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Negotiated employee involvement in the Societas Europaea – a new mode to harmonisation and convergence or to heterogeneity and fragmentation?

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INTRODUCTION

Since the late 1960s/early 1970s various issues of employee involvement have been on the political agenda of the European Union (EU) (Gold and Schwimbersky 2008). The original political plan was to create a unitary system of economic and/or industrial democracy and to initiate upward "harmonization" of existing national systems. However, various draft Directives failed during several decades of political controversy between national and European corporate actors. In institutional terms, unanimity in the Council of Ministers constituted a necessary requirement, but fundamental and enduring differences of interest between member states prevented any solution. Finally, the Maastricht Treaty, or to be more precise its Protocol on Social Policy and Agreement changed the requirements for decision making from unanimity to qualified majority. As a consequence, one, but only one, part of this ongoing problem was solved when the Directive on the "Establishment of a European Works Council or a procedure in Community-scale undertakings … for the purposes of informing and consulting employees" (EWC Directive) was passed in 1994. Ever since then it has been of major practical relevance as well as scholarly interest. Almost 900 EWCs exist (ETUI 2009) and research on their day-to-day activities and protracted problems has become the dominant topic in European employment relations research (Keller and Platzer 2003).

However, the other part of employee involvement still remained untouched if not dormant. Over the years, suggested changes were characterised by their increasing degree of flexibility. The first proposals of the 1970s intended to introduce one, and only one, highly standardised model. Later on, proposals changed towards a menu of options companies were supposed to choose from. Finally, the project even disappeared from the political agenda for quite some years (Sorge 2006).

The report of the so-called Davignon group (Group of experts 1997) was the beginning of the final stage and managed to provide the key for the solution of a long lasting political stalemate in a diverse European polity. In 2001, a political compromise was struck in the regulation of the European Company (Societas Europaea or SE). It consists of two interrelated parts, the "Regulation on the Statute for a European Company" (2157/2001/EC) and its "Directive supplementing the Statute for a European Company with regard to the involvement of employees" (2001/86/EC). Both parts create an integrated new legal structure for corporate governance at the supranational level and are intended to progress both economic and social integration. As the latter has been largely neglected to date, these regulations will make an effort to contribute to the "social dimension of the internal market" (in Delors' terms) or to the development of a "European social model" (in more recent terms).

For the purpose of this paper, the Regulation is of less importance than the Directive. The former is directly binding and applicable in all member states, whereas the latter had to be transposed from European into national legislation by all (old and new) member states within three years. The SE Directive is of fundamental interest for all problems of European employment relations in general as well as for new forms of collective voice and

representation in particular. Its mode of regulation differs from existing, purely national forms as well as from former European ones but has some striking similarities with the already existing EWC Directive. Both are characterized by their procedural rather than substantive mode of regulation. Furthermore, in contrast to existing national forms of regulation, all issues of employee involvement are not preset by legislation but are freely negotiated between central management and the employees of the company. Finally, employee involvement in the context of SEs can consist of two closely interrelated levels, the SE works council (SE WC) for information and consultation purposes and board level representation.

The paper will discuss neither the protracted history nor legal technicalities because both have been extensively discussed in the existing literature (Gold and Schwimbersky 2008; Van Greven and Storm 2006). Instead of dealing with these more or less well-known issues we will focus on important but widely neglected problems and present a systematic empirical analysis of negotiated forms of worker representation and employee involvement in the normal SEs established between late 2004 and the beginning of 2010, the period covered in this paper. These early cases are of special interest for two interrelated reasons. First, they constitute the first empirical results of the legal provisions for this new supranational form of corporate governance. Second, their negotiation and practice define rules and principles for all future SEs and, thus, initiate path dependencies of lasting impact. They mark a major change from the previous focus on EWCs and are of significance for future public policy debates.

The questions we address in this paper are: What do these new forms of collective voice and representation at the supranational level look like? What is the relevance of SEs for the development of an emerging system of European employment relations in a broader perspective? What is their impact for the advancement of the European social model? Is negotiated employee involvement in the SE likely to lead to a new mode of harmonisation and convergence or rather to heterogeneity and fragmentation?

In methodological regards the paper is based on an analysis of the existing literature, including a large number of company documents, the only valid quantitative database on SEs (http://ecdb.worker-participation.eu), a series of semi-structured interviews with representatives of both sides and non-participant observation in some official meetings. Individual SEs constitute our point of departure but we provide a systematic analysis instead of dealing with individual examples (as for example Biehler 2009 does).

ONE CAVEAT: VARIETY OF EMPIRICAL TYPES

By 15/03/2010, 535 SEs were registered in the registers of the EEA member states (European Company Database 2010).[1] The indicated legal provisions are quite different from the results of their implementation at enterprise level. In contrast to all former assumptions and the intent of the Directive, not only “normal” SEs with both, business activities and employees, but also various unexpected forms have to be distinguished:

- “Empty” SEs are economically active but have no employees,
- “shelf” SEs are inactive,
- for “UFO” SEs only few details, such as their names, are known from the registers. Some indicators provide strong hints that these cases are also empty or shelf SEs.

The existence of these various forms is the first major unexpected result of implementation. These exceptional forms of SEs without economic activity and/or employees even represent the majority in absolute figures: 399 out of 535 and therefore about 75% have to be categorized in one of these three forms (European Company Database 2010). The decisive question for the purpose of this paper is, if these SE are of relevance for issues of employment relations. On the one hand, one could argue that these companies are not of direct importance, as no employees are concerned. Especially for empty SEs, this argument

[1] These 535 SE are the SE still existing. A couple have already been deleted from the register (for example, because the company was ceased, changed its name and/or its country of seat).

is not to be dismissed. On the other hand, we observe, that meanwhile more than 100 shelf SEs were activated – and in some cases, then employees are concerned. The decisive question is therefore, what happens, if such an "atypical SE" (Keller and Werner 2009, 417) is activated.

This differentiation leads us to the, at least for our purpose, more important form of SE: 136 (plus about 20 at present in the process of formation) "normal" SEs have both business activities and employees. Thus, they comply with the criteria prescribed in of the Directive. In quantitative regard they constitute a minority of about 25% of the cases. They are of focal interest because of their characteristics and they make up the unit of analysis for our detailed empirical analysis.

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

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

Figure 1: Ways of forming an SE
Source: Köstler 2006, 17.

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

All in all, the rather detailed and complicated distinction of legal forms is, at least for the time being, not of major empirical importance. Anyway, one more finding is quite astonishing: Another form of establishment, which is not foreseen in the Statute, plays a surprisingly important role: 30 out of the 136 normal SE result from an activation of a shelf SE. Later on, we also explain the implications for issues of employee involvement.

PRELIMINARY ANALYSIS AND EXPLANATION

Concerning the date of establishment, there is some slow numerical growth, i. e. some increasing interest in the new legal form exists. The sluggish start had to do with the distribution and availability of information about the new opportunities as well as with initial uncertainties and delays of transposition of the Directive in some member states. In a comparison of 2009 with 2008 it seems that there is some kind of settling down at a certain level. Anyway, due to the limited number of observation periods, it is still too early for final assertions about the development.

Year	No. of SEs established	No. of normal SEs established
2004	**7**	**2**
2005	**14**	**3**
2006	**31**	**12**
2007	**84**	**38**
2008	**176**	**46**
2009	**178**	**30**
2010 (until March, 15th)	**45**	**5**

Table 1: Establishment of SEs (total) by year
Source: European Company Database 2010 and own research.

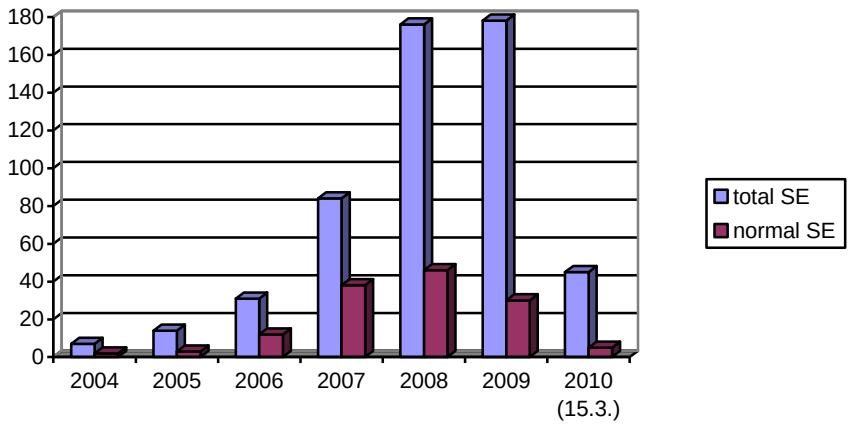

Figure 2: Establishment of SEs by year
Source: European Company Database 2010 and own research.

Some characteristic features (which are connected for example with a number of employees threshold in certain member states or with specific sectors, we will come back to this later on) are the reasons for the growing interest from the beginning. It seems as if company-specific and not sector-specific problems are the decisive factors for the establishment. First of all, there is a more or less accidental distribution across sectors/industry; there are normal SEs active in industrial as well as in service sectors; highly internationalized sectors, such as the automotive industry, are not overrepresented. At least for the time being, this specific pattern is difficult to explain because the overall number of normal SEs is still rather small.

Furthermore, in terms of company size there is no clear trend but enormous differences ranging from SMEs to MNCs or from single-digit to six-digit numbers of employees. In this regard, the SE regulation differs greatly from the EWC Directive. SEs are of non-binding, purely optional nature and leave all existing national forms of governance untouched. They can be selected by enterprises of all possible sizes, whereas only MNCs (with at least 1,000 employees in the EU and at least 150 in two member states) have to establish a EWC. This formerly unexpected present pattern of broad attractiveness could last because the Directive defines no limits in terms of company size or numbers of employees. The only prerequisite for establishing an SE is a minimum registered capital of 120,000 EUR. As originally expected (Davies 2003), some large companies have established SEs. They realize economies of scale and savings in transaction costs including administrative and legal costs. In these cases the levels of employee involvement existing at national level have to be preserved in the SE according to the “before and after” principle of the Directive (Article 7). Occasional attempts to change the status quo were not successful because of trade union intervention.

Surprisingly or not, the empirical distribution across EU member states is rather uneven. More than one half of all normal SEs have their seat in Germany, some others in Austria and the Scandinavian countries, few in the new member states that joined the EU since 2004[2], but none for example in the Mediterranean countries. It is also noticeable that large MNCs whose headquarters are outside of Europe are (still) missing.

Table 3 below illustrates that the new legal form is overtly attractive for German companies. The explanation for this regional concentration has to do with peculiarities of the German system of co-determination. According to the Co-determination Act (*Mitbestimmungsgesetz*) of 1976 all private and public limited companies with more than 2,000 employees are subject to stricter forms of co-determination and have to provide parity between employers’ and employees’ representatives on their supervisory board. According to the One-Third Participation Act (*Drittelbeteiligungsgesetz*) of 2004 companies with a workforce of 500 to 2,000 have to establish a supervisory board and employee representatives constitute one

[2] The distribution across countries is different if we look not only at normal SEs. For instance, in the case of shelf SEs, there are many companies registered in the Czech Republic (table 3).

third of its members. If a company comes close to the threshold of 2,000 employees the establishment of an SE is an attractive legally provided option to avoid changing the composition of the supervisory board. If a company has close to 500 employees this option is appropriate to prevent the establishment of a supervisory board.[3]

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

Member State	**No. normal SEs by 15.3.10**	**No. shelf shelf SEs by 15.3.10**	**No. empty SEs by 15.3.10**	**No. UFO SEs by 15.3.10**	**total**
CZ	18	43	4	175	**240**
D	72	19	20	13	**124**
UK	2	0	16	6	**24**
NL	8	0	12	4	**24**
SK	2	6	1	11	**20**
F	8	0	1	9	**18**
L	2	1	6	7	**16**
AT	7	0	5	2	**14**
CY	4	0	1	5	**10**
S	2	2	1	3	**8**
B	1	0	0	7	**8**
N	4	0	2	0	**6**
EST	4	0	0	1	**5**
EIR	0	0	3	2	**5**
FL	0	0	0	4	**4**
LV	1	0	1	0	**2**
HU	1	0	1	0	**2**
PL	0	0	1	1	**2**
DK	0	0	0	1	**1**
E	0	0	1	0	**1**
P	0	0	0	1	**1**
BG	0	0	0	0	**0**
FIN	0	0	0	0	**0**
GR	0	0	0	0	**0**
IS	0	0	0	0	**0**
I	0	0	0	0	**0**
LT	0	0	0	0	**0**
M	0	0	0	0	**0**
RO	0	0	0	0	**0**
SLO	0	0	0	0	**0**
total	**136**	**71**	**76**	**252**	**535**

Table 2: Distribution of SEs across member states
Source: European Company Database 2010 and own research.

FORMS OF EMPLOYEE INVOLVEMENT I: THE SE WORKS COUNCIL

The conclusion of autonomous negotiations on employee involvement constitutes a necessary precondition for the official registration of a SE in the country it is headquartered in (Article 12 of the Regulation). In the founding phase a so-called special negotiation body (SNB), whose election and all other procedural issues are indicated in the Directive (Article

[3] Furthermore, the Directive provides the choice between monistic and dualistic forms of corporate governance. We will come back to this issue.

3), constitutes the representative organ of the employees and negotiates on their behalf. Its principles are similar to those of the EWC Directive. Both are based on a strict priority for negotiated solutions.

We assume that negotiated forms of employee involvement will, almost by definition, lead to an increasing degree of heterogeneity between individual SEs (and, of course, national companies operating under another legal form) instead of some minimum of homogeneity and a certain extent of standardisation across industry in the case of legal enactment. Its consequences will consist in the development of new, tailor made arrangements and, thus, an overall loss of transparency. No SE will be like any other in terms of "information and consultation". In qualitative regard, these negotiated forms at European level are weaker than legal rights of strict co-determination at national level. They could possibly lead to some new form of "enterprise specific" Industrial Relations that would be separated from "their" regular national or sector-specific forms and would exist next to them.

The first examples demonstrate that the SNB constitutes no monolithic bloc because it represents rather heterogeneous if not even contradictory interests. Processes of internal bargaining between representatives from different countries take place (among others, about the final distribution of seats) (Keller and Werner 2008). These internal difficulties must be settled and common positions must be reached before negotiations with management are launched; otherwise employees' bargaining position is weakened. Furthermore, both sides can make use of external resources (Art. 3 (5) SE-Directive) to improve their bargaining position in the negotiations. The management side frequently hires law firms. The SNB utilizes the expertise of representatives from national or supranational unions.

The Directive allows for three potential outcomes (zero option, application of standard rules, agreement – table 3). In reality, however, these negotiations mostly lead to some kind of compromising agreement because no side is interested in their failure. In this procedural regard, the legal prescription that negotiations have to be concluded before the registration of the SE can take place (Article 12 of the Regulation) is of major importance. In substantive regard, they result in tailor-made, rather "flexible", non-standard forms and mechanisms of employee information and consultation. These outcomes (including size and composition, available resources such as release from work, opportunities of training and education, number of ordinary and extraordinary annual meetings, terms of office) have lasting consequences and define "constraints and opportunities" for all future everyday activities of the SE WC.

- **Option 1: "zero option"**
  → if the SNB decides not to start or to cancel negotiations (with 2/3 of the votes representing at least 2/3 of the employees and employees from at least two member states)
  → an EWC as a transnational organ of employee involvement is only possible if the preconditions of the EWC Directive are fulfilled
- **Option 2: Agreement about employee involvement**
  → according to Article 4 of the Directive
  → "normal" scenario
- **Option 3: standard rules apply**
  → if no agreement is reached between the parties
  → if no agreement is reached before the deadline and the governing bodies of the companies approve the continuation of the procedure

Table 3: Possible outcomes of the negotiations about employee involvement
Source: Köstler 2006, 24.

In most agreements, two regular annual meetings are agreed upon, in some cases the parties could arrange only one. Extraordinary meetings are usually possible in the case of events with exceptional consequences for employees. The size and distribution of SE WC seats depends on the number. of employees and their distribution across member states; usually this was no controversial topic during negotiations. In some cases, also employees from outside the EEA (especially Switzerland) were included. Especially in larger SEs, smaller steering or select committees exist as sub-units of the SE WC and are responsible for the organization of day-to-day activities.

The so-called “standard rules for information and consultation” (Article 7 of the Directive) define default standards of employee involvement if no agreement can be reached within the comparatively short period of six months. These statutory fallback provisions are of relevance in the vast majority of negotiations because they constitute a certain baseline that can hardly be undercut (Keller and Werner 2008). They establish a certain “shadow of the law” for both sides: Management can hardly offer less favourable conditions without taking a high risk of failure, the SNB can hardly achieve more without management’s voluntary consent. Therefore, these “standard rules” are comparable to the “subsidiary requirements” of the EWC Directive (Article 32). – Furthermore, if a EWC existed before the establishment of the SE, this institutionalized body of interest representation is usually transformed into an SE WC, in other cases an SE WC is established. The level of information and expertise available for the SNB is higher in the former case – and can be of major impact during the negotiations.

From our data it is obvious that, as in the case of EWCs (Kerckhofs 2006; ETUI 2009), national trajectories including their customs and practice exert a strong influence on the specific character of SE WCs. They can be designed as employee-only bodies, as in Germany, or as joint bodies, as in France or Belgium. SEs have followed their national path dependencies: All SEs headquartered in Austria or Germany have established employee-only SE WCs whereas SEs headquartered in France have opted for joint bodies. It remains to be seen however, if these different forms of establishment and composition will lead to different outcomes.

Anyway, in regard of this evidence we do not include all 136 normal SEs, as one could possibly assume, but only a minority of 56. Rights of information and consultation exist only in these limited number. In other words, in the majority even of the normal SEs there are no such rights, not to mention the atypical forms.[4] In the remaining 80 normal cases, there have been negotiations in some cases, but a more or less voluntary abdication and therefore the “zero-option” resulted; in other cases there were no negotiations at all. The question has to remain open, why the companies were registered in these cases.[5]

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

FORMS OF EMPLOYEE INVOLVEMENT II: BOARD LEVEL REPRESENTATION

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

The majority of EU member states (19 out of 27) provide for some kind of employee representation at board level (Kluge/Stollt 2007). In contrast to the vast majority of existing national regulations, SEs have the free and unrestricted choice between both forms irrespective of their future headquarters and independent of employees’ preferences. The

[4] These 56 cases are headquartered in an even more limited no. of countries: 40 in Germany, 4 in France respectively Austria, 3 in Norway, 2 in Cyprus, and one each in Luxemburg, the Netherlands and Sweden.
[5] The problem of non-negotiations is especially relevant for the activation of shelf SE: Only in two out of 30 cases negotiations took place after activation.

SNB plays only a reactive role because this basic decision is initiated and made by management and owners before negotiations about employee involvement are launched. Negotiations are more complex than in the case of EWCs because both levels of employee involvement have to be covered.

In empirical terms the distribution of both forms is quite similar. 60 out of the 136 normal SEs have a one-tier, 76 have a two-tier structure. Furthermore, two distinct developments can be observed.

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

On the other hand, quite some changes of governance structures did happen – at least so far – only in one direction, i.e. from two-tier towards one-tier forms. The common denominator for these remarkable transformations is the structure of ownership in combination with company size. These options of change are especially popular for SMEs whose majority of shares belongs to one family. These owners, whose vast majority are Germans, have strict preferences for a corporate governance structure of their own choice. They intend to avoid any restriction of their "managerial prerogatives" by introducing parity on the supervisory board and, thus, closer cooperation with influential employees' representatives, without, however, formal representation on the administrative board. For them, the SE provides the opportunity to accomplish their goals and to limit employee rights to information and consultation by an SE WC.

The empirical facts illustrate these findings: Only one SE, that "changed" its corporate governance structure, provides for board level participation rights. In total, only four of the monistic SEs have implemented such rights, while 22 of the dualistic ones do. But again, only in a minority of 26 out of the 136 normal cases board level participation rights exist.[6]

It remains to be seen, however, if the first empirical examples represent isolated decisions by individual owners or if they are forerunners of a broader trend in the future. If a larger number of similar SMEs imitate this strategy, future challenges at national level, i.e. some kind of erosion, are to be expected.

Another most recent development of "regulatory arbitrage" especially in larger SEs refers to the size and composition of the board. Its size is fixed by the owners in the 'terms of foundation' and can hardly be changed during the subsequent negotiations between management and the SNB, even if the results of negotiations have priority in legal terms. There is, at least in a handful large German cases, a certain trend towards a smaller overall number of members and "slimmer" boards, but not towards smaller boards of directors. The indicated arguments are reasons of greater efficiency – or pure ideology. Some SEs with headquarters in Germany have reduced the overall number of seats on their supervisory boards. This measure applies to representatives of employers and employees equally. Therefore, it does not result in a weakening of employees' rights on parity representation, as trade unions sometimes fear, and the pre-existing proportions of representation and balance of power between capital and labour respectively are preserved. Some employee representatives claimed in interviews however that they had difficulties obtaining some of the information that management was obliged to provide.

[6] These 26 SEs are distributed as follows: 21 have their headquarters in Germany, 3 in France and 2 in Austria. Therefore, only a minority of EEA member states is – until now – empirically directly affected by SE board-level representation. This picture gets only slightly improved, if one compares the member states composition of the employee representative in these 26 boards (see text).

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

Anyway, it has to be stated that some kind of internationalization of boards can be observed. National systems of board level representation tend to be quite “introverted”, only “domestic” employees have voting rights while employees in foreign plants or subsidiaries do not (Däubler 2007, 274 for a criticism on this issue). This constellation of rights and interests has only slowly changed and gradually included some transnational perspectives. In other words Europeanisation, not to mention globalisation, has only been of recent relevance in the day-to-day practice of employee participation. In this regard, a striking finding is that meanwhile there are more than 20 foreign employee representatives on different supervisory boards (e. g. from the UK, Poland, Belgium or Italy). Therefore, some trade unionists state an “export” of co-determination to member states without such rights at national level. In our interviews, these representatives usually praise their new position and emphasize their new rights. Some even tell us, that they have new possibilities “to do something” in their own member state, especially if they talk as board level representative of the (mother) SE to the management of a national subsidiary. Anyway, representatives from countries with high standards mention that this coin also has another side: They say that the loose influence due to a “dilution” of a well-institutionalized system. All in all, the impact of this limited number should not be overestimated.

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

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

CONCLUSIONS AND OUTLOOK

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

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

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

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

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

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

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