

Chapter 4

Worker participation in SEs – a workable, albeit imperfect compromise

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1. The rocky road to the SE

At the European level, not least since the Single Market Act of 1986, the political and economic integration process and thus market liberalisation have progressed. This internal market is both the goal and the means of European integration. It provides the impetus for the abolition of trade barriers to the free movement of goods, services, people and capital between the Member States. At the same time, it drives the development of possibilities for enterprises to organise their cross-border activities. In order to achieve this goal, for years there have been efforts to promote the emergence of appropriate company law structures at several levels:

- through the harmonisation of national company law and
- through the creation of original European, supranational types of company,
- complemented by the increased competition of company law systems.

There are more than a dozen EU directives and recommendations on company law. Uniform frameworks are under discussion with regard to various issues of corporate governance (European Commission 2011a; European Commission 2011b; Reflection Group on the future of European company law 2011). Despite some efforts towards harmonisation, company law – and thus also the field of worker participation on company bodies – remains a hotchpotch. Thus there has so far been, in large part, no harmonisation in respect of the corporate constitution, legal forms and group law because of the variety of legal structures and industrial relations. The core areas of the laws on public limited company structures and on the conduct of company bodies have remained

national. Because of the system's path dependency it has not been possible to create a uniform model that does justice to all traditions. Instead, in recent times competition has been imposed on legal orders and in particular on corporate legal structures. This was caused not least by the cross-border mobility and cross-border recognition of national company forms, fortified by the case law of the ECJ (Centros 1999, Überseering 2002, Inspire Art 2003, etc.). The concept of competition realised by the increase in choice on the part of shareholders and companies seems in many cases to eclipse the concept of harmonisation.

Even the original European supranational forms of company (EWIR, SE, and SCE)¹ tend to consolidate competition between systems by offering, besides cross-border mobility, new alternative legal forms. Although they offer a uniform European legal cloak they are shaped by various forms of national company law legislation (Cremers 2012). Even though such a focus on competition and attractiveness in large parts of European company law can, on one hand, compel national legal forms to adapt (for example, the introduction of a so-called '*Unternehmergesellschaft*' or 'entrepreneur company' for small entrepreneurs in Germany's law on limited liability companies - GmbH - and reforms with a similar focus in other countries like Spain and Italy), on the other hand, it harbours the danger of a 'race to the bottom' with regard to the protection of stakeholders (Cremers and Wolters 2011: 54). The increase in organisational options for companies within the framework of European competition in particular creates dangers for employees because of the new possibilities to avoid worker participation on company boards (Sick 2008: 216, 221; Sick and Pütz 2011). Thus a threat to the emergence of a European social model cannot be excluded. There are doubts whether, over the long term, this is conducive to consistency in company law and social policy (see Art. 7 TFEU). The latter, in any case, according to Art. 153 para. 1f TFEU, also includes board level employee representation. And thus social integration must not be a contradiction but rather a requirement for economic integration (Malmberg, Sjödin and Bruun 2011).

Nonetheless, European legal reforms should offer an alternative to the various national legal forms and serve enterprises' cross-border activities in order to facilitate the exercise of freedom of establishment. For the first time they are putting into effect European regulations for board

1. After its failure in 2011 after its rejection by a number of member states, among other things because of shortcomings with regard to codetermination, the SPE remains on ice.

level-participation. The most prominent example is the European Company (SE). In this way workers' participation at EU level has reached a high point with the current SE provisions' (van het Kaar 2011) and offers an opportunity to disseminate worker participation throughout Europe. The legal basis of the SE was adopted at the European level on 8 October 2001 after more than 30 years of debate, having stalled in the area of company and worker involvement law. 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 worker participation rules in Europe. The variety of worker participation models in Europe became clear within the framework of the SE with regard to four criteria:

- corporate legal structure;
- thresholds for company board level employee representation;
- participation quotas;
- qualitative differences with regard to worker participation.

1.1 Corporate legal structure

With regard to the corporate legal structure as connecting factor in board level employee representation, some countries have chosen the two-tier system, with enterprise management through the board as well as a supervisory board as independent control and advisory body, incorporating employee representation (for example, Germany, Austria, Netherlands, Denmark). The one-tier structure with a single board of directors, which combines management and supervision, exists in other countries (for example, Sweden, the United Kingdom, Spain, Ireland). If there is board level employee representation, employees' representatives generally take on the role of non-executive directors. Other countries (for example, France, Finland) provide for a right to choose between the two systems (cf. Kluge, Stollt and Conchon 2010).

1.2 Thresholds for board level employee representation

Besides that, countries also differ significantly with regard to the threshold above which board level employee representation comes into play in company bodies (if at all). This ranges from 25 employees in Denmark through 35 in Sweden to 300 in Austria and 500 in Germany for one-third participation and 2000 for a parity-based supervisory board. At

the same time, there are also distinctions in terms of legal form and private or state-owned companies.

1.3 Participation quotas and qualitative differences with regard to board level employee representation

The differences with regard to participation rates are also substantial. Sometimes there is a fixed number of employees' representatives (Sweden, Norway), sometimes there is one-third participation (Denmark, Austria) and in particular in Germany there is parity (in general with a decisive vote of the chairman).

On top of this come differences in existing board level employee representation rights and in decision-making authority. However, it would be wrong to evaluate board level employee representation rights in isolation. They are to be considered together with industrial relations, to which, for example, the strength of the right to strike or of other competences in the system as a whole belong.

All this shows that a comparison and standardisation of different models is extremely problematic, which is why the creation of a uniform legal form was so difficult and subject to dispute. Only in 1996 did the European Commission's group of experts, under the chairmanship of Etienne Davignon, develop a workable concept. Because of the abovementioned differences the issue of worker participation had to be resolved by negotiations between the company and employees' sides with an additional legal fall-back solution to protect existing rights.

2. The compromise: the before-and-after approach and the priority of negotiated solutions

The turning point in the struggle concerning the legal form of the SE thus came with the introduction of the principle of protecting existing rights. This was taken into account in two ways: first, the before-and-after approach, which is geared towards continuing the highest level of board level employee representation in the supervisory or administrative body 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.

All Member States were able to agree on this solution: some, because they intended in this way to safeguard their existing level of board level employee representation and others, because they did not have to adhere to it and also (in particular in the United Kingdom) they set great store by the alleged competitive advantage of little or no employee participation.

The regulatory framework that was eventually adopted contains a Regulation on the SE's founding statute under company law (SE Regulation). Employee involvement is provided for in a separate supplementary EU Directive, which the Member States are required to transpose into national law (SE Directive). A so-called 'special negotiating body' (SNB) is to be formed for the phase of negotiating the agreement with the management on the manner and extent of employee involvement. According to the implementing legislation of many countries external trade union representatives can also (or are required to) be members of this body, even if they are not employees of the company concerned (cf. Art. 3 para. 2b). If an agreement is reached on employee involvement, it supersedes the fall-back of the standard statutory regulations in accordance with the Annex of the SE Directive. The European trade union movement supported this solution because in the struggle to improve industrial relations in Europe the SE for the first time offers an opportunity for the Europe-wide inclusion of all SE employees with a uniform level of information, consultation and participation (ETUC 2011). This model should thus represent the foundation for all further developments of cross-border company law. With its regulations on the SE the European legislator thus presents board level employee representation as a form of good European corporate governance.

According to the Directive, the role of the employees in the SE is anchored in two ways: first, by information and consultation through the formation of an SE Works Council, which is to be informed and consulted about important management plans (participation in accordance with works constitution legislation); second, at the level of the corporate legal structure through the influence exerted by employee representatives on the composition of the company's control and management organs (supervisory board or administrative board). Both forms of employee involvement – that of information and consultation and that of board level employee representation – can be combined. The SE Works Council is very similar to the European Works Council (EWC) in respect of its form of establishment, organisation, mode of operation and the

extent of its competences. However, when it comes to negotiations, there is no employee threshold and negotiations are limited to six months (one year maximum).

2.1 Negotiations and standard statutory (fall-back) solution

The priority of negotiated solutions means that the European legislator has largely foregone prescribing a determinate form of employee involvement or board level employee representation by law. The contents of agreements, indeed, are in principle left to the signatory parties. The authority to reach an agreement is, as already mentioned, restricted by two important cornerstones: first, by the 'before-and-after principle' for the protection of the rights acquired by workers previously employed in companies that had board level employee representation; second, by the incursion of fall-back provisions in the event that no agreement can be reached between the employee and the employer side. The fall-back or standard statutory provisions thus serve as benchmarks concerning:

- formation, composition, period of office and meetings of the SE Works Council;
- the information and consultation rights of the SE Works Council; and
- worker representation in the administrative body.

It is not permissible to entirely renounce cross-border information and consultation by means of an agreement. Usually, these rights are exercised in the SE Works Council. However, if no SE Works Council is formed, the parties must establish an alternative procedure for information and consultation with the same prescribed minimum contents (Art. 4 para. 2 SE Directive).

2.2 SE Works Council

If the negotiations cannot achieve results in the time period provided (six months to one year) a 'statutory' SE Works Council is set up, possibly with worker representation in the administrative body in accordance with the standard statutory provisions in the annex of the SE Directive. These provisions grant the SE Works Council much stronger rights than the fall-back provisions of the earlier EWC directive. In particular, the

SE Works Council plays a 'key role in determining which people shall be assigned to the supervisory board' (Rose in this volume). Also, there are further information rights with regard to cross-border matters and it is the statutory goal of consultations in extraordinary circumstances between the SE management and the SE Works Council to reach agreement on the form of the planned measures. It was only with the recast of the EWC Directive that came into force in 5 June 2009 that EWC-rules were aligned to SE Works Council rights.

An SE Works Council has competence with regard to matters with relevance going beyond the level of one single EEA Member State (transnational matters). It always takes precedence in relation to the EWC, however, because it is furthermore independent of the number of employees, it is not dependent on the initiative of the employees and it is tasked with distributing the quota of seats allotted to the employee representatives in the administrative body to the EEA Member States. It is in principle left to the negotiating parties to grant the SE Works Council more far-reaching competences with real regulatory powers within the framework of works agreements or board level employee representation rights. In that case, however, it often comes into competition with national works councils, which may occasionally lead to conflict. Here the competences of the national and the European levels must be properly brought into balance in the agreement and in practice. In any event, national employee representation shall not be infringed.

2.3 Board level employee representation

In order to avoid disputes concerning the varying quality of board level employee representation regulations in the EU Member States, the 'before and after comparison' is geared solely towards preserving the numerical share of members of the company's supervisory or administrative board to be appointed (for example, in Germany, Austria and Sweden) or proposed (in the Netherlands) by the employees' side. Thus in individual companies it depends on the maximum degree of rights concerning the appointment of members that existed prior to the founding of an SE.

Rules had to be established on the compulsory retention of board level employee representation to cover both cases in which the parties reach an agreement and cases in which no agreement is reached and thus the

statutory fall-back regulations kick in. In both instances it is generally required that the existing board level employee representation applies to a certain minimum quorum of the total workforce and to that extent bears a certain degree of representativeness (see next section).

2.4 Types of establishment, worker participation and company structure

The founding of an SE is limited to certain instances of enterprise restructuring and cooperation. Four possible original founding scenarios are envisaged (Art. 2 SE Regulation):

- *merger* of public limited companies subject to the law of different EEA countries;
- founding of a *holding company* by public limited companies and limited liability companies from at least two EEA countries;
- formation of a *joint subsidiary* by companies in accordance with Art. 48 para. 2 TEC, other legal persons (under public or private law) from at least two countries or by an SE itself; and
- *transformation* of a public limited company with its seat and main administration in one EEA country and which for at least two years has had a subsidiary subject to the law of another EEA country.

On top of this as a further derived form of establishment there is the foundation of a subsidiary SE by an existing SE (Art. 3 para. 2 SE Regulation).

In the case of merger, board level employee representation shall be ensured by the standard statutory solution only if previously at least 25 per cent of the SE's workforce was covered by it. In the case of a holding company the figure is 50 per cent. In order to obtain Spain's agreement an optional solution was created for the founding of an SE by merger. In this instance, the EEA countries can exclude the application of the standard statutory solution in national law and permit the founding of an SE only if agreement is reached. No state has exercised this option, however.

The inclusion of the transformation scenario as one of the options for founding an SE was particularly controversial because it was seen to harbour the risk that it would be used as a means of 'eluding codetermi-

nation’ and thus could undermine the preservation of acquired rights. Thus for the case of transformation of a national company into an SE the preservation of board level employee representation – to the same extent and with regard to the same elements – is always required (Art. 4 para. 4 SE Directive). With regard to ‘all elements of employee involvement’ – in the words of the directive – at least the same degree of board level employee representation as existed before the transformation into the SE is thus ensured. Correctly interpreted, this includes not only the proportion of employees but also the internal composition of the employees’ side: trade union representatives, employee representatives and thus indirectly also the size of the supervisory board.

An important precondition of the compromise that was eventually reached about the SE statute was the recognition in principle of the equivalence of the one-tier and two-tier company structure. The directive on employee involvement thus applies to both models. Quite a few people feared with regard to Germany’s strong codetermination that the legal form of the SE would not find much use – and not at all in the case of the one-tier model because strong participation on the part of employees in the board of directors would be an alien element. The opposite has been the case. In fact, the largest number of active SEs are to be found in Germany (see Köstler in this volume) – precisely because of board level employee representation.

Here in particular the SE offers enterprises organisational options with regard to board level employee representation. And the idea that in Germany there is no scope of application for the one-tier SE with board level employee representation has been refuted since Puma SE (founded in 2011) with its one-third participation involving three employee representatives as non-executive directors in the nine-person one-tier administrative board.

The new legal form offers the employees’ side the opportunity to internationalise the structures of representation in the company. This involves the international composition of the supervisory board by employees and the international representation of works councils with regard to cross-border matters. Large companies, by contrast, in founding SEs have so far sometimes sought to reduce the supervisory board in size, while small and medium-sized companies are using the new company form more and more to ‘freeze’ board level employee representation in its current form before reaching the threshold for the application of Ger-

man codetermination laws (500 employees with regard to the one-third participation law and 2000 employees with regard to the codetermination law).

3. Problems in SE practice and demands for revision

3.1 Static consideration of negotiation outcomes and structural changes

This codetermination-based motive to found SEs on the part of companies directs our attention directly towards problems with the SE in practice. One main shortcoming lies in the fact that negotiation outcomes or the standard statutory solution have long-term validity. There is no general and legally safeguarded specification for renegotiation if the facts on the basis of which negotiations were concluded subsequently change. Only in the case of structural changes in the SE and the affected companies is there an obligation for renegotiation (recital 18 of the SE Directive). The crux of the problem is the question of what particular structural changes trigger a demand for renegotiation. This is unambiguous, for example, in the acquisition of a legal entity with board level employee representation by an SE without codetermination or in a switch from the one-tier to the two-tier structure. Austria has transposed a useful list of legal examples into law (Art. 228 para. 2 *Arbeitsverfassungsgesetz* – Labour Constitution Act). Germany, for example, does not have anything of the kind.

For board level employee representation there are problems at two levels:

- It is not ensured that in the case of renegotiation because of structural changes the before-and-after principle devised to protect employees is oriented towards the new facts and employee numbers with regard to the obligatory standard rules.
- A mere increase in employee numbers does not represent a structural change according to the prevailing legal opinion and this does not provide grounds for a demand for renegotiations.

In this static consideration of the period of SE establishment there are grounds for fearing that the rights of employees with regard to board level employee representation will be frozen at the level of participation

existing when the negotiations take place. By focusing solely on the before-and-after principle for protecting acquired rights the dynamic character of national rights and thresholds is entirely neglected, thereby enabling companies to elude board level employee representation before the relevant threshold is reached for a higher level of board level employee representation. After the founding of an SE an increase in the number of employees and passing national thresholds for a higher level of board level employee representation does not lead to renegotiations with a new standard statutory solution. Many companies in Germany make use of this option (see Köstler in this volume). These SEs, after the passing of the national threshold, have no or a lower level of worker representation on the supervisory or administrative board. This gap could be closed by a detailed definition of ‘structural changes’. Any revision of SE law in the future should therefore include the following points:

- An increase in the number of employees by a certain number should lead to renegotiations as a structural change.
- Standard statutory solutions must be oriented towards the new facts.

Until this is the case the employees must seek in the negotiations, as far as possible, to achieve adequate regulations for renegotiations.

With regard to protection via the before-and-after principle the question also arises whether the standard statutory solutions have to be oriented only towards the level of board level employee representation practiced so far in the relevant companies or whether there should be compliance with the level provided for in the law, even if this hitherto has not been in use in the relevant companies. Thus does ‘protection of acquired rights’ mean the protection of the board level employee representation actually realised in the company so far, or does it mean the level of board level employee representation provided for by law? With regard to the standard statutory solutions it thus depends on the actual or the normative composition of the supervisory or administrative board. If one refers to the first – which thus far corresponds with actual practice – the follow-up question arises of until what point in the founding of the SE the enforcement of the demand for the level provided for in the law with regard to the standard rules can take effect. In the case of a transformation, the difference is particularly obvious because here the priority is protecting substantive acquired rights over the autonomy of negotiations. This is based on the safeguarding in the SE Directive (Annex Part 3a) of all worker representation provisions that previously ‘applied’. However,

laws also find ‘application’ that are not implemented in individual companies. The safeguarding of the level of worker participation provided for by law needs to be specified with regard to the abovementioned uncertainties when there is a revision of the SE Directive.

3.2 Shelf SEs

The large number of shelf SEs is another problem. Such SEs are founded without employees in order to be activated at a later date. In practice, these are registered without negotiations with the employees contrary to the wording of Art. 12 para 2. SE Regulation if the SE and its founding companies have no employees (see the contributions by Kelemen and Stollt and by Köstler in this volume). Properly speaking, although activation of such a shelf SE is to be regarded as a structural change with an entitlement that triggers an obligation to conduct negotiations, hitherto negotiations have actually taken place in only a few instances. The question is, however, what actually counts as activation (see Köstler in this volume). On top of this, the Registry no longer exercises supervision after the registration of the SE and, therefore, the entitlement to negotiations considered to be a condition of registration can be circumvented in practice. If the shelf SE is not to be used as a vehicle to bypass worker participation when it comes to its activation, specification of the definition of structural change and an obligation on the part of the Registry to supervise fulfilment of the obligation to engage in negotiations is required.

3.3 Negotiating autonomy

Another fundamental question concerns the scope or limits of the parties’ negotiating autonomy. In this respect, companies’ autonomy with regard to their articles of association and the organisational autonomy of the administrative or supervisory board are regarded as possible restrictions on the contents of agreements. In the case of an SE established by means of transformation, ‘the agreement shall provide for at least the same level of all elements of employee involvement as the ones existing within the company to be transformed into an SE’ (Art. 4, para. 4 SE Directive). In this respect, autonomy with regard to agreements, but also autonomy with regard to articles of association is also already restricted. In the case of other forms of SE establishment, negotiating autonomy

is restricted regarding the votes required to reduce the existing level of participation, to discontinue negotiations or to fail to enter into negotiations. A qualified majority of two-thirds of the votes of no less than two member states is needed (Art. 3 para. 4 and 6 SE Directive).

Of practical relevance is the debate concerning the limits of negotiating autonomy, in particular with regard to the size of the supervisory board. In practice, the size of the supervisory board is often excluded from the negotiations. However, because the size of the supervisory or administrative board is also decisive for the number of employee representatives, this should also be regulated in the agreement and take precedence over any possible decision on the part of the company. Clarification of this point in the SE Directive is therefore desirable.

4. Conclusion

Despite the problems and the risks with regard to worker participation, the regulations on the SE represent a historic compromise that takes proper account of the variety of industrial relations in Europe. It offers companies flexibility and a uniform legal form and grants the employees' side the opportunity to internationalise the structure of representation. The shortcomings with regard to safeguarding acquired rights need to be rectified and a dynamic approach taken to follow-up negotiations. But in no circumstances must there be a deviation from the compromise concerning the SE that is to the detriment of the employees, thus sacrificing the historic agreement on safeguarding employee rights on the way to a Social Europe to the idol of enterprise flexibility. The SE and the relevant provisions on worker participation should be taken as guidelines for all future models of European company law.

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