companies under the European Company Statute (ECS). Final Report*. Dublin: European Foundation for the Improvement of Living and Working Conditions.
- Rose E. and R. Köstler (2011) *Mitbestimmung in der Europäischen Aktiengesellschaft (SE). Betriebs- und Dienstvereinbarungen. Analyse und Handlungsempfehlungen*. Frankfurt am Main: Bund-Verlag.
- Stollt M. and N. Kluge (2011) 'The potential of employee involvement in the SE to foster the Europeanization of labour relations'. *Transfer*, 17 (2), 181–191.
- van het Kaar, R. (2011) 'The European Company (SE) Statute: up against increasing competition?', *Transfer*, 17 (2), 193–201.