Worker participation in Europe – Current developments and its impacts on employees outside the EU

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Abstract:

Worker participation has been subject to controversial debate in Europe. Although the Member States' traditions in industrial relations and especially in worker participation vary greatly, the Council of Ministers agreed on some directives in this regard, recently: the EWC directive (94/45/EC) and the information/consultation directive (2002/14/EC), and the directive (2001/86/EC) supplementing the Statute for a European company with regard to the involvement of employees, which emphasises voluntary negotiations between employees' representatives, a so-called special negotiating body, and the management. The latter directive does not only provide information and consultation procedures but also provisions regarding board-level representation. For that reason, the focus of this paper is on the European company (Societas Europaea = SE). In this context, the fundamental provisions regarding the SE are presented. After discussing some exemplary cases in order to demonstrate the practical implications of this legal initiative regarding employee involvement, some issues arising are examined.

Worker participation in Europe – Introductory remarks

Direct as well as indirect employee involvement has always been controversially discussed in Europe. A reason for that might be seen in the huge differences in the industrial relations systems and traditions, which are "not simply the result of chance occurrence or historical accident, but develop(ed) instead because of identifiable forces" (Bean, 1994:80), such as the economic environment, law and public policy, social attitudes, and the demographic and technological context (Katz and Kochan, 1992; Kochan, 1980). Although these differences are persistent, Member States agreed recently on some legal initiatives regarding indirect employee involvement. In 1994, the Council of Ministers agreed on the Directive (94/45/EC) on the establishment of an European Works Council or a procedure in community-scale undertakings and community-scale groups of undertakings for the purposes of informing and consulting employees that provides a framework for a transnational information and consultation procedure. Later, in 2002, the Council and the Parliament agreed on the Directive (2002/14/EC) establishing a general framework for informing and consulting employees in the European Community. This directive is aimed to set a minimum standard of information and consultation with respect to national issues all over Europe. Although EU Member States that do not have a system of information and consultation at the national level so far are able to enact less strict rules (article 10), by and large, this directive might be seen as a step towards employees' legal right to be informed and consulted in all Member States.

Even though these two directives might be seen as groundbreaking, the focus of this paper is on a legal initiative that goes beyond the scope of information and consultation, namely the European company (SE=Societas Europaea). The SE is governed by two legal acts, the council regulation No. 2157/2001 and the directive regarding employee involvement No. 2002/14/EC, which are presented below in more detail. Considering the scope of the directive, it is astonishing that it does not only provide rules regarding information and consultation but also on worker participation meaning board-level representation in that instance. Although no certain model of worker involvement is preferred by the directive, but moreover negotiations in good faith between the parties are emphasised, it offers the opportunity for European employees' being represented at the board-level.

The structure of the paper is the following: First of all, the principal provisions regarding the corporate governance structure, the governing law, and especially employee involvement are discussed. Then three exemplary cases are presented. Before concluding, three issues arising in this context are examined.

The European Company Statute

Emergence

On October 8^{th,} 2001, after more than 30 years of discussion, the Council of Ministers enacted two legal instruments: the council regulation (No. 2157/2001) on the Statute for a European company (SE), subsequently referred to as SE/Re, and the council directive (2001/86/EC) supplementing the Statute for a European company with regard to the involvement of employees, subsequently referred to as SE/Di. In this context, it is a legitimate question, why it did take Member States more than 30 years to agree on the SE. Actually, two major obstacles can be identified: (1) the scope of an European group law and (2) the scope of employee involvement.

The first obstacle was overcome with the Commission's proposals in 1989 and 1991 (European Commission, 1989a and 1989b; European Commission, 1991a and 1991b), a complete revision of the 1970 proposal which would have created a comprehensive European group law (European Commission, 1970). In those proposals the SE became a hybrid form. This means that the institutional frame of the European company is governed by Community law, while certain aspects, such as tax law or capital maintenance requirements, are subject to national provisions. At the same time, the proposal was divided into two parts: a regulation on the statute of the European company and a directive supplementing this regulation with regard to the standing – explicitly not participation - of employees. Regarding employee participation, the directive would have put companies in the position to choose between three equivalent models of employee involvement – equivalent in the view of the Commission. Due to some Member States' disagreement on employee involvement, the matter was let to rest again.

Eventually, the obstacle of employee involvement was overcome by suggestions of the so-called Davignon Report (European Commission, 1997), which was prepared by a group of high-ranking experts on European systems of worker involvement presided by Etienne Davignon. Due to the great diversity of national models of employee involvement, the group pleaded for "negotiated solution(s) tailored to cultural differences and taking account of the diversity of situations. […] The path we are opening up is therefore that of negotiations in good faith between the parties concerned, with a view to identifying the best solution in each case, without imposing minimum requirements" (European Commission, 1997, paragraphs 94c and 95). However, it needed another two compromises before it could come to the "miracle of Nice" (Hirte, 2002:1).

The first compromise is the so-called "before and after" principle and was made in 1998 (Herfs-Röttgen, 2001; Blanquet 2002). It specifies that employees' acquired rights regarding worker participation must be secured, meaning that "rights in force before the establishment of the SE should provide the basis for employee rights of involvement in the SE" (Directive 2001/86/EC, recital 18). After this agreement, only one Member State, namely Spain, still impeded the deal. This anew standstill was overcome during the Nice Summit in December 2000 by the agreement on the opting-out clause, which was added due to Spain's urging (Köstler, 2001; Pluskat, 2001) and means that Member States have the opportunity to make it possible for an SE to register without an agreement on the involvement of employees in case of a merger between companies that were not subject to worker participation so far (Directive 2001/86/EC, recital 9). Eventually, the SE/Re and the SE/Di, which are specified in more detail below, were enacted on October 8th, 2001. Consequently, the SE could have been found by joint-stock companies since October 8th, 2004.

The Legal Acts

The SE is available only for companies with certain legal forms, namely joint-stock companies such as the British plc. or ltd. or the German AG or GmbH. Moreover, companies concerned must be subject to law in at least two Member States (SE/Re article 2). Though, Member States refers here not only to the 25 EU Member States but involves also the other three Member States of the European Economic Area (EEA) due to their acceptance of the SE/Re and the SE/Di (Decision, 2002). The SE, which has a separate legal personality, must be seen as another legal alternative for joint stock companies doing business in Europe. In contrast to the 1970ies draft the SE/Re does not constitute a comprehensive European group law, but provides companies with an institutional frame that is filled by national law. Consequently, it cannot be spoken about one uniform SE but moreover it must be spoken of

28 different ones (Hommelhoff, 2001; Schwarz, 2001; Wiesner, 2001). The minimum capital, which must be divided into shares, is € 120,000.-- suggesting that the establishment of a SE is only reasonable for large groups (Hommelhoff, 2001). Additionally, the abbreviation "SE" is provided exclusively for European companies and must be put in front of or behind the company name (SE/Re article 11). For the internal corporate governance structure is specified that the SE must have a general meeting of shareholders and either an administrative board, so-called one-tier system, or a management board and a supervisory board, so-called two-tier system, as governing bodies (SE/Re articles 38 to 45 and 52 to 59). The companies are free to choose between the two systems.

In general, the SE/Re provides four forms of foundation. First of all, a SE can be established by a merger, which is only available to public limited companies from at least two different EU or EEA Member States. Secondly, a SE can be found by the formation of a holding company, which is available to public and private limited companies that have their registered offices in at least two different EU or EEA Member States or have subsidiaries or branches in Member States other than that of their registered office. Additionally, a holding-SE can form a subsidiary-SE, which is considered as secondary form of foundation (Hommelhoff, 2001). According to Wenz (2003), who examined the SE as to its practical applications, the holding-SE might play a considerable role particularly for parent companies from countries outside the EU and the EEA in order to reorganise their business in Europe, which for example is currently discussed by General Motors (see for example http://www.commentwire.com/commwire_story.asp?commentwire_ID=6080). Thirdly, a SE can be established by the formation of a joint subsidiary, which is available under the same circumstances applicable to the formation of a holding company to any legal entities governed by public or private law. Finally, the SE can be found by the conversion of a public limited company that was previously formed under national law and had a subsidiary in at least one other EU or EEA Member State for at least two years. In this context, Wenz (2003) talks about a reengineering-SE. Even though a (national) public limited company converted into a SE is not allowed to move its registered office at the same time as the transformation takes place (SE/Re article 37 paragraph 3) and is not allowed to reduce the form of board-level representation (SE/Di article 4 paragraph 4), companies might benefit from a transformation, because then they can choose the corporate governance structure.

Furthermore, Wenz (2003) identifies another application of the European company statute, the cross-border-SE that means the transfer of registered office (SE/Re article 7). According to the SE/Re the transfer of registered office does not require liquidation and new foundation of the company anymore. Rather companies are able to transfer their registered office by preserving their legal identity resulting in a higher degree of mobility of the SE. In fact, it is the first time that companies are free to move their registered office without losing their legal personality within the EEA. Even though the possibility to transfer registered office is not completely unlimited, as aforementioned, the provisions contribute considerably to the completion of the SE's freedom of establishment and undoubtedly will increase the mobility of European companies.

After having outlined the SE/Re, the paper turns to worker participation in the SE (see for instance Pluskat, 2001; Heinze, 2002; Teichmann, 2002; Köstler, 2003). The crucial link between the SE/Re and the SE/Di is that the SE may not be registered unless an agreement on arrangements for employee involvement has been concluded (for details see SE/Re article 12 paragraph 2; see also Blanquet, 2002). By that, it is guaranteed that the provisions on co-determination are respected (Weiss, 2003). At this point of analysis, it is pointed out that the SE/Di does not affect national provisions regarding worker participation at the company level, meaning, for instance, that the German Works Constitution Act (Betriebsverfassungsgesetz –

BetrVG) is still applicable (Köstler, 2002). The SE/Di rather deals with transnational information and consultation rights on the one hand and with board-level representation on the other (Heinze, 2002; Teichmann, 2002; Weiss, 2003).

While information and consultation procedures have to be established in any SE, the form of board-level representation in the SE is subject to voluntary negotiations which are conducted by the management and the special negotiating body (SNB) that represents employees of all companies concerned and is established as soon as possible after the plan of establishing a SE was announced by the management. In principle, the employees' representatives are elected or appointed – dependent on national provisions – in proportion to the number of employees in each Member State of the companies concerned. Simply put, every country in which the companies concerned do business shall be represented with one vote (Köstler, 2002; ETUC, 2003). In general, the SNB may ask assistance in negotiations of experts of choice (SE/Di article 3 paragraph 6) who then have an advisory function. Costs incurred must be beard by the companies, but Member States can set limits. Besides provisions on the election or appointment of the employees' representatives in the SNB the Member States may provide that trade unionist can be members of the SNB, irrespectively, whether they are employees of the companies concerned or not (SE/DI article 3 paragraph 2 lit b).

Generally speaking, each member of the SNB has one vote (SE/Di article 3 paragraph 4). In principle, the SNB can agree on any form of worker participation, as long as the agreement is accepted with the absolute majority. If co-determination shall be reduced in case of establishment by a merger or by creating a holding company/forming a subsidiary, a two-third majority decision representing two-thirds of the employees that are employed in at least two Member States is required, when 25 percent (creation of a merger-SE), respectively, 50 percent (creation of a holding-SE or subsidiary-SE) of the employees concerned where covered by any form of co-determination so far. Additionally, the SNB may agree with a qualified majority decision that negotiations are not commenced at all or are terminated (SE/Di article 3 paragraph 6) resulting in the application of national law regarding information and consultation of employees, as a rule application of the EWC Directive (94/45/EC), if the management still wants to establish a SE (Heinze, 2002; Keller, 2002).

After the SNB is established the negotiations shall commence as soon as possible. The duration of negotiations is fixed by the SE/Di to six months from the SNB's establishment, but may be extended up to one year by agreement of the parties involved (SE/Di article 5). The task of the SNB is to negotiate with the management of the companies concerned about a written agreement on the arrangements for the involvement of the employees within the SE (SE/Di article 4). The agreement shall specify the scope of the agreement, the composition, the functions, the procedure for information and consultation, and the frequency of meetings of the representative body as well as the financial and material resources to be allocated to the representative body. If the SNB and the management agree on board-level representation, the number of members and the procedure of their election, appointment, recommendation or opposition by employees and their rights shall be specified in the agreement, too. Additionally, it shall specify the date of entry into force, its duration, cases were the agreement should be renegotiated, and the procedure for renegotiation. If the parties do not arrive at an agreement within the prescribed time and the management still wants to form a SE, or the parties involved agree so, then standard rules are applicable (SE/Di article 7 and part three of the annex).

In the annex of the SE/Di, the standard rules are divided into three parts. Part one contains provisions on the composition of the representative body. Standard rules regarding information and consultation can be found in part two. In Annex part 3, participation is

governed. Which part of the standard rules is applied depends on some criteria, which are related basically with the result of the negotiations, the form of foundation, and the number of employees already covered by any form of worker participation.

The standard rules concerning the composition of the representative body and those for information and consultation are applied, if the negotiating parties agree so. Additionally, they are applied, when the negotiations failed, but the management still wants to establish an European company and the SNB did not refuse negotiations or terminate negotiations. With respect to standard rules regarding participation, not only the afore-mentioned criteria must be fulfilled but also some additional ones that are bound to the form of foundation and on the proportion of the total number of employees of the companies concerned who were covered by a certain form of co-determination so far (SE/Di article 7). These criteria are presented below in Table 1.

Form of foundation	*Standard rules regarding participation apply, when …*
Transformation	Employees have been covered by any form of participation so far. Then, this regime must be maintained.
Merger	25% of the employees were covered by any form of participation so far or even less than 25% if the negotiating parties agree so. Then, this regime must be maintained.
Holding or subsidiary	50% of the employees were covered by any form of participation so far or even less than 50% if the negotiating parties agree so. Then, this regime must be maintained.

Table 1: Application of standard rules regarding participation

Besides provisions on the negotiation procedure, the content of the agreement and the standard rules, the SE/Di contains also miscellaneous provisions, such as the reservation and confidentiality (article 8), the operation of the representative body and procedure for the information and consultation of employees (article 9), the protection of employees' representatives (article 10), the misuse of procedure (article 11), and the compliance with the Directive (article 12). However, these provisions are not presented here in detail. Finally, an overview of the negotiations and its outcomes are presented below in Figure 1 (next side).

Exemplary cases

What does that all mean for the creation of a SE? In the following, cases are presented that shall illustrate the great variety of possible outcomes. In general, agreements are hardly predictable. Even though the standard rules ensure quite strong worker participation, it is conceivable that the SNB might even agree on a reduction of worker participation standards in the SE with the management by being granted job guarantees, future investments for (certain) plants or similar in return.

Case 1. Company A, a UK ltd. with 4,500 employees in the UK has a subsidiary in Germany with 3,500 employees and Company B, a Spanish SA with 2,000 employees, want to form a holding-SE seated in the Netherlands. The SNB consists of 11 members (5 from the UK, 4 from Germany and another 2 from Spain). The SNB can agree on any form of worker participation by an absolute majority, because the number of employees concerned covered by any form of worker participation before the formation of a SE is still below the threshold of 50% applicable in case of formation of a holding-SE (only the German employees were covered by worker participation so far). If the management and the SNB agree so or negotiations fail but the management still wants to establish a holding-SE than the standard

rules apply. This means, that proceedings regarding information and consultation (SE/Di Appendix Part I and II) are applicable, while the threshold for the application of the standard rule regarding board-level representation is not accomplished. The registered office can be transferred to the Netherlands.

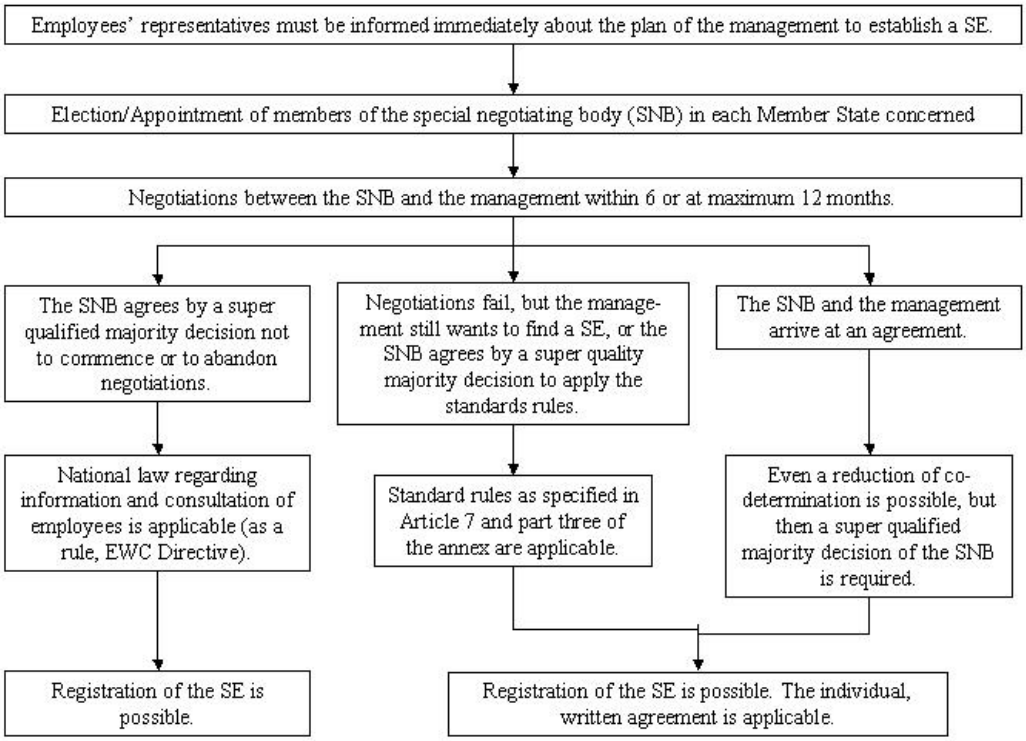

Figure 1: Employee participation in the SE
(Adapting Keller, 2002:205; Blanquet, 2002; Heinze, 2002; Röthig, 2002)

Case 2. Company A, a UK ltd. with 4,500 employees, Company B, a German AG with 2,500 employees, and Company C, a Spanish SA with 3,000 employees, want to merge and transfer its seat to the Netherlands. The SNB consists of 11 members (5 from the UK, 3 from Germany and another 3 from Spain). In case of a merger, it must be ensured that all participating companies are represented in the SNB. This criteria is fulfilled here. The SNB can agree on the form of worker participation that covered at least 25% of the total number of employees before the creation of the merger by an absolute majority, ie the German co-determination, or even on a reduction of that worker participation by a two-thirds majority that must represent two-thirds of the employees in at least two Member States. This means that the British and Spanish representatives can outvote the German representatives. If the management and the SNB agree so or negotiations fail but the management still wants to establish a SE by merger than the standard rules apply. In case of a merger this means that not only proceedings regarding information and consultation are applicable but also the standard rules regarding board-level representation, because the threshold of 25% of employees concerned were covered by any form of co-determination so far resulting in a transfer of the equal proportion of employee representatives in the board as provided by German law. The registered office can be transferred to the Netherlands.

Case 3. Company A, a German AG with 4,500 employees in Germany, has branches in the UK with 3,500 employees and in Spain with 2,000 employees. The management wants to

transform Company A into a SE and transfer its seat to the Netherlands. The SNB consists of 11 members (5 from Germany, 4 from the UK and another 2 from Spain). In this instance, worker participation cannot be reduced. The only thing that changes regarding worker participation is that the board-level representatives are not any longer only from Germany but also from the UK and Spain depending on the agreement. Thus, the board-level representation becomes European. Another question under negotiations might be that the management wants to change its structure from two-tier to one-tier, a choice it did not have before, resulting in new arrangements regarding worker participation. Regarding the transfer of seat, it can be said that it is not possible at the moment of the establishment of a SE by transformation. Consequently, Company A SE must stay in Germany for the moment, but can be transferred later without liquidation and new foundation of the SE.

Issues

As indicated above, one of the critical issues with regard to worker involvement in the SE might be seen in negotiations between the management and the SNB aimed to come to an agreement. However, an even more critical issue might be that the members of the SNB must agree on the form of worker participation they want enforce before the SNB can negotiate it with the management. The outcome of that "internal" negotiations cannot be predicted seriously due to heavily varying preferences, aims, traditions, and roles regarding employee involvement and more specifically regarding board-level representation in Europe.

In order to demonstrate the great variety of traditions regarding board-level representation in Europe respectively the potential for tensions in the negotiation procedure two countries considered as the extremes of the "worker participation's continuum" are presented in more detail below: the UK with no rights for board-level representation and Germany with extensive rights for board-level representation. The following analysis of board-level representation in Germany and the UK refers mainly to Schulten et al (1998) and Mävers (2002).

In Germany, employees have considerable legal rights regarding board level-representation: the Coal, Iron and Steel Industry Co-Determination Act (1951), the Co-Determination Amendment Act (1956), the Works Constitution Act (1952), and the Co-Determination Act (1976). The procedure of appointment or election of representatives varies with respect to the size of the company and their industries. In all companies with 500 to 2,000 employees, one-third of the members of the supervisory board represent the employees. In companies with more than 2,000 employees even one-half of the members of the supervisory board are employees' representatives. In these large companies, the chair of the supervisory board represents the shareholders and has a double vote in case of critical decisions. The labour director, who is a member of the management board, could be appointed without agreement of the employees, but this seems being rather hypothetical. In the coal, iron and steel industries, a neutral member is appointed to the supervisory board by the management and the employees' representatives in order to avoid a deadlock. The labour director can only be appointed with the agreement of the employees' representatives.

In the United Kingdom, there is no legal right for board-level representation. Instead of worker participation provided by law as known, for instance, in Germany or Austria, collective bargaining, understood as a "mechanism for the determination of pay rates and other basic terms and conditions for the majority of the workforce and more generally represents a key arena for the conduct of collective relations between managers and managed" (Blyton/Turnbull, 1994:175), is of great importance. In the 1970ies after Britain's accession

to the European Economic Community, claims for board-level representation raised. In the following years, two reports, the Bullock Report and the White Paper, were published that offered proposals for the introduction of board-level representation. At that time and later, some formerly state-owned enterprises, for example British Railways or the British Steel Corporation, tried to establish some form of board-level representation. Due to those companies bad performance and the fact that the idea of worker participation did not gain acceptance on the social partner's agenda, the matter was given up.

In Table 2, an overview of provisions regarding board-level representation in European countries can be found.

Country	Comments
Austria	1/3 of supervisory board
Belgium	No board-level representation
Cyprus	No board-level representation
Czech Republic	1/3 of supervisory board
Denmark	1/3 of supervisory board (at least two members)
Estonia	No board-level representation
Finland	According to an agreement between the employer and the personnel groups
France	According to the type and size of company
Germany	According to the type and size of company: 1/3 or ½ of board
Greece	Board-level-representation only in state-owned companies
Hungary	1/3 of supervisory board
Iceland	No board-level representation
Ireland	1/3 of board (between 1 and 5 directors)
Italy	No board-level representation
Latvia	No board-level representation
Liechtenstein	No board-level representation
Lithuania	No board-level representation
Luxembourg	1/3 of board
Malta	Board-level-representation only in state-owned companies
Norway	1/3 of board
Poland	In partly or formerly state-owned companies: 1 to 4 members of the board
Portugal	Board-level-representation only in state-owned companies
Slovakia	1/3 of supervisory board
Slovenia	1/3 to ½ of supervisory board
Spain	Board-level-representation only in state-owned companies and saving banks
Sweden	2 members of the board
Switzerland	No board-level representation
The Netherlands	No legal provision to appoint or elect a certain number of employee representatives, but the works council has a veto power
United Kingdom	No board-level representation

Table 2: Overview of provisions regarding board-level representation in Europe (adapting SWX, 2002; LLB, 2003; ICEX, 2004; Kluge and Stollt, 2004a and 2004b)

Another issue of great importance might be seen in the fact that for the first time board-level representation is Europeanised. So far, only German employee representatives were in the supervisory board of a German joint-stock company (for example, DaimlerChrysler as an exception). With the SE, the current situation changes. The SNB decides on the matter which representatives are sent in the board and from which countries they are. It seems reasonable to assume that it will be in the interest of the employees' representatives that employees from different countries are represented in the competent organ. Of course, some might argue now that the SE falls short the global reality of a lot of these companies, but it still seems better having only an European solution than having no such solution.

So far, European employees have been in the centre of the analysis, but of course the question arises as to the SE's impacts on employees outside Europe. Actually, no provision regarding that question can be found in the SE/Di. This might be connected with the fact that it is ruled in the SE/Re that only companies that are found and registered in the Member States may participate in the foundation of a SE. Nevertheless, companies from outside Europe might re-organise their European business by taking advantage of the SE or European companies might be involved in business outside Europe. Consequently, it is worth thinking about impacts on employees outside Europe. As Köstler (2004) argued, the SE/Di does not explicitly bar employees from outside Europe from involvement arrangements in the SE. It appears legally feasible that employees from outside Europe can be included simply by a corresponding wording in the written agreement between the management and the SNB. Though, this option should not be overrated, as such a wording depends heavily on the willingness of the – European - management and the – European – SNB. It might just not be in their interest to involve employees from outside Europe, even though they might be affected likewise by the decisions taken. This is true especially for European companies that have subsidiaries not only in Europe but also overseas. In those cases in which the headquarters of the group is outside Europe, one might even more doubt the willingness of the - non-European - management to establish a global employee involvement procedure.

By and large, it will take a great effort of the parties concerned, the SNB and the management, whose attitudes are stamped by varying preferences, aims, and traditions, to come to an agreement on the issue of worker involvement. Upon all doubts, it must be recognised that the creation of the SE and with it the provisions regarding employee involvement are fundamental. Probably, it is not that "miracle" that has been proclaimed by some authors (see for instance Hirte, 2002), but it is a step in the right direction. Of course, pressures on the national systems of industrial relations and corporate governance increase, and not all people concerned will benefit, but overall the competitive position of companies in the EEA in comparison to companies outside this economic area might be strengthened (Blanquet, 2002).

Prospects

The aim of this paper was to present current developments with respect to worker involvement in Europe. For that reason, two directives, the EWC directive and the information/consultation directive, were mentioned. The focus of the paper, however, was on the European company and especially on its provisions regarding worker participation. Some exemplary cases have demonstrated plainly the difficulties that might arise in the context of the form of worker participation. In the course of the paper, three issues have been identified. First the issue of the different traditions making it impossible to predict the outcomes of the negotiations. Secondly, the issue of the Europeanisation of board-level representation making it thrilling to have a closer look at board-level decisions in the future. As a third issue, the impacts on employees outside Europe were discussed.

In essence, the introduction of the SE might advance the creation of European best practices not only regarding corporate governance but also with respect to worker participation rights. The creation of the SE might be seen as the first step towards an "international company". Considering this as the first step, this would mean that in an indefinite future there will be a negotiated worker participation not dominated any longer by employees' representatives from certain countries or economic areas but representing employees from all over the world.

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