

Introduction: A decade of experience with the SE

Jan Cremers, Michael Stollt and Sigurt Vitols

1. Background

The European Company (or *Societas Europaea*, hereafter SE) is remarkable in at least two respects. First, together with the Directive on the establishment of a European Works Council, it had one of the longest gestation periods of all EU initiatives: 30 years between the original proposal for a European company legal form by the European Commission in 1970 and the passage of the Regulation and Directive on the European Company in 2001. Second, it may be the only supranational legal form available for companies to incorporate with limited liability in the world.

Despite this, the SE is practically unknown among the general public. While it is on the radar screen of an increasing number of trade union officials and managers, it is still not well understood by most practitioners. One reason is that the SE is still a relatively new legal form and exists in significant numbers in only a few countries. Another reason is that relatively few scholars have examined the overall significance of this legislation in the decade since its passage. Key questions have not or only partially been examined in depth by the scientific community, including: How has the SE been implemented in practice? How great has the uptake of the European Company by the business community been? Are there significant differences between countries and sectors? What impact has the European Company had on business practice? Has it improved company mobility and flexibility? What impact has it had on national industrial relations systems and Social Europe? To what extent has it inspired other legislative initiatives by the European Commission? And: what will the likely future development of the European Company be?¹

1. For an earlier, pioneering effort, which focused on the history and structure of the SE Statute and its likely effect, see Gold, Nikolopoulos and Kluge (2008).

In order to address some of these important questions, the SEEurope Network decided to compile a book presenting new research on these issues. This unique network, which is organized by the European Trade Union Institute, was founded in 2003 to observe the transposition of the SE legislation and its practical impact on businesses and industrial relations. The network involves legal, economic and industrial relations experts from the European Economic Area (EU Member States plus Norway, Iceland and Lichtenstein).² Over the years the network has produced a broad range of publications, including country reports, case studies and topical reports. From the beginning, the research and monitoring has also been conducted with a view to meeting the needs of practitioners in Europe involved in the founding of an SE.

In the hopes that the network can contribute to the understanding of and further discussion on the SE (and also influence the debate on European company law and corporate governance), we have put together this edited volume. Our ambition is to provide a comprehensive overview in one source on the SE, its development, impact and potential, and also to provide literature and insight into the debates and issues for those who are interested in pursuing the matter in more depth.

2. What is the European Company?

The SE Statute for a European public limited-liability company was among the measures listed in the Commission's White Paper on completing the internal market to be adopted by the Council before 1992 (European Commission 1985). After a lengthy decision-making process the EU Council in Nice in December 2000 adopted the general principles and rules for a European Company Statute. It consisted of two inter-related legal acts, namely the Regulation on the Statute for a European Company (Council Regulation 2157/2001, hereafter SE Regulation) and the Directive on workers' involvement in the SE (Council Directive 2001/86/EC, hereafter SE Directive). Whereas the SE Regulation contains the legal provisions for the establishment and running of the SE Statute (e.g. conditions of capital, registered office, legal basis, types of establishment, formation/structure of the SE, SE bodies and their re-

2. The SEEurope Network also includes a correspondent from Switzerland. Though the SE legislation does not apply there, the country is involved through SE subsidiaries.

spective competences), the SE Directive supplements the SE Regulation with regard to employees' rights to information, consultation and participation. In the end the adoption of the SE Directive in particular was 'the result of a delicate compromise among Member States that took more than 30 years of negotiations to achieve' (COM(2008)591 final).

The SE Regulation and the Directive were concluded as two intertwined legal acts. The entry into force of the Regulation was deferred so that each Member State had the time to incorporate the provisions of the Directive into its national law. Member States had to set up in advance the necessary 'machinery' for the formation and operation of SEs with registered offices within its territory. According to recital 19 of the Regulation the rules on the involvement of employees in the SE, as laid down in Directive 2001/86/EC, form an indissociable complement to the Regulation and must be applied concomitantly. The Directive is designed to ensure that employees have a right of involvement in issues and decisions affecting the life of their SE.

The SE legislation entered into force on 8 October 2004. It wasn't however until March 2007 that all EEA Member States had transposed the SE Directive into national law. Companies have now one option more when choosing a suitable company form for their European business. Next to the well-known national company forms (such as the British plc, the French SA or the German AG) a new supranational company form was created. An SE may only be set up within the territory of the European Union and the EEA countries Iceland, Liechtenstein and Norway. In other countries, like for instance Switzerland, it is not possible to register an SE. Every company established under the European Company Statute must be preceded or followed by the abbreviation SE. The capital of an SE is divided into shares and expressed in Euros. Its minimum subscribed capital is EUR 120,000 (SE Regulation, Art. 4(2)). The SE is registered in the member state in which it has its registered office. Once the SE has been established it can transfer its seat to another EU/EEA Member State. As the registered office must always be in the same country as the SE's head office this means that the administrative seat must also be relocated. The SE also made cross-border mergers much simpler in contrast to the existing complex national rules and regulation. Another specific feature of the SE statute is the flexibility with regard to corporate governance: An SE can freely choose between a monistic (administrative board) or a dualistic board structure (management board and supervisory board).

3. The SE as part of the EU company law programme

In the European Commission's publications the diversity of national legislations and company law forms is often characterized as a barrier to expansion in the Single Market. According to the Commission, allowing flexible company law rules for the different corporate forms across Member States could help reduce some of the obstacles and costs European undertakings face. More uniform company law rules could help companies to expand in other Member States and save on the costs of setting-up and running businesses abroad. Cross-border groups would also benefit from such rules, which would allow them to set up the same organisational structure in all Member States.

Over the years, the EU institutions have taken a number of initiatives in the area of company law. The basic reasoning in this respect was the idea that the harmonisation of a number of minimum requirements would facilitate the freedom of establishment of companies; at the same time this would guarantee legal certainty in intra-Community operations, where the presence of a number of common safeguards was key for the creation of trust in cross-border economic relationships (European Commission 2003). The initiated programme was backed up by a paradigm change in the socio-economic field. Since the late 1990s the objectives to strengthen shareholder rights and third party protection went hand in hand with the aim that company law 'should provide for a flexible framework for competitive business' (High Level Group of Company Law Experts 2002a and 2002b).

Between 1968 (adoption of the First Company Law Directive) and 1989 (adoption of the Twelfth Company Law Directive), nine Directives and one Regulation were adopted. These European measures have had an important impact on national company law. After the signature of the Maastricht Treaty of 1992, the development shifted to a situation of more political deference to national law, for example with a higher number of references to national rules in legislative proposals. This more flexible approach to harmonisation made it possible to adopt the SE Statute.

As stated above, the 'SE project' has taken over 30 years to come to fruition. The original plan was to create completely independent company legislation applicable EU-wide for the SEs. Under that system, every SE – irrespective of the Member State in which it was established – would have been exclusively subject to European Community law. This ambi-

tious goal could however never be realised because of differing opinions among the EU Member States. In many important areas, SEs are now subject to the national legislation of the country in which they have their registered office.

Indeed, both the SE Regulation and the SE Directive explicitly granted the Member States many individual options. In anchoring both pieces of SE legislation into national legislation, the member states had some degree of flexibility. For some areas – such as fiscal law, competition law and bankruptcy law – the SE Regulation does not contain provisions at all. That means that, in these areas, the SE is subject to the ‘regular’ national and European legislation. In the areas where the SE legislation provisions are only partial, the legal provisions of the country where the SE has its registered office apply like they would for any other (national) company established in that country. In actual fact, there is therefore not one single SE law, but rather one for each of the 30 EEA Member States. Many different national legal regimes apply and uncertainty remains as to the legal effect of directly applicable EU law and the overlap and the interaction between EU law and the national law. Behind its unified image, the SE is treated in every Member State in many respects as if it were a national public limited-liability company: in the large majority of cases and Member States, the status of the SE is similar to the status of a domestic public limited-liability company. It is noteworthy that a majority of Member States provide the SE with stronger protection for minority shareholders and that many of them also provide better 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 it.

4. Worker involvement as a key issue

The SE legislation represented a milestone, not only in the field of EU company law, but also in the area of European regulation of employee involvement. The SE Directive linked to the SE Statute contains provisions for a legally binding procedure of company-level negotiations, not only for a transnational employee information and consultation body (the SE Works Council) but also for the first time for employee representation in the company’s administrative or supervisory board (participation). In accordance with the so-called ‘before-and-after principle’ a company is however obliged to grant participation rights at board level only if the employees had such rights before.

The SE gave rise to new opportunities for both sides of industry. Businesses were enabled to operate within a single legal body throughout Europe. And for workers it was and is an opportunity for involvement for all SE employees subject to the same European standard for information, consultation and – where applicable – also for participation. This is why the European trade union movement welcomed the legislation in October 2001 as a historic achievement on the road to improved industrial democracy and civil society in Europe.

Article 12 (2) of the Regulation prescribes that an SE may not be registered unless an agreement on arrangements for employee involvement pursuant to Article 4 of Directive 2001/86/EC has been concluded, or a decision pursuant to Article 3(6) of the Directive has been taken (to not take up negotiations or to terminate negotiations already started), or the period for negotiations pursuant to Article 5 of the Directive has expired without an agreement having been concluded. The procedure resembles the European Works Council (EWC) Directive: Instead of prescribing detailed provisions on how employees have to be involved, the SE Directive provides for a tailor-made agreement negotiated between the participating companies and a special negotiating body (SNB) made up of employee representatives from the different countries concerned. Additionally, it provides for obligatory standard rules in cases where the negotiating partners fail to reach an agreement. There is a major difference with the EWC procedure: No initiative by the employees is needed. In fact, it is the management or administrative bodies of the participating companies which have to take the necessary steps to start – as soon as possible – negotiations with the representatives of the companies' employees on arrangements for the involvement of employees in the SE.

The relatively high standards for worker involvement in the SE are seen as a milestone by the European trade union movement, especially in comparison with weaker provisions in the Cross-Border Mergers Directive and much weaker or completely lacking provisions in proposals for other directives (e.g. the European Private Company or SPE). The ETUC references these achievements in its call for a European minimum standard for worker information, consultation and participation (ETUC 2011 and 2012). Nevertheless, at the same time it should be acknowledged that there are a number of weaknesses regarding worker involvement in the SE Directive and its implementation. These should be addressed in any revision of the SE Directive. A number of the chapters in this book discuss this problem in detail.

5. About this book

Since its foundation in 2003 a large amount of relevant knowledge was collected by the SEEurope Network. The bulk of this research has been published in reports and studies that are recorded on the website www.worker-participation.eu and in the ETUI's European Company Database (<http://ecdb.worker-participation.eu>). However, given that more than a decade has passed since the passage of the SE legislation, the time was ripe to publish a 'one-stop' publication that provides a comprehensive overview of the SE legislation and its history, assesses the overall significance and impact of the SE on the business sector and worker involvement in Europe and also provides an outlook on the future of the SE. The ambition of the network was also to inform and influence policymakers regarding the revision of the SE legislation specifically as well as European company law and corporate governance generally. As a result, members of the SEEurope Network were asked to write chapters based on their specific area of expertise or their national experiences with the SE. In a few cases these chapters are summaries or updates of recent research.

Since the focus is on the experiences since 2001 with the SE legislation and 2004 with the actual take-up of this new EU corporate form, we have decided to give this book the title *A decade of experience with the European Company*.

In the remainder of this introduction we provide an overview of the individual chapters in this book. Part I consists of three contributions looking at the legal and practical development of the SE legislation. Based on the latest data from the ETUI's SE database, Michael Stollt and Melinda Kelemen in Chapter 1 analyse almost a decade of SE facts and figures and investigate how the new company form has been put into practice. How many SEs have been established since October 2004 and in which countries? What is the preferred form of founding? What have the company motives been and to what extent have they made use of the new flexibilities offered by the SE legislation? The article draws up a mixed balance sheet for the SE, with some light but also enough shadow, especially with regard to the implementation of worker involvement rights. The authors highlight that the lack of publicly available information on registered SEs and the predominance of SE foundations through a subsidiary represent a particularly important threat to the SE's social dimension.

As mentioned before, the SE project represents the outcome of a decades-long debate between Member States and the European institutions. In the second chapter Sandra Schwimbersky and Michael Gold trace back the tangled history of the SE and look at the most important steps, legislative proposals, searches for compromise and setbacks. The look back into the past helps the reader to better understand the genesis of this remarkable piece of legislation and can also at least partially explain some of the deficiencies of the compromise finally reached in 2001. Moreover, the contribution summarizes important developments in European company law since the entry into force of the SE legislation.

Not only the adoption of the SE legislation but also the subsequent transposition of the SE Directive into national law was delayed. Lionel Fulton shows in Chapter 3 that, despite the fact that the transposition process in most countries was seen as essentially technical and did not generate widespread debate, it was not until spring 2007 that the last Member State had transposed the SE Directive. The article analyses how the different Member States have implemented the various options the SE Directive left to their discretion. Fulton concludes that, whereas much is common across all 30 sets of legislation, national practices have determined the choices of the country with regard to employee involvement.

Part II situates the SE corporate form in the company landscape. In Chapter 4, Sebastian Sick describes the background of the SE rules on worker involvement in general terms. One of the main hindrances to the SE as a Europe-wide uniform legal form was the reconciliation of various legal traditions and, in particular, of (board-level) participation rules in Europe. The solution that led to an agreement between Member States was formulated in two ways: first, the before-and-after approach, which is geared towards continuing the highest level of participation in the supervisory or administrative board of the companies involved in the founding of the SE; second, the priority given to negotiated solutions, in accordance with which provisions that have been agreed take precedence over legal regulations. The chapter ends with an overview of problems in the SE practice and with demands for revision. The crux of the problem is the question of what particular structural changes trigger a demand for renegotiation.

The next four chapters are dedicated to national reports. In Chapter 5, by Jan Cremers and Anders Carlson, the extraordinary share that the Czech Republic accounts for in the total number of SEs created is treated. The

SE is mainly an alternative to Czech national corporate forms, without a substantial transnational component. In the sixth chapter Roland Köstler assesses the experiences in Germany with negotiations on worker involvement. Given the fact that worker involvement is an integral part of daily business in this country, in most cases negotiations were taken up and the application of the standard statutory solution has been a rare exception. The author's impression is that more details were discussed and set down with regard to information and consultation (SE works councils) than with regard to participation. In the contribution on Luxembourg (Chapter 7 by Patrick Thill) the drivers underlying SE transfers to the country are investigated. The 2006 SE law does not prescribe any tax regime for SEs, but the government made the national SA tax framework apply to SEs, which has attracted many holding companies. However, there is no unified driver; sometimes the strength of the financial market constitutes an incentive, sometimes the surrounding countries represent the major market. In Chapter 8 Robbert van het Kaar notes that, in the Netherlands, the emergence of the SE did not have a major impact on the corporate landscape. However, one specificity is that the Netherlands was involved in almost one third of all the transfer of seats of SEs in the EEA. According to Van het Kaar, the overall picture is so diverse and the absolute numbers of SEs so low that it would be risky to speculate regarding the factors that may be relevant in explaining the different movements. Worker involvement seems to be unproblematic and not really relevant for the choice of the SE form.

Part III takes a closer look at the experiences with worker involvement. In Chapter 9 Udo Rehfeldt summarizes the results of important research commissioned by Eurofound. The arrangements of worker involvement in the SE have opened up a new dimension in the Europeanisation of industrial relations. The provisions of the SE Directive support the development of European identities in transnational companies and of European mandates for employee representation. In some cases there has also been a positive effect on workplaces where the notion of social dialogue and cooperation so far has been either weak or non-existent. This overall impact is however still limited. If the SE directive has succeeded in guaranteeing and Europeanising existing participation rights, no case was found where such rights were introduced in SEs without first having existed at national level. The second limitation of impact stems from the fact that only very few SEs with employee involvement have been created up to now.

Chapter 10, written by Sophie Rosenbohm, covers the relationship (and dynamic) between worker participation at board level on the one hand and information and consultation practices on the other. Her focus is on SEs headquartered in Germany, therefore the outcome cannot be generalised to other national industrial relations cultures. She identifies different groups of SEs. In some cases, the existence of a transnational information and consultation body is preserved, whereas in the majority of SEs examined a European information and consultation body is established for the first time. A third group is the small number of SEs where management and employee representatives have agreed on another procedure for information and consultation but this has not led to transnational employee representation. Overall, the empirical analysis underlying this chapter indicates that an SE foundation can potentially contribute to an improvement of transnational information and consultation procedures on the European level.

The eleventh chapter, by Edgar Rose, is an analysis of the content of SE agreements, again based on German case studies. The author concludes that, in comparison with the standard SE statutory regulations, in most SE agreements there are advantageous provisions for the employees' side; however, some agreements fall significantly short of trade unions' minimum requirements. Many of the SE agreements under investigation make a valuable contribution to the strengthening of employees' representation at the European level by providing a solid basis on which SE works councils may exert influence. In companies in which employee representatives sit on the supervisory board this is evident, particularly in the fact that it is predominantly the SE works council that plays the key role in deciding who shall occupy the supervisory board seats on behalf of the employees. Thus the role of the SE works council can be significantly greater than that of the European Works Council (EWC). On top of that SE negotiators have often managed to conclude better conditions for the SE works council operations.

Part IV is dedicated to the political and legal outlook for the SE and related initiatives. Chapter 12, authored by Jan Cremers, examines the process of revising the SE legislation. As is typical in the EU, a procedure for reviewing the impact of new legislation and deliberating on the possible need for revision was built into the SE legislation. The first go at evaluation was characterized by a certain reluctance of the social partners and the European Commission to recommend revision, in part because of the newness of the legislation. However, in a new round, the ETUC has

emphasized problems in the SE legislation and its implementation, including the lack of an effective central register and the ability of companies to ‘freeze in’ the current status of worker participation. However, in its new Action Plan on European company law and corporate governance announced in December 2012, the European Commission declined to propose revision of the SE legislation.

Chapter 13 (also authored by Jan Cremers) examines a number of other initiatives to establish European-level company forms. The political opposition to the SE proposal did not discourage the European Commission from proposing three other legal forms in 1992, namely the European Mutual Society, the European Association and the European Cooperative Society. All three quickly ran into opposition from some and a lack of interest by most, with only the European Cooperative Society eventually being passed (in the wake of the SE legislation). Subsequent proposals for the European Private Company (SPE) in 2003 (and finally tabled in 2008) and the European Foundation in 2012 have run into similar controversies, showing very clearly the ‘red thread’ of concern that appears again and again with regard to impacts on national business and industrial relations systems and a lack of clear business need.

In Chapter 14 Romuald Jagodzinski shows the interdependence of different European initiatives involving worker involvement. Specifically, the lifting of the multi-decade ‘blockage’ of the SE legislation was in part enabled by the European Works Councils Directive, which showed that a solution to national concerns could in part be mitigated through including negotiations on worker involvement. However, certain provisions in the SE legislation also established precedents which fed back into the revision of the EWC directive process, allowing for a stronger recast of the EWC Directive. This type of process has implications for discussions on other proposed directives or directives up for revision, including the Cross-Border Mergers Directive, and the Cross-Border Transfer of the Registered Office of Companies.

The final chapter, by Aline Conchon, provides an overview of the systems of employee board level representation in the EEA as well as recent developments. This chapter clearly shows the diversity of national systems of participation, which is one of the reasons that proposals not respecting this diversity have run into problems. Furthermore, it also shows the lack of a trend to convergence between systems, which ensures that

diversity between systems of worker participation will remain an issue for the foreseeable future.

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