In the fridge? Consultation on the functioning of the European Company Statute

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Jan Cremers gives his view in an upcoming article of the ongoing deliberations about the findings of the Ernst & Young report. According to him the European Commission hardly deals with earlier criticism, such as the high occurrence of shelf SEs and the abuse of the location of registered and head office of an SE. Besides that, question-marks can be raised with regard to the methods used in this consultation.

What has happened so far?

The SE Regulation, which entered into force in 2004, required the European Commission to present a report on its application, including proposals for amendments, where appropriate, after five years. DG Internal Market and Services commissioned Ernst & Young to carry out this study (Ernst & Young 2009). The study report was finalised in December 2009 and published on the Commission's website in March 2010. In spring 2010, the Commission launched an online consultation via its website to evaluate the results (European Commission 2010a), while at the same time organising a conference on the SE statute. The aim was to examine the findings of the study and to provide the Commission with input on issues relevant for assessment (European Commission 2010b). The SEEurope network published a critical assessment of the procedure used.[1] In this contribution we provide a short update of the ongoing deliberations. A longer version will be published in Transfer 2-2011.

The European Commission's final report after the consultation

In November 2010, the European Commission presented a Report to the European Parliament and the Council on the application of the SE Regulation, along with a Commission Staff Working Document (European Commission 2010c). In it, Commissioner Barnier no longer stresses the '*burden'* of workers' involvement. The Commission summarises that the SE statute has facilitated the cross-border transfer of the registered seat of companies with a European dimension, and allows them to better reorganise and restructure, and to choose between different board structures. At the same time, it upholds the rights of employees' involvement in decision-making within companies and protects the interests of minority shareholders and third parties. Question-marks (though few) are also present, with the Commission pointing out that the statute has not resulted in a uniform SE legal form across the EU and that uncertainty remains as to the legal implications of the statute's directly applicable rules and their interface with national law. According to the Commission, the uneven distribution of SEs across the EU suggests that the SE statute does not respond sufficiently well to the needs of companies in all 27 member states. Potential amendments are considered, but will not come before 2012, as SE transposition started only at the beginning of 2007.

What about the criticisms?

The Commission's report hardly deals with earlier criticisms. For instance, the large proportion of shelf SEs is not seen as a problem. The report states that the creation of shelf SEs by dedicated providers can be explained by the fact that making shelf companies available for sale is common practice in certain countries. The Commission takes note of the fact only that workers' organisations express concerns that shelf SEs might be used to circumvent the SE Directive and that there is no justification for annual financial statements not being available in company registers.

One of DG Internal Market's hobbyhorses is treated prominently in the final report. The requirement that an SE's registered office and head office shall be located in the same member state (or, in some member states, in the same place) is again quoted as something that a number of consultation contributors regard as an obstacle in practice. The Commission refers to the European Court of Justice's ruling opening the door to separate locations for a company's registered office and head office and seems to subscribe to the position of certain stakeholders that the real seat principle is difficult to apply in practice 'in a modern world where the location of the headquarters of an international company, the place where the strategic decisions are taken, is not easy to determine'. The Commission stresses that the possibility of separate registered office and head office could make the SE statute an attractive instrument for facilitating company restructuring. It sees this as a potential step towards better alignment of a corporation's business and legal entities within the EU, with the only opposition being in the area of fiscal control. The requirement for maintaining the registered office and head office in the same country was indeed quoted during the consultation as an obstacle, although just as many contributors were in favour

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of retaining this link. The comment that there is a risk of serious abuse if this requirement is abolished is not taken seriously. It should be pointed out that it was not just workers' organisations that took this critical view, but also notaries and government institutions.

The Commission's own agenda

After looking at the procedure, questions arise concerning DG Internal Market's agenda. Given the question-marks that can be raised with regard to the methods used in this consultation, the evaluation in the synthesis produced by DG Internal Market and Services, and the final report, the question is whether the Commission has been properly served. The answer is 'probably not': a comparison of our own stocktaking and the Commission staff documents shows that findings are quoted in a selective fashion and the reports lead to questionable statements and conclusions. Items that do not fit in with the Internal Market agenda are practically neglected. Other items figure prominently, even if evidence is missing or the actual number of contributors was very low. Certain aspects of the SE Regulation are labelled 'burdensome', although the underlying opinions expressed are neither uniform nor consistently formulated. Other arguments are not taken up, for instance, the need for a European company register. All in all, not very convincing arguments for further (de)regulation; and this is probably the reason why the European Commission has put the item 'in the fridge' until late 2012.

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1. http://www.worker-participation.eu/About-WP/Publications/Worker-participation-a-burden-on-the-European-Company-SE-A-critical-assessment-of-an-EU-consultation-process