

SOCIETAS EUROPAEA AND BUSINESS TRANSNATIONAL MOBILITY

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ABSTRACT: *This paper analyses a subject which, for around 35 years, was largely academic, as it could even be seen from its Latin name: the Societas Europaea. Now it is no longer academic, but will it be a real opportunity for the business community? We think it may be, depending on the requirements and willingness to pay a price in the form of a considerable degree of legal uncertainty.*

The original concept of the S.E. was a truly European company governed by a single set of rules, irrespective of where its seat was located, and having the freedom to move from one EU Member State to another without being bothered by the traditional obstacles faced by companies subject to national law.

The question we ask ourselves, and try to find an answer as objectively as possible is whether the promise of unrestrained mobility that the S.E. makes can truly be attained or if it remains just that – a promise?

KEYWORDS: *Societas Europaea, transnational mobility, business opportunity, legal uniformity.*

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1. INTRODUCTION

U.E. member states have to harmonize their national legislation in order to ease the existence and activity of companies within the U.E. In the same time, new legal provisions are elaborated concerning the activity of companies set up under U.E. legislation.

The European Company (SE) has been for more than 35 years a subject opened mainly to academic debate, as we can deduce out of its Latin name: *Societas Europaea*. Finally, after such an extended period of theorizing, a true Saga – the name given to this long process by some authors - Bourne, N., 1998, the concept has stepped from a theoretical level to the practical one. However, we ask ourselves whether this concept and, at the same time, way of organizing commercial activities represent or not a real opportunity for the entrepreneurs?

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Two main and very important arguments stand at the basis of the SE concept creation, as outlined by the scholarly literature. van Gerven, D., Storm, P., 2006. On the one hand, the grievance, we say now, of applying one unitary set of legal provisions to the SE indistinctly of its statutory head office or its central administration office – by applying one unitary set of legal provisions a unitary management and referencing system could be ensured, replacing thus the existing system of complying a trans-national company to different national legislations of each member state it has branches in. Lannoo, K., Khachatryan, A., 2003. On the other hand, the freedom of movement from one member state to another without the traditional impediments and obstacles that each national legislation of E.U. member states sets up to national companies.

2. TRANSNATIONAL MOBILITY – MAIN ADVANTAGE OF THE S.E.

We focus in this paper on the trans-national mobility aspect of the SE considered as the main advantage promised by this legal entity introduced by European legislation, but also, in close connection, on the problem of cross-border merger. Bourne, N., 1998.

In order to exactly and fully understand the value of this advantage of the SE an evaluation of the existing situation before this type of legal entity appeared would be relevant. Hence, on several occasions, the business environment expressed its regret toward the lack of a corporate form at the level of the entire U.E. available in case of trans-national reorganization by merger.

The following situation can be imagined: two companies similar in size and economic importance localized in two different U.E. member states, having activities integrated to some degree. If the management bodies of these two companies would at a certain moment reach the conclusion that they could be more efficiently managed and the capital needed for their activity could be more easily constituted if the two companies merged into a single one, then a series of difficult and laborious procedures would lay ahead in order to reach this goal. Until the legal form of the SE was defined and was applied in practice, companies found in such situations as described above resorted to intricate and dual organization and functioning structures. Unilever, Royal Dutch/Shell, Reed Elsevier, Fortis, Rothmans International, Smith Kline Beecham, Eurotunnel, RTZ-CRA are only some examples. The methods used by these groups consisted either in trading on the stock exchange the shares of the two companies as a single unit or in setting up complicated corporate structures. van Gerven, D., Storm, P., 2006.

Beside these practical difficulties companies face, the increase of cross-border mobility of persons and production factors doubled by the commercial opportunities that this freedom of movement can offer lead to a continuous increasing demand for company cross-border mobility by transferring the head office (registered of central administrative).

In the majority of U.E. member states the cross-border transfer of a companies' statutory head office is impossible to accomplish unless it loses its legal personality, respectively liquidates and dissolute in the state of origin and forms a new company in the host state.

Until the end of the 20th century, the transfer of the registered head office of a company was banished and sanctioned by the dissolution of the company in question by

the state of origin by either not recognizing or applying the national legislation of the host state.

This state practice was put to an end due to the European Court of Justice case-law in the 1986 – 2003 period (Case 270/83, *European Commission vs. France*, 28th January 1986, Report of the European Court of Justice, 1986, p. 273; Case 79/85, *Segers*, 10th July 1986, Report of the European Court of Justice, 1986, p. 2375; *Daily Mail* Case, 27th September 1988, Report of the European Court of Justice, 1988, p. 5483; Case C-212/97, *Centros*, 9th March 1999, Report of the European Court of Justice, 1999, p. I-1459; Case C-208/00, *Überseering*, 5th November 2002, Report of the European Court of Justice, 2002, p. I-9919; Case C-167/01, *Inspire Art*, 30th September 2003, Report of the European Court of Justice, 2003, p. I-10155), case-law that has established the rule according to which the companies from a member state are free to set up branches in other member states than the state of origin and are free to carry out commercial activities through these branches even if in the state of origin do not carry out any sort of commercial activities and even if the sole purpose of these arrangements is to elude a more drastic legal regime. The setting up of a branch by a company in a different state than that of origin when the company in question does not carry out commercial activities in the state of origin is practically reduced to the transfer of the operational head office of that company. van Gerven, D., Storm, P., 2006.

The result of these decisions of the E.C.J. – the freedom of trans-national transfer of the head office of a company according to the rules provided by the national legislation was insured – in so far as the host state provides for restrictive rules in this matter. However, the vision of the E.C.J. changes in the reverse situation, *id est* not the host state but the state of origin sets up in its legislation a series of obstacles in the free establishment of a companies' head office. As such, in the *Daily Mail* case but also in *Überseering* case the Court stated that the state of origin of a company can restrict its own national companies the freedom of moving its head office on the territory of another member state. The distinction made by the E.C.J. was considered in the scholarly literature as an artificial one and without a very clearly defined basis. van Gerven, D., Storm, P., 2006.

We can therefore conclude for the time being that the aspects regarding the trans-national mobility are treated in a pretty laconic and sometimes unsatisfactory manner in the national legislations of U.E. member states be it in case of cross-border mergers be it in case of relocation of registered or central administrative head office of a company from one state to the other. Can the SE offer a viable alternative to these shortcomings?

3. STATUTE OF THE S.E. (COUNCIL REGULATION 2001/2157.CE)

As stated in the first paragraphs of our endeavor one of the main goals of the SE is to allow a higher degree of company mobility that is merger and the transfer of the head office.

Council Regulation 2001/2157/EC of 8.10.2001 on the Statute for a European company (SE) offers some solutions. Thus: two or more public limited-liability companies with registered offices and head offices within the Community (two different states) may form an SE by means of a merger.

In the above described situation, one or more of the companies involved in the merger can be a SE.

Once formed, the SE can transfer its registered office in a different member state and this transfer does not involve its dissolution or the formation of a new legal entity. An SE may itself set up one or more subsidiaries in the form of SE s.

Therefore, can the SE constitute a good instrument of trans-national merger?

According to article 2 of the Council Regulation: „Public and private limited-liability companies (...), formed under the law of a Member State, with registered offices and head offices within the Community may promote the formation of a holding SE provided that each of at least two of them: (a) is governed by the law of a different Member State; (...)”. Thus, one of the conditions provided in this article is for the companies involved in the merger to have their registered offices and head offices within the E.U. However, in paragraph 5 of the same article 2, the Regulation states the possibility of a Member State to provide that a company whose head office is not in the Community to participate in the formation of an SE provided that 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. According to the Regulations' Preamble (paragraph 23), such a link exists in particular if a company has an establishment in that Member State and conducts operations there from.

The term „real seat” is not defined in the texts of Council Regulation 2157/2001. Therefore, until a definition at E.U. level will be elaborated the national authorities of each member state benefit from a high degree of interpretation of this notion. However, the less restrictive the interpretation of this concept, the more attractive that state will become for the formation of a SE.

The Dutch Legislation, for example, identifies this seat using the criteria of the state from which the company is actually managed from and considers necessary to interpret the particular circumstances of each case separately. Therefore, following this example, if the company management council and share-holders meetings take place in the Netherlands, the real seat of that company will be considered to be localized in the Netherlands. Other states apply different criteria in localizing the real seat of a company. Germany, another example, considers of great importance the place where the decisions of the management bodies of the company are implemented. van Gerven, D., Storm, P., 2006.

Unfortunately, however, until now a unitary and single criterion of identifying the real seat of a company has not succeeded in imposing itself in the legislation and practice of all E.U. member states and the concept continues to be vaguely defined. In this matter, as in all areas of law, the problem of different material sources of law that explain different manifestation of legal provisions, finds its applicability.

A problem can occur, due to the lack of a unitary definition at European level of the concept of real seat, in the situation described in article 64, paragraph 1 of Council Regulation 2157/2001. According to this legal provision, when an SE no longer complies with the requirement laid down in Article 7 (locating their head office and their registered office in the same place), the Member State in which the SE's registered office is situated shall take appropriate measures to oblige the SE to regularize its position. When the criteria used by both implied member states to determine the real seat of a company do not

coincide, the SE's management finds itself in a difficult situation and has to shown much precaution, assuring to comply with the legislation of both states.

Problems of similar nature are not, however, excluded when a SE is formed by merger.

According to the provisions of Regulation 2157/2001, a SE can be formed in one of the following 4 ways:

- merger;
- formation of a holding SE;
- formation of a subsidiary SE;
- conversion of an existing public limited-liability company into an SE.

An imperative condition for the formation of a SE by merger is that at least two of the companies involved are registered in different member states. This method of formation offers a possibility of international merger for companies that have their registered seat in different member states and a merger in the traditional sense would not be possible under the provisions of national legislations.

However, some problems can arise in the situation when trans-national merger is a way of forming a SE. Article 26 of the Regulation imposes a requirement, according to which the legality of a merger shall be scrutinized, as regards the part of the procedure concerning the completion of the merger and the formation of the SE. The competence of carrying out this scrutiny belongs to the court, notary or other authority competent in the Member State of the proposed registered office of the SE and is done on the basis of certificates issued by authorities of each member state involved. Forthward, article 25 provides: „(1) The legality of a merger shall be scrutinized, as regards the part of the procedure concerning each merging company, in accordance with the law on mergers of public limited-liability companies of the Member State to which the merging company is subject. (2) In each Member State concerned the court, notary or other competent authority shall issue a certificate conclusively attesting to the completion of the pre-merger acts and formalities.” The authority of that member state where the proposed registered office of the SE is located shall in particular ensure that the merging companies have approved draft terms of merger in the same terms and that arrangements for employee involvement have been determined pursuant to Directive 2001/86/EC (article 26, paragraph (3), Regulation 2157/2001).

4. DISADVANTAGES RAISED BY THE FORMATION OF THE S.E.

These multiple scrutinizes set up through the provisions of Regulation 2157/2001 can impose on the merging companies great efforts from the point of view of time and expenses that these procedure suppose. The obligations imposed on the authorities of the member state where the proposed registered office of the SE is located can become excessive. Imagine the situation of a notary that has to verify the rules provided by Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees, as they were transposed in the national legislation of different EU member states.

Another lets say problematic provision is that of article 19 of the Regulation that allows the national legislation of a member state to forbid a company from taking part in the formation of an SE by merger if any of that Member State's competent authorities

opposes it. Such opposition may be based only on grounds of public interest and there is provided the possibility of review by a judicial authority.

Within the unique market that the EU represents it is difficult to imagine how the merger of two limited-liability companies (that do not activate in fields supervised by the state, such as the financial area) could constitute a problem of public interest. van Gerven, D., Storm, P., 2006. Moreover, it seems to be absurd to offer a state the possibility to oppose the merger of two companies in the situation when it finds itself in the impossibility to act and wishes to oppose the acquisition of one company by the other.

The opposition permitted through the provisions of article 19 represents without any doubt a restriction of the freedom to settle. The ECJ case-law has established 4 fundamental conditions that must be met in cases such an opposition is exercised: the undiscriminating nature; the imperative need to salvage general interests; a proper, adequate nature for reaching the set goal; the requirement of not crossing the limits of what is necessary to reach the set goal. Meeting all of these 4 conditions is not, naturally, an easy task. However, it is not unimaginable that a state adopts a contrary point of view and considers the merger of limited-liability companies as a threat to vital national interests.

There is, however, a reverse of the medal that cannot be denied. According to article 30 of Regulation 2157/2001 a merger may not be declared null and void once the SE has been registered. Therefore, once the formalities of forming the SE have been fulfilled, the companies involved in the merger are sheltered from any ulterior complications. Moreover, article 29 provide the *ipso jure* trans-national transfer towards the SE of all the assets and liabilities of each company being acquired are transferred to the acquiring company, as well as the fact that the shareholders of the company being acquired become, *ipso jure*, shareholders of the acquiring company. These consequences, of great importance for the companies involved could not have been implemented through the legislation of one singular member state and thus the existence of such legal provisions at the level of the entire EU becomes salutary.

Besides the advantage of permitting international merger by the formation of the SE itself there also exists the advantage of transferring the registered seat of the company from one member state to another. Drury, R., 2008. According to the legal provisions that govern the SE the condition that the registered office and head office be in the same member state must always be respected. The legal provisions that regulate the transfer of the registered office of the SE offer the possibility of a flexible answer to the commercial needs of companies without the necessity of dissolution or liquidation of a company and setting up a new one in a different member state, frequently this transfer being required in order to avoid excessive taxation. „Survey on the *Societas Europea*”, 2003.

5. CONCLUSIONS

To conclude, the SE problematic at this time is complex due to the diversity of national legislation of member states. The liberty given to the legislator by the Council Regulation is insufficient, although the Regulation does not cover legal aspects such as taxation, competition, intellectual property rights or insolvency and therefore the national provisions of member states of European norms are applicable. The risks of creating

conditions for positive discrimination inside the harmonized national legislation are high, for SE benefit from legal provisions that the indigenous companies do not enjoy. However, article 10 of Council Regulation 2157/2001 states that an SE shall be treated in every Member State as if it were a public limited-liability company formed in accordance with the law of the Member State in which it has its registered office.

The opportunity offered by SE depends, therefore, on the expectations of each entrepreneur in particular, the nature of the business carried out through this new type of legal entity but also on the availability to pay a price for this choice, price materialized in a considerable degree of uncertainty as far as the applicable legislation is concerned.

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