

THE EUROPEAN COMPANY (SOCIETAS EUROPAEA) ON RIND SIGHT

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Abstract

The article deals with the rind aspects of European Company (also known by its Latin name Societas Europaea or SE), a “type of public limited-liability company regulated under European Union law”. Although this form of company was proposed more than 40 years ago, it was only in 2001 when the Council issued Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company defining the European company (SE) as “a legal structure that permits a company to operate in different European Union (EU) countries under a single statute”, as determined by the law of the Union and common to all EU countries. Being a new legal form, the SE coexists with the corporate forms that already were in each Member State being governed by both European Regulation and national law. As it follows we address the rules, classification, conditions for settling an SE, organization structures, tax harmonization, employee involvement in the SE, advantages and disadvantages of SEs, as well as the opportunity of SPEs.

Keywords

European Company (SE); European Union; law; creditors; employees; shareholders.

JEL Classification

K22; O52.

Introduction

The European Company (also known by its Latin name *Societas Europaea* or SE) is defined as a species of public limited-liability company regulated under European Union law.

Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE) defines the European company (SE) as a “legal structure that permits a company to operate in different European Union (EU) countries under a single statute, as determined by the law of the Union and common to all EU countries”. These provisions are completed by Council Directive 2001/86/EC of 8 October 2001 regarding the involvement of employees.

Although it was proposed almost 30 years before it came into force, it was only in 2004 when EU facilitated the existence of SE that gives companies the possibility to operate in more than one Member State the option of being established with a European corporate identity and operate with a single set of rules and a unified management system or even as a single merged company.

Since its introduction back in 2004, the European Company statute was chosen by more than 1800 businesses, from which approximately 600 SEs have been established in 22 of the Member States with a very broad spectrum of business areas in which the SEs are commercially active. First, companies used the SE to create a European identity, to set the ground for cross-border restructuring within the group and to determine employee participation.

Societas Europaea (SE) European Regulation versus national law

The main particularity of a SE having domicile in an EU country is that it has dual governance:

- the EU specific regulation; and
- for the aspects not covered by the regulation, by national laws applying European measures for the SE specifically and those applicable to public limited liability companies. Matters such as liquidation, winding-up, insolvency and suspension of payments are mostly governed by the applicable national law.

Rules for establishing an SE

Being a new legal form, the SE coexists with the corporate forms that already are in each Member State. The SE is a separate legal entity with a minimum registered share capital of EUR 120,000 divided into shares eligible for listing on a stock exchange. The name of an SE must include the letters "SE". An SE has headquarters in the Member State where its head office is located and thus registered in the appropriate commercial register. In addition to these regulations, the SE is subject to and governed by the national laws of its headquarters Member State, thus the basic requirements for an SE are the same in each Member State. Still most of the details are determined by national law. We can say that SE is more national rather than European common legal entity. In order to create a European company, it is necessary to be an existing base represented by at least two corporate firms with domicile in different EU countries. The company can be created in one of the following ways.

Table 1 Rules for establishing an SE

| Type of constitution | Type of company | Criteria to be met |
|---|---|--|
| Merger (to establish a European company) | Public limited liability companies | At least two of the companies must originate in different EU countries |
| Establishment of a European holding company | Public limited liability company or a limited liability company | At least two of the companies must originate in different EU countries or they must have had a subsidiary or branch in another EU country for at least 2 years |
| Establishment of a European subsidiary | Companies, enterprises or other legal entities | At least two of the companies must originate in different EU countries or they must have had a subsidiary or branch in another EU country for at least 2 years |
| Conversion | Public limited liability company | The company must have had a subsidiary in another EU country for at least 2 years |

Source: ec.europa.eu/internal_market/company/societas-europaea

There are five exclusive ways (if we take subsidiaries into account) for creating an SE. Each of these ways reflects the basic requirement, called in international law extraneity element, that is a cross-border or international element that must exist.

First of all, existing public limited-liability companies can merge in order to form a European company, if and only if at least two of the companies involved come from different Member States.

Secondly, companies, such as public or 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.

The third way to create an SE is as a joint venture company. In this case the same condition for cross-border activity apply.

Fourthly, there is a converting way that means that the existing public limited-liability company can be converted into an SE if it has a subsidiary in another Member State for at least two years.

Last but not least, an SE itself can establish subsidiary European companies.

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 “mother” companies – can be achieved by using SE Regulation and the existing legal options.

For corporate company to establish a European Company it has to:

- “be created under the law of one of the European Union countries
- have both registered and head offices in the EU, and
- have a presence in other EU countries (subsidiaries or branches) or be governed by the laws of at least two different EU countries.
- Minimum subscribed capital of €120,000” (SE Regulation)

As stated before, a European company can create one or more subsidiaries. Its subsidiaries are also European companies.

The registered office of the SE is where it has its central administration, or its true centre of operations. Still, the SE may transfer its registered office within the EU without having to undertake the dissolution procedure of the original company in order to form a new company. Both registration and completion of liquidation of a European company is published for information in the Official Journal of the European Union.

Organization structures, tax harmonization and employee involvement in the SE

The statutes of the European company can relate to two different possible organization systems:

- the two-tier system providing for a management board and a supervisory board in addition to the general meeting of shareholders;

and

- the single-tier system providing simply for the general meeting and an administrative board.

The name of any new European Company should be preceded or followed by the abbreviation “SE” and only companies created under the European Company Statute are allowed to use this designation.

SE Regulation does not provide for the tax treatment of the SE. However, according to article 10 of the SE Regulation, fiscal treatment of an SE is the same as for a national stock corporation in the Member State in which the SE has its administrative centre. Thus, taxation of the SE follows the applicable national tax system for stock corporations. Given that there is an harmonization of all member states national regulation with primary European Law, the secondary European law (especially

Merger Directive) that must be complied to, it is safely to say that Member States have enacted their own national regulations regarding the fiscal treatment of SE matters.

In what working relations are concerned (that is management-employee relations) it is compulsory that an agreement containing information and consultation procedures and, where appropriate, employee involvement in the management bodies of the SE, exists for every SE established.

The employee involvement supposes any means by which employees can influence decisions there are to be taken within a SE. Such means are:

- information and consultation
- Participation in managing the SE by having:
 - “the right to elect or appoint a number of members of the SE supervisory or administrative body, or
 - the right to recommend and/or oppose the appointment of some or all of the members of the Company’s supervisory or administrative body.” (see Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees)

Summarizing what we stated before, SE can be settled in one of the following ways:

Table 2 Condition for settling an SE

| How | Who | Requirements |
|---|---|--|
| Merger (to form a European Company) | Public limited liability companies | At least 2 of those companies need to be from different EU countries |
| Formation of a European holding company | Public or private limited liability companies | At least 2 of these companies need to be from different EU countries or They need to have had, for at least 2 years, a subsidiary or a branch in another EU country |
| Formation of a European Company subsidiary | Companies, firms or other legal bodies | At least 2 of those need to be from different EU countries or They need to have had, for at least 2 years, a subsidiary or a branch in another EU country |
| Conversion | A public limited liability company | This company needs to have had, for at least 2 years, a subsidiary in another EU country |

Source: ec.europa.eu/internal_market/company/societas-europaea

European private limited-liability company (Societas Privata Europaea). A step forward?

As can be easily seen from the things presented before, the SE addresses mainly the “big” business, leaving aside, somehow the small and medium size companies. In order to “fill” this gap the idea of a European private limited-liability company – Societas Privata Europaea was born the 1990s.

Commission presented a “Proposal for a Council Regulation on the Statute for a European private company” on 25 June 2008 (COM(2008) 396 – Commission’s Draft of the SPE Regulation). The Council of the European Union also presented its proposal on 27 April 2009 (9065/09 – Council’s Draft of the SPE Regulation). Although the main features of the so called “small sister of SE” were drafted, 8 years after the Commission Draft Regulation, SPE is still only a proposal.

SPEs are supposed to exist in addition to the corresponding national legal forms and are meant to be governed by the expected SPE Regulation, which does not contain any regulations on labor law, tax law, accounting or the insolvency of an SPE. These aspects will be governed by national law and existing Community law.

As a private limited-liability company, the SPE would have: own legal personality, a minimum registered share capital of 1.00 EUR and cannot be publicly traded. It may be formed by one or more natural persons and/or legal entities by: conversion of an existing company; merger of existing companies or division of an existing company. The main difference between SE and SPE is that SPE does not require a cross-border element. This difference was, in fact, the main reason the proposal of SPE was criticized, as absence of a cross-border requirement will make the SPE highly accessible, but also means that EU legislation is actually interfering with internal matter, given that it was mainly the extraneity element that legitimate EU regulation.

On more general perspective, the idea itself on the SPE is under question and on continuous debate as it is meant to be “a uniform vehicle throughout the European Union”. Well, it is an illusion to think that the SPE could be perfectly uniform throughout the European Union since there is no European corporate law that provides guidance for national court of law, that is the court entitled to interpretation of the regulation for every individual case brought to justice.

Conclusions

Most of the prosperity and success of European Companies is related to the single market and its common set of rules. The four freedoms and the single market made more trade possible between European nation. Being a win-win situation, Societas Europaea, at first, came as a natural, yet long waited, step forward towards the more connected EU. The dual law system, combining both common, European rules as well as national law system makes SE a little bit harder to deal with then it as intended back 40 years ago. Although the common set of rules aim to make it all simple the fact that European countries had the possibility to adopt or decline one or more of the privileges, determined a heterogeneous system. In time, Member States proved to be but frightened to lose their autonomy, and thus started to refer to national laws more often and ended by, somehow, giving up the original, very articulated, common plan. The ‘European label’ of an SE was intended to remove barriers, even psychological barriers, between Member States and to create a European ‘dimension’ of business.

Also, the creation of n SE, can be seen as very strict as Regulation requires a high degree of a cross-border activity and a minimum capital requirement of 120.000 EUR. These two aspects together with the expensiveness of creating an SE make things really difficult and used mainly by big companies which can afford the costs and, in the end, SEs didn’t prove to be as attractive as first intended.

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