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**Article**

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Berndt Keller, Frank Werner\*

## **Negotiated Forms of Worker Involvement in the European Company (SE) –First Empirical Evidence and Conclusions\*\***

This article analyses the negotiations on worker involvement in the first almost four years of the European Company SE and their outcomes. First, some basic institutional aspects of the SE itself and its current empirical situation are described and explained. Then, the focus is on questions of employee involvement in this new legal form. Again some main institutional provisions on employee involvement are assessed, before a detailed empirical analysis on specific issues is presented. A final appraisal based on this assessment concludes the article.

Key words: **European Company / Societas Europaea (SE),  
industrial relations in the EU, worker participation**

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## 1. Introduction

The idea to create a “European” legal form for companies dates back to the early years of the European Union. It took more than 30 years before it could be finalized. The Nice Summit in 2001 passed the “Council Regulation on the Statute for a European Company” (EC/2157/2001) and the “Directive supplementing the Statute for a European Company with regard to the involvement of employees” (2001/86/EC). The European Company (*Societas Europaea*, SE) was created and a long-lasting stalemate, that focused on the question how the employees’ interests should be guaranteed in this new legal form, was solved (for an analysis of the historical processes Gold/Schwimbersky 2008). Until autumn 2004, the Directive had to be transposed into national law and since October 2004 companies are free to choose this additional legal form; of course, national ones continue to exist.

Meanwhile, quite a few companies have already chosen the SE as “their” legal form. In this article, we will have a closer look on these first cases and especially on the processes of the negotiated forms of employee involvement. First of all, we describe and briefly discuss some basic institutional aspects of the SE itself and elaborate on the present empirical situation. This new legal form gains gradually in importance, especially in specific member states and for companies with certain characteristics. Then, we will come to our focus, the question of employee involvement. Again we first describe some main institutional provisions on employee involvement before we present our detailed empirical analysis. Some virulent problems are, probably not surprisingly, already laid down in these institutional preconditions. Finally, we come to an appraisal based on our assessment.

The empirical base of our study is, on the one hand, the European Company database. It is prepared by the “SEEurope-Network” of the European Trade Union Institute in Brussels in Co-Operation with the German Hans-Böckler-Foundation ([http://www.worker-participation.eu/european\\_company](http://www.worker-participation.eu/european_company)). It constitutes the most reliable source available in the field of this new legal form and is also used by the European Commission. On the other hand, we also conducted a series of semi-structured interviews with representatives of both sides and had the unique opportunity of non-participant observation in some official meetings. In substantive regard we benefited from previous research on European Works Councils (EWCs).

## 2. The legal form of the SE – brief institutional remarks and the present “state of the art”

### 2.1 Institutional remarks

An SE, whose seat must be located in one of the member states of the European Economic Area (EEA) and can be transferred from one member state to another at any time once an SE was formed, may be established in four different ways. A necessary precondition for the establishment is a transnational element. Without such a cross-border factor, the establishment of an SE is – at least according to the Statute – not possible. Furthermore, each way of foundation can have, and this is of specific interest from our perspective, specific implications for employee involvement. There

are, for example, different quotas for the application of the so-called standard rules of employee involvement according to the different forms (for details Köstler 2006).

**Figure 1: Ways of forming an SE** (Source: Köstler 2006: 16)

WAYS OF FORMING AN SE	
<b>Merger</b>	Public limited-liability companies from <b>two</b> member states can form an SE by merger
<b>Holding</b>	Public and private limited-liability companies from <b>two</b> member states can form a Holding
<b>Subsidiary</b>	Any legal entities governed by public or private law from <b>two</b> member states (or an SE itself) can form a subsidiary-SE
<b>Conversion</b>	A public limited-liability company can convert into an SE if it has had a subsidiary in another member state for <b>2 yrs</b>

The decision to establish an SE is exclusively made by the company's management and shareholders/owners and can not be influenced by its employees and/or their representative bodies. This is an important difference compared to the Directive on EWCs. In this case, the employees play a more active role: They can request a EWC whenever they wish to as long as the preconditions are fulfilled and they can have as much time of preparation as they want before the official process is initiated. In the case of a SE, however, they are in a more or less reactive role with certain time restraints (cf. chapter 3).

Once the decision to establish an SE is made, the company's governing body usually sets up so-called "terms of foundations" which explain the legal and economic aspects of the foundation as well as its implications for the shareholders and employees. Furthermore, the statute of the company and details of the procedures for the negotiations on employee involvement must be stated.

The terms of foundation also decide on the SE's organ structure. Two systems are legally possible: On the one hand, the so-called one-tier or monistic system with a board as the only governing body (as for example in British companies) or, on the other hand, the so-called two-tier or dualistic system with two different organs, a management board and a supervisory board (as known from German or Austrian

companies). The choice of system is up to the company's owners and management and, again, can not be directly influenced by the employees. This decision is already made before the negotiations about employee involvement are officially initiated. It has to be emphasized that this new legal form provides the option to establish a one-tier system in a country of seat that has so far only allowed two-tier systems (and vice versa). This option seems to be important for the attractiveness of SEs at least for companies with certain characteristics, as the next paragraphs show.

## 2.2 *SE sub-forms*

By July 2008 at least 196 SEs were established.<sup>1</sup> The first non-intended result of empirical evidence is that different sub-forms of SEs have to be distinguished. There are some cases with quite unusual and unexpected characteristics, and these companies are, at least in absolute figures, the most important ones:

Firstly, so-called "empty" SEs are economically active (for instance, they hold some kind of shares) but do not have employees. Secondly, "shelf" SEs are completely inactive and have no employees either. They could be taken out of the shelf, sold and activated. Shelf-SEs are usually established by specialised firms and used to speed-up and to simplify the process of establishment; operating companies which want to become an SE can, therefore, buy this shelf. Thirdly, so-called "UFO-SEs" have to be distinguished. In this case the only available information known from the company register is their existence. Nonetheless, there are often some indicators that these UFO companies are also empty- or shelf-SEs.

As already mentioned, these sub-types are the most important ones in absolute figures. For the purpose of our article, these companies are of no direct interest because they do not have employees. By definition, industrial relations can not exist.

In this regard, especially shelf-SEs may become more interesting in the future. When these companies came into existence, it was unclear if they could be registered at all. Article 12(3) of the SE statute states that negotiations on employee involvement constitute a necessary precondition for the registration. Nevertheless some courts registered individual shelf-SEs and neglected the fact that there had not been any negotiations. Trade unions that took legal action against this step lost their case; the reason was that there can not be any negotiations if there are no employees.

The decisive question is about the consequences if a shelf-SE is sold and activated to take up active operation with employees. Under certain circumstances the activation of a shelf-SE could provide an option for the avoidance, first, of negotiations and, later on, of employee involvement. When a shelf SE is activated one can assume that the law relating to the setting up of a new firm would apply, and negotiations on employee participation would have to take place.<sup>2</sup> Until now at least ten shelf-SEs were activated and it seems that negotiations did not take place in all cases. It will be of relevance in future cases to observe if trade unions take legal action and how the courts will decide.

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<sup>1</sup> We took this figure from the European Company database.

<sup>2</sup> In the case of the largest shelf SE activated until now, the present Donata Holding SE with about 4,000 employees, exactly this happened.

### 2.3 Normal SEs

More important for our purposes than the non-normal SEs mentioned so far, are, of course, the so-called “normal”-SEs. These are companies with economic activities and employees. Including the ten activated shelf-SEs, 51 normal SEs operate by July 2008 (table 1). Furthermore, there are about 20 companies in the process of the foundation of an SE. These normal cases constitute the base of our empirical analysis.

**Table 1: Normal SEs** (Source: European Company Database at <http://www.worker-participation.eu>, own additions)

Company (Name)	Headquarter	Sector of Activity	Number of Employees (if exactly known)	Organ structure	Date of registration
ABN AMRO Nordic Securities SE	Sweden	Financial Services	322	One-tier	30.09.05
Allianz Investment Management SE	Germany	Financial Services	ca. 350-500	One-tier	12.06.07 (as a shelf-SE)
Allianz SE	Germany	Financial Services	133 846	Two-tier	13.10.06
BASF SE	Germany	Chemical Industry	65 590	Two-tier	14.01.08
Bitzer SE	Germany	Metal		One-tier	14.04.08 (as a shelf-SE)
Carthago Value Invest SE	Germany	Financial Services	5	Two-tier	15.02.06
Catalis SE	Netherlands	IT	444	One-tier	25.01.08
Conrad Electronic SE and Conrad Holding SE	Germany	Retail	2414	One-tier	18.08.06
Convergence CT SE	Germany	Medical Engineering	3	One-tier	31.01.06 (as a shelf-SE)
Conwert Immobilien Invest SE	Austria	Real Estate	79	One-tier	14.12.07
Demonta Trade SE	Czech Republic	Metal	ca. 30		01.06.07
Donata Holding SE	Germany	Cosmetics	3922	One-tier	21.03.06 (as a shelf-SE)
Elcoteq SE	Luxembourg (formerly Finland)	Metal	7450	One-tier	01.10.05
Eurotunnel SE	Belgium	Transport		One-tier	04.04.06
Fresenius SE	Germany	Chemical Industry and Hospitals	45 777	Two-tier	13.07.07
Galleria di Brennero Brennerbasistunnel BBT SE	Austria	Construction	33	Two-tier	17.12.04
Graphisoft SE	Hungary (formerly Netherlands)	IT	253	One-tier	27.07.05
Hager SE	Germany	Metal	ca. 7600	Two-tier	15.06.07
Huber Group Holding SE	Germany	Metal	ca. 100	Two-tier	08.04.08
I. M. Skaugen SE	Norway	Transportation	ca. 1500	One-tier	20.12.07
Informa Deutschland SE	Germany	Media		One-tier	07.02.08 (as a shelf-SE)

Company (Name)	Country of seat	Sector of Activity	Number of Employees (if exactly known)	Organ structure	Date of registration
Istrokapital SE	Cyprus	Financial Services			01.02.08
Joh. A. Benckiser SE	Austria (formerly Germany)	Financial Holding		One-tier	10.04.07
Luxury & Sport Cars SE	Latvia	Trade		Two-tier	06.06.07
Lyreco CE SE	Slovakia	Trade	ca. 30	One-tier	08.10.05
MAN Diesel SE	Germany	Metal	6682	Two-tier	31.08.06
Max Bögl International SE	Germany	Construction		Two-tier	09.11.07 (as a shelf-SE)
Mensch und Maschine SE	Germany	IT	350	One-tier	07.12.06
Nh-Trans SE	Czech Republic	Transport			31.07.07
NordiTube Technologies SE	Germany (formerly Sweden)	Metal		One-tier	30.05.08
Odfjell SE	Norway	Transport	ca. 3500	One-tier	23.07.07
Odfjell Terminals SE	Norway	Transport	860	One-tier	23.07.07
Olivenbauer SE	Germany	Restaurants		One-tier	19.09.06 (as a shelf-SE)
Omnia Holding SE	Czech Republic	Real Estate	ca. 5		02.08.07
Orchestra Service SE	Germany	IT	60	One-tier	15.06.07 (as a shelf-SE)
PCC SE	Germany	Chemical	3756	One-tier	05.02.07
Plansee SE	Austria	Metal	1422	One-tier	11.02.06
Porsche Holding SE	Germany	Automobile	11 571	Two-tier	13.11.07
Prosafe SE	Norway	Oil	55	One-tier	02.02.07
Riga RE SE	Latvia	Financial Services	31	Two-tier	11.08.06
Sapodo SE	Germany	IT	7	One-tier	13.11.07 (as a shelf-SE)
SCOR Global Life SE	France	Financial Services	801	One-tier	25.07.07
SCOR Global P&C SE	France	Financial Services	801	One-tier	03.08.07
SCOR SE	France	Financial Services	801	One-tier	25.06.07
SE Sampo Life Insurance	Estonia	Financial Services	110	Two-tier	12.01.07
Seesam Life Insurance SE	Estonia	Financial Services	ca. 200	Two-tier	29.10.07
Sevic Systems SE	Germany	Elektronics	ca. 100	One-tier	15.03.07
SpiritON MEDIA Holding SE	Germany	Media		One-tier	21.11.07 (as a shelf-SE)
Strabag Bauholding SE	Austria	Construction	32 682	Two-tier	08.10.04
Surteco SE	Germany	Paper/Plastics	2109	Two-tier	20.11.07

We have already introduced the four different ways of establishment. It is relevant to note that the vast majority of normal SEs have been established by conversion, followed by merger. On the other side, the foundation by holding or subsidiary has not played any role so far. This peculiar distribution is relevant because of its contrast with

the decade-long debate about the creation of the legal option for an SE. The discussion was always about holdings, subsidiaries and mergers (of “European champions”, for example, or of the daughters of non-European multinationals in several member states that might intend to simplify the structure of their daughters). The discussion was hardly about conversions of existing companies. But exactly the SE creates a new option for various reasons as we will explain.

In a detailed analysis of these first cases, one can not identify specific trends concerning the distribution of SEs according to size and sectors (Keller/Werner 2008a). The size of the first SEs differs to a considerable degree. There are small SEs with only some dozen up to some hundred or thousand employees (e. g. Riga RE SE or Galleria di base del Brennero SE) as well as large ones with some ten-thousand or even more than a hundred thousand employees (Allianz SE or BASF SE). For the time being there is also no clear trend concerning the sectoral distribution. There are SEs in the production as well as in the service sectors (table 1). It seems that the decision to establish an SE is in most cases correlated with company specific and not with sectoral characteristics (e. g. the level of internationalization, as some observers formerly used to argue).

The next question within the increasing over-all number of SEs is a comparison of the foundation dates. Even if there is a small increase from 2006 to 2007 and probably also from 2007 to 2008 (as mentioned there are about 20 planned SEs at the moment), it is too early to definitely conclude if the SE will become a “bestseller” or not.

**Table 2: Year of foundation of normal SEs**

Year	2004 (possible from October 8 <sup>th</sup> )	2005	2006	2007	2008 (registered and planned, until July)
<b>No. of normal SEs founded</b>	2	4	11	26	27

Anyway, the SE is much more important in some countries than in others: At least so far, the vast majority of normal SEs has been established in a very limited number of the 30 EEA member states (table 1). On the one hand, almost half of all registered normal SEs have their headquarters in Germany; furthermore Austria and the Scandinavian countries are affected. On the other hand, no normal SE has been established in the UK or the Mediterranean member states. The “new” member states, that joined the EU since 2004, are concerned only in a limited number of cases. In contrast to MNCs, subject to the EWC Directive, the “Eastern enlargement” of the EU has no major impact. The reason are related to the institutional factors already mentioned: The SE constitutes a mere option for companies’ managements, whereas in the case of EWC there is the requirement to adjust to existing regulation, if the legal preconditions are fulfilled and the employees take the initiative (Keller/Werner 2008a). In the next section we will come back to this extremely uneven distribution across countries. At least in the German cases there seem to be connections to issues of employee involvement.



### 3. Employee involvement

#### *3.1 Institutional provisions and their implications*

Before an SE can be registered by the national courts, negotiations about employee involvement are obligatory (Article 12(3) of the Statute). Again, the management has to take the initiative. With the decision to set up an SE and the publication of the terms of foundation its employees also have to be informed and asked to set up a so-called “Special Negotiation Body” (SNB) to negotiate with the management about the form and content of employee involvement. The period of time for setting up the SNB is usually ten weeks, as we will argue later, not very long. For the negotiations themselves usually a six-month-period, also not too much time, is indicated. It has to be stated that these rules again mark an obvious shift from material to only procedural regulation, as we could already observe in the case of EWCs (Villiers 2006), and therefore produce consequences, which have to be analysed.

The SNB is set up and represents all employees of the companies and all its subsidiaries (Article 3 of the Directive). Basically, each country and each plant is supposed to have at least one representative in the SNB. Furthermore, the number and distribution of its members is based on a proportionality of the total number of employees and their distribution across member states. The procedure of SE formation can have some implications.<sup>3</sup>

In companies with a former EWC, the SNB often mirrors the composition of the EWC. Exchange of information and co-operation are, of course, easier to achieve if the members of the SNB already know each other from their interaction within the EWC. The expertise of such experienced SNB members seems to be higher than in cases without a former institutionalized body representing employees’ interests. Some SNB members, especially the chairperson and representatives from countries with many employees, exert a strong informal influence because they keep in touch between the formal meetings and often also consult informally with management (Keller/Werner 2008a). In some larger SEs, with SNBs of 30 or even more members smaller negotiation committees are built that negotiate on behalf of the SNB.

The SNB can hire external experts, also representative from national trade unions or the European industry federations. All costs must be paid by the company. Furthermore, the national laws implementing the Directive can include the provision that trade union representatives can also be full members of the SNB, even if they are not employees of the company. Compared to the SNB known from the “article 6-phase” of EWCs (Lecher et al. 2001; 2002; Müller/Platzer 2003) some improvements from an employees’ point of view therefore take place (Keller/Werner 2007).

An analysis of the negotiations in the first cases demonstrates that the preparation of the SNB members is crucial for achieving a positive outcome. This is particularly the case when employees from a large number of countries are involved. The trade union representatives on the SNB have an important role to play. They have to

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<sup>3</sup> To give an example: If the SE is set up by a merger, the employees of each company concerned must have at least one seat independent of the member state they are employed in as long as no double representation is given (for details Köstler 2006).

provide information about the various traditions in advance, thus contributing towards a balance of national interests. Research on EWC indicates that processes of internal bargaining are likely to happen between representatives from different countries and/or plants (Lecher et al. 2001; 2002). This is also true for SEs. Conflicts and problems within the SNB that could weaken its negotiating position have to be solved, and common positions have to be established prior to the actual negotiations. Again, trade union experts often played a crucial role in the analysed cases.

As mentioned, there is no precise legal provision for the scope and contents of employee involvement. An agreement between SNB and the companies' management can be reached in full "autonomy of the parties". Article 4 of the Directive only specifies the topics an agreement usually could contain. They include "the scope of the agreement; the composition, number of members and allocation of seats on the representative body; the functions and the procedure for the information and consultation of the representative body; the frequency of [its] meetings [and its] financial and material resources". This "representative body" that is responsible for information and consultation of the employees is usually called the "SE works council" (SE WC).

Secondly, the parties can decide about an "arrangement of participation" in the governing bodies of the SE, i. e. especially in the supervisory board (two-tier system) or administrative board (one-tier system). This is the level to address "problems of overall strategic decision-making and control or supervision of boards" (Keller 2002, 425). Therefore, the negotiations usually refer to two levels of employee involvement, information and consultation/the SE WC on the one hand and board level participation on the other hand.

During the long lasting debate the political and scholarly discussion about the SE statute addressed especially this level (Mävers 2002). In contrast the first cases show, as will be discussed later, that the level of the SE WCs (Blanke 2006) is also quite important – in most cases even more important than negotiations about participation rights.

As already mentioned the negotiations usually last for six months. In some cases they can be extended up to one year. Three basic outcomes are possible (Köstler 2006):

The "regular case" constitutes an agreement about employee involvement. As mentioned it is "freely negotiable" between the parties; in the case of establishment by conversion at least all previously existing components and contents of employee involvement must be retained.

An agreement usually regulates both levels mentioned; i. e. it indicates details about the SE WC (such as composition, rights and resources) and it states how participation in the governing organs is to be arranged.<sup>4</sup> Furthermore some final provisions, such as the duration of the agreement and rules for termination, are usually stated as well. There is, however, no provision about its termination in some agree-

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<sup>4</sup> The SNB decides about the acceptance of an agreement with a so-called double majority. This means that the majority of its members must accept it and that furthermore the majority of the SE's employees must be represented.

ments, a particularly unfavourable constellation for the employees' side. Typically there is a certain period of time specified during which an agreement can not be terminated by either side. This period is usually quite long and lasts up to ten years. Some agreements prescribe that single parts (about the SE WC and about participation) can be terminated separately whereas in others the agreement can only be completely terminated. If any party wants to terminate the agreement, the period of notice is usually between six months and one year.

The second scenario consists of the so-called "standard rules" (Article 7 of the Directive). They become effective if both sides can not reach an agreement within the negotiation period, or if the parties agree on their application (instead of a detailed agreement the parties then just state in a short contract that employee involvement shall follow the standard rules). In this scenario, the way of SE formation has some impact. The standard rules contain three parts: They indicate some provisions about the representative body, about information and consultation of the employees, and, in some cases, that have again to be differentiated according to the variant of establishment, about participation in the governing organs.

Thirdly the so-called "zero option" can apply if the SNB decides not to start negotiations with the management at all or to terminate them before an agreement is achieved. In this case, only the national provisions for employee involvement apply; furthermore, the establishment of an EWC is possible if the provisions are fulfilled (at least 1,000 employees within the EU and at least 150 in two member states) and the employees take the initiative.

Our data show that most negotiations lead to an agreement, even if it is quite short in some cases. These short agreements are usually those with very limited rights for employees. In these cases their power resources are not sufficient to reach better results. Low power resources can especially result from a low level of the standard rules which would apply if the negotiations failed; they are low, if not many rights, e. g. no participation, existed before.

From a rational-choice perspective the standard rules reflect some kind of "minimum standards" and therefore provide a "shadow of the law" (Bercusson 1994). Some results from research about institutional arrangements of EWCs are comparable to the SE, especially the so-called "Article 6 provisions". It can be assumed that the negotiations will revolve around this shadow of the law, and indeed, they usually do. It will be of relevance to observe, if the two levels of negotiation, about the SE WC and about participation in the governing organ(s), will be more or less independent from each other, or if some kind of trade-offs can be observed.

### **3.2 SE Works Councils**

In most cases shown in table 1, a SE WC realizes the issue of information and consultation and the representative body according to the Directive. There are only very few exceptions. The SEs with seat in France follow national path dependencies and establish so-called "joint bodies" according to the French-Belgian model.<sup>5</sup>

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<sup>5</sup> In a German case there is no representative body or SE WC at all, instead the employees get informed by management in a assembly of all employees once a year.

The size and composition of the SE WC depends on the number of employees according to the countries and plants affected and their national proportionality. At least in the larger SE WCs, a steering or select committee exists; we already know comparable committees from larger EWCs (Kerckhofs 2006). They usually consist of the chairperson and the deputies; these usually represent the most important countries in terms of distribution of the workforce (Keller/Werner 2008a).

In companies with former EWCs the SE WCs takes over; usually some more rights and far reaching resources than the EWCs used to have can be achieved in the negotiations. This result is due to the fact that the standard rules provide these slightly better rights. Anyway, in all agreements the rights of the SE WCs are limited to information and consultation; real bargaining or even veto rights have not been achieved so far.

In comparison with EWCs the Directive and the resulting laws provide more rights to SE WCs in issues of information and consultation. The SNBs were not always fully aware of this fact. In cases of insufficient preparation of SNB members the rights of the SE WC stated in the agreements are not as far reaching as if the SNB knew about and used this power resource. At least in the larger SEs with several national works councils the agreements also state which body has to cope with specific issues: Usually, the SE WC is only responsible for issues of transnational character or of concern for the SE itself, whereas national bodies, which continue to exist, are in charge of national issues. Usually there is a provision indicating that national bodies can transfer competences to the SE WC if they want to.

The resources of SE WCs tend to vary with size. As far as certain issues are concerned, such as release from work and protection from dismissals, most agreements refer to the national provisions applicable for individual members. This means, however, that different provisions could apply for different members of the same SE WC.

The number of meetings agreed on differs from case to case. There are agreements that allow only for one meeting while others provide up to four meetings per year. Anyway, most agreements concede two ordinary annual meetings, while extraordinary meetings are possible in cases of unexpected events such as mass dismissals. All expenses are paid by the company in all cases. In most cases, the bills are directly remunerated, while in others there is a certain budget for the SE WC, for which it is fully responsible.

The typical agreements also provide for training measures; their content can be determined by the SE WC, as long as it "is necessary for the SE WC's work", as one agreement states. Anyway it is noticeable that in most cases management insisted that SE WC members participate in English training measures if necessary. In the long run, the meetings of SE WCs should completely be in English, while for the first years many agreements also accept the possibility of simultaneous translation.

We have already mentioned the importance of the standard rules as some kind of "fall-back provision" and "shadow of the law". In the analysed cases they indeed served as the baseline in the negotiations. They predetermined the scope and content of the agreements at least in these cases, and they constitute the vast majority, when especially the SNB was fully aware of their content and therefore knew how to use

them as a power resource. The effect of these standard rules is comparable to the so-called “subsidiary requirements” in negotiations about the establishment of EWCs (Keller/Werner 2008a). We know from previous research that only a very limited number of EWC agreements surpasses these minimum standards (Kerckhofs 2006). The same is true for the SE: In our view it is not justified to talk about agreements that significantly surpass the standard rules prearranged by the Directive. All in all, there is, of course, a significantly higher number of EWC than of SE agreements.

### ***3.3 The level of participation / board-level representation***

As already mentioned, SEs have the free choice between one- and two-tier systems of corporate governance; this decision is made by the management and the owners/shareholders of the company well before the negotiations on employee involvement are initiated. This basic decision can not directly be influenced by the employees; some limited impact is only possible if, for instance, board-level representation exists in the company before the decision to establish a SE is made. The majority of EU member states (19 out of 27) provides for some kind of employee representation at board-level. This is the case in one-tier as well as in two-tier systems, even if there are remarkable differences between countries both in quantitative as well as in qualitative terms (Kluge/Stollt 2007).

What do the results for the first SEs look like? Table one shows that 31 SEs have a one-tier structure whereas only 16 have a two-tier system of corporate governance.<sup>6</sup> Interestingly enough there are 18 SEs which used the foundation of a SE as a vehicle to change their structure from the two-tier to the one-tier system. This transformation of corporate governance was not legally possible in their country of seat beforehand. Especially for Germany this change is quite remarkable: The majority of the German SEs (in absolute numbers, regardless of their size) has a one-tier structure (15 out of 25).

Why do these companies opt for this modification? There seem to be two groups of SEs: One group belongs to a mother company that has its seat in a country where the one-tier model is normal. These SEs use this model common in the country of seat of their mother company regardless of the fact that the two-tier model is the standard in the country where the SE has its seat now. The other group is constituted by SEs managed by their owners. In these cases the (majority or even all) share-owners are actively involved in running the SE and do not approve any necessity for control by a supervisory board, especially not by a co-determined one. Indeed, in none of the 15 German one-tier SEs the agreement includes participation at board-level. Anyway, some employee board members report that they are subject to new responsibilities, including financial liability. This constellation constitutes particular problems if they do not receive all the information other members have (Keller/Werner 2008a).

Basically, the standard rules only provide for participation rights if they already existed in the company before the foundation of the SE. It means they must exist in real terms; just the legal option of board-level representatives is not sufficient, if the

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<sup>6</sup> The structure of four SEs cannot be exactly identified.

employees do not make use of it. This is true for only one of the 18 cases<sup>7</sup> that changed their organ structure to the one tier system and could explain the fact of non-existing participation rights in these SEs nowadays. Anyhow, one has to keep in mind that some agreements last more or less forever, especially if no date of termination is indicated. This means that there never will be any participation regardless of growth.

Furthermore, our analysis shows that the level of participation at board level is higher in SEs of the two-tier model. Even if the decision to establish an SE was in some cases used to reduce the overall size of the supervisory board<sup>8</sup> or to fix the number of members for an indefinite period of time, there is almost no case in which the proportion between members of the shareholders' and the employees' side has been changed. Both sides lost an equal number of seats. This decision is valid regardless of any growth in the number of employees, which would result in a larger supervisory board according to national law.

Anyway it is relevant to analyse who loses seats when their overall number is reduced. On both sides, the external members, i. e. trade-union members on the employees side, lose proportionally more seats than the internal ones, i. e. former members of the management board on the shareholders' side and employees/(SE) WC members on the employees' side.

As the size and composition of the governing bodies is already fixed in the terms of foundation and, therefore, well before the negotiations are initiated, this reduction has hardly ever been a major topic in the negotiations, even if in some cases the SNB or individual members<sup>9</sup> tried to put it on the agenda. In most cases it was evident, that the terms of foundation were not open to amendment in this point, even if the law states that the company's statutes have to be changed if the negotiations on employee involvement show a different result. From a theoretical point of view, the SNBs had no power resources to achieve a change. The standard rules would not have provided for that either, and potential resources for change or trade-offs were not strong enough (cf. chapter 3.4).

From a German perspective there is another relevant aspect concerning board-level representation. Some of the German SEs have about 2,000 employees and are thus close to the threshold for the introduction of parity-based co-determination in capital companies. It is realistic to assume that the motives underlying the establishment of some of these SEs are to be found in this context: The one-third representation to be realized in these companies was supposed to be kept instead of introducing parity between both sides. Indeed, as already mentioned, the standard rules provide as a fall-back provision only the specific level of co-determination that already existed before. Again it is not surprising that due to this context one-third representation is

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<sup>7</sup> Only in one one-tier case in Austria (Plansee SE) there are also two employee representatives next to three other members on the board.

<sup>8</sup> This is especially true for the larger German companies such as Allianz and BASF.

<sup>9</sup> Especially the external ones representing trade unions seemed to be more interested in the topic than the internal ones, who usually focus on the SE WC.



“frozen” (Köstler/Werner 2007) in these companies for all future – and, thus, parity is prevented.

### ***3.4 Trade-offs between the two levels of employee involvement***

In purely legal terms, the two levels of employee involvement to be negotiated about are independent. As already mentioned, during the long-lasting debate about an SE statute the main focus was on the level of board-level representation. However, as our analysis demonstrates, the levels of the SE WCs and board-level representation are interrelated. Therefore, the possibility for trade-offs between both levels exists (Keller/Werner 2008a).

The first trade-off concerns internal interests on the employees’ side. Among others, employees from a country who did not accomplish representation on the supervisory board received an additional seat in the SE WC. Comparable trade-offs also refer to internal and external members of SNBs: Outside trade union officials are more interested in board-level representation than in membership of the SE WC. They might accept exclusion from the latter in exchange for membership of the former and simply accept a role as sources of information, agents of coordination and providers of support for the internal members.

A further type of trade-off again refers to the levels of employee involvement. Concessions made in terms of the number of employee representatives at board-level are frequently used as an argument for improved rights and resources for the SE WC. The existence of two levels of representation thus creates certain opportunities for trade-offs which do not exist in the case of EWCs and therefore generates another power resource besides the slightly stronger fall-back provisions.

Furthermore, cross-national trade-offs can take place because representatives from individual member states sometimes have different interests. One group may not be interested in topics dealt with at board-level and opt for strengthening the SE WC instead. The reasons could be that actors are familiar with one set of formal and informal rules but not with others because of lack of 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).

To summarize, there are lots of trade-offs to be observed and the extent of use often depends on the actors’ preparation and knowledge. But if they are used, they often constitute a quite valuable power resource.

## **4. Summary and appraisal**

At least for the time being two major caveats have to be made (Keller/Werner 2008b). First, there are no general motives for the foundation of SEs, even if more specific reasons have to do with the size of companies and the countries of origin. As indicated there are some specific reasons for SMEs, especially German ones, such as circumvention of stricter national regulation of co-determination or freezing of existing standards. Other reasons, such as considerable savings of transaction costs, are valid for bigger companies, primarily MNCs. Second, it is still too early for empirical studies on employee involvement in everyday activities of SEs. Such work will be of importance in the next generation of research and will be needed for more profound theory

building. In comparison with research on EWC we are still in the stage of Article 13 agreements.

Keeping these limitations in mind, one should not neglect the argument, that companies that want to avoid co-determination do now have an easier legal option to do so. The traditional companies with established models of co-determination will most likely preserve them, at least in their main features. Nevertheless, new companies do have the possibility to decide quite autonomously about “their” specific forms of corporate governance and the level of employee involvement they are willing to accept. In the future, such fast growing companies especially in the private service sectors could play a more important role.<sup>10</sup>

Furthermore one has to keep in mind that all SE agreements are tailor-made and enterprise-specific (Keller/Werner 2008a). As mentioned, they are the result of free negotiations in full “autonomy of the parties”. In other words, no agreement is exactly like another; they are rather heterogeneous and follow the principle of subsidiarity. As Villiers argues (2006: 187), the SE “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”. Insofar, the SE regulation is not about any kind of European “harmonisation” but exclusively about the preservation of rules and standards institutionalized at national level. Even here the existing legislation seems not to be strong enough in order to prevent non-expected developments as we have demonstrated.

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<sup>10</sup> Teichmann (2007) even argues that this situation could also lead to competition between different forms of national legislation within the EU.



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