

# **New forms of employee involvement at supranational level. The case of the European Company**

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## **INTRODUCTION**

Since the late 1960s/early 1970s various issues of employee involvement have been on the political agenda of the European Union (EU) (Gold/Schwimbersky 2008). The original plan was to create a unitary system of economic and/or industrial democracy and to initiate upward "harmonization" of existing national systems. Various draft Directives failed during several decades of political controversy between national and European corporate actors. In institutional terms unanimity in the Council of Ministers constituted a necessary requirement, but fundamental and enduring differences of interest between member states prevented any solution. Finally, the Maastricht Treaty, or to be more precise its Protocol on Social Policy and Agreement changed the requirements for decision making from unanimity to qualified majority. As a consequence, one part of this ongoing problem was solved when the Directive on the "Establishment of a European Works Council or a procedure in Community-scale undertakings ... for the purposes of informing and consulting employees" (EWC Directive) was passed in 1994. Ever since then it has been of major practical relevance as well as scholarly interest. More than 850 EWCs exist (Kerckhofs 2006) and research on their day-to-day activities and protracted problems has become the dominant topic in European employment relations research (Keller/Platzer 2003).

However, the other part of employee involvement still remained untouched if not dormant. The report of the so-called Davignon group (Group of experts 1997) was the beginning of the final stage and provided the key for the solution of a long lasting political stalemate in a diverse European polity. In 2001, a compromise was struck in the regulation of the European Company (Societas Europaea or SE). It consists of two interrelated parts, the "Regulation on the Statute for a European Company" (2157/2001/EC) and its "Directive supplementing the Statute for a European Company with regard to the involvement of employees" (2001/86/EC). Both parts create a new legal structure for corporate governance at the supranational level and are intended to progress both economic and social integration. As the latter has been largely neglected to date, these regulations will make an effort to contribute to the "social dimension of the internal market" (in Delors' terms) or to the development of a "European social model" (in more recent terms).

For the purpose of this paper, the Regulation is of less importance than the Directive. The former is directly binding and applicable in all member states, whereas the latter had to be transposed from European into national legislation by all (old and new) member states within three years. The SE Directive is of fundamental interest for all problems of European employment relations in general as well as for new forms of voice and representation in particular. Its mode of regulation differs from existing, purely national forms as well as from former European ones but has some striking similarities with the already existing EWC Directive. Both are characterized by their procedural rather than substantive form of supranational regulation. Furthermore, in contrast to existing national forms of regulation, all issues of employee involvement are not preset by legislation but are freely negotiated between central management and the employees of the company. Finally, employee involvement in the context of SEs can consist of two closely interrelated levels, the SE works council (SE WC) for information and consultation purposes and board level representation.

The paper will discuss neither the protracted history nor legal technicalities because both have been extensively discussed in the existing literature (Gold/Schwimbersky 2008; Van Greven/Storm 2006). Instead of dealing with these more or less well-known issues we will focus on important but widely neglected problems and present a systematic empirical analysis of negotiated forms of worker representation and employee involvement in the normal SEs established between late 2004 and the end of 2008, the period covered in this paper. These cases are of interest for two interrelated reasons. First, they constitute the first empirical tests of the legal provisions for this new supranational form of corporate governance. Second, their

negotiation and practice define rules and principles for all future SEs and, thus, initiate path dependencies of lasting impact. They mark a major change from the previous focus on EWCs and are of significance for future public debates.

The questions we address in this paper are: What do these new forms of collective voice and representation at the supranational level look like? What is the relevance of SEs for the development of an emerging system of European employment relations in a broader perspective and what is their impact for the advancement of the European social model? – In methodological regards the paper is based on an analysis of the existing literature, including a large number of company documents, the only valid database on SEs (<http://ecdb.worker-participation.eu>), a series of semi-structured interviews with representatives of both sides and non-participant observation in some official meetings. Individual SEs constitute our point of departure but we provide a systematic analysis.

## ONE CAVEAT: VARIETY OF TYPES

Four ways of establishing an SE are indicated in the Statute (Article 17-37): merger, holding company, subsidiary, conversion.

Table 1: Ways of forming an SE

|                     |                                                                                                                            |
|---------------------|----------------------------------------------------------------------------------------------------------------------------|
| • <b>Merger</b>     | Public limited-liability companies from two member states can form an SE by merger                                         |
| • <b>Holding</b>    | Public and private limited-liability companies from two member states can form a holding                                   |
| • <b>Subsidiary</b> | Any legal entities governed by public or private law from two member states (or an SE itself) can form a subsidiary -SE    |
| • <b>Conversion</b> | A public limited-liability company can convert into an SE if it has had a subsidiary in another member state for two years |

Source: Köstler 2006, 17.

By 31/12/2008 at least 307 SEs were registered (European Company Database 2008). The indicated legal provisions are quite different from the results of their implementation at enterprise level. In contrast to all former assumptions, various unexpected forms have to be distinguished:

- “Empty” SEs are economically active but have no employees,
- “shelf” SEs are inactive,
- for “UFO” SEs only few details such as their names, are known from the registers.

Some indicators provide strong hints that these cases are also empty or shelf SEs. The existence of these forms is the major first unexpected result of implementation. These exceptional forms of SEs without economic activity and/or employees even represent the majority in absolute figures (European Company Database 2008).

70 (plus about 20 at present in the process of formation) “normal” SEs have both business activities and employees. Thus, they comply with the criteria of the Directive. In quantitative regard they constitute a minority. However, they are of focal interest because of their characteristics and they make up the unit of analysis for our detailed empirical analysis.

In empirical perspective not all possible forms of establishment are of equal, and not even of similar relevance: By far, conversions are the most frequent form followed by mergers; the formation of a holding company or a subsidiary is of next to no practical importance for normal SEs. This distribution is remarkable because the long-lasting controversy about the SE Statute was dominated by the assumption that mergers would constitute the dominating form of establishment. The main reason for the choice of conversions has to do with the motives of foundation; we come back to this surprising aspect in the next section. All in all, the rather complicated distinction of legal forms is, at least for the time being, not of major practical importance.

## PRELIMINARY ANALYSIS AND EXPLANATION

Concerning the date of establishment, there is some slow numerical growth, i. e. an increasing interest in the new legal form exists. The slow start had to do with the distribution and

availability of information as well as with initial uncertainties and delays of transposition in some member states.

Table 2: Establishment of normal SEs by year

| Year | No. of normal SEs established |
|------|-------------------------------|
| 2004 | 2                             |
| 2005 | 4                             |
| 2006 | 11                            |
| 2007 | 26                            |
| 2008 | 27                            |

Source: Own research.

Some characteristic features are the reasons for this growing interest. It seems as if company-specific and not sector-specific problems are the decisive factors for the establishment. First of all, there is a more or less arbitrary dispersion across sectors/industry; there are normal SEs active in industrial as well as in service sectors; internationalized sectors, such as the auto industry, are not overrepresented. At least for the time being, this specific pattern is difficult to explain because the overall number of normal SEs is still rather small.

Furthermore, in terms of company size there is no clear trend but enormous differences ranging from SMEs to MNCs or from single-digit to six-digit numbers of employees. In this regard, the SE regulation differs greatly from the EWC Directive. SEs are of non-binding, purely optional nature and leave all existing national forms of governance untouched. They can be selected by enterprises of all possible sizes, whereas only MNCs (with 1000 employees in the EU and at least 150 in two member states) have to establish an EWC. This formerly unexpected present pattern of broad attractiveness could last because the Directive defines no limits in terms of numbers. The only prerequisite for establishing an SE is a registered capital of 120,000 EUR.

As originally expected, some large companies have established SEs (Davies 2003). In doing so, they realize economies of scale and savings in transaction costs including administrative and legal costs. In these cases the levels of employee involvement existing at national level have to be preserved in the SE according to the “before and after” principle of the Directive (Article 7). Occasional attempts to change the status quo were not realized because of trade union intervention. – Surprisingly or not, the empirical distribution across EU member countries is rather uneven. About one half of all normal SEs have their seat in Germany, some others in Austria and the Scandinavian countries, few in the new member states that joined the EU since 2004<sup>1</sup>, but none in the UK or the Mediterranean countries. It is also noticeable that large MNCs whose headquarters are outside of Europe are (still) completely missing.

Quite obviously the new legal form is overtly attractive for German companies. Our best personal guess is that this regional concentration has to be explained by peculiarities of the German system of co-determination. According to the Co-determination Act (*Mitbestimmungsgesetz*) of 1976 all private and public limited companies with more than 2,000 employees are subject to stricter co-determination and have to provide parity between employers’ and employees’ representatives on their supervisory board. According to the One-Third Participation Act (*Drittelbeteiligungsgesetz*) of 2004 companies with a workforce of 500 to 2,000 have to establish a supervisory board and employee representatives constitute one third of its members. If a company comes close to the threshold of 2,000 employees the establishment of an SE is an attractive option to avoid changing the composition of the supervisory board. If a company has close to 500 employees this option is appropriate to prevent the establishment of a supervisory board. Furthermore, the Directive provides the choice between monistic and dualistic forms of corporate governance. We will come back to this issue.

This strategy should not be labelled “escape from co-determination” in its rigorous sense because these companies have never been subject to stricter forms. In our view “avoidance of stricter forms of co-determination”, “freezing of existing standards” or “preservation of the status quo ante” are more accurate descriptions. In other words, the new legal form of SE provides companies of certain sizes with an easy way out of national rules and creates a comfortable option that was not available under purely national forms of regulation. It remains to be seen, of course, if this emerging trend will continue and stabilize.

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<sup>1</sup> The distribution across countries is different if we have a look not only on normal SEs. For instance, in the case of shelf SEs, there are many companies registered in the Czech Republic.

Table 3: Normal SEs

| Company (Name)                                 | Headquarters                   | Sector of Activity              | Number of Employees (if known) | Organ structure | Date of registration |
|------------------------------------------------|--------------------------------|---------------------------------|--------------------------------|-----------------|----------------------|
| ABN AMRO Nordic Securities SE                  | Sweden                         | Financial Services              | 322                            | One-tier        | 30.09.05             |
| Allianz Investment Management SE               | Germany                        | Financial Services              | ca. 350-500                    | One-tier        | 12.06.07             |
| Allianz SE                                     | Germany                        | Financial Services              | 133.846                        | Two-tier        | 13.10.06             |
| ASIC SE                                        | Germany                        | IT                              | 1.429                          | Two-tier        | 31.10.08             |
| BASF SE                                        | Germany                        | Chemical Industry               | 65.590                         | Two-tier        | 14.01.08             |
| Bitzer SE                                      | Germany                        | Metal                           |                                | One-tier        | 14.04.08             |
| BVE Holding SE                                 | Germany                        | Financial Services              | 2                              | One-tier        | 19.06.08             |
| Carthago Value Invest SE                       | Germany                        | Financial Services              | 5                              | Two-tier        | 15.02.06             |
| Catalis SE                                     | Netherlands                    | IT                              | 444                            | One-tier        | 25.01.08             |
| Colostrum Gesundheitsprodukte SE               | Germany                        | Trade                           |                                | Two-tier        | 27.10.08             |
| Conrad Electronic SE and Conrad Holding SE     | Germany                        | Retail                          | 2.414                          | One-tier        | 18.08.06             |
| Convergence CT SE                              | Germany                        | Medical Engineering             | 3                              | One-tier        | 31.01.06             |
| Conwert Immobilien Invest SE                   | Austria                        | Real Estate                     | 79                             | One-tier        | 14.12.07             |
| Demonta Trade SE                               | Czech Republic                 | Metal                           | ca. 30                         |                 | 01.06.07             |
| Donata Holding SE                              | Germany                        | Cosmetics                       | 3.922                          | One-tier        | 21.03.06             |
| DVB Bank SE                                    | Germany                        | Financial Services              | 437                            | Two-tier        | 01.10.08             |
| Elcoteq SE                                     | Luxembourg (formerly Finland)  | Metal                           | 7.450                          | One-tier        | 01.10.05             |
| Equens SE                                      | Netherlands                    | Financial Services              |                                | Two-tier        | 17.07.08             |
| Eurotunnel SE                                  | Belgium                        | Transport                       |                                | One-tier        | 04.04.06             |
| Fresenius SE                                   | Germany                        | Chemical Industry and Hospitals | 45.777                         | Two-tier        | 13.07.07             |
| Galleria di Brennero Brennerbasistunnel BBT SE | Austria                        | Construction                    | 33                             | Two-tier        | 17.12.04             |
| Graphisoft SE                                  | Hungary (formerly Netherlands) | IT                              | 253                            | One-tier        | 27.07.05             |
| Gütermann SE                                   | Germany                        | Textile                         | ca. 800                        | Two-tier        | 13.08.08             |
| Hager SE                                       | Germany                        | Metal                           | ca. 7.600                      | Two-tier        | 15.06.07             |
| HAWE Hydraulik SE                              | Germany                        | Metal                           | ca. 1.800                      | Two-tier        | 05.08.08             |
| HITEUROPE SE                                   | Germany                        | Logistics                       |                                | One-tier        | 06.11.08             |
| Huber Group Holding SE                         | Germany                        | Metal                           | ca. 100                        | Two-tier        | 08.04.08             |
| I. M. Skaugen SE                               | Norway                         | Transportation                  | ca. 1.500                      | One-tier        | 20.12.07             |
| Informa Deutschland SE                         | Germany                        | Media                           |                                | One-tier        | 07.02.08             |
| Interseroh SE                                  | Germany                        | Metal                           | 1.729                          | Two-tier        | 24.09.08             |
| Istrokapital SE                                | Cyprus                         | Financial Services              |                                |                 | 01.02.08             |
| Joh. A. Benckiser SE                           | Austria (formerly GE)          | Financial Holding               |                                | One-tier        | 10.04.07             |
| Klöckner & Co. SE                              | Germany                        | Metal                           | 7.377                          | Two-tier        | 08.08.08             |
| Knauf Interfer SE                              | Germany                        | Metal / Services                | 1.667                          | Two-tier        | 27.06.08             |
| Luxury & Sport Cars SE                         | Latvia                         | Trade                           |                                | Two-tier        | 06.06.07             |
| Lyreco CE SE                                   | Slovakia                       | Trade                           | ca. 30                         | One-tier        | 08.10.05             |
| MAN Diesel SE                                  | Germany                        | Metal                           | 6.682                          | Two-tier        | 31.08.06             |
| Max Bögl International SE                      | Germany                        | Construction                    |                                | Two-tier        | 09.11.07             |
| Mensch und Maschine SE                         | Germany                        | IT                              | 350                            | One-tier        | 07.12.06             |
| NEW YORKER SE                                  | Germany                        | Trade                           |                                |                 | 13.11.08             |
| Nh-Trans SE                                    | Czech Republic                 | Transport                       |                                |                 | 31.07.07             |
| NordiTube Technologies SE                      | Germany (formerly S)           | Metal                           |                                | One-tier        | 30.05.08             |
| Odfjell SE                                     | Norway                         | Transport                       | ca. 3.500                      | One-tier        | 23.07.07             |
| Odfjell Terminals SE                           | Norway                         | Transport                       | 860                            | One-tier        | 23.07.07             |
| Olivenbauer SE                                 | Germany                        | Restaurants                     |                                | One-tier        | 19.09.06             |
| Omnia Holding SE                               | Czech Rep.                     | Real Estate                     | ca. 5                          |                 | 02.08.07             |
| Orchestra Service SE                           | Germany                        | IT                              | 60                             | One-tier        | 15.06.07             |
| PCC SE                                         | Germany                        | Chemical                        | 3.756                          | One-tier        | 05.02.07             |
| Plansee SE                                     | Austria                        | Metal                           | 1.422                          | One-tier        | 11.02.06             |
| Porsche Automobil Holding SE                   | Germany                        | Automobile                      | 11.571                         | Two-tier        | 13.11.07             |
| Prosafe SE                                     | Norway                         | Oil                             | 55                             | One-tier        | 02.02.07             |
| Q-Cells SE                                     | Germany                        | Solar Energy                    | ca. 2.500                      | Two-tier        | 23.10.08             |
| Riga RE SE                                     | Latvia                         | Financial Services              | 31                             | Two-tier        | 11.08.06             |
| RKW SE                                         | Germany                        | Chemicals                       | 2.221                          | Two-tier        | 08.10.08             |
| Sapodo SE                                      | Germany                        | IT                              | 7                              | One-tier        | 13.11.07             |
| SCOR Global Life SE                            | France                         | Financial Services              | 801                            | One-tier        | 25.07.07             |
| SCOR Global P&C SE                             | France                         | Financial Services              | 801                            | One-tier        | 03.08.07             |
| SCOR SE                                        | France                         | Financial Services              | 801                            | One-tier        | 25.06.07             |
| SE Sampo Life Insurance                        | Estonia                        | Financial Services              | 110                            | Two-tier        | 12.01.07             |
| Seesam Life Insurance SE                       | Estonia                        | Financial Services              | ca. 200                        | Two-tier        | 29.10.07             |
| Sevic Systems SE                               | Germany                        | Elektronics                     | ca. 100                        | One-tier        | 15.03.07             |
| SGS SandersGeoScience SE                       | Germany                        | Electronics/IT                  |                                | One-tier        | 04.11.08             |
| Solon SE                                       | Germany                        | Solar Energy                    | Ca. 850                        | Two-tier        | 02.12.08             |
| SpiritON MEDIA Holding SE                      | Germany                        | Media                           |                                | One-tier        | 21.11.07             |
| Strabag Baunoting SE                           | Austria                        | Construction                    | 32.682                         | Two-tier        | 12.10.04             |
| Surteco SE                                     | Germany                        | Paper/Plastics                  | 2.109                          | Two-tier        | 20.11.07             |
| transGourmet Holding SE                        | Germany                        | Trade                           | ca. 21.000                     | One-tier        | 20.11.08             |
| Wiener Privatbank SE                           | Austria                        | Financial Services              |                                | One-tier        | 23.08.08             |
| WIKI International SE                          | Germany                        | Metal                           |                                | Two-tier        | 01.12.08             |
| Wilo SE                                        | Germany                        | Metal                           | 1.871                          | Two-tier        | 24.07.08             |

Source: European Company Database 2008 and own research.

## FORMS OF EMPLOYEE INVOLVEMENT I: THE SE WC

The conclusion of autonomous negotiations on employee involvement constitutes a necessary precondition for the official registration of an SE in the country it is headquartered in (Article 12 of the regulation). In the founding phase a special so-called negotiation body (SNB), whose election and all other procedural issues are indicated in the Directive (Article 3), constitutes the representative organ of the employees and acts on their behalf. Its principles are similar to those of the EWC Directive. Both have a strict priority for negotiated solutions.

The first examples demonstrate that this body constitutes no monolithic bloc of interests because it represents rather heterogeneous if not even contradictory interests. Processes of internal bargaining between representatives from different countries take place (among others, about the final distribution of seats) (Keller/Werner 2008). These internal difficulties must be settled and common positions must be defined before negotiations with management are launched; otherwise employees' bargaining position is weakened. Both sides can make use of external resources. The management side frequently hires law firms. The SNB tries to improve its bargaining position in the negotiations and utilizes the expertise of representatives from national or supranational unions.

The Directive allows for three potential outcomes (zero option, application of standard rules, agreement, cf. Table 4). In reality however, these negotiations mostly lead to some kind of compromising agreement because no side has an interest in their failure. In this procedural regard, the legal prescription that negotiations have to be concluded before the registration of the SE can take place (Article 12 of the regulation) is of major importance. In substantive regard, they result in tailor-made, rather "flexible", non-standard forms and mechanisms of employee information and consultation. These outcomes (including size and composition, available resources such as release from work opportunities of training and education, number of ordinary and extraordinary annual meetings, terms of office) have lasting consequences and define "constraints and opportunities" for all future ordinary activities of the SE WC. Especially in larger SEs, smaller steering or select committees exist as sub-units of the SE WC and are responsible for the organization of day-to-day activities.

Table 4: Possible outcomes of the negotiations about employee involvement

|                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <ul style="list-style-type: none"><li>• <b>Option 1: "zero option"</b><ul style="list-style-type: none"><li>→ if the SNB decides not to start or to cancel negotiations (with 2/3 of the votes representing at least 2/3 of the employees and employees from at least two member states)</li><li>→ an EWC as a transnational organ of employee involvement is only possible if the preconditions of the EWC Directive are fulfilled</li></ul></li><li>• <b>Option 2: Agreement about employee involvement</b><ul style="list-style-type: none"><li>→ according to Article 4 of the Directive</li><li>→ "normal" scenario</li></ul></li><li>• <b>Option 3: standard rules apply</b><ul style="list-style-type: none"><li>→ if no agreement is reached between the parties</li><li>→ if no agreement is reached before the deadline and the governing bodies of the companies approve the continuation of the procedure</li></ul></li></ul> |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|

Source: Köstler 2006, 24.

The so-called "standard rules for information and consultation" provided in the Directive (Article 7) define default standards of employee involvement if no agreement can be reached within the comparatively short period of six months. These statutory fallback provisions are of relevance in the vast majority of negotiations because they constitute a certain baseline that can hardly be undercut (Keller/Werner 2008). They constitute a certain "shadow of the law" for both sides: Management can hardly offer less favourable conditions without taking a high risk of failure, the SNB can hardly achieve more without management's voluntary consent. Therefore, these "standard rules" are comparable to the "subsidiary requirements" for EWCs. – Furthermore, if an EWC existed before the establishment of the SE, this institutionalized body of interest representation is usually transformed into an SE WC, in other cases an SE WC is established. The level of information and expertise that is available for the SNB is higher in the former case – and can be of major impact during the negotiations.

It is obvious that, as in the case of EWCs (Kerckhofs 2006), national trajectories including their customs and practice exert a strong influence on the specific character of SE WCs. They can

be designed as employee-only bodies, as in Germany, or as joint bodies, as in France or Belgium. SEs have followed their national path dependencies: All SEs headquartered in Austria or Germany have established employee-only SE WCs whereas SEs headquartered in France have opted for joint bodies, as our data shows. It remains to be seen however, if these different forms lead to different outcomes.

Finally, the quality of options differs. It has to be pointed out that SE WCs do not have genuine rights of co-determination and co-decision-making but only much weaker rights of information and consultation. In this regard they are roughly comparable with EWCs whose ability to influence outcomes are, however, less favourable because fallback arrangements are different in both Directives. In qualitative regard the options of SE WC differ from those of some of their national counterparts (especially but not only German works councils).

## **FORMS OF EMPLOYEE INVOLVEMENT II: BOARD LEVEL REPRESENTATION**

Basically two forms of corporate governance at board level exist in individual countries. So-called one-tier systems have only one administrative board (or board of Directors) (such as in the Anglo-Saxon countries) whereas two-tier systems consist of a management board and a supervisory board which monitors the former (such as in Germany). In empirical regard, the question of superiority is undecided (Nagel 2007) and trends towards convergence are difficult to detect.

The majority of EU member states provide for some kind of employee representation at board level. In contrast to the vast majority of existing national regulations, all SEs have the free and unrestricted choice between both forms irrespective of their future headquarters and independent of employees' interests in one or the other. The SNB plays only a reactive role because this basic decision is initiated and made by management and owners before negotiations about employee involvement are launched. In empirical terms the frequency of both forms is rather similar (cf. Table 3). Negotiations are more complex than in the case of EWCs because both levels have to be covered.

On the one hand, certain impacts of national trajectories are to be expected. This assumption about path dependence is especially valid for larger companies that save transaction costs because of a unified management and reporting system. SEs, especially larger ones, from countries with two-tier structures keep this form of corporate governance and have to preserve the pre-existing levels of employee participation. In other words, standards of national regulation are not drastically lowered in the transition from the national to the new unified European form – but are, of course, not improved either.

On the other hand, quite a few changes of governance structures did happen but – at least so far – only in one direction, i.e. from two-tier towards one-tier forms. The common denominator for these remarkable transformations is the structure of ownership in combination with company size. These options of change are especially popular for SMEs that are either completely family-owned and managed or where one family owns the majority of shares. These owners, the vast majority of whom are German, have strong preferences for a corporate governance structure of their own choice and intend to avoid any restriction of their “managerial prerogatives” by introducing parity on the supervisory board and, thus, closer cooperation with influential employees' representatives, without, however, formal representation on the administrative board. For them, the SE provides the opportunity structure to accomplish their goals and to limit employee rights to information and consultation by an SE WC. It remains to be seen, however, if the first empirical examples represent isolated decisions by individual owners or if they are forerunners of a broader trend in the future. If a larger number of similar SMEs copy this strategy, future challenges at national level, i.e. some kind of erosion, are to be expected.

Another most recent development of “regulatory arbitrage” refers to the composition of the board especially in larger SEs. Its size is fixed by the owners in the ‘terms of foundation’ and can hardly be changed during the subsequent negotiations between management and the SNB, even if the results of the negotiations have priority in legal terms. There is a certain trend towards a smaller overall number of members and “slimmer” boards, but not towards smaller boards of directors. The indicated arguments are reasons of greater efficiency or pure ideology. Some SEs with headquarters in Germany have reduced the overall number of seats on their supervisory boards. This measure applies to both sides and affects representatives of employers and employees equally. Therefore, it does not result in a weakening of employees'

rights on parity representation, as trade unions sometimes fear, and the pre-existing proportions of representation and balance of power between capital and labour respectively is preserved. Some employee representatives claimed in interviews however that they had difficulties obtaining some of the information that management was obliged to provide.

A more detailed analysis shows that the number of external members, who are supposed to represent broader and more general interests, is reduced. Therefore, their impact on processes of decision-making will be more limited than it used to be on purely national boards in the past. This emerging trend to exclude “outsiders” seems to be one implicit goal of management, especially during the establishment of larger SEs. It indicates a transformation towards forms of trans- or supranational “enterprise-specific syndicalism” so far widely unknown at national level. If this trend continues it will have far-reaching consequences for existing national forms and their customs and practices because it takes only a smaller and more limited spectrum of (“insider”) interests into regard and increases the already existing degree of fragmentation.

There is some empirical evidence for certain trade-offs between negotiation objects at both levels of employee involvement, SE WC and board level representation. These exchanges are only possible because negotiations deal with both levels simultaneously and take place despite the fact that both are legally independent from each other. The enterprise-specific division of labour between both bodies of interest representation is the result of autonomous negotiations, not of legislation. Among others, if the SNB agrees on a smaller size of the supervisory body it is sometimes able to achieve more rights and resources for the SE WC (such as the implementation of a controlling system for the  $\infty$ -operation). Cross-national trade-offs can happen because of differing interests of national representatives (Keller/Werner 2008).

For the time being, the perspective of collective bargaining at SE level is not a realistic one. In the long run, however, this option could evolve in at least some SEs and create additional problems for persisting national systems, especially for those of dual nature because it would weaken their important sectoral pillar. Potential objects for this kind of “enterprise-specific” bargaining would be “soft” ones (such as working time or training/re-training) instead of “hard” ones (wages and salaries).

## **CONCLUSIONS AND OUTLOOK**

In times of deregulation and liberalization of product as well as labour markets, the principles of regulation at EU level have shifted from substantive to procedural forms. Since the early 1990s regulation covers procedural issues only whereas all substantive ones are left to decision-making by private actors at the enterprise level. The well-known EWC Directive constitutes a prototypical example. The SE Directive also fits into this overall more recent pattern, continues and even strengthens it. Both are also strictly in line with the principle of subsidiary.

In contrast to the long list of failed draft directives of the 1970s and 1980s (Sorge 2006), the ultimate goal is not upward “harmonization” of existing national systems but the definition of a floor of rights at minimum level. This regulatory approach attempts to protect national systems (with comparatively high standards) against any kind of deterioration – without, however, always being able to achieve this goal. This goal is less ambitious than its predecessors but most likely more realistic, especially in the EU of 27 members with rather heterogeneous systems of employment relations, conflicting national interests and resistance to fundamental changes.

Our empirical analysis demonstrates that the SE constitutes a prototypical example of “negotiated Europeanization” (Lecher et al. 2002) by public and private actors. This peculiar combination of legislation at supranational and negotiation at national and enterprise levels was unknown in the vast majority of EU member states. This specific, relatively new mode of regulation leads to tailor-made, enterprise-specific, highly flexible procedures and, therefore, to rather heterogeneous types and modes of employee involvement instead of relatively uniform, standardized forms. In contrast to former regulatory strategies, its goals do not consist in any ambitious kind of European upward “harmonization” or unifying “convergence” of differing national forms, but in the best possible case in a pure conservation of nationally institutionalized formal rules and informal standards. The most likely consequences of the implementation of this “voluntaristic” political choice are emerging trends towards enterprise-specific forms and increasing divergence not only between but also within member states as

well as between individual SEs; even certain degrees of fragmentation instead of tendencies towards convergence seem possible.

We mentioned earlier that there has been a certain increase in the number of normal SEs. If this trend continues, the SE will be of some although probably limited impact for the Europeanization of employment relations and the development of a European social model in the future. It remains to be seen if it constitutes a general “danger” for (at least some) national systems of employee involvement in the long run, as some observers, especially trade unionists, assume. If the numerical trend accelerates this fear might be correct. There are empirical indicators for the assumption of a stricter orientation towards the Anglo-Saxon model of corporate governance.

One final caveat has to be made. First, the overall number of normal SEs is still small because it is not obligatory to establish them and the option is still relatively new. We know, however, from the EWC experience that the first examples constitute test cases for all future ones. Second, we had to focus on the stage of establishment without being able to do research on the actual day-to-day work of the new institutions in individual SEs. This task constitutes the next challenging step for follow-up studies.

Last but not least one has to keep in mind that all judgments depend on the specific national point of view. From a non-German perspective the SE creates the first opportunity for employees' representatives from some countries, among others the UK, to be informed and to participate in managerial decision-making (Fulton 2006). Some optimistic observers have even talked of an “export of co-determination” and, thus, have quite obviously exaggerated the potential impact of the SE for employee involvement. One could conclude, however, that various national systems are unevenly concerned. Countries with high standards (such as Germany and Austria) will profit less than some others (such as the UK, Ireland and some new member states).

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