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# Societas Europaea

Analysis of adoption and practical functioning

Master's thesis within European Company Law

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Jönköping December 2007



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### Abstract

Due to constant expansion of the European Community (EC), the harmonization in the fields of European company law and development of internal European market have emerged into considerably bigger and more complex issues. Aspects of corporate mobility, having a direct simultaneous connection to the right of freedom of establishment, have been one of the most problematic spheres for reaching international consensus. Despite numerous directives adopted by Member States (MS) European undertakings continue to be regulated by national legislations. The idea of a common European limited liability company, sc. Societas Europaea (SE), was put into process of realization in order to facilitate the internal trade and to help multinational companies to obtain legal certainty and trans-European character by rising above the variety of national legislations. Furthermore, the SE was to make cross-border enterprise management more flexible and less bureaucratic and to help improving the general competitiveness of Community enterprises.

The process of formation of the European Company Statue took over forty years and the result of the final adoption turned out to be something completely different from the essential idea of the European Company. Due to the historical, socio-political and legal differences MSs had difficulties with compromising on the majority of aspects and instead of one common SE form, the Community had basically adopted 28 different alternatives, loosing the original valuable supranational character. The strongest advantage of the SE are the rights conferred to it by the Regulation. The frequent use of renvoi technique undermines this aspect of SE's precedence over national legislation. The true potential of the European Company remains thus highly theoretical and the current shape of the SE presents only a weak alternative to the national corporate forms of the MSs.

A European Company cannot be freely incorporated solely by investment of private capital. There is a need for existence of at least two legal enterprises which furthermore must fall under the scope of different national legislations. In other words in order to create an SE, the definite cross-border element between companies at hand must be visible or can be identified. It can be formed by means of merger, creation of a holding, incorporation of a subsidiary or conversion. The subscribed capital for the SE shall at its minimum equal €120 000. The Council Regulation on SE provides a flexible management regime, permitting companies to choose between two administration systems (one-tier/two-tier) that exist in the Community. The issues of employee involvement are regulated in separate directive that is a supplement to the Regulation.

Despite the recent developments of freedom of establishment through the case-law, the matter remains utterly complicated. The SE may seem on one hand as a logical solution, being able to incorporate in different MSs, to merge or to form a holding without burdensome processes of winding-up and re-incorporation. On the other hand the Regulation restricts the mobility of the SE by provisions prohibiting location of registered and head of-

fice of the company in different MSs, depriving it thus from one of the basic Community freedoms. Prudent attitude to mobility and aspiration to protect national interests have partly diminished essential advantages of the SE. It appears to be impossible to have a principle place of business in one MS while being registered in another. Possible amendments are awaited shortly, but so far the SE has definitely not achieved many of practical goals considering mobility and has fulfilled very few of its important theoretical expectations.

National perspective on the adoption of the SE seems to be relatively positive, accepting the theoretical advantages of corporate mobility, options of structure and management and possibility to obtain an essentially European trademark. However, there is also an amount of skepticism addressed to deficient practical functioning due to the lack of uniform legislation. European organizations and companies tend to have a slightly more cautious and restrained approach. The idea of a European Company is praised more for its genuinely European character. Representatives for established SEs prefer to talk about internationalization of trade, European recognition, enhanced competitiveness and market integration, while very little speaks about the true practical potential. The SE is furthermore often observed as a useful but still mainly theoretical legal instrument, playing an indispensable part in the overall development of European company law.

Political motives seem to be considerably heavier while discussing the question of necessity of adoption that later attracted so little interest. Additionally, the basic idea of the SE also seems to include definite measures for general European unification, granting SE the symbolic value of commonly European enterprise. Consequently, failing in purely practical application in the absence of a clear need for common limited liability company, the SE has its theoretical and crucially important politically socio-psychological purposes.

# Table of content

<b>1</b>	<b>Introduction.....</b>	<b>1</b>
1.1	Background .....	1
1.2	Purpose.....	2
1.3	Method .....	2
1.4	Delimitations.....	2
<b>2</b>	<b>The essence of Societas Europaea.....</b>	<b>3</b>
2.1	Historical overview .....	3
2.1.1	The initiation .....	3
2.1.2	A theory of illusion .....	3
2.1.3	Re-launch .....	4
2.1.4	Final amendments and adoption.....	5
2.2	Political background and expectations .....	6
2.2.1	Official statements of the Commission.....	6
2.2.2	Theoretical advantages of the SE.....	7
2.2.3	Remarks in Financial Services Action Plan .....	8
2.2.4	Publicized reasons for problematic approval .....	9
2.3	Principles of formation.....	9
2.3.1	General remarks .....	9
2.3.2	Formation by merger .....	10
2.3.3	Formation by creating a holding company .....	11
2.3.4	Formation by incorporation of a subsidiary .....	12
2.3.5	Formation by conversion .....	12
2.4	The structure of European Company .....	13
2.4.1	General remarks .....	13
2.4.2	Rules concerning different administration systems.....	14
2.5	Employee involvement .....	14
2.5.1	General remarks .....	14
2.5.2	The scope and content of the directive .....	15
<b>3</b>	<b>Societas Europaea in relation to freedom of establishment .....</b>	<b>17</b>
3.1	The essence and necessity of freedom of establishment.....	17
3.1.1	Freedom of establishment .....	17
3.1.2	General comments and observations .....	17
3.2	Transfer of company's seat within the Community .....	17
3.2.1	General remarks .....	17
3.2.2	The principle of real seat and the principle of incorporation .....	18
3.2.3	Standpoints in judgments of the European Court of Justice .....	18
3.2.4	Summary and conclusion .....	21
3.3	Mobility of Societas Europaea.....	21
3.3.1	Expectations accompanying the adoption .....	21
3.3.2	Determination of nationality adopted by the Regulation .....	22
3.3.3	Problematic aspects of transfer of SE's seat .....	23

3.3.4	The ECS as a necessity in lack of authority of the ECJ	26
3.3.5	Avoidance of European Delaware effect.....	26
3.4	Comments and conclusion .....	27
<b>4</b>	<b>The question of supranationality .....</b>	<b>29</b>
4.1	Change of views through the time of development.....	29
4.2	Consequences of application of renvoi technique .....	30
4.2.1	General remarks .....	30
4.2.2	Undermining the supranationality .....	30
4.3	Legal sources and their ranking .....	31
4.4	Comments and conclusion .....	33
<b>5</b>	<b>The reality of Societas Europaea .....</b>	<b>34</b>
5.1	National perspectives .....	34
5.1.1	Sweden.....	34
5.1.2	Denmark .....	37
5.1.3	Finland.....	39
5.2	Commission's Consultation .....	41
5.2.1	Foreword .....	41
5.2.2	An overview of responses.....	41
5.3	Opinions of established SE companies .....	46
5.3.1	Foreword .....	46
5.3.2	An overview of responses.....	47
5.4	Comments and conclusion .....	50
<b>6</b>	<b>General Conclusion.....</b>	<b>51</b>
6.1	A superb but purely theoretical idea .....	51
6.2	Poor adoption and general lack of interest .....	51
6.3	The need of improvement and essential amendments.....	53
6.4	Certain political motives behind the adoption .....	54
	<b>List of reference .....</b>	<b>55</b>

# 1 Introduction

## 1.1 Background

Since its creation the European Community (EC) has been expanding considerably through recruitment of new members, reaching on the 1<sup>st</sup> of January 2007 the impressive number of 27 states under the sails of a single supranational organization. Striving towards political unification and higher level of legal and economical harmonization has constantly become more challenging, considering historically developed differences in law systems and essential understandings of well-functioning society. In order to survive and be able to compete economically on the global scale, the Community has created a common European internal market, accompanied by certain freedoms and the complex structure of regulations. Assuring the maintenance of advantages and development of this market can definitely be seen as one of the corner stones for success and prosper of the whole Community.

The exceptional importance of development of the internal market is reflected in the Articles 43 and 48 of the EC Treaty<sup>1</sup>, where one of the basic freedoms, the freedom of establishment, has obtained its legal form and capacity. It grants the right to companies to take up and pursue legal activities in any Member State (MS) of the Community, which furthermore also includes the right to transfer company's registered office or the principle place of business without being discriminated or submitted to unfair conditions by the state of origin or the state of destination. The main condition for companies to enjoy the freedom of establishment is to be created in conformity with any of Community states' legal order and to have a registered office, a central administration or a principle place of business within the borders of Community.<sup>2</sup>

European company law can point to an eventful history and has been developing extensively with a direct simultaneous connection to aspects of freedom of establishment. It has been one of the most problematic spheres for reaching international consensus and despite numerous company-law directives, adopted by MSs, European undertakings continue to be regulated by national legislations. The idea of a common European limited liability company to facilitate the internal trade and to help multinational companies in rising above the variety of national restrictions has been sculptured for decades. The ambitious draft included altogether 284 articles-- a complete set of legislation comprising a wide diversity of aspects of what was to become the European Company. The theoretic idea of creation of Societas Europaea (SE) was without a doubt observed as a next step in further unification of national markets, giving a whole new meaning to freedom of establishment.

After a complicated process of compromising, the agreement was reached, and on the 8<sup>th</sup> of October 2004 the SE Council Regulation<sup>3</sup> finally saw the light. Now looking back at three years that passed, one cannot leave the fact unnoticed that only a handful of companies has used the possibility of creating an SE. What reason can lay behind poor adoption of what seems to be such a huge step in corporal mobility? An outcome at hand could certainly be partly foreseen, but still it leaves a slight feeling of disappointment after a long time of great expectations. It is obvious that in order to reach the consensus important parts of the original regulation were given up, leaving it up to national legislations to fill in

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<sup>1</sup> Official Journal of the European Communities C 325/33.

<sup>2</sup> Craig P., De Burcka G., 2003, p. 765-766.

<sup>3</sup> Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE).

the cracks of insufficiency. Therefore one might question the effectiveness of SE, which may in some cases seem to be failing to fulfill its theoretical purpose. Or might there be another function, stretching itself beyond legal and economical factors, taking stand in more general and global matters?

## **1.2 Purpose**

The main purpose of this thesis is to analyze the present situation of the European Company form, in order to clarify certain problematic issues. One issue, which is of a more practical nature, consists of the reasons for a poor adoption of the SE company form since the admission of the European Company Statute (ECS). Another issue, which is slightly more theoretical, tackles the efficiency of SEs with the purpose of concluding whether it is able to fulfill certain presupposed political and economical expectations. Finally, through a generally hypothetical discussion, with a backup of previously analyzed material and reached conclusions, I am hoping to achieve a deeper understanding of ultimate motives for the creation of a common form of European limited liability company.

## **1.3 Method**

Through the whole thesis the primary sources of law will be followed. Furthermore I will take in consideration relevant literature and a number of articles that will enable me to get a better comprehension of the studied field and look at the problems from different angles. During the description of transfer of company's seat I will also turn to the European Court of Justice (ECJ) case-law.

The minor but definitely not least important part of the thesis will present the opinions of different companies and the variety of organizations, in order to put the theoretical knowledge into a more realistic context. For that I will use the materials of the European Commission Consultation from 2006 and some of my own company research and interview documentation.

I will furthermore show the national perspective on the SE adoption, legislation and functioning. I have chosen to include opinions of official authorities as well as private experts of Sweden, Denmark and Finland.

## **1.4 Delimitations**

The primary aim of this thesis is to deal with questions in the fields of national and EC company law. Nevertheless I have decided to include partly certain specific features of SE's labor law (considering employee involvement) and company management and organization, for those are of great importance to determine origins of construction of the ECS. The impacts of taxation will be left out entirely.



## 2 The essence of Societas Europaea

### 2.1 Historical overview

#### 2.1.1 The initiation

The idea of European Company can be considered almost as old as the actual existence of the EC in its basic form. The concept originally belonged to professor Sanders of Rotterdam School of economics. There is a slight difference in launching dates, but the literary sources agree on that the foundation of the idea itself goes back to 1957-1959, making the concept almost fifty years old.<sup>4</sup> The draft statute for the SE, submitted by Sanders, was very extensive and detailed due to the dual purpose of this initiation. It was intended to create a possibility for companies operating on national level to constitute new structures at a European scale and to introduce a statute for European public limited liability company that would be governed by supranational legislation, containing provisions of strictly European identity. Da Costa and Bilreiro pointed that from certain point of view, the SE constituted the extrapolation of the European companies, proposed by the Council already in 1949, for the SE was intended to have a purely supranational community origin status without any national link.<sup>5</sup>

But the wheels did not really start turning until 1965 when, on the initiative of the French government, the European Commission set up a working party under the leadership of the same professor Sanders, who has already been mentioned above. The aim was to put forward a proposal for a common form of European limited liability company that would correspond to existing internal EC regulations.<sup>6</sup> The basic outline was completed the following year with a prior intention to construct a substitute for the national company law in form of common supranational legislation. This draft was used as a template for Commission's proposal for a regulation that was issued in 1970. This proposal besides the description of possibilities for creation of European Company and its management and organization also included set of laws concerning accounting, labor law, revision, liquidation and taxation.<sup>7</sup> It reproduced, both in form and substance, the original draft, being impressively well developed, extensive and ambitious, containing 284 articles.<sup>8</sup> But what seemed to be practically perfect in its theoretical phase, was to give a new interpretation to the famous expression "everything takes its time".

#### 2.1.2 A theory of illusion

The Economic and Social Committee released a favorable opinion<sup>9</sup> in relation to Commission's proposal, considering it an optional solution for Community obstacles in the economic, social and socio-political fields. Yet I would like to mention the fact that despite overall positive attitude and support of the majority, there were several opposing opinions,

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<sup>4</sup> Goulet K., 2001, p. 299, Werlauff E., 2003, p. 1.

<sup>5</sup> Da Costa C. T., Bilreiro A. de M., 2003, p. 1.

<sup>6</sup> Werlauff E., 2003, p. 2.

<sup>7</sup> Goulet K., 2001, p. 299.

<sup>8</sup> Da Costa C. T., Bilreiro A. de M., 2003, p. 2.

<sup>9</sup> Official Journal C 131, 13th December 1972.

presented by representatives of different Committee groups. Approximately two years later the European Parliament adopted a resolution<sup>10</sup> in favor of the proposal, suggesting a number of amendments mainly in the section of employee involvement.<sup>11</sup>

After the consultations with the Parliament and the Economic and Social Committee, the Commission, on the 30<sup>th</sup> of April 1975, submitted the new altered version of the draft to the European Council. In resemblance to the original proposal, it stated the identical legislation for establishment and governance within all MSs, disregarding the location of the actual seat of the company. The proposal was approached with extreme cautiousness, for it was obviously regarded as being too radical. The majority of the MSs were neither prepared to impose rules of the proposal on the management of groups of companies nor willing to accept provisions on employee involvement.<sup>12</sup> The Council in its turn created another working party that continued scrutinizing the proposal for almost six years between 1976 and 1982.<sup>13</sup> However the procedure was blocked, for it proved to be impossible to reach the consensus considering certain areas, which also included problematic spheres of taxation and the relationship within groups of related companies. It should probably also be noted that the participation of the representatives from more conservative systems, like for example Germany, did not make the process of negotiations any easier. The idea of SE slowly started turning into an illusion.<sup>14</sup>

### **2.1.3 Re-launch**

Despite the difficulties, the Commission maintained an active interest in common European company project, referring in its White Paper on completing the Internal Market to the Statue of a European public limited liability Company among the measures to be adopted by the Council before 1992.<sup>15</sup> Seven years after the interruption of the procedure of the working party, appointed by the Council, the Commission had finally abandoned the original proposal and in August 1989, under the initiative of its president Jacques Delors, came up with a new draft of provisions.<sup>16</sup> The conclusion of the Internal Market Council of 18<sup>th</sup> November 1988 revealed that the majority of the MSs agreed with an urgent necessity of the European Company. Approach, suggested by the Commission, was almost entirely accepted, specifically favoring the optional nature of the Statue, its independence towards domestic laws and the concept of mechanism permitting the employee involvement in the company.<sup>17</sup>

The new draft submitted by the Commission contained a completely new approach to the matter. This time the common tax system for European Companies and regulations for enterprise groups were left out and the employee involvement was to be regulated by a sepa-

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<sup>10</sup> Official Journal C 93, 7th August 1974.

<sup>11</sup> Da Costa C. T., Bilreiro A. de M., 2003, p.2.

<sup>12</sup> Ibid., p. 3.

<sup>13</sup> Goulet K, 2001, p. 299.

<sup>14</sup> Da Costa C. T., Bilreiro A. de M., 2003, p. 3.

<sup>15</sup> Ibid., p. 3.

<sup>16</sup> Goulet K., 2001, p. 300.

<sup>17</sup> Da Costa C. T., Bilreiro A. de M., 2003, p.3-4.

rate independent directive.<sup>18</sup> In other words the proposal was more flexible and substantially simplified, including several references to various national legislations. These, in their turn, had already been submitted to co-ordination as a result of several adopted company-law directives. The aim of the creation had turned to building the set of rules governing solely constitution and a limited amount of functioning of the SE.<sup>19</sup>

In May 1991 the Commission presented yet another amended proposal for a regulation that was also accompanied by an amended proposal for directive on employee involvement. These proposals, in resemblance to the drafts of 1989, favored the application of national rules on the SE, providing that common Community rules were basically not necessary. This time the proposal for the regulation had also been distanced from provisions in several company law directives, and controversial issues, concerning the groups of companies as well as employee representatives, were totally suppressed. Internal structure rules of the proposal were largely inspired by the fifth company law directive and the majority of areas outside the company law were subjected to rules of MSs, which often proved to be in need of harmonization.<sup>20</sup> But the national interests kept miraculously avoiding compromises and political disputes continued. In particular I should probably point out the resistance of several MSs to settlement of employee involvement that was resolved, as described in the next paragraph, only in 1998 with help of the proposal laid down by the authorities of United Kingdom. Spain would however continue to block the dossier for two more years.<sup>21</sup>

#### **2.1.4 Final amendments and adoption**

Final years in last decade of the millennium were dedicated to construction of an optimal compromise in question of employee involvement. In 1994 the Directive on European Work Councils<sup>22</sup>, promoting a system of information and consultations of workers, was adopted. In November of 1995 the Commission submitted a Communication on information and consultation of workers, proposing exercising of the mechanisms presented in the above mentioned Directive. However the national debates led to an understanding that a simple application of suggested principles would not solve existing problems. A year later, in November 1996, the Commission created a group of experts, under the leadership of Etienne Davignon<sup>23</sup>, that had presented a final report to the Commission in May of 1997. It suggested negotiations to establish worker participation, being carried out simultaneously with the process of constituting the European Company. In case negotiation failed, the default systems would be valid, with application of rules relating to European Works Councils Directive.<sup>24</sup>

After filing of a Davignon report, the consensus was reached among fourteen MSs. Approximately thirty years from the first proposal, at the meeting of heads of states and heads of government in Nice in December 2000, the necessity of a common form of incorpora-

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<sup>18</sup> Goulet K., 2001, p. 300.

<sup>19</sup> Da Costa C. T., Bilreiro A. de M., 2003, p. 4.

<sup>20</sup> Ibid., p. 5

<sup>21</sup> Goulet K., 2001, p. 300

<sup>22</sup> Council Directive 94/45/EC of 22 September 1994, OJ L 254, 30 September 1994, p. 64.

<sup>23</sup> Former Vice-President of the Commission.

<sup>24</sup> Da Costa C. T., Bilreiro A. de M., 2003, p. 5.

tion had finally lead to an agreement. Events started picking up speed and revised proposal for a Regulation<sup>25</sup> for the SE Company, supplemented by a parallel Directive on the involvement of employees, were adopted by the Community in October 2004.<sup>26</sup> Hope bars were by that time once again raised enormously high and MSs beamed enthusiasm when the complicated phase of creation had finally reached its end and the SE had officially appeared in publication of the Official Journal on the 10<sup>th</sup> of November 2001.

## 2.2 Political background and expectations

### 2.2.1 Official statements of the Commission

Objective for creation of the common form of European limited liability company was presented by European Commission together with the Proposal for a Council Regulation on the Statute for a European Company. The following aims and intensions were stated:

*“To create a European Company with its own legislative framework. This will allow companies incorporated in different Member States, to merge or form a holding company or joint subsidiary, while avoiding the legal and practical constraints arising from the existence of fifteen different legal systems. To arrange for the involvement of employees in the European company and recognize their place and role in the company.”*<sup>27</sup>

In the same publication the European Parliament approved the proposals still subjected to certain amendments. These were designed primarily to expand and ease the conditions governing the formation of a European company. The Parliament willingly approved the intensions of legislative framework and, despite slight disagreements, gave its full support.

The Commission proceeded with assertions that the ECS will provide companies with an optional new instrument, which will make cross-border enterprise management more flexible and less bureaucratic and should help to improve the competitiveness of Community enterprises. The SE will make it possible to operate Community-wide, while being subject to Community legislation directly applicable in all MSs.<sup>28</sup>

Mario Monti, commissioner for a single market and taxation, noted that the ECS constitutes an instrument for developing economic activity. As such, it is therefore an instrument perfectly in line with the objective to make the market more liberal, more dynamic and less subject to national technical burdens. He stressed that the Statue needs to be considered as both a positive symbolic signal for the Single Market and further step towards its completion.<sup>29</sup> In his opinion the European Company was an additional option and not a replacement for existing national systems, which would remain unchanged. Its optional and additional character has important implications for the solutions, which the Community needs in order to make possible its adoption. I would especially like to emphasize the following statements that describe Monti’s attitude to the reaction of the MS and reflect his view on the SE:

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<sup>25</sup> Also called “the statue”.

<sup>26</sup> Werlauff E., 2003, p. 2.

<sup>27</sup> <http://www.itcilo.it/actrav/actrav-english/telearn/global/ilo/law/eucomp.htm>, 2007/09/16.

<sup>28</sup> <http://europa.eu/bulletin/en/200110/p103046.htm>, 2007/09/16.

<sup>29</sup> Monti M., 1997.

*“It [SE] is sui generis - we need to free ourselves from constraints of the kind "that's not how we do things here" and find new and ad hoc answers... Again, I think it is worth repeating that we are talking only of a further option for companies. The option not to create a European Company will endure, even if the process of creating one had already started. It should be viewed as a new choice for companies, which is - of necessity - a move away from each of the different national traditions across the Community.”*<sup>30</sup>

Continuing the topic of doubts and uncertainties, Frits Bolkestein, member of the European Commission in charge of the Internal Market and Taxation, pointed in his speech to the obvious fact of the skepticism accompanying something new, evoking fear of the unknown. He did not try to deny the fact that there is a lot to be done in plenty of areas, but at the same time declared the certainty that it is important to create a "European perspective" for businesses by allowing them to combine or reorganize their business structure so that they can take full advantage of the single market. According to Bolkestein, it is essential to underscore "the opportunity in diversity" afforded by this new European Company.<sup>31</sup>

## 2.2.2 Theoretical advantages of the SE

In his speech Bolkestein takes up and summarizes theoretic advantages of the European Company that were indented upon the final decision-making by the Commission. Following are in my opinion the most important aspects that are often discussed by academics and that are subjects to publication and political publicity:<sup>32</sup>

- Companies that are active across the Internal Market will be able to operate throughout the Community with *one* set of rules, a unified management and a reporting system. This will make it possible to set aside numerous national restrictions of MSs where these companies have established their subsidiaries.
- The European Company offers the prospect of reduced administrative costs and a legal structure adapted to the Internal Market as a whole. Cross-border operations will be facilitated and thus there will no longer exist a need for setting up a costly and complex network of subsidiaries. The substantive reductions in administrative and legal costs are estimated to be up to €30 billion per year.
- By setting up as a European Company, a business will be able to restructure fast and easily to take full advantage of the trading possibilities within the Internal Market. Moving across borders will be possible without the burdensome and costly process of dissolution and winding up in one MS and re-registering in another. The Statute will thus maximize the freedom of movement for such public companies.
- The European Company furthermore presents the possibilities for optimizing and restructuring groups of companies that have established themselves in different MSs. They will be able to create the SE for a specific geographic area, for each sector of activity or for each product line. This will allow much more efficient and def-

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<sup>30</sup> Monti M, 1997.

<sup>31</sup> Bolkestein F., 2002, Speech/02/598, Rickford, J., 2003, p. 41.

<sup>32</sup> Bolkestein F., 2002, Speech/02/598, Rickford, J., 2003, p. 41-42, see also <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/01/314&format=HTML&aged=1&language=en&guiLanguage=en>, 2007/09/16, [http://ec.europa.eu/internal\\_market/smn/smn28/s28mn30.htm](http://ec.europa.eu/internal_market/smn/smn28/s28mn30.htm), 2007/09/16.

initely less costly management and will lead to productivity gains which will, so it is estimated, even surpass the economies of scale achieved.

- The European Company is also an important instrument within the Economic and Monetary Union in matters of access of capital. For pan-European projects, for example Trans-European Network projects in transport, energy and telecommunications, a European Company could more easily attract investors and private venture capital than a series of national companies all working under different national rules.
- And last but not least, “the European dimension” of the company’s activity is something such a company might have an interest to bring to publicity. The SE offers the possibility to trade under the unified “European flag” which will have a certain reputation value. This “European identity” of a company will also be a way of removing the psychological barriers between MSs and prompt a more European outlook on doing business.

The European Commission had welcomed formal adoption of the ECS by the Council of Ministers on the 8<sup>th</sup> of October 2001. To summarize the advantages and expectations, presented by the members of the Commission, the SE was to give companies, operating in more than one MS, the option of being established as a single company under Community law and thus to be able to operate throughout the EC with one set of rules, a unified management and a reporting system rather than with all the different national laws of each MS where they have subsidiaries. For companies active across the Internal Market, the European Company therefore offers the prospect of reduced administrative costs and a legal structure adapted to the Internal Market as a whole.<sup>33</sup>

### **2.2.3 Remarks in Financial Services Action Plan**

Financial Services Action Plan<sup>34</sup> (FSAP) is a continuation for a Commission’s Communication of 28<sup>th</sup> of October 1998 entitled “Financial services: building a framework for action”. It was presented at the request of the European Council, which needed an urgent program in order to achieve the objectives set out in the framework for action, on which a consensus during the meeting in Vienna in 1998 had emerged. The plan puts forward the indicative priorities and a timetable for specific measures mainly to accomplish necessary development in establishing a single market in wholesale financial services, making retail markets open and secure and strengthening the rules on prudential supervision.<sup>35</sup>

FSAP presented among other measures the adoption and development of the ECS as a specific measure for improving the single market in financial services. It pointed to the necessity of creating a secure and transparent environment for cross-border restructuring. Commission noted that the adoption of the ECS should protect minority shareholdings and lead to a more rational organization of corporate legal structures in the single market. Adoption of the ECS would also enable the Commission to come forward with proposals

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<sup>33</sup>MEMO/01/314,

<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/01/1376&format=HTML&aged=0&language=EN&guiLanguage=en>, 2007/09/16.

<sup>34</sup> Commission Communication of 11 May 1999 entitled “Implementing the framework for financial markets: action plan” [COM(1999) 232 final - Not published in the Official Journal].

<sup>35</sup> FSAP.



for Directives on cross-border mergers of public limited companies and transfers of company headquarters.<sup>36</sup>

## 2.2.4 Publicized reasons for problematic approval

It was interesting and at the same time a little bit surprising to find in “Frequently asked questions” section on the homepage of the European Community the query on the subject of why the approval of the proposal has taken thirty years. Interesting in the sense that academics all over the Europe have been discussing the issue for several decades and it is obvious that to give a simultaneously precise, short and comprehensive answer is practically impossible. The surprising aspect is that someone, presumably not an amateur, would really take up such a complicated matter in a single direct question. Anyhow, the Commission chose to publicize an answer that I present here in its entirety:

*“Partly because the European Company, in order to be based on Community law valid in each Member State, has to be established by a Regulation (directly applicable in all Member States) as opposed to a Directive (implemented through national law). Agreement therefore required consensus amongst all Member States on aspects of company law where there are still widely varying rules in national law. Moreover, it has required finding common ground between those Member States with a tradition of worker involvement (anxious that European Companies should not be used as a means to avoid national worker involvement requirements) and those Member States where worker involvement is not imposed (anxious that European Companies should not be used to introduce worker involvement obligations). In the end, it has required a compromise at the EU's highest political level, the European Council (at Nice).”<sup>37</sup>*

## 2.3 Principles of formation

### 2.3.1 General remarks

A European Company cannot be freely incorporated solely by investment of private capital. There is a need for existence of at least two legal enterprises which furthermore must fall under the scope of different national legislations. In other words in order to create an SE, the definite cross-border element between companies at hand must be visible or can be identified.<sup>38</sup> According to the Regulation, the SE shall be created according to legislation of the state where it has its actual seat. It will further gain the legal status in the state of the seat after the process of official registration. In regard to registration it should be noticed that there does not exist any universal register intended specifically for European Companies, so the essence of this administrative process is purely national.<sup>39</sup> The national registration will however become the further subject for official publication in *Official Journals of European Communities*.

The subscribed capital for the SE shall, according to Art. 4(2) of the ECS, at its minimum equal €120 000. If the MS is not the member of European Monetary Union (EMU), the ac-

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<sup>36</sup> FSAP.

<sup>37</sup> MEMO/01/314

<http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/01/314&format=HTML&aged=1&language=en&guiLanguage=en>, 2007/09/16.

<sup>38</sup> Werauff E., 2003, p. 39.

<sup>39</sup> Goulet K., 2001, p. 301.

tual amount can also be presented in national currency. Finally if the national legislation of a MS requires a greater subscribed capital for companies carrying out certain type of activities, this legislation is applicable on European Companies having their registered office in that MS.<sup>40</sup> Other issues considering share capital, shares themselves, promissory notes, bonds and other types of securities are submitted to national legislations.<sup>41</sup>

Art. 2 of the ECS presents the four methods that can be used for formation of the European Company. All four in a matter of principle require that participating companies have their registered office as well as their actual seat within the Community, though not necessarily in the same MS. The definite requirement that both registered office and the actual seat shall be found within the Community applies, with regard to Article 7, to an ordinary company that wishes to transform itself to an SE (except where Article 2(5) is applicable)<sup>42</sup>. However this requirement can be set aside while using formation by methods of merger, holding or use of subsidiary. Thus according to Art. 2(5) it is up to national legislation to decide whether an exemption can be granted to the company in question.<sup>43</sup> The above implies that a non-Community company can be used in establishment of the SE if it has previously incorporated a subsidiary in a MS of the Community or acts through an incorporated affiliate.<sup>44</sup>

### 2.3.2 Formation by merger

The first possibility for formation of a European Company is a process of merger between at least two public limited liability companies<sup>45</sup> that are currently established in different MSs. According to the principle requirement, the registered office and the principle seat of the companies shall be set within the borders of Community, unless the national legislation gives dispense on the grounds of existing continuous economy link in accordance with Article 2(5). The merger can be organized through acquisition, according to rules set out in a Third Company Law Directive<sup>46</sup>, or through the formation of a new company.<sup>47</sup> During the merger by acquisition (absorption), the acquiring company becomes an SE at the same time as it carries out the acquisition. With the merger by formation of a new company (combination), the SE at hand is becoming a “new company” as the final result of such merger.<sup>48</sup> An SE represents consequently a continuation of merged companies, taking over all the assets and liabilities of those companies.<sup>49</sup>

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<sup>40</sup> SE Regulation Article 4(3).

<sup>41</sup> Blomberg C., Svernlöv E., 2003, p. 10.

<sup>42</sup> SE Council Regulation Article 2(4).

<sup>43</sup> Welauff E., 2003, p. 40-41.

<sup>44</sup> Van Gerven D., Storm P., 2006, p. 36.

<sup>45</sup> A list of public limited liability companies in the respective MS of community can be found in Annex I attached to the ECS.

<sup>46</sup> Third Company Law Directive (78/855/EEC), Article 3.

<sup>47</sup> Van Gerven D., Storm P., 2006, p. 37-38, SE Regulation Article 17.

<sup>48</sup> Werlauff E., 2003, p. 44.

<sup>49</sup> Van Gerven D., Storm P., 2006, p. 38, SE Regulation Article 17.



Merger and the basic process of formation come into force as soon as the European Company has been registered. After the registration the merger is considered being immune to invalidity and cannot be declared void.<sup>50</sup> National law of a MS may though provide the possibility for competent authorities to oppose company's participation in formation by merger, if company at hand is incorporated in that MS. Such opposition can only be valid with a certificate from the court, notary or other investigating authority<sup>51</sup>. Opposition can only be based on the grounds of public interests (for example financial stability) stated in Article 19 of the Regulation. Other occurring matters not specifically covered by Regulation shall be governed in accordance with Article 3(1) by the laws of the MS where the company has its registered office.<sup>52</sup>

### 2.3.3 Formation by creating a holding company

Two or more public and/or private limited liability companies<sup>53</sup> can contribute their shares in order to establish an SE, which in exchange for those shares will become their parent company. The fact that only companies with liability linked to shares can participate in formation of a holding is clearly stipulated in Article 32(7) of the Regulation. Companies' seat and registered office shall according to principal requirement be found within the Community. Therefore, if a company formed under the law of a MS has its registered office outside the Community, participation in formation of a holding can be refused in case conditions in Article 2(5) are not fulfilled. Companies shall furthermore have a definite cross-border element, being governed by the laws of different MSs or for at least two years owning a subsidiary set in another MS.<sup>54</sup>

Companies promoting the formation of a holding SE continue to exist beholding their assets and liabilities. This is one of the reasons why, opposed to the case of mergers, there is no equivalent right of veto for MS on the formation of a holding SE. According to Werlauff, there is a logical explanation asserting that no legal person "disappears" from jurisdiction of the state leaving behind debts or other problematic financial or legal issues.<sup>55</sup> Nevertheless, MSs are allowed, in accordance with Article 32(1) of the ECS, to adopt provisions designed to ensure the proper protection of creditors, employees and minority shareholders who may oppose the formation of a holding SE. The matters not comprehended by the Regulation shall be resolved by the laws of MS where a holding SE has its registered office.<sup>56</sup>

A holding SE acquires legal personality on the day of registration if the national registry approves the formalities and conditions of formation in question. A notice of the formation with following registration shall be published in the Official Journal of European Communities.<sup>57</sup>

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<sup>50</sup> Goulet K., 2001, p. 302.

<sup>51</sup> SE Regulation Article 25(2).

<sup>52</sup> Van Gerven D., Storm P., 2006, p. 39.

<sup>53</sup> A list of qualifying companies can be found in Annex II attached to the ECS.

<sup>54</sup> Van Gerven D., Storm P., 2006, p. 46-47, SE Regulation Article 2(2).

<sup>55</sup> Werlauff E., 2003, p.59

<sup>56</sup> Van Gerven D., Storm P., 2006, p. 46-47.

<sup>57</sup> Ibid., p.50, SE Regulation Article 33(5).

### 2.3.4 Formation by incorporation of a subsidiary

Companies within the meaning of the second paragraph of Article 48 of the EC Treaty or legal entities can form a European Company by incorporation of a subsidiary. In accordance with Article 2(3) of the Regulation that also includes any other type of legal bodies governed by public or private law. Since the Regulation comprises other legal bodies, non-profit entities with legal capacity are also able to incorporate an SE subsidiary through a permission of relevant legislation. Only requirements, in resemblance with previous alternatives of formation, are that these companies are formed in accordance with the laws of a MS and have their registered office and actual seat within the Community unless Article 2(5) is applicable.<sup>58</sup> Furthermore, at least two of the entities at hand must be subjected to the laws of different MSs or two of these entities must have for at least two years owned a subsidiary governed by the law of another MS.<sup>59</sup>

After formation, the capital of the SE subsidiary is held by founding companies in shares in proportion to their capital contribution.<sup>60</sup> There is not much clarity in appointing the nationality for this type of European Company. Its country of origin can often be the MS where one of the founders has its seat. But it can also be registered in MS totally alien to the founders, for the ECS does not contain any references considering this question. However MS, where SE subsidiary is registered, may impose the legal obligation to locate company's seat within the territory of that MS.<sup>61</sup> In that case it is possible to turn to Article 7 of the Regulation in order to get guidance considering location of SE's registered office and its actual seat.

The registration of subsidiary SE takes place in the national registry of a MS where SE's registered is located. The registration shall be published in the Official Journal of European Communities.

### 2.3.5 Formation by conversion

A public limited liability company established under the law of a MS can, according to the principles of conversion, be transformed into an SE, if it has by that time had for at least two years a subsidiary company subjected to the laws of another MS.<sup>62</sup> There is no definition of subsidiary in the Regulation, but the concept has been defined in the Seventh Company Law Directive<sup>63</sup> and most of the MSs have transposed that definition into national legislations. According to Werlauff, it shall be noted that the requirement of a cross-border element prior to the transformation is not satisfied solely by having a branch, which in the draft for the proposal of the Regulation was suggested to be equivalent to subsidiary. Such an equating did not accomplish desired practical consequences.<sup>64</sup> Unlike in cases of three previous formation alternatives, the ordinary company in most cases has to have its regis-

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<sup>58</sup> Van Gerven D., Storm P., 2006, p. 50-51.

<sup>59</sup> SE Regulation Article 2(3).

<sup>60</sup> Van Gerven D., Storm P., 2006, p.51.

<sup>61</sup> Werlauff E., 2003, p. 64.

<sup>62</sup> SE Regulation Article 2(4).

<sup>63</sup> Seventh Company Law Directive (83/349/EEC), Article 1.

<sup>64</sup> Werlauff E., 2003, p. 66.

tered office and actual seat within the Community. Nevertheless there are occasions when this condition can appear to be irrelevant in case Article 2(5) can be applied.<sup>65</sup>

Conversion does not lead to a liquidation of original company or a creation of a new one. Instead it presents a factual continuation of the old company in a new form. This newly formed SE takes over all the assets and liabilities. The important aspect of conversion is that registered office may not be transferred into another MS until the end of the process.<sup>66</sup> Later envisaged transfer can take place in accordance with Article 8 of the Regulation.<sup>67</sup> Furthermore similarly to the case of holding SE, the national authorities do not have the right to veto the transformation on the grounds of the public interest.<sup>68</sup>

After completion of the process of conversion, an SE shall be registered in the national registry of a MS where it has its registered office. A notice of conversion must also be published in the Official Journal of European Communities.

## 2.4 The structure of European Company

### 2.4.1 General remarks

The organization of the SE remained an unresolved complication for quite some time before it was decided that the Regulation could provide a more flexible regime, permitting companies to choose between two administration systems that exist in the Community. The first one, a one-tier system, submits company to a single administrative organ which exercises both management and control functions. The second administration system, a two-tier system, offers the separation of power by giving management functions to management organ and controlling functions to supervisory organ.<sup>69</sup> It must thus be assumed that the list of possible organs is exhaustive and it is not possible for an SE to establish another kind of organ not presented in the Regulation.<sup>70</sup> The ECS includes the rules considering both of systems presented above.

Apart from the rules mentioned, SE also benefits from the freedoms in national legislation of MSs, where they have their registered office. According to Da Costa and Bilreiro there is a high probability for that countries with more liberal company law (for example Ireland) will be able to attract more SEs than countries with stricter and more conservative framework. It is specified in Article 6 that the Regulation represents the instrument of incorporation as well as means of national company law and articles of association. In other words, while establishing numerous rules concerning the distribution of power and functioning of the organs, it also provides possibilities for national legislation and companies themselves to govern the territories not specifically covered by it.<sup>71</sup>

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<sup>65</sup> Van Gerven D., Storm P., 2006, p. 52.

<sup>66</sup> SE Regulation Article 37(3).

<sup>67</sup> Van Gerven D., Storm P., 2006, p. 53.

<sup>68</sup> Werlauff E., 2003, p.67.

<sup>69</sup> Da Costa C. T., Bilreiro A. de M., 2003, p. 61.

<sup>70</sup> Werlauff E., 2003, p. 73.

<sup>71</sup> Da Costa C. T., Bilreiro A. de M., 2003, p. 61.

The general meeting of shareholders is one of the flagmen, playing the crucial part in SE's organization and leadership. The definition of power and its limitation are presented in the Regulation, The Directive<sup>72</sup> and national legislations applicable to public limited liability companies.<sup>73</sup> These powers are generally exclusive and cannot, without a clear legal stipulation, be delegated to another organ or authority.<sup>74</sup> It shall however be noted that the Regulation does not include terms like "the general meeting is the highest authority" or any other similar expressions, in order to avoid misleading considering shareholders meeting's actual possession of power. In other words it cannot be regarded as an omnipotent company organ.<sup>75</sup>

## 2.4.2 Rules concerning different administration systems

The Regulation provides a common set of rules for both administration systems. The following areas, listed in Section 3 of the Regulation, are comprised without differentiation<sup>76</sup>:

- Members of the SE organs, their appointment, duration and mandates
- Transactions subject to authorization
- Quorum and decision taking
- Confidentiality duty and liability of the members of the SE's organs

Furthermore, according to a two-tier system, the management organ shall run the SE on day-to-day basis. Members of the management are appointed and dismissed by the supervisory organ, which has access to information and therefore can exercise control over management. However MSs where SE in question has its registered office can impose certain conditions of their own concerning members of the management.<sup>77</sup>

Finally in the context of a one-tier system the administrative organ manages the European Company. It can often be stipulated by the law of MS, where the SE in question has its registered office, that one or more managing directors shall be responsible for day-to-day management under the same conditions as for public limited liability companies, registered in that particular MS.<sup>78</sup>

## 2.5 Employee involvement

### 2.5.1 General remarks

Aspects of labor law can definitely be seen as the "consensus test" that had continuously stumbled negotiations considering adoption of proposal for the ECS. The issue was so

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<sup>72</sup> Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees.

<sup>73</sup> SE Regulation Article 52.

<sup>74</sup> Van Gerven D., Storm P., 2006, p. 59.

<sup>75</sup> Werlauff E., 2003, p. 95.

<sup>76</sup> SE Regulation Articles 46-51.

<sup>77</sup> Da Costa C. T., Bilreiro A. de M., 2003, p. 65-66, SE Regulation Articles 39-42.

<sup>78</sup> Da Costa C. T., Bilreiro A. de M., 2003, p. 67, SE Regulation Articles 43-45.

complicated that in 1989 it was decided to separate it from the original draft.<sup>79</sup> The essential conflict had been built on the question of the employee involvement. It had divided the MSs into those which supported the system of employee participation and those which favored a system based mere on information and consultation. The matter was resolved by incorporation of the principal pursuant to which an SE, formed of existing companies, will strive to preserve their system and rules of employment. Supplementing the regulation, Directive 2001/86/EC was published officially codifying the consensus of MSs.<sup>80</sup>

## 2.5.2 The scope and content of the directive

One of the central and most important features of the Directive is that it does not allow, according to Article 12(2) and (3), to register an SE as long as the modalities for employee involvement have not been determined. As a result it becomes absolutely impossible to create an SE in MSs that has not transposed the Directive.<sup>81</sup> The significance and delicacy of the question explains to certain point that aim of the Directive. Striving for common result in the name of unification on this problem, MSs can still keep to their historically developed norms by choosing in their opinion the most proper methods of implementations.

The procedure provided in the Directive aims to en effective establishment of employee involvement, based either on participation or simple right to information and consultation. It gives a priority to negations between parties before the application of certain national reference rules<sup>82</sup> (in case of failure of those negotiations). Parties also can simply choose, under condition of mutual agreement, to call off the negotiations in favor of national legislation.<sup>83</sup> The procedure itself is complex, administratively extensive and time consuming. Following are in general terms presented course of actions for procedure of employee involvement:<sup>84</sup>

- Creation of a special negotiation body.
- Design of agreement between competent parties with specification of scope of the agreement at hand, composition of representative body, its functions and frequency of meetings.
- Decision on duration of negotiations.
- Stipulation by the MSs' legislation of standard rules that correspond to provisions set out in the Directive and its Annex.
- Reservation and confidentiality in order to safeguard the crucial information that is revealed to representatives. Each MS may furthermore provide dispense for certain type of information that can be excepted from the access of representatives in order to remain completely confidential.
- Protection of employees' representatives from any unfair treatment

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<sup>79</sup> Goulet K., 2001, p. 308.

<sup>80</sup> Francois P., Hick J., *Nauta Dutilh*, "European involvement" from Van Gerven D., Storm P., 2006, p. 78-79

<sup>81</sup> *Ibid.*, p. 79

<sup>82</sup> Provided in the Annex of the Directive.

<sup>83</sup> Council Directive 2001/86/EC, Article 7(1)(b).

<sup>84</sup> Da Costa C. T., Bilreiro A. de M., 2003, p. 74-77.

No representation requirements are imposed on creation of an SE, if at least one of the founding companies already has such arrangements. If an SE is to be formed by the method of conversion, then its arrangements are simply continued.<sup>85</sup> If the methods of merger or formation of a holding SE are used, the negotiating party can always insist on standard rules and if certain rules are exceeded in current involvement, the opponent party cannot waive them. The Directive, in Article 7(2)(c), also allows the employees to choose the form of representation if there is more than one form of founding companies.<sup>86</sup>

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<sup>85</sup> Council Directive 2001/86/EC, Article 7(2)(a).

<sup>86</sup> Rickford J., 2003, p. 27-28.

## **3 Societas Europaea in relation to freedom of establishment**

### **3.1 The essence and necessity of freedom of establishment**

#### **3.1.1 Freedom of establishment**

Besides the free movement of goods, services, persons and capital, the EC Treaty also grants freedom of establishment to undertakings created within the frameworks of EC. This particular freedom stands for a great number of recent developments on Internal European Market. Article 43 of the Treaty clearly prohibits the application of restrictions on the nationals of one MS in another MS as well as stipulates fortification for setting up branches, agencies and subsidiaries. Furthermore freedom of establishment gives the right to set up and manage undertakings, in particular those within the meaning of the second paragraph of Article 48, submitted to the legislation of a specific MS.

Finally one of the most important features of the Treaty is that it, through the first paragraph of Article 48, equates all the companies and firms, formed in accordance with laws of MSs, with natural persons. In other words there should be no difference in the treatment of legal and natural persons within the Community. Consequently protection against the discrimination in the Article 12 of the Treaty theoretically also applies to companies on a single condition that they have to be established within the framework of the Community.

#### **3.1.2 General comments and observations**

The EC with a population slightly under half a billion people is not the biggest but one of strongest and definitely most balanced economical entities in the world. Yet during the last three decades it has become harder and harder to compete with the phenomena of cheap labor, possession of natural resources and extreme methods of entrepreneurship outside the Community. It is obvious that for the development of a strong economy with stable, healthy competition European companies need a freedom of choice considering geographical areas and legal and economical environments where they can pursue their activities.

The internal market is something that is created in order to secure the Community's well-being and to preserve the standard of living under the pressure from the outside actors. Without proper systematic development it will be harder to retain our positions on the global economy level. The abolishment of national restrictions and prohibition of discrimination shall in my opinion not be viewed as diminishing of rights or freedoms of specific MSs. Instead it shall be primarily observed as unification in the name of the common good. In accordance with human nature and basic economical principles it is a normal reaction to protect what's yours and to chase personal profits. But the idea of a Community presents a bigger picture of something that can be achieved through coalition and co-operation. I assert that the prosperity of the whole Community depends on the maintenance of advantages and development of the internal market and that in its name MSs will have to learn to accept the idea of giving up certain national norms and values.

### **3.2 Transfer of company's seat within the Community**

#### **3.2.1 General remarks**

Just as every natural person has a nationality and belongs to a certain MS, so do the companies of the Community. Nowadays they, just like natural persons, do not actually have to



be found within certain MS in order to be associated with it. But the question of companies' nationality is far from being resolved and has for decades remained subject of controversy in European company law. Although the question of transfer of seat has both directly and indirectly been mentioned in the Treaty, experts and national representatives have not been able to produce a workable solution.<sup>87</sup> Founding members like France, Germany and Italy are not willing to accept movement of company headquarters without its re-incorporation into the new legislative system, while such states as UK, Denmark and for example Spain adhere company cross border relocations without losing their legal identity.<sup>88</sup> The application of different principles gives constant rise to conflicts between domestic legislations which have so far primarily been resolved by the interference of Community's legal bodies.

### **3.2.2 The principle of real seat and the principle of incorporation**

As it has been mentioned above, there are two basic principles governing the connection of undertakings to specific states and economic activity territories. The first principle is mostly known as "the real seat principle", "the main seat theory" or "the actual seat theory" (the real seat principle) and the latter is usually called "the incorporation principle" or "the incorporation theory" (the incorporation principle). According to the real seat principle, the company shall follow the legislation of a MS where its actual seat is situated. Decisive circumstances in this case are location of central administration and the principal place of business, which point out the state where company has to be registered to enjoy certain legal capacity. The incorporation principle on the other hand gives companies an opportunity to be recognized in the MS solely on the condition that it has lawfully been established under the legislation of any other MS. As a consequence of the principle, the legal status of the company can be determined regardless of the state in which its activity is effectively developed.<sup>89</sup>

According to Wymeersch, in Europe the legal issue would not be so controversial if, beyond the technical discussion, there were not important political interests at stake.<sup>90</sup> Obvious differences in the principles are caused by different approaches to the development of freedom of establishment. Though striving for harmonization countries like Germany keep fighting battles to retain their economic stability. German courts consider such public interests as the protection of creditors and minority shareholders still being ultimately important and definitely necessary to secure at the brink of an eventual active migration of the companies.<sup>91</sup>

### **3.2.3 Standpoints in judgments of the European Court of Justice**

#### **3.2.3.1 Foreword**

Following are the outcome and short analysis of the cases that correlate directly with the matter of transfer of seat within the Community. Rulings of the Court in Segers, Daily Mail, Centros and Überseering cases will be examined in their chronological order. They

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<sup>87</sup> Wymeersch E., 2003, p. 661.

<sup>88</sup> Killian B., Baldwin T., 2002, p. 3.

<sup>89</sup> Wymeersch E., 2003, p. 661-662.

<sup>90</sup> Ibid., p. 662.

<sup>91</sup> Killian B., Baldwin T., 2002, p. 7.



contain, in my opinion, the most relevant and interesting judgments, capturing several different elements of the conflict and demonstrating ECJ's influencing standpoints.

### 3.2.3.2 Segers

The Segers<sup>92</sup> case was one of the first to bring some light upon the problem of incorporation and location of economic activity. Commission took an obvious step towards the basics of incorporation principle by providing following statement, considering interpretation of Article 43 of the Treaty, that later became one of the ground pillars while dealing with relevant conflicts:

*"... , a company formed in accordance with the law of another member State is entitled to conduct its business in the [Netherlands] under the same conditions as those applying to companies formed under the [Netherlands] law."*<sup>93</sup>

It was also fully supported by ECJ that in its turn noted that for the application of the provisions on the right of establishment, Article 48 requires *only* that the companies are formed in accordance with the law of a MS and have their registered office, central administration or principle place of business within the Community<sup>94</sup>. National security legislation and the fact of formation under one legislation while conducting business under another were proved to be immaterial.

### 3.2.3.3 Daily mail— a different approach to emigration

Daily Mail<sup>95</sup> judgment fairly described ECJ's attitude to emigration of the companies. Clear intention of the defendant company to change residence solely for tax purposes was prohibited without the consent of UK Treasury. ECJ emphasized that unlike natural persons, companies are creatures of the law and, in the present state of Community law, "creatures of national law". They exist only by virtue of varying national legislation which determines their incorporation and functioning.<sup>96</sup>

The Court pointed out its tolerance towards the variety of national legislations, but the question whether they may further impose restrictions on emigration or even fully deny the possibility of it was officially postponed to further decisions.<sup>97</sup> Important fact was that MSs were able to retain the power within their own jurisdiction. That leads to a conclusion that while dealing with emigration regulators have more or less free hands to make restrictions on freedom of establishment in their own interests. The companies proved to be able to transfer their actual center of administration, remaining however a subject to the legal regime of the jurisdiction under which they have been incorporated.

According to Wymeersch this was not the case of transfer of seat although the real seat principle, while discussing Daily Mail, was followed. That seems definitely reasonable when

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<sup>92</sup> Case 79/85 Segers v Bedrijfsvereniging voor Bank- en Verzekeringswezen, Groothandel en Vrije Beroepen [1986] ECR 2375.

<sup>93</sup> Ibid., para. 11.

<sup>94</sup> Ibid., para. 16.

<sup>95</sup> Case 81/87 R v HM Treasury & Commissioners of Inland Revenue, ex parte Daily Mail and General Trust Plc [1988] ECR 5483.

<sup>96</sup> Ibid., para. 19.

<sup>97</sup> Wymeersch E., 2003, p. 676-677.

taking into consideration the fact that the relocation of seat in this case would lead to an intentional change of the applicable regime.<sup>98</sup>

### 3.2.3.4 Centros

Judgment in *Centros*<sup>99</sup> could certainly be described as a logical continuance to *Segers*. Once again tendency to apply the incorporation principle, in order to serve interests of freedom of establishment, seemed to be favorable. The fact that a company had been formed in one MS merely for the purpose of conducting business in another MS was in that case of no importance. ECJ however also confirmed four conditions needed to be fulfilled in order to justify the restrictions, and with it even the basics of the seat principle.<sup>100</sup>

The problematic dilemma with the case is that the principle of incorporation was never in itself mentioned in the case and had consequently no impact on the states applying seat principle. Nelson pointed to the fact that both Denmark and UK are “incorporation States” that, in this case, could actually be the most logical explanation.<sup>101</sup>

### 3.2.3.5 Überseering— a direct exposal of the real seat weaknesses

Year 2000 presented probably the most direct and groundbreaking judgment in the observed field. ECJ had clearly moved away from the real seat principle in favor of incorporation. An argument that the legal capacity of the company is determined by the legislation of the state where company’s central administration is situated was rejected and proclaimed to be against the freedom of establishment.<sup>102</sup> Furthermore the fact that German law treated companies incorporated under the law of other MS less favorably than companies incorporated under its own legislation proved to be discriminatory.

In accordance with the application of the real seat principle, German law refused to recognize company’s legal capacity after the transfer of the actual center of administration, unless the company in question had completed the re-incorporation process. Possible justifications for the restriction were presented by German government but following ECJ statement stood its ground and left no room for any legal uncertainties:

*“Such objectives cannot, however, justify denying the legal capacity and, consequently, the capacity to be a party to legal proceedings of company properly incorporated in another Member State in which it has registered office. Such a measure is tantamount to an outright negotiation of freedom of establishment conferred to companies by Articles 43 EC and 48 EC”.*<sup>103</sup>

To safeguard the favorable effects of the real seat principle, the claimant, and supporting governments, particularly Germany, relied on the dicta of the ECJ in *Daily Mail*, which they claimed supported the view that a company exists only by virtue of the domestic law, which in turn determines that company’s legal capacity and functioning.<sup>104</sup> This argument

<sup>98</sup> Wymeersch E., 2003, p. 678.

<sup>99</sup> Case C-212/97 *Centros Ltd v Erhvervs- og Selskabsstyrelsen* [1999] ECR I-1459.

<sup>100</sup> *Ibid.*, para. 34.

<sup>101</sup> Nelson M., 2004, p. 7.

<sup>102</sup> Case C-208/00 *Überseering BV v Nordic Construction Company Baumanagement GmbH (NCC)* [1999] ECR I-9919, para. 80-82.

<sup>103</sup> *Ibid.*, para. 93.

<sup>104</sup> Killian B., Baldwin T., 2002, p. 5.

however was held to be irrelevant strangling the last hope for the real seat to stand a chance against incorporation.

Besides denying legal capacity, German legislation, in accordance with the seat principle, assumed Überseering company to change its nationality from Dutch to German. Überseering stressed in its defense that it had neither intended to move to Germany nor wind up its activities in Netherlands.<sup>105</sup> This is a good example giving an idea of how complicated it might be to avoid certain negative national law effects due to the seat principle while dealing with cross-border transfers.

It can be noted though that the ECJ made its statement solely on the basis of freedom of establishment, not taking into account any of the company law aspects. It did not declare German company law invalid but mainly refused its application in light of the superior legal rule, i.e. the Treaty.<sup>106</sup>

### **3.2.4 Summary and conclusion**

In conclusion it can be stated that the real seat principle is in the variety of situations restrictive and incompatible with freedom of establishments and Articles 43 and 48 of the Treaty. Denial of legal capacity, enforcement of nationality and rejection of secondary establishment with primary establishment having no economic activity prove often to exceed borders of proportionality and therefore lack possibilities for justifications. The incorporation principle on the other hand facilitates conduction of business in several MSs at the same time and thus helps to stimulate trade and overall economic activity on the internal market. It also leads to a higher level of legal certainty when companies, while transferring their seat or the principle place of business, do not have to fear unfair requirements and the loss of legal capacity or any other basic company right. Discussed case law creates a strong opinion that the ECJ is willing to take a step from the conservative seat jurisdiction system, yet no absolutely concrete or direct statement has been presented. The obstacle for abolishment is an obvious lack of harmonization, when a great deal of MSs, for a number of reasons, still prefers to apply the real seat principle. The possible solution might as well be dwelling in creation of something with common all-European background that would present different regions for compromising.

## **3.3 Mobility of Societas Europaea**

### **3.3.1 Expectations accompanying the adoption**

As it has already been described in chapter 2.2 of this thesis, one of the objectives of creation and adoption of the SE was a possibility for European companies to incorporate in different MSs and be able to merge or form a holding without being submitted to the restrictions caused by variety on national legislations. Officials praised the ECS for making cross-border trading less complicated, improving the competitiveness of Community enterprises. The original and foundational idea was to subject the SE to common Community legislation being directly applicable in all MSs. Thus the ECS would theoretically maximize

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<sup>105</sup> Case C-208/00 Überseering BV v Nordic Construction Company Baumanagement GmbH (NCC) [1999] ECR I-9919, para. 48.

<sup>106</sup> Wyrmeersch E., 2003, p. 680.

the freedom of movement for companies through avoidance of burdensome processes of winding-up and re-incorporation.<sup>107</sup>

The SE was meant to be an option to national corporate forms already available. Its foremost advantage would basically be its uniform credibility throughout the whole Community with no exceptions in any of the MSs. The SE would, according to the original idea, enable cross-border re-organization, giving companies possibility to reach the scale of “European dimension” within the internal market. The choice of unfamiliar legislation accompanied by legal, fiscal and psychological barriers would no longer be necessary.<sup>108</sup>

### **3.3.2 Determination of nationality adopted by the Regulation**

The SE Regulation provides in Article 7 that the European Company is to be located within the Community, with its registered office and its head office in the same MS. This basically means that the seat indicated in company’s articles of association is to be found in the place of company’s central administration and principal area of its economic activity. Consequently the Regulation takes a step towards the criteria of the real seat principle, which has been described in chapter 3.2.2. It furthermore grants the right to MS, where an SE in question has its registered office, to impose the obligation of locating registered office and central office in the same place.<sup>109</sup>

The ECJ has previously stated that localization of the registered office serves the purpose of determination of national framework applicable on the company. Thus the matters not regulated by the Regulation shall be submitted to the national provisions of MSs where SE has its actual seat. According to Da Costa and Bilreiro this solution avoids certain situation that require the application of principles of conflict of laws for situations, where company has its registered seat located in a MS that applies the principle of incorporation but has its central administration in MS that exercises the real seat principle.<sup>110</sup>

It can be understood that the reason for such stiff legislation is the fact that the European Company shall not be used as a mailbox company, in contrast to possibilities that exist for national private and public companies after outcomes of Centros case.<sup>111</sup> Consequently in situations where an SE in question does not comply with requirement of having both registered office and head office in the same place, the MSs where company has its registered office shall take appropriate measures to oblige the SE to regularize its position within specific period of time. The SE shall re-establish its head office in the MS of its registered office or transfer its registered office by means of the procedure in Article 8. An SE which fails the regularization shall face the procedure liquidation conducted by its MS of registration.<sup>112</sup>

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<sup>107</sup> Blomberg C., Svernlöv E., 2003, p. 9, see also chapter 2.2.

<sup>108</sup> Rickford J., 2003, p. 18.

<sup>109</sup> Da Costa C. T., Bilreiro A. de M., 2003, p. 49.

<sup>110</sup> Ibid., p. 49.

<sup>111</sup> Werlauff E., 2003, p. 115.

<sup>112</sup> SE Regulation Article 64.

### **3.3.3 Problematic aspects of transfer of SE's seat**

#### **3.3.3.1 General remarks**

One of the most peculiar features of the SE Company is its increased options of mobility within the Community. While national companies are forced to wind up their activity in the home state in order to re-establish themselves in the state of destination, the SE can transfer its actual seat without losing its legal personality. In other words it remains the same company throughout the entire process of transfer.<sup>113</sup> Once an SE is legally established, it can transfer its registered office by the means of provision laid down in Article 8 of the ECS. Such a transfer will not result in the winding up or creation of a new legal entity, but the process of transfer still appears to be quite intricate.

Firstly I would like once again to take into consideration Article 7 of the Regulation, providing that the registered office of the SE shall be situated in the same MS as its head office. It is a crucial point for the transfer of SE's seat, for it signifies that the transfer of the registered office also entails the transfer of the head office. The further consequence of it is that an SE cannot transfer its head office while maintaining its registered office in the original MS. Considering this, it becomes obvious that the SE, compared to other companies created within the national framework, lacks the opportunity to fully exercise its freedom of establishment within the Community. Storm raises the question concerning the validity of such discrimination despite its legal origin and adoption. In order to answer it, he refers to Article 230 of the Treaty, stressing the fact that regulations may not be in violation of the Treaty and if they are, they can, wholly or partly, be declared null by the decision of the Court at the request of a MS. Despite those facts Storm is rather skeptical concerning such drastic measures, pointing to the possibility of a preliminary ruling that would be binding on the Court in doubt as well as having the effect of judicial precedence throughout the Community.<sup>114</sup>

One could argue that the SE, unlike companies under national law, is the creature of the Community law and can therefore be submitted to any rules of that law. However, those rules have to be in accordance with the Treaty, which is the primary legal source of the Community. That is why Storm emphasizes the possibility for the SE to transfer its head office without being obliged to simultaneously transfer its registered office. He still seems to refrain from any directly criticizing conclusions, claiming the matter to be of high uncertainty and thus being included as one of the most important issues mentioned in Article 69 of the ECS.<sup>115</sup>

#### **3.3.3.2 Contradictions to case-law**

Next I would like to take up a discussion whether the judgment of the ECJ in the *Überseering* case might have any influence on the function of Regulation rules concerning the transfer of SE's seat. Wymeersch points to the fact that in Article 8 of the Regulation, which deals with the transfer of the registered office, while in accordance with the favored incorporation principle the transfer of the registered office into another MS is impossible. The issue becomes even more complicated with taking into account Article 7, discussed in the previous chapter, which submits the requirement of locating both the registered office and the head office in the same MS. As it has

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<sup>113</sup> Weraluff E., 2003, p. 119.

<sup>114</sup> Van Gerven D., Storm P., 2006, p. 11.

<sup>115</sup> *Ibid.*, p. 11.

been mentioned, the rule seems to be of extreme importance, considering such drastic sanctions as liquidation, which have been granted to MSs.<sup>116</sup>

Wymeersch emphasizes the importance of raising the question whether this requirement is compatible with ECJ's judgments in *Überseering*. He argues that such a requirement imposes considerable burdens on companies wishing to transfer their head office without simultaneously moving their registered office. This would result in change of the applicable law, specifically in cases of transfer of seat into MS applying the real seat principle. And that, according to Wymeersch, means depriving companies from their benefits of freedom of establishment. The change of applicable law would furthermore probably also appear in transfer of SE's seat from incorporation to another incorporation state, as the location of "registered office" would also be affected, following Article 7 of the Regulation. That gives a definite and clear image of the Regulation favoring the idea of the real seat principle, while ECJ has taken steps towards its possible abolishment. However it has to be noted that the Regulation does not expressly refer to change of the applicable law due to transfer of SE's seat. It merely states the obligation of adaptation of company's articles of association.<sup>117</sup>

As the compatibility of the requirements with the Treaty's freedom is unconvincing and loose, the exceptions to freedom of establishment will have to be assessed on the basis of "general good". Consequently the exception might be considered valid for national companies to the extent it relates to prudential measures. Commission stated that it can be seen as necessary also for effective supervision of the SE, so as to avoid the SE being used for doubtful practices such as tax fraud or money laundering.<sup>118</sup> Wymeersch agrees with exception solely on the grounds of definite and clear "general good", but argues that the overall justification considering location of SE's registered office is far from being convincing.<sup>119</sup> Therefore he joins Storm claiming the Regulation provisions being contrary to Treaty's freedom of establishment.

As we have seen, a change of company's seat would necessarily result in the change of the applicable regime. The company in question would therefore be subjected to national laws, that in itself still present a great deal of diversity.<sup>120</sup> As a consequence, the company obtains the right in accordance with the Article 8(1) to transfer the seat without the re-incorporation, but still has to conform with to the local rules of its new home state. These rules may cause a complete administrative and financial overhaul. That is why Wymeersch considers judgment in *Überseering* being a more favorable and easily adoptable solution.<sup>121</sup>

### 3.3.3.3 Amendments considering location of registered office

Article 69 of the ECS requires the Commission to compose a report on proposals for amendments to the Regulation by 8<sup>th</sup> of October 2009. Among other problematic issues

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<sup>116</sup> Wymeersch E., 2003, p. 690-692.

<sup>117</sup> *Ibid.*, p. 692.

<sup>118</sup> <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/01/314&format=HTML&aged=1&language=en&guiLanguage=en>, 2007/09/18.

<sup>119</sup> Wymeersch E., 2003, p. 692-693.

<sup>120</sup> SE Regulation Article 9.

<sup>121</sup> Wymeersch E., 2003, p. 693.



the possibility for European Company to locate its registered office and head office in different MSs shall be discussed.<sup>122</sup> Werlauff points to potential results that also include the possibility to take into consideration other developments in the EC like for example decisions of the ECJ made directly on the basis of freedom of establishment in Articles 43 and 48 of the Treaty.<sup>123</sup>

The preamble of the Regulation expressly states that the Regulation does not intervene in the choice between the real seat principle and incorporation principle.<sup>124</sup> At the moment the choice itself is still regulated by the variety on national laws, but taking into consideration judgment in Centros case Werlauff observes as a high probability the fact that the seat principle will be rejected in the future for being contrary to the Treaty-based freedom of establishment.<sup>125</sup>

In its communication with the Council, the European Commission has showed the awareness and consideration in relation to matters of location the registered office. Year 2009 at the latest, as it has already been mentioned, the Commission will submit a report on the ECS, in accordance with Article 69 of the Regulation. A general overhaul of the Statute and, in particular, of the issues listed in Article 69 does only seem realistic on the basis of that report. The Commission scrutinized the fact that Article 7 of the SE statute provides, inter alia, for that the registered office of an SE shall be located in the same MS as its head office and, in addition, allows MSs to provide that the SEs, with registered office in their territory, have the obligation of locating their head office and their registered office in the same place. In the light of case law of the ECJ, especially the judgment in the Überseering case, the Commission asserted that a modification of Article 7 of the Regulation may be considered.<sup>126</sup>

#### **3.3.3.4 Situations where transfer of the SE can be prohibited**

According to Article 8(15) of the ECS, if the SE in question is subjected to winding up, liquidation, insolvency or suspension of payments or other similar proceedings it may not transfer its registered office to another MS. It is further also assumed that the matter at hand is supervised by a legal public authority which is able to prevent the transfer of the company. Legislation of a MS, where the SE company is registered, may provide the restriction on the transfer of registered office that entails the change of the applicable law if such an authority opposes the procedure of transfer. Such opposition must be justified on the grounds of public interest that in itself possesses a lower standard of requirement than the one usually used by the ECJ.<sup>127</sup> In other words the access to this opposition for MSs is in reach of hand.

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<sup>122</sup> SE Regulation Article 69(a).

<sup>123</sup> Werlauff E., 2003, p. 109.

<sup>124</sup> SE Regulation, Recital (27) of the preamble.

<sup>125</sup> Werlauff E., 2003 p. 109-110.

<sup>126</sup> Communication of the Commission on a simplified business environment for companies in the areas of company law, accounting and auditing, Brussels, 10.7.2007 COM(2007) 394 final, p. 14.

<sup>127</sup> SE Regulation Article 8(14), Werlauff E., 2003, p. 128-129.

The meaning and scope of “public interest” is not absolutely clear. Under court proceedings, in accordance with Article 8(14), references for preliminary ruling, on the grounds of Article 234 of the Treaty, may be made to the ECJ. In the absence of more specific standards for application of “public interest”, the Court’s interpretation of the expression can be used to cover other specific categories of interest. It is furthermore also possible to ask for Community law requirements for national authorization in matters at hand. Yet the main purpose of ECJ is solely to interpret the law, while the application falls within the competence of national legislative and supervisory bodies.<sup>128</sup>

### 3.3.4 The ECS as a necessity in lack of authority of the ECJ

There has for some time existed a question whether it is possible, with judge-made law, under Treaty provisions on freedom of establishment, to give companies right to transfer their seat from state to state. Unfortunately even the ECJ has so far avoided direct judgments of such influence, confining itself mostly to opinions and indication on how European company law should handle those matters. *Daily Mail* is an example of such prudent attitude, where the ECJ had abandoned any attempt to proclaim the freedom of establishment being supreme over the national company law positions in case of MSs applying the incorporation principle.<sup>129</sup>

It was suggested that the new judgment of *Daily Mail* could have different outcomes. The change of domicile for a company also requires a simultaneous change of nationality, which natural persons do not have. At least there is no Treaty-based right to change nationality and in countries using the principle of incorporation legal persons, opposed to natural persons, exist only by the virtue of the laws of a MS of their registration. Still there is a clearly stated right to set up primary and secondary undertakings in another MS. A different judgment could suggest an equal application of primary establishment on companies, but this would also mean a requirement of enforcement of a right to change the nationality of the company. It is very doubtful that creation of such a right can be carried out through judge-made law. Therefore the SE Regulation is, by the side of 14<sup>th</sup> Company Law Directive, the only option to bring development into this question.<sup>130</sup>

### 3.3.5 Avoidance of European Delaware effect

The requirement of Article 7 to locate registered office and head office of the SE within the same MS can also be observed as solution to cumbersome discussion considering risks of a possible European Delaware effect. Concerns about such risk have been especially high after the *Centros* judgment and it can still become a reality for other forms of undertakings, while in respect to the European Company this risk is definitely eliminated. European Council and Parliament have basically put an end to free forum shopping that with adoption of the ECS can appear only in significantly restricted forms.<sup>131</sup> An SE can only be subjected to jurisdiction preferences to a very limited extent, while other kinds of companies are often limited to do that because national tax laws may follow their dynamics and are sometimes able to specify company’s actual seat for tax purposes.<sup>132</sup> Consequently, a

<sup>128</sup> Werlauff E., 2003, p. 130.

<sup>129</sup> See chapter 3.2.3.3.

<sup>130</sup> Werlauff E., 2003, p. 120-121.

<sup>131</sup> *Ibid.*, p. 111.

<sup>132</sup> *Ibid.*, p. 112.



possibility for creation of European Delaware is minimized to uncommon and rather exceptional situations.

A choice by the management of an SE can still be made after identification of the most business-friendly and liberal national legislation, but the company can only enjoy such framework if it not only formally but also in reality changes its domicile. Furthermore there will be no more forum shopping in order to avoid matters of employee involvement, for Directive on involvement of employees provides MSs with appropriate measures in order to prevent the use of the SE for depriving the employees from their rights.<sup>133</sup>

### 3.4 Comments and conclusion

I would like to start with a short résumé of the general state of affairs of freedom of establishment and mobility of companies within the Community. It can with relatively high level of certainty be concluded that the real seat principle is in the variety of situations restrictive and incompatible with Articles 43 and 48 of the EC Treaty and thus also with freedom of establishment. The incorporation principle, on the other hand, facilitates conduction of business in several MSs at the same time, helping to stimulate trade and overall economic activities on the Internal Market of the Community. It is the development of European companies' competitiveness and extension of their trade options that guarantee the maintenance of high life standards and stable economy. Incorporation principle, being in line with freedom of establishment, aims at a higher level of legal certainty for companies transferring their seat or principle place of business. Its practical application diminishes the possibility of unfair requirements and loss of legal capacity or any other basic company right.

Despite the presented arguments, the matter of transfer of companies' seat remains unresolved and extremely complicated. One of the reasons is probably because, as Wyrmeersch noted, the case law neither does deal with the transfer of the seat as such, nor with the incorporation or real seat principles. It does not contain elements that could constitute the core for a legal regime applicable to the way companies could transfer their corporate seat.<sup>134</sup> That is why the idea of a common form of European limited liability company seems to be such a logical solution. Being able to incorporate in different MSs, to merge or to form a holding are the definite advantages of the SE. Possibility to avoid burdensome processes of winding-up and re-incorporation, following common legislation and maintaining the "European scale" of business display the SE as unique form of an enterprise in Europe.

But analyzing the facts I insist on re-examination of development and potential success in the field, by taking into consideration to contradictions and new complications. The ECS restricts the mobility of the SE by provisions prohibiting location of registered and head office of the company in different MSs. Therefore, the SE seems to lack, compared to other forms of companies within the Community, one of the fundamental cores of freedom of establishment, raising the tricky question of compatibility with the Treaty. Prudent attitude to mobility and aspiration to protect national interests have, in my opinion, partly deprived the SE from its advantages, with every transfer subjecting it to a new unfamiliar national set of laws. By providing the SE with a practical right to change nationality, there has also been provided an obligation to do that. Compared to other forms of companies, with the SE it appears to be impossible to have a principle place of business in one MS while being regis-

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<sup>133</sup> Council Directive 2001/86/EC, Article 11.

<sup>134</sup> Wymeersch E., 2003, p. 680, 689-690.

tered in another. This makes the SE an option that in a great deal of situations cannot be observed as favorable, leading to a necessity of weighing the advantage and disadvantages in order to establish the most optimal solution.

European company law seems to be on the right track and experiences positive tendencies by means of a systematic support and advance of incorporation. But it is too early to praise the SE for being a logical and necessary step in its development. Possible amendments are awaited shortly, but so far the SE has definitely not achieved many practical goals considering mobility and has fulfilled very few of its important theoretical expectations.

## 4 The question of supranationality

### 4.1 Change of views through the time of development

In order to analyze the position of the SE as a supranational entity, I would like once again to turn to the historical background and the process of formation of the ECS. The original idea, submitted by professor Sanders, was basically transformed into the first proposal of the Commission in 1970 and aimed at a completely uniform set of rules applicable throughout the whole Community. The draft, presented by the working party, contained provisions governing almost every aspect of the SE and gave it the image and the identity of “essentially European” entity. Clear supranational character presupposed total precedence over any national legislation. According to Goulet, the adoption of such proposal would have resulted in definite elimination of any necessity of national company law in matters relating to European Company.<sup>135</sup>

But the MSs were clearly not ready to transfer such a great amount of power to the new trans-European form of enterprise. As the result of difficulties finding consensus in several areas, the new altered version of the proposal was submitted to the Council in 1975. This time the SE would lose its supranationality in questions of employee involvement.<sup>136</sup> The working party, appointed by the Council, did not succeed in solving the complication. Instead, there appeared to be new difficulties in spheres of taxation and management of European Companies.<sup>137</sup> In the end of 70' the process had at some point reached the state, where the great part of the original proposal needed to be either abolished or completely changed in order to reach the agreement. That was probably one of the main reasons for temporarily abandonment of the idea in 1982-- the SE was losing the basics of the original idea of its supranationality.

The second half of the 80's revealed the general enthusiasm of majority of the MSs towards reconsideration of European Company matters. The conclusion of the Internal Market Council pointed to the national acceptance of Commission's approach. I would especially like to emphasize the fact that, due to urgent necessity of the SE, independence towards domestic laws was amongst issues of national tolerance and compromise.<sup>138</sup> But this independence had been limited to very few areas considering aspects of future European Company. Supranationality in questions of common taxation system and regulations for group of companies was transferred to national legislations in their entirety, while employee representation was to be regulated by separate independent directive.<sup>139</sup> As the result of these limitations, the proposal was simplified, losing a big part of its original identity. In order to fill the gaps of now often incomplete legislation, the necessary references to national legislations had to be made.

In 1991 yet another proposal, submitted by the Commission, presented a new set of rules, giving the ECS its final touch. Internal structure rules for the SE were now largely inspired by the fifth company law directive and majority of areas outside the company law were

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<sup>135</sup> Goulet K., 2001, p. 299, Da Costa C. T., Bilreiro A. de M., 2003, p. 1-2.

<sup>136</sup> Da Costa C. T., Bilreiro A. de M., 2003, p. 3.

<sup>137</sup> Goulet K., 2001, p. 299.

<sup>138</sup> Da Costa C. T., Bilreiro A. de M., 2003, p. 3-4.

<sup>139</sup> Goulet K., 2001, p. 300.

subjected to rules of MSs, which often proved to be in lack of harmonization.<sup>140</sup> The SE managed to maintain a very insignificant part of the original idea of common trans-European enterprise. National approach of the 90's did not leave much chance for the SE to actually be able to exercise its status of supranationality, which now had become almost hypothetical. The result of later adoption presented an enterprise that was able to change its nationality without losing its legal identity and was recognized in the whole Community. Yet the SE was being subjected to the variety of national legislations, maintaining a unique enterprise only by the virtue of its mobility and options of formation.

## 4.2 Consequences of application of renvoi technique

### 4.2.1 General remarks

The scope of the Regulation was reduced to a few essentials including authorization of certain provisions in company's articles of association. The remainder of applicable law is to be derived from the national framework of MSs where the SE at hand is registered. It is considered a crucial principal of the ECS that, except where the Statue requires or permits otherwise, the MSs must treat the SE as any other limited liability company within its area of authority.<sup>141</sup> Thus the MSs of registration must apply their public company law, while other MSs have to recognize the SE in question being the public company of the state of its registration. Professor Rickford describes the SE as a chameleon, drawing its legal character largely from the law of its registration. The reality of relation to certain law area changes radically the decisive circumstances of whether and where to form the European Company.<sup>142</sup>

### 4.2.2 Undermining the supranationality

So instead of fully identical legal entities, the Community has created the form of incorporation that has its uniform aspects, but nevertheless is largely dependable on renvoi techniques-- references to domestic legislation. Werlauff asserts that what we have currently, is only a more indirectly harmonized form of incorporation. In his opinion this fact represents one the greatest weaknesses of the SE Regulation: the ECJ can be required to answer questions not just about how the Regulation shall be interpreted, but also require the interpretation of a Company Law Directives, which are implemented into national legislation and to which the Regulation refers.<sup>143</sup> As directives are implemented through national adoption, the renvoi technique approaches the possibility of interpretation of semi-national legislation that seldom remains identical from state to state. And when companies can no longer rely on the Regulation, we get a clear indication of that the supranationality of European Company is definitely being incomplete.

Furthermore, the Regulation expressly provides the whole range of matters that are to be governed by the variety of national legislations. The following list of necessary references to laws of MS does definitely cover a great part of any national company law<sup>144</sup>:

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<sup>140</sup> Da Costa C. T., Bilreiro A. de M., 2003, p. 5.

<sup>141</sup> SE Regulation Article 9(1)(c), Rickford J., 2003, p. 20.

<sup>142</sup> Rickford J., 2003, p. 20.

<sup>143</sup> Werlauff E., 2003, p. 16-17.

<sup>144</sup> Van Gerven D., Storm P., 2006, p. 14.

- Capital and its maintenance, including issuance of and payment for shares, contribution of assets for shares, distribution of profits, financial assistance, statutory reserves and purchase and redemption of own shares
- Shares, including most of the rights and operations attached to them
- Formation and registration
- Merger
- Rights of minority shareholders to appoint directors
- Disclosure of information by directors
- Liability of directors
- Powers of general meetings, as well as their organization and conduct
- Preparation and content of annual/consolidated accounts
- Winding up, liquidation and insolvency
- Cessation of payment and similar procedures

The Regulation maintains altogether 67 substantial articles that, in their turn, contain 65 references to national laws and 32 possibilities for MSs for choosing an option. In addition, the Directive on Employee Involvement contains five references and eight options. So the inevitable conclusion is that instead of one common form of SE, we basically end up with 28 different alternatives that deviate from state to state. Discussing the implication of references, Storm points to the important fact of the extremely weak prospect of eliminating the existing national differences in the foreseeable future. Therefore the disparity will remain a source of legal uncertainty for quite a while.<sup>145</sup>

I would also like to mention Recital No. 16 of the preamble to the Regulation that appears to be of definite undermining character. It refers to rules of SE as to something that is not required for the subsequent coordination of the laws of the MSs. Therefore the rules and the principles of international private law are applied where an SE exercises control as well as where it remains the controlled company. This leads to a conclusion that the general principles of private international law are also applied to the European Company in matters of choice of law.<sup>146</sup>

### 4.3 Legal sources and their ranking

Article 9 of the Regulation presents a clear list of rankings of different categories of sources of law in European Company legislation. Werlauff points to the fact that even though the method of ranking of legal sources is quite unusual, in the end it does seem to be logical considering application of renvoi technique. The outline of Article 9 may also seem to be a little bit complicated, but in reality it can be reduced to four simple and quite obvious elements<sup>147</sup>:

1. Every matter which is expressly dealt with by the Regulation is governed by the Regulation.

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<sup>145</sup> Van Gerven D., Storm P., 2006, p. 14.

<sup>146</sup> Werlauff E., 2003, p. 17-18, SE Regulation, Recital No. 16 of the preamble.

<sup>147</sup> SE Regulation Article 9, Werlauff E., 2003, p. 22-23.

2. If the Regulation gives an expressed reference to SE's articles of association<sup>148</sup>, these shall apply.
3. If the Regulation does not deal with an issue itself or through the reference to the articles of association, the legislation of a MS governing an SE, where the SE in question is registered, shall apply.
4. Finally, if an issue cannot be solved in accordance with any of the previous possibilities, the SE shall turn to national legislation governing ordinary limited liability companies. In case national company law does not cover the problem, the articles of association of the SE shall apply.

It is important that the laws adopted by the MSs specifically for SE companies must comply with Company Law Directives applicable to public limited liability companies.<sup>149</sup> Although the Regulation does not present any concrete consequences if this is not the case, the Directives can have a direct vertical (state/private) effect on the SE. Thus any Company Law Directive can be asserted directly applicable in national courts while dealing with issues considering European Companies. In case of preceding incorrect implementation of the Directive, the Regulation, according to Werlauff, may be assumed to “raise the Directive up” to the legal level of implementation. Consequently the provisions of the Directive become directly applicable both on vertical and horizontal (private/private) plane.<sup>150</sup> The Regulation is generally applicable and can create both rights and duties for private persons, but considering vacuum between its provisions and application of renvoi technique, it is important to keep national company laws as harmonized as possible.

The ranking of legal sources of the SE may go through remarkable changes in the subsequent revision of the Regulation, stated in Article 69. As it has been mentioned before, the Commission is required to submit a report on amendments of issues stated in the article by the 8<sup>th</sup> of October 2009. It is possible that the scope of the Regulation will be extended on a number of points. Among other thing there will be a consideration whether it is appropriate to allow in the laws, that MSs issue in accordance with the Regulation for SE companies, to make it possible for the SE to include provisions in their articles of associations that would otherwise not be authorized in article of association of an ordinary limited liability company.<sup>151</sup> Of enormous significance are also subjects of location of SE's head office and registered office in different MSs<sup>152</sup>, maintenance of capital and management structure<sup>153</sup>. Development in those areas would certainly give the SE more freedom comparing to ordinary companies in its home MS. Exercise of those possibilities would enable European Company to gain higher supranational status and thus make it more attractive as an option of running a business in Europe.<sup>154</sup>

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<sup>148</sup> Called “company statutes” in the Council Regulation.

<sup>149</sup> SE Regulation Article 9(2).

<sup>150</sup> Werlauff E., 2003, p. 23.

<sup>151</sup> SE Regulation Article 69(d).

<sup>152</sup> See chapter 3.2.

<sup>153</sup> SE Regulation Article 69(d).

<sup>154</sup> Werlauff E., 2003, p. 24.

#### 4.4 Comments and conclusion

Considering the facts presented above, I have a hard time believing that the SE can really be observed as a truly supranational form of enterprise. Probably one of the most influential reasons for that is the knowledge about the scope of the original idea that unfortunately did not stand a chance against decades of conservative prudent attitude. According to Hauschka, the SE Regulation represents now the lowest common denominator in relation to original intentions, being a lot closer to national limited liability companies than it was ever intended.<sup>155</sup>

Still, depending on the angle of perception, it may also occur that the objection of supranationality is not as strong as it may seem. National implementation of Company Law Directives tends to create a positive but overrated image of already existing provisions that provide the SE with certain degree of trans-European legislation uniformity. I would like to emphasize the fact of existing differences in final products of those implementations and point to the aspect of those implemented directives being applicable to ordinary limited liability companies basically to the same extent as to the SE<sup>156</sup>. In other words, I claim that those directives do not give the SE greater supranationality than to any other national company.

The greatest advantage of the SE are the rights conferred to it by the Regulation. The frequent use of renvoi technique undermines this aspect of SE's precedence over national legislation. So I think many would agree with the fact that only the extension of the scope of directly applicable Regulation can give the SE a truly supranational character. That would furthermore give the SE clear legal superiority over national form of undertakings, making it considerably more attractive corporate form.

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<sup>155</sup> Hauschka C., 1992, p. 147.

<sup>156</sup> Conformity of laws adopted for the SE with Company Law Directives, chapter 4.3.



## 5 The reality of Societas Europaea

### 5.1 National perspectives

#### 5.1.1 Sweden

##### 5.1.1.1 General remarks

Despite the three cases of SE establishment, including well-known Nordea and Alfred Berg, the overall attention and interest towards the adoption of European Company in Sweden seems to be pretty insignificant. Considering the period of time, since its creation, and prognoses made by several academics around 2003 and 2004, there are no signals for any radical changes in the nearest future either. According to Dejmek, there are several reasons behind the occurred situation that definitely cannot be considered as something unforeseen or surprising.<sup>157</sup>

One of those reasons seems to be the lack of practical experience and knowledge of SE's functioning in reality. We have to look at the issue with regard to the fact that Sweden, by the time of adoption of the ECS, belonged to a group of relatively young MSs. Taking into account numerous consensus complications, coming especially often from for example Germany, trying to force through their national bureaucratic views, did not find much positive response in Swedish views on the matter. Besides, Sweden is relatively small country, having only a few companies of great size with a wide economic activity on international level enough to transform into an SE or to take part in its formation. Nevertheless, there is a clear tendency to describe Sweden as an attractive state for creation and development of European Companies. It cannot be expected to receive any awards for the most company-friendly environment or undemanding labor law. But on the other hand, Sweden provides a simple registration and formation process, Swedish workers are well educated and have good foreign language skills and corporate tax, compared to several MSs, is relatively low. Thus, according to Dejmek, extension and simplification of legislation around the SE would only favor Swedish economic activity.<sup>158</sup>

##### 5.1.1.2 Formation of the SE

According to Article 15 of the SE Regulation, the formation of an SE shall, unless otherwise provided by the Regulation, be governed by national law applicable to public limited liability companies of the state of SE's registration. In this context it shall be mentioned that, compared to other MSs, formation of an SE in Sweden will not include any involvement of a notary. Furthermore, the Regulation gives a possibility of formation of an SE holding and subsidiary to both public and private limited liability companies, covered by Annex II of the Regulation. Here it has to be noted that Swedish company law, in resemblance to Finland and in contrast to Denmark and Norway, continues to operate with one single form of company with limited liability.<sup>159</sup>

Sweden is not the member of European Monetary Union (EMU). The Regulation contains a clear option for MSs, where the third phase of EMU does not apply, to state the share

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<sup>157</sup> Dejmek P., 2003, p. 727.

<sup>158</sup> Ibid., p. 728.

<sup>159</sup> Dejmek P., "Sweden" from Oplustil K., Teichmann C., 2003, p. 295-296.



capital of the SE in their national currency.<sup>160</sup> Sweden however does not intend to use this option. All European companies registered within its legal framework are obliged to express in Euro their share capital as well as their annual accounts. Sweden proves to be positive towards resemblance with the Regulation of common European enterprise and considers, in its Memorandum of the SE<sup>161</sup>, the use of Euro being natural and most logical option.<sup>162</sup>

### 5.1.1.3 Location of registered office and head office of the SE

Article 7 of the Regulation provides that the registered office of the SE shall be located in the same MS as its head office. It furthermore gives MSs possibility to impose the national requirement of such location on European Companies registered in that particular MS. As it has been discussed previously, such a requirement enforces the aspects the real seat principle. Sweden adheres to the principle of incorporation and thus considers requirements in Article 7 being alien to its legal framework. The SE, similarly to Swedish national companies, should have the freedom of locating its registered office and head office in different MSs. Consequently, Swedish authorities do not support the integration of provisions in Article 7 into the Swedish legislation.<sup>163</sup>

In this context Dejmek especially emphasizes the fact of European case law development since the adoption of the Regulation. The ECJ has implicitly accepted the fact of possible location of offices in different MSs. Dejmek provides therefore the general Swedish opinion on this matter, by pointing to overruling of Article 7 by the case law, before the prior had even entered into force.<sup>164</sup>

### 5.1.1.4 Transfer of registered office

One of the main advantages of the SE is its ability to transfer the registered office without burdensome and time-consuming processes of liquidation and re-incorporation. Article 8(5) of the Regulation provides MSs with a possibility to adopt provisions designed to ensure appropriate protection for minority shareholders who oppose the transfer of SE's seat. Swedish opinion, presented in the Memorandum, honors the SE for its supranational character and power to transfer its seat, providing those features as the most important in cases of choice between different forms of enterprise. Consequently it is regarded as less appropriate to complement national legislation with rules that would restrict SE's freedom of establishment, granted by the Regulation.<sup>165</sup>

An SE has to apply to the Registration Authority (RA) for the authorization of transfer. The RA notifies the known creditors, who, within a certain period of time, may provide an objection to the transfer. If an objection is received, the matter is usually subjected to a competent civil court, which may present the requirement of payment or providing securities for legal approval of transfer. National legislation may however often provide the ex-

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<sup>160</sup> SE Regulation Article 67(1).

<sup>161</sup> Ds 2003:15 Europabolag, a report of a Swedish Government Council supplementing the adoption of Statute of European Company.

<sup>162</sup> Dejmek P., "Sweden" from Oplustil K., Teichmann C., 2003, p. 296, Ds 2003:15, p. 88.

<sup>163</sup> Ds 2003:15, p. 29.

<sup>164</sup> Dejmek P., "Sweden" from Oplustil K., Teichmann C., 2003, p. 299.

<sup>165</sup> Ds 2003:15, p. 31.

emption from this obligation. One of the most important examples is related to employees' salary claims, since salaries are usually guaranteed by the state in question.<sup>166</sup> Swedish Memorandum nevertheless concludes that this exemption shall not apply to transfer of an SE. Thus, Swedish salary guarantee system shall continue to apply to Swedish employees even after the transfer of the registered office.<sup>167</sup>

Article 8(14) of the Regulation provides the possibility for MSs to incorporate laws that would enable competent national authorities to oppose the transfer of SE's seat on the grounds of public interest. Unfortunately, as I had already mentioned in chapter 3.3.3.4, the scope of "public interest" is not defined in the Regulation. Therefore interpretation used for Article 58 of the EC Treaty is often used as an example for understanding of "public interest" content. Sweden decided not to employ such possibility for objection in its national legislation. There could not be found any sufficient justifications for application of "public interest" in order to hinder the transfer of SE's seat.<sup>168</sup>

#### **5.1.1.5 The structure of the SE**

The one-tire structure system of the European Company, presented in Section 2 of the Formation Title in the Regulation, has been considered equivalent to the administrative board of Swedish public limited liability companies. This made any additional legislation practically redundant.<sup>169</sup>

In case of the SE registered in Sweden, that would favor the two-tire system, the issue may become a bit more problematic. A management organ shall in this case be considered equivalent to the Swedish administrative board, and it shall be appointed and removed by the supervisory organ. Dejmek pays attention to the fact that in the context of two-tire system, Swedish legislators have found a lot of inspiration in Finnish Companies Acts. The optional possibilities are provided there for the general meeting to appoint a supervisory board in addition to management organ. The supervisory organ shall thus supervise the work of management. Swedish legislation states similarly, that the management organ in two-tire companies will be appointed by the supervisory organ.<sup>170</sup>

Memorandum acknowledges that a mere reference to the provisions concerning the Swedish administrative board would be inappropriate, with regard to the supervisory organ in the two-tire system, since this concept is alien to the Swedish law. In order to solve the lack of necessary rules, the Swedish legislators have turned to a number of provisions in Swedish company law concerning the administrative board and its members, which shall apply accordingly to the supervisory organ.<sup>171</sup> However, the Swedish authorities have a negative opinion considering the extension of power and influence of the supervisory organ on company management. The renvoi technique, with regard to functioning of the supervisory organ, is considered to be sufficient. To illustrate the statement, I would like to turn to the

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<sup>166</sup> Dejmek P., "Sweden" from Oplustil K., Teichmann C., 2003, p. 302.

<sup>167</sup> Ds 2003:15, p. 35.

<sup>168</sup> Prop. 1994/95:68, p. 44.

<sup>169</sup> Dejmek P., "Sweden" from Oplustil K., Teichmann C., 2003, p. 305.

<sup>170</sup> Ibid., p. 306.

<sup>171</sup> Ibid., p. 306.

fact that the Memorandum had clearly rejected the proposal to enable the supervisory organ to decide over changes in company's main economic activity.<sup>172</sup>

### **5.1.1.6 Employee involvement**

The participation of employees has definitely been one of the most complex negotiation issues of European Company. Due to the sensitiveness of the subject, Swedish legislative authorities decided to separate the process of implementation of SE-Directive from general drafting of the legislative measures necessary to supplement the Regulation.<sup>173</sup> Several deviations from the original wording of the Directive can be noticed in the implemented provisions. During the translation and adoption, Swedish legislators tried as much as possible to maintain the standards set by their national framework.<sup>174</sup>

I should probably specifically mention that, relying on its own system, Sweden did not adopt option presented in Article 13(2) of the Directive, which allows the MS to take measures that would guarantee the maintenance of the employee representation, when participating companies cease to exist as separate entities. Furthermore, Sweden had also opposed the exempt application of the standard rules, when an SE is formed by merger.<sup>175</sup>

## **5.1.2 Denmark**

### **5.1.2.1 General remarks**

Danish general opinion towards adoption of the Regulation seems to be quite positive, at the same time still remaining cautiously restrained. The initial lack of uniform legislation is believed to partly discourage the use of the SE. Danish authorities find a reduction of costs, due to its ability to operate in all MSs under the common set of rules, being the biggest advantage of the SE. But clearly so far this ability is only a vision, drifting far from the reality. Denmark also seems to be critical towards the loss of ability to manage risk through several legal entities, which are not jointly liable. Furthermore, as many Danish businesses are small and medium-sized enterprises, the costs related to formation may constitute a barrier for to extensive use of the SE. On the other hand, Denmark finds attractive the possibilities of saving the administrative costs and subjection to supervision of only one MS. Plus, the European Company gives Danish enterprises options for cross-border transactions and re-organizations, giving an advanced possibility for transfer of registered office and distribution of tax-free dividends.<sup>176</sup>

### **5.1.2.2 Formation of the SE, location and transfer of seat and minority protection**

According to Danish national law, a public limited liability company must have its registered office as well as its head office within Danish municipality. Thus with regard to Article 7 of the Regulation, Danish legislative authorities have obviously used the possibility

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<sup>172</sup> Ds 2003:15, p. 62-64.

<sup>173</sup> Dejmek P., "Sweden" from Oplustil K., Teichmann C., 2003, p. 309-310.

<sup>174</sup> Dejmek P., 2003, p. 740.

<sup>175</sup> Edhall, Rutberg, Rempner, Andresson, Liljeholm, Kamp-Wigforss, *Mannheimer Swartling*, "Sweden" from Van Gerven D., Storm P., 2006, p. 445-446.

<sup>176</sup> Thorup, N. Hansen, C. J. Hnasen, Ottosen, *Kroman Reumert* "Denmark" from Van Gerven D., Storm P., 2006, p. 175-176.

to impose such a requirement on European Companies, registered in Denmark.<sup>177</sup> The requirement of such location was, however, called into question in Danish literature with specific reference to the cases of Centros and Überseering. Obvious violation of freedom of establishment was discussed, but with regard to its complexity, it is so far remaining opened.<sup>178</sup> So if an SE does not have its registered office and head office in the same municipality, the Danish Agency can fine the company and its members, but it can never force an SE into liquidation.

Besides location of the offices, it was also decided to adopt the provision, referred to in Article 8(5), according to which the minority shareholders obtain a protection through the possibility of legal request directed to an SE to repurchase their shares. Still, in resemblance to Swedish legislation, it was provided that Danish national authorities cannot oppose the merger of an SE on grounds of public interest. The option to grant national institutions a veto has been introduced only with respect to financial authorities, grounded on the safety and proper functioning of the financial sector.<sup>179</sup> Finally, since 1998, Danish public and private limited liability companies are able to express their share capital in either Danish kroner or Euro. Thus no specific provision, in regard to European Companies, needed to be adopted.<sup>180</sup>

### **5.1.2.3 The structure of the SE**

In accordance with Danish national law, the managing director of the Danish PLC can be a member of the supervisory board. This shall be observed with regard to the fact that both the managing directors and the members of the supervisory board are responsible for the managing of the company. Thus it is the supervisory organ that has the decisive controlling power. Despite the existence of two management organs, there is a clear indication of Danish national companies applying the one-tier system under provisions of the SE Regulation.<sup>181</sup>

The two-tier system is therefore introduced as an alternative to the managing of European Companies, registered within Danish framework. The supervisory organ, in accordance with Article 41(3), is given the right to require the management organ to provide information necessary to exercise supervision. That right is considerably extended, being provided to all the individual members of that organ. Despite the options presented in Article 48(1) however, the supervisory organ of a Danish SE, with a two-tier system, is not given a right for itself to make certain categories of transactions subject to its prior authorization.<sup>182</sup>

### **5.1.2.4 Employee involvement**

According to professor of Syddansk University, Friis Hansen, some minor adjustments are necessary in order to synchronize the Danish national legislation on employee involvement

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<sup>177</sup> Hansen F., "Denmark" from Oplustil K., Teichmann C., 2003, p. 73.

<sup>178</sup> Thorup et al., "Denmark" from Van Gerven D., Storm P., 2006, p. 178, see also Hansen F. "Free movement of companies—the head office theory is dead; ong live the registration theory".

<sup>179</sup> Thorup et al., "Denmark" from Van Gerven D., Storm P., 2006, p. 183.

<sup>180</sup> Hansen F., "Denmark" from Oplustil K., Teichmann C., 2003, p. 73

<sup>181</sup> Ibid., p. 74.

<sup>182</sup> Ibid., p. 75.

with the SE framework. Still, he assured that there will be no material changes in Danish legislation.

Danish works councils differ somewhat from those in other MSs. They consist of an equal number of employee and management representatives. An SE is obliged to inform works council of the financial situation, the current state and probable trend of employment and substantial organization changes. As only a few collective bargaining agreements contain rules on European works councils so far, an SE is likely to be subjected to the Works Councils Act<sup>183</sup>. I would also like to pay attention to the fact of absolute equality between rights and obligations of employee representatives and ordinary board members on the board of directors. Thus, employee representatives are obliged to safeguard the interests of an SE even to the detriment of its employees.<sup>184</sup>

### **5.1.3 Finland**

#### **5.1.3.1 General remarks**

The SE did not succeed in winning any wider attention in Finland either, for so far the only example of creation of European Company is Elcoteq SE. Nevertheless, Finnish representatives seem to acknowledge the SE's trans-European character and separate it from other national corporate forms. The foremost advantage of the SE is seen in possibility to transfer of company's seat without processes of liquidation and re-incorporation. The SE is described as tax-neutral pursuant to the Merger Directive<sup>185</sup>, providing also the legal framework for tax-neutral cross-border mergers.<sup>186</sup>

#### **5.1.3.2 Registration, location and transfer of seat and minority protection**

Finland applies the principle of incorporation while determining if Finnish law is governing the entity in question. Consequently, Finnish legislation does not limit the possibility for companies to exercise their right of transferring their head office outside Finland. Such a liberal attitude can be explained by the simple fact that a transfer in general does not affect the legal status of the company or lead to its winding up. In resemblance to Swedish legislation, Finland does not require the location of companies registered office and head office in the same place. I would also like to mention that a registered office of the SE, located in Finland, has to be registered at the Finnish Trade Register.<sup>187</sup> There is also a specific requirement, providing that all the documents with regard to the transfer of company's registered office have to be translated into Finnish or Swedish.<sup>188</sup>

Shareholders may object the transfer of an SE from Finland and demand from the company the redemption of their shares at the current market value. The transfer of an SE from Finland may furthermore result in an obligation to register a branch. While transferring its seat into Finland, the established European Company has to be sure to comply with the

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<sup>183</sup> Act No. 371 of 22 May 1996, amended and transposing Council Directive 94/45/EC of 22 September 1994.

<sup>184</sup> Thorup et al., "Denmark" from Van Gerven D., Storm P., 2006, p. 196 .

<sup>185</sup> Council Directive 2005/19/EC.

<sup>186</sup> Heikel, Nybergh, *Hannes Snellmann* "Finland" from Van Gerven D., Storm P., 2006, p, 205

<sup>187</sup> Ibid., p. 207.

<sup>188</sup> Sec. 20a(4) Trade Register Decree 208/1979.

Finnish model of article of association requirements for limited liability company. The SE in question also must disband any branch offices it may have in Finland because, in accordance with the national law, a Finnish company is not allowed to maintain a branch in Finland. Finally, I would like to point out that alike Sweden and Denmark, Finland had opted not to adopt the rules considering the possibility for a competent national authority to object the transfer of the SE, stated in the Article 8(14) of the Regulation.<sup>189</sup>

### **5.1.3.3 The structure of SE**

Observing the management of Finnish SE, it can be concluded that the Regulation did not provide the necessity for any new introductions to the Finnish national law, for latter is already containing both one-tier and two-tier system. In addition, the separation of powers between management and supervisory organs, described in the Regulation, are generally in line with nationally applicable method.<sup>190</sup>

In Finnish one-tier system, according to the implemented legislation, the statutory organs holding the power are the general meeting, the statutory board and the board of directors. In a two-tier system the management organ holds the real power, being responsible for administration of company's financial affairs, supervision of accounting and overall proper running of the company. The supervisory organ, on the other hand, oversees the management and the managing director, playing a relatively limited role in actual administration and management. I would also like to point out that, in resemblance to Denmark, Finland did not give any right to the supervisory organ to make certain categories of transactions subject to its approval. In Finland, the two-tier system has been adopted only by few larger corporations. Finnish representatives also claim that, for the past ten years, there could be identified a clear trend to switch from two-tier to one-tier management structure. One of the reasons for that seems to be the juxtaposition of supervisory board between shareholders and the board of directors, resulting in unnecessary bureaucracy, unclear management liability and less effective decision making.<sup>191</sup>

### **5.1.3.4 Employee involvement**

The Directive was transposed into Finnish national legislation in form of SE Employee Involvement Act that covers mainly European companies registered in Finland. However there are parts of the act, which are applicable irrespectively of the MS of the registration. The adopted act is, in its general content, the reflection of the Directive with some minor deviations. This considers the creation of a special negotiation body as well as standard rules of employee participation. I would like to mention two exceptions of more significant nature with regard to the latter, which have a certain similarity to Danish provisions. Firstly, the employee representatives on the administrative organ of an SE have, according to Finnish legislation, the same rights and obligation as the shareholder representatives (except participation and voting in matters of collective labor). And secondly, the act stipulates that the employees of an SE, working within its national framework, are entitled to appoint a representative to the board of directors or the supervisory board through the consensus by election.<sup>192</sup>

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<sup>189</sup> Heikel et al., "Finland" from Van Gerven D., Storm P., 2006, p. 207-209.

<sup>190</sup> Ibid., p. 222.

<sup>191</sup> Ibid., p. 222-223.

<sup>192</sup> Ibid., p. 226-228.



## 5.2 Commission's Consultation

### 5.2.1 Foreword

In 2006 the European Commission had asked for an opinion on future development of European company law. In this research any interested parties could present their views on different aspects of trans-European legislation, one of them being practical application of the ECS (and thus the SE) and its possible improvement and future long-term development. The Commission had altogether received 216 answers from the variety of private and public organizations, national authorities and several corporate forms around Europe. It is obvious that it would be way too ambitious and time-consuming to present the detailed analyze of this research. Therefore I took a certain risk of choosing responses and comments that, from my point of view, were the most interesting and practically useful. I often prioritized to focus on responses from European undertakings. The basic idea behind the SE was a creation of an option for European companies that would help to expand their economic activity over national borders. Thus it seemed logical to me to assume that the opinions of companies were of great importance, for they should best cope with identifying the advantages and disadvantages as well as the practical benefits of SE's adoption.

Still, coming back to value of Commission's consultation, with a feeling of slight disappointment, I would like to mention that making selections was not that hard. The reason for that was the fact that at least a half of the participants had either left the question considering the ECS out or refused to file any direct comments, referring to the lack of practical experience. My overall impression of particularly this matter in the research showed (with very few exceptions) the general lack of interest towards the adoption and future of the SE. The responses were mostly of utterly reserved character, giving very restricted and one-dimensional views.

### 5.2.2 An overview of responses

#### *Deminor International ScrL*:

Deminor International is the leading European company assisting minority shareholders and investors. Since 1990 it has developed an expertise in the field of active shareholder engagement strategy. I would like to point out that opinions expressed considered first of all structure and corporate governance of the SE. Deminor confirmed that, by the time of Consultation, it had not yet confronted any problems regarding minority shareholders in the SE. It observed critically the subjection of European Company to different national legislations and therefore strongly supported harmonization of European company law. Deminor pointed to the objective of harmonization being one of the most important and prioritized goals pursued by the SE Regulation. According to presented practical view, in order to improve the regulatory framework governing the SE, Article 9(2) of the Regulation and adoption of common European legislative measures would have to be combined. Before examining further modification, Deminor considered the study of the extent of those legislative measures at the European level within the framework of Commission's Action Plan being of great importance.<sup>193</sup>

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<sup>193</sup>[http://circa.europa.eu/Public/irc/markt/markt\\_consultations/library?l=/company\\_law/priorities\\_consultation/international\\_scrldf/\\_EN\\_1.0\\_&a=d,2007/11/31](http://circa.europa.eu/Public/irc/markt/markt_consultations/library?l=/company_law/priorities_consultation/international_scrldf/_EN_1.0_&a=d,2007/11/31), p. 12-13.

Herbert Smith LLP:

Herbert Smith is a leading and full-service international legal practice with a 1,200-lawyer network across Europe and Asia.<sup>194</sup> The company, just like several others, stressed the fact that it was too early to judge how useful the ECS is in practice. Herbert Smith presented two modifications that were definitely worth considering even in the absence of practical experience<sup>195</sup>:

- Firstly, Herbert Smith mentioned that the requirement for the head office to be located in the MS where the SE is incorporated is unnecessarily restrictive. Removing this requirement would increase the appeal of the new form.
- Secondly, there could be identified an uncertainty among the MSs in relation to branches of the SE. Does an economic activity in another MS, that would otherwise have to be registered as a branch (if it were a public company), have to be registered as a branch by the SE in question? Herbert Smith pointed that clarification on this matter after consultation with MSs would be helpful.

ÖRAK—The Austrian Bar:

ÖRAK is a public-law organization that is responsible for safeguarding the rights and affairs of Austrian lawyers and for representing them at both national and European level. It does furthermore also deal with further tasks determined by law such as, for example, rendering expert opinions on legislative projects. The ÖRAK presented an opinion almost identical to the response of Herbert Smith. It emphasized the fact that it is way too early to jump into direct conclusions, but, supporting the above mentioned concerns of Herbert Smith, pinpointed three important issues<sup>196</sup>:

- The ECS prohibits the separation of head office and registered office (seat of management and registered seat), meaning that in the case of a merger SE there is the all or nothing principle regarding the seat. ÖRAK believes that merger is likely to be psychologically more acceptable if the registered seat can be in one MS and the seat of management in another. A modification of the ECS in this respect could facilitate cross-border mergers in the form of the SE.
- Some MS require a foreign SE, which pursues an economic activity within their borders, to register as a branch, while others choose to leave that requirement out of their national framework. This question, according to ÖRAK, requires an urgent attention. It claims there is a definite need of a uniform answer to the issue of whether an SE, incorporated in one MS and having economic activities in another MS (which would require it to register a branch in that member State if it were not an SE) should be required to register a branch.
- The need of extended legal certainty with regard to taxation.

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<sup>194</sup> <http://www.herbertsmith.com/AboutUs/>, 2007/11/31.

<sup>195</sup> [http://circa.europa.eu/Public/irc/markt/markt\\_consultations/library?l=/company\\_law/priorities\\_consultation/herbert\\_smith\\_llppdf/\\_EN\\_1.0\\_&a=d](http://circa.europa.eu/Public/irc/markt/markt_consultations/library?l=/company_law/priorities_consultation/herbert_smith_llppdf/_EN_1.0_&a=d), 2007/11/31, p. 6.

<sup>196</sup> [http://circa.europa.eu/Public/irc/markt/markt\\_consultations/library?l=/company\\_law/priorities\\_consultation/austrian\\_barpdf/\\_EN\\_1.0\\_&a=d](http://circa.europa.eu/Public/irc/markt/markt_consultations/library?l=/company_law/priorities_consultation/austrian_barpdf/_EN_1.0_&a=d), 2007/11/31, p. 10.

Hermes Investment Management Ltd:

Hermes Investment Management is an institutional fund manager independent of any broader financial services group. It invests funds on behalf of 240 clients including pension funds, insurance companies, government entities and financial institutions, as well as charities and endowments.<sup>197</sup> Just as Herbert Smith and ÖRAK, Hermes considered the experience of the SE being too insignificant for an informed assessment. However, Hermes pointed that the ongoing transformation of Allianz AG into Allianz SE<sup>198</sup>, the first such transformation of a major European company, gave the SE a new image, demonstrating the ECS as a useful legal instrument. Hermes expressed a great deal of optimism towards the future of European Company and took a stand encouraging the Commission to consider the reasons, why companies choose the SE as a corporate form. Finally, Hermes praised the SE for providing an elegant way to reduce the size of supervisory boards of German enterprises.<sup>199</sup>

Nordea Bank AB:

Nordea presented the opinion that the economic benefits of European financial integration are beyond doubt and that the ECS can serve as an important tool in this process. Nordea stressed that its foremost positive experience was a possibility, by merging strong bases from each national market, to create an integrated Nordic production and distribution networks. The real benefit, however, arose when an institution could operate as one fully integrated company. Nordea aimed, during that time, at converting the parent company in the group into a European Company in accordance with the ECS. The conversion was to be accomplished through legal cross-border mergers with the other Nordic banks in the Nordea Group. When the parent company was converted into a European Company, the subsidiary banks would be transformed into branches. The transformation was expected to lead to an improvement of operational efficiency, reduced operational risk and complexity as well as enhanced capital efficiency.<sup>200</sup>

According to Nordea, an important aspect in the formation of a company is that it allows flexibility for potential future changes of legal structure. The formation must allow further mergers, acquisitions and internal restructurings, both within one country and cross-border. The Regulation includes, in this context, a “lock-up” effect, as future cross-border mergers by acquisition are not possible once the European Company is established. The ECS contains detailed rules on the formation of European Companies through such mergers, but includes no rules for further cross-border mergers by acquisition into the European Company. Consequently we end up in situation where a transformation of a parent company with subsidiaries in different Member and EEA States into a European Company cannot be made by successive cross-border mergers. If the parent company is to be the surviving entity, the mergers have to be executed simultaneously. Furthermore, later acquired companies cannot be merged cross-border into the European Company after the transforma-

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<sup>197</sup> <http://www.hermes.co.uk/>, 2007/11/31.

<sup>198</sup> See chapter 5.3.

<sup>199</sup> [http://circa.europa.eu/Public/irc/markt/markt\\_consultations/library?l=/company\\_law/priorities\\_consultation/investment\\_management/\\_EN\\_1.0\\_&a=d](http://circa.europa.eu/Public/irc/markt/markt_consultations/library?l=/company_law/priorities_consultation/investment_management/_EN_1.0_&a=d), 2007/11/31, p. 12.

<sup>200</sup> [http://circa.europa.eu/Public/irc/markt/markt\\_consultations/library?l=/company\\_law/priorities\\_consultation/nordea\\_bank\\_abpdf/\\_EN\\_1.0\\_&a=d](http://circa.europa.eu/Public/irc/markt/markt_consultations/library?l=/company_law/priorities_consultation/nordea_bank_abpdf/_EN_1.0_&a=d), 2007/11/31, p. 2-3.

tion. Nordea sees the solution to the problem in national compliance with Cross-border Mergers Directive and thus opposes broadening of the concept of merger in the Regulation. Finally, but perhaps most importantly, Nordea added that in order for the SE to be useful, it is vital that also other Community law is coherent and coordinate and does not obstruct transformation.<sup>201</sup>

Law Society of England and Wales and Institute of Directors:

By including the response of those organizations, I would like to present the general opinion valid in United Kingdom. The responses were much alike and I took the liberty of displaying them as a single view. Just to make it clear before going into their comments, Institute of Directors is an independent non-party political organization of individual members, founded back in 1903, aiming to serve, support, represent and set standards for directors to enable them to fulfill their leadership responsibilities in creating wealth for the benefit of business and society as a whole.

Common understanding was that it is too early to judge how useful the ECS is in practice. Although the use of this new form has been relatively limited so far, Law Society claims that it has been greater than it had been expected and, as it becomes better known and points of uncertainty are resolved, the adoption may have a slight tendency increase.<sup>202</sup> Institute of Directors appeared to be a bit more, critical pointing to the fact that there is so far no UK evidence that the ECS has been useful in practice and only one such company has been incorporated, presenting the general uptake as extremely limited. Institute of Directors considered the real problem of poor adoption, despite the amount of issues related to the complexities of the legal form, being the lack of clear identification of the need for the model.<sup>203</sup>

Furthermore, once again two familiar modifications worth considering were given. The first was the problematic requirement for the head office to be located in the MS where the SE is incorporated. Recent EC case-law suggests that, under the Treaty, a company should be free to have its head office in a different MS. Thus it is unduly restrictive to require the head office to be where the SE is incorporated, and changing this would make the SE much more attractive. The second modification considered the registration of a branch in the MS of economic activity if national legislation requires so. As different MSs appear to be taking different views on this question, Law Society suggested arranging a forum among MSs in order to discuss whether other differences or problems have been identified which it would be helpful to resolve.<sup>204</sup>

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<sup>201</sup> Ibid., p. 3.

<sup>202</sup>[http://circa.europa.eu/Public/irc/markt/markt\\_consultations/library?l=/company\\_law/priorities\\_consultation/society\\_walespdf/\\_EN\\_1.0\\_&a=d](http://circa.europa.eu/Public/irc/markt/markt_consultations/library?l=/company_law/priorities_consultation/society_walespdf/_EN_1.0_&a=d), 2007/12/01, p. 9-10.

<sup>203</sup>[http://circa.europa.eu/Public/irc/markt/markt\\_consultations/library?l=/company\\_law/priorities\\_consultation/institute\\_directorspdf/\\_EN\\_1.0\\_&a=d](http://circa.europa.eu/Public/irc/markt/markt_consultations/library?l=/company_law/priorities_consultation/institute_directorspdf/_EN_1.0_&a=d), 2007/12/01, p. 7.

<sup>204</sup>[http://circa.europa.eu/Public/irc/markt/markt\\_consultations/library?l=/company\\_law/priorities\\_consultation/society\\_walespdf/\\_EN\\_1.0\\_&a=d](http://circa.europa.eu/Public/irc/markt/markt_consultations/library?l=/company_law/priorities_consultation/society_walespdf/_EN_1.0_&a=d), 2007/12/01, p. 9-10.

*Confederation of Finnish Industries, Ministry of Justice Hungary and French Chamber of Commerce:*

Here are some examples of general attitude from MSs in different parts of the EC. The obvious common understanding is that the SE has attracted limited interest throughout Europe. This applies, as it already has been mentioned before, to Finland, Hungary and France without any particular exception. Confederation of Finnish Industries considers benefits of the SE Regulation being unclear with regard to the introduction of 10<sup>th</sup> Directive and also possible future introduction of 14<sup>th</sup> Directive. Article 69 seems to be the priority of the discussion, as representatives for organizations hope for an abolishment of the requirement on placing the SE's head office and registered office in the same MS. They encourage the Commission to adopt further legislation that would modify the ECS and permit maximum flexibility in creating and running European Companies, including provisions allowing for different head office and registered office locations. As a matter of great importance is furthermore considered the examination of the rule excluding natural persons from the establishment of an SE, and other similar restrictions, reducing the room for maneuver of the companies establishing the SE. Hungarian ministry of justice also pointed to the benefits of the overall revision of the Regulation, having a great importance, not only from the point of view of an eventual amendment of the text, but also for positive influence on the elaboration of both the Regulation of the statute of the European private company and the 14th Directive.<sup>205</sup>

*Danish Commerce and Companies Agency:*

In the chapter 5.1.2 on Danish national perspective I had generally described its attitude towards the SE as quite positive but also restrained. Commerce and Companies Agency states that the compromise on the Regulation, with only a small part of company law issues regulated at the EC level, has not so far had the desired success. As the SE to a large extent is regulated by 28 different regulatory systems, depending on the State in which the company is registered, the advantages and thus the success of the European Company are considered relatively limited. However, by pointing to the fact that the possibility for a registration of a European Company has only been offered to the business community for about 18 months (by the time of the Consultation), the Agency does not deny the prospect of trend changes in the future of European enterprising.<sup>206</sup>

The Danish Commerce and Company Agency stresses, in resemblance to several other opinions, the importance of improvement of the Regulation towards a company form that is to a major extent regulated on the supranational level. This would provide the business community with a legal instrument granting more legal certainty and thereby also higher practical value. A real supranational SE would furthermore, according to the Agency, even if the Regulation only covers company law issues, improve the options for companies to

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<sup>205</sup>[http://circa.europa.eu/Public/irc/markt/markt\\_consultations/library?l=/company\\_law/priorities\\_consultation/confederation\\_industries/\\_EN\\_1.0\\_&a=d](http://circa.europa.eu/Public/irc/markt/markt_consultations/library?l=/company_law/priorities_consultation/confederation_industries/_EN_1.0_&a=d), 2007/12/01, p. 7-8.

[http://circa.europa.eu/Public/irc/markt/markt\\_consultations/library?l=/company\\_law/priorities\\_consultation/ministry\\_hungarypdf/\\_EN\\_1.0\\_&a=d](http://circa.europa.eu/Public/irc/markt/markt_consultations/library?l=/company_law/priorities_consultation/ministry_hungarypdf/_EN_1.0_&a=d), 2007/12/01, p. 6.

[http://circa.europa.eu/Public/irc/markt/markt\\_consultations/library?l=/company\\_law/priorities\\_consultation/chamber\\_commercepdf/\\_EN\\_1.0\\_&a=d](http://circa.europa.eu/Public/irc/markt/markt_consultations/library?l=/company_law/priorities_consultation/chamber_commercepdf/_EN_1.0_&a=d), 2007/12/01, p. 5.

<sup>206</sup>[http://circa.europa.eu/Public/irc/markt/markt\\_consultations/library?l=/company\\_law/priorities\\_consultation/companies\\_agencypdf/\\_EN\\_1.0\\_&a=d](http://circa.europa.eu/Public/irc/markt/markt_consultations/library?l=/company_law/priorities_consultation/companies_agencypdf/_EN_1.0_&a=d), 2007/12/01, p. 9-10.



establish themselves and pursue cross-border economic activities, while at the same time being able to reduce the unnecessary administrative costs. Finally, the Agency asserted being desirable to modify largely scrutinized Article 7 of the Regulation, for this requirement clearly contradicts the general principles of European company law.<sup>207</sup>

*The Quoted Companies Alliance:*

I would like to conclude the overview of the Commission's Consultation with a rather radical and straightforward response from the Quoted Companies Alliance (QCA). QCA is a non-profit organization dedicated to the protection of the smaller quoted company sector interests.<sup>208</sup> I did not present this opinion with views of Law Society of England and Wales and Institute of Directors, although QCA is also situated in UK, for a simple reason of its standpoint's clarity. Following is the response in its entirety:

*"We are unclear what purpose the ECS is trying to serve. In our experience practitioners are unlikely to use new legal entities in the absence of clear reasons to do so. They will invariably prefer the relative certainty provided by existing structures. Accordingly we do not believe the ECS is useful in practice."*<sup>209</sup>

## 5.3 Opinions of established SE companies

### 5.3.1 Foreword

In order to add a higher practical value to this thesis and following the advice of my supervisor, Pr. Jan Andersson, I decided to carry out a research of my own that would lead to a better comprehension of the practical situation. According to the [www.seeurope-network.org](http://www.seeurope-network.org), there are a bit over 60 registered European Companies. About a quarter of those are sc. shelf companies-- companies incorporated and held in stock for later use, which is often the fastest way to obtain offshore companies since they are fully formed and available instantly.<sup>210</sup> Besides these, there were several European Companies that did not seem to have any economic activity or there was simply no available information that would help to contact them or indicate the nature of their existence. Probably even more interesting fact is that, according to the above mentioned [www.seeurope-network.org](http://www.seeurope-network.org), in April 2007 there were only thirteen companies that officially had employees and economic activity. So in the end I was able to contact 34 SEs, the number not appearing to be particularly impressive for a corporate form that has now been accessible all around Europe for over three years.

The following questions were asked:

1. What were the main reasons for creation of an SE, why was it preferred to national forms of enterprise? What method of formation was used, why?

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<sup>207</sup> Ibid., p. 9-10.

<sup>208</sup> <http://www.quotedcompaniesalliance.co.uk/>, 2007/12/01.

<sup>209</sup> [http://circa.europa.eu/Public/irc/markt/markt\\_consultations/library?l=/company\\_law/priorities\\_consultation/companies\\_alliancepdf/\\_EN\\_1.0\\_&a=d](http://circa.europa.eu/Public/irc/markt/markt_consultations/library?l=/company_law/priorities_consultation/companies_alliancepdf/_EN_1.0_&a=d), 2007/12/01.

<sup>210</sup> [www.baselglobal.com/laws.htm](http://www.baselglobal.com/laws.htm), 2007/11/29.



2. Would You assert that the purpose and expectations accompanying the formation have been fulfilled?
3. How useful do You consider the SE-form generally being in practice? Would You suggest any modifications, or probably any specific complementary additions within the scope of the SE Council Regulation?

I was aware of my poor chances, but the results were even more disappointing than I had expected. I had received only six responses, containing information of material value. I suppose that one of the main reasons for that may be the size of an average SE. Many of them are big corporation with several thousand employees and a huge management and administration division. I had several times been re-directed, for it is obviously utterly complicated to find the right person, who would be able to give a complete answer to the questions above. Plus, several of the recipients complained over the lack of time. The responses received were, similarly to the ones in Commission's Consultation, essentially simple and once again quite one-dimensional, not leaving much space for further discussion. Two of the companies had also sent their press and agreement releases and interviews, containing important management standpoints. I tried to make the best of the situation, using the tools available, in order to carry out as just conclusions as possible with regard to accessible knowledge of SE's practical functioning.

### 5.3.2 An overview of responses

#### Allianz SE:

Allianz is one the biggest German insurance and financial services companies with more than 162,000 employees in more than 70 countries worldwide, having its seat in Munich, Germany. For establishment of an SE the method of conversion was used. Following, I would like to present the comments of Allianz CEO, Mr. Michael Diekmann, provided in an interview regarding the change to a legal structure of SE.

Diekmann described the establishment of an SE as a necessary step in becoming "more international", particularly in the questions of administration and management:

*"We need to make sure that the international aspect of our company is properly reflected in our Supervisory Board, Management Board and the way in which employees are represented. The European Company as legal entity was introduced last year, and gives us the right framework."*

The main advantage of adoption of the SE is seen in possibilities for the board to concentrate on critical strategic issues— to take the right decisions and to execute quickly. Diekmann asserted that by bringing Allianz insurance businesses more closely together, both in Germany and Italy, the significant improvement of customer focus is becoming visible. Diekmann stated furthermore that Allianz is expending too much effort working in structures that have come into being in a piecemeal, historic fashion and could be much more clear-cut. The new structure of a European Company is expected to make Allianz a great deal more international and thus by definition more competitive on the world stage. Allianz obtains a possibility to introduce clearer and more effective governance, being more conducive to its cooperation with connected Group companies.

Donata Holding SE:

Donata Holding Services is an Italian web-creation and -advertising corporation. The owner of the company, Mr. Cesare Casadonte, kindly provided some information on his company. I would like to start with a trivia that actually became the reason for a slight confusion. Namely Casadonte asserted that the company is registered in Italy and governed by Italian law, while the above mentioned [www.seeurope-network.org](http://www.seeurope-network.org) provided information that Donata Holding has its seat in Düsseldorf (Germany) and referred to the origin of Atrium Fünfte Europäische VV SE (which at the moment is a shell company with no employees or economic activity). This is probably just the case of a simple disinformation or might also be the rare situation where the SE is having its registered office and principle place of business in different MSs.

Mr. Casadonte pointed out that it is important to observe and understand the general tendencies on the European market. He sees the development of European trade moving towards clear trans-national character and common unification. The SE shall, according to Casadonte, be considered the inevitable part of this process. He is generally satisfied with the results of adoption of the SE form by his company and considers it being useful in the constantly expanding field of info technology. Finally, Casadonte mentioned the importance of improvement and simplification of process of corporate movement within the EC, being the crucial aspect for simultaneous operating in several MSs.

Elcoteq SE:

Elcoteq SE is a leading electronics manufacturing services company with original design manufacturing capabilities in the communications technology field with almost 20,000 employees in 15 countries worldwide.<sup>211</sup> Elcoteq's project director, Ms. Minna Aila, provided that Elcoteq became the first Finnish SE (and, according to my information, also the only one so far) in October 2005 by conversion from a national public limited liability company. The management is, according to Aila, generally pleased with the results of the conversion. An important fact to be paid attention to is a transfer of Elcoteq's seat to Luxembourg on 01.01.2008 that became possible with the adoption of the SE form. As for amendments and improvements, the Elcoteq corporation emphasizes that the SE company form would better serve its purpose with the set of common rules on accounting and taxation. One such example would be the plan for a Common Consolidated Corporate Tax Base (CCCTB) within the EC.

Galleria di Brennero Brennerbasistunnel BBT SE:

Galleria di Brennero Brennerbasistunne organizes and monitors the infrastructure project for the construction of the 50km-long railway tunnel through the Brenner pass. It is the project co-financed by the European Union from the budget of Trans-European Networks. The company was initially established in 1999 as the BBT EEIG and transformed, through the process of merger, on 16 December 2004 into a European Company.<sup>212</sup> BBT S.p.A., established as a public limited company, seated in Bozen (Italy), merged with the

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<sup>211</sup> <http://www.elcoteq.com/en/About+us/frontpage.htm>, 2007/11/29.

<sup>212</sup> [http://www.bbt-se.com/index.php?option=com\\_content&task=view&id=66&Itemid=83](http://www.bbt-se.com/index.php?option=com_content&task=view&id=66&Itemid=83), 2007/11/29.

Brenner Basistunnel Aktiengesellschaft, established as a public limited company and having its seat in Innsbruck (Austria). After the merger, the Brenner Basistunnel EEIG was disbanded and the BBT SE, with the seat in Innsbruck, took over its entire capital. Mag. Patrizia Fink praised the form of European Company for facilitating cross-border mergers and the possibility to transfer the seat to another MS. For the record, it is planned, in accordance with the construction schedule, to transfer the seat of BBT SE to Bozen, Italy. Furthermore, Fink stated, that obtained corporate structure grants both participating MSs an equal influence and control over the project. Insofar, the management of the BBT seems to be fully satisfied with the choice of the corporate form.

Fink's general opinion was that the SE has the privilege to experiencing the unlimited legal recognition all over Europe. Consequently, this allows the SE to put-up an intense cross-border competition and offers a new wide range of trade possibilities. The corporate structure of the SE is governed, according to Fink, by a relatively harmonized framework, giving cross-border mergers and the process of company re-organization a level of legal certainty.

#### MAN Diesel SE:

MAN Diesel is the world's leading provider of large-bore diesel engines for marine and power plant applications, having approximately 6,400 employees worldwide.<sup>213</sup> It was established in August 2006 by the conversion from MAN B&W Diesel AG and has its seat in Augsburg, Germany. Katia Langmann, the assistant of communications, kindly provided me with company press releases, related to the background and the essence of conversion, conversion agreement and company's articles of association.

The Executive Board of MAN Diesel declared that the intensions behind the adoption of SE form were to make the Diesel Engine Division of the MAN group even more international player, showing a single face to the customer. The CEO of MAN, Håkan Samuelsson explained: "*In a European Company we will think and act on an even more international scale, which is absolutely essential in the face of global competition,*" adding that markets have become global and Man Diesel is currently finding itself in a perfect position to serve their needs. Dr. Georg Pachta-Reyhofen, who became the Chairman of MAN Diesel's Executive Board on 1<sup>st</sup> of July 2006, agreed providing that having site in several different MSs requires the ability of the SE to speed up the integration of the company and enhance the important factor competitiveness. The Man Diesel SE Board sees the possibility to obtain an international status and, while retaining its parity structure, to be able to include representatives from different MSs.

#### Plansee SE:

With annual sales of approximately 500 million Euros and a global workforce of 2,200 employees, the Plansee High Performance Materials division is the world's leading supplier of refractory metals and composite material products.<sup>214</sup> Plansee manufactures and markets its products in the three largest economic regions-- Europe, America and Asia, having it headquarters in Reutte, Austria. Mr. Karlheinz Wex provided me with short but explicitly direct answers.

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<sup>213</sup> <http://www.manbw.com>, 2007/11/30.

<sup>214</sup> [http://www.plansee.com/hlw/about\\_plansee\\_ENG\\_HTML.htm](http://www.plansee.com/hlw/about_plansee_ENG_HTML.htm), 2007/11/30.

An adoption of the SE enabled Plansee to apply the one-tier board system, so main reasons for an establishment of the SE can be considered closely connected to the issues of corporate governance. The company is generally satisfied with the result of adoption. According to Wex, the essence and specter of the Regulation generally do not require any immediate amendments or modifications. It is mainly the adjustment of the EC law to the national standards that currently presents the greatest challenges.

## 5.4 Comments and conclusion

Studying the national perspectives of European Company, I became deeply convinced that the EC truly has 28 different forms of the SE. Observing the adoption and implementation in what I assume to call Scandinavia, it is quite surprising that countries having so much in common, both legally and politically, can have considerable differences in their views. Generally, the Scandinavian national opinions towards adoption of the SE seem to be relatively positive, accepting the theoretical advantages of corporate mobility, options of structure and management and possibility to obtain a genuinely European trademark. But equaling optimism, there is an amount of skepticism addressed to deficient practical functioning due to the lack of uniform legislation. Lack of harmonization becomes even more obvious, when all three MSs included tend to have own opposing views on several aspects of European Company. As example I would like to take Swedish and Finnish criticism towards restrictions in Article 7 of the Regulation and common understanding that in order to maintain the advantages of mobility, the protection of minority and possibility for national authorities to object transfers have to be partly given up. The questions of structure and management seem to have a long way to sufficient harmonization and supervisory boards of the SE in Northern Europe will most likely not obtain as much power as those in for example Germany. The same goes also for employee involvement, where most of the countries are fiercely holding on to the details of their traditional national legislation. As a result we have a positively acknowledged new product that everybody wants to have custom to their own taste.

Turning to perspective of European organizations and companies, I found a much more cautious and restrained approach. As it has already been mentioned above, a big part of opinions exclude the aspect of practical functioning of the SE, most often explained by the lack of substantial practical experience. Simplification of mergers, enhanced mobility and options for optimizing corporate structures are definitely attractive, but often considered incomplete in the absence of reliable common set of rules. Restrictions, as location of offices, and numerous legal uncertainties seem to place the SE on the same level with national companies, while adoption of company law Directives raise opinions considering the SE being unnecessary with regard to future company law development. The idea of a European Company is praised more for its genuinely European character. Representatives for established SEs talk mostly about internationalization of trade, European recognition, enhanced competitiveness and market integration. They tend to describe the SE as a symbol of cross-border business activity, while in reality there is very little to be said about the essential legal potential of the European Company. Finally, the SE seems to be observed also as a useful but still mainly theoretical legal instrument, playing an indispensable part in the overall development of European company law.

## **6 General Conclusion**

### **6.1 A superb but purely theoretical idea**

I have to admit that during the process of research, I gradually came to a conclusion that what I have been studying could only be observed as an idea, an illusion of a common form of European company that never had a chance to become a reality. I do not think that anybody would ever try to deny the greatness of theoretic carcass behind that idea. Pr. Sanders presented in the beginning of the 60s something, that had a potential to change the face of European company law and present totally new perspectives on international trade. Societas Europaea was intended as a truly supranational corporate form, having a genuinely trans-European character. I still consider the proposed ambitious draft of rules, governing the majority of aspects of European Company, granting it reliability, recognition and unlimited access to every national market within the Community, being its biggest advantage.

So with regard to all of those aspects and situation within the Community at that time, the SE was definitely the right and most natural choice for development of internal trade and corporate legislation. Unfortunately for European Company, the number of MSs got bigger while the process of adoption seemed to stump on its every step. Historically developed nemesis countries had hard times compromising on majority of important aspects and with the decades the original outline of the idea took a more ascetic shape, giving up a great number of primary advantages that made the idea of the SE so unique. At the same time the overall development of Community company law was following its natural route. If European Company was considered to be something radical and extremely drastic, the harmonization of national company laws had been fully accepted and observed as something necessary in the name of unification. In my opinion when those two processes cross and collaborate into a combined legislation, we will obtain an optimal supranational legislation that each and every member of the Community will be willing to accept.

So far, the corporate situation within the Community can be found somewhere in between those processes. But if national company law continues its quest for harmonization, the adoption and development of the SE seem to have currently reached its destination. And the solution we have reached may be supported by strong optimistic political and scholarly opinions, may have visible supranational aspects and obvious advantages, but going back forty years it is easy to see that the European Company has not become what it was intended to be. MSs have obtained such an influence on the functioning of the SE that its clear supranational aspects are utterly impossible to identify. Instead of one common European company form, the Community has adopted 28 different alternatives, which, with regard to their correlation with company law Directives, have in my opinion turned out to be a hybrid essentially similar to national limited liability undertakings. Therefore my final statement on that issue is that the original Societas Europaea has never left the paper and remains widely theoretical, with its practical attempt resulting only in highly overestimated legal prototype.

### **6.2 Poor adoption and general lack of interest**

Stating the failure of adoption of the original idea leads to the issue of difficulty to fulfill certain expectations and thus to the problems and aspects of poor practical application of the SE. Many of the national representatives similarly to the authorities of the Community seem to favor the positive and optimistic opinions, seeing the European Company as the next step in the integration of the internal market, corporate mobility and structure as well as the object of general European unification. At the same time both MSs and their nation-



al forms of undertakings take often strictly restrained positions, pointing to the variety of situations where the SE does not seem to fully live up to its theoretical potential. Taking an example, the possibility to transfer company's seat without the processes of dissolution and re-incorporation might seem as an excellent possibility for conquering the new markets by using mobility, while the requirement to locate company's head office and the registered office in the same place puts the above mentioned advantage of the SE on the option scales, where possibilities need to be weighed in order to establish the most optimal solution for every particular situation.

It has often been mentioned that through the adoption of the SE big corporations will get a possibility to function under a single set of rules, superior to any national legislation. But with regard to insufficient legislation and application of *renvoi* techniques, functioning of the European Company seems to, in majority of important aspects, have passed over to the MSs, maintaining only a handful of thin independent provisions that survived in the form of the ECS. Consequently, the company establishing an SE subjects itself to one set of national rules, that actually may be useful in cases of the above mentioned big corporations, having the complicated systems of subsidiaries in different MSs. But the important advantage of common supranational legislation has definitely been diminished to just an optional choice of a MS law, available basically to any other national corporate form.

Many associate creation of European Company with coming up to truly international playground, obtaining the opportunity to be considered as essentially European enterprise without any national prejudices. That can definitely be observed as an advantage for a company established in several MSs and undergoing the process of expansion. However, I doubt strongly that there are many companies, which may consider the creation of an SE in the name of obtaining the European brand absolutely necessary. Several SE companies, that I studied, needed basically only one of the specific SE aspects available, often in order to avoid the restrictions of their national legislation. Possibility to choose between one-tier and two-tier system, options of merger and employee involvement adjustment are good examples of such legal picking. Thus, it seems that if the form of the European Company has been chosen, it has been done for one or maximum two specific reasons, while one of those often occurs to be the non-materialistic goodwill factor of above mentioned internationalization. No European undertaking so far seems to be needing the full available potential of the SE adopted, the reason for that being a clear character of option among other almost equally valuable options.

Monti and Rickford with several others pay a lot of attention to the fact that the SE is an opportunity, an additional alternative, and there was never the intention to discriminate in favor of the European Company at the expense of national equivalent forms.<sup>215</sup> The choice and weighing between the corporate forms can thus be considered intentional with regard to all the facts presented. It is just that the SE does not live up to the potential of a strong and competitive option, being not attractive enough for European enterprises. Considering also the restriction dictated by the requirement of size of the companies, the chances of enhancing future acceptance of the SE form becomes even smaller. There is no practical possibility to create a European Company instantly from scratch just by having a business idea. Therefore, the introduction of the European Private Company can have a bigger success at attracting investors and recruiting supporters. The SE, on the other hand, may have a chance of a significant improvement if the provisions in Article 69 of the Regulation will get a positive effect. It would definitely grant the European Company important advantag-

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<sup>215</sup> Chapter 2.2.1, Rickford J., 2003, p. 125.



es, making it more attractive among other corporate options. But the same goes also for the introduction of company law Directives and I rather believe that situation of the SE will not be changing considerably in the future.

### 6.3 The need of improvement and essential amendments

The urgent necessity of improvements seems to be accepted by national representatives as well as by Community authorities. The matter cannot be left dwelling in the present situation, if the SE form is ever intended to be made a competitive alternative to national corporate forms. There is a quite realistic possibility to change the trends regarding adoption and practical application of the European Company. Following, I would like to present the aspects that currently seem to be of primary importance for improvement and development of the concept:

- In accordance with Article 69(a) of the Regulation, there is a current discussion considering the possibility to locate company's registered office and head office in different MSs. As we have seen, the question is of great importance from the perspective of freedom of establishment, having positive influence on general development of corporate mobility and creating congruency with European case-law. Article 7 presents the clear restriction depriving the European Company from one of the basic Community rights. Even if MSs will have to partly give up the control over SEs registered within their framework and there will inevitably occur situations of conflict of laws, the need for free effective trans-national operation seems to be of explicit priority.
- An uncertainty considering establishment of branches should be resolved as soon as possible. The matter of requirement to register the branch needs to be harmonized or brought to some uniform solution, in order to avoid legal complications often accompanying the transfer of SE's seat.
- Article 8(14) of the Regulation does not seem to find much response on the national level. As the SE is praised for the opportunities of mobility, the possibility for national authorities to object the transfer should be reduced to application only in exceptional situations.
- In order to enhance flexibility and potential for future changes in the structure of the European Company, the possibility of formation must also include further mergers, acquisitions and internal restructurings (both within one country and cross-border) after the SE is established. The Regulation needs to be modified with regard to the "lock-up" effect, averting further options for further cross-border mergers by acquisition into the European Company. The solution of the problem is often seen in national compliance with Cross-border Mergers Directive, consequently leading to a situation where broadening of the concept of merger in the Regulation in accordance with Article 69(b) appears to be redundant.
- Finally the process of general harmonization of national legislations is of significant value. As the majority of aspects of the SE are governed through renvoi-techniques, applying the uniform solutions and norms throughout Europe will grantee more legal certainty. Here I would also like to mention Article 69(d), containing intensions to extend the scope of SE's articles of association. That would

liberate European Company from several restrictions, which national limited liability companies are often subjected to<sup>216</sup>.

## 6.4 Certain political motives behind the adoption

So the question I have been keeping in the back of my head the whole time is why did the Community need to adopt something that was from the beginning doomed to practical failure. To make it even more simple is just to ask why we have a corporate form that no one really needs and only a handful of entities are able (but often are quite reluctant) to use. It is not a surprise that the Commission did not get any concrete responses to the development of the concept of the SE in its Consultation, for during its three years of existence the European Company has officially been used by totally 30-40 companies. Due to the obvious lack of interest there, appears to be little room and meaning for its future development. However it is the matter of uncertainty, if the concept of the SE may become partly or completely obsolete in the future..

All those questions and ideas lead to a conclusion that common European form of limited liability company has to have certain political motives considerably more heavy than they first might seem to be. I would like for start with the statement of Pr. Sanders, who describing the reaction of his colleges, in the beginning of the process of creation of the Statue, pointed to the fact of noticing among all the business possibilities, the chance to bring the European Community closer to the citizens.<sup>217</sup> In other word, the basic idea of the SE included the adoption of definite measures for general European unification. Taking as an example any European country, it most often has to have a government, a certain amount of citizens, an official language, an army, a distinguishable culture, a flag, a national anthem aso., in order to be accepted as an independent political and geographical entity. Those are the aspects, often being of a generally symbolic value, that usually create the sense of patriotism and affiliation within people. I personally believe that a very heavy argument of common European sense of transnational confidence lies behind the adoption of the European Company. The idea to consider yourself being a European rather than a national of any particular MS seems to have lately become more and more important, from the point of progress of the European Community.

As several interviewed SEs had pointed out, the formation of the European Company has granted them possibility to step into arena of trans-European level, diminishing the distance to customers in all MSs, appearing as a genuinely European entity. Seems like the Community needs the symbolic value of the SE for the support and development of internal market which, as I have already mentioned before in Chapter 3.1.2, is of crucial importance for maintenance and prosperity of European standards. Furthermore, it has several times been mentioned that the SE is a theoretically important legal instrument, which plays an important part in the formation and overall development of European company law. And if there is no clear and predominant practical need for the form of European Company, it definitely has its theoretical and politically socio-psychological purposes.

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<sup>216</sup> See also Werlauff E., 2003, p. 14.

<sup>217</sup> Sanders P., "The SE: from conception to reality" from Rickford J., 2003, p. 37.

## List of reference

### Legal Sources

- Communication of the Commission on a simplified business environment for companies in the areas of company law, accounting and auditing, Brussels, 10.7.2007 COM (2007) 394 final
- Consolidated version of the Treaty establishing the European Community, Official Journal of the European Communities C 325/33
- Council Directive 94/45/EC of 22 September 1994 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees, OJ L 254, 30 September 1994
- Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees
- Council Directive 2005/19/EC of 17 February 2005 amending Directive 90/434/EEC 1990 on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States
- Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE)
- Ds 2003:15 Europabolag, 2003, XBS Grafisk service, Stockholm
- Financial Services Action Plan ( hereby referred as FSAP), Commission Communication of 11 May 1999 entitled "Implementing the framework for financial markets: action plan" [COM(1999) 232 final - Not published in the Official Journal]
- Official journal of the European Communities
- Regeringens proposition 1994/95:68, Europeiska Ekonomiska Intressegrupperingar (EEIG)
- Regulation (EEC) No 574/72, Official Journal C 131, 13th December 1972
- Seventh Council Directive 83/349/EEC of 13 June 1983 based on Article 54(3)(g) of the Treaty on consolidated accounts
- Third Council Directive 78/855/EEC of 9 October 1978 based on Article 54(3)(g) of the Treaty concerning mergers of public limited liabilities companies
- Trade Register Decree 208/1979 (Finland)

## Cases

- Case 79/85 Segers v Bedrijfsvereniging voor Bank- en Verzekeringswezen, Groothandel en Vrije Beroepen [1986] ECR 2375
- Case 81/87 R v HM Treasury & Commissioners of Inland Revenue, ex parte Daily Mail and General Trust Plc [1988] ECR 5483
- Case C-212/97 Centros Ltd v Erhvervs- og Selskabsstyrelsen [1999] ECR I-1459
- Case C-208/00 Überseering BV v Nordic Construction Company Baumanagement GmbH (NCC) [1999] ECR I-9919

## Literature

- Da Costa C. T., Bilreiro A. de M., (2003). *The European company statute*. The Hague: Kluwer.
- Craig P., De Búrca G., (2008). *EU law: text, cases and materials*, (4<sup>th</sup> ed.). Oxford: Oxford University Press cop.
- Oplustil K., Teichmann C., (2004). *The European company - all over Europe: a state-by-state account of the introduction of the European company*. Berlin: De Gruyter Recht.
- Rickford J., (2003). *The European company: developing a Community law of corporations: collected papers from the Leiden university Unilever programme, 2002*. Antwerp: Intersentia, cop.
- Storm P., Van Gerven D., (2006). *The European company. Vol. 1*, (1<sup>st</sup> ed.). Cambridge: Cambridge University Press.
- Werlauff E., (2003). *SE : the law of European company*, (1<sup>st</sup> ed.). Copenhagen: DJØF Publishing.

## Articles

- Blomberg C., Svernlöv E., (2003). Europabolag- en ny associationsform. *Ny juridik*, 3, 7-21.
- Dejmek P., (2003). Genomförandet av Europabolaget i nationell rätt - lättare sagt än gjort? *Europarättslig tidskrift*, 4, 726-742.
- Goulet, K., (2001). Europabolaget. *Europarättslig tidskrift*, 3, 299-315.
- Huschka C., (1992). Die Europäische Aktiengesellschaft (SE) im Entwurf der Kommission von 199: Vor der Vollendung? *Europäische Zeitschrift für Wirtschaftsrecht* 1992, 147 ff.
- Killian B., Baldwin T., (2002). The End of the Real Seat Theory (Sitztheorie): The European Court of Justice Decision in Überseering of 5 November 2002 and its Impact on German and European Company Law.

## List of reference

[www.gleisslutz.com/media.php/Veroeffentlichungen/Downloads/GleissLutz\\_Baelz\\_2002-12-01.pdf?dl=1](http://www.gleisslutz.com/media.php/Veroeffentlichungen/Downloads/GleissLutz_Baelz_2002-12-01.pdf?dl=1).

Nelson M., (2004). The seat theory and the incorporation theory-- an analysis of the meaning of the freedom of establishment. *IUR Information* 5, 3-13.

Wymeersch E., (2003). The transfer of a company's seat in European Company Law. *Common Market Law Review*, 40, 661-695.

### Internet

[www.baselglobal.com](http://www.baselglobal.com)

[www.bbt-se.com](http://www.bbt-se.com)

[www.circa.europa.eu](http://www.circa.europa.eu)

[www.elcoteq.com](http://www.elcoteq.com)

[www.europa.eu](http://www.europa.eu)

[www.gleisslutz.com](http://www.gleisslutz.com)

[www.herbertsmith.com](http://www.herbertsmith.com)

[www.hermes.co.uk](http://www.hermes.co.uk)

[www.itcilo.it](http://www.itcilo.it)

[www.manbw.com](http://www.manbw.com)

[www.plansee.com](http://www.plansee.com)

[www.quotedcompaniesalliance.co.uk](http://www.quotedcompaniesalliance.co.uk)

[www.seeurope-network.org](http://www.seeurope-network.org)

### Speeches

Bolkestein F, (2002, November 29). Speech 02/598 on the new European Company: opportunity in diversity. Conference at the University of Leiden, Leiden.

Monti M., (1997, September 24). Speech/97/190 on the European Company Statute. Kangaroo Group Brussels.