

SE regulation and establishment

EU Company Law

Exam question

Explain and discuss the interaction between the SE Regulation and national company law and how a SE (a European Company) is established (including the motives for establishment).

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.

Interaction of SE Regulation and national company law

Renvoi-technique

The original intention was to create a common European form of company which would be identical from Member State to Member State. This idea was however abandoned.

The Regulation surrenders its powers and instead refers to national company laws – although national company law is shaped by the relevant EU Company Directives.

On a number of areas such as: maintenance of capital, increase of capital, decrease of capital there are no independent rules for the SE. Same goes for protection of minority shareholders. Reference is merely made to the conditions that apply in the SE's home country.

The 67 substantive articles of the Regulation (as against 282 in the first Commission draft of 1970), contain 65 references to national law and 32 options for Member States.

As a result we do not have one SE – but one SE for each of the Member States.

Some areas were the SE Regulation points to the laws of the home state:

- SE shall be regarded as a public limited company governed by the national law – art. 3.
- (Formation). Art 15.1
 - National law of public limited companies shall apply where not regulated by the Regulation
- Capital of the SE / maintenance and changes to the capital. Art. 5
 - Minimum capital. → MS can provide for more
 - Capital maintenance and changes → national law – some of those are harmonized!
- Management liability towards the SE. Art. 51.
- Conduct of general meetings and voting procedures. Art. 54-60.
- Winding up, liquidation, insolvency, cessation of payments. Art. 63.

Harmonization?

Remember: e.g. 2nd company directive etc.

Ranking – The SE is governed by what?

Article 9 of the SE Regulation (hierarchy of legal sources).

- "1. An SE shall be governed:

- (a) by the SE 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.”

The laws which are adopted by the Member States specially for the SE must be in accordance with directives applicable to public limited liability companies. Art 9(2)

According to art. 18 national law governs questions not covered by the Regulation.

The SE's equality of status with ordinary companies

No discrimination. See recital no. 5 in the preamble and Art. 10.

Same sanctions. See recital no. 18 in the preamble.

Formation of a SE company

Why choose a SE?

Free movement across EU.

Choice of structure

- one-tier vs. two-tier

Introduction

An SE cannot be freely incorporated through the investment of capital in the same way as formation of an ordinary public or private limited company.

At least 2 companies must already be in existence – and these must have a cross boarder element due to different nationality. - natural persons can not form an SE

There will at some point be off-the-shelf SEs offered for sale.

There are several ways of forming an SE - and different types of bodies may be involved in each:

1. by merger
2. as a holding company
3. as a subsidiary
4. by transforming an existing public limited company into an SE.

All have a cross-boarder element

Capital rules

Minimal capital rule

- 120,000 EUR.

Capital maintenance rules and capital change rules

- Regulated by local national law on public limited liability companies

Legal personality

Legal personality at time of registration. Art. 12.

Renvoi

Regardless of which method is used to form an SE – the formation shall be governed by the national company law of the state in which it is registered. Art. 15(1).

Employee involvement

An SE cannot be registered before an arrangement for employee involvement has been concluded – or when no arrangement could be reached until the applicable rules on employee involvement have been determined in accordance with the SE Employment Involvement directive

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

Formation by merger

Art. 2(1) and 18-31

2 or more public limited companies (or existing SEs) may merge to form an SE provided that

- at least 2 of them are governed by the laws of different Member States.

The merger may be conducted by acquisition (with the acquiring company becoming an SE) or by the formation of a new company (with the merging companies ceasing to exist).

In general: What is a merger?

- When – (1) without going into liquidation - one or more companies (2) transfer all assets and liabilities to another existing company / a new company (3) in exchange for shares in the the existing company and (if applicable) cash payment (not exceeding 10% of the nominal or, in the absence of a nominal value, of the accounting par value of these shares.)
- cf. Art. 3 of the merger directive.

Essential elements

- MS may provide for its competent authorities to oppose the merger on grounds of public interests.
 - E.g. tax claims.
- MS may also provide protection for minority shareholders who opposed the merger.
- Approval of the draft terms by the GM of each of the merging companies.
- Publication of information
- Experts examination of the draft terms.
- Protection of the creditors and holders of securities.

- The legality of the merger is controlled by MS of each of the merging company, regard to national law
- **Questions not solved** by the Regulation is governed by national law – art. 18.

Merger by acquisition

Merger by formation

Formation by holding

Art. 2(2) and 32-34.

2 or more private or public limited companies (including existing SEs) may form an SE by promoting the formation of a holding SE provided that:

- at least 2 of them are governed by the laws of different Member States

OR

- at least 2 of them have - for at least 2 years – had a subsidiary company governed by the laws of another Member State or had a branch in another Member State.

The minimum proportion of shares in each of the companies - promoting the establishment of the holding company – shall be shares conferring to **more than 50% of the voting rights**.

Formation by subsidiary

Art. 2(3) and 35-36.

2 or more legal bodies (art. 48 EC) (including existing SEs) may form a subsidiary SE provided that:

- at least 2 of them are governed by the laws of different Member States OR
- at least 2 of them have - for at least 2 years – had a subsidiary company governed by the laws of another Member State or had a branch in another Member State.

An existing SE may itself form another SE as a subsidiary company, in which it may be the sole shareholder.

- Art. 3(2)

Formation by transformation

Art. 2(4) and 37

A public limited-liability company with its registered office and head office within the Community may be transformed into an SE provided that:

- for at least 2 years – has had a subsidiary company governed by the laws of another Member State.