

# Topics of Seminar 8

## European Company (Part 2)

- **Internal governance rules of the SE**
- **Board structures**
  - one tier and two-tier systems
- **Employee participation and corporate law**
  - Theoretical foundations
  - Employee participation in the SE – procedures
  - Legal arbitrage and employee participation



# Internal governance of the SE

## Structure of the SE

### ▪ “Company Organs”

- General meeting
- Unitary board (“administrative organ”) – **one-tier structure**
- Management board and supervisory board - **two-tier structure**

### ▪ Choice to be made in Statutes (AoA)

- i.e. ultimately by the shareholders

### ▪ General meeting

- Appoint (supervisory) board members
- Exact competence of GM defined by national (plc) law and EU company law (where harmonised)
- E.g. issuing shares

## SE boards




- **Terms of board members not to exceed 6 years**
  - Re-election possible
- **Disqualification (Art 47)**
- **Certain transactions subject to express board approval**
  - Subject to statutes and applicable national law
- **Liability of board members:**

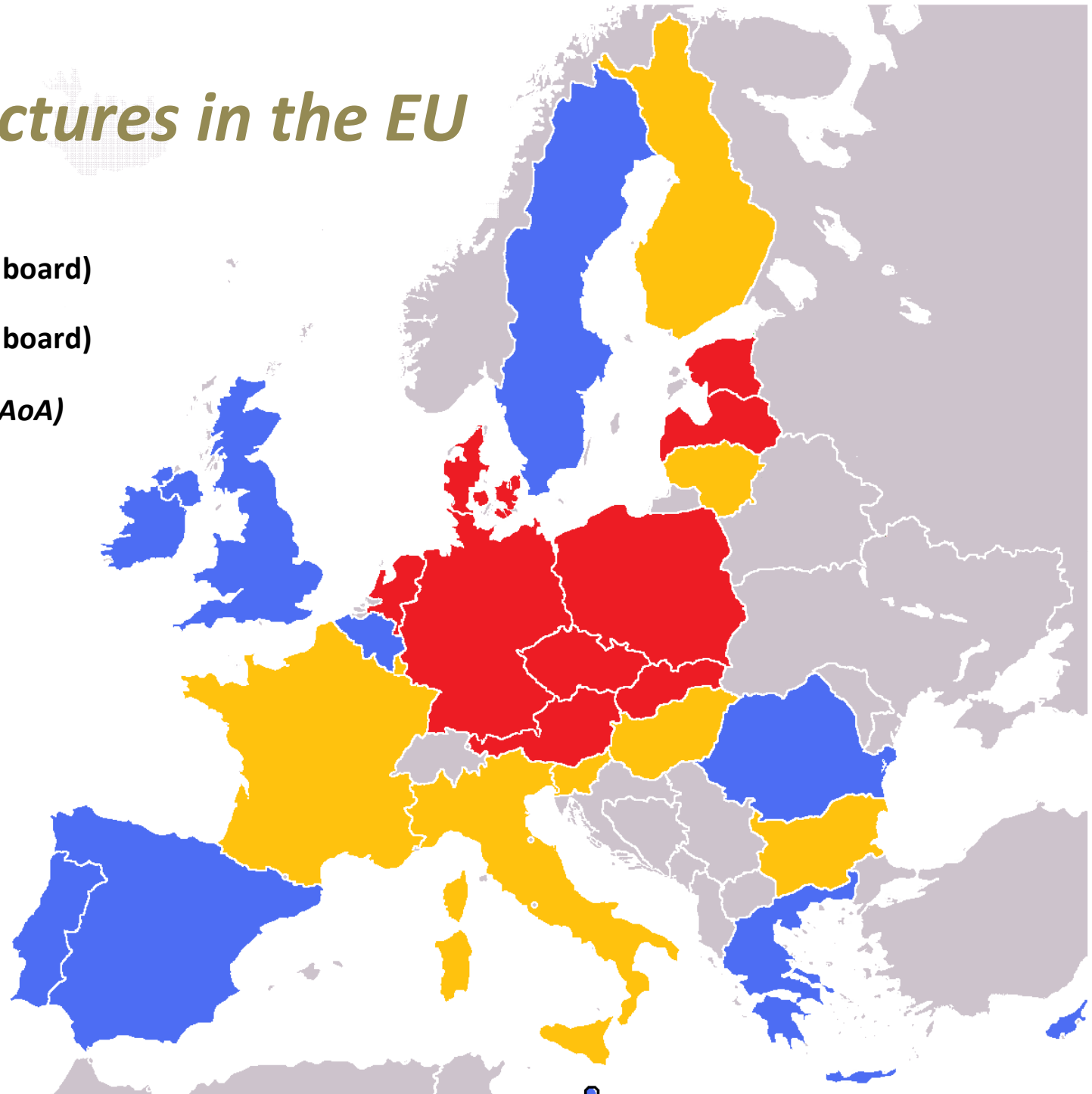
*“Members of an SE’s [board] shall be liable, in accordance with the provisions applicable to [PLCs] in the Member State in which the SE’s registered office is situated ... following any breach [of their] duties.”*

*– Art 51*



# *Board structures in the EU*

-  **Monistic (one-tier board)**
-  **Dualistic (two-tier board)**
-  **Choice (subject to AoA)**

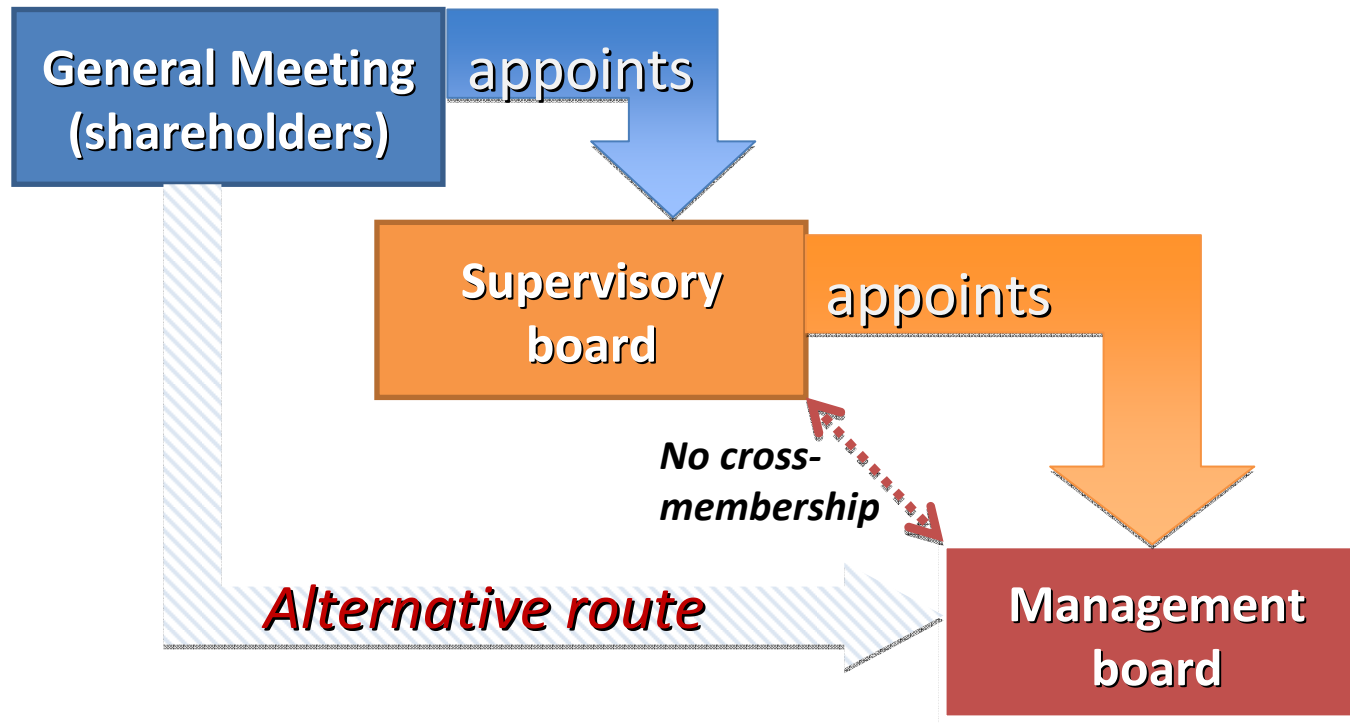


## Two-tier structure

- **Management board**
  - responsible for day-to-day management
  - Informs supervisory board
  
- **Supervisory board**
  - supervises work of the management organ
  - must not exercise the power to manage the SE
  
- **Board size subject to statutes and Member State regulation**
  
- **Appointment**

# Internal governance of the SE

## Two-tier structure



## One-tier structure

- **Unitary board (administrative organ)**
  - responsible for day-to-day management
  - Usually: executive and non-executive members
  - Advise / supervise
  
- **Board size subject to statutes and Member State regulation**
  
- **Appointment by general meeting**




# Employee involvement

- **Employee information and consultation**
  - Providing employees (representative bodies) with information about corporate decisions
  - Establishing a dialogue between employees and management
- **Employee participation**
  - Influence on composition of administrative/supervisory body
  - Election / nomination / recommendation / opposition rights







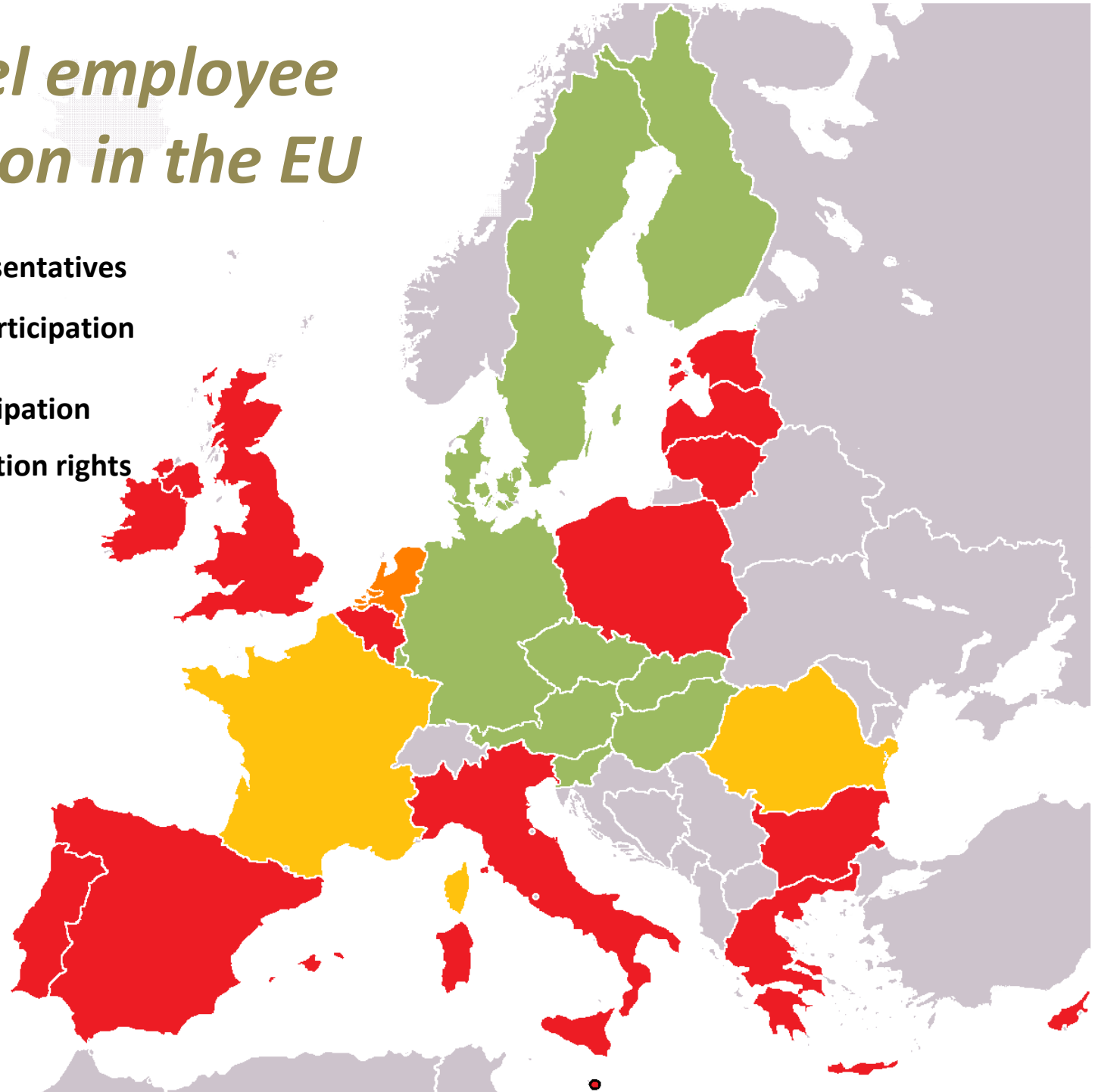


# Employee participation and corporate law

- **What is the theoretical justification for a system of “shareholder primacy”?**
  - **Are employees “adjusting stakeholders”?**
  - **Protection by contract?**
  - **Is employee participation detrimental to shareholder wealth?**
  - **In what way can employee participation influence employee behaviour?**
  - **What is a firm-specific investment?**
- 

# *Board-level employee participation in the EU*

-  Board-level representatives
-  No board-level participation
-  Advisory BL participation
-  Employee nomination rights (Netherlands)



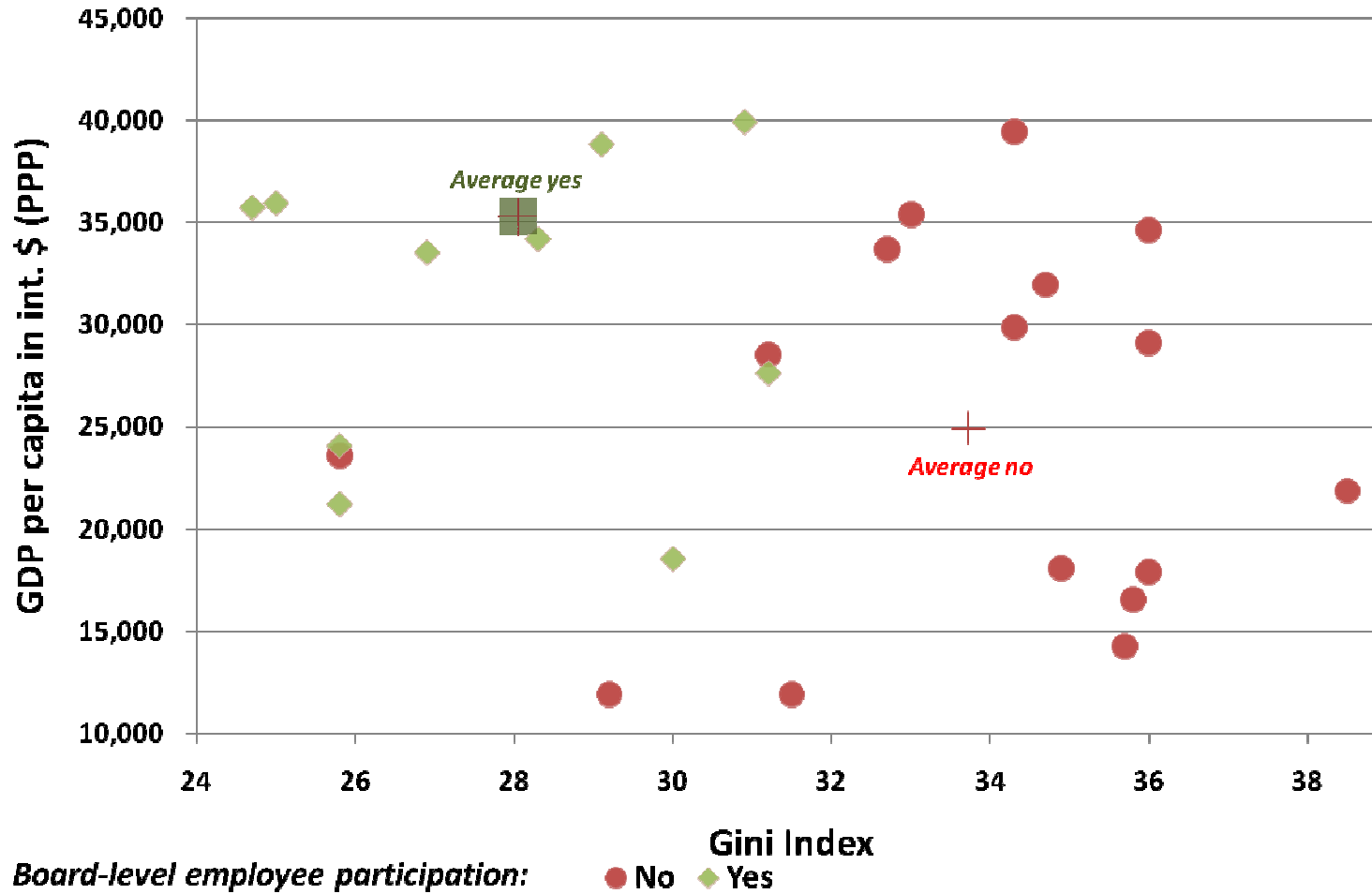
## The political dimension

- **Potential distributional effects of employee participation**
  - May strengthens the bargaining power of employees
  - Potential positive externalities?
  - Strikes, “social peace”, etc
  - egalitarian society?
- **Short-termism and long-term investments**
  - Potential influence of shareholder primacy on investment strategies
  - Compare US / UK /Germany

# Board-level employee participation in the EU

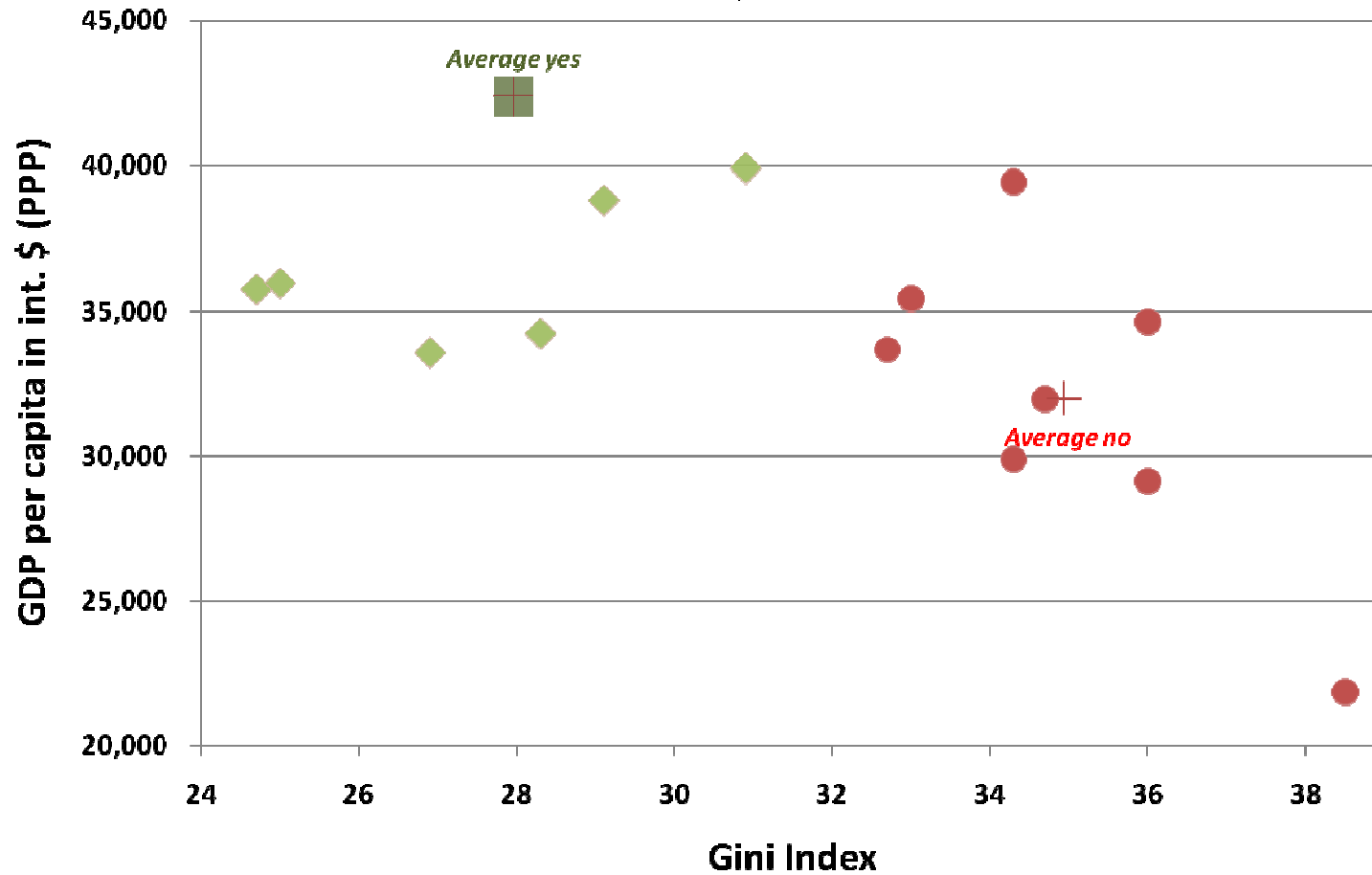
## Employee Participation, GDP per capita and equality (EU-27)

(Netherlands = yes, France = no)



# Board-level employee participation in the EU

Employee participation, GDP per capita and equality (EU-15)  
(Netherlands = yes, France = no)

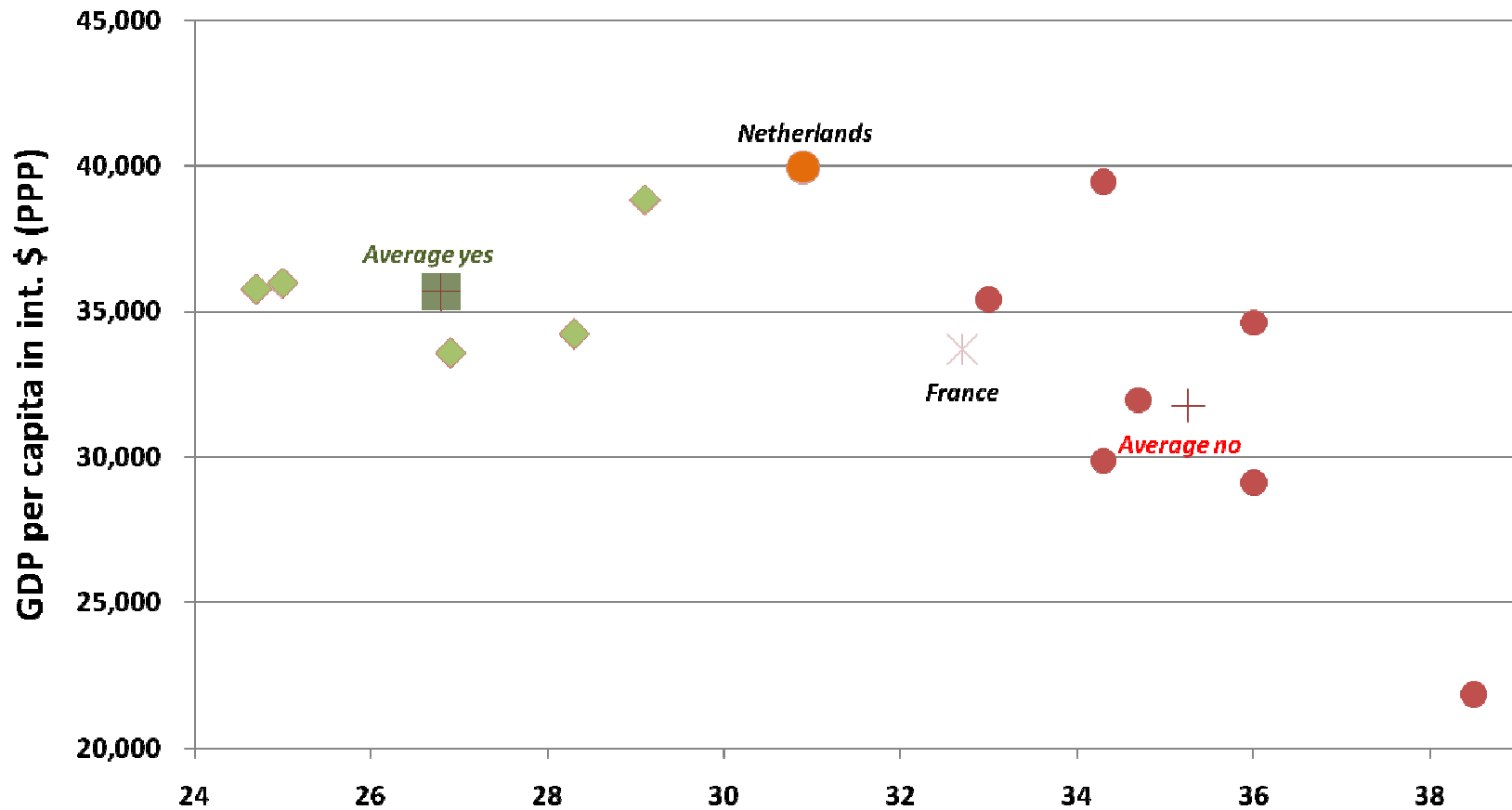


Board-level employee participation: ● No ◆ Yes

# Board-level employee participation in the EU

## Employee Participation, GDP per capita and equality (EU-15)

(with The Netherlands and France not assigned to either group, ex Luxembourg)



Board-level employee participation:

Gini Index  
● No    ◆ Yes

# Employee participation in the SE

- **The “before and after” principle**
  - **BL Employee participation only mandatory where pre-existing → “defensive” approach**
- **Special Negotiating Body (SNB)**
  - **Representatives from each Member State concerned**
  - **One employee representative from a Member State for each 10% (or less) of total employees**
  - **Subject to overall cap, companies ceasing to exist (merger) shall be assigned a representative**
  - **Decisions usually with “double” ordinary majority**

## Employee participation in the SE

- **Election/appointment according to MS law**
- **Function of the SNB**
  - **SNB negotiates with management about employee participation**
  - **Mutual agreement necessary**
  - **But: Strong default rules**
  - **Standard Rules → highest proportion**
  - **Negotiation timeframe: 6 months**
    - **(12 months with mutual agreement)**



# Employee participation in the SE

- **The “Standard Rules”**
  - “highest proportion”-principle
  - Numeric determination !
  - Participation by employees from different MS to be decided by SNB
- **Scope of application**
  - Agreement
  - No agreement within timeframe (default)
  - and 25% (merger) / 50% (holding/sub) or decision by SNB
  - “No escape” in transformation

## Employee participation in the SE

- **When can employees agree to go below “highest standard”?**
    - ***Never* if established by way of transformation**  
  
***In other cases:***
      - **Supermajority (2/3) if participation applied to 25% (merger) / 50% (holding/subsidiary)**
  - **Always supermajority if decided to opt-out completely**
  - **“No export – no escape”**
- 