

Chapter 12

The EU assessment of the SE corporate form

Jan Cremers

1. Introduction

The general principles and rules for the Statute for a European Company (Societas Europaea, hereafter SE) that were adopted by the EU Council in December 2001 consisted of two intertwined legal acts: the European Company Statute Regulation (Council Regulation 2157/2001) and the supplementing Directive on employee involvement (Council Directive 2001/86/EC). The SE legislation entered into force on 8 October 2004 and, by mid-2007, all EU countries had transposed it into national law. Since then, the number of SEs has been increasing. Actual uptake, however, has fallen short of the expectations and calculations of those instigating the legislation for this new legal vehicle for companies wishing to do business throughout the EU. Responsible European Commissioner Frits Bolkestein, for instance, saw the prospect of ‘substantive reductions in administrative and legal costs’, estimated to be up to €30 billion per year. After the conclusion of the SE rules he stated that ‘the Societas Europaea will offer companies a “European flag”, which has value in publicity terms. This “European identity” of a company will also be a way of removing the psychological barriers between Member States and prompt a more European outlook on doing business’ (Bolkestein 2002).

Eight years have passed since the entry into force of the SE rules on 8 October 2004. The SE legislation formulated in the SE Regulation and the SE Directive contains review time schedules in order to evaluate how this new supranational company form is working in practice and to identify necessary adaptations of the legal framework. The review of the SE Regulation was laid down in Art. 69:

‘Five years at the latest after the entry into force of this Regulation, the Commission shall forward to the Council and the European Par-

liament a report on the application of the Regulation and proposals for amendments, where appropriate.’

As regards the SE Directive, Article 15 obliges the European Commission (EC) to review, no later than 8 October 2007:

‘in consultation with the Member States and with management and labour at Community level, the procedures for applying this Directive, with a view to proposing suitable amendments to the Council.’

With these formulas the assessment of the Directive in principle had to come first. As the national transposition was tardy, only six Member States transposed the Directive within the deadline established in the Directive (8 October 2004), the prescribed deadlines were partially held off.

The EU regulatory tradition lays the responsibility for the start of such assessments with the European Commission, but the assessment procedure and the European actors involved are grounded on a different legal frame. Inside the EC it was and is the responsibility of the Internal Market and Services Directorate General to launch the revision debate with regard to the Council Regulation vis-à-vis the European Council and the European Parliament. For the Regulation the European Parliament only has to be consulted and the social partners have no special consultative status. The assessment of the Directive is the responsibility of DG Employment, Social Affairs and Inclusion, with the European Parliament as co-legislator and a special status for the European social partners, which has been strengthened as a result of the ratification of the Lisbon Treaty.

In this chapter the revision debates at EU level on the SE rules over the past five years are summarised.

Part 2 describes the first assessment of the SE Directive in the middle of 2008. This first assessment at EU level lacked real substance. The transposition had dragged along to mid-2007. Thus, the SE Directive became operational throughout the EU only from 2007 with 146 SEs registered by mid-June 2008 in only 13 Member States. A majority of Member States, the European social partners and the EC had to conclude that there was a lack of practical experience in applying the Directive. The next stage in the revision debate was the assessment of the SE Regulation, which took place in 2010. In part 3 the assessment process

is treated in general terms. In this consultation on the functioning of the SE Regulation the social partners were not asked to come up with an opinion. Both sides of industry figured in a list of responses to the EC's website-based consultation. BUSINESSEUROPE repeated the view that the SE Directive provisions can work out as substantial obstacles to companies wanting to make greater use of the instrument. With only a limited number of SEs established, BUSINESSEUROPE stressed that it was too early to subject the issue of worker participation to revision. The ETUC recalled that the compromise reached on workers' involvement had been thoroughly designed and that, without it, realisation of the SE statute would have been unthinkable.

The 2010 SE Regulation assessment was based on a commissioned study that was heavily criticised. In part 4 the study and its conclusions and the main critics are treated. The criticisms range from serious omissions to a seriously deficient methodology. The representativeness of the respondents was questioned, as was the narrow view taken by the authors, which was mainly the perspective of the majority shareholder. The elaborated recommendations went beyond the scope of the study (which was the evaluation of the SE Regulation, not the SE Directive); with conclusions related to the item of workers' involvement, although no in-depth research was undertaken in that area. The emphasis put on workers' involvement as a supposed negative driver rather contributed to conserve 'myths about participation in the SE'.

Part 5 is dedicated to the 'problematic' aspects of the SE Directive. The EC reopened the possible review debate on the SE Directive in 2011 with a formal first-phase consultation of the social partners under Article 154 TFEU. In autumn 2011 it became clear that the positions of the social partners were quite far apart. In separated responses they made it clear that there was no common ground for negotiations based on the procedures that can be derived from the Lisbon Treaty.

In the last part 6 the national input that was collected in 2011 by the ETUI through the SEEurope Network is summarised. The editors of this book acted as members of the steering group of this survey and the results are topical also for the next stages to come. The chapter ends with a brief treatment of the (political) outlook. A new and general consultation has been initiated by the EC and the conclusions (and possible related proposals) are expected by the end of 2012.

2. The first assessment of the SE Directive

In September 2008 the European Commission formulated a Communication on the review of Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees (COM (2008) 591 final). The EC had commissioned a report by independent experts (Valdés Dal-Ré 2008) and had addressed to the Member States and to the European Social Partners a questionnaire, in preparation of a possible review of the Directive. In their joint reaction the European Social Partners considered that the Directive did not require amendment or clarification, given the virtual lack of experience in applying the national provisions transposing the Directive.

At that time, the European employers' confederation BUSINESS-EUROPE took the view that the rules governing employee participation and the requirement to set up a Special Negotiating Body (SNB) constituted a substantial obstacle impeding companies in making greater use of the European Company Statute. According to BUSINESS-EUROPE, to increase the number of SEs greater flexibility was needed in order to strengthen the negotiating autonomy of the social partners at company level, and in so doing allow for agreed solutions tailored to the needs of the company and its employees.

The ETUC, while considering that it was too early to revise the Directive, highlighted the following issues: (a) the size of the organ where participation is exercised should not be excluded from the negotiations; (b) in order to ascertain the level of participation for the purposes of applying the 'before and after' principle, account should be taken not only of the participation rights exercised in practice but also of the participation rights granted by national legislation but not exercised in practice; (c) employees' representatives within the SE should be given a uniform level of protection; (d) the employees' representative body (like the SE Works Council) should be involved, at least, at the same time as information and consultation is required by national law; (e) representation of the particular interests of younger employees and of disabled employees should be ensured at European level.

The EC argued in the September 2008 Communication, which summarised these consultations, that it was still too early to revise the SE Directive or to propose changes to the existing legislation, due to a lack of

practical experience. The EC also proposed waiting for the evaluation of the SE Regulation. In the resulting communication the EC recognised a problem in the high number of SEs established without employees and, consequently, without any negotiations on employee involvement and acknowledged the increasing problems with shelf SEs that had been ‘activated’ in the meantime, without negotiations having taken place (COM (2008) 591 final).

3. The assessment of the SE Regulation

Article 69 of the SE Regulation states that five years at the latest after the entry into force of the Regulation, the Commission shall forward to the Council and the European Parliament a report on the application of the Regulation and, where appropriate, proposals for amendments. With entry into force in October 2004 this report on the functioning of the Regulation had to be planned for 2009.

According to Article 69, the report on the functioning of the Regulation should, in particular, analyse the appropriateness of the following aspects:

- allowing the location of an SE’s head office and registered office in different Member States;
- broadening the concept of merger;
- revising the jurisdiction clause;
- allowing provisions in the statutes of an SE adopted by a Member State pursuant to authorisations given to the Member States by this Regulation.

In December 2008, the European Commission commissioned Ernst and Young to conduct a study on the operation and impacts of the European Company Statute Regulation. The study was supposed to pursue four objectives, without direct reference to the Article 69 aspects:

- (i) to map the relevant legislation applicable in 25 EU/EEA Member States;
- (ii) to draw up an inventory of the existing SEs;
- (iii) to analyse the data gathered and identify the main drivers for setting up or not setting up an SE, as well as the main trends and practical problems;

- (iv) to formulate an analytical conclusion, focusing on the effectiveness of the SE Statute.

In March 2010, the EU Commission made available the finalised ‘Ernst and Young study’ on the EU website (E&Y 2009). Shortly afterwards, on 23 March 2010, the Commission launched an online consultation on the results of the study, to which interested parties could respond (EC 2010a). In this 2010 consultation, including the open procedure to all stakeholders to react on the commissioned study on the operation and the impacts of the SE Statute, the social partners were not asked to come up with a (joint) statement. Both sides of industry figured in a list of responses to the online consultation via the EC’s website dominated by business consultants and academics. The next step in the Commission’s review procedure was a conference on the European Company (SE) statute and the study’s results that took place on 26 May 2010 in Brussels, with around 120 participants.

The replies from the European social partners diverged. The European Trade Union Confederation was among the contributors that reacted very critically to the whole approach, while the (both national and European) employers’ organisations were supportive of the main conclusions of the E&Y report and agreed with the positive and negative drivers put forward. *BUSINESSEUROPE* repeated the position already taken during the earlier assessment of the Directive, stressing that the provisions set forth in the SE Directive and the requirement to set up a special negotiating body (SNB) can be seen as substantial obstacles to companies wanting to make greater use of this instrument.

The ETUC noted that without the compromise reached on employee participation, the realisation of the SE statute would have been unthinkable (ETUC 2010 reply to DG market consultation on the operations and impacts of the Regulation of the SE Statute, published on the EC website). The criticism from the side of the trade union concentrated on the ‘historical’ meaning of the SE rules; both texts (the Regulation and the Directive) are two intertwined sides of the compromise underlying the SE legislation. The compromise that has ultimately been reached in Directive 2001/86/EC is in no way futile or incidental. On the contrary, it has been very thoroughly designed. The procedural rules and guarantees in Directive 2001/86/EC continue to be an indispensable condition for the application and for any further advancement of the SE statute. A company’s decision on whether or not to establish an SE is the result of a

process of calculation and deliberation. Numerous factors contribute to this decision, such as the quality and user friendliness of SE legislation, fiscal issues, capital management, facilitation of mergers and acquisitions and several other general organisational aspects. The SE legislation represents a European form of corporate governance; it was not intended to be – and must not be allowed to become – an instrument putting national regulations in competition with each other. The ETUC warned against a reopening of the SE Directive ‘by the back door’ of the SE Statute.

The ETUC strongly objected to the study’s notion that employee involvement in general is a negative driver with regard to the establishment of SEs. The unions took the stand that thirty years of discussion were spent before the SE ultimately finally came into effect – and a substantial part of the discussion was spent on the involvement of employees. Another point of criticism was the fact that for the assessment of the positive and negative drivers for the SE legal form, the standpoint of the majority shareholder (investor) of the SE had been adopted. Thus, the interests of other important stakeholders were overlooked and part of the E&Y report gave the impression that the findings expressed were to a great extent based on the perception of legal consultants rather than on material evidence.

The ETUC pinpointed the creation of empty and shelf SEs and the fact that the legislator is not acting against this unintended effect. The legal form of an SE was not invented for companies without economic activity and employees. E&Y failed to give concrete answers to the reason for shelf SEs. The question should not be what the main advantages for a company are to buy a ready-made shelf SE, but rather what the Commission wants to do against this violation of the spirit of the SE legislation.

In June 2009 BUSINESSEUROPE organised a roundtable on the European Company Statute with representatives from companies, the European Commission and its member federations. According to BUSINESSEUROPE, the most important regulatory issues for a company to consider when assessing in which country to place its registered office and/or head office are:

- Tax related reasons;
- National corporate law;
- Equity and debt restructuring facilities (for example, the UK scheme of arrangement);

- Corporate restructuring facilities (for example, the availability of a corporate division facility without mutual residual liability).

The European employers' organisation was and is of the opinion that the SE Statute can work as a powerful marketing tool, facilitates internal restructuring and allows for a more efficient management structure. The supervisory board can be smaller than what is imposed by certain national laws on public limited liability companies (for example, the Co-determination Act in Germany) and the process for electing its members can be shortened. Flexibility is key when it comes to choosing among the different company forms available in Member States. The SE Statute provides such flexibility. Additional reasons driving enterprises to choose the SE corporate form are related to the need to capitalise on its mobility (cross-border mergers and registered office transfers). While the adoption of the Directive on cross-border mergers (Directive 2005/56 of 26 October 2005) now offers this possibility to companies organised under the domestic laws of a Member State, the SE still has an advantage as regards the transfer of the registered office.

BUSINESSEUROPE formulated some critical points:

- a number of shortcomings related to the Statute and to other regulatory issues
- address certain weak points of the Statute and bring forward amendments that could improve the attractiveness of this important instrument
- the finding (namely, that the implementation of EU legislation on cross-border mergers, the advantages linked to mobility and simplification of group structure have lost part of their importance) should not be overestimated

The employers noted a lack of public recognition and awareness of the SE legal form by Member States' public authorities. It has also proved difficult to explain the SE Statute to authorities outside the EU. The Statute is not very recognisable, a fact which can impose additional barriers to trade. Companies are hesitant to do business with the unknown; the negative drivers relate mainly to taxation uncertainties and the creditor protection (that can be difficult in practice). BUSINESSEUROPE has on several occasions repeated the view that the overly complicated and structured provisions around employee participation and the creation of the special negotiating body, which are foreseen in the Directive ac-

companying the SE Statute, can be a substantial obstacle to companies wanting to make greater use of this instrument. The organisation is of the opinion that these provisions work as an obstacle impeding companies in making use of the European Company Statute. However, since only a limited number of SEs were established after the adoption of the SE Statute, BUSINESSEUROPE's members believed it was too early to engage in a revision process on the issue of workers' participation, which requires a significant experience of the Directive's weaknesses in order to identify valid points for further improvement.

As a result of these activities the European Commission formulated a synthesis of the contributions to the online consultation (EC 2010b). At the end of this procedure a *Report of the Commission to the European Parliament and the Council on the application of Council Regulation 2157/2001 of 8 October 2001 on the Statute for a European Company (SE)*, formulated in November 2010 by the Commission was published (EC 2010c), summarising the outcome. One of the most significant statements in the report is:

'Any consideration of amendments to the SE Statute to tackle the practical problems identified by various stakeholders will have to take into account that the SE Statute is a result of a delicate compromise following lengthy negotiations. The Commission is currently reflecting on potential amendments to the SE Statute, with a view to making proposals in 2012, if appropriate. Any such amendments, if put forward, would need to be carried out in parallel with any possible revision of the SE Directive, which would be subject to the consultation of social partners in accordance with Article 154 of the Treaty.' (EC 2010c: 10)

The European Commission presented this report in November 2010 to the European Parliament and the Council, along with a Commission Staff Working Document. Responsible Commissioner Barnier no longer stressed the 'burden' of workers' involvement. The EC summarised that the SE statute had facilitated the cross-border transfer of the registered seat of companies with a European dimension, and had allowed these to better reorganise and restructure, and to choose between different board structures. At the same time, it upheld the rights to employees' involvement in decision-making within companies and protected the interests of minority shareholders and third parties. Question marks (though few) were also present, with the EC pointing out that the statute had not re-

sulted in a uniform SE legal form across the EU and that uncertainty remained as to the legal implications of the statute's directly applicable rules and their interface with national law. According to the Commission, the uneven distribution of SEs across the EU suggested that the SE statute did not respond sufficiently well to the needs of companies in all 27 Member States. Potential amendments were to be considered, but not before the end of 2012, as the transposition of the SE rules started only at the beginning of 2007.

4. The functioning of the SE Regulation according to Ernst & Young

The 2010 consultation on the SE Regulation was built around a report that the EC had commissioned to Ernst & Young (E&Y); in this section we take a closer look at the reasoning of the E&Y consultants. The *Study on the operation and impacts of the Statute for a European Company* – published on the European Commission's website in March 2010 – described in four chapters the results of the E&Y research. A legal mapping of the relevant legislation applicable in the EU/EEA Member States (in Chapter 1), an inventory of the SEs and related information (Chapter 2), an analysis of the data and identification of the main trends (Chapter 3) and an analytical conclusion (Chapter 4). The E&Y study was commissioned in 2008 and data collected until 15 April 2009.

The study revealed that after five years of implementation of the legislation on the SE Statute, the initial expectations had not been fully met. The number of SEs created was still small, which was seen as a result of a number of shortcomings related to the Statute and to other regulatory issues. According to E&Y the drivers for choosing the SE company form will always result from a 'business case' and generally consist of a set of reasons that are related to each other. The authors indicated that they adopted the standpoint of the majority shareholder (investor) of the SE for the assessment of the positive and negative drivers for the SE legal form. If the position of another stakeholder were to be chosen (for example, minority shareholders, creditors, or employees), the study could lead to a completely different picture. E&Y had no talks with so-called shelf SEs, as no contact information could be found for these companies and therefore no competent legal representative or spokesperson could be contacted.

The starting point for the E&Y comparison between the attractiveness of national company law and SE rules was the thesis that the SE may present an interesting alternative to the domestic public limited liability company, notably in those cases where there are strong differences with the national rules and procedures. But this effect is still limited. Behind its unified image, the SE is mainly governed by different national legislations.

The SE is basically treated in every Member State as if it were a public limited liability company: in the large majority of cases and Member States, the status of the SE is similar to the status of a domestic public limited liability company. It is noteworthy that a majority of Member States provide the SE with higher protection for minority shareholders and that many of them also provide higher protection for creditors. However, this is generally related to the cross-border nature of the SE and not to the desire to adopt a more stringent statute for the latter.

If flexibility and attractiveness are assessed solely from the point of view of the majority shareholder then three Member States stand out with a relatively higher level of attractiveness (the UK, Luxembourg and Italy). The higher attractiveness of these Member States can be explained first by the fact that their national legislation generally does not provide for specific protection of various stakeholders (minority shareholders, creditors) when setting up an SE or transferring its registered office. Furthermore, their national legislation generally allows for flexible solutions as regards the requirements for membership of the corporate organs, since they all allow legal entities to be a member of one of the corporate organs and they do not provide for specific disqualification requirements.

According to E&Y the low degree of uniformity of the SE Statute from one Member State to another appears to be a counter-incentive, as the lack of harmonisation (from a tax, social and legal point of view) is a recurring criticism against the SE corporate form. In interviews with five legal representatives of companies that had contemplated and then abandoned the idea of becoming an SE, the SE corporate form was sometimes described as a negative flagship due to the lack of harmonisation of the SE Statute; the advantages offered by the SE Statute were outweighed by this major drawback.

The SE is the only form of company that has the ability to transfer its registered office beyond its national border within the EU/EEA. Con-

cluding hastily that tax aspects do not impact the decision to set up an SE would certainly be a mistake, mainly considering the possibility to transfer the registered office of an SE as strong differences between the rates of Corporate Income Tax in the different Member States are of course likely to interest companies. Many companies are set up in jurisdictions merely to obtain the tax benefits of specific tax treaties, although the chosen structure has in reality little commercial substance (p. 232). Companies interviewed continue to keep a close watch on tax and legal developments in the various Member States, bearing in mind that the transfer of their registered office is possible. In the event of the transfer of the registered office and head office of SEs outside their jurisdiction, most Member States apply a liquidation treatment that results in the full disclosure and taxation of the silent reserves.

Generally the use of the SE vehicle can be explained for the purpose of group restructuring, either to reduce the number of legal entities inside a cross-border group (simplification of the group structure) or to rationalise and harmonise the corporate structure of the cross-border group (simplification inside the cross-border group). In theory, the possibility to freely transfer the registered office of an SE could be a strong incentive for the success of this corporate form. Companies in Member States with a strong tax burden might be tempted to adopt this corporate form to freely transfer their registered office, even if the tax benefits in this respect are not as high as commonly expected. In addition, the SE can be used as a vehicle to transfer towards Member States with more flexible legal systems, such as the UK or Luxembourg.

The E&Y authors reveal that with the transposition of the EC Merger Directive into national law, the Member States' national legislation provides a procedure for cross-border mergers (almost) identical to that of the SE Regulation. Recourse to the SE is therefore no longer necessary to ensure legal certainty in cross-border mergers. In addition, the provisions related to employee participation are more flexible within the legal framework of the EC Merger Directive than in the SE Statute. According to Article 3 of the SE Directive, as soon as the plan for the establishment of an SE is drawn up, the management or administrative organs of the participating companies shall 'take the necessary steps, including providing information about the identity of the participating companies, concerned subsidiaries or establishments, and the number of their employees, to start negotiations with the representatives of the companies' employees on arrangements for the involvement of employees in the SE'.

In contrast, Article 16 of the Merger Directive does not in all cases require that steps shall be taken to start negotiations on arrangements for the involvement of employees in the company resulting from the merger. In short, in a cross-border merger negotiations should, as a general rule, only take place if (a) one of the merging companies has employee participation and more than 500 employees, (b) the legislation of the Member State of registration provides for less participation rights than those existing previously, or (c) the legislation of the Member State of registration discriminates against workers in other Member States as far as employee participation is concerned. Moreover, the Merger Directive provides the flexibility for the relevant organs of the merging companies to choose to apply standard rules on employee participation without first having to set up and start negotiations.

To the surprise of many, the Ernst & Young study on the SE Regulation made the topic of employee involvement a prominent issue. Employee involvement, in their view, represents a key negative driver with regard to establishing SEs in many countries: ‘The lack of success of the SE in most of the Member States with no or restricted employee participation is often explained by the complex, costly and time-consuming negotiations required in order to organise employee involvement in Member States where the national legislation does not foresee the obligation for domestic companies to organise such involvement. As a direct consequence, this appears to be an incentive against the SE.’

There have been strong criticisms of the study and its conclusions. Most contributors to the online consultation were of the opinion that the legal mapping provided useful information and that the inventory was correct, although outdated. However, the seriously deficient methodology that, for example, did not distinguish in its country analysis between normal and shelf SEs and the analysis of the main drivers received a lot of criticism. Empirical evidence was weak, the sample of respondents was very small and unbalanced and the selection of respondents was biased (Creemers *et al.* 2010). Moreover, the representativeness of the respondents was questioned, as was the narrow view taken by the authors, which is mainly the perspective of the majority shareholder. The elaborated recommendations went far beyond the scope of the study (which was the evaluation of the SE Regulation, not the SE Directive), whereas no in-depth research on employee involvement was undertaken. In fact, the emphasis put on the supposed negative role of employee involvement rather contributes to conserve the ‘myths about participation in the SE’.

The sample's representativeness was criticised also for other reasons, notably because the report remained vague about the respondents: Who was consulted and who was interviewed, what was collected through desktop research and how many SEs participated? Was there enough evidence, given the sample of five legal representatives of companies that abandoned the idea of setting up an SE, related to the main positive and negative drivers for not setting up an SE? The analysis should have been based on a methodological frame starting with a set of reasons related to each other. Besides, certain relevant questions were not assessed:

- The SE Regulation formulates specific obligations on reporting and/or registration mechanisms in the case of transfer or merger that were not included in the study.
- How is the functioning of the registration as formulated in the Regulation (except that it is often absent or late) and what is the quality of the transfer proposals (Article 8) and related reports?
- How is the scrutiny of mergers organised and is there any convergence between Member States?
- To what extent is the 'real and continuous link' with a Member State economy controlled?
- Is there compliance with the principle that there should be 'an establishment in a Member State and operations conducted' for non-EU companies?
- And how do these items relate to the enormous number of shelf SEs?
- Why was the phenomenon of the shelf SE not a central subject of the study?

5. A new stage of consultations

As the European Commission formulated the Communication on the review of Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees in September 2008 the joint reaction of the European social partners had been that the Directive did not require amendment or clarification. In 2008 the main motivation for this reaction was the virtual lack of experience in applying the transposed national provisions of the Directive with only a few countries having applied the SE rules. The main conclusion of the EC was consonant that some issues deserved further consideration and that it was too early to revise the Directive. The Commission acknowledged the complexity of the procedure instituted by the

Directive for employee involvement. However, the Commission recalled that the adoption of the Directive was the result of a delicate compromise among Member States that took more than 30 years of negotiations to achieve. As the Regulation was due for review at the end of 2009, the Commission decided to postpone consideration of the appropriateness of revising both instruments and the scope of any such revision.

After the assessment of the SE Regulation the European Commission reopened in July 2011 a consultation of the social partners on the possible review of SE Directive 2001/86/EC supplementing the Statute for a European company with regard to the involvement of employees. The new initiative was a first-phase consultation of the social partners under Article 154 TFEU on the possible review of Directive 2001/86/EC supplementing the Statute for a European company with regard to the involvement of employees. The aim was to elicit the European social partners' position on the possible revision of the Directive with 'a view to simplifying the arrangements for the representation of employees in European companies' and their view on the scope of such a revision. The EC approved a consultation document on 5 July 2011, First phase consultation of Social Partners under Article 154 TFEU on the possible review of Directive 2001/86/EC supplementing the Statute for a European company with regard to the involvement of employees (C (2011) 4707). Directly afterwards, in July 2011, the Commission approached the social partners. In the consultation document and the Commission's letter 'three problematic areas' were listed concerning the rules on employee involvement contained in the SE Directive: (a) the complexity of the procedure for employee involvement; (b) the lack of legal certainty concerning certain aspects of the negotiation procedure; and (c) the concern that the use of the SE form could affect the rights to employee involvement granted by national or EU law. The procedure used was in accordance with Article 154 TFEU. This article says 'before submitting proposals in the social policy field, the Commission shall consult management and labour on the possible direction of Union action'. If the social partners want to open up negotiations the Commission can decide whether there is a case for EU action. If the Commission decides that there is, it will launch a second-phase consultation of the social partners at EU level and come up with a final consultation document. That phase will cover the content of any proposal for action, in accordance with Article 154(3) TFEU. In principle, the social partners will then have nine months for negotiations. As a consequence, the consultation was addressed and restricted to the ETUC and BUSINESSEUROPE.

In the consultation document the EC raised four questions related to these areas:

- (1) Are these the main issues raised by the operation of the Directive?
- (2) Should the Directive be amended?
- (3) Would other non-legislative measures at EU level merit consideration?
- (4) Would the social partners initiate negotiations under Article 155 TFEU?

The social partners replied in October 2011. *BUSINESSEUROPE* recommended that the Commission should give priority to simplifying the SE Regulation, in particular to reducing the number of references to national laws and of options given to Member States on particular aspects of the Regulation. The employers' side referred to the long and difficult Council negotiations that occurred over a period of thirty years, with fifteen Member States or fewer, before the SE statute could be adopted in 2001. There was also reference to the fact that different views of Member States on how to address the issue of employee involvement in the Statute were at the core of these difficulties. The *ETUC* asked for a continuation of the dialogue on improving the SE rules (both the Directive and the Regulation). This continuation has to be based on the acknowledgment that the compromise reached on employee participation had been very thoroughly designed. The provisions of the Directive form (according to recital 19 of the Regulation) an indissociable complement to the Regulation and have to be applied concomitantly. The present diversity within the Member States regarding employee participation makes it necessary to create a European participation provision for any piece of EU company law dealing with the adoption of a European legal status or company's cross-border structural changes. The Lisbon Treaty offers a clear legal framework for enhancing employee participation as a part of the process of the implementation of the EU Charter of Fundamental Rights.

6. Is the Directive problematic?

The SEEurope Network, over the years recognised by several scholars as the most important source of reference for SE data, contributed indirectly by an overview of national experiences with the SE rules in reaction to the questions raised in the consultation documents. In a comparative re-

port (Cremers 2011) the expert contributions to the question of whether the SE Directive is problematic were summarised. Their contributions did not directly touch on the ‘political’ question (‘whether or not a dialogue has to be initiated’). Basically, the SEEurope experts underlined that employee involvement is not just a technical issue but a key element of the SE rules that has to be assessed first and foremost from the perspective of employees’ rights, not through the prism of the employer, as is the case in the Commission’s paper. Most of the experts also stressed that worker participation in companies calls for dynamic provisions, not the freezing of existing practices. Other general comments included:

Practical experience is still too limited in many countries

The SE is still fairly rare in most Member States. Some experts call it a non-event and refer to the absence of incentives. Other experts report that there is no registered SE active, only some subsidiaries of foreign SEs. The prevailing lack of adequate information on the SE and lack of national experience in many countries, as signalled by the social partners, is broadly confirmed. Moreover, there is a clear lack of experience in most countries with the negotiation procedures described in the Directive.

Proper registration is lacking

In many countries, proper registration is missing. National registration is often poor; no contact information can be found and not all SEs have released and published information that should normally be made public. The information available in the EU Official Journal is very limited, especially with regard to employee involvement. Therefore, the identification of an SE is difficult, notably in situations with empty or shelf SEs.

The establishment of shelf SEs and the risk of manipulation

The current procedure applies to the right to maintain existing participation. However, once the SE is created, there is no guaranteed procedure for negotiated employee involvement emerging on new facts after the establishment of an SE. The rules that apply at the moment of establishment no longer apply at the moment of activation. New facts (for instance, as a result of activation or structural changes) should lead to the (re)opening of negotiations.

The risk of manipulation in situations with poor workers' representation, such as in activated shelf SEs, has to be faced through further regulation of the activation of shelf SEs. An activation that leads to the appearance and/or recruitment of a workforce should be considered a structural change and therefore initiate the process of negotiations on worker involvement.

With regard to the complexity of the procedure for employee involvement (the *first problematic area*) the SEEurope experts found no hard evidence that registered SEs qualify the procedures of employee involvement as a serious hindrance. According to the experts the alleged complexity is sometimes used as an alibi. Besides, a lack of information (on company structure, existing worker representation and the number of workers involved) is signalled in the related negotiations. One could also argue that it is in the interest of the central HR management of a future SE to have a precise knowledge of the employee structure of the company and of the existing social dialogue institutions. The experts referred to the compromise that was reached as a minimum guarantee for the workers to be informed, consulted and involved through participation rights. They indicated that the procedures for negotiating employee involvement in an SE are fairly similar to the procedures for the establishment of a European Works Council, something that many companies are now familiar with. Several experts noted that the incidence of SEs is low even in countries in which there is no workers' participation tradition. Therefore, the concern expressed that the introduction of the SE could be a threat to existing national rights does not apply. The lack of created (or established) SEs is related to other factors, such as the satisfaction or dissatisfaction, respectively, with the flexibility of existing national company law and other incentives and disincentives (for instance, the lack of clear economic and fiscal incentives for companies).

Concerning the lack of legal certainty (the *second problematic area*) the SEEurope experts underlined the fact that the Directive neither addresses certain aspects of the negotiation procedure nor certain situations (cases where no employees are eligible or want to be elected as a member of the SNB; no provision governing the relationship between the Representative Body in the SE and the European Works Councils that might exist within the group of companies to which the SE belongs; the relations between the national and transnational levels of information and consultation are not governed; no method of calculating the number of workers).

The SEEurope experts mentioned cases in which the governing bodies of an SE decided to buy or to establish subsidiaries, when new companies joined the SE and when empty SEs were activated as possible effects on the rights to employee involvement granted by national or EU law (the *third problematic area*). The possibilities for bypassing negotiations on worker involvement must be blocked. Or, as one expert pointed out: ‘activation of shelf SEs should automatically lead to negotiations under the same rules as at the time of an SE initial establishment’. The focus on the moment of establishment does not take into account the lifecycle of a company that can be subject to changes in size, structure, purpose, seat and so on. Therefore, worker involvement should be based on guiding principles that apply at all stages of the life of an SE, including a more dynamic interpretation of the ‘before and after’ principle. Finally, the SE experts underlined that a future revision should cover the Regulation and the Directive as a whole.

7. Outlook

The assessment of the SE rules as described in the synthesis produced by DG Internal Market and Services and in the final report of the European Commission is too selective in some areas. Certain aspects of the SE Regulation are labelled ‘burdensome’, although the underlying opinions expressed are neither uniform nor representative. The Commission’s reports hardly deal with criticisms. For instance, the large proportion of shelf SEs is not seen as a problem. The EC states that the creation of shelf SEs by dedicated providers can be explained by the fact that making shelf companies available for sale is common practice in certain countries. The Commission notes only that workers’ organisations express concerns that shelf SEs might be used to circumvent the SE Directive and that there is no justification for annual financial statements not being available in company registers. Already it may be seen from the large number of ‘non-normal SEs’ that the SE is used – at least in some cases – for rather dubious purposes. Therefore, any revision of the SE legislation must decide on what kind of companies the SE should be more attractive to. Indeed, the SE’s reputation could suffer in the eyes of important European-scale companies, if any interested party can take advantage of this area of European law without further ado, regardless of motive. A further flexibilisation and simplification can therefore be neither an aim nor a value in itself. But, for instance the comment that there is a risk of serious abuse if certain requirements are abolished is not taken seriously.

The impression is also that the EC is too much fixed on its own agenda. The EC keeps stressing that the possibility of separate registered office and head office could make the SE Statute an attractive instrument for facilitating company restructuring. It sees this as a potential step towards better alignment of a corporation's business and legal entities within the EU, with the only opposition being in the area of fiscal control. The requirement for maintaining the registered office and head office in the same country was indeed quoted during the consultation as an obstacle, although just as many contributors were in favour of retaining this link. The critical comment, not just by workers' organisations, but also by notaries and governmental institutions that there is a risk of serious abuse if this requirement is abolished has not been taken seriously (Cremers 2011).

In November 2010, the European Commission presented a report to the European Parliament and the Council on the application of the SE Regulation. Commissioner Barnier indicated that potential amendments were postponed till 2012. Early 2012 the European Commission launched a new public consultation on the future of EU Company Law. Although the subject of this consultation was of a general nature (*The Future of EU Company Law*) the European Commission decided to wait for the outcome of this public consultation, with a deadline of 14 May 2012, before dealing again with the possible amending of the SE rules. Modernisation of the existing texts is one of the items of this consultation. The consultation's focus was on simplification of procedures, increased uniformity by reducing cross-references to national legislation, reduction of minimum capital, deletion of cross-border element requirements, the enabling of the split of registered offices and headquarters over two Member States, modification of employee participation and questions related to the shelf company issue (EC 2012). All these items are by their nature strongly related to the SE debate. Therefore, the EC will probably wait with further initiatives until detailed announcements on the results of this general consultation are published (planned before the end of 2012). However, whether the most important characteristic of the SE Statute, according to several contributors to the past assessments (and also mentioned in the summary of the 2012 general consultation), namely the complexity caused by frequent cross-references in EU legal forms to national legislation, can be tackled in the actual political context is doubtful.

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