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REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL

The application of Council Regulation 2157/2001 of 8 October 2001 on the Statute for a European Company (SE)

(Text with EEA relevance)

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1. INTRODUCTION

The European Company Statute ("SE Regulation")[1] was adopted on 8 October 2001 after more than 30 years of negotiations in the Council. It offered the possibility to create a new legal form called a European Company, also referred to as an SE after its Latin name *Societas Europaea*. The objectives of the SE Regulation, according to its recitals, were to, *inter alia,* remove obstacles to the creation of groups of companies from different Member States, (…) allow companies with a European dimension to combine, plan and carry out the reorganisation of their business on a Community scale and to transfer their registered office to another Member State while ensuring adequate protection of the interests of minority shareholders and third parties, (…) to ensure as far as possible that the economic unit and the legal unit of business in the Community coincide, (…) permit the creation and management of companies with a European dimension, free from the obstacles arising from the disparity and the limited territorial application of national company law (…) and (…) to allow companies with a European dimension to adapt their organisational structure, and to choose a suitable system of corporate governance ensuring efficient management, proper supervision and the maintaining of the rights of employees to involvement[2].

The SE Regulation is complemented by Council Directive 2001/86/EC on the involvement of employees in the SE ("SE Directive"). The deadline for adapting national legislation to the European legislation on the SE was set for 8 October 2004, but was met only by 8 Member States. The SE Directive was transposed in all Member States only at the beginning of 2007.

Article 69 of the SE Regulation requires the Commission to present a report on its application including proposals for amendments, where appropriate, five years after the entry into force. To gather the necessary data on the practical application of the SE Statute the European Commission's Directorate General for Internal Market and Services has commissioned an external study and consulted stakeholders in a public consultation and at a conference[3].

2. APPLICATION OF THE SE STATUTE: THE INVENTORY OF SES

As of 25 June 2010, 595 SEs were registered in the EU/EEA Member States. The number of SEs increased in an exponential way from 2004 to 2008. In 2009 fewer new SEs were created

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1 Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European Company (SE).

2 Paragraphs 1, 2, 4, 6, 7, 14 and 21 of the recitals of the SE Regulation.

3 The external study of Ernst&Young (hereinafter: "E&Y study"), the summary report of the Consultation and the information on the Conference of 26 May 2010 is available at: http://ec.europa.eu/internal_market/company/se/index_en.htm.

than in 2008, but in 2010 the trend was again an increased number of new SEs created. SEs were registered in 21 out of the 30 EU/EEA Member States, with the vast majority (around 70%) in the Czech Republic or Germany. Very few SEs were registered in Southern European Member States, with the exception of Cyprus.

The Commission Staff Working Document accompanying this Report contains detailed information on the inventory of SEs and their characteristics as well as on the SE legislation applicable in the different Member States.

3. THE MAIN DRIVERS AND TRENDS

3.1. Positive and negative drivers to set up an SE

Testimonies from companies reveal that, in general, the decision to set up an SE or not depends on the particular "business case", i.e. it is based on a set of reasons relevant to the particular situation of a given company. The reasons may vary and it is difficult to identify a general trend relevant for all companies. However some reasons appear to have in general more importance than others, and some seem to be more important in certain Member States and sectors of activity than others. Some of these reasons, identified by companies as positive or negative drivers, are presented below.

The **European image** of an SE is reported to be one of the most important positive drivers. It is particularly attractive for companies who seek to stress their European affiliation or want to benefit from a European legal form, which is better known than their national forms, to penetrate other Member States' markets without having to set up foreign subsidiaries. However, the importance of the European image varies. It is reported to be an advantage especially for companies in small countries, in Eastern European countries, in Belgium and in export-oriented countries (e.g. Germany). On the other hand, in some Member States, in specific sectors, a national label is considered to be more marketable than the European label.

The **supra-national character** of an SE is reported as a potential advantage in the process of conducting cross-border mergers or structural changes in a group (e.g. transforming national subsidiaries into branches of the parent company). In particular, it helps to avoid the feeling of a national 'defeat' of the management and staff in the absorbed company or previous subsidiaries.

The **possibility to transfer the registered office** to another Member State is considered an essential driver and a real comparative advantage of the SE compared to national companies. In the absence of a directive on the cross-border transfer of the registered office of a company the SE remains the only company form that allows companies to transfer their registered office to any other Member State without liquidation[4]. Reportedly, this possibility is particularly attractive for holding companies. However, in practice, only a limited number of SEs has transferred their registered office (49 as of 25 June 2010).

The possibility to use the SE form as a means to conduct a **cross-border merger** was considered an important driver until the entry into force of the Cross-border Merger Directive. In addition, the provisions on employee participation are reported by companies and legal

[4] However the SE Statute requires that the head office is moved together with the registered office, which reduces the advantage.

advisors as more flexible in the said Directive than in the SE Statute, although this is contested by worker organisations.

A number of respondents to the public consultation mentioned the SE's potential for **reorganisation and simplification of the group structure** as a positive driver. Reportedly, the transformation into an SE, including the conversion of subsidiaries into branches, is particularly attractive for companies in the finance and insurance industries. The advantages mentioned are only one supervisory authority (instead of a number of them in all Member States where a company has subsidiaries) and easier compliance with capital requirements. However, the advantages of such restructuring in the form of an SE are not evident (as it would also be possible by using a national company) unless combined with other advantages, such as the European image, the supra-national character of the SE or the possibility of seat transfer.

Respondents to the public consultation mentioned also advantages of the SE form in terms of financing (stronger position in negotiations with banks and in bids for EU financial support) and the SE's flexible rules on employee involvement in Member States where these matters are regulated by mandatory rules. As regards the latter, both companies and unions report that the SE Statute offers the possibility to: (i) negotiate an employee involvement model, thereby tailoring it to the specific needs of the company or group, instead of having to comply with mandatory national rules; (ii) have a mixture of representatives from different Member States instead of representatives only from one Member State (this can help to build a European employee consciousness and could be an advantage for European wide groups); and (iii) reduce the size of the supervisory board to increase its efficiency. Reportedly, the SE form is sometimes used to maintain the same system of employee involvement irrespective of an increase of the company's workforce[5].

The **set-up costs, time-consuming and complex procedures, and legal uncertainty** together with the **lack of hindsight and practical experience** of the advisors and competent public authorities are reported as the most important negative drivers when *establishing an SE*. Well-known examples of the high cost of formation of an SE include Allianz SE and BASF SE, whose costs for reincorporation as an SE amounted to €95 million and €5 million respectively. Leaving these cases aside, the average set-up costs for the SEs interviewed in the external study were approximately €784,000 (including the tax and legal advisory costs, translation costs and registration costs). The overall set-up costs range from approximately €100,000 up to figures of between €2 and 4 million.

Insufficient awareness about the SE amongst the business community in and outside of the EU is reported as being the most significant problem in the *running of the SE*. When announcing the adoption of the SE form, the management often has to invest in explaining the nature of the SE to business partners (customers, suppliers, banks etc.) and employees.

Several companies, legal advisors and business associations consider the rules on **employee involvement** as a negative driver as, in their view, they are complex and time-consuming, especially in Member States where the national legislation does not provide for a system of worker participation. Sometimes these rules are considered disproportionate, namely if very few employees are concerned by the involvement process. The requirement that registration

[5] Trade unions report that in Germany the SE has in a few cases been created to maintain the same level of worker participation in the supervisory board, even though the threshold for a national company (either 500 or 2,000 employees) would require a change in the board's worker representation.

of an SE cannot be made before the completion of negotiations on employee involvement is also sometimes mentioned as an important negative driver, in particular for listed companies for whom the certainty of procedures and of the time-frame for registration is crucial. However, these opinions are not shared by the workers' organisations.

3.2. Trends on the distribution of SEs

The external study and participants to the consultation and conference report that the **size of national companies** is likely to have an affect on the distribution of SEs. It is argued that the increased cost (especially the high minimum capital requirement) and complexity of setting up an SE as compared to a public limited-liability company constitutes more of a hurdle in Member States where the national companies tend to be small and medium sized enterprises. Poland, Spain, Portugal, Greece and Italy are mentioned as examples of countries where this could partially explain the small number of SEs. A respondent to the public consultation also mentioned that there is a positive correlation between the number of multinational companies and the number of SEs in a given Member State.

The **knowledge and awareness in the legal and business community** about the SE form also seems to have an impact. Testimonies suggest that in Member States where the SE form has been actively promoted, for instance in the Czech Republic and Germany, there are more SEs, whereas in Member States such as Italy or Spain, where information and advice on the SE form is not easily available, very few or no SEs have been set up. There could have been also a positive spiral effect: an increased number of SEs in a Member State had raised the interest of other companies in this legal form which resulted in more SEs set up in that country.

The external study also finds that **late implementation of the SE Directive in some Member States** could have had an impact on the level of awareness and the number of SEs in these countries[6].

Another trend is that, in general, more SEs have been set up in **countries that allow only the two-tier corporate governance system**, rather than in countries that allow only the one-tier system, and very few SEs are set up in countries that already allow both systems. However, according to some respondents to the public consultation the choice of a board structure which is unknown in the national law where the SE is registered can result in legal uncertainty or practical difficulties.

As regards the correlation between the distribution of SEs in different Member States and the **national rules on employee participation** stakeholders' views vary. While the external study and the vast majority of respondents to the public consultation agree that such trend, in general[7], exists, worker organisations and researchers working in the field of labour law disagree with this view.

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6 In countries that implemented the SE Directive in 2006 or later (i.e. Slovenia, Greece, Luxemburg, Ireland, Bulgaria and Romania) there are few SEs.

7 This trend is not without exceptions, notably in Slovenia (0), Hungary (3), Finland (0), Denmark (2) and Sweden (9) very few SEs were registered as of 25 June 2010, if any, although these countries have relatively extensive rules on worker participation, whereas there were several more SEs registered in the United Kingdom (23) and France (19) although these two countries have no or limited rules on worker participation.

Respondents to the public consultation mentioned also other possible explanations for the distribution of SEs in the EU/EEA, in particular: (i) the flexibility of certain aspects of the SE form compared to national legal forms; (ii) the different value of the European label; (iii) differing set-up costs and transaction costs of an SE; (iv) tax systems of Member States.

The high number of **shelf SEs** in certain Member States, in particular the Czech Republic and Germany, also contribute to the explanation of the high number of SEs in these two Member States[8]. Reportedly the creation of shelf SEs by professional providers in these countries could be explained by the fact that the system of shelf companies available for sale is common there[9] and meets specific business needs. According to the respondents to the public consultation companies buy shelf SEs mainly to save time and costs and avoid a complex and uncertain formation procedure. A number of the respondents mentioned that shelf SEs also make it possible to create an SE without having to fulfil a burdensome cross-border element[10] or go through the negotiations on employee involvement. The possibility to avoid heavy requirements is particularly important for smaller companies. On the other hand, worker organisations express concerns that shelf SEs might be used to avoid the SE Directive's rules on worker involvement. In this context it should be mentioned that there is lack of information on many shelf SEs after they have been activated. This could partly be explained by the fact that annual accounts are published retrospectively. Another explanation is that some companies, due to their small size, are exempted from publishing more than abridged balance sheets and notes on their accounts. Reportedly, in some cases the annual accounts are not available in the business registers without any justification for that.

4. PRACTICAL PROBLEMS IN THE APPLICATION OF THE SE STATUTE

Based on the evidence gathered in the consultations with stakeholders several problems have been identified in the application of the SE Statute, both in relation to the creation and the functioning of the SE. A more detailed explanation of the problems identified in the consultations with stakeholders is presented in the Staff Working Document accompanying this Report.

4.1. Creation of an SE

The initial aim of the SE Statute was to provide a European form for already existing cross-border businesses of a reasonable size without making it difficult for small and medium sized enterprises to form SEs. However, the conference and the public consultation have shown that businesses, in particular SMEs, consider the current formation conditions very burdensome. **The set-up costs, time-consuming and complex procedures, and legal uncertainty of the SE formation process**, mostly stemming from the lack of uniformity of the SE Statute and the many references to national law, are amongst the most important obstacles discouraging businesses from establishing an SE. Stakeholders also mention a **heavy cross-border requirement** (in particular the requirement for companies forming an SE to have had a subsidiary or a branch in another Member State for at least two years before the SE creation),

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8 However these two countries also have the highest number of operating SEs.

9 Unlike in France and Italy where, according to the respondents to the public consultation, shelf companies are not really known or used.

10 E.g. to avoid having to fulfil the cross-border requirement for each subsidiary in a group transforming into an SE.

limited methods of creation of an SE and a **high minimum capital requirement** as considerable obstacles.

As regards the **limited methods of creation**, participants to the conference and the consultation mentioned especially the lack of possibility to create an SE directly by private limited liability companies by means of cross-border merger or transformation and the lacking possibility to create an SE by way of division as areas where adjustments could be considered. The possibility to allow an SE to be set up by way of division is related to the question of **broadening the concept of merger in Article 17(2) of the SE Regulation** (cf. Article 69(b)). A respondent to the consultation argues that division is an obvious instrument for restructurings both within and across the boarders of a Member State and that a cross-border division whereby an SE could be formed would be easier and less time-consuming than the alternatives that already exist[11]. It is also argued that although there is no legislation at EU level on cross-border divisions, the jurisprudence of the European Court of Justice in the *Sevic* Case (C-411/03) has already made it possible to carry out a cross-border division when the companies involved are governed by the laws of different Member States. On the other hand the external study argues that allowing an SE to be set up through division would lead to further dividing the economic and legal unit of a group of companies rather than simplifying the group[12].

Some stakeholders (companies, including SEs, legal advisers and business associations) also find the **SE's employee involvement rules**, in particular the negotiation procedure related to the setting up of an SE, complex and time-consuming. However, according to the trade unions these negotiations are not a burden, but rather a necessary mechanism allowing for a proper dialogue between the management and the employees of a company. On the other hand, the unions express a concern that the SE rules are not fully adapted to all situations. In particular, the SE Statute does not contain a clear rule on whether a shelf SE can be registered or not, given that there are no negotiations on employee involvement as neither the SE nor the participating companies have employees at the time of the SE's creation.

4.2. Life of an SE

A number of respondents to the public consultation find the requirement that **the registered office and the head office of an SE shall be located in the same Member State** (or, in some Member States, in the same place) an obstacle in practice[13]. The Statute provides for a severe sanction (liquidation) if the SE does not comply with this requirement. Since the adoption of the SE Statute significant developments have occurred that have changed the approach to the question of companies' seat. In particular, the jurisprudence of the European Court of Justice has opened the way for acceptance of the principle of separation of registered and head office in the European Union[14]. Furthermore, according to some stakeholders the real seat principle is difficult to apply in practice in a modern world where the location of the headquarters of an

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11 The alternatives are: (i) a national division and a subsequent cross-border merger, which can be carried out on the basis of the SE Regulation or Directive 2005/56/EC and – if the cross-border merger is carried out on the basis of Directive 2005/56/EC – finally a conversion of the acquiring company into an SE, or (ii) a national division, followed by a conversion of the acquiring company into an SE and a subsequent transfer of the registered office of the SE.

12 Moreover, none of the SEs interviewed by the contractors of the external study and none of the respondents to the consultation mentioned the limited methods of formation as a negative driver.

13 Cf. Article 69(a) of the SE Regulation.

14 See cases *Centros* (C 212/97), *Überseering* (C 208/00), *Inspire Art* (C 167/01), *SEVIC* (C 411/03) and *Cartesio* (C 210/06).

international company, the place where the strategic decisions are taken, is not easy to determine. The principle where the applicable company law is determined by the law of the country of the SE's registered office is straightforward and easy to identify. Moreover, the possibility to separate the registered and head office of the SE could make it an attractive tool for simplification of the group structure[15] and it could be a step towards having the economic unit and the legal unit of business groups in the EU coincide better. The external study argues in favour of the separation. It is also supported by businesses' testimonies, but opposed by other stakeholders, e.g. some Member States and trade unions. They fear that, *inter alia*, a possibility to separate the registered and the head office could make the fiscal control difficult to apply due to the lack of transparency of information about companies registered in other Member States.

Some respondents to the public consultation mentioned a number of practical problems arising from the differences in national rules in the process of transferring the SE's registered office and from burdensome or unclear rules on the SE's internal organisation. Participants to the conference suggested that the SE Statute should offer more flexibility to the founders and shareholders on the internal organisation of the SE, even if such flexibility is not available to national companies in the Member State of the SE's registration[16]. This would also reduce the number of references to national legislation. However, as this would result in the SE being in direct competition with the national legal forms, a doubt was expressed as to how much could be achieved politically on this issue.

A number of stakeholders indicated several interpretational problems with the SE Statute's provision on **conversion of an existing SE into a national company**.

A number of respondents to the public consultation and trade union representatives at the conference mentioned also the lack of clear rules on employee involvement when **a shelf SE is activated** or structural changes occur after the SE's creation. In trade unions' view this poses a risk that the employee involvement rules can be circumvented.

The SE Statute, in its Article 69(c), requires the Commission to study whether it is appropriate to revise the jurisdiction clause in Article 8(16) of the SE Statute in the light of any future changes in the European or national laws in the area covered by the 1968 Brussels Convention ("Convention")[17] . This revision clause was added to take into account any necessary changes of the rules on jurisdiction following the adoption of the Council Regulation (EC) 44/2001 of 22 December 2000 ("Brussels I Regulation") which replaced the Convention. This was necessary as the Brussels I Regulation, discussed at the same time as the SE Regulation, was adopted after the discussions on the SE Statute ended. Article 8(16) of the SE Statute provides that after the transfer of the registered office to another Member State, an SE may still be considered as having its registered office in the Member State where the SE was registered prior to the transfer insofar as its dealings before the transfer are concerned. This rule permits to bring legal proceedings with respect to dealings of the SE which were undertaken before the transfer in the Member State where the SE was registered at that time. It must be read in conjunction with the applicable jurisdiction rules, in particular Article 2 and 60 of the Brussels I Regulation which permit proceedings against a company to be brought, *inter alia*,

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15 The SE could register its subsidiaries in one Member State, and thus the entire group could be governed by only one company law regime, whilst having the head offices of each subsidiary located in other Member States, where they would conduct the actual business.

16 Cf. Article 69(d) of the SE Regulation.

17 Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters.

before the courts of the Member State where the company has its statutory (registered) office. Article 8(16) thus widens the scope of jurisdiction for legal proceedings against an SE compared to what is possible for other types of companies under the Brussels I Regulation. To the knowledge of the Commission the rule of Article 8(16) has not yet been used in practice. Also, it is doubtful whether the rule adds much to the existing jurisdiction rules in the Brussels I Regulation, which already permit legal proceedings to be brought before the courts of the Member State where, for instance, a contract is performed or damages are caused or felt. Nevertheless, the Commission sees no reason at this stage to change the current rule.

5. ADMINISTRATIVE BURDENS

The Centre for European Policy Studies has made a measurement[18] of the administrative burdens contained in the SE Regulation. According to the measurement the SE Regulation imposes administrative burdens of €5.2 million annually. This represents 0.04% of the €12.1bn administrative burden measured in the annual account/company law area in February 2009[19]. However, it should be noted that administrative burdens cover administrative costs of all required information obligations regardless of whether or not these obligations are necessary to protect legitimate stakeholder interests. The High Level Group of Independent Stakeholders on Administrative Burdens (HLG)[20] underlines that any future reform of the SE Statute should also take into account the aspect of reducing administrative burdens. It suggests looking, in particular, at the possibilities to reduce the information obligations associated with reporting, publication of information, use of independent experts and requirements for meetings[21].

6. CONCLUSION

The external study concludes that the original objectives of the SE Statute have been achieved to some extent, but the situation could still be improved.

The European Company has made it possible for companies with a European dimension to transfer the registered seat cross-border, to better reorganise and restructure and to choose between different board structures, while maintaining the rights of employees to involvement and protecting the interests of minority shareholders and third parties. The European image and supra-national character of the SE are other positive aspects of the SE.

However, six years of experience with the SE Regulation have shown that the application of the Statute poses a number of problems in practice. The SE Statute does not provide for a uniform SE form across the European Union, but 27 different types of SEs. The Statute contains many references to national law and there is uncertainty about the legal effect of directly applicable law and its interface with national law. Furthermore, the uneven distribution of SEs across the European Union shows that the Statute is not adapted to the situation of companies in all Member States.

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18 http://ec.europa.eu/enterprise/policies/better-regulation/files/abst09_ceps_extension_en.pdf.

19 This measurement was based on 8 of the most burdensome Directives in the area. See http://ec.europa.eu/enterprise/policies/better-regulation/files/abst09_companylaw_en.pdf.

20 The HLG was set up to advise the European Commission on the Action Programme for Reducing Administrative Burdens in the EU, see Commission Decision of 31.08.2007, C(2007)4063, Article 2.

21 HLG opinion of 20 May 2010, paragraph 30.

Any considerations of amendments to the SE Statute to tackle the practical problems identified by various stakeholders will have to take into account that the SE Statute is a result of a delicate compromise following lengthy negotiations. The Commission is currently reflecting on potential amendments to the SE Statute, with a view to making proposals in 2012, if appropriate. Any such amendments, if put forward, would need to be carried out in parallel with any possible revision of the SE Directive, which would be subject to the consultation of social partners in accordance with Article 154 of the Treaty. More generally, any measures which the Commission would propose as a follow-up to the present report would be subject to better regulation principles, including an impact assessment.