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Summary

— Since its introduction as a new corporate form, the SE has become a widely recognised European alternative for company structuring within the 31 member states of the EEA (Member States).

— It gives companies operating in more than one Member State the option of being established with a European corporate identity and operating with one set of rules and a unified management system or even as a single merged company.

— The possibility to choose between a one-tier and a two-tier management system provides a flexible tool to structure a company according to the individual needs of the founding entities.

— So far, companies have primarily used the SE to create a European identity, to set the ground for cross-border restructuring within the group and to determine employee participation.

— In the years ahead, the possibility to relocate the registered office and the seat of the SE to another Member State without sacrificing the corporate identity of the SE might be of peculiar interest for companies located in the UK, in order to maintain direct access to the European Single Market after the Brexit.

1 Introduction

The idea of a European public limited-liability company was introduced back in the late 1950s, and a first draft of an SE statute was submitted by the Commission in 1970.

However, it took more than four decades for this first idea to turn into solid legislation. The SE legislation came into force on 8 October 2004, and the first two SEs (MPIT Structured Financial Services SE and SCS Europe SE, both registered in the Netherlands) were established on the same date.

The purpose of the SE is to meet the challenges of globalised markets and to achieve the aim of a single market in Europe. The European dimension of the legal form overcomes obstacles arising from the different treatment of companies by national laws of the Member States and gives European corporations the option of creating a larger entity to boost their international competitiveness. The SE facilitates cross-border restructuring for companies from different Member States and gives investors access to a supra-national investment and business vehicle.

2 Legal Basis

The legal basis for the establishment of an SE is set out in Council Regulation (EC) No. 2157/2001 on the Statute for a European Company dated 8 October 2001 (Official Journal L294/1 – SE Regulation[1]), which came into force on 8 October 2004. Whereas the SE Regulation defines the legal framework for the company structure, it is supplemented by Council Directive 2001/86/EC regarding employee involvement dated 8 October 2001 (Official Journal L294/22 – SE Directive[2]). The SE Regulation is directly applicable law and merely grants the Member States certain options and implementation rights.

The Member States have enacted the necessary laws to supplement the SE Regulation. In addition, they have transposed the SE Directive into national law.

[1] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:294:0001:0021:EN:PDF
[2] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:294:0022:0032:EN:PDF

3 Characteristics

As a new legal form, the SE coexists with the existing corporate forms of each Member State. It is a separate legal entity with a minimum registered share capital of EUR 120,000 divided into shares which are eligible for listing on a stock exchange. The name of an SE must include the letters "SE". An SE is domiciled in the Member State where its head office is located and is registered in the appropriate commercial register. In addition to the SE Regulation, the SE is subject to, and governed by, the national laws of the Member State of its domicile, i.e. the national law implementing the SE Regulation transposing and the SE Directive as well as the respective national stock corporation acts. As a result, the basic requirements for an SE are the same in each Member State but most of the details are still determined by national law – making the SE a national rather than a uniform European legal entity.

4 Formation

There are five exclusive ways of forming an SE. Each alternative reflects the basic requirement that a cross-border or international element must exist. Firstly, existing public limited-liability companies can merge to form an SE, provided that at least two of the companies involved come from different Member States. Secondly, companies – both public and private limited-liability companies – can form a holding SE if more than 50% of the capital of each of the promoting companies is contributed and at least two of the promoting companies are from different Member States or have had a subsidiary or branch in another Member State for at least two years. Thirdly, with the same condition for cross-border activity applying, a subsidiary SE may be formed as a joint venture company. Fourthly, an existing public limited-liability company can be converted into an SE, provided that it has had a subsidiary in another Member State for at least two years. Fifthly and finally, an SE itself can establish subsidiary SEs.

The SE Regulation does not require a newly formed SE to be a commercially operating entity. Thus, an SE may be established as a shelf company provided that the respective national law allows for such an establishment. Once established, the shelf SE may be acquired by any third party.

Even though the SE Regulation restricts the ways in which an SE can be formed to five alternatives, any kind of corporate structure – depending on the individual needs of the founding companies – can be achieved by utilising shelf SEs and the existing legal options.

5 Advantages

The main advantages of the SE are the facilitation of cross-border restructuring, the choice between a one-tier and two-tier management system, the determination of employee participation, the possibility of transferring the SE's registered office to another Member State and the creation of a European corporate identity.

5.1 The SE Regulation provides a secure legal basis for companies domiciled in the Member States to undertake cross-border restructurings, such as mergers and the establishment of European holdings and joint ventures. In contrast to the use of national corporate forms, the SE ensures equal treatment of the founding entities due to its neutrality, and even allows for a third "independent" Member State to be the registered seat of the SE.

5.2 With regard to the corporate governance of the SE, the SE Regulation leaves it to the founding entities to decide between a one-tier and a two-tier management system. Thus, an SE can either be established with a management board and a supervisory board (two-tier system) or, according to the Anglo-American board system, with one administrative organ combining management and supervisory functions (one-tier system). This choice enables a company to be structured according to the individual needs of the founding entities as well as to introduce the same corporate governance system in all Member States.

5.3 The SE provides more flexibility regarding employee participation. Depending on the level of employee participation in the founding entities, the employees of an SE are involved through participation in the supervisory or administrative organ of the SE and, on an operational level, through the creation of an SE works council. Both kinds of employee involvement are determined in an agreement between the companies establishing the SE and the respective employees. In negotiating such an agreement, the employees are represented by a special negotiating body. The parties are free to determine the content of such an agreement as long as certain minimum requirements are met. If no agreement is reached, the standard rules set out in the law apply. These rules contain provisions regarding the composition of a representative body for employees, its information and consultation, as well as provisions regarding the level of employee participation in the supervisory or administrative organ. In particular, the standard rules stipulate that any employee participation scheme that applies in one company participating in the SE is transferred to the SE as a whole if such employee participation scheme applies to a certain percentage of the total number of employees of all participating companies. For companies in Member States with high levels of employee participation (e.g. Germany), conversion into an SE provides the option of freezing the existing level of employee participation, thereby avoiding any future increase or even preventing the introduction of employee participation. Furthermore, conversion into an SE provides the option of downsizing the supervisory board of the company and internationalising employee participation on such supervisory board, thereby minimising the influence of the unions.

5.4 The registered seat of an SE can be relocated to any other Member State without sacrificing the corporate identity of the SE and without the prior consent of its creditors. However, at the same time, the corporate head office of the SE must also be relocated to such Member State, because the head office and registered seat of an SE must always be in the same Member State.

5.5 The establishment of an SE symbolises the European orientation of the company by giving it a European corporate identity and a European branding. In particular, such a European identity is an advantage of the SE compared to using the Cross-Border Merger Directive 2005/56/EC dated 26 October 2005 (Official Journal L310/1 [3]), which provides another legal basis for cross-border mergers between companies in the Member States.

The aforementioned advantages not only make the SE an attractive legal form for large international company groups but also for small and medium-sized firms, in particular with regard to the choice of management structure and level of employee participation.

[3] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:310:0001:0009:EN:PDF

6 Taxation

The SE Regulation does not provide for the fiscal treatment of the SE. Instead, according to article 10 of the SE Regulation, the tax treatment of an SE does not differ from that of a national stock corporation in the Member State in which the SE is domiciled. Taxation of the SE therefore follows the applicable national tax system for stock corporations.

Tax items have to be considered both for the formation of the SE and the ongoing taxation of an existing SE.

As regards formation of the SE, the five exclusive ways of forming SEs are also relevant for corporate income taxation. The Merger Directive 2009/133/EC dated 19 October 2009 (Official Journal L310/34[4]), as amended on 13 May 2013, 2013/13/EU (Official Journal L141/30[5]), provides basic rules aiming at such formation without corporate income taxation.

The Merger Directive in particular stipulates that a merger, de-merger or a contribution of shares or assets (reorganisation) shall not cause a taxation of hidden reserves to the extent the reorganisation does not lead to a different allocation of taxable assets to a permanent establishment of a Member State (Art. 4, 9 Merger Directive). Furthermore, the allocation of shares in the acquiring/absorbing entity to the shareholders of the transferring entity in the case of a merger, de-merger or share swap shall not cause a taxation of the capital gains on the level of the shareholder (Art. 8 Merger Directive). As a consequence of these rules, it is crucial to determine whether or not a Member State loses such taxation right or whether such taxation right is restricted. Such analysis has to be undertaken for each asset respectively shares, and for each jurisdiction within the European Union involved. The Merger Directive provides therefore sufficient framework for cross border formations of an SE without detrimental tax effects.

The Member States have meanwhile enacted their own national regulations regarding the fiscal treatment of cross-border reorganisation procedures and, in particular, of the SE. Looking at the various ways of formation, it can be summarised that formation of an SE by conversion of the legal form does in principal not raise such tax issues at all since the corporate body remains the same and all other ways of forming an SE are covered by the aforesaid regulations of the Merger Directive and the applicable national tax rules.

As regards ongoing taxation, likewise, not only local tax rules of a Member State but also European regulations have to be considered. For one thing, all national regulations must comply with primary European law. The benchmark for the European Court of Justice when assessing such compatibility is mainly the fundamental freedoms stated in the Treaty of the European Union. Furthermore, secondary European law, in particular in the form of Parent Subsidiary Directive dated 30 November 2011, Council Directive 2011/96/EU (Official Journal L345/8[6], amending Council Directive 90/435/EEC – Parent Subsidiary Directive, dated 23 July 1990, Official Journal L225/6[7]), significantly influences tax treatment of the SE and its subsidiaries.

Prior to the implementation of fiscal provisions regarding the SE, transferring the registered seat of an SE to another Member State triggered liquidation taxation, even if the legal entity itself remained unchanged by the transfer. Since the implementation of accompanying fiscal provisions, only assets that are allocated to the head office of the legal entity changing its registered seat are subject to taxation; assets that are allocated to a permanent establishment (PE) in the (old) Member State are not taxed. This privilege is lost, of course, if the SE relocates its corporate head office and registered seat to a state outside the EEA and thus is no longer subject to taxation by a Member State.

Dividend payments within the group of an SE can be exempt from any withholding taxes based on the Parent Subsidiary Directive, which includes the SE in the list of privileged legal entities.

Provided an SE is registered in a Member State and maintains branches/PEs in several Member States, such Member State in which the SE has its registered seat taxes the global income of the SE. The profits and losses of its branches/PEs can generally be credited, deducted or exempted from such tax liability in the Member State of the head office. In those Member States in which the SE maintains a branch/PE, the SE remains liable for taxation in respect of such branch/PE.

[4] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:310:0034:0046:EN:PDF
[5] http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013L0013&qid=1473423703004&from=en
[6] http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32011L0096&qid=1474028402294&from=en
[7] http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31990L0435&from=en

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