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AK Position Paper

Consultation of the EU commission on the results of the external study by Ernst & Young on the experiences concerning the European Company Statute

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About us

The Federal Chamber of Labour is by law representing the interests of about 3.2 million employees and consumers in Austria. It acts for the interests of its members in fields of social-, educational-, economical-, and consumer issues both on the national and on the EU-level in Brussels. Furthermore the Austrian Federal Chamber of Labour is a part of the Austrian social partnership.

The AK EUROPA office in Brussels was established in 1991 to bring forward the interests of all its members directly vis-à-vis the European Institutions.

Organisation and Tasks of the Austrian Federal Chamber of Labour

The Austrian Federal Chamber of Labour is the umbrella organisation of the nine regional Chambers of Labour in Austria, which have together the statutory mandate to represent the interests of their members.

The Chambers of Labour provide their members a broad range of services, including for instance advice on matters of labour law, consumer rights, social insurance and educational matters.

More than three quarters of the 2 million member-consultations carried out each year concern labour-, social insurance- and insolvency law. Furthermore the Austrian Federal Chamber of Labour makes use of its vested right to state its opinion in the legislation process of the European Union and in Austria in order to shape the interests of the employees and consumers towards the legislator.

All Austrian employees are subject to compulsory membership. The member fee is determined by law and is amounting to 0.5% of the members' gross wages or salaries (up to the social security payroll tax cap maximum). 560.000 – amongst others unemployed, persons on maternity (paternity) leave, community- and military service – of the 3.2 million members are exempt from subscription payment, but are entitled to all services provided by the Austrian Federal Chambers of Labour.

Herbert Tumpel
President

Werner Muhm
Director

Executive Summary

From the point of view of AK, the present study is a political commissioned work. Particularly criticised is the fact that the study authors regard works participation as an annoying and undesired burden within the scope of the founding process of an SE.

Successful economic management requires trust and confidence. The current economic and financial crisis shows what happens if the trust into the economy and its regulatory framework has been lost. In particular the European Corporate Law bears a special responsibility to create a legal and regulatory framework, which considers the interests of stakeholders warranting protection, such as creditor and consumer protection as well as worker participation.

The European Public Limited-Liability Company (SE), which can be founded since October 2004, meets this requirement to the extent that appropriate minimum standards with regard to company law and worker participation were stipulated when an SE was founded. An SE is by definition a European and not a national enterprise. This is on the one hand expressed by the necessity of a cross-border reference when setting up an SE and by transnational agreements with regard to worker participation. Both legal acts, the Council Regulation (EC) 2157/2001 on the Statute for a European company (SE) and the Council Directive 2001/86/EC supplementing the Statute on the European Company with regard to the involvement of employees, form a unit, which is the reason why only one SE can be registered in the companies' register (Commercial Register), if in addition to the SE Statute an agreement on the participation of employees in the SE has also been passed. The SE legislation is therefore the expression of the political will that worker participation is part of the Corporate Governance of an SE.

From the point of view of AK, the present study is a political commissioned work. Particularly criticised is the fact that the study authors regard works participation as an annoying and undesired burden within the scope of the founding process of an SE. Such a negative basic attitude towards worker participation is obviously reflected in the results of the study. The study reduces worker participation to a technical matter (time intensive, difficult and complex) without addressing the political objectives of the SE Directive. These can among others be read in Article 3 of the Council Directive (2001/86/EC): "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."

The range of persons asked reveals the shareholder-focussed orientation of the study. The main contributors are business representatives and legal

representatives of various law firms. Employee-side experts are only very sporadically involved. It is therefore little surprising when the measures for protecting employees (Article 34 and 37, page 31) executed by the Member States are described as little flexible and not very attractive. That the Commission, within the scope of the consultation, is now looking for answers to important social problems in connection with SE foundations (e.g. causes for the large number of setting up shelf companies, reasons for the acquisition of shelf SEs etc.), shows that the study addresses important questions only very unsatisfactorily.

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Finally, the recommendations derived from the study, show whose "child" the study is. Key words such as "Flexibilisation and Simplification" are used to promote further deregulation (abandoning the unit of registered office and head office, reducing worker participation). The results and recommendations of the study will therefore under no circumstances receive the support of the Federal Chamber of Labour.

The AK position in detail

Drivers

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

The study would like to answer the question which positive and negative factors influence the foundation of an SE. The study proceeds methodically and completely undifferentiated. Although the study authors are aware of the fact that 40 percent of the 369 registered SEs on the scheduled date 15.4.2009 are so-called shelf foundations (empty or shelf SEs), which neither employ staff nor pursue any business activities, normal SEs and shelf SEs are not evaluated separately. One must, however, assume that the reasons and interests for setting up a normal SE and establishing a shelf SE are very different. Hence, with regard to setting up a shelf SE, the question of worker participation is not an issue, because a shelf SE, at least initially, does not employ any staff.

The study reaches the conclusion that worker participation is in particularly regarded as a negative factor in those Member States, which do not know any national worker participation at company level. This result is surprising, as according to the SE Directive the "before-after principle" applies.

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Hence, if the Board (supervisory board or administrative board) does not have worker participation before setting up the SE, then there is no obligation to introduce worker participation after the SE has been founded. This is also the case in practice. It is therefore obvious that many entrepreneurs have received bad advice concerning worker participation rules with regard to SEs. This applies in particular to all those who do not know any worker participation on the board at national level. Because in particular for these, worker participation cannot be a negative factor in accordance with the "before-after principle". Negotiations with regard to information and consultation are also taking place when setting up a European Works Council, so that most companies, which operate throughout Europe, have relevant experience. It can therefore be said that from the point of view of AK worker participation is not the negative factor when setting up an SE. What is definitely lacking is relevant information concerning the SE Directive to involve employees in the SE. It is therefore vital that the European Commission clarifies matters.

Another negative factor, which is mentioned, is the participation of trade unions in the "special negotiation body" (SNB). In practice, the presence of trade union representatives within the scope of negotiations is no disadvantage. On the contrary, based on

their expertise and experience, trade union representatives often make an important contribution to develop an efficient negotiation process between employer and employee representatives, which is then positively concluded. Apart from that, the SE Directive also wanted to ensure that employer representatives too had the option of drawing on external expert knowledge in a "special negotiation body". Apart from that, when an SE is set up the management also collaborates with advisors (solicitors), using their expertise. It is therefore more than justified that the employee side also has the opportunity of drawing on the experience and expertise of trade unions. To describe the involvement of trade union representatives per se as a negative factor is therefore rather short sighted. In the sense of compensating the balance of power within the negotiation team, it is absolutely justified and necessary.

The period of six months to negotiate worker participation is by no means too long to achieve a valuable agreement.

Compared to national regulations, the negotiations on worker participation are described as being complex, cost intensive and time consuming. That the implementation of national regulations governing participation, which – as in Austria – are often based on legal guidelines, are less time intensive, does not surprise. It can be said, however, that it was in particular the objective of the SE Directive, which aimed at promoting individual flexible solutions for worker participation by means of negotiations between employer and employee representatives. Standard rules should only apply if negotiations fail. It is the same in practice where standard rules are also only drawn upon in exceptional cases. The normal case are individual agreements. A period of 6 months has been envisaged for negotiations, during which results on worker participation at board level as well as information and consultation rights at Works Council level have to be achieved. One should not forget, however, that the negotiation team is often made up of persons coming from different Member States, who need an appropriate period to get into the matter (different cultures, overcoming language barriers, different levels of knowledge). The period of six months to negotiate worker participation is by no means too long to achieve a valuable agreement. The study also points out that in practice the period of 6 months is rarely exceeded (page 241), which means that the parties are making a serious attempt to find a quick solution.

The options of moving the registered office, improving the image, of cross-border mergers and the creation of simpler company structures are all mentioned as positive reasons for setting up an SE. From the point of view of the entrepreneur, the option of moving the registered office is probably a positive reason even though in practice this move is less significant in case of normal SEs. It definitely plays a role in case of so-called shelf SEs, which do not employ any staff and do not pursue any business activities. It appears as if in this case the SE was just used as a special purpose vehicle to exploit tax or organisational advantages through forum shopping.

This was surely not the intention of the SE legislator and should therefore be examined in more detail.

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

From a critical point of view, it is noted that attractiveness or non-attractiveness of national regulations for setting up SEs has been defined from the perspective of a majority shareholder. The study tries to prove empirically that those Member States, which have attractive national foundation rules, would also have a greater number of SEs. From our point of view, this link does not exist. On the contrary: the so-called "low attractive" Member States Czechia (CZ) and Germany (DE) alone accommodate 60 % of all SEs, whilst the "highest attractive" states, Italy (IT), Luxembourg (LU) and Great Britain (UK), only have 7.3 % or 27 SEs in total. This clearly shows that national foundation rules do not play any decisive role with regard to setting up SEs.

The statements of the study on shelf foundations (empty or shelf SEs) are disappointing. The study does establish the existence of a large number of shelf foundations (almost 40 %) but does not provide an explanation for this phenomenon. There are neither given any reasons for shelf foundations nor is an explanation provided why in particular Czechia has such a high number of shelf SEs. One would also have to examine whether the empty SEs meet the minimum capital requirements and whether they - as provided in the statute - show any cross-border reference. Unfortunately, the study does not provide any relevant answers.

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

We refer to Article 7 of the statute of European Public Limited-Liability Company (SE), according to which registered office and head office have to be in the same Member State. A separation of registered office and head office is not possible for legal reasons alone.

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.

It is amazing that the study pins the success or failure of SE foundations in individual Member States predominantly on the criteria of worker

participation and national corporate governance system (board system or dual system). The reason given for this opinion is that the concentration of SEs in Member States with worker participation and dual corporate governance system (supervisory board, board of directors) is significantly higher than in those without worker participation and board system.

Even though in individual cases worker participation might be a reason not to choose the SE, its significance is largely overestimated. As already pointed out, the "before-after principle" applies in accordance with the SE Directive. According to this principle, Member States without worker participation are not obliged at all to introduce worker participation to the SE Board in case of change. Therefore, worker participation at board level cannot be an obstacle for setting up an SE. There is obviously an information gap, which needs to be closed. Apart from that, the criterion of worker participation - if at all - can only be of significance in case of normal SEs, but never in case of empty or shelf SEs.

Important are the recent developments with regard to national and European company law, which enable companies to choose their cross-border organisation under company law from a large number of alternatives.

Far more important from our point of view are the recent developments with regard to national and European company law, which enable companies to choose their cross-border organisation under company law from a large number of alternatives. Reference is made to the decisions of the ECJ (key word: Inspire Art) as well as the 10th Directive concerning cross-border merger.

(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.

One of the significant realisations from the study is the surprisingly large number of shelf foundations (empty or shelf SEs). Unfortunately, the authors did not analyse the reasons for this development. In particular, the development in Czechia should have been examined, as the majority of Czech SEs are in fact national companies without cross-border activities.

In Austria, SEs were also used to change the corporate governance system. The Austrian company Plansee for example has introduced the board system via setting up the SE. What is remarkable is the fact that of five members on the board, two are employee representatives. Compared to the statutory tripartite system (one third of the supervisory board are employee representatives) the participation ratio has thereby increased.

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

Although this concerns a central question, the study contains few explanations. The fact that the Commission now looks for answers to important corporate problems in connection with SE foundations within the scope of the consultation shows once more that

the study paid little attention to important questions. No consequences are demanded even within the scope of future recommendations with regard to empty SEs, although the purchase of shell companies or similar help to avoid negotiations on worker participation.

Practical problems encountered

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

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Possible follow up

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

AK does not support the recommendations of the study. AK requests to maintain Articles 7 of the Statute for a European company (SE), according to which registered office and head office do have to be in the same Member State. Any softening of this provision would boost the number of dubious SE foundations, which would also increase the risk that tax, creditor protection and worker participation provisions would be avoided. The minimum equity of Euro 120,000 represents an important seriousness threshold and should not be lowered. All efforts to weaken worker participation are strictly rejected.

As a general rule it can be said that it is relatively easy to set up an SE. This applies in particular to converting a national limited company to an SE.

Registration officers or officials who are responsible for registering an SE play a key role in setting up an SE. If there is a lack of understanding with regard to checking the conditions for registering an SE, in particular in respect of concluding an agreement on worker participation it cannot be excluded that an incorrect SE will be entered in the register. The AK therefore requests that the Commission assumes more responsibility within the scope of controlling SE foundations, after all an SE is a company based on European legislation. We propose in particular the creation of a central European company register for European legal forms, which is responsible for the registration of an SE and fulfils certain requirements (easy access, timeliness, comprehensibility).

There is need for change with regard to the question of changing the structure after the SE has been set up. This was hardly considered in the Directive, which, however, could result in undermining worker participation. Another need for change concerns the fact that in case of the standard

rules on worker participation and the before-after principle to be applied is only concerned with co-determination in the participating companies, not, however, with co-determination in the subsidiaries or companies affected.

Apart from that, the Commission should closer analyse the problem of shelf foundations (empty or shelf SEs) and activate such companies as structural changes, which trigger renegotiations with regard to worker participation. Finally, the study should be used by the Commission to support founders of SEs by appropriate instructions and explanations.

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