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The European Company Statute: Implications for Industrial Relations in the European Union

ABSTRACT ■ This article explores the origins and development of the European Company Statute, with particular reference to its provisions for employee involvement, both through a ‘representative body’ and through board-level participation. European companies can be seen as ‘hybrid’ organizations in which common European-level elements are combined with supplementary features deriving from the legislation of the country in which they are registered. The article outlines the types of company that have opted so far to become European companies and analyses a variety of the issues raised, including the range of options that now confront management in setting up such a company, the position of the unions and the ‘Europeanization’ of company boards. The principal conclusions are that the Statute represents a further step in the development of ‘multi-level governance’ of the EU, and that it will increase regulatory competition among the member states.

KEYWORDS: company law harmonization ■ corporate governance
■ employee board-level participation ■ European Company Statute
■ multi-level governance

Introduction

In October 2001, the Employment and Social Policy Council of the European Union adopted the European Company Statute (ECS) after 31 years in the making, ‘probably the longest legislative process ever experienced in this field’ (EWCB, 2002a: 7). The Regulation and Directive giving effect to the ECS came into force three years later in October 2004, and took effect across the European Economic Area (EEA), the (then) 25 member states of the EU along with Iceland, Liechtenstein and Norway. The Regulation, which is directly applicable, came into force on 8 October 2004, though transposition of the Directive into national legislation was patchy: only nine countries, including the

UK, met this deadline, though the others have subsequently transposed the ECS.¹

These two new legal instruments are designed to encourage the creation of 'European companies', that is, companies that operate across the EEA governed by a single set of management and reporting systems. The Regulation covers the legal structure of the European company (*Societas europaea*, SE), while the Directive covers employee representation, a highly controversial feature of the ECS and the principal focus of this article. This unified framework of legislation is intended to simplify the range of regulations otherwise applicable to companies in each member state, reduce administrative and legal costs, and promote economies of scale. Furthermore, SEs should be able to restructure themselves more easily across borders as they can relocate their registered offices without being restricted by national bureaucracies.

Between 8 October 2004 and 8 September 2007, 98 SEs had been established in 17 EEA countries (SEEUROPE network, 2007). The SEEUROPE network identifies four categories of SE: 'normal' SEs, 'empty' SEs, 'shelf' SEs and unidentifiable or 'UFO' SEs. 'Normal' SEs, of which there were 33, have both operations and employees. There were also 14 'empty' SEs, with operations but no employees, including companies that subcontract services, and 19 'shelf' SEs, with neither operations nor employees, intended solely to be sold on to interested parties to reduce set-up costs and delays. There were 32 'UFO' SEs, about which there is insufficient information for allocation to any of the other categories. A further two SEs had been transformed back into public limited companies and one had been liquidated, while seven more were in the pipeline (making 108 in total).

Only the 'normal' SEs provide for an agreement on employee involvement. Nineteen had established procedures for transnational information and consultation and ten, not necessarily the same as these, had established transnational board-level representation. The largest and best known European company so far is Allianz SE, with some 170,000 employees worldwide, which was registered in Munich in October 2006. An SE works council has been established, and employee representatives fill half of the 12 seats on the supervisory board.

The principal motives for the foundation of an SE have included: the creation of a European identity; the simplification of corporate legal structures and hence cross-border restructuring; the attraction of capital, especially for cross-border projects; the reduction of operational risk; the enhancement of capital efficiency; the simplification of the procedures for relocating headquarters; cost reductions with an aim of improving efficiency; using the SE as a vehicle for entering the European market; and the desire for an improved competitive position.

The European company can be seen as integral to the continuing economic integration of the EU. Against the background of the Single European Market and Economic and Monetary Union (EMU), it takes its place as one of the most tenacious instruments designed to improve the efficiency and flexibility of European corporate activity, in a line of company law harmonization directives. This article examines the lengthy development of the ECS, which it divides into five stages:

- genesis, 1959–70;
- attempted harmonization, 1970–82;
- flexibility, but failure, 1985–93;
- flexibility, and success, 1995–2001;
- main provisions and implementation, 2001 to date.

The article focuses in particular on the requirements placed in the ECS for European companies to introduce employee board-level representation, and how these have affected its evolution and eventual content. It also analyses the prospects for the future – the number and type of European companies coming forward for registration, their motivation and their significance for further economic integration.

Origins and Evolution

Genesis (1959–70)

The creation of a uniform structure for public limited companies across the European Economic Community (EEC) was first proposed shortly after the Treaty of Rome in 1957. The idea was mooted at two conferences in 1959 and 1960 (Bärmann, 1970; Skaupy, 1966) and by Pieter Sanders in his inaugural lecture as professor of comparative law at Rotterdam University in 1959 (Sanders, 1973; Thompson, 1969). Sanders argued that an ECS, with uniform legal status across all member states, should supplement existing national company law systems, rather than replace them. Furthermore, the European company should be entirely voluntary: ‘those interested can take it or leave it’ (Sanders, 1973: 88). These principles underlying the SE – its supplementary and voluntary status – have remained constant throughout. In 1962, the French industries’ association adopted the idea, which the French government subsequently proposed to the Council of Ministers in 1965 (Skaupy, 1966). The Commission asked Sanders to elaborate his proposal, which it published in draft form in 1967. It was later revised, and – as a ‘Proposal for a Council Regulation embodying a Statute for European Companies’ – was submitted to the Council in June 1970 (Bulletin, 1970).

Attempted Harmonization (1970–82)

The basic rationale for the ECS was that undertakings 'should be able to plan and carry out the reorganization of their activities at Community level' in order to improve their competitiveness (Bulletin, 1970: 5). The principal difficulty was that the legal framework of European undertakings remained national but that it 'no longer corresponds to the economic framework within which they are to develop if the Community is to achieve its purpose' (Bulletin, 1970: 5). The only solution, therefore, was to allow the establishment, alongside national companies, of others that were 'wholly subject only to a specific legal system that is directly applicable in all the member states, thereby freeing this form of company from any legal tie to this or that particular country' (Bulletin, 1970: 6). The draft ECS therefore allowed for the formation, structure, operation and liquidation of a European company, and included the highly controversial issue of employee participation.

The draft ECS noted the wide variation in legal provision affecting employee participation across the EEC, which in 1970 consisted of only the six original member states (Belgium, France, Federal Republic of Germany, Italy, Luxembourg and the Netherlands). However, their laws all reflected the common principle that employees must be 'enabled to unite in defence of their interests within the undertaking and to share in the making of certain decisions' (Bulletin, 1970: 87). The European company should not only take this principle into account but 'encourage' it, as cooperation between employees and management, and between employees in different countries, would contribute 'to the solution of particular problems which may arise when a company's personnel is recruited from more than one member state' (Bulletin, 1970: 87).

The draft ECS envisaged three types of machinery for regulating employee representation in the European company: the formation of European works councils (EWCs); employee representation on its supervisory board; and the conclusion of collective agreements. EWCs were based on an extension of existing national legislation governing domestic works councils, familiar across the Six, while collective agreements were also a long-standing fixture of all European industrial relations systems. The innovation – or potential innovation – was the reference to employee representation on supervisory boards.

German legislation provided the model, because – at that time – Germany was the only member state that required such representation (Keller, 2005).² Fearing dilution of its own legislation, Germany convinced the Commission that 'such representation is necessary in the case of the European company' (Bulletin, 1970: 88). Title V of the ECS laid down the requirements; Article 137, for example, stipulated that at least one third of the members of the supervisory board should be employee representatives elected through the national institutions of

employee representation acting as an electoral college. In due course, both the Economic and Social Committee and the EP commented on the text and proposed a number of amendments. The Commission accordingly submitted its 'Amended Proposal for a Council Regulation on the Statute for European Companies' to the Council in May 1975 (Bulletin, 1975).³

The main alteration was in the inclusion of co-opted members on the supervisory board. However, there was still only one model envisaged: one-third representation for shareholders, employees and members co-opted by shareholders and employees respectively. Lack of flexibility persisted despite the accession in 1973 of three new member states: Denmark, Ireland and the UK. Denmark was later to introduce a system of employee board-level representation in 1973, and Ireland in the public sector. There were attempts to introduce a UK system in the 1970s, but the Conservative government elected in 1979 resolutely opposed employee board-level representation (Gold, 2005). The legal basis of the ECS proposal remained Article 235 (now Article 308) of the EEC Treaty, requiring unanimity in the Council of Ministers. By 1982, discussion in the Council was deadlocked, and progress on the ECS was suspended.

Flexibility, but Failure (1985–93)

The prospects for adoption seemed better in 1985 with the publication of the Commission's White Paper, 'Completing the Internal Market'. It contained around 300 measures – focusing particularly on the elimination of non-tariff barriers to trade among the member states by the end of 1992 – and was followed by the Single European Act, which took effect in 1987, and applied qualified majority voting in the Council to promote their introduction. These measures included the ECS, and in June 1987 the Council requested the institutions involved to make 'swift progress' on the measure (Bulletin, 1989: 7). The Commission soon published a Memorandum designed to overcome the negotiating deadlock in the ECS by offering all parties the chance to comment on various aspects, including its voluntary status, the independence of national legislation and three models of employee representation (EC, 1988).

These three models were subsequently slightly amended and incorporated into the Commission's new draft ECS (Bulletin, 1989). A member state would be allowed to limit the choice of models for European companies having their registered office on its territory, as their equivalence was 'ensured by the Statute' (Bulletin, 1989: 9). Either between one-third and one-half of representatives on the supervisory or the administrative board were to be appointed by the employees or co-opted by the board; or a 'separate body' was to represent employees in line with statutes laid down in consultation with the representatives of the founding companies; or

'other models' could be set up following agreement between management and employee representatives. The new draft also allowed for the introduction of a 'standard model' either by agreement or in case of failure to agree, which was to conform to 'the most advanced national practices' with respect to information and consultation. The ECS thereby became a 'hybrid', subject to Community legislation on the one hand, but supplemented by national legislation, for example relating to taxation or specific forms of employee participation on the other (Blanquet, 2002).

Furthermore, the Commission now split the ECS into a Regulation, covering company law aspects based on Article 100a (now Art. 95) of the EEC Treaty, and a Directive, covering the employee representation aspects based on Article 54 (3) (now Art. 44 (2g)). Both Articles allowed for qualified majority voting rather than unanimity on the Council. These new texts were subsequently amended in 1991. The Directive, for example, was amended with respect to the procedures for adopting the model of participation, appointing members of the supervisory board and electing the representatives of the employees within the European company (Bulletin, 1991, para. 1.2.47). Largely because of the disagreement of Germany, Ireland and the UK regarding the equivalence of the three models proposed, Council subsequently suspended discussions again in 1993. Germany feared that the 1989 version of the ECS contained weaker provisions on employee representation at board level, which might allow companies based in, or operating in, Germany to avoid stronger national provisions. Ireland and the UK, by contrast, opposed the introduction of such representation through EU legislation on the grounds that the model was inappropriate to their own domestic conditions (Goulding, 2004). Thus the Single European Market came into effect without the ECS.

Flexibility, and Success (1995–2001)

EMU, culminating in the introduction of the euro in 1999, led to further pressure to adopt the ECS, in addition to which the successful adoption of the EWC Directive in 1994 demonstrated that progress on EU-level employee participation was still possible. Business too continued to lobby for the ECS (Blanquet, 2002). In 1995, the Commission published a Communication on worker information and consultation (Goulding, 2004), which recommended establishing a 'general framework' for national-level information and consultation (later to become the Directive adopted in 2002). The Commission suggested that the provisions on employee participation could possibly be dropped, as the companies affected would be governed by the EWC Directive and the new 'general framework' Directive (Goulding, 2004: paras 8–89).

Against this background, the Commission convened a 'high-level expert group', chaired by Etienne Davignon, a former Vice-President of

the Commission; its results were published in 1997. Noting the difficulties in harmonizing the diversity of institutional and legal frameworks for employee participation across the member states, the report 'opted for a different approach', giving priority to 'a negotiated solution tailored to cultural differences and taking account of the diversity of situations' (Group of Experts, 1997: para. 94c). The report therefore proposed that negotiations between management and employee representatives should determine the system of participation within each European company, but that a set of fallback provisions should apply, particularly in case of failure to agree. This approach – negotiations backed by statutory arrangements – reflects that enshrined in the EWC directive in 1994.

The Presidency of the Luxembourg Council produced a revised draft Directive in 1997, incorporating the Davignon report's recommendations on employee participation. One key area awaited resolution before the Directive could be adopted unanimously by the Council, as required by its revised Treaty base, Article 308. This was the 'before and after' principle, which guarantees the acquired rights of workers to participation in the European company to ensure that they are never eroded or eliminated as a result of its creation (Blanquet, 2002). Following protracted negotiations, the Nice Council in December 2000 eventually agreed an opt-out clause to meet Spain's reservations over this principle. This allowed member states like Spain and the UK to exempt companies from employee board-level representation when forming a European company by merger and when none of them had such provision beforehand. The Employment and Social Policy Council subsequently concluded a political agreement on the Regulation and Directive, which it at last adopted on 8 October 2001 (OJ, 2001a, 2001b).

But even then the controversy was not over. The European Parliament (EP) prepared to challenge the alteration in the legal base under which the Regulation and Directive had been adopted. Article 308 is the general Article that allows the Council – on a proposal from the Commission, and following consultation with the EP – to take 'appropriate measures' by unanimity to achieve one of the objectives of the EU. The EP called for a change in the legal base to Article 137 (3) which covers 'representation and collective defence of the interests of workers and employers, including co-determination' and would have allowed it a greater influence through its co-decision procedure. However, following debate, the EP resolved to abstain from a legal challenge in February 2002, allowing the ECS finally to come into force on 8 October 2004.

Main Provisions and Implementation, 2001 to Date

The formation of a European Company – or SE – remains purely voluntary and supplementary to national forms of company legislation. The

Regulation allows four different methods of establishment, through:

- a merger;
- the creation of a holding SE;
- the creation of a subsidiary SE; or
- the transformation of a company already registered in a member state and doing business in at least one other member state.

As we see below, the type of formation largely determines the model of employee board-level representation. The formation itself is a complex affair, which requires extensive consultation with the various stakeholders (EWCB, 2002a; Goulding, 2004). The Regulation requires the SE to have a general meeting of shareholders and *either* a single-tier administrative board *or* a two-tier management board plus a supervisory board. Companies are free to choose between the two corporate governance structures all over Europe. Additionally, the Regulation offers the SE the chance to relocate its headquarters between member states without hindrance.

The Directive governs provisions for two levels of transnational employee representation within the SE: employee information and consultation through a 'representative body' (or equivalent procedures) and arrangements for board-level representation, referred to as 'participation'²⁴ with safeguards to prevent the dilution or abolition of existing systems (EWCB, 2002b). The Directive (Article 2 (h)) uses the term 'involvement' to refer to both these levels together. In this context the 'before-and-after principle' (Article 18 of the preamble to the Directive) must be highlighted, as this ensures that the involvement rights within a company existing beforehand remain in force after the establishment of the SE. Because such a wide range of systems governing representation at workplace and company-board levels currently exists across the member states (EIRO, 1998; Group of Experts, 1997; LRD, 2004), securing agreement on the provisions contained in the ECS proved exceedingly controversial, which accounts for much of the delay in its adoption.

The Directive gives priority to negotiations between management and employee representatives through a Special Negotiating Body (SNB) in establishing involvement procedures throughout the SE. Broadly speaking, the SNB and management can agree on any procedure of employee involvement. But while in the case of 'maintenance or improvement' of existing provisions a simple majority of the members of the SNB representing a majority of the employees is required, in the case of a 'reduction of participation rights'²⁵ a two-thirds majority of the members of the SNB representing two-thirds of the employees in at least two member states is required. In addition, the number of employees covered by board-level participation is crucial, and the critical threshold varies from one form of foundation to another.

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However, the ‘standard rules’ outlined in the Annex apply in a number of circumstances: if both sides agree; or if the SNB had not abandoned negotiations; or if there is failure to agree after six months, or 12 by extension, and management still wants to establish an SE (Article 7). These rules require information and consultation at sub-board level through a ‘representative body’ in all cases, but their application to participation at board level is more complex.

In the case of the transformation of an existing company into an SE, a reduction of employee board-level participation rights is not possible by law. The involvement rights granted in the member state where the company was registered and continues to be located, following registration as an SE, continue to apply. In the case of mergers, or the formation of holding companies or joint-subidiaries, employee representation on the administrative or supervisory board must match the highest proportion of members of the competent board applicable in the companies involved, prior to registration as an SE. If none of the companies involved in the creation of an SE is subject to regulation requiring employee board-level representation prior to registration, then the SE is not required to introduce it.

However, companies have to meet a number of conditions (Article 7) for the standard rules to apply. In addition to the conditions regarding information and consultation rights, regulations governing employee board-level representation must cover at least 25 percent of the workers affected in the case of a merger, and at least 50 percent of the workers affected in the case of a holding company or a joint-subidiary in order to be applied to the SE. The SNB may agree to reduce these representation thresholds, and it must decide on the model of board-level representation to be introduced if more than one operates across the companies involved.

By and large, the model of employee involvement in an SE is dominated primarily by the form of foundation, which lays the cornerstone for the scope of negotiations. As noted above, when a national joint-stock company is transformed into an SE, it is not possible to reduce employee involvement, because procedures for employee involvement granted beforehand must remain in force after the transformation. In consequence, employee involvement becomes broadened out across the SE’s European operations. However, in the case of an SE created by merger or by a holding- or subsidiary SE, the scope of negotiations themselves turns out to be broader. In order to clarify this point, two hypothetical cases are presented that are otherwise the same but where the form of foundation differs. The countries were chosen because of the extent of dissimilarity of the national models of corporate governance (Vitols, 2001).

Case 1. Company A, a UK public limited company (plc) with 4400 employees in the UK, Company B, a German *Aktiengesellschaft* (AG) with 2500 employees, and Company C, a Spanish *sociedad anónima* (SA) with 3100 employees, want to form a holding-SE with headquarters in the Netherlands. The SNB consists of 12 members (five from the UK, three from Germany and four from Spain) and can agree on any form of employee involvement by a simple majority. This is because the number of employees covered by any form of board-level participation before the formation of a SE is still below the threshold of 50 percent applicable in case of formation of a holding-SE, as until then only the German employees had been covered. If management and the SNB agree, or if negotiations fail but management still wants to establish a holding-SE, and the SNB had not abandoned negotiations, then the standard rules apply. This means that arrangements covering information and consultation through the 'representative body' are applicable, though the threshold – that 50 percent of existing employees must be covered by board-level participation – is not met, and so the SE is exempt from participation at that level. It can therefore be assumed that employees will have information and consultation rights, but no participation rights at board level. Nevertheless, board-level representation in the national companies remains unaffected. The holding-SE can be registered in the Netherlands.

Case 2. This time, the same companies – the UK plc, German AG and Spanish SA – want to merge and register their headquarters in the Netherlands. The SNB consists of the same 12 members. In the case of a merger, all participating companies must be represented on the SNB, and this condition is met. The SNB can agree by a simple majority on the form of employee board-level participation, provided that this is a system which covered at least 25 percent of the total employees beforehand (the most advantageous being the German model). It may even agree on a reduction in that form of participation, provided that it votes by a two-thirds majority representing two-thirds of the employees in at least two member states (in this case, by eight votes out of 12). This means that the British and Spanish representatives, who control nine votes, could together outvote the German representatives and agree on information and consultation rights only (without board-level representation). However, if management and the SNB agree, or if negotiations fail but management still want to establish an SE by merger and the SNB has not abandoned negotiations, then the standard rules apply. In this case, not only are information and consultation procedures applicable, but also the standard rules regarding board-level representation apply as well, because the threshold of 25 percent of employees covered by participation beforehand was reached. The German model therefore takes effect: half the members of the competent organ will be employee representatives. The merger-SE can again be registered in the Netherlands.

Issues Arising

Analysis of these hypothetical cases, and the actual SE foundations that have taken place, indicate major issues arising regarding negotiations on the involvement of employees, the operation of everyday business and the implications for corporate governance. First of all, it should be stressed that the SE has no influence on either national labour legislation or employment contracts, which remain unchanged. In principle, this is true also for the influence of the SE on employee involvement in works councils or other forms of representation at plant level. That is, such arrangements remain unaltered provided that the national legal requirements for application are still fulfilled. These might include, for instance, the number of employees at a site required to trigger the threshold for a works council, or – for a group works council – that the headquarters of the SE is still in that country. However, in accordance with the autonomy of the parties, other aspects of representation may be renegotiated. Consequently, the SE agreement on the involvement of employees might provide the opportunity to clarify participatory structures and hence improve the situation for both sides by assigning different competences to different levels of employee involvement both nationally and transnationally. The opportunities created by the ECS might thereby contribute to greater consistency of employee involvement at works council and group levels.

A second issue is management's scope for action, that is, the range of alternatives open and the opportunities to define this range. This depends on the legal basis in the country hosting foundation and consequently on the nature of national transposition, the form of foundation and, last but not least, the proportion of employees already granted participation rights. Management's scope for action therefore does not depend solely on its intentions, but rather on the skill and expertise of their lawyers in creating legal entities which offer the greatest scope for choice, without actually constituting a misuse of the procedures. It can be assumed that it is in the interests of management to have as many alternatives as possible, and hence the greatest scope for action. However, avoidance or circumvention of worker participation should not be seen as the principal motive for the foundation of a European company. Various commentators (Brück, 2004; Stegemann, 2005; TaylorWessing, 2004) point out that the creation of European corporate identity, cross-border mobility, the simplification of legal structures and cross-border restructuring seem to be higher priority motives. Nevertheless, whether companies will seize the opportunity to achieve a reduction in worker participation at the same time as other benefits remains an open question.

As indicated in case 2 above, the ability to reach an agreement in the course of negotiations might be identified as a third main issue. The great

potential for conflict lies not only in the negotiations between the SNB and management, but also in negotiations within the SNB between members originating from different countries with different traditions, experiences and preferences regarding employee involvement. Broadly, there are three ways in which the membership of the SNB may be determined: by works councils, or similar bodies; by unions; or directly by employees (Fulton, 2006). Furthermore, there may be concerns over the standard of training of SNB members and fears that, in some cases, they may even be appointed by management.

The only matter that is clear for the moment is the position of the European trade union industry federations. In their view, employee representatives have a reactive role in the process of establishing a SE, in contrast to the EWC where they have a more proactive role, because the process is initiated by management. If management plans to establish a SE, then the employee representatives will negotiate in good faith. Luc Triangle of the European Metalworkers' Federation (EMF) indicates that the Federation and national affiliates involved in negotiations seek the highest possible level of employee involvement (EMF, 2003). This is in accordance with the resolution of the ETUC (2003) and the SE-checklist drawn up by UNI-Europa (2004), which represents employees in private sector service industries. Given the great variety of interests, preferences and traditions of the national affiliates, this consensus within the representative organizations at European level is remarkable. However, it is not yet clear whether national employee representatives will abide by these guidelines; the distribution of power among the actors involved will be decisive. It is conceivable that managements might offer, for example, investment or employment guarantees in exchange for a reduction in participation rights, in particular a reduction in the number of employee representatives on the relevant board of the SE.⁶

The Europeanization of board-level employee representation can be seen as a fourth issue affecting management and employees in the company, as well as the trade unions and their European federations. Until now, only national employee representatives have normally been present on the competent board of national public limited companies,⁷ even though some companies have a considerable number of employees outside their country of origin. With the SE, it is possible that, for the first time, employee representatives both in the representative body and on the board will hail not only from the company's country of origin but also from EEA countries where the SE has subsidiaries or establishments affected. Generally speaking, the origin and number of employee representatives are fixed during the course of negotiations over a written agreement on the involvement of employees in the SE. It is reasonable to assume that employee representatives will represent the diversity of employees, though some might argue that the SE falls short of the global reality of

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many of these companies. While this may be true, a purely European solution may seem preferable to no solution at all.

It remains to be seen how this European diversity with all its challenges, ranging from use of different languages to varying attitudes towards cooperation with management, will be handled. The potential for conflict, or indeed the ability to reach agreement at all, are issues concerning not only negotiations on the involvement of employees but also the everyday operations of the representative body and the company board or boards. The lines of conflict may shift, not necessarily between employee representatives from different countries, and new coalitions may emerge, depending on the issue on the agenda, in ways unfamiliar from past experience. By and large, employee representatives and management will need to make great efforts to overcome these conflicts, which will arise not only when the SE is formed but also later when the parties are expected to work together in a constructive manner on a daily basis. It is a moot point whether the decision-making process and the decisions actually taken will differ in any significant way from those before the launch of this new form of Europeanization.

Conclusions

Indeed, Europeanization affects not only the company and the actors involved, but also the evolution of models of corporate governance. What are the implications of the ECS for corporate governance in general, and for industrial relations in particular, across the member states of the European Union? The SE can be seen as a further example of the development of 'multi-level governance' across the EU (Marginson and Sisson, 2006: 55). The Directive has now been transposed into national legislation by the member states, and can itself be viewed as the outcome of various accumulated compromises down the years. The Directive allows for subsidiarity, in that it encourages negotiations to settle SE-specific arrangements through the SNB, with the application of standard rules only under specific circumstances, thus guaranteeing certain minimum standards. And over time, informal processes – such as patterns of learning and the diffusion of good practice – will undoubtedly influence outcomes of employee representation in SEs, as they already have in the evolution of EWCs (Gold, 2003). Furthermore, the formation of an SE remains purely voluntary and its structure runs parallel to existing systems of company law across the member states. For this reason, as noted above, it has been described as a 'hybrid' organization, with a common EU structure supplemented by a battery of national elements (Blanquet, 2002).

In this context, controversy centres on whether the SE can be seen as a means of 'positive' or 'negative' integration. The former refers to the

'reconstruction of a system of economic regulation at the level of the larger economic unit', and hence implicitly to harmonization and convergence; while the latter denotes, less ambitiously, the mere 'removal of ... barriers to trade' (Scharpf, 1999: 45), and hence implicitly mutual recognition of continuing national differences – possibly enabling 'regime competition'.

The ECS was originally intended to harmonize company law but, as outlined above, the eventual Directive – with its emphasis on subsidiarity – reflects a process of 'multi-level governance' and fragmentation. The choice of structure of corporate governance and the negotiations on the involvement of employees, for example, are noted by commentators who deny that the SE can be seen as a means of harmonizing company law in the member states (Lutter, 2002; Schulz and Geismar, 2001). But these conclusions can go further. The harmonization of laws is regarded as a means to secure the Common Market (EEC Treaty, Article 3.1h) by reducing transaction costs and sources of friction. Complete harmonization would require a single European-wide legal order that, from an economic point of view, would entirely eliminate these barriers and so lead to gains in efficiency. However, this is essentially a static perspective. The *process* of harmonization has itself on occasion proved rigid and cumbersome, ending in deadlock, especially in the context of enlargement. The fate of the draft Fifth Directive illustrates this point: after years hopelessly waiting in the legislative pipeline, it was eventually withdrawn in 2004.

However, the SE does not reflect the principle of reciprocal recognition either. Of course, an SE can conduct business all over Europe but, if it moves its registered office from one member state to another, the supplementary national legislation that applies changes too – including its tax liabilities, the rights of stakeholders and the framework of labour regulation – which is in clear opposition to this principle.

The key point is that the SE is considerably more highly mobile than a national public limited company owing to the simplified procedures for relocating headquarters that apply.⁸ For this reason, the SE constrains the freedom of national legislators. The management of an SE is in the position to make use not only of its 'voice-power' but also of its 'exit-power', by 'voting with its feet' (Tiebout, 1956). In this way, it can exert considerable pressure on those member states that do not satisfactorily meet the demands and requirements of the private sector. For example, when two companies merge and form an SE, the labour relations of the countries involved must be a factor in determining where to locate the headquarters. Since tax advantages accrue to the country where the headquarters are located, this must act as an incentive to countries to create a labour environment attractive to SEs. As a result, the ECS is likely to promote regulatory competition *between* national legal frameworks. Furthermore, it is also likely to promote such competition *within* such

national legal frameworks. This is because if national legislators offer an SE with, for example, a choice of board structures which is regarded as advantageous by existing companies, then pressure will increase to amend national legal structures to conform with this new standard. These developments could prove detrimental to workers' rights, though some argue that such competition should not be rejected outright as it may help to minimize state and market failure (Grundmann, 2001).

This article concludes that the main result of the ECS will be to increase regulatory competition (Lutter, 2002). At the moment, it is still too early to identify any trends either from the SEs that have already been formed or from those planned in the near future, but a 'race to the bottom' should not be regarded as inevitable. The evaluation of the outcome depends to a great extent on the subjective perspectives, and these might differ considerably across Europe, since some countries require extensive mandatory employee involvement while others require little or none. Trade unions and works councillors in Austria or Germany, who are generally used to very high levels of employee involvement, naturally fear loss of influence within the highest organs of their companies. However, unions in certain other countries, such as Spain or the UK, may gain access to board rooms and participation in high-level decision-taking within the company. Some of the established SEs have already demonstrated that employee representatives from different European countries can sit on the same board (LRD, 2006). There is, for example, now one UK employee representative on the supervisory board of Allianz SE alongside one French and four German representatives.

The systems of corporate governance that survive may not be the least restrictive but rather the ones that are best able to balance the interests of all their stakeholders, including employees. These may yet prove to be the systems that give companies the best chance of adapting to fast-changing business environments in the long run. Current debates in the field of corporate social responsibility tend to reflect these concerns about the breadth of stakeholding that companies should embody (Williams and Conley, 2005). However, whether the result is a 'race to the bottom' or a 'climb to the top', the debates amongst academics and practitioners are likely to continue for a long time yet (Charny, 1991). Either way, it is extremely doubtful that one model of corporate governance will eventually triumph over another, given the enduring influence of institutional and legal frameworks at national level.

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NOTES

- 1 By date order: Denmark (April 2004), Sweden, Hungary and Iceland (May 2004), Austria (June 2004), Finland (August 2004), Slovak Republic and United Kingdom (September 2004), Belgium and Malta (October 2004), Czech Republic (November 2004), Germany and Cyprus (December 2004), Estonia (January 2005), the Netherlands, Norway, Poland and Latvia (March 2005), Lithuania (May 2005), France (July 2005), Italy (August 2005), Portugal (October 2005), Liechtenstein (November 2005), Slovenia (March 2006), Greece (May 2006), Luxembourg (August 2006), Spain (October 2006) and Ireland (January 2007). Romania and Bulgaria, which joined the EU in January 2007, transposed the ECS in March and July 2007 respectively.
- 2 To this day, Belgium and Italy have no such provisions. French legislation is merely enabling. Legislation in the Netherlands dates from 1971 and in Luxembourg from 1974. German legislation dates from 1951 and 1952, and was supplemented in 1976.
- 3 The ECS should not be confused with the draft Fifth Directive, first proposed in 1972 and heavily amended in 1983. This Directive would have required employee representation at board level in all large publicly limited companies across the EEC. It remained deadlocked and was eventually withdrawn in 2004.
- 4 'Information' means that the competent organ of the SE informs the representative body about any issues that concern the SE itself, its subsidiaries or its establishments in another member state so that the representative body is able to assess in depth the possible impacts. 'Consultation' means the establishment of dialogue and exchange of views between the representative body and the competent organ of the SE. The opinion expressed by the representative body may be taken into account in the decision-making process within the SE. 'Participation' means the influence of the representative body on the decision-making process within the SE by means of the right to elect or appoint some of the members of the company's supervisory or administrative organ, or the right to recommend and/or oppose the appointment of some or all of the members of the company's supervisory or administrative organ (Article 2 (i-k)).
- 5 This is defined (Article 3 (4)) as representation in the organs of the SE 'lower than the highest proportion existing within the participating companies'.
- 6 This paragraph draws on discussions at SEEUROPE meetings in November 2004 and March 2006.
- 7 Exceptions can be found at DaimlerChrysler, where there are employee representatives on the supervisory board from both Germany and the USA, and at Aventis, where both German and French employee representatives have seats.
- 8 This is so only for member states whose legislation requires that a company is governed by the law of the country in which its headquarters are located: Austria, Belgium, France, Germany, Greece, Luxembourg, Portugal and Spain (Staudinger and Grossfeld, 1998).

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