ETUC REPLY TO DG MARKT CONSULTATION ON THE ERNST & YOUNG STUDY ON THE OPERATION AND THE IMPACTS OF THE STATUTE FOR A EUROPEAN COMPANY

(I) INFORMATION ABOUT THE RESPONDENT

A. Name of the company/organization and your function

European Trade Union Confederation
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B. Its country of origin/legal form/size/field of activity

The ETUC exists to speak with a single voice, on behalf of the common interests of workers, at European level. Founded in 1973, it now represents 82 trade union organisations in 36 European countries, plus 12 industry-based federations.

The ETUC is based in Brussels, Belgium.

PRELIMINARY REMARKS

In the 2008 review of the SE Directive, the Commission concluded that given the lack of experience it is too early to revise the Directive. In accordance with Article 69 of the SE Regulation, the Commission will now undertake a review of the SE Statute. The ETUC is very conscious of the fact that it is difficult to maintain a clear distinction between the provisions of the SE Statute and those of the SE Directive, given that both texts are the two sides of the compromise underlying the SE legislation. In this context, the ETUC finds it worrying that a central finding of the study concerns employee involvement whilst no analysis of the objectives and mechanisms of the Directive has been undertaken. The ETUC therefore warns against a reopening of the SE Directive ‘by the back door’ of the SE Statute.

Secondly, the ETUC is very critical about the methodology of the study. The authors have chosen to focus on the point of view of main shareholders, ignoring the fact that a company is a conglomerate of various interests: minority shareholders, creditors, employees etc. The findings of the study are therefore one-sided and do not accurately reflect the legal situation nor a complete perspective of the company. In this response, the ETUC points at some particularly unbalanced findings which, in its view, cannot constitute a valid basis for an accurate review of the operation of the SE Statute. However, the ETUC recalls that any question concerning employee involvement must first and foremost be subject to a consultation of the European social partners in line with the provisions of the Treaties. This online consultation on the results of the study on the operation and impacts of the SE Statute cannot be considered as a substitute for such consultation.
(II) DRIVERS

Question 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 answers.

Positive drivers

The study identifies five positive drivers in the choice of the SE legal form: possibility of transfer of registered office, value of the European image, possibility of cross-border merger, a simplified management structure and other regulatory reasons.

The primary reason why European trade unions may support a company’s decision to create an SE is the fact that the SE Statute and its accompanying Directive offer a European model of sound corporate governance. The SE Statute allows the emergence of European companies which are competitive on the global markets and more socially-oriented. The current economic context points out the shortcomings of shareholders’ only models and highlights the need for more sustainable corporate behaviour. But by focussing on the point of view of majority shareholders only, 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 study ranks the possibility to transfer registered office as the first place among the list of positive drivers. Such statement must be nuanced. According to the latest data, the transfer of registered seats concerns a small minority of SEs (less than 10%). Furthermore, only a very small share of them has employees and business activities. This means that the transfer of seats is at best a theoretical driver for ‘normal SEs’ (“good to have the option”). However, the transfer of seats of shell SEs could also point to a development that the SE allows for regime shopping, which was certainly not the intention of the SE legislation.

The possibility of performing cross-border mergers is ranked as the third positive driver. As the study recalls, the cross-border merger Directive has introduced an additional facility in EU law for cross-border mergers. However, comparing both provisions, the study concludes that the cross-border merger Directive provides more flexibility for the merging companies with regard to employee participation. Therefore the possibility of creating an SE by way of cross-border merger is no longer an actual incentive (p.217). Such assumption is not supported by any material evidence and can certainly be debated.

It is precisely the possibility to negotiate tailor-made solutions that brings companies the flexibility they need for the arrangements concerning employee participation. In this regard, it is quite remarkable that in almost all cases, the negotiating parties in the SE have preferred to conclude their own SE agreement.

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2 [http://ecdb.worker-participation.eu](http://ecdb.worker-participation.eu)
Furthermore, a clear advantage of the SE legislation is that it provides more certainty to management as the main aspects concerning participation arrangements do not vary from one Member State to another. In the absence of negotiations under the SE Directive, the national provisions on participation will then have vocation to apply (Art 13.2 of the SE Directive). Given the relative lack of convergence on participation regimes in the EU, such situation would become very complex for a company with bodies in different Member States.

**Negative drivers**

The study identifies costs, complexity and uncertainty as negative drivers for not choosing the SE. In particular, the study points at the necessity of setting up a special negotiating body and of conducting negotiations with the latter (p.241). On the basis of interviews conducted with SEs and non SEs, the study further states that “the employee involvement process is considered to be a negative driver especially in the Member States in which the national legislation does not provide for a system of employee participation” (p.242).

The severe flaw in the concept of the study is particularly obvious in this section as the conclusions are made in full contradiction with the legal situation. The study should have made it clear that the assertions contained in sections 1.2.1.1 and 1.2.1.2 are based on mere perceptions on the part of the interviewees and do not reflect the legal reality. The SE Directive is based on the “before and after principle” which seeks to prevent that the establishment of a European Company dilutes pre-existing employees’ rights. This principle also means that a company in which there were no pre-existing participation rights does not have to introduce such a regime against its wishes after incorporation into an SE. The wording of the SE Directive is unambiguous: during the negotiations, it is the parties themselves who decide whether to establish arrangements for participation (Art 4.2.g). If the parties fail to agree, the standard rules on participation only apply in the cases where the company was already subject to employee participation (Art 7.2 and 7.3).

Furthermore, it is inaccurate to suggest that the procedures for employees involvement spelt out in the SE Directive are unknown to some Member States. Under European law, there are currently about 16 Directives which impose clear information and consultation obligations of employees throughout the Union!

Concerning the cost and the length of the negotiating procedure, the study dismisses itself the myth (albeit briefly) by acknowledging that the 6 months period is rarely reached or exceeded (p.241). This proves that both negotiating parties take their responsibilities very seriously and try to achieve an agreement as quickly as possible.

Finally, the study argues that the presence of representatives of trade unions is a negative driver but again does not give any basis to draw this conclusion. The presence of trade union representatives in the special negotiating body (which corresponds to a national choice following Recital (19) of the SE Directive) reflects on the one hand the role of trade unions in national industrial relations system and is on the other hand an expression of the legislator’s will to support the employee representatives during the negotiations with external expertise. Whereas the management usually works together with law
firms experienced in the setting-up of an SE, it is essential for the employee side to have access to experience with SE negotiations from an employee perspective (for company employees’ representatives the negotiations are a one-time experience). Moreover, the legal advice of trade union experts on the specific legal situation applicable in the particular case and their knowhow as negotiators has helped in many cases to clear away uncertainties among the special negotiating body members and to make negotiations more fluent and efficient.

Question 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?

Question 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)

The ETUC regrets that so much consideration is given to the national perspectives for assessing the merits of the SE, both in the study and in the Commission’s questionnaire. In particular, the ETUC warns against exporting national company law debates to the European level.

The SE legislation represents a European form of corporate governance; it was not intended to be - and must not be allowed to become - an instrument putting national regulations in competition with each other. Equally, the SE legislation cannot be considered as an escape door for ‘unwanted’ national regulations. Rather, it must be ensured that the choice of location of the SE does correspond to genuine European business needs.

Finally, it should be stressed that the formulation of question 3 is incorrect. The ETUC reminds the Commission that according to Article 7 of the SE Regulation, the registered office of an SE shall be located in the same Member State as its head office. The ETUC opposes any amendment to Article 7.

(III) MAIN TRENDS

Question 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 this individual Member State? Please explain your answer.

According to the study, the SE is relatively successful in Member States with “extensive employee participation” because of the possibility to derogate through the SE negotiating process from the national co-determination regime. The study notes that SEs are located predominantly in the
Member States with a tradition of two-tier corporate structure, explaining this tendency by the fact that such traditions also generally apply “extensive employee participation” regime.

The ETUC cannot agree with the argument that the relative success or failure of the SE can be explained by the criterion of employee involvement. The study does not present convincing justification for elaborating such theory.

First, the study displays grave misconceptions about the mechanisms of the SE negotiations on employee participation. As has already been highlighted under question 1, the obvious lack of legal and material evidence make it very inappropriate for the study to overemphasise the importance of employee involvement as a key negative driver in the Member States with no or restricted employee participation.

Secondly, the study relies on the German example to argue that the SE might help to optimise the national rules on employee participation. However, the relative success of the SE in Germany cannot be explained by the motive of decreasing employee board-level representation.

The legal form of an SE has been chosen by more (normal) companies in Germany than elsewhere in the EU. The largest group among these normal, operative German SEs are those 50 SEs which had in their previous legal status no board level representation.

According to recent empirical findings of the Hans Böckler Foundation, for only relatively few companies there is evidence that the change into an SE was connected to participation aspects. These changes usually occurred when the company became close to a national participation threshold (500 or 2000 employees). In these cases indeed some companies used the SE as a vehicle to “freeze” the level of participation or stick to the current status of not having board level representatives.

However, in all German cases the parity (half of the seats for companies with more than 2000 workers) or one third participation of employees (between 500 and 2000 workers) was kept after the SE foundation.

In the case of the Austrian company Plansee the proportion of board-level representation was even increased during the conversion process (2 out of 5 employee representatives which is notably higher than the usual 1/3 proportion according to Austrian law). This is all the more remarkable as the new structure provides for a one-tier system including employee representatives in the administrative body (but now excluding external control).

Finally, the lack of sound evidence is particularly visible in the table establishing the correlation between the degree of employee participation and the corporate governance structure (p.249). In this table, it is very unclear what is meant ‘few’, ‘very few’, ‘no success’, ‘relative success’ or ‘success’ of the SE. For instance, the UK (16 SEs) and Belgium (10 SEs) are both labelled Member States with ‘few SEs’, without any consideration for the respective size of these economies. At a later stage, the study even contradicts itself by reporting that Belgium, a relatively small country, is actually quite
successful (p.250). The same remark can be made for Estonia and Latvia, which are classified as countries with very few SEs without any consideration to their relatively very small size.

The criterion of ‘degree of participation’ used in the first column of the table (‘no participation’, restricted participation’ or ‘extensive participation’) is also a problematic notion. Such criterion is only valid for SEs with an actual workforce and is of no use in case of empty or shelf SEs.

**Question 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.**

The ETUC is very concerned that, while overemphasising the employee involvement criterion, the study seems to have underestimated the influence of genuine business reasons to explain the attractiveness or not of the SE in specific national contexts. Possible areas for further investigation should include in particular the scale of activities of companies, which can be linked to the structure of national economies (eg: in some Member States, the predominance of SMEs without European activities might explain why companies do not consider to apply for the SE. Similarly, undertakings being branches of multinationals companies rather than head offices will seldom consider converting into an SE ...).

The ETUC also regrets that the study fails to give concrete answers to the reason for the creation of shelf SEs, especially in the Czech Republic. Given the scale of the phenomenon, it is important to gather more material in particular to ensure that the objectives of the SE legislation are not being bypassed.

**Question 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 ETUC is very concerned that shelf SEs – ie companies without economic activity nor employees – may serve to by-pass the rules on negotiations on employee involvement once the SE is ‘activated’ at a subsequent stage. Such behaviour violates the spirit of the SE legislation. The ETUC therefore recommends that a more critical assessment is made of the reasons and the consequences of the establishment of SEs without any economic activity.
(V) POSSIBLE FOLLOW UP

Question 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 border)?

As already highlighted in its preliminary remarks, the ETUC stresses that a review of the SE Statute must not lead to a reopening of the SE Directive by the backdoor. Furthermore, it must be thoroughly assessed whether any potential amendment to the SE Statute would be consistent with the provisions of the SE Directive. As a result, and given the inadequate methodology used in the study, the ETUC calls for a specific consultation of the European social partners before any review of the SE Statute is envisaged.

The ETUC is particularly concerned by the proposed amendments to Article 12 of the Statute. The proposed amendment to Article 7 is also very problematic.

Article 12

The study proposes to allow the registration of an SE in the absence of any negotiations if none of the companies involved has any employees. The ETUC is strongly opposed to such amendment as this would further encourage the establishment of dubious shelf SEs with a view to circumvent employee involvement rights. For the ETUC, it is the very existence of shelf SEs which should be put into question because they can easily contradict the initial objective of the SE legislation.

The study further proposes that negotiations shall be conducted as soon as the SE is activated and a certain number of employees is reached. Earlier in the text, the study states that there is a shared opinion amongst legal theorists that the notion of structural change, which would require renegotiation on employee involvement, does not include the activation of shelf SEs (p.246). The ETUC has strong doubts that such a view is unanimously shared by legal advisers. Nonetheless, it is true that more precise provisions on the definition and consequence of structural change would bring helpful clarification. This issue is important since according to the study 20% of the SEs have changed their employee structure since their creation (p.205-206). More may be expected as the majority of shelf SEs still has no employees.

For the ETUC, it is clear that the activation of shelf SEs should be perceived as a structural change which requires negotiation on employee involvement, under the same rules as at the time of the SE creation. In order to allow some control about the start of commercial activities, the ETUC calls for the creation of a European SE register, requiring that SEs report such changes.
Concerning the specific question of thresholds, the ETUC considers that the deficient methodology of the study does not allow for a balanced discussion. The proposed amendment cannot be considered without an appropriate consultation of all the stakeholders, and in particular of the European social partners. As a general principle, and in the absence of minimum European standards on participation rights, the SE legislation should not be used as a way to exert pressure on national participation rights.

The study further proposes that in the case of formation of an SE by merger, merging companies have the right to bypass the negotiations and to be directly subject to the standard rules of the Directive. The ETUC is strongly opposed to such suggestion. The negotiation process is an indispensable stage to achieve tailored made solutions, best suited to both parties. Furthermore, practice clearly shows that in almost all cases the negotiating parties have reached an agreement within a reasonable delay. The ETUC warns against aligning the provisions of the SE legislation to the provisions of the cross-border merger Directive as the cross border merger Directive only deals with participation of employees, whilst the SE legislation contains provisions on information and consultation.

Article 7

The study proposes to put into question the principle of Article 7 of the Statute and to allow the SE to separate the registered office and the head office. The ETUC is strongly opposed to such amendment, as the risk of circumvention of employee participation rights through the setting up of ‘letter box companies’ would increase.

In any case, the application of the ECJ case law on the location of the registered office is not justified in the case of an SE. The decisions of the ECJ sought to facilitate freedom of establishment for national legal forms within the EU. These considerations cannot be transposed to the SE Statute, which is creating a European company form.

ETUC recommendations

As previously highlighted, more attention should be paid to the worrying phenomenon of shelf SEs. The ETUC recommends in particular that activation of such SEs are more clearly defined as a structural change triggering negotiation on employee involvement. The ETUC also recommends the creation of a European register where SEs would be required to report key information on its structure and operations.

As already expressed in its response to question 1, the ETUC has strong concerns about the way the findings of the study are presented. Employee involvement is presented as a key negative driver without making it clear that this finding is based on a perception on the part of a group of potentially biased interviewees and not on the legal reality. It is important to keep this psychological factor in mind when reflecting on the future of the SE legislation. Amending the legislation cannot constitute an appropriate response when the understanding of the existing text is inaccurate. Rather, the ETUC strongly encourages the Commission to reflect on how complete information on the mechanisms of the SE legislation as well as its potential benefits can be better communicated to stakeholders throughout the Union.
Finally, the ETUC notes that the main factor of complexity concerning rules on employee participation is the relative absence of convergence between the national traditions in the EU. On the other hand, business is increasingly becoming global. It is therefore necessary for the EU to reflect if and how a streamlining at European level of the provisions on employees’ participation can be achieved. Such reflection should not be geared towards downsizing existing national provisions but rather to see how the EU can promote competitive and socially responsible European company forms. In this regard, the ETUC notes with great interest the call of the European Parliament to initiate a consultation with the social partners “with a view to evaluating and where necessary streamlining, creating or reinforcing the provisions for employees’ participation in the internal market”.

(VI) ANY OTHER COMMENTS

The ETUC wishes to underline the poor methodology of the study. In particular, the following elements contribute to generally unbalanced findings:

- The study exclusively takes the point of view of majority shareholders to rate the attractiveness of the SE, overlooking the interests of other important stakeholders. Furthermore, on several occasions the findings expressed are based on the perception of legal consultants rather than on material evidence about what is happening in practice at company level (see our critics under question 1)

- The study emphasises employee involvement as a problematic factor, without providing any analysis of the SE Directive and its objectives. As a result, the study continuously suggests that employee involvement is a technical aspect of the SE Statute, overlooking the fact that it is a key aspect of the political compromise underlying the SE legislation (the SE Directive and the SE regulation are two related parts)

- Without establishing that this is the really the case, the study continuously suggests that employee involvement is a costly, burdensome and complex requirement but does not analyse to which extent an active involvement of employees in the life of the SEs proves beneficial to the running of the company. Especially in the current economic context, workers’ involvement is an interesting avenue to improve corporate governance.

As a result, the ETUC strongly recommends that the Commission undertakes further analysis and a broader range of consultation before drafting its final report on the application of the SE Statute.

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3 EP Resolution of 12 March 2009 on employee participation in companies with a European Statute P6_TA (2009) 0131. This Resolution tabled by four political groups was adopted with an unusually large majority (542 votes to 57, with 14 abstentions)