

SE structure and transfer of office

EU Company Law

Exam question

Explain and discuss the structure of the SE (the European Company) and the transfer of registered office and head office of the SE.

Introduction

Source of EU law

Regulation (EC) 2157/2001 (The SE regulation)

Directive 2001/86/EC (The SE directive on employee involvement)

Both are based on **art. 308 EC**

- → the **council** may take appropriate measures by **unanimous** decision in order to achieve Community objectives where the **treaty does not provide the necessary powers** thereto.

The SE came into force as of 8 October 2004.

The SE Regulation applies not only in the EU, but also throughout the European Economic Area (EEA) (i.e. Iceland, Norway and Liechtenstein).

Public limited company – legal personality

The SE (Societas Europaea) is an European **public limited** company with legal personality

- and the **shareholders liability** is limited to their capital contribution (Art. 1 (2) of the SE Regulation).

An SE has **legal personality** from the time of registration

- This implies that it can **acquire rights and obligations**/liabilities by law, is entitled to sue and to enforce its rights, and can be sued in order to ensure compliance with its obligations.

The original concept of the SE

Creation of a **truly** European company governed by a single set of rules

- regardless of where the company's registered seat was located, and
- having the freedom to move from one Member State to another without being bothered by traditional obstacles faced by companies subject to national law.

From the preamble

- "It is essential ... [to have] companies formed and carrying business under the law created by the Community Regulation **directly applicable** in all MS."
- This did not happen. The SE Regulation heavily uses renvoi to point at national law.

Why is there a need for an SE?

- Uniform form of incorporation
- SE permits cross-boarder mergers
- SE can change nationality
 - i.e. can be transferred to another country, without needing to be liquidated in the state of origin and be re-incorporated in the receiving state.
 - **In case of an ordinary limited company** such removal from one Member State to another would require the implementation of the draft 14th Company Directive on cross-border change of domicile.

The need for SE seems overrated.

- The lack of a European company did not hamper the internationalization of businesses.

Registered office

An SE must be registered in a Member State.

- The registration formalities are determined by the law of the Member State where the SE is formed.

Furthermore, an SE's registered office must be located in the same Member State as its head office (real seat).

Capital

Regardless of the currency in which it is expressed, an SE is required to have a **minimum** amount of subscribed share capital of the equivalent of at least EUR 120.000.

- This relatively significant amount is intended to ensure that only companies of a reasonable size register as SE's
 - and to discourage small and medium-sized undertakings from opting for SE status.

Structure

Company bodies

General Meeting

and

either a supervisory organ and a management organ (2-tier system) ↔ an administrative organ (1-tier system)

General meeting

The SE Regulation reserves the following powers to the general meeting:

- transfer of the registered (and head) office
- amendment of the statutes of the SE
- appointment and removal of the members of the supervisory board (in a 2-tier system) / administrative body (in a 1-tier system)
- formation of SE by merger
- formation of SE as a holding company
- matters for which responsibility is given to the general meeting of a domestic public limited company
 - this is of special importance for the various matters that are almost completely referred to national law (e.g. annual accounts and the winding up of an SE)

Decisions of the general meeting are taken by the majority of the votes cast.

- Exception: Amendment of articles of association (2/3).

Administration and management

One-tier system

- Management is undertaken by an 'administrative organ'.

Two-tier system

- Management is undertaken by a 'management organ' and
- a separate 'supervisory organ' that supervises the work of the management organ.

One-tier

In this system an ‘administrative organ’ manages the SE. The administrative organ must meet at least once every 3 months. A chairman must be appointed from amongst the members.

Two-tier

In this system a ‘management organ’ manages the SE and a separate ‘supervisory organ’ supervises the work of the management organ. In general, no person may be a member of both.

Supervisory organ

- The supervisory organ may not exercise management powers.
- It must appoint a chairman from amongst its members.
- No person may sit in both the management organ and the supervisory organ (independence).

Management organ

- Members of the management are appointed by the supervisory organ.
 - MS may require or permit the GM to appoint and remove members.
- The management organ must report to the supervisory organ at least every 3 months.

Common rules

- Members of company organs are appointed for max 6 years – reappointment possible.
- Legal persons (companies) may be on the board, provided they may in national public limited company.
- Statutes (vedtægterne) shall list the transactions that require
 - the authorization of the management organ by the supervisory organ (two-tier system)
 - express decision by the administrative organ (one-tier system)
- Decision making requires at least 50% of the members be present (or represented).
- Members of the organs are liable for loss or damage sustained by the SE as a result of breach of the obligations attached to their functions.

Transfer of office

Registered office – head office

Art. 7:

- The SE must have its registered office and head office in the same Member State.
 - The SE company may not function as a mailbox company only.
- → Prevents Delaware effect

Art. 64.

- Consequence **if registered office and head office not in the same member state:**
- “The Member State in which the SE’s registered office is situated shall take appropriate measures to oblige the SE to regularise its position within a specified period of time:
 - a) by **reestablishing its head office** in the Member State in which its registered office is situated, or
 - b) by **transferring the registered office** by means of the procedure laid down in Art. 8.
- The Member State in which the SE’s registered office is situated shall put in place the measures necessary to ensure that an **SE which fails** to regularise its position in accordance with the above **is liquidated**”

Transferal of registered office

Art. 8:

- The registered office **may be transferred** to another Member States **without** it resulting in the **winding up** of the SE or the creation of a new legal person.
- The principal requirement is shareholder approval.
 - → approval of the GM with at least 2/3 majority. - art. 59.

Art. 8 sets up the special "transfer rules":

- Publish a transfer proposal
 - containing
 - proposed new reg. Office,
 - implication on employee involvement,
 - timetable,
 - creditor and shareholder protection rights
- Report on judicial/economic aspects – drawn up by the management or administrative organ
 - Should also contain implications for shareholders, creditors and employees.
- The interests of creditors must be adequately protected an accordance with local law.
 - MS may adopt appropriate provisions protecting the minority shareholders who opposed the transfer.
- Decision of transfer may not be taken for 2 months after publication of transfer proposal.
 - During this time, the relevant authorities in the Member State where the SE is registered can oppose the transfer. Art. 8 (6)
 - 1 month before the decision, shareholders and creditors have the right to examine the transfer proposal and the report.
- The transfer can only take place once the authorities in both Member States are satisfied that all the acts and formalities have been completed.