# Questions related to the review of the SE Directive – Basic considerations for the Social Partners' consultation

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SEEurope summary report
**european trade union institute**

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## Introduction

The European Commission decided in July 2011 to reopen the consultation on the SE legislation. The new initiative was a first-phase consultation of the social partners under Article 154 TFEU on the possible review of Directive 2001/86/EC supplementing the Statute for a European company with regard to the involvement of employees.

The European Commission approved a consultation document on 5 July 2011, 'First phase consultation of Social Partners under Article 154 TFEU on the possible review of Directive 2001/86/EC supplementing the Statute for a European company with regard to the involvement of employees', C (2011) 4707. Soon afterwards, the Commission approached the social partners. In the consultation document and the Commission's letter 'three problematic areas' were listed concerning the rules on employee involvement contained in the abovementioned Directive: (a) the complexity of the procedure for employee involvement; (b) the lack of legal certainty concerning certain aspects of the negotiation procedure; and (c) the concern that the use of the SE form could affect the rights to employee involvement granted by national or EU law. In the consultation document the European Commission raised four questions related to these areas:

(1) Are these the main issues raised by the operation of the Directive?

(2) Should the Directive be amended?

(3) Would other non-legislative measures at EU level merit consideration?

(4) Would the social partners initiate negotiations under Article 155 TFUE?

The procedure used was in accordance with Article 154 TFEU. This article says 'before submitting proposals in the social policy field, the Commission shall consult management and labour on the possible direction of Union action'. As a consequence, the consultation was addressed and restricted to the ETUC and BusinessEurope with a fairly short deadline (30 September 2011).

The Commission will examine the views expressed during this first phase. If the social partners want to open up negotiations the Commission can decide whether there is a case for EU action. If the Commission decides that there is, it will launch a second-phase consultation of the social partners at EU level and come up with a final consultation document. That phase will cover the content of any proposal for action, in accordance with Article 154(3) TFEU. In principle, the social partners will then have nine months for negotiations.

## Background

After a decision-making process lasting 30 years, the EU Council adopted the general principles for a Regulation on the Statute for a European Company (Societas Europaea, hereafter SE) and the Directive with regard to the involvement of employees in European Companies (SE Directive) in December 2000. The main purpose was to enable companies to operate their businesses on a cross-border basis in Europe under the same corporate regime. The SE legislation entered into force on 8 October 2004 and, by mid-2007, all EU countries had transposed it into national law. The number of SEs has been increasing since the legislation came into force. Actual uptake, however, has fallen short of the expectations of those instigating the legislation in the 1990s. Motives for adopting the SE form have changed over the past 10 years. The argument that it strengthens a company's European profile or identity has slowly lost its significance. The reasons given for adopting the SE statute vary nowadays from strengthening a company's European identity to 'regime-shopping' related to tax optimisation/evasion and other corporate or financial arguments.

As of September 2011, a total of 909 registered SE companies were listed in the ETUI's European Company Database (ECDB), 92 more than at the time of the previous update (June 2011). The number of 'normal' companies is currently 189. The significant growth in the number of SE registrations is mainly due to the establishment of shelf companies in the Czech Republic where new shelf producers keep appearing. The total number of SE companies in the Czech Republic (509 in total, 66 more than 3 months ago) makes up 56 per cent of the total number of SEs in Europe.

Summarising the current numbers there are 909 established SEs, of which:

— 189 normal; — 96 empty; — 498 UFO (including 78 Micro SEs); — 126 shelf SEs.

For more information, visit http://www.worker-participation.eu/European-Company/SE-COMPANIES-News/Review-2010

In September 2008, the European Commission presented a Communication on the review of the SE Directive. The Commission commissioned a report and sent out a questionnaire to Member States and European social partners. Given the lack of experience in applying the transposed national provisions, the joint reaction of the social partners in 2008 was that the Directive did not require amendment or clarification. At that time, BusinessEurope took the view that the rules governing employee participation and the requirement to set up a Special Negotiating Body (SNB) constituted a substantial obstacle to increasing the number of SEs. Greater flexibility was needed in order to strengthen the negotiating autonomy of the social partners at company level. The ETUC highlighted that, in order to ascertain the level of participation

for the purpose of applying the 'before and after' principle, account should be taken not only of the participation rights exercised in practice but also of the participation rights granted by national legislation but not exercised in practice. Furthermore, employees' representatives within the SE should be given a uniform level of protection.

In a 2010 consultation on the functioning of the SE Regulation the social partners were not asked to come up with a joint statement. Both sides of industry figured in a list of responses to an online consultation via the EC's website dominated by business consultants and academics. According to BusinessEurope the provisions set forth in the SE Directive and the requirement to set up an SNB can be seen as substantial obstacles to companies wanting to make greater use of this instrument. However, with only a limited number of SEs established, BusinessEurope again stressed that it was too early to subject the issue of worker participation to revision. The ETUC noted that the compromise reached on employee participation had been very thoroughly designed and that, without it, the realisation of the SE statute would have been unthinkable (ETUC 2010 reply to DG market consultation on the operations and impacts of the Regulation of the SE Statute).

The Report of the Commission to the European Parliament and the Council on the application of Council Regulation 2157/2001 of 8 October 2001 on the Statute for a European Company (SE), formulated in November 2010 by the Commission, summarised the outcome of the public consultation (Com 2010 676):

> Any consideration of amendments to the SE Statute to tackle the practical problems identified by various stakeholders will have to take into account that the SE Statute is a result of a delicate compromise following lengthy negotiations. The Commission is currently reflecting on potential amendments to the SE Statute, with a view to making proposals in 2012, if appropriate. Any such amendments, if put forward, would need to be carried out in parallel with any possible revision of the SE Directive, which would be subject to the consultation of social partners in accordance with Article 154 of the Treaty.

## The ETUC approach in general

According to the ETUC, European Companies (SE) can establish a cornerstone of workers' involvement at transnational level. The SE Directive (Directive 2001/86/EC) linked to the SE Statute (Regulation EC 2157/2001) has for the first time introduced participation rights for workers at board level. Negotiations must be carried out with a view to establishing information and consultation procedures through the establishment of an SE works council. In the view of the ETUC, the European Company (SE) gives rise to new opportunities for both sides of industry. This is the first time that businesses have been enabled to operate within a single legal body throughout Europe. But it is also the first opportunity for involvement for all SE employees subject to the same European standard of information, consultation and

participation. This is why the European trade union movement welcomed this new legislation in October 2001 as an historic achievement on the road to improved industrial democracy and civil society in Europe.

The ETUC wants to stress that the SE legislation represents a European form of corporate governance; it was not intended to be – and must not be allowed to become – an instrument that puts national regulations in competition with each other. The current SE legislation in this sense represents a balanced compromise, reached after more than 30 years of intensive discussions between Member States, one difficulty being efforts to organise the workers' voice within the SE. Employee involvement in the SE is certainly not just an unnecessary burden on companies, but an elementary part of the SE. A European Company (SE) is, by definition, a European, not a national company. This is reflected in the transnational arrangements on worker involvement. These rights are not a minor matter, but represent a key feature of the European Company (as expressed by the SE Directive). Equally, the SE legislation cannot be considered an escape door from 'unwanted' national regulations.

The ETUC is very concerned that, while overemphasising the employee involvement criterion (employee involvement being presented as a key negative driver without making it clear that this thesis was based on a perception on the part of a group of potentially biased interviewees and not on the legal reality), the 2010 consultation on the SE Regulation has underestimated the influence of genuine business reasons on the attractiveness or not of the SE in specific national contexts. In the 2010 reply to the SE Regulation consultation the ETUC suggested possible areas for further investigation:

> in particular the scale of activities of companies, which can be linked to the structure of national economies (eg: in some Member States, the predominance of SMEs without European activities might explain why companies do not consider to apply for the SE. Similarly, undertakings being branches of multinationals companies rather than head offices will seldom consider converting into an SE …). The ETUC also regrets that the study fails to give concrete answers to the reason for the creation of shelf SEs, especially in the Czech Republic. Given the scale of the phenomenon, it is important to gather more material in particular to ensure that the objectives of the SE legislation are not being by-passed.

The ETUC welcomes that the Commission in the consultation document recognises the large proportion of shelf SEs as a problem; this is a step in the right direction. There is risk of serious abuse, which has to be tackled.

The ETUC underlines the need for a European company register. In their respective submission papers for the 2010 SE Regulation consultation the ETUC and BusinessEurope shared the view that there has to be a European registry for SEs (and this was backed by a broad range of contributors, including the Chambers, several researchers and lawyers). Unfortunately, this shared point of view, bringing together the European social partners, was

virtually neutralised in the European Commission's summary, by the phrase 'a few respondents proposed the creation of a European Register'.

## SEEUROPE reporting in general

The ETUC consulted the affiliates based on a draft submission paper that was formulated in cooperation with the ETUI's SEEurope team. In summer 2011 the national SEEurope experts were also asked to react to the questions raised in the consultation documents based on their expertise. This document is a synthesis of the received contributions. The reactions of the SE experts can be divided into three parts:

(1) remarks of a general nature;

(2) remarks and comments from the national perspective on the 'three problematic areas' identified by the European Commission and listed in the Commission's letter;

(3) the experts' opinions on the four basic questions formulated in paragraph 5 of the consultation document.

We have listed and summarised the most important general remarks and comments in this section. The next section is dedicated to the 'three problematic' areas and the final section summarises the comments related to the four basic questions. The report will not directly touch on the 'political' answer to the last question raised ('whether or not a dialogue has to be initiated'). However, some personal statements of the experts related to a possible dialogue are included at the end.

Basically, the experts underline that employee involvement is not just a technical issue but a key element of the SE rules. Most of the experts also stress that worker participation in companies calls for dynamic provisions, not the freezing of existing practices (still less maintaining the status quo if such practices do not exist).

Other general comments include:

– Practical experience is still too limited in many countries

Several experts report no functioning SEs. The SE is still fairly rare in most Member States. Some experts call it a non-event and refer to the absence of incentives. Other experts, for instance with regard to Bulgaria, report that there is no registered SE active, only some subsidiaries of foreign SEs. The prevailing lack of adequate information on the SE and lack of national experience in many countries, as signalled by the ETUC, is broadly confirmed. Moreover, there is a clear lack of experience in most countries with the negotiation procedures described in the Directive. For instance, in the UK almost all SEs have no registered employees and thus there is little experience to draw on.

– Proper registration is lacking

In many countries, proper information and registration are missing. National registration is often poor; no contact information can be found and not all SEs have released and published information that should normally be made public. The information available in the EU Official Journal is very limited, especially with regard to employee involvement. Therefore, the identification of an SE is difficult, notably in situations with empty or shelf SEs.

– The establishment of shelf SEs and the risk of manipulation

The current procedure applies to the right to maintain existing participation. However, once the SE is created, there is no guaranteed procedure for negotiated employee involvement emerging on new facts after the establishment of an SE. The rules that apply at the moment of establishment, no longer apply at the moment of activation. New facts (for instance as a result of activation or structural changes) should lead to the (re)opening of negotiations.

The Austrian expert pinpoints the risk of manipulation in situations with poor workers' representation, such as in activated shelfs. The Czech report mentions the need for further regulation of the activation of shelf SEs. An activation that leads to the appearance and/or recruitment of a workforce should be considered a structural change and therefore initiate the process of negotiations on worker involvement. This is one reason why a future revision of the SE Regulation and of the SE Directive has to be treated as one topic.

## The three problematic areas from a national perspective

According to the covering letter the European Commission has identified three problematic areas concerning the rules on employee involvement contained in the SE Directive:

(a) the complexity of the procedure for employee involvement;

(b) the lack of legal certainty concerning certain aspects of the negotiation procedure;

(c) the concern that the use of the SE form could have an effect on the rights to employee involvement granted by national or EU law.

#### a) The complexity of the procedure for employee involvement

In the consultation document the Commission refers to several companies, legal advisors and business associations that cited the complexity of the rules on employee involvement in the public consultation of the SE Regulation. It is noted that workers' organisations do not share this opinion.

There is no hard evidence that registered SEs mention the procedures of employee involvement as a serious hindrance. According to the SEEurope

experts the alleged complexity is sometimes used as an alibi. The consultation document quotes the Eurofound study stating that 'it took a great deal of effort to compile documentation on the subsidiaries, the number of employees and the existence of local employee representation'. One could also argue that it is in the interest of the central HR management of a future SE to have a precise knowledge of the employee structure of the company and of the existing social dialogue institutions. Some experts refer to the compromise that has been reached (and has to be maintained) as a minimum guarantee for the workers to be informed, consulted and involved through participation rights. Others indicate that the procedure for negotiating employee involvement in an SE are fairly similar to the procedures for the establishment of a European Works Council, something that many companies are now familiar with.

Several experts note that the incidence of SEs is low even in countries in which there is no workers' participation tradition. The Maltese expert declares that employee involvement as prescribed in the Directive could not be described as 'a radicalisation of industrial relations'. In neither Greece nor Cyprus can the established tradition of worker participation be considered a 'threat'. In Latvia, employee involvement, information and consultation and social dialogue are not developed or common practice, not just in SEs, but also in domestic companies. The United Kingdom has no common statutory structure for employee representation and employees have no right to participate at board level. Therefore, the concern expressed that the introduction of the SE could be a threat to existing national rights does not apply.

The lack of created (or established) SEs is related to other factors, such as the satisfaction or dissatisfaction, respectively, with the flexibility of existing national company law. Several experts mention that there are other incentives and disincentives that determine the establishment of SEs. In the United Kingdom an exemplary case is quoted, in which one SE was set up in order to comply with the requirement to have a legal representative in the EU for clinical trials taking place there.

In the analysis of the Spanish case other explanations for the underdevelopment of the process are presented. The employers' organization (CEOE) reported that several companies that started informal consultations after the passing of the regulation shared the opinion that the complexity of the procedure was a negative driver. However, CEOE pointed out that the lack of clear economic (such as tax and fiscal) incentives for companies offered a better explanation of the failure, so far, of the SE process in Spain.

The Portuguese expert formulates it simply: 'negotiation is by nature a complex process'. Besides, his impression is that it is not the negotiations as such, but the fact that employee involvement might be increased that is seen as problematic. In the Latvian report the same impression is formulated, complexity not being the main problem but the possible increase in the level and scope of employee involvement in general.

The Danish expert notes that the establishment of a cross-border company always has to relate to different rules and provisions; employee participation can be seen as a natural part of these national traditions. An important part of these rules is available on the Internet.

The Bulgarian expert states that the procedures are not long 'if there is an understanding on both sides that employee involvement is important'. Furthermore, a lack of proper information and disclosure can make procedures complex. In this context the same provision as in the recast of the EWC Directive (the information of the representative national or European social partners in any negotiations) would probably improve identification and accelerate the procedure.

Although Switzerland has not implemented the SE rules, the country has SE subsidiaries as well as Swiss companies that have opted for the establishment of subsidiaries in an EU Member State. A lack of information (on company structure, existing worker representation and number of workers involved) is signalled in the related negotiations. According to Swiss colleagues the involvement of the trade unions at an early stage of the negotiations could improve this situation.

**b) The lack of legal certainty concerning certain aspects of the negotiation procedure**

The fact that the Directive does not address certain aspects of the negotiation procedure nor certain situations (cases where no employees were eligible or want to be elected as a member of the SNB; no provision governing the relationship between the Representative Body in the SE and the European Works Councils that might exist within the group of companies to which the SE belongs; the relations between the national and transnational levels of information and consultation are not governed; no method of calculating the number of workers) is said to be a source of legal uncertainty.

It is reported from Spain that both trade unions and employers' organisations acknowledge that the lack of legal certainty concerning certain aspects of the negotiation procedure is a relevant point. The absence of capacity for forming an SNB is regarded as a key factor in the marginal importance attributed to the SE process in Spain. Legal uncertainty also affects relations between workers' representatives in the SE and the EWC that might exist in the company. At the same time, the method for calculating the number of workers in the SNB has not caused major difficulties.

The Portuguese expert notes that new legal dispositions normally cause a certain legal uncertainty that later on is eliminated in practice.

Some Member States have already anticipated the negotiation procedure. For instance, Bulgaria has implemented legal provisions for the election of SNB members with a system of delegation if not all employees can attend a general assembly. The right to elect can also be transferred to the trade unions or existing workers' representatives. It is also noted, as national systems of information

and consultation are still underdeveloped in Bulgaria, that the improvement of relations between the national and the transnational level should help to strengthen the national system in order to guarantee adequate representation at the transnational level. The existence of several levels of transnational information and consultation bodies is signalled by the Swiss expert, for instance in the case of a Swiss transnational company having its world and European headquarters in Switzerland, and an SE for one division in Germany: there is a manifest lack of provisions on flow of information, competences and links between the representative body of the SE and the EWC at group level. According to the Danish expert this relationship should be left to the signatories; the two bodies meet within the framework of their own concerns.

In the Latvian report it is signalled that in the few established SEs the procedure of negotiations with the SNB has been very formal, with the disclosed information limited to an absolute minimum, which accordingly has resulted in no actual involvement of the employees in decision-making and no participation in the management structures of the company after the SE has been registered.

**c) The possible effect on the rights to employee involvement granted by national or EU law**

The consultation document lists the following aspects: changes that occur in the SE after its registration, insufficient acknowledgement of the participation exercised at group level, a loss or reduction of participation rights in case of an SE conversion and reduction in the size of the body in which participation is exercised.

Changes that occur after the foundation and registration of an SE need to be registered.

The SEEurope experts mention cases in which the governing bodies of an SE decide to buy or to establish subsidiaries, when new companies join the SE and when empty SEs are activated. The possibilities for bypassing negotiations on worker involvement must be blocked. Or, as one expert put it: 'activation of shelf SEs should automatically lead to negotiations under the same rules as at the time of an SE initial establishment'. The focus on the moment of establishment does not take into account the lifecycle of a company that can be subject to changes in size, structure, purpose, seat and so on. Therefore, worker involvement should be based on guiding principles that apply at all stages of the life of an SE.

In most non-core countries in the SE process, the constitution of an SE does not entail a loss or reduction of participation rights at board level, given that these not exist or only exist in a number of public or privatised companies (such as Spain). The spreading of the SE process in these countries should not be regarded as a threat to existing participation rights but as a means for introducing or consolidating involvement practice in a larger number of companies.

## The experts' contributions on the four basic questions

In general terms, the SEEurope experts tend to back up the ETUC position paper. They stress that employee involvement has to be assessed first and foremost from the perspective of employees' rights, not through the prism of the employer, as is the case in the Commission's paper. With regard to the four questions, some national specificities are worth mentioning.

**Question 1.** *What is your opinion as regards the analysis contained in this paper regarding employee involvement in SEs? Are there any further issues that you consider should be added?*

The Nordic experts stress the need to create additional possibilities to establish participation mechanisms where no previous participation structures are in place. This would provide a right for employees to call for negotiations to establish an SE works council and to achieve adequate participation rights if there is enough support from the SE's personnel.

The German and Austrian experts call for a more dynamic interpretation of the 'before and after' principle. If this principle leads to a freezing of rights at the existing level, without taking into account the possible increase of the workforce, the principle will lead in a future 'after' status to a reduction of participation rights compared to the 'before' status. The same reasoning is followed in the Portuguese report: the SE rules ignore changes that in the 'before' situation should have led to an extension of rights and therefore cause serious risks to granted rights. The result is a 'freezing' of the 'before' status quo.

An increase in the number of employees by a certain amount should also be defined as a structural change.

With regard to the activation of shelf SEs reference is made to the rulings of the Oberlandesgericht Düsseldorf (2009) that this must be regarded as a structural change.

For all structural changes it should be clear that the fall-back (or 'standard') clauses relate to new facts.

The Bulgarian expert makes a strong plea for more involvement in the process of the social partners, both at national and European level. The need for clarification of workers' rights in specific situations (establishment of joint ventures, takeover of existing companies) is mentioned in the Bulgarian report. Furthermore, the need for a European register is underlined as it could help to improve transparency and visibility. In the Bulgarian report the limits of the 'before and after' principle are demonstrated: the principle can lead to the absence of any participation rights in constituencies that have no established participation rights. Should it not be the aim of the European legislator to guarantee an improvement of employee rights in all companies that are based on European rules?

Another problem that is signalled by several experts is the loss of rights as a result of the reduction of the number of board members. The Danish expert suggests that this should not take place without negotiations and/or procedures that compensate the possible reduction of participation rights.

The setting up of a European SE register is suggested by the Maltese expert, as a way to regulate the SE's operations and an instrument that can help in solving the problems with empty and shelf SEs (main functions: registration and supervision, support and assisting in establishment, provide information on principles and practices).

The Polish expert has serious question marks with regard to the analysis. His reasoning is that any complexity with regard to the employee involvement procedure would have been more easily accepted if the SE had created other important advantages compared to domestic public limited liability companies. It looks as if the setting up of an SE does not result in any added value and therefore the focus turns to worker involvement. In a similar way the Spanish expert talks about the absence of incentives for SE establishment.

**Question 2.** *Do you think that the Commission should launch an initiative to amend the Directive in parallel with a possible review of the SE Statute? If so, what do you consider should be its scope?*

According to the experts, it is obvious that the SE Statute should be reviewed in parallel with amendments of the Directive.

The Bulgarian report asks for explicit national discussion to be organised in advance of any review in order to clarify many of the issues raised.

In the Danish report a joint audit of the SE regulation and the SE Directive is suggested.

The Portuguese expert calls for amendments that would lead to a more dynamic application of the 'before and after' principle, notably in case of critical changes after SE establishment.

According to several experts the high incidence of shelf SEs requires an improvement of existing rules. The Polish expert underpins this with several examples (registration of empty or shelf SEs without prior negotiations or without a clause for mandatory negotiations after recruitment of workers starts, unclear relations between national and European levels of information and consultation, different forms of participation, contrasting legal provisions of the SE rules and the cross-border merger Directive). The UK report refers to problems with the SE rules, in particular the treatment of companies that change over time. This is most obvious for SEs registered without employees, but it also applies to others.

The Swiss expert suggests including in a possible review of the Directive the early information and involvement of the trade unions in order to facilitate

the negotiation procedure and to avoid a lack of information for workers' representatives. In the Spanish report it is suggested that a clearer role be introduced for employees' representatives in the constitution of the SNB.

Some experts question whether the current crisis is the right moment to start a revision.

**Question 3.** *Do you think that, apart from and/or instead of legislative measures, other action concerning employee involvement at European Union level merits consideration? If so, what form of action should be taken, and on which issues?*

The process of providing public information and greater transparency and disclosure can be improved without legal amendments and there is probably more urgency with regard to this type of initiative. This is for instance stated in the Bulgarian report where it is combined with a plea for national social partner discussions that can lead to the identification of particular problems. The Polish expert suggests more in-depth research on the potential influence of employees' representatives on a company's good and effective governance.

Along the same lines, the Portuguese expert recommends the promotion of knowledge and information on employee involvement at EU level. The Latvian expert adds the need for more in-depth research, to work towards the identification of best practices and to promote the active involvement of national social partners. The Nordic experts back this up. The audit suggested in the Danish report should lead to an investigation of how the rules function in practice, the definition of best practices and a set of recommendations.

The Austrian expert warns against reforms that could lead to intensified 'regime-shopping'.

Several experts stress the need for further research with regard to the production and trade of (ready made) shelf SEs. Germany and the Czech Republic are the main countries responsible for this. In Germany, incubators tend to set up shelf SEs for direct use, but in the Czech Republic, new traders are found every day. As a buyer, you do not need minimal capital; you only need to pay administration fees. None of the companies of this kind will be obliged to initiate (or to work with) employee involvement .

Business activities require trust and decent worker participation can contribute to a climate of trust and a more long-term vision. Company law must be developed from that perspective.

**Question 4.** *Would you consider initiating a dialogue under Article 155 TFEU on any of the issues identified in this consultation? If so, which?*

The SE experts underline that a future revision should cover the Regulation and the Directive as a whole. Some of the experts note that the question of whether European dialogue is topical and recommendable is not easy to

answer as the national social partners are not (yet) ready because of their limited experience.

According to the Spanish report a dialogue under Article 155 TFEU must produce fruitful results for the re-launch of the SE process. Several issues should be addressed in depth in order to overcome the barriers against creating SEs identified by companies. Also, participation issues should be tackled in order to clarify the exact extent of employee involvement in the SE against the background of heterogeneous national (and sectoral) industrial relations practices.

The Maltese expert suggests initiating a dialogue at European level aimed at setting up an SE register. In the Danish report a dialogue is suggested on the overall package of SE rules. The Italian experts note that in any revision the decisive question will be to what extent there is a political will to make concessions on 'simplification' in order to achieve improvements regarding such important issues as the definition of 'structural change' in the activation of shelf SEs.