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The European Company
Societas Europaea

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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 30 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 to operate 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 used the SE in particular to create a European identity, to set the ground for cross-border restructuring within the group and to determine employee participation.

- A new European corporate form, the European Private Company (SPE), aimed at small and medium sized enterprises, is scheduled to be available as from 1 July 2010 and may well become the standard corporate vehicle across Europe in the future.

1 Introduction

The idea of a European public limited-liability company was introduced as early as 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 common market in Europe. Therefore, it 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 sets out the legal framework for the company structure, it is supplemented by Council Directive (EC) No 2001/86 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 SE Directive, however, is an order to the Member States to transpose the provisions contained therein into national law.

By now, all Member States have enacted the necessary laws to supplement the SE Regulation and to transpose the SE Directive into national law, with Bulgaria and Romania being the last two Member States to pass the respective legislation in 2007.

[1] *http://eur-lex.europa.eu/lexuriserv/lexuriserv.do?uri=oj:l:2001:294:0001:0021:en:pdf.*

[2] *http://ec.europa.eu/employment_social/labour_law/docs/directive2001_86_en.pdf.*

3 Characteristics

As a new legal form the SE stands next to 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 with 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 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 – turning the SE into a national rather than a uniform European legal entity.

4 Formation

There are five exclusive ways to form an SE. Each alternative reflects the basic requirement that a cross-border or international element exists. 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, 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 to transfer 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 on which companies domiciled in the Member States may now 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 the option 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 applied 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), the conversion into an SE provides the option to freeze the existing level of employee participation, thereby avoiding a future increase of such level or even the introduction of employee participation at all. Furthermore, the conversion into an SE provides the option to downsize the supervisory board of the company and to internationalise the 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 also has to be relocated to such Member State, as 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 as against using the newly introduced Cross-Border Merger Directive (EC) No 56/2005 dated 26 October 2005 (Official Journal L310/1 – Merger Directive[3]), which provides another legal basis for cross-border mergers between companies in the Member States.

The aforementioned advantages do 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 the management structure and determination of employee participation.

[3] *http://europa.eu.int/eur-lex/lex/lexuriserv/site/en/oj/2005/l_310/l_31020051125en00010009.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 the SE does not differ from that of a national stock corporation in the Member State, in which the SE is domiciled. Thus, the taxation of the SE follows the applicable national tax system for stock corporations.

However, European regulations have to be considered with regards to the taxation of an SE. For one thing, all national regulations have to comply with primary European law. The benchmark for the European Court of Justice when assessing such compatibility is mainly the fundamental freedoms as stated in the Treaty of the European Union. Furthermore, secondary European law, in particular in the form of the Merger Directive and the Parent Subsidiary Directive dated 22 December 2003 (EC) No. 123/2003 (amending Directive 90/435/EEC – Parent Subsidiary Directive[4]), significantly influences the tax treatment of the SE. The European Union extended the scope of application of these directives explicitly to the SE. Moreover, by now, the Member States have basically enacted their own fundamental national regulations regarding the fiscal treatment of cross-border restructuring procedures and, in particular, of the SE.

Before the implementation of fiscal provisions regarding the SE, a transfer of 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 company group of an SE can be exempt from any source taxes based on the Parent Subsidiary Directive, which now includes the SE in the list of privileged legal entities.

Fiscally, it can be advantageous if an SE, which was formed by merger and which is registered in a Member State, maintains branches/PEs in several Member States. If the 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. If the parent company, however, maintains legally independent subsidiaries, then such a deduction is rarely possible. 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://www.legaltext.ee/text/en/ph3264.htm*

7 Examples

Since its introduction in October 2004, approximately 150 SEs have been established in 20 of the 30 Member States. The spectrum of business areas in which the commercially active SEs operate is very broad. Prominent examples include the following:

- **Strabag Bauholding SE**, Austria, was established as one of the first SEs on 12 October 2004.
- **Galleria di Brennero Brennerbasistunnel BBT SE**, Austria, was established on 17 December 2004 as a joint venture between Austria and Italy relating to the construction of the Brenner-Base-Tunnel. According to the agreement between Austria and Italy regarding this project, the registered seat of the company shall change for the planning, construction and operation phases respectively from Austria to Italy and vice versa.
- **Schering-Plough Clinical Trials SE**, United Kingdom, was established as a subsidiary SE on 22 February 2005 and facilitates the group's compliance with EU legislation regarding clinical trials.
- **Elcoteq SE**, Finland, another major industrial company, was established on 1 October 2005.
- **Tetra Laval Capital SE and Tetra Laval Treasury SE**, both established in the Netherlands on 20 October 2005, are examples of using the SE as a vehicle to transfer a company out of the EEA. Both SEs were first established in the Netherlands, then their respective registered seats were relocated to Luxemburg and from there to the Cayman Islands by losing the SE legal form and turning into an "exempted company limited by shares" according to the laws of the Cayman Islands.
- **Mensch und Maschine Software SE**, Germany, was established on 12 August 2006. Mensch und Maschine Software SE changed its management structure from a two-tier to a one-tier system, in which the majority shareholder is the chairman of the administrative board as well as the chief executive officer. Furthermore, as the number of employees was less than 500 at the time of establishment of the SE, the status of no required employee participation was frozen for the future of this SE.
- **Allianz SE**, Germany, was established on 13 October 2006 by way of merger of Allianz AG and Riunione Adriatica Di Sicurta S.p.A (RAS). The main reason for Allianz was to merge RAS with Allianz AG so as to completely integrate the Italian insurance business into the Allianz group. However, at the same time, Allianz SE downsized its supervisory board from 20 to 12 members, and the employee representatives on this board are now elected on a European level.

- **PCC SE**, Germany, was established on 5 February 2007 in order to reflect the strong European focus of this company in its corporate form. Furthermore, PCC SE was established with a one-tier board system, with the owner of the company also being the chairman of the Board of Directors.

- **Fresenius SE**, Germany, was established on 13 July 2007. The main reason for the conversion of Fresenius AG into an SE was to maintain the size of its supervisory board (12) and have the employee representatives on such board elected on a European and not merely national level.

- **Porsche Automobil Holding SE**, Germany, was established on 13 November 2007. In addition to the aforementioned motives regarding employee involvement in general, Porsche Automobil Holding SE was also established to prevent any involvement of employee representatives of Volkswagen AG (in which Porsche Automobil Holding SE currently holds 35,14 %) in the operative business of Porsche.

- **BASF SE**, Germany, established on 14 January 2008, also used the SE to downsize the number of seats on its supervisory board from 20 to 12 and to have the employee representatives on the supervisory board elected at a European level.

Other prominent German companies which have recently announced their intention to convert into an SE, but have not been registered yet, are **GfK AG, Interseroh AG IM, Klöckner & Co. AG** and **SGL Carbon AG.** All of these companies state the creation of a European identity and the transfer of employee participation to a European level as their main reasons for the conversion. Outside Germany, **Wiener Privatbank AG** of Austria has recently announced its conversion into an SE, involving a change of the management structure from a two-tier to a one-tier system. The shareholders' meeting of **Songa Offshore ASA**, a Norwegian company operating in the drilling industry, has approved the establishment of an SE by merging the company with its Cyprian subsidiary, and the shareholders' meeting of **AmRest Holdings N.V.**, a Dutch restaurant operator, also approved the conversion of the company into an SE. Both Songa Offshore ASA and AmRest Holdings N.V. state as the main reason their intention to transfer the seat of the company to Cyprus and Poland respectively.

8 The European Private Company (SPE)

In addition to the SE, the idea of a European private limited-liability company – Societas Privata Europaea (SPE) – meeting the needs of small and medium-sized enterprises has been discussed since the 1990s. As a result, the Commission presented a "Proposal for a Council Regulation on the Statute for a European private company" on 25 June 2008 (COM(2008) 396 – SPE Regulation[5]). The proposed SPE Regulation will have to be ratified by the Council of the European Union after a hearing of the European Parliament and shall apply from 1 July 2010 onwards.

The SPE shall exist in addition to the respective national legal forms and be governed by the SPE Regulation, its articles of association and the applicable national laws. In particular, the SPE Regulation does not contain any regulations on labour law, tax law, accounting or the insolvency of an SPE, as these issues shall be governed by national law and existing Community law.

As a private limited-liability company, the SPE shall have its own legal personality, a minimum registered share capital of EUR 1.00 and may not be publicly traded. It may be formed by one or more natural persons and/or legal entities (I) according to the SPE Regulation, (II) by conversion of an existing company, (III) by merger of existing companies or by division of an existing company. Other than the formation of an SE, the formation of an SPE does not require a cross-border element.

The SPE Regulation grants to the shareholders a high degree of flexibility to determine the internal organisation and corporate governance of the SPE, in particular the choice between a one-tier and a two-tier management system. In addition, however, the SPE Regulation contains a catalogue as Annex I, which lists certain issues that have to be regulated in the articles of association of an SPE. These issues refer to the formation (e.g. name, address and initial capital), shares (e.g. division, voting rights), capital (e.g. financial year, reserves) and organisation (e.g. resolution adoption methods, majority requirements) of the SPE.

The registered seat of an SPE can be transferred to another Member State while maintaining its legal personality. As the registered seat and the corporate head office of an SPE do not need to be in the same Member State (unlike those of an SE), such transfer is easier than in the case of an SE and provides additional options for restructuring.

Employee participation in an SPE is subject to the national laws of the Member State in which it has its registered seat. If an SPE that is subject to employee participation transfers its registered seat to a Member State without the same participation rights, the management and the employees of the SPE must negotiate an agreement on employee participation. However, such negotiations only have to take place if at least one third of the employees of the SPE are employed in the home Member State providing such rights. The SPE Regulation limits the duration of these negotiations to six months with a possible extension of another six months. If no agreement is reached, the SPE remains subject to the existing employee participation rights of the home Member State.

The proposed concept of the SPE will not only be an interesting alternative for small and medium-sized enterprises but will also constitute an attractive legal form for subsidiaries of internationally operating company groups. In any event, it can be expected that the SPE will quickly gain recognition and might even become the standard corporate vehicle across Europe one day.

[5] *http://eur-lex.europa.eu/lexuriserv/lexuriserv.do?uri=com:2008:0396:fin:en:pdf.*

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