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The establishment of the European Company (SE) – The first cases from an industrial relations perspective

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ABSTRACT This article presents the first systematic empirical analysis of all presently existing European companies (SEs) in general and focuses on industrial relations issues and in particular the negotiated rules of employee involvement. The introductory part gives a summary of established SEs. Then, it elaborates on the election procedures and problems on the employees' side and the special negotiation body. The following two parts indicate empirical details of employees' information and consultation, i.e. on representative bodies (or SE works councils) and board level representation (among others, size and composition, resources). Finally, some tentative conclusions and predictions on the impact of SEs on the development of European industrial relations are given.

Introduction

First attempts to establish a European Company (Societas Europaea or SE) can be traced back to the 1960s. Despite a series of draft Statutes the issue was not solved because the necessary unanimity in the Council of Ministers could never be reached. It even faded away from the political agenda throughout the 1980s and early 1990s. Finally, the so-called Davignon group (Group of Experts, 1997) was supposed to unravel the long lasting political stalemate. After more than three decades a fairly complicated, highly formalised political compromise was reached in late 2001 (Keller, 2002).

The resulting legislation consists of two parts, the Council "Regulation on the Statute for a European Company" (2157/2001/EC) and the "Directive supplementing the Statute for a European Company with regard to the involvement of employees" (2001/86/EC). The Directive had to be transposed into national law within three

years. This necessary step of the policy cycle has been delayed in some member states (EWCs Bulletin, 2006). Nevertheless, processes of implementation are under way.

The European Company Statute (ECS) does not constitute a compulsory and obligatory new form but constitutes only the option to establish a Europe-wide legal structure. In other words, the Directive provides an additional, transnational level of rights for a European public limited liability company but leaves all existing national forms untouched.[1] It facilitates a unified management and reporting system instead of operating under substantially differing national laws and provisions.

The protracted history of the ECS (Gold/Schwimbersky, 2007; Stollt, 2006; Theisen/Wenz, 2005; Weiss, 2002) will not to be dealt with again in the following analysis. Any detailed expertise of legal problems (Nagel et al., 2005; Blanke/Köstler, 2006; Köstler, 2006; Van Greven/Storm, 2006) is also beyond its scope. This article rather presents the first systematic empirical analysis of all presently existing SEs, i.e. which were established between October 2004 and the end of 2006. First of all, the cases of the initial phase are relevant as such, i.e. as first negotiated rules of employee involvement in SEs. Furthermore, these test cases of the incubation period are also of more general importance because they set a precedent for all future SEs.[2]

Our focus is on relevant issues of industrial relations in general and employee involvement in particular because they have been widely neglected in the existing literature that is dominated by legal expertise. Therefore, the Directive will be more important in our context than the Regulation and its legal structure.

In methodological regards the paper is based on a thorough analysis of the existing literature (including the rapidly growing “grey literature”)[3], a series of semi-structured interviews with representatives of both sides and non-participating observation in some official meetings. We do not provide a purely additive collection of specific cases but a systematic analysis. Nevertheless individual SEs have, of course, to be taken as the point of departure. We develop an empirically based conceptual frame of analysis which has the advantage that it can be updated and expanded in order to cover and include all future cases.

The structure of the paper is as follows. First, we will present a short summary of established SEs (part 2). Then, we will elaborate on the complicated election procedures on the employees’ side (part 3). The following two sections indicate details of employee involvement, i.e. on SE works councils (part 4) and board level

representation (part 5). Finally, some tentative conclusions and predictions are given (part 6).

The establishment of SEs: An empirical overview

Forms and numbers of SEs

There are four forms of SE establishment:

- by merger of two or more existing public limited-liability companies,
- by formation of a holding company by two or more public or private limited liability companies,
- by formation of a subsidiary by two or more companies (or from a SE itself),
- by transformation (conversion) of an existing public limited-liability company.

- Table 1: Registered SEs about here -

At the end of 2006, the overall number of registered SEs is at more than 50. Different sub-forms can be identified (Schwimbersky, 2006; SEEurope-Network, 2006; Gold/Schwimbersky, 2007): There are some with unusual characteristics from an industrial relations perspective. Three of them are the most important in quantitative terms:

- "Empty" SEs – these companies are characterised by economic activity, but no employees;
- "shelf" SEs – companies without activity and without employees;
- "UFO" SEs – companies from which only few details, such as their names, are known from the registers. This most recent, semi-official term means companies that are most likely also "shelf" or "empty" SEs – very often they do have terms such as "capital", "finance" or "invest" in their name, indicating that there are economic activities, but probably no employees.

Furthermore, there are some more types such as two sold shelf SEs, a failed SE and liquidated SEs (SEEurope-Network, 2006).[4]

All these sub-forms are not analysed in detail because they are, at least for the time being, not of direct interest for industrial relations purposes. Reasons for their

establishment are difficult to detect because of missing empirical evidence. They "may be activated later by the founders or sold as an "off-the-shelf" SE to another company or companies interested in taking on this form" (EWCs Bulletin, 2005: 13).

"Normal" SEs

"Normal" SEs with economic activity and employees are of more interest for the purposes of our study. Their number is at 16 and, thus, much smaller. Again we distinguish two sub-types: Some of them are already established and registered, while others are in the phase of foundation. These "normal" SE, which are summarised in table 2, constitute the base of our empirical analysis – by definition, industrial relations can only happen if both, employers and employees, exist. In most cases, these SEs were or will be established by way of conversion (twelve cases), while some others were or will be formed by merger (SEEurope-Network, 2006). These two types of formation are the most important ones in comparison with the above mentioned others.[5] In other words, the formation of a holding company or a subsidiary has not played any role in these cases. All in all, the sophisticated legal distinction of forms seems to be of minor practical importance in the presently existing cases.

- Table 2: "Normal" SEs – established and planned about here -

In a detailed analysis of these first cases, one can not identify specific trends regarding the distribution of companies across size, sectors and location of registered headquarters. Size differs to a considerable degree. There are smaller companies with only some dozen up to some hundred or thousand employees (first of all, Lyreco CE SE and Galleria di base del Brennero SE) as well as larger ones with some ten-thousand or even a hundred thousand or more employees (among others, Allianz SE and Fresenius AG). The very first case was Strabag, a company with 30,000 employees; Nordea bank[6] being of comparable size followed as well as some smaller companies. Allianz and Fresenius, the "big players", needed some time until they used the new legal form as well. – All in all, there is a surprisingly wide range in this specific regard of size. Available data of establishment on a yearly base also do not allow to detect "trends". The overall number has not increased in 2006 in comparison

with 2005. It is too early for such an analysis that will, without doubt, be useful in the long run (similar Kerckhofs, 2006 for EWCs). In contrast to the threshold indicated in the EWC Directive all rules of employee involvement in the SE are valid independent of the number of employees.

As far as the distribution across sectors is concerned there is no clear trend (yet). The fact that some sectors are more internationalised than others in terms of production and composition of their workforces has not led to more "normal" SEs in the first case.[7] There are SEs in the second (production) as well as in the third (service) sector. It seems that the decision to establish an SE is in most cases connected with company specific problems such as a reduction of complexity (e.g. through a merger) and cost reduction – and not with the sector-specific features, companies' sizes or the country of seat.

If one compares the location of registered headquarters, until now the vast majority of "normal" SEs was founded in a limited number of countries. Six SEs have their seat in Germany and three in Austria, some others in Scandinavian countries. Interestingly enough, so far no "normal" SE has been established in the UK or the Mediterranean EU member states. Furthermore, there are only two SEs having their seat in the new member states that joined the EU in 2004 and had to transpose the Directive as part of existing Community law.[8] At least so far, and in contrast to multinationals which are subject to the EWC Directive "On the establishment of a European Works Council or a procedure in Community-scale undertakings for the purposes of informing and consulting employees" (94/45/EC) (Voss, 2006), the so-called eastern enlargement of the EU has had no major impact. The reason seems to be that the foundation of SEs constitutes a mere option whereas in the case of EWCs there is a necessity to adapt. Last but not least, it is quite remarkable, that non-European multinational companies have not established SEs yet.[9] All in all, it is probably still too early to detect dominating trends because the spread of information takes time. Consultants at national level, such as law firms or employers' associations, could fill this gap and act as guides for certain size, sector or country specific developments.

The initiation phase

Principles

The basic decision about the establishment of an SE is up to the companies' management or, to be more precise, to their management and administrative organs and can not be influenced by employees and/or their representatives. It has to be kept in mind that the particular form of establishment has a major impact on the form and content of employee involvement (Patra, 2006). For instance the so-called "standard rules" (Article 7 of the Directive), a specific kind of minimum standards of employee involvement that is applicable if the negotiating parties can not reach an agreement on employee involvement at all or within the six month deadline, apply only in some cases that are connected with the form of establishment of the single SE (Table 3).

- Table 3: Forms of establishment and the application of the standard rules about here -

An SE may not be registered with the national authorities before "both sides of industry" have reached an agreement on employee involvement at least in the form of information and consultation (Article 12 (2) of the Regulation).[10] In contrast to the EWC Directive the management or administrative bodies of the participating companies have to take the initiative; a special request by the employees or their representatives to launch negotiations is not necessary. Thus, any kind of unilateral decision-making by management in cross-border companies is supposed to be prevented and basic principles of "joint regulation" are officially recognised as integrated elements of corporate governance. For employees' representatives from some countries, especially from those with voluntarist traditions (van het Kaar 2005), the SE provides the first opportunity to influence managerial decision-making at the group-level, for others it might be a deterioration of impact in comparison with "their" experience at national level.

There is no precise legal provision for the scope and content of employee involvement. According to Article 4 of the Directive, the agreement shall – "without prejudice to the autonomy of the parties" – only specify items such as "(a) the scope of the agreement; (b) the composition, number of members and allocation of seats on the representative body […]; (c) the functions and the procedure for the information and consultation of the representative body; (d) the frequency of [its] meetings […]; (e) [and its] financial and material resources […]". Furthermore, "arrangement of

participation" can be established if "the parties decide" about that. Finally, it shall contain agreements about questions such as the date of entry into force and its duration.

Again, to emphasise it explicitly: All procedural and substantial details are, in contrast to existing regulation in some EU member states, such as Germany, not fixed by legislation but are freely negotiable between central management and the employees of the company (Manz et al., 2005; Nagel/Köklü, 2004). The outcomes of this "negotiated participation" are open. As stated, the agreement shall at least cover the issue of information and consultation, but can also contain arrangements about participation. The negotiations usually refer to two levels: One is involvement through information and consultation by a representative body, the other is the question of participation in the governing bodies of the SE.

The Special Negotiation Body (SNB)

In negotiations during the founding phase employees of the forthcoming SE are represented by a "special negotiation body" (SNB) whose members are elected or appointed in proportion to the number of employees in each member state (according to Article 3 (2A) of the Directive). Its fairly complicated procedural arrangements share some similarities with those of the EWC Directive or, to be more precise, with its so-called Article 6 provisions (Müller/Platzer, 2003 for details). Nevertheless, in comparison with the EWC Directive there is a shift from geographical to proportional representation of the work force. All in all, it is noticeable that modes and patterns of regulation are very similar in both Directives. The ECS carried provisions for EWCs from the start and the EWC Directive acted as a source of learning.[11]

The Directive allows three potential outcomes of the negotiations between central management and the SNB, the so-called "zero option", application of standard rules and an agreement between both sides – the "normal" scenario. Our data show that in all negotiations concluded so far an agreement was signed.[12]

- Table 4: Possible outcomes of the negotiations about employee involvement about here -

In companies with an EWC before the foundation of an SE the SNB widely reflects the composition of the EWC – its members frequently also negotiate in the SNB. Co-operation and exchange of information and accumulated expertise are easier to arrange if some form of institutionalised interaction has already existed. A detailed analysis of existing cases shows that SNB members are usually organised in their national trade unions.

Some SNB members, especially its chairperson and representatives of the countries with most employees, are of greater importance than others for content, direction and outcomes of the negotiations. These members exert a high, informal influence because they keep in touch between formal meetings – or even negotiate with management's representatives about certain open questions before the next "official" meeting of the SNB takes place. Furthermore, if the SNB consists of a large number of members, a smaller negotiation commission (comparable to a select committee according to Article 5 of the EWC Directive) is usually established in order to negotiate with management on behalf of the SNB.

External resources

Within a broader frame of reference external resources have to be taken into regard.[13] External experts can be hired by both sides (Article 3 (5) of the Directive). On the employers' side central management frequently hires law firms. This strategy creates typical principal agent problems because the interests of principals and their agents could differ. Law firms might be more interested in attracting new clients than in solving issues of individual forthcoming SEs.

On the employees' side the number of external experts has frequently been limited to one during the important phase of implementation when general prescriptions have to be adapted to national rules and customs and practices (EWCs Bulletin, 2006). Trade unions support the activities of the SNB. Their representatives, also those from the European level, can even be full members of the SNB (Article 3 (2 (b)) of the Directive), if national legislation that implements the directive provides this option. The competent national trade union usually play an important role although a feedback to the European level is sought for. Their representatives could contribute to balance between company-egoistic and more general employees' interests. One would, therefore, expect more active organisation and co-ordination than in the case

of EWC. Their status is less contested than under the regulations of the EWC Directive because of these legal provisions. From managements' point of view "anti-union" strategies are less promising, and, therefore, less frequent.

European Industry Federations, i.e. sectoral organisations at supranational level, play a certain role in these processes: As in the case of EWC (Waddington, 2006) they prepared guidelines for the negotiations (among others, on minimum standards of employee involvement) before the first negotiations took place. Especially the European Metalworkers' Federation (EMF) was active in an early stage (EMF, 2003), others were inspired by its work (UNI-Europa, 2004). These guidelines, setting "out a common understanding and political decision reached within" the single national trade unions within a sector, shall bind the SNBs during negotiations regarding "information, consultation and participation rights of workers in an SE" (Triangle, 2005: 207). "The development of these guidelines was not an easy exercise […] because of national differences on this issue" (ibid.). These tasks of supra-national co-ordination constitute new challenges for trade unions – and their scarce resources.

Processes of internal bargaining

Empirical evidence from research on EWC (Lecher et al., 2001; 2002) indicates that bargaining processes take place not only between central management and SNB but also between employees' representatives from different countries who have experienced different legal and institutional environments (inter- versus intraorganisational bargaining according to Walton/McKersie, 1991). Especially trade union representatives as external experts as well as SNB members had a major function in balancing such differing interests on the employees' side. Very often individual members just did not know details of the "customs and practices" of other countries; here, some information played an important role in the balancing processes.

Conflicts between representatives from different countries were likely to appear also in questions such as simultaneous interpretation and the distribution of seats especially in the supervisory bodies of the SEs. Voluntary mediation of interests by trade union experts, often combined with a hint to the legal requirements to adapt, marked the latter solution also in questions of differing national interests within the

SNBs. It is obvious that such internal difficulties and conflicts have to be settled and common positions have to be reached before negotiations with central management can be launched in order to avoid weakening of one's own bargaining position. Nevertheless informal arrangements have been difficult to reach in individual cases.

Empirical results I: SE works councils

In the 16 SEs of our analysis the "representative bodies", which are normally called "SE works councils" (SE WCs), usually reflect a continuation of formerly existing EWCs in terms of its members and structures. Normally there is a division of competences between new and already existing forms of employee involvement: The SE WC is only in charge of issues concerning the SE itself, while bodies existing on other (especially national) levels continue to be responsible for all issues of national subsidiaries (Blanke, 2006). It is usually also stated in the negotiated agreements that national bodies are allowed to transfer parts of their competences in specific cases to this supranational level as long as this step is in line with national legal requirements. Furthermore, the Directive also allows for "equivalent procedures" instead of an SE WC. They are, however, as in the case of the EWC Directive of no real importance.

The agreement of employee involvement also deals with SE WCs' rights. At least so far they are in all SEs limited to information and consultation only and do not bargaining rights. Although the SE WCs' rights are usually similar to those the EWCs had beforehand, we also observe some improvements in individual cases. They address especially "technical" terms and issues that were not solved during the EWCs' phase (such as institutionalisation of meetings and hearings with the management, (initiative) proposals of the EWC and "controlling" procedures of the interaction that were agreed between both sides).

Size and composition

The overall number of members of SE WCs depends on the number of SE employees or, to be more precise, on their national proportionality. In most cases its composition reflects the one of the former SNB both in the distribution of seats across

countries as well as in individual members. Therefore, the allocation of seats in the SE WC is usually not a major internal bargaining object for the SNB.

In the case of EWCs the distinction between EWCs according to the German (employee-only) or French model (joint bodies) is of some relevance (Kerckhofs, 2006). In contrast to this potential organisational split, all existing SE WCs are employee-only bodies. This fact is due to a specific form of "path dependency": Until now the vast majority of registered SEs has been established in member states which have institutionalised this form of employee involvement.

In the majority of EWCs there exist smaller steering or select committees for the organisation of day-to-day activities (ibid.). In the case of SE WCs similar committees exist, at least in bigger SEs. They usually consist of the chairperson of the SE WC and the deputies and represent usually the most important countries in terms of the number of employees. In the future, individuals might be in charge of these activities on an informal base and without the existence of a written paragraph in the agreement.

Resources

Various forms of resources are of importance for the constraints and opportunities of SE WCs. As already mentioned, their size depends on the number of SE employees. Regarding issues such as release from work and dismissal protection of SE WCs members the agreements often refer to (national) "provisions applicable in each [individual] case" (quote from an agreement). In the majority of cases two ordinary annual meetings with central management are to take place; sometimes, only one regular meeting is agreed upon. Extraordinary meetings are usually possible if essential and/or unexpected events concerning the employees of the SE take place. Preparatory meetings of SE WCs before meetings with central management are provided for, too. All expenses are paid by the company.

Regarding training measures, which are of utmost importance for their future work, the SE WCs and its members could reach a relatively high autonomy in most agreements.[14] Such measures can include economic topics as well as social ones, but language courses are also covered. In most cases, management insisted on English as the only working language in order to reduce costs of simultaneous interpretation. Often, the members of the SE WCs are therefore explicitly asked to

participate in English language training programmes if necessary. Nonetheless, the SEs accepted in the first cases to take over costs for interpretation, too. External experts to be paid by the SE can be hired as well.

Regarding the duration and termination of the first agreements there are similarities but also differences. Usually the first duration period is quite long, from four up to ten years. During that period the agreement can not be terminated by any side. Such provisions are usually agreed upon as well. In some cases, single parts of the agreement (i.e. about SE WCs and participation in the governing bodies) can be terminated independently from each other, while in others this option is only mentioned in general. The period of notice, in case any side terminates the agreement, is usually six months but can also be up to one year. Furthermore there is one agreement, in which these questions are not addressed at all.

The importance of standard rules

There are obligatory "standard rules for information and consultation" for cases in which negotiations between management and the SNB fail to reach an agreement (Article 7 of the Directive). From a purely legal point of view these statutory fall-back provisions and reference positions do not constitute binding minimal standards. From our analysis it is obvious, however, that they create and serve as the baseline in negotiations and pre-determine the scope and content of agreements in the vast majority of cases.

These standard rules are of utmost importance and create a certain "shadow of the law". The logic of the situation can be explained in rational choice terms: One side can not offer less, at least if it does not want to risk the complete breakdown of negotiations and the deterioration of necessary relationships, and the other side knows that it is rather difficult to conclude more far-reaching results without the purely voluntary consent of management.[15]

These results of negotiations at the level of minimal "standard rules" do not constitute a real surprise because they are comparable to the "subsidiary requirements" for negotiations on the foundation of EWCs. We know from existing research that only a small number of agreements surpass these thresholds predetermined by these minimum standards (Kotthoff, 2006). The Directive allows furthermore for "equivalent

procedures" instead of an SE WC. They are, however, as in the case of the EWC Directive of no real importance.

Empirical results II: Board level representation

Existing analysis illustrates that there are monistic as well as dualistic forms of *corporate governance* at national level (Group of Experts, 1997; Fulton, 2006; Kluge/Stollt, 2006 for details). So-called "one-tier systems" have an administrative board (or board of directors) only whereas so-called "two-tier systems" consist of a management board and a supervisory board which controls and monitors the former. The majority of EU member states (19 out of 27) provide some kind of employee representation on the board level (Kluge/Stollt, 2007). There are, however, significant differences in qualitative as well as quantitative regards; gaps between countries are even wider than in the already mentioned case of employee involvement. Measures of efficiency are (almost) impossible to indicate.

Forms of corporate governance

SEs have a choice between both forms of governance (Article 38 of the Regulation).[16] Later changes between forms are also possible – but unlikely to take place.[17] The distribution in "normal" SEs is as follows: Ten SEs do or will have an one-tier structure, while in six cases the board structure is of dualistic nature. In the vast majority of cases management opted for the governance structure that prevails in the country of registration (Schwimbersky, 2006). This pattern comes as no surprise because one would expect a certain, probably even high degree of organisational continuity (or "path dependency") (for the UK: Villiers, 2006). This is the case with EWCs. The majority of "joint bodies" according to the French-Belgian model are based in France whereas the majority of "employee-only" bodies according to the German-Dutch model are based in Germany (Kerckhofs, 2006).

There are four exceptions[18] which lead to the question why changes from one form to the other have taken place at all and how they could be explained. In the two already registered cases the only common denominator is the fact that both are owner-centred companies.[19] These owners are actively involved in running "their" company and not interested in co-operation with any kind of supervisory board.

Size and composition

The basic decision about the overall number of members and, definitely not less important from the employees' point of view, the number of employee representatives on the administrative or supervisory board is beyond the scope of negotiations between the SNB and management. As already mentioned, this decision is made by the owners in the so-called "terms of foundation" – well before negotiations with the SNB are launched.

In the two-tier system the decision to establish an SE was occasionally used to cut the overall size of the supervisory body (not only on the employees' but on both sides). Of course, employees of the SE also lost seats when the overall number of members was reduced. The size and the composition of the governing bodies have hardly ever been a major topic in negotiations about employee involvement although employees' representatives tried to introduce it. In most cases it was clear – as this topic was fixed in the terms of foundations – that in the negotiations this issue could not be changed. The proportional representation of employees in the governing bodies has never been reduced compared to the situation beforehand.

In all SEs employee representatives in the governing boards do have, at least formally, the same rights as the members from the employers' side. Sometimes they claim to have difficulties in getting all information. Especially in the one-tier system with employee members on the board they report on a "new responsibility" as full member of the board, e.g. also in terms of financial liability. Problems might especially arise when employee members face difficulties in getting all necessary information.

Trade-offs

From a legalistic point of view forms of "joint regulation" at both levels of influence are independent from each other. Until recently some observers (Mävers, 2002) expected that negotiations on employee involvement would preliminary address issues of board level representation. In empirical terms, however, both forms exist and are interrelated. In fact, there are certain trade-offs in various regards: One refers to the internal interests on the employees' side (among others, the allocation of seats). It happened, for instance, that the employees from one country who could not

get the claimed seat in the supervisory board got an additional one in the SE WC. Furthermore, external trade unionists are more interested in board level representation but less in SE WC issues than internal SNB members. The former act as sources of information, agents of co-ordination and providers of support for the latter.

Another kind of trade-off refers to both levels of employee involvement. Concessions which had to be made in the overall number of employees' representatives on the governing body were used as an argument in order to achieve more rights and especially resources for the SE WCs (such as in questions of accessibility of management or resources). In this regard some kind of "do ut des"-bargaining happened. Opportunities for trade-offs are wider than in the case of EWCs because of the existence of two levels.

Furthermore the relationship between the results of negotiations at both levels is of major importance. Representatives from individual member states (among others, France and Germany) may have different interests. One group may not be very interested in topics dealt with at board-level – and opt for strengthening the SE WCs instead. The reasons could be that actors are familiar with one set of formal and informal rules but not with the other because of lacking experience at national level. In other words, the latter form is, for ideological and/or historical reasons, not a national priority in all member states (Taylor, 2006).

In most cases of two-tier systems the members of the SE WC are also employees' representatives in the governing boards, especially in the supervisory boards. This configuration could contribute to close and viable work relationship in the future.[20]

A national point of view

There are some results which are of specific interest from a national, in this case German point of view: In Germany there has been a heated political debate about major changes of existing laws on co-determination because of the introduction of SE. Some critiques have argued (BDA/BDI, 2004; von Werder, 2004) that countries with extended forms of employee involvement would suffer from this legislation and would be less attractive for SEs to be established. The present experience shows, however, that exactly the opposite has happened. In contrast to arguments frequently put forward there is no competitive disadvantage for companies based in Germany

either to establish or to become part of SEs because of existing regulation. However, the ongoing discussion could possibly weaken existing rights of co-determination if the government decided to change existing rights.

As already indicated the overall number of “normal” SEs has remained small. Therefore, it is not justified to assert a general danger for the national system of co-determination because of developments at EU level. At least for the time being there is no trend towards “escape from co-determination” or its “erosion” as assumed by (quite a few) trade unionists. On the long run, however, interests of national representatives could differ – and might be used by management to weaken existing forms of employee involvement.

The “before and after”-principle means that rights of employee involvement which existed in at least one of the companies establishing an SE have to be preserved in the SE (Article 4 (4) of the Directive for the case of establishment through a conversion). This regulation states that existing opportunities of employee involvement are only to be protected but not to be expanded. In specific cases, when only companies from member states without provisions for board-level participation are concerned (such as Italy and the UK), there will even be SEs without employee representation on the board. Some attempts to change the status quo, as in the above mentioned Strabag case, took place but could be prevented by trade union opposition. As already mentioned, the activity of EIFs could be necessary in this regard.

Perspectives and the future relevance of SEs

One caveat has to be kept in mind. This analysis has to be of preliminary nature because it can, by definition, not yet include the actual work and real functioning of forms of negotiated employee involvement within the SEs and its importance for IR institutions and practices. In this specific, long range regard it is comparable to the early studies on EWCs according to Article 13 (such as Marginson et al., 1998). Therefore, follow-up studies on the empirical impact of employee involvement will be necessary in order to evaluate long-term consequences for institution building at transnational level. As mentioned in the introduction, our analysis can be extended to future cases. And, it could also be combined with case studies.

Perspectives

All in all, rather unitary models of employee involvement are unlikely to come into existence. It is realistic to assume that future forms will vary substantially not only between but also within member states and, even more, from one SE to the next. First of all, existing national regulations differ significantly and will exert a major impact at supranational level. The dominance of established national "customs and practices" during the phase of transposition will even strengthen this trend (for the specific case of the UK Villiers, 2006). These processes are highly politicised and subject to ample lobbying activities of national social partners especially in cases of strict disagreement; national governments have ample room for political manoeuvre (Keller, 2002). There will be not only 30 SE laws or nationally modelled transpositions because critical issues are to the political choice of member states. Furthermore, all agreements concluded within the SEs will be enterprise specific and tailor-made because they are the results of free negotiations between central management and SNB. In other words, they are based on the primacy of the principle of subsidiarity and rather heterogeneous negotiations and not of relatively homogeneous legislative nature.

Any kind of "upward harmonisation" of widely differing national rules towards a unified, genuine European system of industrial relations constituted an ambitious political goal but proved, as we also know from other policy fields, not a realistic concept for integration policies in a diverse polity (van het Kaar, 2006). It constituted the fundamental model of social regulation during the 1970s and early 1980s but proved impossible to be materialised because political consensus in the form of unanimity could never be reached in the Council of Ministers. Therefore, it had to be abolished and substituted by more realistic, "flexible" concepts. "The Directive does not aim to introduce new or additional aspects of employee involvement but rather it seeks to prevent the disappearance or reduction of what already existed prior to the establishment of an SE" (Villiers, 2006: 187). This specific regulation is not about any kind of European "harmonisation" but about the preservation of nationally institutionalised rules and standards.

Thus, the obvious trends towards wide-ranging, "flexible" instead of unitary and "voluntaristic" instead of binding forms, which have been initiated by the EWC Directive in the early 1990s, will not only be continued but even be strengthened. Any

tendency towards “convergence” would be a rather unlikely result of these processes; instead, already existing “divergence” is likely to increase. In other words, high degrees of diversity or even fragmentation are to be expected as the results of implementation in individual SEs. Contribution to some kind of “Europeanisation” of IR which have been expected by a few insiders as well as outside observers is unlikely to take place.

Furthermore, the ECS and its supplementing Directive constitute a prototypical example of what has been labelled “negotiated Europeanisation” in another context (Lecher et al., 2002). Since the early 1990s this dominating principle of regulation leaves responsibility for the results with the private actors and not the public ones, such as the Commission. Last but not least, the ECS is an integrated part of the fundamental change from substantive to procedural regulation. In other words, present legal regulation indicates norms for procedure and modes only whereas older ones also included more or less detailed rules of substance. As has been indicated above, only procedures have been regulated in the SE Directive whereas all issues of substance and content of employee involvement are freely negotiable.

The future relevance of SEs

One has to keep in mind that the ECS constitutes a project of economic rather than of social integration. Within this frame of reference one crucial question is, of course, related to the future number of SEs. In our specific context of employee involvement one has to think of SEs not in a broader sense as mentioned in the introduction but of SEs with economic activities and employees. There are two opposing predictions: One expects a significant increase, the other only a limited number of foundations. At least for the time being, the second scenario seems to be more realistic for various reasons. Alternative strategies for transnational mergers and acquisitions of companies have been made available by legal action (first of all, the Directive on the Cross-Border Merger of limited liability companies (2005/56/EC) and the discussed Directive on cross-border transfer of registered office of limited liability companies). So far, they have not been but could be utilised in the foreseeable future. Consultancies have already developed screens concerning the question under which circumstances a cross-boarder merger is more favourable compared to other options such as the establishment of an SE. Choices in individual cases are impossible to

predict. Furthermore, economies of scale are supposed to be realised and savings of transaction costs (among others, administrative and legal costs) are to be materialised. This can only be taken for granted, however, if their size creates sufficient incentives. Last but not least, existing problems of taxation have not yet been solved (Wenz, 2006). A common EU tax policy which would create a major incentive to establish an SE does not exist – and is not likely to come into existence in the foreseeable future.

If these indicated reasons are correct the empirical impacts of the SE on the development of the "European social model" in general and European industrial relations in particular should not be overestimated. There could be, however, another imminent development in the long run. SEs could be a major factor in the emergence of supranational "enterprise specific" industrial relations that would separate them from national systems, especially from collective bargaining at sectoral level as it exists in the majority of Western European countries. Thus it could contribute to new forms of trans- or supranational "enterprise syndicalism". Such a development would increase the already existing degree of fragmentation. Thus the original idea to establish a unified legal form by means of the SE would be turned into its opposite.

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NOTES

[1] This Directive should not be confused with the Directive "establishing a general framework for informing and consulting employees in the European Community" (2002/14/EC), which refers exclusively to minimum standards at national level. Its impact will be significant in "voluntaristic" member states with no formal information and consultation rights and procedures (UK, Ireland and some new member states).

[2] The case of Allianz SE is the most prominent one, at least for the time being. Röthig (2006: 54) argues that it might become a "cornerstone of a new reference model".

[3] One important source of reference is http://www.seeurope-network.org, the home page of a project by the European Trade Union Institute in Brussels and the German Hans Boeckler Foundation.

[4] One could possibly argue that there is a fifth form, companies with economic activity but a fairly small number of employees (Carthago Value Invest SE, Convergence CT SE, SE TradeCom Financeinvest). They are of next to no relevance for the purposes of our analysis on employee involvement.

[5] Nonetheless in the "non-normal" cases we also identify the two other forms, holding and subsidiary; especially the latter one can be observed in several cases (SEEurope-Network, 2006).

[6] Nordea has not been registered as an SE yet. There are unsolved problems regarding the transfer of the banking liability system. Nonetheless an agreement about employee involvement in the future SE has already been signed.

[7] On the other hand, most of the "non-normal" SEs operate in the financial sector.

[8] These two companies are Graphisopft SE with its seat in Hungary and Lyreco CE SE with its seat in Slovakia. Lyreco CE SE is a daughter of a company with its seat in an "old" EU member state (France). Some observers argue that the establishment of an SE in these cases might be a "test" on how this new legal form works and provide an option for the mother companies. Graphisoft SE was established in the Netherlands and transferred its seat to Hungary, where meanwhile most of its employees work. This company is until now the only "normal" SE with a transfer of seat from one member state to another. Transfers of seats are rare events. Elcoteq SE has announced to transfer its seat from Finland to Luxembourg, although it has no employees there until now.

[9] In this respect it was for instance assumed that the SE might be an option for General Motors in order to merge its European daughters (Opel, Vauxhall, Saab, etc.) in one company. As several issues of taxation regarding e.g. profits and losses in different member states are not solved yet for the SE (Wenz, 2006), this might explain why such cases are still awaiting the developments in this respect.

[10] In the case of the planned Zoll Pool Hafen Hamburg SE, a company with economic activity and employees, its management tried to get the SE registered although no negotiations with employees had taken place. The judge declined registration and argued that a necessary precondition for registration consists in negotiations about employee involvement beforehand. The management therefore finally decided not to establish an SE (Blanke, 2005). In other cases concerning shelf SEs other courts came to different judgements.

[11] Regarding the election of the SNB members Fulton (2006) and Ioannou (2006) identify three different groups of countries: In seven countries, such as Austria or Germany, the SNB members are chosen by national works councils, in 16 countries, such as Cyprus, Norway or Sweden, the unions choose them and in Estonia, Malta and the UK they are directly elected by the employees.

[12] Strabag, the first SE, is of special interest in this regard. When it was registered in October 2004 employee involvement was "overseen" (Pohl, 2005). The owner of Strabag just went to the head of the EWC and asked her to sign an "agreement" stating that all employee involvement should remain in the new Strabag SE as it was before (i.e. a mainly "Austrian" EWC). The court registered the SE despite the fact that there had not been any negotiations. Some trade unions did not accept this and decided to take court action. After a long lasting dispute management finally agreed to negotiate with a SNB with representatives from all employees concerned including the foreign ones. Meanwhile, an agreement could be reached and the Strabag case could be regarded as "repaired" from an (European) trade union perspective (Kluge, 2006).

[13] Our working hypothesis is that opportunities of employee involvement are more favourable in bigger companies than in smaller ones.

[14] As one agreement states: "Members of the SE Works Council have a right to participate in training and educational events, insofar as these provide knowledge which is necessary for the work of the SE Works Council".

[15] The standard rules, which define the smallest common denominator, also apply in some other cases, i.e. when negotiations fail.

[16] There is, in clear contrast to earlier draft Directives, no strict preference for the one "best" form any longer. One political lesson to be learned was that all attempts to generalise one, fairly advanced model to all other member states failed.

[17] In the case of Allianz management explicitly stated that the decision in favour of the two-tier system has been made in consideration of the fact that a one-tier system could lead to serious problems as some examples demonstrate. "The dualistic system is superior to the monistic one. There no doubts exist about the question who is responsible for the control and who for the realisation of company's strategy" (Dr Paul Achleitner, CFO of Allianz SE, in: Hans-Böckler-Stiftung, 2006, own translation).

[18] These exceptions consist of three existing SEs, Conrad Electronic SE, Lyreco CE SE and Plansee SE, and one planned one, Mensch und Maschine Software AG

[19] In the case of Plansee SE one major reason for the establishment of the SE was that the owners wanted to have the same organisational structure in all their three business units. As two already had a one-tier structure with one of the owners as CEO, they also decided to establish this structure in the third company – the only possible way to reach this aim was the establishment of an SE (Schwimbersky, 2006). Lyreco CE SE is the small subsidiary of the Lyreco group whose sole owner is a French entrepreneur.

[20] In the case of Plansee, where the company changed its organ structure from a dualistic to a monistic one the employee members of the board are former members of the works councils.

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TABLE 1. Registered SEs

Company (Name)	Type	Location of headquarters
Afschrift SE	UFO	Belgium
Alfred Berg SE	normal	Sweden
Algest SE	UFO	Luxembourg
Allianz SE	normal	Germany
Atrium Achte Europäische VV SE	shelf	Germany
Atrium Dritte Europäische VV SE	shelf	Germany
Atrium Vierte Europäische VV SE	shelf	Germany
Atrium Fünfte Europäische VV SE	shelf	Germany
Atrium Neunte Europäische VV SE	shelf	Germany
Beiten Burkhardt EU-Beteiligungen SE	shelf	Germany
Beteiligungs- und Investment SE	UFO	Germany
Bolagsstiftarna International SE	shelf	Sweden
Carthago Value Invest SE	5 employees	Germany
Convergence CT SE (formerly Atrium Erste Europäische VV SE)	3 employees	Germany
Culture Commune SE	UFO	Belgium
DIAG Human SE	UFO	Liechtenstein
Donata Holding SE	UFO	Germany
EBD European Business Development SE	empty	Germany
Elcoteq SE	normal	Finland
Equipotential SE	UFO	Germany
Eurotunnel SE	UFO	Belgium
Fortis Intertrust Corporate Services SE	empty	Netherlands
Galleria di base del Brennero Brennerbasistunnel BBT SE	normal	Austria
GIS Europe SE	UFO	Netherlands
Go East Invest SE	empty	Germany
Graphisoft SE	normal	Hungary
Graphisoft Park SE	empty	Hungary
Investimenti Belgium SE	UFO	Belgium
Joh. A. Benckiser SE	UFO	Germany
Jura Management SE	empty	Netherlands
Lyreco CE SE	normal	Slovakia
MAN Diesel SE	normal	Germany
MatMar SE	empty	Austria
Media Corner SE	UFO	Belgium
Minos 2005/01 Vermögensverwaltungs SE	empty	Germany
MPIT Structured Financial Services SE	empty	Netherlands
Narada Europe SE	empty	Norway
Plansee SE	normal	Austria
Riga RE SE	UFO	Latvia
RPG Industries SE	UFO	Cyprus
Schering-Plough Clinical Trials SE	empty	UK
SCS Europe SE	empty	Netherlands
Startplattan 39001 SE	shelf	Sweden
Startplattan 39902 SE	shelf	Sweden
Strabag Bauholding SE	normal	Austria
Sunshine Invest SE	UFO	Belgium
Tourism Real Estate Property Holding SE	empty	Netherlands
Tourism Real Estate Services Holding SE	empty	Netherlands
SE TradeCom Finanzinvest	3 employees	Austria
Viel et Compagnie-Finance SE	UFO	Netherlands
World-Wide-Invest SE	UFO	Germany
YSL Beauté Benelux SE	UFO	Belgium

Source: SEEurope-Network 2006; own additions

TABLE 2. „Normal“ SEs – established and planned

SE (Name) no. of employees (concerned/ worldwide)	**Country of Seat (bold) & countries involved**	**Sector**	**Date of registration / date of announced intention to establish an SE**
Alfred Berg SE (registered) [322 employees]	**Sweden**, Denmark, Finland, Norway	Finance	September 2005
Allianz SE (registered) [128,000 employees]	**Germany**, Belgium, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Netherlands, Norway, Poland, Portugal, Slovakia, Spain, Sweden, UK	Finance	October 2006
Conrad Electronic SE (registered [2,314 employees]	**Germany**, Austria	Trade	August 2006
Elcoteq SE (registered) [19,600 employees]	**Finland**, Estonia, Germany, Hungary, Sweden	Electrical industry	October 2005
Fresenius (planned) [ca. 100,000 employees]	**Germany**, Italy, Sweden	Medical care	October 2006
Galleria di base del Brennero SE (registered) [33 employees]	**Austria**, Italy	Construction	December 2004
Graphisoft SE (registered) [253 employees]	**Hungary**, Germany, Netherlands, Spain, UK	IT	July 2005
Lyreco CE SE (registered) [30 employees]	**Slovakia**, Austria, Czech Republic, Hungary	Trade	October 2005
MAN Diesel SE (registered) [6,700 employees]	**Germany**, Czech Republic, Denmark, France, Greece, Netherlands, Spain, Sweden, UK	Metal industry	September 2006
Mensch und Maschine Software AG (planned) [350 employees]	**Germany**, Austria, Belgium, France, Italy, Poland, Sweden, UK	IT	Negotiations terminated
Nordea Group (planned) [29,000 employees]	**Sweden**, Denmark, Norway, Finland	Finance	registration planned
Plansee SE (registered) [1,341 employees]	**Austria**, France, Sweden, UK	Metal industry	February 2006
Strabag Bauholding SE (registered) [31.000 employees]	**Austria**, Belgium, Czech Republic, Germany, Hungary, Italy, Netherlands, Poland, Slovakia, Slovenia	Construction	October 2004
SCOR SA (planned) [706 employees]	**France**, n/a	Finance (Reinsurance)	July 2006
Suez SA (planned) [160,700 employees]	**France**, Belgium, Czech Republic, Germany, Italy, Luxembourg, Netherlands, Poland, Sweden, Slovakia, Spain, UK	Services	Political decision to be made
Surteco AG (planned) [2,109 employees]	**Germany**, Italy, Poland, UK	Paper industry	October 2006

Source: SEEurope-Network 2006; own additions

TABLE 3. Forms of establishment and the application of the standard rules

THE STANDARD RULES ONLY APPLY:

- in the case of conversion, where participation rights already exist
- in the case of mergers (unless member- states use opt-out) :
  - where a participation right already existed, extending to at least 25% of the workers
  - where a participation right already existed, covering less than 25% of the workers and the special negotiating body makes a decision on this subject
- in the case of the creation of an SE by way of a holding or a subsidiary
  - where a participation right already existed, extending to at least 50% of the workers
  - where a participation right already existed, covering less than 50% of the workers and the special negotiating body makes a decision on this subject

Source: Köstler 2006, 26

TABLE 4. Possible outcomes of the negotiations about employee involvement

- **Option 1:**

  “zero option”

  à if the SNB decides not to start or to cancel negotiatitons (with 2/3 of the votes representing at least 2/3 of the employees and employees from at least two member states)

  à only an EWC as transnational organ of employee involvement is possible, if the preconditions of the EWC directive are fulfilled

- **Option 2:**

  Agreement about employee involvement

  à according to Article 4 of the Directive

  à “normal” scenario

- **Option 3:**

  standard rules apply

  à if no agreement between the parties

  à if no agreement reached before the deadline fixed and the governing bodies of the companies approve the continuation of the procedure

Source: Köstler 2006, 24