

# Chapter 6

## SEs in Germany

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### 1. Introduction

Looking back at six years of experience with the European company (SE) in Germany it must be said that there have been a lot of surprises. Even when the transposition law came into force at the end of 2004 many took the view that the number of SEs in Germany would be limited. Things have turned out otherwise.

Even if one considers only the proportion of normal companies out of all such companies in Europe (as of 1 June 2012, 100 out of 213) it is clear that Germany leads the field. Furthermore, in several respects there is a wide range of companies

- if one ranks them by number of employees, from more than 5 to over 100,000;
- from large public limited companies to family businesses, the latter perhaps only for asset management purposes – undoubtedly with a lot of shareholdings – but also as a means of raising capital for these family businesses;
- and finally, only 60 out of the 100 were previously German public limited companies and only 33 previously listed on the stock exchange.

### 2. The SE in the national corporate landscape

In the presentation in this chapter we shall focus on limited companies. In quantitative terms, especially the limited liability company (GmbH, of which there are around 1 million), then the public limited company (AG, 10,000) and finally cooperatives (8,000). Public limited companies are

incorporated companies whose equity capital is provided by shareholders. AGs by law must have a supervisory board that appoints and supervises the board of directors. This so-called dual system of company management and supervision is also decisive for the other two legal forms. However, this applies only above a certain number of employees (500).

AGs, GmbHs and cooperatives generally with more than 500 employees must have a supervisory board with one-third of the seats going to employees (in around 1,500 companies). In companies and groups with more than 2,000 employees parity applies: in other words, equal seats for the shareholders and the employees (660 companies).<sup>1</sup>

For Germany the SE for the first time provides an opportunity to switch from the dual-tier administrative board/supervisory board system to the one-tier administrative system. However, only 30 out of the 100 companies have done this so far. These companies – often family businesses – previously had almost no employee participation in the supervisory board. They were often not public limited companies in the form of an AG and straightaway moved over to the SE form. There are various reasons for this. Above all, when converting into a public limited company in Germany worker participation is compulsory. In general, around one-third of companies previously had no worker participation in the supervisory board, but were close to the threshold of 500 or 2,000.<sup>2</sup>

A notable exception with regard to switching to the administrative board system is Puma, with previously one-third of the seats in the supervisory board and now also in the board of directors.

A further argument for the SE is the possibility of simple transfer of seat to another country in the EEA at a later date. Very few have moved to Germany so far; however, this also applies the other way round. Otherwise, there is a wide range of reasons for transforming into an SE, from acquiring a European image through simplified corporate structures to merger with foreign companies.

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1. According to the law of 1976, if there is parity the chair – appointed by the shareholder members – of the supervisory board has a casting vote in the event of a stalemate. For mining and steel historically the oldest regulation applies, namely the threshold of 1,000 and the same number on each side plus a neutral member who has the casting vote in the event of a tie.
  2. Concerns with over 500 but less than 2,000 employees rarely come under the one-third participation law due to a legal loophole.

Parity has been retained in the supervisory board. All companies that had parity in the supervisory board (Codetermination Act 1976) kept it, although in some cases the number of members was reduced, even from 20 to 12. In the end, there are no cases left with parity in the supervisory board that has remained below what German law provides, at 6:6. It has always been possible to block successfully the notion promoted by some legal advisors that only parity as such counts. There was a contrary solution with regard to one-third participation from six to three to six to four (confirmed by a court ruling).

### 3. Facts and figures

A total of 213 out of the 1,286 SEs are 'normal' (in other words, a properly operating company with five employees or more). Besides normal SEs there are UFO and empty/micro SEs; 100 of the 213 normal SEs are in Germany.<sup>3</sup>

The others are to be found in 24 countries. Of the 100 normal SEs in Germany 70 have a dual-tier and 30 a one-tier structure.<sup>4</sup>

- (a) Eleven of the 70 with a dual-tier structure have parity-based codetermination (Allianz, BASF, Bilfinger, Fresenius, MAN, MAN Diesel, Porsche, SGL Carbon, SCA, BP Europa, Dekra) and prior to that were subject to the Codetermination Act 1976 that prescribes parity.

A total of 22 have (at least) one-third participation<sup>5</sup> and 37 (as a rule, either the total number of employees was below 500 or the holding had fewer than 500 – this is the exemption clause in §2 of the One-third Participation Act) have no seats.

There is information and consultation in all 30 monistic SEs (with one exception<sup>6</sup>).

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3. As of 1 June 2012.

4. This includes the first with one-third employee representation on the board of directors: Puma SE (1,056 employees in Germany).

5. One instance has 6:4 instead of 6:3: GfK.

6. Puma SE.

(b) Looking at the 100 normal SEs more closely:

1. Thresholds (when German companies establish an SE the relevant reference is the threshold of 500 or 2,000 for employees in Germany; therefore we categorise according to employees numbers):
  - 14 enterprises > 2,000 employees
  - 40 enterprises > 500 employees (but because of the legal holding problem – see above – of the One-Third Participation Act without employees in the supervisory board)
  - 46 enterprises < 500 employeesThe majority of enterprises were thus below the threshold for supervisory boards with employee participation in Germany.
2. Company law/founding/Normal SE
  - Only 60 of the 100 enterprises were previously a public limited company
  - Only 33 of the 100 enterprises are listed on the stock exchange
  - But 26 of the 100 are activated shelf SEs.
3. Size of the supervisory board
  - In 12 enterprises the size has remained the same (for example, Fresenius, SGL, SCA, BP, Dekra); changes took place from 20 to 12 (Allianz, BASF, Bilfinger), from 12 to 20 (Porsche), 20 to 16 (MAN) and 9:9 (MAN Diesel and Turbo SE). These enterprises already had parity in the supervisory board (Codetermination Act 1976). A ratio of 6:4 was chosen (at GfK) since one-third participation is not required (LG Nürnberg-Fürth 8.2.2010).

#### **4. Negotiations on worker involvement**

If negotiations were entered into in Germany it was important to determine whether there was already participation on the part of German employees in the supervisory board. Then the before-and-after principle of the SE safeguarded this legal position and, to that extent only, the European distribution of seats was an issue. Apart from that it was important whether there had previously been a European Works Council or not. In the latter case, in many instances it had to be explained to the other members of the special negotiating body what the upcoming negotiations were about.

It is often said that negotiations with the employees' side when an SE is established are long and costly. The latter should above all in 'important instances' be related to the general transformation costs, in which case things look very different. And with regard to time, in many instances the negotiations were completed in a day. Less complex negotiations are often mistakenly used as an argument which in fact utilised the basic six month period (but only in one case so far have the negotiations been extended). Indeed, because of the schedule of the negotiators on the enterprise side no other option was possible. It also makes a difference whether representatives from three countries or all EEA states have a seat at the negotiating table.

Germany has transposed into law the possibility provided for in the SE Directive of allowing external trade union representatives to be members of the special negotiating body. The limit is every third seat in the German delegation, however. But this is not contrary to European law, as many believe. On the contrary, the relevant provisions need to be set out more precisely to establish how this has to be done technically.

In general we can say that the failure of negotiations and thus the application of the standard statutory solution has been a rare exception (only one instance of this is known).

Many things to do with the standard statutory solution – in particular when previously there was parity in the supervisory board – are subject to dispute among jurists. This applies especially to the simple change of form into an SE, which is a frequent occurrence. Many in that case have preferred to reach agreements, however.

It is difficult to tell who has given away more in this situation. Without knowing the circumstances in which the agreements were reached we can only evaluate their contents (see also section 3.7 of the contribution by Rose to this volume). At this point the impression is that more details were discussed and set down with regard to information and consultation (SE Works Council) than with regard to codetermination. With regard to information and consultation there were also 'highly imaginative' procedural solutions in order to avoid having to set up an SE Works Council: the relevant body was given a different name or, for example, the workforces were offered only information (but not consultation). This concerned above all small companies, however, which often had

only domestic interest representation or even no works council.

The passages in the agreements on codetermination (30 instances as of 1 June 2012) are very similar, however, and often differ only in accordance with how things stood previously (parity or one-third participation). In the case of parity, from time to time there were discussions on whether the old regulations and practices could be retained in the face of the priority of European law. This involved, for example,

- the deputy chair,
- committees of the supervisory board,
- voting procedures in the supervisory board,
- and the labour director.

As a rule, compromises were found with regard to formulations that maintained previous positive practices.

## **5. Experiences/practical impact on worker involvement**

With a view to the upcoming revision a number of problematic issues can be treated. In practice, they have never had as much importance as the countless articles written by lawyers who recommend themselves as business consultants, would suggest.

### 5.1 Shelf SEs

Article 12 of the SE Regulation, by all means, entails negotiations with the employees' side, or at least an attempt in that direction. That was what we thought and thus we tried to persuade the courts of registration in Germany not to register SEs without employees. Now, however, this entity exists in German company law, known as a shell or shelf company. Thus these applications to the courts were, on one hand, unsuccessful since they stated that without employees there can be no negotiations, but they can definitely be registered. On the other hand, there was a legal opinion that, when an SE is activated, the entitlement to negotiations is revived and thus negotiations can be called for (finally confirmed by

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7. Guiding principle: 'on the question of the resumption of the employee participation procedure on the establishment of a shelf SE with an enterprise with employees.'

the higher regional court in Düsseldorf on 30 March 2009). But what is activation? Is a change in the purpose of the business enough for that? How many employees are enough for that purpose? However, cases are also known in which negotiations were deliberately started with only a few employees. And who is responsible for supervising the whole thing? When it comes to introducing amendments an obligation must be laid on the courts of registration and anchored in the SE Regulation. But naturally the best thing would be greater precision concerning instances of activation.

This applies all the more to the latest idea from the lawyers, namely a transformation into an SE without having any employees at all in the foreign subsidiary. If an agreement is concluded in the event of transformation by all means it must be supplemented by renegotiation clauses to cover the case in which there are employees abroad later on. Otherwise, there is a structural change so that renegotiations arise as a legal consequence.

## 5.2 Avoidance or freezing of codetermination

With regard to the high thresholds in German legislation (500, 1,000, 2,000) it is clearly the case that enterprises transform into SEs shortly before they are due to reach a threshold. This applies to 500 and also 2,000; empirical research has been carried out on suspect cases. Many enterprises just under 2,000 have also exploited a loophole in German law, the One-third Participation Act (details in §2 of the Act). This provides for fundamental exceptions from supervisory board participation if the holding itself has fewer than 500 employees and the group less than 2000. The latter is totally out of date but even with the recent amendment in 2004 it was not changed. A response on the part of the German legislator is both possible and necessary here. Generally, the German thresholds for national supervisory board participation should be changed, if one compares them with how things stand in other countries.

It is astonishing, however, that a large number of companies went below the lowest German threshold already at the time of transformation into an SE. It is an open question whether here the European image, the purpose of the business or the influence of consultants is to the fore.

The other cases, however – deliberately establishing a participation-free

SE in the first place – can ultimately not really be solved by defining entitlements to renegotiation in European law more precisely and more extensively and by including considerable changes in the workforce. This demonstrates that the before-and-after principle which was envisaged as a means of protection with regard to the establishment of an SE, including workers' participation, can also have a detrimental effect under the law as it currently stands.

### 5.3 SE with the involvement of an SE or combination SE with merger

The SE Regulation already provides that an SE can also establish subsidiary companies in the form of an SE. In practice, this takes two forms:

- shelf SEs give birth to further shelf SEs, and
- groups in the form of an SE combine certain activities cross-border in a subsidiary SE.

The first form serves to avoid the need to raise a lot of capital for those who trade in shelf SEs. Here it should be considered whether this business model should be supervised more strictly by the courts. In some circumstances it would be enough if the high stock capital of the SE had to remain in the shelf company.

On the establishment of an SE within a group the question regularly arises of who is now responsible for negotiations on the employees' side and how a new agreement can be inserted into the existing one. While for the regulation of codetermination particular attention must be paid to the clause that takes account of an increase in the number of employees for the SE Works Council it is a matter of the new body linking up with the existing SE Works Council. To the extent that the specific features of the new entity are to be taken into account it may not be isolated from the overall structure of information and consultation.

Many cross-border mergers now take place in accordance with the 2005 EU Directive on cross-border mergers of limited liability companies and supersede the transition to an SE. Indeed the conditions for enterprises are arranged more attractively. Here the reverse process of adaptation to the participation regulations in the SE would be necessary. It is thus particularly outrageous that a merger can take place directly without nego-

tiations with the employees' side. And naturally European mergers lack something that would correspond to the SE Works Council.

An SE can be established by merger of public limited companies (the case at issue in the SE Regulation). One can now consider establishing an SE from the outset, however, for example, by a change of legal form and then later hit upon the idea of reducing complexity in the group. While the instance of a merger of a company not previously existing in the group via the entitlement to renegotiation is already regulated by law, the other forms that are encountered in practice have not been conclusively thought through in legal terms. Harmonising solutions need to be developed in European law for cases in which, after the establishment of an SE, as second step foreign subsidiaries vanish as a result of cross-merger. Attention will have to be paid to that at the time of the second step and, on the other hand, a distinction will have to be made between the issues of the SE Works Council and worker participation in the supervisory board/administrative board.

## **6. Concluding remarks**

As someone concerned with practical consultation – also with regard to existing SEs – I would like to emphasise two aspects:

Where the employees' side was previously strong and the trade union involvement was intensive after the establishment of the SE, things remain satisfactory. In such instances the new colleagues from abroad form a good impression of participation in the supervisory board/administrative board, which previously they had not experienced. They are urged to promote it in their own countries.

In other set-ups there is at least a cross-border information and consultation committee; the thresholds for a European Works Council were much higher and the enterprise management must seize the initiative at the establishment of the SE, while in the case of the European Works Council the demand for negotiations must come from the employees' side. Even in these instances the judgement should not be made that it is only a European instrument for weakening the position of the employees. Here it is thus important to reach agreement on information and consultation rights that are closely in compliance with the SE Directive and the national transposing legislation and not to give up important points again.