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Reply to the consultation of the EU Commission on the SE study of Ernst &Young (20.5.2010)

(I) Information about the respondent

A. Name of the company/organisation:

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Name and function:

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B. Country of origin :

Belgium

Legal form:

Association Internationale Sans But Lucrative ; the ETUI is supported financially by the EU Community

Field of activity:

Research, Health and Safety, Education

C. Cross-border activities:

The ETUI considers itself as European institution which works with topical European composed expert networks; in this case it refers on the expertise of its **SEEUROPE expert network** covering 28 EU member states and Liechtenstein and Norway (EEA MS).

(Ib) General remarks

Generally, it must be emphasised that the SE Directive provides for obligatory involvement rights at European level. A European Company (SE) is, by definition, a European, not a national company. This is also reflected in the transnational arrangements on worker involvement. These rights are not a minor matter, but represent a key feature of the European Company (as clearly expressed by the SE Directive).

Thus, it is not adequate to deal with employee involvement as if it was a detrimental and undesirable burden in the process of establishing SEs, as the study seems to suggest. The SE legislation mirrors the political agreement to accept mandatory employee involvement (by information and consultation and, where applicable, also by participation in the company boardroom) as an essential element of the corporate governance of any company at transnational level applying European company law and also to safeguard pre-existing participation rights. There should be a serious effort to consider how to teach applicants to respect the provision on employee involvement, for example, by organising adequate instruction of the authorities involved in registering SEs and by following up consistently whether the application of the SE legislation complies with the provisions.

Seriously deficient methodology

The methodology used in this study is seriously deficient, and therefore the main conclusions reached cannot be considered to be supported by statistical evidence.

With regard to Chapter 3 ('Analysis of the data and identification of main trends') the following shortcomings related to the methodology used for identifying the main (positive and negative) drivers for SEs can be identified:

- First, **the analysis should be differentiated in terms of at least three different company sizes**, since the interests and motivations of such companies are likely to be quite different: large companies (which, among other things, are already or likely to become subject to codetermination in countries with strong codetermination legislation), medium-sized companies (which may potentially grow above the threshold for codetermination) and the founders of shelf companies. In addition, it would be useful to differentiate another category, namely small SEs. Aggregating the statistics may hide some significant differences between these groups.
- Second, there is **a remarkable lack of detail on the statistical basis for the analysis** – for example, the table on p. 209 lacks any indication of how many answers it was based on, how many non-responses and so on. Without this kind of detail, it is not possible to see whether there might be a serious problem with representativeness in the sample. In fact, it is indicated in footnote 15 (page 22) that **only five non-SEs were interviewed**, thus raising serious questions about the representativeness of this small number of companies for the opinions of non-SEs.
- Third, there is **a problem with aggregating answers from SEs and non-SEs in the analysis**, which seems to be the case, for example, in the table on p. 209 ('Assessment of the positive drivers in the choice of the SE legal form'). Analytically different groups should be kept separate (for example, those

choosing the SE form, those which considered but rejected the SE form and those which have not yet or are just starting to consider the form).

- Fourth, **the table on page 249**, which apparently is supposed to provide a key part of the argument for drivers for the SE, **is not based on solid statistical methodology**. Although the title of the section includes the word 'correlation', there is in fact no statistical procedure used which would be worthy of such a designation (for example, Pearson correlation). Given the great difference in sizes of countries there should be some attempt to 'normalise' the data, for example, by dividing the number of foundations in each country by the total number of companies. The methodology should also distinguish between companies with employees which are changing their legal form and the foundation of companies without employees. To illustrate this: it is very unlikely that most of the Czech SEs were founded to avoid codetermination legislation, since most of them have no employees.
- Fifth, **the table on p. 249 does not use consistent definitions between the cells**, especially given that there is no attempt at standardisation by country size. For example, the UK (with 16 SEs) and Belgium (with 10 SEs) are referred to as having 'few SEs' (France with 15 also seems to fit in this category), whereas Austria (with 13 SEs) and Luxembourg (with 11 SEs) are put in the category of 'relative success' and Slovakia (with 13 SEs) is put in the category of 'success'. Furthermore, based on the explanations offered, one would expect increasing numbers of SEs as the strength of worker participation increases (that is, more SEs in 'restricted participation' than in 'no participation' and more in 'extensive participation' than 'restricted participation'). This, however, is not the case, especially in the 'one tier' column where most of the SEs are in the 'no participation' cell.

For Chapter 1 (legal mapping), the analysis relies on an aggregate ranking based on more or less flexibility. However, the methodology should leave open whether one or a small number of options/provisions might actually be the driving force behind the choice of the SE form. Thus, even though a country might appear less flexible, in fact it would have the one key option/provision that is the real driving force behind SE foundation.

Based on current standards of statistical practice, the methodology used in this study is seriously deficient, and therefore the main conclusions reached with regard to drivers for the SE cannot be considered as supported by statistical evidence.

Moreover, the **data used seem to be at least partly outdated.** Of course, in every study a cut-off point must be selected. However, the moment chosen here seems to be rather early, resulting in partly outdated SE information on which far-reaching conclusions are drawn. The starting point for the analysis is almost one year before the publication date. The SE data – even if declared 'updated' – are therefore not fresh. As

of 29 April 2010 there are more than 550 SEs in Europe (ETUI SE database), whereas the study only deals with 369 SEs.

Also, **the 'SE typology' is not clear:** Whereas the study as such only distinguishes between 'operational' and 'shelf SE', in the factsheets document (Excel table) the SEEurope categories 'normal', 'empty', 'shelf' and 'UFO' SEs are used without further explanation or definition.

More attention should have been paid to the relevant case law (and literature) on **empty and shelf SEs**. The argument that activation cannot be considered as a structural change is not convincing, especially in light of the sizable group of shelf SEs which have been activated (see also the replies in Section V).

(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.

Employee involvement as negative driver?

The study 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). Besides the methodological problems with the study and the resulting conclusions (see above) it seems rather obvious **that the negative driver is not the employee involvement regime as such but rather the myths about participation in the SE.** According to the 'before and after principle', in most cases where there was no participation previously, there is no obligation to introduce participation rights. Indeed, in practice no SE has been obliged to introduce participation rights which did not exist before. Nevertheless, many employers are probably not aware of the real meaning of the 'before and after principle'. A negative driver is therefore the prevailing lack of adequate information on the SE and missing national experience in many countries.

Trade union representatives in the SNB as a negative driver?

Moreover, the study argues that the presence of trade union representatives in the SNB is a negative driver. The presence of trade union representatives in the SNB (which is a member state's choice, following recital 19 of Council Directive 2001/86) reflects, on the one hand, **the role of trade unions in the national industrial relations system** and, on the other hand, is 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 setting up SEs, it is essential for the employee side to have access to experience with SE negotiations from

an employee perspective (for company representatives the negotiations are a one-time experience). Moreover, the juridical advice of trade union experts on the specific legal situation applicable in the particular case and their know-how as negotiators helped to clear away uncertainties among the SNB members and to make negotiations smoother and more efficient.

This assessment can be confirmed by a statement of the chief legal adviser of MAN, made in a seminar organised and documented by the Deutsches Aktieninstitut (DAI) in 2007. He pointed out that, in this specific case (negotiations on an agreement in MAN Diesel SE at this time), having external trade union representatives as members of the special negotiating body played a distinct and constructive role in achieving a positive result. According to him, there would be no reason to consider trade union participation per se as negative (DAI, 2007, Die Societas Europaea (SE). Studien. No. 38, p.162).

‘Complex, costly and time-consuming negotiations’?

In many country reports, the rules on employee involvement in establishing an SE are considered as ‘more complex’ than the rules on national plcs (AT p. 121, BE p. 123, BG p. 125, CY p. 127, FR p. 138, EL p. 142, HU p. 144, IT p. 146, LT p. 148, LU p. 150, NL p. 152, PL p. 156, UK p. 171). Especially in countries with no participation the SE is considered more burdensome than national company forms (p. 246).

At least for Germany-based SEs, the creation of the new structure ‘simplified’ pre-existing complex procedures. This is true for the election of employee representatives according to German codetermination law (in companies with up to 8,000 employees) which requires direct election by every employee. According to the SE agreements, it is usually now the SE works council which is responsible for appointing the employee representatives to the supervisory board

Moreover, the study itself states: ‘**In practice, the maximum six-month period is rarely reached or exceeded**’ (p. 241). This proves that both negotiating parties take their responsibilities towards the company very seriously and try to achieve an agreement as quickly as possible. If the worker involvement arrangements are to be more than just an empty commitment on paper then indeed a period of six months for the negotiations seems adequate. On the other hand, taking into account the fuzzy point of departure for negotiations within the SNB, a body with, in most cases, a very diverse composition, the lack of information about SEs and the fact that the transposition laws of specific EU member states are usually only available in the national language, it may be argued that the results achieved within six months are remarkable – in practice we have seen both sides showing their great satisfaction with the common success achieved by a good agreement on employee involvement. At BASF, even a new generic name (‘BASF Europa Betriebsrat’ [BASF Europe Works Council]) was created. In this context, another argument can be brought forward: employee representatives can be assumed to be very committed to the strict timetable for SE negotiations because they have a great interest

in averting harm to their workplaces, for example, of the kind which might arise if the stock market took the view that the company is unable to reach agreement with its employees.

Possibility to transfer the company seat as a positive driver

The latest data from the ETUI's SE Database (http://ecdb.worker-participation.eu) reveal that 41 SEs have, in the meantime, transferred their seat. However, only a very small proportion of them have employees and business activities. Therefore, **the transfer of seat is de facto for most 'normal SEs' at best a positive driver in theory** ('good to have the option'). At least 18 of the 41 SEs do not have any employees at all (the figure is likely to be much higher). This could indicate that the SE indeed is often used for tax/regulatory regime-hopping, which was certainly not a key intention of the SE legislation.

Participation rights unknown in one-tier systems?

On p. 248, the authors argue that only countries with a two-tier corporate structure have a tradition of extensive participation rights. In reality, there is a considerable number of countries with a monistic board structure in which extensive participation rights exist. These include, in particular, Sweden, Denmark, Norway, Finland and Luxemburg (in some of these countries both corporate structures are possible, but the one-tier option is dominant). In Sweden, Norway and Denmark there are very low thresholds for participation at board level (25/30/35 employees). As a direct consequence of this, participation is a normal feature of corporate governance in these countries. This, again, makes it unlikely that the aspect of employee participation is a key negative driver in these countries. One also has to keep in mind that in no EU country is there real parity at board level: even in large German companies (>2,000 employees) with a nominal 50 per cent share of the board seats, the chair (who always comes from the shareholder side) has a casting vote in the event of a tie in the supervisory board.

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

The typology (and division) of national legislation in terms of attractiveness/unattractiveness seems not to be confirmed by empirical evidence. The six countries forming the so-called 'low attraction' countries (CY, CZ, DE, EE, FI, SE)

host 405 of a total of 556 SEs (ETUI SE Database, 25.4.2010). The three countries of the group with the 'highest attractiveness' (IT, LU, UK) together host only 40 SEs. These figures indicate that national legislation apparently does not play a major driver role and that the categorisation of the study is not backed up in practice. However, it is remarkable that the study opted for the very narrow perspective of the majority shareholder to define what is attractive and what is not attractive.

Regarding the 'success' of **empty SEs or shelf SEs** in some of the EU member states the results of the study leave rather mixed feelings. There are no satisfying indications of the particular reasons for the creation of this type of SE. Even though the chapter on legal mapping occupies a large part of the study the outcomes of this exercise are rather disappointing in this regard**.** Perhaps the legal structure is not the only explanatory criterion. A reader might wonder whether more attention should have been paid to the subject of the **minimum capital for SEs**. We have seen several SE registrations where an observer may ask whether the required minimum capital was shown only for registration purposes, but afterwards withdrawn because the effective proof of the existence of €120,000 is required only at the time of creation. This may explain the huge number of 'child SEs' borne by the small number of 'SE incubators' in the Czech Republic. It is worth investigating further whether this observation played a relevant role in those cases of doubtful UFO SEs or shelf SEs.

(3) What, in your view, are the most important regulatory issues for a company to consider 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 of transferring the registered office)?

(The question as such is slightly irritating: 'to place its registered office **and/or** head office'. According to the SE legislation, both the registered office and the head office need to be in the same country.)

(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.

Doubius assessment of the impacts of employee involvement/participation

The study's thesis that the relative success or failure of the SE is, for the most part, explained by the criterion of employee involvement (p. 243) is rather surprising, as this

conclusion has no basis in the study itself. Moreover, the importance allocated to this item seems unjustified in light of the items listed for analysis after five years of entering in force, explained in Art. 69 of Council Regulation No. 2157/2001. Certainly, it cannot be derived from the correlation table on p. 248. First, it is not clear what is meant by 'few' or 'very few' or 'no success', 'relative success' or 'success' with regard to the SE Statute, especially when looking at the relative size of the different economies.

Second, and more importantly, the variable on the Y-axis is 'degree of participation'. In our view, this can only be used when looking at normal SEs and is of no use in the case of empty or shelf SEs (see also the remarks on methodology).

In particular cases, employee involvement might be a reason for not choosing the SE form. However, the great emphasis put in the study on employee involvement being *the* key negative driver seems to be **largely exaggerated and certainly not sufficiently proven** (see remarks on methodology).

Indeed, the existence **de facto of 30 (national) SE regimes** instead of a single one (which was the original purpose) seems to be much more important, in our view. In the long period during which there was no SE, companies found alternative ways to organise their European cross-border business in an efficient way. The SE is now just one option among others (including European alternatives such as the Cross-Border Merger Directive and new possibilities created by national company law).

A further important driver, as already mentioned, seems to be the still **prevailing lack of knowledge with regard to the SE**. Here it would be desirable that the European Commission and employer organisations raise awareness of the real implications of the SE and particularly the myths with regard to employee involvement.

It seems that **the study overemphasised the perspective of commercially oriented legal advisers** but did not sufficiently inquire about the experience of practitioners on both sides of the company, employers and employees, who were actually involved in negotiations. This might partly explain the rather unbalanced results.

This impression also prevails when looking at the list of people interviewed. Out of 60 interviews in total, **25 lawyers plus two professional SE founders** were interviewed. Certainly, these people are in contact with a lot of (potential) SE founders. However, one should be aware of their own (commercial) interests in the SE issue, which might explain the bias of the study.

The six interviews with 'experts on the employee representatives' side' reflect the wish of the European Commission for a balanced report. However, their voices and opinions are rarely heard within the main report. Moreover, in one case, an expert was even wrongly quoted (in the meantime corrected, following the intervention of the expert), and in another case important further statements were left out (see at (5) the Polish example).

Reduction of participation as a key motive in Germany?

The relative success of the SE in Germany **cannot be explained by the motive of decreasing employee board-level representation.**

The legal form of SE has been chosen by more (normal) companies than elsewhere in the EU. The largest group among these normal, operational German SEs are those 48 SEs which previously had no board-level representation.

According to recent empirical findings of the Hans Böckler Foundation, for only relatively few companies is there evidence that the change into an SE was connected to participation issues. These changes usually occurred when the company came close to a national participation threshold (500 or 2,000 employees). In these cases, 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 parity (half of the seats) or one-third participation of employees was kept after the SE's foundation.

In the case of the Austrian company **Plansee** the proportion of board-level representation was even increased during the conversion process (two out of five employee representatives, which is notably higher than the usual one-third 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).

(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.

Overall, the **study underestimates the factor of specific national contexts** which make the SE either attractive or not so attractive. This is particularly the case for countries in which a lot of SEs have been founded, such as Germany, the Czech Republic and the Netherlands.

One of the most remarkable research findings to date is the **number of empty SEs, shelf SEs and so-called UFOs**. A surprisingly large number of SEs in these categories have been founded in the **Czech Republic**. In our view, the study fails to explain this. The legal mapping in the first part of the study gives no plausible answers: the Czech Republic does not stand out as a country with a flexible company law system or SE legislation. Moreover, this country is one of only three that has implemented the option of extra protection for employees (see p. 70). In the particular context of Czech SEs, it is clearly national reasons which have resulted in a relative SE boom. Most Czech SEs are de facto national companies which do not operate on a European scale. The only reason

why these companies were able to set up an SE (without any cross-border element) is because they were able to purchase one from an 'incubator SE', which creates SE subsidiaries by the dozen. In this sense, it is disappointing that the study did not really find more reasons underlying the numerous SE creations in the Czech Republic (except the possibility of reducing the number of persons in the company's administrative bodies, p. 130).

Change of company board structure

In some cases, the SE was used to change the structure of the company from a two-tier to a single-tier system. This can be observed mainly in cases of majority ownership, for example, by a family. It can be assumed that one of the purposes behind these operations was to 'optimise' ownership and to **expel any external persons from supervisory boards**. This may also explain why, in those cases, the retention of employee involvement has not been a significant problem: works council representatives can be regarded as internal non-executive directors.

Impact of the SE legislation on national company law

The SE regulation, after only a short period in existence, has had an impact on national company law. The SE provides an additional option on top of existing national structures. In particular, companies have the choice of whether they will organise the SE with a two-tier or a single-tier structure. This might have had an impact on decisions to make this choice legally available to companies applying national corporate law. In recent years, company law in Slovenia, Hungary and Luxemburg has been reformed and now provides national companies with the choice of one- and two-tier systems. This could also have put people off applying the SE option. Company managers and owners may have felt inclined to stick with what they feel more familiar with: (reformed) national structures.

Another explanation for the disproportionate distribution of SEs might be the structure of businesses in many EU member states. For example, in Poland and Italy we see mainly small and medium-sized enterprises, which are less likely to seek to transform themselves into SEs. Moreover, not having SEs registered with their head offices does not mean that there are no SE operations. In many EU member states there are branches of large MNCs rather than head offices. One of these is PCC SE: the SE is registered in Germany, but most employees are located in Poland.

The low number of SEs in a non-participatory environment is not an argument against participation as an element of company governance – the example of Poland

In Poland, there are only a few SEs and no extended provisions on worker participation at board level. Board-level participation does not have a strong tradition in Poland and this does not seem to be changing. Consequently, the results presented for Poland (p. 241) reflect an attitude expressed by enterprises and also presented in the commercial law literature in Poland, which names worker participation in the SE or in cases of cross-border mergers as often a 'hindrance' or an 'inconvenience' or a factor that diminishes the attractiveness of the SE set up by merger.

Negotiations on employee involvement before a company's registration did not previously exist in Polish commercial law, even in so-called commercialised companies. We may also acknowledge that no EWC has so far been set up in MNCs subject to Polish law, even though several MNCs meet the criteria. This means that no SNB has been set up in Poland so far. However, these facts cannot be taken as a reason to water down employee involvement standards in the SE. Even though the SE statistics may in some cases "correlate" with the restricted board-room representation at the national level, there are also other very important reasons for the low number of SEs in Poland to date. These relate, for example, to the **scale of activities of Polish companies** and the **higher share capital required for SEs, compared to national public limited liability companies**.

Moreover, the **Cross-Border Merger Directive** allows for a simpler recourse to the standard rules on employee participation, which opens another option competing with the SE regulation.. On the other hand, the two SEs which do operate in Poland are real and not shelf companies, which may be a hopeful sign. The lack of empty SEs in Poland may also indicate that employee involvement procedures are not the only negative factor discouraging the establishment of SEs.

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

• **Speeding up and simplification of SE registration procedure** (reasons depend also on national context, and are not limited to speeding up employee involvement).

• **In some cases, circumvention of negotiations on employee involvement**. Although this is not in accordance with the law (see also the decision of a German court, p. 252), where there is no complaint, there is no redress.

As this question touches the very core of the SE the findings adduced by the study are insufficient, making it even more surprising that the consequences of such 'non-conformist' SE creations are not addressed critically by the recommendations.

(IV) Practical problems

(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).

(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 (for example, for SMEs, groups operating across borders and so on)?

The point of departure for the study should have been the requirements for analysis laid down in Art. 69 of Council Regulation No. 2157/2001. The reader would have expected answers, first, to the items listed there. However, the recommendations developed from the study findings go further and include other items, such as the procedure on employee involvement, which was not a concern of Art. 69.

Registered office and head office in the same country

The requirement for an SE to have its registered office in the same member state as its head office **should be maintained**. As stated by the study itself, the fact that eight member states have even exercised their right to require that the SE is located in the same place, not only in the same country, shows that there is no consensus on this point.

Removing this requirement is likely to further increase the use of the SE statute for dubious reasons, such as tax hopping. Also, the danger of misusing the SE to circumvent employee involvement rights would increase.

Registration of an SE without negotiations – structural changes

The authors of the study propose the amendment of the Regulation, as well as explicitly allowing registration in the absence of negotiations if none of the companies involved has any employees. The large shelf SE market shows that such registration is already possible. The key problem resulting from this is that employee involvement rights might

be circumvented when, later on, the (shelf SE) company is sold and employees are 'transferred' to the company. Thus, the acceptance of shelf SEs as such should be called into question because it could easily contradict the initial intention of the SE legislation. This is all the more likely if, as is currently the case, there is no control of the commencement of commercial activities, including the existence of employees in former shelf SEs. The creation of a **European SE register**, which would also make it compulsory to report such changes, would make it easier to overcome any dubious use of this type of SEs.

With regard to shelf SEs, the authors of the study state that consensus exists on the meaning of **structural changes** (see p. 250 ff), which does not consider the activation of an empty or shelf SE as 'structural change'. We doubt whether this is true. The issue is of the utmost importance, because 20 per cent of SEs have significantly changed their employee structure since their creation (>50 employees during the first fiscal year after creation) (pp. 204–205, p. 206).

In contrast, the **commercial activation of shelf SEs or empty SEs should be perceived principally as a 'structural change', which requires investigation of the further involvement of employees at the transnational level**. In this regard and if the SE operates cross-border it should be subject to the same rules as at the time of its creation. In particular, for these special cases the introduction of an employee threshold could be discussed, above which negotiations on employee involvement would be triggered automatically. However, preexisting thresholds for participation at board level in the EU member states (which are very low in some cases, such as Sweden, with 25 employees, Denmark with 35, Norway with 30 and the Czech Republic with 50) must be respected. As far as European law is concerned, there is a threshold of 50 employees in the SCE Directive and 500 employees in the Cross-Border Merger Directive. In particular, the latter certainly cannot serve as a reference because it is (a) only one criterion among several and (b) the threshold refers only to participation rights.

As a matter of principle the SE legislation should in no way be used to apply pressure to lower existing national participation rights.

Direct application of standard rules (as in the Cross-Border Merger Directive)

The study proposes to allow the relevant bodies of the merging companies to have a right to choose, without any prior negotiations, to be directly subject to the standard rules. The proposal to adapt the SE legislation to the corresponding rules of the Cross-Border Merger Directive does not take into account the fact that the Cross-Border Merger Directive deals only with employee participation rights. However, the **SE Directive provides for information, consultation and participation rights**. A unilateral management right to immediately apply the standard rules would certainly devalue the negotiations on employee involvement. As explained above, a maximum period of six months does not seem excessive for working out tailor-made involvement

procedures (sometimes including representatives from more than 20 countries). Moreover, practice clearly shows that in almost all cases the negotiating parties reach an agreement. The application of standard rules is therefore also in practice only the last resort, in case negotiations fail, a situation which apparently both sides try to prevent.

The idea of **allowing the registration of an SE even if the negotiations on employee involvement are still in progress** (p. 259) would devalue the negotiations and weaken the employees' position, which would seem to be contrary to the spirit of the SE Directive itself.

(VI) Any other comments

Deviate from the original focus

Looking at the recommendations for possible amendments (p. 276 ff.), the recommendation with the greatest impact is the one concerning Art. 12 of the Statute, which establishes the link between the Statute and the Directive. However, the Directive is largely absent from the study (see next point).

The study suggests far-reaching adjustments of the SE legislation in order to make the SE form more attractive for companies. They are guided by the concept of 'simplification' and concern also employee involvement. This is surprising as this subject was not a focus of this study. The SE Directive was explicitly excluded from the analysis. The expressed intention of the study was to carry out a mapping of SEs and to identify any problems which might have arisen in the national transposition of the SE regulation.

All the more reason that it should be understood that a narrow understanding of 'simplification' will not serve as an adequate basis for making processes leaner, in particular with regard to employee involvement. There are specific reasons why seeking agreement on employee involvement by negotiation is an elaborate and complex matter. Thus, 'simplification' would not make it easier to respect the political intention of the SE legislation to provide employees with a more secure position at the transnational level.

The missing link to the SE directive

As is clear from Art. 12 of the Statute, the Statute and the Directive form an inseparable whole. In principle, no SE can be established without negotiations on the involvement of employees. Against this background, the study pays far too little attention to this link to SE Directive, which results in a rather unbalanced picture and misleading conclusions.

The lack of attention to the Directive affects the study as a whole. Examples include:

- The **choice of perspective**: The attractiveness of the SE is judged from the majority shareholder perspective only. For example, a member state's decision to implement specific options to protect employees (Art. 34 and 37(8), see p. 31)

results in the study in a (–), meaning 'less flexible' and, ultimately, 'less attractive'.

- The **view on employee involvement**: The study suggests, time and again, that employee involvement is only a technical issue (and for companies a burdensome, time consuming and complex requirement).
- **Lack of analysis**: To the extent that attention is paid to the Directive (see the synoptic table on pp. 44–46), there is no real analysis. The Cross-Border Merger Directive is seen as advantageous to the establishment of an SE because of the (simpler) rules on employee participation.

This approach clearly contradicts the aims of the SE legislation. The study comments only on the aims of the SE regulation, whereas the (equally important) aims of the SE Directive are not mentioned.

> In order to promote the social objectives of the Community, special provisions have to be set, notably in the field of employee involvement, aimed at ensuring that the establishment of an SE does not entail the disappearance or reduction of practices of employee involvement existing within the companies participating in the establishment of an SE. (SE Directive, recital 3)

Further flexibilisation and simplification – an aim in itself?

Whereas it is of course important to remove unnecessary burdens from business, flexibilisation and simplification cannot be an aim in itself. There is already a wide range of rather dubious motives for setting up an SE. These include:

- The **business of setting up shelf SEs** (which threaten existing rights to information, consultation and participation).
- The **high proportion of empty SEs which have transferred their seat** to another country, often simply for tax reasons.
- The decision to opt for an SE **to reduce existing external control possibilities** (for example, in family-owned businesses).
- The **high number of de facto national SEs** (especially in the Czech Republic) with no cross-border activities at all.

Certainly, these 'SE users' were not what the European legislator had in mind when creating the SE. The SE Regulation refers in its preamble to "companies the business of which is not limited to satisfying purely local needs" which "should be able to plan and carry out the reorganisation of their business on a Community scale". Any revision of the SE legislation should therefore take into consideration the aims of the SE legislation (including the SE Directive) and who the real target groups are. Making the SE more flexible and more 'simple' merely to obtain a higher number of SEs would be misguided.

Let us finally recall the reasoning why the European Company (SE) represents certainly a special type of understanding why companies need strong provisions for being successful at all: "The type of labour needed by European companies -- skilled, mobile,committed, responsible, and capable of using technical innovations and of identifying with the objective of increasing competitiveness and quality -- cannot be expected simply to obey the employers' instructions. Workers must be closely and permanently involved in decision-making at all levels of the company." (Final report of the `High-level expert group on workers' involvement` (Davignon group), 1997).