
Is Europeanised board-level employee representation specific? The case of European Companies (SEs)

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Jeremy Waddington and Aline Conchon

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Contents

Abstract	4
Introduction	5
1. The running of SEs' boards	15
1.1 Contents of the agenda of the board.....	16
1.2 Frequency of board meetings	19
1.3 Pre-meetings between management and employee representatives	20
1.4 Participation of employee representatives in board committees	21
2. Do board-level employee representatives in SEs constitute a collective actor?	26
2.1 The resources available to board-level employee representatives.....	26
2.2 The coordination of board-level employee representatives	28
2.3 A European identity?	30
3. The coordination of institutions of employee representation in SEs	33
3.1 Interpreting the confidentiality duty.....	33
3.2 Membership of the works council	35
4. Power or influence of board-level employee representatives on SEs boards?	38
4.1 Quality of information related to the agenda of the board.....	38
4.2 Employee representatives' intervention at the board	39
4.3 The locus of real decision-making	42
4.4 Influence or power of board-level employee representatives?	44
Conclusions	47
List of references	50
List of abbreviations	54

Abstract

Workers are granted the right of representation on corporate boards with the same rights and duties as other board members, including the right to vote, in no fewer than nineteen European countries. In addition to national legislation, board-level employee representation is also a European right insofar as it is anchored in European law and referred to as ‘participation’. The 2001 Statute for a European Company (known as ‘SE’ after its Latin name *Societas Europaea*), grants a Europe-wide legal status to public limited-liability companies and was the first piece of European company law to include provisions on the Europeanisation of participation. When such participation is agreed it is not only employee representatives from the ‘home country’ of the company headquarters who sit on the board but also employee representatives from the ‘participating countries’ in the establishment of an SE.

This Working Paper investigates whether European board-level employee representation in SEs is specific. Is it truly ‘Europeanised’ in the sense that board-level employee representatives on SE boards act in a way that is dissimilar to their counterparts in the headquarters ‘home country’? Or, as it was initially feared with regard to European Works Councils, is it ‘coloured by the national system of their company’s country of origin’ in the sense that board-level employee representation in SEs would only be an ‘international extension of national systems of workplace [here, board-level] representation’ (Streeck 1997: 31)? Alternatively, and similarly to European works councils, is an intermediary position possible, which represents the ‘intersection of country-specific and transnational influences’ (Marginson 2000: 27)?

To shed light on these questions, this Working Paper compares responses provided by two sets of actors to a questionnaire-based survey conducted by the authors between 2009 and 2013. The first set of actors comprises employee representatives who sit on the board of an SE (38 respondents). Since board-level employee representation in SEs is mainly found in German-based SEs, comparative analyses are elaborated on the basis of responses provided by the second set of actors comprising employee representatives who sit on the boards of German companies (1,213 respondents).

The findings demonstrate that board-level employee representation in SEs is best defined as being located at the intersection of German and European practices. Beyond the practices board-level employee representation shares with both German parity codetermination and one-third codetermination, board-level employee representation in SEs also displays its own specific characteristics.

Keywords

Industrial relations, corporate governance, worker representation at board level, European Company Statute, codetermination

Introduction

Workers have the right of representation on corporate boards in nineteen European countries. In addition to these national rights, board-level employee representation is anchored in primary and secondary European law. With regard to European primary law, employee representation at board level is recognised as a fundamental worker right. It is enshrined in the 1989 Community Charter of Fundamental Social Rights for Workers (to which Member States are committed according to the 5th Recital of the European Treaty) and in European social policy (Article. 153(1)(f) of the Treaty on the Functioning of the European Union). In European secondary law, the 2001 Statute for a European Company¹ (known as ‘SE’ after its Latin name *Societas Europaea*) is the first piece of European company law to include provisions on European board-level employee representation.² The adoption of the Statute paved the way for the adoption of two further components of European company law, the 2003 Statute for a European Cooperative Society and the 2005 Cross-Border Mergers Directive, which both include provisions on board-level employee representation, based to a large extent on the SE Directive. Each of these legislative measures led to the emergence of Europeanised boards on which sit employee representatives from the ‘home country’ of the company headquarters and their counterparts from ‘participating countries’ in the establishment of an SE, a European Cooperative Society or a merged company. Because of the small number of established European Cooperative Societies (54 throughout Europe as of November 2016³) and the lack of comprehensive

1. The SE Statute is regulated by two inseparable and complementary legal texts: the Council Regulation 2157/2001 on the Statute for a European Company [which will be referred to as the SE Regulation] which deals with pure company law elements (i.e. provisions related to legal registration, structure of managerial bodies, accounts, capital requirement and so on), and the Council Directive 2001/86/EC supplementing the Statute for a European company with regard to the involvement of employees (i.e. employee information, consultation and board-level representation).
2. Board-level employee representation is referred to in European law as ‘codetermination’ (within the Treaty on the Functioning of the European Union) or ‘participation’ (in the SE Statute). Although wordings differ, the meaning remains the same as illustrated by the definition of ‘participation’ provided in the SE Directive: ‘participation’ means the influence of the body representative of the employees and/or the employees’ representatives in the affairs of a company by way of: the right to elect or appoint some of the members of the company’s supervisory or administrative organ, or the right to recommend and/or oppose the appointment of some or all of the members of the company’s supervisory or administrative organ’ (Art. 2(k) of the SE Directive).
3. Information courtesy of Anders Carlson, co-manager of the European Company (SE) database [ECDB].

data with regard to the use of the Cross-Border Mergers Directive⁴ compared to the 2,695 SEs which were registered as of February 2017,⁵ this working paper exclusively focuses on SEs as a point of departure for investigating Europeanised board-level employee representation.

The SE Statute took thirty years of protracted political debates before it was adopted in 2001 and came in force in 2004 (Sasso 2009; Schwimbersky and Gold 2013). The most contentious point was the regulation of employee involvement in SEs, which, after the failure of attempts to impose a single form of representation, had to cope with the considerable variety of national institutional settings in terms of employee information, consultation and board-level representation, as well as the absence of such rights in some Member States. Under the influence of the European works council [EWC] Directive adopted in 1994, the solution came from the adoption of a flexible approach based on two key principles. The first principle determined that employee involvement institutions in an SE are settled by a negotiated agreement, which, in general, is a prerequisite for the legal registration of the new SE and allows for tailor-made arrangements. The second principle precludes self-regulation from leading to a weakening or circumvention of acquired rights. According to this so-called 'before and after' principle pre-existing national rights of worker representation at board level must be safeguarded, whereas there is no obligation to agree on provisions related to board-level employee representation if no such a right existed in any of the companies involved in the establishment of the SE. The combination of these two principles, and more particularly the elaboration of the 'before and after' principle, led some observers and scholars to describe the SE Statute as a 'no export, no escape' compromise (Davies 2003: 87) since there is no intention to extend board-level employee representation throughout Europe, as was initially envisaged. Instead, the emphasis is on the protection of existing national rights (Villiers 2006).

The 'before and after' principle comes into play at the time of negotiating employee involvement in the future SE. Similarly to an EWC, a special negotiation body [SNB] has to be set up to convene the negotiations which can last six months, or up to a year if both parties agree. If the SNB is able to conclude an agreement with management, both parties can freely decide on its content. For such an open agreement to be allowed to reduce or eliminate pre-existing rights of board-level employee representation, however, a qualified majority of two-thirds of the SNB members is required in situations in which these pre-existing rights covered at least 25 per cent of employees, in cases

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4. The only study of cross-border mergers' impact on board-level employee representation was restricted to surveying merger plans in 14 countries over the 2008-2012 period. The authors identified 51 cases in which the cross-border mergers might have led to a Europeanisation of board-level employee representation. However, the actual outcome remained uncertain in most cases (Biermeyer and Meyer 2015; ETUC and ETUI 2015).
 5. Data on SEs, which are reported throughout this working paper, come from the European Company Database [ECDB] set up by the ETUI which can be accessed online at <http://ecdb.worker-participation.eu/>.

where the SE is formed by a merger,⁶ or 50 per cent of employees when the SE is formed as a holding company or a jointly-owned subsidiary. Where an SE is formed by means of a conversion from national to SE status, the SNB cannot decide to reduce pre-existing rights. If the SNB and management agree, or if they fail to reach an agreement within the time frame, the standard rules apply, which are provided as an annex to the SE Directive.⁷ Regarding board-level employee representation, the standard rules state that, in the case of an SE established by conversion, pre-existing rights, if any, continue to apply. In all other cases, the 'higher' pre-existing rights, defined as the rights to the largest proportion of employee representatives on the board, are safeguarded provided that they cover at least 25 per cent of the SE employees in case of an SE formed by a merger, or at least 50 per cent of the SE employees in case of the creation of a holding company or a jointly-owned subsidiary. In essence, whereas the modalities for employee information and consultation are always included in the agreement or through application of the standard rules, the 'before and after' principle governs arrangements on board-level employee representation.

Not all SEs have employee representatives on their board as a consequence of the 'before and after' principle, in part because not all SEs are genuine and active companies. The existence of 'empty' or 'shelf' SEs, which have no operations and no employees, led the research team responsible for the ETUI European Company Database [ECDB] to distinguish 'normal' SEs, with business activities and more than five employees, from the entire set of established SEs. On this basis, as of February 2017, there were 450 'normal' SEs from a population of 2,695 established SEs. Although SEs can be found in 27 of the 31 countries of the European Economic Area (EEA), their distribution is uneven. The greatest number of registered SEs is concentrated in Czechia with 1,898 SEs of which only 90 are 'normal' companies. The second largest country in this regard is Germany with 411 SEs of which 231 are 'normal'. There are more than 100 SEs in only one other country: Slovakia, with 123 established SEs. A group of eight countries has between 10 and 50 SEs (in ascending order of number of established SEs: Belgium, Liechtenstein, Cyprus, Austria, Luxembourg, Netherlands, France, and the United Kingdom). The number of established SEs is lower than 10 in the remaining sixteen countries and there is no registered SE in four countries (Croatia, Iceland, Romania and Slovenia).

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6. SEs could be formed by means: of a merger of companies located in at least two distinct countries of the European Economic Area (composed of the 28 European Member States and Iceland, Lichtenstein and Norway); of the formation of a transnational holding company; of the formation of a subsidiary by two or more companies located in at least two countries; of the conversion of an existing public limited-liability company which has had at least one subsidiary in another country for at least two years.
 7. A third possible outcome of the negotiation process on employee involvement could be that the SNB decides not to open or to terminate negotiations. In this case, the national rules on employee information and consultation apply as well as the European Works Council Directive. However, this potential outcome is not possible in the case of a SE formed by means of conversion.

Among the 450 ‘normal’ companies, 129 SEs grant their employees involvement rights and 66 of these specifically include board-level employee representation. According to the latest comprehensive data from the European Worker Participation Competence Centre (EWPPCC) at the ETUI available as of July 2016, a total of 188 board-level employee representatives from seventeen different European countries sat on the board of an SE (Carlson 2017: 14). The situation is once again uneven as the majority of these board-level employee representatives come from Germany (142 individuals). The next most frequently represented countries are France (7 individuals), the Netherlands (7), United Kingdom (6), Austria (5), Poland (4) and Belgium (3). The remaining countries are represented either by 2 individuals each (Czechia, Hungary, Sweden and Romania,) or a single board-level employee representative (Denmark, Italy, Portugal, Slovakia, Switzerland and the United States of America as a non-EEA country). The distribution of employee representatives on SE boards according to their ‘country of origin’ depends on two principal factors. First, the country of the location of the SE headquarters plays a major role. Board-level employee representatives from the country of the MNC’s headquarters tend to be over-represented, especially when the proportionality principle is applied (representation proportionate to the size of the workforce in each country) as this ‘home country’ is usually that where the largest number of people is employed. Currently, the headquarters of 53 of the 66 SEs with board-level employee representation are located in Germany. The remaining SEs with board-level employee representation are registered in France (8 SEs), Austria (2 SEs), Hungary (1 SE), Finland (1 SE) or Cyprus (1 SE). The second factor is board size. In practice, the larger the board, the greater the number of seats allocated to employee representatives and an increased likelihood of having board-level employee representatives that originate from countries other than that of the headquarters of the MNC. An outcome of the combination of these two factors is less Europeanisation of SE boards than would have been expected. Only half of SE boards with employee representatives are truly internationalised insofar as at least one employee representative comes from a country different than that of the headquarters. The other half of SE boards is deemed ‘ethnocentric’ and comprises exclusively employee representatives from the country in which the headquarters are based. Data were slightly different at the time of the questionnaire distribution to SE boards (spring 2011), not least because there were fewer SEs with board-level employee representation at that time (28). The overall picture is comparable, however, as there were also an overwhelming majority of German board-level employee representatives (81 out of 112 individuals), an overwhelming majority of German-based SEs (25 out of 28 SEs) and almost the same difference between the number of Europeanised boards (15) and ‘ethnocentric’ boards (10).

Few studies have assessed the detailed composition of all SE boards on which sit employee representatives as presented above. Rather, a first category of research conducted on SEs adopted a legal perspective by examining the transposition of the SE Directive into national laws (Fulton 2013; Köstler 2011), the consequences and impact of the SE Statute on national industrial relations institutions (in Germany, Nagel 2007; in the United Kingdom, Koukiadaki

2009; in Greece, Koutroukis 2009 and Patra 2009; in Slovenia, Hojnik 2009), or the impact of the SE Statute in fostering a European market for corporate control (Sasso 2009). A second strand of empirical research on SEs relies on a socio-economic perspective and investigates three main topics: the spread and features of SEs in Europe; the motives behind the adoption by companies of the SE Statute; and the processes and outcomes of negotiation on employee involvement. Studies conducted on the first topic centred on the practical use of the Statute and the institutional characteristics of established SEs (throughout Europe, Stollt and Kelemen 2013; in Germany, Köstler 2013; in Czechia, Cremers and Carlson 2013; in Luxembourg, Thill 2013, in the Netherlands, van het Kaar 2013).

There are different views regarding the motives and rationales of company managements that adopt the SE Statute, particularly in Germany. One view argues that the principal motive lies in management willingness to weaken or circumvent national provisions for board-level employee representation by taking advantage of the 'before and after' principle (Eidenmüller *et al.* 2009; Ernst & Young 2009). In theory, the SE Statute allows a company to become an SE before reaching the national workforce threshold for the adoption of, or increasing the number of representatives within, board-level employee representation. The 'before and after' principle assumes that if there was no representation at board level before the adoption of the SE Statute, there is no obligation to implement it afterwards. In Germany, for example, three different systems of board-level employee representation are in place:⁸ if *one-third codetermination* was operated within a company, similar arrangements would have to apply to a new German-based SE, which otherwise may have had to implement *parity codetermination* had the workforce of the company increased to more than 2,000 employees. In contrast, advocates of the second view argue that sound empirical data invalidate such a conclusion given that relatively few German companies chose the SE Statute and that a majority of German-based SEs comply with the codetermination system, which would have applied to them if they had remained German firms (Köstler and Pütz 2013). In addition, if the 'weakening or circumventing' argument is valid, numerous SEs would have been established in the Nordic countries in which rights for board-level employee representation are wide-ranging. This is not the case, as only a single SE is registered in Finland, as in Denmark, four in

8. The *Montan codetermination* system applies to companies in the iron, steel and coal industry with more than 1,000 employees. In these circumstances, employee and shareholder representatives are present in equal numbers on the supervisory board and an additional 'neutral' member (whose nomination requires acceptance from both sides) has, de facto, a casting vote in the event of a tied vote. The *parity codetermination* system applies to companies with more than 2,000 employees (except in the iron, steel and coal industry). Within this system employee and shareholder representatives are also present in equal numbers on the supervisory board, but the chair (who is usually appointed from among the shareholder representatives) has a casting vote in the event of a tied vote, which is why this system is sometimes referred to as 'quasi-parity' codetermination. Under these first two systems, therefore, workers never hold a majority of board seats. The *one-third codetermination* system applies to companies with between 500 and 2,000 employees whose representatives constitute 33 per cent of the supervisory board.

Norway and five in Sweden.⁹ On the basis of ten detailed case studies, Rehfeldt *et al.* (2011: 1) conclude that ‘codetermination rights in the [SE] supervisory board were secured or even improved’. An analysis of German-based SEs agreements concurs in demonstrating that board-level employee representation is preserved, if not slightly increased, in the vast majority of cases (Köstler and Rose 2014: 141-142). Furthermore, cases that might indicate an attempt to escape the German codetermination system are concentrated among family-owned companies and firms with major Anglo-American shareholder ownership (Rosenbohm 2014). The marginal reality of corporate strategies intended to bypass compulsory board-level employee representation might then better be labelled ‘preventive avoidance of stricter forms of codetermination’, ‘freezing of previously existing standards’ or ‘preservation of the status quo ante’ (Keller and Werner 2012: 629; Höpner and Waclawczyk 2012). Supporters of this second view, however, acknowledge that the SE Directive allows for the implementation of bypass strategies. Although it remains a minority practice, around 50 companies (out of the then 225 ‘normal’ German-based SEs) are said to have avoided parity codetermination by becoming an SE (Hans-Böckler-Stiftung 2016). Despite contradicting the spirit of the European legislation underpinning the SE Statute, such practices are made possible because of different legal loopholes, which, as argued by those supporters (Sick 2013, 2015), should be closed. In particular, uncertainty persists regarding the obligatory reopening of negotiations on employee involvement where there has been a significant growth of the workforce. The closing of this and other loopholes has not been supported by the European Commission, which eventually decided not to revise the SE Statute (European Commission 2012: 14).

Regarding the third topic of socio-economic research: assessing the processes and outcomes of negotiations on employee involvement in SEs. These assessments were undertaken through the elaboration of detailed analysis of SE agreements (of SEs across Europe, Glass 2009 and Santoro 2012; of German-based SEs, Köstler and Rose 2014), by means of case studies of SEs (Schwimbersky and Rehfeldt 2006; Stendstrand *et al.* 2007; Knudsen *et al.* 2008; Klambauer 2008; Rehfeldt *et al.* 2011, Casey *et al.* 2016) or by the combination of both methodologies (Keller and Werner 2008, 2010, 2012; Rosenbohm 2013a, 2014). In each case, emphasis was placed on deciphering the final institutional design of employee involvement mechanisms and, particularly, of the means of employee information and consultation through the setting up of a SE ‘representative body’ commonly called the SE works council (Rosenbohm 2013b). Information was also provided on the institutional setting of board-level employee representation but, with the exception of few observations drawn from some case studies (Rehfeldt *et al.* 2011) or from interviews conducted with a handful of board-level employee representatives in SEs (in Gold *et al.* 2010), very little is known about the actual practice of SE boards and the role of employee representatives therein. This Working Paper addresses this knowledge shortfall by focusing on the experiences and representations of employee representatives who sit on the board of an SE.

9. Source: ETUI ‘European Company (SE) database’ as of February 2017.

Similarly to the principal question addressed in EWC research, the question examined in this Working Paper is whether Europeanised board-level employee representation in SEs is specific. Is it truly 'Europeanised'? Do board-level employee representatives on SE boards act in a way that is dissimilar to their counterparts in the headquarters 'home country'? Alternatively, as it was initially feared with regard to EWCs, are the actions of board-level employee representatives on SE boards 'coloured by the national system of their company's country of origin' (Streeck 1997: 331) in the sense that board-level employee representation in SEs would only be an 'international extension of national systems of workplace [here, board-level] representation' (*ibid.*)? Is an intermediary position possible which, as was argued with regard to EWCs, represent an 'intersection of country-specific and transnational influences' (Marginson 2000: 27)? With the objective of providing materials and evidence that shed a light on this problematic, four interrelated questions are scrutinised.

First, are SE boards different from their domestic counterparts? One of the stated motives for management to adopt the SE Statute is the possibility of modifying the structure of corporate governance institutions. The SE Statute allows for a choice between dual or monistic board structures, which contrasts with many national legal frameworks where only one of these two structures is permitted; and variations in the size of the board, whereas many domestic legal frameworks stipulate size requirements. In practice, 80 German-based SEs chose to be governed by a monistic structure instead of the dual structure, which prevails in Germany (Köstler and Pütz 2016). In addition, a slight trend towards the decrease in the size of boards when the SE Statute was adopted is also observed (Keller and Werner 2010; Rosenbohm 2014; Köstler and Pütz 2016) These elements, combined with the point that the SE regulation contains provisions that determine the running of SE boards (frequency of meetings, contents of board agenda), might imply that SE boards differ from their domestic equivalents, which may have implications with regard to the activities of board-level employee representatives.

Second, do employee representatives from different countries act with a unified transnational identity at the board of an SE? The aggregation of employee representatives appointed from different countries does not automatically lead to the emergence of a collective actor with a single transnational identity as each individual may retain his/her domestic perspective. It has been argued, however, that employee representatives on SE boards 'should take account of the interests of all SE employees' (Kluge 2008: 129) and not only those of their fellow nationals. A point backed up by the European trade union federations such as UNI Europa Finance (2006) and industriAll Europe, which stipulates in its guidelines for employee involvement in SEs that 'the mandate in a cross-border company with a European Company Statute is a European mandate with strong national roots. The SE Supervisory/Administrative body members represent not only those Member States from which the members come, but the interests of the employees of the company as a whole' (industriAll Europe 2013: 3). The European Trade Union Confederation (ETUC) advocates a similar view (2003: 25). Board-level

employee representatives in SEs, therefore, are expected to act differently from their domestic counterparts. In practice, the three German employee representatives on the board of a German-based SE interviewed by Gold *et al.* (2010) expressed such a transnational perspective. But counter examples may exist. For example, difficulties were reported by an employee representative who sat on the board of the former Fresenius SE who pinpointed coordination problems due to different national interests, communication pitfalls, and geographical distance, which made spontaneous urgent meetings hard to organise (Schütze 2011: 12).

Third, how do employee representatives on SE boards and members of SE works councils coordinate their actions, if at all? Networking of board-level employee representatives with other representative institutions within the company is key to the action of the former and to the effectiveness of the overall system of employee involvement (Casey *et al.* 2016; Waddington and Conchon 2016). Close connections seem to exist between these two institutions of labour representation in SEs. Among seven SEs with board-level employee representation studied by Rehfeldt *et al.* (2011) employee representatives on the board are also members of the SE works council in four cases and invited as guests to works council meetings in most of the other cases. The coordination issue is all the more relevant when the SE works council is the main constituent of board-level employee representatives as a consequence of the role played by the SE works council in the appointment of board-level employee representatives, which seems to be the dominant practice. On the basis of the analysis of 44 agreements on employee involvement in German-based SEs, 'in most SE agreements the SE Works Council is afforded a key role in determining which people shall be assigned to the supervisory board' (Rose 2013: 223).

Fourth, are employee representatives on the board of SEs more, less or as influential on strategic decision-making as their domestic counterparts? The Europeanisation of boards and, in particular, the acceptance of employee representatives from countries where employee representation at board level is unknown, might lead to an increase of board-level employee representatives' influence insofar as 'foreign' representatives gain access to information that otherwise would have been unavailable. In contrast, the diversification of board-level employee representatives might lead to a juxtaposition of diverging perspectives and practices and a loss of unity in collective action as mentioned by some employee representatives on SE boards: 'representatives from countries with high standards [...] argue a loose influence on corporate decision-making due to a certain 'dilution' of well-institutionalized and practiced rights' (Keller and Werner 2012: 636).

The Working Paper's structure follows the red line drawn by these four questions in devoting a section to each. The first section looks at the running of SE boards, which is captured by the study of four variables: namely, the contents of the agenda of the board, the frequency of board meetings, the organisation of pre-meetings between board-level employee representatives and corporate management, and the existence of, and participation of, employee representatives in sub-committees of the board. The second section

assesses the extent to which employee representatives who sit on the board of an SE constitute a single united collective actor. Four variables serve as a proxy in this regard. First, resources at the disposal of employee representatives are considered, given that they may greatly determine the ability of board-level employee representatives from different countries to network. Second, the organisation of employee pre-meetings is evaluated as a way to foster a collective identity. Third, the existence of such a collective identity is assessed by reference to definitions of the quality of the relationships established by employee representatives within the board. Fourth, the extent to which employee representatives on SE boards consider their mandate as European, which embraces all the SE employees is gauged against the interests they report defending in a situation of international restructuring. The third section questions the coordination of employee representative institutions within SEs by considering the confidentiality issue, which could work as an obstacle to information exchange between board-level employee representatives and members of the SE works council. In contrast, the bifurcated situation of the respondents as both board members and SE works councillors is also discussed in this section as such a situation might, at least partially, address this issue. The fourth section focuses on the power of board-level employee representatives in SEs, which is dependent on the quality of information provided, on the activism of employee representatives at the board and on the locus of real decision-making, all of which are examined before gathering respondents' own views on their capacity of influence on SE boards.

Investigation of these questions and their attached variables relies on our analyses of data collected within the framework of the first large-scale questionnaire-based survey of employee representatives who serve on the boards in sixteen European countries and in SEs. Conducted by the ETUI from 2009 to 2013 with the financial support of the Hans-Böckler foundation, the 'Corporate Governance and Voice of Labour' survey is aimed at understanding the role, activities and networking of board-level employee representatives (for an extensive presentation of the findings, see Waddington and Conchon 2016). For the purpose of this Working Paper, the 38 responses received from employee representatives on SE boards are analysed and are compared with the 1,213 responses of their German counterparts. As mentioned above, board-level employee representation in SEs is mainly found in German-based SEs, hence the overwhelming majority of German employee representatives on SE boards. The distribution of survey respondents follows the same pattern insofar as 82 per cent of respondents that sit on the board of an SE whose headquarters are located in Germany. This is not to imply that all of the 38 respondents from SEs come from Germany, at least ten of them are non-Germans originating from seven different countries.¹⁰ Moreover, apart from the sole respondent who sits on a board of a non-German based SE in which the proportion of employee

10. The anonymity of respondents (their name and that of the company on whose board they sit are unknown) prevents us from identifying precisely their 'country of origin'. The figure of at least 10 non-German respondents is derived from the information provided by the respondents who filled in the separate 'contact details' sheet, which accompanied the questionnaire for those who wished to be informed of the survey findings.

representatives is 7 per cent, the 37 other respondents sit either on a board with one-third employee representatives (39 per cent) or with half employee representatives (58 per cent). As a consequence, responses from employee representatives on SE boards are compared to those provided by German respondents sitting within the framework of one-third codetermination and of parity codetermination.¹¹

11. To the best of our knowledge, none of the German-based SEs established at the time of the questionnaire distribution previously applied the Montan codetermination system, hence it is excluded from the comparative exercise.

1. The running of SEs' boards

As mentioned above, senior management might choose to turn a company into an SE in order to benefit from a more flexible corporate governance framework. This has been a driver for 80 German companies whose adoption of the SE Statute accompanied a change from a dual corporate governance structure, comprising a management board and a supervisory board, to the one-tier system with a single board of directors (Köstler and Pütz 2016). Two explanations for this trend are available: the SE could adopt the corporate governance structure of the parent company in the event that the SE was formed as a joint subsidiary; or the owners may wish to eliminate the control performed by the supervisory board over senior management (Keller and Werner 2008). The practice of adopting a monistic board within SEs, however, falls outside the scope of this research since it does not touch upon board-level employee representation. Except for one company,¹² all of the German-based SEs with a monistic structure have no board-level employee representation, mainly because they were not subject to codetermination prior to the adoption of the SE Statute having had less than 500 employees (Köstler and Pütz 2013, 2016). On the basis of a detailed analysis of SE agreements concluded within German-based SEs, the dual structure of corporate governance and the corresponding level of participation were maintained in the vast majority of large companies (Rose and Köstler 2014: 142). The marginality of the phenomenon of employee representation on the board of directors of an SE is confirmed by the survey results, which show that the great majority of SE respondents (84 per cent) sit on a supervisory board. The survey results also demonstrate that some SE boards were smaller than before the adoption of the SE Statute and that German senior managers might take advantage of the SE Statute in order to modify the structure and the running of the corporate board. This section assesses the extent to which the boards of SE are run differently from those of purely German companies by looking at the elements that have direct implications for the activities of board-level employee representatives; namely, the contents of the agenda of the board, the frequency of board meetings, the practice of pre-meetings between senior management and employee representatives who sit on the board, the existence and participation of board-level employee representatives in board committees.

¹² The company is PUMA SE whose board of directors is composed of one-third of employee representatives.

1.1 Contents of the agenda of the board

With regard to the contents of agenda of the board, the SE Regulation (Art. 48) states that the SE's articles of association shall include a list of the categories of transactions which cannot be made without the formal approval of the supervisory board (in the dual board structure) or the board of directors (in monistic structures). These categories of transactions have to be put on the agenda of board meetings when required. The German transposition law further specifies that the SE supervisory board can establish such a list (Art. 19 of the SE-Ausführungsgesetz, hereafter SEAG). The German legislator thus repeated the legal provisions that applied to domestic companies at the time the Regulation was adopted.¹³ The German Act on public-limited liability companies (Aktiengesetz, hereafter AktG) explicitly mentions the following duties of the supervisory board: the appointment and dismissal of the management board (Art. 84), the determination of the aggregate remuneration of management board members (Art. 87 (1)), the examination and approval of books, records, assets, annual financial statement, annual report and distribution of profits (Art 111 (2) and 171 (1)). In addition, since 2002 German law necessitates that a list of transactions that require the approval of the supervisory board be established either by the supervisory board or the company's articles of association (Art. 111 (4)). The German corporate governance code (Regierungskommission 2015) further specifies that such a list should 'include decisions or measures which fundamentally change the asset, financial or earnings situations of the enterprise' (recommendation 3.3). It is expected, therefore, that the range of the agenda of SE boards will not differ significantly from that of their German counterparts in being wide-ranging.

The column headed 'BLERs (Board-level employee representatives) do not participate on this issue' for SE respondents in Table 1 reveals that there is no issue on which more than 6 per cent of respondents do not participate. The proportion of SE respondents who indicate that issues are 'not a duty of the board' is also extremely low with a maximum of 8 per cent except for the item 'industrial relations', which is reported as not being a board duty by one respondent in six. In general, employee representatives on SE boards are thus engaged in a wide-ranging agenda raised at the board, a prerequisite for genuine participation in strategic decision-making. The only noticeable variation between SE boards and those in Germany relates to the item 'health and safety', which is more likely to be beyond the scope of board duties in German companies than in SEs: 'health and safety' is more likely to be excluded from board duties in parity codetermination (11 per cent of respondents) and in one-third codetermination (13 per cent) than in SEs (3 per cent). The participation of employee representatives on all issues is very much the same when comparing SE boards and German boards with parity codetermination.

¹³ Since then, a law was adopted in Germany (the so-called *TransPug* Act of July 2002) which makes it compulsory for public-limited liability companies to establish such a list of decisions requiring approval of the supervisory board for the management board to implement them. See below.

The situation of employee representatives on SE boards and on one-third codetermined boards in Germany is also comparable with regard to 'BLERs do not participate on this issue' with two exceptions. Respondents sitting on a German board with one-third codetermination are less likely than their SE counterparts to participate in the 'purchase or sale of subsidiaries' and in 'the remuneration of senior managers'. Figures are low enough to conclude that the range of items discussed at SEs and boards of German companies is largely comparable in that it is as extensive.

Table 1 demonstrates that financial and organisational topics of a strategic nature are prominent on the agenda of SE boards. No less than seven items are 'often' or 'always' discussed at the SE board (with frequency indices ranging from 3.9 to 4.5). Included among these items are those of significant consequence for the employees of SEs, such as 'acquisitions or mergers', 'purchase or sale of subsidiaries' and 'investments'. Two other topics of direct interest to employee representatives, the 'sale or closure of plants' and 'employment situation', appear to be less prominent, although they are discussed at a frequency ranging from 'sometimes' to 'often'. In contrast, topics that traditionally pertain to the field of employment relations (health and safety, gender policy, vocational training and industrial relations) appear more rarely on the agenda of the board. Reference to the frequency data reveals no major difference between SE boards and German boards with parity codetermination. The average frequency scores are similar: 3.5 within SEs and 3.4 within parity codetermination. In contrast, variation arises when comparing SE boards with German boards with one-third codetermination, where the average frequency score is 3.2. As a consequence, the comparison of frequencies is handled in two steps: first, by comparing SE boards with German boards with parity codetermination; and second, by comparing SE boards with German boards with one-third codetermination.

SE boards and German boards with parity codetermination share a common feature in that items related to employment relations ('health and safety', 'gender policy', 'vocational training' and 'industrial relations') appear in the lower reaches of the ranking by frequency. These issues are rarely discussed at board meetings. 'Gender policy' is more frequently addressed on SE boards, however, whereas 'vocational training' and 'industrial relations' are more often on the agenda of German boards with parity codetermination. The comparative analysis on the remaining board items also reveals some significant variations. Financial matters ('profit distribution', 'taking out/granting of loans and credit', 'management remuneration') and topics related to the structure and organisation of the company ('acquisitions or mergers' and 'purchase/sale of subsidiaries') are more frequently discussed at SE boards than at German boards with parity codetermination. In contrast, the 'employment situation' is slightly less prominent on the agenda of SE boards. With the exception of topics related to 'vocational training' and 'employment situation', the same set of differences prevail between SE boards and German boards with one-third codetermination, but on an even greater scale when it comes to 'acquisitions or mergers', 'purchase/sale of subsidiaries' and 'management remuneration', which are far more frequently addressed on SE boards. In addition, no less

Table 1 The frequency at which agenda items are discussed at the board

	SEs N=36-37 ¹				German codetermination types				
	Parity codetermination N=821,859		One-third codetermination N=293-303		Parity codetermination N=821,859		One-third codetermination N=293-303		
	Frequency ²	Not a duty of the board %	BLERs do not participate on this issue %	Frequency ²	Not a duty of the board %	BLERs do not participate on this issue %	Frequency ²	Not a duty of the board %	BLERs do not participate on this issue %
Adoption/review of accounts and balance sheets	4.5	/	/	4.5	/	/	4.5	1	/
Product market policy	4.1	3	/	4.1	1	/	3.9	4	2
Acquisitions or mergers	4.0	/	/	3.8	3	1	3.4	4	7
Profit distribution, dividends or settlement of losses	4.0	3	3	3.7	10	2	3.7	4	4
Purchase/ sale of subsidiaries	3.9	/	/	3.7	3	1	3.1	8	9
Investment (technology, real estate, etc.)	3.9	/	3	4.0	2	/	3.9	1	2
Appointment/removal of auditors	3.9	3	3	4.1	1	/	3.8	3	5
Appointment/removal of management board/executive committee/senior managers	3.7	3	/	3.9	3	1	3.1	8	8
Sale/closure of plants, relocation of production	3.7	3	/	3.7	2	/	3.1	2	3
Taking out/ granting of loans and credits	3.7	8	3	3.1	7	2	3.2	9	5
Employment situation (likely trends)	3.6	/	/	3.9	2	/	3.6	3	1
Research and development	3.6	5	/	3.5	3	1	3.2	7	1
Remuneration/compensation of senior managers	3.6	6	3	3.3	5	2	2.9	10	13
Increase/reduction in the company's share capital	3.5	6	6	3.4	13	2	3.2	10	7
Environmental matters	3.2	5	/	3.0	4	/	2.9	6	2
Health and safety	2.7	3	/	2.5	11	1	2.3	13	3
Gender policy, promotion of women	2.4	8	3	1.9	12	1	1.7	12	4
Vocational training	2.0	8	3	2.4	13	1	2.2	17	3
Industrial relations (collective bargaining, trade unions)	1.9	16	3	2.4	15	1	2.2	18	3

Notes:

1. The values of 'N' vary from issue to issue. The values of 'N' provided represent the range.
2. The data on frequency were calculated in two stages. In stage one the number of respondents who indicated that an issue was 'not a duty of the board' and 'BLERs do not participate on this issue' was subtracted from the value of 'N'. In stage two points were awarded on a five point scale with five points awarded to respondents who answered that an issue was 'always' discussed at board meetings and one point awarded where an issue was 'never' discussed'. Point awarded on this basis were summed and divided by the value of 'N' calculated in stage one to produce an average score. In practice, therefore, the higher the score reported under 'frequency' the more frequently the issue appears as an agenda items at the board.

than six other items are more often put on the agenda of SE boards than on that of German boards with one-third codetermination ('appointment/removal of management', 'sale/closure/relocation of plants', 'research and development', 'increase/reduction in company's share capital', 'environmental matters'). Although the range of board agendas appears to be wide in all cases, the frequency at which items are discussed at the board is generally higher in SE boards than in German boards with parity codetermination on several items with the noticeable exception of the 'employment situation'. The difference between SE boards and German boards with one-third codetermination is greater.

1.2 Frequency of board meetings

The SE Regulation is not straightforward about the expected number of board meetings in the dual corporate governance structure. The SE Regulation stipulates a minimum of four meetings of the board of directors per year (Art. 44 (1)), and requires the management board to report to the supervisory board at least once every three months (Art. 41(1)), thus it could be assumed that SE supervisory board meetings might take place at least quarterly. This frequency of board meetings is equal to that stated in the AktG. Supervisory boards of German listed companies are required to meet quarterly, a frequency that can be reduced to two board meetings per year in unlisted companies (Art. 110 (3) AktG). The frequency of meetings of SE boards and German boards is thus expected to be very similar.

Table 2 shows that SE boards with employee representatives meet almost every three months on average, illustrated by a frequency index of 1.74 and an average number of board meetings of 3.7 per year. Less than one extraordinary board meeting takes place every year in SEs. These figures are comparable to those related to German boards with parity codetermination. In contrast, SE codetermined boards meet more frequently than German boards with one-third codetermination, which are convened three times per year on average and are less likely to convene an extraordinary meeting. The main point of divergence thus rests between SE boards and their German counterparts composed of a third of employee representatives.

Table 2 Frequency and number of board meetings

	SEs N=38	German codetermination types	
		Parity codetermination N=852-870	One-third codetermination N=301-305
Frequency of board meetings <i>Index</i> ¹	1.74	1.75	1.58
Number of regular meetings in the reference year ² <i>Mean in absolute value</i>	3.7	3.6	3.3
Number of extraordinary meetings in the reference year ² <i>Mean in absolute value</i>	0.7	0.5	0.4

Notes:

1. The index data were calculated by awarding points to responses on a five point scale with five points awarded to respondents who answered that the board meets 'weekly' and one point awarded to those who reported that the board meets 'every six months'. Points awarded on this basis were divided by the value of 'N' to produce an average score. In practice, therefore, the higher the index score, the higher the frequency of board meetings.
2. The year referred to in the questionnaire when asking the respondents to provide with the number of meetings in a year was set as the one preceding the year of the questionnaire sending. Depending on the date of the questionnaire (initial or reminder) sending, the reference year varied between 2008 and 2010.

1.3 Pre-meetings between management and employee representatives

Both the SE Regulation and the SE Directive are silent as to the organisation of preparatory meetings between SE management and board-level employee representatives prior to full board meetings. German law is also silent on this point. The German corporate governance code, however, acknowledges such an informal institution by stating that 'in supervisory boards with codetermination, representatives of the shareholders and of the employees can prepare the supervisory board meetings separately, possibly with members of the management board' (recommendation 3.6). As preparatory meetings are a mere 'possibility' in the German context and are not regulated in the SE Statute, practices may differ between German and SE boards.

Table 3 shows that half of the employee representatives on SE boards (53 per cent) meet either 'always' or 'often' with senior managers before the holding of full board meetings. The second most common practice reported by one quarter of SE respondents comprises irregular and sporadic meetings that take place 'sometimes' or 'rarely'. A further 21 per cent of SE respondents report 'never' meeting senior management prior to board meeting. These uneven practices are replicated among German companies with parity codetermination, which follow the same pattern as observed for SEs. A majority of respondents in German boards with parity codetermination indicate that they regularly hold pre-meetings with senior management (59 per cent), and slightly more than a quarter do the same on an irregular basis (28 per cent) and a significant minority 'never' meet with senior management prior to the full board meeting (13 per cent in German boards with parity codetermination).

Table 3 Are pre-meetings of board-level employee representatives and senior management held before the formal board meeting?

	SEs %	German codetermination types	
		Parity codetermination %	One-third codetermination %
Always	40	44	25
Often	13	15	9
Sometimes	13	16	16
Rarely	13	12	10
Never	21	13	40
	N=38	N=862	N=292

As for the two previously studied variables, variations arise when SEs are compared with German companies with one-third codetermination. With reference to the ranking of practices, the most common practice between employee representatives on German boards with one-third codetermination and their senior management is to ‘never’ meet prior to board meetings, as opposed to practices in force in SEs and German companies with parity codetermination. The holding of regular meetings is only ranked second with 34 per cent of respondents in a German company with one-third codetermination while about 26 per cent report irregular meetings. Board-level employee representatives in SEs and in German companies with parity codetermination are both more likely to have the opportunity to exchange information, views and potentially establish agreed positions with the senior management prior to meetings that also involve shareholder representatives than their counterparts on German boards on which employee representatives are in a minority position.

1.4 Participation of employee representatives in board committees

The SE Regulation and Directive do not contain any provision regarding the possibility or obligation for SE boards to establish sub-committees. In contrast, the German law transposing the SE Regulation specifies that the board of directors in monistic structures is allowed to set up such sub-committees and, more particularly, an audit committee (Art. 34(4) SEAG). The German legislator here again intended to harmonise the situation with that of the dual structure insofar as domestic supervisory boards are also allowed to set up sub-committees, especially an audit committee, and can decide that opinions emanating from sub-committees are binding, provided that the restrictions stipulated in the AktG are respected. In particular, some matters cannot be referred to a committee to decide in lieu of the full supervisory board (Art. 107(3) AktG). Establishment of board sub-committees, therefore, is not compulsory according to German law, but may well be implemented in listed companies, as recommended by the German corporate governance code regarding an audit committee and a nomination committee, the latter having

Table 4 The participation of board-level employee representatives in sub-committees

Sub-committee	German codetermination types											
	SEs N=31				Parity codetermination N=691			One-third codetermination N=124				
	Full member, invited to each meeting %	Guest member, invited to some meetings %	Not a member, never invited %	This sub-ctte does not exist %	Full member, invited to each meeting %	Guest member, invited to some meetings %	Not a member, never invited %	This sub-ctte does not exist %	Full member, invited to each meeting %	Guest member, invited to some meetings %	Not a member, never invited %	This sub-ctte does not exist %
Audit/accounting	36	3	35	26	23	2	27	48	20	2	27	51
Remuneration/compensation	23	/	32	45	26	1	27	46	22	/	30	48
Nomination/appointment	10	3	35	52	14	1	23	62	7	1	18	74
Strategy	6	/	10	84	7	/	11	82	6	4	8	82
Investment	3	/	13	84	8	1	14	77	13	/	8	79

Note: Respondents were initially asked to indicate whether sub-committees of the board existed at all within their company. The data reported in Table 4 are those from respondents who indicated that one or more sub-committees were in operation.

to be exclusively composed of shareholder representatives (recommendations 5.3.2 and 5.3.3). In practice, 79 per cent of respondents who sit on a German board with parity codetermination indicate that at least one board sub-committee is in place, compared to only 41 per cent of their counterparts sitting on a board with one-third codetermination. The difference may be due to the smaller size of German companies with one-third codetermination coupled to the reduced likelihood that they are listed and thus follow the recommendations of the German corporate governance code. An overwhelming majority of SE respondents (82 per cent) report the existence of at least one board sub-committee, a proportion that is similar to that of the respondents in German parity codetermination. The central question in relation to board-level employee representation is to know whether employee representatives also sit on board sub-committees, as sub-committees allow privileged access to more detailed information and informed discussions between board members. Table 4 assesses the extent of SE board-level employee representatives' participation in board sub-committees in comparison to that of their German counterparts.

The column headed 'this sub-committee does not exist' in Table 4 illustrates the varied presence of the different board committees insofar as its reverse reading provides evidence of the existence of sub-committees. The sub-committee most frequently found in SE boards is the audit committee, the establishment of which is reported by no fewer than three-quarters of SE respondents. About half of the employee representatives on SE boards also report that a remuneration committee is in place (55 per cent) and a similar proportion mention the establishment of a nomination committee (48 per cent). The existence of both a strategy and an investment committee is far less common (reported by 16 per cent of SE respondents). The rank order of board committees according to the frequency of their establishment in German companies with codetermination does not depart significantly from that identified for SEs. The two most frequently formed sub-committees are the audit and remuneration committees, while the third most frequent is the nomination committee. In contrast, strategy and investment committees are only rarely established. There are, however, two marked discrepancies with regard to the possibility of establishing audit committees and nomination committees. These sub-committees are more frequent in SE boards than in their German counterparts: this variation is most marked when comparing SE boards with German boards with one-third codetermination.

Irrespective of the legal status of the company, the participation of board-level employee representatives in sub-committees can be understood either in terms of them being full members or excluded, insofar as the practice of inviting employee representatives as guest members to sub-committee meetings is extremely rare. Where an audit sub-committee exists, almost half of the SE board-level employee representatives engage as full members.¹⁴ Only 40 per

14. Percentages of respondents' participation in board committees where they exist are calculated on the basis of responses to the question 'for each sub-committee are you...?' minus responses to item 'this sub-committee does not exist'. As a consequence, percentages reported within the text differ from those presented in Table 4.

cent of them do so in the remuneration and the strategy committees, and they are less likely to participate in nomination and investment committees; only 20 per cent of SE respondents report being full members of these committees. Variations between the participation in sub-committees of board-level employee representatives in SEs and in German boards with parity codetermination arise with regard to their involvement in the nomination and investment committees where they exist. Board-level employee representatives in SEs are less likely to be a full member of the nomination committee than are their counterparts in boards with parity codetermination (20 per cent of board-level employee representatives in SEs sit on a nomination committee compared to 37 per cent of employee representatives on boards with parity codetermination). The difference between SEs and boards with one-third codetermination is not significant. The proportion of SE respondents who report sitting on the investment committee when it exists (20 per cent) is significantly lower than that of employee representatives in one-third codetermination (59 per cent). Although board-level employee representatives in SEs participate as much as their German counterparts in the audit, remuneration and strategy committees, they are more likely to be excluded from sub-committee discussions on the appointment of senior management and company key investments. They thus have a slightly reduced involvement in these areas of strategic decision-making.

In summary, although SE boards and German codetermined boards share a key feature in that the content of the agenda of the board is wide-ranging in all cases, some disparities exist which reveal the particular character of SE boards. SE boards look more similar to German boards with parity codetermination than those with one-third codetermination in that they follow the same pattern regarding the frequency of board meetings and pre-meetings involving board-level employee representatives and senior management. Features related to the existence of at least one board committee, to the establishment of investment, remuneration and strategy committees and to the participation of board-level employee representatives in the remuneration, strategy and audit committees, where they exist, are similar. Variation between SE boards and German boards with parity codetermination on some central points raises the question of the extent to which the intensity of participation is strictly equivalent in the two cases. Whereas the audit and nomination committees are more frequently established in SEs, the engagement of SE board-level employee representatives as full members of the latter and of the investment committee is less common than in German parity codetermination. Whereas the range of the board agenda is comprehensive in both cases, several financial and organisational topics are more frequently addressed at SE board meetings, which, in contrast, discuss less frequently the employment situation within the company. These differences imply that board-level employee representatives on SE boards and on German boards with parity codetermination may assess their influence on strategic decision-making differently. This issue is examined below. The likelihood of differences between board-level employee representatives in SEs and their counterparts in German boards with one-third codetermination is much higher given the marked discrepancies noted in this section regarding the operation of boards. The frequency at which no less than eleven out of the

nineteen strategic topics listed in Table 1 are put on agenda of an SE board is much higher than in one-third codetermination. Both full board meetings and pre-meetings involving board-level employee representatives and senior management are more frequent in SEs, as is the setting up of sub-committees and, more particularly, of audit and nomination committees. Employee representatives on SE boards, therefore, enjoy greater opportunities to benefit from a higher intensity of participation than employee representatives that sit on a German board in which the ‘employee side’ is in a minority position.

2. Do board-level employee representatives in SEs constitute a collective actor?

Research on EWCs concludes that training, networking and intense communication between EWC representatives help to generate a transnational perspective and a collective identity shared by employee representatives with different industrial relations backgrounds (Weston and Martinez Lucio 1998; Miller and Stirling 1998; Turner 1996; Whittall 2000; Stirling 2004; Timming 2006; Waddington 2011). It is assumed that a similar set of conditions might equally foster the emergence of a transnational collective actor at board level instead of a mere juxtaposition of national perspectives among SE board-level employee representatives from different countries. This section examines the extent to which employee representatives within SEs share a transnational identity. The section initially identifies the resources that are at their disposal. Second, it assesses their coordination activity on the basis of both the frequency of pre-meetings that they hold and the way they describe their relationships. Findings of these two sub-sections shed a light on those of the third sub-section, which evaluates the identity of board-level employee representatives in SEs.

2.1 The resources available to board-level employee representatives

The survey focuses on a set of seven resources, which are assumed to be necessary to the activity of board-level employee representatives: namely, training, communication facilities, administrative support, reimbursement of travel expenses, access to experts, director's fee and liability or legal aid insurance. The SE Regulation and Directive and the German transposition laws are all silent on the specific rights of board-level employee representatives to benefit from each of these resources and do not stipulate any additional resources. According to German law, employee representatives who sit on codetermined boards have access to remuneration as a board member; to the reimbursement of their expenses, which may include travel and communication facilities; and can consult experts when preparing board meetings, the costs of whom are met by the company (Köstler *et al.* 2013). Employee representatives on German boards do not have specific rights related to training, secretarial support or liability insurance. This is not to imply, however, that they do not have access to these resources in practice. Such resources are available to board-level employee representatives as a consequence of their simultaneous membership of a works council, whose specific rights to training will be also open to them, or as a consequence of management policy, which may, for

example, apply the recommendation 5.4.5 of the German corporate governance code inviting companies to support supervisory board members in undertaking appropriate training. In the absence of similar hard or soft legal provisions in the SE Statute, the situation of board-level employee representatives in relation to resources is expected to be uneven and more unfavourable to employee representatives on SE boards.

Contrary to expectations, it is immediately apparent from Table 5 that employee representatives on SE boards have access to all resources. Almost all of them are reimbursed for travel expenses and nine SE respondents of every ten benefit from communication facilities, training and a director's fee. A very high proportion of SE respondents is also covered by a liability and legal aid insurance (87 per cent) and can consult experts (79 per cent). Although secretarial or administrative support is the least common resource granted to employee representatives on SE boards, two-thirds of them benefit from it. Comparison with their counterparts in German codetermined boards reveals variations which occur on only two resource items in comparison with parity codetermination, but on four of them in comparison with one-third codetermination. Employee representatives on German boards with parity codetermination are better equipped than SE respondents in terms of access to expert advice and to administrative support. Administrative support is also more likely to be available to respondents operating within one-third codetermination. It is acknowledged, however, that a vast majority of SE respondents mention being in receipt of advice from experts and, therefore, cannot be described as being deprived of such a resource compared to their German counterparts in parity codetermination. The direction of variation between employee representatives on SE boards and on German boards with one-third codetermination is opposite insofar as SE respondents appear to be better equipped in relation to reimbursement of travel expenses, director's fee and liability and legal aid insurance. The overall picture, therefore, is one of a vast majority of employee representatives on SE boards accessing a wide range of resources comparable to their counterparts in German parity codetermination and having access to more resources than their counterparts operating in one-third codetermination with the exception of secretarial and administrative support. As secretarial and administrative support is assumed to play a minor role in generating transnational team building among board-level employee representatives in SEs, this shortfall is unlikely to be damaging.

The overall picture points to advantages accruing to employee representatives on SE boards when the time resource is considered. SE respondents mention spending on average 15.8 hours per month in fulfilling their board duties compared to their counterparts in parity codetermination and in one-third codetermination both of whom report spending less hours per month (respectively 11.0 and 9.1 hours). The conditions that could contribute to the collective work and identity of SE board-level employee representatives are thus in place. It remains to be seen how SE board-level employee representatives make use of them.

Table 5 The resources provided to board-level employee representatives

Support	SEs N=38 (%)	German codetermination types	
		Parity codetermination N=870 (%)	One-third codetermination N=305 (%)
Reimbursements of travel	95	89	84
Communications	90	91	93
Training	90	97	92
Director's fee	90	88	81
Liability insurance/legal aid insurance	87	82	77
Advice from experts	79	90	82
Secretarial/administrative	68	82	76

2.2 The coordination of board-level employee representatives

The SE Regulation, the SE Directive and the German transposition laws are silent as to the organisation of pre-meetings between board-level employee representatives. Hard law does not regulate this point in Germany. In contrast, and as mentioned above, the German corporate governance code acknowledges the organisation of preparatory meetings of board-level employee representatives by stating that ‘in supervisory boards with codetermination, representatives of the shareholders and of the employees can prepare the supervisory board meetings separately’ (recommendation 3.6). Additionally, such a practice is strongly recommended by German trade unions (Köstler *et al.* 2013). The legal framework, therefore, invites the assumption that the organisation of pre-meetings of board-level employee representatives might be more frequent in the case of the large German companies than in SEs, as the former comply with the national corporate governance code.

Table 6 shows that three-quarters of SE respondents regularly meet (‘always’ or ‘often’) with fellow board-level employee representatives prior to full board meetings. Slightly less than one fifth hold such pre-meetings on an irregular basis (‘sometimes’ or ‘rarely’) while only a minority (5 per cent) ‘never’ meet to prepare their action at board meetings. SE respondents follow the same pattern as employee representatives on German boards with one-third codetermination. In contrast, and as expected when considering the recommendation within the German corporate governance code, which is most commonly applied by large (listed) companies, the holding of pre-meetings among board-level employee representatives in parity codetermination is much more frequent than in SEs. Almost all the respondents that sit on a German board with parity codetermination (97 per cent) meet regularly prior to board meetings. Insofar as pre-meetings involving board-level employee representatives are indicative of efforts to establish agreed positions for presentation at board meetings, the coordination between SE respondents, as well as between German respondents in one-third codetermination, appears to be weaker than in German parity codetermination, although it remains widespread.

Table 6 Are pre-meetings of board-level employee representatives held before the formal board meeting?

	SEs %	German codetermination types	
		Parity codetermination %	One-third codetermination %
Always	62	88	61
Often	14	9	13
Sometimes	5	2	8
Rarely	14	1	8
Never	5	/	10
	N=37	N=862	N=256

Notes: 'N' values correspond to the total of respondents who answered the question minus those who indicated that they were the only board-level employee representative sitting on the board.

Assessment of the coordination among board-level employee representatives can be complemented with data on the quality of their relationship, which provides information about the essence of such pre-meetings and the extent to which they may only be a formal practice empty of genuine cooperation. Respondents were asked to define their relationships with other board-level employee representatives along a cooperative to conflict-oriented scale. Results are displayed in Table 7.

Table 7 How would you describe your relationship with other board-level employee representatives?

	SEs %	German codetermination types	
		Parity codetermination %	One-third codetermination %
Very cooperative/consensual	73	66	55
Fairly cooperative/consensual	14	27	21
Intermediate	13	6	13
Fairly conflictual	/	1	1
Very conflictual	/	/	/
No relationship	/	/	10
	N=37	N=870	N=305

No fewer than 87 per cent of SE respondents define their relationship with other board-level employee representatives as being either 'very' or 'fairly' cooperative. The remaining respondents judge it as 'intermediate' while no employee representative on an SE board mentions the lack of relationship or the existence of a conflictual relationship. The relationship among board-level employee representatives is more cooperative in SE boards than in German boards with one-third codetermination where 76 per cent of board-level employee representatives define their relationship as being 'very' and 'fairly' cooperative. Results in one-third codetermination in Germany, however, have to be put into perspective against the relatively high percentage of respondents

who indicate having no relationship with their contemporaries. A bias might distort these results given that 16 per cent of employee representatives on German boards with one-third codetermination indicate that they are the only employee representative sitting on the board. In contrast, SE respondents broadly follow the same pattern as the majority of respondents in parity codetermination where 93 per cent define relationships with colleagues as ‘very’ or ‘fairly’ cooperative. The relationship between SE board-level employee representatives is more likely to be ‘very’ co-operative, however, than in parity codetermination. Compared to practices in parity codetermination the lower frequency of regular pre-meetings among employee representatives on SE boards is thus compensated by a more cooperative spirit. Coordination in SEs can be defined as being different rather than weaker. In general, the extent of the quantitative and qualitative coordination of SE board-level employee representatives is wide enough to allow the formulation of common strategies and perspectives, which increase the likelihood of the adoption of a transnational or European identity.

2.3 A European identity?

European trade unions support the view that employee representatives who sit on SE boards should defend the interests of all employees and not just those of employees in their own country. The nature of these interests is open to interpretation given that the ‘duty of loyalty’, as referred to by corporate governance scholars, is regulated in none of the legal texts that govern the SE Statute, be it the SE Regulation, the SE Directive or the German transposition laws. The legal provisions of the German AktG are no more explicit, although it is commonly agreed that board members in German companies should be loyal to the ‘interest of the company’, which is defined in the German corporate governance code as encompassing the interests of the shareholders, the employees and other stakeholders (recommendation 4.1.1). In the absence of legal constraints, SE board-level employee representatives enjoy considerable room for manoeuvre in defining their priorities. Provided that they adhere to the view of European trade unions, SE board-level employee representatives are more likely than their domestic counterparts to prioritise the interest of all SE employees and, therefore, pay more attention to the interests of employees from countries other than the home country. Another scenario observed in the context of EWCs is that representatives favour the interests of employees from their country over that of all the company employees throughout Europe (Waddington 2011). To assess this point board-level employee representatives in SEs and in Germany were asked to rank their priorities according to the interests they would defend during of international corporate restructuring. The results are presented in Table 8.

Almost all SE respondents set the defence of the interests of employees from their home country as the main priority in the event of international restructuring. SE board-level employee representatives display a national rather than a supranational outlook, contrary to the recommendation of European trade unions and comparable to the approach of EWC

representatives. Half of the SE respondents, however, ranked the interests of ‘employees from abroad’ in second and place these interests before those of the company, which are viewed as a priority by slightly more than a third of SE employee representatives. This ranking reveals that SE respondents prioritise the employees from their country, but they consider the interests of employees from other countries more important than any other interests.

Table 8 If international restructuring to improve economic performance should entail job losses, when the final decision has to be made what are your priorities?

To protect	SEs %	German codetermination types	
		Parity codetermination %	One-third codetermination %
Employees from your country	97	94	87
Employees from abroad	53	32	22
The company	37	48	54
Local labour market	13	14	11
Wider society	/	4	2
Shareholders	/	2	2
Another interest	/	/	1
	N=38	N=870	N=305

Notes: Respondents were asked to rank their answers to the question one, two, three, etc. The reasons ranked at position one and two in the ranking are reported here, hence the percentage data add up to more than 100 per cent.

Comparison with the positions of board-level employee representatives in German companies confirms that employee representatives on SE boards place a greater emphasis on the interests of employees in other countries than their domestic counterparts. Although the protection of employees in Germany is also of greatest importance to board-level employee representatives in both forms of German codetermination, it is the interest of the company that comes second in the ranking before that of employees from abroad, which is prioritised by only one-third of employee representatives on German boards with parity codetermination and one fifth of those on boards with one-third codetermination. Findings of this comparative analysis lead to the conclusion that there might not be genuine European identity among employee representatives on SE boards, but they are more European in perspective than their domestic equivalents.

To summarise, with the exception of secretarial and administrative support and to a lesser extent access to experts, resources at the disposal of employee representatives on SE boards are as extensive as those of their German counterparts operating with parity codetermination and are more wide-ranging when considering the time dimension. Furthermore, the situation of SE respondents is significantly more favourable than that of board-level employee representatives on German boards with one-third codetermination. Despite the benefit of wide-ranging resources, employee representatives on SE boards tend to hold less regular pre-meetings compared to board-level

employee representatives in German parity codetermination, and follow the same pattern as respondents in one-third codetermination. Coordination in SEs, however, is not of a lower quality than in parity codetermination insofar as internal relationships are more likely to be very cooperative. The prevalence of conditions favourable to the emergence of a collective identity, however, does not lead to a truly transnational perspective among SE board-level employee representatives, although they adopt a more Europeanised position than their domestic counterparts.

3. The coordination of institutions of employee representation in SEs

In addition to provisions that regulate employee representation on the board, the SE Directive seeks to ensure that SE workers have information and consultation rights on issues and decisions affecting the life of the company. The effectiveness of different systems of employee representations at company level depends on their coordination, which generates information flows and a collective definition of strategy (Knudsen 1995; Streeck 1995; Casey *et al.* 2016). Coordination between employee information and consultation and board-level employee representation is not legally stipulated in the SE Statute, with the exception of a minor point according to which the SE works council shall receive communications on the agenda of board meetings. The confidentiality duty imposed on each SE board member may constitute an impediment to information exchange between board-level employee representatives and members of the SE works council, and may lead to the two groups of representatives conducting their mandates in isolation. Coordination might nevertheless take place when board-level employee representatives are also members of the SE works council or invited to its meetings as guests, which tends to be a common practice according to the findings of previous empirical studies (Rehfeldt *et al.* 2011). Two contrasting situations may be identified in practice: one in which no coordination prevails in the absence of communication and information exchange between employee representatives on the SE board and members of the SE works council; and a second in which the confidentiality duty is handled in such a way that it does not prevent the coordination of the different representative institutions. An assessment of these two situations is at the core of this section, which initially focuses on the manner in which SE board-level employee representatives cope with the confidentiality constraint before turning to the question of their potential holding of a simultaneous mandate in the SE works council.

3.1 Interpreting the confidentiality duty

The SE Directive stipulates that members of the SE works council ‘are not authorised to reveal any information which has been given to them in confidence’ (Art. 8 (1)). The corresponding German transposition law, however, specifies that this duty of confidentiality, which is incumbent on members of the SE works council, does not concern their relationship with employee representatives on the SE board (Art. 41 (3) of the SE-Beteiligungsgesetz, hereafter, SEBG). SE works council members are thus allowed to pass information to SE board-level employee representatives. In contrast, information transmission in the other direction is limited as a

consequence of the duty of confidentiality of board members, which prevents them from divulging ‘any information which they have concerning the SE the disclosure of which might be prejudicial to the company’s interests, except where such disclosure is required or permitted under national law provisions applicable to public limited-liability companies or is in the public interest’ (Art. 49 of the SE Regulation). In addition, the SE Directive contains a provision which precludes the SE board from transmitting information to the SE works council in the event that the disclosure of such sensitive information, which is defined as trade or business secrets in the German transposition law (Art. 41 (1) SEBG), ‘would seriously harm the functioning of the SE (or, as the case may be, the participating company) or its subsidiaries and establishments or would be prejudicial to them’ (Art. 8 (2) of the SE Directive). These two legal provisions, therefore, limit the information flow from SE board-level employee representatives to members of the SE works council.

The domestic German context is not more favourable insofar as members of the supervisory board of a German public limited company, employee representatives included, shall not disclose confidential information or trade and business secrets, which have become known to them as a result of their membership to the board (Art. 93 (1) AktG). Moreover, ‘the supervisory board members are bound to maintain confidentiality as to confidential reports received or confidential consultations’ (Art. 116 AktG). In each instance, therefore, be it an SE or a German company, board-level employee representatives enjoy limited room for manoeuvre in exchanging information with other institutions of labour representation within the company. The existence of a second limitation in the case of SEs might imply that employee representatives on SE boards interpret their confidentiality duty in a much more demanding fashion than their domestic counterparts in Germany.

The upper panel of Table 9 reports the views of respondents on confidentiality, while the lower panel presents their views regarding documents with a specific subject matter. Reference to the SE data on general documents confirms that employee representatives on SE boards apply a strict interpretation of their confidentiality duty with almost three-quarters of them treating documents marked confidential as such, and only a small minority (3 per cent) considering that no document is confidential. They do not over-interpret confidentiality rules, however, as only slightly less than a fifth consider every document to be confidential. The position of SE respondents with regard to the confidentiality of documents is broadly similar to that of their counterparts on German codetermined boards. Employee representatives on German boards with one-third codetermination, however, are more likely to treat every document as confidential. The most significant variation is that relating to the interpretation of the confidentiality of documents marked confidential, which is far more closely observed by SE respondents than by German board-level employee representatives, almost half of whom assume some leeway in assessing the status ‘confidential’. Such a finding may imply that the coordination of action between employee representatives on SE boards and the SE works council are more limited than the corresponding practice at the national level.

Table 9 What is defined as confidential and non-communicable regarding the affairs of the board?

	SEs %	German codetermination types	
		Parity codetermination %	One-third codetermination %
Documents marked confidential	71	54	49
Every document	18	17	29
No document is confidential	3	3	6
Information about the strategic plan of senior management	61	56	45
Information about the budget/financial circumstances of the company	42	38	28
Information about investment budgets	40	26	19
	N=38	N=870	N=305

Notes: Respondents could tick more than one box for this question hence the sum of the percentage data is more than 100 per cent.

Turning to the specific documents mentioned in the lower panel of Table 9 reveals a clear hierarchy of respect for confidentiality from SE respondents with ‘information about the strategic plan of senior management’ much more likely to be respected than ‘information about the budget/financial circumstances of the company’, which, in turn, is more likely to be respected than ‘information about investment budgets’. Respondents sitting on German codetermined boards display exactly the same rank order. Marked variations are noted, however, when examining the proportion of respondents who treat each of the specific documents as confidential. In particular, employee representatives on SE boards are significantly more likely to treat information about senior management’s strategic plan and about the company’s financial situation as confidential than their counterparts in German boards with one-third codetermination. Employee representatives on SE boards are also more likely to consider that information about investment budgets as confidential than their German counterparts in parity and one-third codetermination. The overall picture is, therefore, one of a much stricter observance of the confidentiality rules by employee representatives on SE boards than by their counterparts in Germany. The twofold constraint put on information disclosure by SE board members seems to have limited the transfer of German practices with regard to the leeway in interpreting the confidentiality duty especially when it comes to documents marked confidential and information about investment budgets.

3.2 Membership of the works council

No legal measure that regulates SEs, German companies or codetermination prevents board-level employee representatives from simultaneously being members of the works council. In practice, the great majority (73 per cent) of employee representatives on the board of a company in ‘Germanic’ countries (Germany and Austria) are also member of the works council (Waddington and Conchon 2016: 83). Case studies conducted by Rehfeldt *et al.* (2011)

revealed a similar pattern in SEs insofar as board-level employee representatives are also members of the SE works council in the majority of SEs. Despite the strict interpretation of their confidentiality duty, coordination of the actions of SE board-level employee representatives with those of the SE works council would be fostered by simultaneous membership of the two institutions as is the case in German industrial relations.

Table 10 shows that 18 per cent of SE respondents hold no other representative mandate in the company, a proportion which is comparable to that of respondents in German parity codetermination, but higher than that of employee representatives on German boards with one-third codetermination. Similarly to German parity codetermination, results related to SE respondents have to be put into perspective as some employee representatives on SE board are German external trade union officers with no link to the company other than their board seat. The first three items in Table 10, relating to membership of national-level and transnational works councils, show that SE respondents are more likely to be members of the national-level works council than of the SE works council although the proportions of respondents reporting this situation do not differ markedly. Furthermore, for board-level employee representatives of SEs simultaneous membership of the SE works council is more common than simultaneous membership of the national-level group works council. Inter-linkages between the two SE representative institutions exist in the majority of cases thanks to the multiple mandates of board-level employee representatives. This practice might well be considered as having been transferred from the German system of industrial relations insofar as a significant majority of employee representatives on German boards, and, more particularly, on German boards with one-third codetermination, are concurrently members of the national-level works council. The holding of multiple mandates by SE board-level employee representatives further contributes to their Europeanisation, especially compared to their domestic counterparts, only a minority whom hold a representative position on a transnational works council.

Table 10 also reveals the extent to which board-level employee representatives hold multiple mandates. Using the sum of the percentage data and subtracting responses to the item 'none' generates a proxy measure of the multiplicity of mandates board-level employee representatives currently hold. This approach reveals that SE respondents are members of 2.3 other representative institutions on average compared to a corresponding score of 1.8 for employee representatives on German boards with parity codetermination and 2.0 in one-third codetermination. Difficulties related to the coordination of the various institutions of labour representation within the company, therefore, may be only marginal in the case of SEs, notwithstanding the possibility for board-level employee representatives to be guest members of the SE works council when not a full member.

Table 10 As well as serving on the board, do you hold any other representative positions within the company?

	SEs %	German codetermination types	
		Parity codetermination %	One-third codetermination %
Member of the works council ¹	68	63	87
Member of the EWC (SE Works council)	63	5	15
Member of the group works council	53	/	53
Shop steward, union representative	24	22	38
Health and safety representative	11	51	7
Staff representative	8	37	/
Other	8	4	4
None	18	22	9
	N=38	N=870	N=305

Notes:

Respondents could tick more than one box for this question hence the sum of the percentage data is more than 100 per cent.

1. Responses to the item 'Member of the works council' integrate responses to the German-specific items 'Members of the young workers' and trainees' representative body'.

In summary, the stricter interpretation that SE board-level employee representatives have of their confidentiality duty may partially impede their coordination with other employee representatives in the SE works council of which they generally are a member. These findings do not exclude the possibility of extreme cases in which not a single board member from the employee side has connections with the SE works council. This does not seem, however, to be the prevalent practice.

4. Power or influence of board-level employee representatives on SEs boards?

The preceding sections demonstrate that the main requirements are in place for a high intensity of participation among board-level employee representatives in SEs. On average, the agenda of SE boards, which usually meet quarterly, is wide-ranging. Half of SE respondents regularly meet with senior management prior to official board meetings and almost half of them sit on the audit committee, which is often established. With the exception of administrative support, employee representatives on SE boards are well resourced. There are certainly sufficient resources to allow SE board-level employee representatives to coordinate their activities with other employee representatives and institutions of labour representation. Although SE board-level employee representatives comply with their confidentiality duty more strictly than their German counterparts, this does not prevent them from having close connections with the SE works council of which they are often full members. Against this background, SE board-level employee representatives are expected to be in a position to influence strategic decisions made at the board. For this to be the case, however, three other conditions need to be met: good quality of information received for the purpose of making informed decisions at the board; the possibility and actual practice of making interventions at the board; and the reality of board meetings as genuine locus of strategic decision-making. Each of these points is examined in the next three sub-sections before a fourth reports the assessments of respondents on their degree of participation.

4.1 Quality of information related to the agenda of the board

The legal texts that regulate the SE Statute (SE Directive, SE Regulation and the respective transposition laws in Germany) do not address the issue of the quality of information transmitted to board members for the purpose of decision-making. The AktG that applies to German companies also contains no provision to ensure that the information will be of a sufficient quality. The only mention of what is a concern common to all board members is to be found in the German corporate governance code, which specifies that ‘informing the supervisory board is the responsibility of the management board. Nevertheless, the supervisory board must itself ensure that it obtains sufficient information’ (recommendation 3.4). Provided that large German companies, which customarily comply with the corporate governance code, apply such a recommendation, the quality of information at the disposal of board members,

employee representatives included, is expected to be higher in the German parity codetermination than in SEs. Table 11 examines this proposition.

Table 11 Do you think that information received for board meeting is sufficient for the purpose of making a decision?

	SEs %	German codetermination types	
		Parity codetermination %	One-third codetermination %
Always	32	21	26
Often	42	55	52
Sometimes	21	17	13
Rarely	/	6	8
Never	5	1	1
	N=38	N=866	N=304

Table 11 shows that almost one-third of employee representatives on SE boards ‘always’ receive sufficient information for board meetings. When combining ‘always’ and ‘often’ responses, a significant majority of SE respondents (74 per cent) report that they receive information of a good quality on a regular basis. Only 5 per cent report that they ‘never’ receive sufficient information for the purpose of making an informed decision, suggesting that a small minority of SE respondents are excluded from participating meaningfully in board meetings. The global comparison of responses from SE board-level employee representatives with those of their domestic counterparts in Germany reveals identical patterns insofar as only a small minority of respondents on a German codetermined board ‘never’ or ‘rarely’ receive sufficient information, whereas a slightly more than three-quarters of them declare benefiting from a good quality information on a regular basis: that is, either ‘always’ or ‘often’. A more detailed analysis shows that employee representatives on SE boards are in a better position than employee representatives on German boards with parity codetermination in ‘always’ receiving sufficient information (SE respondents 32 per cent; parity codetermination, 21 per cent).

4.2 Employee representatives’ intervention at the board

Within the framework of this research, seven strategic interventions that employee representatives may make at the board are considered: requiring a topic to be included on the board’s agenda; requiring a report on company affairs; calling an extraordinary board meeting or an extraordinary general meeting of shareholders; delaying a board decision; preventing a board decision to be made; preventing the implementation of a board decision. Legal provisions related to the SE Statute and to German public limited companies are both silent with regard to the three latter interventions relevant to the

politics of board-level employee representation. The convening of general meetings of shareholders is not an individual right of board members, but a collegial right of the entire supervisory board or board of directors, both in the SE Statute (Art. 54 (2) of the SE Regulation) and German company law (Art. 111 (3) AktG). Board-level employee representatives do not have the *de jure* possibility of calling an extraordinary shareholder meeting. Whereas the SE Regulation contains no provision on the ability of board members to convene a board meeting, the German transposition law specifies that any member of the board of directors of a German-based SE may require the Chair to convene the board (Art. 37 (1) SEAG). Individual members of the supervisory board of a German-based SE are thus also entitled to do the same. This is consistent with German company law, which grants each board member the same right (Art. 110 (1) AktG).

Although the capacity of each individual board member to require the inclusion of a topic on the agenda of the board is not explicitly regulated in German company law, national lawyers infer from the individual right that board members have to call a board meeting that they can also require a change in the agenda of the board meeting (Köstler *et al.* 2013). Such an interpretation, therefore, may apply to the situation of German-based SEs. Finally, the SE Regulation states that ‘the supervisory organ may require the management organ to provide information of any kind which it needs to exercise supervision in accordance with Article 40(1). A Member State may provide that each member of the supervisory organ also be entitled to this facility’ (Art. 41 (3)). The German legislator took advantage of this opportunity to specify that each individual member of the supervisory board of a German-based SE can request further information (Art. 18 SEAG), thus ensuring a consistency between transnational and national regulations, according to which individual supervisory board member of a German public limited company can request from the management board a report on company affairs (Art. 90 (3) AktG). From the seven potential interventions considered in the survey, two are legally defined as a right of individual board member in German-based SEs and German public limited companies (calling a board meeting, requesting a report on company affairs), hence these interventions are also available to SE board-level employee representatives. The ability to require a topic to be included on the agenda of the board remains a matter of legal interpretation. Board-level employee representatives in German-based SEs and in German companies, therefore, are on an equal footing with regards to the way their potential interventions at the board are regulated. This suggests that their action and degree of intervention will be comparable. Table 12 examines this situation.

Table 12 shows that a significant proportion of SE respondents report ‘I do not have the possibility to do so’ on only two items: calling an extraordinary shareholder meeting and preventing the implementation of a board decision. Results linked to ‘calling an extraordinary shareholder meeting’ reflect the aforementioned absence of an individual right for board members to call a general meeting of shareholders. Results linked to ‘preventing the implementation of a board decision’ could be attributed to the specificities of the dual system of corporate governance in which implementation of a board

Table 12 Interventions made by board-level employee representatives at the board

Have you?	SEs N=38		German codetermination types				
			Parity codetermination N=799-839		One-third codetermination N=295-302		
	Yes %	No %	Yes %	I do not have the possibility to do so %	Yes %	No %	
Required a topic to be included on the board's agenda	66	34	82	18	73	26	1
Requested a report on company affairs	66	34	70	30	70	29	1
Delayed a board decision	50	45	70	29	46	50	4
Prevented a decision to be made by the board (e.g.: when unanimity is required)	24	68	33	60	18	72	10
Prevented a board decision from being implemented	18	69	22	70	16	73	11
Called an extraordinary board meeting	13	82	36	61	16	81	3
Called an extraordinary shareholder meeting	5	74	2	81	1	81	18

Note: respondents were asked to indicate 'yes', 'no' or 'I do not have the possibility to do so'. The sum of the figures for each intervention is thus 100 per cent.

decision is not a duty of the supervisory board but of the management board. As expected, no variation is apparent with results from German respondents in relation to the interventions board-level employee representatives do not have the possibility to make. The two most common interventions made by SE respondents require a topic to be included on the board's agenda and request a report on company affairs. Two-thirds of employee representatives on SE boards state that they have made these interventions. The third most common practice is that of delaying a board decision, which is reported by half of the SE respondents. Almost a quarter of the SE respondents also report having prevented the board from making a decision. In contrast, less than a fifth prevented a board decision from being implemented, called an extraordinary board meeting or a general meeting of shareholders. Although the two most common interventions of SE board-level employee representatives are not strategic, they are indicative of their active position on the board. Furthermore, as a half of SE respondents have played a role in modifying the decision-making process and a quarter have prevented the board from making a decision, it is clear that SE respondents exert a certain degree of influence at the board.

SE board-level employee representatives intervene at the board similarly to their German counterparts on boards with one-third codetermination (see Table 12). In contrast, board-level employee representatives in German parity codetermination are more active on several counts than their counterparts on SE boards. Employee representatives on German boards with parity codetermination are much more likely than their counterparts in SEs to require a topic to be included on the agenda of board meetings (82 per cent compared to 66 per cent), to delay a board decision (70 per cent compared to 50 per cent), to call an extraordinary board meeting (36 per cent compared to 13 per cent) and to prevent a board decision from being made (33 per cent compared to 24 per cent). These variations are emphasised by looking at the average number or type of intervention respondents made at the board, which is addressed by using the sum of the percentage data as a proxy measure. On average, SE respondents made 2.4 different types of interventions at the board, a result which is exactly the same as that of German respondents in one-third codetermination and lower than that of employee representatives on German boards with parity codetermination (3.1). Although employee representatives on SE boards cannot be said to be passive, they follow the degree of interventionism displayed by their German counterparts in one-third codetermination rather than the more active role undertaken by their counterparts in parity codetermination.

4.3 The locus of real decision-making

Employee representatives have the prerequisites for a high intensity of participation in board decisions and intervene actively at the board. These basic conditions for influence can be bypassed, however, if strategic decisions are made outside of the boardroom in confidential meetings from which employee representatives are excluded. The shift of the locus of strategic decision making

from the board to informal meetings from which employee representatives are excluded has been identified as one of the main practices implemented by management and/or shareholders opposed to board level-employee representation (Batstone *et al.* 1983). Table 13 examines respondents' views as to where the main board decisions are made and whether they are party to these decisions.

Table 13 In your view, where are the main decisions on board-level issues really made?

	SEs %	German codetermination types	
		Parity codetermination %	One-third codetermination %
During board meetings	33	32	33
During meetings outside the board involving shareholders	22	27	28
During meetings outside the board excluding BLERs	20	17	30
During meetings outside the board involving BLERs	11	12	4
During sub-committee meetings	8	10	3
During meetings outside the board excluding shareholders	6	2	2
	N=36	N=849	N=300

Note: respondents were asked to tick only one box hence the sum of percentages is 100.

Table 13 shows that only a third of SE board-level employee representatives think that major decisions are made at formal meetings of the full board. Assuming that employee representatives attend meetings of the board, sub-committees, and, by definition, informal meetings 'outside of the board involving board-level employee representatives', the survey results suggest that between 52 per cent and 80 per cent of SE respondents are engaged in strategic decision-making.¹⁵ In contrast, only 6 per cent of employee representatives on SE board think that strategic decisions are made during informal meetings outside of the board from which shareholder representatives are excluded. Although strategic decisions tend to be taken outside of formal board meetings, employee representatives are not totally excluded from the decision-making process insofar as a majority of them, between a half and four fifths, participate in board meetings, meetings of the sub-committees and some informal meetings outside of the board. A similar minority of one-third of employee representatives on the two forms of German boards think that strategic

15. The range of attendance of board level representatives at meetings where the main decisions are made is calculated as follows. The minimum figure in the range is calculated by summing the proportion of respondents that cited 'during board meetings', 'during meetings outside the board involving employee representatives' and 'during sub-committee meetings'. The maximum figure is calculated by subtracting the proportion of respondents that mentioned 'during meetings outside of the board excluding employee representatives' from 100 per cent.

decisions are made during board meetings. SE respondents follow the same pattern as respondents located in German parity codetermination insofar as the range of employee representatives' attendance at formal and informal meetings where board-related decisions are made is comparable: 54-83 per cent in parity codetermination. In contrast, participation of SE board-level employee representatives in formal and informal meetings where strategic decisions are taken is higher than that of their counterparts in one-third codetermination in Germany who attend between 40 per cent and 70 per cent of such meetings. These findings are consistent with the argument that the running of SE boards is comparable to that of parity codetermination German boards.

4.4 Influence or power of board-level employee representatives?

It is apparent from the analyses conducted throughout this Working Paper that the pattern of board-level employee representation in SEs is not a pure replication of that of German parity codetermination or that of one-third codetermination. SE boards and their employee representatives borrow practices from the two systems of codetermination. Elements of this last section illustrate this statement. The manner in which SE board-level employee representatives intervene at the board is comparable to that of their counterparts in one-third codetermination, whereas the proportion of employee representatives on SE boards who participate at the real locus of decision-making is similar to the situation in parity codetermination. A final question, central to the practice of employee participation in strategic decision-making derives from these observations: which pattern do employee representatives on SE boards follow regarding the exercise of influence or power over board decisions? Are SE employee representatives in a position similar to the more powerful board-level employee representatives in parity codetermination or is their situation more aligned that that of the less powerful employee representatives in one-third codetermination?

By applying an accepted conceptual framework, this sub-section answers these questions regarding SE board-level employee representatives (Waddington and Conchon 2015, 2016). In applying this conceptual framework a distinction is drawn between 'partial participation', 'full participation' and 'control'. In partial participation employee representatives are limited to exerting an *influence* over board decisions in that they are either 'informed' or 'consulted' on the decision to be made, but the final decision rests solely in the hands of management. In contrast, full participation refers to a situation of joint decision-making that allows employee representatives to exert *power* and to ensure that their preferences are incorporated into the final decision. Joint decision-making is operationalised by reference to 'discussing matters until a shared position is reached' or by 'co-managing the company'. A third situation is one of a 'control' by employee representatives who have the capacity to reject, refine or accept management initiatives. It is anticipated that this situation

would be more common in dual systems of corporate governance in which the supervisory board oversees the activities of the management board. Table 14 presents the survey results in the form of a continuum of involvement in ascending order of influence (captured by the items ‘are informed, but have little opportunity to discuss matters’ and ‘are consulted, but the final decision rests with other board members’), control (‘control the management through supervision’) and power (‘discuss matters with other board members until a shared position is reached’ and ‘co-manage the company by participating in the preparation of decisions’) afforded to board-level employee representatives.

Table 14 Regarding the actual practices of the board, do you think that you...?

	SEs %	German codetermination types	
		Parity codetermination %	One-third codetermination %
Co-manage the company by participating in the preparation of decisions	11	14	10
Discuss matters with other board members until a shared position is reached	13	18	12
Control the management through supervision	21	34	24
Are consulted, but the final decision rests with other board members	39	23	39
Are informed, but have little opportunity to discuss matters	16	11	15
	N=38	N=855	N=300

Note: respondents were asked to tick only one box hence the sum of percentages is 100.

More than half of the SE board-level employee representatives (55 per cent) think that they are in a situation of influence in so far as they are either ‘informed’ or ‘consulted’ on board decisions. Almost one quarter (24 per cent) define their position as being a powerful one of joint decision-making in which they either ‘co-manage the company’ or ‘discuss matters until a shared position is reached’. Although the great majority of SE respondents sit on a supervisory board, only about one fifth (21 per cent) indicate that they ‘control the management through supervision’. The picture in SEs is clear-cut in that a majority of board-level employee representatives (76 per cent) do not define their capacity of action as exerting power over board decisions. SE respondents follow a pattern that is similar to that of employee representatives on German boards with one-third codetermination. When defining their position at the board, more than half of the board-level employee representatives in one-third codetermination (54 per cent) think that they exert an influence, 22 per cent exert power and 24 per cent refer to control. Assessment of both the SE respondents and respondents in one-third codetermination sharply contrast with that of parity codetermination. Respondents who sit on parity codetermination German boards are evenly distributed over the three situations with one-third (34 per cent) mentioning that they influence board

decisions, another third (32 per cent) exert power over board decisions and a third (34 per cent) control management through supervision. Compared to their counterparts in SEs, employee representatives on German boards with parity codetermination are less prone to think that they are 'consulted' and more likely to consider that they control senior management decisions. Although a majority of respondents in parity codetermination (68 per cent) also define their situation as not being one of power over board decisions, the proportion of those who do (32 per cent) is significantly higher than in SEs (24 per cent).

To summarise, employee representatives on SE boards regularly receive sufficient information for the purpose of making informed decisions, which complement the adequate resources available to them. Between a half and three-quarters of SE employee representatives are engaged in the different formal and informal meetings at which board-related decisions are taken. The prerequisites for a high intensity of participation are met, a point translated into practice in the form of the variety of interventions made at the board. No fewer than half of SE respondents mention that they managed to delay a board decision and close to a quarter state that they prevented a board decision from being made. Comparatively though, employee representatives on German boards with parity codetermination tend to be more active than their counterparts in SEs, which may explain the observed variations in terms of influence and power. Another explanation for this differentiated assessment of their degree of involvement in board decision-making may lie in the perception board-level employee representatives have of the quality of their relationship with senior management. The first section of this Working Paper demonstrated that the quantity of interaction with senior management on the occasion of meetings taking place prior to full board meetings is equivalent in SEs and in German parity codetermination. The perception of the quality of such a relationship, however, differs to the extent that 63 per cent of SE respondents strongly agree and agree with the statement that 'senior managers view me as a skilled partner' compared to 73 per cent of employee representatives on German boards with parity codetermination. As was previously mentioned, at least 10 of the 38 SE respondents are not German but come from countries where board-level employee representation is unknown (United Kingdom, Italy) where dual systems of corporate governance are unknown or marginal (United Kingdom, Italy, France), which may explain the lower proportion of SE respondents who report 'controlling the management through supervision'; and from countries where industrial relations are of a more adversarial nature (France and central and eastern European countries represented in the population of SE respondents by Czechia, Hungary and Poland), hence a potentially distorted perception of their involvement in board decisions. Although the actual influence of SE board-level employee representatives might remain identical to that in force prior to the adoption of the SE Statute, the group view on this influence might differ because of the integration of new perceptions from individuals who are not accustomed to practices applied in German parity codetermination.

Conclusions

This Working Paper contributes to the existing set of empirical studies conducted on SEs by presenting first-hand knowledge on the functioning of SE boards and board-level employee representation. It is apparent from answers provided by 38 employee representatives on SE boards that the requirements for a high intensity of participation in strategic decision-making are in place in most cases. The agenda of the board is wide-ranging, with financial and organisational matters that have potential implications for SE employees frequently discussed at the board. SE boards are active insofar as board meetings take place quarterly and are preceded in half of the cases by a meeting between senior management and employee representatives. The great majority of SE boards have established at least one sub-committee. Audit committees are the most frequently established and board-level employee representatives usually have a position on such committees. Comprehensive resources (in terms of reimbursement of travel expenses; communication facilities; training; director's fee; liability or legal aid insurance; and, to a less extent, access to experts) are available to SE board-level employee representatives who, on average, spend two working days per month on fulfilling their board duties. The holding of pre-meetings among board-level employee representatives is a common practice in SEs and adds to the general context of cooperative relationships. Although coordination between employee representatives on SE boards does not result in them adopting a genuine transnational identity, defence of the interests of employees from countries other than their home country comes second among their priorities in the event of an international restructuring, after the interest of employees from their home countries, but before those of the company.

SE board-level employee representatives interpret and comply with their confidentiality duty in a very strict manner. This would have constituted a significant impediment to their coordination with members of the SE works council had not two-thirds of SE respondents simultaneously been members of the SE works council. A great majority of employee representatives on SE boards report regularly receiving sufficient information for the purpose of making informed board decisions. They are active board members insofar as SE respondents made 2.4 different types of intervention at the board. These interventions are of a meaningful nature as they impact board's decision-making process, illustrated by the finding that half of SE board-level employee representatives report having managed to delay a board decision, while a quarter managed to prevent a board-related decision from being made. In most cases the board is not the real location of strategic decision-making. A majority of SE board-level employee representatives, however, are engaged in both

formal and informal meetings at which board-related decisions are made. Despite favourable conditions and the activism of employee representatives, only one quarter of respondents define themselves as having power over board decisions, while half think that their interventions are restricted to influencing board decisions. Such an assessment might have less to do with the actual power or influence of SE board-level employee representatives than with the fact that some SE employee representatives come from countries with no or low standards of board-level employee representation compared to the German situation.

Besides identifying how SE boards operate and the activities undertaken by SE employee representatives, this Working Paper provides material for answering our initial question: namely, is board-level employee representation in SEs specific or a mere extension of national institutions and practices? The vast majority of respondents (82 per cent) sit on the board of a German-based SE, sit on a supervisory board (84 per cent) and, albeit in lower numbers, sit on an SE board comprising 50 per cent employee representatives (58 per cent). Evidence presented throughout this Working Paper suggest that SE board-level employee representation is not an extension of national institutions and practice, but is specific because it displays its own features, as well as sharing features with either German parity codetermination or one-third codetermination. Some commonalities between board-level employee representation in SEs and in the German parity codetermination have been identified. The two systems have in common a wide-ranging agenda of the board, a quarterly frequency of board meetings, a high rate of pre-meetings between senior management and board-level employee representatives, the establishment of at least one sub-committee, a comparable degree of cooperative relationships among employee representatives, as well as a similar engagement of board-level employee representatives in the real locus of strategic decision-making both inside and outside the formal board meetings. On some variables, board-level employee representation in SEs also looks very similar to that of German one-third codetermination. The agenda of the board is wide-ranging in both cases, similar numbers of pre-meetings amongst board-level employee representatives are held, the activism of employee representatives at the board is very similar, as is their perceived degree of influence over board decisions. On several variables, board-level employee representation in SEs displays a unique pattern, different from both German parity and one-third codetermination. Some financial and organisational topics are more frequently discussed at SE boards than in German codetermined boards, with the exception of the employment situation, which is more likely to be discussed at German boards with parity codetermination. SE boards are much more likely than German codetermined boards to have an audit committee. SE board-level employee representatives are more likely than their German counterparts to be excluded from the nomination and investment committees where they exist. Employee representatives on SE boards benefit from wide-ranging resources, but have a more limited access to experts and secretarial support than their German counterparts. SE board-level employee representatives devote more time to their board duties than their German counterparts. SE respondents also interpret their duty of confidentiality more

strictly than any of the respondents from Germany. SE board-level employee representatives are more likely to hold at least two other representative positions within the company and to 'always' receive sufficient information for the preparation of board meetings than their German counterparts. In addition, and in relation to the Europeanised composition of SE boards, SE board-level employee representatives appear to be much more Europeanised than their domestic counterparts as they put a greater emphasis on defending the interests of employees from countries other than their own and are much more likely to sit on a transnational representative institution, the SE works council. Against this background, therefore, board-level employee representation in SEs should be regarded as specific, as it is not a mere international extension of the German codetermination, but is rather at the 'intersection of country-specific and transnational influences' as argued by Marginson (2000: 27) with regard to EWCs.

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List of abbreviations

AktG	Aktiengesetz (German law on public-limited liability companies)
Art.	Article
BLERs	Board-level employee representatives
ECDB	European Company DataBase
EEA	European Economic Area
ETUC	European Trade Union Confederation
ETUI	European Trade Union Institute
EWC	European Works Council
EWPCC	European Worker Participation Competence Centre
SE(s)	Societas Europaea (European Company)
SEAG	SE-Ausführungsgesetz (German transposition law of the SE Regulation)
SEBG	SE-Beteiligungsgesetz (German transposition law of the SE Directive)
SNB	Special Negotiation Body

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