# The SE Company: A ‘Federal’ Company Type Available from 8 October 2004

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*Abstract*: With effect from 8 October 2004, it will be possible to establish a European company, a so-called SE, under the SE Regulation, no. 2157/2001 of 8 October 2001 on the statute for a European Company (SE), and directive 2001/86 adopted on the same date and complementing the statute on the involvement of employees.

If one were to express in one sentence the need for a common European company, the SE, it would be this: There is a need for a type of company which (A) is as uniform as possible from one member state to the next in order to allow businesses to enter known territory when using a foreign company of this type, and which (B) has the unique feature that the company can change nationality, i.e. it is able to move to another member state without the need to dissolve in the state from which it is moving and to re-establish *ab initio* in the state to which it is moving.

This article discusses the most important features of the regulation and the directive which companies and their advisers now have about two years to study. See also Erik Werlauff (in Danish)*: SE-selskabet – det europæiske aktieselskab* (Jurist- og Økonomforbundets Forlag, 2002) and Erik Werlauff (in English): *SE - the law of the European Company* (DJØF Publishing 2003).

## 1 The Need for a Common European Company

With the opening sentence of Art. 1(1) of the SE Regulation: “A company may be set up within the territory of the Community in the form of a European public limited-liability company (Societas Europæa or SE) on the conditions and in the manner laid down in this Regulation”, an exceptional and historic situation has arisen in European Company law, one which offers European businesses entirely *new possibilities for structural change and internationalisation*.

The idea of creating a special European company is 50 years old. As early as 1957, Professor Sanders of the Rotterdam School of Economics suggested the establishment of a common European company form which would considerably ease the administrative burdens of business enterprises. The Commission established a working group in 1965 on the initiative of the French government. The group prepared a proposal which then led to the Commission's 1970 draft regulation. The basic principle of this draft regulation was extensive liberation from national company law and the creation of a supranational company law.

For 30 years – from 1970 to 2000 – many assumed that the idea of a common European company had to be considered a mirage. But at the meeting of heads of states and governments in Nice in December 2000, the plans were put back on the table, and it was decided that this form of company must be made a reality within a relatively few years. Then followed with remarkable speed a revised proposal for a regulation ("statute") on SE companies and a proposal for a parallel directive on employee involvement in such companies.

The statutory authority for the SE regulation is Art. 308 EC (ex 235), i.e. the elastic clause allowing small changes to the Treaty. This is expressed in the following laconic terms of point 28 of the SE Regulation's Preamble: "The Treaty does not provide, for the adoption of this Regulation, powers of action other than those of Article 308 thereof." With these brief words, an end has been put to the discussion which for some time threatened to obstruct the regulation, as the Parliament was of the opinion that Art. 95 EC (ex 100A), i.e. the rules governing the Single Market, ought to form the legal basis of the SE regulation (*cf*. the Parliament's Opinion of 26 June 2001, Report A5-0243/2001).

## 2 What (yet) Remains to be Achieved

When, however, the first enthusiasm over the advent of all the new possibilities has given way to cold-headed deliberation, a number of issues take form which force one to the recognition that there is quite a *long way still to go before we reach the goal of genuine European harmonisation of company law* which will allow a cross-border company or group to draw up a uniform, transnational plan in terms of company law.

Firstly, one may mention the *renvoi technique applied in the SE regulation*. It involves a level of dissimilarity from one member state to the next with regard to the SE company's capital etc. It is primarily for this reason that a question mark may be placed against the claim that the Societas Europæa really can be characterised as a "supranational" company form. This objection is not, however, quite so substantial as may be assumed. The fact is that quite a lot has already been achieved in terms of uniform rules on the protection of capital, on mergers, divisions etc. in individual member states in the form of company law directives *based on the European provisions*. The SE regulation refers several times to the rules applying in the SE company's home state (or the state of domicile of merged companies) *in the implementation of Community measures*. It is admittedly unfortunate that the relevant directive will thus apply to the SE in the form in which it was implemented in the state in question. But one must assume that the relevant directive will be given some direct effect. Given that the SE regulation prescribes that the legislation adopted by member states specifically for the SE must be in accordance with the directives applying to public limited liability companies referred to in Annex I (*cf*. Art 9(2) of the regulation), there is much to indicate that this provision should be interpreted as something other and more than an injunction on member states. It is more interesting to ask whether the regulation – compared with the relevant company directive – can have direct effect, i.e. can be claimed directly in national courts, and this question must presumably be answered in the affirmative. To the extent to which I am right in this assumption, there is, after all, a not inconsiderable element of "supra-nationality" in the SE regulation, also in areas which are not governed and harmonised directly by the regulation.

It is easy to point to other matters which one could wish had been resolved via the SE regulation. One – by which I mean the European Parliament and other integration-friendly organs etc. – could, for example, have wished to see a *uniform taxation of SE companies*, both with regard to the tax base (the computation of taxable income) and the tax rate. The SE regulation was close to foundering in parliament on this basis, but recognising that the best of all solutions may well be the worst enemy of a good solution, they thought twice and accepted that the regulation represents the highest achievable goal in the area for now. But imagine for one moment if uniform rules had been created under which the tax authorities of the home state were to compute the income for the entire group, including cross-border elements, levy the tax (based on different rates from state to state if necessary) which the entire group was to pay, and then distribute the tax to each of the states involved.

## 3 What Wlse may be Achieved as of 8 October 2009?

In return for the Parliament's acceptance of an SE regulation with no tax provisions and containing a requirement that an SE's registered office must be in the same state as its head office etc., the Parliament has been given *the promise* in the regulation *that within five years after the regulation's coming into force, the Commission must review the question* of whether there is a basis for taking further steps on a number of points (*cf*. Art. 69 of the regulation). Under this article, the Commission must present a report to the Parliament and the Council on the application of the regulation, the implication being that the report will be based on the experience gained in the intervening period, which report will include proposals for amendments as appropriate.

The Commission must also review the question of whether it would be appropriate to allow an SE to locate its head office and registered office in different member states (*cf*. Art. 69(a)). This will allow consideration to be given to the development which is otherwise taking place within the EU, including the effect of case law based directly on the freedom of establishment of Articles 43 and 48 EC (ex 52 and 58). If, for instance, the main seat criterion for determining a company's nationality were to be disallowed by the European Court, this must affect the development to be expected in the SE regulation.

There must also be an analysis of whether it will be appropriate to broaden the concept of merger in Art. 17(2) of the regulation [the Danish version of the regulation refers erroneously to Art. 7(2)] in order to include other types of merger than those specified in Articles 3(1) and 4(1) of the Merger Directive, 78/855/EC, i.e. merger by acquisition and merger by the formation of a new company (combination) (*cf.* Art. 69(b) of the regulation). As a merger in the true sense – defined as the combination of companies such that only one continues and the others are wound up – only exists in the above two variations, absorption and combination, the best endeavour clause in Art. 69(b) of the regulation must reflect the theoretical possibility of other types of mergers than the one defined: *cf.*, for example, the terminology used in the Merger Taxation Directive 90/434, and general usage of the term "merger", a relatively broad concept covering more than the mere amalgamation of companies.

The final question to be analysed is whether it will be appropriate, in the national legislation to be introduced pursuant to the regulation, to allow member states to insert provisions into the statutes of an SE which deviate from or complement the national legislation, even when such provisions would not be allowed in the statutes of a traditional public limited company with its registered office in the member state in question (*cf.* Art. 69(d) of the SE regulation). Similarly to the possibility that the restriction which requires an SE's head office and registered office to be located in the same state may be abolished, this addition holds considerable potential. In a number of areas, the SE is subject to the same restrictions which apply to traditional public limited companies – one need only mention protection of capital, management structure etc. – but the best endeavour clause in Art. 69(d) gives authority to loosen the ties and allow the SE to develop more freely than traditional public limited companies in its home state. If the possibilities inherent in this clause are exploited, the SE will, as a company form, be genuinely able to acquire supranational status, and thus become a highly attractive alternative to traditional national company forms. Such development must of course take place within the framework diligently constructed over decades through the company directives.

## 4 The Ranking of Sources of Law

It is rare to see a *ranking as such of the different categories of sources of law* in rule sets etc. in company law, but the SE regulation uses such a method in Art. 9. Although this procedure may smack a little of "Roman law", it makes reasonable sense when considered in light of the renvoi technique employed.

The SE company is governed by: (a) the regulation's provisions, (b) the provisions of the company's statutes when expressly authorised by the regulation, or (c) matters which are not governed by the regulation or are only partly governed, then the following sources of law with regard to those aspects which are not governed by the regulation: (i) national legislation introduced by member states pursuant to Community measures relating specifically to the SE company, (ii) national legislation which would apply to a public limited company formed in accordance with the law of the member state in which the registered office of the SE is located, or (iii) the provisions of the SE company's statutes under the same rules applying to a public limited company formed in accordance with the law of the member state in which the registered office of the SE is located (*cf.* Art. 9(1) of the regulation).

This ranking may sound complex, but it can be split up into some relatively simple and hardly surprising components: all matters considered by the regulation are governed by it. If the regulation expressly allows the company a choice of options etc. in the statutes, the statutes apply. If the regulation fails to solve the problem in this manner (either alone or with the statutes), the national legislation on SE companies will apply. If this fails to solve the problem, the member state's ordinary company law will apply. If this also fails, the statutes will apply.

The double reference to the SE company's statutes may appear circular, but it is essentially logical: the statutes may apply either because the regulation expressly authorises them to regulate the question, or because neither the regulation nor the national company law is able to provide an answer. In the former situation, the statutes acquire the role of source of law by delegation of powers, while in the latter case its role is that of complementary residual source.

## 5 Legal Personality, Limitation of Liability and Capital Requirements

It is clear even from the SE regulation's Art. 1(1) that an SE has the *form, albeit a special form, of a public limited company*: "A company may be set up ... in the form of a European public limited-liability company ...". The similarity in form is even more apparent in the fact that the SE's capital is divided into shares (*cf.* the Regulation's Art. 1(2), first sentence).

It is a *limited liability* company because each shareholder is only liable for the amount which he has subscribed (*cf.* Art. 1(2), second sentence).

The SE has the status of a *legal person* (*cf.* Art. 1(3)). This means that the SE has a separate legal identity, capacity to act, legal capacity and the capacity to take proceedings.

The SE gains legal personality on the date on which it is registered pursuant to Art. 12 (*cf.* Art. 16(1)). If actions have been performed in the name of the SE before its registration, and if the company does not assume the obligations attending those actions after registration, the natural persons, companies or other legal entities which performed the actions are jointly and severally liable for them unless otherwise agreed (*cf.* Art. 16(2) on the liability of company founders).

The SE's *capital must be expressed in euros* (*cf.* Art. 4(1) of the SE regulation). The subscribed capital must be minimum EUR 120,000 (*cf.* Art. 4(2) of the regulation). A member state such as Denmark, which has not yet entered the EMU's third phase, may require an SE registered in that state to express its capital in the national currency, but the SE may nevertheless also state its capital in euros (*cf.* Art. 67(1)).

If a member state requires a bigger subscribed capital for companies engaged in certain types of activity, that requirement will apply to SE companies with registered offices in that member state (*cf.* Art. 4(3)). Thus special legislation governing e.g. financial companies, insurance companies, investment companies and other "qualified" types of companies takes priority over the SE regulation if the special legislation requires a capital greater than EUR 120,000.

There is a logical connection between this provision and the provision which prescribes that if the type of activity carried out by an SE is governed by special regulations in the national law, that law will apply fully to the SE (*cf*. Art. 9(3) of the regulation). This could apply to insurance and financial activities, legal firms, accountants and other types of activity subject to special regulations.

## 6 Equality of SE Companies and Other Public Limited Companies

Individual member states must ensure that the SE *is not discriminated against relative to traditional national companies* (*cf*. point 5 of the Preamble). Member states must thus ensure that the provisions governing European companies pursuant to the SE regulation do not result in (A) discriminatory treatment of SE companies compared with public limited-liability companies, or (B) disproportionate restrictions on the formation of an SE or the transfer of its registered office. In other words, the traditional EU requirements, (A) the anti-discrimination principle and (B) the efficiency principle, must be fulfilled.

Without prejudice to the provisions of the regulation, a European company must therefore be treated, in the individual member states, as a public limited company formed pursuant to the national legislation of the member state in which the SE has its registered office (*cf*. Art. 10 of the regulation).

## 7 Registration, Publicity, Start of Operations and Founders' Liability

Every SE must be *registered* in the member state in which its registered office is located in a register designated by the member state (*cf*. Art. 3 of the First Council Directive, 68/151, *cf*. Art. 12(1) of the SE Regulation).

Certain conditions must be satisfied before the SE may be registered:

If the registration is the result of a transfer of the company, a certificate issued under Art. 8(9) *cf*. Art. 8(8) of the regulation by the authorities of the state in which the old registered office was located must be produced.

Whether the result of a merger, the forming of a holding company or a subsidiary, a restructuring process or a transfer, when an SE presents for registration, it must be able to document that the employee rules of Directive 2001/86 are satisfied. Otherwise the company cannot be registered (*cf*. Art. 12(2)-(4) of the regulation). For a description of these rules, the reader is referred to the discussion on employees' legal rights in a European company, where the description rightfully belongs.

The regulation does not mention whether the SE may start operations before it is registered, i.e. before it acquires legal personality under Art. 16(1) of the regulation. The question therefore depends on the provisions of national legislation on this point, but such provisions must comply with the provisions of the first and second Company Law Directives, i.e. the Disclosure Directive and the Capital Directive, on this question.

Upon registration, the SE becomes subject to the disclosure requirements laid down in the first Company Law Directive. Documents and information regarding the company which must be published under the SE regulation must thus be published as prescribed by the national legislation of the member state in which the company has its registered office (*cf.* the First Directive, 68/151).

Registration of a European company – or its deletion from the register – must also be published in the Official Journal of the European Communities (OJ) when publication under Art. 13 of the regulation has been effected, i.e. when the ordinary disclosure rules have been observed (*cf.* Art. 14 of the regulation). The notice must contain the company's name, number, date and place of registration, registered office and sector of activity, as well as the date and place of publication and the title of publication. Any transfer of the company's registered office must be published in the OJ in a notice containing the information specified in 14(1) and information on the new registration (*cf.* Art. 14(2)).

The information specified in Art. 14(1) must be sent to the Official Publications Office of the European Communities within one month after publication under Art. 13 (*cf.* Art. 14(3)).

## 8 The Four Methods of Formation

An SE cannot be formed freely through the investment of capital like a traditional public or private limited company. There must be *at least two public limited companies already in existence*, and these companies must have different nationalities so that they together constitute a transnational unity.

These provisions, which present some obstacles to the formation of European companies, are intended to prevent the SE from being used to evade national legislation on employee involvement etc. The protection against evasion is, however, limited, as the transnational element required by the regulation is modest, despite the two-year rule applying in some areas (cf. below). To this should be added that the method involving the formation of an SE subsidiary (cf. Art 2(3) of the regulation) is almost identical to a traditional company formation, the only difference being that the founders must include at least two companies from different member states. Moreover, fully registered SE companies will probably be available off the shelf.

It must thus be recognised that the protection against evasion of national rules embedded in the special formation rules for European companies is limited, and the SE Regulation will probably be amended later to allow an SE to be formed precisely in the same manner as a traditional public or private company limited.

An SE may be formed either

- by allowing companies from different member states to merge,
- by allowing companies from different member states to establish a holding company,
- by allowing companies or other legal entities engaged in commercial activities and belonging to different member states to establish a joint subsidiary, or
- by allowing an existing public limited company whose registered office *and* head office are within the EU to be restructured as an SE, provided that the

company has a subsidiary in another member state than the one in which it has its registered office.

There is logic behind these methods of establishment. The SE Regulation operates with *well-known merger and take-over methods*: (1) a true merger, i.e. the combination of two or more legal entities, (2) establishment of a joint "superstructure" in the form of a holding company to which the owners transfer their shares in the participating companies, normally against compensation in the form of shares issued by the holding company, and (3) establishment of a joint subsidiary, possibly but not necessarily via the transfer of assets from the participating companies to the subsidiary. Merger, formation of a holding company ("share exchange") and transfer of assets are known methods of merging or taking over companies under the Merger Taxation Directive 90/434, although the fourth method offered by the directive, division, has not yet been included in the SE Regulation. Directive 90/434 will be amended in order to meet the needs for SE Companies, cf. the Commissions' draft of 17 October 2003, COM (2003) 613.

It is important to note the nuances in the requirements applying to participating companies in the different situations:

For each of the methods it will be seen that every company participating in the formation or to be transformed from a traditional share company into an SE will be required to fulfil two cumulative conditions: (1) its registered office must be located in the EU, and (2) its head office must be located in the EU, although not necessarily in the same state as the registered office.

This requirement that each company has both its registered office and its main office in the EU cannot be waived for a traditional public limited company wanting to turn itself into an SE (cf. Art. 2(5) *per contra*). The cumulative requirement may, however, be waived in the other three situations, i.e. establishment by merger, by forming a holding company or a subsidiary.

The question of whether the requirement will be waived depends on the national law of the individual member state. Art. 2(5) expresses the situation in the following terms: "A Member State may provide that a company the head office of which is not in the Community may participate in the formation of an SE provided that company is formed under the law of a Member State, has its registered office in that Member State and has a real and continuous link with a Member State's economy".

It is thus left to the state in which a participating company has its registered office to decide in its law whether such a company can participate in the formation of a European company, although the company does not have its main office in the EU. But if the state affirms this right, the company is required to have "a real and continuous link with a Member State's economy." The choice of the phrase "a Member State" indicates clearly that the link need not be to the state in which the company has its registered office. It must be assumed that state legislation cannot make such a claim, but that if the state applies Art. 2(5), it must adopt it as it stands, in other words either apply Art. 2(5) in full or not at all.

Whichever method of company formation is used, the national company law of the state in which the European company intends to establish its registered office will apply to the formation of the company (cf. Art. 15(1) of the Regulation).

Another common feature is that the SE gains legal personality on the date on which it is entered in the register under Art. 12 (cf. Art. 16(1)). It is also the case that if actions were performed in the name of the SE before it was registered, and if the SE does not, after its registration, assume the obligations arising out of these actions, the natural persons, companies or other legal entities which performed the actions will be liable for them jointly and severally unless otherwise agreed (cf. Art. 16(2) on the liability of founders).

One cannot say in advance that one method of forming an SE is "better" than the others, but one can point to elements which ought to be considered in the choice of method. It should be remembered that the motives for forming an SE may differ widely. The simplest motive may be the wish to achieve this supranational company form partly because of its image, and partly, perhaps, because it opens the possibility of moving to another state at some later stage. If this is the main motive, the strategy is to find the simplest way to reach the goal, and this will probably often be to choose the method involving the transformation of a traditional public limited company into an SE.

The situation is different if the main motive is to use the opportunity of merging (i.e. genuinely uniting) companies domiciled in different member states. In that case the formation of an SE company is the only realistic option as long as the tenth company law directive on cross-border mergers remain a draft. The method in this situation is self-evident.

The next situation may be that a public bid has been made for the majority shareholding in one or more companies listed on a stock exchange or other organised market. One could easily imagine the situation where such a bid could be linked to the formation of an SE, and that the offer made to the shareholders of the target companies would be payment in the form of shares in the SE. In this situation the formation of an SE holding company is the right instrument for the wish to realise visions of gathering several companies under one holding company.

Finally, it may be the case that independent companies in several states want to combine across their frontiers. This has been seen with telecoms companies, airlines, insurance companies, banks, and the car sector. The situation may either involve a limited combination in which the participating companies retain their independence but merge central parts of their activities, and where the choice is consequently the formation of an SE subsidiary to which they transfer certain assets. Or it could be a more extensive combination in which participating companies either enter into a proper merger, i.e. the formation of an SE by merger, or where they invite their shareholders to transfer their shares in the national companies into a joint SE holding company. Regardless of the choice made among these methods, the result is quite an extensive amalgamation, although it must be recognised that when all is said and done, a decision must be made on the choice of domicile for the SE company, as the company is not truly supranational. The choice of location for the registered office will also often show which of the merging parties was finally the strongest.

Many examples could be mentioned in which the SE company would have been a relevant company law option for the participating companies. For many of the cross-border company constructions described by Karsten Engsig Sørensen*: Samarbejde mellem selskaber i EF*, an SE would have been the logical solution.

There are also more recent amalgamations which could have used an SE company to advantage: with effect from 2002, the Danish supermarket chain FDB changed from a co-operative society to a public limited company while simultaneously combining activities in Denmark, Norway and Sweden. The shops etc. of FDB and associated companies were then transferred to COOP Danmark A/S, which became a subsidiary 100% owned by a joint holding company, COOP Norden AB (Sweden), which in turn is owned by the cooperative societies in Denmark (38%), Norway (20%) and Sweden (42%). The shops of the Swedish and Norwegian societies were similarly transferred to a Swedish and Norwegian subsidiary, both 100% owned by COOP Norden AB. It will be seen that this structure reflects an intermediate form between a pure co-operative society and a public limited company, as the original co-operative societies continue to exist in each country, but they no longer own and run the shops. An SE could have been a logical solution at least for the joint holding company, COOP Norden AB (Sweden).

## 9 The Organs of the European Company

The European company's organs are (cf. Art 38 of the Regulation) (a) the general meeting, and (b) either a supervisory organ and a management organ (two-tier system) or an administrative organ (one-tier system) depending on the choice made in the company's statutes.

It must be assumed that this list of organs or possible organs is exhaustive so that it is not possible to establish an SE with any types of organ other than those specified.

Art. 38 of the regulation appears to give the individual company the *right to choose between the monistic and the dualistic management system*. There is nevertheless a number of areas which may be the object of – more explicit – regulation under national SE legislation if the states wish to make use of the scope allowed them under the regulation.

Under articles 39(5) and 43(4) of the regulation, the individual member states are given the power to limit the company's freedom of choice. A state which does not permit a two-tier system for traditional public limited companies can also prohibit such a system for European companies domiciled in that state (cf. Art. 39(5)), and a state which does not permit a one-tier system for traditional public limited companies can similarly prohibit such a system for European companies domiciled in that state (cf. Art. 43(4)).

This gives a sworn supporter of the monistic system, such as the United Kingdom, authority to prescribe the monistic system for European companies as well – and a sworn supporter of the dualistic system, such as Germany, similar authority to prescribe the dualistic system for European companies as well.

The reader is again reminded, however, of the *best endeavour clause* contained in Art 69 of the regulation, which obliges the Commission to report to the European Parliament before 8 October 2009 on the basis for further development of the regulation on a number of points. The report must analyse whether it will be appropriate, in the national legislation introduced pursuant to the Regulation, to authorise member states to allow provisions to be inserted in the statutes of an SE which deviate from or complement such national legislation, even when the provisions would not be allowed in the statutes of a traditional public limited company with registered office in the relevant member state (cf. Art. 69(d) of the SE regulation). Like the possibility of abolition of the provision which requires the SE company's main office and registered office to be located in the same state, this addition can prove to be immensely important. It may, for example, one day lead to a situation in which the state's scope for excluding one or other of the two administrative systems is replaced by the intention of an older draft of the SE regulation: a direct choice to be regulated in the statutes of the European company as the company itself decides.

If the SE has *chosen a two-tier system* in its statutes, the management organ is responsible for managing the company (cf. Art. 39(1) of the regulation). A member state may provide that a managing director or managing directors are responsible for the daily management under the same conditions as those applying to public limited companies which have their registered office within the territory of the member state in question.

If the SE has chosen a *one-tier system*, the administrative organ will be responsible for managing the company (cf. Art. 43(1) of the regulation). As in the case with a two-tier system, a member state can, however, decide that a managing director or managing directors are responsible for daily management under the same conditions as those applying to public limited companies which have their registered office within the territory of the member state in question.

The members of company organs are appointed for a period to be decided in the statutes, but which *cannot exceed six years* (cf. Art. 46(1) of the regulation). It is interesting to note that not only the members of a supervisory organ (if the structure of the SE is such that it has one), but also the members of the management organ must be appointed for a fixed term. Under Danish company law, we are used to managing directors being appointed for an indefinite period, as the legislation places no time limit on their mandate. There may be provisions inserted in the service contract, but under company law, the board is free to make its own decisions. Under the rules applying to an SE, however, no appointment of a member of a company organ – including a managing director – can be made for a period longer than six years (cf. Art. 46(1)). Unless otherwise decided in the statutes, the members can be reappointed one or more times for a maximum period of six years (cf. Art. 46(2) of the regulation).

The SE company's statutes can allow *a company or another legal entity to be a member of one of its organs* unless otherwise provided under the company law of the member state in which the SE has its registered office (cf. Art. 47(1) of the regulation). It is interesting that a legal person may thus be appointed to a company organ. It is an option we do not have in Danish law for either board or management (cf. however, Section 52:3 of the Danish Companies Act on managers of a shipping line in the form of a company limited by shares, whereas the appointment of an accountancy firm to act as accountant poses no problems). A legal person can only become a member of an SE's management or supervisory organ if this is authorised in the company's statutes. National company law can, however, close this option. If national legislation precludes this option for traditional public limited companies, it will also be closed for European companies. But national legislation cannot allow this possibility for traditional share companies while closing it to European companies.

If a company or other form of legal entity is appointed member of an SE organ, the legal entity must appoint a natural person as its representative for the exercise of its powers in the organ in question (cf. Art. 47(1), second paragraph of the regulation).

## 10 Domicile, and Transfer of Domicile

The European company's registered office must be located within the EU *in the same member state as the one in which the company's main office is located* (cf. Art. 7, first sentence of the regulation). Thus the discussion of a main seat versus an incorporation criterion has been firmly taken in hand.

A member state can order European companies registered in its territory to locate its main office and registered office in the same place (cf. Art. 7, second sentence of the regulation). This gives national company law the scope for requiring that the registered office and the main office must be located in the same municipality, for example, or within some other defined geographic area.

One should not, however, overlook the best endeavour clause of the regulation's Art. 69, which binds the Commission to submit a report before 8 October 2009 on the basis for changing and amending the regulation on a number of points. The report must examine whether it will be appropriate to permit a European company to have its main office and its registered office located in different member states (cf. Art. 69(a)).

Among other matters, the report must consider the development which is taking place elsewhere in the European Union, including on the basis of case law based on the right of establishment under Art. 43 and 48 EC (ex 52 and 58). The European Court has actually set aside the main seat criterion as the basis for determining a company's nationality, and this must influence the expected development of the SE regulation. Allready the *Centros* case (judgment of 9 March 1999, case C-212/97) indicated that the main seat criterion would be set aside as being contrary to the freedom of establishment under the EC Treaty: cf. *EuZW* 2000:156 *ÖstOGH*, in which the provision under Austrian company law which requires a company to document that its actual main seat is located in the alleged country of domicile – and thus the Austrian main seat criterion itself – was found to be inapplicable in the light of Community law rules on the right of secondary establishment. The German supreme asked the European Court whether it was entitled to enforce the main seat criterion against a Dutch private limited company which is moving its actual main seat, but not its registered office, to Germany. Whereas German law would previously have seen the matter as a new formation and only recognised the company under German law if it was founded in accordance with German company law (cf. *EuZW* 2000:412 *BGH*), the ECJ decided in *Überseering BV mod NCC Nordic Construction Company Baumanagement GmbH*, judgment of 5 November 2002, C-208/00, that articles 43 and 48 of the Treaty preclude German law from denying Überseering BV, a company registered in the Netherlands, the capacity to bring legal proceedings in Germany (in a case of alleged defects in a property clearance performed for the company) on the grounds that the Dutch company which had its actual main seat in Germany did not have legal capacity, and consequently lacked the capacity to bring legal action under Section 50 of the *ZPO*. This does not mean that the main seat criterion is null and void in every respect, but the consequence that German law hitherto had drawn from the criterion: the denial of legal capacity of the foreign company, was and is unproportional and therefore unacceptable to community law. The German consequences of the Überseering judgment were drawn in *ZIP 2003.718 BGH*, cf. *Stefan Leible & Jochen Hoffmann* i ZIP 2003, 927 ff. It is hard to understand how the stricht demands of the SE regulation that the SE company keeps its staturoty and actual main seat in the same state can be in accordance with the judgment in Überseering. In this respect, the regulation already seems to be overhauled by the development in judgemade law, based directly on articles 43 and 48 of the Treaty.

It is interesting that the SE regulation nowhere attempts a *definition of an actual main office*. The national law of various member states no doubt offers many good suggestions for how the concept should be defined. Most of those countries which place weight on the actual main seat in their company and/or tax law refer, in accordance with statutory or administrative rules and regulations, to the place where the daily operating decisions are made, which normally means the place where the company's management is discharging its responsibilities for the company. German company law uses the expression *Geschäftsführungsakte*. Basically, the manner in which a state applies the main seat criterion is a question of the detailed regulation of its legal system – as long as the main seat criterion in its pure form has not been overruled by the European Court as contrary to Community law: cf. the decision to seek a preliminary ruling in *EuZW* 2000:412 *BGH*, Peter Behrens in *EuZW 2000* p. 385, and Wulf-Henning Roth in *ZIP 2000* p. 1599 ff. Tax law has also given considerable inspiration both with regard to national tax law (in Denmark *SEL* Section 1:6, which operates with a main seat criterion under tax law – cf. further below) and in particular the common European "source of law" – or rather: source of inspiration – the OECD Double Taxation Convention model. Art. 4(3) says that in case of dual domicile, if "a person other than an individual is a resident of both Contracting States, then it shall be deemed to be a resident only of the State in which its place of effective management is situated". This is no help, however, if both countries uses the main seat criterion and interpret it differently. As far as Danish law is concerned, the criterion in *TfS* 1998:607 *H* (= *UfR* 1998:1534 *H*), *California Kleindienst*, must decide the case.
One significant fact puts a stop to these considerations, however: the SE regulation nowhere appears to leave the question of a definition of the actual main seat to national company law. The regulation nowhere establishes a renvoi to e.g. the legislation of the member state in which the SE has its registered office. The consequence of this must necessarily be that the term the "SE's main office" is a community law concept and must be interpreted as such. True, the regulation does grant (or leave) some powers to the member states: a member state may, as noted, require an SE whose registered office is located within its territory to locate its main office and its registered office *in the same place* (cf. Article 7, second sentence). For the time being, member states will also retain the power to decide in their general company law and administrative practice between a main seat and a

registered office criterion (cf. the Preamble, point 27, cited above). But none of these reservations gives the member states any competence to define anything so important, indeed almost *the* most important concept in the Regulation, as the actual main seat. To do so would also be highly destructive for the uniform application of the regulation's core elements – one might say those aspects for which a revoi is *absolutely* unacceptable – if there are several different definitions of the main seat criterion across member states.

It must therefore be assumed without doubt that the term "main office" of a European company is a *Community law concept* which can – and which the court of last instance must – submit to the European Court for a preliminary hearing in accordance with Art. 234 EC (ex 177). This is both good and bad. The bad point is that a legal dispute of the main seat can take quite a long time if it can or must be submitted to the European Court. The good thing is, however – and this must overshadow any inconvenience – that it would be completely contrary to the regulation's underlying principle if the main seat at least were not to be interpreted in a uniform manner as a Community law principle.

It is clear that the SE regulation is serious in its requirement that the registered office and the actual main seat must be in the same place. It is clear from the fact that the authorities in the member state in which the SE has its registered office are guaranteed some considerable powers in cases of non-compliance with that requirement. When reading the provisions, it is important to note the imperative "shall" in contrast to "may". These are not discretionary powers, but powers which *must* be applied by the authorities, simply because the SE regulation rests extensively on a highly important compromise among the states which adhere to the main seat theory and those adhering to the registration or incorporation theory. It must simply be made impossible to use a European company as a mailbox company in contrast to the possibilities of traditional public and private limited companies after *Centros.* Several member states will undoubtedly say that if they cannot trust that the requirement regarding the same location of the registered office and actual main office will be enforced effectively, some important preconditions for signing the SE regulation fall away.

The member state in which the registered office is located must give access to a judicial review of all infringements of the regulation's Art. 7 (cf. Art. 64(3)).

The review procedure has suspensory effect on the procedures under Art. 64(1)-(2).

There are no further rules for the judicial review, but the procedure must undoubtedly be regulated to allow the courts genuine scope for testing on its merits the question of whether the authorities are right in claiming that the actual main office is not located in the same state (or in the same place) as the registered office.

The question of evidence is not, however, the only relevant issue. If the conflict is in the definition of the main seat concept, i.e. the regulation's pivotal concept, the European company's main office, the case may well become even more intricate. It was argued above that the term must be considered to be a Community law concept, which means that it can or must be interpreted by the European Court through preliminary rulings under Art. 234 EC (ex 177). If this assumption is correct, it follows that an SE facing a national injunction under Art. 7 of the regulation must not only be allowed to present factual evidence to the court, but also be given the opportunity to argue that the judge can or must submit the question prejudicially.

One of the most special and fascinating legal features of the European company is its complete mobility within the EU. While a national public or private limited company is tied to its home state and cannot, under the current concept of law, move from country to country but must accept dissolution in its old home state and reconstitution in the new, it is a unique feature of the SE that it *can move to another European member state while fully retaining its legal personality*. It is one and the same company which leaves state A and takes up residence in state B (although it must amend its statutes etc. to adapt to the new home state).

The management or administrative organ must prepare a *transfer proposal* (cf. Art. 8(2)). The term "management or administrative organ", which is used in several places in the regulation, signifies that the SE can have either a one-tier or a two-tier system, depending on its statutory provisions.

The transfer proposal must be publicised pursuant to Art. 13, which refers to all the publicity rules applying in the SE's home state under the Disclosure Directive 68/151. Any additional forms of publicity provided for by the member state of the registered office must also be observed.

The transfer proposal must provide certain information specified in the regulation's Art. 8(2). This includes the SE company's current name, registered office and registration number as well as information regarding (a) the proposed registered office of the SE, (b) the proposed statutes of the SE, including if relevant its new name, (c) any consequences of the transfer for employee involvement in the SE, (d) the proposed timetable for the transfer, and (e) any rights provided for the protection of shareholders and/or creditors.

The management or administrative organ must prepare a report explaining and justifying the legal and financial aspects of the transfer, and explain the consequences of the transfer for shareholders, creditors and employees (cf. Art. 8(3)). The inspiration from the merger rules in Directive 78/855/EC is evident.
The SE's shareholders and creditors have the right, at least one month before the general meeting which is to decide on the transfer, to review the transfer proposal and the report prepared under Art. 8(3) at the company's office, and also to obtain free copies of these documents upon request (cf. Art. 8(4)).

With regard to SE companies registered within its territory, a member state may adopt provisions to secure appropriate protection for *minority shareholders who oppose the transfer* (cf. Art. 8(5)). In Denmark, one could imagine the application of principles equivalent to Section 79 of the Companies Act compared with Section 81a, such that an offer of redemption is made to outvoted shareholders. The wording of Art. 8(5) does not, however, appear to authorise unconditional redemption of minority shareholders. Only shareholders who "oppose the transfer" are included, and the national rules must therefore be formulated in such a manner that only actively protesting minority shareholders are "protected", and in the manner decided by national law, be it through redemption rules or any other means. The problem is analogous to the problem discussed above concerning the establishment of an SE through merger, i.e. in relation to Art. 24(2) of the regulation.

A member state may provide that, with regard to European companies registered in that member state, the transfer of a registered office which would have the effect that the national legislation of another member state will apply to the company will not take effect if a competent authority in that member state *opposes the transfer* within the two month period which follows the publication of the transfer proposal (cf. Art. 8(14) of the regulation).

According to Art. 8(14), such opposition “may be based only on grounds of public interest”. It will be seen that the provision does not use terms such as “public order”, “ordre public” or similarly strong expressions. The term “public interest” indicates something less than the alternative expressions cited. European case law on “public ordre” cannot, therefore, be fully applied here. “Less” will suffice if the authorities want to oppose the transfer.

Tax interests, employee interests etc. may therefore be relied upon, but they may not escalate into a prohibition as such against the transfer, hardly even to a prohibition applying to certain categories of companies. Any prohibition must also be clearly authorised in national legislation, and it may not be applied in an arbitrary or discriminatory manner, which would make the mobility of SE companies or certain categories of SE companies illusory. Neither may such a prohibition discriminate in relation to certain receiving member states.

If an SE is supervised by a national financial supervisory authority according to Community directives, the right to oppose a proposed transfer also applies to this authority (cf. Art. 8(14), second paragraph). The connection between the provision’s first and second paragraphs is not entirely clear. It must be assumed that the “public interest” requirement must be satisfied in both cases, i.e. whether it is the financial supervisory authority or any other authority which opposes the transfer. The difference between paragraphs one and two must then be that if an authority opposes the transfer under the first paragraph (i.e. the opposing party is an authority other than the financial supervisory authority in the state which the company proposes to leave), it must have explicit authority to do so in the state’s national legislation, whereas opposition launched by the state’s financial supervisory authority can be based directly on the regulation, i.e. this particular authority does not require authorisation in national legislation. The comments above regarding arbitrariness, discrimination etc. must also apply here.

## 11 Employees

One of the points which blocked the adoption of the SE Regulation for years (as well as the draft tenth company directives on international mergers and the fourteenth company directive on international transfer of domicile) is the question of employee involvement.

*If the SE is formed by merger* – whether merger by absorption or merger by combination – the employees are protected directly under the regulation: the rights and obligations of participating companies in terms of employment terms and conditions based on national legislation, practice and individual employment contracts or employment relationships which existed on the date of registration will be transferred to the SE upon its registration (cf. Art. 29(4) of the regulation). The same applies if a traditional limited company is transformed into an SE (cf. Art. 37(9) of the regulation).

The EU legislature took the requirement on employee involvement so seriously that an SE *cannot even be registered before the question of the form which employee involvement will take has been solved.*

When an SE wants to register – whether its path to the registration authority lies through a merger, the forming of a holding company, a subsidiary, restructuring or transfer – it must thus be able to prove that the employee rules of Directive 2001/86 are satisfied. Otherwise it cannot be registered (cf. Art. 12(2)-(4) of the regulation).

Thus an SE will not be able to register unless it has:

entered into an agreement on arrangements for the involvement of employees under Art. 4 of Directive 2001/86, i.e. an agreement must have been reached on an arrangement for employee involvement in the company, or a decision has been made under Art. 3(6) of the directive, i.e. a decision made by the special negotiating body to terminate the procedure to conclude the agreement referred to in Art. 4, or the negotiation period under Art. 5 of the Directive (six months or up to one year if it is decided to continue) has expired without any agreement having been reached (cf. Art. 12(2) of the regulation).

In other words, an SE can be registered even though the negotiations have terminated, or the time limit has expired. The reason is that if any of these situations should arise, the provisions referred to in the directive will apply. These standard provisions will then apply automatically from the date of the company's registration (cf. Art. 7(1) of the directive).

*The SE company's statutes* may not at any time be in conflict with the arrangements for employee involvement which have been decided (cf. Art. 12(4) of the regulation). If new arrangements introduced under Directive 2001/86 are in conflict with the current statutes, the statutes must be amended as required. In this event a member state may decide that the company's management or administrative organ may change the statutes without requiring a decision by the general meeting. What this means is that a new arrangement on employee involvement takes precedence over the SE company statutes.

A *"special negotiating body"* must be established to represent the employees of participating companies and affected subsidiaries or establishments (production units) (cf. Art. 3(2) of the directive, opening sentence). The special negotiating body is defined as the organ to be established under Art. 3 of the directive for the purpose of negotiating with the competent organs of the participating companies on the introduction of arrangements for employee involvement in the SE company (cf. Art. 2(g) of the directive).

It is the responsibility of the negotiating body and the participating companies' competent organs to *conclude a written agreement on arrangements for the involvement of employees* within the SE (cf. Art. 3(3) of the directive). To this end the participating companies' competent organs must inform the negotiating body on the plan and the actual process of establishing the SE up to the point of registration.

The competent organs of the participating companies and the negotiating body must "negotiate in a spirit of cooperation" with a view to reaching agreement on an arrangement for the involvement of employees in the SE (cf. the directive's Art. 4(1)).

Without prejudice to the parties' autonomy (and subject to the requirement of Art. 4(4) that an SE formed by transformation of a traditional company must have *"at least the same level of all elements of employee involvement as the ones existing within the company to be transformed into an SE"*), the agreement must at least specify: (a) the scope of the agreement, (b) the composition and number of members and allocation of seats on the representative body which will be the discussion partner for the company's competent organ in matters relating to the information and consultation of employees in the SE and its subsidiaries and establishments, (c) the functions and the procedure for the information and consultation of the representative body, (d) the frequency of meetings of the representative body, (e) the financial and material resources to be allocated to the representative body (f) if, during negotiations, the parties decide to establish one or more information and consultation procedures instead of a representative body, the arrangements for implementing these procedures (g) if, during negotiations, the parties decide to establish arrangements for participation, the substance of these arrangements including (if applicable) the number of members in the SE's administrative or supervisory body which the employees will be entitled to elect, appoint, recommend or oppose, the procedures for how these members may be elected, appointed, recommended or opposed by the employees, and their rights, and finally (h) the date of coming into force of the agreement and its duration, cases where the agreement should be renegotiated, and the procedure for its renegotiation.

One distinctive feature of the SE Employee Directive is its *standard provisions* which the parties may either agree to adopt (because, on average, they provide a reasonable balance between the interests of the parties), or which will apply if the parties do not agree on another arrangement under the directive's negotiation procedures.

Member states may thus decide standard provisions on employee involvement which must comply with the provisions set out in the annex to the directive (cf. the directive's Art. 7(1)).

If an SE is formed by merger, the national rules need not, however, contain standard provisions on participation in compliance with Part 3 of the Annex (cf. the reference in Art. 7(1) to Art. 7(3), which in turn refers to Art. 7(2)b on formation by merger). As it is the standard provisions of the member state in which the SE company is to have its registered office which will apply (cf. below), this exemption means that traditional limited companies can in some cases "merge their way out" of employee participation, i.e. *if* the home state of the continuing SE has no standard provisions corresponding to Part 3 of the Annex, and *if* a participation agreement is not reached in accordance with the directive's negotiation procedure. We are here touching on a quite delicate area where the final version achieves a reasonably balanced formulation, but which has undeniably caused difficulties along the way. Supervision will undoubtedly be particularly vigilant in such cases in order to ensure that the cross-border merger is motivated by genuine commercial interests and needs on the part of the company, and not merely by a desire to merge its way out of a statutory right of participation of the employees in the former home state: cf. Art. 11 of the SE Employee Directive, under which member states must take appropriate measures to prevent misuse of an SE for the purpose of depriving employees of their right to involvement or withholding such rights.

*The standard provisions in the state in which the SE is to have its registered office* will apply from the date of the company's registration in the following cases: (a) if the parties so agree, (b) or if no agreement has been concluded within the six or twelve month period under Art. 5, and (b-1) the competent organ of each of the participating companies decides to accept the application of the standard rules in relation to the SE and so to continue registration, and (b-2) the special negotiating body has made no decision under Art. 3(6) to terminate negotiations (cf. Art. 7(1), second sentence). The words "... and so to continue with its registration ..." are important. They indicate that although the competent organs of each participating company (normally the general meeting: cf. above on the different methods of formation) may have the power to say "no" to the standard provisions, if they do so, the formation of the SE will, however, stop right there.

It follows that no SE can be formed without at the very least the application of the standard provisions, but as noted, formation by merger may under certain circumstances result in a situation where the continuing SE does not have employee participation, although one or more of the merged companies did.

The standard provisions which are the "fall-back position" for parties which fail to reach another agreement (but which the parties may also explicitly agree to apply) fall into three parts. *Part 1* is the composition of the employee's representative body, *Part 2* contains the standard provisions for information and consultation, and *Part 3* the standard provisions for participation.

*If an SE is formed by the transformation of an existing company*, and if the national rules on employee participation in the management or supervisory organ applied before the registration, *all aspects of the participation arrangement will continue to apply to the SE*. If, for example, a Danish public limited company is transformed into an SE, and if nothing else was agreed under the negotiation procedure in relation to the formation, the rules on employee representation etc. will continue in the familiar form under the Danish Companies Act.