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# Worker participation: a 'burden' on the European Company (SE)?

A critical assessment  
of an EU consultation process

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Jan Cremers, Norbert Kluge and Michael Stollt

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**Conference reader, 24 and 25 November 2010**

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**europaen trade union institute**

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## Foreword

Six years have passed since the entry into force of the European Company (SE) legislation on 8 October 2004. From the beginning, the European Trade Union Institute has closely followed the development of the 'Societas Europaea' through its SEEurope research project, which involves experts from all 30 EU and EEA member states. The SE legislation represents a milestone, not only in the field of EU Company Law, but also in the field of European regulation on employee involvement. It consists of two intertwined legal acts, namely the European Company Statute Regulation (Council Regulation 2157/2001) and the supplementing Directive on employee involvement (Council Directive 2001/86/EC). The SE Directive contains provisions for a legally binding procedure of company-level negotiations, not only on a transnational employee information and consultation body (SE Works Council) but for the first time also on participation at board level, in accordance with the so-called 'before-and-after principle'.

Fairly soon, it became evident that the SE could be more dynamic than many had predicted, at least in some member states. The ETUI's European Company (SE) Database (<http://ecdb.worker-participation.eu>) today provides information on 654 registered European Companies, established in 21 countries. However, only 164 of these SEs can be classified as 'normal', in the sense that they are both operational and have employees. In fact, a large proportion of the SE inventory is made up of so-called 'empty SEs' or 'shelf SEs'. Whereas the first are operational (but have no employees, at least for the time being), the latter have neither operations nor employees. In general, shelf companies are 'ready made companies' set up by specialised companies to be sold later to customers who do not want to undergo the complex foundation process themselves.

Both the SE Regulation and the SE Directive contain a review time schedule in order to evaluate how this new supranational company form is working in practice and to identify necessary adaptations of the legal framework. As regards the SE Directive, Art. 15 obliges the European Commission 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'. In September 2008, the EU Commission published its Communication on the review of the SE Directive (COM(2008) 591 final). In the communication, the Commission acknowledged the increasing problems with shelf SEs that had been 'activated' in the meantime, but without any negotiations having taken

place. Overall, the Commission argued that it was still too early to propose changes to the existing legislation, due to a lack of practical experience. It also proposed waiting for the evaluation of the SE Regulation. At that time, the European Social Partners considered that the Directive did not require amendment or clarification, given the lack of experience in applying the national provisions transposing the Directive.

This review of the Regulation is laid down in Art. 69 of the SE Regulation: ‘Five years at the latest after the entry into force of this Regulation, the Commission shall forward to the Council and the European Parliament a report on the application of the Regulation and proposals for amendments, where appropriate.’ According to the article, this report should, in particular, analyse the appropriateness of:

- 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 Statute for a European Company (SE). The study was supposed to pursue four objectives:

- (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 provide an analytical conclusion, focusing on the effectiveness of the SE Statute.

In March 2010, the EU Commission finally made available the so-called ‘Ernst and Young study’ on their website. Shortly afterwards, on 23 March, the Commission launched an online consultation on the results of the study, to which interested parties could respond until 23 May 2010. 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.<sup>1</sup> Finally, in July 2010, the European Commission produced a summary report on the replies to its online consultation.

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1. The programme and discussions of this conference are documented on the European Commission’s website (in English, French and German) by video stream: [http://ec.europa.eu/internal\\_market/company/se/index\\_en.htm](http://ec.europa.eu/internal_market/company/se/index_en.htm). The summary report is available at [http://ec.europa.eu/internal\\_market/company/se/index\\_en.htm](http://ec.europa.eu/internal_market/company/se/index_en.htm).

The ETUI and its SEEurope research network have contributed to this review process by responding to the consultation and by actively participating in the SE conference. This ETUI paper brings together an analysis of the consultation procedure and the Commission consultation summary and the ETUI's reply to the consultation. The reply was compiled with support from the members of the SEEurope network.

To the surprise of many, the Ernst and Young study made the topic of employee involvement a prominent issue in their report on the SE Regulation. 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 critics of the study and its conclusions, notably the seriously deficient methodology that, for example, does not distinguish in its country analysis between normal and shelf SEs. Moreover, the representativeness of the people interviewed was questioned, as was the narrow view taken by the authors, which is mainly the perspective of the majority shareholder. In fact, 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'.

Also, the European Commission's consultation procedure reveals some important questions and critical remarks. In our Inventory (included as part 1 of this paper) we raise the question of the value of a web-based public consultation. How should the individual contributions be weighted? What is the relevance of the contribution of, let's say, BUSINESSEUROPE compared to the contribution of an individual citizen from behind his desk? As demonstrated in the Inventory, the Commission is very selective in highlighting the contributions it received, although the suggestion is that every number counts. Surprisingly, Commission Services neither treats critical remarks seriously nor confirms or refutes them. Serious criticism that could upset the conclusions is ignored. Even worse, the argument that Ernst and Young had no mandate to evaluate the Directive on workers involvement is not mentioned.

By the time of writing (October 2010), the Commission has not yet published its report with recommendations on revision of the SE legislation, which is expected in the coming months. From an employee perspective, there are certainly some points which require improvement, such as the increasing



problems with ‘activated’ shelf SEs and the prevailing lack of information on SEs in the absence of a European Registry of SEs. Especially the lack of information related to employee involvement today almost ‘invites’ circumvention of the mechanisms of SE legislation.

Certainly, an important aim of the review process is to consider how the European Company could be made more attractive. However, any revision of the SE legislation must decide on what kind of companies the SE should be more attractive to. 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. Indeed, the reputation of the SE could suffer in the eyes of important European-scale companies, if basically 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 not an aim or a value in itself. The current SE legislation in this sense represents a balanced compromise, reached after more than 30 years of intensive discussions between EU member states, including the difficult issue of how to organise the workers’ voice within the SE. Employee involvement in the SE is certainly not just an unnecessary burden on companies, but an elementary part of the SE.

Michael Stollt and Jan Cremers, October 2010

# Assessment of the European Company Statute – Inventory of consultation papers

## 1. Introduction

The EU Council in Nice (December 2000) adopted the general principles for a Regulation on the Statute for a European Company (Societas Europaea, hereafter SE) and the Directive on workers' involvement in the SE. Both the Regulation and the Directive were published in October 2001 in the Official Journal of the European Communities. The SE legislation (EC 2157/2001) entered into force on 8 October 2004, thereby enabling companies to opt for this new corporate form. In the majority of countries there was a considerable delay due, not to substantial national debates on the substance of the Directive that had to be transposed into national law, but rather to an apparent lack of interest. By mid-2007, all EU countries had transposed the SE legislation into national law. The number of SEs has been increasing continuously since the SE legislation came into force. Nevertheless, the use of the SE Statute falls short of the expectations of those who instigated the legislation in the 1990s. At the outset, several large companies announced their intention of transforming into an SE. These intentions have, so far, not been realised.

The main purpose of the SE statute was to enable companies to operate their businesses on a cross-border basis in Europe under the same corporate regime.

The motives for opting for the SE form have changed over the past 10 years. The argument that it strengthens a company's European profile or identity has slowly vanished from the scene. Or, as one business advisor puts it, the European image is in practise an 'accessory' motive: it is significant but not one of the main drivers. The choice of the SE structure has become part of a series of considerations within the framework of a 'business case'. To remain under national legislation or to go for the SE corporate form is just one element in the overall selection process.

According to BUSINESSEUROPE (Position Paper 2010<sup>2</sup>), the most important regulatory issues that a company should consider when deciding in which country the registered office and/or head office should be located are taxation, national company law, equity and debt restructuring facilities and corporate restructuring facilities.

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2. All contributions can be downloaded from [http://ec.europa.eu/internal\\_market/company/se/index\\_en.htm](http://ec.europa.eu/internal_market/company/se/index_en.htm)

Therefore, the reasons why the SE Statute is chosen vary nowadays from strengthening the European identity to regime-shopping related to tax optimisation/evasion and other corporate or financial arguments. Some companies still use the SE as a marketing tool.

In specific situations – notably in Germany – the statute can also be used as a means of reducing the size of the supervisory board.

Article 69 of the SE Regulation required the Commission to present a report on its application, including proposals for amendments, where appropriate, five years after its entry into force. To that end, DG Internal Market and Services commissioned Ernst & Young to carry out an external study that was finalised in December 2009 (*Study on the operation and impacts of the Statute for a European Company*, published on the European Commission's website in March 2010).

In spring 2010, the European Commission (DG Internal Market) launched a consultation to test the results of this study among the relevant stakeholders. Based on this consultation, the Commission wanted to consider suggestions for amendments to the Statute. In this paper I summarise the outcome of the consultation process, concluding with some critical remarks.

## **2. Aim of the consultation and the involvement of stakeholders**

The European Commission's Internal Market and Services Directorate General launched the public consultation on the results of the Study on the operation and the impacts of the Statute for a European Company (SE) on 23 March 2010. The method used was an online consultation via the EC's website and the deadline for responses was 23 May 2010.

At the same time, a Conference on the Statute for a European Company was announced for 26 May 2010. This Conference, organised by the European Commission, aimed at supporting ongoing work with a view to elaborating the report required by Regulation 2157/2001 on the Statute for a European Company. The experiences, problems and challenges so far, as well as possible improvements for the future were discussed in two panels, one related to the creation of the SE and the other to issues concerning its functioning.

The aim of the consultation was to examine the findings of the Ernst & Young study and to provide the Commission with input on issues relevant for the assessment of the SE. The questions concerned positive and negative drivers for setting up an SE; main trends in the distribution of SEs across the EU/EEA; practical problems encountered by companies in the course of setting up or running an SE; and possible improvements of the current legislative framework (EC Synthesis, 2010).

Consultation participation was modest. The EC website DG Internal Market and Services lists 72 responses, from 18 different countries, including 16 Member States.

The Commission uses, in accordance with the respondents' choice, a division into three categories:

(a) *Individual respondents*

The website mentions 38 individual respondents; as two respondents sent in two identical versions and one person delivered two complementary replies, the total list in fact comprises 35 replies. The first category is heterogeneous, containing European institutes (such as the ETUI), some Chambers, individual companies, business advisors, researchers, notaries, banks and insurance companies. Also in this category of individual respondents are the General Confederation of SMEs, the German Institute of Stocks and CEC.

(b) *Governmental organisations*

The Commission received three replies from (regional) governmental authorities (Belgium, Bavaria and Liechtenstein).

(c) *Registered organisations*

In total, 31 contributions from registered organisations are listed on the website. In this category, 12 responses were identical (national replies plus summary from the International Bar Association, IBAR). The Council of Bars in Europe (CCBE) provided two identical responses, one in French and the other in English.

The registered organisations that replied included:

- three employer' organisations (BUSINESSEUROPE, Medef, Finnish Industries EK);
- four trade union organisations (ETUC, DGB, CO-Industri, NFU), the German organisation of managerial staff and the Austrian Federal Chamber of Labour; and
- ten business advisors (including lawyers' associations, notaries, financial services and solicitors).

Taken into account the double counting, the EC received in total 57 different responses, with two groups dominating: business advisors (incorporated in *a* or *c*) and academia (category *a*).

In the summary report, the EC comes up with another categorisation: 20 responses from legal advisors/lawyers' associations, 14 from business organisations, 11 from individuals and eight from employee organisations and a residual category, including public authorities, accountants, notaries, employers' organisations and individual companies (including two SEs). There were nine respondents from the 'Industry and services' sector and six respondents from 'Bank, finance, and insurance'. Most of the individual contributions came from researchers in the field of labour law and worker

involvement: together with the replies from employee organisations this made 16 in total.

In this inventory, we summarise in three paragraphs the input of six types of stakeholders: employers' associations and trade unions (the social partners – paragraph 4), governmental organisations and the Chambers (paragraph 5), business advisors and academia (paragraph 6). If relevant, individual contributions are incorporated in one of these paragraphs. We start with a brief overview of the content of the Ernst & Young study.

### **3. The study on the operation and impacts of the Statute for a European Company**

The results of the research are described in four chapters in the Ernst & Young study: a legal mapping of the relevant legislation applicable in the EU/EEA Member States (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 study reveals that after five years of implementation of the legislation on the SE Statute, the initial expectations have not been fully met. The number of SEs created is still small, which is seen as a result of a number of shortcomings related to the Statute and other regulatory issues.

The legal mapping and the inventory seem correct (although outdated); they provide useful and important information. The point is made that the reasons or 'drivers' for choosing the SE company form result from a 'business case' and generally consist of a set of related reasons. The authors indicate 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 had been chosen (for example, minority shareholder(s), creditors or employees), the study would have presented a completely different picture. They also admit that they had no talks with representatives of so-called shelf SEs. Characteristically, no contact information was available and therefore no competent legal representative or spokesman could be contacted.

The starting point for the comparison between the attractiveness of national company law and the SE rules is the thesis that the SE may present an interesting alternative to the domestic public limited liability company. This might be true in those cases where strong differences exist in comparison to national rules and procedures. But this effect is still limited.

Behind its uniform image, the SE is governed mainly by different national legislations:

- In the large majority of cases and Member States, the status of the SE is similar to that 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, three Member States stand out with a relatively higher level of attractiveness (the UK, Luxembourg and Italy). The greater 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 become members and do not provide for specific disqualification requirements.

According to Ernst & Young, 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 the tax, social and legal points of view) is a recurring criticism of the SE corporate form. In the interviews with non-SEs, 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 are outweighed by this major drawback.

The SE is the only form of company that may transfer its registered office beyond its national border within the EU/EEA. Concluding hastily that tax aspects do not affect decisions to set up an SE would certainly be a mistake. This applies in particular to the possibility of transferring the registered office of an SE, as significant differences between the rates of corporate tax in 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 little commercial substance (p. 232). It is noteworthy that the 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, which results in the full disclosure and taxation of the silent reserves.

Generally, the use of the SE vehicle can be explained by a desire to institute 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).

Thus, the possibility to freely transfer the registered office of an SE can be a strong incentive, explaining the success of this corporate form. Companies

in Member States with a heavy tax burden may be tempted to adopt this corporate form in order to transfer their registered office freely, even if the tax benefits in this respect are not as high as commonly expected. In addition, the SE can sometimes be used as a vehicle to transfer to Member States with more flexible legal systems, such as the UK or Luxembourg.

The 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 relating 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 it has more than 500 employees, (b) the legislation of the Member State of registration provides for less participation rights than those existing before, 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.

In their conclusion, the Ernst & Young authors state that companies in Member States with one-tier corporate governance and without employee participation are in general relatively reluctant to create SEs, which are seen as having more drawbacks than advantages in comparison to national public limited liability companies, without specifying the character of these drawbacks.

In the executive summary and in the concluding chapter a lot of space is dedicated to workers' involvement as a negative driver, although the focus of the commissioned work was supposed to be on an assessment of the Regulation, not of the related Directive on workers' involvement in the SE.

The authors conclude that, although the employee involvement negotiation procedure allows for tailor-made solutions for each company and the 'standard rules' provide for sufficient security for the employees in order for them not to lose the level of involvement they had prior to the formation of the SE (before/after principle), employee involvement rules for the SE can be



seen as an important factor in the limited take-up of the SE in some Member States. The need for negotiations regarding future employee involvement under the SE Statute is viewed as too inflexible in Member States where the national legislation applicable to public limited liability companies does not provide for a compulsory employee participation regime. As a consequence, companies, in those Member States in particular, often refrain from entering into such negotiations, since they can avoid this with domestic companies (Ernst & Young, p. 14).

On page 276 of the report it is stated that the employee involvement system provided for by the SE Statute ‘ensures, in most cases, the adequate protection of employees’ rights, but may appear, on the one hand, as too stringent and, on the other, as not fully adapted to all situations (for example, shelf companies which are activated subsequently)’.

#### **4. The social partners’ view**

Council Regulation (EC) No. 2157/2001 establishes the Statute for a European company. Council Directive 2001/86/EC supplements the Regulation as far as the involvement of employees is concerned, with the aim of ensuring that the establishment of an SE does not entail the reduction of practices of employee involvement existing within the companies participating in the creation of the SE.

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. 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 for 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 lack of experience of applying the national provisions transposing the Directive.

At that time, BUSINESSEUROPE took the view that the overly complicated and structured provisions around employee participation and the creation of a Special Negotiating Body were a substantial obstacle to increasing the number of companies resorting to the European Company Statute. In its view, greater flexibility was needed in order to strengthen the negotiating autonomy of the social partners at company level, and in so doing to 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 issue of the size of the organ in which 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 representative body (RB) should be involved, at least in the event that information and consultation are required by national law; (e) representation of the particular interests of younger and of disabled employees should be ensured at European level.

The European Commission's main conclusion was 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, it also noted 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.

The Ernst & Young study was commissioned in 2008 and data collected until 15 April 2009. With regard to the consultation on the functioning of the SE regulation, including the open procedure inviting all stakeholders to react to 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.

As a result, both sides of industry figure in a list of responses, dominated by business advisors and academia.

## 4.1 The employers' position

In general, the employers' organisations were supportive of the main conclusions of the Ernst & Young report: they agreed with the list of the main positive and negative drivers it put forward.

BUSINESSEUROPE organised a roundtable on the European Company Statute in June 2009, 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 locate its registered office and/or head office are:

- tax;
- national company 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 organisation takes the view 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 on public limited liability companies by legislation in some countries (for example, the Codetermination 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 encouraging enterprises to choose the SE corporate form concern the need to capitalise on 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 member state domestic law, the SE still has an advantage as regards the transfer of the registered office.

BUSINESSEUROPE formulates a number of critical points: There are a number of shortcomings related to the Statute and to other regulatory issues. It addresses certain weak points of the Statute and brings forward amendments that could improve the attractiveness of this important instrument. It also considers that the findings on the implementation of EU legislation on cross-border mergers, the advantages linked to mobility and simplification of group structure have lost some of their importance and should not be overestimated.

The employers note a lack of general recognition and awareness of the SE legal form by Member State public authorities. It has also proved difficult to explain the SE Statute to authorities outside the EU. The Statute does not have a very high profile, 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 creditor protection (which can be difficult in practice).

BUSINESSEUROPE's members believe that the overly complicated and structured provisions with regard to employee participation and the creation of the Special Negotiating Body, which are foreseen in the Directive accompanying the SE Statute, can be a substantial obstacle to companies that want to make greater use of this instrument.

The Confederation of Finnish Industry adds that employee participation is a negative driver ('in practice it could easily lead to the implementation of the strictest employee participation rules'). Medef declares that the SE has cumbersome incorporation procedures under the regulations, including the employee involvement rules. It considers that the concerns about employee involvement explain the current distribution of SEs among the various Member States.

The employers' organisations suggest that:

- the minimum amount required should be decreased in order to foster the creation of SEs, a position warmly embraced by the General Confederation of SMEs;

- the Regulation should allow for the creation of an SE ex nihilo and the participation of any limited liability company in the incorporation of an SE;
- application of the simplified merger procedure, in order to create an SE when the absorbing company holds all of the absorbed company's voting rights, should entail a release from the obligation to convene the absorbed company's general meeting, as provided for by the 10th Directive on cross-border mergers (Art. 15.1);
- the creation of a European registry for SEs. This would improve the transparency and visibility of the SE Statute.

On the issue of worker participation, since only a limited number of SEs have been established since the adoption of the SE Statute, BUSINESSEUROPE's members believe it is too early to engage in a revision process, which requires significant experience of the Directive's weaknesses in order to identify valid points for further improvement. Medef suggests that it might be interesting to provide for an alternative to mandatory negotiations before the registration of an SE, in particular when a cross-border consultative body already exists (European Works Council). According to Medef, it is also worth contemplating the introduction of the possibility of merging companies' governing bodies in order to make them subject, prior to negotiations, to the provisions governing cross-border mergers.

The German employers' organisation stated at a meeting held by the Dublin Foundation dedicated to SE research that, according to their member organisations, employee involvement was not regarded as problematic.

In this consultation, four companies contributed. As the main drivers of the SE form they confirm the possibility of cross-border transactions, the simplification of the group structure and the creation of a single legal entity. The flexibility in the choice of the one-tier or the two-tier system and the easier transferability are also considered to be positive aspects. BP mentions the administrative costs of the planned employee involvement, but admits that these costs would also be encountered in the case of a cross-border merger under another jurisdiction. An additional positive aspect mentioned by individual company representatives is the possibility of reducing the number of supervisory board members. Allianz is very positive about the flexibility of the employee participation model and the European composition and identity of employee involvement. This opens the way to new participation models. The other companies confirm that the SE provides flexibility regarding employee involvement.

Clarification is needed with regard to the role of existing European Works Councils in relation to newly-elected Special Negotiating Bodies. The companies also ask for further harmonisation of employee involvement based on the SE Directive and on Directive 2005/56/EC. They are critical of the requirement to complete the worker participation process and suggest looking for ways to secure these rights.

Also criticised is the fact that the corporate governance of an SE mainly remains subject to the applicable national laws. In case of transfer, extensive amendments are required that could complicate matters. Clarification of these rules and legislative convergence are necessary as companies encounter challenges based mainly on differences in nature and functioning not related to European company law.

The fact that the Ernst & Young authors did not properly assess the discrepancies between the theoretical results of the report and SE reality, such as the fact that Germany and the Czech Republic are in theory “less attractive” countries with regard to forming an SE.

Although it is not one of the objects of the Ernst & Young report, Allianz comes up with a list of proposals for reviewing the SE Directive.

## 4.2 The trade unions

As in the case of the employers, the total number of trade union responses was modest. This is partly due to the fact that the ETUC has a clear mandate to act on behalf of national and European affiliates. Contributions came from the ETUC and CEC, the Nordic Confederation NFU and the German confederation DGB, as well as the national trade union CO-industri from Denmark. The Austrian Arbeiterkammer response also belongs here.

The ETUC clearly sets the scene with its statement that its affiliates are very conscious of the fact that it is difficult to maintain a clear distinction between the provisions of the SE Statute and those of the SE Directive, given that the two texts represent the two sides of the compromise underlying the SE legislation. The ETUC warns against a reopening of the SE Directive ‘by the back door’ 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 for putting national regulations in competition with each other.

The unions’ contributions have one fundamental issue in common: they strongly object to the study’s view that employee involvement in general is a negative driver with regard to the establishment of an SE. The unions believe that the 30 years of discussion needed before the SE ultimately finally came into effect, a substantial part of which concerned employee involvement, cannot be taken lightly.

The compromise that was ultimately reached in Directive 2001/86/EC is in no way futile or incidental. On the contrary, it has been very thoroughly designed. Without it, the realisation of the SE Statute would have been unthinkable. The procedural rules and guarantees in Directive 2001/86/EC continue to be an indispensable condition for the application and any further advancement of the SE Statute. Or, as the NFU observes: the prerequisites in Directive 2001/86 regarding information, consultation and participation are discussed in a context of problems, rather than possibilities. According to the CEC, the Directive manages to accommodate the needs of Member States with different levels of employee participation, ranging from high to a complete lack of formalised employee participation.

A second point of criticism that is widely shared is the fact that the standpoint of the majority shareholder (investor) of the SE has been adopted in order to assess positive and negative drivers. Other stakeholders are left out. CO-industri notes that the interests of other important stakeholders are overlooked and has the impression that the findings expressed are to a great extent based on the perception of legal consultants rather than on material evidence.

A third point that the unions mention is the creation of empty and shelf SEs and the fact that the legislator is not acting against this unintended effect. The legal form of SE was not invented for companies without economic activity and employees. The study fails to give concrete answers to the question of why shelf SEs exist. The question should not be what the main advantages are for a company to buy a shelf SE, but rather what the Commission will do to combat this violation of the spirit of the SE legislation.

The NFU has clearly stated that it is of the utmost importance that rules be laid down at European level concerning whether shelf SEs can be considered to be in line with the Directive. This should not be left to the discretion of national courts. The ETUC recommends in particular that the activation of such SEs be more clearly defined as a structural change, thereby triggering negotiations on employee involvement.

The DGB states, somewhat ironically, that there are other 'positive' drivers in the choice of the SE legal form: the possibility of simplifying the company structure and creating a shelf SE. The latter development is booming: these SEs are 'ready to use' – no negotiations are necessary, only a change in the company's purpose. This development is critical in connection with the main positive driver identified by the study: the possibility of transferring the registered office. The consequence is a form of regime shopping in the European Union. The DBG criticises the fact that the presence of trade union representatives in a Special Negotiating Body supporting the employee representatives during the negotiations is labelled a negative driver. Why is it more acceptable for the management to work together with international law firms?

Finally, the unions criticise the consultation from a procedural point of view: the study comes up with central conclusions related to employee involvement,

while no analysis of the objectives and mechanisms of the SE Directive has been undertaken. The authors had the task of looking at the functioning of the Regulation. Any questions concerning employee involvement should have been subject to a consultation of the European social partners. An online consultation cannot be considered a valid substitute for social partner consultation as enshrined in the Treaties.

The recommendation to create a European register that requires SEs to report key information on their structure and operations has been warmly welcomed by the unions. Such a register should also provide information on branches and subsidiaries in other EU countries.

## **5. Governmental institutions and the Chambers**

As already mentioned, three governmental institutions and six Chambers reacted. Their input is wide-ranging and a little random.

### **5.1 Governmental organisations**

The three governmental organisations that responded to the questionnaire were the Belgian Ministry of Justice, the Bavarian Ministry of Justice (citing the Bavarian Bar of Lawyers) and the Liechtenstein Office of Land and Public Registration. All three agree in general with the findings of the study about the positive drivers for setting up an SE. Liechtenstein mentions especially the conclusions of the study with respect to the mobility of the SE. Most of the other answers diverge from one another.

According to the Belgian Ministry, the most important regulatory issues to consider for a company when assessing in which country to place its registered office and/or head office are fiscal and social legislation, and employee participation rules. The Ministry remarks that the mobility of the SE is a positive driver for choosing the SE corporate form, as long as this can be verified by Article 7. Also, the kudos of a European image can help in the case of a merger of equals. Since the EC Directive on cross-border mergers, the creation of an SE is not necessary in order to simplify a group structure. Furthermore, the possibility for an SE to choose freely between the one-tier and two-tier systems may be considered a positive driver. Some specific provisions relating to an SE's general meeting of shareholders are more flexible than for a Belgian NV/SA. The Belgian Ministry sees the involvement of employees and the negotiating procedure as more complex than for the formation of a Belgian NV/SA. Furthermore, the minimum share capital required to incorporate an SE is higher than required for the formation of a Belgian NV/SA.

The Liechtenstein Office suggests that the employee involvement regime has to be revised in order to strengthen the attractiveness of the SE. The inclusion of a threshold with regard to the number of employees could be considered. Liechtenstein also notes that, according to the study, around 38 per cent

of SEs are shelf companies, that is, formed without activities or employees (Liechtenstein adds: predominantly a question of time and money). For the sake of legal certainty with regard to the setting up of such companies, appropriate legal provisions should have been introduced.

However, the Bavarian Ministry of Justice is of the opinion that there is no need for easier access. Abolition of the explicit link between the head office and the registered office – the Belgian Ministry also declares that it should remain – is rejected based on four arguments (including the avoidance of workers' rights). The Bavarian Ministry is clearly against a reduction of the minimum share capital required to incorporate an SE.

## 5.2 The Chambers of Commerce, Economics, Industry and/or Crafts

The six Chambers that contributed were the national Chambers of France, Germany and Austria, as well as the Paris, Cantabria and Maribor Chambers. The background and functioning of the Chambers are not fully comparable, however, and their contributions are not always coherent.

The Austrian Wirtschaftskammer is critical of the study and pinpoints contradictions in the analysis and conclusions. The Chamber notes that the strong divergence between the expected unified Statute based on the Regulation and the different applicable national SE rules is a very negative outcome. The Cantabria Chamber underlines that national laws must be harmonised with European legislation. Also, the French Chamber criticises the lack of European harmonisation. European registration meets with overall approval.

Most Chambers note that SMEs are looking forward to the opportunities presented by the European Private Company form.

According to the French Chamber, the principal attraction of establishing an SE is the possibility to simplify internal structures in companies that operate Europe-wide. Also positive is the free choice between the one- and two-tier systems of supervision, a choice that exists also under French company law. Furthermore, a transfer to another Member State is easier under the SE regime.

The German Chamber takes the view that the relocation of the head office to another EU/EEA Member State independently of the location of its registered office should be allowed. The Paris Chamber suggests providing the option of leaving this decision to the Member States.

The Cantabria Chamber agrees with the identification of the positive drivers and mentions 'the benefits for employees of being able to participate in the taking of important decisions'.



The Paris Chamber, on the other hand, agrees fully with the analysis of the negative drivers: poor knowledge on the side of civil administration, elevated communication costs, high capital requirements on starting up an SE and complicated and costly negotiations with the workers.

## **6. External experts**

It is not possible to treat this category as a uniform group. It includes a mixed collection of research institutes, the Bavarian Bar of Lawyers and individual academics, not to mention a large number of business consultants: in one of the contributions of the Chambers the extra costs of using external consultants were mentioned as a ‘negative driver’.

Certainly, it seems that the creation of the SE has established a happy hunting ground for consultants and legal services. First, we shall look at external legal consultants, the professional group closest to the authors of the report, Ernst & Young.

### **6.1 Business consultants**

In our typology, this category is largely a melting pot, composed of consultants and solicitors, legal and financial service providers, and notaries.

Our classification does not do sufficient justice to the varied views in this group.

In general terms, notaries, accountants, advocates and law firms concentrate on legal and corporate issues and stress the complexity of setting up SEs. They come up with detailed and specific company law proposals related to their practical experience. One general observation and point of criticism is that the Regulation makes many references to the national laws of the Member States in order to specify the conditions pertaining to setting up SEs, as well as their operating procedures. At the moment, the rules make it difficult to advise with certainty on the requirements that apply to the SE (because it is not always clear what national law applies to it). The resulting lack of harmonisation between local legislations explains the complexity of the legal system governing the SE, and why there is so little enthusiasm for this form of organisation.

In the CCBE’s view, the main considerations when planning to transfer a head office are as follows:

- maintaining legal personality in the Member State to which the office is transferred;
- requirements with regard to minimum capital stock;
- the applicable tax regime;



- the ease and costs of setting up and operating the company whose office is being transferred;
- the flexibility with which the company's operations can be organised.

Most of the contributors in question agree with the key conclusions of the consultation and on the positive and negative drivers for resorting to the SE (the positive drivers are the ability to transfer the registered office, the European profile of the SE and corporate simplification; and the negative drivers are cost, complexity and uncertainty and the obligation to negotiate on employee involvement).

In some contributions, tax optimisation is seen as the most important regulatory issue: tax considerations are said to be important for all companies and therefore may influence their choices. All IBAR members agree that tax aspects are the most important regulatory issues to be considered. Laws on company supervision (such as reporting standards) and insolvency may also have some impact in terms of regulatory issues. They believe that the study overstates the impact of the respective corporate structure.

The IBAR members also agree that the inherent complexity of the SE, the considerable costs and employee involvement constitute substantial burdens that may well outweigh any positive drivers, from the perspective of most companies.

Most tax and company law consultants take a tough stance: the SE no longer (with the exception of the ability to transfer the registered office) offers any additional flexibility over a national public company now that the 10th Directive has been fully implemented. The *Cartesio* judgment means that there is no need to resort to the SE form. Other company law advisors subscribe to the view that the transfer of the registered office is one of the main reasons (drivers) for opting for the SE.

The SE Regulation has two major benefits: (i) it provides for legal certainty, in terms of both procedural rules and legal effect, and (ii) it allows for corporate migration to any Member State. A 'European' image is just an 'accessory' motive.

One positive driver for forming SEs not listed by Ernst & Young is that, in some cases, domestic provisions on the participation of employees' representatives which are applicable to national limited liability companies do not apply to the SE. The rules on the role of employees, based on the directive supplementing the SE Regulation, are in certain respects more attractive and provide for more flexibility than those prescribed by the domestic legislation mentioned above.

The group of business consultants/lobbyists takes a different stance. Some of these are among Ernst & Young's main competitors and used the consultation as an opportunity to advertise themselves ('we have achieved for our clients ... at

very competitive costs’). Others directly lobby in the interest of (small) interest groups (‘tailoring the general approach of the SE Regulation to non-listed entities, especially family-owned businesses’).

What is striking is that this category takes the toughest (negative) stance on workers’ involvement, with a long list of complaints. They include: the administrative burden both of establishing and operating the Special Negotiating Body and then operating the supervisory board; the length of the SNB process and the fact that, in some respects, it is something which the company cannot control; the involvement in both the SNB and the resulting supervisory board of employees from a range of countries creates logistical issues concerning how these bodies will operate and adds potential costs, for instance, travel and accommodation expenses, training, translation costs and the establishment of an additional body which may need to meet more often than the existing European Works Council.

In their view, amendments to the employee participation process that dilute workers’ involvement are far more important than amendments to the corporate issues set out in the SE Statute. Proposals include the following: companies founding an SE should have the right to shorten the employee participation process by directly choosing the standard rules; there should be a minimum number of employees which qualify a Member State to be represented in the Special Negotiating Body and the SE works council; the existence of an SE works council at the level of the parent company should obviate the need to establish additional SE works councils at the subsidiary levels.

Business consultants seem to lack any concern for workers’ interests: the client is king (and workers are seldom the client...) and it is in the interest of the client to lower the standards of mandatory employee participation.

To quote one consultant: ‘Our clients have often experienced difficulties with the rigid and insufficiently detailed rules on employee involvement’. According to another: ‘the procedural provisions of the SE directive should be overhauled and made more transparent and hence more user-friendly in the interest of small and medium-sized companies’.

According to most of the IBAR submissions, shelf SEs are not perceived as a means of by-passing formation requirements or the employee participation rules. Others are much more critical in this respect. Given the large number of shelf SEs set up in the Czech Republic, some consultants criticise the fact that the study does not carry out a thorough review. Since the vast majority of SEs are shelves, the authors should have looked into what has become of them: how many have been sold so far and how many transferred? Other contributions throw a special light on a new industry: the creation of a new product – the ready-made company. Shelf SEs are freely available at short notice and can be made operational at a reasonable price; purchase avoids the burden of establishing an SE – according to the advertising, you only have to change the purpose of the company. Therefore, in some countries acquiring a shelf

SE can be less expensive than setting one up from scratch as it helps to avoid a potentially burdensome formation procedure. This results in savings in financial and human costs, as well as time with regard to the legal formation of a company. In principle, there is no need to conduct an employee participation process or, as the study sets out, there are a number of uncertainties with regard to how the employee participation rules apply to shelf SEs. The SE Directive does not contain specific rules on the role of employees when an SE is activated or structural changes occur after its formation, such as changes to the structure of the SE or taking on employees or the acquisition of (part of) another company and its employees. In this way, there is the possibility of circumventing the rules on employee participation by establishing a shelf SE or acquiring the shares of a shelf SE and then engaging in some activities (also referred to as the ‘activation’ of a shelf SE).

A shelf SE also offers the option of changing the legal form into a European Company without meeting the SE Regulation requirements (especially the cross-border relationship).

## 6.2 Research institutes and academia

This category is composed of a broad spectrum of individual researchers and industrial relations experts close to renowned institutes. The comments and remarks can be divided into two categories:

- (i) much criticism is formulated with regard to methodology, analysis and the (lack of) empirical findings;
- (ii) substantive contributions are delivered based on the authors’ own research and experiences.<sup>3</sup>

To start with the first set of remarks: in general terms, all contributions criticise the sample used and the fact that, for the assessment of the positive and negative drivers for the SE legal form, the standpoint of the SE’s majority shareholder (investor) was adopted. A general observation, addressed by all respondents, is the focus of the study: the point of departure for the study should have been the requirements for analysis laid down in Art. 69 of Council Regulation No. 2157/2001. The commissioned work had to focus on an assessment of the Regulation, not of the related Directive. Serious assessment of employee involvement would mean an evaluation of the Directive in terms of other research questions, the assessment of practical experiences and paying some attention to the perspective of (among others) minority shareholders, creditors and employee representatives.

Other critical remarks of a methodological nature are the questionable categorisation of countries and the evidence provided for the degree of SE

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3. The ETUI collected experiences within the framework of the SEEurope network. The resulting contribution is included in this Working Paper.

success. The data used are outdated. In parts of the study there is a notable lack of detail on the statistical basis for the analysis. A sample of only five legal representatives of companies that abandoned the formation of an SE, which the report used to assess the main positive and negative drivers with regard to setting up an SE raises serious questions concerning evidence. As no satisfactory indications are presented of particular reasons for creating this type of SE several contributors asked why the phenomenon of the shelf SE was not a central subject of the study?

Experience shows that individual companies may have very specific reasons for choosing the SE form. One plausible and interesting thesis, which was not pursued in the study, is that the distribution of SEs may reflect the advice given to companies by legal practitioners and consultants.

The argument – based on only one case – that legal and tax incentives are possible drivers (in the case of Luxembourg) needs more fundamental research, based on all existing SEs.

In several countries (UK, Poland), the added value (for fiscal or competitive reasons) of setting up an SE instead of a national limited liability company is not clear.

The lack of transparent information and the plain fact that, besides normal SEs, there are also empty and shelf SEs are heavily criticised. The question is raised whether this was the intention of the legislator. The creation of a European SE register would make it easier to overcome any dubious uses of SEs. The rationale behind the shelf SE should be a key topic for further research. One possible reason for their existence is that there is no control on subscribed capital once the SE has been established: in principle, the required minimum capital need be presented only for registration purposes, and afterwards withdrawn because effective proof of the existence of €120,000 is required only at the time of creation. As many of these shelf SEs have only one owner, the deposit capital can be used for a whole series of SEs. Moreover, once established, an SE can very easily create a large number of subsidiary SEs without requiring an equivalent amount of new capital (a practice well known in national legislation, at least in the Netherlands). So far, it is unclear how strict the national rules on registration and compliance are in this regard and how enforcement is functioning.

The main advantages in buying a ready-made shelf SE are likely to be similar to those of buying any shelf company set up under national legislation, principally speed and the avoidance of any administrative difficulties. However, while national law governs national shelf companies with regard to employee participation, this is not the case for a shelf SE, as its arrangements on employee participation are governed by an agreement between management and the Special Negotiating Body (SNB). If initially there are no employees, there can be no SNB and employee participation can be avoided.

In order to avoid circumvention of the rules commercial activation of shelf SEs or empty SEs should be perceived principally as a ‘structural change’, which requires further investigation of employee involvement at the transnational level.

The ETUI has emphasised that the SE Directive provides for obligatory involvement rights at European level. A European Company (SE) is, by definition, a European, not a national company. This is also reflected in the transnational arrangements on worker involvement. These rights are not a minor matter, but represent a key feature of the European Company (as clearly expressed by the SE Directive). The listing of the involvement of employees as a ‘negative driver’ – in other words, a disincentive – is surprising, given the fact that there is no obligation to introduce employee participation at board level if it did not exist before the SE was set up. According to the ‘before and after’ principle, in most cases where there was no participation previously, there is no obligation to introduce participation rights.

Most researchers confirm that, in practice, no SE has been obliged to introduce participation rights which did not exist before. It may be that companies are unaware of this. Some respondents suggested that thought should be given to how to teach applicants for SE status to comply with the provision on employee involvement, for example, by organising adequate instruction of the authorities involved in registering SEs and by following up consistently whether a particular application of the SE legislation complies with the provisions.

All contributors see the suggestion that companies should be able to apply the standard rules without any negotiations with workforce representatives as problematic. This would relieve companies of any obligation to take account of the specific concerns of their workers.

## **7. Concluding remarks: all animals are equal, but some are more equal than others...**

A number of questions arise. How should a web-based public consultation be concluded? How should the individual contributions be weighted? What is the relevance of the contribution of, let’s say, BUSINESSEUROPE in comparison to the contribution of individual citizens? What substance is there in the charge that the European Commission is prejudiced in favour of certain answers?

DG Internal Market and Services of the European Commission, in its synthesis (EC Synthesis, 2010) seems to prefer the ‘neutral’ method: just count the numbers.

That is why the Commission’s services synthesis starts with an overview of the contributions received, on the basis of individual countries and the three categories laid down in advance (individual, governmental and registered organisations). Surprisingly, these three categories are not used in the

examination and elaboration of the replies. In the introduction, the EC opts for a new categorisation of legal advisors and business organisations, employers and employee organisations, public authorities, accountants, notaries, companies and individuals. However, later on in the synthesis, this is simplified into what almost looks like a dichotomy of worker organisations and labour researchers, on the one hand, business associations and legal advisors, on the other hand. It is questionable whether this is correct and does justice to the wide range of expressed opinions.<sup>4</sup>

Although a web-based public consultation is not representative either quantitatively or qualitatively, references to numbers appear throughout the document ('16 out of 53', 'only three disagreed', '70 per cent of respondents', 'one in ten respondents' and so on). This method becomes utterly obscure when it is no longer the total number of respondents that is the reference, but only those respondents who have expressed an opinion on the issue (what does the huge majority of 21 versus 1 refer to, specifically, and what do 'seven against three' or '12 against two' actually mean?).

Officially, the consultation process was aimed at testing the findings of the Ernst & Young study; the EC wanted input on relevant issues for the SE assessment. After reading all the contributions the question arises concerning DG Internal Market's agenda. Given the question marks that can be raised with regard to the procedure used in this consultation, the chosen working methods and the evaluation of the outcome as presented in the synthesis produced by DG Internal Market Services, the question is whether the European Commission has been properly served.

The answer is, 'probably not' and therefore EC Services is trying to find a way out via a more general evaluation of the relevant consultation papers, using vague references ('most', 'a few', 'a number of') and by stressing in the results the dichotomy mentioned earlier of worker organisations and labour researchers versus business associations and legal advisors. The use of these references brings the European Commission under suspicion, as the dichotomy is certainly not correct in several cases. The synthesis is not free from selective perception.

In addition, it is important to note some of the more critical remarks formulated by several contributors:

- the E&Y study has serious methodological deficiencies;
- the analysis was undertaken solely from the perspective of the majority shareholder;
- the consultation process was relatively unstructured;
- quantitative and qualitative evidence is not always provided or is difficult to verify.

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4. DG Internal Market does not take seriously the methodological criticisms made by respondents. Remarks regarding statistical evidence, correlations and other questions are mentioned under *Any other comments*.



It is also worthwhile to look at some examples of selective perception and arbitrariness, starting with a particularly important instance.

In the EC synthesis there is no reference at all to activities within the framework of the European Social Dialogue. Although not explicitly stated, the ETUC is probably categorised within the framework of the dichotomy of worker organisations and labour researchers, while BUSINESSEUROPE is in the category of business associations and legal advisors.

There is no reference in the synthesis to the explicit joint positions of either the ETUC or BUSINESSEUROPE. They share, for instance, the view that there has to be a European registry for SEs (and this is backed by a broad range of contributors, including the Chambers, several researchers and lawyers). In the synthesis this shared point of view, bringing together the European social partners, is virtually neutralised at the end, by the phrase ‘a few respondents proposed the creation of a European Register’. Even more importantly, the European Social Partners still adhere to their joint conclusion formulated in 2008, when the SE Directive was discussed in the European Social Dialogue. BUSINESSEUROPE believes that it is too early to engage in a revision process, which requires significant experience of the Directive’s weaknesses in order to identify valid points for further improvement; the ETUC, meanwhile, warns against reopening the SE Directive ‘by the back door’ of the SE Statute.

Comparison of our own inventory and the EC Services synthesis shows that there is even more at stake. The formulated synthesis is sometimes vague, findings are quoted in a selective fashion and the synthesis leads to questionable statements and conclusions

### **General approach**

The general approach adopted in the synthesis is that answers are taken into account only to the extent that they match specific questions. This means that overall criticism is not taken into account or is sidelined in the synthesis. If we go through the various contributions we can list a whole range of critical comments or remarks. But, according to the synthesis, a ‘majority’ of the contributors approved of the Ernst & Young analysis of the drivers of SE formation. The EC states that, insofar as there is opposition it can be located mainly in the group of worker representatives and labour researchers. But this is the case only if the answers to the first question are isolated from all the other replies. In reality, the outcome is much more diverse. There is a whole spectrum of opinions, ranging from complete approval to harsh criticism, and even some individual lobbying in between. This range cannot simply be quantified in terms of ‘so many contributors agree and so many disagree’.

### **Regrouping or stigmatisation**

At the beginning of this paper, we criticised the fact that every contribution is awarded the same weight. At first glance, the evaluation appears to be neutral in that respect (the International Bar is as important as Ms X sitting at her computer). However, a close reading of the synthesis undermines this appearance. In the synthesis, the category of worker representatives and

labour researchers is separated from the other contributors. Despite the fact that other coalitions are possible – for instance, the example of agreement between BUSINESSEUROPE and the ETUC on the need to have a European Register – these coalitions are not mentioned.

**Criticisms of the procedure are not welcome.**

All the remarks related to methodology are treated at the end, in a few lines; Commission Services neither treats these remarks seriously nor confirms or attempts to refute them. The EC ignores serious criticisms that could upset its conclusions. Even worse, the arguments that Ernst & Young had no mandate and was not commissioned to evaluate the Directive on employee involvement is not even mentioned. It is also striking that some critical remarks that do not belong within the competence of DG Internal Market are almost neglected (for instance, most of the tax-related arguments, although these are formulated by almost all contributors as ‘the most important regulatory issues to be considered’), while others are picked up without serious research.

**Highlighted items**

Items that do not fit in with the Internal Market agenda, or areas outside DG Internal Market’s competences, are almost neglected and other items figure very prominently, even if there is no evidence or the actual number of respondents in this regard was very low. Some aspects of the SE Regulation are labelled ‘burdensome’, although the opinions expressed are incidental, not uniform or formulated coherently. On the other hand, almost unanimous arguments that ‘tax aspects are the most important regulatory issues’ are not taken up, as is the case with the need for a European Register mentioned earlier.

Another interesting example is the ‘European image’ of the SE as a positive driver. Here we get a broad range of replies, from business consultants, who say that this is only ‘window-dressing’, to individual companies that declare that it is one of the main elements of their business case. Notwithstanding this broad range of contributions EC Services conclude that the uniform corporate identity and image is second most important in the list of positive drivers.

**Are you being served?**

Is the EC honest in its presentation and in the selection of items treated in the synthesis?

As already mentioned, some items figure prominently regardless of the fact that the relevant number of respondents is (very) small. The disputed requirement of maintaining the registered office and head office in the same country is indeed quoted by some respondents as an obstacle. However, other contributions that are in favour of retaining this link are not mentioned, and the comment that there is a risk of serious abuse if this requirement is abolished is not heard at all. And in this case it is not only the workers group that takes this critical stance, but also the notaries and the governmental institutions.

Along the same lines is the conclusion that ‘the high minimum capital requirement’ is a disincentive. Several contributors – and it is not the workers



group that takes the strongest stance here – take the opposite view and/or do not consider it a ‘high’ threshold.

In the paragraph dedicated to other issues related to the formation of an SE the floor is given to the comments even of individual contributors. This leads to a complete list of practical problems concerning employee involvement based on individual remarks. Having read all the contributions I must say that there are no grounds for such an extensive list.

In conclusion, it looks as if the EC has attempted damage control after receiving an Ernst & Young study with only a few ‘useful’ indications and the patchy outcome of an open and arbitrary public web-based consultation.

This leads, on the one hand, to the neutralisation of criticisms. It also leads to a defence of the importance of the SE’s ‘European image’ and the further promotion of the SE Statute (to be honest, is it a problem that there are relatively few SEs?).

On the other hand, the EC is heavily invested in the importance of worries about burdensome regulation and other business lobbyist concerns, and as far as DG Internal Market is concerned, that is what the outcome of the study should have been.

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# The ETUI's reply to the consultation of the EU Commission on the SE study of Ernst & Young\*

## 1. General remarks

Generally, it must be emphasised that the SE Directive provides for obligatory involvement rights at European level. A European Company (SE) is, by definition, a European, not a national company. This is also reflected in the transnational arrangements on worker involvement. These rights are not a minor matter, but represent a key feature of the European Company (as clearly expressed by the SE Directive).

Thus, it is not adequate to deal with employee involvement as if it was a detrimental and undesirable burden in the process of establishing SEs, as the study seems to suggest. The SE legislation mirrors the political agreement to accept mandatory employee involvement (by information and consultation and, where applicable, also by participation in the company boardroom) as an essential element of the corporate governance of any company at transnational level applying European company law and also to safeguard pre-existing participation rights. There should be a serious effort to consider how to teach applicants to respect the provision on employee involvement, for example, by organising adequate instruction of the authorities involved in registering SEs and by following up consistently whether the application of the SE legislation complies with the provisions.

### Seriously deficient methodology

The methodology used in this study is seriously deficient, and therefore the main conclusions reached cannot be considered to be supported by statistical evidence.

With regard to Chapter 3 ('Analysis of the data and identification of main trends') the following shortcomings related to the methodology used for identifying the main (positive and negative) drivers for SEs can be identified:

- First, **the analysis should be differentiated in terms of at least three different company sizes**, since the interests and motivations of such companies are likely to be quite different: large companies (which, among other things, are already or likely to become subject to

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\* The reply was compiled with support from the members of the SEEurope network.

codetermination in countries with strong codetermination legislation), medium-sized companies (which may potentially grow above the threshold for codetermination) and the founders of shelf companies. In addition, it would be useful to differentiate another category, namely small SEs. Aggregating the statistics may hide some significant differences between these groups.

- Second, there is a **remarkable lack of detail on the statistical basis for the analysis** – for example, the table on p. 209 lacks any indication of how many answers it was based on, how many non-responses and so on. Without this kind of detail, it is not possible to see whether there might be a serious problem with representativeness in the sample. In fact, it is indicated in footnote 15 (page 22) that **only five non-SEs were interviewed**, thus raising serious questions about the representativeness of this small number of companies for the opinions of non-SEs.
- Third, there is a **problem with aggregating answers from SEs and non-SEs in the analysis**, which seems to be the case, for example, in the table on p. 209 ('Assessment of the positive drivers in the choice of the SE legal form'). Analytically different groups should be kept separate (for example, those choosing the SE form, those which considered but rejected the SE form and those which have not yet or are just starting to consider the form).
- Fourth, **the table on page 249**, which apparently is supposed to provide a key part of the argument for drivers for the SE, **is not based on solid statistical methodology**. Although the title of the section includes the word 'correlation', there is in fact no statistical procedure used which would be worthy of such a designation (for example, Pearson correlation). Given the great difference in sizes of countries there should be some attempt to 'normalise' the data, for example, by dividing the number of foundations in each country by the total number of companies. The methodology should also distinguish between companies with employees which are changing their legal form and the foundation of companies without employees. To illustrate this: it is very unlikely that most of the Czech SEs were founded to avoid codetermination legislation, since most of them have no employees.
- Fifth, **the table on p. 249 does not use consistent definitions between the cells**, especially given that there is no attempt at standardisation by country size. For example, the UK (with 16 SEs) and Belgium (with 10 SEs) are referred to as having 'few SEs' (France with 15 also seems to fit in this category), whereas Austria (with 13 SEs) and Luxembourg (with 11 SEs) are put in the category of 'relative success' and Slovakia (with 13 SEs) is put in the category of 'success'. Furthermore, based on the explanations offered, one would expect increasing numbers of SEs as the strength of worker participation increases (that is, more SEs in 'restricted participation' than in 'no participation' and more in 'extensive participation' than 'restricted participation'). This, however,

is not the case, especially in the 'one tier' column where most of the SEs are in the 'no participation' cell.

For Chapter 1 (legal mapping), the analysis relies on an aggregate ranking based on more or less flexibility. However, the methodology should leave open whether one or a small number of options/provisions might actually be the driving force behind the choice of the SE form. Thus, even though a country might appear less flexible, in fact it would have the one key option/provision that is the real driving force behind SE foundation.

Based on current standards of statistical practice, the methodology used in this study is seriously deficient, and therefore the main conclusions reached with regard to drivers for the SE cannot be considered as supported by statistical evidence.

Moreover, the **data used seem to be at least partly outdated**. Of course, in every study a cut-off point must be selected. However, the moment chosen here seems to be rather early, resulting in partly outdated SE information on which far-reaching conclusions are drawn. The starting point for the analysis is almost one year before the publication date. The SE data – even if declared 'updated' – are therefore not fresh. As of 29 April 2010 there are more than 550 SEs in Europe (ETUI SE database), whereas the study only deals with 369 SEs.

Also, **the 'SE typology' is not clear**: Whereas the study as such only distinguishes between 'operational' and 'shelf SE', in the factsheets document (Excel table) the SEEurope categories 'normal', 'empty', 'shelf' and 'UFO' SEs are used without further explanation or definition.

More attention should have been paid to the relevant case law (and literature) on **empty and shelf SEs**. The argument that activation cannot be considered as a structural change is not convincing, especially in light of the sizable group of shelf SEs which have been activated (see also the replies in Section V).

## 2. Drivers

(1) Do you agree with the findings of the study about the positive and negative drivers for setting up an SE and their importance? Please explain your answer.

### Employee involvement as negative driver?

The study states that 'the employee involvement process is considered to be a negative driver, especially in the Member States in which the national legislation does not provide for a system of employee participation' (p. 242). Besides the methodological problems with the study and the resulting conclusions (see above) it seems rather obvious **that the negative driver is not the employee involvement regime as such but rather the myths**

**about participation in the SE.** According to the 'before and after principle', in most cases where there was no participation previously, there is no obligation to introduce participation rights. Indeed, in practice no SE has been obliged to introduce participation rights which did not exist before. Nevertheless, many employers are probably not aware of the real meaning of the 'before and after principle'. A negative driver is therefore the prevailing lack of adequate information on the SE and missing national experience in many countries.

### Trade union representatives in the SNB as a negative driver?

Moreover, the study argues that the presence of trade union representatives in the SNB is a negative driver. The presence of trade union representatives in the SNB (which is a member state's choice, following recital 19 of Council Directive 2001/86) reflects, on the one hand, **the role of trade unions in the national industrial relations system** and, on the other hand, is an expression of the legislator's will to support the employee representatives during the negotiations with **external expertise**. Whereas the management usually works together with law firms experienced in setting up SEs, it is essential for the employee side to have access to experience with SE negotiations from an employee perspective (for company representatives the negotiations are a one-time experience). Moreover, the juridical advice of trade union experts on the specific legal situation applicable in the particular case and their know-how as negotiators helped to clear away uncertainties among the SNB members and to make negotiations smoother and more efficient.

This assessment can be confirmed by a statement of the chief legal adviser of MAN, made in a seminar organised and documented by the Deutsches Aktieninstitut (DAI) in 2007. He pointed out that, in this specific case (negotiations on an agreement in MAN Diesel SE at this time), having external trade union representatives as members of the special negotiating body played a distinct and constructive role in achieving a positive result. According to him, there would be no reason to consider trade union participation per se as negative (DAI, 2007, *Die Societas Europaea (SE)*. Studien. No. 38, p.162).

### 'Complex, costly and time-consuming negotiations'?

In many country reports, the rules on employee involvement in establishing an SE are considered as 'more complex' than the rules on national plcs (AT p. 121, BE p. 123, BG p. 125, CY p. 127, FR p. 138, EL p. 142, HU p. 144, IT p. 146, LT p. 148, LU p. 150, NL p. 152, PL p. 156, UK p. 171). Especially in countries with no participation the SE is considered more burdensome than national company forms (p. 246).

**At least for Germany-based SEs, the creation of the new structure 'simplified' pre-existing complex procedures.** This is true for the election of employee representatives according to German codetermination law (in companies with up to 8,000 employees) which requires direct election by every employee. According to the SE agreements, it is usually now the SE

works council which is responsible for appointing the employee representatives to the supervisory board

Moreover, the study itself states: '**In practice, the maximum six-month period is rarely reached or exceeded**' (p. 241). This proves that both negotiating parties take their responsibilities towards the company very seriously and try to achieve an agreement as quickly as possible. If the worker involvement arrangements are to be more than just an empty commitment on paper then indeed a period of six months for the negotiations seems adequate. On the other hand, taking into account the fuzzy point of departure for negotiations within the SNB, a body with, in most cases, a very diverse composition, the lack of information about SEs and the fact that the transposition laws of specific EU member states are usually only available in the national language, it may be argued that the results achieved within six months are remarkable – in practice we have seen both sides showing their great satisfaction with the common success achieved by a good agreement on employee involvement. At BASF, even a new generic name ('BASF Europa Betriebsrat' [BASF Europe Works Council]) was created. In this context, another argument can be brought forward: employee representatives can be assumed to be very committed to the strict timetable for SE negotiations because they have a great interest in averting harm to their workplaces, for example, of the kind which might arise if the stock market took the view that the company is unable to reach agreement with its employees.

### Possibility to transfer the company seat as a positive driver

The latest data from the ETUI's SE Database (<http://ecdb.worker-participation.eu>) reveal that 41 SEs have, in the meantime, transferred their seat. However, only a very small proportion of them have employees and business activities. Therefore, **the transfer of seat is de facto for most 'normal SEs' at best a positive driver in theory** ('good to have the option'). At least 18 of the 41 SEs do not have any employees at all (the figure is likely to be much higher). This could indicate that the SE indeed is often used for tax/regulatory regime-hopping, which was certainly not a key intention of the SE legislation.

### Participation rights unknown in one-tier systems?

On p. 248, the authors argue that only countries with a two-tier corporate structure have a tradition of extensive participation rights. In reality, there is a considerable number of countries with a monistic board structure in which extensive participation rights exist. These include, in particular, Sweden, Denmark, Norway, Finland and Luxemburg (in some of these countries both corporate structures are possible, but the one-tier option is dominant). In Sweden, Norway and Denmark there are very low thresholds for participation at board level (25/30/35 employees). As a direct consequence of this, participation is a normal feature of corporate governance in these countries. This, again, makes it unlikely that the aspect of employee participation is a key negative driver in these countries. One also has to keep in mind that in no EU



country is there real parity at board level: even in large German companies (>2,000 employees) with a nominal 50 per cent share of the board seats, the chair (who always comes from the shareholder side) has a casting vote in the event of a tie in the supervisory board.

(2) Do you agree with the study's assessment of the attractiveness/unattractiveness of national legislation for setting up an SE? Do you think that other or additional issues with regard to national legislation should be taken into consideration for that assessment?

The typology (and division) of national legislation in terms of attractiveness/unattractiveness seems not to be confirmed by empirical evidence. The six countries forming the so-called 'low attraction' countries (CY, CZ, DE, EE, FI, SE) host 405 of a total of 556 SEs (ETUI SE Database, 25.4.2010). The three countries of the group with the 'highest attractiveness' (IT, LU, UK) together host only 40 SEs. These figures indicate that national legislation apparently does not play a major driver role and that the categorisation of the study is not backed up in practice. However, it is remarkable that the study opted for the very narrow perspective of the majority shareholder to define what is attractive and what is not attractive.

Regarding the 'success' of **empty SEs or shelf SEs** in some of the EU member states the results of the study leave rather mixed feelings. There are no satisfying indications of the particular reasons for the creation of this type of SE. Even though the chapter on legal mapping occupies a large part of the study the outcomes of this exercise are rather disappointing in this regard. Perhaps the legal structure is not the only explanatory criterion. A reader might wonder whether more attention should have been paid to the subject of the **minimum capital for SEs**. We have seen several SE registrations where an observer may ask whether the required minimum capital was shown only for registration purposes, but afterwards withdrawn because the effective proof of the existence of €120,000 is required only at the time of creation. This may explain the huge number of 'child SEs' borne by the small number of 'SE incubators' in the Czech Republic. It is worth investigating further whether this observation played a relevant role in those cases of doubtful UFO SEs or shelf SEs.

(3) What, in your view, are the most important regulatory issues for a company to consider when assessing in which country to place its registered office and/or head office (both at the moment of formation and during the life of a company – taking into account the possibility of transferring the registered office)?

(The question as such is slightly irritating: 'to place its registered office **and/or** head office'. According to the SE legislation, both the registered office and the head office need to be in the same country.)

### 3. Main trends

(4) Do you agree with the study that the main reasons for the current distribution of SEs across the EU/EEA member states are connected to the employee participation system and corporate governance system of the individual member state? Please explain your answer.

#### Dubious assessment of the impacts of employee involvement/participation

The study's thesis that the relative success or failure of the SE is, for the most part, explained by the criterion of employee involvement (p. 243) is rather surprising, as this conclusion has no basis in the study itself. Moreover, the importance allocated to this item seems unjustified in light of the items listed for analysis after five years of entering in force, explained in Art. 69 of Council Regulation No. 2157/2001. Certainly, it cannot be derived from the correlation table on p. 248. First, it is not clear what is meant by 'few' or 'very few' or 'no success', 'relative success' or 'success' with regard to the SE Statute, especially when looking at the relative size of the different economies.

Second, and more importantly, the variable on the Y-axis is 'degree of participation'. In our view, this can only be used when looking at normal SEs and is of no use in the case of empty or shelf SEs (see also the remarks on methodology).

In particular cases, employee involvement might be a reason for not choosing the SE form. However, the great emphasis put in the study on employee involvement being *the* key negative driver seems to be **largely exaggerated and certainly not sufficiently proven** (see remarks on methodology).

Indeed, the existence **de facto of 30 (national) SE regimes** instead of a single one (which was the original purpose) seems to be much more important, in our view. In the long period during which there was no SE, companies found alternative ways to organise their European cross-border business in an efficient way. The SE is now just one option among others (including European alternatives such as the Cross-Border Merger Directive and new possibilities created by national company law).

A further important driver, as already mentioned, seems to be the still **prevailing lack of knowledge with regard to the SE**. Here it would be desirable that the European Commission and employer organisations raise awareness of the real implications of the SE and particularly the myths with regard to employee involvement.



It seems that **the study overemphasised the perspective of commercially oriented legal advisers** but did not sufficiently inquire about the experience of practitioners on both sides of the company, employers and employees, who were actually involved in negotiations. This might partly explain the rather unbalanced results.

This impression also prevails when looking at the list of people interviewed. Out of 60 interviews in total, **25 lawyers plus two professional SE founders** were interviewed. Certainly, these people are in contact with a lot of (potential) SE founders. However, one should be aware of their own (commercial) interests in the SE issue, which might explain the bias of the study.

The six interviews with ‘experts on the employee representatives’ side’ reflect the wish of the European Commission for a balanced report. However, their voices and opinions are rarely heard within the main report. Moreover, in one case, an expert was even wrongly quoted (in the meantime corrected, following the intervention of the expert), and in another case important further statements were left out (see at (5) the Polish example).

### Reduction of participation as a key motive in Germany?

The relative success of the SE in Germany **cannot be explained by the motive of decreasing employee board-level representation.**

The legal form of SE has been chosen by more (normal) companies than elsewhere in the EU. The largest group among these normal, operational German SEs are those 48 SEs which previously had no board-level representation.

According to recent empirical findings of the Hans Böckler Foundation, for only relatively few companies is there evidence that the change into an SE was connected to participation issues. These changes usually occurred when the company came close to a national participation threshold (500 or 2,000 employees). In these cases, some companies used the SE as a vehicle to ‘freeze’ the level of participation or stick to the current status of not having board-level representatives.

However, in all German cases parity (half of the seats) or one-third participation of employees was kept after the SE’s foundation.

In the case of the Austrian company **Plansee** the proportion of board-level representation was even increased during the conversion process (two out of five employee representatives, which is notably higher than the usual one-third proportion according to Austrian law). This is all the more remarkable as the new structure provides for a one-tier system, including employee representatives in the administrative body (but now excluding external control).

(5) Do you agree with the possible explanations for the current distribution of SEs in the EU/EEA presented in the study? If you think there are other possible explanations, please list them.

Overall, the **study underestimates the factor of specific national contexts** which make the SE either attractive or not so attractive. This is particularly the case for countries in which a lot of SEs have been founded, such as Germany, the Czech Republic and the Netherlands.

One of the most remarkable research findings to date is the **number of empty SEs, shelf SEs and so-called UFOs**. A surprisingly large number of SEs in these categories have been founded in the **Czech Republic**. In our view, the study fails to explain this. The legal mapping in the first part of the study gives no plausible answers: the Czech Republic does not stand out as a country with a flexible company law system or SE legislation. Moreover, this country is one of only three that has implemented the option of extra protection for employees (see p. 70). In the particular context of Czech SEs, it is clearly national reasons which have resulted in a relative SE boom. Most Czech SEs are de facto national companies which do not operate on a European scale. The only reason why these companies were able to set up an SE (without any cross-border element) is because they were able to purchase one from an 'incubator SE', which creates SE subsidiaries by the dozen. In this sense, it is disappointing that the study did not really find more reasons underlying the numerous SE creations in the Czech Republic (except the possibility of reducing the number of persons in the company's administrative bodies, p. 130).

## Change of company board structure

In some cases, the SE was used to change the structure of the company from a two-tier to a single-tier system. This can be observed mainly in cases of majority ownership, for example, by a family. It can be assumed that one of the purposes behind these operations was to 'optimise' ownership and to **expel any external persons from supervisory boards**. This may also explain why, in those cases, the retention of employee involvement has not been a significant problem: works council representatives can be regarded as internal non-executive directors.

## Impact of the SE legislation on national company law

The SE regulation, after only a short period in existence, has had an impact on national company law. The SE provides an additional option on top of existing national structures. In particular, companies have the choice of whether they will organise the SE with a two-tier or a single-tier structure. This might have had an impact on decisions to make this choice legally available to companies applying national corporate law. In recent years, company law in Slovenia, Hungary and Luxemburg has been reformed and now provides national

companies with the choice of one- and two-tier systems. This could also have put people off applying the SE option. Company managers and owners may have felt inclined to stick with what they feel more familiar with: (reformed) national structures.

Another explanation for the disproportionate distribution of SEs might be the structure of businesses in many EU member states. For example, in Poland and Italy we see mainly small and medium-sized enterprises, which are less likely to seek to transform themselves into SEs. Moreover, not having SEs registered with their head offices does not mean that there are no SE operations. In many EU member states there are branches of large MNCs rather than head offices. One of these is PCC SE: the SE is registered in Germany, but most employees are located in Poland.

The low number of SEs in a non-participatory environment is not an argument against participation as an element of company governance – the example of Poland

In Poland, there are only a few SEs and no extended provisions on worker participation at board level. Board-level participation does not have a strong tradition in Poland and this does not seem to be changing. Consequently, the results presented for Poland (p. 241) reflect an attitude expressed by enterprises and also presented in the commercial law literature in Poland, which names worker participation in the SE or in cases of cross-border mergers as often a ‘hindrance’ or an ‘inconvenience’ or a factor that diminishes the attractiveness of the SE set up by merger.

Negotiations on employee involvement before a company’s registration did not previously exist in Polish commercial law, even in so-called commercialised companies. We may also acknowledge that no EWC has so far been set up in MNCs subject to Polish law, even though several MNCs meet the criteria. This means that no SNB has been set up in Poland so far. However, these facts cannot be taken as a reason to water down employee involvement standards in the SE. Even though the SE statistics may in some cases “correlate” with the restricted board-room representation at the national level, there are also other very important reasons for the low number of SEs in Poland to date. These relate, for example, to the **scale of activities of Polish companies** and the **higher share capital required for SEs, compared to national public limited liability companies**.

Moreover, the **Cross-Border Merger Directive** allows for a simpler recourse to the standard rules on employee participation, which opens another option competing with the SE regulation.. On the other hand, the two SEs which do operate in Poland are real and not shelf companies, which may be a hopeful sign. The lack of empty SEs in Poland may also indicate that employee involvement procedures are not the only negative factor discouraging the establishment of SEs.

(6) What, in your view, are the main advantages for a company in buying a ready-made shelf SE compared to setting up an SE directly?

- **Speeding up and simplification of SE registration procedure** (reasons depend also on national context, and are not limited to speeding up employee involvement).
- **In some cases, circumvention of negotiations on employee involvement.** Although this is not in accordance with the law (see also the decision of a German court, p. 252), where there is no complaint, there is no redress.

As this question touches the very core of the SE the findings adduced by the study are insufficient, making it even more surprising that the consequences of such 'non-conformist' SE creations are not addressed critically by the recommendations.

#### 4. Practical problems

(7) Please provide examples of practical problems you have encountered in the course of setting up or running an SE (please focus only on company law-related problems).

#### 5. Possible follow-up

(8) Do you agree with the study's recommendations for possible amendments of the SE Regulation? Which recommendations are the most important, in your view? Do you have any other suggestions for amendments of the SE Regulation that would increase its attractiveness for businesses (for example, for SMEs, groups operating across borders and so on)?

The point of departure for the study should have been the requirements for analysis laid down in Art. 69 of Council Regulation No. 2157/2001. The reader would have expected answers, first, to the items listed there. However, the recommendations developed from the study findings go further and include other items, such as the procedure on employee involvement, which was not a concern of Art. 69.

## Registered office and head office in the same country

The requirement for an SE to have its registered office in the same member state as its head office **should be maintained**. As stated by the study itself, the fact that eight member states have even exercised their right to require that the SE is located in the same place, not only in the same country, shows that there is no consensus on this point.

Removing this requirement is likely to further increase the use of the SE statute for dubious reasons, such as tax hopping. Also, the danger of misusing the SE to circumvent employee involvement rights would increase.

## Registration of an SE without negotiations – structural changes

The authors of the study propose the amendment of the Regulation, as well as explicitly allowing registration in the absence of negotiations if none of the companies involved has any employees. The large shelf SE market shows that such registration is already possible. The key problem resulting from this is that employee involvement rights might be circumvented when, later on, the (shelf SE) company is sold and employees are ‘transferred’ to the company. Thus, the acceptance of shelf SEs as such should be called into question because it could easily contradict the initial intention of the SE legislation. This is all the more likely if, as is currently the case, there is no control of the commencement of commercial activities, including the existence of employees in former shelf SEs. The creation of a **European SE register**, which would also make it compulsory to report such changes, would make it easier to overcome any dubious use of this type of SEs.

With regard to shelf SEs, the authors of the study state that consensus exists on the meaning of **structural changes** (see p. 250 ff), which does not consider the activation of an empty or shelf SE as ‘structural change’. We doubt whether this is true. The issue is of the utmost importance, because 20 per cent of SEs have significantly changed their employee structure since their creation (>50 employees during the first fiscal year after creation) (pp. 204–205, p. 206).

In contrast, the **commercial activation of shelf SEs or empty SEs should be perceived principally as a ‘structural change’, which requires investigation of the further involvement of employees at the transnational level**. In this regard and if the SE operates cross-border it should be subject to the same rules as at the time of its creation. In particular, for these special cases the introduction of an employee threshold could be discussed, above which negotiations on employee involvement would be triggered automatically. However, preexisting thresholds for participation at board level in the EU member states (which are very low in some cases, such as Sweden, with 25 employees, Denmark with 35, Norway with 30 and the Czech Republic with 50) must be respected. As far as European law is concerned, there is a threshold of 50 employees in the SCE Directive and 500 employees in the Cross-Border Merger Directive. In particular, the latter

certainly cannot serve as a reference because it is (a) only one criterion among several and (b) the threshold refers only to participation rights.

As a matter of principle the SE legislation should in no way be used to apply pressure to lower existing national participation rights.

### Direct application of standard rules (as in the Cross-Border Merger Directive)

The study proposes to allow the relevant bodies of the merging companies to have a right to choose, without any prior negotiations, to be directly subject to the standard rules. The proposal to adapt the SE legislation to the corresponding rules of the Cross-Border Merger Directive does not take into account the fact that the Cross-Border Merger Directive deals only with employee participation rights. However, the **SE Directive provides for information, consultation and participation rights**. A unilateral management right to immediately apply the standard rules would certainly devalue the negotiations on employee involvement. As explained above, a maximum period of six months does not seem excessive for working out tailor-made involvement procedures (sometimes including representatives from more than 20 countries). Moreover, practice clearly shows that in almost all cases the negotiating parties reach an agreement. The application of standard rules is therefore also in practice only the last resort, in case negotiations fail, a situation which apparently both sides try to prevent.

The idea of **allowing the registration of an SE even if the negotiations on employee involvement are still in progress** (p. 259) would devalue the negotiations and weaken the employees' position, which would seem to be contrary to the spirit of the SE Directive itself.

## 6. Any other comments

### Deviate from the original focus

Looking at the recommendations for possible amendments (p. 276 ff.), the recommendation with the greatest impact is the one concerning Art. 12 of the Statute, which establishes the link between the Statute and the Directive. However, the Directive is largely absent from the study (see next point).

The study suggests far-reaching adjustments of the SE legislation in order to make the SE form more attractive for companies. They are guided by the concept of 'simplification' and concern also employee involvement. This is surprising as this subject was not a focus of this study. The SE Directive was explicitly excluded from the analysis. The expressed intention of the study was to carry out a mapping of SEs and to identify any problems which might have arisen in the national transposition of the SE regulation.

All the more reason that it should be understood that a narrow understanding of ‘simplification’ will not serve as an adequate basis for making processes leaner, in particular with regard to employee involvement. There are specific reasons why seeking agreement on employee involvement by negotiation is an elaborate and complex matter. Thus, ‘simplification’ would not make it easier to respect the political intention of the SE legislation to provide employees with a more secure position at the transnational level.

## The missing link to the SE directive

As is clear from Art. 12 of the Statute, the Statute and the Directive form an inseparable whole. In principle, no SE can be established without negotiations on the involvement of employees. Against this background, the study pays far too little attention to this link to SE Directive, which results in a rather unbalanced picture and misleading conclusions.

The lack of attention to the Directive affects the study as a whole. Examples include:

- The **choice of perspective**: The attractiveness of the SE is judged from the majority shareholder perspective only. For example, a member state’s decision to implement specific options to protect employees (Art. 34 and 37(8), see p. 31) results in the study in a (–), meaning ‘less flexible’ and, ultimately, ‘less attractive’.
- The **view on employee involvement**: The study suggests, time and again, that employee involvement is only a technical issue (and for companies a burdensome, time consuming and complex requirement).
- **Lack of analysis**: To the extent that attention is paid to the Directive (see the synoptic table on pp. 44–46), there is no real analysis. The Cross-Border Merger Directive is seen as advantageous to the establishment of an SE because of the (simpler) rules on employee participation.

This approach clearly contradicts the aims of the SE legislation. The study comments only on the aims of the SE regulation, whereas the (equally important) aims of the SE Directive are not mentioned.

In order to promote the social objectives of the Community, special provisions have to be set, notably in the field of employee involvement, aimed at ensuring that the establishment of an SE does not entail the disappearance or reduction of practices of employee involvement existing within the companies participating in the establishment of an SE. (SE Directive, recital 3)



## Further flexibilisation and simplification – an aim in itself?

Whereas it is of course important to remove unnecessary burdens from business, flexibilisation and simplification cannot be an aim in itself. There is already a wide range of rather dubious motives for setting up an SE. These include:

- The **business of setting up shelf SEs** (which threaten existing rights to information, consultation and participation).
- The **high proportion of empty SEs which have transferred their seat** to another country, often simply for tax reasons.
- The decision to opt for an SE **to reduce existing external control possibilities** (for example, in family-owned businesses).
- The **high number of de facto national SEs** (especially in the Czech Republic) with no cross-border activities at all.

Certainly, these ‘SE users’ were not what the European legislator had in mind when creating the SE. 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”. Any revision of the SE legislation should therefore take into consideration the aims of the SE legislation (including the SE Directive) and who the real target groups are. Making the SE more flexible and more ‘simple’ merely to obtain a higher number of SEs would be misguided.

Let us finally recall the reasoning why the European Company (SE) represents certainly a special type of understanding why companies need strong provisions for being successful at all: “The type of labour needed by European companies -- skilled, mobile, committed, responsible, and capable of using technical innovations and of identifying with the objective of increasing competitiveness and quality -- cannot be expected simply to obey the employers’ instructions. Workers must be closely and permanently involved in decision-making at all levels of the company.” (Final report of the ‘High-level expert group on workers’ involvement’ (Daignon group), 1997).

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