



**ANSWER TO THE
CONSULTATION ON THE RESULTS OF THE STUDY ON THE
OPERATION AND THE IMPACTS OF THE STATUTE FOR
A EUROPEAN COMPANY (SE)**

CEC European Managers position

MAY 2010

1 Information on the respondent

CEC European Managers is one of the six European social partners participating in the cross-industry social dialogue Committee on the employees' side.

CEC federates a growing number of national organisations (trade-unions, employees associations, sectoral and professional federations) representing executives and managers operating in the industry, services and public sector. Their number has been increasing constantly during the last years and their weight and impact in the European economy is important.

2 Answers to selected questions raised in the questionnaire

2.1 Question II (2) / Question III (4)

CEC strongly objects to the study's notion of employee involvement in general being a negative driver for the establishment of an SE (e.g. in chapter 1.2.1.2).

This is for various reasons:

a) Political reasons for CEC's criticism

From a political perspective, the passage of the SE directive is inextricably entwined with the idea of respecting the "great diversity of rules and practices existing in the Member States as regards the manner in which employees' representatives" (quote from recital nr. 5 of Directive 2001/86/EC).

Roughly thirty years of discussion were spent before the SE ultimately finally came into effect – and a substantial part of the discussion was spent on the involvement of employees.

The compromise that has ultimately been reached in directive 2001/86/EC is in no way futile or incidental. In the contrary, it has been very thoroughly designed. Without it, the realisation of the SE statute would have been unthinkable. From CEC perspective, the procedural rules and guarantees in directive 2001/86/EC continue to be an indispensable condition for the application and for any further advancement of the SE statute.

b) Systematic reasons for CEC's criticism

CEC does not flatly dispute, that the directive's requirement of a negotiation procedure might be a certain deterrent to the establishment of an SE for those companies who are opposed to the idea of employee participation as a matter of principle.

However, for CEC, any suggestion that by creating an SE, companies from member states without formal employee involvement schemes inevitably encounter the risk to be "infiltrated" with "unwanted" employee participation schemes or even by board- and supervisory-level participation would be an oversimplification.

Rather, CEC is convinced that the directive manages to accommodate the needs of member states with *different* levels of employee participation systems, ranging from high, medium and low to the complete lack of any formalised employee participation.

For example, if an SE is formed between a larger company *without* formalised employee involvement and a smaller company *with* an employee involvement scheme, several provisions in the directive makes sure, that there is no automated export of employee involvement to the SE.

Most importantly, the negotiating bodies are free to opt even for an "involvement-free" SE and need a three-quarter-majority in the negotiation body only if the percentage of employees with who loose participation rights exceeds certain thresholds (e.g. 25 percent of the combined workforce in the case of the creation of the SE through a merger, 50 percent in the case of the creation of an SE as a holding society).

Chapter 2.1.of the study, illustrated with a map, tries to establish a direct link between the existence or non-existence of board- and supervisory-level participation in national legislation and the number of SEs that have been created so far.

Although plausible at first glance, this chapter fails to present verifiable, statistically significant evidence for a correlation between the two factors.

As it is also thoroughly examined in the study, numerous other factors contribute to a company's decision on whether or not to establish an SE, such as the quality and user-friendliness of SE-legislation, fiscal issues, capital management, facilitation of mergers and acquisitions general aspects of company beyond employee participation.

Another aspect that, from CEC's perspective, is not adequately treated in the study is the regional distribution of companies within the EU for which an SE is particularly suited. None withstanding the fact that the SE has gained considerable acceptance also among mid-sized companies, SEs are especially well-suited for large corporations with significant cross-border activities. These companies are not evenly regionally distributed within Europe which, under a methodological viewpoint, also speaks against a visualisation such as the one featured in chapter 2.1.

The exact weight of mental reservations against employee-involvement in states with little or no participation rights can not be exactly measured. Accordingly, CEC criticises any attempt to assign a major or even deciding to role to the rules on employee involvement for the success of the SE within the EU as speculative.

Generally speaking CEC views participation and involvement of employee representatives as a valuable resource for organisational effectiveness through higher employee commitment and reduced transaction costs. Many companies therefore rightly go further than just information and consultation in their employee involvement schemes. The legislators at the national and European level should therefore refrain from creating additional barriers for further employee involvement.

Question V (8)

None withstanding the afore-mentioned criticism, CEC shares some observations in the study and recommends certain changes in the current SE regulation.

First, shelf-SE's risk to become an increasingly popular vehicle for "bypassing" one of the basic aims of directive 2001/86/EC - which is to negotiate on good-faith and without fore-ordained results on the levels of employee participation and an how to deal with pre-existing forms of employee involvement.

So far, the question whether the activation of a shelf-SE that has been created without employees automatically leads to new negotiations is left to jurisdiction – with an unpredictable outcome for the employees. So far, no stable patterns in jurisdiction have emerged, as the example of Germany (page 252 of the study) shows.

Therefore, CEC argues for amending directive 2001/86/EC in a way that there will be an automatism between the activation of a shelf-SE and new negotiations.

Second, and more generally speaking, CEC views the notion of "structural change" as a pre-requirement for reopening negotiations as too narrowly defined even beyond the afore-mentioned case of the activation of a shelf-SE.

Considering the dynamic changes in many industries and the effects thereof on big corporations such as mergers, conversions, spin-offs etc, there is real danger that both the efficiency and the legitimacy of an employee involvement scheme will gradually be "worn off" over time – unless there is a reliable instrument that allows for occasional readjustments.

Adapting business processes to a changing environment is vital for success in business. This undisputed empirical rule should therefore also apply to the structures of corporate governance including employee participation.

Third, the CEC recommends strengthening the principle that the representation of employees should generally not be lower than prior to the creation of an SE unless the negotiation body opts for such a solution with a certain quorum, regarding the points 3, 7 and 18 of the 2001/86/EC Directive. It is stated that there are several cases of companies which used legal options in the national company law in order to reduce or eliminate participation altogether at the board- and supervisory-level, a few months before announcing a merge or transformation into an SE, as the conference of 2010 May 26th (in Brussels, on the initiative of DG Internal Market and Services) about the SE has confirmed. CEC can not accept such a situation and asks the European Commission to take adapted measures to prevent such circumvention of the regulation on the involvement of employees.

Further Suggestions

CEC also encourages the European Commission to use this consultation for an assessment whether there is a need for adding to the already existing statutes on the European Company and the European Cooperative Societies an additional Statute a European Mutual Associations. In the area of insurance or reinsurance, there are currently incentives to turn existing mutual associations in limited liability societies as a means to gain better access to the common market. Today, "mutual form" organizations do not have access to the ability of having regulatory control in one country (headquarters) and are obliged to multiply the regulatory obligations in each country in which they have an activity. Also regarding to strong issues like Solvability II, this situation is indeed an important competition distortion that should be settled by the creation of a European mutual status.