

Consultation on the results of the study on the operation and the impacts of the statute for a European company (SE)

- Contribution of the Confederation of German Trade Unions

The Questionnaire

(I) Information about the respondent

A. Name of the company / organisation and your function

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B. Its country of origin / legal form / size / field of activity

*Federal Republic of Germany
Non-registered association.
6.264.923 members (2009)
Trade Union Congress*

C. Indicate whether you conduct cross-border activity and in which form (branches, subsidiaries, provision of services, export / direct sales of goods) and / or plan to expand your activity to other Member State(s) in the foreseeable future.

Not applicable.

(II) Drivers

- (1) Do you agree with the findings of the study about the positive and negative drivers for setting up an SE and their importance? Please explain your answer.

The German experience would lead to some other „positive” drivers in the choice of the SE legal form: it is the possibility to simplify the company structure and to create a shelf SE.

The last development is a booming business model: these SEs are ready to use – no negotiation, only change the subject of the company. This development becomes very critical in connection to the positive driver the study points out in first place: the possibility to transfer registered office. Normally the transfer topic is more of theoretical interest, because less than 10% of all SEs are affected by this. But if the possibility of transfer registered office is used by a shelf SE we will get a development that the SE allows regime shopping in the European Union and not more the emergence of European companies which are competitive on the global markets.

If the study identifies the negotiating process as expensive, complex and uncertain in its results, and as negative drivers for not choosing the SE, couldn't the same be said about the European Union itself! Employee participation is not the problem for a SE; it was for the European legislator a key element for this new legal form. „Employee involvement” is a very familiar legal mechanism for European law: in over 15 Directives the Union set clear information and consultation obligations of employees! So it is a bit keen to claim Member States without participation rights as the study does. And even it is keener, to see in those rights a negative driver.

It should not be surprising, that we could not share the study if it argues that the presence of representatives of trade unions is a negative driver. Not only because the study gives no basis to draw this conclusion. It is more our experience: the presence of trade unions representatives in a special negotiating body supports the employee representatives during the negotiations with

external expertise. On which other way – beside that it was the will of our national legislator to handle it this way – could there be equal fighting rights between employee representatives and management, if the management works together with international law firms experienced in the setting-up of an SE?

If we are asked to explain your view with the findings of the study two general points are important to recall:

First: in 2008 the Commission concluded the review of the SE Directive, that it is too early to revise the Directive, because of the lack of experience (COM (2008) 591 final). Today the Commission undertakes a review of the SE Statute. Even if two years are a long time, full of new experiences, even if the provisions of the Statute postulate such a review, two year should not be enough to forget, that the SE Statute and the SE Directive are the two sides of the SE legislation! The idea, not only the compromise, was that company law and employee involvement belongs together.

Therefore the method of the study is in need to explanation: why have the authors chosen to focus on the point of view of main shareholders? Ignoring on one side the fact that a company is a conglomerate of various interests from minority shareholders, creditors, employees etc. but seeing on the other side the fact, that “the position of another stakeholder ... could lead to a completely different picture” (Appendix 1.2)? Why have the authors chosen to focus on the point of view of company law. Is it because in “the field of employee involvement ... a comparison with domestic law ... is not easy” (loc. cit.)?

Second: Have we learned anything from the current economic crisis? Could we maybe see the shortcomings of shareholders' only models and the need for more sustainable corporate behaviours? The study has completely failed to analyse to which extent the SE Regulation can, for the sake of the company, act as an efficient counterbalance to the investors' tendencies towards short-termism.

The picture drawn by the study is in black and white only. It does not accurately reflect the legal situation or companies' actual perspective. So, the findings cannot constitute a valid basis for a review of the operation of the SE Statute!

- (2) Do you agree with the study's assessment on the attractiveness / non-attractiveness of national legislation for setting up an SE? Do you think that other or additional issues in the national legislation should be taken into consideration for that assessment?

The question to ask is still: what is „attractive“? If someone focus on the point of view of main shareholders other points are „attractive“ than from minority shareholders, creditors, employees etc. point of view. Their preference for „attractiveness“ could lead – in the words of the authors of the study – „to a completely different picture“ (Appendix 1.2).

It is not the Commission duty to think of additional issues in the national legislation that should be taken into consideration otherwise the risk emerges to export national company law debates to the European level.

- (3) What are in your view the most important regulatory issues to consider for a company when assessing in which country to place its registered office and / or head office (both at the moment of formation and during the life of a company – taking into account the possibility to transfer the registered office).

Has the SE legislation created a European form of corporate governance for genuine European business needs, or was it intended to be an instrument putting national regulations in competition with each other?

The answer is given in Article 7 of the SE Regulation: the registered office of an SE shall be located in the same Member State as its head office – because the choice of location of the SE should not be considered as an escape door for 'unwanted' national regulations!

(III) Main trends

- (4) Do you agree with the study that the main reasons for the current distribution of SEs across the EU / EEA Member States are connected to the employee participation system and corporate governance system of the individual Member State? Please explain your answer.

The simple thesis of the study is: the SE is successful in Member States with “extensive employee participation” because of the possibility to move on from the national co-determination regime.

Beside the little problem of not presenting convincing justification for elaborating such a theory, the study seems to rely on our national German discussions. But empirical findings of the Hans Böckler Foundation, shows, that for only a few companies there is evidence that the change into an SE was connected to participation aspects. When a company became close to a participation threshold of 500 or 2000 employees the SE was used as a vehicle to “freeze” the level of participation or stick to the current status of not having board level representatives.

- (5) Do you agree with the possible explanations for the current distribution of SEs in the EU / EEA presented in the study? If you think there are other possible explanations please list them.

Has it really nothing to do with genuine business motivations that a SE is attractive or not?

- (6) What are in your view the main advantages for a company to buy a ready-made shelf SE compared to setting up an SE directly?

The question is not what are the main advantages for a company to buy a ready-made shelf SE, the question must be, what the Commission suggests against this violation of the spirit of the SE legislation. The legal form of an SE was not invented for companies without economic activity and employees. The SE Statute and the Directive allows the emergence of European companies which are competitive on the global markets and more socially-oriented.

The establishment of SEs without any economic activity bypasses the rules on negotiations on employee involvement once the SE is 'activated' at a subsequent stage: only 4 of the now 22 activated shelf SEs under the 72 normal SEs have an „agreement“.

(IV) Practical problems encountered

- (7) Please provide examples of practical problems you have encountered in the course of setting up or running an SE (please focus only on company law related problems).

Again: the SE Statute and the SE Directive are the two sides of the SE legislation! The underlying idea was that company law and employee involvement belongs together. But why focus the authors of the study than on the point of view of company law?

One of the biggest problems is the moment of renegotiation of the agreement: what are "structural changes"? We need some definitions by the legislator.

(V) Possible follow up

- (8) Do you agree with the study's recommendations for possible amendments of the SE Regulation? Which recommendations are the most important in your view? Do you have any other suggestions for amendments of the SE Regulation that would increase its attractiveness for businesses (e.g. for SMEs, groups operating across borders)?

General:

To minimize the risk, that the review of the SE Statute lead to a reopening of the SE Directive by the backdoor, the Commission should consult the European social partners as set in Article 15 of the Directive.

Article 12:

A registration of an SE without negotiation or employees would further encourage the establishment of shelf SEs with a view to circumvent employee involvement rights. Shelf SEs contradict the initial objective of the SE legislation.

Article 7:

The proposed amendment to Article 7 of the Statute becomes very critical in connection to proposed amendments to Article 12:

As above mentioned (answer to question 1) the transfer topic is more of theoretical interest, because of the very small number of affected SEs. But if the possibility of transfer registered office is used by a shelf SE we will get a development that the SE allows regime shopping in the European Union and we will get a development of less protection of interests.

(VI) Any other comments

None.