Advantages and Disadvantages of the SE-Statute

By

Sanaa Kadi


In response to on-going market integration and the fulfilment of the objectives of the internal market there has been an effort through European legislation to harmonize key areas of company law in the EU. This is reflected in a series of Directives, especially in the areas of capital protection, EU merger and division rules. In conjunction to these we have also seen the introduction of the SE Directive. It is the latter that forms the focus of this paper. The paper assesses the question of whether the SE has been a success and at the same time identifies the difficulties that MS have faced in implementing and giving effect to the Societas Europa. In the latter parts of the paper, I critically assess whether the legislation has brought with it, more positive or negative elements and the necessary steps for the future harmonisation of companies across the Union.

**KEYWORDS: Internal Market; SE Directive; Corporate Seat; Societas Europaea**

All EU MS have now implemented the SE statute into their national laws. More than 100 companies by March 2008 have been registered as SE Companies, 418 SEs by 21st August 2009 and 993 SEs December 2011. Several benefits can be enumerated from the SE Statute as the reduction of administrative and legal costs, the ability to expand and restructure companies without having to set up a network of subsidiary companies as well as the possibility to move the registered office from a Member State to another. But there are also disadvantages.

When MS first started the national transposition of the SE Statute, there were many points that emerged, such as the role of unions, costs and the board system in e.g. the fact of introducing a new form of company, especially for States having the two-tier system, as they had to introduce the single-tier system to their national law. Nevertheless, the SE Regulation brings more simplifications to the structures of decision-making and governance; it gives companies more freedom during the establishing process regarding the choice of the best national company law system that satisfies the needs of the enterprise, and without straining the company with unnecessary transaction costs. The SE Company may be formed by persons from different MS, and there is no limitation on the number of employees the company may have. However, the SE Company shall have a system of worker involvement in
the decision-making of the Company. The SE companies are free to choose the system of a board they prefer; it is not the Member State that imposes its choice of a board system on the Company as it was intended in the 1991 proposal. If the Member State does not provide this freedom to its public limited liability companies, then it will have to provide specific rules for the system which does not apply in this Member State.

The SE has three main advantages; a European and transnational image, a simplification in case of seat transfers to another Member State, as well as a simplification during the trans-border fusion or restructuration of entities.

Furthermore, the SE Regulation is interesting for the non-European entities as well because it allows them to carry out business activities in the European internal market by creating subsidiaries in Europe (a good example being the joint venture subsidiary “Narada Europe SE” in the telecommunication industry which was formed between the Chinese entity Narada and the European entity Eltek.

Advantages of the SE Statute

The abolishment of national restrictions and the prohibition of discrimination must not be considered as diminishing the rights or freedoms of any Member State. On the contrary, it must be observed as unification for a common interest. The prosperity of the European Union depends on preserving and further enhancing the advantages of a European Internal Market; MS are undergoing a process of accepting the fact that it is necessary to yield certain national norms and principles for the sake of a stable economic growth.

The Transfer of Seat of the SE

The seat transfer is regulated in Art.8 of the SE Regulation. The common rule is that the transfer does not change the identity of the European Company; it changes only the applicable law. The SE Statute provides that the company can transfer the seat to another State without the SE being forced to wind up or to create a new legal person. Until now, at least 60 SEs have transferred their seat from one state to another without any difficulty.

According to the SE Regulation, not only the registered office must be located in the EU, but both the registered office and head office of an SE company must be in the same state. In order to prevent entities located outside the EU from entering the EU market, it is not allowed for companies having their registered office or head office outside the EU to form an SE. However, these companies from non-EU states are allowed to be shareholders in an SE.

The possibility for an SE to move its registered office gives it an advantage compared to other company forms in Europe. On the 2nd February 2012, the European Parliament adopted a resolution making recommendations to the Commission on the 14th company law Directive on the cross-border transfer of company seats. Should the 14th Company Law Directive pass and be implemented on a national level, the SE company will likely lose some of its attractiveness, because it would not be
the only company to have the attribute to move its registered office without restrictions anymore.

Article 8(3) of the Regulation provides that when the management proposes to transfer the registered office of the SE, the proposal must include a report which justifies the legal and economic aspects of the transfer and explains the implications for the shareholders, creditors and the employees. The decision to transfer must be approved by the qualified majority of the General Assembly. The minority shareholders have the possibility to ask for the repurchase of their shares if the MS' legislation permits this, (France and Germany allow the repurchase of shares; the UK and the Netherlands do not allow such an action).

So the steps to take in the transfer of the registered office is that first, a proposal of transfer is crafted where the proposed new registered office, the statutes, the transfer timetable and possibly the new names of the SE are being indicated. The proposal has also to contain the implications of the transfer on the employee involvement. After that, the management or administrative organ draws up a report, where they expose the juridical and economic features of the transfer, and the implications for the shareholders, creditors and workers. Then, after the shareholders have examined the report within a period of two months, the general meeting decides on the transfer. Finally, the company is deregistered in the State of origin and registered in the new Member State.

A very important remark must, however, be made regarding Directive 2005/56/EC on cross-border mergers of limited liability companies of 26 October 2005, which permits all limited liability companies to a cross-border merger under similar conditions as an SE. The SE statute is not unique anymore in offering the faculties of cross-border merger without liquidation; the SE is not the “only” company form anymore that has the ability to cross-border merger without the need to liquidate or having a tax neutral treatment in this cross-border transactions.

**Cross-Border Merger**

The cross-border merger is regulated by Art. 2(1), 3(1), 17-31. As the SE Company is supposed to be treated like any other domestic company, a SE company should not be discriminated against and therefore, would benefit from the same treatment as the one afforded to domestic legal company forms. Thus, the SE should be able to enter into a merger. Furthermore, it is possible for SE companies with registered offices in the same state to merge together to the same extent as it is allowed for other national company forms in the same situation; the merger of SE companies would therefore be subject to the obligatory 3rd Directive on Mergers implemented by all the MS. It is also possible on the basis of the same Directive for an SE company and an ordinary company with registered offices in the same Member State to merge, resulting in the SE company to be the continuing company. In addition to that, mergers between SE companies having their registered office in different MS are normally possible based on the Directive 2005/56/EC on cross-border mergers of limited liability companies.

Two issues restrict the SE. Firstly, the conditions for the formation of an SE; individuals cannot directly form an SE. That would reduce the SE's advantages
compared to the EEIG\textsuperscript{xviii} and the SCE\textsuperscript{xx}, because an SE cannot be created ex nihilo.\textsuperscript{xx}

Additionally, the SE must have a trans-national dimension. When an SE is formed by merger, the founder companies have to be situated in at least one of the MS. Similar conditions apply to the transformation into an SE, when the company involved must procure a subsidiary subject to the laws of another Member State for a minimum of two years. Secondly, the SE is subject to the ‘real seat’ principle; it means that its registered office, and its central administration must be in the same location. Nonetheless, the principle of the ‘registered office’ permits the company to choose the MS where it wants to be established, by this way an SE Company can decide by itself what law would apply to it, and establish their business management and central administration in another Member State. The SE statute was the only possibility for companies in order to promote cross border merger before the implementation of the Directive on cross-border merger in 2005.

The SE Regulation encourages the establishment of cross-border mergers by formation of a new entity through the EU or by a takeover. As a result of the wording of the Regulation, it is not really clear whether an existing SE has the opportunity to take advantage of those two methods of formation. Some scholars argue that takeovers only concern the creation of an SE, as they think that existing SEs can only merge by creation of a new company. Other authors think that the SE Statute does not allow any form of merger for existing SEs. However, an SE can undertake mergers directly by way of merger by new formation. To get the same outcome as the direct merger, it is advised to create a holding company in order to get the assets of the SE and of the other company involved; another solution would be a transaction in two steps, first a merger between the company involved and a subsidiary of the SE, then the merger of the subsidiary into the SE. Furthermore, the SE affords entities other alternatives, which permit the implementation and enhancement of cross-border cooperation via SE holding companies or SE subsidiaries.\textsuperscript{xxi}

\textbf{Disadvantages of the SE Statute}

As it was stated above there are 993 SEs in the EU registered in 25 MS.\textsuperscript{xxii} However, in reality, not all these SEs are in conformity with the real definition of the Statute; one has to draw a distinction between a \textit{Normal SE}, a \textit{Shelf SE} and an \textit{Empty SE}; if the SE has real operations and worker participation, it is considered as a Normal SE, if there are neither workers nor operations, it is a Shelf SE, if the SE has operations but no workers, it is an Empty SE. Finally, SEs with no information at all on whether they are operating or not, are named \textit{UFO SEs}.\textsuperscript{xxiii} Although half of the Normal SE companies are German, it is, in fact, the Czech Republic which hosts the highest number of UFO SEs (580 Czech registered SEs, among them only 35 are normal SEs)\textsuperscript{xxiv}

Additionally, an SE cannot be freely established only by investment of private capital. There is a requirement of existence of at least two legal entities, which must be subject to different national legislations.\textsuperscript{xxv} The majority of the normal SEs has been established by way of a merger between at least two companies or by way of conversion of an existing PLC. However, one can also create an SE trough a Shelf SE. The SE Statute permits an SE to establish other SEs in the form of subsidiaries. This practice of Shelf SE companies has been developed especially in Germany and the
Czech Republic; After their creation, these subsidiaries are purchased by interested clients. The new owner subsequently activates the SE by transferring employees into it and/or by operating business activities. This practice could be considered as a threat to worker involvement rights in SE companies, as the rights of workers to information consultation and participation are provided only at the moment of the founding of an SE; it is difficult to negotiate workers' rights after the recruitment of the employees. Therefore, employees had no guarantee for their rights when former shelf SE companies had been activated.xxvi

Another critique is that the SE Regulation does not cover situations or questions of administrative law, competition law, taxation, intellectual property law or insolvency. According to the TFEU, companies of the EU do not actually have to be in a certain Member State in order to be associated with it. However, the question of companies "nationality" has remained for a long time subject of controversy in European company law. Despite the question of transfer of seat has been mentioned in the Treaty, experts and national representatives have not been able to issue an adequate solution. Some MS like France, Germany and Italy are not always ready to accept movement of company headquarters without re-incorporation into the new legislative system, while some states as UK or Denmark permit company cross-border relocations without losing the legal identity. The difference in the application of national principles constantly gives rise to conflicts between national laws and are only resolved by the interference of the EU legal bodies.xxvii

The principal objective of the SE Company is to liberate the concerned companies from the juridical problems and the practices that result from the existence of 27 EU +3 (Norway, Liechtenstein, Iceland) different legislations; thus, the S.E. Company must rely on an independent law, distinctive from the national laws of the MS. However, the SE Regulation constitutes itself of seventy Articles which, in their turn, contain sixty-five references to national laws and thirty-two options for MS to choose from. Furthermore, the Employee Directive contains five references and eight options. So the inevitable conclusion is that instead of one common form of SE, the SE Statute would end up with 30 different alternatives for every reference, changing from MS to MS.xxviii

The introduction of the SE Statute into national laws has been very slow and delayed, the transposition was supposed to be done by October 2004. However, only about one tier of the MS has transposed the Statute on time like the UK and the Scandinavian countries.xxx Germany transposed the Statute on 22nd of December 2004 and France on the 13th of July 2005. However, The United Kingdom has transposed the Statute on time, although UK has always been tepid towards European Company Law,xxx the transposition in UK took place on 6th of September 2004.xxxi

Unlike limited liability companies, the SE Company cannot be found by natural persons. There are only four types of structural changes of already existing companies. The Art.2 (1-4) of the SE Regulation states in detail the need for the SE to have a cross-border element. The range of types of company varies according to which means of formation is chosen, and the restriction imposed on the formation of the SE Company shows that the MS are not ready to accept an independent choice or to tolerate an alternative to their domestic company types.xxxii Thus, the
fact that the freedom of access to the formation of an SE Company is restricted makes this company less advantageous since the aim of it was in the beginning to provide businesses with a company that enjoy uniformity and mobility.

As demonstrated, the SE Regulation does not guarantee a supranational company form with a level of Uniformity throughout the European Union. The SE Regulation refers all the time to national legislation, which put the provisions existing in the SE Regulation in a doubtful position, especially when the SE Statute is facing a situation of interplay with provisions of national rules. Moreover, the irregular dispersion of SEs throughout the EU leads us to deduce that the SE Regulation does not satisfy the requirements of entities in all MS. Therefore, the Commission intends to amend the SE Regulation and present a proposal by 2012; the eventual amendments should be examined also by social partners, as part of the policy of promoting the engagement of the European social partners in the formulation of EU social policy.xxxiii

There are two basic principles governing the connection of companies to MS. The first principle is “the real seat principle” and the second is “the incorporation principle.” When applying the real seat principle, the company must follow the legislation of the State where its actual seat is situated, in this case the location of central administration and the principal place of business. The incorporation principle, on the other hand, gives companies an opportunity to be recognized, under the condition that the company is lawfully established under the legislation of a Member State and continues its activities under the law of the state where it was registered, even if the company has never operated in the MS of registration. Consequently, the legal status of the company can be determined regardless of the MS in which its activity is effectively developed. The legal issue would not be so controversial if there was no political interest behind.

By providing rules prohibiting the location of registered and head office of the company to be in different MS, the SE Regulation restricts the mobility of the SE; even if this measure was in order to protect national interests, it has definitely reduced the advantages of the SE.

The SE is a legal form suitable for businesses that require mobility and freedom. However, this company form is not intended for small business corporations.xxxiv The SE Regulation brought dynamism to European Company Law and had a big impact on the development of the Directive on cross-border mergers of limited liability companies, and the progress made concerning the envisaged statute of the EPC.xxxv

The application of the renvoi technique in many issues in the European Company raises some doubt about whether the SE is considered as a supranational company.xxxvi The renvoi technique method is used excessively in the SE Regulation and although an alteration would be a major transformation of the Regulation, it seems a necessary step; otherwise the whole concept of the SE could become redundant, for it is highly probable that in the near future, mainly through EU Directives, numerous national company forms will have an edge over the SE.

Conclusion
Nevertheless, the European Company is a very important instrument for both European entities wishing to expand their cross-border business, and for European subsidiaries of foreign groups. It has been concluded that the provisions in the SE Statute contain some imperfections, which limit and restrict the SE Company advantages. However, and as the Regulation itself states, these imperfections can be reviewed in order to improve the SE Statute in the future. The issue related to the registered office, which was not resolved by the statute, must be handled as well.\textsuperscript{xxxvi}

The SE has been a challenging project, taking almost fifty years in order to give birth to a Regulation that cannot even be considered as a European code of Company Law.

Furthermore, it is argued whether there is actually any need for a supranational type of Company form as the SE, and whether it is necessary to create more supranational company forms. On a certain number of key issues the SE Company is highly regulated. In other areas though, most of the rules are taken from the national law of the state where the SE Company has its registered office; this weakens one of the SE’s main advantages, namely its uniformity.

However, this argument must not be overstated, because there has been an effort in European legislation to harmonize key areas of Company Law in the EU through a series of Directives, especially in the areas of capital protection, EU merger and division rules. Even if the SE Regulation refers to the domestic laws where the SE is registered, it is, in fact, pointing at the EU Company Law Directives.\textsuperscript{xxviii}

Nevertheless, even this argument is criticized as the EU Directives are implemented differently in each of the MS, which means that they will apply to the SE in different ways,\textsuperscript{xxxix} this will again reduce the SE’s uniform character.

Did the Societas Europaea bring more positive or negative effects? I would definitely say that the SE brought more positive effects, and the fast increase of SE companies all over Europe will confirm this opinion. However, on the other hand, it is obvious that the SE Regulation did not achieve all the original intended goals; the various references to national laws raise concerns about uniform application of the Statute.

Notes

\textsuperscript{i} See worker-participation.eu/ factsheets
\textsuperscript{ii} Cathiard: See http://avocats.fr/space/catherine.cathiard/content/_C823A8F5-C663-4937-89B5-DD1F9899484F published on 30.08.2011, See also www.worker-participation.eu (page visited on 21.02.2012)
Grundmann, pp. 688

See Maury

Cathiard: See http://avocats.fr/space/catherine.cathiard/content/_C823A8F5-C663-4937-89B5-DD1F9899484F published on 30.08.2011

Robakov: pp.17

Grundmann, pp. 685


Art.8 (6) & Art.59 of the SE Regulation


Köstler: pp.20


European Economic Interest Grouping

European Cooperative Society

Ex nihilo means: out of nothing

Lenoir, pp.19-20


See Art.1, 2 of the SE Regulation


Those states are Denmark, Hungary, Iceland, Sweden, Austria, Finland, UK, Slovak Republic, and Belgium.


Grundmann, pp.678


Lenoir: pp. 21

Werlauff 3: pp. 160

Lenoir: pp. 20-21
