

Employee involvement in companies under the European Company Statute (ECS)

Case study: Fresenius SE

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Introductory remarks

The case study report on Fresenius SE is based on interviews conducted in February and March 2010. The report focuses on employee involvement in a company under the European Company Statute.

In May 2010, the Fresenius SE shareholders approved the conversion of all preference shares into ordinary shares, which was accompanied by a change of the company's legal form into a partnership limited by shares (*Kommanditgesellschaft auf Aktien*, KGaA). The general partner of the partnership limited by shares (KGaA) will be the Fresenius management SE. The change of legal form and the share conversion was expected in and around the second half of 2010.¹

Profile of the company and the nature of social dialogue

General information on the company and the SE

In July 2007, Fresenius AG (a public company) was the fourth German company with a two-tier corporate governance structure to become a European Company (*Societas Europaea*, SE).² Fresenius is a globally operating provider of health care products and services, with about 130,000 employees in approximately 100 countries.³ With its headquarters in Bad Homburg, Germany, Fresenius employs around 64,000 people in 23 countries of the EU.

The company's growth was accompanied by several changes in its legal form, starting with the company being led by a single entrepreneur, transformed into a limited liability company and then to a partnership company. In 1986 Fresenius was listed as a public company, with a workforce at the time of 2,100. In recent years Fresenius has had a remarkable international business expansion through the acquisition of companies operating in the health care sector. The Fresenius product portfolio covers products and services mainly for dialysis, for hospital operations, engineering and facilities for the medical care of patients at home. Currently the group has four separate business segments, each of which is responsible for its own business operations.⁴

- Fresenius Medical Care offers pharmaceutical products with a focus on dialysis products and therapies for chronic kidney failure patients (71,617 employees).
- Fresenius Kabi provides infusion therapy and clinical nutrition for patients inside and outside the hospital (21,872 employees).
- Fresenius Helios is part of the group since the acquisition of the German hospital operator Helios Kliniken in 2005 (currently 62 hospitals, 33,364 employees).
- Fresenius Vamed operates in the project and management of health care facilities, inclusive of hospitals, health care centres, spas and wellness centres (2,849 employees).

¹ See: Fresenius SE Press release, May 12, 2010.
<http://www.fresenius.de/internet/fag/com/faginpub.nsf/Content/P-Info+2010+05+12>.

² Only three companies (normal SEs) with headquarter in Germany adapted the SE legal form before Fresenius: MAN SE, Allianz SE and Hager SE.

³ See: Annual report 2009, pp. 69 or Fresenius website (as of April 2010)
<http://www.fresenius.de/internet/fag/com/faginpub.nsf/Content/The+Health+Care+Group>.

⁴ In addition, there are Fresenius Netcare and Fresenius Biotech with approximately 800 employees.

Distribution of workforce by country

At the end of 2009, the Fresenius group had 130,510 employees worldwide of which 40,416 were based in Germany. A total of 49% of the employees are in the EU or the European Economic Area (EEA), 34% are in North America, 9% in Latin America or other regions, while 8% are in the Asia-Pacific area. In all, 69% of the workforce are employed in foreign companies belonging to Fresenius outside of Germany.

The composition of the higher level management boards at Fresenius show a certain degree of internationalisation (rather than Europeanisation). The Fresenius SE management board represents three countries at the highest level of management. The degree of internationalisation is even higher in several management boards or supervisory boards of companies within the Fresenius group. For example Fresenius Kabi or Fresenius Medical Care AG and CO KGaA have an equal presentation of American and German members on their supervisory boards. In total, eight nationalities are present in Fresenius management boards.

A management representative emphasised this distinctive and comparably high level of Europeanisation as one indicator Fresenius being a European company rather than a German AG (also in regard to reasons for converting the company into an SE).

The conversion into an SE: driving forces and motivation

The Fresenius AG management board published a conversion report in 2006 with explanations and reasons for the economic and legal aspects of the planned conversion of Fresenius AG into an SE in 2006. According to its conversion report⁵ the adaptation of the new legal form was part of the broader company strategy and complied with the increasing internationalisation of the Fresenius group. Fresenius SE mentioned two principal reasons for converting the company into an SE.

The first is the company's strong European and international business involvement. The previous legal form was a German stock corporation (*Fresenius AG - Aktiengesellschaft*). Taking the group's strong business activities in all EU countries, at the time with sales reaching 40% in all EU countries (22% in Germany and 18% in other EU countries in 2006) into account, Fresenius chose the legal form of an SE to emphasise its European and international orientation and the importance of the European and international markets. Accordingly, its previous legal form (*Aktiengesellschaft AG*) did not sufficiently reflect the group's main business activities which expanded well beyond Germany. At the time of the conversion, approximately 50% of all Fresenius employees were located in the EU and European Economic Area. Alternatives to the conversion were evaluated by the management board with the result that no option was sufficiently accommodating of the interests of the company and the shareholders: 'Prior to the change of the legal form, the management board of Fresenius AG has examined in great detail the alternatives to the proposed measure.'⁶

Fresenius stated that the SE was the only available legal form allowing stock market listing in a supranational form comparable to the German stock corporation (*Aktiengesellschaft AG*).

The second reason officially outlined by Fresenius refers to its corporate governance practices. The company stated that with the new legal form, Fresenius would be able 'to continue its high-quality and efficient corporate governance practice' and 'to maintain the number of supervisory board members to be 12'.

⁵ Conversion report Fresenius 2007.

⁶ Conversion report, p. 30.

More specifically, the conversion report claimed that the SE was ‘the only’ legal form which allows for maintaining the number of supervisory board members to be 12.⁷

As a German stock corporation, Fresenius AG was legally bound to the provisions of the German co-determination law (*MitbestG 1976*) requiring a two-tier corporate governance system with a management board and a supervisory board. The composition and size of the supervisory board corresponds to the number of employees, which in the case of Fresenius had reached a significant barrier. Since the completed acquisition of the German Helios Kliniken GmbH, the number of employees had increased to more than 29,000 in Germany, which had a direct impact on the size of the supervisory board. Consequently, ‘the supervisory board of Fresenius AG would have to be enlarged to twenty members ...’⁸ One argument presented by Fresenius on maintaining the size was the effectiveness and the highly regarded work provided by this body in the past while being restricted to 12 members only. Fresenius stressed the link between efficiency and the restricted number of seats as an essential precondition for fulfilling the duties of a supervisory board.

In addition, a management board representative highlighted that the SE supervisory board would reflect a company Europeanisation in its composition. As for the employee representatives, the six appointed members of the supervisory body would represent the interests of all employees in the EU (see section on supervisory board).

A closer consideration of the official reasons for change may lead to the assumption that there were a few underlying motives, namely the European image, involvement in European business activities and the company’s presentation as a European enterprise by adding SE to its official name. However, the determining reason, or at least an issue providing significant impact, was the need to conserve the size of the supervisory board.

In light of the German co-determination law requiring an enlargement to 20 members, employee representatives confirmed the company’s overall intention to limit the number of supervisory board members to 12. However, through the Fresenius acquisition of the Helios Kliniken another German trade union got involved. While employees of this chemical company were traditionally represented by the *Industriegewerkschaft Bergbau, Chemie, Energie* (IG BCE), hospital employees are part of the service sector and were covered by the trade union ver.di. With an enlarged supervisory board of 20 members there would have been a strong and additional presence of ver.di representatives (company and trade union) as new actors, in addition to the IG BCE representatives. The current SE supervisory board includes both ver.di and IG BCE representatives as a result of the negotiations on the SE agreement defining employee involvement.

Another general reason for adapting the legal form of an SE is often the advantage of simplified acquisition of companies in EU or EEA countries or the harmonisation and optimisation of corporate structures of a cross-border group through the SE. An example is the Allianz SE which has chosen the legal form of an SE to combine its German stock corporation Allianz AG with an Italian subsidiary (*Riunione Adriatica di Securita*, RAS), instead of the alternative complex, time- and cost-consuming process used for cross-border mergers.⁹ However, so far Fresenius has not made use of this possibility.

⁷ Conversion report Fresenius SE, pp. 30.

⁸ Fresenius conversion report, p. 29.

⁹ See: Ernst & Young: Study on the operation and the impacts of the Statute for a European Company (SE), 2009, pp. 215.

Structure and practice of social dialogue

As a German company with a two-tier corporate governance, Fresenius AG's employee representation took place through works councils and parity representation on the supervisory board according to the co-determination law (*MitbestG 1976*). There are several employee representation bodies within Fresenius. As a result of Fresenius' gradual expansion, its works council structure in Germany shows various differences. The medical care and Fresenius Kabi units which are traditionally covered by the IG BCE have a general works council (*Gesamtbetriebsrat*). According to an agreement from 2005, these units will maintain the general works council structure, refrain from establishing a central works council (*Konzernbetriebsrat*) and establish location works councils instead. The ver.di-led employee representation bodies of Helios Kliniken and Wittgensteiner Kliniken have central works councils and are not covered by this agreement.

Prior to the company's conversion to an SE, a European works council ('European Forum') was part of the tradition of employee involvement at Fresenius. This European Forum was a European works council (EWC) established before 22 September 1996 by means of a priority agreement on the basis of Article 13 of the European Works Council directive 94/45/EC. Accordingly, the European Forum was a voluntary employee representation body as an exception to the directive and hence not covered by its scope.

Interview partners described the European Forum as a much weaker body than other EWCs in regard to rights, role and work and referred to it as a voluntarily established body. According to employee representatives, the meetings were strongly dominated by the management board which set the agenda and did not provide space and time for internal communication or meetings between employee representatives. The European Forum was officially defined as a dialogue platform for employees and employer representatives.¹⁰ Another problem was the language barrier, given the fact that no interpretation was provided and the only working languages were German and English.

Since its conversion, the SE works council has 'replaced' the European Forum as the new employee representation body at the European level. In comparison, the new SE works council has gained a number of important new competences that were the subject of negotiation in the special negotiation body (SNB).

The negotiation process of employee involvement

According to the legal provisions of the SE directive, an SNB has to be established to negotiate the practical arrangements for employee involvement in the SE agreement. Given that Fresenius was one of the first companies in Germany to adopt the new legal form, there was not much first-hand experience those involved could benefit from. The members of the SNB charged with this important task were put under a certain pressure to present results within a given time frame. Within this framework, the negotiations for employee representation were to a certain extent self-regulated.

The special negotiation body: composition and nomination procedures

The Fresenius SNB was composed of 22 members appointed according to the following:¹¹ seven seats for Germany and one seat each for every European country Fresenius had undertakings in, irrespective of the number of employees. In some countries, such as Ireland or Denmark, the number of employees was low (17 and 19 respectively for Ireland and Denmark), while Austria had 2,377 in 2007. However, all of these countries were only entitled to send one delegate.

¹⁰ See: § 1 Preamble of the Fresenius agreement on the Fresenius European Employee Forum 19.09.1996.

¹¹ According to the conversion report, the SNB was supposed to have 28 seats. Not every country with Fresenius undertakings sent a delegate to the SNB.

The composition and nomination procedure was the subject of certain and mainly internal difficulties. With Germany having the greatest proportion of employees and automatically holding the majority of seats, this arrangement repeatedly caused criticism and resentment among the other country representatives who felt overwhelmed.

In addition, the nomination of the German representatives caused internal problems and was subject to power struggles between the two trade unions ver.di and IG BCE. ver.di got involved at Fresenius after the acquisition of the Helios Kliniken in 2005 (it belongs within the service sector) and at once represented three-quarters of the entire workforce in Germany. This sudden growth had an impact on power claims, personnel decisions and the distribution of seats among the German employee representatives at the SNB.¹² Interview partners stated that the new IG BCE and ver.di arrangements at Fresenius required the development of mutual trust, internal exchange of information and a specific work plan. Until that point the cooperation between the IG BCE-led central works council (GBR) and the ver.di-led KBR could only have been described as very modest. The need to establish an SNB set the actors involved under a certain pressure to enable cooperation and negotiations. One positive driver facilitating the harmonisation among the German delegates was the previous cooperation at the German federation of trade unions (DGB) between the two trade union secretaries responsible for Fresenius. It was agreed to nominate one IG BCE works council representative, four ver.di works councils and one trade union representative each for the German delegation to the SNB. Based on strategic reasons, particularly previous working experience and contacts with the management board, and as a concession to the IG BCE, the IG BCE works council representative was selected to be the chairperson of the SNB.¹³

Another example of internal nomination problems at the national level was France. Although Fresenius has a respectable number of employees in France, no representative was sent to participate in the SNB. According to an employee representative, France failed to collectively nominate a delegate for the SNB due to the very difficult relationships between the various trade unions in the French Fresenius plants.

Nomination procedures were different in each European country and this repeatedly led to problems and the spread of resentments among the SNB delegates. One related to the German practice of involving external trade union representatives in the various bodies without being employees of the company. Especially with a view to the nomination of trade union representatives to the supervisory board, this issue has been the subject of debate in the SNB. Aside from German trade union representatives, the Italian and Swedish delegates were sent directly from their trade unions (FEMCA CISL and the Swedish Chemicals and metal workers union) instead of Fresenius companies. The Italian member of the SNB is a trade union official in charge of the international department of FEMCA CISL. He was chosen because of his major experience at European level. It has also to be mentioned that it is part of CISL's strategic objectives to introduce people who have experience of board-level participation within Italian companies. In a few cases, the same people were members of the SNB and Fresenius' previous European Forum.

¹² The same problems applied to the distribution of seats for the supervisory board and SE works council.

¹³ Had the SNB successfully negotiated additional seats on an enlarged supervisory board, the IG BCE would have been directly represented as the second German trade union. There is a mutual agreement between ver.di and the IG BCE for the distribution of seats in supervisory boards of companies with the presence of both trade unions (e.g. RWE). This agreement would have also applied for Fresenius.

Preparation and first steps of work

The start-up and first meeting of the newly established SNB has been described by interview partners as stagnant, slow and difficult. Given that there was hardly any information or knowledge on the legal form of the SE, no delegate had been previously involved in a comparable negotiation process. Members of the SNB were very critical and even shared a negative position on the SE. A problem was the lack of trust between people who had never met before and who had to appear as a coherent body with strong negotiation abilities. Another serious problem and an issue decelerating the internal negotiation process was a lack of knowledge of the different systems of employee representation and collective bargaining in the various countries. The different industrial relations traditions, national backgrounds and particularly individual national interests of SNB delegates were hindering the development of a coherent negotiation position.

Preparatory work was carried out by the German delegation prior to the first meeting of the SNB, who presented a paper outlining the basic requirements for the SE agreement. During the internal negotiating procedures many of these points were rejected by the European delegates – partly because of different national objectives and partly because of the perceived German dominance. The SNB faced many internal controversies due to the different views and industrial relations traditions of its members. In regard to the negotiations, a management representative referred to the management's advantageous starting position compared to the highly heterogeneous SNB group assembling solely for the purpose of the SE negotiations.

The negotiation process

The SNB elected an executive committee as its core negotiating body. The executive committee consisted of seven members: four trade union representatives and three company representatives covering four nationalities (Sweden, Italy, Austria and Germany). Both the employee side and the management side assessed the establishment of this committee as advisable and very helpful.

A works council referred to the important asset provided by the participation of trade union secretaries and an external expert from the *Hans-Böckler Stiftung*. Their input and expertise on the entire legal framework and on other negotiations in SNBs facilitated the development of a consensus among the heterogeneous group. A trade union secretary stated that the Fresenius SNB was an extraordinary case, given that several trade union representatives and external experts were involved. He further elaborated on potential conflicts, power struggles and personnel hierarchies caused by the involvement of too many actors.

Given that Fresenius was one of the first companies to convert into an SE, the actors involved worked under the impression that they were accomplishing 'pioneer' work. The negotiation process was time consuming and included five meetings of the SNB and an additional six meetings of the executive committee within the legally binding time frame of six months. One of the non-German members of the executive committee described the need to understand the model of industrial relations in order to be able to participate in the negotiation process. In this context he particularly stressed the difficulties in getting a grip on the German legal body. According to the interviewee, this is true for all SNB members coming from countries with a completely different industrial relations tradition.

The employee side had the clear objective of negotiating additions to the standard rules provided in the German *SE-Beteiligungsgesetz (SEBG)*, which apply to the SE agreement in the case of failed negotiations. Interview partners stated that the management's main concern was to complete the negotiations with the SNB and to present an SE agreement as its final outcome. Failed negotiations could hardly have been communicated as a positive result and a justification for of the change to the new legal form. A failure would have easily been portrayed negatively by the media and the image of the company may have been damaged.

The SE agreement on employee involvement

A management representative presented the first draft of the agreement on the employee involvement in the Fresenius SE, and it served as the basis for negotiations. The SNB defined a number of core aspects as strategic priorities, which could not be agreed upon in the SE agreement.¹⁴

1. The size of the supervisory board – the SNB demanded 16 or 18 seats, but the size was restricted to 12 members.
2. The regularity of meetings of the SE works council – the SNB demanded more than one annual meeting, but only one annual meeting was negotiable.
3. The right of the SE works council to launch initiatives: the SNB demanded an expansion of this right to further areas, but the SE agreement defines a compulsory coordination on initiatives with the management.¹⁵

Aside from these three points, the SNB was unable to push through several others, but in the end succeeded in concluding 19 additional aspects as additions to the standard rules defined in the German *SE-Beteiligungsgesetz*. Among others, the following points are most relevant.¹⁶

SE works council:

- every country is represented with one member, except for Germany with seven members;
- one regular meeting per year and extraordinary meetings in the event of cross-border matters of exceptional importance to the Fresenius group;
- participation of up to two trade union representatives and up to two external or internal experts at meetings;
- establishment of an executive committee with seven members representing a minimum of four countries and at least three regular annual meetings;
- simultaneous interpretation for all languages present, translation services for documents;
- information and consultation right;
- distinctive definition of information and consultation rights in case of mass redundancies;
- right to launch initiatives.

¹⁴ This is only a selection of core points as the SNB tried to negotiate further points.

¹⁵ See SE Agreement Fresenius, part I, article 9 ‘*Initiativrechte des SE Betriebsrat und der Unternehmensleitung. [...] Der SE Betriebsrat und die Unternehmensleitung können gemeinsam innerhalb des Geltungsbereichs der Vereinbarung Initiativen zu länderübergreifenden Maßnahmen [...] ergreifen.*’

¹⁶ The SE Agreement Fresenius contains additional aspects on validity period, terms of office, dismissal protection for SE works council members and others.

Supervisory board:

- six employee representatives in the supervisory board of 12;
- election by SE works council;
- for Germany, every third employee representative has to be a trade union representative, who is not an employee of Fresenius (in practice, one trade union representative);
- deputy chairperson of the supervisory board is a employee representative.

Arbitration board:

- in the event of disputes, the parties have the right to appeal to the arbitration board;
- composition of the arbitration is according to the principle of parity with a neutral chairperson.

Costs:

- the SE agreements explicitly defines that all costs for travel and accommodation, interpretation services, language courses and further training as well as administrative support shall be provided by the company. This also covers costs for external experts.

Employee representatives emphasised that these aspects presented a significant asset for defining employee involvement in the SE. It was further stated that genuine co-determination rights or an enlargement of the supervisory board to more than 12 members could not be achieved. However, the Europeanisation of the employee side in the supervisory board by having one Italian and one Austrian in addition to four Germans has been evaluated as a very positive outcome. Also the participation of two trade union secretaries as elected members in the supervisory board is considered as an important gain. Both the management and the employee representatives involved in the negotiations have assessed the Fresenius SE agreement as very positive and have personally earned positive feedback.¹⁷

The representation body (SE works council)

The SE works council had its constitutive meeting in July 2007 at the Fresenius headquarters in Bad Homburg. According to the SE agreement, every European country may elect a delegate according to national voting provisions for the SE works council, which currently has 21 members representing 15 countries. Officially the SE works council is entitled to 29 members, but at the works council meeting in 2010, eight country representatives were absent. The following table summarises the distribution of seats of the SE works council 2010 according to the number of employees in the EEA countries and refers to the absence of country representatives.¹⁸

¹⁷ The management representative stated that several German companies have copied parts of the Fresenius SE agreement for their SE agreements. He also mentioned legal firms contacting him for consultation after the successful conclusion of the Fresenius SE agreement. Trade union representatives involved in the negotiations for this SE agreement were afterwards involved in further negotiations.

¹⁸ The SE works council is entitled to 29 seats, but eight EU and EEA countries have not sent a delegate to the SE works council.

Table 1: Overview composition of Fresenius SE works council 2010

Country	Headcount	%	Seats
Austria	1,344	3.9	1
Belgium*	100	0.2	1
Czech Republic*	2,061	3.5	1
Denmark	20	0.0	1
Estonia	38	0.1	1
Finland	24	0.0	1
France	2,407	4.0	1
Germany	40,124	67.2	7
Greece*	39	0.1	1
Ireland*	39	0.1	1
Hungary	854	1.4	1
Italy	1,441	2.4	1
Luxembourg*	4	0.0	1
Netherlands	559	0.9	1
Norway	492	0.8	1
Poland	2,236	3.7	1
Portugal*	1,394	2.3	1
Romania*	583	1.0	1
Slovakia*	414	0.7	1
Slovenia	114	0.2	1
Spain	2,245	3.8	1
Sweden	907	1.5	1
United Kingdom	1,236	2.1	1
Total	59,657	100	29

* not present

Source: SE works council representative, headcount as of end of September 2009

Germany, representing the country with the highest share of employees (40,124), holds a share of seven seats. The size of the works council and the distribution of seats follow a certain order according to which a country reaching more than 10% of the entire Fresenius workforce is entitled to a second seat. As indicated in the table, no other country has reached this percentage. In addition to elected work councils, two supervisory board members who are trade union representatives may attend the annual meetings. Currently these positions are held by a German ver.di representative and an Italian FEMCA CISL representative who both do not belong to the Fresenius workforce.

The SE works council shows a distinctive degree of Europeanisation in its composition and has established a network of European employee representatives as the official representatives of their national workforce. In contrast to the European Forum, the SE works council has gained certain competencies and acts as a self-administrated body. Two important gains are the establishment of the executive committee, composed of seven members with three regular annual meetings, and the right to launch initiatives.

Rights and areas of work

The SE works council meetings are prepared by the executive committee, and in particular its chairperson. Every meeting includes the presentation of country reports and the presentation of activities in the supervisory board. In addition, recent meetings have dealt with topics such as labour and health protection, corporate social responsibility (CSR) and a review of the situation in regard to the European development of the SE.

The SE works council has certain information and consultation rights as defined in the SE agreement covering, for example, the structure, the economic and financial situation of the group, as well as the employment situation and outlook. In the event of exceptional circumstances (e.g. transfer or relocation of undertakings or businesses, mergers), the SE works council has to be informed and consulted. Furthermore there are distinctive quantifiable regulations (scalings) in case of mass redundancies, which again require the information and consultation of the SE works council.¹⁹ So far no incident of mass redundancies at Fresenius SE has taken place.

Another important surplus falling under the SE works council competences is the right to launch initiatives in order to define guidelines on certain matters such as CSR or health and safety at work. The SE agreement states that these initiatives have to be coordinated with the management.

Also, the SE agreement stipulates the presence two of external or internal experts and two representatives of the European trade union federation at every meeting of the SE works council. Until now representatives from the European federations EMCEF and the EPSU²⁰ attended the meetings, as well as experts from the ETUI²¹ or the *Hans-Böckler Stiftung*. Given this, the SE works council may benefit from the input and expertise of several and different external actors.

The voting procedure of the SE works council is defined as twofold majority voting for five main areas:

- election of chairperson of the SE works council and the two vice chairpersons;
- election of the other four members of the executive committee;
- establishment and appointment of further committees;
- definition of terms and conditions;
- election of an employee representative to the SE supervisory board.

These decisions require a majority vote of present members and the majority of Fresenius' represented employees. One exception is the election of the supervisory board members, which requires a two-thirds majority of the present electorate as well as a two-thirds majority of the entire Fresenius workforce. All further decisions of the works council and its executive committee are subject to simple majority voting.

¹⁹ Collective redundancies are dismissals of workers in one country over a period of 30 days. The SE agreement for employee involvement at Fresenius has the following quantification defining collective redundancies: at least 50 workers (or 20%) if less than 500 workers are employed; at least 100 (or 15%) for 500 to 1000 employees; at least 150 (or 10%) for 1000 to 3,000 employees and at least 300 (or 7.5%) for 3,000 to 10,000 employees.

²⁰ European mine, chemical and energy workers' federation (EMCEF) and the European federation of Public Service Unions (EPSU)

²¹ European Trade Union Institute in Brussels (ETUI)

A particularly important function of the SE works council is its right to elect six employee representatives for the supervisory board. Given this, the employee representatives at board level are democratically elected delegates and represent the European workforce of the Fresenius SE. In this case there is an election instead of the commonly applied nomination procedure of supervisory board members. The employee and management side have mutually labelled this feature as an essential outcome of the negotiations in regard to establishing employee involvement in the SE.

Experiences of work: development and specific features

The SE works council faces a high turnover of personnel among its members. It was documented that every meeting is attended by a few new representatives participating for the first time. The fluctuation may be explained by differing voting procedures and terms of office of the European employee representatives, but it has had a challenging impact on the continuity and development of a productive working atmosphere. However, an interview partner said that in most cases personnel continuity had been provided and that results were remarkable with regard to the slow but certainly developing 'discussion culture'. He described the lively discussion at the SE works council meeting in 2010 as very positive and an indicator such a culture was possible.²²

Internally, the establishment of an open culture of discussion and exchange remains problematic. Like in the SNB, different industrial relations traditions involve a varying degree of openness and willingness to debate. While for example Austrian, Dutch and German members are used to an open culture of exchange, other members were reluctant to participate. Another feature is the lack of regular communication and exchange of information among SE works council members in between the scheduled meetings, which has been criticised by employee representatives. One of the interviewees also pointed out the difficulty of identifying and pursuing common objectives on the side of the employee representatives. The proposals to organise a training course and to try to enter into negotiations on an International Framework Agreement were initially shared but later abandoned.

Interview partners mentioned that the management board showed a different level of involvement and hence a lower interest towards the SE works council compared to the previous European Forum. Whereas the entire management board attended meetings of the European Forum, the management board has a minimal presence at the SE works council meetings. However, it was mentioned that there was consent among the European employee representatives on the qualitative gains for the SE works council in comparison to the European Forum.

Board level representation

The size and composition of the supervisory board of Fresenius SE is defined in the SE agreement resulting from the negotiations between the SNB and the management. Accordingly, its size is limited to 12 members irrespective of possible mergers and acquisitions in the future and any corresponding increase in the number of employees. Based on the principle of parity representation, the employee side is entitled to six members.

Two major differences compared to the previous Fresenius AG supervisory board are Europeanisation and the representation of the European workforce by elected employee representatives. The six members are directly elected by the SE works council. With Italian and Austrian members in the SE supervisory board, the employee side has gained a European image.

²² At the last works council meeting, the chairperson of the management board presented a report on the economic situation of Fresenius SE. There was a question-and-answer round and a discussion on strategic solutions between the management and SE works council.

Currently, the composition of the employee side of the supervisory board is:

- a German works council representative from Helios Kliniken (ver.di member), chairperson of the SE works council;
- a German works council representative from Wittgensteiner Kliniken (ver.di member), member of the SE works council;
- a German works council representative from Fresenius Kabi (IG BCE member), member of the SE works council;
- an Austrian works council representation from Vamed AG (Austrian trade union member);
- an Italian trade union secretary from FEMCA CISL, energy, fashion and chemicals;
- a German trade union secretary from ver.di, vice chairperson of the SE Fresenius supervisory board.

Table 2: *Overview of employee side representatives at supervisory board Fresenius SE*

	Country	Membership in trade union	Member in SE works council	Additional information on further offices
1	Germany	ver.di	Yes	Chairperson of SE works council
2	Germany	ver.di	Yes	
3	Germany	IG BCE	Yes	
4	Germany	ver.di	No	Vice-chairperson of SE supervisory board
5	Austria	Austrian Metalworkers Union	Yes	
6	Italy	FECA CISL	No	

Source: *author illustration according to interviews*

In addition to SE works council members this board level representation body includes two external trade union secretaries (ver.di and FEMCA CISL).

Aside from this, the core areas of the SE supervisory board’s work remain the same compared to its previous legal form of the AG. Similar topics are discussed in this body of board level representation underlying the same legal provisions as under the AG.

A trade union representative referred to one challenge which may appear as a problem. Previous internal discussions among the employee side supervisory board members have changed according to the Europeanisation of its members and present national interests, language barriers and communication problems. Also, he stressed that supervisory board members could not meet as spontaneously as before to discuss urgent matters due to distances between countries.

A supervisory board member of the employee side described the climate among the supervisory board members as very respectful and appropriate. Moreover he referred to his function as an international employee representative rather than a restrictedly European representative. Although elected by the European employee representation body (SE works council), he participated in discussions and decisions in the supervisory board of concern to the distinctive global perspectives and hence the entire global workforce of Fresenius SE. In discussions on e.g. working conditions and wages in China and Vietnam he also represents the employee side. The Italian member of the supervisory board stated that he has always been provided with the necessary translations of the working documents. Coming from a country with no tradition of board-level participation he evaluated his involvement in the context of the Fresenius SE as an extremely positive experience.

General evaluation

The case of Fresenius has outlined a number of problems and advantages of the negotiation process leading to an SE agreement on the practice of employee involvement. The SE agreement was mutually assessed as a very positive result by the employee and management representatives involved.

The Europeanisation of the SE works council and the supervisory board were particularly positively evaluated by a management board representative involved in the negotiation process. He emphasised that the legal form of the SE was a model for success and that the negotiations were an important channel to gain a broader acceptance among employees for the SE agreement. Moreover he described the manner of SE negotiations as ‘self-regulated’ in the broader context of regulations.²³ A general remark which is also frequently presented by the management of companies adapting the legal form of an SE²⁴ was that the negotiation on employment involvement provided space for suitable solutions matching each company’s specific structure and needs instead of facing the legal requirements of the German co-determination act.

Employee representatives referred positively to the increasing communication and the exchange of information and culture among the European employees enabled by the SE work council. It was repeatedly stated that the SE agreement constituted major progress with regard to employee participation compared to the previous agreement on the European Forum and has evidently led to a Europeanisation of industrial relations and employment representation. Here, it is particularly important to stress the difference between the SE works council and the merely voluntary assembly of employees in the European Forum. The agreement on the European Forum from 1996 stipulates that membership should be drawn from both management and employee representatives in the forum, which served as a dialogue platform. For employees, it did not cover distinctive information and consultation rights or the right to launch initiatives for employees and there was no regulation on board-level representation of employees, which are significant gains in the SE agreement. On the practical side, the only working languages in the European Forum were German and English. While the SE works council has simultaneous interpretation for all present languages, no administrative support similar to that provided to the executive committee of the SE works council was given.

In contrast, employee representatives complained that it was impossible to push through further co-determination rights on the European level since the employee side represented through the SNB simply lacked the pressure to call a strike on the corporate level.²⁵

Certainly, as the employee representation body, the SNB faced serious internal problems, and it is dependent on the personal negotiation skills of its members and the general manner of negotiations with the management. However, this process may open the door for the Europeanisation of industrial relations and lead to several interesting results (‘negotiated Europeanisation’). In the case of the negotiations for the Fresenius SE agreement, its assessment by interview partners was very positive and has thus indicated the added value of negotiations.

²³ The labour director of Fresenius SE described the manner of negotiations as a regulated self-regulation (‘eine regulierte Selbstregulierung’). Interview 22 February 2010 in Bad Homburg

²⁴ See for example: Reichert, Jochem: Experience with the SE in Germany, in: Utrecht Law Review, Vol. 4, issue 1, March 2008, Speech held at a conference ‘Companies Cross Borders within Europe’, in Utrecht on September 20, 2007, p. 27. Or Reepesgaard, Lars: Familienunternehmen setzen auf neue Rechtsform, in: Handelsblatt, 27.01.2000. Nr. 18, pp. 40-41.

²⁵ Employee involvement and co-determination on the corporate level remains untouched by the conversion into an SE, which only applies for employee information, consultation and participation at board level. A works council interviewee stated that the employees at his undertaking (corporate level) would hardly have been mobilised for the issue of a strike on the company’s conversion into an SE.

A multilayer process of Europeanisation has taken place at Fresenius due to the conversion to an SE.

Through the SNB as the European employee representative body negotiating the SE agreement, broader acceptance for the SE agreement among employees may be gained (European acceptance). The SE works council is the employee representation body of the Fresenius European workforce and has the important function of electing members for board level representation in the supervisory board. In this regard the elected employee representatives from different EU countries represent the interests of the whole workforce at this level (Europeanisation of supervisory board / board-level representation). Another process of Europeanisation applies to industrial relations. European countries without co-determination have clearly gained stronger employee involvement by the new dimension of the workers' voice in company decision-making at the supervisory board. Precisely this took place at Fresenius where the majority of countries represented countries without co-determination rights (Europeanisation of industrial relations).²⁶

Often critically evaluated is the issue that the SE provides for an erosion of co-determination rights.²⁷ This assumption generally applies to companies in Germany.²⁸ In the case of Fresenius, a ver.di representative suggested that the disadvantage caused the new SE compared to the former AG is not substantial and has only reached a limited degree.

In regard to the actual motives for converting Fresenius into an SE, official statements and publications have clearly labelled the European image and the size of the supervisory board the as determining drivers. It seems that the conversion was necessary at a time when a second German trade union (ver.di) would have entered the supervisory board with a strong presence of several actors and would have caused changes on the balance, interest representation and composition of the supervisory board of then 20 members.

Sources and interview partners

Beside general information on the company, the SE agreement on employee involvement at Fresenius SE and the Agreement on the Fresenius European Employee Forum (as of 19 September 1996), this case study report is based on interviews with a member of the management board of Fresenius SE, a German member of the SE works council and supervisory board, a FEMCA CISL representative as member of the supervisory board, a ver.di representative as a member of the SNB, an IG BCE representative as a member of the SNB and a German trade union representative as a supervisory board member. Interviews were carried out in February and March 2010 in Berlin and Bad Homburg.

²⁶ In this regard several trade unions (e.g. from Spain) consider the SE as an opportunity to introduce and to consolidate employee representation in the board level. However they are critical on the changing impact of an SE on the landscape of national industrial relations traditions. See: Köhler, Holm-Detles and Bebeaga, Sergio Gonzales: SEs in Spain, in: worker-participation.eu: News bulletin April 2010, ETUI.

²⁷ Wilke, Maack and Partner / Institut de Recherches Economiques et Sociales: Employee involvement in companies under the European Company Statute (ECS), 2009, p. 12.

²⁸ This discussion mainly takes place in German and remains highly controversial. In a recent article, Dr. Köstler from the *Hans-Böckler Stiftung* in Germany states that this assumption is only partially true and only applies to single cases. Only few single companies have uses the SE statute to flee from co-determination. (Press release *Hans-Böckler Stiftung*, 23.04.2010)