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THE EUROPEAN COMPANY STATUTE – EXAMINATION OF ITS IMPACTS ON CO-DETERMINATION

At the Nice Summit in December 2000, after more than 30 years of controversial debate, the Council of Ministers agreed on the European Company Statute (Societas Europaea = SE). In this context two legal instruments were enacted, the council regulation (No. 2157/2001) on the Statute for a European company, which rules the internal corporate governance structure of the SE, and the council directive (2001/86/EC) supplementing the Statute for a European company with regard to the involvement of employees on the company level, which emphasises voluntary negotiations between employees' representatives, a so-called special negotiating body, and the management. In October 2004, the SE can be established by companies based in the EU and the EEA for the first time.

The legal form of the SE provides companies all-over Europe extensive opportunities for structural adjustments in accordance with their organisational needs. However, it does not only have substantial impacts on the companies' capacity to act but also on the Member States. Actually, the introduction of this new form of enterprise is expected to put considerable pressure on the national corporate governance systems as well as on the national fiscal systems. Additionally, the paradigm shift of the Community is remarkable regarding co-determination. This means, the Community does not try to establish a specific institutional pattern anymore, but pushes procedures that promote the idea of worker participation in management's decisions.

The paper gives a brief overview of the emergence of the SE. Then, the contents of the regulation and the directive are presented. Subsequently, the focus of the paper is on the impacts on co-determination taking into consideration exemplarily the great variety of forms of worker participation currently prevalent in the EU and the EEA.

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Emergence

Since the 1920ies, the idea of a transnational legal form[1] was discussed by some institutions (for details see Bärmann, 1970; Theisen/Wenz, 2002). The discussion about a European legal form began during the Notary Convention in France in 1959, when the French notary Tibièrge suggested the introduction of a European public limited company. In the following years especially the Dutch Professor Pieter Sanders promoted the idea and even worked with experts on a proposal for a statute of a European company, which should have had a uniform legal basis in, at that time, six Member States (Sanders, 1966). In June 1970, the Commission presented her first proposal of a regulation to the Council of Ministers (European Commission, 1970). After the European Parliament and the European Economic and Social Committee commented the proposal, it was presented again to the Council of Ministers, in 1975. Overall, the proposal was groundbreaking. It would have created group law and established a European Works Council as well as board-level representation. However – or rather because of that - the Member States, where company law was not developed very much at that time, were not about to accept it. In the following 25 years, the idea of a European form of enterprise was discussed heavily. Particularly the issue of employee involvement caused disagreement and led to suspension of the debate again and again.

In the history of the European Company (Societas Europaea = SE) some milestones can be identified. First of all, with the proposals of 1989 (European Commission, 1989 a and b) and 1991 (European Commission, 1991 a and b) the SE became a hybrid form, meaning that the Commission gave up its plan to establish a uniform company law. It wanted to create a form of enterprise that was on the one hand subject to community law, but at the same time was governed by national law. Additionally, the presented regulation was split in two parts: a regulation on the statute of the SE and a directive supplementing this regulation with regard to the standing – not participation – of employees. The Commission under its president Jacques Delors offered a compromise to the issue of worker participation by suggesting three equivalent models of employee involvement – equivalent in the opinion of the Commission. However, Member States were not able to agree on it.

Even though the discussion on the SE was motivated politically, the companies' management did not give up lobbying for the creation of a transnational legal form. As another milestone in this context can be seen the so-called Davignon Report, i.e. a report of a group of high ranking experts on European systems of worker involvement published in 1997 (European Commission, 1997). This group of experts was asked by the

[1] The terms form of enterprise, legal form, and legal structure are used interchangeably.

Commission to suggest a solution for the issue of worker participation. Overall, they did not want to consider one system of worker participation as better than the other one resulting in the suggestion 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, paragraph 95). However, Member States still could not agree on the SE.

In fact, it needed another two compromises or say milestones. The first compromise is the so-called "before and after" principle meaning that employees' rights that were in force before the foundation of a SE should lie the basis for employee involvement after the establishment (Herfs-Röttgen, 2001; Blanquet 2002). Additionally, it was specified that this approach does not only apply to the initial establishment of a SE, but also to structural changes in existing European companies (Council Directive 2001/86/EC, recital 18). But still, Spain could not agree on the SE, because it thought that the provisions on worker participation were too far-reaching. Consequently, in December 2000, the Member States agreed on the so-called opting-out clause allowing Member States not to apply the standard rules regarding worker involvement in case of a merger of companies that are based in countries where no worker involvement is granted by law (Council Directive 2001/86/EC, recital 9). Eventually, on October 8th, 2001 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.

The Legal Acts

On October 8th, 2004 joint stock companies[2] located at least in two Member States[3] or doing business in at least two Member States by branches or subsidiaries can form a SE. Thus, the SE can be seen as another legal alternative for companies instead of legal forms provided by national law. 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" provided exclusively for European companies must be put in front of or behind the company name (SE/Re article 11).

[2] For a comprehensive list of all legal forms concerned, the reader is referred to the Annex of the SE/Re.

[3] In this case, Member States means not only EU Member States but also Member States of the European Economic Area (EEA), because the EEA joint committee took the decision (No 93/2002) to accept the SE/Re and the SE/Di.

In general, the SE/Re provides four forms of foundation. First of all, an 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. In this context, Wenz (2003), who examined the legal instruments as to their practical applications, talks of a merger-SE, i.e. a merger of two equal partners, or an acquisitions-SE, i.e. one company acquires, respectively, absorbs another (similar at Kloster, 2003).

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), the holding-SE might play a considerable role for parent companies from countries outside the EU and the EEA in order to reorganise their business in Europe.

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. This form of foundation might be of importance for companies that are interested in close cooperation with other companies in certain fields. Consequently, the companies involved might establish a Joint-Venture-SE (Wenz, 2003).

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 intensity of board-level representation (SE/Di article 4 paragraph 4), companies might benefit from a transformation, because then they can choose between a one-tier and a second-tier structure. According to Wenz (2003) this aspect increases undoubtedly the interest of companies in the SE.

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. 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.

For the statutes is specified that the SE must have a general meeting of shareholders and either a management board and a supervisory board, so-called two-tier system, or an administrative board, so-called single-tier system, as governing bodies (articles 38 to 45 and 52 to 59). The companies are completely free to choose between the one-tier-system and the two-tier-system. In sum the SE/Re contains fundamental provisions regarding the SE's internal corporate governance structure (see for example, Herfs-Röttgen, 2001; Heinze, 2002; Hirte, 2002; Lutter 2002). However, Member States still determine a great deal of applicable law, such as tax law (Hommelhoff, 2001; Schulz/Geismar, 2001), reporting standards, liability, disclosure requirements, and even rule amendment of the articles as well as capital raising and maintenance of capital (Theisen/Wenz, 2002). Consequently, it can be expected that the SE will not have a uniform European design, but 28[4] different ones.

This diversity in design and the simplified opportunity of transfer of registered office might challenge corporate governance systems all over Europe. In this context, Grundmann (2001) argues that this kind of competition between the Member States' corporate governance systems should not be rejected from the start, but rather is desirable, because this competition might minimise state and market failure. Even though it cannot be predicted, if this competition results in a race-to-the-bottom or a climb-to-the-top – a controversially debated issue (Charny, 1991; Grundmann, 2001; Wymeersch, 2001). Considering this argument of the race-to-the-bottom, the SE could also be viewed as a mandatory minimum standard for companies that do business cross-boarders aimed at restricting unlimited, ruinous competition on incorporations between Member States (Theisen/Wenz, 2002).

After having outlined the SE/Re and its implications for corporate governance systems persistent in Europe, the paper turns to employee involvement in the SE, which is ruled by the SE/Di (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 plant level, meaning, for instance, that the German Works Constitution Act (Betriebsverfassungsgesetz – BetrVG) is still applicable (Köstler, 2002).

[4] 25 EU Member States and 3 Member States of the European Economic Area

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 intensity of board-level representation in the SE is subject to voluntary negotiations which are conducted by 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, even though Member States can set limits. Besides provision 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 co-determination, as long as the agreement is accepted with the absolute majority. Is co-determination reduced when a SE is established by a merger or by creating a holding company or forming a subsidiary[5], 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 Directive on the European Works Council (94/45/EC) (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, but may be extended up to one year from the SNB's establishment 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 an agreement on the arrangements for the involvement of the employees

[5] Is the SE established by conversion, then a reduction of co-determination is ex lege not possible (SE/Di article 4 paragraph 4).

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. 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 make a decision according to SE/Di article 3 paragraph 6.

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: 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.

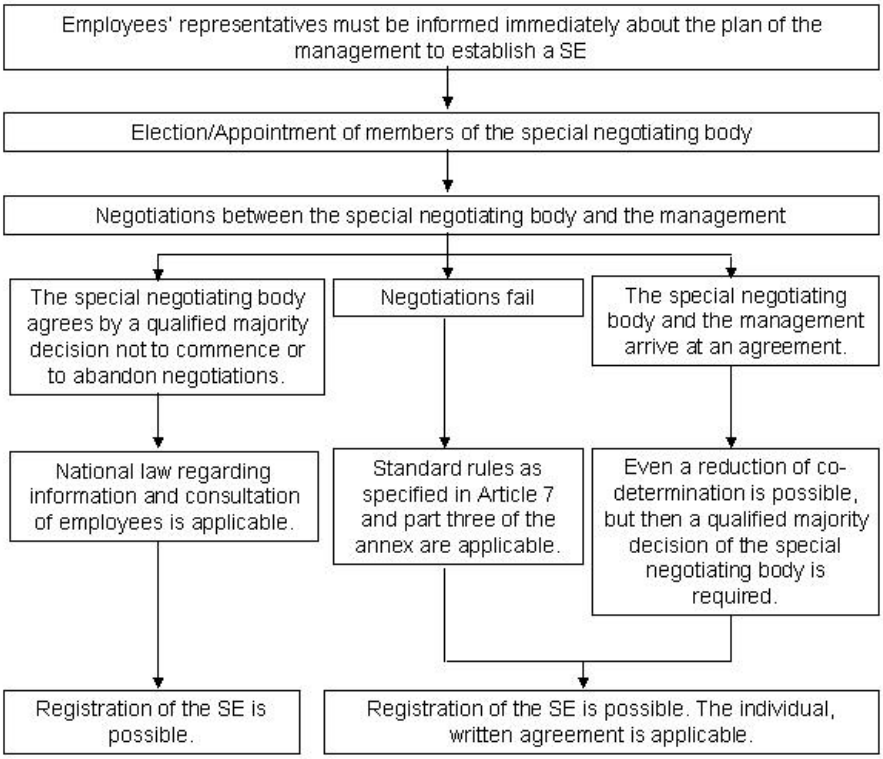

Figure 1: Employee participation in the SE
(Adapting Keller, 2002:205; Blanquet, 2002; Heinze, 2002; Röthig, 2002)

Issues

As indicated above, the critical issue with regard to worker involvement in the SE can be seen in negotiations between 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 due to heavily varying preferences, aims, traditions, and roles regarding worker participation in Europe. In order to make that point

clear, two positions considered as the extremes of the "worker participation's continuum" are presented in more detail: the UK with no rights for board-level representation and Germany with extensive rights for board-level representation. Additionally, Norway is presented as an example from the EEA Member States.[6]

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 represents the shareholders and has a double vote in case of critical decisions in the supervisory board. The labour director, who is a member of the management board, could be appointed without agreement of the employees, but this seems rather being hypothetical. In the coal, iron and steel industries, the neutral member is appointed 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 Norway, board-level representation in private sector enterprises is quite common. There is substantial legislation on worker participation in the private sector, the 1976 Companies Act, the 1980 Foundations Act, and the 1985 Act on general and limited partnerships. In general, one third of the members of the board are elected by the employees. If the companies have "corporate assemblies" or a similar body additionally to the board, then employees are represented in both bodies. Companies that are not covered by the legal framework might conclude voluntary arrangements. In public sector enterprises, however, no uniform set of rules regarding board-level representation is provided. Nevertheless, in some state and municipal institutions some form of board-level representation can be found.

The following table (see Table 2) gives an overview of EU and EEA countries where some form of board-level representation is compulsory for private and privatised companies.

[6] The following description of board-level representation in Germany, Norway and the UK refers mainly to Schulten et al (1998) and Mävers (2002).

Country	Number of employees representatives on the board	Structure
Austria	$^1/_3$ of supervisory board	Dualistic
Czech Republic	$^1/_3$ of supervisory board	Dualistic
Denmark	$^1/_3$ of supervisory board (at least two members)	Monistic
Finland	According to an agreement between the employer and the personnel groups	Mixed
France	According to the type and size of company	Mixed
Germany	According to the type and size of company: $^1/_3$ or ½ of board	Dualistic
Hungary	$^1/_3$ of supervisory board	Dualitstic
Ireland	$^1/_3$ of board (between 1 and 5 directors)	Monistic
Luxembourg	$^1/_3$ of board	Monistic
The Netherlands	No legal provision to appoint or elect a certain number of employee representatives, but the works council has a veto power	Dualistic
Norway	$^1/_3$ of board	Mixed
Poland	In partly or formerly state-owned companies: 1 to 4 members of the board	Dualistic
Slovakia	$^1/_3$ of supervisory board	Dualistic
Slovenia	$^1/_3$ to ½ of supervisory board	Dualistic
Sweden	2 members of the board	Monistic

Table 2: EU/EEA Member States with board-level-representation in private and privatised companies (adapting Schulten et al, 1998; Kluge and Stollt, 2004a and b)

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 3, EU and EEA countries can be found that do not have legal obligations regarding board-level representation in private or privatised companies

Country	Comments
Belgium	
Cyprus	
Estonia	
Greece	Board-level-representation only in state-owned companies
Iceland	
Italy	
Latvia	
Liechtenstein	
Lithuania	
Malta	Board-level-representation only in state-owned companies
Portugal	Board-level-representation only in state-owned companies
Spain	Board-level-representation only in state-owned companies and saving banks
United Kingdom	

Table 3: EU/EEA Member States without board-level-representation in private and privatised companies (adapting SWX, 2002; LLB, 2003; ICEX, 2004; Kluge and Stollt, 2004a and 2004b)

By description of the state of the art of board-level representation in three countries out of the 28, the great variety of systems was demonstrated plainly. The differences in these systems are according to Bean (1994:80) "not simply the result of chance occurrence or historical accident, but develop(s) instead because of identifiable forces", such as the economic environment, law and public policy, social attitudes, and the demographic and technological context (Katz and Kochan, 1992; Kochan, 1980). Considering these differences between national systems of board-level representation, it becomes obvious that agreement between the members of the SNB might be difficult to accomplish.

But what does this mean for the creation of a SE? In the following, cases are presented that illustrate the impact of the forms of foundation on the negotiation outcome.

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.

Case 2. Company A, a UK ltd. with 4,500 employees in the UK, 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. Company A wants to convert 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. 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. It is not clear so far, how co-determination as provided by German law for the two-tier structure can be transferred to the one-tier structure. Additionally, in case of conversion it is not possible to transfer the registered office at the same time. Consequently, it must stay in Germany for the moment, but can be transferred later without liquidation and new foundation of the SE.

Resume

As indicated by these cases, it will take a great effort of the parties concerned, the SNB and the management, who are determined by varying preferences, aims, and traditions, to reach 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 corporate governance increase, and not all people concerned will benefit, but overall the competition position of companies in the EU and the EEA in comparison to companies outside this economic area is strengthened (Blanquet, 2002). In essence, the introduction of the SE might support the creation of a European corporate governance system that consists of European best practices.

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