



Foundation for
Family Businesses

Entrepreneurial co-determination in the Societas Europaea (SE)

On the further development of the negotiating solution



Summary of main results

Societas Europaea (SE) is a European form of organisation that is frequently used by family companies in Germany. The decision to operate as a Societas Europaea underscores a company's international focus and offers the opportunity to develop a bespoke governance structure that fosters international dialogue with European employees. Unlike a public limited company in Germany, the SE also offers a choice between the dualistic management model (Management Board/Supervisory Board) and the internationally widely-used monistic management model (Board of Directors).

The SE form of organisation places a priority on negotiations. When the business is founded, an international negotiating body representing the employees is formed. This body is charged with concluding an SE participation agreement with the company's management. Focal points to be covered during the negotiations include all participation rights of employees, from rights to information and hearings through to corporate co-determination.

Should the parties fail to negotiate an agreement, the European "before/after solution" safeguards the status quo in the area of corporate co-determination. If co-determination was practised in the original German company, this level of co-determination is maintained in the SE: the proportional share of employee representatives on the Supervisory Board or Board of Directors remains at the same level as in the original company.

However, the European rules do not call for the proportional share of employee representatives to rise if the workforce increases. This rule has been criticized as a "freezing effect" because the company potentially remains below the German co-determination level over the mid- and long term if, at the time of its founding, it did not employ a one-third participation rule or a form of co-determination in which employees and management are represented on an equal basis. The current German government has announced its desire to address this freezing effect.

Just like the priority of negotiations, the before/after principle is based on European law. Neither falls within the purview of German lawmakers. On the national level, consideration could be given to substantiating the abuse, which takes the form of a general clause in European SE regulations. The ultimate interpretation of the abuse rests with the European Court of Justice, whose rulings serve as the basis of German lawmakers' legislative activities.

Drawing on other countries' practices, German law could determine that the presumption of abuse exists in cases in which an SE established without a co-determination mechanism quickly exceeds the relevant co-determination threshold set by national law. In the process, the

Internationally positioned family businesses have confidence in the Societas Europaea (SE)

Priority of negotiations with the international workforce of the SE

Fundamental principles of corporate co-determination at the SE are not the responsibility of national lawmakers

counter-argument that the SE was not established for the purpose of evading co-determination requirements must continue to be possible. In particular, the idea of abuse must be rejected if an SE participation agreement covering employees' participation rights was concluded in concert with the employees' negotiating committee.

In light of the constitutional and union-law prohibition on retroactive laws, such an amendment can apply only to those SEs founded after the new regulation took effect. The legally defined protection of reliance on existing law could be restricted at most during a transition period in which the concrete new legal regulation is already foreseeable.

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