HEC EUROPE INSTITUTE

The Societas Europaea or SE

The new European company

Noëlle Lenoir

This report was commissioned by the French Minister of Justice

The original and complete version of the report in French is available by contacting the publisher, ''La Documentation Francaise”.

HEC Paris
July 2007

Contents

Introduction……………………………………………………………….. 1

Chapter 1
"The Original Approach of Transnational Law"…………………….... 13

Chapter 2
"What is the SE ?"…………………………………………………….... 31

Chapter 3
"Social Model and Fiscal Neutrality of the SE"……………………… 55

Chapter 4
"Initial Experience of Companies that have chosen to become an SE"….. 81

Chapter 5
"Proposals for the Next Step Forward"…………………………….... 109

Conclusion…………………………………………………………….. 125

Annexes …………………………………………………………….. 127

“L’Europe ne se fera pas en un jour et sans heurts…”

Robert Schuman

Introduction[1]

Why the creation of the *Societas Europaea* (SE) statute was and remains a good idea.

The SE, an idea that dates back to the origins of European construction

Enfin, la société européenne! At Last, The European Company: such was the title of an article published in the wake of the SE Regulation and Directive of 8 October 2001 by Françoise Blanquet who had followed and upheld this project for years[2]. It is true that the adoption of these texts was a relief for those who had worked towards the creation of a transnational company for the whole of the common market. Just a few years previously, it had indeed seemed far from certain that the SE would

[1] The working group contributing to this report was composed of Ronan Guerlot, judge in the Commercial Law Department of the Civil Affairs Division at the French Ministry for Justice, Mirko Hayat, Adjunct Professor at HEC (Law and Taxation Department), Erwan Le Meur, Lawyer, Debevoise & Plimpton LLP and Marie-Laure Combet, Trainee Lawyer, Debevoise & Plimpton LLP

[2] Françoise Blanquet, a judge, was responsible for the SE file at the Internal Market Directorate General and is the person who followed the debates to which the SE gave rise the most directly over the long term. Her article *Enfin, la société européenne !*, *Revue du droit de l'Union européenne*, n° 1, 2001, provides a good illustration of the different stages in the debates around this issue up to 2001.

ever see the light of day. The idea of offering companies the possibility to opt for a transnational statute to make it easier for them to do business in the Common Market went back a long way. However, although it dated back to the 1950s, many of those who had responded to the idea enthusiastically were beginning to have doubts as to whether it might ever become reality. Others even questioned whether the SE could be of use against a backdrop of globalisation bringing with it worldwide rather than European markets.

A quick look back over the history of the debates surrounding the SE is essential to understand the stakes of a formula offering such great potential to companies. Imperfect as the statute might be, the SE offers firms a precious tool for their growth strategies inside Europe.

The issue was first raised in the years immediately after the Second World War, even before the European Economic Community (EEC) was set up by the Treaty of Rome on 25 March 1957. It was the Council of Europe which was the first to propose a project for "European companies" when it was created in 1949. It may seem surprising to see this organisation usually associated with defending human rights tackling business law, but the general remit of the Council of Europe was to seek to harmonise legal practice in the Member States via international conventions, thereby promoting awareness of a European identity. The project for "European companies" clearly had its place in such efforts. It had little success, however, and an amended project was presented in 1952 but soon abandoned.

The torch was taken up in 1959, first of all in France where the Congress of Notaries in Tours looked into the idea of creating a European public limited company.[3] Soon afterwards, a Dutch professor who was to play a decisive part in drawing up the first version of the SE statute – Pieter Sanders, Dean of the Rotterdam Law Faculty – made it the subject of his inaugural lecture to the city's Higher Institute of Economic Sciences. The project then reappeared on the official agenda at the instigation of the French government. In a memorandum dated 15 March 1965, France called on the Commission to set up a group of experts to draw up a preliminary draft of the statute for an SE. Professor Sanders was appointed to chair the group composed of law professors and practitioners. Published in 1967,[4] the Sanders report was particularly convincing and ambitious. It contained a complete, detailed draft statute for the SE, covering its formation, incorporation, reductions or increases in capital, governance, accounts, amendments to the articles and even winding up. Only the fiscal and criminal aspects were not addressed, as the members of the Sanders commission considered that it was up to specialised jurists to make proposals in these fields. Inspired by German law on public limited companies, deemed at the time to be the most accomplished model, the Sanders report put forward a uniform type of

---

[3] See *Le Statut de l'étranger et le marché commun*, 57th Congress of the Notaries of France, Vol. I and Ii, Tours, 1959, edited by S. ed., 1959 and "Compte rendu des travaux", *Revue du marché commun*, 3, 1960, suppl. n° 27, p. 80, J. Foyer.

[4] *Projet d'un statut des sociétés anonymes européennes* by Professor Pieter Sanders, "Études" collection, "Concurrence" series, n° 6, Brussels, 1967.

company of which the European legal personality implied the application of uniform law in all the States. The system was optional: any public limited company could either be governed by the national law of the country of its registered office, or could opt for the SE statute and be governed only by Community regulations. As the report states, "the SE is a supplementary form of public limited company placed [...] at the disposal of business – alongside the public limited company under national law – as a possible legal form". The Commission, in its preface to the report, saw it as the best way of achieving the objectives targeted by the reform, which is to say:

• to allow the mobility of companies by making it possible for them to transfer their registered office from one country to another;

• to facilitate mergers and the creation of subsidiaries by companies in different Member States; and

• to encourage the grouping together of production factors scattered all over the Common Market, joint initiatives and access to the European capital market.

The Commission approved the Sanders report and took up its outline in a draft regulation presented to the Council on 30 June 1970. The text published in the *Official Journal of the European Community* on 10 October comprised no less than 284 articles.[5] It established a genuine European code for companies and groups of companies, including taxation and labour relations issues, with the intention that the whole system should apply independently of national rules. The Netherlands immediately expressed misgivings about a text which, in their opinion, was too "continental" in its inspiration and too rigid in its requirements. It was then the turn of the United Kingdom and Ireland, which entered the EEC in 1972, to issue reservations about the fiscal and social provisions of the statute.[6] A new text was presented by the Commission in 1975 but the negotiations were a long time in getting started.

It was only with the Single European Act of 1987 that the reform was given a fresh start. In a memorandum of 15 July 1988 on the "Internal Market White Paper",[7] the European Commission took up the idea of a statute for a European transnational company. Still entirely optional, this statute was destined for companies [8] wishing to restructure themselves through cross-border mergers on the European level without being faced by the more or less insurmountable legal and fiscal obstacles. The SE clearly fell within the scope of the preparation for the establishment of the internal

---

[5] "Proposal for a Council regulation embodying a statute for the European company", *OJEC*, 10 October 1970, n° C. 124.

[6] Although absent from the Sanders report, these provisions did feature in the Commission's proposal.

[7] White Paper on the "Internal Market and Industrial Cooperation – Statute for the European Company", Memorandum to Parliament, the Council and the two sides of Industry, COM(88)320, June 1988.

[8] The Sanders report considered the interest for large and medium-sized companies in opting for an SE statute to conduct cross-border mergers or to create jointly-owned subsidiaries with companies from other Member States.

market promoted by Jacques Delors, the President of the Commission, by endowing companies with "specific structures [...] founded on a law other than national laws to avoid the partitioning of national markets within the Community".[9] The aim was to make European management of companies more flexible and less bureaucratic, thereby making them more competitive.

The discussions still made no progress, however. In one Council meeting after another, the States reiterated their approval of the project in principle. However, they stumbled over their divergences on the terms. While the British wanted to see the statute for an SE rid of its provisions on worker participation, the Germans made the presence of these same provisions a condition for their acceptance. Their fear was that they might see certain German groups opt for the SE statute with the aim of getting around codetermination requirements, the well-known *Mitbestimmung*.[10].

The Commission drew its conclusions from the criticisms made by the States and two new proposals were put on the table in October 1989:

• First, an extensively amended proposal for a regulation:[11] to respond to objections on the length of the text, the Commission cut it down by more than half. In reply to concerns that the different conceptions of companies in the various States should be taken into greater account, the new proposal also included frequent references to national law. At this stage, the fiscal strand was maintained. This gave the SE the possibility of deducting losses incurred by its permanent establishments in the other States from its taxable base[12].

• Next, a separate text – a directive – establishing the social system for the SE: this was to be the subject of long discussion, with "the place of workers"[13] in the SE and their involvement in management being the main bones of contention between the States.

Day-to-day management of the SE, however, was clearly placed under the responsibility of its management and German-style codetermination was now only one model among others proposed for SEs.

---

[9] See the aforementioned Commission White Paper of 1988 on the internal market.

[10] This system devised in the 1960s is the most advanced in Europe in terms of employee participation in company decision-making. It takes the form of tan obligation to have an equal number of seats for employee representatives with voting rights on the supervisory boards of large companies. It has been taken up to a certain extent in the statute for the SE, although it is currently the subject of debate in Germany itself (see below).

[11] *OJEC* 16 October 1989, n° C. 263 and *Bulletin C.E.*, Suppl., 5/89.

[12] As one of the main objectives of the SE statute is to simplify its structures, and notably the transformation of its subsidiaries into branch offices by merger, the aim was to take account of the specificity of the SE in this respect.

[13] Wording preferred by Jacques Delors to that of "participation".

The process of adopting the statute for the SE was still far from being complete. On the occasion of the successive proposals presented by the Commission from 1991 onwards, the statute for the SE was gradually "streamlined". The fiscal strand, in particular, was withdrawn.

As for the proposal for a directive on worker involvement, it was still a subject of disagreement between States. A compromise solution was finally found in 1996 by a group of experts chaired by Étienne Davignon, President of the Société Générale de Belgique and former Vice-President of the Commission. The Davignon report suggested that the social partners in each SE should be left totally freed to decide by agreement on the system of worker involvement that suited them best. The last misgivings, of the United Kingdom and above all of Spain, were overcome and a few years later – at the European Council in Nice in December 2000 under the presidency of France – the States came to a unanimous political agreement on the SE.

It was therefore on the basis of this agreement at the Nice European Council (which also approved the treaty establishing the European Community[14] currently in force) that the two texts forming the SE statute were finalised:

- Council Regulation (EC) n° 2157/2001 of 8 October 2001 "on the Statute for a European company (SE)";[15] and

- Council Directive 2001/86/EC of 8 October 2001 "supplementing the Statute for a European company with regard to the involvement of employees".[16]

What lessons can be learned from the longest gestation period in European history?

1. First of all, it is clear that the management of companies and all its legal, financial, fiscal and social dimensions, is firmly rooted in the cultural traditions of the States and therefore it is not easy to agree on a common system. Paradoxically, it took less time for the introduction of the single currency (about thirty years) than for the project on the statute for the SE which required almost fifty years, if we take as our guide the first proposals of the Council of Europe!

2. The second lesson concerns the political conditions required to achieve major reforms. Taking once again the example of the single currency, it was the fruit primarily of a political will in France notably, but also and most importantly in Ger-

[14] This treaty has been in force since February 2003. The consolidated version of the text was published in the *OJEU* on 24 December 2002, C. 325/33.

[15] *OJEC* of 10 October 2001, L. 294/1.

[16] *OJEC* of 10 October 2001, L. 294/22.

many.[17] While there can of course be no question of comparing the Euro to the SE, which is much more modest in its scope, we can draw one conclusion as regards the latter: it will only be a genuine success if the States have the political determination to encourage it and pay attention to the way the statute, which refers to national legislation, is accommodated in their company and even tax law.

3. The third observation is that company law is a living law and its potentialities are revealed in practice. Due to its innovative – and it must be said, as yet excessively complex – character, it will only be possible to genuinely appreciate the SE formula in the light of the actual experience of the companies that have chosen it. The contribution of this statute as a driving force of their growth strategy, and also the difficulties they encounter here or there, will dictate the adjustments that have to be made by the States that wish to attract companies registered as SEs to their territory.

4. Finally, in the same pragmatic vein, the texts on the SE themselves are to be assessed and updated. The authors of the 2001 Regulation wisely allowed for this in Article 69 which gives the Commission the task of presenting a report on application of the regulation to the Council and Parliament "five years at the latest after [its] entry into force", along with any "proposals for amendments, where appropriate".[18]

It is precisely in this spirit, with an eye on the French presidency of the European Union in the second half of 2008, that this report proposes to open the debate on possible improvements to the 2001 Regulation in the light of the experience of the first SEs that have already been registered or are in the process of being set up, and to list, without waiting for these modifications, the adjustments to be made to the French regulations of 2005 and 2006 on the SE.

---

[17] At the time of the negotiations on the Maastricht Treaty establishing the single currency, 65% of Germans were against giving up the Mark. However, Chancellor Kohl had the courage to make a resolutely European choice in accepting to give up the Mark, the symbol of the country's "economic miracle", in favour of the single currency. Judging by its foreign trade performance in 2007, Germany has no reason to regret that choice.

[18] Article 69 is worded as follows:
"Five years at the latest after the entry into force of this Regulation, the Commission shall forward to the Council and the European Parliament a report on the application of the Regulation and proposals for amendments, where appropriate. The report shall, in particular, analyse the appropriateness of:
a) allowing the location of an SE's head office and registered office in different Member States;
b) broadening the concept of merger in Article 17(2) in order to admit also other types of merger than those defined in Articles 3(1) and 4(1) of Directive 78/855/EEC;
c) revising the jurisdiction clause in Article 8(16) in the light of any provision which may have been inserted in the 1968 Brussels Convention or in any text adopted by Member States or by the Council to replace such Convention;
d) allowing provisions in the statutes of an SE adopted by a Member State in execution of authorisations given to the Member States by this Regulation or laws adopted to ensure the effective application of this Regulation in respect to the SE which deviate from or are complementary to these laws, even when such provisions would not be authorised in the statutes of a public limited-liability company having its registered office in the Member State."

The SE comes at the right time

Although it has become increasingly complex over time and through the successive versions of the Commission's proposals – to the extent of sometimes being difficult to apply and interpret – the 2001 regulation on the SE holds the future in its hands. Admittedly, it does not represent an autonomous Community law as had been intended in the initial proposal in 1970. On the contrary, the SE is largely governed by the national law on public limited companies of the country where the company has its registered office, both regarding its incorporation and even more so regarding its working. These references to national law are extensive regarding the powers of its management organs and the organisation of its general meetings. It becomes total in matters relating to the applicable tax and accounting systems and concerning accountability of the directors to shareholders and third parties.

However, the scope of the 2001 regulation should not be underestimated. It goes further along the road towards European integration than the directives and regulations harmonising national laws. Despite its many and excessively complex references to the laws on public limited companies in the various Member States, the approach of the regulation on the SE remains a federal one. By endowing the SE with legal personality under Community law, it establishes the principle of the right of the companies in question to organise themselves and move around the European area like they do within their national territory. If they should choose to transfer their registered office from one Member State to another or to merge with a company from another State, the SE retains its legal personality. They can cross a national border without having to change this legal personality in the way other public limited companies under strictly national law have to, with all the constraints that involves. All changes in the nationality of commercial companies are considered purely and simply as a winding up of the business from a legal and taxation point of view, meaning notably that all taxes that had hitherto been deferred become payable.

SE law is autonomous to a certain extent. It is lies alongside the law on public limited companies of each of the States with which it is also overlaps. This step forward is far from being purely conceptual. It is an original method, parallel to that of harmonising national legislations, to break down the barriers to cross-border management of European companies. It is a tool, in fact.

The people spoken to by the working group – in companies and employers' socio-professional organisations – acknowledged the interest of such an approach. Some of them, however, pointed out that the 2001 Regulation had arrived too late. They observed that companies has already taken other routes not only to structure themselves internally, but also to implement external growth strategies in Europe: the successful Air France/KLM or BNP Paribas/Banco Nationale Lavoro mergers, for example, were conducted on terms other than those of the SE on cross-border mergers.

On the basis of its European survey, however, the rapporteur is convinced that the SE is far from being out of date. On certain aspects it can be criticised, as will be explained later, for not being sufficiently attractive. In particular, it can be regretted that it is excessively complex due to the excessive fragmentation of the statute for each of the (thirty) countries in the European Economic Area.[19]

The fact remains that the current context is much more favourable to the cross-border operations the statute of the SE is supposed to facilitate than that of the Europe of the 1970s. Several reasons enhance the interest of such operations.

1. First of all, the euro: the single currency has taken away the obstacle of exchange rate fluctuations. The existence of the euro combined with interest rates at historically low levels on the European market provides a strong incentive for investors. It is no coincidence that Europe, according to all recent studies, is the focus of the world's mergers and acquisitions. In 2006, these operations are said to have represented $1,700 billion, and forecasts give no sign of a slowdown in coming years.[20] Although legitimate criticisms can be made of operations conducted by certain investment funds for purely financial reasons and short-term profit, it must be admitted that this trend affecting all the different sectors of activity, highlights opportunities for economic development, growth and therefore employment in Europe.

2. The second reason for which the SE statute comes at the right time relates to the existence of a far from negligible "European *acquis*" in company law. Most of the harmonisation directives scheduled in the 1960s have been adopted and, in some cases, have already been amended several times. Thanks to these texts, the ways in which companies are managed from one Member State to another within Europe have come closer together. In this way, they have become more legible on the European level. This harmonisation provides the common core on which the SE is based in each of the States in which it has its registered office and whose national legislation on public limited companies it applies.[21] This harmonisation concerns such key domains as the various disclosure obligations of share companies, their accounts (annual and consolidated accounts), the formation, maintenance and modifications of

---

[19] The European Economic Area (EEE) is an association agreement signed in 1992 between the countries of the European Union and the following three countries –Norway, Iceland and Liechtenstein – which have all incorporated the 2001 regulation into their domestic law. Chapter V of the EEA agreement referring to Annex XXII states that the signatories of the agreement must transpose Community legislation on companies. SEs have already been registered in two of the three countries mentioned above.

[20] See "L'Europe de 2007-2008 demeurera en ebullition", *L'Agéfi*, 16 January 2007: "Merger and acquisitions activity in Europe should continue to increase in 2007 and 2008, with 33% of companies and 37% of investment funds counting on an increase in their operations over 2006 and 49% on the current rate being maintained, according to a study published yesterday. According to this study published by TNS Sofres for law firm DLA Piper, only 10% of the companies and 11% of the funds surveyed forecast a slow-down in the rate of their acquisitions."

[21] As will be seen later, for matters not governed or partly governed by the Regulation, the SE is treated like a public limited-liability company of the country where it has its registered office.

their capital (decreases/increases), mergers (today national and very soon cross-border [22]) and split-ups.

3. Thirdly, this "European *acquis*" is social. It concerns information and consultation of the workers[23] or the creation of European Works Councils in transnational groups[24]. The *acquis* of European social legislation is all the more important when it comes to the SE system that the statute for the SE must include worker involvement provisions directly inspired directly in certain respects from European social *acquis*.

4. Among the other texts in the European *acquis* resulting in the convergence of the ways companies behave in the European area, mention should be made, fourthly, of the directives on stock exchange law. By harmonising and strengthening the rules applicable to listed companies in the implementation of their financial strategy, they place shareholders and third parties in a better position to enforce their rights on the occasion of cross-border operations.

Adopted following the creation of the Euro, but also and above all in response to scandals such as Enron in the United States and Parmalat in Europe, these rules have transformed the stock market landscape. In order to safeguard a climate of trust between companies, investors, savers and the general public on the European financial market, they have increased and rationalised the transparency requirements of issuers. Two texts are worthy of mention here. First of all, the "Prospectus" directive.[25] In the spirit of the statute for an SE, it aims to facilitate cross-border operations by allowing companies that are authorised to make public issues to make an offering or an application for admission of their securities to a regulated market on the basis of a single prospectus that is valid for the whole of Europe. The "Transparency"[26] directive, meanwhile, increases the protection of shareholders and third parties. It harmonises the periodic disclosure obligations of listed companies regarding their annual, half-yearly or even quarterly reports. As requirements for shareholders to declare

---

[22] Directive 2005/56/EC of the European Parliament and Council of 26 October 2005, on cross-border mergers of limited liability companies. This directive aims to facilitate cross-border mergers between share companies of different types governed by the legislation of different Member States.

[23] Directive 2002/14/CE of the European Parliament and Council of 11 March 2002, establishing a general framework for informing and consulting employees in the European Community – Joint declaration by the European Parliament, Council and Commission on worker representation.

[24] 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.

[25] Directive 2003/71/EC of the European Parliament and the Council of 4 November 2003, concerning the prospectus to be published in the event of an offer to the public of securities or with a view to admission of securities to negotiation, and modifying directive 2001/34/EC.

[26] Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC.

when their holding of the shares in certain companies exceeds certain percentages have now also been harmonised, it becomes much easier to monitor changes in the control exercised by those who are in a position to influence the way a company operates.

These directives concern listed companies. While not all SEs will be listed, the SE statute should attract a large number of listed companies. Such is already the case of German group Allianz in the insurance sector and of Elcoteq, a company of Finnish origin specialising in electronics outsourcing.[27] Other large listed companies have already gone a good way towards adopting the statute of the SE. Such is the case of the SCOR group, a French reinsurance firm, of Fresenius, a German company in the health sector, of Nordic financial group Nordea or of German chemicals group BASF.

5. A fifth factor provides further justification for a transnational statute for companies in Europe: the introduction of harmonised accounting standards. Freedom of movement throughout the European market implies, for the companies in question, the need for increased transparency and control of their activities to protect the interests of their shareholders, employees and third parties. This is the goal of the new European regulations on accounting standards. By facilitating comparisons of the economic health of companies operating on the European and worldwide levels – on the basis of a "fair presentation" of the company and its assets – the European regulations on the IFRS standards contribute to enlightening investors and even the companies themselves in their cross-border development choices.

6. Lastly, the contribution of information and communication technologies to cross-border management should not be neglected. Generally speaking, without these technologies, the transparency requirements imposed on European companies would have little effect. The use of electronic media and in particular internet is also a powerful tool in facilitating the oversight work of the regulators, meaning the market authorities and the prudential control authorities in the fields of insurance and banking.

Today, these IT tools are particularly useful for groups wishing to refocus their management, in line with one of the key ideas of an SE statute aimed at encouraging restructuring of companies with directors from different European States. It also turns out that, after favouring the creation of subsidiaries in the countries in which they have operations, a number of financial or industrial groups are seeking to rationalise their management to make it more consistent and cut administrative costs. One of the ways of doing this is to transform some of their subsidiaries into branches by using the merger-acquisition procedure allowed for SEs within the framework of the 2001 regulation. As will be seen in the review of initial experience of SEs, this ap-

---

[27] Allianz SE was registered on 13 October 2006 in Germany and Elcoteq SE on 14 October 2005 in Finland (See Chapter 4: Initial experience of companies that have chosen to become an SE).

proach is not adopted by all large companies. Some of them, in contrast, see the interest of keeping subsidiaries in the various States, as they are considered national companies by the States in question and provide a way of adapting their operations more effectively to the specifics of each country. The fact remains that the SE statute facilitates the choice between "branches" and "subsidiaries". When companies choose to switch to branches, the shareholders of the subsidiary that is acquired become shareholders of the parent company making the acquisition and must be able to continue to exercise all their rights. If they choose the subsidiary approach, group management can enjoy a better overview of the way its subsidiaries are run when these subsidiaries are SEs, with governance which is therefore harmonised to a certain extent. In both approaches, IT tools allow the role of the stakeholders to be asserted in corporate governance.

Anything on the legal level that facilitates cross-border corporate management by electronic means can only contribute to the attractiveness of the SE. If the statute is not as attractive as might have been expected, it is not due to the delays in the adoption of the 2001 regulation, as the justification for the SE is even stronger today than it was before. It is because of the sometimes uncertain or unsuited nature of certain provisions of the regulations in relation to economic realities. The potentialities are great however.

It is in this transition phase that this report seeks, first of all to assess the interest of the SE formula as the embodiment of a transnational law that is fundamentally different from the procedure of harmonising domestic law (I).

Following this, the next objective is to appraise the originality of the SE statute itself, notably from the viewpoint of SEs registered in France (II).

As this statute in company law includes a social strand but does not include a particular taxation system, the questions raised in these two fields are also examined in order to ensure that the report is exhaustive (III).

Lastly, although many countries took time enacting the 2001 regulation, it is already possible to draw up an initial review of the way in which companies have used it and the reasons for which they have decided to adopt an SE statute– or not (IV).

It is on the basis of this survey and of a large number of hearings and visits that this report then recommends looking into possibilities for improvements (V).

The adoption of the statute for the SE is something of a miracle given the great wariness of the States to accept the principle of a company whose transnational statutes correspond to intra-Community business, inherent as that principle may seem to the common market. And yet intra-Community trade represents over two-thirds of European companies' exports of goods and services and is the source of Europe's wealth.

However, beyond the economic reasons for recognising a genuinely European identity for companies, the creation of the SE responds to a political objective which has become all the more important with the enlargement of Europe: strengthening the feeling of belonging to a single community of values and destiny among European business and social stakeholders.

This does not mean, as this report tries to show, that the statute of the SE has only a symbolic scope. It does have practical effects. As Mario Monti, the Commissioner for the Internal Market at the time, emphasized at a conference organised by the Chamber of Commerce and Industry of Paris (CCIP) in 1997: [28] "Do you think that Bill Gates would have had such success in the United States with Microsoft if he had had to set up a subsidiary in each State instead of operating throughout the United States with the same company?"

* * *

[28] Seminar of the Business Law Research Centre of the Chamber of Commerce and Industry of Paris (the CREDA), 4 December 1997; http://www.ccip.fr/creda.

Chapter 1

The Original Approach of Transnational Law

Those who had placed their hopes in the establishment, through the SE, of a genuinely autonomous company law of a federal nature have good reason to be disappointed. The gap is indeed great between the initial objective of the Sanders report and the Commission proposal of 30 June 1970 on the one hand, and the current statute for the SE. In the absence of an agreement between the States on a truly uniform statute, the SE is a hybrid. Governed by a mere European framework statute derived from the provisions of the regulation of 8 October 2001 that are directly applicable to it, for all other matters it is considered as being a public limited-liability company of the State in which it has its registered office. “Subject to this regulation, the formation of an SE shall be governed by the law applicable to public limited-liability companies in the Member State in which the SE establishes its registered office”. Consequently, there are as many SE statutes as there are States in the EEA, which is to say 30: the 27 members of the Union and the three countries – Norway, Iceland and Liechtenstein – that signed this agreement with the EU.

However, it would be unfair to see the SE as anything less than decisive progress towards European integration.

• The key interest of the SE – for the company itself as well as for those who finance it and for its employees – resides in its legal personality under European law.

• Although attenuated by the options offered to States to determine the terms of application of the SE statute, this variable statute is a good way of bringing the law of the different States closer together and to support companies seeking to consolidate their position in Europe.

The virtues of recognising a European legal personality

The European legal personality of the SE does not endow it with a merely symbolic value. It extends the range of its means of action within the European area. The SE enjoys greater freedom of movement that other public limited-liability companies in managing its cross-border activities, a fact which should encourage the States to greater vigilance in ensuring that their territory is attractive. In this respect, the SE contributes to the integration of the internal market. Looking beyond the market, the creation of transnational structures – such as the SE today, the European Economic Interest Grouping (EEIG) in the past and the European Cooperative Society in the future – establishes a form of European citizenship for companies. In this way, the SE makes its contribution to the construction of Europe.

The SE, a factor in integration of the internal market

If the primary aim of the SE is to enable companies "the business of which is not limited to satisfying purely local needs [to] plan and carry out the reorganisation of their business on a Community scale" (by the terms of the first whereas clause in the 2001 Regulation), it can also be perceived as an original way of furthering integration of the internal market.

The first method used to favour this necessary integration is the more traditional approach of harmonising domestic law. This approach widely prevails in European business law. The eleven directives of the company law action plan defined in the Commission Communication of 21 May 2003,[29] fall within this approach. On the one hand, companies have been forced, by these directives, to make their situation more transparent and therefore easier to check for investors and public authorities. On the other, multinational firms have been able to refer to more consistent rules from one State to another thanks to these directives. Although it may be regretted that European legislation is not always clear or that its transposition in the different Member States has often taken time in coming and in some cases leaves much to be desired, the fact remains that European harmonisation of company law has played and continues to play a major role in providing a more secure legal environment for companies and making them more competitive in Europe. For investors, there is no doubt that European business law is a factor in the attractiveness of Europe as a whole.

---

[29] Communication from the Commission to the Council and European Parliament: *Modernising Company Law and Enhancing Corporate Governance in the European Union - A Plan to Move Forward* (COM/2003/0284 final).

We should not delude ourselves: the adoption of directives or regulations harmonising domestic laws will be increasingly difficult. The enlargement of Europe to 27 countries (and more in the future) makes the decision-making process more cumbersome. It may well become increasingly difficult to build compromises between States seeking, quite naturally, to ensure that business activities generating tax revenues and employment remain or are attracted to their respective territories, and which therefore have diverging interests in this respect.

Against this backdrop, the SE formula is interesting for the indirect effect it exerts on bringing domestic laws closer together without this being seen as a constraint by the States, as the SE is only optional in nature. While the States are required, by virtue of the regulation and directive of 8 October 2001, to organise the enactment of the statue in their domestic law, companies remain entirely free to create an SE or to transform themselves into an SE. The 2001 regulation on the SE also broadly conserves (too much, it could be argued) national particularities by referring for the points it does not address to the law on public limited-liability companies of the State in which the SE has its registered office. This provides a way to avoid coming to a decision in the recurring – but vain – debate on the comparative merits of the common law and civil law conceptions of company law. Although the SE is close to the continental model, it provides an ideal vehicle to accompany the necessary interpenetration of legal cultures in Europe.

Most of all, however, by allowing the SE to cross borders without having to wind itself up in the State of origin and immediately be born again as a new legal entity in its new State, the 2001 regulation establishes the cross-border mobility of companies. This mobility is a powerful way of bringing national legal systems closer together by leading each State to borrow the mechanisms that appear the most relevant and the most attractive for the setting up of business activities from its neighbours. Competition between legal systems should bring about convergence. That is at least the wager that can reasonably be made. It is a wager, however, that does not necessarily amount to deregulation, in our opinion. As will be emphasised later, harmonisation between domestic legislation in a context of "Law Shopping" and competition between laws is even more indispensable. It is the only way capable of guaranteeing, in the general economic and social interest of Europe, the essential rights of the stakeholders in the company: shareholders, public or private creditors and employees, which must be secured as the fair return for the freedom the companies gain to move around within the Community.

SE and "European citizenship" for companies

The institutionalisation of European legal entities, such as the SE, is recent.

The first entity of its kind to be established in Community law was the European Economic Interest Grouping (EEIG). Directly inspired by French law on the *groupement d'intérêt économique*, it was created by Regulation n° 2135-85 of Council of 25 July 1985.[30] The EEIG, the character of which may be civil or commercial depending on its purpose, cannot make profits in its own right. It is an instrument purely for contractual cooperation between companies in different Member States. Its registration in one of the States gives it rights and duties, such as the ability to enter into contracts or to go to law. The States are free to recognise the legal personality of the EEIG or not, and French law has done so. In France, EEIGs have legal personality as soon as they are listed on the Company Register. They may transfer their registered office without losing their legal personality. No review of EEIGs has ever been made and, astonishing as that may appear, their precise number in 2007 is not known. All that is known is that in 2001 [31] there were 1,221 of them, more than half of which were registered in France and in Belgium. The EEIG formula would probably have been more widely applied if its statute had been less restrictive as regards the needs of European joint-ventures. For instance, it can be regretted that in French law, the EEIG cannot be transformed into a public limited liability company – or therefore into an SE – unless wound up first, with all the penalising fiscal consequences that entails. The fact remains, however, that in fields such as cross-border transport, education, research, culture or the audio-visual sector – services in general – the EIGG is a good instrument for transnational cooperation. The best illustration is that of Arte, the Franco-German TV channel, which has operated since its beginnings in the form of an EEIG.

The third legal structure that is specific to European company law is that of the *Societas Cooperativa Europaea*, the SCE. Started in 1992, negotiations on the creation of a statute intended for cooperative companies operating in the European area soon stumbled, like for the SE, over the question of worker involvement. The political agreement on the SE made at the European Council in Nice, however, allowed negotiations on the SCE to resume and the statute saw the light of day less than two years after that for the SE. As for the latter, it was necessary to split off the social strand of the reform in a separate directive to overcome the opposition of the most reluctant States. The statute for the SCE is therefore divided between a regulation of 22 July 2003 on company law and directive of the same date on worker involve-

[30] Published in OJEC n° L. 199, 31 July 1985, this regulation was transposed into French law by Law n° 89-377 of 13 June 1989.

[31] Data from the European Commission's monthly list of EEIGs of June 2001.

ment.[32] The scope of the creation of the statute for an SCE is no less, relatively speaking, than for the SE. More and more cooperatives,[33] present in the service sector and not only in agriculture, wish to develop cross-border cooperation, set up purchasing or sales centres and to have the possibility to organise themselves as a network covering European territory. The possibility of doing so in the form of a single legal structure will constitute a new facility for these companies. It is interesting to note a phenomenon of convergence between laws through the SCE. Admittedly, like the 2001 SE regulation, the 2003 SCE regulation refers issues it does not address to national law, allowing national particularities that are very pronounced in the cooperative world to be conserved. At the same time, the Community legislator adopted the perspective of bringing the statue for the SCE closer to that of stock companies in the interests of efficiency. This was further accentuated in the SCE statute of 2003. Like the SE, the SCE can choose between two management systems – the one-tier or the two-tier system – and its operation is based on that of the public limited-liability company. This testifies to the integrating effect of the European Economic Area. The statute for a commercial company thus becomes, by the inclusion of a commercial dimension in the statute for the SCE, a sort of European ordinary law.

There is every reason to think that the process of creating this type of Community structure is not about to stop, as each reform opens the way to the next. Among the developments it has rendered possible, the statute for the SE has broken the deadlock on the SCE and, very recently, on the occasion of the German presidency of the Union in the first half of 2007, the project for the European Private Company (EPC) called for by France and various professional organisations for many years. The European Commission took up the idea in its plan to modernise company law.[34] For the first time, German Chancellor Angela Merkel included the EPC in the priorities for the programme of the EU presidencies for the year 2007 and the first half of 2008.[35] The SPC statute targets SMEs more particularly. More and more SMEs are investing or offering their services beyond their national borders. Increasing numbers of them are positioning themselves notably on the markets of the countries of Central and Eastern Europe where consumption and modernisation needs are

---

[32] Council Regulation n° 1435/2003 of 22 July 2003, on the statute for a European Cooperative Society, and Council Directive 2003/72/EC of 22 July 2003, supplementing the statute for a European Cooperative Society with regard to the involvement of employees (published in the *OJEU* n° L. 207 of 18 August 2003). The deadline for adaptation and transposition of these texts expired on 18 August 2006. The process of adapting and transposing these texts is currently underway in France.

[33] In 2004, there were some 300,000 cooperative societies in Europe representing about 60 million people, out of a total of 20.5 million companies in the EU at that date (*Source:* website of the French Ministry for the Economy and Finance, updated December 2004). In all probability, the total number of companies in the Europe of 27 must be between 28 and 30 million.

[34] Communication of the Commission to the Council and European Parliament of 21 May 2003: *Modernising Company Law and Enhancing Corporate Governance in the European Union - A Plan to Move Forward* (COM/2003/0284/final).

[35] See the “Programme of the Future German, Portuguese and Slovenian Presidencies” for the period 2007-first half 2008, Council of the European Union, Brussels 21 December 2006, POLGEN 25-17078/06, p. 30.

great. The SPC would enjoy greater statutory freedom than SEs, even unlisted ones. Judging by the extent of the success encountered by the *Société par Actions Simplifiée* (SAS), introduced into French law in 1994,[36] and by which the SPC is largely inspired, we can imagine the interest that will be aroused by the creation of the SPC among many of the 18 million SMEs in Europe (out of a total of 20 million companies).

Implementation of the SE has awakened interest in other projects that might have been thought abandoned. Such is the case of the project for a statute for a "European mutual society". It is even possible (and is at least to be hoped) that the projects for a statute for a European association or European foundation might be revived in the near or not-so-near future.

The creation of legal entities under Community law does not concern only the civil and commercial fields. The social domain has also seen such entities in European groups of companies. European Works Councils, special negotiation groups in charge of preparing an agreement on the involvement of workers in EEIGs, SEs or SCEs, or the SE Group Council are all examples of this.

Even if it does not imply the application of an autonomous Community law, the notion of European legal personality is called upon to play the role of a driving force in bringing cultures and practices in the different countries of Europe closer together. Endowing legal entities – other than the European public institutions themselves such as the European Community,[37] the European Investment Bank and the European Central Bank[38] – with legal personality under European law represents a fundamental change. We can even put forward the idea that it gives the companies in question, such as the SE, a form of citizenship akin to the European citizenship of the men and women who are Community nationals.

This comparison finds its justification in the very conception of European citizenship. Each national of a Member State of the European Union has been, since the Maastricht Treaty of 1992, both a citizen of their country and a citizen of Europe. Taking up the provisions of the Maastricht Treaty, Article 17 of the EC Treaty states that "[...] Every person holding the nationality of a Member State shall be a citizen of

---

[36] Law n° 94-1 of 3 January 1994 establishing the *Société par Actions Simplifiée*.

[37] The European Constitutional Treaty provides in its Article I-7 that "the Union has legal personality". Currently, in fact, only the European Community formally has this legal personality. Granting this legal personality expressly to the European Union will have a twofold advantage: it will establish, on the one hand, the competence of the European Union to conclude international agreements; on the other, it will make it possible to transfer into the "first pillar" of Community competences, those competences in the other two pillars (foreign policy, defence, justice and internal affairs) thereby facilitating the decision-making processes in various fields of European policy.

[38] Some European agencies do have legal personality, such as the Office for Harmonisation in the Internal Market (OHIM) in charge of issuing companies with the "Community Trademark" for products and services.

the Union. Citizenship of the Union shall complement and not replace national citizenship." European citizenship, although subsidiary in nature, nonetheless comprises two specific rights drawn from Community law. For example, all European citizens have the right to vote and are eligible in municipal elections and elections to the European parliament wherever they reside in Europe.[39] They also benefit from diplomatic and consular protection of Community origin: should the State of which the person in question holds the nationality not have a diplomatic or consular representation in a third country, this protection is granted to them by any other Member States with such a representation there.

It should be possible to transfer the notion of European citizenship, relatively speaking, to European legal entities (whatever the legal form: EEIG, SE, SCE or a future SPC). The principle of according the same treatment to legal entities and natural persons features in Article 48 of the EC Treaty[40], thereby making this proposal all the more logical and reinforcing its legal grounding.

It is indeed possible to make a parallel between European citizenship of individuals and that of the SE. In both cases, it is a subsidiary notion. European citizenship of individuals derived from their national citizenship attaching them to the Member State that gives them their civil status. Likewise, the SE is born as a legal personality under Community law on the day of its registration in a national company register. In the same way that the European citizen moves around freely in Europe without any document other than its national identity document, the SE is recognised in all the Member States due to its specific statute. The statute of the SE makes any specific treaty on the recognition of legal entities in the European Union superfluous for the companies in question, regardless of the recent jurisprudence of the Luxembourg Court on the freedom of establishment forcing Member States to recognise the legal capacity of foreign companies formed in accordance with the laws of another Member State without restriction.[41] The question of the recognition of the personality of companies and legal entities which has never been resolved as the Brussels Convention of 29 February 1968[42] has never come into force, has now therefore been explicitly settled for the SE by the 2001 regulation.

---

[39] Ari Vatanen, of Finnish nationality, was elected as an MEP on a list presented by the UMP political party in France.

[40] According to the first clause of Article 48 of the EC Treaty (ex-article 58): "Companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community shall [...] be treated in the same way as natural persons who are nationals of Member States."

[41] See notably ECJ "Centros" of 9 March 1999, case C-212/97 (Rec. 1999, p. I-1459); ECJ "Überseering" of 5 November 2002, case C-208/00 (Rec. 2002, p. I-9919); ECJ "Inspire Art" of 30 September 2003, case C-167/01 (Rec. 2003, p. I-10155).

[42] The text of this convention, written by Professor Berthold Goldman, is reproduced with his report to the RTD eur. 1968, p. 400.

Beyond the benefit of freedom of movement recognised within the freedom of secondary establishment for all companies in Europe,[43] the statute for the SE could offer companies other advantages relating to their European legal personality: on the one hand, it should be accepted that SEs benefit from European diplomatic and consular protection all over the world, just like European citizens do. Also, it could be of interest to look into whether it would be a good to idea to allow the SE, in all the Member States in which it has establishments, to claim the benefits, if necessary, of the trade, establishment or investment treaties signed by the said States with third countries.

Multiple reference standards

It has always been understood that the regulation on the SE would concern only the aspects of company law governing corporate life. Ambitious as they may have been in seeking to grant an autonomous statute to the SE, its initiators never imagined that it might be based on a new, entirely Europeanised business law independent of national law in all fields. Even the Sanders report in 1967 mentioned the fields the statute did not cover, quoting: "administrative law, the law of the industrial and commercial professions, competition law, general labour law, tax law and criminal law". In all these, it referred to national law, although establishing the principle that "the SE may not be treated less favourably than a national public limited-liability company". Although it does not contain this point, interesting as it would have been, the statute for the SE states in a similar way that it does not cover fields such as "taxation, competition, intellectual property or insolvency", indicating that "[...] the provisions of the Member States' law and of Community law are therefore applicable in the above areas and in other areas not covered by this Regulation".

[43] Freedom of establishment is divided into two branches: freedom of principal establishment, guaranteed by Article la 43, clause 1 of the treaty referring to companies registered in the European Union: "Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited", and secondary freedom of establishment, guaranteed by the second sentence of the same article extending the benefit of the principle to so-called "secondary" establishments of these companies, regardless of their corporate form: "Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State".

Denaturing the notion of the Community regulation

For the rest, the regulation diverges from the initial conception of the SE reflected in the Sanders Report and the initial proposals of the Commission in the 1970s. Three conceptions were possible:

– make the SE a transnational legal entity the formation and operation of which were based on an entirely Europeanised law that was independent of the laws of the different States (initial proposal);

– on the contrary, while giving it legal personality under European law, treat the SE like a public limited-liability company of the Member State in which it has its registered office and apply mainly the national law of the said State (2001 regulation); or

– as a middle way, provide for the application of uniform Community rules completed by references to national laws (adapted if necessary), but without giving States the option of applying certain requirements or not. The latter approach would have been in line with that of the 5th directive on the formation of public limited liability companies, although differing from that text by the optional nature of the SE. The proposal for harmonised laws on public limited liability companies did not see the light of day. The State – those abiding by *Common Law* and those within the sphere of Germanic-Roman Law – were incapable of coming to an agreement on a common mode of corporate governance.[44] But above all, it was the structure proposed for the public limited-liability company that was too rigid and unsuited. Given that use of the SE form remained optional and did not require the States to amend their laws on public limited-liability companies (other than to the extent required by application of the various European harmonisation directives), it might have been imagined that an agreement would be found on a more homogenous structure for the SE, wherever its registered office. It would have been both logical and efficient. For the reasons mentioned above, however, which we will come back to later, it was the least "integrated" formula that was chosen. Not only does the 2001 regulation make multiple references to national laws on public limited-liability companies, it repeatedly gives the States options which make the statute for the SE less clear and reduce its legal security. This has been rightly criticised by most commentators on the 2001 regulation, and came as something of a surprise to one American group that decided to transform one of its European subsidiaries into an SE, only to find that SEs did not have the same physiognomy "on this side and the other of the Pyrenees".[45]

---

[44] Presented for the first time to the Council of Ministers in 1971, the proposal for the 5th directive was much too rigid and came out clearly in favour of structures based on the German model of dualism and codetermination.

[45] This expression, drawn from Pascal's *Pensées* ("truth on this side of the Pyrenees, error on the other side") highlights the differences in legal approaches to the SE from one European country to another.

So what remains of the initial proposal of the European Commission almost forty years on? First of all, the recognition of the legal personality of the SE under Community law transcending national law. Next, the mobility which – for the moment, at least [46] – other European public limited-liability companies do not enjoy. Lastly and above all, the potentialities generated by the very existence of the SE label as the gateway to a more easily accessible European space.

For these reasons, despite the reduced ambitions regarding the creation of the SE, it must be considered as being a first step towards achieving the legal and economic unity of a genuinely European company. In this respect, the approach reflected by the Commission, in its proposal for a statute published in 1970,[47] remains topical. As a reminder, its terms were:

"Whereas the harmonious development of business activities throughout the Community calls for a move from the stage of a Customs union to an economic union, that such a move implies notably, not only the elimination of barriers to trade, but also the restructuring of production and marketing factors on a European dimension to achieve an extended market working in a comparable manner to a national market; and to this effect, it is indispensable that companies whose activity is not limited to satisfying purely local needs should be able to conceive and carry out the reorganisation of their activities on the Community level and that the enhancement of their resources and competitive capacity should be conducted directly on that level [...];

"[...] that, even if the means of action provided by the treaty for the harmonisation of legislations and conclusion of agreements to make the legal mobility of companies possible by seat transfer of by merger do provide solutions to some of these difficulties, they do not eliminate the need to choose a given national legislation to give the company that is European in economic terms the legal status that is indispensable for a commercial company [...];

"[...] that the only solution susceptible to achieve both the economic and legal unity of the European company is therefore to allow the formation, alongside companies under different national laws, of companies governed entirely by a single law that is directly applicable in all States [...]."

---

[46] Two instruments in favour of company mobility inside the Community could soon be competing with the SE. One is directive 2005/56/EC which must be transposed into the laws of the Member States by the deadline of 15 December 2007 and the other is the 14th directive on cross-border seat transfers, which has not yet gone beyond the project stage (see the last public consultation of the Commission in 2004: http://ec.europa.eu/internal_market/company/seat-transfer/2004-consult_fr.htm).

[47] "Proposal for an EEC regulation on the statute for European limited-liability company", *OJEC*, 10 October 1970, n° C. 124, quoted above.

What has changed is not the goal but the scope of the Community statute for the SE which, in its original form as recommended by the Sanders Report and the Commission's first proposals, would have been a unique experience in the direct application of the material rules of European company law.

The way in which difficulties in the application or construction of this *sui generis* law was in fact a radical one. It was up to the (national or Community) judge to fill out the gaps in the statute for the SE, not by referring to national law, but "according to the general principles by which this statute is inspired" or, "if these general principles do not allow the question to be settled, according to the general rules or principles common to the laws of the Member States".[48] The statute for the SE, by highlighting the fundamental principles of Community law, reinforced the constitutional nature of the European Treaty. It would also have avoided constantly having to ask the question of the competent court and applicable national law in the various situations companies can face in their relations with their shareholders, employees or creditors in different countries. In the absence of uniformity of the rules of international private law recognised in the different States, we see increasingly frequent conflicts of law and jurisdiction which are all sources of legal insecurity, as well as making procedures longer.

But the States were not ready to go so far, even on the SE. It was therefore preferable, as was decided at the European Council in Nice in December 2000, to come to a less ambitious but realistic political agreement to bring these discussions that had been going on too long to a close. The shift in perspective is evident, however. It is no longer the interest of companies doing cross-border business in structuring and consolidating themselves on the European level which prevails over the interest of the States in defending the attractiveness of their own territory against that of the others. The priorities are in fact reversed: by preserving the particularities of the States through references to national law and through the options offered to each Member State, the 2001 regulation opens the way to increased competition between the States which must be noted.

This denaturing of the very notion of Community regulation was the price to pay for an agreement. It is enough to read it to see that it is no longer a directly operational legal instrument. This remark is not merely that of a legal purist. The lack of clarity of European legislations resulting from laborious compromises is a growing preoccupation of business and social stakeholders in Europe. It also has the drawback of contributing to a feeling among citizens that European construction is something remote.

---

[48] This reference to the general principles common to the laws of the Member States evokes the wording introduced by the Maastricht Treaty in 1992, according to which: "The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law."

In principle, as specified in Article 249 of the EC Treaty "A regulation [...] shall be binding in its entirety and directly applicable in all Member States", while directives leave room of adaptations of the standards by the States. A directive "shall be binding, as to the result to be achieved, upon each Member State [...] but shall leave to the national authorities the choice of form and methods". The 2001 regulation, however, does not correspond to these definitions. It leaves the Member States much more room than usual for adaptations, and more than many directives. Only a minimal part of these provisions is for direct application, contrary to what is ultimately suggested by Article 70. This article repeats the wording of the Treaty according to which it "shall be binding in its entirety and directly applicable in all Member States". In fact, contrary to the clear provisions of Article 249 of the treaty, the 2001 regulation is practically inapplicable without being received into the national laws of the States concerned. On top of this, national laws may vary widely given the large number of possibilities for adaptation offered by the text: minimal harmonisation, *opting in* or *opting out*, etc. The use of the expression "at least", revealing just minimal harmonisation, features in practically all the provisions relating to governance of SEs (formation and working of management organs, majority required in general meetings to amend the statutes, shareholders' rights in meetings, etc.). As for the options offered to the States, there are no less than 32 of them.[49] With the result that for each theme relating to the working and incorporation of the SE, there are at least 10 variants depending on where the registered office is based. Some of these variants concern subjects as essential as the protection of minority shareholders in case of cross-border mergers and transfers of the registered office.

This technique consisting in the European legislator opening the possibility for States not to apply the rules its sets out is not limited to the texts on the SE. Its use is tending to become more widespread in the economic and financial fields, which raises some problems. At the time, this way of overcoming divergences between States can appear a good way out, but multiplying the options available to States to apply European law *à la carte* weakens the Community spirit. It is also an opportunity to raise new barriers between States that the Common Market was supposed to remove. Finally, it raises the question of the principle of equality. Returning to the example of the SE, given that it is conceived as a Community entity, how can we justify that shareholders in a company registered in one State will be protected better than shareholders of another company registered in a neighbouring State? One well-informed commentator on the statute of the SE has noted that "The European tree would perish quickly if the roots turned out not to be adapted to the national soil". This image is indeed realistic, but it does not paint the whole picture of the need for a consistent European-wide strategic, economic and social vision among companies and their stakeholders, including employees.

---

[49] See "The Societas Europaea: a new opportunity?", Paul Storm et Nauta Dutilh, *in* Dirk Van Gerven, *The European Company*, tome I, Cambridge University Press, 2006.

Complex system of references to national laws

Depending on their feelings regarding the creation of the SE, some commentators deplore what they see as a timorous statute, while others are delighted to see that, despite its gaps, the statute still represents the "backbone" of the SE. The latter expression gives a good insight into the legal nature of the SE statute, for if the 2001 regulation provides the structure for the consistency of the statute, it does not reflect, and by a long stretch, its appearance and the reality of its operation depending on the place where it is registered. First and foremost, the SE is a sort of standard-bearer for the European corporate model that has been forged over time. This model has two aspects related to European citizenship. Its mobility ensures it freedom of movement and establishment within the Union, in principle. Its relatively advanced worker involvement system corresponds to the specific dimension of social Europe. Apart from these two major elements of mobility (cross-border mergers and transfers of registered offices) and worker involvement (the system for which is defined by social negotiation), the traits that are common to all SEs are essentially five in number.

The first and most visible is the European label. In all the countries of Europe, SEs must place the abbreviation SE after their name, in reference to the Latin *Societas Europaea*. The second is the requirement of minimum capital subscribed in principle in Euros, despite the fact that certain countries have waived minimum capital requirements in the setting up of unlisted companies. The designation of the registered office of the SE is the third characteristic that sets it even more clearly apart than the two previous ones. The regulation opts clearly for the "real seat", requiring all SEs to have that registered office – determining the national law applied to it – in the State in which it has its central administration. We know, of course, that a good share of European States prefer the system of the "law of incorporation" leaving companies the freedom to register in the country of their choice, even if the seat of their management of business is in another country. We should also mention registration as the decisive deed in the same way for all SEs, endowing the company with legal personality. This contrasts with the *Common Law* countries (United Kingdom), where this personality is inherent to the formation of the company, while in others (Belgium, Luxembourg, Netherlands), it results from the signature of the deed in front of the notary before registration. Lastly, in terms of governance, the SE is free to choose between a two-tier system (with management committee and supervisory board) or the single-tier system (with a board of directors) even in those States which allow public limited-liability companies only one of the two systems.

The degree of harmonisation of the Community statute for the SE is not therefore negligible, but the life of companies incorporated as SEs would have been simplified if the regulation had been more precise and if it had merely referred to the provisions of national law on public limited-liability companies rather than multiplying the options and thereby affecting its consistency. Instead, the States undid the work accomplished by the Commission little by little. In the course of often fierce

discussion, one or another of the States demanded – and got – the right to an option to adapt or even avoid altogether the application of one provision or another without it being clear exactly what the nature of the interests being defended was, given that companies, in the interests of clarity and security, essentially wanted the fullest harmonisation possible (with the exception of the social strand which raises other issues).

The result is a hierarchic system of standards of unrivalled complexity in European law. This system of standards is specified in Article 9 of the Regulation which we reproduce here in full as the perfect illustration of the erring ways to which the European legislator can be reduced. According to this article:

"1. An SE shall be governed:

a) by this Regulation;

b) where expressly authorised by this Regulation, by the provisions of its statutes, or

c) in the case of matters not regulated by this Regulation or, where matters are partly regulated by it, of those aspects not covered by it, by:

i) the provisions of laws adopted by Member States in implementation of Community measures relating specifically to SEs;

ii) the provisions of Member States' laws which would apply to a public limited-liability company formed in accordance with the law of the Member State in which the SE has its registered office;

iii) the provisions of its statutes, in the same way as for a public limited-liability company formed in accordance with the law of the Member State in which the SE has its registered office.

2. The provisions of laws adopted by Member States specifically for the SE must be in accordance with Directives applicable to public limited-liability companies referred to in Annex I.

3. If the nature of the business carried out by an SE is regulated by specific provisions of national laws, those laws shall apply in full to the SE."

It is most edifying to read this provisions showing the limits of the European decision-making process when national interests prevail, interests which in this case tended to be cultural rather than economic. Is an imperfect compromise better than no compromise at all? Giving up on the idea of a European statute for companies would have been highly prejudicial, but given the stakes – for growth in Europe, companies and shareholders, employees and creditors – we can only regret the way in which the States altered a project seen as being one of the most emblematic in the construction of a common economic area. In just 70 articles, the 2001 refers to na-

tional law on no less than 65 occasions and offers no less than 32 options left to the discretion of the States.[50] The SE statute will become genuinely attractive when it becomes more homogenous. The French *Conseil Constitutionnel*, in recent jurisprudence, highlighted a principle corresponding to "the constitutional objective of the accessibility and intelligibility of the law". Founded on the "guarantee of rights" set out in Article 6 of the Declaration of Human and Citizen's Rights, this principle obliges the legislator to "adopt sufficiently precise provisions and unequivocal wording"' to enable those the law is intended for to understand it and its scope.[51] Despite the difficulties of the European decision-making process in a Europe of 27, this preoccupation should be a constant inspiration for the Council of Ministers in its role as European legislator. This is all the more important if we take into account the fact that the conditions in which European law is received in 27 national legal systems with more of less pronounced differences are likely to become more and more heterogeneous.[52]

Recent trends are not encouraging in this respect, as shown by the negotiations and then transposition method for the directive on take-over bids.[53] The European Commission has observed that the authorisation given to the States not to apply certain essential provisions or to exempt their companies from compliance with these provisions if the issuer of the bid is not subject to the same provisions in their own country, has given rise to new protectionist attitudes. This goes against the whole idea of a directive aimed at opening borders for investors. We should not take an entirely black view, however. The 2001 regulation has shown its ability to drive forward the rate of reform in European company law; it brings with it a dynamic which could make the SE the model for coming years.

[50] See "The Societas Europaea: a new opportunity?", Paul Storm and NautaDuthil, mentioned above.

[51] See, for example, the decision of the Conseil DC n° 2005-530 of 29 December 2005, whereas clauses 77 to 89 published in the *JORF* of 31 December 2005.

[52] ECJ „Walter Rechberger, Renate Greindl, Hermann Hofmeister and others. against Republik Österreich" of 15 June 1999, case C-140/97 (Rec. 1999 p. I-03499): "50. According to the case-law of the Court, a breach is sufficiently serious where, in the exercise of its legislative powers, an institution or a Member State has manifestly and gravely disregarded the limits on the exercise of its powers. Factors which the competent court may take into consideration include the clarity and precision of the rule breached (Case C-392/93 *The Queen* v *H.M. Treasury, ex parte British Telecommunications* [1996] ECR I-1631, paragraph 42)"

[53] Press release, IP/07/215 on the report of the European Commission published in February 2007 on the transposition of the Takeover Directive.

What conclusions can be drawn from the specific approach of the statute in relation to the demands of competitiveness?

1. The regulation in no way goes against the trend towards increasingly contractual approaches to corporate organisation and operation. The statutory freedom of the SE is mentioned as the second source of the law applicable to the company and, even if the room it is allowed is less than it would appear at first sight[54] *due to the possibility for the States to restrict it, there is some flexibility allowing SEs to adapt their statutes to their particular purposes and these should be highlighted.*

2. The regulation explicitly validates the European acquis *in company law, with the law of the States being called upon to fill in the gaps in the regulation without departing from the body of Community directives patiently built up over a period of forty years Although only certain directives are mentioned (those of 9 March 1968 on obligatory disclosures by companies, of 9 October 1978 on mergers of public limited-liability companies or that of 21 December 1989 on the single-member private limited-responsibility companies for single-person SEs), it is all the chapters of Community law on public limited-liability companies along with the regulation, which provide the foundation for the SE and makes it a form which, ultimately, is familiar all over Europe.*

3. Entities such as the SE could play a key role in bypassing the growing difficulties of harmonisation of national legislations by establishing a sort of "28th regime".[55] *The idea is that a 28th regime is both uniform and optional for all European nationals and applies in the same way in all the member States. It is superimposed on the national systems without forcing the States to change their own legislation in depth. Such is the spirit of the 2001 Regulation. The SE is a specifically European legal instru-*

---

[54] The 5th directive on the structure of the public limited-liability company, which was abandoned (see above) included even more rigid provisions leaving little room for manoeuvre in the statutes of the company.

[55] We should actually call it the 31st regime, given that the EU has 27 members to which must be added the three signatories of the EEA: Norway, Iceland and Liechtenstein.

ment, as stressed by the Court of Justice of the European Communities on the subject of the SCE. In a ruling of 2 May 2006[56] *which is perfectly transposable to the SE, the Luxembourg Court qualified the SCE as a* "*European legal form of a specific and Community nature [...]*", insisting on the fact that "*the regulation being challenged, which leaves the existing national laws unchanged, cannot be seen as having the purpose of bring the laws of the Member states closer together [...], but has the purpose of creating a new form of cooperative society which comes on top of the national forms*".

---

[56] ECJ, "European Parliament against the Council of the European Union" of 2 May 2006, case. C-436/03 (Rec. 2006, p. I-3733): in this case, the European Parliament filed for the cancellation of the regulation on the statute for the European Cooperative Society on the sole grounds that the legal basis chosen for the regulation in question was Article 308 EC rather than Article 95 EC. The Court dismissed the case of the Parliament judging that the legal basis chosen by the Council was appropriate given that the purpose of the Regulation was not the convergence of the laws of the Member State applicable to cooperative societies, but the creation of a new form of cooperative company to exist alongside the national forms.

Chapter 2

What is the SE?

In appearance, the SE is more or less European, because it borrows extensively from the law on public limited-liability companies in the country where its registered office is. It is not fundamentally different from these companies because it represents a "European legal form of a specific and Community nature,"[57] the legal personality of which departs from solely national issues. To take up the metaphor of the 2001 regulation as the "backbone" of the SE, we could liken the national standards it must comply with as the flesh surrounding the backbone and its articles as the clothing worn by each individual and expressing its singular personality. The 2001 regulation is therefore not enough, in itself, to apprehend the real identity of the SE. Reference must be made to national law, either that specific to SEs or that generally applicable to public limited-liability companies, to get a precise idea of how it is formed and operated. It is naturally to the description of the SE *à la française* that this chapter is devoted, it being noted that France has chosen to insert the SE as much as possible into the ordinary law on public limited-liability companies, a few exceptions aside. The final incorporation of the statute for the SE into French domestic law dates back to the end of 2006: the law of 26 July 2005 and two enforcement decrees in April and November 2006.

The subject of the SE, technical and austere as it may appear, raises questions of policy and principle that affect the very conception of European construction. The authors of this report hope to raise awareness of this dimension outside legal, economic and financial circles. At stake here are not only issues of our competitiveness, but also regarding our independence and, in the broadest sense, of the European model itself.

An examination of the French SE system calls for several preliminary remarks:

• First, the SE registered in France is subject to a regime which, increased mobility aside, is not far removed from that of the public limited-liability

---

[57] According to the expression of the Luxembourg Court of Justice. See EJC, European Parliament against the Council of the European Union" of 2 May 2006, Case C-436/03.

company. French lawyers will find themselves in familiar terrain with this form of company. Rather than marking out the SE as a new form of company, France sought to avoid excessive distortion between the SE regime and that of the public limited-liability company. Little effort was needed, indeed, to do so, as most of the notions used in the 2001 Regulation existed in French law. For example, French law knows the one-tier (board of directors) and two-tier (management committee and supervisory board) systems, unlike some other countries which apply only one of the two forms of governance (one tier in Belgium and two-tier in Germany, for instance). Likewise, French law recognises the notion of "complete transfer of assets and liabilities" – making mergers possible in the fullest sense of the term – which is not the case in all European countries, notably the United Kingdom. Finally, by adopting the obligation for the SE to have its registered office at its administrative head office, does not depart from French law based on the theory of the "real seat" (unlike countries such as the United Kingdom, Ireland and the Netherlands which allow the registered office and head office to be dissociated).

• The similarities between the 2001 Regulation and French business law should be distinctly convenient, in principle, for companies in France. Yet, as was revealed in most of the interviews with managers from these companies, business would have preferred a more innovative statute that was less rigid and endowed the SE with the benefit of management methods that were genuinely adapted to its transnational activities. The 2001 regulation, meanwhile, establishes a framework based on traditional standards for the SE. Its governance structure remains traditional. France did not seize the opportunity given to use the SE as an experimental laboratory for the modernisation of this law. It is true that most of the Member States, faced with the novelty of the concept of the European company, used this opportunity only cautiously.

• The most notable step forward in French law on the road towards this modernisation concerns unlisted companies and targets SMEs. At the instigation of the rapporteur for the text in the French Senate, Philippe Marini, the law of 26 July 2005 granted unlisted SEs statutory freedom close to that of *Sociétés par Actions Simplifiées* (SAS). However, it was difficult for the French legislator to go further in the light of the regulation and the binding nature of all its dictates.

• One last remark: the 2001 Regulation is much more precise regarding the terms of the creation of the SE than its operation. In the former case, it was necessary to address the preoccupations of the German government that the SE might become an escape route for German groups to free themselves of the requirements of the German social system. As far as governance was concerned, the preoccupation was different. The demand of the States was to conserve their particularities and to appropriate, as it were, the statute for the SE by fitting it into their national legal traditions. The SE was the fruit of delicate compromises and was born under close surveillance, as if the States refused to see this unparalleled commercial company escape their control.

These mixed feelings towards the innovation of the first commercial company of European nature ever to be created explain why some of the provisions in the statute for the SE are so cumbersome:

- The methods for creating an SE are very closely controlled, and the 2001 Regulation rules out any creations of SEs from scratch, in particular.

- Its governance methods are relatively traditional and do not always take account of the trend towards a more contractual conception of the company.

- The mobility of the SE, the main contribution of the statue, is attenuated by the complexity of its procedures and the uncertainty of some of its rules.

Closely controlled procedures

Requirements of nationality and anteriority

Under no circumstances can an SE be created from scratch. Only companies that already exist and have establishments or are established themselves in different Member States can envisage the possibility of transforming themselves into an SE or creating an SE. To create an SE by merger, the merger must be between public limited-liability companies in at least two different Member States. To form a holding SE or a subsidiary SE, at least two of the companies taking part must be from different Member States or have had at least one subsidiary or branch office in another Member State for at least two years. These requirements often raise questions. Can two SEs that have just been created envisage creating a holding SE between them before two years are up? How is the two-year period calculated and how is the criterion of control over subsidiaries or offices abroad assessed? Can SEs wishing to join forces to create a new SE refer to their situation before they became an SE? The regulation is not sufficiently clear. This lack of precision is its main failing and arises from the fact that the European legislator focused on the methods for forming SEs without providing a precise response to the way in which these companies can manage their development once they have been set up. Similarly, people have difficulty understanding the fact that a parent company with subsidiaries in several European countries cannot choose quite simply to transform one of them into an SE. This transformation is ruled out by the provision of the regulation requiring a public limited-liability company to have had a subsidiary in another Member State for at least two years if it wants to become an SE (which might not be the case of the subsidiary in question).

This cross-border requirement is not specific to the SE. The other European entities such as the European Economic Interest Grouping (EEIG) created in 1985 or the European Cooperative Society (SCE) established by the European Regulation of 22 July 2003 (currently being incorporated into domestic law) must also have a cross-border dimension. Unlike the SE, however, they can be created from scratch without any other prior conditions than the obligation to observe the required formalities. To take the example of the Arte television channel, it was set up at the outset in the form of an EEIG between France and Germany.[58] Likewise, three of the five ways of forming an SCE – the two others being by merger and conversion – are direct creations. The 2003 Regulation merely defines the criteria to be fulfilled by the founders of an SCE. They may all be natural persons (residing in at least two Member States). They may be natural persons, companies and public or private legal entities (residing in at least two Member States or governed by the legislation of at least two States). They can all be companies and other public or private legal entities (residing in at least two Member States or governed by the legislation of at least two States).

Nothing comparable to the provisions for the SCE is explicitly envisaged for the SE. For example, although nothing prohibits natural persons from taking part in the creation of an SE, it would have been useful to have confirmation of this in the text. The vagueness surrounding the creation of the SE reflects the hesitations of the States in the face of this entity that is transnational rather than national and with which their administrations are not familiar. It is possible to understand why an SE cannot be created from scratch but why are so many restrictions needed? The attitude of the European legislator, giving the impression of taking away with one hand what it gives with the other, is a paradox, given that the vocation of the SE from the outset to provide the freedom of movement and restructuring opportunities that other commercial companies do not have, within the European area. Companies that adopt the SE statute are not more likely to relocate within Europe or elsewhere in the world than other companies already do using the existing legal means, such as top holdings or subsidiary holdings.

Participation of non-EU countries in the creation of an SE

Most of the Member States (France included) did not take up the possibility allowed by the 2001 Regulation to authorise companies from third countries to take part in the creation of an SE. In so doing, they reinforced the "European preference" aspect of the SE, by which the methods of creation (by European companies)

[58] "The inter-State treaty of 2 October 1990, signed between the French Republic and the eleven "former" German Länder, established the foundations of the European cultural channel ARTE (Association relative à la télévision européenne) created by contract on 30 April 1991, in the form of a European Economic Interest Grouping (EEIG)."
(*Source:* http://www.france-allemagne.fr/ARTE-Association-Relative-a-la.html.)

and action (mergers and seat transfers within the Community) are strictly European. The fear would seem to be that the SE might be used by third countries as a convenient, discrete way of taking over industries in Europe. Behind this fear of a "Trojan horse" SE lies the question of preserving the economic independence of Europe and protecting its vital interests, notably in energy and industry. This independence has never been as fragile as it has been since the beginnings of European construction, more particularly in energy in relation to Russia. Although the issue merits public debate, it is beyond the framework of this report. It should also be said that, as things stand, there is nothing preventing a company outside the Community launching a takeover bid on a European company, SE or not.

The four ways of forming an SE

Cross-border merger

The cross-border merger is, without a doubt, the most attractive and innovative of the four ways of forming an SE. The possibility to conduct this type of operation depended hitherto exclusively on the conception of international private law in the different States. It was necessary for the law applicable to the company wanting to merge with a foreign firm to accept the validity of cross-border mergers, which is far from being the case all over Europe. Next, the countries of the companies taking part in the merger have to recognise the legal personality of foreign companies. Lastly, the national law of each company (the acquiring and acquired companies) had to be applied cumulatively, notably to the merger contract. Experiences of cross-border mergers show that ways have been found of resolving these difficulties, with only the rule of the unanimous acceptance of the shareholders [59] preventing these operations from being completed.

Having said this, examples of cross-border mergers remain extremely rare and it would appear that they have only consisted in acquisitions of wholly-owned subsidiaries by their parent companies. As an illustration, the first cross-border merger in Europe generally quoted as an example occurred in 1993, when the English

[59] If a unanimous vote is not possible, other solutions must be found. An offer to buy out minority stakes or an undertaking on their part to approve the merger at the general meeting can be envisaged in unlisted companies. In listed companies, the acquiring company can issue a public offer with a view to obtaining 95% of the capital of voting rights of the target company. If it is successful in this, it will be able to use the squeeze-out procedure giving it 100% of the target which it can then acquire.

company Barclays Bank PLC took over Barclays Bank S.A., its wholly-owned French subsidiary. Barclays Bank wanted to take advantage of a European directive authorising banks to operate in another country via a mere branch office rather than a subsidiary as previously.[60] This first merger showed that it was possible, despite profound differences between the national laws involved. The merger agreement was drawn up in compliance with both French and English law. The main difficulty, arising from the fact that English law does not provide for the complete transfer of assets and liabilities, was also overcome by a specific commitment by Barclays Bank [61]. The merger was conducted without an exchange of securities or increase in capital; the shares in the French subsidiary were simply cancelled. The subsidiary became a branch while remaining subject to French tax, of course. The operation was an exceptional one, however, and involved a lot of specific conditions. The PSA Peugeot Citroën group also reports that it has conducted cross-border mergers, but once again always in the financial field and involving wholly-owned subsidiaries.

With the SE, mergers become not only possible but even encouraged. The 2001 regulation envisages two possible approaches. The first is the merger by acquisition in which the acquiring company takes the form of an SE at the same time as the merger. German insurance group Allianz SE, registered in Munich in late 2006, became an SE in this way through the acquisition of its Italian subsidiary RAS. The second mechanism is the merger by formation of a new company, in which the public limited-liability companies disappear and are replaced by the SE. In both cases, the procedures are based on those provided for national mergers, the rules for which were harmonised by the directive of 9 October 1978. There are two SE-specific provisions, however. In the interests of simplification, the merger is approved by a qualified majority of the shareholders. It therefore becomes possible in companies that are not wholly-owned. It is also accompanied by a social negotiation which must result in the setting up of a worker involvement system in application of the directive of 8 October 2001 (see later).

The 2001 regulation sets out the minimum content of the merger project, publicity rules (in the national gazette of the Member State of each of the companies taking part), the terms of appointment of the independent expert(s) who may be common to the companies involved in the merger and must draw up a report for the shareholders. The draft terms of the merger must be approved by a qualified majority of the general meeting of each of the companies involved (two-thirds majority in France; three-quarters in Germany, for example). The protection of the interests of creditors, holders of bonds or securities (other than shares) carrying special rights are governed by national law. It is the registration of the SE and not, as on the national

---

[60] The idea was to optimise the management of equity on the level of the group by calculating ratios globally, with a branch not being required to be capitalised to the same level as a subsidiary.

[61] English law knows only the transfer of receivables (but not of debts) to the benefit of the acquiring company. To make the merger possible and be able to take over its French subsidiary, Barclays Bank has to give a unilateral, irrevocable undertaking to the creditors of the French subsidiary to take on its liabilities.

level, the approval by the general meeting of the merger operations, that concludes the merger. European entities such as the SE genuinely come into existence with registration on the companies register. Without registration, the SE does not have legal personality.

Fortunately, the regulations reduces the formalities in the case of "simplified" mergers by waiving the need for a report by experts. In French law, a merger is simplified when the parent company takes over a wholly-owned subsidiary. The regulation also provides, if the States should so opt, for a simplified procedure when the merger – acquisition is conducted by a company that holds 90% of the shares with voting rights. Unlike French law, however, it requires the approval of the general meeting of the acquired company, which seems superfluous.

Scrutiny of the legality of the merger takes all the more particular importance in that it guarantees the SE against the risk of being null and void. The Regulation leaves it up to the States to designate the "court, notary or other authority competent" to conduct this scrutiny. France, unusually, has entrusted this not to one but to two authorities with the capacity of public and ministerial officer: the clerk of the commercial court, who is normally competent in operations of this kind, and the notary. The clerk of the court scrutinises the part of the procedure concerning each company taking part and the notary the actual performance of the merger. First, the clerk of the commercial court issues the company taking part with the legality certificate showing that it has accomplished the required formalities. The notary then checks the certificates submitted by the scrutinising authorities of the companies taking part (the clerk of the commercial court in France), the adoption of the same draft terms of the merger, the regularity of the consultation of holders of bonds and of securities other than shares, compliance with any other requirements that are applicable to mergers in domestic law and the terms of worker involvement in the SE. It is then up to the clerk of the commercial court of the registered office of the SE, after one last check, to carry out registration on the register of companies. This to and fro between two French authorities, when cross-border mergers also necessarily imply the intervention of authorities from different Member States in different languages and systems, has been the object of some criticism. Legal practitioners and companies have pointed out that notaries, unlike some of their foreign counterparts (such in Germany or in Italy) are not familiar with mergers and that these superimposed controls complicate a process in which success depends on keeping control over the time necessary. The clerks of the commercial courts, meanwhile, reacted negatively to a regulation which appears to ignore the effectiveness of their scrutiny in preventing risks of companies being null and void. It is not the purpose of this report to enter into what is specifically a French debate. It can only be hoped that this system will not lead to delays and unnecessary costs.

The second major originality of the SE statute is that it grants shareholders and several public authorities the right to oppose a cross-border merger. A twofold opposition system which was not included in the original statute for the SE has been organised. First of all, the regulation allows the States "to ensure appropriate

protection for minority shareholders who oppose a transfer". This question does not apply for public limited-liability companies. Pending the transposition of the 2005 directive on cross-border mergers, they cannot envisage any such merger without the unanimous consent of their shareholders. As well as the possibility for a minority group (33.33% in France and 25% in Germany, for example) to oppose the merger conducted to form an SE, certain national legislations grant minority shareholders the right to demand that the SE buy back their shares. France did not take up this option (although it did in matters relating to transfers of the registered office of the SE). Given the importance of the mergers and acquisitions carried out by French companies, it did not appear logical to show any reservations in the face of a movement that has contributed greatly to the development of the French industrial and financial fabric.

Apart from shareholders, several public authorities can oppose a cross-border merger involving an SE. This right [62] is subject to conditions: it must be exercised before each of the companies taking part has been issued (by the clerk of the commercial court in France) with the certificate evidencing that it has completed all the formalities prior to the merger, it must be based on "grounds of public interest" and it is subject to review by a legal authority. In France, this right of opposition may be exercised by the Procureur de la République and by three regulators: the Autorité des Marchés Financiers (AMF) if the merger concerns portfolio management companies accredited in France, the Comité des Etablissements de Crédit et des Entreprises d'Investissement (CECEI) if it concerns banks, and the Comité des Entreprises d'Assurance (CEA) if it concerns insurance companies. The outlines of this power which is contested by many business stakeholders, remain imprecise. In any event, a regulator should be able to block a cross-border merger only on grounds relating directly with its mission: defending the interests of investors for the AMF, of depositors for the CECEI and the insured for the CEA .

Even within this framework, the scope of the right of opposition is not clearly defined. The reflex for national regulators can be to seek to retain control over companies over which they may no longer have oversight powers if they are restructured as an SE. We have one example of this in the attitude of the Scandinavian banking regulators faced with the creation by merger of Nordea SE. The objective of Nordea, the leading Scandinavian bank, in adopting the statute of SE was to rationalise its management. The registered office of the future SE is to be based in Sweden and its Danish, Finnish and Norwegian subsidiaries will become branches. But the national oversight bodies – in particular the Norwegian Financial Supervisory Authority (FSA) – are not ready to transfer[63] their powers to their Swedish counterpart. The Norwegian government itself apparently wants to keep a subsidiary of Nordea on its territory. The general meetings of all the companies taking part in the merger intended to create

[62] It is also provided for in cross-border seat transfers.

[63] Regarding scrutiny in banking, like in the insurance sector, the competent body is that of the seat of the subsidiary. When the establishment is merely a branch office, the competent body is that of the seat of the parent company.

Nordea SE have approved it and the unions agree, but the supervisors in the different States are preventing the operation from being finalised by demanding guarantee deposits that would increase the requirements it must currently meet. It is true that the protection of the interests of savers, depositors and insurance clients is essential at a time when the activity of financial markets driven by interest rates at all-time lows does engender systemic risks. But the statute of the SE would be without meaning if it was not possible for national regulation authorities to cooperate more effectively rather than competing with each other, which raises the issue of mutual trust between regulators in different European countries.

The right of opposition of the Procureur de la République might appear more surprising, as it would seem, logically, to correspond to the criteria used to trigger prior scrutiny in matters of direct foreign investment, breaches of public order, public safety or interests of national defence or in the field of armaments. Article 296 of the EC Treaty provides that, inside the European territory, a State can, take "such measures as it considers necessary for the protection of the essential interests of its security which are connected with the production of or trade in arms, munitions and war material; such measures shall not adversely affect the conditions of competition in the common market regarding products which are not intended for specifically military purposes". French legislation entrusts this scrutiny to the Ministry for the Economy and Finance which, generally after consulting with the Ministry for Defence, can decide to submit the investments in question to prior authorisation. If we take the example of a company from another Member State seeking to grow or restructure itself by merging with a French company whose activities are entirely or partly related with national defence. The operation could either be subject to approval by the Minister for Finance or could be the object – if an SE is concerned – of opposition from the Prosecution Department (*parquet*). It would be useful if French law could specify the way in which the two procedures are reconciled. For example, the Prosecutor's veto could concern defaults by the company or by a controlled or controlling company.

Can it also cover other grounds? Could the Prosecutor invoke "imperative requirements in the general interest" (notion emerging from European jurisprudence to justify hindrances to the freedoms established in the Treaty) relating, for example, to the protection of the interests of creditors, minority shareholders or employees,[64] the effectiveness of tax audits or the fairness of commercial transactions? It is a fact that "as the notion of public interest is broad enough to encompass not only the fight against tax evasion, but also quite simply the preservation of national employment, there is the risk that certain States could make extensive use of this option".[65] But

[64] As suggested by whereas clause 24 of the regulation: "The SE should be enabled to transfer its registered office to another Member State. Adequate protection of the interests of minority shareholders who oppose the transfer, of creditors and of holders of other rights should be proportionate. Such transfer should not affect the rights originating before the transfer."

[65] This remark by Professor Michel Menjucq *in La Société européenne*, Dalloz, 2003, p. 211, applies to seat transfers and to cross-border mergers.

limits must be set, because the company would find itself, paradoxically, in a situation less conducive to mobility than before it adopted the SE statute. Such prior scrutiny does not exist today when companies carry out cross-border mergers or transfer their registered office. Is this additional scrutiny useful? In fiscal matters in particular, aside from the particular systems concerning transfers of profits or payments made to persons or companies based in " tax havens", the tax administrations have weapons to combat abuse and these anti-abuse systems do not evade the scrutiny of the European judges, as shown by the ruling issued by the ECJ in the "Cadbury Schweppes" [66] case in which the Luxembourg Court judged that a national legislation on controlled foreign companies can only apply to wholly artificial arrangements. It points out that "companies or persons cannot improperly or fraudulently take advantage of provisions of Community law. However, the fact that a company was established in a Member State for the purpose of benefiting from more favourable legislation does not in itself suffice to constitute an abuse of the freedom of establishment. Therefore the fact that Cadbury Schweppes decided to establish CSTS and CSTI in Dublin for the avowed purpose of benefiting from a favourable tax regime does not in itself constitute abuse and does not prevent Cadbury Schweppes from relying on Community law."[67] What is being condemned here by the ECJ is in fact the automatic use of an anti-abuse system by the tax administration (of the UK in this case), without a prior examination, of the particular circumstances of the case.

The same principles apply when a company seeks a more favourable legal environment. In the "Centros" ruling of 9 March 1999,[68] the Court condemned the refusal of the Danish government to register a subsidiary of a British company on that grounds that it did not have any activity in the United Kingdom and was seeking to bypass the formalities required for creating companies in Denmark. This jurisprudence, followed by other decisions of the same type, profoundly transformed the legal landscape by establishing the freedom of movement of companies in Europe, something which had hitherto been theoretical rather than a reality. Except for "imperative requirements in the general interest" and notably when there is fraud, neither the host State of the company nor its State of origin can block it. There is no longer any place for national protectionism when it is a matter of respecting freedom of establishment (the right to create a subsidiary, a branch or an agency anywhere within the Community) as recognised by the Treaty.[69] It is in this context that must be appreciated the right of opposition of public authorities to a cross-border merger or transfer of the registered office of an SE. A more extensive conception of this right would go against the jurisprudence and against the whole point of the SE. Could the Prosecutor's Office oppose a cross-border merger for social reasons? Could the Prosecutor use its veto to avoid the social disorder a merger project would have caused? This kind of intervention would run the risk of causing more problems than it would solve.

---

[66] ECJ, Cadbury Schweppes Overseas Ltd of 12 September 2006, Affaire C-196104.

[67] Press release of 12 September 2006.

[68] ECJ, Centros of 9 March 1999, Case C-167/01.

[69] Articles 43 and 48 of the EC Treaty.

It should also be noted that the member States will only have the possibility to give such a right of opposition to national authorities in the framework of the 2005 directive on "cross-border mergers", by the terms of Article 4 b), if they already have such a right to block mergers on the national level. This is not the case in French law. The result of this is that the right of opposition conferred on the Public Prosecutor will have the effect of placing the SE at a disadvantage in relation to other forms of company once the directive on cross-border mergers has been transposed.

The holding SE

The second formation method provided by the 2001 regulation is the creation of a holding SE. This is open not only to public limited-liability companies, but also to private limited liability companies (SARL in France) which, in the form of the GmbH, are much more numerous in Germany than the public limited liability company (*Aktiengesellschaft* or AG).

As suggested by its name, the purpose of the holding company is to hold and manage (majority or minority) stakes of one company in other companies that are often based in different States and active in the most widely varying sectors. All sorts of set-up are possible: the holding company can merely manage the assets of its companies. It can also play a role in coordinating the companies in a group or even be in charge of the strategies of the group as a whole.[70] Within the group, it can provide specific administrative, financial, accounting or legal services. In creating EADS Participations BV or EADS NV, and Euronext NV under Dutch law, these two groups, like Renault Nissan, were seeking to set up control structures. The goal is clearly to provide much-needed united management in groups comprising different national cultures. More generally, the group holding, such as that at the top of EADS or Euronext, allows partners who do not separately have the control of companies in which the parent has stakes to structure their power within these companies. This type of "financial" holding must be distinguished from the "buy-out" holdings in which the aim is to buy stakes in companies or take them over with a very low initial investment (the loans required are borne by the holding which pays them off with revenues from the target company).[71]

Holdings can be in any legal form and their shares can be listed on the stock exchange or not. The statute of the SE offers them the advantage of a more harmonised legal framework, as the principles governing the contributions to and

[70] The direct implication of the group holding in management of the subsidiaries can, however, have unfavourable fiscal or criminal implications (de facto directors).

[71] See the LBO technique: the LBO or Leveraged Buy-Out is a company takeover operation financing a large part of the acquisition by debt. A holding company that takes on the debt is set up to buy a company, with the cash flow surpluses of the target being transferred regularly to the holding via dividends to enable it to pay the interest on its debt and pay it back. The LBO is often a solution in family successions or the sale of a division by a group. It can also enable a company to leave the stock exchange when it is undervalued.

formation of the holding set out in the Regulation are identical, no matter what the nationality of the companies promoting the operation. The possibility to set up single-person subsidiaries, to transfer the registered office of the holding to another Member State, or for shareholders representing at least 10% of the share capital to demand the organisation of a general meeting and to set its agenda are all additional advantages. French law also allows the inclusion in the statutes of SEs which do not issue shares to the public of restrictions on share trading rights, or of the obligation for shareholders to surrender their shares in certain cases, or of the obligation to disclose any change in their shareholders, all of which are likely to encourage wider use of the holding.

Mention should be made of a trend towards harmonisation of the taxation of holdings in the Union, notably regarding the taxation of gains made on securities. Also, as has already been indicated, national administrations have legal means to oppose abuses.

If the companies that have adopted the statute of the SE have made little use of the procedure for the creation of a new holding, it is because of its requirements similar to those for the formation of an SE by merger. Although the holding may only have a limited number of employees, the worker involvement system established by the 2001 directive may apply through the inclusion of the employees of all the subsidiaries and establishments of the companies creating the SE. As for the obligation for the directors of the companies taking part in the creation of an SE to indicate in a report "the implications for the shareholders and for the employees of the adoption of the form of a holding SE", it can be dissuasive in the case of the creation of a takeover holding in which the founders do not want to reveal the strategy to take over the target company. Also, each shareholder is required to declare the percentage of shares or contributions it is putting in and which will correspond to the proportion or shares it will receive. However, France did not take up the option relating to the possibility of specific protection of minority shareholders, creditors and employees opposed to the creation of the holding.

The subsidiary SE

The simplicity of the formation of a subsidiary SE compared with the procedure to create a holding SE is striking.

Any company (and not only public limited-liability companies as is the case in mergers, for example) or any private or public legal entity can set up a joint subsidiary in the form of an SE with another company or entity. The regulation simply refers to national law on public limited-liability companies (for the terms on subscription of shares), no doubt taking account of the ease with which international subsidiaries can be created without ant need to create an SE.

An SE can also create a wholly-owned subsidiary, allowing the creation of "chains" of single-person subsidiary SEs headed by a top SE. In France, public

limited liability companies – unlike the SAS – must have more than one shareholder and the possibility of chains of single-person public limited-liability companies arouses suspicions of artificial set-ups in the eyes of the legislator. While keeping this principle for the public limited-liability company, the French *Code de Commerce* allows an exception for the single-person subsidiary SE. This formula has a future. It can help to simplify the organisation of European, Japanese or American groups in search of a more coherent management model for their subsidiaries in Europe. In this way, these subsidiaries can be managed according to a model that may not be uniform (the applicable law remains that of the country in, which they are established) but at least is more harmonised through the choice between one or two-tier structures.

Conversion of a Public Limited-Liability Company

Any Public Limited-Liability Company that meets the cross-border criteria can be converted into an SE. The terms of the operation are similar to those for the other cases of SE formation. The management and administration organ draws up a project for the conversion and a report justifying the legal and economic aspects of the operation along with the consequences for the shareholders and employees. After independent experts have submitted a report certifying that the net assets of the company are sufficient, the general meeting is invited to approve the draft terms of the conversion and the modification of the statutes. The publicity formalities for the planned conversion are those provided in France for public limited-liability companies, without the involvement of a notary. To avoid misuse of the procedure, the new SE cannot transfer its registered office to another Member State at the same time as it is created.

Of the seventy or so SEs registered at the beginning of 2007, on which only very piecemeal information exists, it would appear that only two of them involved the procedure of creation of a holding, a limited number are subsidiaries, and the very great majority of these SEs were created either by conversion or by cross-border merger.

Traditional governance methods

It cannot be denied that the statute of the SE reveals the age of the project. The mobility inherent to the SE is limited by it. Likewise, the governance methods are somewhat traditional, although the 2001 regulation left the State room for manoeuvre to allow a certain flexibility.

Factors in stability

Capital

In principle, the capital of the SE is expressed in Euros. States outside the Euro Zone may, however, choose to require of SEs registered on their territory that they subscribe the capital in the national currency. Sweden has not done so and the capital of Nordea SE will be expressed in Euros. On a more material level, every SE must have subscribed capital of €120,000. This requirement is not insignificant at a time when several States, such as the United Kingdom and more recently France, have reduced or done away altogether with minimum capital requirements for certain unlisted companies. Should all capital requirements be abandoned? The share capital, as a guarantee for creditors in case of bankruptcy, is no longer always an effective guarantee. It is the net assets that really reflect the situation of the company and the statute for the SE therefore establishes a rule of equivalence between the share capital and the net assets of the SE.[72] We do not suggest, however, that all minimum capital requirements should be suppressed for unlisted SEs, because they are a way of confirming the commitment of its promoters to its European dimension.

However, we could consider setting different minimum amounts depending on the SE. The minimum provided by the 2001 regulation is too low for SEs that issue securities to the public[73] (and in the fields of banking and insurance the States demand much higher amounts, as allowed by the regulation) and may be too high for many unlisted companies.

Registered office

The SE must have its registered office in the State where it has its head office. This rule is different from those presiding over the formation of an SE. While the promoters of an SE must have their registered office inside the Community, they are not required to be registered (applicable national law) in the country where they have their head office (seat of the corporate organs). For example, a company registered in the United Kingdom but with management organs and general meetings in the Netherlands can take part in the creation of an SE.

As far as the working of SEs once they have been formed is concerned, it is different. The European legislator has clearly opted to apply the "real seat" theory requiring that the statutory seat (registration) and head office (seat of the management) must be the same. In contrast, the "registered office" theory allows companies to be governed by the law of the country of their choice by choosing their place of

[72] Subject to a few nuances mentioned above.

[73] SEs registered in France issuing securities to the public must have capital of €225,000, just like French public limited-liability companies.

registration, while having their head office or even their activities in another State. Although at the time of the signature of the Treaty of Rome, the six founder countries applied the theory of the real seat, a growing number of Union countries have turned to the registered seat theory. This was the case of the Netherlands back in 1959 and it is the traditional practice in the Common Law[74] countries such as the United Kingdom and Ireland. Historically, this solution was a way of exporting British law in the Empire and Commonwealth.

The negotiators of the Rome Treat, probably with the enlargement of the Community to the United Kingdom in mind, were careful to remain neutral on this issue. The current Article 48 of the EC Treaty (derived from the Treaty of Rome) simply indicates that "companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community shall […] be treated in the same way as natural persons who are nationals of Member States", leaving the States the choice between the real seat and the registered office regime. This dilemma did not exist when the Commission presented its first proposal in 1970. As a purely European legal instrument, the SE even had the possibility to have several head offices in the Community without designating a main one. The SE was governed by no other law (except in fiscal and criminal matters) than its European statute which was uniform in all the States. Even its registration was European, with management of the SE register being confided to the Court of Justice of the European Communities in Luxembourg. It was when this ambition was abandoned at the end of the 1980s that the choice had to be made, and was made in favour of the more demanding system, that of the real seat. The aim was to prevent the creation of "letter-box" companies, to allow the States to retain control over the SEs registered on their territory,[75] to avoid "Law Shopping" and more particularly social or fiscal dumping, in other words to set up barriers to control the mobility of SEs. The result is that the system of the real seat is imposed on States which have never applied it, such as the United Kingdom, for all the SEs established on their territory.

Sanctioned by the dissolution of the company in the event of non compliance, the theory of the real seat is becoming the norm for entities with European statutes. It applies to EEIGs, to UCITS[76] and to the SCE. It is strict in France where, in accordance

---

[74] In the *Common Law* countries, legal personality is an objective reality and the role of the State in acknowledging it is secondary.

[75] This problem is raised when establishments of a parent company are branches without legal personality, rather than subsidiaries. The authorities responsible for oversight of branches of insurance companies or banks are those of the State where the registered office is located and not those of the State where the branches are established.

[76] The term Undertaking for Investments in Collective Securities (UCITS) refers to companies or funds whose main activity is managing portfolios of financial securities. See Council Directive 85/611/EEC of 20 December 1985 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) establishing a general regime on investments, equity requirements, conservation of assets and supervision of funds.

with an option offered by the 2001 Regulation, the registered office and central administration must have an identical location. This restriction, which does not exist in the ordinary law on public limited-liability companies,[77] is not really understood. It could actually encourage companies with foreign directors to base their registered office – as they cannot separate it from their central administration – in the Paris region rather than in other regions that are less easily accessible to visitors from abroad. The system borders on the absurd when it even prevents a company whose registered office is in La Défense to hold the meeting of its board of directors or supervisory board in Paris itself.

Governance

Corporate organs

Despite the incessant references in the SE statute to national law on public limited-liability companies, the governance of the SEs is not at odds with conception its initiators had of it when it was supposed to be an entirely European company. The SE model remains a continental one. It is inspired by German law and is also close to French law.

Any SE can opt for a two-tier or a one-tier organisation. Although the two possible systems have existed in France for many years, other countries Europe recognise either one system or the other. Such is the case of Germany, for example, where public limited-liability companies (AG) only have the two –tier system (with a joint supervisory board to allow codetermination), and where the one-tier system was introduced in 2004 for the SE. In contrast, Belgium, like Italy and Spain for example, only has the one-tier system for public limited-liability companies, and introduced the two-tier system specifically for the SE.[78] The question has been raised as to whether the States are obliged, rather than merely having the possibility, to offer SEs registered on their territory the choice between two-tier and one-tier governance. Some people consider that the States must only accept the registration of SEs whose structure – be it one or two-tier – does not comply with their national law, when the said law allows only for one of the systems. According to us, there is no doubt that the States have the obligation to offer SEs registered on their territory the choice between the two-tier and the one-tier system. This is how the British government has understood it, despite the fact that the statute for the SE is far removed from governance practices in the United Kingdom. In this Common Law country, British companies are generally organised on a one-tier basis, but the Companies Act does not contain any express provisions on this point as it is a matter of statutory freedom. British law has not been amended in this respect for SEs which, like public limited-liability companies, remain free to choose the (one-tier

---

[77] The Crédit Lyonnais – now LCL – has its registered office in Lyon and its management organs in Paris
(http://www.lcl.com/fr/actualites/nous_trouver/sieges_filiales/).

[78] There was a debate as to whether this system should be extended to all public limited-liability companies.

or two-tier) structure that is best suited to their needs. The only difference is that a British public limited-liability company (*Public Limited Company/PLC*) is not subject to any requirements dictating the way it must organise its corporate organs, while a British SE must comply with the standards of the 2001 Regulation.

Management of the two-tier SE is confided to the management organ. If applicable, the option exists to have one or several managing directors handling day-to-day management on the same terms as in the ordinary law on public limited-liability companies in France. The two-tier SE registered in France is represented by management committee or one or several managing directors who can make binding commitments with third parties on behalf of the company. It is the role of the supervisory committee and, optionally, according to ordinary law on public limited-liability companies, of the general shareholders' meeting, to nominate and remove the members of the management committee (in France, appointments are the responsibility of the supervisory board and dismissals either of the general meeting or, if the statutes so provide, of the supervisory board). The number of members of the management board is set by the statutes which may have to observe a minimum and a maximum number. The two-tier SE registered in France follows the regimes of the public limited-liability company which makes the distinction between companies issuing securities to the public (maximum 7 members on the management committee) and private companies (maximum 5 members on the management committee).

The supervisory board of SEs with their registered office in France is composed of 3 to 18 members in accordance with ordinary law on public limited-liability companies. The regulation specifies that the president of the supervisory board must be one of the members appointed by the shareholders. This provision responds to the preoccupation of the German government not to depart from the system of codetermination which excludes the appointment of an employee representative to head the supervisory board. The scope of the scrutiny by the supervisory board of the management of the company by the management committee is not specified. There is therefore room for variants from one State to another. We know that in Germany, the supervisory board is the key organ in that country's model of capitalism and that it has greater powers than in France. The regulation is much more explicit, however, on the sources of information of the board. It is entitled to quarterly information on the business from the management committee and to extensive information each time events occur that are likely to have marked repercussions on the situation of the company. At all times, it is given all the information it requires for its supervisory role and can decide on any spot checks that it might deem necessary; lastly, each member of the board is entitled to be given all the information transmitted in this way individually. This list reflects the concern of the German government to avoid any reduction in the powers of the supervisory board of the SE. For the employees represented on the board, this power of information is particularly important. It is also in line with the rules on codetermination that the 2001 regulation mentions the duty of the members of the organs of the SE not to divulge information "even after they have ceased to hold office". This stipulation does not appear in French law, with the obligation of discretion after leaving office resulting from the general duty of loyalty.

The one-tier SE is administered by the Board of Directors. There may also be one or several Managing Directors taking responsibility for day-to-day management "under the same conditions as for public limited-liability companies" at the choice of the Member States, and the regulation does not specify whether these managing directors are natural or legal persons. France considered that these provisions did not require any changes in relation to the public limited-liability company regime which, logically, does not authorise legal persons to perform the functions of managing director. Management of the one-tier SE is therefore provided in France by the president of the board of directors, or by a managing director, possibly assisted by one or several assistant managing directors. The members of the board of directors are appointed by the general meeting and their number – between 3 and 18 in French law – is established by the statutes. The regulation goes as far as to stipulate the frequency of meetings (at least one every three months) to be set by the statutes, and also establishes the right of each director (as on the supervisory board) to be informed individually of all the information transmitted to the board.

The emphasis in the regulation on the information of the organs of management and administration responds to the need, referred to in the 2001 regulation, for a clear distinction between "those responsible for management and those responsible for supervision", no doubt inspired by the balance of powers illustrated by German-style codetermination.

Shareholders

Although it refers to national laws, the regulation devotes no less than ten or so articles to shareholders.

It provides, for example, that the general meeting of the SE is held once a year, within six months of closing the accounts, and that other meetings can be called either by the administration or supervisory organ or by the "competent authorities". In France, in the event of default of the administrative or supervisory organs, these authorities are the official auditors, liquidators and shareholders (majority or not), in certain precise conditions. The regulation offers shareholders an additional possibility: that of demanding that a meeting be held on a specific agenda, if they represent at least 10 % of the subscribed capital. A lower percentage is admitted if the statutes of the SE so provide or if national law on public limited-liability companies so authorises. However, in France, since the law of15 May 2001 on "new economic regulations",[79] shareholders representing 5% of the capital can apply, at their own expense, to the president of the commercial court to call a general meeting, and to have a trustee appointed to that effect and an agenda set for the meeting. The statute for the SE would therefore seem to open up the possibility of proceeding without the prior appointment of a trustee.

---

[79] Law n° 2001-420 of 15 May 2001.

As for rules on majorities at general meetings (majority of votes or, if it is a question of modifying the statutes, qualified majority), France did not change them as the Regulation would have allowed for the needs of the SE. For any modification of the statutes, this majority is two-thirds, as for public limited-liability companies. The regulation requires only a calculation of votes that differs from that in French law. Only votes cast count, to the exclusion of those attaching to shares in respect of which the shareholder did not take part in the vote, abstained or cast a blank of spoilt vote. In French public limited-liability companies, the majority is calculated on the basis of the votes held by all the shareholders who are present or represented, with blank or spoilt votes being equivalent to a vote against the resolution. In this respect, the proposal for a directive on the exercise of shareholders' voting rights[80] provides that all the votes cast concerning a given resolution must be taken into consideration when the count is made in order, on the one hand, to reflect the wishes of the shareholders and, on the other, to assure the shareholders that their votes have indeed been taken into account by the company.

Finally, the regulation reserves the rights of holders of a determined class of shares, such as preferential shares or shares with double voting rights. No resolution modifying their rights may be passed without them having been consulted separately beforehand, depending on the specific rights affected by the decision. The only difference between the 2001 regulation and the French Code de Commerce is that the latter required a two-thirds majority in such cases.

Contrary to what is suggested in Article 9 establishing the order of priority of the standards applicable to the SE, the regulation in fact leaves little room for statutory freedom. It is particularly liberal, however – at least from a French perspective – concerning "regulated agreements", meaning those between the company and its directors and which are likely to give rise to conflicts of interest (negotiation of a contract with the company, purchase of an asset of the company, etc.). By leaving it to the statutes of the SE to list the categories of transactions subject to authorisation by the supervisory or administrative organ, the regulation makes it possible to exclude regulated agreements. It leaves to national law, however, the care of fixing the limits by specifying the operations which must be subject to authorisation as a minimum. This is the choice made by the French legislator. The statutes of the SE *à la française* must provide for the authorisation of the same categories of transactions as in the regime for public limited-liability companies.

In one case, however, the French parliament leapt into the breach opened by the 2001 Regulation to extend the contractual autonomy of the SE. It allowed SEs that do not issue securities to the public statutory freedom obviously inspired by the very flexible regulations on Sociétés par Actions Simplifiées (SAS). Its shareholders

---

[80] Proposition de directive du Parlement européen et du Conseil sur l'exercice des droits de vote des actionnaires de sociétés qui ont leur siège statutaire dans un État membre et dont les actions sont admises à la négociation sur un marché réglementé et modifiant la directive 2004/109/CE (COM/2005/0685 final – COD 2005/0265).

are therefore relatively free to regulate their relationships by inserting all kinds of clauses into the statutes on inalienability (limited to ten years), approval, pre-emption, exclusion and suspension of non-pecuniary rights, as well as change of control clauses, including further to a merger or a scission. Like in the SAS, there are safeguards. For example, these clauses must be passed unanimously. These highly innovative provisions (which do not exist in the statute for public limited-liability companies) are an attractive feature of the French unlisted SE. They correspond, in any case, to the current needs of SMEs whose partners must be able to come to an agreement in advance on their respective roles regarding the future of the company. The enhanced statutory freedom of the SE initiated in this way is one of the possible routes for adjustments of the statute for the SE mentioned in Article 69 of the 2001 Regulation.

Mobility

Transfers of the registered office

The possibility offered to SEs to move around the European are is, along with cross-border mergers, the key advantage of the statute. It has taken a half century for the freedom of movement proclaimed as one of the most fundamental principles of the Treaty of Rome to become a practical reality for companies. And even now, this reality is, for the moment – pending the adoption of the 14th directive on cross-border transfers of share companies – reserved for entities under Community law such as the EEIG, the SE or, once the texts have been incorporated into national law, the SCE. It is therefore necessary to go through the recognition of a Community statute for mobility of the company within the Community to become a reality. The continuity of the legal person, wherever it has its registered office and wherever it transfers it between Member States, in fact eludes the question of nationality. In the countries of civil law traditions, and in France in particular, transferring a registered office from one country to another amounts to changing nationality and involves the disappearance of the commercial entity. Losing legal personality, however, when crossing borders, involves considerable drawbacks that are not only administrative in nature, but above all fiscal, with the winding up of the activity of the company, even if it is for purely legal reasons, making all taxes on profits, dividends and other gains immediately payable. This situation is paradoxical: European nationals can move around without restrictions or checks. Individual traders can do business wherever they like in Europe. Only companies are not free to do so.

These drawbacks exist not only for companies registered in countries that adopt the real seat theory, but also in countries opting for the statutory seat approach. The reluctance of States to see a company give up their national law has psychological and economic motivations: psychological because the company changes *lex so-*

cietatis and must henceforth comply with the formation and operating rules of the host country; economic for fear of losing tax revenues.[81]

For these reasons, the States generally set up barriers to prevent companies leaving their territory. In France, for example, although the *Code de Commerce* allows the Shareholders' General Meeting of any public limited-liability company to decide not unanimously, but by a qualified majority to "change the nationality of the company", there is one condition: "that the host country must have signed a special convention with France allowing its nationality to be acquired and the registered office to be transferred to its territory while conserving its legal personality". However, since this provision was introduced by the Law on Companies 24 July 1966, no convention has been signed between France and another European country. The only treaty ever signed is that of 12 November 1959 between France and Ethiopia for the construction of Djibouti to Addis-Abeba railroad!

Transferring the registered office is not an objective for its own sake, but it can make it possible to resolve difficulties arising, for example, from mergers between several countries of different nationalities, thanks to the choice of a registered office in a "neutral" country in which none of them are based. A change in the control of a company can also make a change of registered office desirable. Finally, it is obvious that such transfers can go both ways. Companies may wish to come to France or to transfer their registered office.

Facilitated by the 2001 regulation, the transfer of the registered office of an SE is far from being without constraints, however. The procedure is relatively cumbersome and is based on that for cross-border mergers. The basic principle is the same: an SE does not lose its legal personality by emigrating to another Member States because, by definition, its European legal personality continues. Consequently, the transfer is treated like a modification of the statutes adopted by a qualified majority vote, subject to increased formalities and guarantees.

Like in mergers, the regulation specifies the minimal obligatory content of the draft terms of the transfer, publicity requirements, and the content of the report by the directors "justifying the legal and economic aspects of the transfer and explaining the implications of the transfer for shareholders, creditors and employees".

Unlike in mergers, the French *Code de Commerce* gives minority shareholders opposed to the transfer the right to demand that their shares be bought back. Bondholders are only entitled to obtain reimbursement of their securities on request in the same way that, in certain conditions, unsecured creditors can obtain reimbursement of the amounts owed. The obligation to buy back the shares of minority shareholders, which penalises the company in that it exposes it to prohibitive costs, reflects

---

[81] Loss of tax revenues is a particular concern for countries where the company is taxed on its worldwide revenues instead of its tax residence determined by a registered office or effective centre of management.

the refusal of States such as France to let companies leave their territory. To prevent fraudulent transfers which are always very shocking, all SEs are required to prove, before they transfer their registered office, that adequate protection is provided for debts originating before the transfer project and for the interests of all creditors, whether private (banks, bare owners of equipment of which the company has the use...) or public (tax office, Social Security, Customs...). By conventions, creditors can obtain the right to demand immediate reimbursement of the debt in case of a transfer of registered office. In all cases, they have the right to oppose it in the courts. The judge to whom the case is referred is competent to order the SE either to reimburse the debts or to provide guarantees (deposit, bank bond, blocking the sums due...) or any other terms in compliance with the law of the country of origin. Failing reimbursement or the provision of the guarantees ordered by the court, the transfer is not binding on creditors. To avoid fraud, transfers are of course also forbidden if a company is bankrupt.

To this is added the right of opposition of the public authorities (market authorities and prudential control authorities, as well as the Procureur de la République) similar to that they have in cases of cross-border mergers. The remarks on the powers conferred on these authorities are therefore the same.

The last feature that is common to cross-border mergers and transfers of the registered office is that scrutiny of legality is shared, in France, between the clerk of the commercial court and the notary. It is the notary who issues "a certificate attesting to the completion of the acts and formalities to be accomplished before the transfer". It is the clerk who strikes the company off as soon as notice is received from the new company register. At all events, cross-border management of the SE will require control authorities to cooperate, not only in France but also between the different countries, something that is certain to enhance their respective practice.

Cross-border mergers of SEs

Once formed, can an SE conduct a cross-border merger by the terms set out in the 2001 Regulation? The question may seem unusual given the main objective of the SE which was to favour concentration operations between European companies to allow them to take on international competition. This objective, emphasized by the Sanders Report of 1967,[82] was taken up in all the proposals of the European Commission on the SE. In 1970, the first proposal mentioned the pooling of "the potential of companies [...] via concentration or merger operations, recourse to such operations being possible, however, with due regard to the rules of competition". These terms are identical to those in the preamble to the 2001 Regulation on combining the potential of European companies via mergers. In fact, the goal of the creation of the SE is the creation of European champions. If the question of whether it is possible for an SE to merge with another company using the provisions of the 2001 regulation is raised, it

---

[82] See below.

is because the text is not explicit, unlike the Commission's 1970 proposal, for example, which mentioned mergers between SEs and between an SE and a public limited-liability company.[83]

Does this mean that SEs, like public limited-liability companies, could be practically prevented from carrying out cross-border mergers? It is this interpretation that prevails.[84] Yet no matter how far we look back into the history of the debates on the European Company, it has always been agreed that the merger was one of the key instruments of cross-border management. Aware as we are that it will be up to the European judges to decide, we consider that choosing a restrictive interpretation would amount to depriving the regulation of its utility. Admittedly, it can always be argued that if the merger by acquisition route is blocked, an SE wishing to extend the scope of its activities can always merge with a public limited-liability company to form a new SE, in application of the 2001 regulation. The only consequence of this approach, however, would be to make the merger being envisaged more complex and expensive without anything being gained. It could also be argued that SEs, like other public limited-liability companies, can carry out such mergers as soon as the directive on cross-border mergers of share companies adopted in October 2005 and to be transposed by the States before 15 December 2007 comes into effect. But this would be meaningless, because is the discussion on this text was reactivated thanks to the appearance of the statute for the SE, it is quite separate from it. The question can also be raised as to whether the 2005 directive is not more limited in its scope than the 2001 Regulation. It applies to the extent that "the legislation of the Member States [governing the companies in the merger] allows mergers between limited-liability companies". But as it does not accept the notion of "universal transfer of assets", the merger is not recognised in the strictest sense of the term in countries such as Ireland and the United Kingdom.[85] All these hesitations on the interpretation of the statute for the SE, and of the 2005 directive on cross-border mergers, show the extent to which the idea of a company being able to behave within the European area in the same way it does on its national territory has not yet been accepted.

---

[83] Articles 269 to 274 of the proposal for a Council regulation (EEC) on the statute for the European limited-liability company published in the OJEC of 10 October 1970, n° C. 124/1.

[84] In this restrictive interpretation, in providing that "in the case of a merger by acquisition, the acquiring company shall take the form of an SE when the merger takes place [...]" the regulation rules out the possibility for an existing SE to carry out a cross-border merger. This provision relating to the creation of an SE is not pertinent and reference should be made to the general provisions of the Regulation, notably Article 3 referring to the public limited-liability company regime for matters it does not address. The procedures provided by the Regulation in cross-border mergers should therefore be combined with the provisions of domestic law on national mergers.

[85] In the United Kingdom, although the universal transfer of assets is not recognised, there is the technique of the *scheme of arrangement* in the *Companies Act*: a company can sign "*an arrangement with its creditors or a class of them*". To be binding, the arrangement must be accepted by the majority (in number) of the creditors representing 75% in value and must be approved by the competent jurisdiction. (*Source:* http://corporate.practicallaw.com/0-107-7201.)

What conclusion can be drawn from this mainly legal and technical description of the methods for the formation and operation of the new form of European company, the SE?

1. European by its legal personality and its means of cross-border action, the SE is treated like a national public limited-liability company of the State where it has its registered office and there is every chance that it will appear, from outside, like any other company.

2. The sole important distinguishing feature is its European label. It is the expression of a political will to build a company of European dimension and culture, notably between directors of different nationalities.

3. The main asset of the SE is mobility. If the Court of Justice of the European Communities has now established this right to mobility, it mainly concerns the "secondary" right of establishment (creating subsidiaries, branches or agencies in any country in the Community), and the SE remains the only form, to date, to benefit from genuine "primary" freedom of establishment (cross-border merger, seat transfer).

4. Although initially inspired by the German conception of the company, ultimately the SE is close to that of the French company. The only real innovation resides in the fact that the unlisted SE has statutory freedom comparable to that of the société par actions simplifiée, thus making France an attractive territory for unlisted SEs.

Chapter 3

Social model and fiscal neutrality of the SE

The SE statute, in the course of the discussions around its various versions, remained very complete in terms of its social dimension without which a political compromise would have been impossible. The reasons linked to the German context and its highly specific system of codetermination have already been mentioned. For the same reasons, but having led to the opposite result, no political compromise would have been possible if it had been a question of addressing the subject of taxation in the statute, since the United Kingdom and Ireland would not have been able to accept this. From a company viewpoint, the SE statute has been thrown off balance: its social system is restrictive and its fiscal angle non-existent. As we will try to demonstrate, this imbalance is less obvious than it would seem at first sight. The social statute of the SE fits in with an inevitable shift by which social relationships will be increasingly organised on a European scale. This is illustrated by the emergence of European Works Councils. Furthermore, if the SE does not enjoy a favourable fiscal statute, recent provisions made on the European and national scales nonetheless enable the avoidance of any penalisation of its cross-border management, in principle.

• The social statute of the SE, as restrictive as it may be, embodies the model of a European company, defined not only in a financial logic, but by reference to all of its stakeholders, in particular its employees.

• From a fiscal viewpoint, it is noteworthy that European law and jurisprudence take account increasingly effectively of the imperative needs of companies' cross-border mobility.

The social model of the SE

The aim of this report is to evaluate the statute of the SE with regard to changes in European Business Law, and whether it is adapted to the requirements of the competitiveness of Europe and its Member States, and does not in principle deal with its social angle. It is nevertheless impossible to keep silent on this subject. First of all, the history of the SE is closely linked to the debates faced by Member States over the last few decades on the place of workers in this new corporate form. The German government was very keen to not separate the SE from the codetermination system specific to German companies.

Secondly and in particular, the provisions for worker involvement implemented by the Directive of 8th October 2001 are the "indissociable complement" of the SE statute. The provisions of the directive must be "applied concomitantly" to the operations set out under the 2001 ruling on the formation, mobility and restructuring of an SE. No SE may be registered if the social dimension has not been completely respected.

The social model of the SE, intrinsically linked to its commercial nature, was new at the time when the regulation and directive of 8th October 2001 were implemented. It has since been transposed in the framework of the Statute for a European Cooperative Society (SCE), which, like the SE statute, is broken down into two texts – a regulation and directive both issued on the same day, 22nd July 2003, concerning company law and employment law respectively. This approach is new. The regulation of 25th July 1985 creating the EEIG mentions that it does not cover the areas of social law and employment law. We do, however, have reason to believe that the statute of the European Private Company (EPC), which the German presidency has made a priority, will incorporate a social aspect. It will no doubt be watered down, but will nonetheless be inspired by its two precedents, the European Company and the European Cooperative Society.

- The main characteristic of the social dimension of the SE is that it is based upon negotiation between social partners with regard to companies.

- This dimension nonetheless incorporates substantial guarantees to take into account the rights accrued by the employees of companies participating in the formation of the SE.

- Hence the originality of the social model of the European Company thus proposed.

The primacy given to dialogue

Negotiation is truly the distinctive trademark of the social policy of the SE. It would not have been possible to reach a political agreement between the States had the Davignon report not actually suggested recognising the freedom of the social partners in each European company – the directors and employees or their representatives of the companies concerned – to decide by mutual agreement on the involvement of workers. Not only does the 2001 directive not impose uniform regulations on each State for all SEs, but it allows each company's social partners to define the place of workers in managing the company by contract. Nevertheless, the social partners do not have complete freedom. They must respect one imperative rule: not to decrease the rights accrued by employees of the companies participating in the formation of the SE, in terms of information, consultation and participation. This "Before/After" principle, which will be examined later, is one of the keys to the transnational social dimension of the SE. This dimension is perfectly in line with the creation of European Work Councils (EWC) by the directive of 22nd September 1994[86], particularly in terms of the structure and role of the "Special Negotiating Body" (SNB). This group consists of employee representatives and is a leading actor in social negotiation leading to both the formation of the EWC and the social dimension specific to each SE. It may be noted that this contractual aspect has already been developed on a national scale in Belgium. If in France, as with other European partners, the transposition of the 2001 directive is a result of regulation (the July 2005 Law and the November 2006 implementation decree), in Belgium the directive was transposed through a collective labour agreement on 6th October 2004, made compulsory by a 22nd December 2004 royal decree [87].

The representativeness of the special negotiating body (SNB)

The directors of companies wishing to adopt the SE statute must inform their employees' representatives to this effect "as soon as possible" after the publication of either the draft terms for the merger or formation of an SE holding company or subsidiary, or the draft terms for converting a public limited-liability company into an SE. Under French Law, this time period is set at one month. The information to be provided includes all necessary details on the companies, subsidiaries and branch offices named to be part of the SE, the number of employees they have, entity by entity, the forms of participation that exist across the company on a national scale and the number of seats on the SNB for the employees in each State. The directive actu-

[86] Directive 94/45/EC of 22nd 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.

[87] The same procedure had already been used for the transposition of the directive of the 22nd September on European Works Councils, transposed into Belgian Law by the collective agreement of 6th February 1996.

ally lays out dual criteria to assign SNB members. Their number is dependent on the number of staff employed (in principle, a seat is assigned per 10% of staff in each State), but workers in each State must be represented in all cases. This may mean that certain entities of the future SE are overrepresented. In this way, the SNB formed in the creation of Allianz SE by merger with its Italian subsidiary consisted of thirty members from around twenty European countries, although in more than a quarter of these countries the insurer did not have more than forty employees, and in Germany it had 75,000 (35,000 employees for insurance) out of a total of nearly 178,000. Once the number of employees to be nominated has been determined, it is up to the States themselves to define the terms of this nomination (in France this is a trade union monopoly).[88] To notify the directors of the companies, subsidiaries and establishments concerned, along with their employees, these appointments are displayed publicly or by other such methods, in the same way as carried out by the French government inspectors.

Protective rules for the proceedings

The directive awards legal personality to the SNB which therefore has the capacity, for example, to file an appeal. It is the role of the directors of the participating companies to call together the SNB with a view to reaching a written agreement on the involvement of workers of the SE. At Allianz, the SNB met for the first time in March 2006. To improve its efficiency, it nominated a group of six delegates from the group itself to conduct negotiations on a daily basis with the company management. The agreement was finalised in six months, equalling the minimal time period set out (this negotiation phase may be extended by another six months), and Allianz was registered on 13th October 2006. The 2001 directive states that the negotiation procedure is governed by the law in effect in the country where the SE has its registered office, whilst setting out the competences and rights of the SNB. Thus, this group is entitled to all necessary information throughout the entire negotiation period. The members of the SNB are not only kept informed of the procedures of the formation of the future SE, which unfolds simultaneously, but they also naturally have access to all data on the terms of transfer of obligations of companies participating in the formation of the SE concerning employment conditions and the individual and collective labour relations.

The SNB has all the means to allow it to complete its task: for example, it may ask for assistance from experts, at the expense of the participating companies (States may, like France, place a limit on the amount that may be charged at the expense of the companies to just one expert). Members of the SNB are protected under the same conditions as delegates from institutions representing permanent staff. They have an obligation of confidentiality of which they are strongly reminded in the 2001 directive. This obligation echoes the constraints placed upon companies and their

---

[88] In the absence of union representatives or staff representatives, SNB representatives are directly nominated by the employees.

directors, specifically during the process of legal and financial operations such as mergers between listed companies, insofar as the presentation of certain information to the public may affect the stock market price.

The decision-making process within the SNB relates to its representativeness defined in relation to all companies participating in the formation of the SE, including their subsidiaries and establishments. The SE therefore makes most of its decisions on a double majority basis: absolute majority of its members representing the absolute majority of the staff concerned. A double two-thirds majority is only required in a limited number of cases.

The agreement

The "Before / After" principle

Contractual freedom, which is the very bedrock of SE employee involvement, is in fact closely framed. In its 1989 proposition (amended in 1991), the European Commission, presided over by Jacques Delors, definitively decided upon an SE statute that was both commercial and social. At that time, it was agreed that it would be up to the individual State to define for SEs registered in their country, the model of employee involvement that is most appropriate for their traditions. Three models considered as being comparable were envisaged: codetermination, like in Germany, or to a lesser degree in Austria and Sweden, with employees represented through the supervisory or administrative body; a French style representative committee; or finally any other formula resulting from an agreement between directors and employees, as in the UK and Ireland.

No hierarchy was drawn up between these models. However, this principle of comparability was not accepted by a German government keen to avoid the flight of its companies to countries without codetermination, and in particular **"**collective codetermination**".** The adoption of the "Before / After" principle enabled this stalemate to be broken. It protected employees of the companies at the origin of the SE against any reduction in the rights to participate in management they would have had before becoming employees of the SE. All this means that the system of involvement to be applied by the SE will be greater than any in place in the companies at the origin of the SE. This means a drastic increase in involvement. The directive, nevertheless, gives the SNB the possibility of waiving the strict application of this principle, it being agreed that if a significant number of employees is concerned (at least 25% in the event of a merger, and 50% for the formation of an SE subsidiary or holding company), it may decide on just a double two-thirds majority (two thirds of the votes of the members representing two-thirds of the employees, this figure including the votes of the SNB members of at least two State members).

This easing of the rules, visibly targeting Germany, appeared sufficiently attractive for German companies like Allianz opting for the SE statute to seek to take

advantage of it. The equal composition of the management bodies of the SEs already formed or in the process of being formed in Germany is not called into question, simply their number. Thus, while the supervisory board of Allianz as a public limited-liability company was composed of twenty members (the maximum under German Law), Allianz SE's supervisory council only has twelve members, of whom four are German trade unionists, as well as one French member and one British member. The German company Fresenius, particularly active in the medical products and services sector and currently in the process of forming an SE, has stated that it wishes to reduce its governance structures in the same way to improve their efficiency.

The SE statute clarifies for the first time what "involvement" of employees in companies actually means. The term is new to European Law and domestic law alike. It evokes the concept of shared responsibility. Despite the diversity of the systems retained in the various European states, the notion of involvement, which now belongs to the community *corpus,* is an element in the definition of the European social model. This notion covers the "information/consultation/participation" triptych, i.e. according to the 2001 directive, "any… mechanism through which employees may exercise an influence on decisions to be taken within the company". Information and consultation refer to identified social laws that are the subject of European harmonisation.[89] However, the model of participation does not yet appear in Community law. Nonetheless, the 2001 directive defines participation as the right to recommend or oppose the appointment of members to the supervisory or administrative boards, or as the right to elect or appoint these representatives. Reference is made here to the highest level of participation, since all members of the supervisory or administrative board – elected, appointed or recommended by the employees' representatives – are full members. They have the right to vote, contrary to the provisions of the French Labour Code for representatives of Work Councils called upon to participate in these councils in an advisory role.

In any case, none of the systems mentioned by the 2001 directive is totally foreign to French companies. This is evidently the case of information/consultation, which occurs through Works Councils, whose capacity has been recognised by French Law. French employment law does not disregard employees' participation. It is the norm in the public sector, in accordance with the 1983 Law on "the democratisation of the public sector".[90] Public limited-liability companies that are controlled by the State must have at least two employee representatives and up to a third of the total number of seats on their administrative or supervisory board. Employee participation, implemented in France under De Gaulle's third way,[91] was con-

[89] See notably Directive 2002/14/EC of the European Parliament and Council of 11th March 2002 establishing a general framework for informing and consulting employees in the European Community.

[90] Law n° 83-675 of 26th July 1983.

[91] For General de Gaulle, participation was part of the "third way between capitalism and communism". He defined this as "the third solution [...] which changes man's condition within modern civilisation".

firmed by means of the Law of 30 December 2006 "for the development of participation and employee stockholding".[92] In addition to increasing employee stockholder representation on the administrative or supervisory boards of listed companies, this law regulates the case of privatised companies. This privatisation must not result in employee participation being called into question, and the minimum number is laid out under law. In addition to the hypothesis of privatisation, employee shareholding itself becomes a vector for participation in management. This, however, will only concern listed SEs registered in France and not those that are not listed. For listed companies, crossing the threshold of 3% of share capital in the hands of employee shareholders leads to the holding of a general assembly to elect directors or members of the supervisory council representing the employees. The Law of 30 December 2006, adopted by consensus, is an indicator of the mutual contributions between partner States favoured by Europe. Following in the footsteps of De Gaulle, the stockholder employee is also ingrained in traditions across the channel in the UK and Ireland. The country of codetermination has also shown an interest in this system, as demonstrated by some of Angela Merkel's statements in 2006.

The 2001 directive establishes worker involvement as a Community principle, reminding each State of its duty to act in good faith under conditions that refer to the Treaty itself.[93] They are required to "take all appropriate measures in conformity with Community law with a view to preventing the misuse of an SE for the purpose of depriving employees of rights to employee involvement or withholding such rights". In this respect, the purpose of the SE Statute is not only to prevent "social dumping". It is also based upon a philosophy of employees' rights, as stakeholders in the company.

Conclusion of negotiations

Negotiations come to an end six months after the first meeting of the SNB (renewable once). However, this does not necessarily mean definitive closure of negotiations. Three situations may arise: a written agreement is indeed concluded at this time and the registered SE incorporates the social dimension in this agreement; the SNB decides on the contrary (on a double two-thirds majority) to conclude negotiations before the end of this period, or even not to begin negotiations, deeming the system of worker involvement organised by national legislation or by framework agreements concerning the group on a national scale to be satisfactory (which is possible in the event of the formation of an SE holding company); finally, negotiations are unsuccessful and the subsidiary rules of the 2001 directive, referred to as "standard" are therefore adopted.

---

[92] Law n° 2006-1770 of 30 December 2006.

[93] Article 10 Line 1 of the EC treaty provides that "all member States take appropriate measures to ensure that the obligations under this treaty or resulting from acts carried out by Community institutions are enforced. They facilitate the performance of their duties".

There are no cases, as far as we know, where there have been no negotiations. So far, there has always been negotiation followed by agreement.[94] The 2001 directive, whilst referring to the contractual freedom of employee representatives and directors, describes what this agreement must contain, which is a factor of legal security for both directors and employees. To use once again the example of Allianz SE, directors and members of the SNB were able to sign a "convention on employee participation" on 20 September 2006, which is to say within less than six months. It is true that certain basic principles of the agreement had been set out previously in the drafts for the statutes of the future SE and it was agreed that these would not be discussed further. The convention provides for an equal-representation supervisory council consisting of twelve members, of whom six employee representatives (including, for the first time, two non-German trade unionists). It also implements an SE works committee whose powers are noticeably extended in relation to those of a standard European works committee, created in application of the 1994 directive. The SE committee has an advisory role and is specifically called upon in the event of "exceptional circumstances" that may have a direct impact on the economic or social situation of the company. The committee has a right of initiative to file points on the agenda of discussions with the company's management, may invite representatives of European trade union movements to its meetings and has the role of nominating employee representatives for the supervisory council. A similar organisation has been adopted at Man Diesel SE. The company has nearly 7,000 employees and is specialised in the production of diesel engines. The convention signed on 27 April 2006 between the SNB and the management provides for a supervisory council that is both reduced in number (from twelve to ten members) and Europeanised (three of the five employee representatives are German and two are Danish). The council at Man Diesel SE is also Pan-European, consisting of nine members, of whom four are German, two Danish, one French and one Czech. Plansee SE, an Austrian company specialised in the manufacture of metal objects, converted itself into an SE in 2006 and has completely retained the codetermination system that it previously employed under Austrian Law. Having selected the one-tier system (despite having two-tier governance beforehand), a third of its board of directors are employee representatives (two out of five members). The directors are keen to retain these participation structures with which they were very familiar and are therefore less inclined to combine them with an SE council (nevertheless set up at the SNB's request as a temporary structure).[95] The process of formation of an SE at the Scandinavian bank Nordea also raises interesting issues in terms of achieving the social aspect of the SE statute. The bank already has a works committee and the trade union representatives sit on the board of directors. However, Swedish legislation, which applies to Nordea SE given its Sweden-based registered office, does not demand such representation in this precise case. The trade unions in the four countries concerned (Denmark, Finland, Norway and Sweden), with a view to maintaining these arrangements, decided to unify their trade union structures to adapt to the European activities of the future SE not only in Scandina-

[94] Except for cases of "shell company" SEs (*see below*).

[95] Sandra Schwimbersky (SEEUROPE Network, Brussels) in cooperation with Udo Rehfeldt (IRES, France), "Case study report on Plansee SE", July 2006, www.seeurope-network.org.

vian countries, but also in Poland (where trade unionism is limited) and the Baltic States. The German chemical giant BASF announced for its part its transformation into an SE without calling codetermination into question. The trade unions immediately agreed to this transformation. These examples do not mean that SEs will necessarily make way for participation. Elcoteq SE, for example, an international company originally from Finland which specialises in telecommunications technologies (and has just transferred its registered office to Luxembourg) has not introduced a system of participation.

The directive allows for the failure of negotiations, a hypothesis which has in fact not yet arisen. In such a case, the "standard" rules would be applied. The report from the Davignon group insisted upon this constraint as a means to prompt employees and directors to reach an agreement, which is always preferential to rules being imposed from outside. The standard rules are defined by the legislation in force in each Member State, but the directive sets out the basic regulations. These regulations concern both the composition of the SE group committee as well as the information and consultation of the employees within this committee. This committee specifically has the right to be informed and consulted[96] in exceptional circumstances "that affect the employees' interests to a considerable extent" (relocations, transfers, the closure of establishments or undertakings or collective redundancies). The model of employee participation in management also falls under the framework of the standard rules that cover employees' representatives' right to vote in the supervisory or administrative boards.

The major provision of the directive and the 8 October 2001 regulation, in social terms, relates to the indissociable nature of social negotiations and business law operations leading to the formation of the SE. As well as being outlined in the 9 November 2006 decree, the agreement relating to the implementation of an SE committee, a system of employee participation or even, failing that, the written commitment of the directors to apply the standard rules, is attached to the request for registration of an SE. In Austria, Bauholding Strabag, a company operating in the construction industry (the first in this sector to be granted the SE statute), experienced the strictness of these stipulations. Registered at the end of 2004, the company was sued by trade unions in both Austria and abroad[97] for having been unaware of the mechanism of social negotiation. The litigation was settled by amicable agreement through the opening of negotiations which in 2006 resulted in an agreement which prescribes codetermination (under the provisions of Austrian law) and the constitution of an SE committee.

---

[96] These provisions relate to directives 2002/14/CE establishing a general framework for the information and consultation of employees in the European Community and 98/59/EC of the Council, on 20 July 1998, relating to the approximation of the laws of the Member States relating to collective redundancies.

[97] Germany, Belgium, Hungary, Netherlands, Czech Republic, Slovakia and Slovenia.

Are directors of a public limited-liability company who wish to create an SE registered in France likely to be dissuaded from doing so by the requirements of the 2001 directive? If we consider the need for dialogue in the work environment between directors and employees as a requirement, the directive should not result in huge changes in the organisation of employee representation in French companies. The position would be different only if the SE created by merger acquired, for example, a German public limited-liability company governed by collective codetermination.[98] However, in other countries, there exist only limited forms of employee representation on company boards, or simply an information/consultation system that is often much less developed than in France.

If we judge by the aforementioned examples of Allianz SE and Man Diesel SE, the council of an SE should have greater powers than those held by the current European works council. Once created, the European works council must meet once per year, and as a rule meets once or twice per year. More often that not, it is an opportunity for dialogue between employee representatives of the different States concerned. However, by contrast with the limited role of the European works council, the French Labour Code has an extensive perception of the role of the committee of an SE. If its scope is limited to "questions which concern the SE itself and any of its subsidiaries or establishments situated in another Member State or which exceed the powers of the decision-making organs in a single Member State at a time", it comes close, on a transnational level, to the national-level works committee. Its compulsory annual meeting refers to all aspects of the SE's economic, financial, industrial and social situation. Moreover, in the event of "exceptional circumstances affecting the employees' interests to a considerable extent, particularly in the event of relocations, transfers, the closure of establishments or undertakings or collective redundancies", the SE committee meets automatically to be informed and consulted. Like the SNB, it has the appropriate resources for its functioning, which are at the company's expense, according to the committee's activity (travel and accommodation costs for employees coming from abroad, interpreting costs etc...).

[98] Codetermination, with a supervisory board (or board of directors if it is for an SE) composed of equal representation is not compulsory in Germany in limited companies with more than 2,000 employees, as employee representation is limited to a third of the council when the workforce totals between 500 and 2,000. No provisions are made for companies with less than 500 staff. None of the other countries with participation systems, such as Austria, Netherlands, Sweden or certain countries in central and eastern Europe enforce collective codetermination as carried out in Germany. It would be appropriate to observe that codetermination in Germany does not really have equal representation on both sides, insofar as the president of the supervisory board is always a representative of the shareholders and has double voting rights.

The future of the social model of the European Company

An instrument for the exportation of a codetermination judged by some to be inadequate for the challenges of international competition,[99] by others as a decisive stride towards a new social Europe to respond to the financial globalisation of methods of social management of companies, the SE social statute causes much debate.

However, this statute was not invented from scratch. As is the case for company law, there is an *acquis communautaire* in Employment law. In addition to the 1994 directive on European works committees, around a dozen other directives relate to this area. The first two date back to the 1970s. They lay down minimal requirements in terms of information and the consultation of employees respectively in the event of collective redundancies (directive of 17 February 1975) [100] and company transfers (directive of 14 February 1977).[101] It follows from this, for example, that in the event of a merger and acquisition designed to create an SE, the acquiring company inherits the obligations of the acquired company resulting from employment contracts or labour relations in place at the time of the transfer, as the 2001 regulation expressly recalls. The most symbolic text is certainly the "Vilvorde" directive of 11 March 2002.[102] Its creation, set in motion following the outburst of emotion caused by the closure of the Renault plant at Vilvorde in Belgium, lent itself to many discussions in view of the heterogeneity of the methods of employee representation in companies in Europe.[103] Whilst allowing each State to adapt the rules laid down in their national legislation, it defines the minimum requirements to be respected by each State. These requirements are based upon two principles. The first is the "useful effect" of the information and consultation of employees, which excludes any *fait accompli*. The second principle refers to the "spirit of cooperation" between employers and employee representatives and takes the opposite course to the culture of confrontation.

[99] The criticism aimed at codetermination in economic circles in Germany led Chancellor Schröder to ask the former CDU minister and instigator of the 1976 Law on codetermination – Kurt Biedenkopf – for an evaluation report which was made public at the end of 2006. The report proposes certain adaptations, but comes down in favour of maintaining a system whose aims are first and foremost political "*Codetermination is about democracy, not economics*", highlights the Biedenkopf report.

[100] Council Directive 75/129/EEC of 17 February 1975 concerning the reconciliation of Member states' legislation relating to collective redundancies, modified and consolidated with other texts under directive 98/159/EC of 20th July 1998.

[101] Council Directive 77/187/EEC of 14 February 1977 concerning the reconciliation of Member states' legislation concerning maintaining worker rights in the case of transfers of firms, establishments, or parts of establishments, modified by Council Directive 98/50/EC of June 29, 1998, later modified.

[102] Directive 2002/14/EC mentioned previously.

[103] This representation is not compulsory in the UK or Ireland. Employee representation in these countries in traditionally carried out by trade unions, through workplace delegates.

The body of texts on information/consultation of company employees and the creation of Pan-European representative institutions (European works council, SE committee and, in the future, the SCE) form as it were the very basis of the organisation of company labour relations on a European scale.

The growing momentum of the European works committee, the advisory role of which has just been confirmed by the French courts,[104] bears witness to an inevitable evolution. It is increasingly on a Pan-European level that European social relations are being organised, at least in large companies. This European model is unique, since no other continent is equipped with such a body of rules in this area. Europe is therefore far from lacking in any social dimension, as some people tried to delude others into believing during the campaign on the referendum on the European constitutional treaty. This dimension is, on the contrary, very present. Furthermore, in countries that traditionally rely on the contractual freedom of social partners, it represents a fundamental change of course in labour relations.

The SE statute falls into this context and will go further than simply establishing a general framework for social cooperation by validating the concept of employee involvement in companies. The social aspect of the SE is justified by the mobility conferred on a company whose vocation is to move around more than the others. In such a case, this mobility forces the company to change applicable national law, in the event of transfers of its registered office or cross-border mergers (in the case of the acquired company). For this reason, the 2005 directive on cross-border mergers also provides for a social negotiation arrangement that is very close to the arrangement relating to the SE.

Whilst abstaining from formulating proposals for modifications, this report does intend however to echo various suggestions of leading economic actors confronted with certain intricacies of the 2001 directive. Three main comments have been made by the companies who undertook (and for certain companies, completed) the process of forming an SE. These three areas require further debate and consideration.

• On one hand, it has been observed that the period of six months set for social negotiation, which may be extended to up to one year, is out of step with the imperatives of the success of operations such as mergers in particular. A merger must be completed in six months. To increase the length of this period means taking the risk of disruption that may harm the interests of the company and its employees. Thus, it has been suggested that the company's registration could be authorised re-

[104] Via a much-debated ruling of 21 November 2006, the Court of Appeal in Paris decided in favour of the trade unions of Gaz de France (GDF) who claimed a lack of information from the European works committee on the GDF-Suez merger. The judgement is founded upon the principle of the "useful effect" of consulting employees, the judge retaining the argument according to which the belated transmission of the expert report on the social consequences of the merger did not allow the European works committee to make known its opinion in good time.

gardless of the finalisation of social negotiations. Failing that, it has been suggested that the negotiation time could be varied depending on the size of the company.

• The question of the nomination procedure for members of the SNB was also raised by legal practitioners and a number of companies who opted for the SE statute. Methods of nomination differ in each State and as a result there is an uncertainty that may open the way for litigation. Why not make the European works council responsible for this negotiation role? This formula, a synonym for simplification, would contribute to the reinforcement of this council, insofar as the agreement on employee involvement of SEs must in principle result in its replacement by the SE committee.

• The last comments refer to the "Before / After" principle given the fear of certain companies of having to adopt the system of codetermination, especially with equal representation. Many French companies make space for employee representatives on their councils. This is a positive for the companies. However, the system of equal representation is not part of French tradition and companies are generally hostile to it. On the other hand, the arrangement of employee involvement that all SEs must put into place symbolises a model of social cooperation that is specific and unique to Europe. It is founded on social and human values. It sees the European view of companies as a community bringing together all stockholders, shareholders, lenders and employees. This does not of course exclude the simplification of an overly complicated arrangement and the consideration of how to combine the social provisions of the 2005 directive on cross-border mergers with those under the 2001 directive on the SE. For both of these texts may have to be applied by the same European company.

Fiscal neutrality of SE cross-border operations

Contrary to the business law provisions which have been seriously scaled back since the first Commission proposal on SEs in 1970, the fiscal provisions have not experienced such a large backward step. This first proposal already stated that "the European public limited-liability company [should] remain subject to national fiscal requirements, as the elaboration of a specific tax regime for the European limited-liability company might be a source of discrimination in favour of or against public limited-liability companies under national law".

Nevertheless, this text contained general provisions allowing the avoidance of the most discouraging effects of this absence of fiscal *corpus*. Notably, it stated that shareholders of companies that existed prior to the merger-created SE could not be taxed on capital gains recorded during the exchange of shares. It also set

out provisions for compensation of losses of permanent establishments of the SE, as well as those of the subsidiaries with more than a 50% stake. Finally, transfers of the SE's registered office were to be exempted from tax, on condition that the company had been resident in the State of origin for at least five years.

For its part, the 2001 regulation contains no specifically fiscal provisions. At most it states that "Member States are obliged to ensure that the provisions applicable to European companies under this Regulation do not result [...] in disproportionate restrictions on the formation of a European company or on the transfer of its registered office,"[105] which may target, amongst others, fiscal aspects. In this way, that which was considered as the common and essential core in 1970 is now viewed as the very height of fiscal harmonisation!

Nevertheless, the context has changed since 1970. Regardless of the regulation on the SE itself, the Commission's initiatives, as well as certain decisions of the Court of Justice of the European Communities, have contributed to changing the Community fiscal landscape in which the SE operates. It is also true that the absence of a fiscal framework appropriate for the functioning of the SE, but not necessarily specific to this new social structure, burdens its development, and that "its success depends closely the tax system that is applicable."[106].

- This deficiency manifests itself for operations relating to the creation or mobility of structures.

- It also concerns ongoing activity and therefore the taxation of the results of an entity operating in the territory of several Member States.

The SE and taxation of the mobility of structures

Taxation affecting cross-border movements of registered offices is usually very dissuasive. However, one of the main qualities of the SE lies precisely in its ability to move from country to country within the Union, as easily as it could in one country. In the same way, cross-border mergers have proved to be very difficult to complete, for legal reasons, whilst a specific tax system, albeit totally insufficient, was applied to them on the territory of the Union.[107] Notwithstanding, one of the main means of formation of SEs is the merger of companies from different member States. If we wish to give momentum to the SE, we must commit to a method enabling us to remove these obstacles.

[105] Whereas Clause n° 5.

[106] Council Directive 2005/19/EC of 17 February 2005, modifying Directive 90/434/EEC.

[107] Directive 90/434/EEC of 23 July 1990 concerning the common taxation system applicable to mergers, divisions, contribution of assets and share exchange relating to companies from different member States.

A context that has long been dissuasive

First of all, taxation is dissuasive in transfers of registered offices. The Member States' traditional principle is to tax companies that leave their territory, in the same way as those who cease activity. In France, several grounds making tax immediately payable have been provided for such cases. In addition to the immediate taxation of profits made during the last tax period, which cannot be challenged, transfers of registered offices, or even of an establishment, also lead in general to the taxation of profits which have been deferred. In particular, this means that all preferential treatment is cancelled and that deferred taxes become immediately payable. This transfer also results in the reintegration of all provisions, even when they remain justified. Finally, and in particular, the operation may lead to the taxation of unrealised capital gains. In this case, assets are evaluated at their market value and the difference with the financial value acts as the basis for capital gains taxation, therefore taking effect even if no handover has taken place. This taxation is qualified as exit tax.

It would seem clear that such financial consequences can, in most situations, only lead to the project for a cross-border transfer of a registered office or establishment being abandoned.

Taxation is not noticeably less dissuasive in terms of cross-border mergers. Admittedly, significant progress was made in 1990 with the adoption of the directive on the tax systems for mergers.[108] However, these transnational operations nevertheless remained difficult to complete due to the absence of a directive to rule on legal questions, as well as the shortcomings noted in applying the fiscal directive of 1990. On this final point, in 1993 the Commission proposed the adoption of a directive modifying this that would allow the removal of a number of existing obstacles.[109] This proposal, however, was not retained

Improvements supplied by the Commission and by the European Court of Justice

This rather unfavourable context shifted recently, however, under the impetus of both the European Commission and ECJ jurisprudence. The Commission initially promoted the adoption of several community texts of a fiscal or strictly legal nature, allowing the most abnormal situations to be cleared up.

---

[108] See note n° 2, page 75.

[109] Council proposal for a Directive modifying Directive 90/434/EEC, COM (1993) 293 final, *OJEU* C. 225 of 20 August 1993.

• The directive of the 17 February 2005 relating to the modification of the tax system for mergers.[110]

As has already been stated, the 1990 text resolved fiscal obstacles to cross-border mergers only imperfectly. Likewise it could not be applied to SEs and SCEs that are not on the list of legal entities entitled to benefit from these provisions.

The States acknowledging the statutes of both the SE and SCE suppose that these companies "will be in a position to transpose their registered offices from one member State to another without being dissolved or liquidated,"[111] and the Commission was able to modify many points of the 1990 "Mergers" directive. Thus, to the operations targeted initially and enjoying preferential tax treatment, were now added "the transfer of registered office, from one Member State to another, of European companies,"[112] defined as the operation by which, without liquidation or the creation of a new corporate body, an SE or an SCE transfers its registered office from one Member State to another. This improvement is likely to be only partial due to the ambiguity in the wording of the directive. In order to get its text adopted in a unanimous manner, the Commission actually found itself almost obliged to propose a new draft, reproduced below to highlight its complexity:

"1. A merger or division or partial division shall not give rise to any taxation of capital gains calculated by reference to the difference between the real values of the assets and liabilities transferred and their values for tax purposes.: .

The following expressions shall have the meanings assigned to them:

a) "value for tax purposes": the value on the basis of which any gain or loss would have been computed for the purposes of tax upon the income, profits or capital gains of the transferring company if such assets or liabilities had been sold at the time of the merger or division or partial division, but independently of it.

b) "transferred assets and liabilities": those assets and liabilities of the transferring company which, in consequence of the merger or division or partial division, are effectively connected with a permanent establishment of the receiving company in the Member State of the transferring company and play a part in generating the profits or losses taken into account for tax purposes."

It seems that a number of member States have interpreted this text as limiting the deferral of the taxation of income, profits or capital gains recorded at the time of a transfer, only for cases where the assets concerned remain effectively connected with a permanent establishment of the SE in the Member State where the SE

---

[110] Council Directive 2005/19/EC of 17 February 2005, modifying aforementioned Directive 90/434/EEC.

[111] Whereas Clause n° 5 mentioned on p. 77.

[112] Title 1 § 2 sub b.

resided before the transfer of the registered office. It is in this sense that France, like most of the Member States, transposed the provisions in question into the Finance Law for 2005.[113] The Commission deems that this restrictive interpretation does not comply with Community law as it explained in the communication of 19 December 2006 [114] (see hereinafter).

According to the information available, only Austria has transposed the fiscal directive on mergers in such a way as not to impose any exit tax.[115]

- The Commission's communication of 19 December 2006 on exit tax.

This communication, entitled *Exit Taxation and the need for coordination of Member States' tax policies*, may be considered as the extension of the "Mergers" tax directive of 17 February 2005 in the sense that it attempts to remove any ambiguity. To clarify the part of the text interpreted restrictively by the Member States, the Commission actually states: "The European Company Statute became available for use on 8 October 2004, making it possible for a company organised in the form of an SE (*Societas Europaea*) to transfer its registered office to another Member State, without this resulting in the winding up of the company or the creation of a new legal person". The 2005 amendments to the Merger Directive ensure that, provided certain conditions are met, the transfer of the registered office of an SE or of a European Cooperative Society from one Member State to another will not result in the immediate taxation of unrealised gains on assets remaining in the Member State from which the office is transferred. The amendments are silent on those assets which do not remain connected to a permanent establishment in the Member State from which the registered office is transferred. However, the Commission considers that the principles of de Lasteyrie apply to such 'transferred' assets.[116] The matter is clear cut: Member States who use the ambiguities of the written directive as an excuse to transpose it in a restrictive manner act in breach of the EC Treaty. However, this communication does not have normative scope. It can not support companies which challenge national legislation deemed by the Commission as contrary to Community law in their national courts or the ECJ.

This communication is also the occasion for the Commission to outline several thoughts for the future to build a system allowing us to reconcile the requirements

---

[113] Law n° 2004-1484 of 30th December 2004.

[114] Communication from the Commission entitled "Exit Taxation and the need for coordination of Member States' tax policies" COM (2006) 825.

[115] The directive will come into force in two stages. Provisions relating to the transfer of an SE's or SCE's registered office should be transposed by 1 January 2006 at the latest. The other provisions should be transposed by 1 January 2007 at the latest. So far, two countries are yet to transpose the provisions concerning the SE and SCE. These are Belgium and Greece. However, several countries have already made it known, as of 2006, that they had transposed the second group of provisions. The countries are Denmark, Spain, Ireland, Cyprus, Lithuania, Malta, Poland and Slovenia.

[116] The aforementioned Communication COM (2006) 825 final.

of the freedom of establishment and protection, in an equal sense, of the fiscal resources of the Member States, at the time of the exit of assets from a Member State. The principle that should prevail to achieve this objective is one according to which the taxation of capital gains may not take place before the effective handover of the assets in question. At the time of the handover, taxation should be divided between the State of origin of the assets and the State of residence of the company at the time of the handover. This ideal situation, which would allow the internal tax asset handover system to be in perfect line with cross-border operation, assumes, all the same, the fulfilment of numerous conditions, such as the harmonisation of the methods for evaluating market values and asset depreciation. It also requires faultless administrative cooperation to ensure efficient monitoring of the assets concerned. Inevitably, in this respect the question will be raised of creating a Community inspectorate (or at the very least the implementation of specific terms for inspection on a Community scale), which is today cruelly missing, in particular with regard to European VAT. We must urgently reconcile member States' legitimate concern to preserve their fiscal resources with the necessity to encourage the development of cross-border economic activities in Europe.

Finally, the impact of the tax differential between Member States should not be neglected, which may justify the transfer notably of intangible assets without intending to assign them in the short or medium term. The aim of this would be to transfer activity, in particular in the service sector, strictly to benefit from more favourable tax conditions.

• The "legal" directive of 26 October 2005 on cross-border mergers of limited companies.

The advantages gained from the 1990 tax directive, modified in 2005, remain inoperative in many situations, to the extent that the legal tool represented by the merger and its assimilated operations had not been subject to any European harmonisation. Thus, in 2003, the Commission noted that "under current Community law, not all Member States permit such mergers. The differences between the legal systems of the various Member States to which the merging companies are subject are sometimes so great that the companies currently have to resort to complex and costly ad hoc legal solutions. This often makes such mergers a risky undertaking, and they do not always take place with the required transparency and legal certainty."[117] Cross-border mergers were actually legally impossible to complete, since they were not permitted in the Netherlands, Sweden, Greece, Germany, Finland, Denmark or Austria. This situation was eminently prejudicial to the functioning of the single market. Adopted after a particularly long legal process, the directive on cross-border mergers follows the same logic as the SE regulation by referring essentially to national laws which must be rid of any provisions standing in the way of such operations.

---

[117] Proposal for 10th directive of the European Parliament and Council of 18 November 2003 on cross-border mergers of listed companies. (COM/2003/0703 final). Presentation of the grounds.

Although an improvement, this legal and fiscal context does not facilitate the mobility of social structures within the European Union, far from it in fact. Tax barriers and the heterogeneity of national legislation mean that one of the fundamental liberties prescribed by the treaty, the freedom of establishment, can not be conducted in good conditions. It is therefore natural that debate has arisen in the legal world, and several decisions from the Court of Justice of the European Communities have attempted to rectify this situation. Although not limited to SEs, they combine to facilitate creation and invite Member States to reflect on the way we can now organise and not hinder the mobility of companies as a means of reinforcing the industrial and financial fabric of the Union.

- The "Sevic Systems AG" judgement of 13th December 2005.[118]

In this case, Sevic Systems AG, formed in Germany, and Security Vision Concept SA, formed in Luxembourg, wanted to merge. This operation should have occurred by the winding up without liquidation of the company from Luxembourg, and the universal transmission of its capital to Sevic, without modification of its company name. However, Sevic was refused registration of this merger in the German Register of Companies. German law on company transformations [119] only provides for mergers between entities whose registered office is in Germany. The question asked of the ECJ, in an application for a preliminary ruling, was whether the freedom of establishment recognized by the Treaty allowed the refusal of registration of the merger between a German company and a company from Luxembourg on the German Register of Companies, solely on the grounds that German law only allows for the conversion of companies with a registered office in Germany.

In its judgement, the Court firmly condemned this refusal by highlighting the fact that German law brings about "a difference in treatment between domestic mergers and cross-border mergers likely to dissuade companies with their registered office in another Member State than Germany from exercising the freedom of establishment provided by the Treaty". In brief, German law violates the freedom of establishment, a fundamental liberty of the treaty which authorises all companies from Member States to operate throughout the European zone as they would in their own territory. A State must be able to validly invoke "*a legitimate objective compatible with the treaty*" (for example National Defence) or "*imperative reasons of public interest*" (notably, the fight against fraud) to admit obstacles to the freedom of establishment of European countries. Moreover, the Court pointed out that cross-border mergers meet the needs of cooperation and groupings between companies formed in different Member States, relating to the very goals of the SE statute.

From this jurisprudence, we can draw lessons that may concern SEs: on one hand, if the 2001 regulation should be considered as ambiguous on the ability of SEs that are already registered to complete cross-border mergers or even if the 2005

---

[118] ECJ, Sevic Systems of 13 December 2005, Case C-411/03 (Rec. 2005, p. I-10805).

[119] *Umwandlungsgesetz* of 28 October 1994.

directive proves to be transposed imperfectly or belatedly, SEs confronted by barriers to entry to a Member State could make good use of it. On the other hand, the "Sevic" judgement raises the hypothesis of the mutual recognition of companies in Europe. The freedom of establishment fulfils this role. It is opposed to a Member State refusing to register a company legally formed in another State on its territory. If the problem does not exist for the SE, which enjoys a European statute, it may apply to companies from States other than that of the registered office of an SE with whom this SE wishes to merge.

- The "Hugues de Lasteyrie du Saillant" judgement of 11 March 2004.[120]

This case relates to a provision of the French Tax Code which applied to persons who, having resided in France, wished to settle in another country. If these people possessed more than 25% of the capital in a company subject to corporation tax, they had to, upon leaving France, pay taxes on capital gains on this capital, calculated by the difference between their market value at the moment of their departure from France and their purchase cost. This meant taxing unrealised capital gains since no sale had been made. The claimant Hugues de Lasteyrie, required to pay this tax having left France, challenged it with the French Council of State which referred the case to the European Community Court of Justice for a preliminary ruling. Once again, as in the previous case, it is the freedom of establishment that provided the answer.

In its judgement, the Court considered that French tax provisions on unrealised capital gains by the sole fact of transfer of the home of a taxpayer to another Member State restricts the freedom of establishment. There would actually be a dissuasive difference in the treatment of taxpayers that cannot be justified by "imperative reasons of public policy", because they are disproportionate in relation to the objective of preventing tax avoidance. These provisions were judged to be contrary to the Treaty, even though the taxpayers in question enjoyed a deferment of payment,[121] or a reimbursement if they returned to France. It is therefore a sort of exit taxation that was condemned by the Court. Although the judgement relates to a tax on natural persons, we can ponder the transposition of the Court's approach to exit taxation on companies in the event of their transfer of registered office.

The SE and taxation of profits

Profits from an SE's ongoing activity must be taxed in a consistent manner, which is to say according to standards that take into account its specificity as a legal entity recognised across the entire Union and which may move without hindrance. It is therefore not a question of creating a preferential and advantageous system to promote SEs, but a question of providing a statute suitable for its main pur-

[120] ECJ, Lasteyrie du Saillant of 11 March 2004, Case C-9/02 (Rec. 2004, p. I-02409).

[121] Provided that sufficient guarantees are provided and a tax representative nominated.

pose, which is that of a European company and not the sum of national companies. This objective could only be fully reached if the entire activity of an SE is subject to just one taxation,[122] calculated according to one body of regulations.

A current fiscal framework unsuited to the imperatives of the SE

There is no denying that the current fiscal framework is fairly incompatible with the ambitions of a large single market to which the SE must conform. Whatever the system of territoriality adopted by the Member States, the activity of a group of companies spanning several countries within the Union, or of one company that has several permanent establishments, is taxed by each of the host countries, according to its own standards and without the real possibility to consolidate the results. We notice this not only through the absence of any system of compensation of cross-border losses, but also because of a strictly national approach to transfer costs and costs of ensuring compliance.

- Offsetting losses

The European Commission's efforts to get the directive organising the compensation of cross-border losses adopted have been in vain.[123] Furthermore, according to national legislation, the possibilities of taking into consideration, in the State of residence, the tax paid in the country of installation of the permanent establishment or of the subsidiary are often in fact limited. These possibilities also exist more often than not in domestic law, which places cross-order operations in an unfavourable situation compared to operations conducted in just one country.

In this way, under the current state of Community and Member State law, an SE with branch offices [124] in other Member States will be taxed in different ways depending on the country where its registered office is located. If this country practices an extensive territoriality of corporation tax, requiring the inclusion of profits recorded nationally and abroad, the results of permanent establishments located in other Member States will then be taken into account for the calculation of tax in the state of residence. If the result is positive, it will in general be taxed by the Member State where the branch office is installed, double taxation being totally or partially avoided by a reimbursement of the tax paid outside the home country. If the permanent establishment makes a loss, due to the "global " nature of the determination of results, the allocation of this loss will nearly always be possible against "global" profits made in the home country.

---

[122] Whose profit would be distributed between the Member States where the company conducts its activities.

[123] See the communication of the Commission to the Council and the European Economic and Social Committee: *Tax treatment of losses in transborder situations* SEC (2006) 1690.

[124] This is the most common form taken by permanent establishments.

If an SE has its registered office in a country of territoriality limited to activities conducted solely on that territory, as is the case in France, the positive or negative results of the permanent establishments will never be taken into consideration for taxation, whereas this would be the case for a similar situation in just one country.

Finally, all of these tax payment arrangements may be modified by international conventions.

An SE of a certain size has every chance of also owning subsidiaries set up in other Member States. In this case, no matter what system territoriality (limited or extensive), profits will only be taxed in the State of residence of the subsidiary. Symmetrically, if a subsidiary makes a loss, the subsidiary will not be taxed on the results of the SE, whereas it would be possible most of the time in a domestic framework.[125]

Obviously, companies have attempted to conform to this situation by looking for solutions allowing them to close in on an optimal solution, or at least comparable to those prevalent in most domestic laws, and SEs may do the same. However, this line of progress is not satisfactory, since it is by definition a source of legal insecurity, an incentive given to the most shrewd and/or best represented taxpayer.

This situation, in addition to the complexity it presents, is far from compatible with the requirements of consistency between the tax system and the fully European dimension of the SE, which must prevail if we want it to retain its significance. In many cases, it is in fact likely to be deemed contrary to Community law in the line of ECJ jurisprudence on the freedom of establishment. It would also be opportune for States to anticipate this movement. In any case, it is in line with the strengthening of European competitiveness, the main objective of the SE.

- Transfer costs

It is by definition the very vocation of businesses with the SE statute to operate on the territory of several Union countries, through branch offices and/or subsidiaries. The question of the assessment of intra-company transactions, which are at the heart of their activity, is inevitably raised. The risks of calling into question the costs of these transactions by national tax departments bring into play situations of dual taxation.

- Costs of ensuring compliance

The final feature goes against the objective of the authors of the 2001 SE regulation: the obligation to comply with all the fiscal legislations of the Member

[125] Except for exceptional cases of global fiscal consolidation.

States in which an SE is established represents a considerable cost, highlighted by the Commission in a study on the fiscal concerns of companies in the internal market.[126] This study, whose aim was to assess the incidence of the difference in the levels of effective taxation of companies of Member States on the localisation of economic activity and investment, concluded that the situation was prejudicial to the development of economic activity on the Union territory.

Actions in prospect

As with "exit taxation" and transfers of registered offices, the unsatisfactory situation of European economic fiscal policy may improve under the impetus once again of the European Commission and the ECJ.

- A Common Consolidated Corporate Tax Base (CCCTB)

If opposition between States concerning tax policy is fierce, the Council has nevertheless deemed it necessary to ask the Commission to seek fiscal provisions comprising of obstacles to cross-border economic activities in the domestic market and to suggest measures to address this. Over the last few years, the Commission has itself striven to promote solutions whose adoption would certainly enable us to improve the functioning of the internal market and competitiveness of companies in the Union, by coordinating the fiscal policy of Member States. This approach is formulated in a 2001 Commission communication entitled *Towards an Internal Market without tax obstacles. A strategy for providing companies with a consolidated corporate tax base for their EU-wide activities for their EU-wide activities.*[127] Amongst the strategies suggested to improve the taxation of companies' profits, there is one that seems to appeal to a sizeable portion of Members States. This strategy consists of taxing companies' profits according to a "Common Consolidated Corporate Tax Base" (CCCTB).

From this perspective, the Commission proposes establishing a single tax base for the European Union (taxable profits). In other terms, the Commission wishes that companies which conduct cross-border activities within the European Union should be authorised to calculate the entire company's taxable income on the basis of a single set of rules and to set up consolidated accounts for tax purposes (and therefore eliminate possible tax consequences from intra-company transactions). Currently, a group of companies must establish a distinct tax base (taxable income) in each Member State in which it conducts business, and according to the tax rules in force in each Member State. Authorised to apply just one set of rules, companies would experience a considerable reduction in costs of ensuring compliance resulting from the coexistence of 27 separate tax systems within the internal market. This would also

[126] Commission report entitled "Fiscal policy of companies in the internal market" (SEC (2001)1681 Final).

[127] COM (2001) 582 final of 23 October 2001.

mean problems created by transfer costs within the Union could be resolved, compensation for losses and global consolidation of profits and losses on a Community level could be authorised, a number of international restructuring processes could be simplified, numerous cases of double taxation could be avoided and many discriminatory situations and restrictions could be eliminated. The Commission believes that if companies calculate their profits on the basis of a common standard (financial information international standards, formerly known as "International Accounting Standards"), this common benchmark of profitability could be used as the starting point of European Union Common tax base. The Commission is therefore working on an allocation mechanism to determine the tax base between Member States.

It would appear evident that if such a possibility were to be offered to companies in Europe, it would be perfectly suitable for the SE. We can even say that it seems tailor-made for the SE, since it allows this new legal form, which is supposed to act without hindrance across the entire Union territory, to be taxed via a single tax base. The Member States concerned will divide the tax proceeds among themselves, according to a rate relevant to their fiscal sovereignty.

We will state for the record that, pending the appearance of the CCCTB, certain points of progress have already been observed. It is notably the case of transfer pricing for which a "Joint Forum" consisting of one representative per national administration and ten experts from professional circles produce "pragmatic, non-legislative solutions within the framework of the OECD Transfer Pricing Guidelines to the practical problems posed by transfer pricing practices in the EU". However, there is no denying that if legal security progresses as a consequence of this, it is far from being optimal.

The other driving force for better fiscal coherence, besides the European Commission, is the Court of Luxembourg. The ECJ deals with questions on fiscal policy, most of the time from the viewpoint of the freedom of establishment. However, the ECJ tends to favour solutions that put internal operations and cross-border operations on an equal footing, which is to say mainly to authorise the compensation of losses.

- The "Marks & Spencer" judgement of 13 December 2005 [128]

Marks & Spencer, a UK company, owned subsidiaries in the UK and in other countries in the Union. At the end of the 1990s, the group encountered large difficulties. In 2001, the parent company decided to cease the activities of several of its subsidiaries. It asked the British Inland Revenue to offset losses recorded in Germany, Belgium and France against profits made in the UK, which was refused by the UK Inland Revenue. Like in most Member States, British legislation actually has mechanisms allowing the consolidation of results belonging to a group, providing these subsidiaries are located in the UK. Called in to settle this dispute, the ECJ took a

---

[128] ECJ, Marks and Spencer of 13 December 2005, Case C-446/03 (Rec. 2005 p.I-10887).

decision that, although limited in its effects, nevertheless condemns this difference of treatment between subsidiaries operating in the same country as their parent company and other countries.

The ECJ in fact notes that "British legislation restricts freedom of establishment, by different fiscal treatment of the losses made by a resident subsidiary and those made by a non-resident subsidiary." This dissuades British companies from creating subsidiaries in other Member States. Such a restriction can only be admitted, according to the Community Judge, if it pursues "a legitimate objective compatible with the Treaty and is justified by pressing reasons of public interest". Once again, it is necessary, in such a hypothesis, that the restriction is proper to guarantee the completion of the objective in question and that it does not go beyond what is necessary to reach this objective. Let us concentrate for a moment on the three elements of justification invoked in this case by the UK and seven other States (including France) involved. All these States put forward a triple necessity linked to their desire not to lose fiscal revenue: to protect a balanced allocation of the authority to tax between the different Member States so that profits and losses are treated in a symmetrical manner in the framework of the same tax system; to avoid the risk of overlapping losses, which would exist if these were taken into account in the Member States of the parent company and in the Members States of the subsidiaries; and finally to avoid the risk of tax evasion resulting from the organisation of clever systems of transferring losses within groups. Without denying the legitimacy of these objectives, the Court considered that British legislation did not respect the principle of proportionality and went beyond what was necessary to achieve these objectives. We cannot in fact deprive a company from its right to group tax relief, designed to avoid double taxation, solely by reason that its subsidiaries reside in other Member States.

The decision may be summarised as follows: subordinating this tax relief on condition that the subsidiaries' losses are not subject to such tax relief in the home country (for example through a transfer of losses or deferring losses to a subsequent tax year) is legitimate, but depriving companies of all rights to tax relief in all cases boils down to demanding payment of tax in an unwarranted manner.

This decision may be considered as the beginning of the recognition of the right to compensate losses within a European group, even if the Court lays down strict limits. Notably, the right to compensation is, in this particular case, only recognised if all possibilities of using deficits in the Member State of the subsidiary are exhausted. It would appear that this excludes automatic consolidation, just like tax integration schemes existing in a number of Member States such as France.

What conclusions can be drawn from this description of the social statute of the SE and the fiscal context in which, given the current state of the law, it must conduct its cross-border activities?

1. Despite its slowness and complexity, the process of social negotiation, followed by the implementation of the scheme for employee involvement specific to each SE, is a great asset. It enables the involvement of the group's employees in the company's projects and in restructuring in response to imperatives of competitiveness from the very beginning and on a straightforward basis,

2. The social status of the SE reinforces the contractual nature of labour relations within the company and thus corresponds to the major trend in Europe of agreements made in this area. The emphasis placed on contractual freedom, the constitutional value of which is now recognised in France, accounts for a particularly sensitive development in our country, which has a long-standing tradition of preferring law over contracts. This shift has just been confirmed by the Constitutional Council's decision validating the arrangement of the French Labour Code allowing the adaptation of a company or group's Works Council information arrangements through a branch agreement.[129]

3. Despite recent progress in European Community texts and jurisprudence lifting fiscal barriers to free movement of companies in the internal market area, and despite the principle of fiscal neutrality of cross-border operations – whether they cover the SE legal form or not -, the absence of all fiscal harmonisation hinders intra-Community development strategies.

4. In both this field and in others, the SE plays a revealing role. It demonstrates, as if it were necessary, the disadvantages of a complete absence of fiscal harmonisation in Europe that prompts companies to implement complicated arrangements, of varying operational levels, and harms the competitiveness of the global site of Europe.

[129] DC nº 2006-545 of 28 December 2006 of the constitutional Council on the aforementioned law for the development of employee ownership and participation.

Chapter 4

Initial experience of companies that have chosen to become an SE

First of all, one cannot but be struck by how difficult it is to obtain information about registered SE companies. The regulations stipulate that the companies in question must publish in the O*fficial Journal of the European Union* essential details by which they can be identified, but this publication has no legal standing. There is therefore no check as to the validity of the information provided, nor even as to whether companies respect this obligation to publicise, and indeed a certain number of SEs seem to dispense with this obligation. Until there is a true official European register which lists clearly and consistently community bodies such as the EEIG, SEs, SCEs and others that will shortly come into being (e.g. EPC), it is impossible to find reliable and exhaustive information gathered together in one place, as at present one must refer to the different company registers in the 21 official languages of Europe. For listed companies information is easier to obtain because of the requirement for transparency to which they are subject under national trading regulations, in accordance with the directive of 15 December 2004.[130] We do know, however, that these national authorities have yet to create, across the Community, the “European network accessible at an affordable price for small investors” longed for by the authors of the “Transparency” directive.[131] This is the context in which Pierre Simon, president of Eurochambres, and the rapporteur decided to collaborate on a survey under the aegis of CREDA [132]. This anonymous survey, in the form of a detailed questionnaire, is still ongoing, and it will not be possible to produce the results in the present report. However, they will be made public after this report has been submitted, once all the questionnaires have been returned by the companies and properly analysed.

[130] Directive n° 2004/109/EC mentioned above.

[131] Whereas 25.

[132] ”Centre de recherche sur le droit des affaires” Paris Chamber of Commerce and Industry. We would also like to thank the ETUI (European Trade Union Institute) and especially Norbert Kluge for allowing us access to data on registered SEs on his truly remarkable website: seeurope-network.org.

The information used in the report, which is not guaranteed to be exhaustive, derives both from information in the public domain [133] and from information gathered in the course of visits and hearings which provided an in-depth dialogue with economic circles in France, Belgium, Germany and the United Kingdom. Some of the very first results from the CREDA survey confirm the conclusions that we drew from these meetings.

Despite the rather fragmented nature of the available information, it is nevertheless possible to present some initial conclusions from the experiences of companies that have opted for SE status.

As consideration is about to get underway regarding improvements to SE status, it will be useful to see whether it does begin to respond to the challenge of Europe's competitiveness, which, according to the accounts given by the companies themselves, is by no means certain.

Assessment of initial experiences

By 1 March 2007, some seventy SEs had been created across Europe and another twenty or so are apparently in the process of being created [134]. This may seem few. However, on the one hand, many States delayed incorporating the SE statute into their national law.[135] On the other hand, although the welcome reserved for the SE, while fairly positive, denoted critical rather than popular success, we must remember the scepticism that surrounded the creation of the simplified joint stock company, which later became the preferred form for unlisted French companies. Many companies, some of them very important indeed, are watching the first steps of the SE with circumspection, but intimate that over time this form of company could be of interest to them in facilitating the restructuring that they need. Which tends to prove that this instrument, though slow in getting started, may in the longer term attract more interest.

---

[133] Especially from the supplement to the *OJEU (TED)* and the website: http://www.seeurope-network.org/homepages/seeurope/home.html.

[134] According to public information available on the website www.seeurope-network.org, the following companies are about to adopt SE status: Fresenius AG, Mensch und Maschine Software AG, Nordea Bank AB, AS Sampo Elukindlustus, SCOR SA, Suez SA, Suomi Mutual Life Assurance Company, Surteco AG.

[135] Out of the twenty-seven Union member States, only Bulgaria and Romania have still to do this.

The potential is there. Arcelor had written into its statutes in 2002 that it would convert to an SE. The buyout of the company in 2006 by Mittal Steel changed the situation and distanced the company from this project, but did not necessarily rule it out definitively. The directors of the Suez group had also formulated such a project, which is for the moment in abeyance, awaiting the outcome of the merger with GDF. More recently still, the creation of an SE was brought up at the time of the takeover bid by the German group MAN for Scania the Swedish heavy goods vehicle manufacturer in autumn 2006.[136] Lastly, in February 2007, BASF, the German chemical giant, made public their plans to convert to an SE. For companies that have as yet no intention of adopting the SE statute, their opinion is still qualified. They feel that the principle of a community statute has great potential, but that it is either slow in coming, or still not sufficiently attractive.

• Alongside the general panorama of the registered SEs in the EEA zone we can already give an outline of the current situation.

• It is particularly in the light of concrete experiences of the "SE" form that we can at this stage best evaluate its advantages and deficiencies.

Panorama of SEs created or in the process of being created in the EEA zone

There is no typical profile of an SE. Registered SEs or companies that are in the process of becoming SEs have very differing characteristics and vary according to their home country, size, sector of activity or the legal procedures used to adopt the status of European company. Even though it is much too soon to predict the main success factors of the SE, it is nevertheless already possible to highlight some typical features from the SEs surveyed.

First of all, it transpires that this type of company did not attract much response in the countries of southern Europe (Italy, Spain, Portugal, Greece), but it is clearly more attractive in the North, especially Germany. The first SEs were created in the Netherlands, which was unusual since this country incorporated the SE statute into their national law fairly late.[137] At present, 14 member States (out of 25, since Bulgaria and Romania have still to incorporate the statute into their national law) have witnessed the creation of SEs on their territory. These are Germany, Austria, Belgium, Cyprus, Estonia, Finland, France, Hungary, Latvia, Luxembourg, the Netherlands, the United Kingdom, Slovakia and Sweden. Significant fact: German SEs represent about 40 % of the total, followed by the Netherlands with 12 %, Austria

[136] See Christian Hetzner and Michael Schields, "L'OPA de MAN sur Scania démarre mal", Reuters, 18 September 2006.

[137] The Netherlands adopted the necessary dispositions when the European company was first introduced in the summer of 2006, whereas Belgium, Austria, Denmark, Sweden, Finland and Iceland adapted their respective national laws on 8 October 2004.

with 10 % and Belgium with 10 %, with a minimal percentage in France. Moreover, three SEs have been created in the European Economic Area (EEA), two of them in Norway and one in Liechtenstein. Among operations carried out with companies that are not members of the Union, we should mention the future Nordea SE which intends to integrate its Norwegian subsidiary. In France, it is for the time being only in the financial and service sectors that procedures have been instigated to form European companies. Two SEs were registered in 2006 and 2007. The first, Viel et Compagnie-Finance SE, specialises in financial intermediation and is a listed company, whereas Innovatis SE, an unlisted family company, is active in the service sector (including mail order selling and property). The French reinsurance company SCOR, for its part, is currently finalising the creation of three SEs which are apparently expected to be registered in June 2007.

The sectors concerned are very varied. The majority of SEs are active mainly in the service sectors, in the areas of law, pharmaceuticals, food, consultancies, computers, property, biomedical engineering, cosmetics, distribution of office supplies, transport. The banking sector, insurance, reinsurance and financial investment advisors clearly predominate. Some SEs have also been created in the industrial sector (construction, production of Diesel engines, extraction industries and metallurgy) and there are prospects for the creation of SEs in the fields of aeronautics, automobile construction, plastics and paper industry and the production and distribution of industrial gas.

Concerning the size of SEs, they range from the very large – like Allianz SE – to the very small, like the "shell companies" registered as SEs. Many of these do indeed appear to be holding structures whose purpose is not always explained. The emblematic examples such as Allianz SE, Elcoteq SE, Man Diesel SE, Viel et Compagnie-Finance SE or shortly Fresenius SE, SCOR SE and Nordea SE, are exceptions. Most SEs have few employees if any, as has just been shown.[138] Almost a fifth of all SEs appear to have been created with no social object in view, the idea being to offer entrepreneurs wishing to use the structure of a European company for a particular purpose the possibility of a ready-made structure. The practice of making such holding structures available to economic actors is relatively rare in France, but it is well-known in Germany in particular where the formalities for forming a company are long and sometimes costly. Moreover, these holding structures have for the most part been created in those countries where the law authorises their creation. About ten such "holding" SEs have been identified in such countries,[139] but they can also be found in Sweden (three) and Hungary (one). It was with this mind that Beiten Burkhardt Rechtsanwaltsgesellschaft MBH, a German law firm present in several countries, including Belgium and Poland, created Beiten Burkhardt EU-Beteiligungen

---

[138] See "Union européenne : lente avancée de la société européenne" by Udo Rehfeldt, *Chronique internationale de l'Institut de recherches économiques et sociales*, n° 101, July 2006; the author pointed out that 14 of the first 33 SE then had no employees.

[139] Eight SEs of this type have been formed in Germany: http://www.seeurope-network.org/homepages/seeurope/home.html.

SE. This firm has openly positioned itself in such a way as to develop a market for preformed SEs.[140]

Regarding the legal procedure for creating an SE, an empirical observation would suggest at this stage that mergers and conversion are favoured. Socioprofessional organisations such as the German Confederation of Industry (BDI), and also the Paris Chamber of Commerce and Industry (CCIP) consider that the conversion route is the simplest since it consists of an internal reorganisation. Companies tend to favour cross-border mergers which to date are possible only through the 2001 regulation (while awaiting the incorporation of the 2005 directive on cross-border mergers).

This brief overview of SEs reflects the basic aspirations of companies opting for this status. In our opinion, the proliferation of "shell companies" should not be interpreted as a dangerous sign. Rather, it is a sign of a wait-and-see posture on the part of actors in the face of a statute that is very innovative, and very complex too, but which has a very great potential. To all intents and purposes it appears that everyone is convinced that the SE statute is evolving and will progress under the influence of other community texts concerning companies or as modifications are applied to the 2001 regulation, which is clearly incomplete (especially with regard to the abilities of existing SEs to act at cross-border level). If we leave to one side the case of SE "holding structures", the primary motivation of SE managers is to assert their company's European identity. This motivation is not only the result of a political commitment towards Europe, or even the expression of a need to acquire a truly European marketing instrument.[141] Their primary concern is to seek efficiency and to reduce their administrative costs. The costs generated in managing the hundreds of subsidiaries that many of the large groups in the Community own are high. Converting subsidiaries into stable establishments removes the multiplication of levels of governance (and possible divergence of opinion between parent company and subsidiaries), removes problems associated with evaluating transfer costs and gives the company back a unified management, enabling them to rationalise major strategic decisions. A report drawn up for the Commission in 1995 on competitiveness estimated that the potential savings to be made by simplifying group structures in accordance with the SE [142] were 30 billion euros per year. Having repeated at the end of 2006 its concern to reduce these costs by 2012, the Commission had no choice but to look into the SE as an

[140] Press release "beiten burkhardt establishes its own european plc". Moreover, a German preformed SE appears to have already been taken over by a company registered in Delaware, proof of the interest of American companies in a formula that enables them to operate more easily in Europe.

[141] Thus Go-East Invest, a German SE, declared in the press: " [...] the SE is also a marketing instrument, whether in relation to clients or to attract qualified workers."

[142] Report of the group headed by Carlo Ciampi, "Competitiveness advisory group", June 1995, mentioned in the article quoted above by Françoise Blanquet.

important means of progressing down this route.[143] For companies, obliged to adapt quickly to changes in the world market, the SE should allow them above all to strengthen their competitive position thanks to the advantage of mobility, whether regarding the possibility of a cross-border transfer of place of business or more especially with cross-border mergers. For major companies in particular, mergers apparently represent the favourite procedure associated with the SE statute. These are very well developed in America, and they correspond to the need for European companies to concentrate activities and hence consolidate, in the face of competition from the emerging countries.

Adoption of the SE statute can also be seen as a restructuring tool via investment funds in the industrial sector, making it possible to simplify the structure of holding companies or operational companies in which funds have a stake.

Companies may have their own specific motives, associated in particular with the opportunity afforded by the SE statute to relax certain regulations judged to be restrictive or penalising. It is therefore not simply by chance that German companies have been the most numerous to opt for the SE statute. It was inspired by German law. In addition and above all, the 2001 directive on the involvement of workers provided the opportunity to allow codetermination. Like Allianz SE, the companies Fresenius AG and BASF AG, which are currently converting to SEs, seem to have the intention of strengthening the membership of their supervisory or administrative board and opening up to international members.

Other motivations apply solely to the financial sector (investors, banks, insurance and reinsurance). Given the risks that these companies must accept, and the obligation to protect depositors and insured parties, the sector is legitimately protected by regulations and prudential surveillance mechanisms. These controls at national level, although restrictive, pose no particular problem in their implementation. The same is not the case at European level. Each national supervisory authority has its own practices and internal rules, and controls may overlap or contradict one another. The setting up of European regulatory committees in the context of the Lamfalussy procedure [144] has improved cooperation between national authorities in a most positive way, and favours exchanges of experience which are encouraging for bringing practices more into line in future. The French regulators, on the basis of their tried and tested expertise, are taking a very active part in these consultations. Nevertheless,

---

[143] Mr. Gunter Verheugen, commissioner for Enterprise and Industry, announced in November 2006 a wide-ranging plan for introducing savings for companies, but which in fact was similar to the plan for deregulation on an unprecedented scale recommended by Mr. McCreevy, commissioner for the Internal Market.

[144] This procedure was adopted in 2001 by the Council of Finance ministers to facilitate the adoption of texts in the very technical field of financial services. It consists of several stages, bringing into the decision-making process committees of regulators in the field. The aim is to benefit from their technical input, but also to create consensus between authorities from different member States. The three committees set up in the context of the Lamfalussy procedure are the European Securities Committee, the European Banking Committee and the European Insurance and Occupational Pensions Committee.

the majority of credit and insurance institutions consider that the control regulations are still too fragmented and that reporting obligations vary greatly from one country to another [145]. Thus, whereas a subsidiary of an insurance company or a bank is controlled by the supervisor of the place where the subsidiary is registered, this supervision falls to the competent supervisor at the level of the parent company when dealing with a simple branch. Thus the structures of an insurance or banking group are not indifferent to the control methods to which they are subject. Moreover, the creation of branches allows for more flexibility in the allocation of the group's capital through the rise of equity capital to the level of the parent company, in order to release funds for investment. Hence the attraction of the SE as a tool to simplify structures, especially via merger by acquisition of subsidiaries by the parent company.

Practical experiences

As well as the general features of SEs, the experience of companies themselves can be just as instructive as this gives us the key to the true concerns of economic actors in defining and implementing their strategies for growth in Europe.

Registered SEs

The case of Viel et Compagnie-Finance and Innovatis, the first two French SEs, created in August 2006 and January 2007 respectively, both by conversion, is all the more interesting since these companies have very different structures and activities.

Viel et Compagnie-Finance is one of the world leaders in financial intermediation.[146] Its activity is essentially international, as is the case for all companies operating in this sector. The company has over 2,000 employees (the majority are brokers) and is active in eighteen countries, with New York and London representing 2/3 of turnover. Nevertheless, the affirmation of a truly European identity played an important part when choosing the SE statute.

---

[145] This is not the place to discuss all aspects of this problem of means of prudential control in the banking and insurance sector, in order to protect depositors and assured parties. This debate is of interest in the application of the recent "Basel II" directive (directive 2006/49/CE of the European Parliament and of the Council of 14 June 2006 on the capital adequacy of investment firms and credit institutions (recast)) in relation to banking law, and discussions currently underway on the "Solvability II" directive (working document of the Commission "Outline of the Framework directive" and its annex (MARKT/2507/05) of 15 April 2005 (MARKT/2507/05)) which is the equivalent for the insurance sector. The main objective of these texts is to modernise risk evaluation methods in both sectors, by basing them on more economic parameters. This was the opportunity to ask questions about the supervision of the companies concerned, as some wanted this to be concentrated in the hands of a "*lead supervisor*" at the head office of the parent company of the group.

[146] Notably, the company has an on-line broker: Bourse Direct.

In contrast to Viel et Compagnie-Finance, a financial company, quoted on the stock exchange, Innovatis is an unlisted family firm in the service sector (property, mail order selling, and pharmaceutics). It has subsidiaries in France and in the rest of Europe, but also in Asia. Here again, it is apparently the wish for a platform from which to display their activities in Europe which was the reason behind adopting the SE statute.

It was also by conversion that Elcoteq, a listed Finnish company specialising in electronics, became an SE in 2006. Active in sixteen countries throughout the world (half of which are in Europe) with 7,450 employees, this new SE used this opportunity to be the focus of a great deal of media attention thus highlighting their pioneering character in a strategy of internationalisation whose main goal is competitiveness. Negotiations concluded with agreement on the setting up of an SE committee with thirteen members representing all the Elcoteq units in the EEA. After one year, Elcoteq SE decided to transfer its head office to Luxembourg [147] as from 1st January 2008. The company emphasized the need for European fiscal harmonisation and the elimination of restrictions which make it impossible, for instance, to create an SE *ex nihilo*.[148]

Of all the companies that have chosen to become SEs, the Allianz group is by far the most emblematic. By its size and its presence in practically all of the European member States, the group is synonymous with the European insurance sector, in which it is one of the main actors. Indeed, almost three quarters of its revenue derives from Europe and it is active in twenty-nine countries in continental Europe. Allianz's basic motivation as explained by the president is the simplification of structures achieved by converting subsidiaries into branches. The reasons for choosing SE status are similar to those of other companies in the sector in terms of being able to make intragroup allocations of equity capital. The advantage hoped for is to optimise the management of equity capital by calculating their prudential ratios globally, as a branch is not required to be capitalised to the same level as a subsidiary. Lastly, the European label is an element of European identification and valorises the company's commercial image (as shown by the slogan: "*Eine neue Entdeckung. Allianz SE. So European*", or "a new discovery. Allianz SE. So European").

Allianz SE was not created by conversion, but formed through a merger between Allianz AG –holding company of the group – and their Italian subsidiary Riunione Adriatica di Sicurtà s. p. a. (RAS) of which they originally held a little over 55 %. This process took about one year from the moment it was announced to the registration of Allianz SE on 13 October 2006 in Munich. Without the SE statute, no operation of this type was possible. This first experience of merger by acquisition under the regime of the 2001 regulation in fact proved to be complex, as the cross-

[147] See press release of 22 December 2006 from the Luxembourg Ministry of Economy and Foreign trade, "La société Elcoteq annonce le transfert de son siège social au Luxembourg".

[148] *Source:* Minna Aila (Project Director), "European Company – Case Elcoteq SE", UNICE seminar, 31 May 2006.

border operations regime, which was in theory assimilated to that of national mergers, still came up against difficulties that should not exist in a single market. First of all, Allianz AG had to increase its participation in RAS (from 55.51 % to 76.3 %). Then, in order to retain the holding function of the future SE, RAS transferred its operational activities to a subsidiary that was 100 % controlled by Allianz. These operational activities were thus left out of the merger between Allianz AG and RAS, which was the third and last stage in the creation of Allianz SE.

Regarding the involvement of SE workers, the agreement passed between the managers and the SNB retained the system of equal codetermination, in return for a reduction in the number of members on the supervisory board and the admittance of non-German Union workers onto the board.[149]

The main comment made by directors of the group relates to the length of time required to create an SE, whether due to the setting up of the social aspects which can cause the registration date to be postponed, or to the complexity of cross-border operations resulting from the application of national laws that are not sufficiently well harmonised. For listed companies the time factor is of course of vital importance.

SEs in preparation

The Fresenius group, headed by Fresenius AG, is a world leader in the field of medical equipment for dialysis, and also produces drugs and medical products associated with nutrition, infusions and transfusions. The group is active in thirty countries in Europe and the United States, and in the EEA, and has 46,105 employees.[150] Its conversion to an SE was decided on at the end of 2006.[151] The group managers that the rapporteur was able to meet, like those at Allianz in Germany, expressed their enthusiasm at the prospect of converting to an SE, while highlighting the complexity of the procedure. In particular, due to delays in incorporating the 2001 directive, the absence of the social aspects of the SE created some difficulties. For Fresenius, the transnational SE statute enabled the company to assert itself as a European actor with the benefit of a much higher profile beyond Germany while still retaining their German roots and their head office in Germany. The governance of the company should remain dualist, with the members of the supervisory board, as in the

[149] The law on codetermination, applicable to public limited liability companies ("*stock corporations*") requires a fixed number of twenty members on the supervisory board as soon as the threshold of 20,000 employees has been passed. As the law relating to the incorporation of directive of 2001 did not apply these thresholds to SEs, Allianz was able to reduce its supervisory board to twelve members, with the agreement of the unions.

[150] *Source*: "Conversion report of the Management Board of Fresenius Aktiengesellschaft for the conversion of Fresenius Aktiengesellschaft, Bad Homburg v. d. H., Germany, into a European Company (*Societas Europaea*, SE) as Fresenius SE Bad Homburg v. d. H., Germany".

[151] Press release by de Fresenius on 4 December 2006: "Shareholders approve conversion of Fresenius AG into a European Company (SE) and share split at Extraordinary General Meeting."

case of Allianz, being limited to less than twenty, with two thirds of employee representatives being non-German.

The adoption of the SE statute by the SCOR group, the leading French reinsurer, listed on both the Paris and New York stock exchanges, is an expression of the management's commitment to Europe and their wish to consolidate in the continent where the company's main activity takes place. The group made the decision to create three European companies directly, the first time this has been done when applying the 2001 regulation. So three operations had to be carried out at once: SCOR SA, a holding company under French law, was converted into SCOR SE which will replace it at the head of the group. It will be the first French SE listed on Eurolist and the NYSE, while the operational subsidiaries, SCOR Global Life ("life" reinsurance) and SCOR Global P&C ("non-life" reinsurance) will be formed through two mergers. The last case is an innovation, with SCOR Global P&C creating an SE through a merger by acquisition of two subsidiaries, one German and the other Italian. This is therefore a tripartite merger with all that that implies in terms of combined application of French, German and Italian law. Moreover, in application of the 2001 directive, the SCOR group, which employed 706 workers in Europe on 31 December 2005,[152] began the negotiation process with the SNB in July 2006, with the group hoping to finalise operations in June 2007.

It is not surprising to note that the motivation behind SCOR's actions is similar to that of any major company in general that has chosen the SE statute, and any company from the financial or insurance sector in particular. Their aims are to strengthen the group's transnational and European identity, to facilitate acquisition operations in Europe, to improve financial flexibility in the allocation of their capital, to simplify structures, to anticipate the solvency restrictions contained in the future directive "Solvability II" [153] and finally, to refocus supervisory control on the group while making optimum use of the "European passport" introduced by the directive of November 2005 on reinsurance.[154] The experience of the SCOR group has brought to light the special features, even certain flaws in the case of the French system, of the SE: dual legal control of the merger, in the hands of the lawyer and the registrar, uncertainty surrounding certain public formalities or in interpreting the legal content of the experts' report (in view of the different nuances in meaning between the 2001 regulation and the French commercial Code). The difficulties linked with the SE regulation are the same as those mentioned by the leaders of Allianz. They concern in

---

[152] SCOR annual report (2005).

[153] For more details:
http://ec.europa.eu/internal_market/insurance/solvency2/index_en.htm.

[154] Directive 2005/68/CE of the Council, of 16 November 2005, concerning reinsurance and amending Council directives 73/239/EEC and 92/49/EEC and also directives 98/78/CE and 2002/83/CE: this directive is an approach to bringing about harmonisation of the supervision of reinsurance activities within the European Union in order to achieve the mutual recognition of authorisations and prudential control systems, thereby making it possible to grant a single authorisation, valid throughout the Community, and apply the principle of supervision by the home member State.

particular the distributive application of different legal rules regarding cross-border mergers and the legal insecurity that results from the multiplicity of national referrals contained in the SE system.

The case of Nordea Bank deserves mention here, but not only because of the importance of this Scandinavian financial establishment, the largest bank in the Nordic countries. We must also mention the deadlocks caused when creating this SE, highlighting once again the need for harmonisation within the community in the area of commercial and financial law, if we truly want the notion of an internal market to become a reality.

In June 2003 [155] the Nordea AB administrative board announced the formation of an SE through a merger between the Swedish parent company, Nordea AB, and its Scandinavian subsidiaries, although to date this has not yet been finalised. The Nordea group is a major player in the financial services market in the Scandinavian and Baltic regions, operating in Norway, Sweden, Denmark, Poland, Finland and Luxembourg. Their project to create an SE has been planned to be carried out in three stages: Nordea AB, the parent company, must first acquire all Nordea Bank Finland's holdings in the Nordea Bank Denmark, Nordea Bank Norway and Nordea Bank Sweden subsidiaries. Second, the company must merge with Nordea Bank Sweden, and the last stage consists of a multipartite merger between the three remaining subsidiaries and the Swedish parent company in order to create a single European company: Nordea SE in Sweden.

Their aims are similar to those of all companies in the financial sector: to simplify the structure of the group (by making subsidiaries into branches); to improve operational efficiency; to remove the constraints linked with the juxtaposition of controls by different national supervisory bodies; to settle the question of transfer costs and VAT on intragroup operations; to reduce operational risks and optimise the allocation of capital by releasing funds for growth.

The interruption of the SE process by the Nordea group has a symbolic value. It illustrates the limitations of the internal market when the standards to be applied are not clearly harmonised. Nordea is currently faced with an unforeseeable obstacle related to national systems for guaranteeing deposits. The objective of the 1994 directive [156] "on deposit-guarantee schemes", while reinforcing the protection of depositors in case of insolvency on the part of their bank, was, however, to avoid any such competition. By making it compulsory for all

---

[155] See press release by Nordea of 19 June 2003, entitled: *Nordea reduces complexity in its legal structure by forming one European Company.*

[156] Directive 94/19/EC of the European Parliament and of the Council, of 30 May 1994, on deposit-guarantee schemes (*OJEU* L. 135 of 31 May 1994, p. 5-14), modified by directive 2005/1/EC of the European Parliament and Council of 9 March 2005 amending directives 73/239/EEC, 85/611/EEC, 91/675/EEC, 92/49/EEC and 93/6/EEC of the Council, also directives 94/19/EC, 98/78/EC, 2000/12/EC, 2001/34/EC, 2002/83/EC and 2002/87/EC, to organise a new structure for supervisory committees of financial services.

credit institutions to be affiliated to a deposit-guarantee scheme incorporating a minimal guaranteed sum and harmonising the responsibilities that weighed heavily on the subsidiaries of banks of other member States,[157] it was the intention of this directive to remove all restrictions on the freedom of the institution and the free provision of services.[158] However, the text makes no mention of SEs. And the supervisors in the countries where Nordea has subsidiaries (Norway, but also Denmark and Finland) concluded that the creation of Nordea SE, by absorbing its subsidiaries, had no effect on the deposits made by these subsidiaries in these countries. It was impossible to recover certain deposits from the "ex-subsidiaries" and a sufficiently large amount was involved for the bank to consider that this situation put them at a competitive disadvantage.[159] The European Commission has not been able to resolve the question posed by the bank on the setting up of a "vested rights clause" which would enable an SE formed through the merger of several banking institutions located in different member States to continue to apply – as an exemption – the local deposit-guarantee regimes until such time as European legislation has been entirely harmonised on this matter.[160]

This type of situation is inexcusable. The absence of any true coherence between deposit guarantee systems at European level will present more and more problems in a market that is much more open to the activities of banks and insurance companies than it was twenty years ago. Given this situation, it is for the member States to take the necessary measures so that the disparity between deposit-guarantee schemes does not lead to "restrictions that are disproportionate to the formation of a European company" according to one of the preambles to the 2001 regulation. This example also underlines the need for national supervisory bodies to move closer together in order to settle jointly and amicably any problems arising from cross-border operations. We will never create a united Europe if there is no mutual trust between countries and their public bodies.

The last example is the German chemical industry group BASF which announced on 27 February 2007 its intention to convert its parent company BASF AG, listed in Frankfurt, Berlin and New York, into an SE. With 179 subsidiaries throughout the world and 56,614 employees, the group still achieves almost half of its

---

[157] According to the text, branches, governed by the rules of their country of origin, are required, to avoid any imbalance, to reduce if necessary the amount of their guarantee to the same level as the credit institutions of the home State. In parallel, they may obtain complementary cover if the guarantee in their country of origin is less.

[158] CJCE, Federal Republic of Germany vs. European Parliament and Council of the European Union, 13 May 1997, Affair C-233/94 (Rec. 1997 p. I-02405).

[159] Press release by de Nordea on 23 June 2004: "*Pioneering the move towards a European Company*" and interview with Peter Schütze, Group Executive Management (*Source:* http://www.nfufinance.org/Resource.phx/plaza/nordea/13.htx).

[160] Press release by Nordea on 23 June 2004: "*Pioneering the move towards a European Company"*, cited above and response by Nordea on 31 March 2006: *Response to the Consultative Paper on Future Priorities for the Action Plan on Modernising Company Law and Enhancing Corporate Governance in the European Union.*

turnover in Europe, where it operates in twenty-four States and where 70 % of its staff work.

The reasons put forward by BASF AG are primarily political. By adopting a Pan-European status, it is the group's intention to manifest "a clear commitment to [its] principal market in Europe", as underlined by the president of the board. Of course their motives are also strategic. Rationalisation of structures, efficiency of company governance and strengthening of the European trade union partnership (by bringing non-German trade union representatives into the supervisory board) are their declared intentions. This conversion is scheduled to take a year to implement.

SEs in the face of national realities

According to the saying, the bottle is either half full or half empty, and similarly an appreciation of the true gains that the SE can bring depends on whether or not one believes it has a future. Those who have confidence in this future will emphasise the fact that the SE represents the beginnings of a real alternative to national public limited liability companies by offering a harmonised framework for cross-border management. The sceptics or those who are disappointed will consider, on the contrary, that the 2001 regulation has missed its chance by producing not one community legal form, but as many SEs as there are States. The reality lies somewhere between the two. The SE can be defined as an entity of the "28th regime", reappropriated by the various national laws. This is why it is of interest to identify the context which is most favourable to the SE, and by examining all the facts try and discover what could encourage a company today to launch itself into this adventure, or on the contrary deter it from taking such a step.

Why register as an SE in one country rather than another?

The attitude of the States

Analysis of such a small sample as the 70 or so SEs that have registered to date cannot provide any definitive conclusions. For all that, the fact that Germany is the main host country for SEs must give us cause for reflection. What are the reasons for this phenomenon? There are several possible interpretations and all contain part of the truth. First of all, the German law covering incorporation, dated

22 December 2004, makes the "German" SE more attractive in respect of the common law relating to the German public limited liability company. Moreover, Germany is the only country in Europe where there has been keen interest in the subject, albeit from a small minority. During a visit to Germany, the rapporteur was able to verify this: lawyers and heads of companies are for the most part familiar with the SE. The other interpretation would be that German company law has become too rigid and restrictive, and limited companies see the SE as a means of relaxing this framework somewhat. It cannot be denied that the SE allows German companies a degree of diversification in modes of governance which was not available to them before. In preference to the traditional two-tier structure, the SE statute now makes single-tier governance a possibility (Man Diesel SE has opted for a single-tier system). Likewise, it is no secret that German companies believe it can only be to their advantage to be able to adapt codetermination by reducing the number of members on the supervisory or administrative boards and integrating trade unionists from other member States. Final explanation: the 2001 regulation was inspired by German company law. Indeed, the original SE – an autonomous community instrument – was nothing less than an exact copy of the model company as defined in Rhine capitalism.

In the United Kingdom, the SE does not arouse the same degree of interest, far from it. It is considered by most of those who have studied the statute as being too much influenced by the civil law tradition. The *Companies Act* offers British companies a much more assertive statutory freedom than public limited liability companies in the countries of continental Europe. The United Kingdom applies a "registered office" system enabling companies to be registered in that country, and hence to apply its law, yet without necessarily having their central administration or even their operational activities there. The SE statute on the other hand, provides that the registration corresponds to the company's "real seat", in other words the place notably where management and shareholders hold their meetings. Nor does British commercial law share certain concepts adopted by the SE such as the universal transfer of assets in case of cross-border merger.[161] In short, the inspiration behind the SE is thought of as "continental" and not much in harmony with the flexibility of the *Common Law.* A survey organised by a law firm in London in October 2004 revealed that 12 % of the British companies interviewed might opt for SE status, and only half of them were aware of the existence of any community legislation on the subject.[162] As part of its information campaign for British companies, the Department of Trade and Industry's website has not helped a great deal to make the SE more accessible with its explanatory brochure on how to form an SE in the United Kingdom, a very learned booklet.

France falls somewhere in the middle. Companies are aware of the subject and generally see the advantage of a company having a community statute, along the lines of the "28th regime". However, the 2001 regulation has floundered in its

[161] See the example of Barclays Bank (see Chapter 2).

[162] http://www.law-now.com/law-now/2004: surveyrevealsdoubts.htm.

excessive complexity. Today, all eyes are looking towards the future to the European private company statute, intended to meet the needs of SMEs that are developing activities in Europe. For all that, unlisted public limited liability companies, by opting for the SE statute, can have a margin of autonomy that is almost comparable to that of the simplified joint stock company. No unlisted limited company, in France or elsewhere in Europe, can freely dictate, as can the "French" SE, relations between its shareholders in order to control its capital. According to the relevant statutes, an SE that does not go public can in fact, as has been shown above, under the terms of the French Commercial Code, subject all share transfers to restrictions on their free marketability, determine that a shareholder be obliged to give up their shares, decide to suspend the pecuniary rights of a corporate shareholder that has undergone a change of management, or even exclude it, or even impose the same suspension and exclusion when such a change is the result of a merger, a split or a dissolution. For obvious reasons, an SE that goes public does not enjoy the same statutory freedom, but its functioning is certainly no more restricted than that of the French limited liability company going public, which it resembles very closely.

Scepticism can sometimes be the expression of expectation or of prudence. The "Delaware effect" [163] could well work to the advantage of any country that proves to be the one most open to this type of company, and where the banks and law firms will be able to offer specialist advice. Paradoxically, community law is urging States, within pre-defined boundaries, to compete in terms of their national laws. It is at the edges, in the small areas of freedom left to the national legislator, that each country can differentiate itself and build a reputation that will enable it to attract economic and commercial activities. Tax law and tax rates are attraction factors which probably count more for companies than company law. However the influence of company law and the legal expertise surrounding it must not be ignored. Otherwise, there would be no way to account for the "Delaware effect", which persuades a very large percentage of American companies to want to register in this American state.

Competition between national laws

As has just been shown, community law leads to a reappraisal of national laws. On the one hand, it allows national legislations complete freedom, because it does not govern everything and there is not always total harmonisation. On the other hand, in an open area such as the internal market, States must appear welcoming to economic activities that will create wealth and employment. Some maintain that by encouraging competition between national laws, community law will experience a levelling down. However, in our opinion it has an essentially protective effect. With no compulsory rule for all, it is in fact the "lowest bidder" in terms of protection of rights that will probably prevail.

[163] The "Delaware effect" describes the effect of attraction exerted by the State which has the most favourable legislation to welcome newly formed companies. See in particular "Delaware's Competition" by Mark J. Roe *in Harvard Law Review*, Vol. 117, p. 588, 2003.

The SE statute is an interesting framework with which to decipher the way in which States are meeting this challenge. Thus, French SE law reveals a lot about the tensions that exist in that country between the wish to give economic actors the flexibility required to create alliances in the marketplace and the desire to limit mobility and block departures abroad. France is by no means the only country in Europe to be faced with this dilemma. This complex problem, which is not always easy to reconcile with the idea of an integrated economic area, lies at the heart of the SE statute. To sum up the French approach to the SE, one could say that it is strongly dissuaded from transferring its registered office outside France and is in fact encouraged to develop cross-border strategies through merger operations.

- Transferring the registered office

The French Commercial Code has decided to exercise almost all the options which, in the context of the regulation, give it the strictest controls over any transfer of registered office outside France. Thus France has exercised the option authorising States to provide specific protection for creditors who are not bondholders. These are mainly clients, suppliers, banks or tax administration. They can contest this and, if the judge so decides obtain reimbursement of the debt or the restitution of safeguards. Germany has similar provisions by allowing creditors to ask for restitution of guarantees, but on condition that they are in a position to prove "in a credible manner" that the repayment of their debts is placed at risk by the projected transfer. Most countries similarly allow creditors the restitution of guarantees and extend this protection to debts incurred after the publication of the transfer project, but before the transfer itself takes place. France has also taken up this option.

A minority of countries, on the other hand, have found it necessary to organise specific protection for minority shareholders in case of a transfer of registered office. In most countries, this protection is assured under the conditions of the national common law. Spain is practically the only State to have exercised this option which gives extra rights to block minority shareholders in four situations described by the 2001 regulation: transfer of the registered office, merger, creation of an SE holding company, or conversion to an SE. Apart from the case of conversion, Germany recognises the need for "equitable compensation" for minority shareholders opposed to the transfer operation, and in Austria this compensation is limited to transfer of registered office and merger. Moreover, in Austria shareholders must explain their opposition in writing. The French Commercial Code, for its part, defines an entirely new regime for redeeming shares, thus enabling shareholders opposed to the transfer to leave the SE. Minority shareholder associations assert that in fact the consequence of the transfer is a change in applicable law. For many companies, on the other hand, this option is enough to quash any desire to transfer their registered office because of the costs incurred by this buy up obligation (up to one third of the company's shares). In their opinion, this is tantamount to reinstating the requirement of obtaining the unanimous agreement of the shareholders (as in the common law).

Apart from the specific rights accorded to shareholders who oppose a transfer of registered office, France reserves a right of opposition to certain public

authorities. This right of opposition on "grounds of public interest", which some assimilate to a right of veto and for which the concrete motives are not specified, is also recognised in Belgium and the United Kingdom (Treasury) and in Spain (government after proposal by the Ministry of Justice or the autonomous community concerned). The United Kingdom, a liberal country, is very careful to ensure, as community jurisprudence shows, that a transfer of registered office is not motivated solely by tax reasons. By applying the regulation that allows member States to impose new formalities in case of transfer of registered office, the United Kingdom has also set up an original procedure. Shareholders and each of the known creditors must be individually notified of the right to examine the transfer project and the report of the supervisory or administrative board at the registered office, and to obtain a free copy on demand. Moreover, every invoice, order or business letter issued by the SE must contain a reference to the proposed transfer, and specify to which member State the company is transferring. These prescriptions exist only in the United Kingdom, apparently.

Few countries have exercised the option consisting of also granting financial regulators a right of opposition. Spain awarded this right to the supervisory authority in the financial sector, and in Austria, this right exists in the insurance sector. In France, the AMF, the CECEI and the CEA have such a right of opposition in relation to their own sectors of activity.

- Cross-border mergers

French law is clearly more favourable to cross-border mergers. The public authorities – Procureur of the Republique, AMF, CECEI and CEA – can certainly oppose a merger for reasons of public interest, under the same conditions as apply to the transfer of a registered office. However, France is not in isolation here. Belgium, Spain, the United Kingdom, also the Netherlands have planned a means for ministerial or regional authorities (for Spain) to state their opposition to the participation of a commercial registered company in their country when an SE is created by merger.

In contrast to the transfer of the registered office, mergers in France cannot be opposed by minority shareholders. Nor has this option been exercised for the creation of an SE holding company. In this matter France is more open to merger operations than Spain, or even Germany which recognises the shareholders' right to "equitable compensation". Moreover, in line with what is provided for in the national law, the minority shareholders of an SE registered in Germany can question the share exchange ratio in the three months following the registration of a merger, and obtain cash compensation if the ratio is "unjust". This power to protest is extended to the creation of an SE holding company. Reserved for shareholders of the company that is absorbed through a cross-border merger, it can only have effect if the other participating companies (whose national law does not include such a procedure) agree to recognise it, which probably does not happen often as these provisions seem to be limited to German law. Through this principle of reciprocity established by the 2001

regulation [164] (and which does not exist in national merger law), German companies can eliminate any risk from procedures that are expedited after a merger is finalised.

The protection of non-bondholding creditors can also be the subject of specific provisions. In most States, they have the right to demand the restitution of guarantees, as in Germany, for example, or even oppose the merger, as in the Netherlands. This is also the case in France. The opposition of these creditors, which does not have the effect of halting the merger operations, is presented to the trade tribunal which can order the repayment of the debt or the restitution of guarantees.

- Participation of companies from a third country in the creation of an SE

The creation of an SE theoretically involves companies registered within the Community. However, the 2001 regulation allows States to authorise companies from other countries to participate in the creation of an SE. The attitude of the different countries varies considerably here. The United Kingdom, Belgium and Spain, for example, have taken up this option and companies from outside countries can thus participate in the creation of SEs registered in these three countries. Other countries have decided not to exercise this option, considering that the SE could then become a "Trojan horse" able to take control of certain activities without sufficient transparency. Thus Germany, Austria and France, for example, have judged it preferable, as a precaution, not to offer this possibility. This decision once again brings to attention the question of the impenetrability of some of the means of acquiring a stake in a company. Now, especially, when other countries are giving all companies from outside countries the right to participate in the creation of an SE, we should perhaps question its true effectiveness, and even its advisability.

- The functioning of the SE

The scope for statutory autonomy recognised in France for unlisted SEs appears to have no equivalent in Europe. However, apart from these provisions concerning only the unlisted SEs, and certain minor easings of restrictions in the functioning of administration and supervisory bodies allowed by the 2001 regulation for listed SEs, the functioning of the SE "in the French style" is not very different from that of traditional public limited liability companies. Its main advantage derives from the fact that it is governed by relatively well harmonised rules, while the public limited liability company statute varies greatly from one member State to another.

---

[164] Article 25.3 of the regulation.

Why opt for SE status?

Problems

While the idea of an SE finds popular unanimity, at least in France, opinions gathered in particular from the major French groups showed to what extent there is still a long way to go to strengthen its attractiveness. The absence of a fiscal section is often raised, but no one has any illusions on this subject. Even the most ambitious version of the SE statute has never included anything but the most modest fiscal proposals (see above). Fiscal sovereignty is a power that, more than any other, States find difficult to share. For the rapporteur, the current period, curiously, is definitely more favourable to a certain degree of fiscal harmonisation. Many political figures at European level are now becoming aware of what the incoherence of the present situation is costing companies. This report presents certain suggestions in order to speed up the rhythm of changes that are indispensable for a tax system at European level.

The rapporteur has also identified four major types of problem for companies in relation to the SE statute derived from the 2001 regulation. These are: the absence of a totally harmonised statute, restrictions on the possibilities of creating an SE, insufficient mobility, contrary to the declared aim, and finally, uncertainties linked with the public authorities' right of opposition.

- The absence of a totally harmonised statute

The heterogeneity of the laws of conversion and adaptation in community texts on the SE is the direct consequence of the multiplicity of options offered to the States and references to national laws. The advantage of having a community legal structure is thus much weakened, which conflicts with the desired objectives of simplification and cost savings. Why adopt the SE statute when the creation of a European company is complex and when ultimately governance is not totally harmonised at community level?

The approach adopted by the SE statute seems full of paradoxes. On the one hand, in terms of company law, it does not fulfil its stated aim, which was that European companies should be able to use the European economic area as their domestic market. Instead they have to submit to national rules which often vary widely. On the other hand, the SE statute contributes *de facto* to a harmonisation of the social aspects. The application of the "Before/After" principle may in certain cases result in the setting up of a system – such as German codetermination– which is foreign to national practices and traditions.

- Restrictions on the possibilities of creating an SE

There has never been any doubt that the European company format is aimed at companies that are involved in European activities and have a European

project. Nevertheless, the conditions laid down for the creation of an SE seem too restrictive. The reason why there is a block on creating an SE *ex nihilo* is not always understood, especially when even a European cooperative company can be created directly by founder members who must simply be of different European nationalities.

Even more incoherent seems to be the rule forbidding a joint stock company other than a public limited liability company to convert to an SE. Given the freedom accorded to the unlisted SE to organise relations between shareholders, if a simplified joint stock company had the possibility of converting to an SE, without having to first go through the stage of converting to a public limited liability company, this would surely attract a large number of these companies.

Lastly, the conditions of foreign origin required to convert to an SE seem poorly adapted to the realities of a company. Such a conversion is only possible if the company concerned has existed for two years and has a subsidiary in a different member State from where the registered office is located. Thus this would preclude a group, for example, from converting one of its subsidiaries into an SE if this subsidiary did not have a sub-subsidiary in a State other than its own.

- Insufficient mobility in the SE

The French system is based on the theory of the “real seat”. Thus French companies wanting to opt for the SE statute, which also uses this system, do not feel out of place. This is not the case for companies from other countries such as the United Kingdom, the Netherlands or Ireland, who have a different system, the “registered office” which enables companies to have their headquarters wherever they see fit, independently of the place where they are registered.

French law has in no way relaxed the “real seat” system, even though many considered it to be out of date and despite its being challenged by community jurisprudence. Not a bit of it. France insists that SEs have their central administration and their registered office “in the same place” (same town? same urbanised area?) whereas there is no such obligation for public limited liability companies.

Lastly, the constraints associated with the procedure for transferring the registered office shed doubts over the advantages to be gained from the SE format. By definition, the adoption of this community status is the key which opens all doors for companies wanting to extend across the entire continent. Transferring the registered office does not mean moving a company’s activities, but changing the national law under whose jurisdiction they fall and usually also changing the site of their central administration activities. It is a decision to be taken with full knowledge of the facts, now by the majority of shareholders for the SEs, instead of unanimity as is the case for the public limited liability companies [165]. However, the obstacles put in the way of

---

[165] While awaiting the adoption of the 14th directive on the cross-border transfer of the registered office of limited liability companies.

a French SE sometimes make their mobility seem purely hypothetical. The right of shareholders opposed to the transfer to ask for the immediate buy back of their shares may ultimately prove to be a nullifying factor.

Cross-border mergers do not give minority shareholders this buy back right under French law, but this time it is the lack of precision of the 2001 regulation on the ability of registered SEs to operate merger-absorptions on the basis of this text which may be a source of complication.

- Public authorities' right of opposition

Last of all, the right of opposition granted to public authorities in case of a merger or transfer of registered office may be a sword of Damocles hanging over the process, given the vague nature of the "reasons of public interest" on which such opposition could be based.

Advantages

Supporting the idea of granting a legal entity like a company the status of citizenship, enabling it to form a community of men and women from several European countries is doubtless the expression of true European convictions. This is not all, however. The SE is an operational tool. As proof of this, if the statute had only disadvantages, then no company would choose it or would pride themselves on such a choice. However, we find more and more often that the executive officers of groups opting for the SE statute now justify their action publicly by stressing the advantages that it brings: European label, cross-border cooperation, mobility, simplification of structures, harmonising modes of governance, social project, European marketing, not to mention specific motivations in certain sectors, like finance and insurance, or project funding.

- The dynamics of the European label

It was the 2001 regulation that stipulated that European companies must add the letters "SE" before or after their corporate name. These letters are simply a sign of European membership and have only symbolic and political value. They are a label which serves as a passport. Fresenius, for example, made it known that they intend to use it to stress their identity as a European company of German origin. The European label can be attractive for SMEs wanting to settle in Central or Eastern Europe. The image effect is not only important in relation to clients, but also to investors and employees. The European label works like a cement, especially when companies have employees from all over Europe. Lastly, when an SE is created out of a rapprochement between companies with strong but different national identities, the SE symbol is the point of consensus thus avoiding the need to opt for one or the other of the States of origin.

- Cross-border cooperation

Facilitating cross-border operations is the major advantage which prompts companies to form an SE. In future perhaps, the conversion of the 2005 directive on “cross-border mergers of limited liability companies”, or the finalisation of the 14th draft directive on “the cross-border transfer of the registered office of limited liability companies” will make the hitherto unpublished provisions of the 2001 regulation seem very banal. As it stands, however, these provisions give the SE a mobility enjoyed by no other company, in any member State. Forming a cross-border merger with a company that was not 100 % controlled was theoretically possible, yet *de facto* excluded. Since the creation of Allianz SE, we know that it is possible. A merger has the advantage, over a public acquisition offer, of gaining total control of the acquired company. And without the risks involved in a bid. The degree of security in a merger, based as it is on a freely entered into merger contract, is in fact much greater. Moreover, the merging of assets results in the company as a legal and economic entity which would not be possible with a spin-off.[166]

To illustrate the added value that the ability to operate cross-border mergers can produce, simply look at the complexity of cross-border cooperation mechanisms used until now due to the impossibility in practical terms of carrying out cross-border mergers.

To meet their development needs companies had to resort to a variety of mechanisms such as lease management agreements or company management contracts,[167] equalising agreements,[168] the creation of common subsidiaries or holding companies controlled equally,[169] the technique of joint shares [170] or the formation of major industrial alliances.[171]

[166] This refers only to a branch of a company’s activities and the contributing company survives the operation, as only its assets are affected. The added branch is simply replaced by shares of the recipient company issued from an increase in capital.

[167] The company management contract is one whereby a company owning an economic group hands over management to a specialised company while continuing to bear the risks attached to the business, in this respect it differs from the lease management contract.

[168] By such agreements, companies with identical regulations and accounting periods share out their profits and/or losses. The agreement may take the form of equal dividend distributions, a pooling of profits or a pooling of profit-generating activities.

[169] The integrated pooling of activities and profits can be achieved by creating two similar legal entities, ensuring that they are managed in the same way by equal composition of the management boards. The equal or identical management boards can be set up either in the parent companies of the groups concerned or in the subsidiaries.

Apart from the legal difficulties associated with setting up such arrangements, they could also lead to fiscal losses linked with possible cross-border movements of dividends and profits, and could in some cases also create a divergence between the company structure and the management structure. Finally, they could distort the transparency of the group structures.

- Mobility

The transfer of the registered office is a mobility factor that an SE like Elcoteq has already put into practice. This mobility should not be seen as necessarily prejudicial to a company. Such a transfer is too often wrongly confused with the relocation of activities. However, it can be useful for European companies that have to adapt to the demands of the market, in whatever European country. It can be an interesting solution for SMEs wanting to establish wherever their market is most promising in Europe. Also, for the same reasons mentioned in relation to the SE acronym, a company born from a merger between two enterprises with very strong national identities may find it convenient to locate their main office in a "neutral" State and thus remove an obstacle which, as some groups have admitted, has prevented some mergers from succeeding.

- Simplification of structures

The simplification of structures is a goal that is very often mentioned. The SE statute incorporates some interesting potential and innovative options. There may be several reasons behind this desire for simplification. They may be financial (cost savings), operational (centralise decision-making), legal (strengthen legal security by unifying structures into subsidiaries or one-person SE subsidiaries) or strategic (flexibility to adapt structures). In fact the SE statute offers a diversity of formats, according to the outlook and identity of the company.

---

[170] Such a joint agreement was set up for the construction management of the Channel tunnel (France-Manche S.A., a French company, and The Channel Tunnel Group Limited, a British company, created a combined subsidiary, Eurotunnel, in the form of an undeclared partnership; the respective parent companies of these companies, Eurotunnel S.A. and Eurotunnel Plc, have administrators who must be members of each administrative board and thus have a common board and common committees; shares are joint shares, that is they form indivisible units, quoted in Paris, London and Brussels; the statutes stipulate that securities cannot be issued except by creating a unit and that the transfer of shares of one company cannot be carried out unless the assignee also holds shares in the other company; moreover, there are rules governing the exercising of preferential rights, share rights, etc.).

[171] The alliance signed 1999 between Renault and Nissan stated that the two groups have cross-shareholdings and a consultation body, the Global Alliance Committee (GAC). The alliance recognised the strategic coordination powers of Renault Nissan B.V., a 50/50 joint venture company located in a neutral country, the Netherlands. The strategic coordination powers of Renault Nissan B.V. in relation to Nissan were exercised by means of a management contract, which authorised the partial or total delegation of the powers of one social body to a third party, and in relation to Renault via a 100 % owned simplified joint stock company, dealing with Renault's industrial activity and whose statutes stated that decisions concerning strategic coordination were in the competence of Renault Nissan B.V. only.

- Harmonisation of modes of governance

The simplification of structures to harmonise rules of governance can be achieved by converting subsidiaries into branches (this is Allianz's intention), which unifies the legal and economic aspects of company management.

Other companies, on the other hand, may wish to retain subsidiaries in different countries for a variety of reasons: to acclimatize the company to the country while still keeping their own identity, to continue to motivate the heads of the subsidiary in terms of performance, or again, to avoid responsibility moving back up the chain when it may be useful to keep decision-making autonomous at each operational level, especially in order to contain disputes. In this respect also, the SE offers some interesting possibilities that do not exist in public limited liability company law in France.

Even when firmly rooted in the national system of the State where it has its registered office, the SE has the advantage of a more complete legal harmonisation than that of other company types. The management of a group can operate in different member States via common standards that the SE offers. Thus it is possible, in whatever countries the SEs are established, to use a single-tier or two-tier system of governance for all the SEs in the group or to designate across the board the president of the administrative or supervisory bodies. Groups therefore now have at their disposal a unique form of company which can be used in all member States, which offers a structural identity, a source of transparency and simplified governance.

- SE holding company

The example of the SE holding company is illustrative. The principles that govern the provisions and the constitution of the holding company, as fixed by the 2001 regulation, are identical whatever the nationality of the initiating companies. This greatly simplifies the process. Moreover, SE holding companies in France, which now have an advantageous tax regime, enjoy an extremely attractive margin of statutory autonomy if they do not call up their savings capital.

This advantage exists when common subsidiaries are created or when the group intends to set up a network of single-person subsidiaries.

- Single-person subsidiaries

Groups of companies can adopt a strategy to dispose of subsidiary companies whose capital they hold in its entirety. This is an advantage in that it can simplify the organisation of these groups. In certain member States such as France where the national law requires a public limited liability company to have more than one shareholder, the SE "single-person" subsidiary can have only a single shareholder. From now on it is no longer necessary for the administrators and the members of the supervisory board to own shares in the company. It is the parent company that has the

powers devolved to the general assembly. In principle, whatever legislation is applicable to the companies in each of the States concerned, a group can now be organised in Europe in the form of an SE holding company at the head of single-person SE subsidiaries. This possibility under the 2001 regulation has apparently not yet been concretised, but clearly this can be envisaged in the future.

- Combined subsidiaries

The combined SE subsidiary, an alternative to the complex mechanisms already described, is a promising tool for cooperation between legal entities in pursuit of a common objective. The creation of "joint-ventures" is another opportunity afforded by the SE.

- Social project

The social aspect of the SE is sometimes seen as an element of great complexity and ultimately a factor in the delays incurred in the process of financial and legal operations. The term of six months extendible for a further six months for SNB negotiations, to which are added delays involved in the prior designation of the members in each State concerned, can indeed result in the normal time required to finalise these operations (such as a merger) being exceeded.

However, this social project which mobilises employees from different units within a group is also beneficial for the company. Company agreements are usually drawn up in a national context, applying rules that are strictly national. In the case of the SE and in line with provisions relating to the institution of a European Works Council, the employee representatives from all countries where the future SE will have establishments have the chance to meet around a table to confer with the management on the social organisation of the company. In this respect, the SE is the focal point of a social project founded on consultation and a contract between social partners. An ideal way to strengthen the mood of solidarity and of belonging to a European group.

- European marketing and the sale of common products and services

In the context of their European strategy, many companies hope to be able to supply standardised products and services, and thus improve the quality/prix ratio. With the harmonisation of the rules for manufacture and safety of many industrial products, not to mention agricultural products, the free movement of goods is largely ensured. The situation is different, however, in the case of services. Service provision from one country to another in Europe raises many further difficulties, despite the fundamental principle of free provision of services recognised by article 49 of the treaty. These problems are clearly demonstrated in the controversy surrounding

the "Services" directive which was intended to remove barriers to the development of service activities between member States, especially with regard to SMEs [172].

In the first place, all financial services were excluded from the scope of this directive (banking, credit, insurance, reinsurance, occupational or personal pensions, investment funds, etc.). These activities are the subject of specific community legislation based on two principles: mutual recognition and the "European passport" enabling financial service operators established legally in one member State to establish themselves or provide their services in other member States, without prior authorisation [173]. Nevertheless, the disparity between legislations, especially regarding consumer protection or fiscal matters, prevents any truly harmonised distribution of financial products throughout Europe. Hence the attempts to devise a system for banking or insurance products at European level which, like the SE, would come under the "28th regime" [174]. The SE does not provide a solution to the absence of harmonisation of the rules on banking and insurance products. However, it is clear that the European label companies use to promote the European image of their products is a substantial incentive to search for such solutions. Indeed, in line with his company's new statute, the President of Allianz SE has announced the creation of a range of pan-European pension products [175].

- Specific advantages in the financial and insurance sector

Remedying the fragmented supervisory systems in the different member States is an important motive for choosing the SE statute, as has been shown, for instance, in the case of the SCOR group or again with Allianz. By restricting the number of subsidiaries there is centralisation at the level of the parent company, both in supervision and in the allocation of equity capital (see *infra*).

Lastly, as a vehicle for cross-border mergers, the SE can help consolidate the financial industry in Europe. Such consolidation, which is presently in its early stages, is considered necessary in order to face the very keen international competition in this sector.

---

[172] This directive, very much amended compared with the initial Commission proposal drawn up at the instigation of Commissioner Frits Bolkestein, was adopted by the European Parliament and the Council, at the end of 2006. Directive 2006/123/EC of 12 December 2006.

[173] In the banking sector and financial conglomerates, directive 2000/12/EC of 20 March 2000 concerning the taking up and the pursuit of the business of credit institutions codifies the directives by combining them into a single text.

[174] The association "Eurofi", a *think tank* based in Paris, has suggested the creation of a pan-European retirement savings product; http:/www.eurofi.net.

[175] Press release by Allianz SE-Diekmann 16 October 2006:
http://www.allianz.com/en/allianz_group/press_center/news_dossiers/allianz_se/news2.html.

- Effectiveness of the SE in helping to fund cross-border projects

An SE that goes public can create an instrument enabling a group to prepare for admission to the Stock Exchange, or for admission of part of its activities. For example, an SE can be created for this purpose by merging specific activities around the activity of national bodies.

The SE is also potentially a very interesting tool to help fund cross-border projects. Until now, the only European structure for hosting this type of project was the EEIG, but its ability to act is limited. The first example of an SE to be used for funding a cross-border project was created on 16 December 2004 at the instigation of the European Commission. It resulted from the conversion of the company Galleria Di Base del Brenner-Brenner Basistunnel BBT. Its aim is to build a fifty-kilometre rail tunnel on the main Berlin-Palermo railway line. This new SE, registered in Austria, is the first to have been created with the aim of funding cross-border infrastructure, but it is certainly not the last.

In conclusion, the experience of the companies that have become SEs or are in the process of doing so is already sufficiently rich and varied to allow us to assess the future potential and the drawbacks of this statute, and this is confirmed by the views expressed by companies that have decided not to opt for this formula:

1) In terms of attractiveness, the French SE does have some advantages. It is based on modes of governance – single-tier or two-tier – that are already known in France. But in addition the unlisted SE in particular has a statutory freedom which makes it especially attractive. Generally speaking, French law relating to the SE is considerably more open to cross-border operations such as mergers, while the provisions for the transfer of a company's registered office are clearly meant to be dissuasive.

2) The reasons why companies do not want to take the plunge into becoming an SE are linked with a fear of having to integrate a foreign social system, organised differently from their own law and practices (codetermination), even though this is hardly likely. Also, the absence of an SE statute that is truly uniform throughout Europe is to be regretted.

3) Just as the reservations felt about the SE are shared by all the companies we consulted, there is also a strong convergence of positive motivation for the SE. The SE as a means of simplifying and strengthening the legal economic and social coherence of major groups, or as a tool to fi-

nance cross-border projects, these are two particularly promising routes to be explored.

4) The quality of the SE that is most appreciated is the mobility it allows and in particular its ability to facilitate the process of cross-border mergers.

Chapter 5

Proposals for the next step forward

In early 2007, Ireland became the latest country to update its statutory framework to encompass the European Company, whilst, at the time of this writing, Bulgaria and Romania, which acceded to the European Union on 1st January 2007, were fully committed to following Ireland's example. At this early stage, there can certainly be no question of making a conclusive assessment of the reform, and that is not the purpose of this report. It remains nevertheless entirely possible to envisage the impact of the, "European Company," especially in terms of opening new horizons. The French Minister of Justice, Mr Pascal Clement, has expressed his desire to see further reflection on the SE as an essential part of the driving force behind France's influence on European policy. France's upcoming presidency of the European Union in the second half of 2008 represents an opportunity in this respect, since, pursuant to Article 69 of the 2001 Regulation, the Commission is required to draw up "a report to the Council and to the European Parliament concerning the application of the Regulation," by 2009. Accordingly, under the cited article, the Commission is charged with formulating, "appropriate proposals for amendments," showing that Community law had, from the very outset, contemplated the need for changes and reforms.

Article 69 of the Regulation [176] sets forth the principal questions that the Commission is specifically requested to examine in its 2009 report, those being the four points of the Article:

a) Whether or not to uphold the theory of the "actual office," or whether the, "location of an SE's head office and registered office in different Member States," is allowable;

b) Broadening the concept of mergers in order, "to admit other types of merger," than those defined by the Regulation, which would seem to target the partial capital contributions and demergers;

[176]. Reproduced in Chapter 1 of the present report.

c) The revision of the jurisdiction clauses set forth by the 2001 Regulation in the case of transfer of the office of the SE, when an action is contentious, instituted after the transfer, concerns litigation arising prior thereto;

d) The granting to SE's by national legislation of the possibility to include within their Statutes provisions, "which deviate from or are complementary to these laws, even when such provisions would not be authorised in the statutes of a public limited-liability company having its registered office in the Member State." In other words, the opportunity to heighten the statutory liberty of SE's.

It is thus in this context that the proposals of the present report are intended. They have a three-prong thrust:

First, and far from being doomed to abandonment, the structure of the SE, inspired by the "28th system," is particularly promising and is worthy of being improved in line with the objectives of the strategy of Lisbon set forth in the year 2000 for reinforcing European competitiveness and social cohesion alike;

Second, if indeed the Statute of the SE bears the mark of its laborious gestation and the concessions that had to be made in order to avoid offending national susceptibilities, with an exceptional number of referrals to national rights and options leaving States the liberty to apply or not certain of its provisions, this Statute nevertheless offers a framework that is partially harmonised;

Ultimately and above all, the European Company is an opportunity, for, without obliging the Member States to substantially change their commercial law, it opens new horizons for a true common European space for economic development and social cohesion.

It is thus in this spirit that the report suggests improving and clarifying certain points of the Regulation of 2001. It intends to lay the necessary groundwork for adapting taxation to the calling of companies destined, as are the SE's, to extend their activities throughout Europe.

The very structure of the Regulation of 2001 is certainly not the exemplary model that might inspire the European Commission for its programme geared to "Better Regulation." The Regulation is part of this type of "variable geometry," Community legislation which is incorporated within the Directive of 21 April 2004 on takeovers and of which the application is perplexing at best. The report does like to fancy itself as realistic, however. Thus, instead of a radical revision of the Regulation of 2001, improvement was proposed. The proposals are centred upon a few major subjects such as the creation of the SE, the means at its disposal for entering into cross-border cooperation, its mobility within the European Economic Area, its margin of statutory autonomy and finally the imperative of transparency leading to proposing the institution of a European Trade and Companies Register.

Creation of the SE

It is not normal that so many obstacles should hinder any possibilities of creating an SE. If this social form is so interesting, why then set such restrictive conditions? The combination of prohibiting the creation *ex nihilo* and the requirements of extraneousness ultimately result in, "disproportionate restrictions on the formation of a European company," relative to the purpose, i.e., that the creation of an SE well corresponds to a European project.

The choice comes down to two different methods:

The first one consists in bringing the system of the SE into alignment with that of the European cooperative society and to consequently authorize the creation *ex nihilo* of an SE by simply requiring that its founders – natural or legal persons – originate from different Member States;

The second method is to limit oneself to allowing any company with share capital – regardless of its legal structure – but having had a presence in other Member States, to create an SE.

This latter method, adopted here, is more restrictive than the first. Still, it is clear that the creation of an SE must reflect the realization of a European development project that is already under way.

Without providing for an *ex nihilo* creation, Article 2 of the Regulation should thus extend the possibilities for creating an SE to any company with share capital, as in the case of transformation of the subsidiary of a group:

- on the one hand, any company with share capital (in France, an SARL or an SAS, for example) may be converted into an SE if it has had a subsidiary in another European country for over one year (instead of two). It must also be able to participate in the constitution of an SE by merger, of an SE holding or of an SE subsidiary, if at least two of the companies concerned come under the law of two different Member States without needing, in this latter case, to have subsidiaries. It must be clearly emphasized that a natural person may participate in the creation of an SE;

- on the other hand, any company with share capital having had for more than one year at least one subsidiary in a different Member State must be able to transform any of its subsidiaries whatsoever into an SE subsidiary or an SE holding, without that the subsidiary thus constituted in SE should possess itself a sub-subsidiary in another Member State.

Cross-border cooperation

This is the very, "core trade," of the European Company. Its status may only be justified by the pursuit of cross-border strategies. It is thus important to quickly clarify in the Regulation the scope of the means of action available to it for this purpose. A variety of questions of variable importance must be dealt with.

Is it thus suitable, in response to the question asked by Article 69 b) of the Regulation of 2001, to broaden the definition of the merger to other, "types of merger?" Indeed, the status of the SE views the only two types of mergers mentioned by the Directive of 9 October 1975 on national mergers: the merger-absorption on the one hand, and the merger by constitution of a new company on the other. For there are other ways of approximation for forming a European Company, such as demergers and partial capital contributions, or other similar methods to merger in Member States other than France, in particular in the United-Kingdom. These methods must effectively be able to provide for the creation of a European Company. For example, a company of another Member State would be able to contribute certain elements of its capital to a French company in the constitution of an SE registered en France. **Article 17 paragraph 2 of the Regulation should thus be modified for broadening the definition of the merger "to other types of merger."**

Furthermore, and although it is within the logic of the SE to be able to carry out cross-border mergers, one must recognize a certain opacity surrounding the Regulation. Its teleological interpretation leads one to believe that an SE may combine with another company (SE or not) of another Member State by merger-absorption. What point is there then in requiring a European Company who intends to merge with another to make the detour of merging by forming a new company? The said procedure would ultimately have the same result, with the added burden of increased cost and complexity of which neither the company itself nor its stockholders nor its creditors would benefit. Quite the contrary. A strictly literal interpretation would lead one to wonder if this is indeed a real possibility, while previous versions of the Regulation of 2001 were explicit in this regard. This uncertainty requires an immediate remedy. **It is simply a question of revising the clear provisions that figured in the statute of the SE in 1970, by inserting yet another new Title III. It would allow SE's to merge with the company of another Member State such as an SE or a PC, by also including this time companies with share capital of the SARL or SAS type in France. Such merger possibilities open to SE's would be based as much on the Regulation as the Directive regarding the social mechanism of the SE.**

Finally, certain difficulties inherent to the joint application of national rights that are implied by the merger between companies of several Member States have already surfaced in practise. It is thus that Allianz SE, in its contribution found

in the annexe hereto, emphasizes the problems arising from the differences in the assessment of share exchange parity. What the shareholders of the absorbed company may receive in return for surrendering their shares is calculated diffusely from one State to another, in such manner as to result in a divergence among minority shareholders from one company to the other. The first ones may consider that that have not been rightly served, while the others feel that the compensation requested by the shareholders of the absorbed company is excessive. Ideally, the same standardised method, set forth by a Community text, should be applied throughout Europe. This path is unfortunately fraught with difficulties. Harmonisation of financial standards such as accounting can give rise to a war of experts. This example is but one illustration of the difficulty of combining contrasting national law with the inferred risks of litigation within the same operation. **Thus, it could also be interesting if merging companies were able to select a sole legislation applicable to the operation, subject to relying on the national system most favourable to the protection of the interests of shareholders[177] and creditors. This path, which would lead to modification of Article 18 of the Regulation, is worthy of further exploration.**

Mobility

Article 69 a) of the Regulation clearly brings up the question of abandonment of the theory of the, "true centre," for the benefit of the "registered office." It is indeed time to forge ahead. As seen previously, a part of the Member States acknowledges that companies registered on their territory and thus subject to their law establish their managerial office or even their operational activities in another State. It is even a tradition in the United-Kingdom where foreign companies are attracted in such manner. Tens of thousands of German companies, usually SME's, have registered in this country, taking advantage of formalities for creating a company[178] that are both streamlined and less expensive. Today, it is true that the majority of them, ill informed of their obligations towards the *Companies House* [179], must deal with certain misadventures. Not having transmitted the financial and accounting information

[177] The fact that France, as other States, has not lifted the option on the cash repurchase of the shares of shareholders opposed to the merger ("*cash out*," under American law) is ill-perceived. Colette Neuville, speaking on behalf of the ADAM, a French association of minority shareholders, brought up this point and suggested, during the meeting of 16 February 2007 to the Minister of Justice, an alternative way: harmonizing the rules for a qualified majority in Europe in case of cross-border merger by increasing this majority in any event to beyond two thirds.

[178] Hugues Williamson, "Germany's love of the `Limited´," *Financial Times*, 3 October 2006.

[179] The British companies register, centralized and kept by the Ministry of Commerce and Industry.

requested annually following their registration, they discovered too late that they had lost their legal existence. The movement is under way despite all that. ECJ jurisprudence progressively tends towards abrogation of the obligation imposed upon companies established in the States applying, as in France and Germany, the “true centre,” theory, to insist that the registered office (registration) and head office (management office) coincide.

The choice made by the Regulation of 2001 is not contrary to the treaty which Article 48 treats on a par with the different criteria possible for combining companies, favouring neither that of, “true centre,” nor that of its “registered office.”

Yet, on the one hand, this choice was not obligatory, and the first versions of the Regulation allowed the SE to have several offices without designating the principal among them. Further, the prohibition of dissociating the registered office from the head office is insignificant as far as Community jurisprudence is concerned.

Without analysing it in detail, the decisions of the Court concerning the freedom of establishment rendered between 1999 and 2005 deserve a few comments, for they shook the notion of free circulation of companies. Contrary to individuals that freely circulate in the European Economic Area, legal persons had practically no way of crossing national boundaries. All of this began to change with the “Centros [180],” decision that condemns the refusal of a Member State to register the branch of a company of another State on the grounds that this latter company has no activity there and that linking it (in this case to the United-Kingdom) has the sole purpose of evading a less favourable national (Danish) law. This essentially means that the companies (other than in the case of fraud mentioned by the Court) may choose their applicable law.

With the “Überseering [181],” decision, the Court condemns Germany, in the name of freedom of establishment, for having denied the capacity to take action against a company that does not have its true centre there. Thus, the, “Inspire Art [182],” judgment expressed that a Dutch law that imposed these special obligations upon foreign companies as, “a matter of form,” was contrary to this right.

The, “Sevic,” decision, the most recent, has already been commented with regards to the European Company [183] fiscal law. It specifies that a State, Germany in particular, may not prohibit the entry into the companies register of a company born of a cross-border merger on grounds that one of the participating companies had its office outside of Germany.

---

[180] ECJ, Centros Ltd of 9 March 1999, Case file C-212/97 (Rec. 1999 p. I-1459).

[181] ECJ, Überseering BV of 5 November 2002, Case file C-208/00 (Rec. 2002 p. I-09919).

[182] ECJ, Inspire Art of 30 September 2003, Case file C-167/01 (Rec. 2003 p. I-10155).

[183] ECJ, Sevic Systems of 13 December 2005, Case file C-411/03.

What remains then of the true centre theory? Not much, apart from the difficulty that an SE registered in one State may have in moving within the Community. Yet another paradox is displayed among British, Irish or Dutch SE's. Their freedom of movement is even more curtailed by the fact that the public limited–liability companies of the three countries concerned have the right to dissociate their registered office from their effective office. In light of this paradox, further accentuated by Community case law, the German government decided at the end of 2006 to abandon the true centre theory and to opt for, as did the Netherlands back in 1959, that of the registered office. Companies would thus have the right, although they may be registered in another State, to have their activities and their administrative office in Germany, or vice versa. This governmental decision follows a proposal by the, " German Council for Private International Law," an independent advisory body made up of lawyers. It is a two-prong proposal that consists of either modifying the Community law and setting forth throughout Europe that, "companies are subject to the law of the State in which they are entered in the public register," or at least, pending a Community text, abandoning the true centre theory in German legislation.

This proposal clearly conveys impending change. Notwithstanding a decree of the principle of the **choice of the place of registration** by all European companies, **Article 7 of the Regulation on SE's should be modified accordingly**. The **SE would thus provide an experimental vehicle that would allow countries such as France or Germany to test the application of the registered office system**. This system, established *de facto* by the Community judge, has distinct advantages. It allows companies born from the combination of different Member State companies, for example, to agree that the company shall be registered in a given State while maintaining its management office in another. This is liable to reduce frictions between the nationalities of the companies at the origin of the combination. The registered office system is also a simplifying factor, insofar as an SE head of the group may submit its subsidiaries from different States to the same national law, by registering all of them in the same country. Ultimately, a State such as France would have the means to attract foreign companies who wish to benefit from the system of the unlisted SE, of which the managerial flexibility leaves nothing to envy of the British "*Limited*."

Governance and statutory autonomy

The Regulation of 2001 does not ignore the statutory liberty placed second among the standards that may govern the SE [184]. It must be emphasized, however, that this liberty is granted. It must be expressly authorized either by the Regulation itself or by national laws applicable to the public company of the State where the SE office is located. The referral made by the Regulation of 2001 instigating the States to decide whether or not to regulate the designation of members of the administrative or protective body, the length of the terms of their members or even regulated agreements is a clear illustration [185] thereof.

The SE is based more on the notion of the "company-institution," rather than that of the "company-contract,". A legitimate formalism is called for in listed companies in order to ensure protection for creditors and shareholders. However, simplification is both conceivable and desirable for unlisted companies. The search for greater managerial flexibility led to the French proposal of the Private European Company (PEC) which today is supported by Germany. The relaxing of the status of the unlisted SE and the PEC project are thus driven by the same will. It could ultimately bear especially on:

- The institution of a **capital less than the minimum of 120,000 euros (modification of Article 4 of the Regulation)**;

- The possibility for these unlisted SE's, pursuant to the example of private limited companies to **statutorily define their management conditions and the status of their Directors**. Consequently, it would be beneficial to **introduce into the Regulation itself provisions** analogous to those of the French Commercial Code expressly establishing the right of the **founder to freely organize the relationships among shareholders (new article in Title I)**.

[184] See the provisions of Article 9 on the hierarchy of standards.

[185] See article 48 of the Regulation.

Towards a European Companies Register

The mobility inherent to the European Company and the flexibility of its adaptation engender a corresponding obligation of transparency throughout Europe. In this field, Community law has been partially harmonized. The Directive of 9 March 1968, modified in 2003, establishes the minimum content of the publication measures[186] imposed upon companies. Meanwhile, this system is fundamentally lacking due to the scattering of information. There are as many systems of trade and companies registers as there are Member States. By referring to national laws, the Regulation of 2001 emphasizes the inconvenience of the absence of a common register or system of exchange among national registers. This handicap is also witnessed among companies under structures other than the SE. Nevertheless, as an SE, it is symbolic.

The fact that the registration of an SE should be subject to a notice in the *Official Journal of the European Communities* only stresses this deficiency further. This publication has no legal effect and such an obligation is most generally not respected. Yet these references provide the only means by which third parties may access comprehensive information with the national register where the SE is registered. With regards to its deed of incorporation, its statutes, the amount of capital subscribed, the identity of its directors as well as the statement of accounts and the statement of profit and loss for each year, all of these items are subject to compulsory publication in virtue of Directive 68/151/EEC which is applicable to the SE).

The Directive of 15 July 2003, having modified that of 9 March 1968, imposes the dematerialization of company registration procedures and other company data. Regardless of the importance in terms of third-party information, the text does not go all the way up to prescribing the dematerialization and accessibility by electronic means of all of the information recorded on the national registers at the cross-border level, surpassing even the linguistic barriers.

---

[186] This Directive n° 68/151/EC was modified by Directive 2003/58/EC of the European Parliament and Council of 15 July 2003. This text imposes the dematerialization of company registration procedures, the conversion to electronic format of the acts and information filed on hard copy at the time of their entry or of their transcription into the register, the formulation by electronic means of the request transmitted by third parties of the copies of these elements together with the receipt of the copies by the interested parties and the publication of these elements through the same channel. This Directive was transposed in part by Decree n° 2005-77 of 1st February 2005 modifying Decree n° 84-406 of 30 May 1984 pertaining to the companies register. This Decree recorded into French law the possibility of performing registration formalities electronically. The transposition is near completion through a new revision of the aforementioned Decree of 30 May 1984 which has a particular focus on the information that must figure on company internet sites.

In light of the difficulties experienced by third parties regarding company information, the European Commission initiated dialogue in March 2006 within the framework of the "BRITE[187]," project for guaranteeing the interoperability between trade registers within the Union. This project is structured upon information processing yet has no legal support and has nothing to do with the principal aim of delegating management of European company registers to the Court of Justice of the European Community itself.

The same thrust must be demonstrated today under another form. Information, generally overabundant, must not be scarce when it is a question of accessing data for protecting rights. That is why the present report proposes the creation of a centralized European register modelled after the model of the Office of Harmonisation for the Internal Market (OHIM), the authority in matters of Community brands, designs and models [188]. The United-Kingdom also has a centralized companies register held by the administration. The structure of the Community organism and its jurisdiction should be subject to a thorough examination and consultation with all professions concerned. One can imagine that this structure, in keeping with the model of certain European agencies [189], would have a Board of Directors made up of representatives of the network of national authorities in charge of auditing the legality and registration of companies (court clerk, notary or judge). Such auditing should remain at a decentralized level, contrary to the registration system of Community trademarks that gives rise to a procedure with the Community Trademark Office (CTMO). Yet the registration would only produce legal effects as an act imparting the legal personality to the SE upon the registration of the information with the European register. The agency would be responsible for auditing the systems for transmitting information to its register, guaranteeing linguistic access to the information, receiving complaints and ensuring the liaison and coordination among national authorities, and even, as needed, enacting recommendations or standards.

The European companies register must clearly not limit itself to the SE alone, or even solely to legal Community entities such as the ECS's, PES's and others. It must ultimately involve all companies. It presupposes a more extensive Community harmonization of publication rules and goes hand in hand with simplifying them.

---

[187] Business Register Interoperability Throughout Europe.

[188] Regulation n° 40/94 of 20 December 1993 on the Community trade mark, Regulation n° 2100/94 of 27 July 1994 on Community plant variety rights and Regulation n° 6/2003 of 12 December 2001 on Community designs.

[189] European Agency for the Evaluation of Medical Products (EMEA) based in London since 1995, for example.

SE Tax Considerations

During the preparation of the present report, there was not a single voice, in France at least, that did not pronounce itself in favour of harmonization of fiscal policy for advancing European business activities. Among the many conceivable proposals in this interest, three are particularly worthy of mention:

The first is establishing a common consolidated platform for company taxation. France supports the initiatives of the Commission for adopting such a common platform that consists of forging a method featuring a consolidated tax base with a tax base assessment mechanism and the application of a national tax rate attributed to each portion of the base thus determined . Everything must be done to combat the scepticism of those who would actually prefer that Europe not meddle with an ever greater fiscal competition throughout the Union.

The abolition of exit taxes is another goal. This would entail modifying the Directive on the tax system for mergers adopted in 2005, by specifying that these taxes are illegal, within the sense of the disclosure by the Commission of 19 December 2006, and as soon as the direct taxation of the Member States converges enough to prevent relocations for fiscal reasons. At least such a measure could be adopted within the framework of strengthening cooperation between Member States with convergent fiscal law. This abolition could be further fortified by putting a review commission in place for taxation of assets transferred after exiting their country of origin [190].

The goal of the last proposal is to ensure the best fiscal security possible for these operations. In such a context, companies interested in engaging the SE creation process should be encouraged to initiate a preliminary dialogue on any fiscal consequences of doing so with the national administrations concerned. For example, the actual market values of transferred assets could be determined in advance through consultation among companies.

In so doing, the SE would become part of a general movement that has been gathering momentum in Europe for several years now. The intragroup, "secured ," transactions are vivid examples derived from the work of the European Forum on Transfer Prices, or in France, the very broad extensions of tax rescript systems, accompanied by their publication on the Minefi internet site which detracts from the confidential character that they displayed prior.

---

[190] intraCommunity VAT fraud is a prime example of Europe's pressing need to reinforce cross-border checks and to propose opportunities for their tax administrations to act as a network of cooperation and information exchange.

This fiscal security would benefit not only tax administrations that could assert their viewpoint immediately (instead of after a long and risky subsequent check), but SE's alike, for they would have a definite tax cost of the operation from the very beginning and once and for all.

For a "European Private International Law Forum"

The report would not be complete if it did not consider the question asked in Article 69 c) of the Regulation on private international law. Must one retrace the provision of the Regulation imparting competence to the jurisdictions of the, "country origin, " in order to know the recourse subsequent to the transfer of the registered office of an SE that did indeed concern lawsuits arising prior to the said transfer? The question refers to any adaptations that may have become necessary by the adoption, "of the 1968 Brussels Convention,[191]" or any text replacing that convention which would be adopted by the Member States." The Community legislature neglected to specify the text under scrutiny, but it would appear to be the Regulation of 22 December 2000 [192] that was in the process of being finalized at the time of adoption of the status of the SE. This text unifies *a minima* the rules of conflicting jurisdictions in civil and commercial matters (excluding matters of taxation, customs and administration as well as bankruptcy[193]). It tends to set forth rules concerning the designation of the competent court in the framework of a civil or commercial procedure and to further specify the conditions for recognition and execution in a Member State of decisions made by the court of another State.

The provisions of Article 8 paragraph 16 of the Regulation on the SE that allow, for example, a creditor to bring a claim before the court of the country origin of the SE having transferred its head office are supposed to be protective. It does not appear at first glance timely to modify them, if indeed they must be, when compared with the provision of Regulation of 22 December 2000. The question underscores the legitimate concern for proper coordination of Community texts. Yet its interest remains above all to reveal more broadly the imperative need to make the rules governing conflicts of laws and jurisdictions simpler and more consistent at the Community

[191] The convention of 27 September 1968.

[192] Regulation nº 44/2000 of the Council, "concerning jurisdiction, the recognition and execution of civil and commercial decisions."

[193] Regulation nº 1346/2000 of 29 May 2000 on insolvency procedures expresses the terms of the rules of jurisdictional competency with regards to cross-border bankruptcies. It does not, however, resolve all possibilities of conflicts of jurisdiction.

level. These companies and their receivers must be able to determine the applicable law without difficulty. Those subject to a given jurisdiction must know where to find their judge. Beyond these principles, it is essential now with a Wider Europe to foster mutual trust between the national judicial systems whose reliability and quality are the key to legal security and the respect of the law. This reflection upon the SE may just be the opportunity for instituting a “European Private International Law Forum,” as an advisory body before the European Commission, in keeping with the spirit of what exists in Germany. The idea is to unite as closely as possible the conceptions of the States regarding applicable law and the judge entitled to adjudicate in case of a conflict of rights.

Summary table of the proposals in the report on Community law

Regulation n° 2157/2001	
Creation of the SE	
Article 2, paragraphs 1, 2, 3 and 4	Broaden the field of application of the mode of creation by conversion into an SE for any company with share capital subject to it possessing a subsidiary for more than one year in another European country (EU / EEA)
Article 2, paragraph 3, b.	Allow a group of companies with a subsidiary in another European country (EU / EEA) for more than one year to convert any one of its subsidiaries into an SE.
Cross-Border Cooperation	
Article 17, paragraph 2	Extend the definition of merger to other types of merger
Insertion of yet another new Title III	Allow an SE to merge with any other company with capital of another member State (SE or not)
Article 18	Strengthen the autonomy of the parties by allowing them to choose a sole legislation applicable to the entire operation, subject to protection of third-parties such as shareholders and creditors.
Mobility	
Article 7	Apply the theory of the registered office
Governance and statutory autonomy	
Article 4	Institute share capital of less than 120,000 euros for the unlisted SE's.

New article in title I	Allow unlisted SE's to statutorily define the conditions of their management, the status of their directors and the law for the founders to freely organize relations among shareholders
Proposals concerning taxation	
Set up a common consolidated base for corporate taxation	
Abolish exit taxes	
Allow companies who wish to create an SE to question the national administrations concerned in order to receive their prior consent regarding their applicable tax law	
Creation of a European companies register based on the model of the Office of Harmonization for the Internal Market (OHIM)	
Setting up of an, "International Private Law Forum (IPLF), " advisory body for the European Commission	

Conclusion

As Europe celebrates its fiftieth anniversary and faces a deep crisis, any sign of the political determination of the States to forge ahead takes on particular value.

The SE, whose origins date back to the birth of Europe, has been through many ups and downs, but they have generally been overcome and the idea that inspired it has always remained. If the European Company contains a social system for worker involvement, sometimes seen as a constraint by the business world, it must be admitted that it is becoming increasingly important to involve the employees collectively, by contractual means, in the strategies and projects for adaptation of European companies. The conception of the company as an "institution", which is that of the SE, in fact, is not out of date. Obviously, it is necessary to ease the burden of formalities on companies and allow them greater statutory room for manoeuvre to organise themselves in line with their needs and projects. But it is also important, today, to reassert that the company is a place of production, a tool for increasing the value of the financing provided by its shareholders and a human community, all at the same time.

Aside from its role of identification with Europe, the essential purpose of the SE is to facilitate the activities of companies and therefore growth in Europe. There are growing numbers of large, medium and even small companies turning to markets on other continents. This movement must not be stopped, and must be allowed to grow. Europe is the market in the world that is the most open to foreign trade and investment. However, the idea of European rather than national world champions does not only make industrial and financial sense, it is a fundamental element in *affectio societatis* for the European Union and, ultimately, in the well-being of Europeans themselves.

The magnificent success and recent (and passing) difficulties of Airbus show the extent to which this model is important to European citizens. This justifies the Union encouraging and promoting the European activity of its businesses through an adapted legal environment.

Lastly, mention should be made of the current trend towards better legislation, not so much in terms of simplifying the law, but purely and simply by deregulating. Europe, like any other political or economic entity, goes through cycles. Yesterday, it seemed certain that Europe would always forge ahead, consolidating common foundations for the activities of its economic and social stakeholders. The internal market and the euro embody this dynamic on the economic level. Today, the key word would seem to be legal disengagement of Europe on the internal market. This is not a solution. It is preferable to bring legal systems and practice closer together in a harmonised, harmonious framework and, while simplifying the rule, promote the outstanding asset of the single European area. It is in this respect that the European company, a new form of "European citizenship" for companies, has a future. This is the profound conviction of the author of this report.

Noëlle Lenoir
Paris, 9 March 2007

Annexes

Table of Annexes*

Annex I
Hearings

Annex II
Points of view of professional associations

Annex III
Opinions of companies

Annex IV
Opinions on the social aspect of the SE

* Please note that only a selection of annexes has been included in the English version of the Lenoir Report.

Annex I

Persons consulted

France

GOVERNMENT

Gérard Larcher, Minister Delegate for Employment, Labour and State for Youth Employment

Catherine Colonna, Minister Delegate for European Affairs

Jean-Denis Combrexelle, Director for industrial relations at the Ministry of Labor

Marie-Christine Lepetit, Income Tax Legislation Director, Treasury

PARLIAMENT

- **The Senate**

Philippe Marini, General Budgetary Secretary

Jean-Jacques Hyest, President of the Law Commission

JUDICIAL AUTHORITIES AND JUDICIAL OFFICERS

- **French Supreme Court (Cour de cassation)**

Guy Carnivet, First President of the French Supreme Court

Daniel Tricot, President of the Commercial Chamber

- **Commercial Courts**

Perrette Rey, President of the Commercial Court of Paris and President of the Conference of Commercial Courts

Christian Bravard, President of the National Council of Commercial Courts clerks

Jean-Marc Bahans, Member of the legal affairs Commission of the National Council of Commercial Courts clerks

- **French High Council of Notaries**

Laurent Dejoie, President and Jean Gabriel Tamboise, Jean-Claude Papon, Dominique Randoux, Notaries

Alain Delfosse, Director of Legal Affairs

REGULATORY AUTHORITIES

- **Financial Regulatory Authority (AMF)**

Michael Prada, President

Olivier Douvreleur, Director of Legal Affairs

Laure Tertrais, Operations Adviser at the Legal Affairs Department

- **French Insurance and Mutuals Supervisory Authority (ACAM)**

Philippe Jürgensen, President

Didier Israel, Legal Advisor

- **The French Credit Institutions and Investment Companies Committee (CECEI)**

Christian Noyer, Governor of the Bank of France and President of the CECEI

Danièle Nouy, General Secretary of the Banking Commission and President of the Committee of European Banking Supervisors (CEBS)

Didier Peny, Director of Credit Institutions and Investment Institutions

Joël Petit, Deputy Director of Legal Services at the Bank of France

SOCIO-ECONOMIC ORGANIZATIONS AND ASSOCIATIONS

- **Paris Chamber of Commerce and Industry (CCIP)**

Pierre Simon, President and President of Eurochambres

Anne Outin-Adam, Directeur of Legal Developments

Claudine Alexandre-Caselli, Statistics Unit Manager, CREDA

- **French Business Confederation (MEDEF)**

Joëlle Simon, Director of Legal Affairs

- **French Association of Private Companies (AFEP)**

Alexandre Tessier, Director General

Odile de Brosses, Director of Legal Services

Stéphanie Robert, Director of Tax Services

- **French association of joint stock companies (ANSA)**

Jean-Paul Valuet, General Secretary

Robert Baconnier, General Delegate

Patrick de Fréminet, Tax Advisor

TRADE UNIONS

Jean-Jacques Cette, Secretary of the AGF Works Council and Member of the Supervisory Board at Allianz

SHAREHOLDERS

- **French minority shareholders' association (ADAM)**

Colette Neuville, President

- **Deminor**

Fabrice Rémon, Partner

Charles Demoulin, Senior Manager

- **Proxinvest**

Paul-Henri Leroy, Manager

COMPANIES

- **AGF**

Jean-Philippe Thierry, President of the Board of Directors of AGF and Member of the Management Board of Allianz SE

- **Air Liquide**

Alain Joly, Former President and member of the Board

- **AXA**

Henri de Castries, President of the Management Board

- **BNP Paribas**

Jean-Louis Guillot, Director of Legal Affairs

- **EADS**

Laurence Dors, General Secretary

Thierry Adam, Director of Legal Services

- **France Télécom**

Pierre Charreton, Director of Legal Affairs

Luc Athlan, Corporate Law Advisor

- **Mazars**

Patrick de Cambourg, President of the Management Committee

Caroline Van Troeyen, General Secretary

- **Peugeot PSA - Citröen**

Jean-Claude Hanus, Director of Legal Affairs, Institutional relations and audit

Jean-Paul Lacroix, Corporate Law and Real Estate Advisor

Gilles Requillart, Financial Law and Corporate Law Advisor

- **Renault Nissan**

Christian Husson, Director of Legal Affairs

- **Saint Gobain**

Bernard Field, General Secretary

- **Schneider Electric**

Henri Lachmann, President of the Supervisory Board

Philippe Bougon, General Secretary

- **SCOR**

Denis Kessler, Executive Chairman

Patrick Thourot, Delegate Director General

Emmanuelle Rousseau, General Secretary

- **SEB**

Jean-Pierre Lac, Deputy Director General

- **Société Générale**

Christian Schricke, General Secretary

Gérard Gardella, Director of Legal Affairs

- **Total**

Thierry Reveau de Cyrières, Director of Legal Affairs

- **Veolia**

Raymond Max Aubert, Director, President of the Veolia Foundation

Alain Tchernonog, Director of Legal Affairs

Jean-Baptiste Duchateau, Corporate Law and Stock Exchange Law Legal advisor

- **Viel and Compagnie Finance SE**

Patrick Combes, Executive Chairman

William Wostyn, Legal Counsel

Olivier Dillenschneider, Lawyer

EXPERTS

- **Association of European Lawyers (AJE)**

Marco Darmon, President and former Advocate General at the ECJ

- **University of Paris I - Panthéon Sorbonne**

Yves Chaput, Professor

Jean-Jacques Daigre, Professor

Martine Kloepfer-Pelese, PhD Student

- **University ofParis II - Panthéon Assas**

Michel Germain, Professor

Hervé Synvet, Professor

- **Law Faculty, Lyon III**

Cyril Nourissat, Professor

- **University of Montpellier I – UFR de Droit**

Paul-Henri Antonmattei, Professor

- **Jean Monnet Faculty, Université Paris-Sud 11**

Véronique Magnier, Professor

- **Arsène Avocats**

Michel Taly, Lawyer

- **Capstan**

Jean-Michel Mir, Lawyer

Arnaud Tessier, Lawyer

- **Clifford Chance**

Daniela Weber-Rey, Lawyer

- **Fidal**

Anne-Sophie Cornette de Saint Cyr, Lawyer

- **Latham & Watkins LLP**

Fabrice Fages, Lawyer

- **Skadden, Arps, Slate, Meagher and Flom LLP**

Catherine Cathiard, Lawyer

Claire Le Gall-Robinson, Lawyer

Europe

EUROPEAN PARLIAMENT

Jean-Paul Gauzes, Member of the European Parliament

Klaus-Heiner Lehne, Member of the European Parliament

EUROPEAN COMMISSION

- **European Commission**

Vladimir Spidla, European Commissioner for Employment, Social Affairs, and Equal Opportunities

Kristin Schreiber, Head of Cabinet for Mr V. Spidla European Commissioner for Employment, Social Affairs, and Equal Opportunities

- **Legal Service**

Michel Petite, Director General

- **Directorate General for the Internal Market**

Thierry Stoll, Acting Director General

Pierre Delsaux, Director for Corporate Law and Corporate governance.

David Wright, Director, Financial Services Policy and Financial Markets

Karel Van Hulle, Director, Insurance & Pensions

Nathalie Berger, Deputy, Policy Development and Coordination of the Internal Market

Philippe Pelle, Deputy, Company Law, Corporate Governance and financial crime

Corinna Ulrich, Shareholders’ Rights Unit

Ludmila Zalik, European Company Unit

- **Directorate General for Competition**

Emil Paulis, Director of Policy and Strategic Support

Carles Esteva Mosso, Policy Director for merger and control matters

- **Directorate General for Taxation and customs union**

Robert Verrue, Director General

Michel Aujean, Director of Analyses and Tax Policies

SOCIO-PROFESSIONNAL ORGANIZATIONS

- **The Confederation of European Business (UNICE)**

Philip de Buck, Secretary General

Jérôme Chauvin, Director of Legal Affairs Department

- **European Trade Union Confederation (ETUC / CES)**

John Monks, Secretary General

THINK TANKS

- **European Trade Union Institute for Research, Education and Health and Safety (ETUI-REHS)**

Norbert Kluge and Michael Stollt

Germany

GOVERNMENT

- **Ministry of Justice**

Robert Weiss, Director General, Law, Economy and Commerce

- **Labour and Social Affairs Ministry**

SOCIO-PROFESSIONNAL ORGANIZATIONS

- **German Industry Federation (BDI)**

Christian-Kurt Scheel, Director of Legal Department

Konstantin Tiemann, Tax Supervisor

Jan Wulfetange, Member of Legal Department

- **German Confederation of Trade Unions (Deutscher Gewerkschafts-bund)**

Marie Seyboth, Director of the political and legal codetermination service

- **German Shares Institute (Deutsches Aktieninstitut)**

Rüdiger Von Ronsen, Chairman of the Board

Franz-Josel Leven, Director

Ralf Fischer zu Cramburg, Lawyer

Cordula Heldt, Lawyer

Claudia Roye, Lawyer

COMPANIES

- **Allianz SE**

Peter Hemmeling, Senior Legal Counsel

Hans Konrad Ress, Head of Legal Services – Mergers and Acquisitions

- **Deutsche Bank**

Michael Kröner, Global Head of Tax

Reinhard Marsch-barner, Senior Counsel Legal Services

- **Fresenius**

Joachim Weith, Senior Vice President

Jürgen Götz, General Counsel

EXPERTS

- **University of Frankfurt**

Friedrich Kübler, Professor

Theodor Baums, Professor

- **Juristische Fakultät der Ludwig-Maximilians- University of Munich**

Hans Jürgen Sonnenberger, Professor

- **University of Würzburg**

Christoph Teichmann, Professor

United Kingdom

GOVERNMENT

- **Department of Trade and Industry**

Philip Bovey, Director

Mike Edbury, Assistant Director

Mark Newman, Assistant Director

SOCIO-PROFESSIONNAL ORGANIZATIONS

- **Confederation of British Industry (CBI)**

Charlotta Blomberg, Legal advisor - Company Affairs

Clive Edrupt, Deputy Head of Group - Company Affairs

- **Trade Union Congress**

Lionel Fulton, Secretary General

UNIVERSITIES

- **British Institute of International and Comparative Law**

Mads Andenas, Director

- **The London School of Economics and Political Science**

Paul Davies, Professor

Jonathan Rickford, Professor

EXPERTS

- **Freshfields**

Vanessa Knapp, Lawyer

Belgium

JUDICIAL OFFICERS

- **Royal Federation of Belgian Notaries (FRNB)**

Pierre Nicaise, President

TRADE UNIONS

- **Confederation of Christian Trade Unions (CSC)**

Geneviève Laforêt, director for corporate service

COMPANIES

- **Media Corner SE**

Jérôme De Béthune, Head of Legal and Public Affairs

- **Afschrift SE**

Mélanie Daube, Lawyer

EXPERT

- **Catholic University of Luven**

Yves De Cordt, Professor

Moreover, a meeting with the Committee of the Social Dialogue on the European and International issues (CDSEI) was held on February 12, 2007. This meeting which was chaired by Mr. Gérard Larcher, the French Minister Delegate for Employment, Labour and for Youth Employment made it possible for the Rapporteur to present the general orientations of the European company statute. Lastly, a work meeting, initiated by the Commission for company law, financial and banking law of the French Legal Advisors Association took place on February 16, 2007 at the ministry of Justice with a large number of company Legal Advisors.

Annex II

Points of view of professional associations

1. Answers of the BDI to the SE Questionnaire

I. The SE, a tool for European groups

a. The efficiency of the SE tool

The SE statute offers companies a valid tool to adapt themselves to a changing environment, it is a voluntary option that - subject to the individual case at issue - may increase a company's competitiveness. It also doesn't add any bureaucratic burden to companies that choose not to use the statute. Moreover, companies opting for the SE will get a European label.

b. The impact of the SE social aspect

The German co-determination might hinder the merger with a European company to a SE. If negotiations between a German co-dertermined company and another company about the new form of co-determination fail, the threshold of 25% of the workers for whom the most powerful determination rights apply to the new SE company leads strongly to the German way of co-dertermination.

II. The constitution of the European Company

a. Ways of constitution of the SE which are the most useful and which appear to have been the most used

From the available pieces of information, we can conclude that the merger and the transformation options are the ones which are the most attractive (10 resp. 11 each). The creation of SE subsidiaries was used at least five times, the creation of a holding only once.

b. The formation of an SE *ab initio*

This has to be analyzed, but it seems to be the right way to reduce the founding costs of a SE.

c. Guarantees to shareholders and to bondholders and non-bondholder creditors

As far as shareholder rights have not been laid down by the regulation, Article 9 I c ii states that national law applies. We are not very happy with the shareholder litigation culture that thrives on German law (Articles 131, 243 German Stock Companies Act).

d. The control of legality

These procedural rules are complicated. Nevertheless, from the creditors and shareholders views there must be reasonable legal possibilities to check the quality of the new ownership in a SE.

e. The workers involvement procedure

In Germany, it is obliged to get the approval of the companies' workers before building up the new SE. This might be annoying for the management, but it is necessary to motivate the personnel for the new structure and to displace fears.

f. The creation of a European register for SEs registrations or for the registration of different European entities

A European register of all SE' s in Europe might be interesting. As a first step, it might be better to ask the national governments in Europe for their experience with the new SE's. In Germany, we have got a new electronical register for all public companies since the beginning of 2007. You might have a look there to inform yourself. The homepage is: *www.unternehmensregister.de*.

III. The operation of the European Company

a. Harmonisation and referrals to national laws

The reference system into the national laws clearly and significantly reduces the attractiveness of the SE. It is the major disincentive of the statute. The approach doesn't have a future!

b. The separation of the real seat from the registered office

In 2007, the European Commission will publish its proposal for a new directive for the transfer of the seat of capitalized companies. The BDI strongly supports this initative because we are convinced that we have to strengthen the companies' mobility. This might be an opportunity to localise the best production, tax and legal surrounding.

c. The ECJ case Law on the Companies' freedom of establishment

It builds up enormous pressure on national systems to adapt to the new competitive environment with more mobile companies.

d. The German Proposal to abandon the real seat theory in favor of the Law of incorporation

We appreciate this development.

e. "Law shopping"

In the context of the ECJ case law, we would prefer not to use the term "law shopping". Company mobility is part of our credo. The ECJ makes the four freedoms of the EC Treaty a reality for individuals and for companies. This is a development we cannot hold up but support.

We do not think that we will get a race to the bottom, but a race to the best conditions to survive as a company. National legal systems have felt the pressure from increased company mobility. In many Member States, there is a willingness to reform the traditional legal forms (France, Netherlands, Germany...). This is only beneficial for the international competitiveness of European companies in particular and of Europe as a whole. The competition between the EU member states in the legal area is a fact. This derives not from the European Law or Jurisdiction, but from the look after the most common and convenient law regime. For a German entrepreneur it might be even better to choose a German legal form than a foreign one because of the language or the better comprehension of the own national law.

IV. Developments and prospects

a. Harmonisation of EC Company Law

We see a real need from companies for the Statute of a European Private Company and the 14th Community Law Directive (CLD) on the cross-border transfer of registered office!

b. The Cross-border mergers Directive and the draft Directive regarding the transfer of registered offices

We are convinced that the 10th and the 14th directives will impose much more possibilities for companies in Europe than the SE. The SE applies not to any companies' size. Therefore we hope that the new EPC will close this gap for smaller companies. Besides, we trust in the voice of the European Court of Justice.

c. Improvement of the SE statute

A convergence process of the insolvency law provisions or the creditor protection systems is more likely to come from the ECJ judgements in the line of Inspire Art.

d. The SE, a Governance model?

No, the SE is a European form of a national shareholders company.

2. Answers of the CBI to the SE Questionnaire

I. The SE, a tool for European groups

The CBI supports the concept of the European Company (SE) and acknowledges that there could be potential benefits particularly for multinational companies through simplification of accounting procedures, reduction of administrative costs and the ability to merge across borders.

Although it has been possible to set up a European Company (SE) in the UK since 8 October 2004, our members have shown little enthusiasm to take up the opportunity. To our knowledge only one UK originating SE has been formed and that for a very specific purpose. The responses we have received indicate that UK companies, although interested, will not be attracted to making use of the SE until the issues of taxation and employee participation have been resolved in an acceptable manner.

Legal complexity is also another disincentive. The SE was promoted as delivering significant reductions in administrative and legal costs by avoiding the need to set up financially costly and administratively time-consuming complex net-

works of subsidiaries governed by different national laws. However, the high degree of flexibility allowed in the local implementation of the SE regulation has resulted in so many local variations that it is necessary to be aware of the different national legal requirements in all Member States. A good example of this is the location of the head and registered offices. In the UK the SE head office and registered office are not required to be the same, but this is not the case in all Member States.

II. The constitution of the European Company

We cannot comment on which of the four ways a SE can be constituted is the most interesting or popular because of the very limited experience in the UK. The one UK SE that has been formed was by creation of a SE subsidiary.

The ability to incorporate the SE de novo in our view would not increase its popularity for the reasons stated above.

Under the UK European Company Public Limited Liability Regulation, where an SE proposes to transfer its registered office to another Member State, the directors of the SE are required to make a solvency declaration, i.e. that the SE is able to meet its debts for the next 12 months in order to ensure the interests of creditors are adequately protected.

Responses from our membership indicate that the mandatory provisions regarding employee involvement are a barrier to the uptake of the SE. Employee participation in company bodies is not a traditional concept in UK employee relations. The regulations require negotiations prior to the formation of the SE and this mandatory negotiation period acts as a barrier even though eventual employee participation is not required by law.

III. The operation of the European Company

The high degree of flexibility allowed in the local implementation of the SE regulation has resulted in many national variations . Accordingly, it is necessary to be aware of the different legal requirements in all Member States. This acts as another barrier to the widespread uptake of the SE.

The UK experience is that the incorporation theory based approach encourages flexibility and mobility of companies. UK law does not require either UK incorporated or a UK formed SE to have the registered office and the head office at the same place.

The CBI supports measures which enable competition between the different corporate systems among the Member States for the benefit of companies. Recent ECJ developments in case law have served to open up cross-border mobility in incorporation. The surge in foreign incorporations in the UK as a result indicates that business is attracted to a regime adopts less rigid approach.

IV. The specific problem of cross-border mergers of SE that are already constituted

The CBI is unable to comment given the limited experience with the SE structure in this jurisdiction.

V. Tax issues

Members consistently report that the absence of any taxation benefits for the SE acts a major disincentive to its adoption by UK companies.

VI. Developments and prospects

The general CBI view on EU company law strategies was summarised in its response to the Future Priorities for the EU Action Plan on Modernising Company Law consultation:

- The CBI supported in principle the main objectives of the Action Plan to improve the efficiency and competitiveness of EU companies and to strengthen shareholder rights and third party protection;
- More consideration should be given to best practice alternatives where action is necessary at all and that the principles of better regulation be followed; and
- More support should be given to principles than rules and experience has shown that competitiveness is supported by less prescriptive measures.

We do not see a significant change in the current rate of uptake for the SE in the future in its present form. Favourable resolution of the taxation and employee representation issues may bring about a change, as there is an underlying attraction for companies and multinationals in particular to adopt a more simplified corporate structure. However, taxation and employee representation are not the only barriers. As mentioned previously the national dimensions resulting from the flexible implementation regime have added a layer of legal complexity and local variations which of themselves may act as barriers, e.g. some Member States require the SE to maintain its head office and registered office in the same place.

The CBI does not see greater harmonisation *per se* as a priority; we support measures which enhance the competitiveness of European business overall and a principles based comply or explain regime rather than prescriptive regulatory measures. We welcome the fact that the emphasis within the EU appears to have moved to simplification and modernisation. Again quoting from our response to the consultation on the Corporate Law Action Plan:

We would prefer to see consideration being given to real problem areas in the existing directives. Existing directives should be subject to the same economic and better regulation criteria as new directives. Inconsistencies may be the result of political compromise due to differences in the national company laws of Member

States and thus impossible to unravel, while gaps may equally be filled by national legislation. In both cases, companies may have learned to live with the existing situation and change may actually impose more costs than benefits. Neither finding should be a prerequisite for EU action.

Instead, any proposals should clearly identify real problems, set clear objectives for dealing with the problem to ensure that the scope of the project is strictly limited to simplification and then set out to analyse possible solutions with a proper impact assessment. One area where simplification would be welcome is in the 2nd company law directive and the effect of recent developments in accounting, which have affected companies' distributable profits.

Another is recent developments in the Financial Services Action Plan, where there is some overlap with company law and where the boundaries between the two have sometimes been unnecessarily confused, particularly in the Transparency directive. A simple principle for policymakers to remember in future might be to deal with prospectuses via securities regulation under the Lamfalussy process and the annual report and other interim reports under company law or accounting policy.

Our experience with the Commission's latest proposal to legislate with respect to private international law in the context of the proposal for a regulation on resolving conflicts in cross border contract law ("Rome I"), does not inspire us to support calls for additional legislation in the context of private international law to clarify conflicts in company law. The Rome I process to date has served to demonstrate the unsuitability of the political process to effectively deal with essentially commercial concerns to the potential detriment of European business.

We do not consider that the European Company Statute has been very useful in practice to date and accordingly, we do not see it a model for governance or a harmonisation vector for other national legislation. Furthermore we see the same issues which have contributed to the lack of success of the SE as arising with the proposal for a European Private Company.

One or two members consider that the creation of a new legal form of private company at EU level could in theory have useful benefits in terms of facilitating certain cross-border activities, e.g., the creation of companies whose activities touch a number of EU Member States or creating holding companies for EU-wide activities as part of corporate restructurings. These members believe that the creation of a new legal form of company would create less confusion than a "halfway house" position such as the adoption of a Model Law for a European Private Company, which could be inconsistently applied by Member States and not give the certainty that the creation of a new legal form of company would give. However, in practice they consider that there will be limitations on the extent to which EU regulation could achieve a widely-used, uniform EU corporate form because matters such as accounting, tax and insolvency laws and regulations would have to remain a matter for Mem-

ber States. Inconsistencies between Member States would inevitably remain, thus removing much of the rationale for the introduction of the new form of legal entity.

3. Assessment of the SE and MEDEF's position

In general, MEDEF has noted that the European company ("SE") form was not attractive to French companies, which show very limited interest for this new corporate form. Various causes are mentioned to explain this reluctance, which essentially relate to the cumbersome and inflexible nature of the SE. First, the creation of SEs is hampered by the cumbersomeness of both the employee involvement regime and the very incorporation procedures. The inherent complexity of the cumulated enforcement of EU provisions and of national rules is also a major obstacle for the success of this new corporate form. Lastly, the lack of flexibility of the structure of the SE reduces even more its attractiveness and makes obvious why the adoption of its statute has not reduced the companies' interest in the European private company.

Beyond these aspects specifically related to company law, it is worth pointing out that there is no tax incentive, as invoked by certain companies.

The motivation of companies which consider, in spite of these difficulties, to use the SE, are essentially related to the will of benefiting from the mobility of the SE, i.e. of the potentialities that it offers in terms of cross-border mergers and of transfer of registered office. In this respect, it is obvious that the transposition of the 10th directive on cross-border mergers and the possible adoption of the 14th directive on the transfer of registered office will largely limit the current interest of the SE in these fields. The use of the SE is also motivated, at least for part of the relevant companies, by the European label which is associated to its status.

MEDEF considers that one can reasonably doubt of the potential success of the SE and that real progress for non-listed companies will come from the adoption of a more flexible European private company statute, without any referral to national laws. Some improvements may, however, be made to the SE statute, which may help promote the only European corporate form as of this date.

I. SE Incorporation Process

A. Broadening the incorporation methods

a. Limited list of conditions of incorporation

The EU Regulation provides for a limited list of four conditions of incorporation of SEs: merger, incorporation of a holding, incorporation of a subsidiary and conversion of a public limited company. The *ex nihilo* creation of an SE, without the prior existence of one or several national companies, is therefore prohibited. Similarly, it is impossible for natural persons to participate in the incorporation of an SE.

The answers to the European Commission's consultation and hearing on future priorities for the action plan on modernizing company law and enhancing corporate governance in the European Union evidence that there is a wide consensus for liberalization[194]. This widening would allow for the incorporation of SEs.

MEDEF shares this wish and believes that in certain circumstances, the option of incorporating an SE *ex nihilo* would be, in practice, undoubtedly useful. The joint project of MEDEF and CCIP in relation to the European private company[195] authorizes, indeed, the *ex-nihilo* incorporation of an EPC[196].

Nevertheless, MEDEF admits that it is necessary to maintain the European dimension of the SE, which is indeed a condition of the legitimacy of the intervention of the EU authorities: a "European fact" must therefore be required from the shareholders of the future SE. One solution would be to transpose the current requirements from legal entities to natural persons, and to require at least two of the future shareholders' place of residence in two different Member States. MEDEF believes that it is necessary to go further in order to widen the "European fact" requested from future shareholders. As such, the operation of an existing or future business exceeding the limits of a national territory would be a significant criterion, which has indeed been used by the European Social and Economic Committee in its 2001 report.

b. Incorporation of an SE by another SE

An SE may participate in the incorporation of another SE following various methods. Outside of the particular method provided for by the Regulation which consists in creating a fully-held subsidiary, the four methods of incorporation provided by the Regulation should be opened to existing SEs. Nevertheless, the incorporation of an SE would then imply that the requisites for these methods of incorporation be met, i.e. that the SE has had for at least two years a subsidiary governed by the law of another Member State or that companies governed by the laws of another Members State participate in the operation.

MEDEF notes that this structure raises serious issues, as shown in the example below. If two SEs incorporated in France want to get closer and incorporate a holding, they can make this holding an SE only if they have had a subsidiary in another Member State[197] for at least two years, which is not necessarily the case.

---

[194] Consultation and hearing on future priorities for the action plan on modernizing company law and enhancing corporate governance in the European Union, Summary report, see question 11.

[195] CNPF/CCIP, la société privée européenne, une société de partenaires, sept.1998.

[196] Article 1 of the draft Regulation.

[197] Similarly:
- merger by creation of a new company: merger of an SE with a French law company (e.g. another company of the group) may not generate another SE.
- subsidiary: the SE can only incorporate a subsidiary SE if this subsidiary is fully-owned or if companies governed by the laws of another Member State participate in the incorporation.

Thus, two SEs may be barred from incorporating a holding SE, which may seem inconsistent. It therefore seems that the European Regulation only considered the incorporation of the SE, without considering the rest of its existence and the transactions that it may happen to carry out. MEDEF believes that gap is unfortunate, and that the current system must be complemented.

B. Incorporation by merger

MEDEF believes that a number of aspects of the incorporation by merger process may be improved.

a. Control of legality of merger

The European Regulation placed the process of incorporation by merger under a double supervision, which is to focus, on the one hand, on the aspects in relation to each of the companies participating in the merger, and, on the other hand, on the aspects of completion of the merger and incorporation of the SE[198]. As regards these second aspects, the European Regulation provides that the legality must be controlled by a competent authority in the Member State of the future registered office of the SE. The French lawmaker has determined an original solution, which was not imposed by the European Regulation, by granting the legality check to be carried out for an SE to have its seat on the French territory, to a notary.

MEDEF had criticized this solution by highlighting that the naturally competent authority was the clerk of the commercial court. Although there is no significant experience in French law allowing for the assessment of the practical consequences of the intervention of a notary, the situation in Member States who have opted for the same solution shows that it makes the process slightly heavier.

b. The simplified merger process

The European regulation provides for a double regime of simplified merger. One of these regimes provides that when an absorbing company holds all of the shares and other securities granting voting rights, the merger bodies are exempted from certain mandatory mentions in the draft merger agreement, and independent experts cannot be appointed[199]. However, as opposed to French law[200], the implementation of the simplified merger regime for the creation of an SE does not imply any

---

[198] Article 25 and 26 of the Regulation (EC) n°2157/2001

[199] Article 31.1 of the Regulation 2157/2001.

[200] Article L.236-11 of the French commercial code.

exemption from the obligation to convene the shareholders' meeting of the absorbed company in order to approve the draft merger agreement[201].

MEDEF believes that the EU legislation should follow French law: convening a shareholders' meeting in this case is indeed totally useless and only imposes a superfluous constraint in a process which is nevertheless known as simplified. Besides, the 10th directive on cross-border mergers of joint stock companies also provides that in this case, the shareholders' meeting of the absorbed company is not to be convened[202].

c. Broadening the merger conditions

The Regulation considers two merger processes: merger by creation of a new company, and merger by absorption, but provides that in its future assessment report on the SE statute, the European Commission will, in particular, consider the opportunity of widening the concept of merger, in order to include other types of mergers.

In this respect, it shall be reminded that directive 78/855/CEE defines "merger-assimilated transactions": existence of a cash adjustment exceeding 10% in case of merger, and merger without disappearance of any of the transferring companies. If the merger provisions are broadened, an SE may therefore be incorporated by way of partial contribution of assets.[203]

MEDEF supports this broadening which would allow for an SE to be incorporated by way of partial contribution of assets. The liberalization of the methods of incorporation may, indeed, only support the creation of SEs.

C. Incorporation of a holding SE, a subsidiary SE and conversion of a public limited company into an SE: the concept of subsidiary

The Regulation opens these three processes of incorporation to public limited companies (or to private limited companies) which have had, for at least two years, a subsidiary governed by the law of another Member State. In relation to public limited companies incorporated in France, the concept of subsidiary is to be construed in accordance with article L.233-1 of the French commercial code, which requires at least half of the share capital to be directly held. The existence of an indirect subsidiary governed by the law of another Member State does not qualify for the incorpora-

---

[201] Under article 23.1 of Regulation 2157/2001, the shareholders' meeting of each of the merging companies must approve the draft merger agreement. This text is not exempted from the provisions in relation to simplified merger.

[202] Article 11.1 of directive 2005/56 of October 26, 2005.

[203] The cross-border merger directive only provides that it is also applicable when the legislation of at least one of the relevant Member States provides for the payment of an adjustment exceeding 10% (article 3.1 of the directive 2005/56 of October 26, 2005.)

tion of an SE. Indeed, certain Member States use a more liberal solution allowing their equivalent of *sociétés anonymes* to convert into an SE if they have indirect subsidiaries governed by the laws of another Member State.

MEDEF considers that the French law should be made more flexible, and the definition of subsidiary adapted in order to include direct and indirect holding of a majority of the share capital. Indeed, the "European fact" proves identical in both cases: controlling a company governed by the law of another Member State. From this point of view, the concept of controlled company, within the meaning of article L.233-3 of the French commercial code, would be by far more adequate than the concept of subsidiary.

II. Operation of SEs

A. Management of SEs with a board of directors

The European Regulation provides that when an SE adopts a single-tier structure and takes the form of a public limited company with a board of directors, "the administrative board manages the SE" but allows Member States to rule that one or several managing directors are responsible for the day-to-day management within the same conditions as for public limited companies.[204] The French commercial code refers directly to the provisions applicable to *sociétés anonymes*, which suggests, at a first glance, that by this reference the French lawmaker intended to exercise the option granted by the European text.

MEDEF considers that the situation is, in fact, more complex. Indeed, this reference is ambiguous and may raise certain issues:

- The European Regulation provides that day-to-day management of an SE may be entrusted to a managing director, while the French commercial code entrusts the general management of a société anonyme to the latter. It is not certain that both expressions can be given the same meaning.

- The European Regulation allows that the day-to-day management be entrusted to one or several managing directors, but does not consider that such duties be exercised by the chairman of the board of directors. The issue is therefore whether the absence of dissociation of the duties complies with the provisions of European law.

MEDEF believes that this uncertainty is detrimental to companies who wish to adopt the SE status.

---

[204] Article 43.1 of the Regulation (CE) n°2157/2001

B. Transposition of the related party agreement procedure

The Regulation provides that the by-laws of the SE must list the type of transactions which are to be authorized by the supervisory or administration body. Article L. 229-7 of the French commercial code provides in this respect that the by-laws of SEs incorporated in France must contain "similar rules" to those contained in the provisions governing the procedure applicable to related party agreements (*conventions réglementées),* with the specification that if the SE has a sole shareholder, a record in the register of deliberations is deemed as an approval of the agreement.

MEDEF condemns this indirect reference to the related party agreement procedure:

The transposition of the related party agreement procedure and the legislative framework that it reflects makes SE management heavier and does not support the incorporation of such companies on the French territory. Similarly, refusing contractual freedom, which is nevertheless established by the Regulation, does not support the incorporation of SEs in France. One may indeed be surprised that the lawmaker, who cared to expressly validate the provisions of the by-laws in relation to shareholding with the express goal of strengthening the attractiveness of French law, also decided to transpose the related party agreement procedure, which is not attractive at all.

- Article L 229-7 of the French commercial code does not comply with the European Regulation: when the matter is governed by the European law, national law is not entitled to intervene.

- This transposition imposes the intervention of the shareholders' meeting, while the Regulation only considers the prior approval by the administration or supervisory body.

- The issue of sanctions in case of non-compliance with the procedure raises difficulties as the applicable qualification may be uncertain: is it a legal limitation to the authority of the managers, enforceable in relation to third parties as such, or a limitation under a provision of the by-laws, which is unenforceable subject to the bad faith of the contractor ?

C. Conversion into a public limited company

The Regulation, and the relevant transposed provisions of the French commercial code, provides that an SE can only convert into a société anonyme after a term of two years as from its incorporation and subject to having approved the accounts of the first two financial years[205].

[205] Article 66.1 du règlement 2157/2001 et article L.229-10 du Code de commerce

MEDEF considers that this term is detrimental to companies, the situation of which is paralyzed, and therefore requests its cancellation.

D. Merger

The Regulation does not include any provision in relation to a merger that might be carried out by an SE. The French commercial code has not provided any indication in this matter.

MEDEF believes that a few precisions should be added.

- In case of merger and absorption, it is essential that an SE be able to absorb another entity, independent of the corporate form of such entity, even if it is not another SE.

- In case of merger by creation of a new company, it is also necessary to allow an SE to incorporate another SE (see above, incorporation process); MEDEF considers that the methods of incorporation should be broadened when an SE participates in the incorporation process.

III. Mobility of SEs: authorization of separation of central management and registered office in France

The European Regulation gives Members States the option of making it mandatory of SEs registered on their territory to have both their central management and their registered office at the same location.[206] The French lawmaker has chosen to exercise this option and prohibited SEs registered in France to dissociate their registered office from their central management.[207]

MEDEF regrets that French law does not take the opportunity from the freedom given by the European law-maker. The solution is all the more questionable as it goes against the stream of current evolutions, which tend to increase mobility for companies, and as such may only hamper the choice of France as a territory of registration for future SEs.[208]

MEDEF highlights, in addition, that the concept of central management, which seems to be distinguished from the concept of effective management, is difficult to define, in particular in view of the dissociation of the various sections of a company, which may be located in very different places.

---

[206] Article 7 of the Regulation (CE) n°2157/2001

[207] Article L.229-1 of the French commercial code

[208] MEDEF – Presentation of the provisions and comments on law n°2005-842 of July 26, 2005 known as *loi pour la confiance et la modernisation de l'économie* (corporate law section) – July 2005, p.11

4. Opinion of the UNICE

I. The SE, a tool for European groups

a. The efficiency of the SE tool

Since the first proposal for a European Company Statute in June 1970, UNICE has repeatedly stressed the positive impact that creation of an appropriate European Company Statute could have for the competitiveness of European companies on global markets.

The SE statute should make it easier and cheaper for companies to expand and to manage cross-border operations without the red tape of having to set up a network of subsidiaries.

It should reduce administrative costs and provide companies with a legal structure adapted to the Internal Market as a whole.

This should encourage more companies to exploit cross-border opportunities. The reduced costs should lead to downward pressure on prices and boost Europe's competitiveness.

The SE should also enable groups of companies which develop activities in different areas in various Member States to restructure by creating one SE for each geographical sector, one SE for each sector of activity or one SE for each product line, thus permitting more efficient and less costly management and leading to productivity gains.

However, UNICE is of the opinion that the compromise reached in Nice has four weaknesses in this respect:

- it does not include an agreement on a suitable tax regime,
- it harmonises only limited aspects of company law and falls short of providing companies with a genuine Community law instrument but rather creates twenty-five different statutes,
- the complexity of the solutions found may discourage companies from opting for a European Company Statute and could put existing European companies at a competitive disadvantage vis-à-vis newcomers who will be able to create a European Company more easily and more quickly.

Since most EU Member States have no provisions for worker participation in corporate bodies, members from those countries express strong opposition to the so-called "reference" rules which would systematically and immediately apply in the event of failure to agree. In UNICE's view, immediate and automatic application of pre-ordained "reference" rules, which prescribe a form of co-determination alien to

the majority of Member States, may have the effect of distorting the negotiating balance from the outset

b. Sectors of activity particularly suited for an SE-type company

Companies providing financial services transform themselves into SE as:

- Banks and insurance companies have to respect different levels of rules by operating in the EU through subsidiaries;
- The SE allows companies to operate throughout the EU on the basis of a single set of rules and a unified management and reporting system;
- a single set of legal and prudential rules allows a simplification of management activities and a stronger match of own resources to the risks covered only required at the level where the registered office is located.

c. Social dialogue provided for by the SE and its impact on the SE attractiveness

Social dialogue takes different forms in different countries and national rules governing worker participation take account of these differences.

The rules set out in the Directive 2001/86/EC supplementing the SE statute are extremely complex and interfere with these national traditions. They therefore have an adverse impact on the attractiveness of the SE.

II. The constitution of an SE

a. A prerequisite for an SE to be registered: implementation of the arrangements for workers' involvement

An SE may not be registered unless an agreement on arrangements for employee involvement has been concluded or the standard rules are applied. The only possible exception concerns application of the rules on employee participation in the case of an SE established by merger.

The procedure to set up the negotiating body and the system to ensure proportional representation of employees is unnecessarily complicated and time-consuming as it currently stands in Art. 3 of Directive 2001/86/EC.

These provisions could be usefully replaced by the system foreseen in Art. 5 of the European Works Council Directive 94/45/EC.

Moreover, the freedom to negotiate tailor-made solutions by management and workers of each SE should not be limited by the Directive's reference rules applying in the absence of an agreement.

b. The creation of an SE register, or even a register of different European entities

At the current stage, we see no reason to oppose the creation of a European SE register

III. The operation of the European Company

a. Harmonisation and referrals to national laws

The fact that it leaves certain issues to be dealt with under national law leads to the lack of a single EU company statute and to the existence of 25 different statutes.

Necessary improvements as:

- it does not include an agreement on a suitable tax regime;
- it falls short of providing companies with a genuine Community law instrument but
- rather creates 25 different statutes; and
- The automatic application of pre-ordained "reference" rules, which prescribe a form of co-determination alien to the majority of Member States may have the effect of distorting the negotiating balance from the outset.

IV. Specific issue of cross-border mergers between existing SEs

a. Directive 2005/56/EC on cross-border mergers of limited liability companies, an adequate solution?

UNICE has always supported the adoption of a directive on cross-border mergers of companies with share capital. Harmonisation and streamlining of company law procedures to facilitate cross-border mergers have been requested by companies for many years in order to remove the existing obstacle impeding their mobility within the European Union.

b. Organic link between company law and labour law

There should not be any organic link at EU level between company law and social law.

The practical arrangements for information, consultation and participation of workers have to be defined in Member States.

V. Tax issues

a. "Tax shopping"

UNICE reiterates its views that the European Company Statute will offer no significant economic benefit without agreement on a suitable tax regime. There should be a common tax regime for SEs. This should preferably be based on a common consolidated tax base. Given that the companies incorporated as SE are going to be taxed according to their domestic regime, the question about tax shopping does, in general, not seem to apply.

b. The ECJ decisions on *Marks & Spencer* (13 December 2005) and *Cadbury Schweppes* (12 September 2006)

Only if there is a common tax regime one could examine whether the common statute, as opposed to nationally different statutes, facilitates cross-border loss offset (Marks & Spencer), or the abolition of unfair CFC regimes (Cadbury Schweppes). Problems related to finding the right allocation key for tax income sharing will remain, though, independent of the SE.

Regarding Marks & Spencer we had mainly two comments:

-in our view, the Court had not made it sufficiently clear that the mere existence of carry-forward rules in the country of the subsidiary should not allow countries to deny a loss deduction by the parent company. This should only be allowed if the loss is really deducted by the subsidiary in the host country, given the fundamental tax principle that a loss can only be deducted once;

-also, the Court should have considered more clearly that a foreign subsidiary may sometimes not be able to offset its losses in the host country even under unlimited (in terms of time) loss carry-forward rules, if it is liquidated before it becomes profitable. We also pointed out that relief opportunities (here: in host countries for the foreign subsidiaries) are sometimes limited in time and may run out before the company becomes profitable.

About Cadbury Schweppes: we generally believe that CFC regimes ("controlled foreign corporation legislation") which aim at preventing the diversion of taxable income to entities in low-tax countries are artificial and a hindrance to economic efficiency, and welcome the ECJ jurisdiction in this regard (Cadbury Schweppes, resident in GB, had to pay tax in GB on income generated by the Ireland subsidiary, since the latter was considered subject to low taxation.)

c. The common consolidated corporate tax base (CCCTB) project

The working group is dealing with a great number of technical issues and is now beginning discussions of the more politically (revenue side) sensitive issues such as keys/formulas for the allocation of tax revenue, and the personal scope of the tax base. These will be decisive for the success of the common tax base.

d. Tax incentive to adopt the SE statute

In general, companies` decisions as to their form of incorporation should be market-based. If companies believe the European Company Statute is more advantageous for their operations, they will opt for it. Tax incentives for a certain company regime might distort the level playing field between companies active across borders and those operating within geographical limits.

VI. Developments and prospects

a. European company law

UNICE has supported[209] the European Commission Company Law and Corporate Governance Action Plan[210] released in 2003 (hereafter 'the Action Plan') and in particular the declared objective of "fostering efficiency and competitiveness of business".

However, excessive regulatory burdens may ultimately restrict the freedom of companies to do business, thereby holding them back from releasing their potential. This is detrimental to business, to company shareholders and more generally to the EU as a whole.

The following principles should serve as a reference for intervention or non-intervention in the areas of company law and corporate governance:

- Subsidiarity
- Principle-based approach
- Market-driven
- Comply or explain
- Transparency and disclosure
- Global orientation

---

[209] See UNICE Comments, "*Commission Action Plan: Modernising Company Law and enhancing Corporate Governance in the European Union*", 6 August 2003 – available at *www.unice.org*

[210] See Commission Communication COM(2003)284, "*Modernising Company Law and Enhancing Corporate Governance in the European Union – A Plan to Move Forward*", 21.5.2003

- Competition
- Better regulation

UNICE stresses the need to eliminate barriers that hinder the free flow of capital between Member States and to enshrine the right of establishment. This means that measures which give companies additional flexibility must also be implemented, such as adoption of a 14th Company Law Directive on the transfer of registered seat.

b. Towards a greater harmonisation of European company law?

UNICE considers it key that the Commission ensures harmonisation of common concepts in the various directives and verifies correct and equivalent implementation at national level.

UNICE supports the adoption of a:

- Statute for a European Private. However, labour law issues should not be added in the EU Private Company Statute.
- 14th Company Law directive on the transfer of registered seat

c. The SE and the other EC tools

UNICE believes the European Company Statute is an important contribution to creating a real Internal Market for companies. UNICE highlights the facts that the SE statute brings certain advantages that are covered neither by the cross-border mergers directive nor by a proposal for a directive on the transfer of seat:

- it gives the company a European image and can be used as a marketing tool,
- it provides the company with a single company structure,
- it helps to have simplified but still flexible governance,
- and in addition,
- it facilitates cross-border mergers, and
- it facilitates transfer of seat.

d. The improvement of the SE statute

UNICE believes that the SE has certain weaknesses.

In order to tackle those issues, further work should be done in order to reach some improvement in 2009 (revision of the regulation).

e. The SE, a Governance model?

The priority given to negotiations between management and workers on employee involvement in the SE is welcome.

Unfortunately, the freedom to negotiate is limited by the existence of reference rules on employee information, consultation and participation in Directive 2001/86/EC.

Moreover, it has to be stressed that the compromise reached on the social aspects of the SE in the context of an optional Statute would be totally unacceptable in the framework of the debate on other company law Directives which are not optional.

For these reasons, the SE cannot be considered a model for other company law instruments.

Annex III

Opinions of companies

1. Contribution of Allianz SE

I. Main advantages of an SE

- Possibility of **cross-border transactions** (e.g. mergers): The establishment of Allianz SE has proved the SE-Statute to be a workable instrument for cross-border activities of companies. For the first time cross-border mergers have become possible.

- The SE creates flexibility as to the corporate governance system (choice between one-tier and two-tier system);

- From a German perspective, it provides flexibility as to employee participation (negotiation model and standard rules; non-applicability of the German Co-Determination Act);

- The SE may lead to a strengthening of the corporate governance system by providing for the possibility to determine the size of the supervisory board in the statutes of the company;

- The SE provides a European dimension to the company by internationalization of the employee participation (European representatives in the supervisory board, SE works council composed of representatives from all member states where the SE has employees);

- The SE creates a European company label and may lead to a European corporate identity (international approach to customers, employees and investors);

- The SE-Statute provides for the in-principle possibility of a cross-border transfer of the registered office.

II. Problem areas and need for amendments of the SE-Statute

- The Nizza-compromise on the SE-Statute was a very important step for the European company law. However, the SE is still largely determined by domestic law. Efforts should be made to strengthen the European aspects of the SE by providing more detailed rules on corporate governance and other corporate aspects of the SE in the SE-Statute. So far presumably less than 10% of the corporate law applicable to the SE is deriving from the SE-Statute. Therefore, the SE - despite its European label - basically still is a domestic company.

- In the course of the merger of Allianz AG with its Italian subsidiary RAS (hereby converting Allianz AG into an SE) we experienced the following difficulty:

  Within the European member states, different methods for the determination of the value of companies are used and mandatory. In Germany for instance the capitalized earnings valuation method (*Ertragswertverfahren*) is the prevailing method whereas in other member states like Italy other valuation methods based on multiples are prevailing. Such differences in the valuation methods may lead to different results which could lead to serious difficulties in determining the applicable exchange ratio. A harmonized approach for the valuation of companies in the context of cross-border mergers should be put on the agenda.

- It is important to note that many member states have provided for far-reaching mechanisms to protect minority shareholders and creditors of a company which shall be transformed into an SE. Similar mechanisms apply in case of the transfer of the registered office of an SE to another member state. In our view the Commission should have a close look at such mechanisms because they constitute an obstacle for the creation of an SE and especially the transfer of its registered seat. Especially the cash exit rights for minority shareholders are not proportionate and impose a huge financial risk on the companies.

  The obligation set forth in Article 7 of the SE-Statute to allocate an SE's head office and registered seat in the very same member state should be abolished. In our view there is no practical or legal need for such an obligation. It reduces the corporate flexibility of the SE. Further, such rule constitutes a discrimination of the SE compared to domestic companies. On the basis of the case law of the European Court of Justice (Centros, Überseering, Inspire Art) a domestic company is allowed to have its head

office and its registered office in different member states. There is no reason why such principle should not also apply to the SE.

The principle question could even be raised whether Article 7 of the SE-Statute violates primary European Community law. The judgments of the European Court of Justice are based on the freedom of establishment (*Niederlassungsfreiheit*) being one of the basic freedoms of European Community law. The basic freedoms set forth in the EU-Treaty (primary EU-law) prevail over secondary EU-law like the SE-Statute.

- The procedure for determining employee participation has proved to be rather complicated. Especially for a big group of companies having employees in almost all member states of the European Union the procedure is burdensome and complicated (information of all employee representative bodies, translation of the SE-documentation in all relevant languages, setting up of the Special Negotiating Body with a large number of members coming from many member states, decision making process within Special Negotiation Body, etc.). The procedure should be strengthened for instance by reducing the references to domestic law (e.g. common rules for the election of the members of the Special Negotiating Body and for the nomination of the employee representatives to the Supervisory Board).

- Further, it is not always clear which matters may be dealt with in the negotiations between the Special Negotiating Body and the management organs of the merging companies. For instance, Article 40 par. (3) provides that the number of members of the supervisory organ shall be laid down in the statutes of the SE. In our view, therefore, the negotiations may not address the question of the size of the supervisory board but just the ratio of employee representatives and shareholder representatives in the supervisory board. There are, however, arguments brought forward by scholars and employee representatives that the negotiations may also address the question of the size of the supervisory board.

- Another unclear and potentially burdensome aspect of the employee participation procedure is the case of subsequent additional cross-border mergers into an already established SE. Such additional cross-border mergers should in our view be possible because according to Article 3 par. 1 of the SE-Statute an SE is regarded as a public limited-liability company for the purposes of the process of setting-up an SE. Thus, even after the establishment of an SE additional domestic companies can be cross-border merged into an existing SE on the basis of the SE-Statute. However, in such a case it seems that the employee participation procedure has to be re-conducted to its full extent. This result is not convincing in a situation where such employee participation procedure was already fully conduced during the establishment of the first SE. The SE-Statute should be amended and should provide for exemption provisions.

- In our view, the numerus clausus of possibilities to establish SEs laid down in Articles 2 and 3 of the SE-Statute could be discussed. The SE could be a genuine European alternative to domestic company forms.

  In a first step it should at least be possible that an established SE may freely convert its subsidiaries into SEs even if such subsidiaries do not have a subsidiary in another Member State. Right now Article 3 par. (2) SE-Statute enables an existing SE only to set up new subsidiaries in the form of SEs without any further requirements. Such privileged right to establish a goup of SE companies should be enlarged by allowing SEs to convert existing subsidiaries into SEs without having to comply with the requirements of Article 2 par. (4) and Article 37 ff. of the SE-Statute (subsidiary governed by the law of another member state). This issue should be on the agenda for a revision of the SE-Statute.

- The restrictions imposed on established SEs under Article 66 of the SE-Statute should in our view be abolished (2 year blocking period for re-conversion of SEs into domestic companies). Article 66 constitutes an obstacle for corporate flexibility.

Dr. P. Hemeling
Senior Legal Counsel

Dr. H. –K. Ress
Head of Legal Services – Mergers and Acquisitions

2. Contribution of Elcoteq SE

I. The SE, a tool for European groups

a. The impact of the SE social aspect on its attractiveness

Most of the companies qualifying for an SE or interested in it would be anyhow within the scope of European Works Council directive provisions. I do not believe that this would specifically reduce the attractiveness.

II. The constitution of the European Company

a. The formation of an SE *ab initio*

I think it would be very important to be able to form an SE ab initio. This would contribute to the attractiveness of the company form.

b. The control of legality

In Finland the legality of formation by merger has been secured by enacting provisions that protect shareholders and creditors of the merging company as set forth in the SE Regulation, article 24. Pursuant to the Finnish European Company Act, sections 4 and 5, a shareholder of a merging company has a right to have his shares redeemed and all the creditors of the company have a right to object the merger. The redemption process and creditors' right to object follow the same provisions as enacted in the Finnish Companies Act concerning a merger.

c. The creation of a European register for SEs registrations, or for the registration of different European entities

Creating a European-wide register for European companies would enhance the transparency and give better understanding about the possible country-related problems in the formation. It would also contribute to the visibility and pan-European image of the company form.

III. The operation of the European Company

a. Harmonization and referrals to national laws

This is the very key for the success of the SE. If there is no further harmonization, there will be very little interest for this company form since many things that it facilitates can already be achieved by other means (e,g, cross-border mergers).

b. The separation of the central administration from the registered office

In today's global business environment the concept of headquarters/ registered office has less and less importance. I think there is no reason to require any company to have its HQ in the country of registration since many companies no longer have traditional HQ anyhow. Also, the concept is not clearly defined in the European legislation.

c. The relevance of the theory of the seat

The mobility of SE is a fundamental element of its raison d'etre. It should not be limited in any way.

d. "Law shopping"

Domicile shopping should be encouraged since it makes European countries compete against each other, thus making – hopefully – the whole Europe more competitive.

IV. Tax Issues

a. The common consolidated corporate tax base (CCCTB) Project

This is a step towards the right direction and would also facilitate the life of SE's if ever adopted.

b. Tax incentive to adopt the SE status

It would be a good idea. SE's could be used a guinea pigs for a pilot project for tax base harmonization.

V. Developments and prospects

a. General assessment of the SE statute

If SE's could fully benefit from a genuine single market it would require harmonization in tax base and accounting rules. Now and SE active in several countries is considered one legal entity from company law point of view, but from tax and accounting point of view all national branches are considered as separate entities. This is the biggest barrier for SE's to utilize the pan-European form.

VI. Elcoteq SE and its transfer of seat

a. Motivations of the transfer of its seat

Consistent with Elcoteq's globalization strategy, the Company has continuously aimed to be close to existing customers and potential new customers and to decentralize Company management and locate it close to its key business operations. At the same time the Company's key operative decision-making has been transferred from Finland to the geographical areas and the Group's international office in Zug, Switzerland. Transferring the domicile to a central location in Europe is a natural sequel to these steps and shall further support the Company's corporate image as a European company. Luxembourg is a central location with respect to the Company's customers. A key purpose of transferring the domicile is to implement the Company's globalization strategy and to create an effective structural basis to ensure the continuous improvement of the Company's competitiveness.

b. The law applicable to cross-border transfers of seat in Finland

In addition to the European regulation the following laws are applicable:

- The Finnish European Company Act (13.8.2004/742)
- The Finnish Companies Act (21.7.2006/624)
- The Finnish Securities Markets Act (26.5.1989/495) (with respect to supervision and trading)
- The Finnish Act on Trade Register (2.2.1979/129)

c. Specific requirements for the operation of such a transfer in Finland and the seat theory

In Finland specific requirements have been imposed on the protection of shareholders of a company transferring its seat to another member state as it is enacted in the SE Regulation, article 8(5). According to the Finnish European Company Act, section 10, a shareholder, who votes against the decision to transfer the company's seat to another member state at the shareholders' meeting deciding upon the transfer, has a right to demand his shares to be redeemed by the company. A holder of option or other special rights entitling to shares has the same redemption right as the shareholder of the company. The redemption process follows the same provisions as enacted in the Finnish Companies Act concerning redemption in a merger.

In Finland the incorporation doctrine is applied. In corporate law matters the registration principle is decisive.

d. Specific ruling from the government

Except for the tax rulings and discussions with the Finnish Financial Supervision Authority no rulings were requested.

Minna Aila
Project Director

3. Contribution of the France Telecom group

The SE has unquestionable advantages but also several disadvantages which hamper the incorporation of this type of company. Thus, it is important that the necessary adjustments be made in order to make this corporate form more attractive both in France and in the other Member States.

I. Advantages and disadvantages of the SE statute

A. Advantages

a. A restructuring instrument for groups within the European Union

The European company (SE) is at the date hereof, the only legal tool which enables companies incorporated in different Member States to merge, create a holding company or a joint subsidiary, while avoiding the legal and practical constraints of each Member State's legal system.

Nevertheless, in order to carry out certain heavily operational restructurings, a number of adjustments should still be added, including the possibility to carry out partial contributions of assets into an existing or to-be-incorporated SE.

b. A Governance instrument

The SE is an excellent tool in terms of governance. Indeed, when subsidiaries are replaced by affiliates, each decision taken by the registered office is immediately effective in all of the affiliates spread throughout the Member States.

Indeed, while a subsidiary has its own governance rules linked to the legal personality of the entity and to its own management and governance bodies, the affiliate or secondary branch is directly linked to the registered office and therefore makes possible simpler organization, synergies (consolidated accounts no longer needed, reinvoicing between subsidiaries and holding company no longer necessary, simplification of administrative organization opening the door for the use of more standardized joint IT tools, thus less costly).

c. The mobility of the SE within the EU

The seat of the SE, determined by the by-laws (registered office) must match the location of its central administration, i.e. its real seat. The SE may also transfer its seat within the EU without being obliged, as previously to the approval of the SE regulation, to wind-up the company in one Member State and to create another company in the other Member State.

d. The SE reinforces the European identity of a group

The SE may appear as a marketing tool and help to display and strengthen the European identity of a group.

e. A better involvement of the employee representative Bodies

The SE may be a tool offering employee representative bodies a broader vision of the main issues related to the group, a better understanding of the difficulties and opportunities of the group over a larger period. Moreover, better involvement of the employee representative bodies through the SE should also improve Social Dialogue, leaving aside historical and national antagonism.

f. Great statutory freedom in relation to SE shareholding clauses

As previously for the SAS (art. L.227-1 et seq. of the French commercial code) the lawmaker, in the implementation law, introduced into French law new provisions enabling SE shareholders who wish to give strong *intuitu personae* to their company to limit the use of the shareholders' agreement by inserting various clauses governing their relations into the by-laws (art. L. 229-11 et seq. of the French commercial code).

B. Disadvantages

We shall not mention the difficulties which may be encountered when setting up the Special Negotiating Body (SNB) and generally during the consultation process of the employee representative bodies which may appear as an obstacle to the formation of an SE.

a. Separation of the central administration from the registered office

Article L. 229-1 of the French commercial code provides that the SE is subject to the provisions of article L.210-3 and that the registered office and central administration may not be separated.

This prohibition of separation of the registered office from the central administration may appear as an obstacle to the formation of an SE. It would be advisable to offer a greater freedom in the choice which may be offered to companies.

b. Reduction of the minimum amount of capital

The SE must be incorporated with a minimum capital of 120,000 euros. A smaller amount of capital may be better adapted to the small and medium-sized companies (80% of the economic base in France) and make the SE more attractive in order to encourage their development in Europe.

c. Cumbersome legality check in case of transfer of registered office, which handicaps this transaction

The split of legality check between the notary and the clerk appears quite cumbersome and may discourage companies from carrying out this type of transfer.

Lastly, the notary does not seem to be the most well-prepared professional to carry out this kind of check. The clerk of the commercial court (or the judge assigned to the companies register) seem to be a more appropriate choice.

d. The SE seems too dependent upon each Member State's company law

One may regret that there is currently as many types of SE as there are Member States.

Each SE seems too dependent upon national company law of the Member State in which it is incorporated. Failing harmonization in that respect might result in a "Delaware" effect.

Common standard SE by-laws at EU level should maybe be proposed.

II. Proposals in view to improve the SE statute at national and / or European level:

A. Enable the ab initio formation of SEs

The SE is, as of today, the only restructuring tool for groups within the European Union. Therefore, further to the transposition of the cross-border merger Directive, the adoption and the implementation of the 14th Directive on the transfer of registered office, the *ab initio* formation of the SE will be an unquestionable advantage in order to enable companies to assert their European identity.

B. Authorize partial contributions of assets to existing or to-be-incorporated SEs

It would be advisable to amend the Regulation of October 8, 2001 on the SE, so as to authorize partial contributions of assets to existing or to-be-incorporated SEs.

Indeed, this type of transactions should make the SE even more attractive and enable more operational restructurings by contributing to the SE (existing, or to be created) separate business sections in the same field distributed among several subsidiaries in different Member States, instead of all of the assets of its companies.

III. What would be the advisable tax provisions for the SE?

A. SE's own tax regime

The achievement of a greater tax harmonization and the removal of the tax obstacles to cross-border business (elimination of double taxation on transfer prices, taking into account cross-border losses, mobility of persons…) would be advisable.

B. Shareholders taxation

Withholding taxes on dividends paid by SEs to their shareholders residing in the EU could be suppressed, independent of their capacity and percentage of capital held. The first Member State to abolish such withholding taxes will create a very strong incentive for localization of SEs on its territory.

Legal Services Directorate

4. Contribution of the PSA Peugeot Citroën Group

As all of the legislation governing the European Company (SE) is now enacted, both in the field of corporate law and labor law, the SE may now be registered in the commercial register in France.

We therefore reviewed the following questions:

- Do we see any interest for the PSA PEUGEOT CITROEN group to adopt this new corporate form?

- And, more generally, what suggestions could we make in order to improve the attractiveness of the SE for French companies?

I. Interest of the SE for the PSA PEUGEOT CITROEN Group. Summary of Advantages / Disadvantages

Firstly, as highlighted by all legal commentators, the potential scope of implementation of the SE is limited.

This is linked to the cases in which the formation of an SE is possible (article 2 of the Regulation).

The most important way to form an SE is the merger of companies.

However, one may regret in this respect that the Regulation has not included demergers and partial contributions of assets, which are common tools of reorganization for groups and indeed included in the tax directives.

Forming an SE outside of the limited cases listed in the Regulation is not possible. This shyness of the lawmaker may be explained by the concern of reserving this corporate form from the start to companies running their business in more than one Member State. One may lament it, as this remains dependent on voluntary approaches.

Moreover, in the current state of legislation, the SE is not intended for substituting for more widespread corporate forms in the Member States' legal systems: Indeed, the SE can only be incorporated from *sociétés anonymes, Società per azioni, Aktiengesellschaften* or Public Limited Companies or their equivalents, in the case of incorporation by way of merger.

The Regulation therefore excludes mergers of companies such as SAS, SARL, GmBh and limited companies, while these legal structures form a very large portion of the European economic base. In the case of Germany, the GmBh are very often companies of a substantial size, and are not as strongly linked to the small company concept as is the SARL in French law.

As far as the PSA Peugeot Citroen group is concerned, most of the commercial, industrial or financial subsidiaries created in the EU (outside of France, Italy and Spain, traditionally linked to the SA) have been incorporated under legal forms which did not enable them to reorganize by way of merger into an SE, in the current state of legislation.

The creation of an SE by way of conversion is also only accessible to *sociétés anonymes*.

Our global analysis does not make us consider advisable, as sometimes suggested by some commentators, to convert these subsidiaries into SAs, prior to proceeding with a conversion into an SE. Indeed, we would then reach extraordinarily long delays, as one would need to take into account the minimum two-year period

referred to in article 2 paragraph 4 of the Regulation. The companies would also be subject to substantial conversion costs. Moreover, the process would be difficult to explain to the labor side.

We may note that the Regulation does accept an exception at the benefit of SARLs in the context of the creation of a holding SE (article 2 paragraph 2). However, the Group has no particular project leading to the creation of a holding company meeting the requirements of article 2.

One may also note that the SASs, surprisingly enough, are excluded from this exception, probably because this corporate form only developed fully in France after 2001.

However, the Regulation extends the ability to create a subsidiary SE to all companies referred to in article 48 of the EEC Treaty, subject to such companies originating from at least two different Member States, or having a subsidiary or a branch in at least two Member States. The SE could therefore prove quite useful in the context of cross-border cooperation, in particular in relation to the solutions adopted by the French SE in respect of the shareholding regime. Nevertheless, it is not certain that the SE may result in having more advantages than the SAS, beyond a communication advantage.

Besides this potential creation of a subsidiary SE, we do not see, at this stage, any situation in which we may use the SE in the context of our group. Here again, the scope of the Regulation is too restrictive, as this would be limited to new subsidiaries, while the Group is already established in all EU countries. We may also point out that a vast majority of our subsidiaries are managed under a sole shareholding form, which is a major simplicity factor. Today, the SE regime does not authorize shareholding by a sole shareholder, with the exception of an SE being a subsidiary of another SE. This is clearly regrettable.

We can therefore see the second weakness of the SE, i.e. its excessive complexity, which makes it a true matter of experts. It would be extremely unlikely for a medium-sized company to consider engaging into the SE adventure, especially with the few “traps” contained therein, which we will refer to below.

This legal complexity may be found in the statute applicable to the SE, namely article 9 of the Regulation, which has been subject to extensive comment. This article has been widely criticized. These criticisms are understandable, as the multiplicity of legislations which is the result of the Regulation, is a source of legal uncertainty. In any case, this complexity can only affect negatively the attractiveness of the SE.

I may highlight, however, a rather positive side effect, but which does not justify, in my opinion, the legislation: I am referring to the acknowledgement of the idea that in the fields determined by the Regulation, the provisions of the by-laws prevail even over mandatory provisions of national law.

This complexity is also to be found at the level of the incorporation of the SE, in particular as regards the SNB, but also as regards corporate law, with the intervention of independent experts appointed by a legal or administrative authority, and in particular of a notary, in charge of certifying the legality of the transactions, including at employment level, without having taken part in the transactions.

If the aim is to improve company competitiveness, as restated by the Lisbon Conference, the SE seems, from the companies' point of view, out of sync with the (justified) constraints that they face, in respect of financial reporting and cost control.

I believe that companies consider unanimously that the intervention of a notary in relation to the certification of the legal and labor regularity of the conversion into a SE will be a major obstacle as long as the terms of such intervention will not be specified.

As this certificate has major legal consequences, a delay issue with obtaining these certificates is likely, as there may be a potential responsibility issue for the profession, as well as a cost issue. Companies raise this issue because they already face quite high notarial costs, even at large company scale, when carrying out mergers in which the absorbed company holds real estate assets. This is clearly a matter which will be taken into account by companies in its most effective aspects.

Is the intervention of a valuing auditor (*commissaire à la transformation*) actually necessary, while the relevant company accounts have been drawn up in accordance with references accepted and certified by independent statutory auditors? If there is any doubt in relation to the accuracy of the accounts of the relevant company, this selective verification of the net assets by an independent expert does not seem a satisfactory response in terms of financial transparency or of third-party security. In this case, one may wonder if the solution would not rather be a strengthening of accounting or company law harmonization, in order to avoid discrepancy between Member States? In any case, it seems that this duty may have been awarded to the statutory auditor(s) of the company, as in the case of a conversion of an SA into an SAS.

The labor chapter also seems to be a complexity and uncertainty factor. In addition to the employee involvement principle which seems unknown to many legal systems within the EU, the conversion into an SE implies very lengthy negotiation delays and the "before / after" principle may be considered as leading to an upwards alignment of the collective status and to a generalization of the codetermination. The SE may also raise fears that the collective negotiation process will need to be opened

on a regular basis and the SNB re-established, when certain thresholds are crossed. This measure may appear as an obstacle to the development of the SE.

This process may therefore seem cumbersome and restrictive, even though we do not question the principle of social dialogue. One may question, besides, the coexistence of this process with the group-level works council (*Comité de Groupe*).

Another difficulty of the SE: the necessary location of the registered office, chosen for incorporation purposes, in the same place as the effective decision center. Taking into account the penalties incurred under this rule, i.e., invalidity, lawyers may only recommend the highest carefulness prior to taking the decision to create an SE. Indeed, one may hesitate on the location of the effective decision center in certain cases where large management teams are split between various geographic locations. The solution chosen by the Regulation is therefore a source of legal uncertainty, or at least imposes a very centralized organization of the General Management, which does not fully match the current reality of all companies.

In our opinion, the SE statute also contains a number of "traps", which are related to the options left by the Regulation for national lawmakers. One may consider, of course, this as an opportunity for national legislations to reinforce their attractiveness in respect of other Member States. The case of France introducing flexibility in the field of shareholders' rights has been quoted in this respect. However, in addition to the inevitable complexity created by this regime, this enables national law-makers to adopt provisions which may hinder the development of the SE and backfire on companies:

Firstly, the right for certain administrative authorities (in France: CECEI, CEA, AMF) to oppose a merger or a transfer of registered office on grounds of "public interest", gives rise to many interpretations. I do not imagine companies engaging into a transaction requiring so much energy, time and thus money, creating, as the case may be, demands at the employee's level, with a risk of having the transaction prohibited based on non-predictable rules. This provision shows excessive carefulness towards a fully assumed and voluntary conception of Europe. It might, though, provide for the use, where applicable, of a national solution based on the principle of "economic patriotism". However this provision is hardly compatible with the principles of a single Market, as confirmed *inter alia* by the European Court of Justice. Besides, it is to fear that identical provisions, unfavorable to French companies, would then be adopted by the other Member States. Also, this kind of provision, essentially defensive, is a source of legal uncertainty.

The possibility of an action being brought against an administrative negative decision does not seem enough as a solution to the needs of companies, be it only in respect of the length of such process.

Secondly, we shall refer to the right for each Member State to adopt provisions aiming at ensuring appropriate protection for minority shareholders who may have voted against the merger or the transfer of registered office.

Prior to initiating such procedures, it would be wise to review the provisions of the relevant foreign law. While France decided not to use this option for mergers, it does apply it for transfers of registered office. In this case, shareholders who oppose the transfer of registered office may have their shares repurchased.

Other legislation may have introduced similar provisions in their national law, with potentially substantial financial consequences. It is the case of the Spanish law 19/2005 of November 14, 2005, who grants an exit right to minority shareholders who disapprove the merger or transfer of registered office.

The relevance of such national law provisions may be questioned.

Indeed, the change in applicable law for the company has always been considered by legal commentators as requiring unanimous approval, and one may easily understand that genuine conflicts of interests arise in this context, which need to be addressed as appropriate. This consideration is fully justified.

However, shouldn't the principle of unanimous approval be substantially lightened, in the event that the new applicable law within the European Union is substantially similar to the initial law, inter alia following the harmonization engaged in by the EU, in respect of shareholder information, new methods of participation to the corporate decisions by modern communication devices, drawing up or publication of accounts? Has the 50-year experience of European law been enough taken into account, in this field as in others? The language issue has, besides, been addressed in the Prospectus Regulation. Lastly, modern technology offers simple, and in any case quickly developing ways for shareholders to exercise their "*affectio societatis*" as they wish.

In any case, it is clear that the SE regime includes a number of uncertain aspects in respect of the implementation of these transaction and to the final cost thereof. Neither the Regulation nor the law specify under what conditions should these shareholders' exits take place.

However, three advantages of the SE have been put forward and might be important:

- The harmonization of the main European groups with the conversion of their subsidiaries into the sole SE form.

One cannot really argue that this would result in a simplification of management of these companies, as the SE, unlike EEIG, is just another national legal form (cf. article 9 of the Regulation) and not a new form that would be the same in all

the EU. The flexibility introduced in the French SE in relation to shareholders' rights is not questionable, but is it really necessary to go through an SE in order to reach this goal? The SAS and other equivalent legal forms in Europe make it possible at lesser costs.

Moreover, it is known that the SE may not actually act as a unique corporate form for existing subsidiaries, as the conversion into an SE is only possible from an SA form. We therefore do not see any particular advantage for the SE in terms of simplification of groups.

- Another advantage put forward was the possibility to carry out a transfer of registered office across the borders of a Member State, without loss of the legal personality and therefore creation of a new legal entity. This would be, theoretically, a major input of the SE. However we do not see which circumstances might, in practice, lead to such a decision, it being understood that any purely tax-related strategy of the company or of one of its managers will be absent from such a decision. Does the fact of being governed by another Member State law justify a transfer of registered office, while the freedom of establishment and of movement of capital is confirmed? One may question such a measure, in particular as a transfer of seat outside of France would authorize shareholders who will have voted against such transfer to require their shares to be repurchased, as seen above. In the case of our Group, I am not aware of this consideration having been undertaken. The transfer of seat therefore seems to represent, in our view, a purely theoretical perspective. However one can understand its interest in some more scattered groups, with the reservation mentioned above as to the issue of keeping together the real decision center and the registered office.

-Lastly, the interest of the SE in relation to merger legislation has been put forward, as it provides for the incorporation of cross-border companies having secondary locations in several EU countries.

This is probably the main, although relative, interest of the SE.

One may object that the merger Directive of October 26, 2005, which applies this time to all stock corporations, limits its interest. This Directive must indeed be implemented at the latest on December 15 2007, i.e. prior to a conversion process into a SE, if undertaken now, be most probably completed. In these circumstances, why choose the SE?

The Merger Directive is indeed below potential expectations. It does not apply to connected transactions, such as demergers, partial contributions of assets (or to the *ascisiones parciales* under Spanish law), which are used for a substantial amount of group restructurings. However, as seen above, the SE Regulation did not have a wider scope of application.

Moreover, it aims at making cross-border mergers easier only in those countries which recognize such type of mergers in their domestic law. It therefore only ensures equality of treatment between cross-border mergers and purely domestic transactions. In particular, it does not recognize, in general, the principle of transfer of all assets and liabilities (*transmission universelle* or *transmission à titre universel*). It may be argued that the Directive did not need doing this, as Council Directive number Three 78/855/CEE of October 9, 1978, in relation to mergers, acknowledged this principle. The difficulty resides however in the fact that this directive only referred to *sociétés anonymes*, excluding any other stock corporations.

Therefore there is no substantial difference between the SE Regulation and the Mergers Directive of 2005 in respect of the recognition of cross-border mergers.

We may regret in this respect that companies do not have any possibility at EU level to carry out mergers and assimilated transactions (partial contribution of assets or demergers) based on a principle of transfer of all assets and liabilities, which would be recognized at the European level for all stock corporations.

Incidentally, the absence of a European legislation, with the exception of the tax Directive on mergers, did not prevent us from carrying out from 1996 the cross-border mergers planned by the Group in the field of banking and financial companies, without any major obstacle but with certain complexities in the implementation thereof, in particular under the rules of the Directive on the mutual recognition of credit institutions.

We were thus able to carry out these transactions in Portugal, Spain, Italy, whose merger legislations are quite similar to French law and who recognize, as France does, the principle of transfer of all assets and liabilities, but also in Germany by way of transfer of all assets and liabilities or winding-up with transfer of assets and liabilities to the sole owner (dissolution-confusion) carried out in September 2005. The only country in which we could have encountered an obstacle, if we had had a project, would have been the U.K., but essentially for communication reasons.

Incidentally, the SEVIC judgment of the European Court of Justice of December 13, 2005, to quote only one, has provided support for this practice.

It must be pointed out that, whatever the procedure used for reorganizing companies, it is in most cases impossible to transfer agreements entered into on an intuitu personae basis. Solutions will therefore need to be changed on a case-by-case basis, depending on the particular context of each matter.

However, we must underline that the cross-border mergers carried out by the PSA PEUGEOT CITROEN involved fully controlled companies. The issue of changing the nationality of the company, which may have been opposed by minority shareholders, was not raised in practice.

The SE would therefore keep an advantage in relation to previous solutions, as it would overcome the potential issue of the hostile vote of minority shareholders, as long as we are dealing with *sociétés anonymes* and subject to the reservations referred to above in respect of the existence of domestic options.

The advantage is clearly quite limited for a Group like PSA Peugeot Citroën, as we have very few minority shareholders in our subsidiaries.

Eventually, we might experience a development of the SE if corporate groups decided to create "pan European" companies in which secondary branches would substitute for subsidiaries. But are we ready to give up the legal and financial security granted by a stock corporation as opposed to direct operation?

Outside of this particular banking context, one would probably need guarantees in terms of equivalent risks, notably in relation to delegations of powers.

Lastly, it must be pointed out that all groups have implemented centralized services in various fields at the benefit of their subsidiaries, such as cash management and legal or financial assistance, which noticeably decreases the disadvantages of the existence of separate legal entities.

Independent of the quality of these intra-group agreements, why should one not develop at the European level solutions which are recognized as valid at the domestic level?

Thus, we have implemented within the last few years an appreciable change in the structure of the group, in relation to the sale, distribution and automotive repair subsidiaries of the Group. After having, as a first stage, converted such subsidiaries from SAs into SASs whenever their shareholding permitted, which was indeed an important step in terms of simplification, we have implemented a merger process between the commercial subsidiaries, now gathered in a single entity, which is, incidentally, an SAS. We expect a simplification of the group there from, but also a higher availability from our sales teams and a strengthened professionalization of certain duties of the company.

Why should it not be the same at the level of our European subsidiaries, who also face legal assistance, reporting, governance or net asset management issues? The advantages deriving from the SE are clear, as long as the latter may be set up under acceptable conditions of legal security and cost.

As a conclusion to this summary on the advantages and disadvantages of the SE, we have not discerned at this date reasons for the PSA Peugeot Citroën group to use the SE structure, however we also see that this approach might change if the legislation which governs the SE was subject to evolution.

II. What suggestions could be made in order to improve the attractiveness of the SE?

The first suggestion may be widening the conditions of creating a SE.

It should not only be advisable for an SE to be possible to be incorporated ab initio, as long as its founder(s) carry out their business(es) in more than one Member State, but also directly or indirectly through subsidiaries, without excluding the cases currently provided by the Regulation.

Secondly, all stock corporations should be allowed to create or to participate in the creation of an SE, by conversion or merger, *inter alia*.

Thirdly, it would be advisable to extend the mergers regime to connected transactions, such as partial contribution of assets or demerger.

The second suggestion which would lead to the development of the SE would consist in simplifying its regime. This simplification may be implemented at various levels:

One aspect of simplification would consist in the approval of a radically European statute, thus largely disconnected from domestic laws. This would provide the SE with a unified statute, which would be easily understandable for companies, but also for all of its partners, employees, shareholders, providers or customers, and in general all stakeholders of the company.

This would imply amending article 9 of the Regulation and challenging the principle of leaving those options to the Members States which were referred to in section one hereof.

In these conditions, the SE would no longer be seen as a complex and legally uncertain structure.

The second aspect would be related to the conditions of creating and running the SE.

The reduction of incorporation delays and costs would be essential in the development of this new corporate form, as explained in section one above. We may consider that the negotiation period for the labor status could be reduced from one year to six months, and the issue of employee involvement questioned in the light of the rules in relation to the Group-level Works Council.

In terms of operation, we believe that the SE may benefit from a more radical distinction between listed companies and private companies, either created in the scope of partnerships, or fully controlled subsidiaries. Indeed, the interests at stake are not the same in both cases. It would be advisable that the solutions provided by the lawmaker be as adapted as possible to the actual issues to be dealt with. As long as we are not in the context of public offerings and as the legal and financial security of third parties is not under threat, why would one not grant a wide freedom of corporate organization at by-law level to the founders? The generalization of the SAS and of the English limited company is an evidence of the importance of these matters.

In this respect, the company held by a sole shareholder should be fully recognized.

In this context, the solutions provided by the ECJ in relation to the issue of the SE's seat, referred to above, should also be followed.

In relation to the amount of share capital (€120,000), one may think that the SE will be intended either for entities without employees, or for large companies already having a large number of employees, for whom this legal form will enable a renegotiation of an already cumbersome labor status. In the first case, the amount may seem too high. We may note, however, that the founders would benefit from flexible provisions in relation to the paying-up of the share capital. This aspect is therefore probably not the most important.

However, more innovative solutions may have been considered, either an amount depending on the business (French solution for credit institutions for example), but which is clearly limited, or, similarly to a number of foreign legislations, solvency testing, with a possibility for both methods to be combined. In any case, the absolute amount of share capital, as well as the fixed nature thereof, have both quite relative meanings.

Further to the SE, it seems interesting to us that an actual European registration with a central European register be organized, which would tend to improve the circulation throughout the EU of corporate documents (by-laws, company deeds, corporate accounts) at the benefit of third parties and all parties in interest. This would simplify the declaration obligations of foreign branches and slightly improve available information in relation to companies.

Modern technology may also contribute to the adoption of fast and economic systems.

Conclusion

It seems to us that the number of SEs would increase if the changes in its statute, described in this memorandum, aimed at softening the penalizing or restrictive nature of such statute today, were implemented.

As far as the PSA PEUGEOT CITROEN group is concerned, this would then be an advisable solution, similarly to our decision of creating two EEIG as early as in 1992.

Gilles REQUILLART
Financial Law and Corporate Law Advisor

5. Contribution of the SCOR group

The SCOR group, a reinsurance company listed in both Paris and New York, whose practice area is, at least in matters of non-life reinsurance, principally in Europe, made the decision to incorporate three European companies as of the beginning of 2006. These companies continue the business of the parent listed company and of each of the two newly created operational companies specialized in Non-life reinsurance and Life Reinsurance. These three companies are in the process of being incorporated, this process should normally be completed in May-June 2007 with the Shareholders' Meetings of the three companies.

The "Societas Europaea" is a particularly appropriate structure for the running of international business such as reinsurance, particularly since current and future European regulation in this business sector encourages and compels companies to adopt this form.

For our group, using this company form demonstrates the firm grounding of our operations in the European market and presents our commercial approach as truly European thereby showing our capacity to offer cross-border insurance and reinsurance instruments. It also contributes to the softening of our image of the Group being centered on one market, i.e. the French market where it would hold a dominant position - which is not the case.

Reinsurance is henceforth subject to a European regulation that applies to each of our subsidiaries in Europe, and therefore multiplies controls at a national level. Combined with the development of "Solvency II" which defines new obligations in terms of amount and location of capital in insurance and reinsurance companies operating in Europe, these regulations have created a heavy burden of numerous control obligations and make part of the net assets unavailable. Without mentioning the regular increase in local accounting constraints (i.e. statutory accounts vs. consolidated accounts and tax-related expenses to quote but a few of the easy ones), which prompts us to look for other, easier solutions in compliance with European regulations in order to assure the flexibility of our capital allowance.

Societas Europaea allows two objectives to be met:

- To reallocate control of reinsurance to the Group by using the single passport provided by the European regulations and therefore making advantage of the control of the Group by the French insurance control authority ACAM, (*Autorité Française de Contrôle des Assurances*), as opposed to having each SCOR affiliate in Europe controlled by each relevant national insurance control authority.
- To allow a flexible management of capital allocation between the various entities of the Group, in order to avoid a strict and costly application of "Solvency II" in each entity, while complying with solvency rules at European Group level.

Conceptually, the process of creating the Societas Europaea is simple, however in practice its implementation is slow and somewhat cumbersome. The "conversion" is relatively straightforward, but the "merger" of the European subsidiaries of SCOR Life and Non-Life (whose corporate names are SCOR Global Life and SCOR Global P&C) is fraught with pitfalls as a result of national rules and the unequal implementation of the Reinsurance Directive by each controlling authority. These pitfalls are sometimes unexpected and lengthy to overcome.

The need for a broad employee consultation, largely inspired by French law and by the structures implemented in Germany tends to surprise many employees from other European countries. It results in slowness and of misunderstandings which can be overcome with time.

In practice, the main obstacle to the European Company today consists in the length of the process. It took SCOR a year and a half to achieve the process and it required formalities with various national Administrations whose interests were not always compatible with the completion of the project and whose abilities on this subject were consequently not yet finalized.

Becoming a Societas Europaea does not have any tax consequences which means that the profits of all of our future European entities (branches) will be taxed locally. This obstacle, which is unquestionably one in the domain of reinsurance, to the central management of our risks, our net assets and profits will produce certain distortions. The Registered Offices of European Companies will, as a result, tend to be situated in countries with more favorable tax regimes. In the reinsurance sector competition is immediately global with headquarters in countries such as Bermuda where taxation is limited. Intra-European tax competition is inevitable and the "European Company" does nothing to resolve this. The European Company could, however, be used to promote standardization of tax rates and favorable tax conditions to keep services such as ours, which are becoming easier to relocate, on the EU territory.

The SCOR Group chose to become a European Company for the entirety of its operations as our subsidiaries outside Europe will be subsidiaries of the parent Company, SCOR S.E. We consider this approach as facilitating and simplifying the management of the Company and we expect it to bring in profits with regards to legal fluidity and easier administrative control of our business. However, the decision to become a European company was primarily to show the firm grounding of our operations in the European market which is today the core business and skill of SCOR.

Patrick Thourot
Delegate Director General

Annex IV

Opinions on the SE social aspect

6. Opinion of Jean-Jacques Cette: Creation of a European company by the German insurance company Allianz, majority shareholder in the French insurance company AGF

The conversion of the German insurance company, Allianz AG into a European Company, including *de facto* its French subsidiary AGF, is quite an event. Before continuing to discuss and analyze this experience it is necessary to understand its context.

- **Political aspects**

Allianz General management's decision to become a European Company was announced in December 2005, just a few months after the resounding French "no" to the European Constitution.

- **Legal aspects**

The transposition law for the European Directive is very recent, its implementation is a first. Nobody has yet had recourse to these provisions.

- **Business aspects**

The insurance industry is just starting to recover from the crisis of 2001, it experiences tight competition.

- **The Company**

Allianz is trying to recover from a period during which, for the first time in the Company's history, it recorded losses after difficulties merging with the Dresdner Bank. It is now beginning to prepare for a merger with the Italian company RAS. The management in Munich has announced a restructuring plan in Germany, which will lead to the closing of sites and the possible loss of 7500 jobs. This has caused great tension with German employee representatives.

Allianz holds 57% of the shares in AGF. After two difficult years in 2001 and 2002, AGF is now recording excellent profits. Employees were heavily involved and consulted in the process of improving the technical profits. They hope to be able to finally have a slight reprieve and expect a return on their investments.

Twenty four other companies in the other European countries are also participating in this venture. The size of these companies varies from less than 200 employees to more than 80,000. These companies might not have trade union representatives as not all relevant countries have adopted the European Directive yet.

There was a European Group committee at Allianz, however this did not meet the requirements of the European Directive. Its powers were limited and did not allow for substantive work.

- **Trade Union aspects**

Our German colleagues face the announcement of a redundancy program.

Employee representatives elections are approaching at AGF (January, February 2006), where the effects of the split between the yes and no camps which occurred during the referendum on the European Constitution are still being felt.

French employees are skeptical about this announcement. Indeed, they are regularly told that all of the sacrifices and efforts that are requested from them are a result of shareholders' demands and they are, of course, aware of the situation facing their German colleagues.

Finally, Allianz has decided that its Registered Office will be in Munich and that the co-determination principle existing under German law will be maintained.

* * *

Negotiation and implementation of the SE

The negotiation process was intense and difficult for numerous reasons. There is a lot to report, however we will try and be brief and state only the essential facts.

Allianz did not have the same image as that of its direct competitors, i.e. a large group. It is considered more a conglomerate made up of lots of different companies spread across Europe. This had a negative impact on its image, especially vis-à-vis Financial Analysts.

Allianz decided to use the European Company provisions as it seemed to support mergers and met two of its needs, which were:

- To complete the merger with RAS under the best possible terms,
- To create a firm basis in Europe from which Allianz could become a global competitor.

This is essentially why, in December 2005, Chairman of the Management Board Mikael Diekmann announced the incorporation of this European Company. The process was therefore set in motion.

As far as the labour aspects are concerned, a Special Negociating Body (SNB) had to be quickly set up, in compliance with the legislation, in order to negociate the aspects relating to the European Work Council (EWC) of the European Company, and to the employee representation at Supervisory Board level, as the Management of Allianz had decided to maintain the co-determination principle.

The first difficulty encountered was creating the SNB as some of the countries had not yet adopted the European Directive or the employees were not represented by a trade union. In France the law had been enacted. Seats on the SNB were allocated according to the number of employees, therefore, out of thirty-five seats France was allocated two. Based on the results of the last elections in our Group, CFDT was awarded these seats.

The meetings of the SNB started in January 2006. Twenty-four countries participated. These thirty-five members represented approximately 170 000 to 180 000 employees. This was the first opportunity to consider the size of our Group and it also enabled us to understand the enormity of the task that we had undertaken. Even before beginning negotiations with the Management it was clear that it was going to be difficult to define a consolidated plan of proposed measures which would meet the demands of the different social and cultural needs represented. And of course, the language barrier did not help matters. We knew how necessary it was to build Europe, but it was going to be tough!

Despite these difficulties, the SNB decided to define its demands in a plenary session and to elect a committee of six members to negotiate such demands with the Management. There were two representatives from Germany, two from Italy, one from England and one from France. They were supported by a specialist.

Many of us thought that the rights given to the European Works Council, as set out in the European Directive, were very limited. Especially in terms of resources (number of meetings, powers of investigation) and information (too vague information or communications a posteriori). However, it was still necessary to agree upon the priorities and to find a common negotiation policy in order to progress in the process.

German and French labor laws easily served as a common point of reference, but trade unions approaches were completely different in the two countries. Our German colleagues, who were clearly the majority, were slightly worried by the labour situation that they were facing in Germany. The principle of co-determination, which until now had worked well and of which they had a firm grasp of control, was beginning to show its limits. The problem was that this was our German colleagues only point of reference. They wanted to negotiate on the framework of the future bodies rather than to negotiate their objectives and means. In other words, their approach was the polar opposite of ours.

Even though we were keen to participate in the construction of a European Company we were totally opposed to the idea of building a German company that would dominate Europe, and we told them that.

It was very difficult, and it took a long time, to modify mindsets and approaches to this project. During this period we did not really make any progress.

At the same time the Management made some half-hearted suggestions. This made us doubt their willingness to cooperate and this was increased further, by their conduct when they reduced the number of representatives on the Supervisory Board. Indeed a couple of months previously the Management had the Shareholders' Meeting vote to reduce the number of members of the Supervisory Board from twenty to twelve despite the negative opinion of the German employee representatives.

Our German colleagues wanted the Management to repeal this decision, however the latter refused to do so explaining that this could only be done at a Shareholders' Meeting. This was no evidence of the good will of the Management because if they wanted genuine co-determination they should have negotiated it before presenting it at the Shareholders' Meeting. In this instance it was a matter of "case closed". The Management reasoned that the reduction to twelve members (i.e. six shareholder representatives and six employee representatives) was intended to increase reactivity with active participation from all members thus reducing the number of commissions. It was therefore surprising to hear the Chairman at the next meeting

of the Supervisory Board in December 2006 announcing the re-instigation of these very same commissions!

Throughout, the Management insisted upon the need to quickly incorporate the European Company and stated that they would not renew the negotiation period by a further six months as provided in the European Directive. This was both a limitation and ultimately a key factor in the negotiations that followed.

What was fundamental in all this was that, although we did not always understand our colleagues' approach, we always respected and appreciated each other. This meant that we could really concentrate on the heart of the matter and operate as a strong team rich in diversity. As a result we were able to raise some key issues in negotiations which we believed were not given any or enough attention, such as:

- The scope of the agreement
- The composition and the membership of the EWC
- The number of meetings of the EWC and the possibility to convene extraordinary sessions of the EWC and its terms of operation
- The ability to create commissions within the EWC
- The information, the type of information and the time frame for providing this information to the EWC, especially in respect to information originating from the Supervisory Board
- The possibility for the EWC, with the permission of the countries involved, to intervene in such country when dealing with cross-boarder issues
- The working conditions of the members of the EWC

Other issues were also raised and discussed however they are too detailed to be mentioned in this report.

We worked in the weeks that followed to ensure significant developments in these matters. In the beginning we clashed with the Company which seemed determined not to change its position, however the approaching deadline, set by the Company itself, became an increasingly powerful advantage as the days went by.

We were therefore able to progress in our negotiations and to finally make a decision that was acceptable to us. Admittedly, the agreement, the first of its kind in Europe, was not as much a benchmark as we hoped it would be in the beginning. It was, however, a firm starting point to work from and which could still be developed at a later stage.

There was the added problem that, what was generally unacceptable in a more labor developed country was head and shoulders above the standards in place in their less labor developed counterparts. It was therefore necessary to find a compromise somewhere between the two which would not reach the extent of either German or French labor law but which would generally raise the general standards.

The next step was to adopt a similar approach concerning the Supervisory Board. We knew that the primary grievance and request of our German colleagues would be to restore the number of members of the Supervisory Board, we also knew that this demand was unlikely to be met, as proved to be the case.

This raised the question, what was the actual role of employee representatives in this body? We wanted to become acting members of this body, not only privileged observers thereof. During this part of the discussions, our German colleagues quite often took the initiative, having experience of Supervisory Boards that we did not have. However, it is a large step forward that the board would no longer be made up completely of German representatives: this Supervisory Board will include an Englishman and a Frenchman amongst the six employee representatives. Throughout these discussions my English colleague and I observed a great deal, which is normal when on new territory. Our questions, which sometimes seemed ingenuous but nonetheless necessary in order to have a thorough understanding of the process, raised some necessary subjects for consideration - especially in situations which, although old history, were somewhat incoherent. A case of habit probably made people forget the original problem. We were, however, successful in incorporating some of our requests concerning our duties and powers.

It remains to say that the principle of the casting vote of the chairman of the Supervisory Board in the event of a tie makes the good operation of this body reliant upon the good faith of the company and of the shareholders to play the co-determination game. After six months of negotiations there was nearly unanimity in accepting the proposed texts of the SNB. The Management Board could consequently proceed to the next step in the process. I do not think that we may, at this stage, refer to this as "experience", however this project will certainly contribute towards building up our future experience.

Without passing judgment, but just by looking at the simple facts, we noticed that the managers of today are rarely what you could call entrepreneurs. They have become administrators who are essentially interested in short-term profits and consequently the reduction of expenses due to shareholders' pressure. These shareholders, heavily influenced by the Anglo-Saxons, no longer have a proprietary view of their investments. They look for the best annual returns no matter what other harmful effects there could be. Companies today therefore work to a different rhythm from countries. On the other hand, countries are increasingly becoming the helpless administrators of the collateral damage caused by these situations. The European Company could become one of the solutions to this problem for several reasons.

Firstly, for commercial reasons. As a result of its size, the European Company could become a global competitor, due to its higher ability to harmonize a commercial and management policy at a scale offering higher profitability than all of the entities individually (such as in the fields of IT and purchases). In this way, a growth and development strategy is better equipped to arise and to be successful. However, the higher the building, the greater the need for a strong foundation. Despite speed being a key factor in today's economy the process should not be rushed. In this type of situation, co-determination may become a key advantage.

Indeed, managers will rarely find support from the Shareholders when it comes to mid-length or long-term measures because they automatically imply a reduction in annual returns. However managers need to undertake these projects for the well-being of the company. On the other hand, they find this support in the employee representatives who see this as an opportunity to consolidate jobs. It is a strong argument in favor of the principle of co-determination for those who fear it. Employee representatives can be allies when discussing the consolidation of the Group future as there is a meeting of minds. In this type of situation of co-determination, employee representatives can report at the highest level on the daily reality of working in the company, which is something that managers quite often do not see or understand or that is often badly described by Consultancy Firms who primarily focus on other aspects. This reality check is imperative for the Group to be able to effectively and realistically implement new business strategies. To have to discuss the remarks of the employee representatives can only be a positive thing. As for the employee representatives, it is definitely beneficial for them to understand the economic realities and stakes that the Company faces on a daily basis. There are realities, whether we like them or not. One of them is that the jobs of today will not be the same tomorrow. It is necessary to admit it and to be ready so that today's employees still be here tomorrow.

If the common interest is not limited to that of the shareholder, the co-determination principle could help us towards achieving this goal. However co-determination is not the answer to everything. Men are men and the market will remain unchanged, and there will always be the temptation to do things the easiest way possible. Co-determination without the necessary balance of powers would just be a sham system. In every instance, the Chairman of the Supervisory Board has the casting vote. That means that if votes are tied the same side will always win. When this happens co-determination no longer exists and the Supervisory Board is just a first rank information tool for the employee representatives. It is better than nothing, but it is no way near what was originally intended. With regard to all of the above, it is to fear that in reality this is what will generally happen. To prevent this, the European Directive would need to give more "direction" so that it can become a useful instrument when dealing with the stakes of the shareholders and the employees in the company. We have already seen examples of how important it is to evolve and adapt with business needs in order for jobs to remain in Europe. In that case, anticipating this evolution by measures such as professional training should be encouraged in the Directive.

Better means and powers should be given to the EWC as well as other relevant economic and strategic information. In order to achieve this and to act quickly, one annual meeting is not realistic. It would therefore be advisable to improve the initial text of the Directive by leaving six months, which are extremely necessary, for negotiations between the different labor groups of the company in order to adopt a further agreement which should provide for an organization matching the daily realities of the company. It will act as a sort of minimum guarantee of the contractual relationship.

Safeguards and arbiters should constantly be in place to ward off the risk of redundancies on a European scale. The national bodies to which the redundant will turn to will find it harder and harder to find alternative solutions. These bodies will also find it harder and harder to meet the demands of their national welfare systems, which cannot exist without financial input. This is a vicious circle as the financial input comes from none other than the employees!

In conclusion, the European company may bring financial solutions for the company and labour solutions for its employees. Co-determination is one of these solutions, however it has only succeeded in Germany as a result of the negotiating parties' mindsets. Times have changed, as well as people's mentalities. It is possible that co-determination is no longer the right approach. Those who will make the most of the co-determination principle will be very efficient and probably formidable in business. By contrast, in case of pretence, the labour consequences will be on a much larger scale than before. Therefore, one must support it, without overpowering it, as it is a term that is greatly appreciated and evoked by managers. This opportunity is therefore not without risk but it is still worth seizing because of everything else that is at stake. As for us, we participate in this challenge with enthusiasm and determination.

Jean-Jacques Cette
CFDT elected representative, Secretary of the AGF Common Work Coucil
Member of Board of Directors of AGF
Member of Supervisory Board of Allianz

7. Opinion of Norbert Kluge, senior researcher ETUI-REHS and Michael Stollt, researcher ETUI-REHS: The European Company (SE) – First experiences from the application of this new piece of European corporate law. Review from the employee point of perspective based on findings of the SEEUROPE project of European Trade Union Institute (ETUI-REHS) (Answers to the questionnaire SE on the social aspect)

I. From your point of view to what extent is the 2001 compromise on the employee participation in the SE satisfactory?

The result reached by the EC Council in 2001 represents a historic compromise. More than 30 years the debate on the introduction of a European Company Statute was in a deadlock. Besides the question of taxation and the board structure the most disputed issue was the question of board-level representation of employees in the SE (participation). Whereas some countries have a tradition of employee board-level representation in their countries (such as Austria, Germany and Sweden) others don't have any tradition at all (e.g. the UK or Italy). Nevertheless, today we can state that some form of statutory board-level involvement of employees can be found in the majority of the EU member states. In at least 13 of the 30 European countries applying the SE legislation statutory employee board-level representation constitutes an integral part of the national Corporate Governance system in the sense that it exists in both the state-owned and the private sector. Interestingly, in the process of reforming their economical and political systems also many post communist countries introduced in the beginning of the 1990s statutory participation rights at board-level (Slovenia, Czech Republic, Hungary and Slovak Republic; Poland for companies in process of privatisation)[211] . These nationally based rights are very much interweaved with the country's specific industrial relations and corporate governance systems. Consequently a vast variety of practices has developed in the past 50 years making a harmonization process extremely difficult and blocking for a long time almost the slightest progress in the adoption of the SE statute. If it was finally possible to overcome the deadlock this was mainly possible due to the following factors:

[211] Norbert Kluge et Michael Stollt (éd.), *The European Company – Prospects for worker board level participation in the enlarged EU*, Bruxelles, ETUI-REHS et SDA, 2006.

The adoption of the European Works Council (EWC) Directive in 1994 which included a new approach based on company-based negotiations (instead of a "one size fits all" approach) and minimum fallback provisions (standard rules).

The introduction of the "Before and After Principle" which seeks to ensure that on the one hand no existing employee rights would get lost and on the other side that no company (and country) to which participation is unknown has to "import" this feature involuntarily.

The introduction of an opt-out-clause with regard to the application of the standard rights relating to participation in the case of a merger was a prominent concession to the Spanish government at the time of the final political decisions on the SE legislation in 2001. However, against expectations of some reviewers the clause had no practical meaning: ultimately not a single country decided to use this clause.

From the beginning, the European trade unions have welcomed the compromise achieved and have supported its implementation. The result was perceived as a not perfect but by and large fair compromise. The positive perception of the new opportunity of statutory employee involvement in boardrooms of SEs was the temporarily final stage of a long lasting controversial internal debate. While the ETUC's Helsinki congress in 1999 described the possibility for employees to influence enterprise decision-making at the highest level as a 'new right at work', from now on, the action programme of the Prague congress in 2003 declared, the ETUC and the European trade union organisations would together strive for the highest possible level of workers' participation in SEs. It suggested to understand the employee mandates on SE supervisory boards or administrative boards as 'European mandates'[212].

For the assessment from a European trade union point of view particularly the following aspects are relevant:

- **Respect of the diversity of systems and traditions:** The compromise found respects the existing varieties and traditions of national systems of trade unionism and interest representation. The trade unions accepted the approach making employee involvement in SEs subject to negotiations with the employer side although they are rather favouring a promotion of employee board-level representation as a harmonized and obligatory feature provided by European legislation. They agreed that the SE legislation opens the door for tailor-made solutions for each SE although this challenges hitherto styles and practices of trade union interest representation.

- **The safeguarding of existing rights is by and large ensured**: The indeed rather sophisticated mixture of free negotiations, minimum fallback provisions, thresholds for the automatic application of the standard rules on participation in case no agreement is concluded, special voting requirements for

[212] Kluge, Norbert (2006) *Europe - Space for workers' participation* Brussels: ETUI-REHS.

the lowering of participation rights, specific rules on the problematic case of a conversion into an SE and the introduction of a misuse clause clearly demonstrate the willingness of the European legislator to avoid the lowering or total abolition of existing national worker involvement rights. As a consequence from this it seems rather unlikely that many companies will try to use the SE statute to get rid or avoid national participation rights. This view is also supported by the first European Companies where negotiations have taken place. In none of the cases existing participation rights have been reduced. Of course, this can only be a very preliminary conclusion.

- **The perspective of providing more employees with a voice in the company organs:** Clearly the use of the "Before and After Principle" represented a turning away from the original aim to introduce a genuinely European corporate form which includes a representation of the employees in the company's organs for every single SE (as foreseen e.g. in the Commission proposals in the 1970s[213]). Nevertheless, the SE Directive opens the door for an extension of participation rights to countries and companies not yet covered by such rules. The nomination of a British worker representative on the supervisory board of Allianz SE is a first indication for a possible development into this direction.

- **A European definition of** employee board-level representation (**participation**): For the first time, a European definition of participation was given and was made an integral part of the European negotiations on the "trias of worker involvement rights" (information, consultation and participation)

- **A better definition of information and consultation rights compared to the EWC Directive**: The wording of the SE Directive makes very clear that information and consultation duties need to be taken seriously by the employer. Obviously, information and consultation only makes sense if a company decision has not already been taken and the opinion of the worker representatives can still be taken into account. The SE legislation promises a kind of "SE works council plus" which means it is based in law substantially better than an EWC together with the additional opportunity to be present in the controlling and monitoring of a company where applicable.

- **A strengthened role for the trade unions:** The legislation enabled countries to provide that representatives of the trade unions can be a member of the Special Negotiating Body and the company's supervisory or administrative board even if they are not employed by the company. Moreover, the Directive makes explicitly reference to the relevance of "community level trade union organizations" being involved as experts. This reflects the important positive contribution which trade unions at both national and European level

[213] Pichot, Evelyne (2001) *Employee representatives in Europe and their economic prerogatives* Luxembourg: European Commission, 2001.

can make to a productive worker involvement system from which both sides benefit.

- **The internationalization of the board composition**: Whereas the board members elected by the shareholder side often reflect the international activities of the company, the "worker side" in almost 100% of the cases so far entirely comes from the home country even if the company has a large part of its workforce employed in other EU countries. The SE opens the door for a real European interest representation at board level with employee representatives from several member states exercising European instead of national mandates. However, without any doubt this represents a major challenge to the worker representatives and their trade unions making a better coordination of the worker positions a precondition for a successful interest representation.

Although it is too early to draw already final conclusions some points remain critical with regard to the status quo of the SE Directive. The following shortcomings appear particularly relevant:

- **Missing rules on structural changes**: As the SE legislation only regulates the initial situation of setting up an SE a crucial open question remains what happens if an SE is involved into structural changes which also affect participation rights. The Directive leaves it to the discretion of the negotiating partners to find a suitable solution in the agreement – clearly a non-satisfying solution. Unfortunately only some of the member states like Austria, France, Germany and the Netherlands have clarified this by inserting rules in their national transposition laws that explicitly state that the employee side can ask for a renegotiation of the agreement if there are substantial structural changes after the creation of the SE which have had a considerable effect on employee involvement[214].

- **Achievement of national employee thresholds for participation at a later stage**: As mentioned before, the Directive only regulates the situation in the initial situation of the SE foundation. This means that if a company does not meet the national criteria for the introduction of participation rights in the beginning it is not obliged to introduce participation rights in the SE later. The Directive misses a clause stating that new negotiations will take place once national standards (in one of the country's where the SE has employees) are met at a later stage (e.g. by meeting an employee threshold).

- **Decisive criterion for the "Before and After Principle": Existing right to participation instead of existing participation regime:** According to na-

[214] Fulton, Lionel (2006) 'Anchoring the European Company in national law', in Kluge, Norbert and Michael Stollt (ed) *The European Company - Prospects for worker board-level participation in the enlarged EU,* Brussels: ETUI-REHS, 31-42.

tional regulation in some EU-member states like Finland or Sweden there is not always an automatic obligation to provide for participation rights in boardrooms. In these cases they need to be triggered by the employee side. Even where formally an automatic procedure exists the representation is not always installed. For the SNB's right to ask for the application of the standard rules on participation the question should be whether one (or more) employee groups had the legal right to ask for a representation at board level irrespective of whether the employee side had already asked for the implementation of this right before.

- **What happens with the "empty SEs" and the "shelf SEs"?**: Since October 2004 at least 65 European Companies have been set-up (Schwimbersky SE-Fact Sheets, February 2007, see www.seeurope-network.org). However, the large majority among them does not have any employees ("empty SEs") and some apparently have not been set up for a specific purpose but shall be sold later to companies so that these can set up in business very quickly (so called "shelf SEs"). On the one hand already the question whether it is in lign with the SE legislation to set-up an SE without any employees is legally contested[215]. On the other hand, and probably even more crucial is the question of what happens if at a later stage employees are "transferred" into these empty SEs which had been registered without any agreement on worker involvement. The current legal uncertainty is doubtlessly an important shortcoming of the SE directive.

- **Need for a European registry of SEs which includes the arrangements on worker involvement:** At the moment it often requires an investigative work to find out more about the setting-up of the SNB and the following negotiations. The EU so far publishes some information compiled from the national registries on their website however it contains no information on worker involvement within these SEs. The member states should be obliged to also collect and publish the details on the negotiation process (including the employee figures for each country, the composition of the SNB and the full-text of the agreement) which shall then afterwards be made available online by the EU Commission. This is to illustrate to the public that the SE-legislation consists bindingly of two pieces: the SE-statute *and* the SE-directive.

- **No lowering of the SE participation standard in subsequent legislation:** As argued above the SE worker involvement mechanism represents a well-balanced compromise respecting the different national traditions and interests of both the employer and the employees. For this reason, it is important to maintain the standard set by the SE legislation also in subsequent legislative measures in the field of company law. Already, the standard was lowered partially within the Directive on cross-border mergers (10th Company Law

[215] Blanke, Thomas (2006) *"Vorrats-SE" ohne Arbeitnehmerbeteiligung.* Edition der Hans-Böckler-Stiftung 161, Düsseldorf: Hans-Böckler-Stiftung.

Directive) especially by raising the existing employee thresholds. The danger is that the SE standard is perforated in coming initiatives even more. In this regard it is essential to ensure that in the planned projects of a 14th company law Directive on the cross-border transferal of seat and even the introduction of a European Private Company Statute (EPCS) shall not be used knowingly for further reduction of the the SE standard. Particularly, it should not be possible that the application of the merger Directive can result in a lowering down of pre-existing participation rights in the situation of an SE becoming subject of a subsequent cross-border merger.

- **Experiences with the implementation of employee involvement in the first SEs established:**

  The first relevant agreements on employee involvement based on the SE Directive (like in Elcoteq SE, STRABAG SE, Plansee SE, Allianz SE or MAN Diesel SE) show no evidence to the assertion that the SE provision lacks attraction because of the obligatory (and by some commentators considered as too complicated and bureaucratic) procedure to achieve the required agreement on worker involvement. In contrast to some expectations mostly raised by the employer side, management was not reluctant to accept substantial employee representation through a sufficiently equipped SE-works council together with boardroom representation where obvious from the origin of an SE and according to the country where it is registered. With the Allianz SE, for the first time ever, a large company - employing some 160,000 workers in virtually all EU Member States - expressly subscribed to a system of European management comprising significant mandatory worker participation. Accordingly, ETUC concluded that mandatory worker participation is not a historically obsolete model (ETUC press release, 25/9/2006).

  Remarkably, the SE contributes to a reasonable innovation regarding the composition of the employee representation at board level. Unlike the situation in the national provisions it is common to compose SE boards by representatives from different origins. In case of Allianz SE also the idea of a "European mandate" is realised: The vice-president of UNI-Finance took seat in the new SE supervisory board.

Another interesting result may be that companies are using the SE as intended to change their corporate structure (transferring from a two-tier system into a single structure like in Austrian Plansee SE) or to transfer their registered seat after having set-up the SE (like Elcoteq SE which moved the registered seat from Finland to Luxembourg). The agreed system of employee representation does not hamper these purposes. Moreover, it is important to note that a change in the board structure does not justify any reduction of the participation standard which existed before. In the case of Plansee SE the change towards a monistic boardroom even led to an increase of the percentage of seats hold by the employee side.

II. How would you respond to complaints from companies about the duration of the negotiation procedure (the formation of the Special Negotiating Body takes months, as does the negotiation process itself)?

Indeed the negotiations can take months and even up to one year, however the latter only if both parties have agreed to prolong. Otherwise the maximum duration is six months. This seems to be reasonably short especially because it unavoidably takes time to set-up a special negotiating body particularly if the company is represented in many member states.

Nevertheless, the negotiations can be speeded-up by the management by providing the employees and their representatives with detailed information on the foundation process and the necessary information needed to set-up the SNB. Also the atmosphere in which the negotiations take place can have an influence how quick an agreement can be found.

However we should keep in mind that the European legislator has expressly coupled the foundation of an SE with the existence of an agreement on worker information, consultation and – where applicable - participation rights. The negotiations are not just a technical, time consuming and burdensome task representing an unavoidable precondition to the registration. The SE shows the commitment of the EU to a specific European model of industrial relations and corporate governance which give employees the right to participate in company decisions which affect them according to a European thread dating back to the pioneer days of the European Coal and Steel Community (ECSC) in 1952.. Not only shareholders have an interest in the well-being of the company but also the workers have a legitimate right to be involved. For this purpose, half a year seems not to be exaggerated for finding a solution respecting the interests of all parties involved in decisions affecting their workplaces at all levels and based on European legislation. Incidentally, in many cases it will not be the negotiations that delay the process of registration. This is for example the case of the Nordic financial services group Nordea where legal uncertainties regarding transferring deposits without problems so far hindered the company to continue with its SE registration.

We would therefore strongly recommend companies to look at the negotiation period as an investment into the company's European corporate culture and as a precondition to later-on benefit from the advantages of a genuinely European solution of worker involvement. In a more transparent decision making structure the proper organisation of the voice of labour at the top of a company will be also prove beneficial for the easier implementation of restructuring processes in a trans-national scale. Potentially, thereby an SE-works council will gain a more important position probably to the disfavor of national representation bodies.

III. What would you answer to companies which refuse to adopt the SE status for fear that the employee participation model could be applicable to them?

Clearly against the initial aims of trade unions the SE regulation guarantees only the preservation of pre-existing rights of statutory involvement by the "Before and After principle". But the law is not designed to introduce a harmonized substantial regime of worker participation – although it also does not prevent somebody to do so in practice.

Secondly, participation in the company's supervisory or administrative board is no "expropriation" of the shareholders. In none of the EU member states the employee representatives are in a position to ultimately prevent a decision from being taken if the shareholder side acts with a single voice (even not in Germany where 50% of the supervisory board seats are reserved for the employee side because of the casting vote of the chairman in the event of a tie). The recommendation of the EU-Commission of 15 February 2005 on the role of non-executive or supervisory directors of listed companies and on the committees of the (supervisory) board makes clear that employee representatives are accepted to serve as "independent non-executive directors" on (supervisory) boards in the controlling of the companies' activities. (European Commission 2005, Appendix 2). Even the OECD Principles on Corporate Governance from 2004 concede expressly the role of employee representatives as representatives of relevant stakeholders of a company at its top organs[216].

Thirdly, research clearly indicates that the existence of participation rights overall has no negative economical consequences for the company. Recently, this was again underlined e.g. in Germany. The independent researchers from a government set-up "Commission on the reform of the German participation system (*Unternehmensmitbestimmung*)" concluded in their final report that research does not indicate any proof for negative implications of the participation at board level on the company's economic success. Also from other countries no such studies are known. Moreover, analysis suggests from empirical evidence that countries providing for a statutory element of employee board-level representation as element of their corporate governance system are economically performing better than others without this feature[217].

Fourthly, the companies should therefore rather look at the benefits they can gain from having worker representatives on their board. In a nutshell these are especially the following:

- Promotion of "peace at the workplace" and facilitation of structural changes through higher legitimacy of company decisions (e.g. far less strikes).

---

[216] OECD (2004) OECD Principles of Corporate Governance 2004., Paris: OECD.

[217] ETUI-REHS and ETUC (ed) (2006) *Benchmarking Working Europe 2006*, Brussels: European Trade Union Institute.

- Higher motivation of employees as they are treated as "business partners" whose voice counts. The consideration of their representatives on (supervisory) board positions fits with the requirements of "high performance workforce" which is involved and committed to the company. This type of workforce characterizes the "European way" of seeking global competitiveness according to the Lisbon strategy.

- Channeling the knowledge and the experience from the shop floor into the decision-making process. Moreover the employee side has a specific interest into the long-term well-being of the company which might counterbalance dangerous short-termism demanded by some shareholders.

- A commitment of the company to involve its employees into the company decision-making from the shop floor up to the company level and including the representation on the board demonstrates that the company is willing to see the employees as citizens at their workplace. A strong and honestly meant participation regime clearly is a signal of a good corporate social responsibility.

The contribution of such a participative and democratic approach to the future success of European companies under the conditions of internationalised markets and globalization was also highlighted by the high level expert group chaired by Etienne Davignon in their *Final Report on European Systems of Workers Involvement*: *"The type of labour needed by European companies - skilled, mobile, committed, responsible, and capable of using technical innovations and of identifying with the objective of increasing competitiveness and quality - cannot be expected simply to obey the employers' instructions. Workers must be closely and permanently involved in decision-making at all levels of the company*."

IV. In this context, would it be desirable to make proposals in order to overcome companies' apprehension regarding the SE status, in particular with regard to the workshop relating to the European Private Company?

Like the ETUC in its position paper from 18/19 October 2006 (ETUC 2006) we will also not take a pertinent stand on the need and desirability of an EPCS, nor on its minimum statutory content concerning its legal personality, capital requirements, board structure, registration, minority rights, financial statements etc. It will comment on that if and when a concrete proposal is on the table. Especially the debate on worker participation and the existing myths to this topic should be led on a rational basis. However, whatever may be the outcome of the recent attempts to introduce this idea, it should be clear from the outset, that any proposal on an EPCS should adequately address the rights of the employees to information, consultation and participation in the affairs and decision making process of the European Private Company. Otherwise, it cannot become recognised as a real European provision.

Moreover, it is questionable whether a specific participation solution is really needed. There is no evidence that the SE solution is only applicable to bigger companies. In this regard, especially the proposal of introducing a minimum employee threshold of 500 employees for participation rights appears unjustified firstly because the SE Directive does not contain any general minimum thresholds of this nature - Moreover and maybe even more important: With the exception of Germany, Luxembourg and Slovenia - no country providing for statutory boardlevel representation of employees limits its applicability to companies above 500 employees. In Sweden national law enables workers' presence in boardrooms already in companies with more than 25 employees[218].

V. Your thoughts on the future of the SE statute

More than two years after the entry into force of the SE legislation, still no run on the SE can be observed. Nevertheless, company's interest into this new corporate form has increased since. Particularly the decision of Allianz to set themselves up as an SE has been a milestone for the acceptance of the SE in business. Doubtlessly, the criticism with regard to the SE statute has diminished since albeit not entirely vanished for the well-known shortcomings of the SE statute. In this regard it is absolutely necessary to clarify the existing legal uncertainties (e.g. with regard to hidden reserves) which still hamper companies from making use of the SE statute.

In the future the SE statute will be one structure among others providing for more trans-national company mobility in Europe. The entry into force of the cross-border merger Directive (December 2007) and the likely adoption of a Directive on the cross-border transferal of the company's seat will complete European corporate law. However, regarding the position of employees it should not be allowed to fall back behind the substantial rules of the SE Directive. Recently, corporate governance has become a contested terrain in Europe. It should not be aggravated by differences between concerned European directives effecting social dumping. If the SE really wants to become what some economists have called the "Flagship of European Company Law", the aspect of a European system of worker involvement at all levels needs to remain a distinctive feature of it.

[218] Kommission zur Modernisierung der deutschen Mitbestimmung. Bericht der wissenschaftlichen Mitglieder der Kommission (2006).
http://www.bundesregierung.de/nn_774/Content/DE/Artikel/2006-12-20-betribliche-mitbestimmung-modernisieren.html

With regard to worker participation rights, the first SE company cases have demonstrated that the necessity to grant participation rights for many companies obviously does not represent an obstacle to their SE project.

Dr Norbert Kluge
Senior researcher ETUI-REHS

Michael Stollt
Researcher ETUI-REHS

HEC EUROPE INSTITUTE

The work of the institute

Training: The HEC Europe Institute designs its training programs to respond to the needs of decision makers who want to better understand both the challenges and opportunities associated with the new European dynamics. The interdisciplinary and pragmatic training programs, for example the seminar "Europe at work", draw on the expertise of the HEC faculty as well as the Institute's network of business and political leaders.

Dialogue: Conferences and debates bring together key political and business personalities known for their contribution to the development of Europe. The aim is to promote open and constructive dialogue, far removed from prepared statements and partisan divisions.

Partnerships: Research plays a vital role in generating new ideas and policies. As part of a major academic institution, the Europe Institute collaborates with other think tanks, universities, business and political leaders and journalists to tackle emerging topics critical to Europe, including transatlantic co-operation and the socio-economic impacts of European Union Expansion.

Governance

Noëlle Lenoir

President of the HEC Europe Institute and former French Minister for European Affairs

Bertrand Moingeon

Director of the HEC Europe Institute and Deputy Dean of HEC Paris

www.hec.fr/hec/eng/instituts/european.html