Study on the operation and the impacts of the Statute for a European Company (SE)

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Final report

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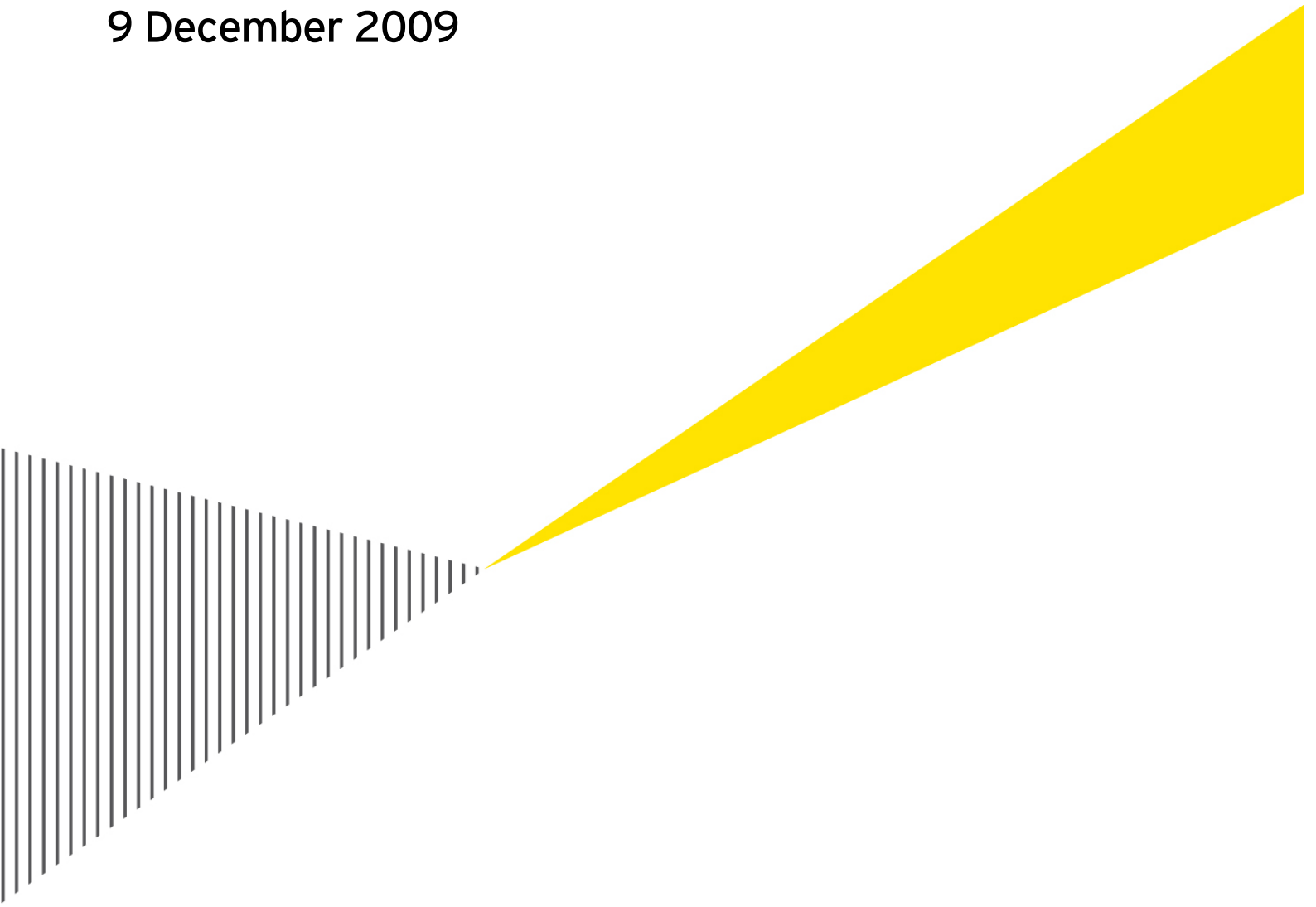

Report drawn up following call for tender from the European Commission

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Contents

FINAL REPORT

APPENDIX 1: LEGAL MAPPING

Appendix 1.1: Questionnaire on relevant legislation applicable in the EU/EEA Member States with regard to the SE Statute

Appendix 1.2: Executive tables on relevant legislation applicable in the EU/EEA Member States with regard to the SE Statute

APPENDIX 2: INVENTORY OF SEs

Appendix 2.1: Questionnaire intended for SEs

Appendix 2.2: Inventory of the SEs (Lists)

Appendix 2.3: Factsheets on established SEs

Executive Summary

Study on the operation and the impacts of the Statute for a European Company (SE)

After over thirty years of intensive discussions and difficult negotiations since the non-adopted draft SE Regulation in 1970, on 8 October 2001 the European Council of Ministers formally adopted Council Regulation (EC) No 2157/2001 (hereafter referred to as the "SE Regulation") creating the Statute for the European Company (known by its Latin name Societas Europaea - SE) and Council Directive 2001/86/EC (hereafter referred to as the "SE Directive") supplementing the Statute for a European Company with regard to the involvement of employees.

This legislation entered into force on 8 October 2004, the date on which, in principle, the new legal entity became available to companies conducting operations in more than one Member State of the European Union.

The purpose of adopting the SE Statute was to provide for "the creation, side by side with companies governed by a particular national law, of companies formed and carrying on business under the law created by a Community Regulation directly applicable in all Member States"[1] in order to overcome the obstacles arising from the disparity and the limited territorial application of national company law. Thanks to the existence of the SE, European companies and groups were to be given the opportunity to structure, reorganise and combine their pan-European operations, to transfer their registered office and to adapt their organisational structure throughout the European Union (EU) and the European Economic Area (EEA)[2] without prohibitive legal obstacles.

After nearly five years of practical implementation of the legislation on the SE, the European Commission has commissioned a study on the operation and the impacts of the SE Statute, prior to the drawing-up of the report required by Article 69 of the SE Regulation, which provides that "five years at the latest after the entry into force of the Regulation, the Commission shall forward to the Council and the European Parliament a report on the application of the Regulation and proposals for amendments, where appropriate".

The aims of the Study are as follows:

1. to provide a mapping of the relevant legislation applicable in 25 EU/EEA Member States,

2. to draw-up an inventory of the existing SEs,

3. to analyse the data gathered and identify the main drivers for setting up or not setting up an SE, the main trends and practical problems,

4. to provide an analytical conclusion focusing on the effectiveness of the SE Statute.

To achieve the goals described above, we formed a working team composed of lawyers and academics from different Member States: two project managers, a steering committee and a scientific committee. This working team has conducted the Study with the assistance of lawyers exercising their activity in the Member States covered[3].

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[1] Preamble of Council Regulation (EC) No 2157/2001 on the Statute for a European Company (SE), paragraph (6).

[2] European Union (27 Member States) and European Economic Area (Norway, Iceland and Liechtenstein).

[3] The members of the working team are given in appendix 1 of this executive summary.

1) Legal Mapping

We prepared detailed questionnaires that were sent to lawyers covering the 25 selected Member States. The purpose was to obtain an accurate view of the national legislation applicable to the SE as well as of the implementation of the thirty-two options provided in the SE Regulation and of the eight options provided in the SE Directive.

On the one hand, these options mainly cover, for all methods of formation of an SE, the protection of the interests of stakeholders (in particular minority shareholders, creditors, employees and public interests) due to the specific cross-border nature of the SE. On the other hand, many options relate to the corporate governance of SEs. Even if both one-tier and two-tier systems are allowed for an SE, many provisions of the SE Regulation concern corporate governance: in particular the size of corporate organs, the nomination and appointment of members of the organs, their right of information, the majority required, the division of competence between the corporate organs, the rules of the functioning of the general meetings, etc.

The answers for each selected Member State are presented in Appendix 1 to the Study, entitled "Legal Mapping". From this data, we prepared synoptic tables in order (i) to assess the methods of implementation in the various Member States and (ii) to identify whether Member States could be grouped according to the degree of flexibility and attractiveness of their national legislation in respect of the SE ('the national SE form'). On the basis of these tables, we conducted a comparison according to two levels of analysis. First, we compared the implementation of the options left open by the SE Regulation as well as the national legislation applicable to the SE in the different Member States in order to assess the relative flexibility and attractiveness of the SE regimes in the various Member States[4], and to see whether Member States could be grouped according to conditions of implementation (inter Member State analysis). Second, we compared the rules applicable to SEs with the legislation applicable to national public limited-liability companies, in order to identify in which Member States the rules applicable to SEs are more or less attractive compared to the rules applicable to the respective national public limited-liability companies (intra-Member States analysis).

Inter Member State analysis

A first grouping of the selected Member States was made on the basis of their implementation of the options in the SE Regulation. In this grouping, most of the Member States are in a comparable situation, two Member States offer a relatively more flexible and attractive SE regime (Luxembourg and Italy) and four offer a relatively more stringent SE regime (Portugal, Germany, France and Austria).

A second grouping of the selected Member States was established by comparing the national rules on public limited liability companies that are applicable to SEs through an explicit reference in the Regulation. Here again, the vast majority of the Member States are at a comparable level of attractiveness. However, three Member States stand out with a relatively higher level of attractiveness in this respect: the United Kingdom, Luxembourg and Italy. The higher attractiveness of these three Member States can be explained firstly by the fact that their national legislation generally does not provide for specific protection of various stakeholders (minority shareholders, creditors etc) when setting up an SE or transferring its registered office. Furthermore, their national legislation generally allows for flexible solutions as regards the requirements for membership of the corporate organs, since they all allow legal entities to be a

[4] The flexibility and attractiveness are assessed solely from the point of view of the majority shareholder.

member of one of the corporate organs and they do not provide for specific disqualification requirements.

Finally, we combined the findings of both analyses, i.e. the implementation of the options and the national legislation on public limited-liability companies applicable to the SE. The purpose of this combination was to conclude on the relative flexibility and attractiveness of these rules applicable to the SE in the various Member States. The conclusion is that the majority of the Member States have a relatively comparable level of attractiveness as regards their national rules applicable to SEs. Luxembourg, Italy and, to a lesser extent, the United Kingdom stand out, showing the relatively highest level of flexibility and attractiveness, whereas Cyprus and Germany have the relatively lowest level of flexibility and attractiveness measured this way.

Intra Member State analysis

As far as the intra Member State comparison between the rules applicable to the SE and the respective national public limited-liability company is concerned, the main conclusion is that the SE is basically treated in every Member State as if it were a public limited-liability company: in the large majority of cases and Member States, the status of the SE is similar to the status of a domestic public limited-liability company. It is noteworthy that a majority of Member States provide the SE with higher protection for minority shareholders and that many of them also provide higher protection for creditors. However, this is generally related to the cross-border nature of the SE and not to the desire to adopt a more stringent statute for the latter. Conversely, and as far as corporate governance is concerned, the SE statute appears to be generally more flexible than the domestic public limited-liability company statute. This is due to the fact that many options provided by the SE Statute have been adopted by the Member States and lead to a result that provide more options or is in other ways less rigid than that provided by their own law.

However, as the inventory of existing SEs and the analysis of the main trends show, measuring the flexibility/attractiveness of the SE in each Member State in this way fails to explain on any general level the decision whether or not to create an SE and the decision on the Member State of its registered office.

2) Inventory of existing SEs

The objective of this inventory was to accurately establish the present and dynamic status of SEs in the EU/EEA. On the basis of research with the Trade Registries in all the EU/EEA Member States and questionnaires sent to all existing SEs, we obtained a clear picture of SEs in the EU/EEA.

The data collected until 15 April 2009 is contained in Appendix 2 to the Study, entitled "Inventory of the SEs", and has been analysed with listings, graphs and charts in the report. In particular we have drawn up the following lists: existing SEs by Member State, SEs having transferred their registered office, publicly listed SEs, SEs by economic field of activity, shelf SEs (no employees and no operational activity), empty SEs (no employees at the time of creation), SEs with more than 100 million euros of turnover, SEs by year of creation (from 2004 to 15 April 2009), SEs by method of formation (merger, holding SE, subsidiary SE, converted SE, SE as subsidiary of an SE), and SEs by corporate governance structure (one-tier or two-tier).

The main features of the overall SE picture are as follows: 369 SEs were registered in 20 EU / EEA Member States as at 15 April 2009. In relation to these SEs 19 Member States have been registered locations of an original SE incorporation, whilst 21 Member States have been registered locations of an SE at least at one point during its life. The number of new SEs have accelerated

considerably from year to year; this could be partially explained, on the one hand, by the fact that the implementation of the SE Statute was only fully accomplished by all Member States in 2007 and, on the other hand, by the creation of many shelf SEs. Shelf SEs (SEs with no activity and no employees) represent 37.7% of the total number of SEs, and most of them are in the Czech Republic. An increased awareness and knowledge of the SE form amongst companies and their legal advisors could also be a partial explanation.

The highest number of SEs registered as at 15 April 2009 are in the Czech Republic (137), followed by Germany (91), the Netherlands (22), the United Kingdom (16), France (15), Austria (13), Luxembourg (11), Slovakia (13), Cyprus (10), Belgium (10), etc. Ten Member States had no SEs.

The majority of SEs operate in the services sector, but SEs are found in all sectors of activity.

The most frequently used method of formation of an SE is the creation of a subsidiary of an SE, which is illustrated by the relatively high number of shelf SEs. Other methods often used include the conversion of a public limited-liability company, the creation of a joint subsidiary and the merger. The creation of a holding SE is very rare.

SEs (apart from shelf SEs) are in the majority of cases (53%) created by only one founding company (SE subsidiary of an SE and conversion) and in 40% of cases by two companies (merger, joint subsidiary or joint holding company).

10% of the SEs (38) have transferred their registered office and the most frequently chosen destinations are the United Kingdom, Cyprus and France followed by Luxembourg and Austria.

As far as corporate governance is concerned, most SEs have been created in Member States which have a codetermination system and where the two-tier corporate structure is compulsory for domestic public limited-liability companies. In most Member States, a majority of SEs have implemented the one-tier corporate structure.

3) Main drivers, main trends and practical problems

On the basis of the legal mapping and of the SE inventory, we conducted 60 interviews with the legal counsels and executives of SEs, with companies which have considered or are considering adopting SE status, as well as with lawyers and SE experts throughout the EU / EEA. This allowed us to determine the main drivers for choosing or not choosing the SE corporate form, as well as the main trends and practical difficulties encountered.

The positive drivers

Mobility of the SE

The first driver is the mobility of the SE. To date, the SE is the only form of company able to transfer its registered office beyond its national border within the EU / EEA. Within the period covered by the Study, 38 SEs had transferred their registered offices, and the large majority of the SEs interviewed stated that this possibility is a real positive driver for the SE. They continue to keep a close watch on tax and legal developments in the various Member States, bearing in mind that the transfer of their registered office is possible. The possibility of a cross-border merger was initially but is no longer, an incentive for adopting the SE legal form, as the EC Directive on cross-border mergers is now implemented in the Member States and makes mergers easier. In particular the merger Directive assures the protection of the existing employee participation but does not organise the negotiation procedure for employee involvement as strictly as the SE Statute does. As a consequence, it is easier for small and medium-sized companies to conduct a cross-border merger resulting in a national public limited-liability company than in an SE.

Image of the SE

The second driver is the European image of the SE. This aspect is also mentioned by the majority of the SEs interviewed, even if it is considered more as a facilitating factor for the SE than as a reason for its creation. The argument given is that the acceptance of the employees, shareholders, creditors and others is relatively good. In the case of a merger, its perception as a merger of equals helps to avoid the feeling of a national defeat. For listed companies, a connection has also been established between the announcement of the creation of an SE and an increase in the company's share value.

Simplification of group structure

The third driver is the simplification of the group structure. However, only a few SEs actually took advantage of the SE Statute to simplify the group structure. This is due, in particular, to the unlimited liability of branches, leading to the preference for a structure with subsidiaries. Furthermore, since the implementation of the EC Directive on cross-border mergers, the creation of an SE is not necessary in order to simplify a group structure.

Flexibility and attractiveness of the national SE form (inter Member State)

With the possible exception of Luxembourg (and to a lesser extent the United Kingdom, the Netherlands, Belgium and Slovakia), the inter Member State level of attractiveness and flexibility of the national legislation applicable to the SE does not seem to be an actual driver in the choice of the SE legal form. This seems all the more true since, during the interviews, the degree of inter Member State flexibility of the national legislation applicable to the SE were not put forward as a positive driver.

Flexibility and attractiveness of the national SE form and other relevant national legislation (intra Member State)

The conclusion on the measured correlation between the actual distribution of SEs and the rating of the selected Member States' rules applicable to the SE (compared to the rules applicable to the national limited liability company) is that, with the possible exception of the United Kingdom, Belgium, Portugal, Bulgaria and Romania and specific cases of differences in rules that might be important for some companies but not for others, the intra Member State national corporate law regime of the SE does not in general seem to be an important positive driver explaining the choice and location of setting up an SE.

However, it is later shown that in some Member States, especially those where the two-tier structure and the co-determination regime are compulsory for domestic public limited-liability companies, the SE may present an interesting alternative to the domestic public limited-liability company. This is particularly the case in Germany where the one-tier system is common for family businesses, which are normally run as private limited-liability companies (*Gesellschaft mit bechränkter Haftung*) and which would have to adopt the two-tier structure when they are or would like to be organised as a public limited-liability company (*Aktiengesellschaft*).

Tax law may also be an issue for SEs and in particular the possibility of transferring the registered office to a lower-tax-rate Member State (or a Member State with more flexible tax legislation or more tax treaties). Of course, taxation may be triggered in the case of transfer of the activity, but transfer may still be advantageous in certain situations.

The negative drivers

Cost, complexity and uncertainty of the SE

The formation of an SE is generally considered to be expensive and time-consuming, due to the negotiation procedure with employees and to the lack of public recognition of the SE legal form. Uncertainty also results from the fact that behind the unified image of the SE, many different national legislations apply and uncertainty remains as to the legal effect of directly applicable law and the interface between the latter and applicable national law.

Involvement of employees

The need for negotiations regarding the future employee involvement under the SE Statute is viewed as too inflexible in Member States where the national legislation applicable to public limited-liability companies does not provide for a compulsory employee participation regime. As a consequence, companies, in those Member States in particular, often refrain from entering into such negotiations, since they can avoid this with domestic companies.

The main trends

Success of the SE in codetermination and two-tier Member States

The result of the above is the concentration of SEs in Member States where the SE legal form offers the possibility for individually negotiated forms of employee participation as an alternative to obligatory rules in national legislation. In these countries, the SE makes it possible to design the employee participation to be better adapted to the company's situation and provides for a specific European solution. It also allows its optimisation. For example, according to German legislation, employee representatives must be employees of the companies having their registered office in Germany. In the SE, participation is organised with the representation of employees of the companies located in all Member States concerned.

The SE also appears to be an alternative to domestic companies in Member States where the one-tier system is not available for public limited-liability companies.

Little success of the SE in the other Member States

In Member States with a one-tier corporate governance and without employee participation companies are in general relatively reluctant to create SEs, which are seen as having more drawbacks than advantages compared with national public limited-liability companies.

Shelf companies

Around 38 % of the SEs are shelf companies, i.e. formed without activity and employees. Those SEs are set up without an arrangement on employee involvement. Article 12 of the SE Regulation states that "an SE may not be registered unless an agreement or arrangements for employee involvement pursuant to Article 4 of the Directive 2001/86/EC has been taken". Nevertheless, in practice the SEs in question have been incorporated. Even when these SEs are activated, there is no provision in the SE Statute which would require negotiation with employees. Some argue that the SE Statute should be improved by providing appropriate rules dealing with such situation. German courts however have decided that in the case of the activation of a shelf SE, the negotiation procedure on employee involvement has to be carried out, applying Section 18 of the German SEBG regarding a "structural change"[5] by way of an analogy.

[5] Oberlandsgericht Düsseldorf, I-3 Wx 248/08, 30 March 2009, Deutsche Notarzeitung, 2009 page 699.

The practical problems encountered

The practical problems can be separated into those relating to the formation of the SE and those relating to the running of the SE.

Formation of the SE

There are some inconsistencies in the rules on the formation of SEs: the two-year period of existence of a branch or a subsidiary is not required in a merger. It is therefore possible to use a procedure involving a merger with a public limited-liability company created for this purpose, instead of the conversion of the national public limited-liability company into an SE. On the other hand, there is a general request for extending the definition of a merger in order to include the contribution of a branch of activity (in the form of a partial contribution of assets).

Furthermore, private limited companies would be interested in the SE legal form. At present, they have to convert first into a domestic public limited-liability company and only then, convert again into an SE. The possibility of direct conversion as well as that of merging with another public limited-liability company or private limited company in order to form an SE would be generally (but not unanimously) welcome. This might, however, be subject to the further development of the draft proposal for a European Private Company (SPE) as an alternative especially for small and medium-sized companies, often run as private limited-liability companies.

Running of the SE

Many companies regret the absence of tax neutrality in the case of transfer of the registered office and transfer of the actual activity. It should be pointed out that this position is clearly adopted in the SE Statute as well as in the EC Directive on cross-border mergers and is unlikely to be modified.

The negotiation of employee involvement is organised for the formation of the SE, but many questions arising during the life of the SE are not really covered. According to the SE Directive, measures must be taken if there is a structural change in the SE. However, an increase or decrease in the number of employees is not usually considered to be a structural change. Consequently, the initial negotiations may from the view of employees' interests turn out to be inadequate in relation to the SE's new situation, without there being any general obligation to renegotiate.

4) Analytical conclusions

The comparison of the objectives pursued by the SE Regulation and the results it has achieved leads to the following conclusions:

Efficiency of the SE Statute

The efficiency of the SE Statute has to be measured according to the degree to which the initial aims assigned to this new European corporate vehicle have been fulfilled. The aims of the SE were (according to the recitals):

- to allow cross-border groups with a "European" dimension to structure, reorganise and expand or combine their pan-European operations on a Community scale and freely transfer their registered office to another Member State, while ensuring adequate protection of the interests of shareholders and third parties and "ensuring as far as possible that the economic unit and the legal unit of business in the Community coincide";

- to allow cross-border groups with a "European" dimension to adapt their organisational structure, and to choose a suitable system of corporate governance ensuring the efficient management, proper supervision and maintaining of the rights of employees to involvement.

When assessing the fulfilment of these initial aims of the SE Statute, ancillary elements must be taken into consideration: (i) the real needs of companies within the EU/EEA at the time of adoption of the SE Statute and their development since then, (ii) the unexpected countereffects linked to the implementation of the initial aims, (iii) the changes in the economic and legal environment since the time of adoption of the SE Statute.

With a view to the above, the efficiency of the SE Statute has been evaluated on the basis of the legal mapping, the SE Survey, the interviews with SEs, non SEs and experts, and the review of literature, and results in the following conclusions:

- The SE Statute allows cross-border groups with a "European" dimension to restructure and reorganise, and, above all, to freely transfer their registered office to another Member State, while ensuring adequate protection of the interests of shareholders and third parties. However, so far this has not led to having the economic unit and the legal unit of business in the Community coincide. This is due to the fact that the reorganisation of groups is legally possible but is still complex (the methods of formation of the SE are limited and thus access to this legal form is limited) and lacks harmonisation in the areas of tax, competition, intellectual property and insolvency.
- The SE Statute allows cross-border groups with a "European" dimension to adapt their organisational structure and to choose a suitable system of corporate governance, ensuring the efficient management, proper supervision and maintaining of the rights of employees to involvement. However, this objective encounters two limits to its achievement: first, behind its unified image, the SE is mainly governed by different national legislations and second, in specific situations, the employee involvement system can appear to be stringent and ill-adapted.

Future of the SE Statute

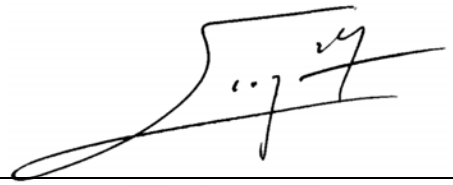
An essential question to address is whether the initial objectives pursued by the SE Statute remain unchanged. In particular, the SE Statute has been implemented in order to allow the reorganisation of the business of companies and groups on a community scale while including the concern of employee involvement. If these objectives remain, the SE Statute can be considered as having formed an appropriate basis for the achievement of these goals but could be enhanced and improved to ensure the full completion of the objectives.

Thus, some aspects of the SE Statute could be improved taking into account the difficulties encountered and analysed in the Study. We consider in the Study that the 2001 objectives are still valid and that possible improvements should therefore be in line with those objectives. The Study indicates that employee involvement rules for the SE is, on the one hand, a considerable factor for the limited take up of the SE in some Member States. On the other hand, it seems that some SEs (in particular shelf SEs) are created to elude the negotiation procedure for employee involvement. This is considered by some as not fully complying with some objectives pursued by the SE Statute. Considering both aspects and taking into account developments in EC legislation and case law, the negotiation procedure for employee involvement could be revised. As regards the first aspect, the simplification of the negotiation procedure could further increase the attractiveness of the SE. As regards the second aspect, an obligation to organise negotiations when a threshold in the number of employees is reached could be considered.

Moreover, taking the objectives of the SE Statute into account, issues such as the possibility of allowing the registered office and the head office of the SE to be located in two different Member States, or of authorising the Member States to allow SE rules to deviate from domestic public limited-liability company rules, are debatable. The Study has not considered practical aspects which could contribute to this academic debate.

Last but not least, the future of the SE is not only linked to the possible amendments of its Statute. The other EC Regulations and Directives are also very important, notably the EC Directive on cross-border mergers and the currently discussed proposal for an SPE Regulation. In particular, the consistency of the SE Statute with the SPE model is essential in order for those two forms of companies to complement each other.

For Ernst & Young



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Introduction: Objectives, methods, and structure of the study

After over thirty years of intensive and tough negotiations and discussions since the non-adopted draft SE Regulation in 1970, on 8 October 2001 the European Council of Ministers formally adopted Council Regulation (EC) No 2157/2001 creating the Statute for the European Company (known by its Latin name Societas Europaea - SE) and Council Directive 2001/86/EC supplementing the Statute for a European Company with regard to the involvement of employees.

This legislation entered into force on 8 October 2004, the date on which, in principle, a new legal entity became available to companies conducting operations in more than one Member State of the European Union.

The purpose of creating of this new legal entity and adopting the SE Statute was to provide for "the creation, side by side with companies governed by a particular national law, of companies formed and carrying on business under the law created by a Community Regulation directly applicable in all Member States"[6] in order to overcome the obstacles arising from the disparity and the limited territorial application of national company law. Thanks to the existence of the SE, European companies and groups should have been given the opportunity to structure, reorganise and combine their pan-European operations, to transfer their registered office and to adapt their organisational structure throughout the European Union and the European Economic Area without prohibitive legal obstacles.

Prior to the adoption of the SE Statute, the SE legal form was expected to interest a wide range of companies and to be especially attractive to companies and groups operating across the European Union. This trend is illustrated in the table below taken from the Ciampi Report[7] and showing the number of companies, according to the size of their workforce that, in 1995, declared their interest in the SE legal status:

Number of companies interested in the SE legal status

(according to the Ciampi report, 1995)

Type of company (per number of employees)	Number of companies in the EU	Companies interested in the SE legal status	
From 1 to 10	6,177,952	1,235,590	(20%)
From 10 to 100	1,017,779	508,890	(50%)
From 100 to 500	72,986	47,441	(65%)
From 500 to 10,000	13,436	10,077	(75%)
10,000 and more	339	339	(100%)

However, it should be noted that the interest expressed in the Ciampi Report concerned a unified European Company which is not the case in the final version of the SE Statute.

[6] Preamble of Council Regulation (EC) No 2157/2001 on the Statute for a European Company (SE), paragraph (6).

[7] Competitive advisory group, Enhancing European Competitiveness – First Report, Luxembourg, 1995.

After nearly five years of implementation of the legislation on the SE, one thing must be acknowledged: the SE Regulation has not encountered the overall success expected –a total of 369 SEs are registered in the various EU / EEA Member States as of 15 April 2009. Furthermore, the SE legal form has not encountered the same success in all the Member States concerned.

In this context, the European Commission has commissioned a study on the operation and the impacts of the SE Statute prior to drawing-up the report required by art. 69 of the SE Regulation, which provides that "five years at the latest after the entry into force of the Regulation, the Commission shall forward to the Council and the European Parliament a report on the application of the Regulation and proposals for amendments, where appropriate".

Objectives of the study

One of the explanations for the disparity in the success of the SE lies in the fact that a certain amount of leeway has been allowed to each Member State for the implementation of the SE Statute: first by referring to national legislation governing public limited-liability companies for certain harmonised or non-harmonised rules and, second, by leaving certain options open to the Member States.

In the context described above, by commissioning a Study on the operation and impacts of the Statute for a European Company, the European Commission expects to be provided with:

(i) an overview of the relevant national legislation applicable in representative EU / EEA Member States,

(ii) an inventory of the established SEs supplemented by an analytical report of the factual data collected on the latter (including factual analysis of the present state of play concerning the implementation and functioning of the SE in representative EU/EEA Member States),

(iii) an analytical conclusion, focusing on the effectiveness of the provisions of European Council Regulation No 2157/2001,

Methods

To achieve the goals described above, a working team was set up composed of lawyers and academics. The working team conducted the study according to the following methods.

Legal mapping methods

The geographical coverage retained for the Study was designed to include representative countries of the EU/EEA in order to obtain the most comprehensive, accurate and relevant analysis possible.

Consequently, the Study covers twenty-five Member States. The countries included in the Study have been selected for their representative nature, based, in particular, on the following criteria:

(i) A balanced geographical coverage between the major European zones and the nature of the countries (large or small),

(ii) A preference for EU/EEA Member States with high economic relevance,

(iii) A preference for countries with a proven record for setting up SEs on their territory, although the reasons explaining why no SEs have been set up in certain countries can also be of considerable interest.

Therefore, only the following EU/EEA Member States are not covered in the Study for the following reasons:

- Liechtenstein: three SEs have been incorporated in Liechtenstein since the implementation of the relevant regulation. In addition, Liechtenstein consists mainly of a financial centre, located in central Europe, and its economic structure is therefore comparable to that of Luxemburg. As Luxemburg was already included in the scope of the Study, it was not considered necessary to cover Liechtenstein, the added value of such an analysis being limited.
- Lithuania: as Latvia and Estonia are already included in the Study, this geographical zone is sufficiently covered. In addition and as opposed to Latvia and Estonia, no SE has been incorporated in this Member State.
- Ireland: the relevant legislation (Council Directive supplementing the Statute for a European company) was implemented very recently in the Irish legislative regime (January 2007) and, furthermore, initially no SEs had been incorporated in Ireland. There is insufficient hindsight to analyse precisely the SE Statute in Ireland accurately and therefore this Member State is not included in the scope of the Study[8].
- Iceland and Malta: no SE has been incorporated in either of these countries. In addition, due to the remoteness of these States, they are not very representative with regard, in particular, to the objectives of the Study.

Once the 25 Member States of the EU / EEA covered in the Study had been defined, in order to identify and examine the national legal framework implementing the SE in each State, a questionnaire was addressed to specialists from each of the 25 EU / EEA Member States (see Appendix 1). This technical questionnaire, intended to ensure coherence and practical relevance with regard to the legislation applicable to the SE, was composed of the following six sections:

- Section I: General provisions of the national law regime applicable to the SE.
- Section II: Formation of the SE.
- Section III: Transfer of the SE's registered office to another Member State.
- Section IV: Organisation and management of the SE.
- Section V: Involvement of employees.
- Section VI: Miscellaneous and other open issues.

The gathering of the legal information through the use of this questionnaire made it possible to draw up an executive table for each EU / EEA Member State (see Chapter 1 and Appendix 1).

[8] There are currently two SEs registered in Ireland, namely Atrium Dritte Europäische UU SE and Carthago Value Invest SE. However, these two SEs were not originally formed in Ireland but in Germany and they transferred their registered office to Ireland on 2 September 2008 and on 7 May 2009 respectively.

Considering the amount of information gathered in Appendix 1, some inaccuracies or incompleteness may subsist.

Using synoptic tables of the options implemented by the Member States, on the one hand, and of the national legislation referred to in the SE Regulation, on the other hand, it is possible (i) to compare the legislation of the selected EU / EEA Member States, (ii) to identify the main differences existing between the Member States, and (iii) to assess these respective rules with regard to flexibility and attractiveness.

Methods for the inventory of SEs and related information

With respect to the inventory of the SEs set up, the first objective was to identify in all the Member States of the EU / EEA (i.e. in the 30 Member States) the SEs that had been registered with the respective national Trade and Companies Registries. To achieve this goal, the lawyers and specialists who assisted us in the legal mapping also requested from their respective Trade and Companies Registries or other competent local public authorities a list of all the SEs registered in their Member State.

Once the list had been obtained, information about each SE was collected by the following means:

- For all the SEs for which contact information was found, a questionnaire compiling all the relevant data to be collected was sent either by electronic mail or by post. This factual questionnaire was composed of the following four sections (see Appendix 2):
  - Section I: Factual data,
  - Section II: Reasons for setting up an SE,
  - Section III: Procedure for setting up an SE,
  - Section IV: Practical problems encountered.

  For those SEs which did not complete the questionnaire, the factual data were gathered via the relevant publicly available sources (see bullet point hereunder), and the remaining information - i.e. not publicly available (in particular, drivers for choosing the SE and actual implementation and issues) - were, to the extent possible, collected by conducting telephone interviews with the appropriate contact person identified in the SE (general counsel, head of the legal department).

- For the SEs for which no contact information could be found, the relevant data were sought in the appropriate publicly available sources, in particular the national Trade and Companies Registries (e.g. by accessing the publicly available registrations or extracts of these registrations, and the publicly available documents such as articles of association and annual accounts).

Throughout this whole process of data-gathering, we faced the following difficulties:

- Some SEs were reluctant to participate in the study and therefore refused to fill in the questionnaire or provide us with any kind of information (publicly available or not).

- A substantial number of SEs, in particular in the Czech Republic and in Germany, are actually shelf SEs[9] and therefore do not conduct any operational activity or have any employees. In these companies, no contact information could be found and therefore no competent legal representative or spokesman could be contacted.
- Finally not all of the information is publicly available, particularly due to the fact that not all the SEs have released and published information that should normally be made public.

The inventory of established SEs and the related information collected are included in the factsheets drawn up for each SE, which are appended to this Study (Appendix 2). Considering the amount of information gathered in Appendix 2, some inaccuracies or incompleteness may subsist.

On the basis of the data, several lists were drawn up, classifying the SEs according to different criteria. The survey results are presented with tables, pie-charts and diagrams, providing information and comparison between Member States with regard to the number of SEs, the form of constitution, the transfer of the registered office, corporate governance, the size, the fields of activity, etc.

Methods for data analysis and the identification of main trends

Further to the information collected, concerning, on the one hand, the legal rules applicable to the SE in the different Member States (legal mapping) and, on the other hand, the reality of the SEs (SE survey), a variety of interviews were conducted (60 interviews in total): interviews with the Chief Executive Officer or Senior Officers of SEs[10], interviews with professional founders of SEs[11], interviews with lawyers with experience in establishing or advising on the SE[12], interviews with experts on the employee representation aspect[13], and interviews with academics engaged in research relating to the SE[14]. These interviews aimed at finding out the main positive drivers for creating an SE. The legal representatives of companies which had contemplated and then abandoned the idea of becoming an SE were also among those interviewed[15]. The objective was then to find out the main negative drivers for not setting up an SE. Throughout the interviews, special focus was also put on the practical problems encountered by the SE in relation to the SE Statute, at the time of formation or while running the business, and those encountered by the non-SEs.

On the basis of the legal mapping, the SE survey and the classification of the main positive and negative drivers, the main trends were identified with regard to the decision on whether to set up an SE, the reasons for the choice of method of formation, the activity and size of the SEs and their founding companies, the system of corporate governance of the SEs and the transfer of their registered offices.

This done, a conclusion on the efficiency of the SE Statute was drawn.

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[9] Shelf SEs are SEs which have neither operational activity nor employee. They should be clearly distinguished from empty SEs which do not have any employees but do have operational activities.

[10] 17 interviews with SEs were conducted.

[11] Two interviews with professional founders of SEs were conducted.

[12] 25 interviews with attorneys-at-law were conducted.

[13] Six interviews with experts on the employee representatives' side were conducted.

[14] Five interviews with academics were conducted.

[15] Five interviews with non SEs were conducted.

Structure of the study

The structure of the study is as follows:

- Chapter 1 is devoted to the mapping of the relevant legislation applicable in the 25 EU / EEA Member States covered by the study;
- Chapter 2 consists of the inventory of the SEs and related information;
- Chapter 3 is composed of the analysis of the data and the identification of the main trends;
- Chapter 4 contains the analytical conclusions.

Chapter 1: Mapping of the relevant legislation applicable in the EU/EEA Member States

General considerations

Hierarchy of norms

Prior to the presentation of the relevant legislation applicable in the various EU / EEA Member States, it is important to mention the sources and norms applicable to the SE: SEs are governed by the relevant company law and by their own constitutional documents. Therefore, the SE, in each Member State, will be governed by:

(i) The EC Treaty;

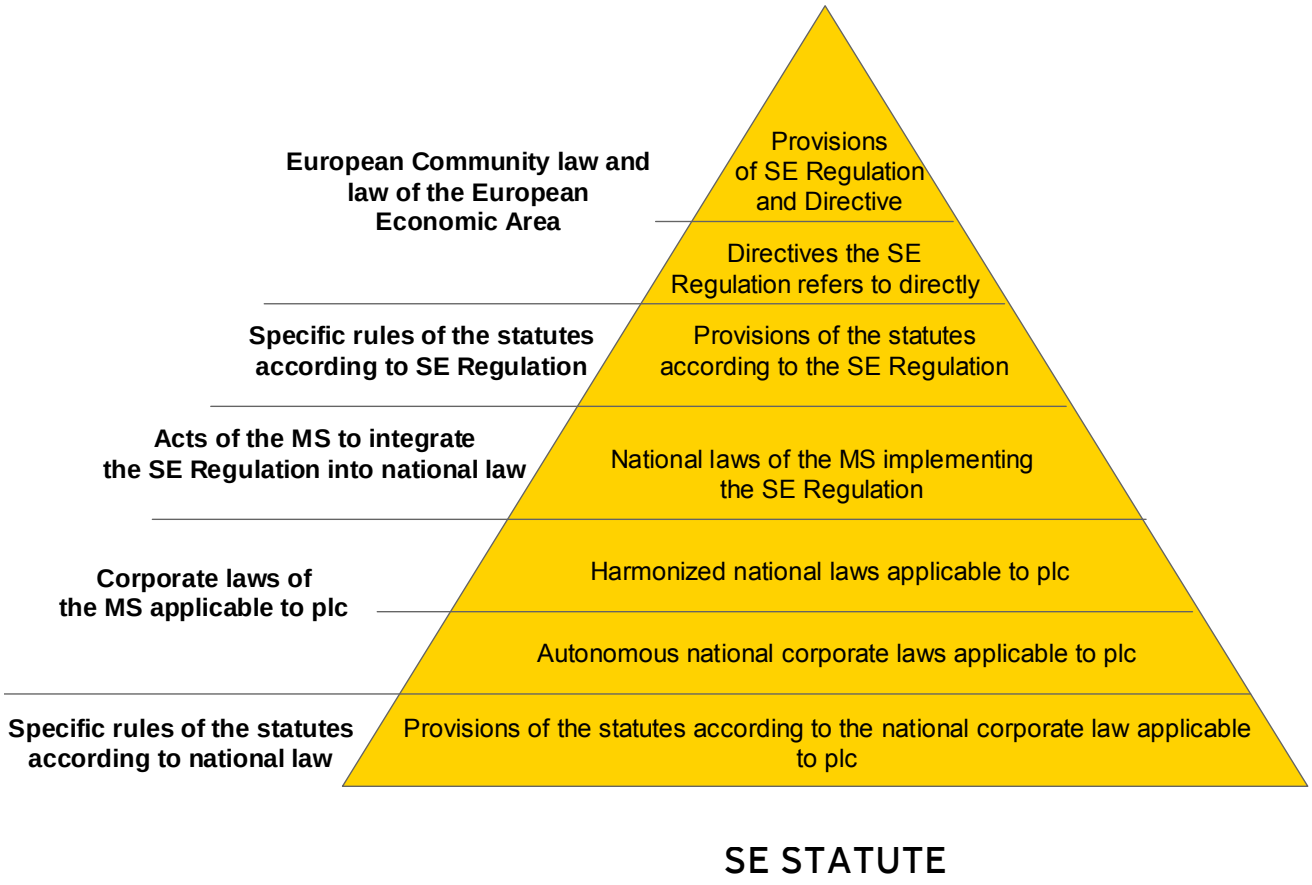
(ii) European Council Regulation No 2157/2001 of 8 October 2001 on the Statute for a European Company (SE) - hereinafter referred to as the SE Regulation and which sets out the relevant company law; the SE Regulation is directly applicable and self executory in the national legislation of the Member States;

(iii) European Council Directive No 2001/86/EC of 8 October 2001 supplementing the Statute for a European Company with regard to the involvement of employees - hereinafter referred to as the SE Directive and which sets out the relevant rules for the involvement of employees in the management of the company; the SE Directive is binding as to the results to be achieved but leaves the national authorities the choice of form and methods of how to implement it (the SE Directive was to be implemented by 8 October 2004);

(iv) The relevant national company law, which sets out further rules and procedures for formation, registration and corporate governance;

(v) The constitutional documents, such as the memorandum and articles of association of the SE itself.

Such sources are classified according to the following hierarchy of norms:



The above pyramid illustrates that the framework of the SE Statute is defined by European Community law but leaves considerable leeway to national law (either specific rules applicable to the SE or rules applicable to national public limited-liability companies): not only has the SE Directive had to be integrated into national laws by each of the Member States, but also all 30 countries have had to integrate the SE Statute into their national legal system and to choose whether to implement the various options left open. Therefore, and due to the applicability of national law on a broad variety of matters, the SE is not a uniform entity throughout the EU / EEA.

Scope of the legal mapping

The basis for the SE Statute is the SE Regulation, which sets out a number of uniform features and characteristics distinguishing the SE from competing (national) legal forms (basically national public limited-liability companies). Even though the SE Regulation includes many uniform and directly applicable provisions, it also refers to national legislation which is sometimes not harmonised (especially in the field of corporate governance). Furthermore it contains a certain number (32) of options, which are left to the discretion of the Member States (with regard to the appropriateness and methods of implementation). The options given by the SE Regulation refer to (i) the formation of the SE, (ii) the transfer of the registered office, (iii) the organisation and management of the SE and (iv) miscellaneous items.

One part of the study commissioned by the European Commission on the mapping of the relevant legislation applicable in the EU / EEA Member States consists in providing details on (i) whether the selected representative Member States have implemented the options of the SE Regulation and, when relevant, how the options have been implemented and (ii) what the differences are between the options chosen for the SE and the respective national rules applicable to public limited-liability companies (1).

On the basis of the raw information collected with regard to the legislation applicable to the SE in the EU / EEA Member States, the study also presents the main differences in the rules applicable to the SE as regards (i) its formation, (ii) the transfer of the SE's registered office to another Member State and (iii) the organisation and management of the SE (2).

Finally, the study groups the Member States according to the flexibility of their laws concerning the SE and the attractiveness of the legal regime of the SE in comparison with the rules applicable to national public limited-liability companies (3).

1. Analysis of the legal implementation of the SE Statute in the EU / EEA Member States

The details on the implementation (or non-implementation) and, if relevant, on the methods of implementation of the 32 options are included in Appendix 1 to this Study– legal mapping –, which contains one executive table for each of the 25 Member States covered by the Study. The following findings should be read in conjunction with the additional comments and details provided in Appendix 1 to the Study.

1.1 Executive tables (Appendix 1)

Executive tables on the legislation applicable to the SE have been drawn up for each of the 25 EU/ EEA Member States covered by the Study. These executive tables include the following information:

- Whether the various options have been implemented or not, and, if relevant, how the options have been implemented;
- The differences between the options chosen for the SE and the respective national rules applicable to domestic public limited-liability companies;
- The provisions of national legislation referred to in the SE Regulation and applying without distinction to SEs and domestic public limited-liability companies.

This information is classified into the following sub-categories:

- Part 1: General provisions of the national law regime of the SE (i.e. references of the national texts applicable to SEs);
- Part 2: Formation of the SE – by means of merger, by formation of a holding SE, by conversion into an SE, and by formation of a joint SE subsidiary[16];
- Part 3: Transfer of the SE's registered office to another Member State;
- Part 4: Organisation and management of the SE (structure of the SE);
- Part 5: Involvement of employees;
- Part 6: Miscellaneous and other open issues.

A summary of all these data is presented in synoptic tables as indicated hereunder.

1.2 Synoptic tables on the legal implementation of the SE Statute

In order to facilitate the process of the analysis of the legal mapping of the relevant legislation applicable to the SE in the selected EU / EEA Member States, three synoptic tables have been drawn up:

- Two synoptic tables of the options left open by the SE Regulation and Directive (1.2.1.);
- A synoptic table of the references to national legislation in the SE Statute (1.2.2.).

These synoptic tables are the bases for analysing the relevant legislation applicable to the SE in the various EU / EEA Member States, for comparing the relevant legislation applicable in the EU / EEA

[16] For the last method of formation of an SE – i.e. creation of a joint subsidiary SE – no option was left open to the Member States.

Member States (the main differences) and for grouping the selected Member States according to the flexibility and attractiveness of their laws in respect of the SE.

.1.2.1 Synoptic tables of the options left open by the SE Regulation and Directive

On the basis of the information relating exclusively to the implementation of the options included in the executive tables for each Member State, two synoptic tables, one concerning the SE Regulation and the other concerning the SE Directive, have been drawn up.

.1.2.1.1 Content of synoptic tables of the options left open by the SE Regulation and Directive

The synoptic table of the options left open by the SE Regulation shows for each of the 25 Member States (indicated in the rows):

- whether the various options left open by the EC Regulation were implemented or not (● / ●) – "Implementation" column;
- to what extent the exercise and conditions of the option chosen by the Member States lead to similarities or differences with the respective law applicable to national public limited liability companies (+ / = / -) – "Comparison with national law" column;
- and to what extent, when conducting an analysis across Member States, the rules applicable to the SE in the given Member State are more flexible (+), less flexible (-) or neutral (=) as compared to the rules applicable in the other Member States – "Flexibility for the SE" column.

The synoptic table of the options left open by the SE Directive shows for each of the 25 Member States the state of implementation of the options left open by the SE Directive and does not include either a comparison with the national law applicable to domestic public limited-liability companies or an analysis of the flexibility for the SE across Member States.

.1.2.1.2 Reading of the synoptic tables of the options left open by the SE Regulation and Directive

For the understanding of the synoptic tables for each option, the method described in Appendix 1 for the reading of the Executive Tables and summarised hereunder applies to the first two columns ("Implementation" and "Comparison with national law"). To fully understand the synoptic tables presented hereunder, it is necessary to refer to the executive tables for the corresponding Member States which provide all the information required. For the sake of clarity, the total amount of options exercised or not exercised cannot result in specific conclusions as such: some options provide more flexible rules, others more stringent rules and others different ways of implementation which are neither more flexible nor more stringent.

Implementation of the options

For each option, in the "Implementation" column:

- a green dot ● means the option is fully implemented by the Member State,
- and a red dot ● means it has not been implemented.

Comparison with national law

► For each option, the "Comparison with national law" column (when applicable) descibes to what extent the exercise and conditions of option by the Member States lead to similarities or differences with the respective law applicable to domestic public limited-liability companies:

- The - sign implies that the rules applicable to the SE are less favourable (more stringent) than the respective rules applicable to national public limited liability companies;
- The = sign implies that the rules applicable to the SE are similar to the respective rules applicable to national public limited liability companies; slight differences may arise that do not result in the rules applicable to the SE being clearly more flexible or stringent.
- The + sign implies that the rules applicable to the SE are more favourable (laxer) than the respective rules applicable to national public limited-liability companies.

When drawing the comparison in order to establish whether the SE Statute can be considered as less flexible (-), similar (=), or more flexible (+) than the legal regime applicable to the national public limited-liability companies, the standpoint of the majority shareholder (investor) of the SE has been adopted. If the position of another stakeholder were to be chosen (e.g.: minority shareholder(s), creditors, employees or public authorities), the comparison could lead to a completely different picture.

Moreover, in certain specific cases, no comparison has been drawn between the rules applicable to the SE and those of domestic law applicable to public limited-liability companies. These cases concern (i) all the options left open by the SE Directive and (ii) the options included in Article 12(4) and Article 50(3) of the SE Regulation. These options belong to the field of employee involvement, in which a comparison with domestic law applicable to national public limited-liability companies is not easy, the rules applying to the SE being specific.

Finally in certain specific cases and for particular Member States, a relevant comparison between the rules applicable to the SE (as a result of the implementation of options) and the rules applicable to national public limited-liability companies cannot be made. This relates in particular to two areas: the cross-border transfer of the registered office and the corporate structure of the SE.

As regards the cross-border transfer of the registered office, many Member States within the EU / EEA do not allow public limited-liability companies to transfer their registered office outside their jurisdiction (or on the condition that the company be wound up in the departure Member State and newly incorporated in the arrival Member State). Therefore, in this specific area the SE legal form has a competitive edge over the national public limited-liability companies. For those specific

Member States, we have therefore systematically put the (+) sign[17] for the SE for all the options relating to the transfer of the registered office (Articles 8(5), 8(7), and 8(14) of the SE Regulation). This concerns the following Member States: Austria, Denmark, Finland, Germany, Greece, Hungary, Latvia, Norway, Poland, Portugal, Slovakia, and the United Kingdom.

Similarly, with regard to the corporate governance structure, it should be noted that many Member States within the EU / EEA make only one type of corporate governance structure (one-tier or two-tier) available to their domestic public limited-liability companies[18]. In this area as well, the SE Statute can be regarded as having a competitive edge over the national public limited-liability company since it offers the possibility of choosing between two categories of corporate governance structure, even in countries where only one category is available. We have therefore systematically put a (+) sign[19] for the SE for all the options relating to the two-tier system (Articles 39(1), 39(2), 39(3), 39(4), 39(5), 40(3), 41(3) and 48(1) paragraph 2) and those relating to the one-tier system (Articles 43(1), 43(2) and 43(4)) for all Member States in which either the two-tier system or the one-tier system is not available to the national public limited-liability companies.

Flexibility for the SE

Whereas the "comparison with national law" column aims at comparing, in each Member State, the rules applicable to the SE and those applicable to the domestic public limited-liability company ("intra" Member State analysis), the "Flexibility for the SE" column presents a comparison across Member States ("inter" Member State analysis). Therefore, it should be read as follows:

- The - sign implies that, in comparison to the options / position adopted by the other Member States, the rules applicable to the SE in that specific Member State are less favourable (less flexible);
- The = sign implies that, in comparison to the options / position adopted by the other Member States, the rules applicable to the SE in that specific Member State are neutral, neither less favourable nor more favourable;
- The + sign implies that, in comparison to the options / position adopted by the other Member States, the rules applicable to the SE in that specific Member State are more favourable (more flexible).

Like in the intra Member State analysis, the inter Member State assessment of flexibility is based on the standpoint of the majority shareholder (investor) of the SE. If the position of another stakeholder were to be chosen (e.g.: minority shareholder(s), creditors, employees or public authorities), the comparison could lead to a completely different picture. Some options were not included in the assessment because it was considered that they do not have an impact on the

[17] NB: For ease of reading and identification of the Member States concerned, the + sign has been put in brackets.

[18] On the one hand, Belgium, Denmark, Sweden, the United Kingdom and Spain do not have a two-tier system for their national public limited-liability companies. Furthermore, in Greece, only listed public limited-liability companies may adopt the two-tier system. On the other hand, Cyprus, the Czech Republic, Estonia, Germany, the Netherlands, Latvia, Poland, and Slovakia do not have a one-tier system for their domestic public limited-liability companies.

[19] NB: For ease of reading and identification of the Member States concerned, the + sign has been put in brackets.

flexibility or non-flexibility for the SE[20]. Taking these factors into consideration, the assessment of the flexibility for the SE was conducted according to the following principles:

- For all the options aiming at increasing the protection granted to specific stakeholders, i.e. the minority shareholders (Articles 8(5), 24(2) and 34 of the SE Regulation), the creditors (Article 8(7) and 34 of the SE Regulation), the public authorities (Articles 8(14) and 19 of the SE Regulation), and the employees (Article 34 and 37(8) of the SE Regulation), it was considered that the non-implementation of the option led to more flexibility (+) than the implementation of the option (-).

- In relation to the above-mentioned category of options, the options granting increased rights to specific stakeholders should also be mentioned. This concerns in particular the option allowing the possibility for Member States to grant the right to each member of the supervisory organ to require the management organ to provide information of any kind which it needs to exercise supervision in the two-tier system (Article 41(3) of the SE Regulation). This also relates to Articles 55(1) and 56 of the SE Regulation, allowing the possibility of providing for the holding of less than 10 % of the SE's subscribed capital being necessary to request the convening of a general meeting or to request that one or more additional items be put on the agenda of any general meeting. For these options as well, it was considered that the non-implementation of the option led to more flexibility (+) than the implementation of the option (-).

- For all the options allowing the Member States to set up mandatory requirements for the SE, it was considered that the non-implementation of the option led to more flexibility (+) than the implementation of the option (-). This concerns specifically:
  - The requirement that an SE has its registered office and head office in the same place (Article 7 of the SE Regulation);
  - The setting-up of a time limit for the possibility for a member of the supervisory body to act as a member of the management body in the event of a vacancy of the latter (Article 39(3) of the SE Regulation);
  - The possibility for granting the right to each member of the supervisory organ to require the management organ to provide information of any kind which it needs to exercise supervision in the two-tier system (Article 41(3) of the SE Regulation);
  - The fixing of a minimum / maximum number of members of the management organ (Article 39(4) of the SE Regulation) and the supervisory organ (Article 40(3) of the SE Regulation) in the two-tier system and of the administrative organ (Article 43(2) of the SE Regulation) in the one-tier system;

[20] These options are those referred to in:

- Article 39(2): possibility to provide that the member(s) of the management organ shall be removed and appointed by the general meeting;
- Article 39(5): adoption of appropriate measures in relation to SEs where no provision is made for a two-tier system in public limited-liability companies;
- Article 43(4): adoption of appropriate measures in relation to SEs where no provision is made for a one-tier system in public limited-liability companies.

- The determination of the categories of transactions which must at least be indicated in the statutes of the SE as requiring authorisation of the management organ by the supervisory organ in the two-tier system or an express decision by the administrative organ in the one-tier system (Article 48(2) of the SE Regulation);

– Conversely, for all the options allowing the Member States to adopt simplified measures for the SE, it was considered that the implementation of the option led to more flexibility (+) than the non-implementation of the option (-). This concerns the following provisions:

- The possibility for a Member State to allow a company, the head office of which is not in the Community, to participate in the formation of an SE provided that the 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 (Article 2(5) of the SE Regulation);
- The possibility for a Member State to provide that the management organ or the administrative organ of the SE shall be entitled to proceed to amend the statutes of the SE in the case of conflict with the employee participation arrangements without any further decision from the general shareholders' meeting (Article 12(4) paragraph 2 of the SE Regulation);
- The possibility for a Member State to provide for the extension of the provisions on simplified mergers to mergers where a company holds shares conferring 90 % or more but not 100 % of the voting rights (Article 31(2) paragraph 2 of the SE Regulation). For this option, a = sign was put for those Member States already having rules providing for a similar simplified merger procedure for their national public limited-liability companies and to which Article 31(1) of the SE Regulation therefore applies, thus making the option left open by Article 31(2) paragraph 2 less relevant. The Member States that have not implemented this option but that do not have rules providing for a similar simplified merger procedure for national public limited-liability companies are marked up with the – sign;
- The possibility for a Member State to provide that a managing director or managing directors shall be responsible for the current management instead of or in addition to the management organ in the two-tier system (Article 39(1) of the SE Regulation) and to the administrative organ in the one-tier system (Article 43(1) of the SE Regulation);
- The possibility for a Member State to provide that in the two-tier system, the supervisory organ may itself make certain categories of transactions subject to authorisation (Article 48 (1) paragraph 2 of the SE Regulation);
- The possibility for a Member State to provide that the first general meeting may be held at any time in the 18 months following an SE's incorporation (Article 54 (1) paragraph 2 of the SE Regulation);
- The possibility for a Member State to allow an amendment of the SE's statutes with a simple majority of the votes cast when at least half of the SE's subscribed capital is represented (Article 59(2) of the SE Regulation).

– The option left open by Article 50(3) of the SE Regulation provides for the possibility to require that, where employee participation is provided for, the supervisory organ's quorum and decision-making are subject to the rules applicable to public limited liability companies, by way of derogation from the provisions referred to in Article 50 paragraphs 1 and 2 of the SE Regulation. Consequently, in all the Member States, which have not

implemented the option left open by Article 50(3) of the SE Regulation, the quorum and decision-making rules of Article 50(1) and (2) apply; this case is shown by the = sign as the rules applicable will be identical for all these Member States. For the three Member States which have implemented the option left open by Article 50(3), we have assessed whether the quorum and decision-making rules provided for their national public limited-liability company is more or less stringent than the rules provided by Articles 50(1) and (2), therefore leading to less (-) or more (+) flexibility for the SE in these Member States.

– The options left open by Articles 67(1) and 67(2) of the SE Regulation shall be handled separately due to their specificities. These options relate to Member States to which the third phase of the economic and monetary union (EMU) does not apply[21] and provide the possibility for these Member States to apply more stringent requirements to SEs with registered offices within their territory compared to SEs having their registered office in Member States where the third phase of the EMU applies[22]. As a consequence, N/A is put for the Member States in which the third phase of the EMU applies. For the other Member States, the non-implementation of these options is indicated by the = sign (as the applicable rules will be identical to those in force in the Member States where the third phase of the EMU applies) and the implementation of the option is marked up by the – sign as the consequent requirements are stricter than in the Member States where the third phase of the EMU applies.

[21] As of 1 January 2009, the EU Member States concerned are: Bulgaria, the Czech Republic, Denmark, Estonia, Hungary, Latvia, Lithuania, Poland, Romania, Sweden and the United Kingdom, as well as three Member States of the European Economic Area (Iceland, Lichtenstein, and Norway).

[22] Article 67(1) of the SE Regulation allows the Member States to which the third phase of the EMU does not apply to make SEs with registered offices within their territories subject to the same provisions as applicable to national public limited-liability companies as regards the expression of the capital. Article 67(2) of the SE Regulation allows those Member States to provide for the requirement for the SEs with registered offices within one of these Member States to prepare and publish their annual and consolidated accounts in the national currency (as well as in Euros).

.1.2.1.3 Synoptic table of the options left open by the SE Statute – SE Regulation

		Option left open by the SE Regulation											
		Miscellaneous						Transfer					
		Company with head office outside the EU /EEA: Allowing a company the head office of which is not in the EU to participate in the formation of an SE –**Art. 2(5) SE Regulation**			**Location of the SE:** Requirement that an SE has its registered office and head office in the same place – **Art. 7 SE Regulation**			**Protection for minority shareholders:** Provisions on protection for minority shareholders who oppose the transfer of the SE's registered office - **Art. 8(5) SE Regulation**			**Protection of the interests of creditors and holders of other rights:** Extension of the protection of the interests of creditors and holders of other rights in respect of the SE to liabilities that arise (or may arise) prior to the transfer - **Art. 8(7) SE Regulation**		
		Implementation	Comparison with national law	Flexibility for SE	Implementation	Comparison with national law	Flexibility for SE	Implementation	Comparison with national law	Flexibility for SE	Implementation	Comparison with national law	Flexibility for SE
Member States	AT	●	-	-	●	=	-	●	(+)	-	●	(+)	-
	BE	●	=	+	●	=	+	●	=	+	●	=	+
	BG	●	-	-	●	-	-	●	=	+	●	=	+
	CY	●	-	-	●	=	+	●	=	+	●	-	-
	CZ	●	=	+	●	=	-	●	=	-	●	=	+
	DE	●	-	-	●	=	+	●	(+)	-	●	(+)	-
	DK	●	=	+	●	=	-	●	(+)	-	●	(+)	-
	EE	●	-	-	●	=	+	●	-	-	●	=	+
	EL	●	=	+	●	-	-	●	(+)	-	●	(+)	-
	ES	●	=	+	●	+	+	●	=	-	●	-	-
	FI	●	=	+	●	=	+	●	(+)	-	●	(+)	-
	FR	●	-	-	●	=	-	●	+	-	●	-	-
	HU	●	=	-	●	=	+	●	(+)	-	●	(+)	+
	IT	●	+	+	●	=	+	●	+	+	●	=	+
	LU	●	=	+	●	=	+	●	+	+	●	+	+
	LV	●	-	-	●	=	-	●	(+)	-	●	(+)	-
	NL	●	-	-	●	=	+	●	=	+	●	-	-
	NO	●	=	+	●	=	+	●	(+)	+	●	(+)	+
	PL	●	=	+	●	=	+	●	(+)	-	●	(+)	+
	PT	●	-	-	●	=	+	●	(+)	-	●	(+)	+
	RO	●	-	-	●	=	+	●	=	-	●	=	+
	SE	●	=	+	●	=	+	●	=	+	●	-	-
	SI	●	-	-	●	=	+	●	=	-	●	=	+
	SK	●	=	+	●	=	+	●	(+)	-	●	(+)	+
	UK	●	=	+	●	=	+	●	(+)	+	●	(+)	-
Total	● / +	13	1	13	7	1	18	16	15	9	12	13	13
	=		13	0		22	0		9	0		7	0
	● / -	12	11	12	18	2	7	9	1	16	13	5	12

		Option left open by the SE Regulation											
		Transfer			Involvement of employees			Formation of the SE					
		Opposition by competent authorities The right of the MS competent authority to oppose the transfer of the SE's registered office on grounds of public interest - **Art. 8(14) SE Regulation**			**Conflict between statutes of the SE and arrangement for employee involvement:** Giving the management or administrative organ of the SE the possibility of amending the statutes in the case of conflict with employee participation arrangements without decision of GM - **Art. 12(4) SE Regulation**			**Opposition by competent authorities:** The right of the MS's competent authorities to oppose the SE's formation by merger on grounds of public interest - **Art. 19 SE Regulation**			**Protection for minority shareholders:** Provisions on protection for minority shareholders who oppose the merger - **Art. 24(2) SE Regulation**		
		Implementation	Comparison with national law	Flexibility for SE	Implementation	Comparison with national law	Flexibility for SE	Implementation	Comparison with national law	Flexibility for SE	Implementation	Comparison with national law	Flexibility for SE
Member States	AT	●	(+)	-	●	N/A	-	●	=	+	●	=	-
	BE	●	-	-	●	N/A	-	●	-	-	●	=	+
	BG	●	=	+	●	N/A	-	●	=	-	●	=	-
	CY	●	-	-	●	N/A	+	●	-	-	●	+	+
	CZ	●	=	+	●	N/A	+	●	=	+	●	=	-
	DE	●	(+)	+	●	N/A	-	●	=	+	●	=	-
	DK	●	(+)	-	●	N/A	-	●	-	-	●	-	-
	EE	●	=	+	●	N/A	-	●	=	+	●	=	-
	EL	●	(+)	+	●	N/A	+	●	-	-	●	-	-
	ES	●	-	-	●	N/A	-	●	=	-	●	-	-
	FI	●	(+)	+	●	N/A	-	●	=	+	●	=	-
	FR	●	-	-	●	N/A	-	●	-	-	●	=	+
	HU	●	(+)	+	●	N/A	-	●	=	+	●	=	-
	IT	●	=	+	●	N/A	-	●	=	+	●	=	+
	LU	●	=	+	●	N/A	-	●	=	+	●	=	+
	LV	●	(+)	-	●	N/A	-	●	-	-	●	=	-
	NL	●	-	-	●	N/A	-	●	=	-	●	=	-
	NO	●	(+)	-	●	N/A	-	●	=	+	●	=	+
	PL	●	(+)	-	●	N/A	-	●	=	-	●	-	-
	PT	●	(+)	-	●	N/A	-	●	-	-	●	-	-
	RO	●	=	+	●	N/A	-	●	=	+	●	=	-
	SE	●	=	-	●	N/A	-	●	=	-	●	=	+
	SI	●	=	+	●	N/A	-	●	=	+	●	-	-
	SK	●	(+)	+	●	N/A	-	●	=	+	●	=	-
	UK	●	(+)	-	●	N/A	+	●	-	-	●	=	+
Total	● / +	13	12	12	4		4	13	0	12	17	1	8
	=		8	0			0		17	0		18	0
	● / -	12	5	13	21		21	12	8	13	8	6	17

		Option left open by the SE Regulation											
		Formation of the SE											
		Simplified merger procedure: Extension of the provisions on simplified mergers to mergers where a company holds shares conferring 90% or more but not 100% of the voting rights - **Art. 31(2) paragraph 2 SE Regulation**			**Protection for minority shareholders:** Provision on protection for minority shareholders who oppose the creation of a holding SE - **Art. 34 SE Regulation**			**Protection for creditors:** Provision on protection for creditors in case of creation of a holding SE- **Art. 34 SE Regulation**			**Protection for employees:** Provision on protection for employees in case of creation of a holding SE - **Art. 34 SE Regulation**		
		Implementation	Comparison with national law	Flexibility for SE	Implementation	Comparison with national law	Flexibility for SE	Implementation	Comparison with national law	Flexibility for SE	Implementation	Comparison with national law	Flexibility for SE
Member States	AT	●	=	=	●	=	-	●	=	+	●	=	+
	BE	●	=	-	●	=	+	●	=	+	●	=	+
	BG	●	=	-	●	=	-	●	=	+	●	=	-
	CY	●	=	=	●	+	+	●	=	-	●	+	-
	CZ	●	=	=	●	=	-	●	=	-	●	-	-
	DE	●	=	-	●	+	-	●	=	+	●	=	+
	DK	●	=	=	●	=	+	●	=	+	●	=	+
	EE	●	=	=	●	=	-	●	=	+	●	=	+
	EL	●	=	-	●	-	-	●	=	+	●	=	+
	ES	●	=	-	●	=	-	●	=	-	●	=	+
	FI	●	=	-	●	=	+	●	=	+	●	=	+
	FR	●	=	-	●	=	+	●	-	-	●	=	+
	HU	●	=	-	●	=	-	●	=	-	●	=	+
	IT	●	=	=	●	=	+	●	=	+	●	=	+
	LU	●	=	=	●	=	+	●	=	+	●	=	+
	LV	●	=	-	●	=	-	●	=	+	●	=	+
	NL	●	=	-	●	=	+	●	=	+	●	=	+
	NO	●	=	-	●	=	+	●	=	+	●	=	+
	PL	●	=	=	●	=	+	●	=	+	●	=	+
	PT	●	=	-	●	-	-	●	-	-	●	=	+
	RO	●	=	=	●	=	+	●	=	+	●	=	+
	SE	●	=	-	●	=	+	●	=	+	●	=	+
	SI	●	=	-	●	-	+	●	+	+	●	=	-
	SK	●	=	=	●	=	-	●	=	+	●	=	-
	UK	●	=	-	●	=	+	●	=	+	●	=	+
Total	● / +	3	0	0	11	2	14	6	1	19	5	1	20
	=		25	10		20	0		22	0		23	0
	● / -	22	0	15	14	3	11	19	2	6	20	1	5

		Option left open by the SE Regulation											
		Formation of the SE			Organisation and management of the SE								
		Favourable vote linked to employee participation: Conversion to SE only with consent of qualified majority or unanimity in the organ of the company to be converted within which employee participation is organised - **Art. 37(8) SE Regulation**			**Responsibility of managing director(s):** Responsibility of the managing director(s) for the current management in the two-tier system - **Art. 39(1) SE Regulation**			**Appointment and removal of management organ:** Member(s) of the management organ appointed and removed by the general meeting in the two-tier system - **Art. 39(2) SE Regulation**			**Vacancy as a member of the management organ:** Time limit for member of the supervisory body acting as a member of the management body in the event of a vacancy in the two tier system - **Art. 39(3) SE Regulation**		
		Implementation	Comparison with national law	Flexibility for SE	Implementation	Comparison with national law	Flexibility for SE	Implementation	Comparison with national law	Flexibility for SE	Implementation	Comparison with national law	Flexibility for SE
Member States	AT	●	=	+	●	=	-	●	=	N/A	●	=	-
	BE	●	=	+	●	(+)	+	●	(+)	N/A	●	(+)	-
	BG	●	=	+	●	=	+	●	=	N/A	●	=	+
	CY	●	=	+	●	=	+	●	=	N/A	●	+	-
	CZ	●	=	+	●	=	+	●	=	N/A	●	+	-
	DE	●	=	+	●	=	-	●	=	N/A	●	=	-
	DK	●	=	+	●	(+)	-	●	(+)	N/A	●	(+)	+
	EE	●	=	+	●	=	+	●	=	N/A	●	+	-
	EL	●	=	+	●	(+)	+	●	(+)	N/A	●	(+)	-
	ES	●	=	+	●	(+)	+	●	(+)	N/A	●	(+)	-
	FI	●	=	+	●	=	+	●	=	N/A	●	=	+
	FR	●	=	+	●	=	+	●	=	N/A	●	+	-
	HU	●	=	+	●	=	+	●	=	N/A	●	+	-
	IT	●	=	+	●	=	-	●	=	N/A	●	=	+
	LU	●	=	+	●	=	+	●	=	N/A	●	=	+
	LV	●	=	+	●	=	+	●	=	N/A	●	=	+
	NL	●	=	+	●	=	-	●	=	N/A	●	=	-
	NO	●	=	+	●	=	+	●	=	N/A	●	+	-
	PL	●	=	+	●	=	-	●	=	N/A	●	=	-
	PT	●	=	+	●	=	-	●	=	N/A	●	=	+
	RO	●	=	+	●	=	+	●	=	N/A	●	=	+
	SE	●	=	+	●	(+)	+	●	(+)	N/A	●	(+)	-
	SI	●	=	+	●	=	+	●	=	N/A	●	=	-
	SK	●	=	+	●	=	+	●	=	N/A	●	+	-
	UK	●	=	+	●	(+)	-	●	(+)	N/A	●	(+)	+
Total	● / +	0	0	25	17	6	17	15	6		16	13	9
	=		25	0		19	0		19			12	0
	● / -	25	0	0	8	0	8	10	0		9	0	16

		Option left open by the SE Regulation											
		Organisation and management of the SE											
		Number of members of the management organ: Fixing of a minimum/maximum number of members of the management organ in the two tier system - **Art. 39(4) SE Regulation**			**Specific two-tier system for SEs:** Adoption of appropriate measures in relation to SEs where no provision is made for a two-tier system in public limited-liability companies - **Art. 39(5) SE Regulation**			**Number of members of the supervisory organ:** Stipulating a certain number or a minimum/maximum number of members of the supervisory organ in the two tier system - **Art. 40(3) SE Regulation**			**Information of members of the supervisory organ:** Granting the right of each member of the supervisory organ to require the management organ to provide information of any kind which it needs to exercise supervision in the two tier system - **Art. 41(3) SE Regulation**		
		Implementation	Comparison with national law	Flexibility for SE	Implementation	Comparison with national law	Flexibility for SE	Implementation	Comparison with national law	Flexibility for SE	Implementation	Comparison with national law	Flexibility for SE
Member States	AT	●	=	+	●	=	N/A	●	=	-	●	=	-
	BE	●	(+)	+	●	(+)	N/A	●	(+)	-	●	(+)	+
	BG	●	=	-	●	=	N/A	●	=	-	●	=	+
	CY	●	-	-	●	=	N/A	●	-	-	●	-	-
	CZ	●	+	+	●	=	N/A	●	+	+	●	=	-
	DE	●	=	-	●	=	N/A	●	=	-	●	-	-
	DK	●	(+)	+	●	(+)	N/A	●	(+)	-	●	(+)	+
	EE	●	-	-	●	=	N/A	●	+	+	●	=	+
	EL	●	(+)	-	●	(+)	N/A	●	(+)	-	●	(+)	+
	ES	●	(+)	-	●	(+)	N/A	●	(+)	+	●	(+)	+
	FI	●	=	-	●	=	N/A	●	=	-	●	=	-
	FR	●	=	-	●	=	N/A	●	=	-	●	=	-
	HU	●	=	-	●	=	N/A	●	=	-	●	+	+
	IT	●	=	+	●	=	N/A	●	+	+	●	+	+
	LU	●	=	+	●	=	N/A	●	+	-	●	=	+
	LV	●	=	+	●	=	N/A	●	+	+	●	=	+
	NL	●	=	+	●	=	N/A	●	-	-	●	=	+
	NO	●	=	-	●	=	N/A	●	+	-	●	=	-
	PL	●	=	+	●	=	N/A	●	=	-	●	=	-
	PT	●	=	-	●	=	N/A	●	=	-	●	=	-
	RO	●	=	-	●	=	N/A	●	=	-	●	=	-
	SE	●	(+)	-	●	(+)	N/A	●	(+)	-	●	(+)	-
	SI	●	=	+	●	=	N/A	●	=	-	●	=	-
	SK	●	=	+	●	=	N/A	●	=	-	●	=	-
	UK	●	(+)	-	●	(+)	N/A	●	(+)	-	●	(+)	-
Total	● / +	14	7	11	6	6		20	12	5	14	8	11
	=		16	0		19			11	0		15	0
	● / -	11	2	14	19	0		5	2	20	11	2	14

		Option left open by the SE Regulation											
		Organisation and management of the SE											
		Responsibility of managing director(s): Provision that the managing director(s) is/are responsible for the day-to-day management in the one-tier system - **Art. 43(1) SE Regulation**			**Number of members of the administrative organ:** Setting a minimum/maximum number of members of the administrative organ in the one-tier system - **Art. 43(2) SE Regulation**			**Specific one-tier system for SEs:** Adoption of appropriate measures in relation to SEs where no provision is made for one-tier system in public limited-liability companies - **Art. 43(4) SE Regulation**			**Transactions subject to authorisation:** Provision that in the two-tier system the supervisory organ may itself make certain categories of transactions subject to authorisation - **Art. 48(1) paragraph 2 SE Regulation**		
		Implementation	Comparison with national law	Flexibility for SE	Implementation	Comparison with national law	Flexibility for SE	Implementation	Comparison with national law	Flexibility for SE	Implementation	Comparison with national law	Flexibility for SE
Member States	AT	●	=	-	●	=	+	●	=	N/A	●	=	+
	BE	●	=	+	●	=	-	●	=	N/A	●	(+)	-
	BG	●	=	+	●	=	-	●	=	N/A	●	=	+
	CY	●	(+)	-	●	(+)	-	●	(+)	N/A	●	=	+
	CZ	●	(+)	+	●	(+)	-	●	(+)	N/A	●	=	+
	DE	●	(+)	-	●	(+)	-	●	(+)	N/A	●	=	+
	DK	●	=	+	●	=	-	●	=	N/A	●	(+)	+
	EE	●	(+)	+	●	(+)	-	●	(+)	N/A	●	+	+
	EL	●	=	+	●	=	-	●	=	N/A	●	(+)	-
	ES	●	=	+	●	=	-	●	=	N/A	●	(+)	+
	FI	●	=	+	●	=	-	●	=	N/A	●	=	-
	FR	●	=	+	●	=	-	●	=	N/A	●	=	-
	HU	●	=	+	●	=	-	●	=	N/A	●	=	-
	IT	●	=	-	●	+	+	●	=	N/A	●	=	-
	LU	●	=	+	●	+	+	●	=	N/A	●	=	-
	LV	●	(+)	+	●	(+)	-	●	(+)	N/A	●	=	-
	NL	●	(+)	-	●	(+)	+	●	(+)	N/A	●	=	-
	NO	●	=	+	●	=	+	●	=	N/A	●	=	-
	PL	●	(+)	+	●	(+)	-	●	(+)	N/A	●	=	-
	PT	●	=	-	●	=	-	●	=	N/A	●	=	-
	RO	●	=	-	●	=	+	●	=	N/A	●	=	-
	SE	●	=	+	●	=	-	●	=	N/A	●	(+)	+
	SI	●	=	+	●	=	-	●	=	N/A	●	=	+
	SK	●	(+)	-	●	(+)	-	●	(+)	N/A	●	+	+
	UK	●	=	-	●	=	-	●	=	N/A	●	(+)	-
Total	● / +	16	8	16	19	10	6	8	8		11	8	11
	=		17	0		15	0		17			17	0
	● / -	9	0	9	6	0	19	17	0		14	0	14

		Option left open by the SE Regulation											
		Organisation and management of the SE											
		Statutory transactions subject to authorisation: Determination of the categories of transactions which must at least be indicated in the statutes of the SE - **Art. 48(2) SE Regulation**			**Quorum and majority rules:** Requirement that, where employee participation is provided for, the supervisory organ's quorum and decision-making are subject to the rules applicable to public limited liability companies - **Art. 50(3) SE Regulation**			**First general meeting:** Provision that the first general meeting may be held at any time in the 18 months following an SE's incorporation - **Art. 54(1) paragraph 2 SE Regulation**			**Convening rights for** minority shareholders**:** Setting-up of the possibility for less than 10 % of the SE's subscribed capital being necessary to request the SE to convene a general meeting and draw up the agenda thereof - **Art. 55(1) SE Regulation**		
		Implementation	Comparison with national law	Flexibility for SE	Implementation	Comparison with national law	Flexibility for SE	Implementation	Comparison with national law	Flexibility for SE	Implementation	Comparison with national law	Flexibility for SE
Member States	AT	●	=	-	●	-	=	●	=	-	●	=	-
	BE	●	=	+	●	-	=	●	+	+	●	+	-
	BG	●	=	+	●	=	=	●	+	+	●	=	-
	CY	●	=	+	●	=	-	●	-	-	●	=	+
	CZ	●	=	-	●	+	=	●	+	+	●	=	-
	DE	●	=	+	●	+	=	●	=	-	●	=	-
	DK	●	=	+	●	+	=	●	-	+	●	=	+
	EE	●	=	+	●	=	=	●	=	-	●	=	+
	EL	●	=	+	●	+	=	●	=	-	●	=	-
	ES	●	=	+	●	=	-	●	=	-	●	=	-
	FI	●	=	+	●	-	=	●	=	-	●	=	+
	FR	●	=	-	●	+	=	●	=	-	●	+	+
	HU	●	=	+	●	-	=	●	+	-	●	=	-
	IT	●	=	+	●	+	=	●	=	-	●	=	+
	LU	●	=	+	●	=	=	●	=	+	●	=	+
	LV	●	=	+	●	=	=	●	=	-	●	-	+
	NL	●	=	+	●	+	=	●	+	+	●	=	+
	NO	●	=	+	●	=	=	●	=	-	●	=	-
	PL	●	=	+	●	-	=	●	=	-	●	+	+
	PT	●	=	-	●	+	=	●	=	-	●	=	-
	RO	●	=	+	●	=	=	●	=	-	●	=	-
	SE	●	=	+	●	=	=	●	=	+	●	=	+
	SI	●	=	+	●	=	=	●	=	-	●	+	+
	SK	●	=	+	●	-	=	●	=	-	●	=	-
	UK	●	=	+	●	-	=	●	+	+	●	=	+
Total	● / +	4	0	21	2	8	0	8	6	8	12	4	13
	=		25	0		10	23		17	0		20	0
	● / -	21	0	4	23	7	2	17	2	17	13	1	12

		Option left open by the SE Regulation											
		Organisation and management of the SE						Miscellaneous					
		Rights of shareholders linked to the agenda: Setting-up of the possibility of less than 10 % of the SE's subscribed capital being necessary to request that one or more additional items be put on the agenda of any general meeting - **Art. 56 SE Regulation**			**Condition for simple majority:** Allowing an amendment of the SE's statutes by simple majority of the votes cast when at least half of an SE's subscribed capital is represented - **Art. 59 (2) SE Regulation**			**Expression of capital:** Make SEs subject to the same provisions as apply to public limited-liability companies as regards the expression of their capital if and so long as the third phase of economic and monetary union (EMU) does not apply - **Art. 67(1) SE Regulation**			**Annual and consolidated accounts:** Requiring the SE to prepare and publish its annual and consolidated accounts in the national currency if and so long as the third phase of economic and monetary union(MEU) does not apply - **Art.67(2) SE Regulation**		
		Implementation	Comparison with national law	Flexibility for SE	Implementation	Comparison with national law	Flexibility for SE	Implementation	Comparison with national law	Flexibility for SE	Implementation	Comparison with national law	Flexibility for SE
Member States	AT	●	=	-	●	=	+	N/A	N/A	N/A	N/A	N/A	N/A
	BE	●	=	+	●	+	+	N/A	N/A	N/A	N/A	N/A	N/A
	BG	●	=	-	●	=	-	●	=	-	●	=	-
	CY	●	=	+	●	=	-	N/A	N/A	N/A	N/A	N/A	N/A
	CZ	●	=	-	●	=	-	●	=	-	●	=	-
	DE	●	=	-	●	=	+	N/A	N/A	N/A	N/A	N/A	N/A
	DK	●	=	-	●	=	-	●	=	-	●	=	-
	EE	●	=	+	●	=	+	●	=	-	●	=	-
	EL	●	=	-	●	=	-	N/A	N/A	N/A	N/A	N/A	N/A
	ES	●	=	-	●	=	+	N/A	N/A	N/A	N/A	N/A	N/A
	FI	●	=	-	●	=	-	N/A	N/A	N/A	N/A	N/A	N/A
	FR	●	-	+	●	=	-	N/A	N/A	N/A	N/A	N/A	N/A
	HU	●	=	-	●	=	-	●	=	-	●	=	-
	IT	●	+	+	●	=	+	N/A	N/A	N/A	N/A	N/A	N/A
	LU	●	=	+	●	=	-	N/A	N/A	N/A	N/A	N/A	N/A
	LV	●	=	-	●	=	-	●	=	-	●	=	-
	NL	●	=	+	●	+	+	N/A	N/A	N/A	N/A	N/A	N/A
	NO	●	=	-	●	=	-	●	=	-	●	=	=
	PL	●	=	+	●	=	-	●	-	=	●	=	=
	PT	●	=	-	●	=	-	N/A	N/A	N/A	N/A	N/A	N/A
	RO	●	=	-	●	=	-	●	=	-	●	=	-
	SE	●	=	-	●	=	-	●	=	-	●	=	=
	SI	●	+	+	●	=	-	N/A	N/A	N/A	N/A	N/A	N/A
	SK	●	=	-	●	=	-	N/A	N/A	N/A	N/A	N/A	N/A
	UK	●	=	-	●	=	-	●	=	-	●	=	-
Total	● / +	16	2	9	7	2	7	10	0	0	8	0	0
	=		22	0		23	0		10	1		11	3
	● / -	9	1	16	18	0	18	1	1	10	3	0	8

		Option left open by the SE Regulation							
		Total							
		Implementation		Comparison with national law			Flexibility for SE		
		●	●	+	=	-	+	=	-
Member States	AT	14	16	3	24	2	8	2	17
	BE	12	18	11	15	3	17	1	9
	BG	17	15	1	28	2	12	1	14 (+2)
	CY	17	13	7	14	8	11	1	15
	CZ	22	10	8	22	1	12	2	13 (+2)
	DE	14	16	8	19	2	9	1	17
	DK	16	16	12	16	3	13	2	12 (+2)
	EE	14	18	6	22	3	16	2	9 (+2)
	EL	17	13	12	13	4	10	1	16
	ES	19	11	9	17	3	11	0	16
	FI	12	18	3	25	1	13	1	13
	FR	15	15	4	19	6	8	1	18
	HU	15	17	6	24	1	10	1	16 (+2)
	IT	2	28	7	22	0	20	2	5
	LU	8	22	4	25	0	21	2	4
	LV	15	17	7	21	3	11	1	15 (+2)
	NL	10	20	6	19	4	14	1	12
	NO	12	20	5	26	0	14	1 (+1)	12 (+1)
	PL	12	20	7	21	3	12	2 (+2)	13
	PT	13	17	4	20	5	5	1	21
	RO	12	20	0	30	1	12	2	13 (+2)
	SE	16	16	8	22	1	14	1 (+1)	12 (+1)
	SI	10	20	3	23	3	14	1	12
	SK	15	15	8	20	1	11	2	14
	UK	14	18	12	17	2	13	1	13 (+2)

NB: Taking into consideration the importance of the options, they all result in more or less attractiveness and flexibility, but none of them clearly outweighs the others. We do not therefore include any differentiated balancing between the options in our calculation.
NB: The number put into brackets correspond to the options left open by Article 67 of the SE Regulation and therefore applying only to the Member States not being part of the third phase of economic and monetary union.

Implementation

● Implemented
● Not implemented
N/A Not applicable

Comparison with national law (rules applicable to national PLC)

\+ Laxer rule for SE (in comparison with national PLC)
(+) No relevant point of comparison under national law → Competitive edge for the SE
= Same rule for SE (as for national PLC)
\- More stringent rule for SE (than for national PLC)

Flexibility for SE

\+ Method of implementation of option providing for more flexibility
= Method of implementation of option neutral for the SE
\- Method of implementation of option providing for less flexibility
N/A Not applicable

As a preliminary comment on the synoptic table of the options left open by the SE Regulation, it can be observed that:

- Concerning the method of formation of the SE, the implementation or non-implementation of the options tends towards an alignment of the legislation applicable to the SE with that of the local public limited-liability companies. The deviation from this general rule leads to more stringent rules for the SE (as compared to the domestic public limited-liability companies) through the granting of specific protection to certain categories of stakeholders (minority shareholders, creditors, employees and public authorities) due in particular to the international character of the SE (as compared with a purely domestic situation).

- The possibility for an SE to freely transfer its registered office beyond its national borders (regardless of the Member State of its incorporation) gives it a competitive edge over national public limited-liability companies in countries where such cross-border transfer is not possible or where the conditions are more stringent. However, the Member States have tended to implement options destined to increase the protection of certain categories of stakeholders (minority shareholders, creditors, employees, and public authorities) due in particular to the international character of the SE (as compared with a purely domestic situation).

- Concerning the organisation and management of the SE, the implementation or non-implementation of the options is not linked to the Member States' desire to make their national legislation applicable to the SE more or less attractive compared to the other Member States or compared to their national public limited-liability companies. The goal sought in the implementation of the options relating to organisation and management (corporate governance) is rather to harmonise the legislation applicable to the SE with that of the local public limited-liability companies. In addition, the possibility for the SE to adopt a corporate governance structure the equivalent of which does not exist for domestic public limited-liability companies is perceived as a real advantage over the latter.

- Concerning miscellaneous items, relating to the requirement that the registered office and head office of the SE be in the same place and the possibility for a company the head office of which is not in the EU to participate in the formation of an SE, most Member States have adopted a stringent approach as regards the question of the head office, either by requiring that the latter be located in the same place as the registered office of the SE or by not allowing a company the head office of which is not in the EU to participate in the formation of an SE.

.1.2.1.4 Synoptic table of the options left open by the SE Statute – SE Directive

		Option left open by the SE Directive					
		Special negotiating body		Standard rules		Reservation and confidentiality	
		Representatives of Trade Unions Possibility of including representatives of trade unions in the special negotiating body - **Art. 3(2) (b) SE Directive**	**Budgetary rules:** Possibility of laying down budgetary rules regarding the operation of the special negotiating body - **Art. 3(7) SE Directive**	**Fixing of the rules:** Possibility of fixing the rules applicable for an SE in the absence of any decision on the form of participation when there was more than one form of participation within the various participating companies - **Art. 7(2) in fine SE Directive**	**Reference provisions in the case of SE established by merger:** Possibility of non-application of the reference provisions in part 3 of the Annex (standard rules for participation) in the case of an SE established by merger under the conditions laid down in Article 7(2) (b) - **Art. 7(3) SE Directive**	**Condition for dispensation:** Dispensation from provision of information subject to prior administrative or judicial authorisation - **Art. 8(2) SE Directive**	**Rules for SEs with specific aims:** Particular provisions relating to the provision of information for SEs which pursue directly and essentially the aim of ideological guidance with respect to information and the expression of opinions - **Art. 8(3) SE Directive**
		Implementation	Implementation	Implementation	Implementation	Implementation	Implementation
Member States	AT	●	●	●	●	●	●
	BE	●	●	●	●	●	●
	BG	●	●	●	●	●	●
	CY	●	●	●	●	●	●
	CZ	●	●	●	●	●	●
	DE	●	●	●	●	●	●
	DK	●	●	●	●	●	●
	EE	●	●	●	●	●	●
	EL	●	●	●	●	●	●
	ES	●	●	●	●	●	●
	FI	●	●	●	●	●	●
	FR	●	●	●	●	●	●
	HU	●	●	●	●	●	●
	IT	●	●	●	●	●	●
	LU	●	●	●	●	●	●
	LV	●	●	●	●	●	●
	NL	●	●	●	●	●	●
	NO	●	●	●	●	●	●
	PL	●	●	●	●	●	●
	PT	●	●	●	●	●	●
	RO	●	●	●	●	●	●
	SE	●	●	●	●	●	●
	SI	●	●	●	●	●	●
	SK	●	●	●	●	●	●
	UK	●	●	●	●	●	●
Total	●	18	21	20	8	3	3
	●	7	4	5	17	22	22

		Option left open by the SE Directive				
		Reservation and confidentiality	Misuse of procedures	Standard rules		
		Administrative or judicial appeal procedures: Provision for administrative or judicial appeal procedures which the employees' representatives may initiate when the supervisory or administrative organ of an SE/participating company demands confidentiality or does not give information - **Art. 8(4) SE Directive**	**Misuse of procedures:** Appropriate measures with a view to preventing the misuse of an SE for the purpose of depriving employees of rights to employee involvement or withholding such rights - **Art. 11 SE Directive**	**Rules on the chairing of meetings:** Possibility of laying down rules on the chairing of information and consultation meetings - **Part 2 of Annex (d) SE Directive**	**Budgetary rules:** Possibility to lay down budgetary rules regarding the operation of the representative body - **Part 2 of Annex (h) SE Directive**	**Allocation of seats:** Determination of the allocation of the seats given to the representative body within the administrative or supervisory body - **Part 3 of Annex SE Directive**
		Implementation	Implementation	Implementation	Implementation	Implementation
Member States	AT	●	●	●	●	●
	BE	●	●	●	●	●
	BG	●	●	●	●	●
	CY	●	●	●	●	●
	CZ	●	●	●	●	●
	DE	●	●	●	●	●
	DK	●	●	●	●	●
	EE	●	●	●	●	●
	EL	●	●	●	●	●
	ES	●	●	●	●	●
	FI	●	●	●	●	●
	FR	●	●	●	●	●
	HU	●	●	●	●	●
	IT	●	●	●	●	●
	LU	●	●	●	●	●
	LV	●	●	●	●	●
	NL	●	●	●	●	●
	NO	●	●	●	●	●
	PL	●	●	●	●	●
	PT	●	●	●	●	●
	RO	●	●	●	●	●
	SE	●	●	●	●	●
	SI	●	●	●	●	●
	SK	●	●	●	●	●
	UK	●	●	●	●	●
Total	●	22	21	13	19	21
	●	3	4	12	6	4

		Option left open by the SE Directive	
		Total	
		Implementation	
		●	●
Member States	AT	6	5
	BE	7	4
	BG	4	7
	CY	7	4
	CZ	7	4
	DE	6	5
	DK	5	6
	EE	6	5
	EL	6	5
	ES	8	3
	FI	5	6
	FR	7	4
	HU	6	5
	IT	7	4
	LU	7	4
	LV	8	3
	NL	9	2
	NO	8	3
	PL	7	4
	PT	7	4
	RO	8	3
	SE	4	7
	SI	8	3
	SK	9	2
	UK	7	4

Implementation
- ● Implemented
- ● Not implemented

N/A Not applicable

As a preliminary comment on the synoptic table of the options left open by the SE Directive, it can be observed that the provisions of the SE Directive are very specific and therefore do not allow any comparison with the rules of domestic law applicable to public limited-liability companies. In addition, and due to their specificities, the rules included in the SE Directive are generally complex and considered in many Member States to be a deterrent to choosing the SE legal form.

.1.2.2 Synoptic table of the references to national legislation in the SE Statute

On the basis of the elements relating to references to the national legislation (applicable to domestic public limited-liability companies), a synoptic table has been drawn up in order to make it easier to compare the relevant legislation applicable in each EU / EEA Member State (identifying the main differences) and to group the selected Member States according to the flexibility and attractiveness of their laws in respect of the SE.

.1.2.2.1 Content of synoptic table of the references to national legislation in the SE Statute

The synoptic table hereunder refers exclusively to "national legislation", i.e. the provisions of the SE Regulation where a direct reference to national legislation applicable to public limited-liability companies is made ("under the same conditions as for public limited-liability companies"). The aim of this table is to assess the flexibility of the national legislation applicable to the SE, by comparing the selected Member States with one another ("inter" Member State analysis). No comparative analysis with the national public limited-liability companies ("intra" Member State analysis) is necessary since the national legislation being assessed applies equally and indifferently to SEs and domestic public limited companies.

.1.2.2.2 Reading the synoptic table of the references to national legislation in the SE Statute

To fully understand the synoptic table relating to the national legislation applicable to the SE, it is necessary to refer to the executive tables for the corresponding Member States which provide all the information required.

The synoptic table of the references to national legislation should be read as follows:

- The - sign implies that, compared to the national provisions of the other Member States, the rules applicable to the SE in that specific Member State are less favourable (less flexible);
- The = sign implies that, compared to the national provisions of the other Member States, the rules applicable to the SE in that specific Member State are neutral, neither less favourable nor more favourable;
- The + sign implies that, compared to the national provisions of the other Member States, the rules applicable to the SE in that specific Member State are more favourable (more flexible).

Again, the assessment of flexibility is based on the standpoint of the majority shareholder (investor) of the SE. If the position of another stakeholder were to be chosen (e.g.: minority shareholder(s), creditors, employees or public authorities), the comparison could lead to a

completely different picture. Taking these factors into consideration, the assessment of the flexibility allowed to the SE was conducted according to the following principles:

- For all the provisions of national legislation aiming at protecting the interests of specific stakeholders, i.e. the creditors (Articles 8(7), 24(1) of the SE Regulation), the holders of bonds (Article 24(1) of the SE Regulation) and the holders of securities (Article 24(1) of the SE Regulation), it was considered that the existence in the national legislation of specific protection mechanisms led to less flexibility (-) than the absence of such mechanisms of protection, tending to be favourable for the majority shareholder (+).

- In relation with the above-mentioned category of rules of national legislation, the provisions granting increased rights to specific stakeholders should also be mentioned. This concerns in particular the reference to national legislation permitting a minority of shareholders or other persons or authorities to appoint some of the members of a company organ (Article 47(4) of the SE Regulation). For these provisions of national legislation as well, it was considered that the existence in the national legislation of increased rights led to less flexibility (-) than the absence of such increased rights, tending to be favourable for the majority shareholder (+).

- For all the references to national legislation which provide for more stringent requirements than the subsidiary rules included in the SE Statute, it was considered that the existence of such national provisions led to less flexibility (-) than the absence of such national provisions, tending to be favourable for the majority shareholder (+).This concerns specifically:
  - The requirement of the law of a Member State that the general meeting of shareholders be held more frequently than once each calendar year (Article 54(1) paragraph 1 of the SE Regulation);
  - The requirement or permission of the law of a Member State that the amendment of an SE's statutes be adopted by a decision of the general meeting of shareholders taken by a majority of at least two thirds of the votes cast (Article 59(1) of the SE Regulation).

- Conversely, for all the provisions of national legislation allowing the Member States to adopt simplified measures for the SE (not automatically included in the SE Statute), it was considered that the existence of such national provisions led to more flexibility (+) than the absence of such national provisions, tending to be unfavourable for the majority shareholder (-).This concerns specifically:
  - The possibility for the national legislation of a Member State to allow a company or other legal entity to be a member of one of the corporate organs of the public limited-liability companies and thus of the SE (Article 47(1) of the SE Regulation);
  - The possibility for the national legislation of a Member State to allow the shareholders themselves (directly or indirectly) to convene general meetings of shareholders when, in particular, the annual general meeting is not held in due time (Article 55(3) of the SE Regulation).

- Finally, three specific cases of references to national legislation can be identified:
  - Article 47(2) of the SE Regulation refers to the cases of disqualification of individuals from serving on corporate organs of a public limited-liability company. As regards to this specific article, for the national provisions of the Member States which stipulate only the usual conditions of qualification (i.e. full legal capacity, incompatibility due to serving on another corporate organ, no judiciary conviction or prohibition), the = sign was used. The national legislation of certain Member States provides for additional requirements, such as age limitations, nationality or domiciliation requirements. In these specific cases, the - sign was used, as the conditions for qualification are more stringent than usual in these Member States.
  - Article 47(3) of the SE Regulation provides that "an SE's statutes may, in accordance with the law applicable to public limited-liability companies in the Member State in which the SE's registered office is situated, lay down special conditions of eligibility for members of a corporate organ representing the shareholders". As regards to this specific article, for the national provisions of the Member States which stipulate only the usual conditions of representation of shareholders (i.e. full legal capacity), the = sign was used. When the national legislation of certain Member States provides for additional requirements for the representatives of shareholders, the - sign was used, as the conditions for qualification are more stringent than usual in these Member States.
  - Article 52 of the SE Regulation provides that the general meeting of shareholders of an SE shall "decide on matters for which responsibility is given to the general meeting of a public limited-liability company governed by the law of the Member State in which the SE's registered office is situated either by the law of that Member State or by the SE's statutes in accordance with that law". The national legislation of all the various Member States provides for a defined scope of competence of the general meeting of shareholders. Nevertheless the Member States may provide for more flexibility in this respect, by allowing the possibility of freely extending or reducing the scope of competence of the general meeting of shareholders in the statutes. Therefore, with reference to this article, the = sign was used when the national legislation of the Member States does not grant the possibility of freely defining the scope of competence of the general meeting of shareholders in the statutes. Conversely, the + sign was used whenever such a possibility exists under the national legislation applicable in the Member States.

.1.2.2.3 Synoptic table of the references to national legislation in the SE Statute

		Reference to national legislation in the SE Regulation			
		Transfer	Formation of the SE		
		Protection of the interests of creditors and holders of other rights: The MS should provide, in respect of any liabilities arising prior to the publication of the transfer proposal, for the adequate protection of the interests of creditors and holders of other rights in respect of the SE in the case of the transfer of the SE's registered office - **Art. 8.7. SE Regulation**	**Protection of the interests of creditors:** The law of the MS governing each merging company shall apply as in the case of a merger of public limited-liability companies with regard to the protection of the interests of the creditors of the merging companies - **Art. 24.1 SE Regulation**	**Protection of the interests of holders of bonds:** The law of the MS governing each merging company shall apply as in the case of a merger of public limited-liability companies with regard to the protection of the interests of holders of bonds of the merging companies – **Art. 24.1 SE Regulation**	**Protection of the interests of holders of securities:** The law of the MS governing each merging company shall apply as in the case of a merger of public limited-liability companies with regard to the protection of the interests of holders of securities, other than shares, which carry special rights in the merging companies - **Art. 24.1 SE Regulation**
		Flexibility for SE	Flexibility for SE	Flexibility for SE	Flexibility for SE
Member States	AT	+	-	-	+
	BE	+	-	-	-
	BG	+	-	-	+
	CY	-	-	-	-
	CZ	-	-	-	-
	DE	-	-	-	-
	DK	-	-	+	+
	EE	-	-	-	+
	EL	-	-	-	-
	ES	+	-	-	-
	FI	-	-	-	-
	FR	-	-	-	-
	HU	-	-	+	+
	IT	+	-	-	+
	LU	-	+	+	+
	LV	+	-	-	+
	NL	+	-	-	+
	NO	-	-	-	+
	PL	+	-	-	-
	PT	-	-	-	-
	RO	-	-	-	+
	SE	-	-	-	-
	SI	-	-	-	-
	SK	-	-	+	+
	UK	+	+	+	+
Total	+	9	2	5	13
	=	0	0	0	0
	-	16	23	20	12

		Reference to national legislation in the SE Regulation			
		Organisation and management of the SE			
		Legal entity as member of corporate organs: The national law applicable to public limited-liability companies may allow a company or other legal entity to be a member of one of the corporate organs of the company - **Art. 47.1. SE Regulation**	**Disqualification from membership of corporate organs of the SE:** The national law applicable to public limited-liability companies may provide that certain persons are disqualified from serving on one of the corporate organs of the company under certain circumstances - **Art. 47.2. SE Regulation**	**Eligibility for representatives of shareholders:** The national law applicable to public limited-liability companies may lay down special conditions of eligibility for members representing the shareholders - **Art. 47.3. SE Regulation**	**Representation of minority shareholders:** The national law applicable to public limited-liability companies may allow for a minority of shareholders to appoint some of the members of one of the corporate organs of the company - **Art. 47.4. SE Regulation**
		Flexibility for SE	Flexibility for SE	Flexibility for SE	Flexibility for SE
Member States	AT	-	=	=	=
	BE	-	=	=	=
	BG	+	=	=	=
	CY	-	=	=	=
	CZ	-	=	=	=
	DE	-	=	=	=
	DK	-	=	=	=
	EE	-	=	=	=
	EL	+	=	=	=
	ES	+	=	=	=
	FI	-	-	=	=
	FR	+	-	=	=
	HU	-	=	=	=
	IT	+	=	=	=
	LU	+	=	=	=
	LV	-	=	=	=
	NL	+	=	=	=
	NO	-	-	=	=
	PL	-	=	=	=
	PT	+	=	=	=
	RO	+	=	=	=
	SE	-	=	=	=
	SI	-	=	=	=
	SK	-	=	=	=
	UK	+	=	=	=
Total	+	10	0	0	0
	=	0	22	25	25
	-	15	3	0	0

		Reference to national legislation in the SE Regulation			
		Organisation and management of the SE			
		Fields of competence of general meeting: The general meeting shall decide on matters for which it is given sole responsibility by the Regulation or the legislation of the MS in which the SE's registered office is situated. In addition, the general meeting shall decide on matters for which responsibility is given to the general meeting of a public limited-liability company in which the SE's registered office is situated - **Art. 52. of the SE Regulation**	**Frequency of annual general meeting:** An SE shall hold a general meeting at least once each calendar year within six months of the end of its financial year - **Art. 54.1. §1 of the SE Regulation**	**Convening rights for shareholders:** The national law may allow the shareholders themselves to convene general meetings, if the general meeting is not held in due time - **Art. 55.3. of the SE Regulation**	**Voting rules regarding amendments to statutes:** The national law applicable to public limited-liability companies may require or permit a larger majority than two thirds of the votes cast to amend the SE's statutes - **Art. 59 of the SE Regulation**
		Flexibility for SE	Flexibility for SE	Flexibility for SE	Flexibility for SE
Member States	AT	=	=	+	-
	BE	+	=	+	-
	BG	=	=	+	=
	CY	+	=	-	-
	CZ	=	=	+	=
	DE	+	=	+	-
	DK	=	=	+	-
	EE	=	=	-	=
	EL	=	=	+	=
	ES	=	=	+	=
	FI	=	=	+	=
	FR	+	=	+	=
	HU	+	=	+	-
	IT	+	=	+	=
	LU	=	=	+	=
	LV	=	=	-	-
	NL	=	=	-	=
	NO	=	=	+	=
	PL	+	=	+	-
	PT	+	=	+	=
	RO	=	=	+	=
	SE	=	=	-	=
	SI	+	=	+	=
	SK	+	=	+	=
	UK	+	=	-	-
Total	+	11	0	19	0
	=	14	25	0	16
	-	0	0	6	9

		Reference to national legislation in the SE Regulation		
		Total		
		Flexibility of the national legislation applicable to SE		
		+	=	-
Member States	AT	3	5	4
	BE	3	4	5
	BG	4	6	2
	CY	1	4	7
	CZ	1	6	5
	DE	2	4	6
	DK	3	5	4
	EE	1	6	5
	EL	2	6	4
	ES	3	6	3
	FI	1	5	6
	FR	3	4	5
	HU	4	4	4
	IT	5	5	2
	LU	5	6	1
	LV	2	5	5
	NL	3	6	3
	NO	2	5	5
	PL	3	4	5
	PT	3	5	4
	RO	3	6	3
	SE	0	6	6
	SI	2	5	5
	SK	4	5	3
	UK	6	4	2

NB: We do not consider any of the references to be clearly more important than others as regards the overall assessment of flexibility/attractiveness. Therefore we do not include any differentiated weighing of the references to national legislation in our calculation.

+ Provision of national legislation providing for more flexibility
= Provision of national legislation being neutral for the SE
- Provision of national legislation providing for less flexibility
N/A Not applicable

As a preliminary comment on the synoptic table of the references to national legislation in the SE Statute, it can be observed that:

- Concerning the method of formation of the SE, the references to national legislation tend towards specific protection for certain categories of stakeholders, very few Member States not providing for such protective rules.
- Concerning the transfer of the registered office, the national legislation of most Member States provides for the protection of certain categories of stakeholders (creditors and holders of other rights).
- Concerning the organisation and management of the SE, the national legislation applicable in the various Member States is very similar and the differences from one country to the other are subtle.

2. Comparison of relevant legislation applicable in the EU / EEA Member States (main differences)

First of all, it should be noted that the SE Statute has been implemented in all the 25 Member States covered, even though in many countries the deadline for implementation by 8 October 2004 was not met. In addition, in implementing the SE Statute, the Member States widely made use of the possibility of modelling the legislation applicable to the SE according to the particularities and conditions of their national legislation, by implementing the options offered in the SE Regulation relating to the formation of the SE (2.1.), the transfer of the SE's registered office to another Member State (2.2.), the organisation and management of the SE (2.3.), and other miscellaneous issues (2.4.) in such a way that it resembled the pre-existing national rules as much as possible.

For the analysis of the implementation of the options and the comparison thereof between the selected Member States, a distinction should be made between:

- the options relating to the formation of the SE and the transfer of the registered office,
- the options referring to the structure (organisation and management) of the SE.

The options left open for the formation of the SE and the transfer of the registered office aim at providing the Member States with the possibility of adopting provisions designed to ensure increased protection for specific stakeholders (e.g.: minority shareholders, creditors, employees or public interests). Specific protection may be considered necessary due to the international character of the SE, which differs from the national character of local public limited-liability companies. This "international" character is evident both in the case of transfer of the registered office, which results in a change of nationality and thus in the change of the legislation applicable to the company concerned, and in the case of formation, where a cross-border requirement needs to be fulfilled.

The options available for the structure of the SE (Title III of the SE Regulation) are of a different nature. As a point of history, the draft fifth Directive[23] dealing with the structure of public limited-liability companies and aiming at harmonising the corporate governance structure for public limited liability companies has not been adopted. Contrary to the other company law directives relating, in particular, to publication, minimum share capital, merger or the annual and consolidated accounts, this non-adopted fifth Directive left a kind of harmonisation loophole in European company law. The first consequence is that it is not possible for the SE to rely on harmonised rules when referring to national legislation relating to corporate governance structure. The second consequence is that the objective of the options available is not the protection of specific stakeholders but to provide a basis for harmonisation in the organisation and management of the SE.

The exercise or non-exercise of the options should therefore be analysed with a view to the purposes considered:

[23] Draft Fifth Directive on the implication for directors' duties, board structure and employee participation.

- For the options relating to the formation of the SE, or the transfer of its registered office, or miscellaneous items, the implementation of the option generally means the granting of specific protection to shareholders or stakeholders due to the international character of the SE.
- The implementation of the options relating to structure (organisation and management) cannot be generally analysed as providing the SE with either a more favorable or a less favorable edge than those applicable to domestic public limited-liability companies. The implementation or non-implementation of the options should be interpreted in direct relation to the national legislation and to any existing differences.

2.1 Comparison as regards the formation of the SE

An SE can be formed in one of four ways, as follows:

- by merger;
- as a common holding company;
- as a common subsidiary; or
- by conversion of an existing public limited-liability company into an SE.

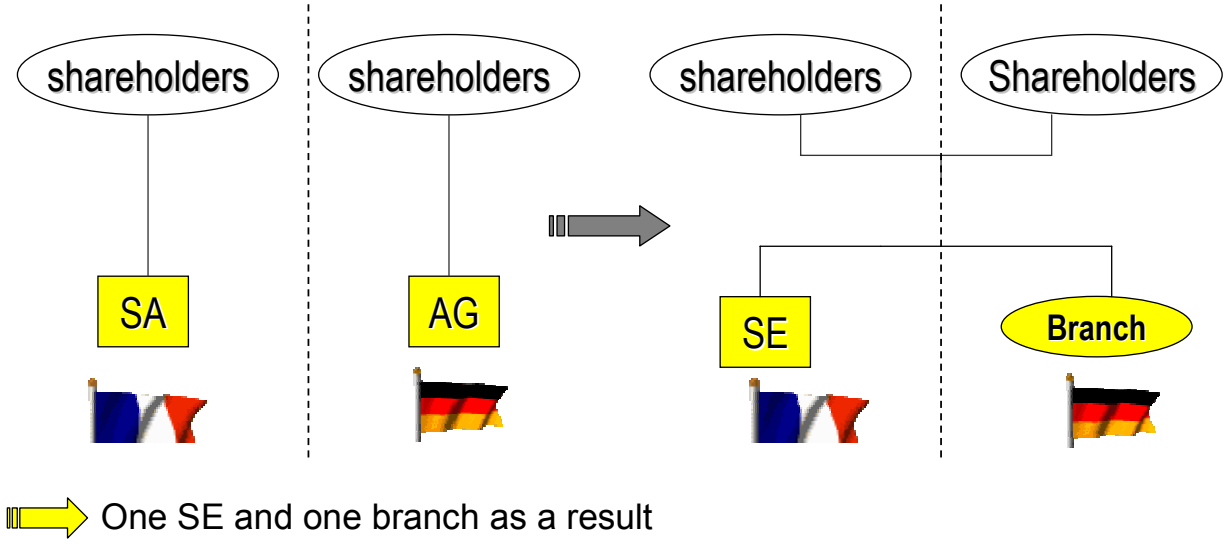
A fifth method of formation is also available and consists of the creation of a 100 %-owned subsidiary SE by a parent SE.

.2.1.1 Formation of the SE by merger

An SE with its registered and head office in an EU or EEA Member State may be formed by a merger of at least two existing public limited-liability companies[24] provided that at least two of the latter are governed by the law of different Member States (see example in Figure hereunder).

[24] As defined in Article 2.1 of SE Regulation referring to Annex I.

MERGER



The process of formation of an SE by merger is mainly harmonised between Member States through in particular the 3rd[25], and more recently the 10th[26] EC Directive. The harmonisation between Member States finds its limits in the options left open by the SE Regulation, which mainly refer to the protection of the interests of various stakeholders. These options are the following:

- Possibility for the Member States to provide the right for competent authorities to oppose the formation of the SE by merger on grounds of public interest before the issue of the certificate conclusively attesting to the completion of the pre-merger acts and formalities (Article 19);
- Possibility for the Member States to adopt provisions designed to ensure appropriate protection for minority shareholders who have opposed the merger (Article 24 (2));
- Possibility for the Member States to extend the provisions on simplified mergers (possibility of dispensation from reports by the management or administrative body, reports by an independent expert or experts and documents necessary for scrutiny) to mergers where a company holds 90% or more but not 100% of the voting rights (Article 31 (2) paragraph 2).

[25] Third Council Directive 78/855/EEC of 9 October 1978 based on Article 54(3)(g) of the Treaty concerning mergers of public limited liability companies.

[26] Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies.

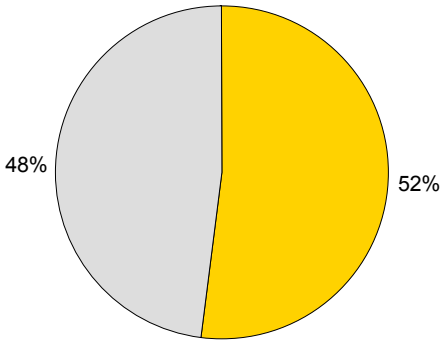
In the following analysis, the comparison between the legislation applicable to the formation of an SE by merger and that applicable to national public limited-liability companies was made with reference to a "national" merger between two domestic companies, not taking into account the case of cross-border merger of public limited-liability companies[27]. An important difference which is not analysed in detail here is the effect of the rules for employee involvement which are only applicable to SEs. As a consequence, no real comparison in this respect is possible between SEs and domestic public limited-liability companies.

On that basis, however, the legal mapping below will highlight practical consequences resulting from the difference between the rules applicable to SEs and to domestic public limited-liability companies.

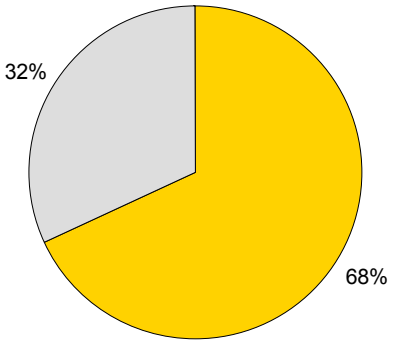
Overview of implementation

Regarding the formation of an SE by merger, the following charts illustrate whether the three options were, overall, exercised by the Member States (25) covered by the Study:

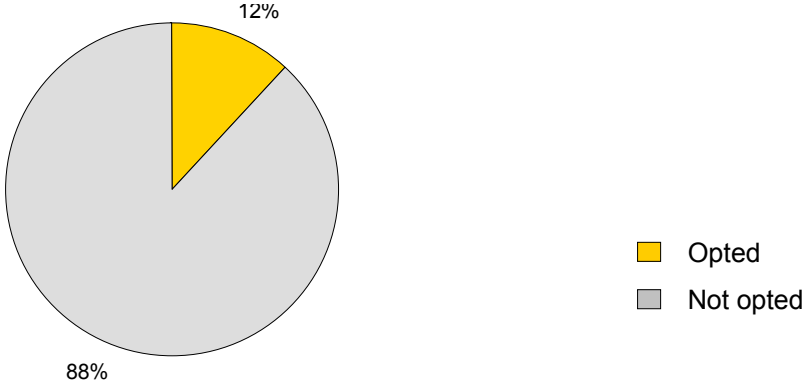
Right of the MS competent authorities to oppose the SE's formation by merger on grounds of public interest – **Art. 19 EC Regulation**



Provisions on protection for minority shareholders who oppose the merger – **Art. 24 (2) EC Regulation**



Extension of the provisions on simplified mergers to mergers where a company holds shares conferring 90% or more but not 100% of the voting rights – **Art. 31 (2) paragraph 2 EC Regulation**



[27] A comparison with the 10th EC Directive on cross-border mergers of limited liability company was not possible, since at the time of conduct of the legal mapping, this Directive was not implemented in all the selected Member States – For details on the date of implementation of the 10th EC Directive, see Section 1.1.1.3. of Chapter 3 – Particular case of formation by cross-border merger.

The Member States have mainly chosen to extend the protection of public interests and the interests of minority shareholders but have not made use of the possibility of extending the provisions for simplified mergers to cases where a company holds shares conferring 90% or more but not 100% of the voting rights.

NB1: According to the provisions of the SE Regulation (Article 24(1)), the protection of the interests of (a) the creditors of the merging companies, (b) holders of bonds of the merging companies, and (c) holders of securities, other than shares, which carry special rights in the merging companies is ensured through reference to the national law applicable to public limited-liability companies of the Member State governing each merging company[28].

NB2: The protection of employees concerned by the creation of an SE by merger is provided for by the SE Directive supplementing the Statute for a European Company with regard to the involvement of employees.

Main differences between Member States

The implementation of the options

► Opposition by competent authorities

Approximately half (13) of the selected Member States implemented the option left open by Article 19 relating to the possibility for competent authorities to oppose the formation of an SE by merger on grounds of public interest before the issuance of the certificate conclusively attesting to the completion of the pre-merger acts and formalities[29]. In this context the right for the competition authorities to oppose the merger was not taken into consideration (as this general rule applies in all the selected Member States). The right of opposition of other competent authorities, when implemented, is, as a general principle, granted either to judicial authorities (Cyprus, France, Greece, the Netherlands and Spain[30]) or to economic authorities (Belgium, Portugal and the United Kingdom). When leading to stricter rules for the SE it can be presumed that this option is implemented due to the specific cross-border (international) nature of the merger, requiring more protection of public interests than in a similar "domestic" operation. As it can be seen from the synoptic tables in section .1.2.1.3, this is the case in 8 Member States (Belgium, Cyprus, Denmark, Greece, France, Latvia, Portugal and the United Kingdom), whereas the implementation in the 5 remaining countries has led to similar rules as the national public limited-liability companies (Bulgaria, Spain, the Netherlands, Poland and Sweden).

[28] See the section on references to national legislation below. Details of the corresponding provisions in each Member State are provided in the executive tables (see Appendix 2 – Legal Mapping).

[29] Belgium, Bulgaria, Cyprus, Denmark, Greece, Spain, France, Latvia, the Netherlands, Poland, Portugal, Sweden and the United Kingdom.

[30] In Luxembourg, the first draft of the law enacting the SE Statute into domestic law contained the possibility for the Ministry of Justice to prevent such a merger. However this option was abandoned and finally not implemented.

As a general rule, all Member States provide for specific rules regarding mergers involving financial institutions[31]. In particular, they provide the supervisory / regulatory authorities with the right of opposition in the case of the formation of an SE by merger involving such domestic financial entities.

It can be further observed that, among others, the Czech Republic, Germany, Slovakia and Slovenia have not implemented this option.

► Protection for minority shareholders who opposed the merger

First of all it can be observed that at the time of the adoption and entering into force of the SE Regulation, the SE Directive on cross-border mergers of limited-liability companies[32] had not been adopted. The option left open by Article 24(2) of the SE Regulation provides that "a Member State may, in the case of the merging companies governed by its law, adopt provisions designed to ensure appropriate protection for minority shareholders who have opposed the merger". Such a possibility has also been provided for by the EC Directive on cross-border mergers in a very similar wording[33]. The comparison which has been made here relates to the merger resulting in the formation of an SE and a merger between two domestic public limited liability companies resulting in a public limited-liability company. The comparison is therefore not fully relevant because the first case includes international considerations and the second does not.

In most (17) of the selected Member States, the option relating to the protection of minority shareholders has been implemented. In 11 of these countries the implementation results in similar rules for the SE and domestic public limited-liability companies (Austria, Bulgaria, the Czech Republic, Germany, Estonia, Finland, Hungary, Latvia, the Netherlands, Romania, and Slovakia) and in 6 countries the implementation results in stricter rules for the SE (Denmark, Greece, Spain, Poland, Portugal and Slovenia). When implemented, the protection offered to minority shareholders consists either of the possibility of requesting an improvement of the share-exchange ratio or of the possibility for them to have their shares redeemed against monetary compensation. The main differences between Member States lie in the conditions for the request of the improvement of the share-exchange ratio or redemption of the shares and in the conditions of the determination of monetary compensation. However, these differences do not substantially affect the flexibility of the SE Statute from one Member State to another. The differences in the conditions lie in particular in the period available to the minority shareholders to request the redemption of their shares. This period generally starts before completion of the merger procedure (the period available to the minority shareholders is most often one month after the shareholders' meeting has voted a decision regarding the merger) and more rarely after completion of the merger procedure[34]. The shares of the existing shareholders can generally be subscribed by the company itself or by a third person. As regards the determination of the monetary compensation offered to the opposing minority shareholders, the price of the redeemed shares is fixed at the fair market value either by the management organ of the company (e.g.: Bulgaria, Estonia, and

[31] E.g.: bank, investment fund, mutual fund, insurance company, pension fund, brokerage house.

[32] EC Directive 2005/56/EC of the European Parliament and the Council of 26 October 2005 on cross-border mergers of limited-liability companies.

[33] Article 4(2) EC Directive on cross-border mergers: "A Member State may, in the case of companies participating in a cross-border merger and governed by its law, adopt provisions designed to ensure appropriate protection for minority members who have opposed the cross-border merger."

[34] In the Czech Republic, the minority shareholders may require the succeeding company to purchase their shares or may claim a monetary top-up by the succeeding company once the merger has been registered with the relevant Trade Registry.

Hungary) or by an independent expert (e.g.: Romania). In the first case, if the opposing shareholders believe the monetary compensation proposed is not fair, they can file a claim to obtain the adjustment of the compensation.

Only in Southern European Member States (Greece, Portugal, and Spain) and some Nordic or Eastern European countries (Denmark, Poland and Slovenia), has the implementation of the option led to more stringent rules for the SE. The situation for these countries is as follows:

- Denmark: Shareholders, who have opposed the formation of the SE by merger may demand that the company redeems their shares, if such a request is made in writing within four weeks of the holding of the general meeting (both in continuing and discontinuing companies). The possibility of the redemption of the shares of opposing shareholders does not apply to mergers of domestic public limited-liability companies.
- Greece: The merger between two national public limited-liability companies requires the approval of a two-thirds majority of the shareholders of the companies concerned, but, in such a case, the opposing minority shareholders have no right to the redemption of their shares. With the creation of an SE by merger, the shareholders who have opposed the merger are entitled to require the purchase of their shares by the company, in the case of significant reason and especially if the share-exchange ratio is extremely unfavorable for the shareholders.
- Poland: When forming an SE by merger, the opposing minority shareholders may request that their shares be bought out, whereas in a merger between two domestic public limited-liability companies, this right can only be exercised in the case of a simplified merger (i.e. when the acquiring company holds no less than 90 % of the target company's share capital).
- Portugal: In the case of the formation of an SE by merger, the right for the minority shareholders who have opposed the operation to redeem their shares is established by law whereas in the case of a merger between national public limited-liability companies, the right of redemption (or even other protective rights for minority shareholders) only exists if established by the company's articles of association.
- Slovenia: According to the rules applicable to a merger between national public limited-liability companies, it is prohibited to contest, before the court, the resolution of a general meeting of shareholders consenting to the merger on the grounds of an inappropriate share-exchange ratio or the inappropriate monetary compensation of the minority shareholders. Conversely, according to the rules applicable to an SE by merger, the resolution of a general meeting of shareholders consenting to the merger can be contested before the court on the grounds of an inappropriate share-exchange ratio if the shareholders of the companies participating in the merger fail to enter into an agreement on the shareholders' right to require a test by the court of the share-exchange ratio.
- Spain: In the formation of an SE by merger, the shareholders who have opposed the merger may exercise their rights to redeem their shares, but they do not have this right in the case of a merger between domestic public limited-liability companies.

When no specific protection for minority shareholders is adopted, this can be explained by the fact that no similar rules exist in the case of the merger of domestic public limited-liability companies. This is the case in particular for Belgium, France, Italy, Luxembourg, Norway, Sweden and the United Kingdom. Only in the Czech Republic has the non-implementation led to different rules compared to the domestic companies (laxer rules for the SE).

► Extension of the provisions on simplified mergers

The provision of Article 31(2) paragraph 1 of the SE Regulation reverts to the simplified merger procedure (i.e. simplified rules for the merger procedure where the acquisition is being carried out by a company holding 90% or more but not all of the shares and other securities conferring the right to vote at a general meeting of one of the other – merged - companies). As a general principle, in such a case, the report by the management or administrative body, the reports by an independent expert or experts and the documents necessary for scrutiny will only be compulsory if the national law governing one of the merging companies so requires. Therefore, if the national law already provides for the possibility for a simplified merger procedure in the event of the acquisition being carried out by a company holding 90% or more but not all of the shares and other securities conferring the right to vote at a general meeting of one of the other – merged – companies, the implementation of the option is less relevant. This is, in particular, the case for Austria, the Czech Republic, Estonia, Italy, Poland, and Slovakia, where as a consequence of Article 31(2) paragraph 1 the rules on the simplified merger procedure already apply (without implementation of the option). Only three Member States have exercised the option left open by Article 31(2) paragraph 2, namely Cyprus, Luxembourg and Romania. However in all three cases, the implementation of the option appears to comply with the already existing provisions of national law on the simplified merger procedure for public limited-liability companies.

For the remaining countries which have not implemented the option, the rules applicable to the SE and those applicable to domestic public limited-liability companies are the same in the following ways:

- In Bulgaria, Finland, Hungary, Latvia, the Netherlands, Norway, Sweden and the United Kingdom, there are no rules on the simplified merger procedure.[35]
- In Germany, France, Belgium, Greece, Portugal, Spain[36] and Slovenia, the rules on the simplified merger procedure are only applicable if the merging company holds 100% of the shares of the merged company.

The references to national legislation in the SE Statute

► Protection of the interests of creditors

Article 24(1) a) provides that "the law of the Member State governing each merging company shall apply as in the case of a merger of public limited-liability companies, taking into account the cross-border nature of the merger, with regard to the protection of the interests of creditors of the merging companies". In five Member States (Cyprus, Finland, France, Hungary and Italy), the creditors may oppose the merger and in six additional Member States (Greece, the Netherlands, Norway, Portugal, Romania and Spain), they have the possibility of effectively preventing the

[35] In Denmark the rules on simplified merger do not exempt from the reports mentioned in Art. 31.

[36] In Spain, a bill, which foresees the extension of the provisions for simplified mergers to mergers where a company holds shares conferring 90% or more of the voting rights, has been recently passed by Spanish Congress although it has not yet come into force.

merger transaction[37]. As a general principle, and on condition that the creditors provide evidence that the settlement of their claims will be threatened by the merger, they can either demand satisfaction or ask for the constitution of securities (Austria, Bulgaria, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Italy, Latvia, Portugal, Romania, Slovakia, Slovenia, Spain and Sweden). The Polish legislation should be specially highlighted as it provides for a specific protection mechanism for creditors in the case of a merger. Under Polish law, in the event of a merger, the assets of each of the merged companies are managed separately until creditors have been satisfied or secured. During this period of separate management, the creditors of each company have priority over the creditors of the other merging companies for the satisfaction of their claims out of the assets of the original debtor. If they deem that satisfaction of their claims may be jeopardised by the merger, creditors may request that their claims be secured.

Luxembourg and the United Kingdom stand apart as regards the protection of creditors in the case of a merger, providing for more flexible national provisions than the other Member States. In Luxembourg, under exceptional circumstances, and under specific conditions, the creditors of the absorbing and/or absorbed company could bring a court action against the directors of the relevant company based on civil law principles (the so-called *"action paulienne"*). In England and Wales, no specific provision to protect the interests of creditors has been enacted; nonetheless, as a general principle, the directors of the company would be expected to have regard to the company's creditors in such a case.

► Protection of the interests of holders of bonds

Article 24(1) a) provides that "the law of the Member State governing each merging company shall apply as in the case of a merger of public limited-liability companies, taking into account the cross-border nature of the merger, with regard to the protection of the interests of holders of bonds of the merging companies".

Similarly to the provisions applicable to creditors, and on condition that the holders of bonds provide evidence that the fulfillment of their claims will be threatened by the merger, they can either demand satisfaction or ask for the constitution of securities (Austria, Cyprus, Finland, Germany, Latvia, the Netherlands, Norway, Portugal, Romania, Slovenia, Spain and Sweden). In certain cases, the company is obliged[38] or has the possibility[39] to convene a general meeting of bondholders and notify them of the intention to conduct a merger. In Bulgaria, any decision of the company to issue new bonds under preferential terms of redemption shall be null and void, unless there is a resolution of the general meeting of bondholders of preceding unredeemed issues. Furthermore, Polish legislation does not provide for any decision by the general meeting of bondholders in the case of a merger but stipulates that holders of bonds shall have, in the acquiring company (or the new company), rights at least equivalent to those they held prior to the merger in either the target company or the merging company. This right may be altered only by way of agreement between the holders of bonds and the acquiring company (or the new company).

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[37] To these Member States, should be added the specific case of Belgium: Belgian law does not provide for the right of opposition in favour of the creditors. However, some creditors have a de facto right of opposition insofar as they have the right to terminate the contract or renegotiate its terms in the case of a merger.

[38] This concerns the following Member States: the Czech Republic, Estonia (if the acquiring company is not a public limited-liability company), Greece (the merger decision must be approved by the holders of bonds convertible to shares), Hungary (holders of bonds have an actual right to oppose the merger operation, but only if the company refuses to grant a bond for their unexpired account receivables), Italy, Portugal, and Spain.

[39] This concerns Belgium, France (the merger plan is submitted to the bondholders' meeting of the companies taken over, unless the said bondholders are offered on-demand redemption of their securities).

Denmark, Luxembourg, Slovakia and the United Kingdom do not provide for any specific mechanisms for the protection of the interests of holders of bonds in the case of a merger.

► Protection of the interests of holders of securities

Article 24(1) a) provides that "the law of the Member State governing each merging company shall apply as in the case of a merger of public limited-liability companies, taking into account the cross-border nature of the merger, with regard to the protection of the interests of holders of securities, other than shares, which carry special rights in the merging companies". There is a more balanced split between the Member States allowing for protection for the holders of securities and those which do not. Very few countries[40] grant a right of opposition to the holders of securities other than shares. In most Member States[41], the holders of securities are entitled to retain the same position after the merger as the one they had in the merging companies.

Several Member States do not provide for any specific legal mechanisms for the protection of the interests of holders of securities, other than shares, in the case of a merger. However, in most cases, special protection provisions can be stipulated in the statutes. This concerns Austria, Bulgaria, Denmark, Estonia, Hungary, Italy, Latvia, Luxembourg, the Netherlands, Norway, Romania, Slovakia and the United Kingdom.

Thus, only Luxembourg and the United Kingdom have very flexible national legislation as regards the protection of the interests of specific stakeholders in the case of a merger. On the other hand, Germany, France and Belgium, all Southern European Member States apart from Italy (i.e. Cyprus, Greece, Spain, and Portugal), certain Nordic countries (Finland, and Sweden), and some Eastern European Member States (the Czech Republic, Poland, and Slovenia) appear to have stringent national legislation as regards the protection of the interests of specific stakeholders in the case of a merger.

Conclusion on the formation of an SE by merger

In conclusion to the analysis of the formation of an SE by means of merger (not taking into consideration Article 31(2) paragraph 2, the latter being too specific), it can be observed that many of the selected Member States have chosen to implement both options relating to the protection of specific stakeholders (public authorities and minority shareholders[42]. In most cases this leads to an alignment of the rules applicable to the SE and the national public limited-liability companies (e.g.:

[40] This is the case for Cyprus, Finland, France (the merger plan must be submitted to a special meeting of holders of investment certificates, unless the acquiring company purchases these securities at the request of the holders, who must accept the conditions of the purchase), Belgium (under Belgian law, the holders of securities do not benefit from a right of opposition as such but have voting rights at the general meeting of shareholders, in the category to which their securities belong).

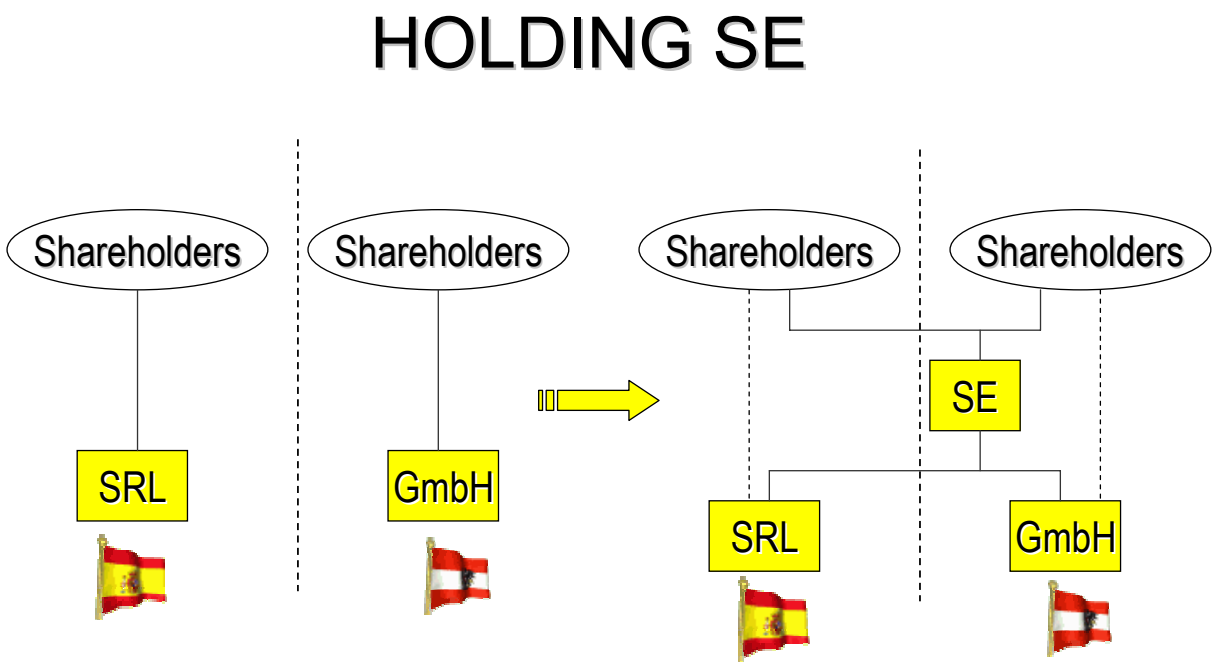
[41] This is the case for the Czech Republic, Germany, Greece, Poland (Polish legislation provides that holders of securities other than shares shall have in the acquiring company (or the new company), rights at least equivalent to those they held prior to the merger in either the target company or the merging company. This right may be altered only by way of agreement between the holders of securities and the acquiring company (or the new company)), Portugal, Slovenia, Spain and Sweden.

[42] This is the case for most of the Southern European countries (Greece, Portugal and Spain), Denmark, the Netherlands, Bulgaria, Latvia and Poland.

Bulgaria and the Netherlands) or to more stringent rules for the SE (Denmark, Greece and Portugal). On the other hand, only three Member States have implemented neither of these two options, namely Italy, Luxembourg and Norway, with the result of applying the same rules to SEs and domestic public limited-liability companies. Similarly, it can be noted that Luxembourg is also one of the Member States with more flexible national legislation, along with the United Kingdom as regards the protection of creditors, holders of bonds and holders of securities other than shares.

.2.1.2 Formation of an SE by creation of a holding company

An SE may be formed as a parent holding SE by the promotion of at least two existing public or private limited companies[43] with registered offices and head offices within the European Union or the European Economic Area formed under the national corporate laws of at least two different Member States or which has had a subsidiary or a branch situated in another Member State for at least two years (see Figure hereunder).



For this method of formation as well, a basis for harmonisation between Member States has been provided by the 1st[44] and 2nd[45] EC Directives, in particular. The harmonisation between Member

[43] As defined in Article 2.2 of SE Regulation referring to Annex II.

[44] First Council Directive 68/151/EEC of 9 March 1968 on co-ordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community.

States finds its limits in the options left open by the SE Regulation, which mainly refer to the protection of interests of various stakeholders. These options are the following:

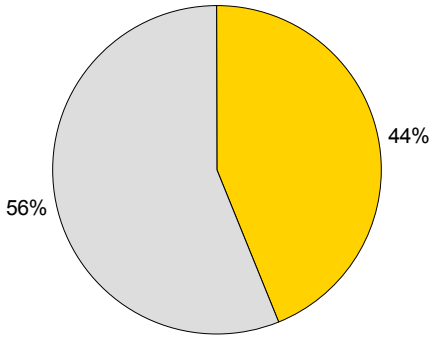
- Possibility for the Member States to adopt provisions designed to ensure appropriate protection for minority shareholders who have opposed the creation of a holding SE (Article 34);
- Possibility for the Member States to adopt provisions designed to ensure appropriate protection for creditors (Article 34);
- Possibility for the Member States to adopt provisions designed to ensure appropriate protection for employees (Article 34).

[45] Second Council Directive 77/91/EEC of 13 December 1976 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent.

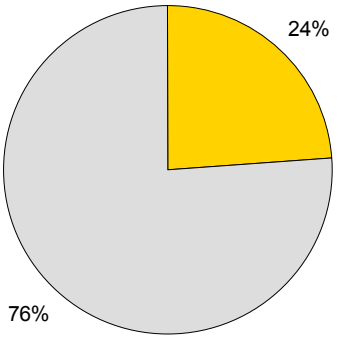
Overview of implementation

Regarding the formation of an SE by creation of a holding company, the following charts illustrate whether the three options were exercised, overall, by the Member States covered by the Study:

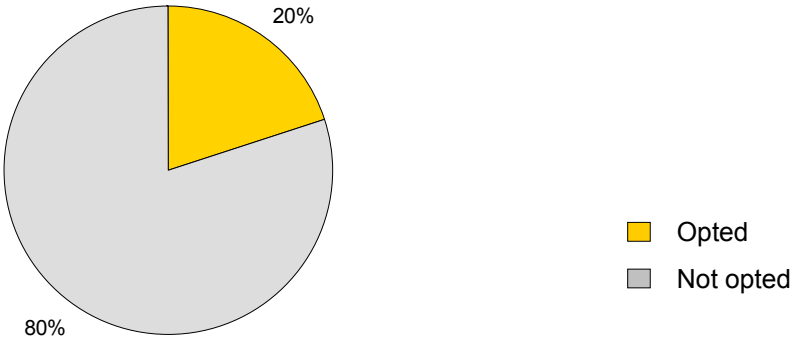
Provisions on protection for minority shareholders who oppose the creation of a holding SE – **Art. 34 EC Regulation**



Provisions on protection for creditors in the case of creation of a holding SE – **Art. 34 EC Regulation**



Provisions on protection for employees in the case of creation of a holding SE – **Art. 34 EC Regulation**



Basically, nearly 50% of the Member States have chosen to extend the protection of the interests of minority shareholders who oppose the creation of a holding SE but only a few of them have implemented special protection provisions for creditors and employees.

From the synoptic tables in section .1.2.1.3 it can be seen that in 15 out of the 22 cases where one of the three options contained in Art. 34 has been implemented, it has led to similar rules with the domestic companies, in 5 cases it has led to stricter rules for the SE and in 2 cases it has led to laxer rules for the SE. It therefore seems that the Member States has in general not seen a need to provide extra protection for the stakeholders in the cases related to creating holding SEs, even though a cross-border requirement also applies to this kind of formation.

Main differences between Member States

The implementation of the options

► Protection for minority shareholders

Almost half (11) of the selected Member States implemented the option to provide for protection of minority shareholders in the case of formation of a holding SE (Austria, Bulgaria, the Czech Republic, Germany, Estonia, Greece, Hungary, Latvia, Portugal, Slovakia and Spain). All of these countries also provided for specific protection for minority shareholders in the case of formation of an SE by merger. Here as well, the protection offered to minority shareholders consists of a monetary compensation or of the possibility for them to have their shares redeemed. The main differences between Member States lie in the conditions for request of improvement of the share-exchange ratio or redemption of the shares and in the conditions of determination of monetary compensation and these conditions are generally the same as those applying in the protection rules for the minority shareholders opposing the formation of an SE by merger.

In Germany in particular, the protection of minority shareholders in the case of formation of a holding SE is less stringent than in the formation of a national holding public limited-liability company, as German national law does not offer the possibility of founding a 100% holding company without the consent of all shareholders[46], whereas for the formation of a holding SE, a qualified majority of three-quarters applies, with a compensation procedure for the opposing minority shareholders.

Only in Southern European Member States (Greece and Portugal), the implementation of the option leads to more stringent rules for the SE. In Greece and Portugal, the minority shareholders may exercise their right to redeem their shares in the case of formation of a holding SE, whereas they do not have this right when a holding domestic public limited-liability company is formed.

In Slovenia, the option left open by Article 34 of the SE Regulation on protection of the minority shareholders was not implemented. The rules provided for in the SE Statute in this respect are nevertheless more stringent than the rules applicable to the national public limited-liability company in a comparable situation. According to the rules applicable to the formation of a holding company between national public limited-liability companies, it is prohibited to contest, before the court, the resolution of a general meeting of shareholders consenting to the formation of the holding on the grounds of an inappropriate share-exchange ratio or the inappropriate monetary compensation of the minority shareholders. Conversely, according to the rules applicable to a holding SE, the resolution of a general meeting of shareholders consenting to the establishment of a holding SE can be contested before the court on grounds of an inappropriate share-exchange ratio if the shareholders of the companies participating in the operation fail to enter into an agreement on the shareholders' right to require a test by the court of the share-exchange ratio.

When no specific protection for minority shareholders was adopted, this can be explained by the fact that the shareholders of the companies promoting the operation are not compelled to assign their shares in accordance with the proposal but can freely decide whether to do so. It is also noteworthy that when no specific protection for minority shareholders was adopted, no protection exist either for domestic public limited-liability companies. This applies in particular to Belgium, Finland, France, Denmark, Italy, Luxembourg, the Netherlands, Norway, Poland, Romania, Sweden

[46] Formation of a public limited-liability company (Aktiengesellschaft) by contribution of the shares (Sachgründung).

and the United Kingdom (almost the same list as for the protection of minority shareholders in the case of merger).

► Protection for creditors

As a general comment, only six Member States have chosen to adopt provisions designed to ensure protection for creditors (Cyprus, the Czech Republic, Spain, France, Hungary and Portugal). This is understandable as the newly created holding SE does not replace the existing founding companies; therefore, the creditors of the founding companies remain creditors of these companies, which still have the same share capital[47] and the same assets. Also according to the legal theory, mechanisms for the protection of creditors in the case of formation of a holding SE are not necessary since the formation of the latter does not have a considerable impact on the legal status of creditors of the existing companies. In addition, the protection of the (future) creditors of the holding SE is already ensured by the general provisions of the formation of a holding SE (apart for the option left open), such protection resulting in particular from the minimum subscription of share capital needed for an SE.

In most cases, when this option is implemented, it is designed to bring the rules applicable to the SE in line with those applicable to domestic public limited-liability companies. These countries are the Czech Republic, Hungary, Cyprus, and Spain, which basically foresee a protection of creditors in the case of a change of control of the company concerned.

In the Czech Republic, the creditors do not have the right to prevent the formation of the holding SE; nevertheless, if, as a consequence of the operation, the value of any receivable of the company's creditors is affected, the creditors can request provision of adequate security. In Hungary, the creditors have an increased right of protection (as compared to the Czech Republic) as they may oppose the formation of a holding SE.

Only France and Portugal have chosen to increase the protection offered to creditors (in comparison with the corresponding rules applicable to national public limited-liability companies). In the case of France, the creditors may oppose the operation within a 30-day period of the last publication of the planned operation in a journal of legal announcements. For Portugal, the general principle is that when a holding SE has acquired assets from the promoting companies, in the process of its formation, it will be held liable for the debts of those companies within the limit of the value of the assets acquired.

Slovenia is the only Member State which has more flexible protection rules for creditors in the case of formation of a holding SE than in the formation of a holding public limited-liability company. Slovenian legislation has not implemented the option relating to the protection of creditors in the case of formation of a holding SE; therefore, it does not provide any special mechanisms for protection of the creditors of the companies forming a holding SE. Conversely, the rules applicable to national public limited-liability companies impose such protection for creditors.

[47] The difference is that the share capital is after formation of the holding SE held, at least in its majority, by the SE instead of the former majority shareholders.

► Protection for employees

Generally speaking, very few Member States (Bulgaria, Cyprus, the Czech Republic, Slovenia and Slovakia) have chosen to adopt provisions designed to ensure protection for employees. This can probably be explained by the fact that employee involvement as provided for in the SE Directive applies, and therefore no further protection appears to be necessary. When Member States have implemented this option, in three out of the five cases, it was designed to bring the rules applicable to the SE in line with those applicable to domestic public limited-liability companies (Bulgaria, Slovakia and Slovenia). In these cases, the protection for employees consists of specific consultation rights. In the Czech Republic the rules applicable to the SE are stricter, whereas in Cyprus they are laxer compared to the domestic companies.

The references to national legislation in the SE Statute

The SE Statute does not refer to the national legislation as regards the rules of formation of a holding SE.

Conclusion on the formation of a holding SE

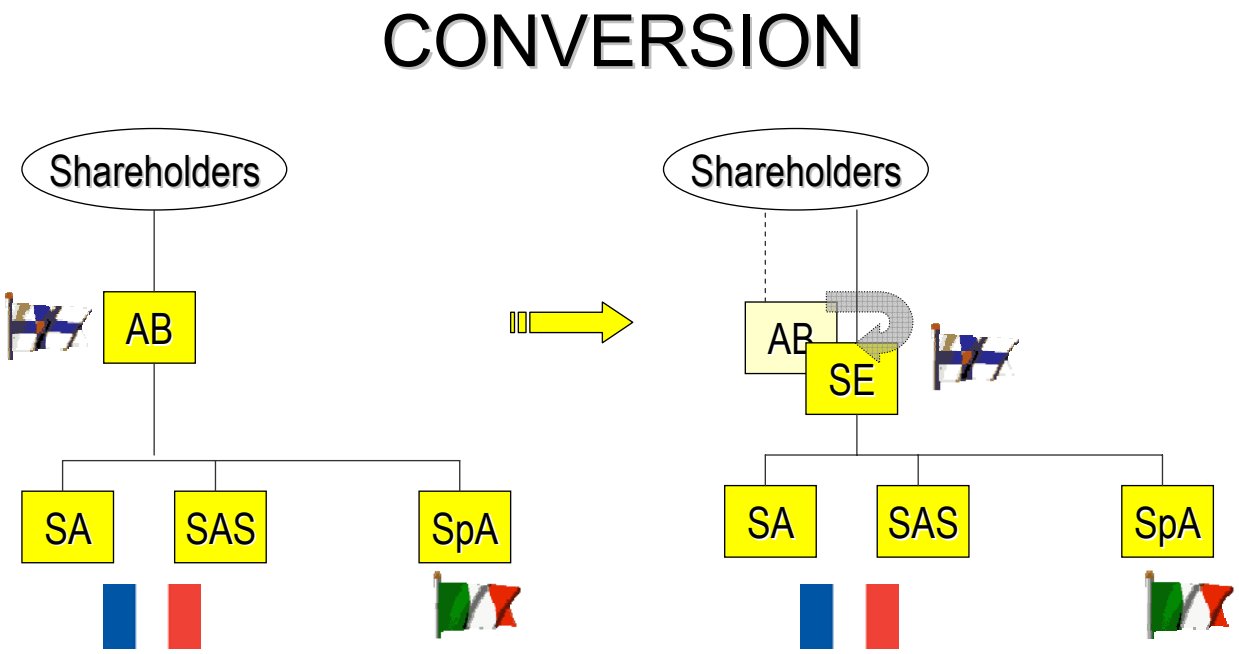
In conclusion to the analysis of the formation of a holding SE, it can be observed that many (11) of the selected Member States have chosen not to implement any of the options on the protection of specific stakeholders[48], and that the Czech Republic is the only Member State to have implemented all the options available in this respect (i.e. protection of the interests of the minority shareholders, of the creditors and of the employees). Protection of minority shareholders is the only of the options relating to creation of holding SEs that has been chosen by a considerable number of countries (11) compared to only 5 and 6 countries for the two other options.

.2.1.3 Formation of an SE by conversion

An SE may be formed by conversion into an SE of an existing public limited-liability company[49], formed under the law of a Member State, the registered office and head office of which are located within the European Union or the European Economic Area and which has had a subsidiary in another Member State for at least two years (see Figure hereunder).

[48] This is the case for Belgium, Luxembourg, the Netherlands, the United Kingdom, Italy, two Eastern European countries (Poland and Romania) and all the Nordic countries (Denmark, Finland, Norway and Sweden).

[49] As referred to in Article 2(4) of the SE Regulation.



The implementation of the options

In this particular method of formation of the SE, no specific protection of the interests of stakeholders is required. Considering that there is no modification in the legal status and personality of the company being converted, no specific protection of the interests of minority shareholders, creditors or employees is necessary. This may explain why only one option has been provided for. This option relates to the required consent of a qualified majority or unanimity in the organ of the company to be converted into an SE within which employee participation is organised (Article 37(8) SE Regulation). This provision constitutes the only option that was not implemented by any of the Member States covered by the study. Although the option was essentially added to the SE Regulation upon the request of the German delegation, the German legislator has not implemented the option[50]. Therefore, in Germany, the conversion of a public limited-liability company into an SE is not subject to the favourable vote of the Supervisory Board, the organ of the German public limited-liability company within which employee participation is organised.

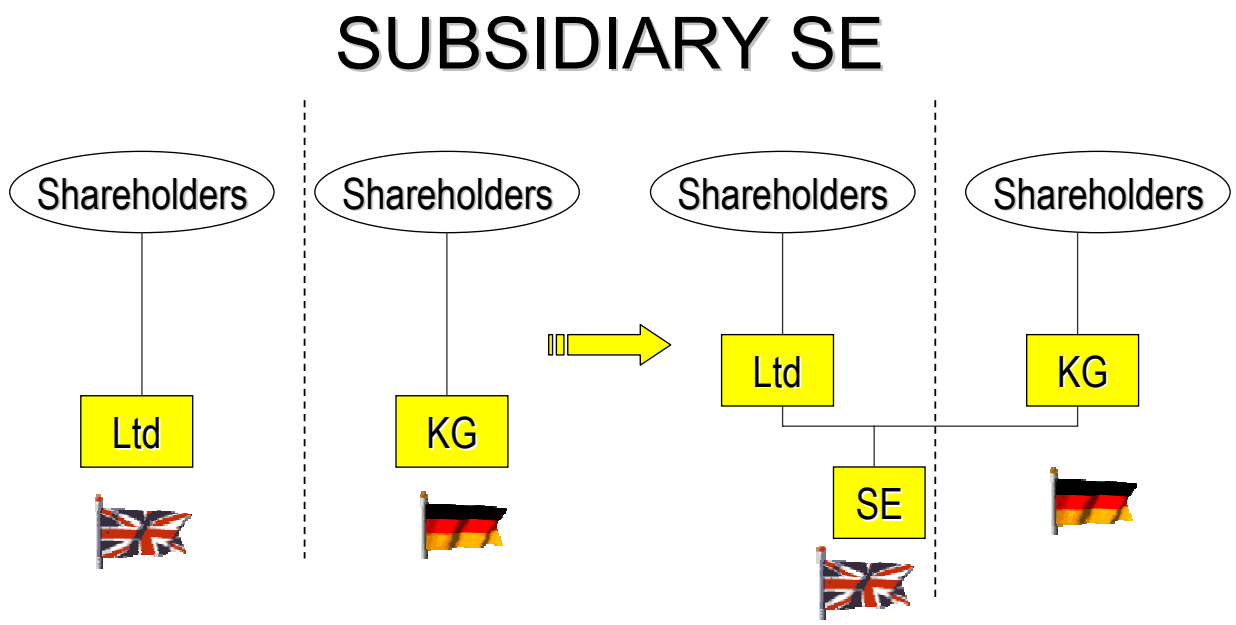
The references to national legislation in the SE Statute

[50] Müncherner Kommmentar zum Aktiengesetz / Schäfer, VO (EWG 2157/2007) Art. 37, margin no. 35.

The SE Statute does not provide for references to the national legislation as regards the rules of formation of an SE by way of conversion.

.2.1.4 Formation of an SE by creation of a subsidiary

An SE may also be formed as a joint subsidiary SE by means of subscription for its share capital by at least two existing companies or legal entities within the meaning of Article 48(2) of the EC Treaty or Art. 34(2) of the EEA Agreement which have their registered office and head office within the European Union or the European Economic Area and which were formed under the national laws of two different Member States or which have had a subsidiary or a branch situated in another Member State for at least two years.



The implementation of the options

No option was left open to the Member States (either in the method of formation of an SE by creation of a common subsidiary or by creation of a subsidiary SE by another SE). Furthermore, the interests of minority shareholders, creditors and employees require no specific protection, as there has already been much harmonisation in this field[51].

The references to national legislation in the SE Statute

The SE Statute does not refer to the national legislation as regards the rules of formation of a subsidiary SE.

2.2 Comparison as regards the transfer of the SE's registered office

As regards the process of transfer of the registered office outside the jurisdiction of a Member State, no harmonisation existed at the time of adoption (and entry into force) of the SE Regulation. There are still no harmonised rules within the EU / EEA in this area. As a consequence, the SE Regulation provides a safety net in the protection of the interests of various stakeholders in the case of transfer of the registered office of the SE. Thus the following options are provided for:

- Possibility for the Member States to adopt provisions designed to ensure appropriate protection for minority shareholders who oppose a transfer (Article 8(5));
- Possibility for the Member States to extend the protection of the interests of creditors and holders of other rights in respect of the SE to liabilities that arise (or may arise) prior to the transfer (Article 8(7));
- Possibility for the Member States to provide the right for competent authorities to oppose the transfer of the SE's registered office on grounds of public interest (Article 8(14)).

Many Member States in the EU / EEA do not allow public limited-liability companies to transfer their registered office outside their jurisdiction and, as a consequence, such transfer results in the winding-up of the company in the departure Member State and new incorporation in the arrival Member State. Therefore, a comparison of the rules applicable to the transfer of the registered office of the SE with the rules of transfer of the registered office of a national public limited-liability

[51] First Council Directive 68/151/EEC of 9 March 1968 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community. Second Council Directive 77/91/EEC of 13 December 1976 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent.

company is not relevant for these countries. However, in this specific field, the SE Statute has a competitive edge over the national public limited-liability company and the possibility of transferring the registered office of the SE at a European level may be a significant driver in the choice of this legal form.

For this reason we have systematically used the (+) sign in favour of the SE for all the options relating to the transfer of a registered office (Articles 8(5), 8(7), and 8(14) of the SE Regulation) and for all countries in which the "international" transfer of the registered office is not possible (even if there is no actual point of comparison with the national public limited-liability company).

This concerns more particularly the following Member States: Austria, Denmark, Finland, Germany, Greece, Hungary, Latvia, Norway, Poland, Portugal, Slovakia, and the United Kingdom.

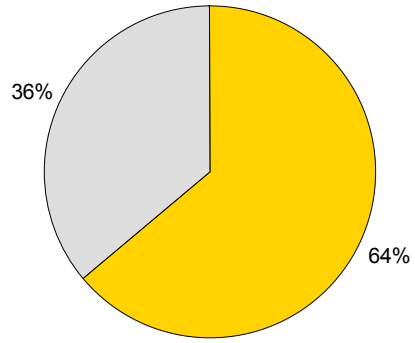
However, it is noteworthy that in several Member States, it is allowed to transfer the head office of public limited-liability companies whilst the registered office remains in the Member State of origin (i.e. Member State of incorporation). This, to a certain extent, may limit the advantage of the SE in comparison with the national companies of these Member States. One has also to keep in mind that, at least partially, the transfer of the head office of a domestic company to another Member State became a possibility under national law only recently, i.e. some time after the implementation of the SE Statute[52]. Thus, the legal environment surrounding the SE could have changed in this regard.

Overview of implementation

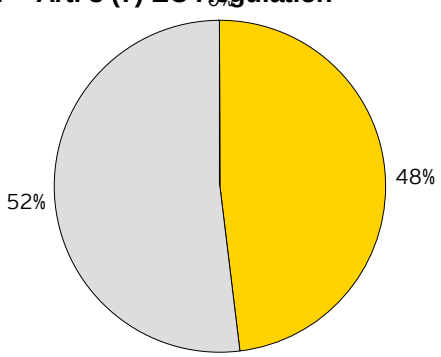
The options left open to the Member States relating to the transfer of the SE's registered office mainly refer to the protection of public interests (based on an opposition right in favour of the competent public authorities) and the protection of minority shareholders, creditors and holders of other rights. The following charts illustrate whether the options have been exercised, overall, by the Member States covered by the Study:

[52] This is the case in particular for Germany.

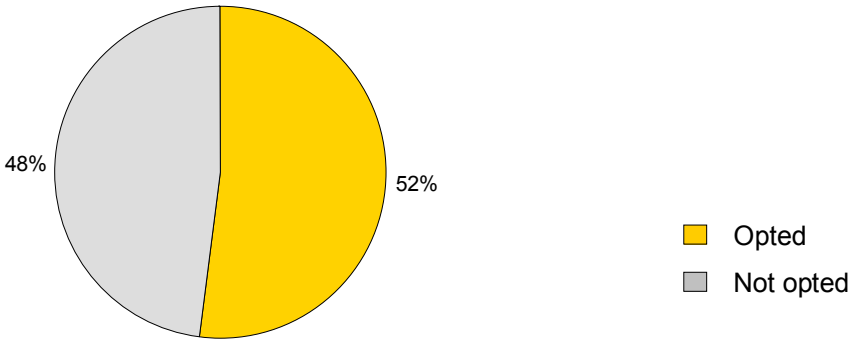
Provisions on protection for minority shareholders who oppose the transfer of the SE's registered office – **Art. 8 (5) EC Regulation**



Extension of the protection of the interests of creditors and holders of other rights in respect of the SE to liabilities that arise (or may arise) prior to the transfer – **Art. 8 (7) EC Regulation**



Right of the MS competent authority to oppose the transfer of the SE's registered office on grounds of public interest – **Art. 8 (14) EC Regulation**



A majority of the selected Member States have chosen to adopt provisions on protection for minority shareholders who oppose the transfer, whereas only around half of the Member States have provided the competent public authorities with the right to oppose the transfer or implemented special provisions for the protection of creditors and holders of other rights.

NB: In the case of the transfer of the SE's registered office, protection of the interests of the employees concerned is ensured by the SE Directive supplementing the Statute for a European Company with regard to the involvement of employees.

Main differences between Member States

The implementation of the options

► Protection for minority shareholders

A majority (16) of the selected Member States have implemented this option. Most Member States which do not allow their national public limited-liability companies to transfer their registered office outside their jurisdiction have implemented the option and, thus, have adopted measures designed to ensure appropriate protection for minority shareholders. The following ten Member States fall into this group: Austria, Germany, Denmark, Finland, Greece, Hungary, Latvia, Portugal, Poland and Slovakia.

Amongst those countries that allow the cross-border transfer of the registered of domestic public limited-liability companies four Member States have implemented the option with the result of applying similar rules (the Czech Republic, Romania, Slovenia and Spain). France is the only Member State which does not provide for rules protecting minority shareholders in the case of formation of an SE by merger or the formation of a holding SE but which provides for such protection rules in the case of transfer of the registered office of the SE outside the French jurisdiction. In the event of an SE transfer being opposed, the shareholders may request the redemption of their shares within one month of the publication of the decision to transfer the registered office. However, the decision to transfer the SE only requires a two-thirds majority whereas for the cross-border transfer of domestic companies the decision has to be unanimous.

Only in Estonia has the implementation of provisions designed to ensure appropriate protection for minority shareholders who oppose a transfer led to more stringent rules for the SE in comparison to national public limited-liability companies. In the case of a cross-border transfer of the registered office of a domestic public limited-liability company, no particular protection rules are provided for, whereas in the case of transfer of the registered office of an SE incorporated in Estonia, a minority shareholder who opposes the transfer may demand that the SE acquires its shares subject to monetary compensation.

As already indicated, when the option is implemented, the protection offered to minority shareholders consists mainly of the possibility for them to have their shares redeemed. The main differences between Member States lie in the conditions and time allowed for request of redemption and in the conditions for determining monetary compensation. These conditions are generally the same as those that apply in the rules protecting minority shareholders opposing the formation of an SE by merger or the formation of a holding SE.

► Protection for creditors and holders of other rights

Twelve member states have chosen to implement this option. Once again, the option has been chosen predominantly by Member States that do not allow their national public limited-liability companies to transfer their registered office outside their jurisdiction. This concerns Austria, Germany, Denmark, Finland, Greece, Latvia, and the United Kingdom. Contrary to the option on protection of minority shareholders, one Southern European country (Portugal) and three Eastern European countries (Hungary, Poland, and Slovakia) have not opted for the possibility of extending the protection of the interests of creditors and holders of other rights to liabilities that arise (or

may arise) prior to the transfer, despite the fact that they do not allow their national public limited-liability companies to transfer the registered office to another country.

For France, Spain, Cyprus, Sweden and the Netherlands, the implementation of the option actually leads to more stringent rules for the SE (in comparison to those applicable to the national public limited-liability companies). In all these cases, the national legislation makes no provision for the protection of the interests of creditors and holders of other rights related to liabilities that have arisen prior to the transfer, whereas such specific protection has been implemented through the exercise of the option left open by Article 8(7) of the SE Regulation.

► Opposition by competent authorities

Similarly to the option provided for by Article 19 of the SE Regulation, approximately half (13) of the Member States implemented the option left open by Article 8.14 regarding the possibility for competent authorities to oppose the transfer of the SE's registered office on grounds of public interest. Eleven of these countries also allowed competent authorities to oppose the creation of an SE by merger (Belgium, Cyprus, Denmark, Spain, France, Latvia, the Netherlands, Poland, Portugal, Sweden and the United Kingdom) whereas two countries did not (Bulgaria and Greece). Out of the Member States that do not allow their domestic public limited-liability companies the possibility of international transfer of their registered office, seven have implemented the option (Austria, Denmark, Latvia, Norway, Portugal, Poland and the United Kingdom) and four have not(Germany, Greece, Hungary and Slovakia). Presumably, the reason for implementation of the option in the seven countries mentioned above is the specific cross-border (international) nature of the transfer of registered office, requiring more protection for the public authorities than in a similar "domestic" operation, whereas the four latter countries presumably did not consider such extra protection necessary.

The Member States which, under their national legislation, allow the international transfer of the registered office for domestic public limited-liability companies have, in general, implemented the option left open by Article 8(14) in such a way as to align the rules applicable to the public limited-liability companies with those of the SE. Thus, Bulgaria, Estonia, the Czech Republic, Romania, Slovenia, Italy and Luxembourg have not granted any opposition right to the public authorities in the case of transfer of the registered office of an SE; in all these countries, no such opposition right exists for the competent authorities in the case of an international transfer of the registered office of a public limited-liability company. On the other hand, Sweden has implemented this option with regard to public policy concerns in respect of the regulation of the capital markets: the supervisory / regulatory authorities have been provided with an opposition right in the case of transfer of the registered office of an SE involving domestic financial entities (which is also in conformity with the rules applicable to national public limited-liability companies). Five Member States allowing the international transfer of the registered office for their domestic public limited-liability companies have implemented stricter rules in the case of the transfer of an SE's registered office compared to that of a national public limited-liability company. This is the case for Belgium, France, Spain, Cyprus and the Netherlands where the competent authorities are entitled to an opposition right in the case of transfer of an SE's registered office but have no such right in the case of transfer of a domestic public limited-liability company's registered office. In these five cases it is difficult to see the reason for the differentiation in the rules.

The right of opposition of competent authorities, when implemented, is, as a general principle, granted either to judicial authorities (Cyprus, France, the Netherlands and Slovenia) or to governmental authorities (Belgium, Norway, Latvia, Portugal, Spain and the United Kingdom).

In addition, most Member States provide for the right for national competent authorities (Financial Authorities) to oppose the relocation of the registered office of the SE outside their jurisdiction when the SE concerned is a financial institution[53].

The references to national legislation in the SE Statute

► Protection of the interests of creditors and holders of other rights

Article 8.7 of the SE Regulation provides that, in respect of any liabilities arising prior to the publication of the transfer proposal, the interests of creditors and holders of other rights must be adequately protected in accordance with requirements laid down by the Member State where the SE has its registered office prior to the transfer.

Several Member States do not provide for specific protection for creditors and holders of other rights in the case of transfer of the registered office of a national public limited-liability company. These Member States are considered as having more flexible regulations from the standpoint of the majority shareholder. This concerns Austria, Belgium, Bulgaria, Italy, Latvia, the Netherlands, Poland, Spain and the United Kingdom.

In the other 16 Member States, the creditors or holders of other rights may request adequate protection, for instance by requiring the preparation of various statements (such as a statement of solvency or a statement evidencing the proper Tax and Social Security status) [54] or requiring the constitution of securities[55].

Conclusion on the transfer of the SE's registered office

An analysis of the transfer of the SE's registered office shows that five Member States have implemented all options available in this respect, namely Austria, Denmark, France, Spain and Latvia, whereas only three Member States have implemented none of the options available (Bulgaria, Italy and Luxembourg). Of these three Member States, Bulgaria and Italy also have flexible national legislation as regards the transfer of the registered office.

[53] E.g.: bank, investment fund, mutual fund, insurance company, pension fund, brokerage house.

[54] i.e. Cyprus and Portugal.

[55] This concerns the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Luxembourg, Norway, Portugal, Romania, Slovakia, Slovenia and Sweden.

2.3 Comparison as regards the management and the organisation of the SE

First of all, it can be observed that in the field of corporate governance, the SE is generally, in the way it functions, subject to national rules applying to public limited-liability companies, as relatively little harmonisation of corporate law has been achieved in this area[56]. In addition, the SE Statute provides for two types of corporate governance, i.e. a one-tier system and a two-tier system, which are sometimes unknown to Member States within the EU / EEA[57]. In addition, as a general comment, it must be stressed that the corporate structures commonly referred to as "one-tier" and "two-tier" in one Member State will not be an identical reflection of the "one-tier" and "two-tier" systems of another Member State, since there is no "European" definition or model of the "one-tier" and "two-tier" corporate systems. Furthermore, in some Member States, the corporate governance system cannot be classified in one of the two categories (one-tier or two-tier) but must be considered as a hybrid system[58]. Therefore, the SE Regulation viewpoint whereby all corporate governance structures fall into one of the two categories (one-tier / two-tier) appears in some cases to be very restrictive.

Articles 39(5) and 43(4) are not actual options left open by the SE Regulation but provide that where no provision is made for a one-tier / two-tier system in relation to public limited-liability companies whose registered office is in their territory, the Member States must adopt the appropriate corresponding measures in relation to SEs. This basically means that the founders of an SE are free to opt for one system or the other, even though one particular corporate governance structure is unknown to the place of its registration (e.g., in Germany, only the two-tier system is available to national public limited-liability companies but SEs located in Germany may opt for the one-tier system; the opposite is true for the United Kingdom).

.2.3.1 Two-tier System

Firstly, it should be observed that several Member States within the EU / EEA do not have a two-tier system for their national public limited-liability companies. Amongst the 25 selected Member States this concerns specifically Belgium, Denmark, Sweden, the United Kingdom and Spain. Consequently these Member States have, in accordance with Article 39(5) of the SE Regulation, adopted

[56] See hereabove, comments relating to the draft fifth Directive.

[57] For instance, all Nordic countries have a corporate governance structure which may be characterised as a hybrid between the "German" two-tier system and the "British" one-tier system. The Nordic public limited-liability companies must have both a management board and a board of directors, the latter being responsible for managing the company's affairs and supervising the management of the company's affairs.

[58] This is the case in particular for Nordic countries. In this respect, with a special focus on Denmark, it can be stated that "The Danish governance structure is usually characterised as a modified two-tier system. It is a flexible system, which may combine advantages both from the British and the German system without being hindered by the disadvantages of these systems. In an EU perspective, the discussion is however dominated with the disadvantages of these two main systems. By implementing the SE Regulation, Denmark therefore had to make a choice, whether the Danish system should be characterised as one-tier or two-tier. Denmark chose based on legal technical reasons to define the Danish system as one-tier" (Paul Kruger Andersen, Aktieoganpartsselskasbret, 9 revised edition, 2006, p. 274).

appropriate measures to make provisions relating to the two-tier corporate governance structure available to SEs.

For these five Member States, there is no actual point of comparison between the rules relating to the SE regarding the two-tier corporate structure and the national rules applicable to public limited-liability companies (as there is no equivalent in this respect). However, in this specific field, the SE Statute can be regarded as having a competitive edge over the national public limited-liability company since it offers the possibility of choosing between two categories of corporate governance structure. For this reason we have systematically used the (+) sign in favour of the SE for all the options relating to the two-tier system (Articles 39(1), 39(2), 39(3), 39(4), 39(5), 40(3), 41(3) and 48(1) paragraph 2) for all countries in which the two-tier system is not available to national public limited-liability companies.

To the above list should be added Greece, which is a special case. Under Greek laws, the two-tier system is only available to listed public limited-liability companies and no appropriate measures have been adopted in relation to two-tier SEs.

In addition, two Member States have very recently introduced provisions relating to the two-tier system for their national public limited-liability companies, namely:

- Italy: the two-tier system was introduced by Legislative Decree no. 6 of 17 January 2003 (i.e. only two years prior to the implementation of the SE Regulation).
- Luxembourg: the two-tier system was introduced into Luxembourg corporate law both for the national public limited-liability company and for the SE by the law of 25 August 2006, implementing the SE Regulation.

Norway should also be highlighted as a special case, due to the particular nature of the "corporate assembly". Under Norwegian law, a corporate assembly is required in companies with more than 200 employees. The corporate assembly has an overall function of supervision / control of the board of directors but, in specific cases, it also adopts resolutions from the board of directors in substantial matters. Companies with a corporate assembly are considered to be organised according to a two-tier system.

Finally, it should be pointed out that, even when a point of reference exists in the national legislation concerned, the exercise of comparing the rules applicable to the SE and those applicable to the national public limited-liability company in most of the options relating to the corporate structure is a highly subjective exercise. This subjectivity is due either to the fact that it is not possible to make any real qualitative assessment of whether the provisions relating to the SE are laxer (more favourable) or more stringent (less favourable), the rules being simply "different" or to the fact that the differences between the two series of rules (SE and public limited-liability companies) are sometimes very subtle and therefore not always meaningful.

Main differences between Member States

The implementation of the options

► Options relating to the management organ

Article 39(1) sets forth as a general principle that "the management organ shall be responsible for managing the SE". In addition, the Member States may provide that a managing director or managing directors shall be responsible for the current management under the same conditions as for public-limited liability companies. Only eight Member States, namely Austria, Germany, Denmark, the Netherlands, Portugal, Italy, Poland and the United Kingdom, have not allowed this possibility and have left the responsibility of managing the SE to the management board collectively. In Germany, for example, there is no possibility for the domestic public limited-liability companies to provide for a separate managing director, who would not be part of the management organ (*Vorstand*). Therefore, the respective option of Article 39(1) of the SE Regulation could not be made use of. However, according to German law and therefore to the provisions applicable to the national public limited-liability companies and to the SEs, it is possible to give sole power of representation to a member of the management board by general regulation in the articles of association and by special decision by the supervisory board. Therefore, a specific need that would lead to the possibility of appointing an additional managing director was not seen by the German legislator.

In the cases where the option was implemented, and as provided for by the SE Regulation, the rules applicable to the SE are the same as those applicable to national public limited-liability companies.

The option left open by Article 39(2) of the SE Regulation states that the Member States may provide that the member(s) of the management organ shall be appointed and removed by the general meeting (instead of by the supervisory board). Similarly to Article 39.1, only ten Member States have not implemented this possibility. This concerns Belgium, Austria, Germany, Denmark, Portugal, Italy, Spain, the United Kingdom, Slovakia and Slovenia. In the cases where the option was implemented, as provided for by the SE Regulation, the rules applicable to the SE are the same as those applicable to national public limited-liability companies.

Article 39(3) provides that, under specific circumstances, the supervisory organ may nominate one of its members to act as a member of the management organ in the event of vacancy, subject to a possible time limit according to the option exercised by the Member States. 16 Member States implemented this option[59]. For some Eastern European countries (the Czech Republic, Estonia, Hungary and Slovakia), as well as for Cyprus, France and Norway, this provision is more favorable for the SE than for the rules applicable to national public limited-liability companies, since in the latter case, the members of the supervisory organ may under no circumstances (even in the event of vacancy) act as members of the management organ. In the other cases of implementation the SE rule is similar to the national rule for public limited-liability companies or the two-tier system is unknown.

[59] Austria, Belgium, Cyprus, the Czech Republic, Germany, Estonia, Greece, Spain, France, Hungary, the Netherlands, Norway, Poland, Sweden, Slovenia and Slovakia.

Article 39(4) of the SE Regulation relating to the possibility for the Member States to fix a minimum and/or maximum number of members of the management organ is examined below, in correlation with the corresponding article relating to the number of members of the supervisory organ (Article 40(3) of the SE Regulation).

► Options relating to the supervisory board

Article 40(3) of the SE Regulation refers to the possibility for the Member States to fix a minimum and/or maximum number of members of the supervisory organ. As a general comment, when the Member States implemented the option available in Article 39.4 and thus regulated the number of members of the management organ, they also implemented the option contained in Article 40.3[60]. When the Member States implemented only one of the two options, this was in order to set the number of members of the supervisory organ[61] and more rarely to set the number of members of the management organ[62].

Number of members		AT	BE	BG	CY	DE	DK	EE	EL	ES	FI	FR	HU	LU	NL	NO	PL	PT	RO	SE	SI	SK	UK
Man. organ - art. 39(4)	Min			3	2	2		3		3	2		3			3 5[63]		1[64]	1 3[65]	3			2
	Ma			9					5	7	5	7	11										

[60] This is the case for Bulgaria, Cyprus, Germany, Finland, France, Greece, Hungary, Norway, Portugal, Romania, Sweden and the United Kingdom.

[61] This is the case for Austria, Belgium, Denmark, Luxembourg, the Netherlands, Poland, Slovakia and Slovenia.

[62] This is the case for Estonia and Spain.

[63] In Norway, the Board of Directors must have a minimum of three members, alternatively a minimum of five members if the company has a corporate assembly.

[64] Under Portuguese law, the management organ and respectively the supervisory board must be composed of an odd number of members with no maximum. Thus, even if Portugal has implemented these options, the Portuguese law must be considered in practice as rather flexible, as the management organ and the supervisory board can be respectively composed of one member only.

[65] Romanian law stipulates that the number of members of the management organ must always be an odd number, with one or more managers. In the case of companies compelled by the law to organise the audit, the minimum number is three managers.

	x																						
Supervisory Organ - art. 40(3)	Min	3	3	3	2	3	3		3		3	3	3	3	3	5	3 5[66]	1[67]	3	5	3	3	2
	Max	20		7		9 15 21[68]						18	15						11				

For the management organ 12 of the selected Member States have set a minimum and 6 have set a maximum number of members. The minimum number is normally set at 2 or 3. Only Norway requires a minimum of five members of the management organ if the company has a corporate assembly. The maximum number is set between five and eleven members (Greece and Finland allowing the lowest maximum number and Hungary allowing the highest maximum number).

For the supervisory organ 20 of the selected Member States have set a minimum and 6 have set a maximum number of members. Again the minimum number is normally set at 2 or 3. However, Norway, Sweden and Poland in the case of listed companies require at least five members. As regards the maximum number, it is set between 7 and 21 members. Bulgaria and Romania have the most stringent rule with the lowest maximum number allowed, i.e. seven and eleven respectively.

It should be stressed that Italy, the Czech Republic and Latvia have exercised none of the options left open by these two articles of the SE Regulation. For Italy, the non-implementation of the option relating to the number of members of the management organ conforms to the rules applicable to domestic public limited-liability companies. However the non-implementation of the option relating to the number of members of the supervisory organ is more favorable for the SE than for national public limited-liability companies, since for the latter the supervisory board must be composed of at least three members (whereas no minimum is required for the SE). For the Czech Republic and Latvia the non-implementation of the option results in more favorable rules for the SE. Thus, both Czech and Latvian SEs can be created with one member of the management board and one member of the supervisory board (whereas in the Czech Republic public limited-liability companies must have at least three[69] members of the management organ and three members of the supervisory board, and in Latvia they must have at least one[70] member of the management organ and from three[71] to twenty members of the supervisory organ). Also in Estonia[72], Luxembourg[73] and

[66] Polish law stipulates that a supervisory board must be composed of at least three members, and of at least five members in listed companies.

[67] The management organ must be composed of an odd number of members with no maximum.

[68] German law stipulates that the maximum number of members of the supervisory board depends on the amount of the share capital:

- Max. 9 members up to 1.5 mio. Euros of share capital
- Max. 15 members up to 10 mio. Euros of share capital
- Max. 21 members in the vent of over 10 mio. Euros of share capital.

[69] Only one member is required where the public limited-liability company is held by a sole shareholder.

[70] Three members, where the Latvian public limited-liability company is a listed company.

[71] Five members, where the Latvian public limited-liability company is a listed company.

[72] Under Estonian law, the supervisory board of a domestic public limited-liability company must have at least three members (unless the by-laws provide for a higher number of persons), whereas no minimum or maximum numbers of members are provided for the supervisory board of an SE.

Norway[74] are the rules for the supervisory board laxer for the SE compared to the national public limited-liability company.

Article 41(3) of the SE Regulation sets out general principles regarding the information of the supervisory organ, in order to allow the latter to exercise its supervision duties. This article also states that the Member States may adopt provisions whereby each member of the supervisory organ is entitled to ask the management organ to provide information of any kind needed to exercise supervision in the two-tier system. 14 of the selected Member States have implemented this option. The decision to implement or not was normally made to align the rules of the SE with the national rules. However, Germany and Cyprus have implemented the option even though a similar right does not exist for the national companies[75], and Italy and Hungary have not implemented the option even though an individual right of information exists for members of the supervisory organ in domestic public limited-liability companies.

Finally, Article 48 of the SE Regulation (located in Section 3 –Rules common to the one-tier and two-tier systems) leaves an option open to the Member States as regards the possibility in the two-tier system that the supervisory organ may itself make certain categories of transactions subject to authorisation. A slight majority (14) of the selected Member States have not exercised this option[76], or when they have done so it was in order to reflect provisions already applicable to their domestic public limited-liability companies[77]. Only Estonia and Slovakia have implemented this option resulting in different (laxer) rules for the SE compared to the national public limited-liability companies with a two-tier system. In Estonia, the provision implementing the option stipulates that "the supervisory board within an SE may, by its decision, determine transactions for the conclusion of which the consent of the supervisory board is needed". Similarly, Slovak law provides that an SE's supervisory board may express the reservation that its approval is required even for those decisions of the board of directors which are not subject to the supervisory board's approval pursuant to the articles of association. In both of these Member States, no such rule exists as regards the national public limited-liability companies.

In general, the provision allowing the supervisory organ itself to make certain categories of transactions subject to authorisation states that the supervisory board is entitled to determine "certain cases" (not specified in the national law provisions) which require the approval of the

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[73] Under Luxembourg law, the number of members of the supervisory board of an SE must be determined in the by-laws but at least three members must be appointed to the supervisory board where employee participation has been provided for in accordance with the SE Directive. For a domestic public limited-liability company, the supervisory board must be composed of three members, except in the case of a single shareholder.

[74] In public limited-liability companies with more than 200 employees (i.e. public limited-liability companies where a corporate assembly must be elected), the corporate assembly requires a minimum of 12 members. Under Norwegian law, the supervisory Board of an SE requires only a minimum of five members.

[75] For Germany, in particular, the implementation of this option consists of a full right of information for each member of the supervisory board, i.e. also the members that are employee representatives as well. Hence, from the point of view of the majority shareholder (investor), this might not always be seen as more favorable for the SE (than for domestic public limited-liability companies).

[76] Belgium, Greece, Finland, France, Hungary, Italy, Luxembourg, Latvia, the Netherlands, Norway, Poland, Portugal, Romania and the United Kingdom.

[77] Austria, Bulgaria, Cyprus, the Czech Republic, Germany and Slovenia.

latter. The definition of the "certain cases" is generally given in the company's articles of association.

The references to national legislation in the SE Statute

The SE Statute does not refer to national legislation as regards the rules relating to the two-tier governance structure in an SE.

Conclusion on the rules relating to the two-tier system

In conclusion to the analysis of the rules relating to the two-tier system, it can be observed that seven options were specifically designed to give the Member States a certain leeway for providing more flexibility in the organisation of the two-tier system. Especially articles 39(4) and 40(3) (setting the number of members of the management / supervisory organ) can represent a main driver on the flexibility of the two-tier system, along with Article 41(3) leaving the possibility of granting an individual right of information to the members of the Supervisory Board. In total, seven Member States have (or have not) made use of the options included in these three articles in order to introduce more flexibility for the SE under the two-tier system in comparison to their national public limited-liability companies: the Czech Republic, Hungary, Italy, Estonia, Latvia, Luxembourg and Norway.[78]

[78] If all seven options relating to the two-tier system is taken into account three further Member States have introduced more flexibility for the SE at least as regards one of the options (Cyprus, France and Slovakia).

.2.3.2 One-tier System

Firstly, it can be observed that several Member States within the EU / EEA do not have a one-tier system for their national public limited-liability companies. Amongst the 25 selected Member States these are Cyprus, the Czech Republic, Estonia, Germany, the Netherlands, Latvia, Poland and Slovakia. Consequently these Member States have, in accordance with Article 43(4) of the SE Regulation, adopted appropriate measures to make provisions relating to the one-tier corporate governance structure available to SEs.

For these eight Member States, there is no actual point of comparison between the rules relating to the SE regarding the one-tier corporate structure and the national rules applicable to public limited-liability companies (as there is no equivalent in this respect). However, in this specific field, the SE Statute can be regarded as having a competitive edge over the national public limited-liability company since it offers the possibility of choosing between two categories of corporate governance structure. For this reason, we have systematically used the (+) sign in favour of the SE for all the options relating to the one-tier system (Articles 43(1), 43(2), and 43(3)) for all countries in which the one-tier system is not available to the national public limited-liability companies.

Furthermore, it should be borne in mind that, even when a point of reference exists in the national legislation, the exercise of comparing the rules applicable to the SE and those applicable to the national public limited-liability company for most of the options relating to the corporate structure is highly subjective and can lead to debatable positions.

Main differences between Member States

The implementation of the options

► Options relating to the administrative organ

Similarly to Article 39(1), Article 43(1) of the SE Regulation sets forth as a general principle that "the administrative organ shall manage the SE". In addition, the Member States may provide that a managing director or managing directors shall be responsible for the day-to-day management under the same conditions as for public-limited liability companies. There are many similarities between the implementation of this option and the implementation of Article 39(1) of the SE Regulation. 16 of the selected Member States have implemented the option in art. 43(1)[79].Most of the Member States which have not implemented the option left open by Article 39(1) have also not implemented the option referred to in Article 43(1), namely Austria, Germany, the Netherlands, Portugal, Italy, and the United Kingdom. In addition, neither Cyprus nor Slovakia have allowed this possibility and have therefore left to the administrative organ collectively the responsibility of managing the SE. It is interesting that neither one of these two Member States has the one-tier system for its national public limited-liability companies. In the cases where the option has been implemented the rules applicable to the SE are the same as those applicable to national public limited-liability companies.

[79] Belgium, Bulgaria, the Czech Republic, Denmark, Estonia, Greece, Spain, Finland, France, Hungary, Luxembourg, Latvia, Norway, Poland, Sweden and Slovenia.

Article 43(2) of the SE Regulation provides for the possibility for the Member States to set a minimum and, where necessary, a maximum number of members of the administrative organ. 19 Member States have implemented this option. All these 19 countries have set a minimum number, but only 6 countries have set a maximum number.

Number of members		BE	BG	CY	CZ	DE	DK	EE	EL	ES	FI	FR	HU	LV	PL	PT	SE	SI	SK	UK
Administrative organ - art. 43(2)	Min	2 3 [80]	3	2	3	3 [81]	3	3	3	3	1	3	5	3	3 5 [82]	1 [83]	3	3	3	2
	Max		9		18	9 15 21 [84]					5	18	11							

The minimum number of members of the management organ is normally set at 2 or 3 members. Only Hungary and Poland, in the case of listed companies, require a minimum of five members of the administrative organ. The maximum number of members required is set between five and twenty-one (with Finland allowing the lowest maximum number and the Czech Republic, Germany and France allowing the highest maximum number).

Except for in Italy and Luxembourg, the implementation or non-implementation of this option leads to an alignment of the rules applicable to the SE and those applicable to domestic public limited-liability companies with a one-tier system. For Italy and Luxembourg, the non-exercise of this option has led to more flexible rules for the SE, as for Italian and Luxembourg public limited-liability companies, the administrative organ must, in principle, be made up of at least three members.

[80] Belgian law provides for a minimum of three directors or two directors provided the company is incorporated by two founders or provided that during a general meeting it is formally confirmed that the company has no more than two shareholders.

[81] The minimum number of members is 3 if the articles of association donot stipulate otherwise and if the share capital does not exceed 3 mio. Euros.

[82] Polish law stipulates that the administrative organ shall be composed of at least three members, and of at least five members in listed companies.

[83] Under Portuguese law, the administrative organ must be composed of an odd number of members with no maximum. Thus, even if Portugal has implemented this option, the Portuguese law must be considered in practice as rather flexible, as the administrative organ can be composed of one member only.

[84] German law stipulates that the maximum number of members of the administrative organ depends on the amount of the share capital:

- Max. 9 members up to 1.5 mio. Euros of share capital
- Max. 15 members up to 10 mio. Euros of share capital
- Max. 21 members in the event of over 10 mio. Euros of share capital.

The references to national legislation in the SE Statute

The SE Statute does not refer to the national legislation as regards the rules relating to the one-tier governance structure in an SE.

Conclusion on the rules relating to the one-tier system

In conclusion to the analysis of the rules relating to the one-tier system, it can be observed that in this field, too, a certain leeway was left to the Member States in order for them (by implementing or not implementing the options) to allow for more flexibility in the organisation of the one-tier system. In total, only two Member States have (or have not) made use of the options in order to introduce more flexibility for the SE under the one-tier system in comparison to their national public limited-liability companies: Italy and Luxembourg.

.2.3.3 Rules common to one-tier and two-tier systems

The SE Regulation provides for specific rules which are common to the one-tier and two-tier systems. Regarding these rules, only two options were left open to the Member States, and more references were made to national legislation (as applicable to the national public limited-liability companies).

Main differences between Member States

The implementation of the options

► Possibility of determining the categories of transactions which must at least be indicated in the statutes of the SE (Article 48(2))

Only four Member States have implemented the option left open by Article 48(2) of the SE Regulation, namely Austria, the Czech Republic, France and Portugal. In general the categories of transactions which must be indicated in the statutes of the SE as requiring authorisation by the supervisory board (in the two-tier system) or by the administrative board (in the one-tier system) refer to the so-called regulated agreements, i.e. the agreements regarding transactions concluded between the SE and its corporate officers or shareholders holding a minimum share of voting rights in the SE or with companies having corporate officers or shareholders in common with the SE.

► Possibility of providing that, where employee participation is provided for in accordance with the SE Directive, the supervisory organ's quorum and decision-making shall be subject to the rules applicable to public limited-liability companies (article 50(3) as an exception to the rules provided for by Article 50 paragraphs 1 and 2)

Only Cyprus and Spain have implemented this option thereby derogating from the provisions referred to in Article 50(1) and (2) of the SE Regulation.

- Cyprus: The Cypriot rules provide for a simple majority vote of the members present at the meeting in all the cases and does not allow any possibility of statutory deviation, in this sense the rules applicable to the domestic public limited-liability companies (and that apply to the SE by way of derogation to Article 50(1) and (2)) can be regarded as more stringent than in the Member States that have not implemented this option.
- Spain: according to Spanish law, the organisation, operation and regime of the board of directors are governed by the stipulations of the company statutes and, failing that, by the stipulations of the law requiring that the quorum to validly constitute a meeting must be of half plus one of the members (present or duly represented) and the decisions are to be decided with an absolute majority (i.e. half plus one) of the members present or duly represented at the meeting. Thus, as regards the rules on quorum, the provisions applicable to Spanish SEs resulting from the implementation of the option left open by Article 50(3) of the SE Regulation must be considered as more stringent than the provisions referred to in Article 50(1) and (2) since more than half of the members must be present at the meeting in order to have the necessary quorum (whereas by application of Article 50(1) and (2) a quorum of only half of the members is required).

The references to national legislation in the SE Statute

► Membership of corporate organs

Article 47(1) of the SE Regulation grants the possibility, if provided for by the national legislation of a Member State, for a company or other legal entity to be a member of one of the corporate organs of a public limited-liability company and thus of an SE. In this respect, ten Member States appear more flexible since their domestic law applicable to public limited-liability companies provides for this possibility. This specifically concerns Southern European countries (Greece[85], Spain[86], Portugal[87], Italy[88] and France[89]), some Eastern European countries (Bulgaria[90] and Romania[91]), Luxembourg[92], the Netherlands[93] and the United Kingdom[94].

[85] According to law 2190/1920 applicable to Greek public limited-liability companies, a legal entity can be a member of the Board of Directors.

[86] Companies or legal entities are allowed to be members of the management organ and of the supervisory organ of SEs registered in Spain.

[87] Portuguese law provides that companies or other legal entities may be appointed as members of the management board or of the supervisory organ. However, these companies or legal entities must designate an individual to exercise their functions.

In all the other Member States[95], only individuals are allowed to be members of the corporate organs of an SE or a domestic public limited-liability company.

Article 47(2) of the SE Regulation refers to the provisions of national legislation to define the cases of disqualification for individuals from serving on corporate organs of a public limited-liability company. The majority of Member States provide for the usual conditions of qualification, i.e. full legal capacity, the absence of incompatibility due to a term of office in another corporate organ, the absence of judiciary conviction or prohibition. However, three Member States have more stringent national legislation as regards the membership of corporate organs:

- Finland: in addition to the usual conditions, Finnish law provides that at least one of the members of the board of directors must be resident within the EEA, unless the Finnish registration authority grants the company an exemption from this requirement.
- Norway: the manager and at least half of the members of the board of directors must be resident in Norway, except as otherwise individually provided by the King of Norway. Furthermore, this requirement does not apply to nationals of States that are parties to the EEA agreement when they are resident in such State.
- France: further to the usual qualification requirements, the members of the corporate organs must fulfil certain conditions linked to their age. Thus, the members of the management organ and of the administrative organ must not be older than sixty-five years of age (the statutes may provide for a lower age limit). Similarly, in the absence of any

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[88] Italian law provides that a legal entity may be a member of the management organ of a national public limited-liability company. Despite lack of a specific legal provision in this respect, according to Italian legal theory, legal entities cannot be members of the supervisory board.

[89] In France, a legal entity may be appointed as member of the Supervisory Board (in the two-tier system) or member of the administrative organ (in the one-tier system). In such a case, the legal entity must appoint an individual as permanent representative, who shall be subject to the same conditions and obligations and who shall incur the same civil and criminal liabilities as if he / she was member of the corporate organ in his / her own name, without prejudice to the joint and several liability of the legal person he / she represents.

[90] In Bulgaria, the statutes may provide for the possibility for a legal entity to be a member of a corporate organ of a domestic public limited-liability company.

[91] In Romania, a legal entity may be appointed as member of a Board of Directors or as member of a supervisory board, while being compelled to appoint an individual as permanent representative.

[92] The law applicable in Luxembourg provides for the possibility for legal entities to be members of the management organ, of the administrative organ and of the supervisory organ of a domestic public limited-liability company.

[93] Dutch law applicable to national public limited-liability companies stipulates that legal entities may be members of the management board but members of the supervisory board must be individuals.

[94] "Corporate" directors are permitted under English law. However, following recent changes to national company law, all companies are also required to have at least one director who is a natural person (i.e. an individual). This also applies to SEs registered in England and Wales.

[95] These other Member States are: Austria, Belgium, Cyprus, the Czech Republic, Denmark (in Denmark, the possibility for a legal entity to be a member of the management organ exists only for public limited shipping companies), Estonia, Finland, Germany, Hungary, Latvia, Norway (in Norway, the possibility for a legal entity to be a member of the corporate organ exists only for shipping limited-liability companies, both public and private), Poland, Slovakia, Slovenia and Sweden.

express statutory provision, the number of members of the supervisory board who have reached the age of seventy must not exceed one third of the members of the Supervisory Board currently in office.

► Representation of shareholders

Article 47(3) of the SE Regulation provides that "an SE's statutes may, in accordance with the law applicable to public limited-liability companies in the Member State in which the SE's registered office is situated, lay down special conditions of eligibility for members of a corporate organ representing the shareholders". First it must be observed that all Member States require the fulfilment of a minimum number of conditions, which are the same across the EU / EEA. These conditions are basically full legal capacity and a clean criminal and fiscal record. However, no Member State has set any very specific conditions with respect to eligibility for membership of a corporate organ representing the shareholders.

Conclusion on the rules common to one-tier and two-tier systems

These options as well as references to national legislation are very specific and do not lead to major dissimilarities or differences between Member States. The common point for all Member States that have exercised these two options is that this has led to the adoption of rules similar to those for domestic public limited-liability companies.

.2.3.4 General meeting

In Section 4 of the Title III, the SE Regulation provides for general rules for the functioning of the general meeting, in order to set a basis for harmonisation with regard to the shareholders' meeting. In addition, four options were left open to the Member States in this area. When implemented, two of these options are designed to increase the flexibility of the functioning of the general meeting and the other two options, when exercised, result in additional prerogatives granted to minority shareholders. Depending on the series of options examined, the following main trends and differences between Member States can be observed:

Main differences between Member States

The implementation of the options

► Options relating to the functioning of the general meeting (Articles 54(1) paragraph 2 and 59(2) of the SE Regulation)

Article 54(1) of the SE Regulation sets out common rules for the frequency of the annual meeting of shareholders (at least once each calendar year, within six months of the end of the financial year of the SE). Furthermore paragraph 2 of Article 54(1) gives the Member States the possibility of providing for derogatory rules as regards the first general meeting (which, if the option is implemented, may be held at any time within 18 months following the SE's incorporation). It is noteworthy that only a minority of Member States have implemented this option (8 countries[96]) and that when they have done so, it was with the purpose of allowing the SE more flexibility than national public limited-liability companies, with the exception of Luxembourg, Sweden, and Denmark. Luxembourg and Sweden have simply aligned the rules applicable to the SE with those applicable to domestic public limited-liability companies. In Denmark the implementation of this option was also chosen to align the SE rules as much as possible with the rules applicable to domestic public limited-liability companies, but even after implementation of the option the SE rule is still less flexible than the domestic rule. [97].

Paragraph 1 of Article 59 of the SE Regulation provides that a decision by the general meeting to amend the statutes must be taken by a majority vote, the majority representing at least two-thirds of the votes cast. Paragraph 2 allows the Member States to provide for a derogation from the above-mentioned rule, leading to increased flexibility (where at least half of the subscribed capital is represented, a simple majority vote will be sufficient). In this case as well, a minority of Member States (7) have exercised the option[98]. The implementation of the option was generally intended to align the rules applicable to the SE with those of the domestic public limited-liability companies (Austria, Germany, Estonia, Italy and Spain). Only Belgium and the Netherlands, by implementing this option, have granted more flexibility to SEs than to their public limited-liability companies.

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[96] This concerns Belgium, Bulgaria, the Czech Republic, Denmark, Luxembourg, the Netherlands Sweden and the United Kingdom.

[97] In the recitals of the proposal of the Act, the Danish legislator explained that implementing the option of Article 54(1) of the SE Regulation would be the choice closest to the rules applicable to Danish public limited-liability companies. In Denmark, §69 of the Public Companies Act requires the first general meeting of shareholders to be held in time for the approved annual accounts to be filed with the Companies Register in time. The annual accounts must be filed five months after the end of the accounting period (four months if the company is listed). According to §15(2) of the Law of Annual Accounts, the first accounting period can be up to 18 months after the formation of the company. This means that a Danish public limited-liability company, if it chooses to have a first accounting period of 18 months, could potentially wait almost 23 months after its formation before it is required to hold a first general meeting of shareholders.

[98] This concerns Austria, Belgium, Denmark, Estonia, Spain, Italy, and the Netherlands.

► Options relating to prerogatives for minority shareholders

Articles 55(1) and 56 of the SE Regulation provide for specific prerogatives for minority shareholders regarding the convening of the general meeting[99] and the placing of additional items on its agenda[100]. In addition, these provisions gave the Member States the opportunity to increase these prerogatives, by reducing the proportion of shareholding required. Respectively 12 and 16 of the selected Member States have implemented these options, thus showing a concern for the protection of minority shareholders. The Member States have set up the following thresholds (in terms of minimum shareholding) to allow minority shareholders to convene the general meeting (Article 55(1) of the SE Regulation) or to place additional items on the agenda (Article 56 of the SE Regulation):

Art	AT	BE	BG	CY	CZ	DE	DK	EE	EL	ES	F I	FR	HU	I T	LU	LV	NL	NO	PL	PT	RO	SE	S I	SK	UK
55.1	10	10	5	10	3 5[101]	5	10	10	5	5	10	5	5	10	10	5	10	5	10	5	5	10	10	5	5
56	10	10	5	10	3 5[102]	5	-[103]	10	5	5	-[104]	5	5	10	10	5	10	-[105]	10	5	5	-[106]	10	5	5

All Member States which have implemented these options, have set up a threshold of 5% of shareholding required for the minority shareholder to request the convening of the general meeting or the placing of additional items on the agenda. Only the Czech Republic stands out, as under specific circumstances, it allows a lower threshold of 3%. In addition, all Nordic countries (Norway, Denmark, Finland and Sweden) allow any shareholder to request that one or more additional items be put on the agenda of any general meeting (without any shareholding requirement).

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[99] Article 55(1): "One or more shareholders who together hold at least 10% of an SE's subscribed capital may request the SE to convene a general meeting and draw up the agenda therefor".

[100] Article 56: "One or more shareholders who together hold at least 10% of an SE's subscribed capital may request that one or more additional items be put on the agenda of any general meeting".

[101] In the Czech Republic, a shareholder or shareholders of a company having a registered (share) capital of more than CZK 100 mio. who hold(s) a total nominal value exceeding 3% of registered capital and a shareholder or shareholders of a company having a registered (share) capital of CZK 100 mio. or less who hold(s) a total nominal value exceeding 5% of registered capital may ask the board of directors to convene an extraordinary general meeting.

[102] In the Czech Republic, a shareholder or shareholders of a company having a registered (share) capital of more than CZK 100 mio. who hold(s) a total nominal value exceeding 3% of registered capital and a shareholder or shareholders of a company having a registered (share) capital of CZK 100 mio. or less who hold(s) a total nominal value exceeding 5% of registered capital may ask the board of directors to place additional items on the agenda.

[103] In Denmark, any shareholder may request that one or more additional items be put on the agenda of any general meeting.

[104] In Finland, any shareholder has the right to have a matter falling within the competence of the general meeting put on the agenda of the general meeting, if the shareholder makes such demand in writing to the board of directors / management organ in such time that the matter can be mentioned in the convening notice.

[105] In Norway, a shareholder has the right to have matters dealt with by the general meeting which he or she reports in writing to the board of directors in such good time that it can be entered on the agenda. If the convening notice has already been sent, a new convening notice will be sent if at least two weeks are left before the date of the general meeting.

[106] In Sweden, any shareholder may move to include an item on the agenda.

In most Member States, the exercise of these two options has led to placing the rules applicable to the SE and those applicable to domestic public limited-liability companies on an equal basis. The only exception to that is Belgium, which on the right to convene a general meeting has granted more prerogatives to the minority shareholders of an SE than to those of a domestic public limited-liability company. In addition, the non-exercise of one or both of the options has led to different (mostly more favourable) rules for the SE (point of view of the majority shareholder) compared to the rules for the national public limited-liability companies in France (+/-), Italy (=/+), Slovenia (+/+), Latvia (-/=) and Poland (+/=).

The references to national legislation in the SE Statute

► Fields of competence of the general meeting

Article 52 of the SE Regulation provides that the general meeting of shareholders of an SE shall "decide on matters for which responsibility is given to the general meeting of a public limited-liability company governed by the law of the Member State in which the SE's registered office is situated either by the law of that Member State or by the SE's statutes in accordance with that law". The national legislation of all the various Member States provides for a defined scope of competence of the general meeting of shareholders. Nevertheless the Member States may provide for more flexibility in this respect, by allowing the possibility to freely extend or reduce the scope of competence of the general meeting of shareholders in the statutes. Nine Member States have allowed such increased flexibility. These Member States are Belgium, Germany, France, Hungary, Italy, Poland, Portugal, Slovenia and Slovakia.

In addition, Cyprus and the United Kingdom stand out: apart from certain provisions of the Company Law, which requires certain decisions regarding a company's affairs to be taken by its shareholders (e.g.: amendment of the company's object or articles of association), there are no specific fields of competence reserved for the general meeting of shareholders. In this field, statutory freedom prevails.

► Frequency of annual general meeting

Article 54(1) of the SE Regulation refers to the possible requirement of the law of a Member State that the general meeting of shareholders be held more often than once each calendar year. However, none of the Member States requires a higher frequency. Therefore, all Member States appear to be on an equal footing as regards the flexibility relating to the frequency of the annual general meeting.

► Convening rights for shareholders

Article 55(3) of the SE Regulation stipulates that if the general meeting of shareholders is not held in due time and, in any event, within two months of a request from the entitled minority shareholders, the competent judiciary or administrative authority within the jurisdiction where the SE's registered office is situated may order that a general meeting be convened within a given period of time or authorise either the shareholders who have requested it or their representatives to convene a general meeting. This general rule set out by the SE Regulation does not preclude the

national provision of a Member State allowing the shareholders themselves (directly or indirectly) to convene general meetings of shareholders when, in particular, the annual general meeting is not held in due time. With reference to the applicable national legislation, the large majority of Member States (19) allow the shareholders themselves to convene the general meeting. The shareholders may have a direct right to convene the general meeting (Romania) but, in most cases, they have an indirect right to convene the general meeting. In one specific case (Austria), the shareholders must revert to the supervisory board to convene a general meeting of shareholders but in the vast majority of cases, they must file a petition with the commercial court[107]. Only six Member States appear less flexible in this respect since they do not grant such prerogative to the shareholders. These Member States are Cyprus, Estonia, Latvia, the Netherlands, Sweden and the United Kingdom.

► Voting rules regarding amendments to statutes

Article 59(1) of the SE Regulation provides that the amendment of an SE's statutes shall require a decision by the general meeting taken by a majority which may not be less than two thirds of the votes cast. The national legislation may require or permit that the amendment of an SE's statutes be adopted by the general meeting of shareholders by a majority of more than two-thirds of the votes cast. This larger majority has generally been fixed at three-quarters of the votes cast. This increased stringency in the national legislation concerns Austria, Germany, Belgium, Cyprus, Hungary, Latvia, Poland, and the United Kingdom.

In addition, Danish national law stipulates specific provisions in this respect: according to the general rules for public limited-liability companies, a majority of two-thirds of the share capital represented at the general meeting and two-thirds of the votes cast is necessary to change the statutes. However, in some cases, an amendment to the statutes may require a supermajority of nine-tenths of the votes cast and nine-tenths of the share capital represented at the general meeting (e.g.: reduction of a right to profit, pre-emption rights, some restrictions to voting rights). A resolution to alter the statutes whereby the obligations of the shareholders towards the company are increased is only valid if all shareholders assent thereto. A resolution to alter the statutes which may result in a change in the legal relationship between the shareholders is only valid if the shareholders whose legal rights are prejudiced assent thereto.

[107] This concerns Belgium, Bulgaria, the Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Luxembourg, Norway, Poland, Portugal, Slovakia, Slovenia and Spain.

2.4 Rules relating to miscellaneous items

Apart from the specific rules applying to the Member States that are not part of the third phase of the economic and monetary union (EMU)[108], three main miscellaneous items should be pointed out:

Main differences between Member States

The implementation of the options

► Options relating to the amendment of the statutes by sole management or administrative organ of the SE (Article 12(4) of the SE Regulation)

Article 12(4) of the SE Regulation provides that the statutes of the SE must not conflict at any time with the arrangements for employee involvement which have been determined pursuant to the SE Directive. Where such new arrangements determined pursuant to the Directive conflict with the existing statutes, the latter must to the extent necessary be amended. Furthermore, the Member States may provide that the management organ (two-tier system) or the administrative organ (one-tier system) shall be entitled to amend the statutes without any further decision from the general shareholder meeting. Only four Member States have implemented this option, thus showing a greater flexibility in comparison with the other selected Member States, namely: the Czech Republic, Cyprus, Greece and the United Kingdom. For this option a comparison between the rules applicable to the SE and those of domestic law applicable to public limited-liability companies is not relevant, since the rules applying to the SE are specific.

► Possibility of allowing a company the head office of which is not in the EU to participate in the formation of an SE (Article 2(5) of the SE Regulation)

As a ground principle, Article 2 of the SE Regulation provides that the SE may be formed by companies or legal entities[109] having their registered office and head office within the Community. However, pursuant to paragraph (23) of the Preamble of the SE Regulation[110] and according to Article 2(5), the Member States may allow "a company the head office of which is not in the Community to 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".

Approximately half (13) of the selected Member States have implemented this option. These are all the Nordic countries (Norway, Sweden, Finland and Denmark), most Southern European countries

[108] This concerns Bulgaria, the Czech Republic, Denmark, Estonia, Hungary, Latvia, Norway, Poland, Romania, Sweden and the United Kingdom.

[109] The required legal from of the company depends on the method of formation chosen (see above – comparison as regards the formation of the SE).

[110] "A company the head office of which is not in the Community should be allowed to participate in the formation of an SE".

(Greece, Italy and Spain), some Eastern European countries (the Czech Republic, Poland and Slovakia), Belgium, Luxembourg, and the United Kingdom. For all Member States which have not implemented this option, the impossibility for a company with its head office outside the Community to participate in the formation of an SE seems to be a real disincentive to the SE (see: Austria, Germany[111], Cyprus, Portugal, France, the Netherlands, Bulgaria, Estonia, Latvia, Romania and Slovenia). Only Hungary imposes a similar requirement in the process of formation of its domestic public limited-liability companies, as Hungarian law does not allow a company the head office of which is not in the Community to participate in the formation of a national public limited-liability company.

- Requirement that an SE has its registered office and head office in the same place (Article 7 of the SE Regulation)

Pursuant to Article 7 of the SE Regulation, the registered office and head office of an SE must be located in the same Member State. Furthermore, the Member States were given the possibility to require that the registered office and head office of the SE must be in the same place within such Member State. Seven of the 25 selected Member States have exercised this option (Austria, France, Greece, Denmark, Bulgaria, the Czech Republic and Latvia). In two of these Member States, this requirement results in more stringent rules for the SE than for domestic public limited-liability companies, i.e. Bulgaria and Greece.

In Germany, §2 of the SEAG originally contained the implementation of this option but was later omitted, at the time when national public limited-liability companies were allowed to locate their registered offie and their head office in different places.

Most Member States which have not implemented this option do not have any similar requirement for their domestic public limited-liability companies, therefore the rules applicable to both legal forms are equivalent. However, in Spain the non-implementation of this option makes the SE rules on this point laxer than the domestic rules.

The references to national legislation in the SE Statute

The SE Statute does not refer to national legislation as regards the miscellaneous rules.

[111] In Germany, after implementation of the SE Statute, national corporate law was changed so that German limited-liability companies can now have their head office in any other Member State (than the Member State of incorporation of the registered office). The non-implementation of Article 2(5) of the SE Regulation therefore seems debatable in the current legal environment.

3. Flexibility and attractiveness of the legislation applicable in the EU / EEA Member States

On the basis of the raw information collected on the legislation applicable to the SE in the EU / EEA Member States and the main differences between Member States developed here above, we have also established groupings of Member States according to the flexibility of their laws in respect of the SE (inter Member State analysis) and the attractiveness of the legal regime of the SE in comparison with the rules applicable to national public limited-liability companies (intra Member State analysis).

3.1 Limits to the exercise of grouping Member States according to flexibility / attractiveness

Firstly, it should be pointed out that it is hardly possible to group the selected Member States according to their geographical zone, common history and legal background, as several Member States with a common legal background have nevertheless often implemented the options in a different manner.

As regards the attractiveness and flexibility of the legislation applicable to SEs in the various Member States, there are two levels of analysis. First, when implementing (or not implementing) the 32 options left open in the SE Regulation, the Member States may have opted for a more or less flexible solution, thus leading to a differentiated attractiveness of the legal regime applicable to the SE across the Member States (inter Member States analysis). In addition, the attractiveness across Member States depends on the references to the laws of the Member States applicable to national public limited-liability companies. Second, and irrespective of the first level of analysis, the rules applicable to the SE in a Member State can be more or less attractive as compared to the corresponding rules applicable to domestic public limited-liability companies (intra Member State analysis).

These two levels of analysis will be considered separately, as it might very well be that the rules applicable to the SE in one Member State are more flexible than the rules applicable in the other Member States but less flexible than the rules applicable to national public limited-liability companies. However, both levels of analysis may have an impact on the actual success encountered by the SE in one specific Member State. Thus, a Member State may have very attractive rules applicable to the SE as compared to the other Member States and nevertheless have few SEs incorporated in its territory because, in comparison with the legal regime applicable to national public limited-liability companies, the legislation applicable to the SE appears relatively unattractive.

Therefore, due to the *de facto* limits, the question of the flexibility of the laws in respect of the SE and the attractiveness of such legal regime in comparison with the rules applicable to the domestic public limited-liability companies should be addressed carefully.

The attractiveness of the legislation applicable to the SE results, first, from the manner in which the 32 options available in the SE Regulation have been implemented (or not implemented) by the various Member States. In this respect, it is possible to draw a comparison across Member States. It seems however that generally the implementation or non-implementation of the options is not linked to the willingness of the Member States to make their national legislation applicable to the SE more or less attractive compared to the other Member States or compared to their national public limited-liability companies. As a main trend, the goal sought in the implementation of the options is to harmonise the legislation applicable to the SE with that of the local public limited-liability companies. This is in particular the main goal that can be observed in the exercise of the options relating to the structure of the SE. As far as the options relating to the formation of the SE or to the transfer of its registered office are concerned, the implementation of the options is sometimes connected with the granting of specific protection to certain categories of stakeholders (minority shareholders, creditors, employees and public authorities) due to the international character of the SE. In addition, these options do not always result in possible and relevant comparisons of the attractiveness of the SE with national public limited-liability companies. This is a direct consequence of the compulsory provisions of the SE Statute. The SE Regulation states that an SE can transfer its registered office across the border. If the national law does not allow this possibility for domestic public limited-liability companies, then it will not be possible to relevantly compare (with the national law applicable to public limited-liability companies) the conditions under which the SE will be able to transfer its registered office. Another example is the fact that many Member States apply only one specific corporate structure system for their national public limited-liability companies (one-tier, two-tier or sometimes a hybrid system of both). As a consequence, it will not be possible to directly compare an SE being authorised to opt for an "unknown" corporate governance system for a local public limited-liability company with the rules applicable to such public limited-liability company.

Furthermore, much of the company law applicable to the SE is the domestic law of public limited-liability companies of the place of registration (Member State of the registered office). The SE Regulation refers many matters to the laws of the Member States applicable to national public limited-liability companies. These elements are necessary to the full understanding of the legal regime applicable to the SE in each Member State studied. This refers in particular to measures relating to the corporate governance structure where the non-harmonised legislation of the various Member States applies. Therefore, the national legislation directly impacts the attractiveness of the SE. The study of these rules would help to differentiate the attractiveness of SEs from one Member State to another. However, it is clear that apart from some rare exceptions, there is no substantially different rule for SEs and national public limited-liability companies.

Last but not least, other important aspects related to the flexibility and attractiveness of the SE are not considered in the grouping analysis, in particular, the national rules relating to employee involvement.

3.2 Grouping of Member States according to attractiveness / flexibility

The Member States can be grouped according to two levels of analysis:

- An inter Member State analysis (3.2.1.): This analysis consists in assessing in which Member States the rules applicable to the SE are more or less flexible compared to the other Member States.
- An intra Member State analysis (3.2.2.): This analysis consists in identifying in which Member States the rules applicable to the SE are more or less attractive compared to the rules applicable to the respective national public limited-liability companies.

.3.2.1 Inter Member States analysis (comparison across Member States)

In the assessment of the flexibility of the laws applicable to the SEs across the Member States, two sources of norms must be taken into consideration:

- The choice and conditions of implementation or non-implementation by the Member States of the options left open by the SE Regulation (3.2.1.1);
- The rules applicable to the domestic public limited-liability companies which also apply to SEs with a registered office in that Member State by way of reference to the national legislation (3.2.1.2.).

Finally, the combination of the flexibility of both sources of norms will be considered (3.2.1.3.).

.3.2.1.1 Grouping of Member States according to flexibility linked with the options

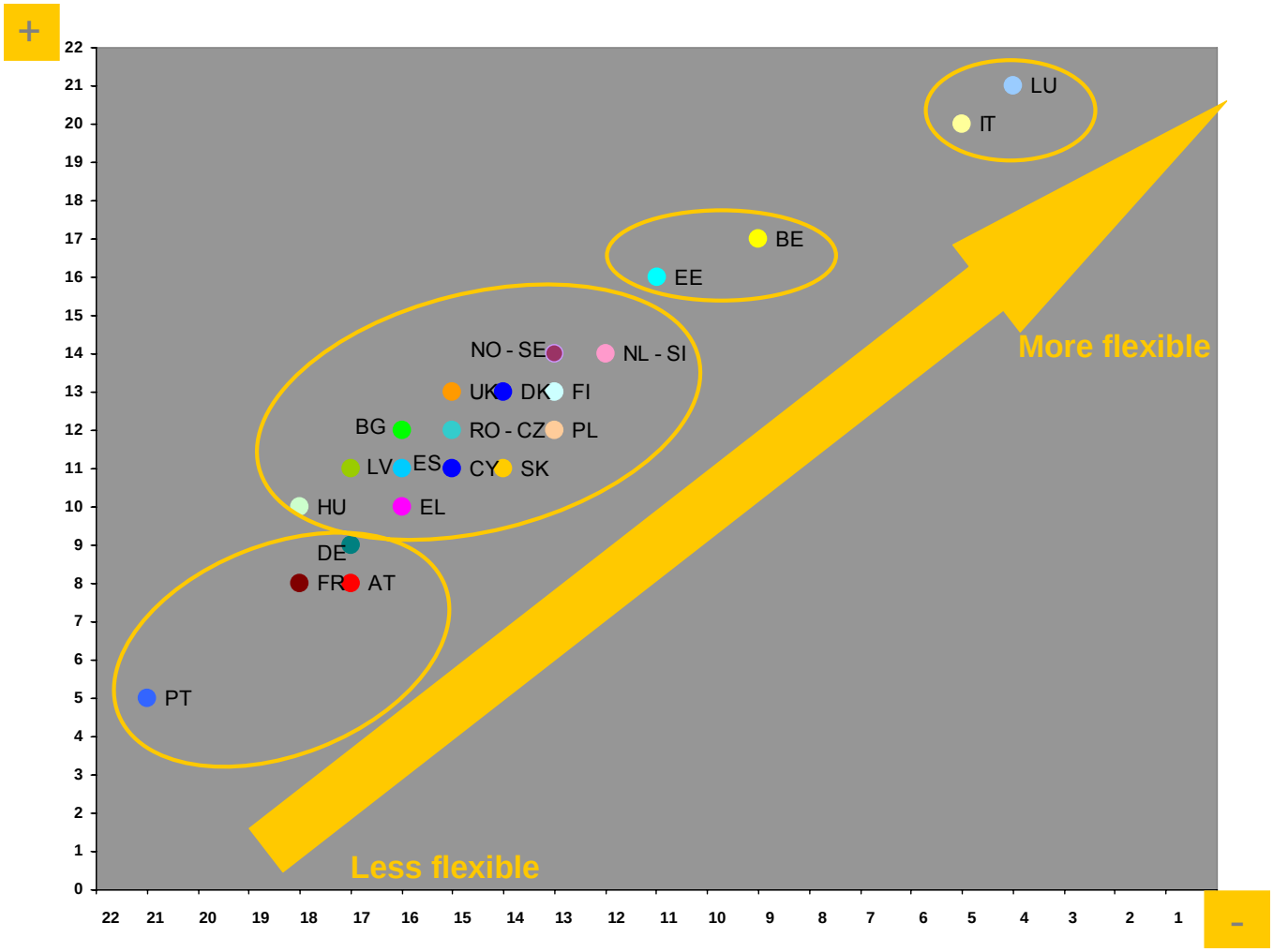
In the synoptic table of the options left open by the EC Regulation, a global scoring for the "Flexibility for the SE" was established in order to allow a comparison across Member States. This scoring was attributed by taking the standpoint of the majority shareholder (investor) of the SE and according to the following principles[112]:

- For all the options aiming at increasing the protection granted to specific stakeholders or at granting increased rights to specific stakeholders , i.e. the minority shareholders, the creditors, the public authorities and the employees, it was considered that the non-implementation of the options led to more flexibility than the implementation of the option.

[112] Additional information is provided in Chapter 1 – Section 1 – Paragraph 1.2.1.2. Reading the synoptic tables on the options left open by the SE Regulation and Directive.

- For all the options allowing the Member States to set up mandatory requirements for the SE, it was considered that the non-implementation of the option led to more flexibility than the implementation of the option.
- Conversely, for all the options allowing the Member States to adopt simplified measures for the SE, it was considered that the implementation of the option led to more flexibility than the non-implementation of the option.

With this systematic approach, the aggregate number of choices made by each Member State relating to the options of the SE Regulation results in an individual scoring[113]. This scoring can be illustrated by the following graph:



GROUPING OF THE MEMBER STATES ACCORDING TO THE WAY OF IMPLEMENTATION OF THE OPTIONS LEFT OPEN IN THE SE REGULATION

This graph shows that the vast majority of the Member States have opted for approximately the same number of more flexible options as less flexible options. These Member States can therefore

[113] Refer to the total of the "Flexibility for the SE" presented for each Member State in the synoptic table of the options left open by the SE Regulation.

overall be assessed to be at a comparable (medium) level of attractiveness as regards the implementation (or non-implementation) of the options left open by the SE Regulation. A more detailed explanation of the graph leads to the following grouping of Member States and conclusions:

► Two Member States stand out with the highest level of attractiveness in respect of the options left open by the SE Regulation: Luxembourg and Italy.

The higher attractiveness of these two Member States is first linked to the fact that these are the two countries that have implemented none of the options relating to the protection of specific stakeholders in the event of formation of an SE (by merger, formation of a joint holding company or conversion) and in the event of transfer of the registered office of the SE.

In addition, both of these countries have allowed a company the head of which is not in the EU to participate in the formation of an SE, and have not implemented the option requiring the registered office and head office of the SE to be located in the same place.

As regards organisation and management, both Member States have generally opted for the most flexible solution when implementing or not implementing the options of the SE Regulation. Concerning the number of members of the corporate organ, Luxembourg requires a minimum of three members for the Supervisory Board whereas Italy requires no minimum or maximum number. It should be noted that as compared to the other Member States, a minimum of three members of the Supervisory Board can be considered a very common standard (most Member States that have required a minimum number have opted for this rule). In the field of corporate governance, however, Italy loses ground on attractiveness as compared to Luxembourg: Italy has not allowed the possibility for a managing director or managing directors to be responsible for the day-to-day management, and thus, has left to the management board (in the two-tier system) or to the administrative organ (in the one-tier system) the responsibility of collectively managing the SE.

► A second category of Member States composed of Belgium and Estonia is characterised by a relatively high level of attractiveness.

As regards the options relating to the protection of the interests of specific stakeholders, the Belgian legislator has opted only for the increased protection of public interests (both in the event of formation by means of merger and in the event of transfer of the registered office). However, he has not implemented any protective measure for the other stakeholders (minority shareholders, creditors, holders of other rights and employees). On the other hand, Estonia has not opted for the protection of the interests of public authorities but put in place specific protection for the opposing minority shareholders in case of formation of an SE by means of merger or by creation of a joint holding company, and in the event of transfer of the registered office of the SE.

As regards the corporate governance structure, Belgian law provides for the requirement of a minimum number of three members of the supervisory board whereas Estonia does not fix any rules in this respect. However, Estonia unlike Belgium requires a minimum number of members (3) for the management organ.

In this second category of countries characterised by a high level of attractiveness, Estonia appears slightly less attractive than Belgium due to two factors. First, contrary to Belgium, Estonia does not allow a company the head of which is not in the EU to participate in the formation of an SE, thus deterring capital outside the EU from participating in the formation of an SE. Furthermore, Estonia belongs to the Member States to which the third phase of the economic and monetary union (EMU)

does not apply[114]. It has opted for the two options relating to the non-application of the third phase of the EMU, thus applying more stringent requirements to SEs with their registered office within its territory compared to SEs with their registered office in Member States where the third phase of the EMU applies[115].

► The vast majority of Member States are to be found in a group characterised by a relatively medium level of attractiveness in respect of the options left open by the SE Regulation.

This group of medium-level attractiveness is composed of two sub-groups as follows:

- All the Nordic countries (Norway, Sweden, Denmark and Finland) to which should be added the Netherlands, the United Kingdom, and Slovenia have a medium-high level of attractiveness as compared to the other Member States.

In this category, the Member States have in general opted for the increased protection of the interests of the various stakeholders in the event of formation of an SE by means of merger or in the event of the transfer of the registered office but have adopted a flexible approach in the other cases where the possibility for protection of specific interests was left open.

Thus, only Norway has implemented none of the options relating to the protection of specific stakeholders in the case of the formation of an SE by merger, creation of a joint holding company or conversion. The other Member States of this category have generally granted specific protection to the stakeholders in the event of formation of an SE by merger. Thus, all these Member States (apart from Finland and Slovenia) have protected the public interests; all of them (apart from Sweden and the United Kingdom) have protected the interests of the opposing minority shareholders. However, none of these Member States have chosen to implement specific measures to protect the interests of specific stakeholders in the event of formation of an SE by creation of a joint holding company or by conversion.

As regards the transfer of the registered office of the SE, the Member States of this group have generally favoured the protection of the interests of the public authorities (apart from Finland and Slovenia) and of the creditors (apart from Norway and Slovenia) over the protection of the interests of the opposing minority shareholders (only Denmark, Finland and Slovenia have specifically protected the interests of the latter).

With reference to the options relating to the corporate governance structure, most of these Member States have imposed requirements as regards the number of members of the corporate organs. Thus, most of these Member States only set a requirement as regards the minimum number of members of the Supervisory Board (Denmark, the Netherlands and Slovenia set a minimum of three members). The United Kingdom sets a minimum of two members for all the corporate organs (management board, supervisory board and administrative organ). In this field, Norway and Sweden appear to be the most stringent countries as they require a minimum number of three members for the management board (and even five in Norway in cases where the company has a corporate assembly) and a minimum of five members for the supervisory board.

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[114] As of 1 January 2009, the EU Member States concerned are: Bulgaria, the Czech Republic, Denmark, Estonia, Hungary, Latvia, Lithuania, Poland, Romania, Sweden, and the United Kingdom as well as three Member States of the European Economic Area (Iceland, Liechtenstein and Norway).

[115] Article 67(1) of the SE Regulation allows the Member States to which the third phase of the EMU does not apply to make SEs with their registered office within their territories subject to the same provisions as those applicable to national public limited-liability companies as regards the expression of the capital. Article 67(2) of the SE Regulation allows those Member States to provide for the requirement for SEs with their registered office within one of these Member States to prepare and publish their annual and consolidated accounts in the national currency (as well as in Euros).

Concerning the miscellaneous issues, only Slovenia and the Netherlands do not allow a company whose head office is not in the EU to participate in the formation of an SE and only Denmark requires that the registered office and head office of the SE be located in the same place. All the other Member States have opted for flexible solutions with reference to these two issues. Finally, several of the Member States of this sub-group belong to the Member States to which the third phase of the economic and monetary union (EMU) does not apply (Denmark, Norway, Sweden and the United Kingdom). These Member States have generally opted for the two options relating to the non-application of the third phase of the EMU, thus applying more stringent requirements to SEs with their registered office within its territory compared to SEs having their registered office in Member States where the third phase of the EMU applies.

- Most of the Eastern European Member States (the Czech Republic, Bulgaria, Romania, Poland, Latvia, Hungary and Slovakia) as well as several Southern European countries (Spain, Cyprus and Greece) have a medium-low level of attractiveness as compared to the other Member States.

In this category, the Member States have in general opted for the increased protection of the interests of the various stakeholders in the case of formation of an SE but have adopted for a slightly more flexible approach in the event of transfer of the registered office of the SE.

As regards the formation of an SE, almost all Member States have implemented all the options relating to the protection of stakeholders in the event of formation of an SE by merger (apart from the Czech Republic, Hungary, Romania and Slovakia for the opposition of competent authorities and Cyprus for the protection of minority shareholders). Most Member States have implemented the option on protection of the minority shareholders (only Cyprus, Poland and Romania have not) and creditors (only Bulgaria, Greece, Poland and Slovakia have not) in the event of creation of a holding SE but very few have implemented the provisions on protection for employees in the event of creation of a holding SE (only Bulgaria, the Czech Republic, Slovakia and Cyprus have done so).

Concerning the protection of the interests of stakeholders in the event of transfer of the registered office of the SE, almost all Member States of this sub-group have implemented the measures of protection for opposing minority shareholders; only Bulgaria, Slovakia and Cyprus have not. On the other hand, fewer Member States have implemented the extension of protection of creditors (Cyprus, Greece, Spain and Latvia have implemented this option) and the right of opposition for competent authorities (Cyprus, Spain, Latvia and Poland have implemented this option).

With reference to the options relating to the corporate governance structure, in this category of Member States, only the Czech Republic and Latvia have fixed no requirement as regards the number of members of the corporate organs and appear in this respect as the most attractive countries. On the other hand, most of these Member States have set a requirement as regards the minimum number of members of the management board and of the supervisory board, with an exception for Poland and Slovakia which only fix a minimum number of members for the supervisory board (this minimum number complying with the standard rule of three – and five in some specific cases for Poland). In this field, Bulgaria must be considered as the least flexible Member State as it requires a minimum and a maximum number of members of both the management organ (with a minimum of three and a maximum of nine) and the supervisory board (with a minimum of three and a maximum of seven).

Regarding the miscellaneous items, very few Member States in this category have allowed a company whose head office is not in the EU to participate in the formation of an SE; these Member States are: the Czech Republic, Poland, Slovakia, Greece and Spain. In addition, several of these countries require that the registered office and head office of the SE be located in the same place. Finally, all the Eastern European Member States of this sub-group (apart from Slovakia) belong to the group of Member States to which the third phase of the economic and monetary union (EMU)

does not apply (Bulgaria, the Czech Republic, Hungary, Latvia and Romania). These Member States have generally opted for the two options relating to the non-application of the third phase of the EMU, thus applying more stringent requirements to SEs with their registered office within its territory compared to SEs with their registered office in Member States where the third phase of the EMU applies. Only Poland appears, in this respect, as a more flexible Member State since it has not implemented either of these two options, with the result of having the same treatment in this respect for the SEs with their registered office in Poland compared to SEs with their registered office in Member States where the third phase of the EMU applies.

- Four Member States, Germany, Austria, France and Portugal, have a relatively low level of attractiveness.

Germany, Austria, France and Portugal have opted for very high protection of the interests of the various stakeholders in the cases of formation of an SE as well as in the event of transfer of the registered office of the SE. Thus, Germany and Austria have systematically protected the interests of opposing minority shareholders in the case of the formation of an SE by merger or by creation of a joint holding company, whereas France has not, instead opting for the right of opposition of the competent authorities and the creditors. Portugal has systematically implemented all the options relating to the protection of the interests of the various stakeholders in the cases of formation of an SE, apart from the measures of protection for creditors (in the event of creation of a holding SE). All four Member States have implemented the option for the protection of the employees in the event of creation of a holding SE.

As regards the protection of the various stakeholders in the case of transfer of the SE's registered office, Austria and France have implemented all the options providing for specific protection for minority shareholders, creditors and competent public authorities, and Germany has implemented all these options except for the option relating to the right of opposition of the national competent authorities. Portugal has systematically implemented all the options relating to the protection of the interests of the various stakeholders in the event of transfer of the registered office of the SE, apart from the measures of protection for creditors.

With reference to the options relating to the corporate governance structure, neither Germany nor Austria nor Portugal has allowed the possibility for a managing director or managing directors to be responsible for the current management, leaving to the management board (in the two-tier system) or to the administrative organ (in the one-tier system) the responsibility of collectively managing the SE. On this particular aspect, France has opted for a more flexible solution by allowing a managing director or managing directors to be responsible for the current management of the SE. As regards the requirement for the number of members of the corporate organs, France and Germany have established rules concerning the management board as well as the supervisory board and, for the latter, by fixing both a minimum and a maximum number of members. Austria provides only for a requirement concerning the number of members of the supervisory board (both minimum and maximum number) and adopts a flexible approach concerning the management board. Portugal requires that the management board, the supervisory board and the administrative organ be composed of an odd number of members without fixing any maximum number. Thus, even if Portugal has implemented these options, it must be considered as rather flexible as regards the number of members of the corporate organs of the SE, which can consist of one member only. Finally, all these Member States have generally implemented the options granting increased rights to specific stakeholders. This concerns in particular the option allowing the possibility of granting the right to each member of the supervisory organ to require the management organ to provide information of any kind that it needs to exercise supervision in the two-tier system: Germany, Austria, France and Portugal have all implemented this option. This also relates to the provisions of

the SE Regulation, allowing the possibility of setting up a proportion of less than 10 % of the SE's subscribed capital necessary to request the convening of a general meeting or to request that one or more additional items be put on the agenda of any general meeting: France, Portugal and Germany have both reduced this proportion to minority shareholders holding at least 5 % of the SE's subscribed capital.

Regarding the miscellaneous items, none of these four Member States allows a company whose head office is not in the EU to participate in the formation of an SE. In addition, apart from Germany which has recently changed its legislation on the public limited-liability companies in this respect, they all require, *de jure* or *de facto*, that the registered office and head office of the SE be located in the same place.

.3.2.1.2 Grouping of Member States according to flexibility linked with national legislation

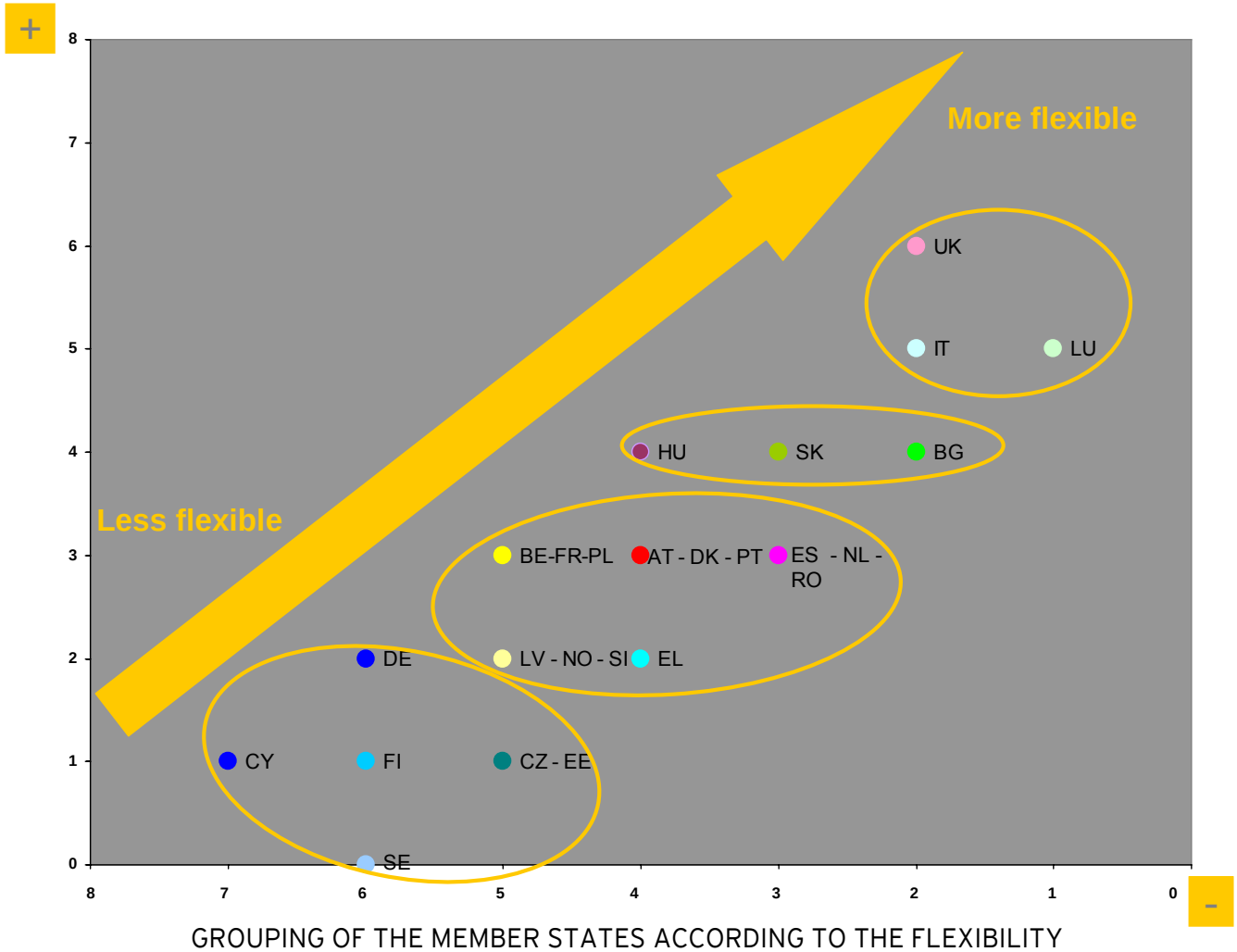
In the synoptic table of the references to national legislation in the SE Statute, a global scoring for "Flexibility for the SE" was established in order to allow a comparison across Member States. This scoring was attributed by taking the standpoint of the majority shareholder (investor) of the SE and according to the following principles[116]:

- For all the provisions of national legislation aiming at protecting the interests of specific stakeholders or at granting increased rights to specific stakeholders, i.e. the creditors, the holders of bonds and the holders of securities, it was considered that the existence in the national legislation of specific protection mechanisms leads to less flexibility than the absence of such mechanisms of protection, relatively favorable for the majority shareholder.
- For all the references to national legislation which provide for more stringent requirements than the subsidiary rules included in the SE Statute, it was considered that the existence of such national provisions leads to less flexibility than the absence of such national provisions, relatively favourable for the majority shareholder.
- Conversely, for all the provisions of national legislation allowing the Member States to adopt simplified measures for the SE (not automatically included in the SE Statute), it was considered that the existence of such national provisions leads to more flexibility than the absence of such national provisions, relatively unfavourable for the majority shareholder.

With this systematic approach, the aggregate number of existing (or non-existant) corresponding national provision(s) in each Member State results in an individual scoring[117]. This scoring can be illustrated by the following graph:

[116] Additional information is provided in Chapter 1 – Section 1 – Paragraph 1.2.2.2. Reading the synoptic tables of the references to national legislation in the SE Statute.

[117] Refer to the total presented for each Member State in the synoptic table of the references to national legislation in the SE Statute.



GROUPING OF THE MEMBER STATES ACCORDING TO THE FLEXIBILITY OF THEIR NATIONAL LEGISLATION APPLICABLE TO THE SE

This graph shows that the majority of the Member States have a relatively medium level of attractiveness as regards national legislation applicable to SEs. A more detailed explanation of the graph leads to the following grouping of Member States and conclusions:

- Three Member States stand out with the highest level of attractiveness in respect of their national legislation applicable to the SE: the United Kingdom, Luxembourg and Italy.

The higher attractiveness of these three Member States is first linked to the fact that their national legislation does not include specific protection in the event of formation of an SE (by merger, formation of a joint holding company or conversion) or in the event of transfer of the SE's registered office. There are two exceptions to this general finding: first, the national legislation of Luxemburg provides for the protection of the interests of creditors and holders of other rights in the case of cross-border transfer of the SE's registered office, and second, Italian legislation provides for the protection of the interests of creditors and the holders of bonds in the event of formation of an SE by merger.

Furthermore, the national legislation of these three Member States generally allows for flexible solutions as regards the requirement for memberships of the corporate organs, since they all allow companies and legal entities to be a member of one of the corporate organs and they do not set specific disqualification rules.

► A second category of Member States, composed of Hungary, Bulgaria and Slovakia, has a relatively high level of attractiveness.

Bulgaria's national legislation provides for specific protection for creditors in the event of cross-border transfer of the SE's registered office and for the holders of securities in the event of formation of an SE by merger, but does not provide for protection in favour of the holders of other rights or holders of bonds in the case of the formation of an SE by merger. Hungary and Slovakia, as a general principle, do not extend or provide for the specific protection of the creditors (in the event of cross-border transfer of the registered office or formation of an SE by merger) but grant protection to the holders of bonds and holders of securities in the case of a merger.

In addition, Bulgaria's national legislation allows companies and legal entities to be a member of one of the corporate organs. None of these three Member States provides for specific requirements for membership or eligibility to the corporate organs (except for the standard regulation in this regard).

► The vast majority of Member States can be found in a group characterised by a relatively medium level of attractiveness in respect of national legislation applicable to the SE.

This group of medium-level of attractiveness is composed of two sub-groups as follows:

- Belgium, France, Spain, Portugal, Poland, Romania, Austria, Denmark and the Netherlands have medium-high attractiveness as compared to the other Member States.

In this sub-group, the Member States have national legislation providing for the increased protection of the interests of the various stakeholders in the event of formation of an SE by merger or in the event of the transfer of the registered office. Thus, all these Member States have provisions for the protection of the interests of creditors and the holders of bonds (apart from Denmark in the latter case). In addition, the legislation of most of these Member States includes specific protection of the interests of the holders of securities; this is the case for Belgium, France, Portugal, Spain and Poland.

In addition, several Member States of this category allow companies and legal entities to be a member of one of the corporate organs: France, Portugal, Spain, the Netherlands and Romania provide for such a possibility. Most of these Member States set the standard requirements for membership or eligibility to the corporate organ (except for France which provides for an age limit for membership of the corporate organs).

- Latvia, Norway, Slovenia and Greece have a medium-low level of attractiveness compared to the other Member States.

In this sub-group, the Member States have national legislation providing for the increased protection of the interests of the various stakeholders in the event of formation of an SE by merger or in the event of the transfer of the registered office. Thus, the national legislation of Greece and Slovenia includes provisions for the protection of the interests of all the stakeholders, i.e. creditors, holders of bonds, holders of securities and holders of other rights. Only Norway and Latvia do not have specific protection as regards the holders of securities in the event of formation of an SE by merger.

In this sub-group, Greece is the only Member State allowing companies and legal entities to be a member of one of the corporate organs, the national legislation of all the other Member States excluding such a possibility.

► Six Member States, Germany, Cyprus, Finland, the Czech Republic, Estonia and Sweden, have a relatively low level of attractiveness.

The low level of attractiveness of these Member States is first linked to the fact that their national legislation systematically includes specific or increased protection for all categories of stakeholders in the event of formation of an SE (by merger, formation of a joint holding company or conversion) or in the event of transfer of the registered office of the SE (with the exception of Estonia which does not provide protection for the holders of securities in the event of formation of an SE by merger).

In addition, in this sub-group, none of the Member States allows companies and legal entities to be a member of one of the corporate organs and several of them provide for increased requirements as regards the membership or eligibility to the corporate organ.

After having examined the flexibility of the laws applicable to the SEs across Member States focusing first on the choice and conditions of implementation or non-implementation by the Member States of the options left open by the SE Regulation and second on the rules applicable to domestic public limited-liability companies which also apply to the SEs with a registered office in that Member State, we will now proceed with the inter Member State analysis by combining both sources of norms applicable to the SEs.

.3.2.1.3 Grouping of Member States according to combination of flexibility linked with national legislation and with the options

In order to conduct the combined analysis of flexibility of the rules applicable to the SEs across Member States, we have considered as a basis the national legislation applicable to the SE (references to the national legislation) and examined how the choice and conditions of implementation or non-implementation of the options have increased or reduced the flexibility of the national rules applicable to the SE.

Thus, in the table below, the score for the "flexibility of the national legislation" applicable to the SE consists of the net difference between the aggregate number of + and – for each Member State obtained in the synoptic table on the references to national legislation in the SE Statute multiplied (weighed) by three[118] [119]. The second column "flexibility of the options" refers to the net difference between the aggregate number of + and - obtained by each Member State in the "Flexibility for the SE" column in the synoptic table on the options left open by the SE Regulation.

Finally, the "Combined flexibility" column results from the aggregation of the first two columns.

[118] See the total of the synoptic table of the references to national legislation in the SE Statute in Chapter 1 – Section 1.2.2. Synoptic table of the references to national legislation in the SE Statute.

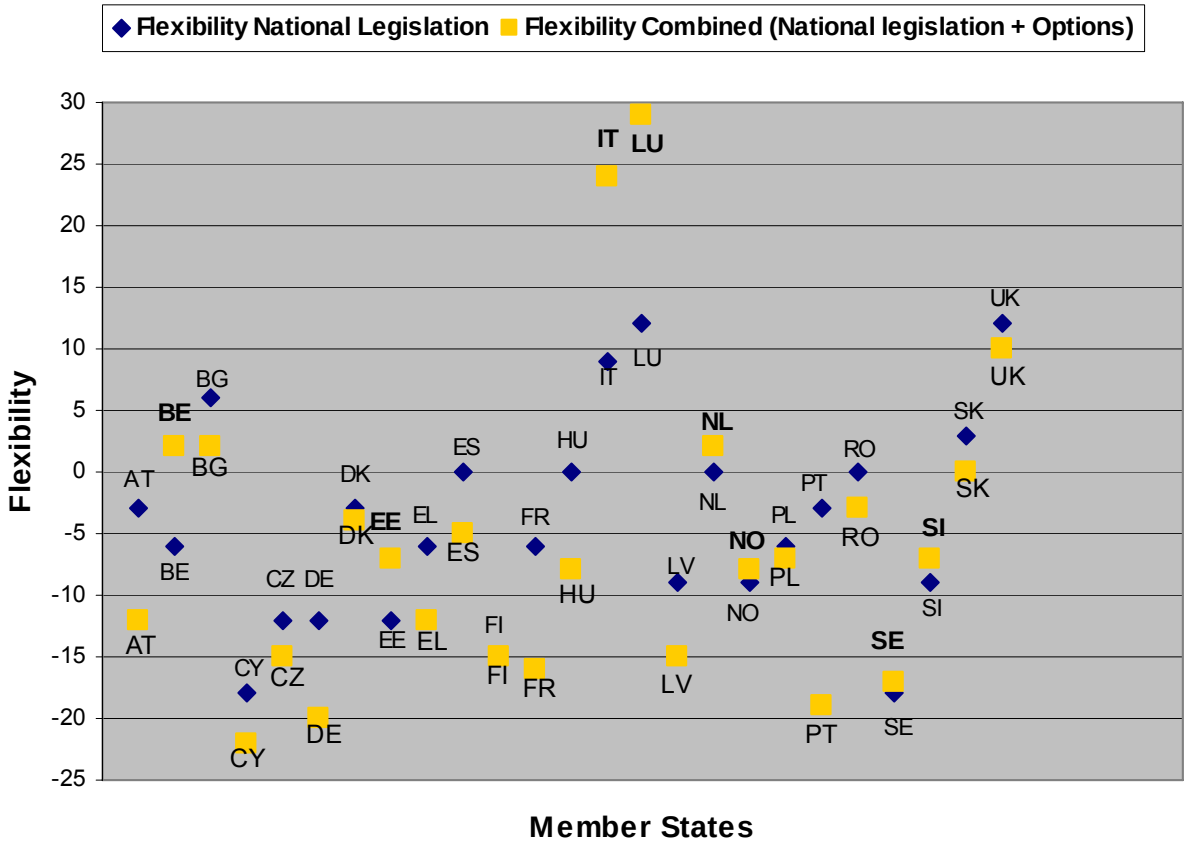
[119] As an example in the synoptic table of the references to national legislation in the SE Statute, Austria has obtained an aggregate number of + 3 and an aggregate number of – of 4. Thus, the final score for the flexibility of the national legislation applicable to the SE in Austria is obtained as follows: (-4+3)x3= -3.

		Flexibility of the national legislation	Flexibility of the options	Combined flexibility
Member States	AT	-3	-9	-12
	BE	-6	8	2
	BG	6	-4	2
	CY	-18	-4	-22
	CZ	-12	-3	-15
	DE	-12	-8	-20
	DK	-3	-1	-4
	EE	-12	5	-7
	EL	-6	-6	-12
	ES	0	-5	-5
	FI	-15	0	-15
	FR	-6	-10	-16
	HU	0	-8	-8
	IT	9	15	24
	LU	12	17	29
	LV	-9	-6	-15
	NL	0	2	2
	NO	-9	1	-8
	PL	-6	-1	-7
	PT	-3	-16	-19
	RO	0	-3	-3
	SE	-18	1	-17
	SI	-9	2	-7
	SK	3	-3	0
	UK	12	-2	10

NB: Taking into consideration the importance of the national legislation applicable to the SE, we have applied a differentiated balancing between the latter and the options in our calculation, by ponderating the flexibility of the national legislation by three.

When analysing the flexibility of the laws applicable to the SEs across Member States by combining both an analysis of the rules applicable to domestic public limited-liability companies which also apply to the SEs and an analysis of the choice and conditions of implementation or non-implementation by the Member States of the options left open by the SE Regulation, we obtain the following trends shown by the graph hereunder:

Flexibility of the SE (Combined inter MS analysis)



INTER MEMBER STATES ANALYSIS OF FLEXIBILITY
(NATIONAL LEGISLATION AND OPTIONS LEFT OPEN IN THE SE REGULATION)

The above graph shall be read as follows:

- The blue triangle shows for each Member State (X axis) the degree of flexibility of its national legislation applicable to the SE (with a ponderation by three) (Y axis).
- The yellow square shows how the degree of flexibility of the national legislation of each Member State is impacted by the choice and conditions of implementation or non-implementation of the options left open by the SE Regulation.

The analysis of this graph leads to the following conclusions:

- The United Kingdom, Luxembourg and Italy stand out with the highest level of attractiveness in respect of their national legislation applicable to the SE. Whereas Luxembourg and Italy have even increased the flexibility of the rules applicable to the SE with their choice and conditions of implementation or non-implementation of the options left open by the SE Regulation, the United Kingdom has rather reduced the flexibility of the rules applicable to the SE.

- A second category of Member States composed of Bulgaria, Slovakia, the Netherlands and Belgium has a relatively high level of attractiveness. Bulgaria and Slovakia have a high level of attractiveness in respect of their national legislation applicable to the SE but, when implementing (or not implementing) the options left open by the SE Regulation, they have reduced this flexibility. Conversely, Belgium is characterized by a medium-level of attractiveness in respect of national legislation applicable to the SE and has increased the attractiveness of the SE when implementing the options left open by the SE Regulation.

- The majority of Member States can be found in a group characterised by a relatively medium level of attractiveness in respect of national legislation applicable to the SE. Most of these Member States have even reduced the attractiveness of the rules applicable to the SE when implementing (or non-implementing) the options left open by the SE Regulation. This concerns in particular the following Member States: Denmark, Spain, Hungary, Poland and Romania. Conversely, Norway, Estonia and Slovenia have rather adopted a position tending to higher attractiveness when implementing (or not implementing) the options left open by the SE Regulation.

- Seven Member States, Austria, the Czech Republic, Greece, Finland, France, Latvia and Sweden have a relatively low level of attractiveness in respect of their national legislation applicable to the SE. When implementing (or not implementing) the options left open by the SE Regulation, almost all these Member States have tended to reduce the attractiveness of the rules applicable to the SE. Only Sweden has adopted a position resulting in a slightly increased attractiveness of the SE.

- The Member States characterized with the lowest level of attractiveness of their national legislation applicable to the SE are Germany, Portugal and Cyprus, which have both tended to reduce their level of attractiveness when implementing (or not implementing) the options left open by the SE Regulation.

As it will be seen from section 2.1.1. of Chapter 2 and discussed further in sections 1.1.2.1.1. and 1.2.2. of Chapter 3, when correlating the combined level of attractiveness and flexibility of the Member States with the actual number of incorporations of SEs in their territories, it appears that the varying degree of success encountered by the SE cannot in general be explained by the higher or lower attractiveness of the legislation applicable to the SE in the various Member States. This is at least the case when looking exclusively at the factors we have included in the analysis. An inter Member States analysis limited to the legal flexibility in this way therefore seems to fail to identify the main drivers explaining the decision to create an SE and the choice of the Member State of incorporation. Only for Luxembourg, the United Kingdom, the Netherlands, Belgium and Slovakia could the relatively higher inter Member State attractiveness possibly be a partial explanation for the above average number of SEs in these countries.

.3.2.2 Intra Member States analysis (comparison between SE and PLC)

Further to the inter Member States analysis and the identification of the Member States in which the legislation relating to the SE is more or less attractive, one must also identify in which Member States the rules applicable to the SE are more or less attractive compared to the rules applicable to the respective national public limited-liability companies (intra Member State analysis).

Firstly, it must be stressed that the main legal reasons leading to the attractiveness or non-attractiveness of the SE over the domestic public limited-liability companies derive directly from compulsory provisions of the SE Regulation. For example, the possibility for the SE to freely transfer its registered office beyond its national borders (independently of the Member State of its incorporation or of its current registered office) will give the SE a competitive edge over national public limited-liability companies in countries where the cross-border transfer of registered offices is not possible[120]. Furthermore, even in the Member States which allow their national public limited-liability companies to transfer their registered office, the legal regime for the cross-border transfer of the SE appears attractive due to its straightforward and simpler set of rules (in particular as compared to the rules applicable to domestic public limited-liability companies). Similarly, the possibility for the SE to adopt a corporate governance structure is not available to domestic public limited-liability companies can be a real advantage. Finally, an SE can create a 100% owned SE (which has no equivalent under domestic public limited-liability company law).

Secondly, the analysis of the attractiveness of the SE legislation in comparison with the national public limited-liability companies also finds its limits in the provisions (and options) of the SE Directive. The compulsory rules on employee involvement (SE Directive) apply specifically to the SE and are in many cases, due to their complexity or specific conditions, a deterrent to the formation of an SE.

Finally, the goal generally sought by the Member States in the implementation (or non-implementation) of the options is often to harmonise the legislation applicable to the SE with that of the local public limited-liability companies. This is in particular the main goal observed in the exercise of the options relating to the structure of the SE.

.3.2.2.1 Grouping of Member States according to attractiveness of the SE compared to national public limited-liability company

It must be stressed that the comparison between the rules applicable to the SE and those applicable to the public limited-liability companies has a limited scope. First, when the provisions of the SE Regulation consist of a direct reference to national legislation applicable to public limited-liability companies, the national legislation applies equally and indifferently to SEs and domestic public limited-liability companies. Second, in the specific case of the options left open by the SE Directive, i.e. the options belonging to the field of employee involvement, no comparison between the rules applicable to the SE and those of domestic law applicable to public limited-liability companies has been drawn, the rules applying to the SE being too specific.

[120] These countries are Austria, Germany, Denmark, Finland, Norway, Greece, Portugal, Hungary, Latvia, Poland, Slovakia and the United Kingdom.

Therefore, the intra Member State comparison of the attractiveness of the SE compared to national public limited-liability company focuses on the analysis of the options left open by the SE Regulation. In the synoptic table of the options left open by the SE Regulation, a global scoring for the "Comparison with national law" has been established in order to allow a comparison intra Member State, i.e. between the rules applicable to the SE and those applicable to the domestic public limited-liability company. This scoring has been attributed by taking the standpoint of the majority shareholder (investor) of the SE respectively public limited-liability company[121]: In certain specific areas and for particular Member States, a relevant comparison between the rules applicable to the SE (as a result of the implementation of the options) and the rules applicable to national public limited-liability companies cannot be made. This relates to the cross-border transfer of the registered office[122] and the corporate structure of the SE[123].

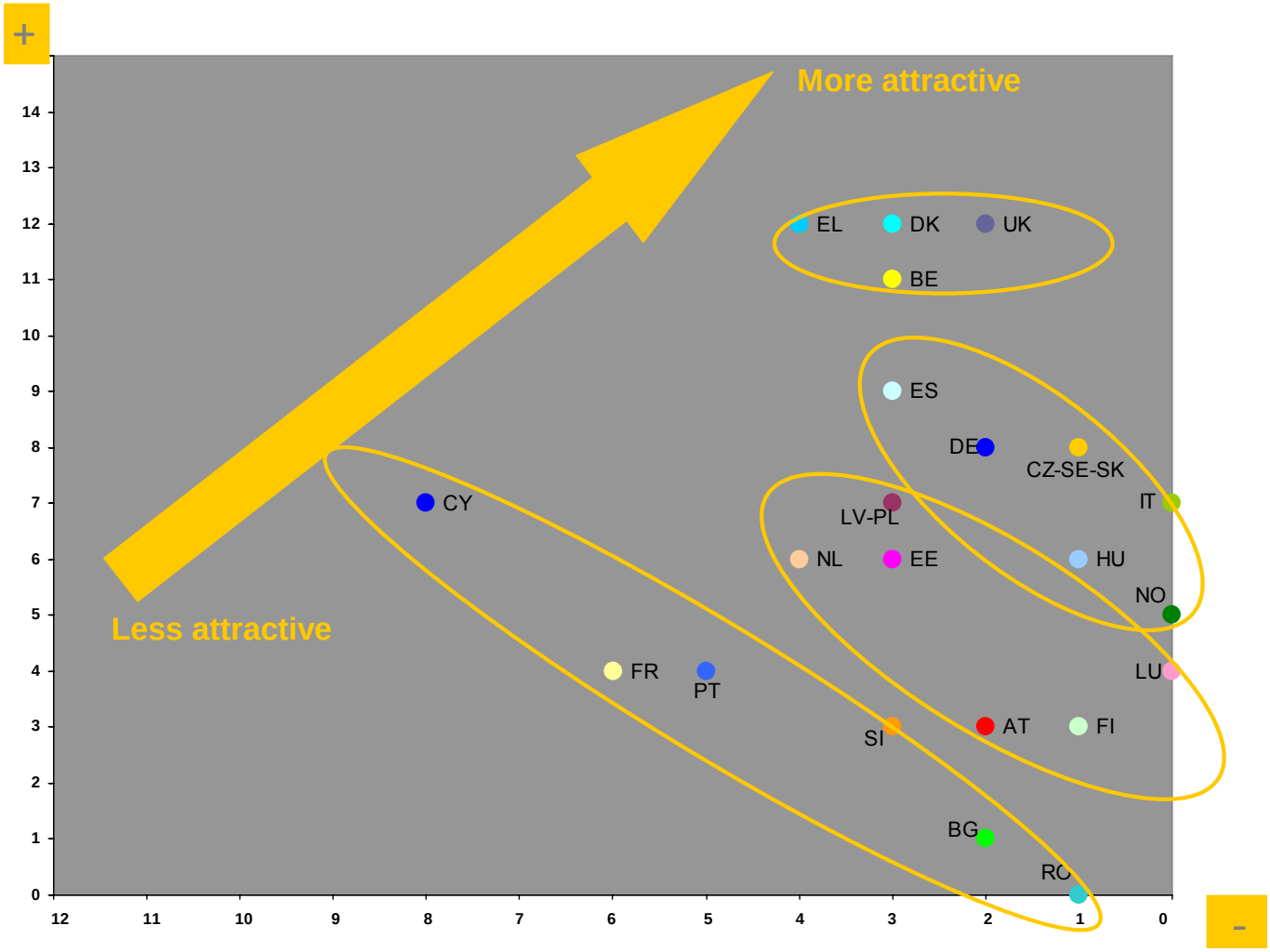
With this systematic approach, the aggregate number of choices made by each Member State relating to the options of the SE Regulation, as compared to the rules applicable to the domestic public limited-liability companies, results in an individual scoring[124]. This scoring can be illustrated by the following graph:

[121] Additional information is provided in Chapter 1 – Section 1 – Paragraph 1.2.1.2. Reading the Synoptic tables on the options left open by the SE Regulation and Directive.

[122] For the Member States where a cross-border transfer of the registered office of the domestic public limited-liability company is not possible, we have considered that the SE has a competitive edge over the national public limited-liability company in this specific area. This concerns the following Member States: Austria, Denmark, Finland, Germany, Greece, Hungary, Latvia, Norway, Poland, Portugal, Slovakia and the United Kingdom.

[123] For the Member States where only one type of corporate governance structure (one-tier or two-tier) is available to their domestic public limited-liability companies, we have considered that the SE has a competitive edge over the national public limited-liability company for all the options relating either to the one-tier corporate structure (for the Member States which only allow the two-tier corporate structure for their domestic public limited-liability companies) or to the two-tier corporate structure (for the Member States which only allow the one-tier corporate structure for their domestic public limited-liability companies).

[124] Refer to the total of the "Comparison with national law" presented for each Member State in the synoptic table of the options left open by the SE Regulation.



GROUPING OF THE MEMBER STATES ACCORDING TO THE ATTRACTIVENESS OF THE SE COMPARED TO NATIONAL PUBLIC LIMITED-LIABILITY COMPANY

Despite the limits to the intra-Member States analysis, this graph shows that the majority of the Member States are situated at a medium level of attractiveness of the SE compared to the domestic public limited-liability company. A more detailed explanation of the graph leads to the following grouping of Member States and conclusions:

► Four Member States stand out with the highest level of attractiveness of the SE as compared to their domestic public limited-liability companies: the United Kingdom, Denmark, Greece and Belgium[125].

The increased attractiveness of the SE in these four Member States is first linked to the fact that the SE presents a real advantage as regards the possibility of freely transferring its registered office to another Member State. Thus, the national legislations of the United Kingdom, Denmark and Greece do not allow their respective domestic public limited-liability companies to freely transfer their registered office to another Member State. In Belgium, even if the possibility of cross-border transfer of the registered office is not specifically reserved to the SE, the rules applicable to

[125] The net score of attractiveness for these Member States is comprised between +10 and +8.

the SE are more flexible than those applicable to the domestic public limited-liability company. Regarding the corporate governance structure, the SE offers an advantage over the public limited-liability company. Belgium, Denmark and the United Kingdom do not have a two-tier system for their public limited-liability companies and in Greece, the two-tier system is only available to listed public limited-liability companies. Thus, in this area as well the SE has a competitive edge over the national public limited-liability company since if offers the possibility of choosing between two categories of corporate governance structure, even when only one category is in principle available.

In addition and as regards the protection of the interests of specific stakeholders, the options implemented by these Member States generally lead to an alignment of the rules applicable to the SE and the national public limited-liability companies, with the exception of Greece and, to a certain extent, Belgium which have sometimes chosen to apply more stringent rules for the SE.

- A second category of Member States is characterised by a relatively high level of attractiveness of the SE compared to their domestic public limited-liability companies: Spain, Germany, Sweden, Slovakia, the Czech Republic, Italy, Hungary and Norway[126].

In this sub-group, several Member States do not allow their public limited-liability companies to freely transfer their registered office to another Member State, thus leading to a higher attractiveness of the SE in this area. This concerns the following Member States: Germany, Hungary, Norway and Slovakia.

In addition, as regards the corporate governance structure, the SE offers an advantage over the public limited-liability company in Spain, Sweden, Germany, Slovakia and the Czech Republic. Germany, Slovakia and the Czech Republic do not have a one-tier system for their public limited-liability companies and in Spain and Sweden, the one-tier system is the only system available to public limited-liability companies. Thus, in this area as well the SE has a competitive edge over the national public limited-liability company.

In most of these Member States, the implementation (or non implementation) of the options left open by the SE Regulation has led to an alignment of the rules applicable to the SE and the national public limited-liability companies. This is in particular the case for the Czech Republic, Slovakia, Hungary, Italy, and Norway. On the other hand, Germany, Sweden and Italy have sometimes implemented more stringent rules for the SE than for domestic public limited-liability companies in the cases of formation of the SE or transfer of the registered office. The increased protection offered to specific stakeholders in the case of the SE can sometimes be explained by the international environment in which the SE is located (as compared to the corresponding domestic situations).

In addition, and regarding specifically the rules applicable to the corporate governance, Germany and the Czech Republic seem to have adopted more flexible rules for the SE than for national public limited-liability companies (in particular, in terms of the number of members of the corporate organs).

[126] The net score of attractiveness for these Member States is comprised between +7 and +5.

► Many Member States have a relatively medium level of attractiveness of the SE compared to their domestic public limited-liability companies: Latvia, Poland, Estonia, the Netherlands, Austria, Finland and Luxembourg[127].

In this sub-group, four Member States do not allow their public limited-liability companies to freely transfer their registered office to another Member State, thus leading to a higher attractiveness of the SE in this area. This is the case for Austria, Finland, Poland and Latvia. The Estonian, Luxembourg and Dutch national legislations generally offer the possibility of cross-border transfer of the registered office to its domestic public limited-liability companies. Though, the rules applicable to the SE are more flexible than those applicable to the domestic public limited-liability company in this respect.

In addition, as regards the corporate governance structure, the SE offers an advantage over the public limited-liability company in almost all the Member States of this sub-group. Thus, in Latvia, Estonia, Poland and the Netherlands, the domestic public limited-liability companies are not allowed to adopt the one-tier system. In this area and for these four Member States, the SE has a competitive edge over the national public limited-liability company. In Austria, Finland and Luxembourg the two types of corporate governance (one-tier and two-tier) are available to national public limited-liability companies.

In some of these Member States, the implementation (or non implementation) of the options left open by the SE Regulation has led to an alignment of the rules applicable to the SE and the national public limited-liability companies. This is in particular the case for Finland and Luxembourg. All the other Member States have adopted an increased stringency for the rules applicable to the SE as compared to those of the national public limited-liability companies, in particular in the areas of formation of the SE and transfer of its registered office. These Member States have generally considered that an increased protection for specific stakeholders in the case of the SE was necessary due to the international character of the SE.

In addition, and regarding specifically the rules applicable to the corporate governance, Latvia seems to have adopted more flexible rules for the SE than for national public limited-liability companies (in particular, in terms of the number of members of the corporate organs).

► A last grouping of Member States stands out with the lowest level of attractiveness of the SE as compared to their domestic public limited-liability companies: Cyprus, France, Portugal, Slovenia, Bulgaria and Romania[128].

In France and Portugal, the SE has a competitive edge over the national public limited-liability company as regards the possibility of freely transferring its registered office to another Member State. Thus, the Portuguese legislation does not allow its domestic public limited-liability company to freely transfer its registered office to another Member State and in France, even if the possibility of cross-border transfer of the registered office is not specifically reserved to the SE, the rules applicable to the SE are more flexible than those applicable to the domestic public limited-liability company, as far as the majority required is concerned. The Slovenian, Bulgarian, Romanian and Cypriot legislations allow the public limited-liability companies to freely transfer their registered

[127] The net score of attractiveness for these Member States is comprised between +4 and +2.

[128] The net score of attractiveness for these Member States is equal or inferior to zero.

office to another Member State. Thus, in this specific area, the SE does not offer an advantage over the national public limited-liability company.

In the area of the corporate governance structure, the SE does not have a significant competitive edge over the domestic public limited-liability company. As a matter of law, both corporate governance systems (one-tier and two-tier) are available to the French, Portuguese, Slovenian, Bulgarian and Romanian public limited-liability companies. In addition, the rules of corporate governance structure applicable to the SE are generally simply aligned with those of the domestic public limited-liability company. Only in Cyprus, the SE offers an advantage over the public limited-liability company, since only the two-tier corporate structure is available to the Cypriot domestic public limited-liability companies. Thus, the SE offers the possibility of choosing between two categories of corporate governance structure (one-tier or two-tier), even though the one-tier structure is not available for Cypriot companies.

Finally, these Member States have generally granted an equivalent or increased protection for specific stakeholders in the case of the SE, thus leading to an increased stringency of the rules applicable to the SE as compared to those of the national public limited-liability companies[129]. This is particularly true in the areas of formation of the SE and the transfer of the registered office.

To conclude, and with regard to the formation of the SE and the transfer of its registered office, nine Member States have systematically implemented the option relating to the protection granted to minority shareholders. This is specifically the case for Austria and Germany, Southern European countries (Greece, Portugal and Spain) and most Eastern European countries (the Czech Republic, Estonia, Hungary, Slovakia and Latvia). Among these countries, only two (Portugal and Greece) systematically grant higher protection for the minority shareholders of an SE than for the minority shareholders of a domestic public limited-liability company. It is highly presumable that the reason for the implementation of higher protection for the minority shareholders of an SE is due to the specific cross-border (international) nature of that legal form, requiring more protection than in a similar "domestic" operation. These two Member States have also implemented the options included in Articles 55(1) and 56 of the SE Regulation, intended to increase the prerogatives of minority shareholders as regards the convening of the general meeting and the setting-up of its agenda. It is noteworthy that no SE has been incorporated in these Member States so far.

With regard to the organisation and management of the SE (structure) and due to the lack of harmonisation of this specific field of European Company Law, it is very difficult to identify main trends or major dissimilarities between Member States and groups of them. However, in this area, two Member States seem to stand out, namely the Czech Republic and Italy. Whereas in the vast majority of other countries, the implementation (or non-implementation) of the options leads to an alignment of the rules applicable to the SE and national public limited-liability companies, these two Member States seem to have adopted more flexible rules for the SE than for national public limited-liability companies (in particular, in terms of the number of members of the corporate organs). Conversely, in the specific area of organisation and management of the SE (structure), Cyprus stands out negatively as having adopted more stringent rules for the SE than for its national public limited-liability companies.

[129] It should however be noted that the French legislator has provided for specific incentive in the national legislation applicable to the SE – See Chapter 3, Section 1.1.2.1.2. Specific incentive of national legislation applicable to the SE.

In conclusion, it should be stressed that the exercise or non-exercise of the options in the various Member States has little impact on the flexibility and the attractiveness of the SE compared to that of the domestic public limited-liability company. In the majority of cases, the implementation (or non-implementation) of the options consists in granting the SE an equivalent regime (similar rules) to that of national public limited-liability companies with a specific view to the protection of stakeholders in an international environment. In fact, such flexibility and attractiveness are linked much more to the compulsory rules applicable to the SE (eg: possibility to freely transfer the registered office of the SE) and to the relevant national legislation (in particular the tax and social legislation).

4. Conclusion on the legal mapping

In conclusion to the legal mapping, the following pages present an executive summary, for each Member State, of the conditions of implementation of the SE Regulation under the national legislation (4.1.). This is followed by a comparative overview of the legal mapping in each Member State (4.2.).

4.1 Executive summary per Member State

.4.1.1 Austria

13 SEs registered in Austria (as at 15 April 2009)

As regards the inter Member State analysis, Austria is characterised by a medium-high level of attractiveness in respect of national legislation applicable to the SE and by a low level of attractiveness as regards the implementation (or non-implementation) of the options left open by the SE Regulation. When implementing (or not implementing) the options left open by the SE Regulation, Austria has tended to reduce its overall attractiveness.

As regards the intra Member State analysis, Austria is characterised by a medium level of attractiveness of the SE compared to the domestic public limited-liability company.

Legal mapping conclusions:

- **Methods of formation of the SE**

Notwithstanding the specific conditions for the formation of an SE, as a general principle, the provisions applicable to the formation of an SE under Austrian law (by merger, conversion, formation of a common holding company or common subsidiary) and those applicable to a national public limited-liability company are similar. When choosing to implement or not to implement the options left open by the EC Regulation, the Austrian legislator did not provide for more flexibility or more stringency for the SE but simply aligned its rules of formation with those of the national public limited-liability company.

- **Transfer of registered office**

According to Austrian law, a national public limited-liability company cannot transfer its registered office out of the member state where it is incorporated. Therefore, the possibility for an SE incorporated under Austrian law to transfer its registered office outside that jurisdiction is a point in favor. The Austrian legislator nevertheless has chosen to extend the protection of various stakeholders (shareholders opposing the transfer, creditors and holders of other rights and public authorities) due to the specific cross-border nature of the transfer.

- **Organisation and management**

It must first be noted that the Austrian Stock Corporation Act provides for a two-tier system only. Thus only the two-tier system is available to national public limited-liability companies. An SE under

Austrian law may however opt for the one-tier system: in such a case, the board of directors must consist of managing and non-managing directors.

As a general principle, all the provisions applicable to the organisation and management of an SE under Austrian law are similar to those applicable to a national public limited-liability company.

- **Miscellaneous**

The registered office indicated in the articles of association of the SE cannot be dissociated from its head office, which is, in principle, in conformity with the rules applicable to national public limited-liability companies.

The Austrian legislator has not implemented the option allowing a company the administrative office of which is not in the EU / EEA to participate in the formation of an SE.

Drivers for setting up SEs:

- **Positive drivers**

The possibility for an SE registered in Austria to be able to "freely" transfer its registered office to another Member State may be considered a strong positive driver.

- **Negative drivers**

The rules relating to the involvement of employees and the negotiating procedure are seen as more complex than for the formation of a national public limited-liability company.

General conclusion:

The rules applicable to the creation of an SE incorporated in Austria are more complex than the rules applicable to the creation of a national public limited-liability company (i.e. employee involvement and the special negotiating body). However, once created, the daily running of an SE incorporated in Austria is very similar to the daily running of a national public limited-liability company, except for the transfer of the registered office which is an advantage for the SE.

.4.1.2 Belgium

10 SEs registered in Belgium (as at 15 April 2009)

As regards the inter Member State analysis, Belgium is characterised by a medium-high level of attractiveness in respect of national legislation applicable to the SE and by a high level of attractiveness as regards the implementation (or non-implementation) of the options left open by the SE Regulation. When implementing (or not implementing) the options left open by the SE Regulation, Belgium has tended to increased its overall attractiveness.

As regards the intra Member State analysis, Belgium stands out with one of the highest level of attractiveness of the SE compared to the domestic public limited-liability company.

Legal mapping conclusions:

- **Methods of formation of the SE**

Notwithstanding the specific conditions for the formation of an SE, as a general principle, the provisions applicable to the formation of the SE are similar to those applicable to the national public limited-liability company (*Société anonyme*). However, in specific cases, the rules applicable to the SE are more stringent, in particular the following:

- regarding the formation of the SE by merger, the Belgian Minister of the Economy may raise an objection, whereas such objection is not provided for with regard to the formation of a national public limited-liability company;
- regarding the formation of a holding SE, a minimum percentage of shares must be contributed for the holding SE to be incorporated, whereas this condition is not required for the incorporation of a holding national public limited-liability company.

- **Transfer of registered office**

According to Belgian law, a national public limited-liability company can transfer its registered office out of the state (EU Member State or not) where it is incorporated, whether the transfer is outbound (from Belgium to another state) or inbound (into Belgium). Therefore, the possibility of the cross-border transfer of the registered office is not specifically reserved for the SE. The Belgian legislator nevertheless has chosen to provide for the protection of the public authorities, as the Minister of the Economy may oppose the transfer of the registered office of an SE. Such a right to oppose the transfer does not exist for national public limited-liability companies.

- **Organisation and management**

It must first be noted that Belgian law provides for a one-tier system only. Thus in principle, only the one-tier system is available to national public limited-liability companies. A specific section has been incorporated into the Belgian Companies Code, so as to allow an SE under Belgian law to opt for the two-tier system. As a general principle, the rules on organisation and management which apply to the one-tier system are similar for the SE and national public limited-liability companies under Belgian law, with the exception of some specific provisions relating to the general meeting of shareholders of an SE which are more flexible than for a national public limited-liability company:

- the possibility for the first general meeting of shareholders of an SE to be held at any time in the 18 months following incorporation. This is not provided for in the case of national public limited-liability companies, though an extended first financial year is generally accepted;

- the possibility for one or more shareholders together holding 10% of the subscribed capital to request the SE to convene a general meeting and to place items on the agenda. The percentage is higher (20%) for national public limited-liability companies;
- the SE Regulation grants a casting vote to the Chairman of the corporate organs of an SE. Such a rule does not exist with regard to national public limited-liability companies (though it can be included in the articles of association);
- a simple majority may be sufficient, provided the conditions laid down by law are fulfilled, for the amendment of the articles of association of an SE, whereas the statutory quorums applicable to national public limited-liability companies are more stringent (qualified majority of ¾ or $^4/_5$) and are binding.

- **Miscellaneous**

The Belgian legislator has adopted a flexible position on two specific issues: first by allowing a company the administrative office of which is not in the EU / EEA to participate in the formation of an SE (provided that said 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), and second by not requiring that the registered office and head office of the SE be in the same place.

<u>Drivers for setting up SEs:</u>

- **Positive drivers**

No specific legal, tax or social measures to encourage the creation of SEs have been set up under Belgian law. However, the possibility for an SE to be able to freely choose between the one-tier and two-tier system may be considered a positive driver.

- **Negative drivers**

The rules relating to the involvement of employees and the negotiating procedure are seen as more complex than for the formation of a national public limited-liability company. Moreover the minimum share capital required to incorporate an SE is higher than that required for the formation of a national public limited-liability company. The methods of formation are limited.

<u>General conclusion:</u>

As a general principle, the SE legal form is considered less attractive than the national public limited-liability company because of the higher requirements for the formation of the SE (higher minimum capital, criteria and methods of formation of the SE). These higher requirements are generally not considered to be outweighed by the advantages relating to the daily running of an SE incorporated in Belgium.

.4.1.3 Bulgaria

0 SEs registered in Bulgaria (as at 15 April 2009)

As regards the inter Member State analysis, Bulgaria is characterised by a high level of attractiveness in respect of national legislation applicable to the SE and by a medium-low level of attractiveness as regards the implementation (or non-implementation) of the options left open by the SE Regulation. When implementing (or not implementing) the options left open by the SE Regulation, Bulgaria has tended to reduce its overall attractiveness.

As regards the intra Member State analysis, Bulgaria stands out with one of the lowest level of attractiveness of the SE compared to the domestic public limited-liability company.

Legal mapping conclusions:

- **Methods of formation of the SE**

Notwithstanding the specific conditions for the formation of an SE, as a general principle, the provisions applicable to the formation of an SE under Bulgarian law (by merger, conversion, formation of a common holding company or common subsidiary) and those applicable to a national public limited-liability company are similar. When choosing to implement or not to implement the options left open by the EC Regulation, the Bulgarian legislator did not provide for flexibility or more stringency for the SE but simply aligned its rules of formation with those of the national public limited-liability company.

- **Transfer of registered office**

According to Bulgarian law, there is no specific restriction on the transfer of the registered office outside Bulgaria; however, a company registered in Bulgaria remains subject to Bulgarian law even if it transfers its seat and registered office to another Member State. The Bulgarian legislator has not implemented any specific protection rules for the various stakeholders in the case of transfer of the SE's registered office outside the jurisdiction of Bulgaria.

- **Organisation and management**

Under Bulgarian law, national public limited-liability companies may choose between the one-tier and the two-tier systems. Therefore, Bulgaria is familiar with both corporate governance structures. As a general principle, the rules on organisation and management are similar for the SE and national public limited-liability companies under Bulgarian law, with the exception of some specific provisions relating to the general meeting of shareholders of an SE which are more flexible than for a national public limited-liability company (eg: possibility for the first general meeting of shareholders of an SE to be held at any time in the 18 months following incorporation).

- **Miscellaneous**

The registered office indicated in the articles of association of the SE cannot be dissociated from its head office, which is more stringent for the SE incorporated in Bulgaria than for the national public limited-liability company.

The Bulgarian legislator has not implemented the option allowing a company the administrative office of which is not in the EU / EEA to participate in the formation of an SE.

Drivers for setting up SEs:

- Positive drivers

No specific legal, tax or social measures to encourage the creation of SEs have been set up under Bulgarian law.

- Negative drivers

The rules relating to the involvement of employees and the negotiating procedure are seen as more complex than for the formation of a national public limited-liability company.

General conclusion:

The rules applicable to the creation of an SE incorporated in Bulgaria are more complex than the rules applicable to the creation of a national public limited-liability company (i.e. employee involvement and the special negotiating body). Conversely, no particular advantages linked to the SE Statute are considered as significantly outweighing the complexity of the rules of formation.

.4.1.4 Cyprus

10 SEs registered in Cyprus (as at 15 April 2009)

As regards the inter Member State analysis, Cyprus is characterised by a low level of attractiveness in respect of national legislation applicable to the SE and by a medium-low level of attractiveness as regards the implementation (or non-implementation) of the options left open by the SE Regulation. When implementing (or not implementing) the options left open by the SE Regulation, Cyprus has tended to reduce its overall attractiveness.

As regards the intra Member State analysis, Cyprus is characterised by a low level of attractiveness of the SE compared to the domestic public limited-liability company.

Legal mapping conclusions:

- **Methods of formation of the SE**

Notwithstanding the specific conditions for the formation of an SE, as a general principle, the provisions applicable to the formation of an SE by way of conversion are similar to those applicable to national public limited-liability companies. As regards the formation of an SE by merger and by formation of a holding SE, the rules applicable are less stringent for an SE than for a national public limited-liability company because not all options have been implemented. Nevertheless, the Cypriot legislator has specifically provided for the possibility for national competent authorities to oppose the formation of an SE by merger on grounds of public interest.

- **Transfer of registered office**

It should be noted that a national public limited-liability company may transfer its registered office out of the jurisdiction of Cyprus. As regards the SE, the Cypriot legislator has implemented specific protection rules for the various stakeholders (creditors and holders of other rights and public authorities) in the case of transfer of the SE's registered office outside the jurisdiction of Cyprus.

- **Organisation and management**

The Cypriot law on national public limited-liability companies contains provisions on the two-tier system only. Thus in principle, only the two-tier system is available to national public limited-liability companies. A specific section has been incorporated, so as to allow an SE under Cypriot law to opt for the one-tier system. In specific cases, more favorable rules are provided for the SE (eg: in the case of vacancy as a member of the management organ, a member of the supervisory board may be appointed to that vacant position for a maximum period of six months, and the provisions applicable to the SE provide for an individual right of information of the members of the supervisory board).

- **Miscellaneous**

The registered office of an SE incorporated in Cyprus may be located in a different place than that of its registered office (but in the same Member States). The Cypriot legislator has not implemented the option allowing a company the administrative office of which is not in the EU / EEA to participate in the formation of an SE, thus leading to more stringent rules for the SE than for national public limited-liability companies.

Drivers for setting up SEs:

- Positive drivers

No specific legal, tax or social measures to encourage the creation of SEs have been set up under Cypriot law. However, the possibility for an SE to be able to freely choose between the one-tier and two-tier systems may be considered a positive driver.

- Negative drivers

There is a general lack of experience as regards the rules applicable to SEs. Therefore, the latter often appear more complex and burdensome than the provisions applying to national public limited-liability companies.

General conclusion:

The rules applicable to the creation of an SE incorporated in Cyprus are more complex than the rules applicable to the creation of a national public limited-liability company (i.e. employee involvement and the special negotiating body). This increased complexity is generally not considered as outweighed by the advantages relating to the daily running of an SE incorporated in Cyprus.

.4.1.5 The Czech Republic

137 SEs registered in the Czech Republic (as at 15 April 2009)

As regards the inter Member State analysis, the Czech Republic is characterised by a low level of attractiveness in respect of national legislation applicable to the SE and by a medium-low level of attractiveness as regards the implementation (or non-implementation) of the options left open by the SE Regulation. When implementing (or not implementing) the options left open by the SE Regulation, the Czech Republic has tended to reduce its overall attractiveness.

As regards the intra Member State analysis, the Czech Republic is characterised by a relatively high level of attractiveness of the SE compared to the domestic public limited-liability company.

Legal mapping conclusions:

- **Methods of formation of the SE**

Notwithstanding the specific conditions for the formation of an SE, as a general principle, the provisions applicable to the formation of an SE under Czech law (by merger, conversion, formation of a common holding company or common subsidiary) and those applicable to a national public limited-liability company (a joint stock company – in Czech *akciová spolecnost*) are similar. When choosing to implement or not to implement the options left open by the EC Regulation, the Czech legislator did not provide for more flexibility or more stringency for the SE but simply aligned its rules of formation with those of the national public limited-liability company.

- **Transfer of registered office**

According to Czech law, a national public limited-liability company can transfer its registered office out of the member state where it is incorporated. Therefore, this possibility is not specifically reserved for the SE. The Czech legislator has not specifically chosen to extend the protection of the stakeholders in the case of transfer of the registered office of an SE.

- **Organisation and management**

Czech company law regarding public limited-liability companies only provides for the two-tier system. Specific provisions have been incorporated so as to allow an SE under Czech law to opt for the one-tier system. As a general principle, the rules applicable to the organisation and management of the SE under Czech law are in line with (or similar to) those of the national public limited-liability company. Any deviations from this general principle tend towards more flexibility for the SE (e.g. no requirement as regards the maximum or minimum number of members of the corporate organs whereas such requirements exist for national public limited-liability companies (at least three members of the board of directors / at least one member of the board of directors in the case of a sole shareholder and at least three supervisory board members), the possibility of nominating one member of the supervisory board to act as a member of the management organ in the case of a vacancy as a member of the latter, and the possibility for the first general meeting of shareholders of an SE to be held at any time in the 18 months following incorporation).

- **Miscellaneous**

The Czech legislator has adopted a flexible position by allowing a company the administrative office of which is not in the EU / EEA to participate in the formation of an SE (provided that the said 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).

The Czech legislator has opted for the requirement that the registered office and head office of the SE be in the same place (the SE is obliged to enter its actual seat of business activity in the Trade Register).

Drivers for setting up SEs:

- Positive drivers

The rules applicable to the SE, as regards in particular its organisation and management, are generally seen as more attractive than those applicable to the Czech public limited-liability companies. The possibility of having a board of directors and a supervisory board each with only one member is perceived as the main driver for having an SE instead of a national public limited liability company, which must have at least three members on its board of directors / a one member in the case of a sole shareholder, and at least three members on its supervisory board.

The possibility of transferring a registered office is perceived as a positive feature of the SE if the need to transfer arises (e.g. due to negative developments in the tax regime in the Czech Republic). On the other hand, no such transfers have been performed in the past and, therefore, this option is really rather theoretical and it may never be widely used.

The European image of an SE is not predominantly perceived as a driver for having an SE.

- Negative drivers

An SE is required to have a higher minimum registered capital (EUR 120,000) than a national public limited liability company (only approximately EUR 80,000). Since a vast majority of SEs are set up/acquired in the Czech Republic by small and medium enterprises or individuals for the purpose of having a vehicle with no need of enormous staffing of the corporate organs and the related expenses, the prescribed minimum level of the registered capital seems to be inadequate and discouraging.

No specific negative drivers have been identified as regards the legal regime of the SE under Czech law.

General conclusion:

The rules applicable to the creation of an SE incorporated in the Czech Republic are globally similar to the rules applicable to the creation of a national public limited-liability company. However, in the specific field of organisation and management, the SE offers greater flexibility than the legal regime of the national public limited-liability company. Apart from this specificity and once created, the daily running of an SE incorporated in the Czech Republic is very similar to the daily running of a national public limited-liability company.

SEs are predominantly set up or acquired to operate as a small or medium business and therefore a majority of SEs have no employees. This means that the complicated regime of employee participation does not apply and is not perceived as a disadvantage of the SE.

The national legislation contains specific national rules under which the SE Regulation would apply. The law on the European Company follows the structure of the SE Regulation which helps with transparency of the law. On the other hand, a number of references to the SE Regulation contained in the law make the text very difficult to read, understand, interpret and apply. In addition, the extensive rules under which an SE may be established and the rules of employee participation are very restrictive in comparison with a national limited liability company and make the use of the entire legislation on SEs difficult to capitalise and apply in practice, and also expensive (as legal

advice is definitely needed). It is only the fact that one can buy a ready-made SE company with the intention of having no employees that makes the concept of the SE so popular in the Czech Republic in comparison with the other Member States. Otherwise, there is a clear preference for the legal form of the national joint stock company.

There are delays with founding SEs, because the registration judges do not have enough practical experience of this process. There are no uniform template documents published by the Government which would be automatically recognised by the registration courts. The relatively low number of SE registrations (compared to the number of registrations of domestic limited-liability companies) means that the majority of judges have no experience of registering an SE. As a result, each registration process with a different judge is unique, due to the additional requirements which they usually have and due to the lack of uniformity of the necessary documentation.

.4.1.6 Denmark

2 SEs registered in Denmark (as at 15 April 2009)

As regards the inter Member State analysis, Denmark is characterised by a medium-high level of attractiveness in respect of national legislation applicable to the SE and by a medium-high level of attractiveness as regards the implementation (or non-implementation) of the options left open by the SE Regulation. When implementing (or not implementing) the options left open by the SE Regulation, Denmark has tended to reduce its overall attractiveness.

As regards the intra Member State analysis, Denmark stand out with one of the highest level of attractiveness of the SE compared to the domestic public limited-liability company.

Legal mapping conclusions:

- **Methods of formation of the SE**

Notwithstanding the specific conditions for the formation of an SE, as a general principle, the provisions applicable to the formation of an SE by conversion, or by formation of a common holding company or common subsidiary are similar to those applicable to national public limited-liability companies. As regards formation by merger, the rules applicable to the SE are more stringent than those applicable to a merger between national public limited-liability companies, due to the increased protection granted to specific stakeholders (in particular public authorities and minority shareholders).

- **Transfer of registered office**

It should be noted that it is not possible for a Danish company to transfer its registered office outside Denmark. Therefore, the possibility for an SE incorporated under Danish law to transfer its registered office outside that jurisdiction is a point in its favour. The Danish legislator has nevertheless chose to extend the protection of various stakeholders (minority shareholders, creditors and holders of other rights and public authorities) due to the specific cross-border nature of the transfer.

- **Organisation and management**

The Danish corporate system applicable to national public limited-liability companies has been classified as a one-tier system. Thus in principle, only the one-tier system is available to the national public limited-liability companies. Specific provisions have been incorporated so as to allow an SE under Danish law to opt for the two-tier system. As a general principle, all the provisions applicable to the organisation and management of an SE under Danish law are similar to those applicable to a national public limited-liability company, apart from very specific cases where more flexible rules have been provided for SEs.

- **Miscellaneous**

The Danish legislator has adopted a flexible position on two specific points. First he has allowed a company the administrative office of which is not in the EU / EEA to participate in the formation of an SE (provided that said 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). Second, he has not specifically required that the registered office and head office of the SE be in the same place: the SE only has to have a manned office in the place where the company has its registered office.

Drivers for setting up SEs:

- Positive drivers

No specific legal, tax or social measures to encourage the creation of SEs have been set up under Danish law. However, the possibility for an SE to be able to freely transfer its registered office and to choose between the one-tier and two-tier system may be considered positive drivers.

- Negative drivers

There is a general lack of experience as regards the rules applicable to SEs. Therefore, the latter often appear more complex and burdensome than the provisions applying to national public limited-liability companies.

General conclusion:

The rules applicable to the creation of an SE incorporated in Denmark are more complex than the rules applicable to the creation of a national public limited-liability company (i.e. employee involvement and the special negotiating body). This increased complexity is generally not considered as outweighed by the advantages relating to the daily running of an SE incorporated in Denmark.

.4.1.7 Estonia

3 SEs registered in Estonia (as at 15 April 2009)

As regards the inter Member State analysis, Estonia is characterised by a low level of attractiveness in respect of national legislation applicable to the SE and by a high level of attractiveness as regards the implementation (or non-implementation) of the options left open by the SE Regulation. When implementing (or not implementing) the options left open by the SE Regulation, Estonia has tended to improve its overall attractiveness.

As regards the intra Member State analysis, Estonia is characterised by a medium level of attractiveness of the SE compared to the domestic public limited-liability company.

Legal mapping conclusions:

- **Methods of formation of the SE**

Notwithstanding the specific conditions for the formation of an SE, as a general principle, the provisions applicable to the formation of an SE under Estonian law (by merger, conversion, or the formation of a common holding company or common subsidiary) and those applicable to a national public limited-liability company are similar. When choosing to implement or not to implement the options left open by the EC Regulation, the Estonian legislator did not provide for more flexibility or more stringency for the SE but simply aligned its rules of formation with those of the national public limited-liability company.

- **Transfer of registered office**

According to Estonian law, a national public limited-liability company can transfer its registered office out of the member state where it is incorporated. Therefore, this possibility is not specifically reserved for the SE. The Estonian legislator has specifically chosen to extend the protection of the minority shareholders in the case of transfer of the registered office of an SE.

- **Organisation and management**

The national law of Estonia does not contain any provisions concerning the one-tier system in relation to public limited-liability companies. Thus, national public limited companies have no choice but to use the compulsory two-tier system, whereas specific provisions have been incorporated so as to allow an SE under Estonian law to opt for the one-tier system. As a general principle, the rules applicable to the organisation and management of the SE under Estonian law are in line with (or similar to) those of the national public limited-liability company. Any deviations from this general principle tend towards more flexibility for the SE (e.g.: no requirement as regards the maximum or minimum number of members of the supervisory board, whereas such requirements exist for national public limited-liability companies, and the possibility of nominating one member of the supervisory board to temporarily act as a member of the management organ in the case of vacancy on the latter).

- **Miscellaneous**

The registered office indicated in the articles of association of the SE can be dissociated from its head office, which is, in principle, in conformity with the rules applicable to the national public limited-liability companies.

The Estonian legislator has not implemented the option allowing a company the administrative office of which is not in the EU / EEA to participate in the formation of an SE, which may represent a significant barrier to the formation of SEs in Estonia.

Drivers for setting up SEs:

- Positive drivers

No specific legal, tax or social measures to encourage the creation of SEs have been set up under Estonian law. However, the possibility for an SE to be able to freely choose between the one-tier and two-tier systems may be considered a positive driver.

- Negative drivers

No specific negative drivers have been identified as regards the legal regime of the SE under Estonia law.

General conclusion:

The rules applicable to the creation of an SE incorporated in Estonia are globally similar to the rules applicable to the creation of a national public limited-liability company. Once created, the daily running of an SE incorporated in Estonia is very similar to the daily running of a national public limited-liability company.

.4.1.8 Finland

0 SEs registered in Finland (as at 15 April 2009)

As regards the inter Member State analysis, Finland is characterised by a low level of attractiveness in respect of national legislation applicable to the SE and by a medium-high level of attractiveness as regards the implementation (or non-implementation) of the options left open by the SE Regulation. When implementing (or not implementing) the options left open by the SE Regulation, Finland has adopted a position resulting in neutrality in terms of attractiveness.

As regards the intra Member State analysis, Finland is characterised by a medium level of attractiveness of the SE compared to the domestic public limited-liability company.

Legal mapping conclusions:

- **Methods of formation of the SE**

Notwithstanding the specific conditions for the formation of an SE, as a general principle, the provisions applicable to the formation of an SE under Finnish law (by merger, conversion, or the formation of a common holding company or common subsidiary) and those applicable to a national public limited-liability company are similar. When choosing to implement or not to implement the options left open by the EC Regulation, the Finnish legislator did not provide for more flexibility or more stringency for the SE but simply aligned its rules of formation with those of the national public limited-liability company.

- **Transfer of registered office**

According to Finnish law, a national public limited-liability company cannot transfer its registered office out of the member state where it is incorporated. Therefore, the possibility for an SE incorporated under the Finnish law regime to transfer its registered office outside that jurisdiction is a point in its favour. The Finnish legislator has nevertheless chosen to extend the protection of various stakeholders (minority shareholders, creditors and holders of other rights) due to the specific cross-border nature of the transfer.

- **Organisation and management**

It should be noted that according to Finnish national law, a public limited-liability company must have a board of directors (one-tier system), however the supervisory board remains optional and subject to provisions included in the articles of association of the company (two-tier system). Therefore, both corporate governance structures are provided for under Finnish national law. In addition and as a general principle, the provisions governing the organisation and management of the SEs incorporated in Finland are similar to those applying to national public limited-liability companies.

- **Miscellaneous**

The Finnish legislator has opted for the requirement that the registered office and head office of the SE be in the same place. In addition, he has allowed a company the administrative office of which is not in the EU / EEA to participate in the formation of an SE (provided that said 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).

Drivers for setting up SEs:

- Positive drivers

No specific legal, tax or social measures to encourage the creation of SEs have been set up under Finnish law.

- Negative drivers

No specific negative drivers have been identified as regards the legal regime of the SE under Finnish law.

General conclusion:

The rules applicable to the creation of an SE incorporated in Finland are globally similar to the rules applicable to the creation of a national public limited-liability company, even if they might appear more complex and burdensome due to the general lack of experience and hindsight as regards the SE. Once created, the daily running of an SE incorporated in Finland is very similar to the daily running of a national public limited-liability company. The limited success of the SE Statute in Finland may be explained by the fact that it does not provide any significant added value.

.4.1.9 France

15 SEs registered in France (as at 15 April 2009)

As regards the inter Member State analysis, France is characterised by a medium-high level of attractiveness in respect of national legislation applicable to the SE and by a low level of attractiveness as regards the implementation (or non-implementation) of the options left open by the SE Regulation. When implementing (or not implementing) the options left open by the SE Regulation, France has tended to reduce its overall attractiveness.

As regards the intra Member State analysis, France is characterised by a low level of attractiveness of the SE compared to the domestic public limited-liability company, not taking into consideration the specific incentive provided for the SE as regards the increased freedom in the definition of the statutes.

Legal mapping conclusions:

- **Methods of formation of the SE**

Notwithstanding the specific conditions for the formation of an SE, as a general principle, the provisions applicable to the formation of the SE are similar to those applicable to the national public limited-liability company (*Société anonyme*). However, in specific cases the rules applicable to the SE are more stringent, namely:

- In the formation of the SE by merger, the public prosecutor may lodge an objection against the formation of an SE on grounds of public interest.
- In the formation of a holding SE, the creditors may oppose the formation of the SE within a 30-day period as from the last publication of the project in a journal of legal announcements.

- **Transfer of registered office**

The transfer of the registered office of a national public limited-liability company outside France (thus implying a change of nationality) requires a unanimous decision of the shareholders. The transfer of the registered office of an SE outside the French jurisdiction can be decided by an extraordinary general meeting of shareholders (i.e. by a majority of two-thirds of the votes cast). The creditors as well as the public prosecutor may lodge an objection against the transfer of the registered office of an SE registered in France outside that jurisdiction.

- **Organisation and management**

Under French law, national public limited-liability companies may choose between the one-tier and the two-tier systems. Therefore, France is familiar with both corporate governance structures.

In addition and as a general principle, the provisions governing the organisation and management of the SEs incorporated in France are those applying to national public limited-liability companies (Article L. 229-7 of the French commercial code). Specific rules are provided for in the case of a vacancy on the executive board, where in such a case, a member of the supervisory board may exercise the functions of a member of the executive board for a maximum period of six months.

- **Miscellaneous**

The registered office indicated in the articles of association of the SE cannot be dissociated from its head office, which is in conformity with the rules applicable to national public limited-liability companies.

The French legislator has not implemented the option allowing a company the administrative office of which is not in the EU / EEA to participate in the formation of an SE, which may represent a significant barrier to the formation of SEs in France.

Drivers for setting up SEs:

- Positive drivers

The specific French rules governing the SE that does not make public offerings offers more flexibility than a national public limited-liability company as regards restrictions on the free negotiability of the shares (possibility of preventing the transfer of shares for 10 years at the most), the obligation for a shareholder to transfer its shares, and the possibility of excluding a shareholder when the control of such shareholder has changed.

- Negative drivers

The rules relating to the involvement of employees and the negotiating procedure are seen as very unfavourable to the formation of SEs in France, in particular the specific involvement of trade unions in the negotiating process (members of the Special Negotiating Body are appointed by the trade unions).

General conclusion:

The rules applicable to the creation of an SE incorporated in France are more complex than the rules applicable to the creation of a national public limited-liability company (i.e. criteria and methods of formation of an SE, employee involvement and the special negotiating body, etc). However, once created, the daily running of an SE incorporated in France is very similar to the daily running of a national public limited-liability company, except for operations that require the prior authorisation of either the board of director or the supervisory board (depending on whether the company has chosen the one-tier or the two-tier system) for which the SE offers more flexibility.

.4.1.10 Germany

91 SEs registered in Germany (as at 15 April 2009)

As regards the inter Member State analysis, Germany is characterised by a low level of attractiveness in respect of national legislation applicable to the SE and by a low level of attractiveness as regards the implementation (or non-implementation) of the options left open by the SE Regulation. When implementing (or not implementing) the options left open by the SE Regulation, Germany has tended to reduce its overall attractiveness, thus being one of the least attractive Member States as regards the legislation applicable to the SE.

As regards the intra Member State analysis, Germany is characterised by a high level of attractiveness of the SE compared to the domestic public limited-liability company.

Legal mapping conclusions:

- **Methods of formation of the SE**

Notwithstanding the specific conditions for the formation of an SE, as a general principle, the provisions applicable to the formation of an SE under German law (by merger, conversion, or the formation of a common holding company or common subsidiary) and those applicable to a national public limited-liability company are similar. When choosing to implement or not to implement the options left open by the EC Regulation, the Czech legislator did not provide for more flexibility or more stringency for the SE but simply aligned its rules of formation with those of the national public limited-liability company. There is however one specificity for the formation of a holding SE, where the provisions relating to the protection for minority shareholders are more flexible for the SE than for the national public limited-liability company (German national law does not offer the possibility of founding a 100% holding public limited-liability company without the consent of all shareholders).

- **Transfer of registered office**

It should be noted that it is not possible for a Germany company to transfer its registered office outside Germany. Therefore, the possibility for an SE incorporated under German law to transfer its registered office outside that jurisdiction is a point in its favour. The German legislator has nevertheless chosen to extend the protection of various stakeholders (minority shareholders, creditors and holders of other rights) due to the specific cross-border nature of the transfer.

- **Organisation and management**

German company law relating to the public limited-liability company (*Aktiengesellschaft*) only provides for the two-tier system. Specific provisions have been incorporated so as to allow an SE under German law to opt for the one-tier system. As a general principle, all the provisions applicable to the organisation and management of an SE under German law are similar to those applicable to a national public limited-liability company, apart from very specific cases where more flexible rules have been provided for SEs (e.g.: provision of an individual right of information of the members of the supervisory board).

- **Miscellaneous**

The German legislator has not implemented the option allowing a company the administrative office of which is not in the EU / EEA to participate in the formation of an SE. In addition, he has specifically required that the registered office and head office of the SE be located in the same place.

Drivers for setting up SEs:

- Positive drivers

No specific legal, tax or social measures to encourage the creation of SEs have been set up under German law. However, the possibility for an SE to be able to freely transfer its registered office and to choose between the one-tier and two-tier systems may be considered positive drivers.

- Negative drivers

There is a general lack of experience as regards the rules applicable to SEs. Therefore, the latter often appear more complex and burdensome than the provisions applying to national public limited-liability company.

General conclusion:

The rules applicable to the creation and daily running of an SE incorporated in Germany are globally similar to the rules applicable to the creation and daily running of a national public limited-liability company. However, in the specific field of employee participation, the SE offers greater flexibility than the co-determination legal regime applicable to national public limited-liability companies.

.4.1.11 Greece

0 SEs registered in Greece (as at 15 April 2009)

As regards the inter Member State analysis, Greece is characterised by a medium-low level of attractiveness in respect of national legislation applicable to the SE and by a medium-low level of attractiveness as regards the implementation (or non-implementation) of the options left open by the SE Regulation. When implementing (or not implementing) the options left open by the SE Regulation, Greece has tended to reduce its overall attractiveness.

As regards the intra Member State analysis, Greece stands out with one of the highest level of attractiveness of the SE compared to the domestic public limited-liability company.

Legal mapping conclusions:

- **Methods of formation of the SE**

Notwithstanding the specific conditions for the formation of an SE, as a general principle, the provisions applicable to the formation of an SE under Greek law (by merger, conversion, or the formation of a common holding company or common subsidiary) are more stringent than those applicable to a national public limited-liability company, because the Greek legislator has systematically provided for the specific protection of various stakeholders (in particular public authorities, minority shareholders, holders of securities and bonds, and creditors of the company) due to the cross-border nature of the SE.

- **Transfer of registered office**

According to Greek law, a national public limited-liability company cannot transfer its registered office out of the member state where it is incorporated without going into liquidation. Therefore, the possibility for an SE incorporated under Greek law to transfer its registered office outside that jurisdiction is a point in its favour. The Greek legislator has nevertheless chosen to extend the protection of various stakeholders (minority shareholders, creditors and holders of other rights) due to the specific cross-border nature of the transfer. For example, shareholders who oppose the transfer of the SE's registered office have the right to require the purchase of their shares by the company, if there is significant reason to do so. Moreover, with regard to any liabilities arising prior to the publication of the transfer proposal, the SE must prove that the interests of creditors and holders of other rights in respect of the SE are sufficiently protected.

- **Organisation and management**

Greek legislation provides that only the one-tier system applies to non-listed public limited-liability companies (*societes anonyms*). Nevertheless, Greek law has not adopted specific appropriate measures concerning the two-tier system in relation to SEs: the national legislation applicable to public limited-liability companies applies to the two-tier system. However, the national legislation does not provide for the formation of a supervisory organ and consequently does not include any specific provisions in relation to the operation of the supervisory organ.

In addition and as a general principle, the provisions governing the organisation and management of the SEs incorporated in Greece are similar to those applying to the national public limited-liability companies.

- **Miscellaneous**

The Greek legislator has opted for the requirement that the registered office and head office of the SE be in the same place, which is more stringent for the SE than for the national public limited-

liability company. In addition, he has allowed a company the administrative office of which is not in the EU / EEA to participate in the formation of an SE (provided that said 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).

Drivers for setting up SEs:

- Positive drivers

Specific tax measures and benefits (law 2578/1998) may encourage the creation of SEs or investments from companies outside the jurisdiction of Greece.

- Negative drivers

The rules relating to the involvement of employees and the negotiating procedure are seen as more complex than for the formation of a national public limited-liability company.

General conclusion:

As a general principle, the legal form of the SE is considered less attractive than the national public limited-liability company because of the higher requirements for the formation of the SE (higher minimum capital, criteria and methods of formation of the SE). These higher requirements are rarely considered outweighed by the advantages relating to the daily running of an SE incorporated in Greece (very little added value of the legal form of the SE) and the credibility of an SE as perceived by companies which do business on a Community scale.

.4.1.12 Hungary

4 SEs registered in Hungary (as at 15 April 2009)

As regards the inter Member State analysis, Hungary is characterised by a medium-high level of attractiveness in respect of national legislation applicable to the SE and by a medium-low level of attractiveness as regards the implementation (or non-implementation) of the options left open by the SE Regulation. When implementing (or not implementing) the options left open by the SE Regulation, Hungary has tended to reduce its overall attractiveness.

As regards the intra Member State analysis, Hungary is characterised by a relatively high level of attractiveness of the SE compared to the domestic public limited-liability company.

Legal mapping conclusions:

- **Methods of formation of the SE**

Notwithstanding the specific conditions for the formation of an SE, as a general principle, the provisions applicable to the formation of an SE under Hungarian law (by merger, conversion, or the formation of a common holding company or common subsidiary) and those applicable to a national public limited-liability company are similar. When choosing to implement or not to implement the options left open by the EC Regulation, the Hungarian legislator did not provide for more flexibility or more stringency for the SE but simply aligned its rules of formation with those of the national public limited-liability company.

- **Transfer of registered office**

According to Hungarian law, in the case of transfer of the registered office outside Hungary (thus implying a change of nationality), the national public limited-liability companies must be wound up and a new entity established in the new state of incorporation. Therefore, the possibility for an SE incorporated under the Hungarian law to transfer its registered office outside that jurisdiction is a point in its favour. In such a case, the Hungarian legislator has nevertheless chosen to specifically extend the protection of the minority shareholders due to the specific cross-border nature of the transfer.

- **Organisation and management**

Under Hungarian law, the national public limited-liability companies may choose between the one-tier and the two-tier systems. Therefore, Hungary is familiar with both corporate governance structures.

In addition and as a general principle, the rules applicable to the organisation and management of the SE under Hungarian law are in line with (or similar to) those of the national public limited-liability company. Any deviations from this general principle tend towards more flexibility for the SE (e.g.: possibility of nominating one member of the supervisory board to act as a member of the management organ in the case of a vacancy on the latter, possibility for the first general meeting of shareholders of an SE to be held at any time in the 18 months following incorporation).

- **Miscellaneous**

The Hungarian legislator has not implemented the option allowing a company the administrative office of which is not in the EU / EEA to participate in the formation of an SE. In addition, he has not opted for the requirement that the registered office and head office of the SE be located in the same place.

Drivers for setting up SEs:

- Positive drivers

No specific legal, tax or social measures to encourage the creation of SEs have been set up under Hungarian law.

- Negative drivers

The provisions on employee representation within the SE and the related procedure can be considered as more stringent than those of the Act on Business Associations pertaining to public limited-liability companies.

General conclusion:

The rules applicable to the creation of an SE incorporated in Hungary appear more complex and burdensome than those applicable to a national public limited-liability company. Once created, the daily running of an SE incorporated in Hungary is very similar to the daily running of a national public limited-liability company. The limited success of the SE Statute in Hungary can be explained by the fact that it does not provide any significant added value.

.4.1.13 Italy

0 SEs registered in Italy (as at 15 April 2009)

As regards the inter Member State analysis, Italy is characterised by one of the highest level of attractiveness in respect of national legislation applicable to the SE and by one of the highest level of attractiveness as regards the implementation (or non-implementation) of the options left open by the SE Regulation. When implementing (or not implementing) the options left open by the SE Regulation, Italy has even tended to increase its overall attractiveness.

As regards the intra Member State analysis, Italy is characterised by a relatively high level of attractiveness of the SE compared to the domestic public limited-liability company.

Legal mapping conclusions:

- **Methods of formation of the SE**

Since the EC Regulation governing SEs has not been enacted by any specific Italian law, the whole regulation directly applies. Notwithstanding the specific conditions for the formation of an SE, as a general principle, the provisions applicable to the formation of an SE under the Regulation (by merger, conversion, but not by the formation of a common holding company or common subsidiary which does not apply in the incorporation of Italian public limited-liability companies) and those applicable to a national public limited-liability company are similar in several aspects. When choosing not to implement the options left open by the EC Regulation, the Italian legislator did not provide for any specific provisions applying to the incorporation of an SE so that the provisions of the Regulation apply, which basically align the rules of formation with those of the national public limited-liability company.

- **Transfer of registered office**

According to Italian law, a national public limited-liability company can transfer its registered office out of the member state where it is incorporated, provided that – in any such case – dissenting shareholders are entitled to withdraw. Therefore, the possibility of the transfer of the registered office outside Italy is not specifically reserved for the SE.

- **Organisation and management**

It should be noted that both the one-tier and the two-tier systems were introduced for national public limited-liability companies by a legislative decree of 2003. Therefore, both corporate governance structures are present in Italian national law. As a general principle, the rules applicable to the organisation and management of a national public limited-liability company are in line with (or similar to) those set by the SE Regulation. Any deviations from this general principle tend towards more flexibility for the SE (e.g.: no requirement as regards the maximum or minimum number of corporate organs whereas such requirements exist for national public limited-liability companies, and the possibility for one or more shareholders together holding 10% of the subscribed capital to request that one or more additional items be put on the agenda of any general meetings of shareholders).

- **Miscellaneous**

A company whose head office is not in the EU can participate in the incorporation of an Italian public limited-liability company provided that the reciprocity condition is met with reference to the relationships between the country concerned and Italy.

Provided that the Italian legislator has not enacted any specific provision with reference to the incorporation of SE, the Regulation shall apply to the case at issue. In addition, he has not opted for the requirement that the registered office and head office of the SE be in the same place.

Drivers for setting up SEs:

- Positive drivers

There are no specific positive drivers: indeed no specific legal measures to encourage the creation of SEs have been set up under Italian law.

- Negative drivers

The provisions on employee representation within the SE and the procedure attached thereto are considered as very complex and cumbersome.

General conclusion:

The rules applicable to the SE appear less attractive than those of the national public limited-liability company since, firstly, the provisions applying to the SE are (i) more cumbersome, (ii) technically more complex and (iii) extremely distant from the local provisions applying to joint stock companies and, secondly, the mandatory involvement of employees in the corporate structure is not provided for in the Italian legal system.

.4.1.14 Latvia

4 SEs registered in Latvia (as at 15 April 2009)

As regards the inter Member State analysis, Latvia is characterised by a medium-low level of attractiveness in respect of national legislation applicable to the SE and by a medium-low level of attractiveness as regards the implementation (or non-implementation) of the options left open by the SE Regulation. When implementing (or not implementing) the options left open by the SE Regulation, Latvia has tended to reduce its overall attractiveness.

As regards the intra Member State analysis, Latvia is characterised by a medium level of attractiveness of the SE compared to the domestic public limited-liability company.

Legal mapping conclusions:

- **Methods of formation of the SE**

Notwithstanding the specific conditions for the formation of an SE, as a general principle, the provisions applicable to the formation of the SE are similar to those applicable to the national public limited-liability company. However, concerning the formation by merger, the rules applicable to the SE are more stringent since the State Revenue Service and / or Financial Capital and Markets Commission may oppose the merger.

- **Transfer of registered office**

According to Latvian law, a national public limited-liability company cannot transfer its registered office out of the member state where it is incorporated. Therefore, the possibility for an SE incorporated under Latvian law to transfer its registered office outside that jurisdiction is a point in its favour. The Latvian legislator has nevertheless chosen to extend the protection of various stakeholders (minority shareholders, holders of other rights and public authorities) due to the specific cross-border nature of the transfer.

- **Organisation and management**

Latvian company law regarding the public limited-liability company provides for the two-tier system only. Specific provisions have been incorporated so as to allow an SE under Latvian law to opt for the one-tier system. In principle, the provisions of the national law applicable to the management organ of a public limited-liability company apply to an SE under the one-tier system (the only specific provision for the SE under the one-tier system is the requirement that the management organ is elected by the shareholders' meeting).

As a general principle, the rules applicable to the organisation and management of the SE under Latvian law are similar to those of the national public limited-liability company. There is a deviation from this general principle concerning the maximum or minimum number of members of the supervisory organ in the two-tier system which tends towards more flexibility for the SE. Moreover, it should be noted that, surprisingly, the Latvian legislator has not implemented the option concerning the convening rights for minority shareholders holding less than 10% of an SE's subscribed capital while the rules applicable to public limited-liability allow shareholders together representing 1/20th of the share capital to request the convening of a general meeting.

- **Miscellaneous**

The registered office indicated in the articles of association of the SE cannot be dissociated from its head office, which is, in principle, in conformity with the rules applicable to national public limited-liability companies.

The Latvian legislator has not implemented the option allowing a company the administrative office of which is not in the EU / EEA to participate in the formation of an SE.

Drivers for setting up SEs:

- Positive drivers

The possibility for an SE registered in Latvia to be able to "freely" transfer its registered office outside Latvia and to be able to "freely" choose between the one-tier and two-tier systems may be considered strong positive drivers.

- Negative drivers

The rules relating to the involvement of employees and the negotiating procedure are seen as more complex than for the formation of a national public limited-liability company.

General conclusion:

The rules applicable to the creation of an SE incorporated in Latvia are more complex than the rules applicable to the creation of a national public limited-liability company (i.e. employee involvement and the special negotiating body). However, once created, the daily running of an SE incorporated in Latvia is very similar to the daily running of a national public limited-liability company, except for the transfer of the registered office which is an advantage for the SE.

.4.1.15 Luxembourg

11 SEs registered in Luxembourg (as at 15 April 2009)

As regards the inter Member State analysis, Luxembourg is characterised by one of the highest level of attractiveness in respect of national legislation applicable to the SE and by one of the highest level of attractiveness as regards the implementation (or non-implementation) of the options left open by the SE Regulation. When implementing (or not implementing) the options left open by the SE Regulation, Luxembourg has even tended to increase its overall attractiveness.

As regards the intra Member State analysis, Luxembourg is characterised by a medium level of attractiveness of the SE compared to the domestic public limited-liability company.

Legal mapping conclusions:

- **Methods of formation of the SE**

Notwithstanding the specific conditions for the formation of an SE, as a general principle, the provisions applicable to the formation of an SE by merger under Luxembourg law and those applicable to a national public limited-liability company are similar. When choosing to implement or not to implement the options left open by the SE Regulation, the Luxembourg legislator did not provide for more flexibility or more stringency for the SE but simply aligned its rules of formation with those of the national public limited-liability company.

- **Transfer of registered office**

The law applicable to national public limited-liability companies refers to the "real seat doctrine" in order to determine the domicile of the company. The domicile is the place where the company's central administration is located and is deemed, until the contrary is proven, to coincide with the place of the registered office. According to Luxembourg law, the transfer of the registered office of a national public limited-liability company out of Luxembourg is possible but implies a change of nationality and therefore requires the unanimous consent of all shareholders and bondholders.

For an SE incorporated in Luxembourg, the possibility of transferring its registered office outside that jurisdiction is a point in its favour since a 2/3^{rds} majority vote of the shareholders is sufficient. Furthermore, the legislator has not chosen to extend the protection of various stakeholders to the SE despite the specific cross-border nature of the transfer.

- **Organisation and management**

The Luxembourg legislator introduced the two-tier system for national public limited-liability companies by the law of 25 August 2006, transposing the SE Regulation. Before the adoption of this law, only the one-tier system was available to the national public limited-liability companies.

As a general principle, all the provisions applicable to the organisation and management of an SE under Luxembourg law are similar to those applicable to a national public limited-liability company. There is a deviation from this general principle concerning the maximum or minimum number of corporate organs which tends towards more flexibility for the SE (no requirement as regards the maximum or minimum number of members of corporate organs except in the case of employee participation, whereas such requirements exist for national public limited-liability companies).

- Miscellaneous

The registered office indicated in the articles of association of the SE can be dissociated from its head office but both must be located in the Grand Duchy of Luxembourg (requirement from Article 7 of the SE Regulation).

The Luxembourg legislator has implemented the option allowing a company the administrative office of which is not in the EU / EEA to participate in the formation of an SE.

Drivers for setting up SEs:

- Positive drivers

The possibility for an SE registered in Luxembourg to be able to "freely" transfer its registered office outside Luxembourg may be considered a strong positive driver.

- Negative drivers

The rules relating to the involvement of employees and the negotiating procedure are seen as more complex than for the formation of a national public limited-liability company.

General conclusion:

The rules applicable to the creation of an SE incorporated in Luxembourg are more complex than the rules applicable to the creation of a national public limited-liability company (i.e. employee involvement and the special negotiating body). However, once created, the daily running of an SE incorporated in Luxembourg is very similar to the daily running of a national public limited-liability company, except for the transfer of the registered office which is less burdensome for the SE.

.4.1.16 The Netherlands

22 SEs registered in the Netherlands (as at 15 April 2009)

As regards the inter Member State analysis, the Netherlands is characterised by a medium-high level of attractiveness in respect of national legislation applicable to the SE and by a medium-high level of attractiveness as regards the implementation (or non-implementation) of the options left open by the SE Regulation. When implementing (or not implementing) the options left open by the SE Regulation, the Netherlands has tended to increase its overall attractiveness.

As regards the intra Member State analysis, the Netherlands is characterised by a medium level of attractiveness of the SE compared to the domestic public limited-liability company.

Legal mapping conclusions:

- **Methods of formation of the SE**

Notwithstanding the specific conditions for the formation of an SE, as a general principle, the provisions applicable to the formation of the SE are similar to those applicable to the national public limited-liability company. However, concerning the formation by a common holding company, the rules applicable to the SE are considered as more stringent since the SE has a higher minimum capital and that the approval of the shareholders is required.

- **Transfer of registered office**

It should be noted that a national public limited-liability company may transfer its registered office out of the jurisdiction of the Netherlands. As regards the SE, the Dutch legislator has implemented specific protection rules for various stakeholders (creditors and holders of other rights and public authorities) in the case of the transfer of the SE's registered office outside the jurisdiction of the Netherlands.

- **Organisation and management**

Dutch company law regarding the public limited-liability company provides for the two-tier system only. Specific provisions have been incorporated so as to allow an SE under Dutch law to opt for the one-tier system.

As a general principle, the rules applicable to the organisation and management of the SE under Dutch law are in line with (or similar to) those of the national public limited-liability company. The deviations from this general principle concern the requirement as regards the maximum or minimum number of members of the supervisory board (more stringent rules for SEs since a minimum of three members is required, whereas such a requirement does not exist for national public limited-liability companies), the possibility for the first general meeting of shareholders of an SE to be held at any time in the 18 months following incorporation (more flexibility for SEs), and the possibility of amending the articles of association of an SE by an absolute majority of the votes cast where at least half of an SE's subscribed capital is represented (more flexibility for SEs).

- **Miscellaneous**

The registered office indicated in the articles of association of the SE can be dissociated from its head office, which is, in principle, in conformity with the rules applicable to national public limited-liability companies.

The Dutch legislator has not implemented the option allowing a company the administrative office of which is not in the EU / EEA to participate in the formation of an SE, which may represent a significant barrier to the formation of SEs in the Netherlands.

Drivers for setting up SEs:

- Positive drivers

No specific legal, tax or social measures to encourage the creation of SEs have been set up under Dutch law. However, the possibility for an SE to be able to freely choose between the one-tier and two-tier systems may be considered a positive driver.

- Negative drivers

The rules relating to the involvement of employees and the negotiating procedure are seen as more complex than for the formation of a national public limited-liability company.

General conclusion:

The rules applicable to the creation of an SE incorporated in the Netherlands are more complex than the rules applicable to the creation of a national public limited-liability company (i.e. employee involvement and the special negotiating body). However, once created, the daily running of an SE incorporated in the Netherlands is similar to the daily running of a national public limited-liability company, except for the possibility for an SE to freely choose between the one-tier and two-tier systems which is an advantage for the SE.

.4.1.17 Norway

5 SEs registered in Norway (as at 15 April 2009)

As regards the inter Member State analysis, Norway is characterised by a medium-low level of attractiveness in respect of national legislation applicable to the SE and by a medium-high level of attractiveness as regards the implementation (or non-implementation) of the options left open by the SE Regulation. When implementing (or not implementing) the options left open by the SE Regulation, Norway has tended to improve its overall attractiveness.

As regards the intra Member State analysis, Norway is characterised by a relatively high level of attractiveness of the SE compared to the domestic public limited-liability company.

Legal mapping conclusions:

- **Methods of formation of the SE**

Notwithstanding the specific conditions for the formation of an SE, as a general principle, the provisions applicable to the formation of an SE under Norwegian law (by merger, conversion, or the formation of a common holding company or common subsidiary) and those applicable to a national public limited-liability company are similar. When choosing to implement or not to implement the options left open by the SE Regulation, the Norwegian legislator did not provide for more flexibility or more stringency for the SE but simply aligned its rules of formation with those of the national public limited-liability company.

- **Transfer of registered office**

It should be noted that it is not possible for a Norwegian company to transfer its registered office outside Norway. Therefore, the possibility for an SE incorporated under Norwegian law to transfer its registered office outside that jurisdiction is a point in its favour. The national law does not contain specific provisions on the protection for minority shareholders, creditors and holders of other rights despite the specific cross-border nature of the transfer. However, the government may oppose the transfer on grounds of public interest.

- **Organisation and management**

The Norwegian Public Limited-liability Companies Act foresees a one-tier system as long as the numbers of employees does not exceed 200. In companies with more than 200 employees a corporate assembly must be elected. Companies with a corporate assembly are considered to be organised according to a two-tier system.

Therefore, Norway is familiar with both corporate governance structures.

In addition and as a general principle, the rules applicable to the organisation and management of the SE under Norwegian law are in line with (or similar to) those of the national public limited-liability company. Any deviations from this general principle tend towards more flexibility for the SE (e.g.: possibility of nominating one member of the supervisory board to act as a member of the management organ in the case of a vacancy on the latter).

- **Miscellaneous**

The Norwegian legislator has adopted a flexible position on two specific points: first by allowing a company the administrative office of which is not in the EU / EEA to participate in the formation of an SE (provided that said 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) and second by not requiring that the registered office and head office of the SE be in the same place.

Drivers for setting up SEs:

- Positive drivers

No specific legal, tax or social measures to encourage the creation of SEs have been set up under Norwegian law. However, the possibility for an SE registered in Norway to be able to "freely" transfer its registered office outside Norway may be considered as a strong positive driver.

- Negative drivers

The setting-up of an SE which in practical terms includes the transfer of business from a Norwegian tax domicile to the tax domicile in which the SE is located, may be subject to exit or capital taxation.

General conclusion:

The rules applicable to the creation of an SE incorporated in Norway are more complex than the rules applicable to the creation of a national public limited-liability company (i.e. employee involvement and the special negotiating body) and appear rather unfamiliar to the national law regime. However, once created, the daily running of an SE incorporated in Norway is very similar to the daily running of a national public limited-liability company, except for the transfer of the registered office which is an advantage for the SE.

.4.1.18 Poland

2 SEs registered in Poland (as at 15 April 2009)

As regards the inter Member State analysis, Poland is characterised by a medium-high level of attractiveness in respect of national legislation applicable to the SE and by a medium-low level of attractiveness as regards the implementation (or non-implementation) of the options left open by the SE Regulation. When implementing (or not implementing) the options left open by the SE Regulation, Poland has tended to reduce its overall attractiveness.

As regards the intra Member State analysis, Poland is characterised by a medium level of attractiveness of the SE compared to the domestic public limited-liability company.

Legal mapping conclusions:

- **Methods of formation of the SE**

Notwithstanding the specific conditions for the formation of an SE, as a general principle, the provisions applicable to the formation of an SE under Polish law (by merger, conversion, or the formation of a common holding company or common subsidiary) and those applicable to a national public limited-liability company are similar. However, there are more stringent rules for SEs concerning the protection for minority shareholders in the case of formation by means of merger (when forming an SE, minority shareholders can request that their shares be bought out, whereas in a merger between two domestic companies this right can only be exercised in the case of a simplified merger).

- **Transfer of registered office**

According to Polish law, a national public limited-liability company cannot transfer its registered office out of the member state where it is incorporated. Therefore, the possibility for an SE incorporated under Polish law to transfer its registered office outside that jurisdiction is a point in its favour. The Polish legislator has nevertheless chosen to extend the protection of minority shareholders and public authorities (no protection for creditors and holders of other rights) due to the specific cross-border nature of the transfer.

- **Organisation and management**

Polish company law regarding public limited-liability company provides for the two-tier system only. Specific provisions have been incorporated so as to allow an SE under Polish law to opt for the one-tier system. As a general principle, the rules applicable to the organisation and management of the SE under Polish law are in line with (or similar to) those of the national public limited-liability company.

- **Miscellaneous**

The Polish legislator has adopted a flexible position on two specific points, first by allowing a company the administrative office of which is not in the EU / EEA to participate in the formation of an SE (provided that said 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) and second by not requiring that the registered office and head office of the SE be located in the same place.

Drivers for setting up SEs:

- Positive drivers

A substantial difference is the possibility of a one-tier system in the SE which is not available to Polish public limited-liability companies. A huge incentive is also the possibility of transferring the registered office of the SE abroad.

- Negative drivers

The rules applicable to the creation of an SE incorporated in Poland are seen as more complex than the rules applicable to the creation of a national public limited-liability company (i.e. employee involvement and the special negotiating body). Moreover, there is a general lack of experience as regards the rules applicable to SEs. Therefore, the latter often appear more complex and burdensome than the provisions applying to national public limited-liability companies.

General conclusion:

The rules applicable to the creation of an SE incorporated in Poland are more complex than the rules applicable to the creation of a national public limited-liability company (i.e. employee involvement and the special negotiating body). However, once created, the daily running of an SE incorporated in Poland is very similar to the daily running of a national public limited-liability company, except for the transfer of the registered office and the possibility to opt for the one-tier system which are advantages for the SE.

.4.1.19 Portugal

0 SEs registered in Portugal (as at 15 April 2009)

As regards the inter Member State analysis, Portugal is characterised by a medium-high level of attractiveness in respect of national legislation applicable to the SE and by a low level of attractiveness as regards the implementation (or non-implementation) of the options left open by the SE Regulation. When implementing (or not implementing) the options left open by the SE Regulation, Portugal has reduced its overall attractiveness.

As regards the intra Member State analysis, Portugal is characterised by a low level of attractiveness of the SE compared to the domestic public limited-liability company.

Legal mapping conclusions:

- **Methods of formation of the SE**

Notwithstanding the specific conditions for the formation of an SE, as a general principle, the provisions applicable to the formation of an SE by way of conversion or by the formation of a common subsidiary are similar to those applicable to national public limited-liability companies. As regards formation by merger or by the formation of a common holding company, the rules applicable to the SE are more stringent than those applicable to national public limited-liability companies, due to the increased protection granted to specific stakeholders (pubic authorities, minority shareholders and creditors).

- **Transfer of registered office**

It is not possible for a Portuguese company to transfer its registered office outside Portugal. Therefore, the possibility for an SE incorporated under Portuguese law to transfer its registered office outside that jurisdiction is a point in its favour. The legislator has nevertheless chosen to extend the protection of various stakeholders (minority shareholders and public authorities) due to the specific cross-border nature of the transfer.

- **Organisation and management**

Under Portuguese law, the national public limited-liability companies may choose between the one-tier and the two-tier systems. Therefore, Portugal is familiar with both corporate governance structures. As a general principle, the rules on organisation and management are similar for the SE and the national public limited-liability companies under Portuguese law.

- **Miscellaneous**

The Portuguese legislator has not implemented the option allowing a company the administrative office of which is not in the EU / EEA to participate in the formation of an SE. In addition, he has not specifically required that the registered office and head office of the SE be located in the same place.

Drivers for setting up SEs:

- **Positive drivers**

No specific legal, tax or social measures to encourage the creation of SEs have been set up under Portuguese law regime.

- Negative drivers

There is a general lack of experience as regards the rules applicable to SEs. Therefore, the latter often appear more complex and burdensome than the provisions applying to national public limited-liability companies.

General conclusion:

The rules applicable to the creation of an SE incorporated in Portugal are more complex than the rules applicable to the creation of a national public limited-liability company (i.e. employee involvement and the special negotiating body, and rules on the protection of specific stakeholders). Conversely, no particular advantages linked to the SE Statute are considered as significantly outweighing the complexity of the rules of formation.

.4.1.20 Romania

0 SEs registered in Romania (as at 15 April 2009)

As regards the inter Member State analysis, Romania is characterised by a medium-high level of attractiveness in respect of national legislation applicable to the SE and by a medium-low level of attractiveness as regards the implementation (or non-implementation) of the options left open by the SE Regulation. When implementing (or not implementing) the options left open by the SE Regulation, Romania has tended to reduce its overall attractiveness.

As regards the intra Member State analysis, Romania is characterised by one of the lowest level of attractiveness of the SE compared to the domestic public limited-liability company.

Legal mapping conclusions:

- **Methods of formation of the SE**

Notwithstanding the specific conditions for the formation of an SE, as a general principle, the provisions applicable to the formation of an SE under Romanian law (by merger, conversion, or the formation of a common holding company or common subsidiary) and those applicable to a national public limited-liability company are similar. When choosing to implement or not to implement the options left open by the EC Regulation, the Romanian legislator did not provide for more flexibility or more stringency for the SE but simply aligned its rules of formation with those of the national public limited-liability company.

- **Transfer of registered office**

According to Romanian law, a national public limited-liability company can transfer its registered office out of the member state where it is incorporated. Therefore, this possibility is not specifically reserved for the SE. The Romanian legislator has not specifically chosen to extend the protection of the stakeholders in the case of transfer of the registered office of an SE as the protections granted are similar to those applicable in the case of transfer of the registered office of a national public limited-liability company.

- **Organisation and management**

Under Romanian law, the national public limited-liability companies may choose between the one-tier and the two-tier systems. Therefore, Romania is familiar with both corporate governance structures. As a general principle, the rules on organisation and management are similar for the SE and the national public limited-liability companies under Romanian law.

- **Miscellaneous**

The Romanian legislator has not implemented the option allowing a company the administrative office of which is not in the EU / EEA to participate in the formation of an SE. In addition, he has not opted for the requirement that the registered office and head office of the SE be located in the same place.

Drivers for setting up SEs:

- Positive drivers

No specific legal, tax or social measures to encourage the creation of SEs have been set up under Romanian law.

- Negative drivers

There are no legal provisions pertaining to tax or social measures that might discourage the creation of SEs. However, the minimum share capital of EUR 120,000 might be considered excessive by investors.

General conclusion:

In general, the rules applicable to the creation and daily running of an SE incorporated in Romania are more complex than the rules applicable to the creation of a national public limited-liability company. Considering the process of setting-up of an SE that has to be complied with, the requirements introduced by the SE Regulation and Directive might be considered as restrictive by many investors. The main deterrents seem to be the administrative formalities to be carried out in each of the host states of companies involved in the formation of an SE. Parties to this process have to be driven by well founded interests in order to complete the entire corporate/judiciary procedure. In this respect, conversion would be the only procedure involving fewer administrative formalities.

Particular reference should be made to the impossibility of incorporating an SE in the absence of an agreement relating to the employee involvement in the company activities (Article 270 (2) b)2) of Company Law 31/1990 as further amended).

.4.1.21 Slovakia

13 SEs registered in Slovakia (as at 15 April 2009)

As regards the inter Member State analysis, Slovakia is characterised by a relatively high level of attractiveness in respect of national legislation applicable to the SE and by a medium-low level of attractiveness as regards the implementation (or non-implementation) of the options left open by the SE Regulation. When implementing (or not implementing) the options left open by the SE Regulation, Slovakia has tended to reduce its overall attractiveness.

As regards the intra Member State analysis, Slovakia is characterised by a relatively high level of attractiveness of the SE compared to the domestic public limited-liability company.

Legal mapping conclusions:

- **Methods of formation of the SE**

Notwithstanding the specific conditions for the formation of an SE, as a general principle, the provisions applicable to the formation of an SE under Slovak law (by merger, conversion, or the formation of a common holding company or common subsidiary) and those applicable to a national public limited-liability company are similar. When choosing to implement or not to implement the options left open by the EC Regulation, the Slovak legislator did not provide for more flexibility or more stringency for the SE but simply aligned its rules of formation with those of the national public limited-liability company.

- **Transfer of registered office**

It is not possible for a national public limited-liability company incorporated in the Slovak Republic to transfer its registered office outside Slovakia. Therefore, the possibility for an SE incorporated in Slovakia to transfer its registered office outside that jurisdiction is a point in its favour. The legislator has nevertheless chosen to specifically extend the protection of the minority shareholders due to the specific cross-border nature of the transfer.

- **Organisation and management**

The national law of Slovakia does not contain any provisions concerning the one-tier corporate governance structure in relation to public limited-liability companies. Appropriate measures have been implemented in Slovak law (SE Act) so that the one-tier corporate governance structure is available, but only to SEs. As a general principle, all the provisions applicable to the organisation and management of an SE under Slovak law are similar to those applicable to a national public limited-liability company. Specific rules are however provided for in the case of vacancy as a member of the management organ, where in such a case, a member of the supervisory board may exercise the functions of a member of the management for a maximum period of one year.

- **Miscellaneous**

The Slovak legislator has adopted a flexible position by allowing a company the administrative office of which is not in the EU / EEA to participate in the formation of an SE (provided that said 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). In addition, he has not opted for the requirement that the registered office and head office of the SE be located in the same place; however, both the registered office and the head office must be located in the same Member State, otherwise the court may dissolve the company.

Drivers for setting up SEs:

- Positive drivers

No specific legal, tax or social measures to encourage the creation of SEs have been set up under Slovak law.

- Negative drivers

No specific negative drivers have been identified as regards the legal regime of the SE under Slovak law.

General conclusion:

The rules applicable to the SE appear less attractive than those of the national public limited-liability company since the provisions applying to SEs are (i) more cumbersome, (ii) technically more complex and (iii) sometimes more stringent than the local provisions applying to national public limited-liability companies (e.g.: quorum for the SEs' general meetings of shareholders where at least half of the members must be present, threat of dissolution if the SE's head office and registered office are located in different Member States). On the other hand, as opposed to national public limited-liability companies, SEs have the advantage of being able to choose the one-tier system for their corporate governance.

.4.1.22 Slovenia

0 SEs registered in Slovenia (as at 15 April 2009)

As regards the inter Member State analysis, Slovenia is characterised by a medium-low level of attractiveness in respect of national legislation applicable to the SE and by a medium-high level of attractiveness as regards the implementation (or non-implementation) of the options left open by the SE Regulation. When implementing (or not implementing) the options left open by the SE Regulation, Slovenia has tended to improve its overall attractiveness.

As regards the intra Member State analysis, Slovenia is characterised by a low level of attractiveness of the SE compared to the domestic public limited-liability company.

Legal mapping conclusions:

- **Methods of formation of the SE**

Notwithstanding the specific conditions for the formation of an SE, as a general principle, the provisions applicable to the formation of an SE by way of conversion or by the formation of a common subsidiary are similar to those applicable to national public limited-liability companies. As regards formation by merger or by the formation of a common holding company, the rules applicable to the SE are more stringent than those applicable to national public limited-liability companies, due to the increased protection granted to specific stakeholders.

- **Transfer of registered office**

According to Slovenian law, the transfer of the registered office is only permitted within the framework of the cross-border merger. Therefore, the possibility for an SE incorporated under Slovenian law to transfer its registered office outside that jurisdiction is a point in its favour. The legislator has nevertheless chosen to specifically extend the protection of minority shareholders in such a case, due to the specific across-border nature of the transfer.

- **Organisation and management**

Under Slovenian law, the national public limited-liability companies may opt between the one-tier management system by appointing a board of directors and the two-tier management system by appointing a management and supervisory board. Therefore, Slovenia is familiar with both corporate governance structures.

As a general principle, all the provisions applicable to the organisation and management of an SE under Slovenian law are similar to those applicable to a national public limited-liability company.

- **Miscellaneous**

The Slovenian legislator has not implemented the option allowing a company the administrative office of which is not in the EU / EEA to participate in the formation of an SE. In addition, he has not specifically required that the registered office and head office of the SE be located in the same place.

Drivers for setting up SEs:

- Positive drivers

No specific legal, tax or social measures to encourage the creation of SEs have been set up under Slovenian law.

- Negative drivers

There is a general lack of experience as regards the rules applicable to SEs. Therefore, the latter often appear more complex and burdensome than the provisions applying to national public limited-liability companies.

General conclusion:

The national law of Slovenia provides for an appropriate framework for the formation of an SE since it does not impose more stringent rules for the establishment of an SE than for that of a public limited-liability company. Nevertheless, such a situation may discourage the creation of SEs due in particular to the lack of any incentives and therefore the non-significant added value of the SE legal form compared to the national public limited-liability company.

.4.1.23 Spain

1 SE registered in Spain (as at 15 April 2009)

As regards the inter Member State analysis, Spain is characterised by a medium-high level of attractiveness in respect of national legislation applicable to the SE and by a medium-low level of attractiveness as regards the implementation (or non-implementation) of the options left open by the SE Regulation. When implementing (or not implementing) the options left open by the SE Regulation, Spain has tended to reduce its overall attractiveness.

As regards the intra Member State analysis, Spain is characterised by a high level of attractiveness of the SE compared to the domestic public limited-liability company.

Legal mapping conclusions:

- **Methods of formation of the SE**

Notwithstanding the specific conditions for the formation of an SE, as a general principle, the provisions applicable to the formation of an SE by conversion or by the formation of a common holding company or common subsidiary are similar to those applicable to national public limited-liability companies. As regards formation by merger, the rules applicable to the SE are more stringent than those applicable to mergers between national public limited-liability companies, due to the increased protection granted to specific stakeholders (in particular minority shareholders).

- **Transfer of registered office**

According to Spanish law, a national public limited-liability company can transfer its registered office out of the member state where it is incorporated. Therefore, this possibility is not specifically reserved for the SE. The Spanish legislator has nevertheless chosen to extend the protection of the various stakeholders in such a case (public authorities, creditors and holders of other rights) due to the specific international nature of the transaction.

- **Organisation and management**

The only available corporate governance structure for Spanish public limited-liability companies is the one-tier system. Specific measures have been adopted in Spanish law to implement the two-tier corporate governance structure but only in relation to SEs. As a general principle, all the provisions applicable to the organisation and management of an SE under Spanish law are similar to those applicable to a national public limited-liability company.

- **Miscellaneous**

The Spanish legislator has adopted a flexible position on two specific points. First, he has allowed a company the administrative office of which is not in the EU / EEA to participate in the formation of an SE (provided that said 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). Second, he has not specifically required that the registered office and head office of the SE be in the same place, whereas public limited-liability companies under Spanish law must have their registered office where the effective management and administration are located.

Drivers for setting up SEs:

- Positive drivers

No specific legal, tax or social measures to encourage the creation of SEs have been set up under Spanish law. However, the possibility for an SE to be able to freely choose between the one-tier and two-tier systems may be considered as positive drivers.

- Negative drivers

There is a general lack of experience as regards the rules applicable to SEs. Therefore, the latter often appear more complex and burdensome than the provisions applying to national public limited-liability companies.

General conclusion:

The rules applicable to the creation of an SE incorporated in Spain are more complex than the rules applicable to the creation of a national public limited-liability company (i.e. employee involvement and the special negotiating body). This increased complexity is generally not considered as outweighed by the advantages relating to the daily running of an SE incorporated in Spain.

.4.1.24 Sweden

6 SEs registered in Sweden (as at 15 April 2009)

As regards the inter Member State analysis, Sweden is characterised by a relatively low level of attractiveness in respect of national legislation applicable to the SE and by a medium-high level of attractiveness as regards the implementation (or non-implementation) of the options left open by the SE Regulation. When implementing (or not implementing) the options left open by the SE Regulation, Sweden has tended to increase its overall attractiveness.

As regards the intra Member State analysis, Sweden is characterised by a relatively high level of attractiveness of the SE compared to the domestic public limited-liability company.

Legal mapping conclusions:

- **Methods of formation of the SE**

Notwithstanding the specific conditions for the formation of an SE, as a general principle, the provisions applicable to the formation of an SE under Swedish law (by merger, conversion, or the formation of a common holding company or common subsidiary) and those applicable to a national public limited-liability company are similar. When choosing to implement or not to implement the options left open by the EC Regulation, the Swedish legislator did not provide for more flexibility or more stringency for the SE but simply aligned its rules of formation with those of the national public limited-liability company.

- **Transfer of registered office**

According to Swedish law, a national public limited-liability company can transfer its registered office out of the member state where it is incorporated. Therefore, this possibility is not specifically reserved for the SE. The Swedish legislator has nevertheless chosen to extend the protection of the various stakeholders in such a case (public authorities, creditors and holders of other rights) due to the specific international nature of the operation.

- **Organisation and management**

The only available corporate governance structure for Swedish public limited-liability companies is the one-tier system. Appropriate measures have been adopted in Swedish law relating to procedure, by reference to rules regarding the board of directors, and relating to substance, by creating new rules on supervision. Thus, the two-tier corporate governance structure is available in Swedish law but only for the SE. As a general principle, all the provisions applicable to the organisation and management of an SE under Swedish law are similar to those applicable to a national public limited-liability company.

- **Miscellaneous**

The Swedish legislator has implemented the option allowing a company the administrative office of which is not in the EU to participate in the formation of an SE but only for companies set up according to the law of an EEA State (provided that said company has its registered office in the concerned Member State of the EEA and has a real and continuous link with a Member State's economy). In addition, he has not specifically required that the registered office and head office of the SE be located in the same place.

Drivers for setting up SEs:

- Positive drivers

No specific legal, tax or social measures to encourage the creation of SEs have been set up under Swedish law. However, the possibility for an SE to be able to freely choose between the one-tier and two-tier systems may be considered positive drivers.

- Negative drivers

There is a general lack of experience as regards the rules applicable to SEs. Therefore, the latter appear often more complex and burdensome than the provisions applying to national public limited-liability companies.

General conclusion:

The rules applicable to the creation and daily running of an SE incorporated in Sweden are more complex than the rules applicable to the creation of a national public limited-liability company. This is chiefly due to the law finding methods (hierarchy of the norms referred to in Article 9 of the SE Regulation) and the employee representation rules. This increased complexity is generally not considered as outweighed by the advantages relating to the daily running of an SE incorporated in Sweden.

.4.1.25 The United Kingdom

16 SEs registered in the United Kingdom (as at 15 April 2009)

As regards the inter Member State analysis, the United Kingdom is characterised by one of the highest level of attractiveness in respect of national legislation applicable to the SE and by a medium-high level of attractiveness as regards the implementation (or non-implementation) of the options left open by the SE Regulation. When implementing (or not implementing) the options left open by the SE Regulation, the United Kingdom has tended to reduce its overall attractiveness.

As regards the intra Member State analysis, the United Kingdom is characterised by one of the highest level of attractiveness of the SE compared to the domestic public limited-liability company.

Legal mapping conclusions:

- **Methods of formation of the SE**

Notwithstanding the specific conditions for the formation of an SE, as a general principle, the provisions applicable to the formation of an SE under the law of the United Kingdom (by merger, conversion, or the formation of a common holding company or common subsidiary) and those applicable to a national public limited-liability company are similar. When choosing to implement or not to implement the options left open by the EC Regulation, the legislator did not provide for more flexibility or more stringency for the SE but simply aligned its rules of formation with those of the national public limited-liability company.

- **Transfer of registered office**

It is not possible to arrange for a private limited company or a public limited company which is incorporated in England or Wales to transfer its registered office to another Member State without winding up its operations in the UK and re-registering in another Member State. This is in contrast to an SE registered with the Registrar of Companies in England and Wales which has the option of transferring its registered office to another Member State. However the procedure for transferring the registered office of an SE is complex and is subject to various provisions which ensure the protection of stakeholders (e.g. creditors and shareholders) – the Secretary of State may also oppose any transfer application in order to protect the public interest. Any decision to oppose a transfer is subject to judicial review.

- **Organisation and management**

The two-tier system of management is not common within UK companies, and English company law does not recognise two-tier board structures. Any references to a Director in English company law and/or other legislation applied by the SE Regulation are deemed to be references to both members of the supervisory and the management board of an SE with a two-tier structure. In general, rules relating to Directors of an SE are similar to those which would apply to Directors of a public limited company under English law.

Drivers for setting up SEs:

- **Positive drivers**

There are no specific legal, tax or social measures which would encourage the creation of SEs in England and Wales.

- Negative drivers

There are a number of potential disadvantages - the main problem which discourages the use of the legal form of the SE is that there are no equivalent employee involvement requirements under English law.

General conclusion:

The rules applicable to the SE appear less attractive than those which apply to a national public limited-liability company because provisions which apply to an SE are (i) generally more cumbersome, (ii) technically more complex and (iii) distant from provisions which otherwise apply to UK companies. Particularly, neither the high level of employee involvement nor optional two-tier governance structure is common in the UK.

4.2 Legal mapping overview

The table hereunder provides an overview of the main differences between the Member States regarding the rules applicable to the SE and the highlights in terms of attractiveness of the SE Statute compared to the domestic public limited-liability company:

		Method of formation of the SE	Transfer of registered office of the SE	Structure of the SE (organisation and management)	Miscellaneous
MEMBER STATES	AT	Notwithstanding the specificities of the SE, similar rules to domestic Plcs	Advantage for the SE (cross-border transfer of registered office of a Plc not possible)	Similar rules to domestic Plcs. Advantage for the SE for which the one-tier corporate structure is possible	Does not allow a company with head office outside the EU to participate in the formation of an SE Requirement of same place for registered office and head office of the SE
	BE	Notwithstanding the specificities of the SE, slightly more stringent rules than domestic Plcs due to specific protection of stakeholders	Advantage for the SE (laxer rules for the cross-border transfer of registered office) but increased protection of the public authorities justified by the cross-border situation	Generally more flexible rules for the SE than those of domestic Plcs Advantage for the SE for which the two-tier corporate structure is possible	Allows a company with head office outside the EU to participate in the formation of an SE No requirement of same place for registered office and head office of the SE
	BG	Notwithstanding the specificities of the SE, similar rules to domestic Plcs	Advantage for the SE (the cross-border transfer of registered office of Plc being not possible as such – the Plc remaining subject to Bulgarian law)	Similar rules to domestic Plc but slightly more flexible for the SE than those of domestic Plcs	Does not allow a company with head office outside the EU to participate in the formation of an SE Requirement of same place for registered office and head office of the SE
	CY	Notwithstanding the specificities of the SE, similar rules to domestic Plcs	Advantage for the SE (laxer rules for the cross-border transfer of registered office) but increased protection of all the stakeholders justified by the cross-border situation	Generally more flexible rules for the SE than those of domestic Plcs Advantage for the SE for which the one-tier corporate structure is possible	Does not allow a company with head office outside the EU to participate in the formation of an SE No requirement of same place for registered office and head office of the SE
	CZ	Notwithstanding the specificities of the SE, similar rules to domestic Plcs	Comparable rules to domestic Plcs	Generally more flexible rules for the SE than those of domestic Plcs Advantage for the SE for which the one-tier corporate structure is possible	Allows a company with head office outside the EU to participate in the formation of an SE Requirement of same place for registered office and head office of the SE
	DE	Notwithstanding the specificities of the SE, similar rules to domestic Plcs	Advantage for the SE (cross-border transfer of registered office of a Plc not possible) but increased protection of all the stakeholders justified by the cross-border situation	Generally more flexible rules for the SE than those of domestic Plcs Advantage for the SE for which the one-tier corporate structure is possible	Does not allow a company with head office outside the EU to participate in the formation of an SE Requirement of same place for registered office and head office of the SE

		Method of formation of the SE	Transfer of registered office of the SE	Structure of the SE (organisation and management)	Miscellaneous
	DK	Notwithstanding the specificities of the SE, slightly more stringent rules than domestic Plcs due to specific protection of stakeholders	Advantage for the SE (cross-border transfer of registered office of a Plc not possible) but increased protection of all the stakeholders justified by the cross-border situation	Generally more flexible rules for the SE than those of domestic Plcs Advantage for the SE for which the two-tier corporate structure is possible	Allows a company with head office outside the EU to participate in the formation of an SE Requirement of same place for registered office and head office of the SE
	EE	Notwithstanding the specificities of the SE, similar rules to domestic Plcs	Similar rules to domestic Plcs	Generally more flexible rules for the SE than those of domestic Plcs Advantage for the SE for which the one-tier corporate structure is possible	Does not allow a company with head office outside the EU to participate in the formation of an SE No requirement of same place for registered office and head office of the SE
	EL	More stringent rules than domestic Plcs due to specific protection of stakeholders	Advantage for the SE (cross-border transfer of registered office of a Plc not possible) but increased protection of all the stakeholders justified by the cross-border situation	Similar rules to domestic Plcs. The specific two-tier corporate structure for the SE has not been adopted	Allows a company with head office outside the EU to participate in the formation of an SE Requirement of same place for registered office and head office of the SE
	ES	Notwithstanding the specificities of the SE, slightly more stringent rules than domestic Plcs due to specific protection of stakeholders	Similar rules to domestic Plcs but increased protection of all the stakeholders	Similar rules to domestic Plcs. Advantage for the SE for which the two-tier corporate structure is possible	Allows a company with head office outside the EU to participate in the formation of an SE No requirement of same place for registered office and head office of the SE
	FI	Notwithstanding the specificities of the SE, similar rules to domestic Plcs	Advantage for the SE (cross-border transfer of registered office of a Plc not possible) but increased protection of all the stakeholders justified by the cross-border situation	Similar rules to domestic Plcs	Allows a company with head office outside the EU to participate in the formation of an SE No requirement of same place for registered office and head office of the SE
	FR	Notwithstanding the specificities of the SE, similar rules to domestic Plcs apart from the formation of a holding SE which is subject to more stringent rules	Advantage for the SE (laxer rules for the cross-border transfer of registered office) but increased protection of the creditors and the public authorities justified by the cross-border situation	Similar rules to domestic Plcs but slightly more flexible for the SE than those of domestic Plcs	Does not allow a company with head office outside the EU to participate in the formation of an SE Requirement of same place for registered office and head office of the SE
	HU	Notwithstanding the specificities of the SE, similar rules to domestic Plcs	Advantage for the SE (cross-border transfer of registered office of a Plc not possible) but increased protection of the minority shareholders justified by the cross-border situation	Similar rules to domestic Plcs but slightly more flexible for the SE than those of domestic Plcs	Does not allow a company with head office outside the EU to participate in the formation of an SE No requirement of same place for registered office and head office of the SE

		Method of formation of the SE	Transfer of registered office of the SE	Structure of the SE (organisation and management)	Miscellaneous
MEMBER STATES	IT	Notwithstanding the specificities of the SE, similar rules to domestic Plcs	Advantage for the SE (laxer rules for the cross-border transfer of registered office) but increased protection of the minority shareholders justified by the cross-border situation	Similar rules to domestic Plcs but slightly more flexible for the SE than those of domestic Plcs	Allows a company with head office outside the EU to participate in the formation of an SE No requirement of same place for registered office and head office of the SE
	LU	Notwithstanding the specificities of the SE, similar rules to domestic Plcs	Advantage for the SE (laxer rules for the cross-border transfer of registered office) and no specific protection for stakeholders	Similar rules to domestic Plcs but slightly more flexible for the SE than those of domestic Plcs	Allows a company with head office outside the EU to participate in the formation of an SE No requirement of same place for registered office and head office of the SE
	LV	Notwithstanding the specificities of the SE, slightly more stringent rules than domestic Plcs justified by the cross-border situation	Advantage for the SE (cross-border transfer of registered office of a Plc not possible) but complexity of the procedure	Generally more flexible rules for the SE than those of domestic Plcs Advantage for the SE for which the one-tier corporate structure is possible	Does not allow a company with head office outside the EU to participate in the formation of an SE Requirement of same place for registered office and head office of the SE
	NL	Notwithstanding the specificities of the SE, similar rules to domestic Plcs apart from the formation of a holding SE which is subject to more stringent rules	Similar rules to domestic Plcs but increased protection of all the stakeholders	Generally more flexible rules for the SE than those of domestic Plcs Advantage for the SE for which the one-tier corporate structure is possible	Does not allow a company with head office outside the EU to participate in the formation of an SE No requirement of same place for registered office and head office of the SE
	NO	Notwithstanding the specificities of the SE, similar rules to domestic Plcs	Advantage for the SE (cross-border transfer of registered office of a Plc not possible) but increased protection of the public authorities justified by the cross-border situation	Similar rules to domestic Plcs but slightly more flexible for the SE than those of domestic Plcs	Allows a company with head office outside the EU to participate in the formation of an SE No requirement of same place for registered office and head office of the SE
	PL	Notwithstanding the specificities of the SE, slightly more stringent rules than domestic Plcs due to specific protection of stakeholders	Advantage for the SE (cross-border transfer of registered office of a Plc not possible) but increased protection of the minority shareholders and public authorities justified by the cross-border situation	Similar rules to domestic Plcs. Advantage for the SE for which the one-tier corporate structure is possible	Allows a company with head office outside the EU to participate in the formation of an SE No requirement of same place for registered office and head office of the SE
	PT	Notwithstanding the specificities of the SE, slightly more stringent rules than domestic Plcs due to specific protection of stakeholders	Advantage for the SE (cross-border transfer of registered office of a Plc not possible) but increased protection of the minority shareholders and the public authorities and complexity of the procedure	Similar rules to domestic Plcs	Does not allow a company with head office outside the EU to participate in the formation of an SE No requirement of same place for registered office and head office of the SE

		Method of formation of the SE	Transfer of registered office of the SE	Structure of the SE (organisation and management)	Miscellaneous
MEMBER STATES	RO	Notwithstanding the specificities of the SE, similar rules to domestic Plcs	Similar rules to domestic Plcs	Similar rules to domestic Plcs	Does not allow a company with head office outside the EU to participate in the formation of an SE No requirement of same place for registered office and head office of the SE
	SE	Notwithstanding the specificities of the SE, similar rules to domestic Plcs	Similar rules to domestic Plcs but increased protection of all the stakeholders	Similar rules to domestic Plcs. Advantage for the SE for which the two-tier corporate structure is possible	Allows a company with head office outside the EU to participate in the formation of an SE No requirement of same place for registered office and head office of the SE
	SI	Notwithstanding the specificities of the SE, slightly more stringent rules than domestic Plcs justified by the cross-border situation	Similar rules to domestic Plcs but increased protection of the minority shareholders	Similar rules to domestic Plcs	Does not allow a company with head office outside the EU to participate in the formation of an SE No requirement of same place for registered office and head office of the SE
	SK	Notwithstanding the specificities of the SE, similar rules to domestic Plcs	Advantage for the SE (cross-border transfer of registered office of a Plc not possible) but increased protection of all the stakeholders justified by the cross-border situation	Generally more flexible rules for the SE than those of domestic Plcs Advantage for the SE for which the one-tier corporate structure is possible	Allows a company with head office outside the EU to participate in the formation of an SE No requirement of same place for registered office and head office of the SE
	UK	Notwithstanding the specificities of the SE, slightly more stringent rules than domestic Plcs justified by the cross-border situation	Advantage for the SE (cross-border transfer of registered office of a Plc not possible) but complexity of the procedure	Generally more stringent rules for the SE than those of domestic Plcs Advantage for the SE for which the two-tier corporate structure is possible	Allows a company with head office outside the EU to participate in the formation of an SE No requirement of same place for registered office and head office of the SE
General Trends		Notwithstanding the specificities of the SE, generally, similar rules for the SE and for the domestic Plcs but slightly more stringency due to the specific protection of stakeholders (in the cross-border context)	The cross-border transfer of registered office is an advantage for the SE over the domestic Plcs in the Member States where it is not possible for domestic companies or possible under very stringent rules.	The rules applicable to the SE are generally similar or slightly more flexible than those of domestic Plcs in all Member States. The availability of the specific one-tier or two-tier systems for the SE is generally an advantage.	No general trend identified as regards the possibility for a company with head office outside the EU to participate in the formation of an SE. Generally no requirement of having the same place for the registered office and head office of the SE.

In conclusion and notwithstanding the specificities linked directly to the SE Statute, it can be seen that in accordance with Article 10 of the SE Regulation, the SE is basically treated in all the Member States covered by our Study as if it were a domestic public limited-liability company. In the vast majority of cases and Member States, the status of the SE is similar to the status of domestic public limited-liability companies.

Regarding the methods of formation and conditions of transfer of the SE's registered office, several Member States provide the SE with a higher protection for minority shareholders and creditors (than in the corresponding cases applicable to domestic public limited-liability companies). These specific measures of protection are presumably related to the cross-border nature of the SE and not to a particular desire to adopt a more stringent status for the SE.

As far as corporate governance is concerned, the provisions relating to the SE generally seem to be more flexible than the equivalent provisions applicable to domestic public limited-liability companies. This is due to the fact that many options provided by the SE Regulation have been welcomed by the Member States.

Chapter 2: Inventory of the SEs and related information

1. Inventory of the SEs (Appendix 2)

For the purposes of taking an inventory of and gathering all the relevant data on the SEs set up in the EU / EEA Member States, a questionnaire (see Appendix 2) composed of the following four sections was prepared and sent to the SEs:

- Section I: Factual data,
- Section II: Reasons for setting up an SE,
- Section III: Procedure for setting up an SE,
- Section IV: Practical problems encountered.

As a result of this inventory, it was found that as of 15 April 2009, 369 SEs overall had been set up in the EU / EEA Member States. A factsheet has been drawn up for each of the 369 SEs and all these factsheets are included in Appendix 2 to this Study.

The factsheets are presented by alphabetical order of the name of the SE (see index), and as an introduction to the factsheets, several lists classifying the SEs according to various criteria are included.

NB: A list of SEs with their respective branches has not been drawn up because it can be seen that the legal form of the SE is rarely chosen with the aim of simplifying the corporate group structure.

2. SE survey results

For all the SEs for which contact information was found, a survey was conducted in the form of an on-line questionnaire, to compile all the relevant data. This factual questionnaire was composed of the following four sections (see Appendix 2):

- Section I: Factual data,
- Section II: Reasons for setting up an SE,
- Section III: Procedure for setting up an SE,
- Section IV: Practical problems encountered.

This survey took place from 15 February to 15 April 2009 and 369 SEs answered.

For those SEs which did not complete the questionnaire, the factual data were gathered via the relevant publicly available sources, and the remaining information - i.e. not publicly available (in particular drivers for the choice of the SE and actual implementation and practical problems) - was, to the extent possible, collected by conducting telephone interviews with the appropriate contact person (general counsel, head of the legal department) that had been identified in the SE.

On the basis of the inventory of the SEs, the corresponding factsheets, the questionnaires and interviews, a factual analysis of the data gathered was conducted and is presented in the following pages.

2.1 General information and activities

This section presents general information on the inventoried SEs, relating to their geographical distribution (2.1.1.), their distribution by fields of activity (2.1.2.) and their year of creation (2.1.3.).

.2.1.1 SEs by country

20 Member States have SEs in their territories whereas 10 Member States have no SE. This leads to the following geographical distribution of SEs within the EU / EEA:

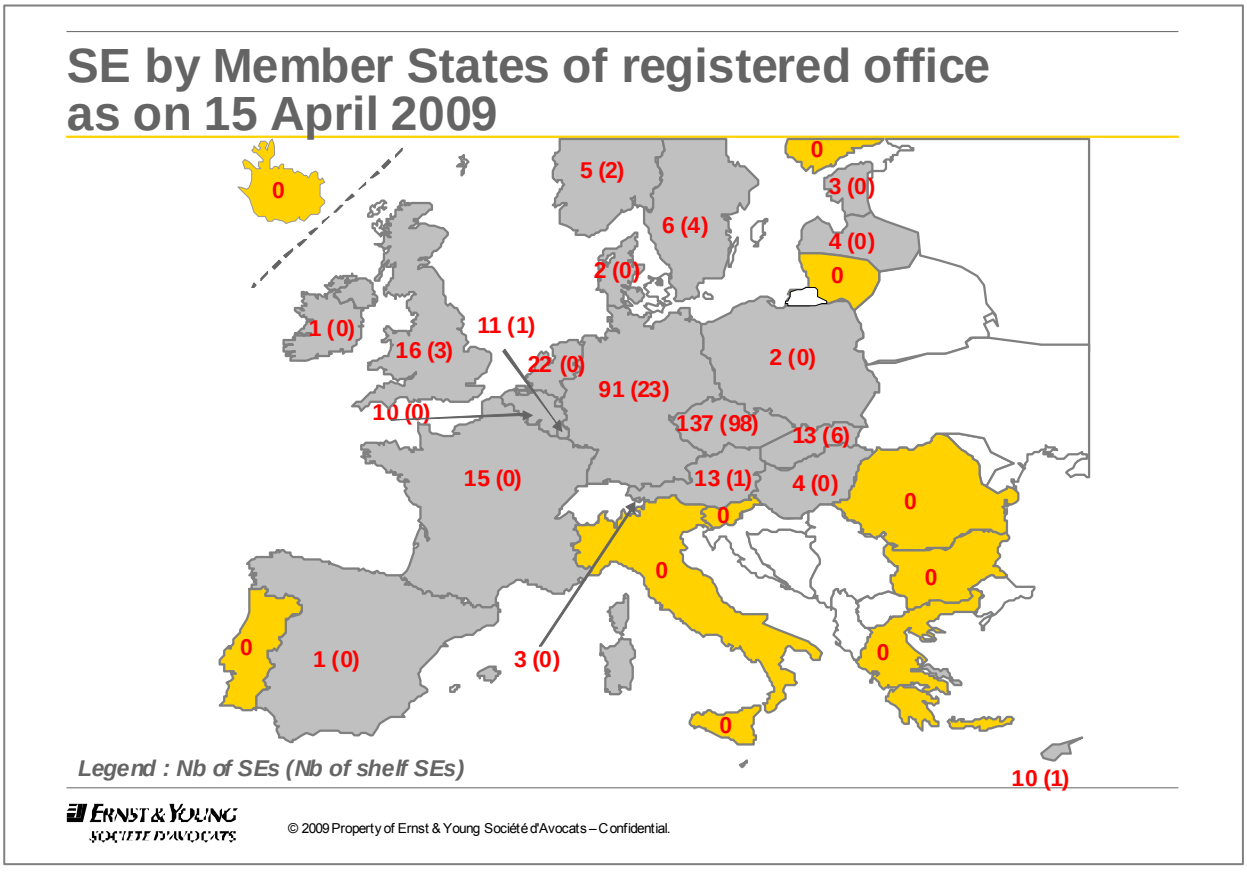
(Question 1.3.1.: Member State where the SE's registered office is located)

Member State where the SEs registered office is located	Number of SE
Austria	13
Belgium	10
Bulgaria	0
Cyprus	10
Czech Republic	137
Denmark	2
Estonia	3
Finland	0
France	15
Germany	91
Greece	0
Hungary	4
Iceland	0
Ireland	1
Italy	0
Latvia	4
Liechtenstein	3
Lithuania	0
Luxembourg	11
Malta	0
Netherlands	22
Norway	5
Poland	2
Portugal	0
Romania	0
Slovakia	13
Slovenia	0
Spain	1
Sweden	6
United Kingdom	16
Total	369

The geographical distribution shows that:

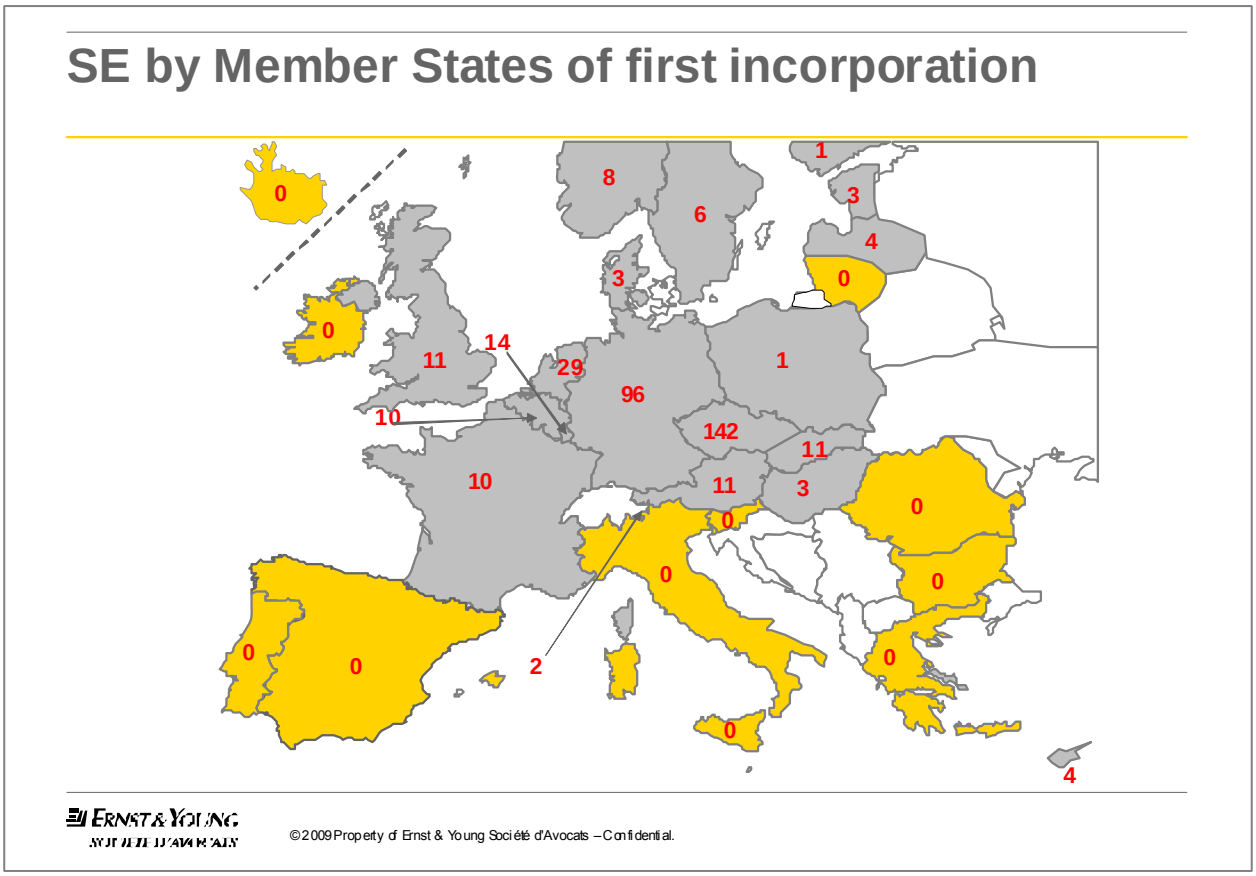
- Two Member States host more than 60% of the SEs: 37.7% of the SEs are located in the Czech Republic and 24.7% in Germany.
- 98 SEs located in the Czech Republic are shelf SEs: this represents 70.5% of the total number of shelf SEs and 26.5% of the total number of SEs.
- Shelf SEs represent more than one third of the total number of SEs, 37.7% to be precise (and 139 shelf SEs in all).

The following map shows the geographical distribution of SEs as well as the number of shelf SEs in each Member State as on 15 April 2009 (i.e. including the transfer of registered offices of SEs that have been performed since formation of the SE):



There is strong disparity in the geographical distribution of the SEs, with several Member States hosting a large number of SEs: the Czech Republic, Germany, the Netherlands, Austria and Slovakia. The success of the SE in the Czech Republic must be mitigated by the fact that this Member State also has the highest number of shelf SEs.

The above map must be compared with the map showing the geographical distribution of SEs according to where they were originally set up (i.e. according to the Member State of first incorporation):



When comparing this map with the current geographical distribution of SEs, one can note that:

- Two Member States have SEs registered in their territories that were initially set up in other Member States of the EU / EEA. Thus, Arcelor Steel Trading SE was originally incorporated in the Netherlands and transferred its registered office to Spain in 2008. One SE registered in Ireland, namely Atrium Dritte Europäische UU SE, was not originally formed in Ireland but in Germany and transferred its registered office on 2 September 2008[130].
- Conversely, one Member State has currently no SE registered in its territory whereas one SE was initially set up there. This concerns Finland, where Elcoteq was initially converted into an SE in 2005 and which transferred its registered office to Luxembourg in 2008.
- Several Member States show a relatively high number of SEs initially not formed in their territories but which transferred their registered office afterwards. This is the

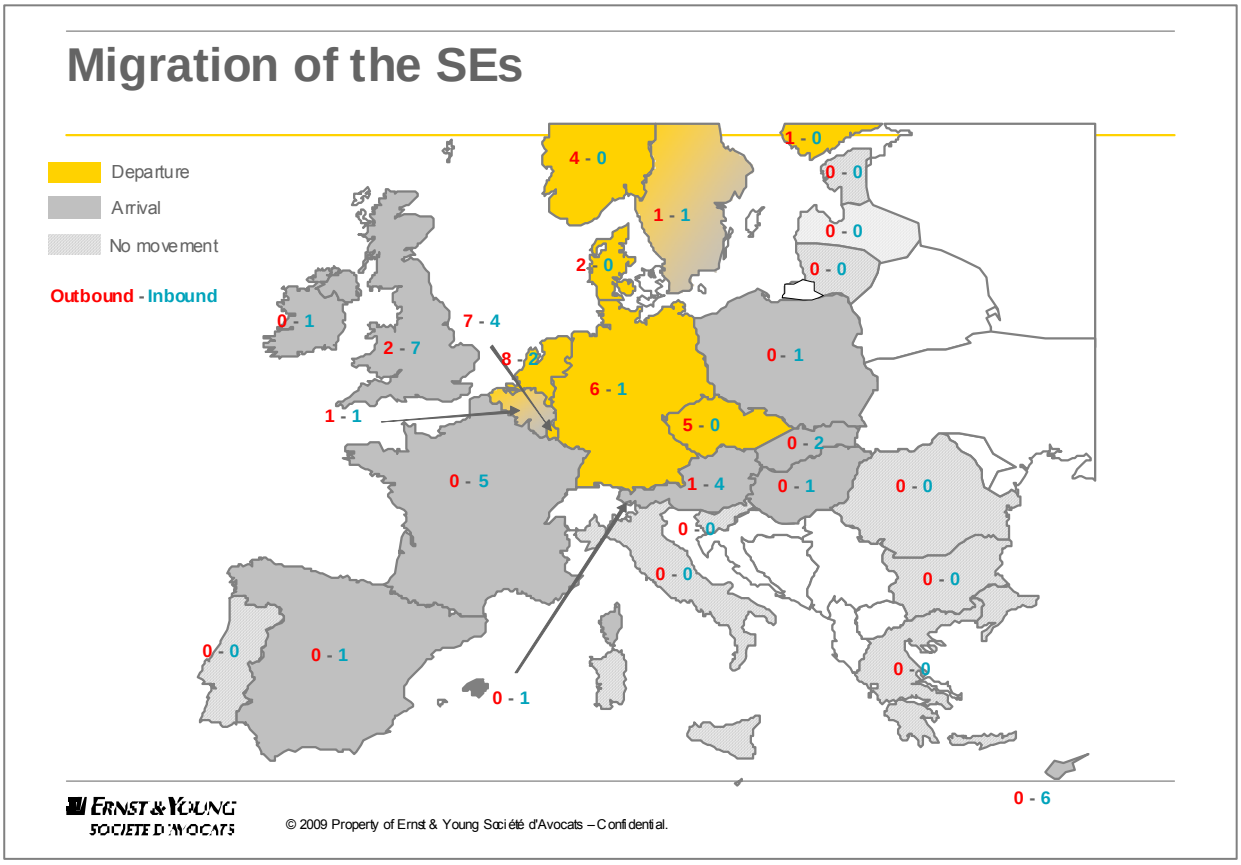
[130] Confirming this trend, a second SE currently registered in Ireland, namely Catrhago Value Invest SE, was originally formed in Gemrnay and transferred its registered office to Ireland on 7 May 2009.

case of the United Kingdom, Cyprus and France which have welcomed respectively seven, six and five SEs.

.2.1.2 Migration of the SEs

When combining the first two maps above, one can draw the following map of the EU / EEA showing the current trend in the migration of SEs:

(Question 1.3.2.: Transfer of the registered office of the SE)[131]



The above map illustrates the following trends:

- 10% of the SEs have transferred their registered office to another Member State (other than the Member State of their initial incorporation).
- The most frequently chosen destinations are the United Kingdom, Cyprus, France and Luxembourg. 33% of the SEs in France, 27% in Luxembourg, 43.8% in United Kingdom and 60% in Cyprus previously had their registered office in another Member State.

[131] The map of the migration of the SEs includes the transfers of registered office that were pending at the time of completion of our Study (i.e. the transfer of registered office that were in the process of realisation). The transfers concerned are shown as "currently under transfer" in the section 1.1.1.2. of Chapter 3. Please note however that, since the transfer was not completed, for the purpose of the Study these SEs concerned still appear in their Member States of first incorporation (i.e. prior to the transfer).

- Germany, Luxembourg, the Netherlands, and the Nordic countries in general are Member States with a significant outbound migration.
- The average time taken for the transfer of registered office is four months.

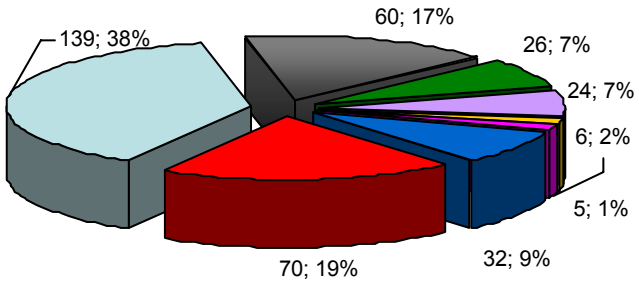
From the analysis of the above trends, one can note that the outbound migration concerns in particular Member States with large employee participation for national public limited-liability companies[132] (i.e. Germany, the Czech Republic, Luxembourg and the Netherlands), whereas the inbound migration is more balanced between Member States with high, restricted and no participation for employees in the domestic public limited-liability companies. This is however only a factual trend which is not supported by any explanatory factors for the transfer of registered office, which are described in the section 1.1.1.2. of the Chapter 3 below.

.2.1.3 SEs by activity

First, it should be pointed out that approximately 37.7% of the SEs are shelf companies[133].

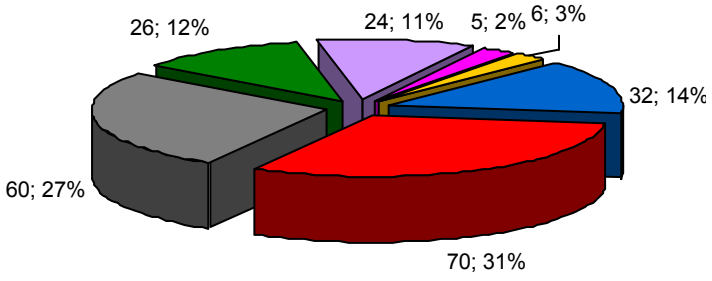
The distribution of SEs by field of economic activity is the following, taking into account, on the one hand, all the SEs (including shelf SEs) and, on the other hand, only the normal SEs (i.e. excluding shelf SEs):

Question 1.4.7: Fields of economic activity of the SE according to the NACE codes (with the shelf SEs)



Results are based on 362 SEs

Question 1.4.7: Fields of economic activity of the SE according to the NACE codes (without the shelf SEs)



Results are based on 223 SEs

- K - Financial and insurance activities
- F - Construction
- G – Wholesale and Retail Trade
- S - Other services activities
- L - Real estate activities
- N - Administrative and support service activities
- C - Manufacturing
- ZZ-Shelf company

[132] See the map in section 2.1. of Chapter 3 with the level of worker board-level participation in Europe.

[133] See paragraph 2.1.1. hereabove.

Without taking the shelf SEs into account, it can be observed that financial and insurance activities score highest (31%), followed by other services (27 %) and real estate (14%). In addition, 13% of the SEs declare two or more activities. It should also be stressed that the two graphs above do not take into account "residual" activities, i.e. sectors in which only one or two SEs declared activities.

When cumulating all the sub categories of the NACE codes to classify the SEs according to the three economic sectors, the following general trend can be identified: approximately 85% of the SEs are active in the services sector, 14% in the industry services and 1% in the agricultural sector. This trend is close to that of the economic sectors in the EU. Thus, within the EU, more than one quarter (28.2%) of the EU-27's gross value added was accounted for by business activities and financial services in 2007. There were three other sectoral branches that also contributed significant shares of just over one fifth of total value added, namely other services (largely made up of public administrations, education and health systems, as well as other community, social and personal service activities (22.3 %); trade, transport and communication services (21.2 %); and industry (20.2 %). The remainder of the economy was divided between construction (6.3 %) and agriculture, hunting and fishing (1.9 %)[134]. There are slightly more SEs in the services sector compared with the European average for this sector (85% for the SE against 71.7% in overall).

As regards the geographical location of operational business, only a few SEs develop their activity exclusively in Europe: 19.5% of the SEs that provided information on their geographical activity declared that they ran their business exclusively in the EU / EEA.

[134] Europe in figures, Eurostat yearbook 2009, p. 71.

The table hereunder gives the detailed breakdown of the SEs by field of economic activity for the top six Member States:

Countries (top 6 and total)	Fields of economic activity																					
	A	B	C	D	E	F	G	H	I	J	K	L	M	N	O	P	Q	R	S	T	U	ZZ
Czech Republic	0	0	1	0	0	0	10	2	2	2	0	19	3	1	0	0	0	1	12	0	0	98
Germany	0	0	16	3	0	1	6	0	0	4	14	0	1	1	0	0	2	0	29	0	0	23
Netherlands	0	0	2	0	0	0	0	0	0	3	17	0	0	0	0	0	0	0	2	0	0	0
United Kingdom	0	0	1	0	0	0	1	0	0	0	1	0	0	0	0	0	1	1	3	0	0	3
France	1	0	0	0	0	0	0	0	0	0	13	0	1	0	0	0	0	0	0	0	0	0
Austria	0	0	1	0	0	2	1	1	1	0	3	2	1	3	0	0	0	0	1	0	0	1
Total (UE)	2	0	26	6	0	5	24	7	3	12	70	32	6	6	0	0	3	3	60	0	0	139

NB: The responding SEs were given the possibility of indicating up to two different economic activities.

An analysis per Member State reveals the following trends:

- Most of the Czech SEs are shelf SEs (71.5%). The real estate activity (12.4%) is the second field of economic activity in the Czech Republic. If the Czech Republic were excluded from the analysis, only 17% of the total number of SEs would be shelf SEs.
- In Germany most of the SEs are companies engaged in other services activities (29%), manufacturing activities (16%) or financial and insurance activities (14%) and 23% are shelf companies.
- In France and in the Netherlands, the majority of the SEs operate in the field of financial and insurance activities.
- In Austria and in the United Kingdom, SEs are more evenly spread per field of economic activity, with no clear trend emerging.

The fields of economic activity corresponding to the NACE codes are as follows:

NACE Code	Field of activity	NACE Code	Field of activity
A	Agriculture, forestry and fishing	L	Real estate activities
B	Mining and quarrying	M	Professional, scientific and technical activities
C	Manufacturing	N	Administrative and support service activities
D	Electricity, gas, steam and air conditioning supply	O	Public administration and defense, compulsory social security
E	Water supply, sewerage, waste management and remediation activities	P	Education
F	Construction	Q	Human, health and social work activities
G	Wholesale and retail trade, repair of motor vehicles, motorcycles	R	Arts, entertainment and recreation
H	Transporting and storage	S	Other services activities
I	Accomodation and food service activities	T	Activities of households as employers, undifferentiated goods and services
J	Information and communication	U	Activities of extraterritorial organisations and bodies
K	Financial and insurance activities	ZZ	Shelf company

The table hereunder gives the detailed breakdown of SEs by field of economic activity for all the Member States in which SEs have been incorporated:

Countries	A	B	C	D	E	F	G	H	I	J	K	L	M	N	O	P	Q	R	S	T	U	ZZ
Austria	0	0	1	0	0	2	1	1	1	0	3	2	1	3	0	0	0	0	1	0	0	1
Belgium	0	0	0	0	0	1	2	0	0	1	3	0	0	0	0	0	0	1	3	0	0	0
Cyprus	0	0	0	2	0	0	0	1	0	0	4	1	0	0	0	0	0	0	1	0	0	1
Czech Republic	0	0	1	0	0	0	10	2	2	2	0	19	3	1	0	0	0	1	12	0	0	98
Denmark	0	0	1	0	0	0	0	0	0	0	1	1	0	0	0	0	0	0	0	0	0	0
Estonia	0	0	0	0	0	0	0	0	0	0	2	0	0	0	0	0	0	0	0	0	0	0
France	1	0	0	0	0	0	0	0	0	0	13	0	1	0	0	0	0	0	0	0	0	0
Germany	0	0	16	3	0	1	6	0	0	4	14	0	1	1	0	0	2	0	29	0	0	23
Hungary	0	0	1	0	0	0	0	0	0	0	1	1	0	0	0	0	0	0	2	0	0	0
Ireland	0	0	0	0	0	0	0	0	0	1	0	0	0	0	0	0	0	0	0	0	0	0
Latvia	0	0	0	0	0	0	2	0	0	0	3	0	0	0	0	0	0	0	1	0	0	0
Liechtenstein	0	0	0	0	0	0	0	0	0	0	3	0	0	0	0	0	0	0	0	0	0	0
Luxembourg	0	0	1	0	0	0	1	0	0	0	1	3	0	0	0	0	0	0	4	0	0	1
Netherlands	0	0	2	0	0	0	0	0	0	3	17	0	0	0	0	0	0	0	2	0	0	0
Norway	0	0	0	0	0	0	0	3	0	0	1	1	0	0	0	0	0	0	0	0	0	2
Poland	0	0	1	1	0	0	0	0	0	0	0	1	0	0	0	0	0	0	1	0	0	0
Slovakia	1	0	1	0	0	1	1	0	0	1	1	3	0	1	0	0	0	0	0	0	0	6
Spain	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1	0	0	0
Sweden	0	0	0	0	0	0	0	0	0	0	2	0	0	0	0	0	0	0	0	0	0	4
United Kingdom	0	0	1	0	0	0	1	0	0	0	1	0	0	0	0	0	1	1	3	0	0	3
Total	2	0	26	6	0	5	24	7	3	12	70	32	6	6	0	0	3	3	60	0	0	139

Results are based on 357 SEs - Information not available for 12 SEs

NB: The responding SEs were given the possibility of indicating up to two different economic activities.

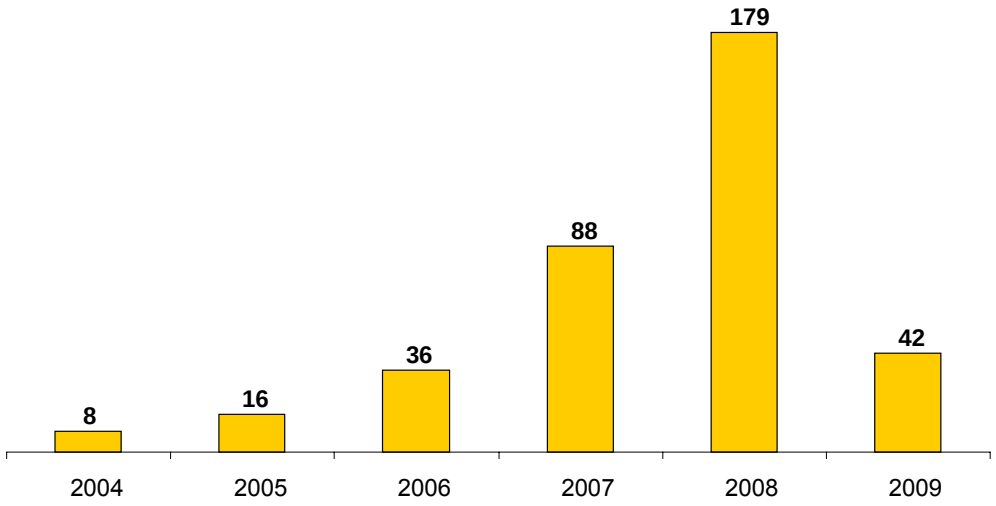
The fields of economic activity corresponding to the NACE codes are as follows:

NACE Code	Field of activity	NACE Code	Field of activity
A	Agriculture, forestry and fishing	L	Real estate activities
B	Mining and quarrying	M	Professional, scientific and technical activities
C	Manufacturing	N	Administrative and support service activities
D	Electricity, gas, steam and air conditioning supply	O	Public administration and defense, compulsory social security
E	Water supply, sewerage, waste management and remediation activities	P	Education
F	Construction	Q	Human, health and social work activities
G	Wholesale and retail trade, repair of motor vehicles, motorcycles	R	Arts, entertainment and recreation
H	Transporting and storage	S	Other services activities
I	Accommodation and food service activities	T	Activities of households as employers, undifferentiated goods and services
J	Information and communication	U	Activities of extraterritorial organisations and bodies
K	Financial and insurance activities	ZZ	Shelf company

.2.1.4 SE by year of creation

The following graph shows the trend in the creation of SEs by year:

(Question 1.1.3.: Year of setting-up)



NB: For the year 2009, incorporations until 15 April were taken into account.

The following points may be noted:

- 48.5% of the SEs were created in 2008.
- Between 2007 and 2008 the total number of SEs created increased by 103%. Most of the increase is due to the Czech Republic, which represents 52% of the SEs created in 2008 (with an increase of 343% in the SEs created in the Czech Republic between 2007 and 2008).
- Before 2008, Germany had the most SEs (⅓ of the total), with 43% of the SEs created in 2006 and 33% of those created in 2007.
- Austria, Sweden, Belgium and the Netherlands were the first countries to host SEs with respectively two, three, one and two creations in 2004.

The detailed breakdown of SEs by year of creation and Member State is given in the following table:

Countries	Date of implementation of the SE Directive[135]	2004	2005	2006	2007	2008	2009
Austria	June 2004	2	1	3	3	2	0
Belgium	October 2004	1	3	4	2	0	0
Cyprus	December 2004	0	0	1	3	0	0
Czech Republic	November 2004	0	0	1	21	95	25
Denmark	April 2004	0	0	0	1	2	0
Estonia	January 2005	0	0	0	2	1	0
Finland	August 2004	0	1	0	0	0	0
France	July 2005	0	0	1	6	1	2
Germany	December 2004	0	3	19	30	42	2
Hungary	May 2004	0	0	1	1	1	0
Latvia	March 2005	0	0	1	2	1	0
Liechtenstein	November 2005	0	0	0	1	0	1
Luxembourg[136]	August 2006	0	1	1	3	9	0
Netherlands[137]	March 2005	2	4	3	7	11	2
Norway	March 2005	0	0	1	4	3	0
Poland	March 2005	0	0	0	0	1	0
Slovakia	September 2004	0	1	0	0	4	6
Sweden	May 2004	3	1	0	1	0	1
United Kingdom	September 2004	0	1	0	1	6	3
Total		8	16	36	88	179	42

Results are based on 369 SEs - created up to 15 April 2009

The Member States that have implemented the SE Directive the latest are also the Member States where very few SEs have been incorporated, and namely:

Countries	Date of implementation of the SE Directive	Nb of SEs (up to 15 April 2009)
Iceland	May 2004	0
Malta	October 2004	0
Lithuania	May 2005	0
Italy	August 2005	0
Portugal	October 2005	0
Slovenia	March 2006	0
Greece	May 2006	0
Spain	October 2006	1[138]
Ireland	January 2007	1[139]
Romania	March 2007	0
Bulgaria	July 2007	0
Total		2

[135] The date of implementation of the SE Directive indicated corresponds to the date of adoption of the law of transposition. In most cases, further decrees (adopted at a later date) were necessary for the full enforcement of the SE Statute.

[136] The SEs incorporated prior to the date of implementation of the SE Directive are shelf SEs, which highly probably have not conducted negotiation on employee involvement.

[137] The SEs incorporated prior to the date of implementation of the SE Directive are shelf SEs, which highly probably have not conducted negotiation on employee involvement.

[138] The SE currently incorporated in Spain was initially created in the Netherlands.

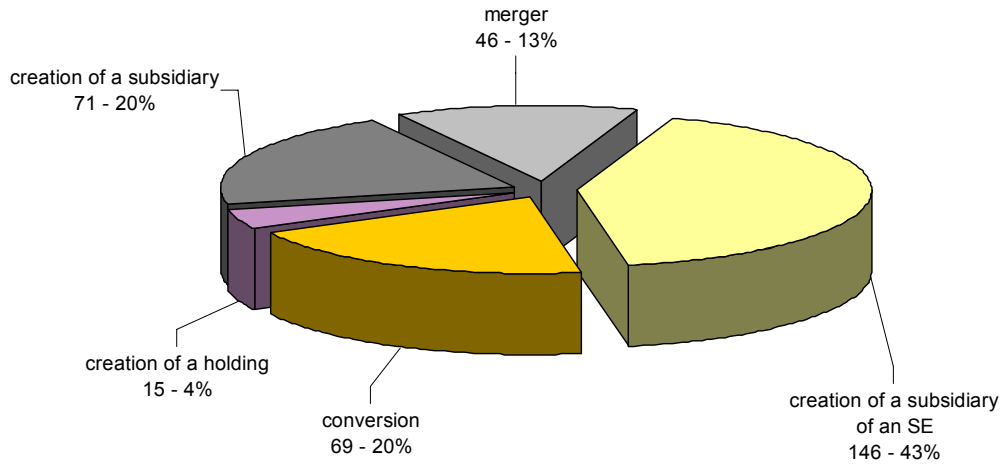
[139] The SE currently incorporated in Ireland was initially created in Germany.

2.2 Formation and founding companies

.2.2.1 Method of formation

The following pie chart illustrates the trends in the method of formation of the SEs, taking into consideration all the SEs (including the shelf SEs):

(Question 1.1.4.: Method of formation)



Results are based on 347 SEs - Information not available for 22 SEs

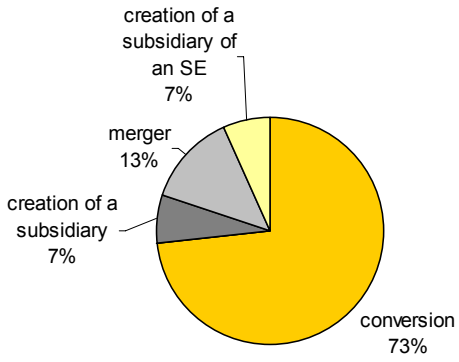
As regards the method of formation of the SEs, the following trends can be observed:

- Most of the SEs have been created as a subsidiary of an SE (43%). This is the most frequent method of formation, but this is also explained by the high number of shelf SEs. This method rocketed in 2008 in particular (+310% in comparison to 2007), with the explosion in the number of SEs created in the Czech Republic (+343% in the number of SEs created between 2007 and 2008). Thus, a correlation can be clearly established between SEs created as subsidiaries of SEs and the formation of shelf SEs in the Czech Republic.
- Before 2008, SEs created as subsidiaries of SEs or other companies represented 43% of the total number created and SEs created by conversion represented 26%.
- Apart from the creation of SEs as subsidiaries of SEs, the most frequent methods of formation are the creation of a subsidiary SE (20%) and conversion (20%).
- The formation of an SE by merger is also one of the methods used, but less frequently (only 13%).

► The creation of a joint holding SE is very rare (4%) and only really started in 2008 with nine creations (only four creations before 2008).

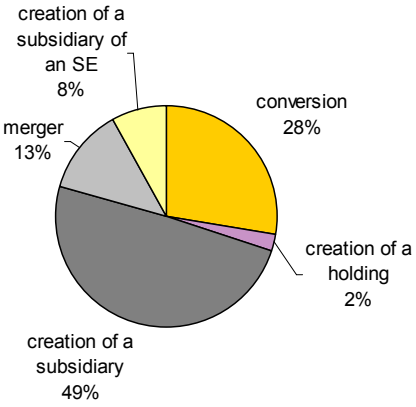
When an analysis is made per Member State, the following trends can be observed:

France



Results are based on 15 SEs

Germany

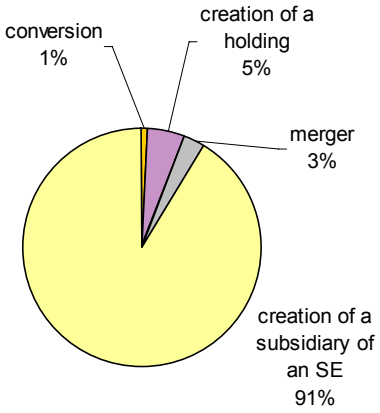


Results are based on 91 SEs

In France, the most commonly used method of formation of an SE is the conversion of a public limited-liability company (73%), followed by the merger (13%).

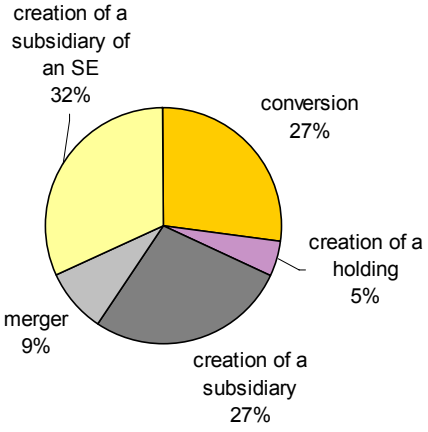
In Germany, almost the majority of the SEs are created as joint subsidiary SEs (49%), conversion being the second preferred method of formation (28%). The creation of an SE as subsidiary of an SE and the creation of a holding SE are not very common, with respectively 8% and 2% of SEs created in Germany.

Czech Republic



Results are based on 139 SEs

Netherlands



Results are based on 22 SEs

In the Czech Republic, there is an overwhelming predominance of the creation of an SE as a subsidiary of an SE (due to the large number of shelf SEs created). Surprisingly enough, the creation of a holding SE is the second most used method of formation but very far behind the creation of a subsidiary of an SE (only 5%).

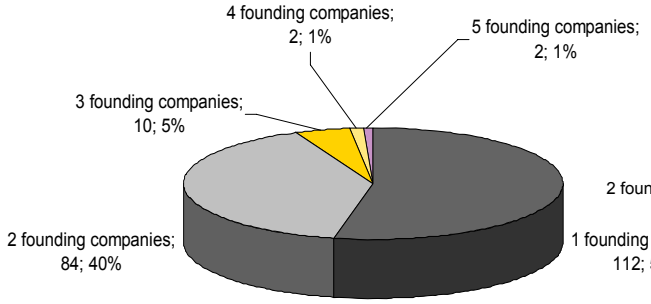
In the Netherlands, the most commonly used method is the creation of a subsidiary SE, either as subsidiary of an SE (32%) or of another legal form (27%). The creation of an SE by conversion is also frequent (27%) whereas the merger and creation of a holding SE methods are rare (respectively 9% and 5%).

.2.2.2 Founding companies

The following pie charts illustrate the trend as regards the number of founding companies involved in the creation of an SE, both taking and not taking shelf SEs into consideration:

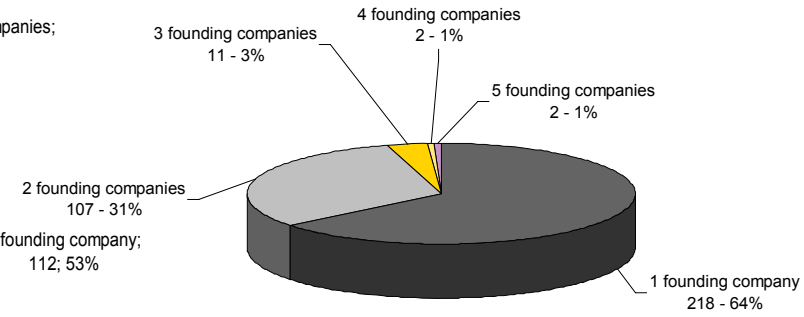
Question 1.2.1. : Number of founding companies (with and without Shelf SEs)

Without taking into account Shelf SEs



Results are based on 210 non shelf SEs
Information not available for 20 SEs

Taking into account Shelf SEs



Results are based on 340 SEs (including Shelf SEs)
Information not available for 29 SEs

As regards the number of founding companies involved in the creation of an SE, it can be observed that:

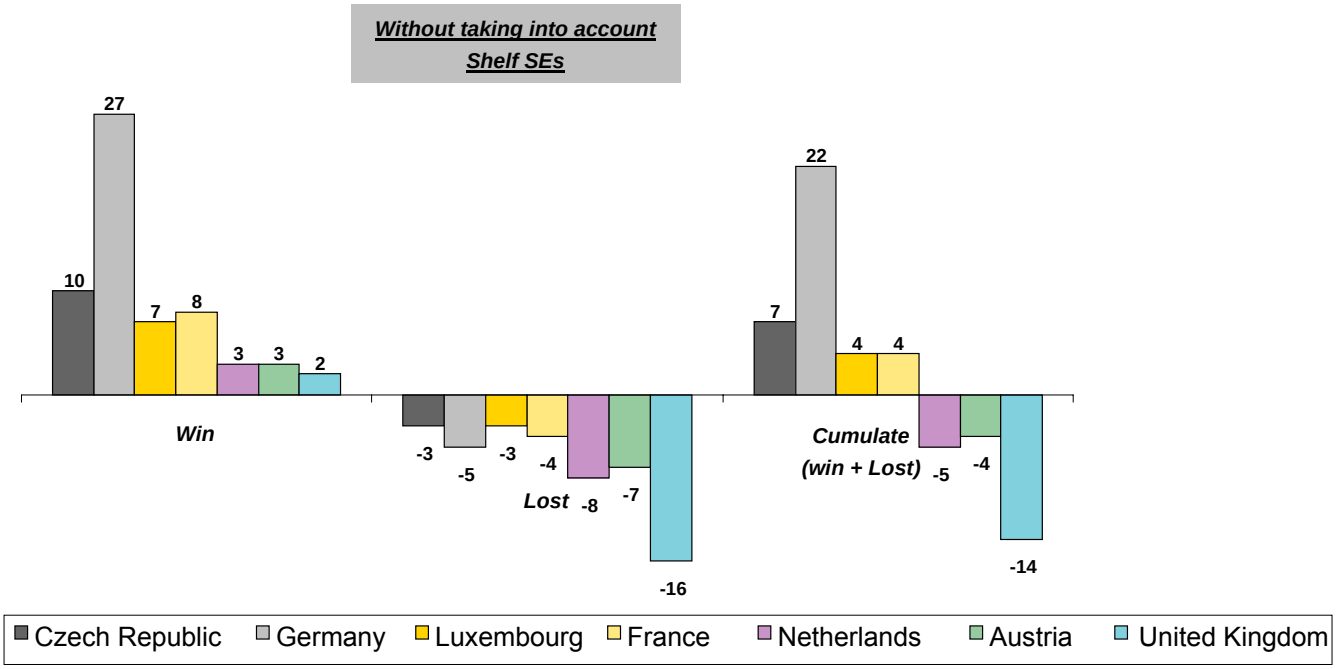
- Most of the SEs were formed by only one founding company. This concerns the SEs formed as subsidiary of an SE and the SEs formed by way of conversion of a public limited-liability company. In all, 149 SEs were founded by another SE (43% of the total); most of them are located in the Czech Republic (87%).
- Without taking the shelf SEs into consideration, 40% of the SEs were created by two founding companies whereas only 7% by more than three companies.

Only 18% of the founding companies created an SE in a Member State other than a Member State where one of the founding companies' registered office is located.

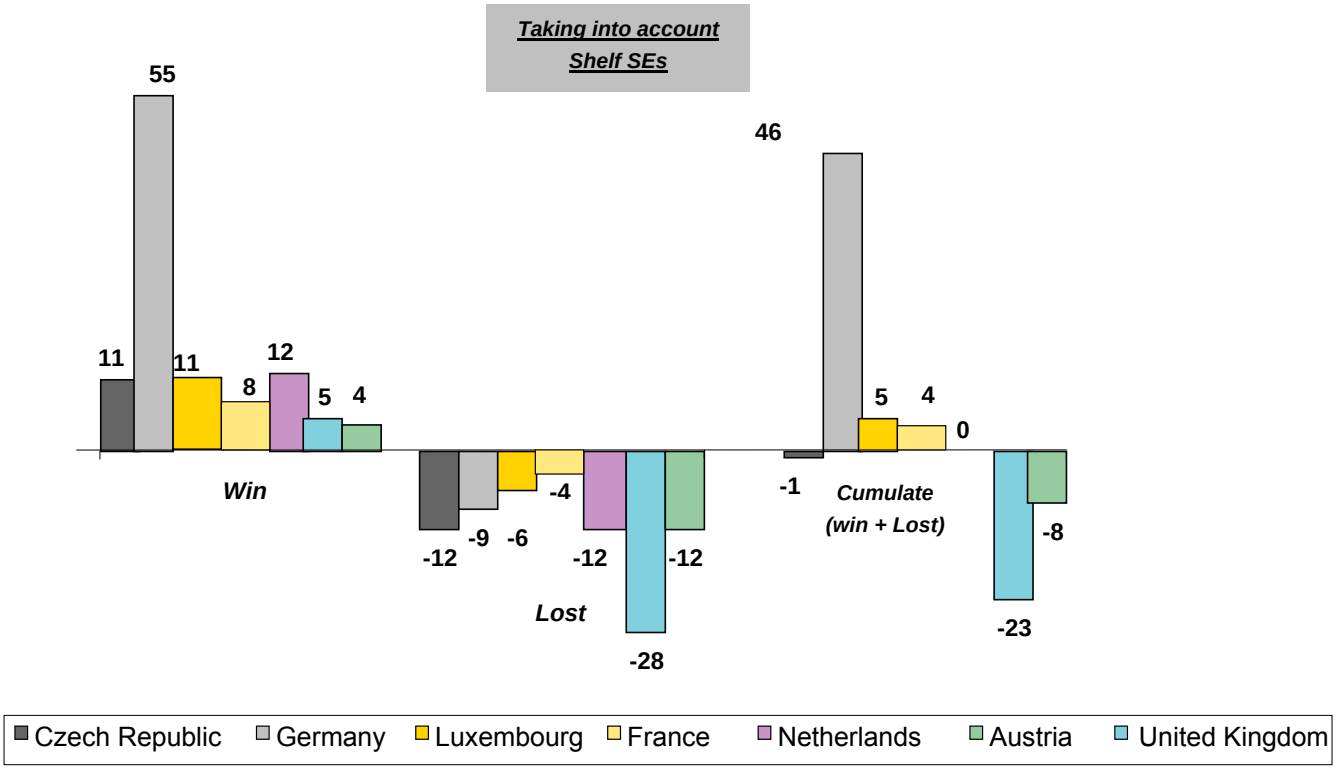
Looking in more detail at the creation of an SE in a Member State other than the Member State where the registered office of one of the founding companies is located, the following charts illustrate the main trends:

NB: The charts hereunder illustrate the situation where an SE has been set up in a Member State different from the Member State of at least one of the founding companies.

Question 1.2.2 b) and 1.3.1.: Analysis of the breakdown of SEs by country according to the initial founding company's country



Results are based on 222 founding companies of 179 non shelf SEs



Results are based on 475 founding companies of 292 SEs

The above chart shows that:

- On the one hand, it is in Germany, the Czech Republic, France and Luxembourg that most of the SEs founded by foreign founding companies have been incorporated.
- On the other hand, the founding companies that have incorporated SEs outside their jurisdiction are located in the United Kingdom, the Netherlands and Austria.

As regards the Member States of incorporation of the founding companies of the SEs, they correspond to the geographical distribution of the SEs. Thus, the SEs are mainly founded by companies incorporated in the Czech Republic (38%). This can be explained by the fact that a large number of Czech SEs are shelf companies these shelf SEs have been created by other Czech companies that are professional company founders. In second place are the SEs created by companies whose registered office is in Germany. Next come the Netherlands, Sweden, Austria and France.

In addition to the two graphs above which illustrate the situation where an SE has been set up in a Member State different from the Member State of at least one of the founding companies, the table below shows the SEs, which have been set up in a Member State different from that of all of the founding companies:

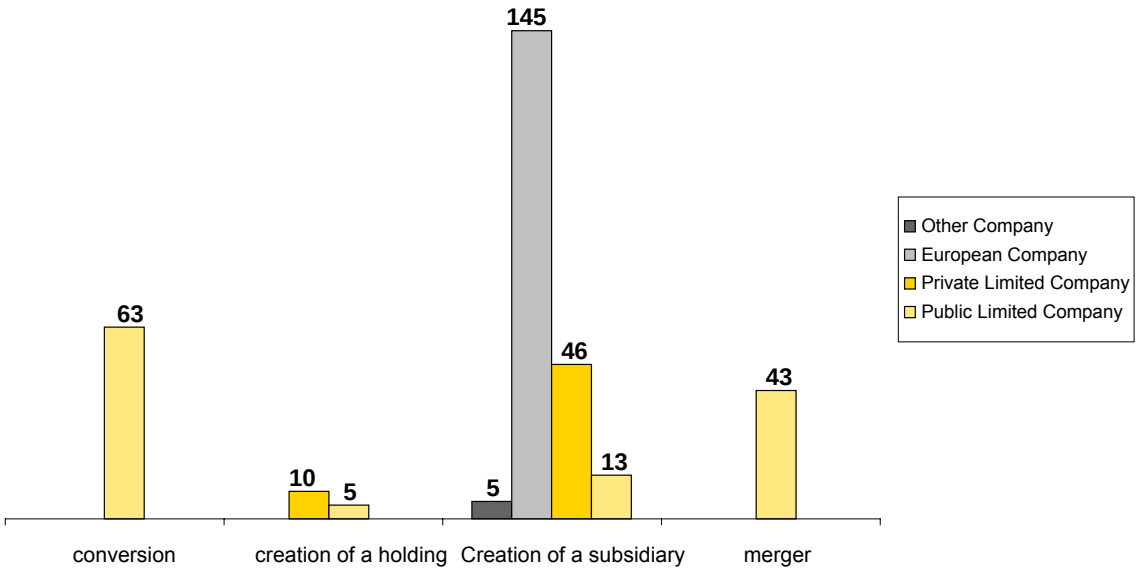
Nb	Information on the SE			Information on the founding companies	
	Name of the SE	Current Member State of incorporation	Method of formation	Name of the founding companies	Member State of incorporation
1	Eurotunnel SE	Belgium	Creation of a subsidiary	France Manche	France
				The Channel Tunnel Group Limited	United Kingdom
2	Cosmas Verwaltungs- und Beteiligungs- SE	Czech Republic	Merger	Apocatena	Germany
				Kosmas VerwaltungsGmbH	Germany
3	X-Study SE	Germany	Creation of a subsidiary of an SE	BluO SE	Austria
4	Auto Group Baltic SE	Latvia	Merger	Heinz Wilke Autohandel	Germany
				Moller Baltikum	Norway
				Eesti Talleks	Estonia
5	MCAA	Poland	Creation of a subsidiary of an SE	PCC SE	Germany
6	Europska SE	Slovakia	Creation of a subsidiary of an SE	Euromater SE	Czech Republic
7	Eurospolocnosti SE	Slovakia	Creation of a subsidiary of an SE	Soffice SE	Czech Republic
8	Lyreco CE	Slovakia	Creation of a subsidiary	Lyreco SAS	France
				Holding Lyreco Internationale SAS	France

Only 8 SEs (out of the 369 as at 15 April 2009) have been set in a Member State totally different from any of its founding companies (i.e. approximately 2%). In addition, the most frequently used method of formation in such a case is the creation of a subsidiary of an SE[140] what tends to prove that such operation does not generally aim at combining or reorganising business.

[140] Two of these SEs were set up by Czech professional founders of companies (i.e. Euromater SE and Soffice SE).

As regards the legal form of the founding companies, the following can be observed:

Question 1.2.2. c): Breakdown of the legal form of the SE-founding companies for each method of SE formation



Results are based on 330 SEs – Information not available for 40 SEs

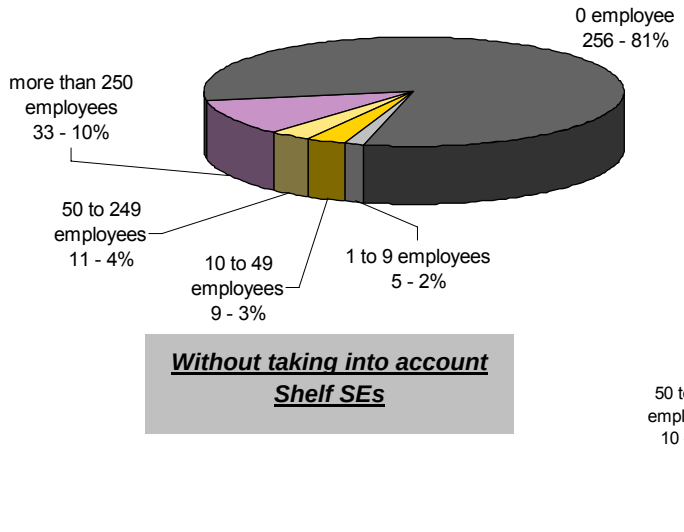
The above graph illustrates the following trends relating to the legal form of the companies founding the SEs:

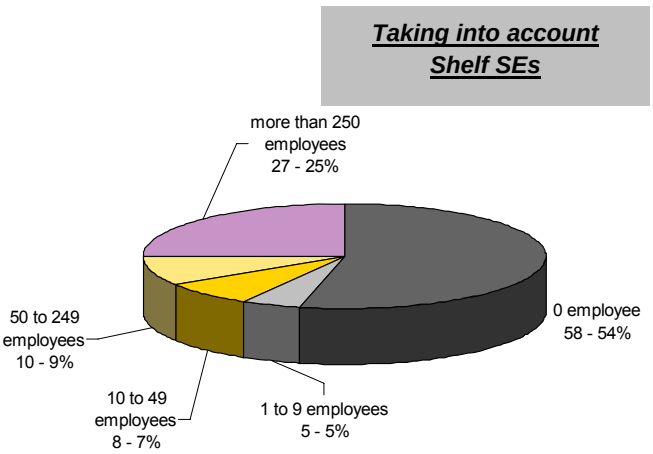
- In accordance with Article 2 of the SE Regulation, the SEs created by means of conversion and by means of merger have exclusively been founded by public limited-liability companies.
- The holding SEs have mostly been created by private limited-liability companies (66.6%) and more rarely by public limited-liability companies (33.3%).
- The SEs created as subsidiaries are predominantly subsidiaries of an SE (69% of the subsidiary SEs created). 87.5% of the SEs created as subsidiaries of SEs have been incorporated in the Czech Republic and are shelf companies. The other founding companies that have created subsidiary SEs are private limited-liability companies (22%) and public limited-liability companies (6%).

.2.2.3 Employees

The following pie charts illustrate the trends in the number of employees in the founding companies of the SEs, taking into consideration, on the one hand, all the SEs (including the shelf SEs) and, on the other hand, only the normal SEs (i.e. excluding the shelf SEs):

(Question 1.2.2.g): Number of employees at the time of formation of the SE)





The above pie charts show that 256 SEs were founded by companies with no declared number of employees, mainly due to SEs founded by shelf SEs in the Czech Republic (107 SEs) but also in Germany (38 SEs).

However, a significant number of the founding companies of the SEs did not provide their number of employees. As at least some of them are well known midsize or large companies, they can be assumed to have a substantial number of employees but this was not integrated into the charts.

The detailed breakdown of the founding companies by number of employees and Member State is as follows:

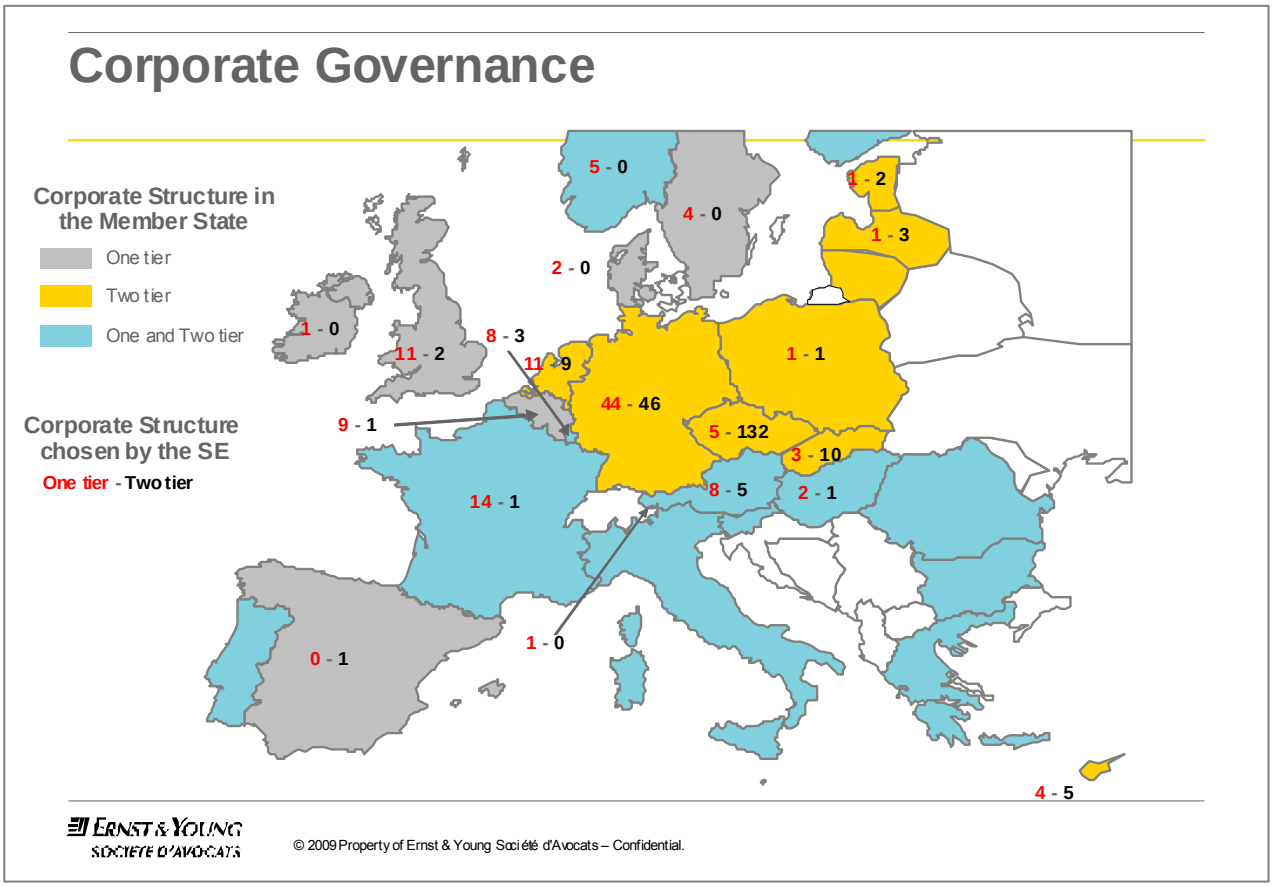
Countries	0	1-9	10-49	50-249	250 or more
Czech Republic	140	1	0	1	0
Germany	80	0	2	4	16
Netherlands	10	0	0	0	3
France	5	2	1	3	3
Luxembourg	2	0	0	0	0
United Kingdom	0	0	0	0	1
Sweden	6	0	0	1	1
Austria	6	0	1	0	6
Belgium	0	1	0	0	0
Slovakia	2	0	2	0	0
Other countries	5	1	3	2	3
Total	256	5	9	11	33

Results are based on 314 founding companies

2.3 Corporate governance

.2.3.1 Governance

The following map of the EU / EEA shows the corporate governance structure currently chosen by the SEs (one-tier / two-tier):



(Question 1.4.9.: Board Structure)

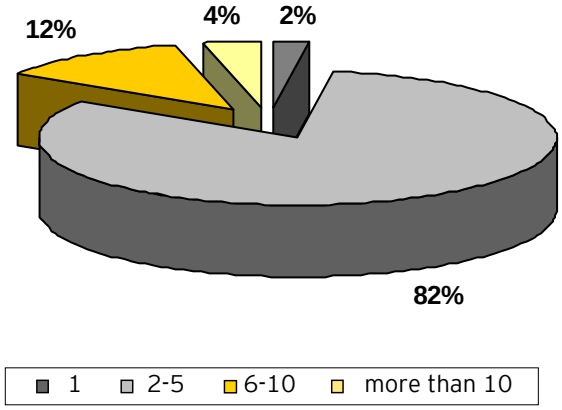
As regards the corporate governance structure chosen by the SEs, it can be observed that:

- The number of Member States where a majority of companies have opted either for the one-tier or the two-tier corporate governance structure is balanced: 12 countries for the one-tier structure and 8 countries for the two-tier structure.
- More than 60% of the SEs have opted for a two-tier structure, only 37% if the SEs in the Czech Republic are excluded.
- In Member States which were only familiar with the two-tier system (e.g.: Germany and the Netherlands), the one-tier system has met with success. However, the reverse is not true: in the Member States in which only the one-tier structure is available for public limited-liability companies or the Member States which are historically

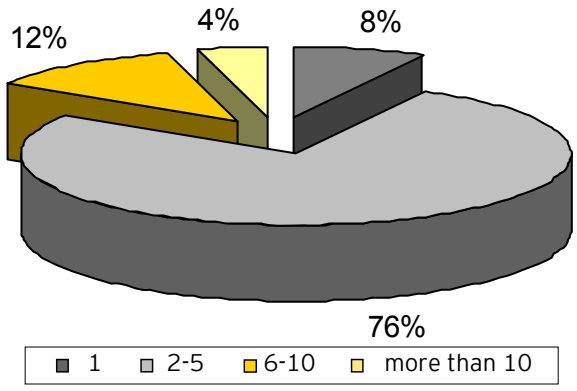
dominated by the one-tier structure even if they use both regimes (eg: France and Luxembourg), very few SEs have opted for the two-tier structure.

As regards the composition of the supervisory / management board, the following pie charts indicate the trends in terms of number of members in the corporate organs just before the creation of the SE and immediately after its formation:

Question 1.4.10: Supervisory/management board members in the SE just after creation



Question 1.4.10: Supervisory/management board members in the Founding Companies just before the creation



Results are based on 221 SEs
Full information not available for 148 SEs

76% of the SEs were founded by companies with only 2 to 5 members in the corporate organs and 92% of the SEs in the Czech Republic (the SEs in the Czech Republic often being incorporated with one management board member and one supervisory board member).

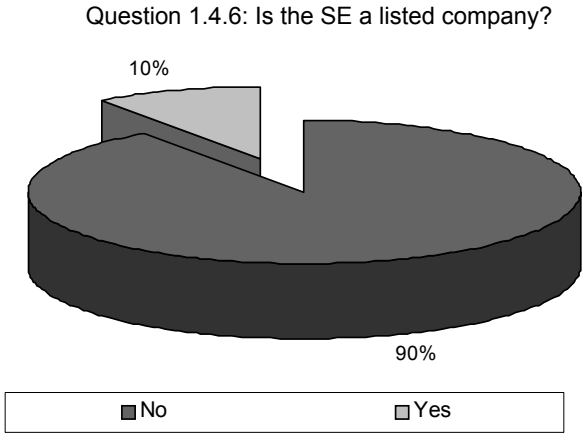
In addition, the following trends can be observed as regards the breakdown of the number of SEs according to the variation in the number of members of the corporate organs (per Member State):

Member States	Breakdown of number of SEs according to the variation in the number of the corporate organs		
	Decrease	Stagnation	Increase
Austria	1	3	0
Belgium	1	1	3
Cyprus	0	1	1
Czech Republic	2	120	8
Germany	5	31	5
Denmark	0	2	0
Estonia	0	1	2
France	5	4	1
Hungary	0	1	0
Luxembourg	1	1	0
Latvia	0	1	2
Netherlands	0	2	3
Norway	1	4	0
Poland	0	2	0
Slovakia	1	2	3
Total	17	176	28

The above table shows that:

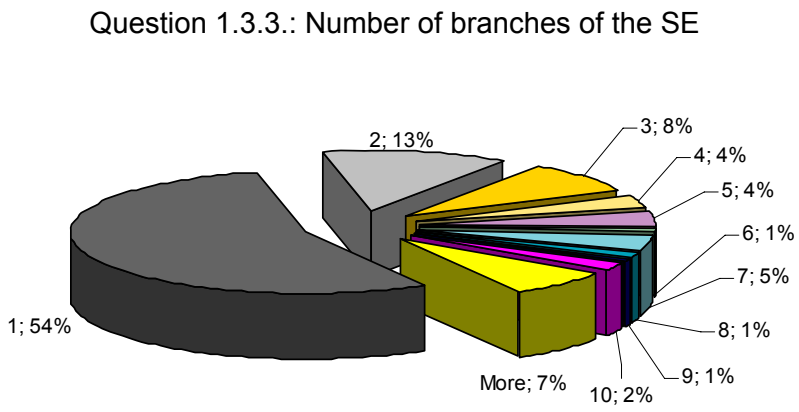
- For the large majority of the SEs (80%) the number of members of the corporate organs remains the same before and just after the formation of the SE. This can be explained by the high number of shelf SEs, where the corporate organs are set up with the minimum number of members required (exactly as in the parent / founding company, especially in the case of formation of an SE as subsidiary of an SE).
- In the other cases, for 12% of the SEs the number of members of the corporate organs increased after the formation of the SE whereas for 8% it decreased. It can be observed specifically for Germany that there is a balance between increase and decrease in the number of members of the corporate organs. Only France is the Member State in which the number of members of the corporate organ has decreased most frequently (5 SEs in which the number of members decreased agains 1 SE in which it increased).

As illustrated by the following chart, few SEs are publicly listed (only 10 %):



.2.3.2 Branches

As regards the number of branches possessed by the SEs, the trend is the following:



The above pie chart illustrates the following:

- 54% of the SEs have only one branch and 32% three or more. SEs with two to ten branches have most of their other branches in Europe; less than 6% of the branches are in a country outside the EU / EEA.
- Eight SEs have more than 10 branches, most of the time outside the EU except for one which has branches in almost all the EU / EEA Member States.

The table hereunder gives the detailed breakdown of SEs by number of branches and Member States:

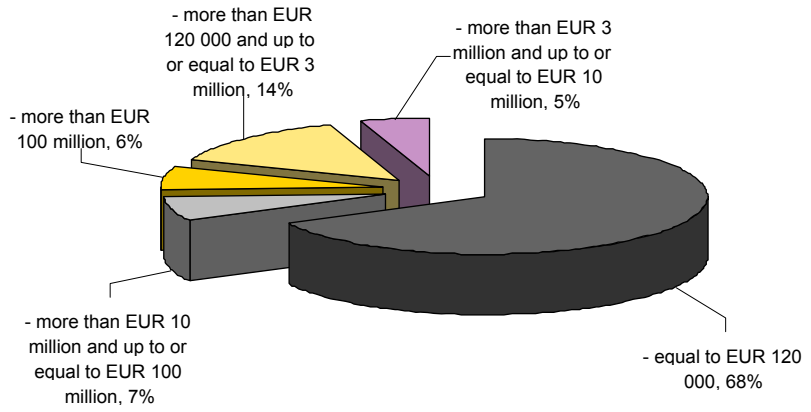
Countries	1	2	3	4	5	6	7	8	9	10	More
Austria	6	1	2	0	0	0	0	0	0	0	1
Belgium	1	2	0	0	0	1	1	0	0	0	0
Netherlands	15	1	0	0	0	0	1	0	0	0	1
Czech Republic	1	0	2	1	1	0	0	0	0	0	1
France	2	0	0	0	2	0	0	1	0	0	1
Germany	35	1	1	1	0	0	2	0	0	2	2
Other countries (less than 5 SEs)	0	9	4	2	1	0	1	0	1	0	2

Results are based on 109 SEs - Information not available for 130 non-shelf SEs

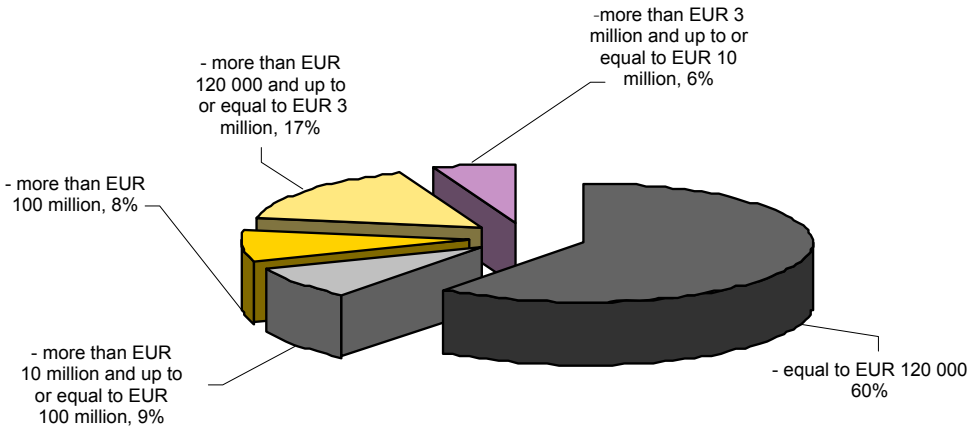
.2.3.3 The subscribed capital of the SE

The following pie charts illustrate the trends relating to the amount of the SE's share capital, both at the time of formation of the SEs and currently:

Question 1.4.2.: Subscribed capital of the SE at the time of its formation



Question 1.4.2.: Current subscribed capital of the SE



Results are based on 354 SEs
Information not available for 15 SEs

The above pie charts show that the large majority of the SEs were created with the minimum share capital required by the SE Regulation. Thus, 68% of the SEs were founded with a capital of EUR 120,000:

- 93% in the Czech Republic (due to the high number of shelf SEs)
- 61% in Germany
- 55% in the Netherlands
- 78% in the United Kingdom

In addition, more than 92% of these SEs have not modified their subscribed capital and have a current share capital still amounting to EUR 120,000.

For the other SEs, that were founded with the minimum share capital of EUR 120,000, the breakdown of their current share capital is the following:

- 12 SEs have a current share capital of between EUR 120,000 and 3 million.
- 6 SEs have a current share capital of between EUR 3 million and 10 million.
- 6 SEs have a current share capital exceeding EUR 10 million.

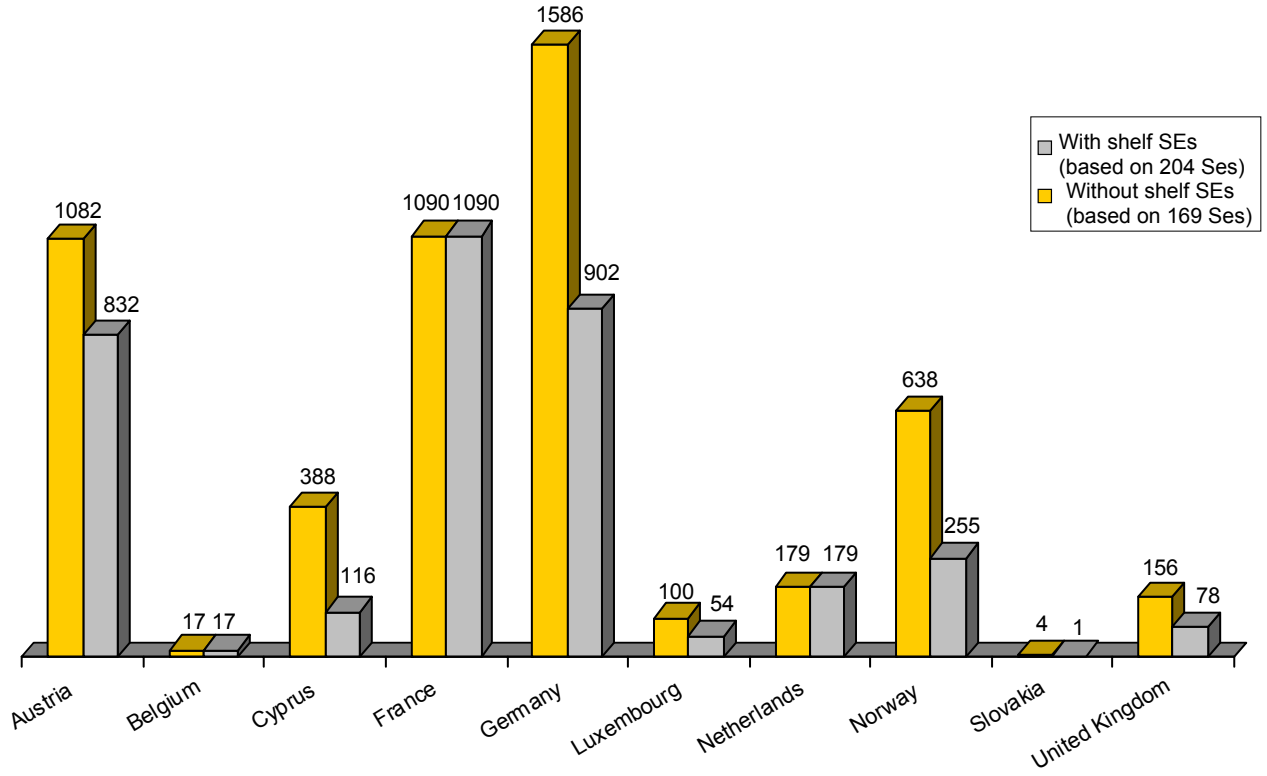
.2.3.4 The balance sheet total / net turnover of the SE

The following charts show the trends[141] as regards the average balance sheet total and turnover[142] of the SEs (by Member State):

[141] The average balance sheet total and average turnover have not been provided for the Member States where there are too few SEs and that consequently average figures are not relevant: Denmark (2), Estonia (3), Hungary (4), Ireland (1), Latvia (4), Liechtenstein (3), Poland (2) and Spain (1). In addition, the SEs incorporated in the Czech Republic and in Sweden have not been included in the calculations since the average figures could not be considered as relevant due to the high number of shelf companies in these two Member States (i.e. 98 SEs out of 137 in the Czech Republic and 4 SEs out of 6 in Sweden).

[142] In addition to the Member States listed above, the average turnover has not been provided for the Netherlands and the United Kingdom as the figures available for the SEs in these two Member States were not significant enough.

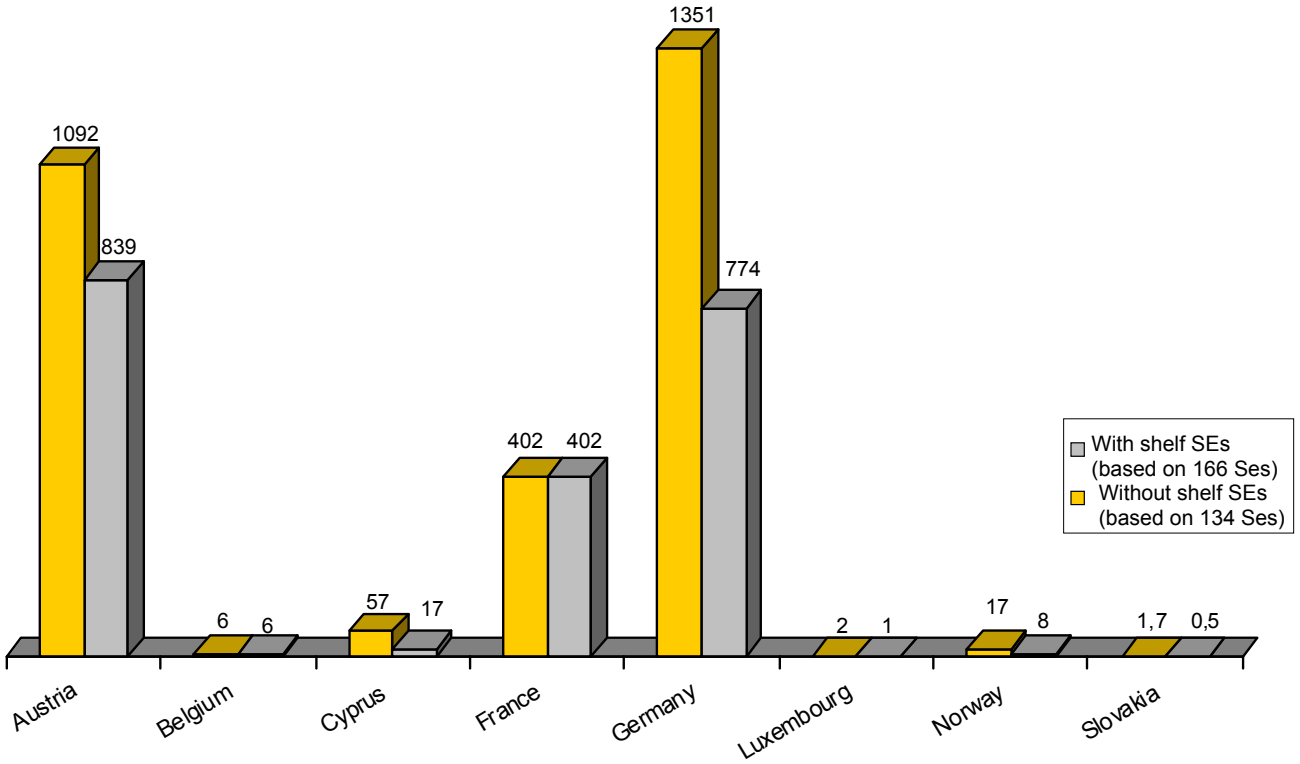
Question 117: Average Balance Sheet Total (in million euros)



With regard to the 204 SEs that provided information on their balance sheet total, the trends identified are the following:

- The SEs' average balance sheet total (thus including the shelf SEs) amounts to approximately EUR 352.40 million.
- The above figure is totally different when the shelf SEs are not taken into consideration, since in this case, the average balance sheet total amounts to approximately EUR 524 million.

Question 1.4.5.: Average Net Turnover (in million euros)



With regard to the 166 SEs which provided information on their net turnover, the trends identified are the following:

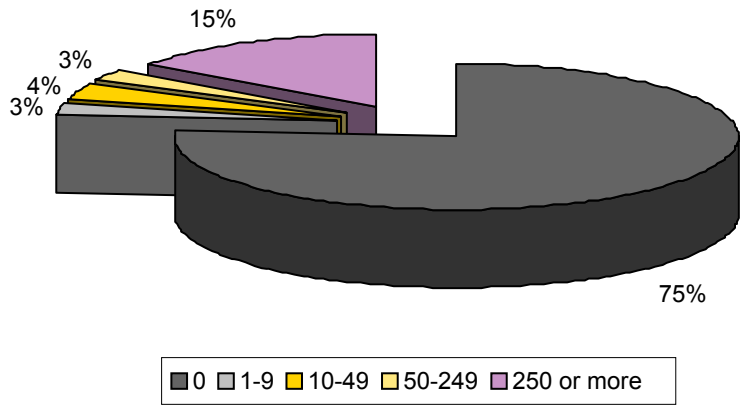
- The SEs' average net turnover (thus including the shelf SEs) amounts to approximately EUR 255,94 million.
- The above figure is totally different when the shelf SEs are not taken into consideration, since in this case, the average net turnover amounts to approximately EUR 366 million.

The two above graphs show that the Member States having an economy based on medium to large sized companies are also the Member States where a significant number of "normal" SEs are registered (Germany, Austria, France).

.2.3.5 Human resources

The following pie chart gives the trend in the SEs' average number of employees, both at the time of creation and currently:

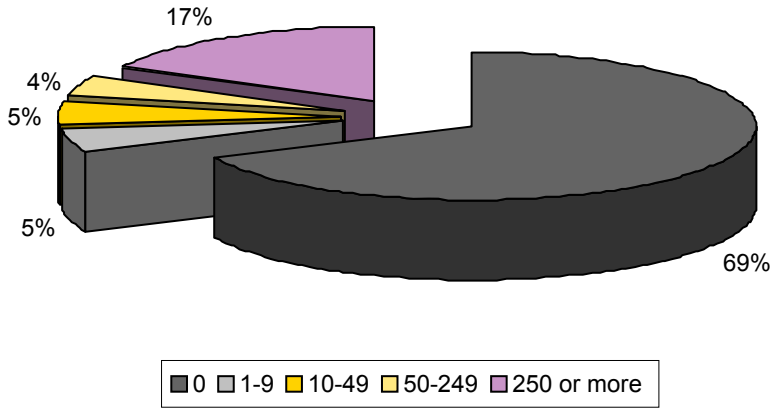
Question 1.4.11. a) : Number of employees at the creation of the SE



The vast majority of SEs were created without any employees. This is due to the high number of shelf SEs or empty SEs. Thus, the following points can be noted:

- 75% of the SEs were created with no employees.
    - 94% of the SEs in the Czech Republic were created with no employees.
    - 65% of the SEs in Germany were created with no employees. However, 28% of the SEs located in Germany were created with 250 or more employees: this represents 53% of the total number of SEs created with 250 or more employees.
- Other countries present a more balanced split between categories.

Question 1.4.11. c): Current average number of employees



Results are based on 312 SEs - Information not available for 57 SEs

Regarding the development of the SEs' workforce, it should be noted that 20% of all the SEs have significantly changed their employee structure since their creation (50 or more

persons employed during the first fiscal year after the creation of the SE). Nevertheless, as shelf SEs play a major role, a substantial number of SEs still have no employees.

.2.3.6 Organisation charts

Several SEs did not answer to the question relating to their position in a group. However, an analysis of 203 SEs (including shelf SEs) shows that:

- 56% (114 SEs) are subsidiaries, 42% (85 SEs) are parent companies, whereas only 2% (4 SEs) are independent companies.
- Czech SEs represent 42% of the subsidiaries and 11% of the parent companies.
- Germany may be considered a powerful Member State in the SE business because its SEs represent nearly 40% of the total number of SEs as parent companies and 6% of SEs as subsidiaries.

A similar analysis of non-shelf SEs provides different results:

- Approximately 75% of the non shelf SEs are parent companies whereas 20% are subsidiaries and less than 5% independent companies.
- Germany is still the top Member State for parent companies with 37%, followed by the Czech Republic (14%) and Austria (11%).
- Germany (15%) is also among the Member States which have the most SEs as subsidiary companies, along with France (21%) and the Netherlands (15%).

3. Conclusion on the SE inventory and related information

The overall number of SEs as of 15 April 2009 is lower than initially expected; 369 SEs had been created by that date. However, the number of SEs created has increased considerably from year to year (there was an increase of 103% between 2007 and 2008 – with a real boom in the Czech Republic where the number of new SEs created between 2007 and 2008 rocketed by 343%). This trend can be partly explained by the fact that the implementation of the SE Statute was not fully completed in all Member States until 2007 (many Member States having transposed the SE Directive somewhat late) and partly by the increasing creation of a large number of shelf SEs. Other explanations that seem likely include the rising awareness amongst companies and the increasing expertise amongst legal advisors about the SE option.

Shelf SEs represent a very large proportion of the total SEs (approximately 37.7%). This number could be even higher bearing in mind that for several SEs, it is sometimes difficult to identify the business activity, if any.

Leaving aside the shelf SEs, the majority of the normal SEs operate in the services sectors: the most common field of economic activity is the banking and insurance sector and the second most common the other services sector. Some SEs are also active in the real estate sector and the wholesale and retail trade, whereas the manufacturing sector represents only 7% of all SEs and 12% of the normal SEs.

The most frequent method of formation adopted is the creation of a subsidiary of an SE, this trend being explained by the high number of shelf SEs. The other methods of formation are chosen in fairly equal proportions, except for the creation of a holding SE which remains a method of formation that is seldom chosen.

38 SEs have transferred their registered office, the most frequent destination Member States being Cyprus, Luxembourg, the United Kingdom and France.

As far as corporate governance structure is concerned, the choice between the one-tier and two-tier structures is fairly balanced. The one-tier corporate structure is quite popular in Member States which do not allow this type of corporate governance for their domestic public limited-liability companies (with the exception of the Czech Republic, where the one-tier structure is chosen by only 4 % of the SEs, the one-tier structure is chosen by 25-55% of the SEs in the other two-tier countries).

Finally, as regards size, and not taking the shelf companies into consideration, the SEs are fairly large companies (the average balance sheet total for the normal SEs amounting to 2,345 million euros and the average net turnover to 1.8 billion euros) and 17% of the normal SEs have a workforce exceeding 250 employees. As far as the development of the workforce is concerned, even if the vast majority of the SEs did not have any employees at the time of formation, 20 % of them have substantially increased the number of their employees since formation.

Chapter 3: Analysis of the data and identification of the main trends

One of the purposes of the Study consists in analysing the data and identifying the main trends as regards the SE and its Statute on the basis of the information collected in Chapters 1 and 2 above, and the interviews with SEs, with companies which are considering the SE legal form or were considering the SE legal form but have abandoned it (hereafter referred to as the "non-SEs"), and with attorneys, experts and academics. Such analysis focuses on the following elements:

- the main drivers in choosing (or not choosing) the SE legal form, these drivers being linked to the SE Regulation itself or linked to the national legislation applicable to SEs (1);
- the main trends and distributional effects explaining the current situation and reality of the SEs (2);
- the practical problems encountered in the implementation and application of the SE Statute (3).

1. Drivers for choosing the SE legal form

As a preliminary comment, it can be observed that there is rarely one single reason leading a company to adopt the SE legal form. The drivers for choosing the SE form result from a "business case" and generally consist of a set of reasons that are related to each other. Therefore, the drivers identified hereafter must not be considered on a separate basis but analysed overall.

In addition, the drivers are not clear-cut and cannot be strictly categorised as positive (1.1.) or negative drivers (1.2.). The list presented hereafter should not be considered as comprehensive but as an identification of the main factors / drivers in our analysis. The reasons leading to choosing or not choosing the SE legal form depends on the particular situation and characteristics of each SE or non-SE.

For the assessment of the positive and negative drivers for the SE legal form, the standpoint of the majority shareholder (investor) of the SE has been adopted. If the position of another stakeholder were to be chosen (e.g.: minority shareholder(s), creditors, or employees), the study could lead to a completely different picture.

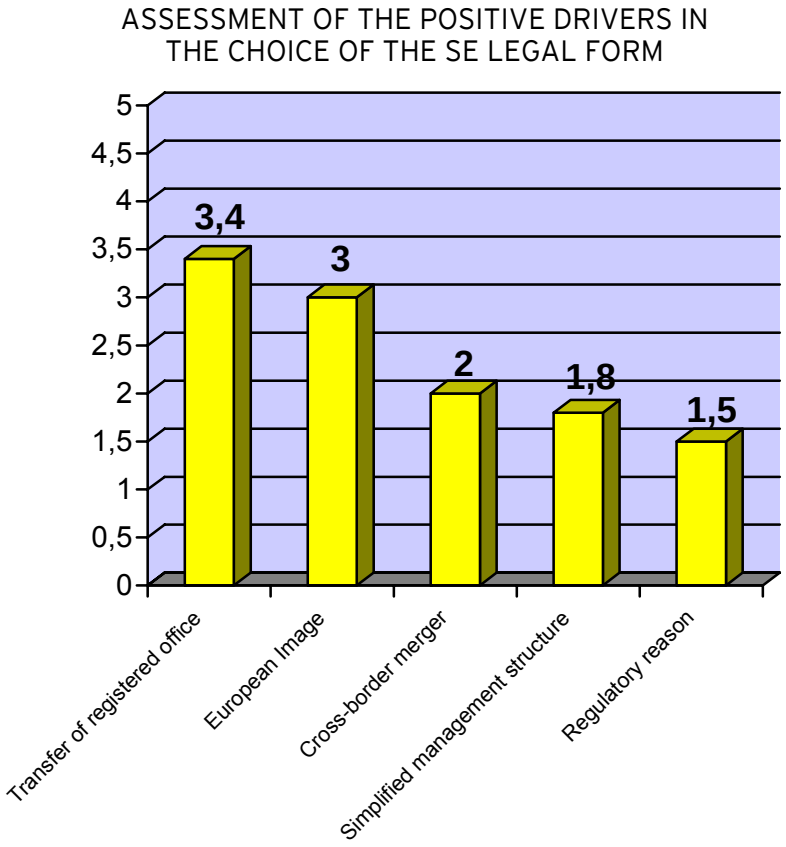
1.1 Positive drivers for choosing the SE

Two sets of rules can have an effect on a company's decision to create an SE: the provisions of the SE Regulation (1.1.1.) and the provisions of national legislation applicable to SEs (1.1.2.).

.1.1.1 Reasons for setting up SEs – reasons linked to the SE Regulation

During the Study, on-line questionnaires were sent to existing SEs and structured telephone interviews were conducted with SEs and non-SEs to question them about the motives for choosing the SE corporate form. The SEs and non-SEs were asked to assess the impact of various factors on their final decision whether or not to opt for the SE legal form, using a scale from 0 to 5 (0 meaning that the driver had no impact on the choice of the SE legal form and 5 that the driver had a maximum impact on the choice of the SE legal form).

Based on 60 interviews and the answers to the questionnaire, five main arguments have been identified as positive drivers in the choice of the SE legal form. These drivers and their respective assessment are the following:



More detailed explanations on each of these drivers are developed hereafter.

.1.1.1.1 Value of the "European" image connected to being an SE

The SE is perceived to be, and in fact is, the first supranational legal form of company created in the EU / EEA. This legal form gives the company a strong European image. Even though this factor obtained a high ranking in the positive drivers for the choice of the SE corporate form among the existing SEs (3/5), it is difficult to assess whether the value of the European image is a decisive and primary driver for the choice of the SE legal form or whether it is instead a subsidiary and ancillary motive.

First, it should be noted that the SE legal form gives a business a European identity, even though behind the European denomination national laws mostly continue to apply. This particular identity is enhanced by the fact that "the name of an SE shall be preceded or followed by the abbreviation SE" and that "only SEs may include the abbreviation SE in their name"[143], thus clearly labelling the European identity of these selected companies. In addition, the SE is still perceived as a pioneering legal form for companies operating Europe-wide or worldwide. Therefore, almost all companies that have formed an SE have made public announcements relating to their Europe-wide activities and the European nature of their business to explain their choice of the SE corporate form. For instance, when announcing its conversion into an SE, Porsche declared: "The SE is a modern and internationally oriented corporate form which, inter alia, enables the size of the Supervisory Board (twelve members), which has proved its worth in the past, to be maintained for the future"[144]. Similarly, when the reinsurance group SCOR announced its intention to transform into an SE, it declared: "Societas Europaea status will in particular enable the SCOR group to strengthen its multinational and European identity, to facilitate its acquisition transactions in Europe, to improve its financial flexibility and also to increase its flexibility with regard to capital allocation"[145].

During the interviews, an SE incorporated in France also explained that "The European image connected to being an SE is the foremost reason why the company chose to convert in 2007. The idea behind this is to have a strong European identity for a decisively European activity. In addition, the European symbol is considered positive for the employees (fostering a common feeling of belonging to a European Company), for partners (suppliers, customers, etc.) and for third parties"[146].

The impact of this European image is different according to the geographical zone. In Eastern European countries, the European image linked to the SE is generally more highly valued than in Western European countries. This might be one of the explanations for the increasing number of shelf SEs intended for sale, established in Eastern Europe by

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[143] Article 11 paragraphs 1 and 2 of the SE Regulation.

[144] Press-release of 24 March 2007 at http://www.porsche.com/international/aboutporsche/pressreleases/archive2007/quarter1/?pool=international-de&id=2007-03-24; Experience with the SE in Germany by Jochem Reichert in European Company Law, December 2008 Volume 5, Issue 6.

[145] Press release of 4 July 2006 at http://www.scor.com/www/index.php?id=231&L=2&showart=406

[146] Interview conducted by Ernst & Young, Société d'Avocats with an SE incorporated in France.

professional company founders (in the Czech Republic and Slovakia, in particular). The choice of a "European" legal form seems to be perceived as a real advantage in itself and evidence of legal security as compared to the recent legal systems in Eastern European Member States. In these countries, the reputational effect linked to the legal form of the SE is quite high and can be a driver in itself, whereas in Western European Member States, the European image alone is more rarely a motive for the choice of the SE. In some Western European Member States that are recognised for the stability and certainty of their legal regime (e.g.: the United Kingdom, Luxembourg and Germany) the choice of the SE legal form implies, conversely, renunciation of a well-known national legal form. The "loss" of national identity might be considered, in some circumstances, to be a disadvantage for national companies and can explain the decision not to opt for the SE statute. Thus, for instance, a non-SE company incorporated in Germany explained that "in our industry, the European image cannot be considered an advantage over a national "German" image"[147] and was instead perceived as a disincentive to choose the SE. This can be true for specific sectors of activity where the national image is stronger as a supranational image: for instance the car manufacturing in Germany[148] and the luxury industry in France.

In addition, for most of the existing SEs that filled in the questionnaire and were interviewed, the "European" image connected with the legal form of the SE was not the trigger or primary reason for the adoption of the SE status. They emphasised that the European image of the SE was instead used as a "signal" intended for the attention of the employees, customers, business partners or third parties in order to gain acceptance of the project within the company and the group concerned. For instance, in the case of the formation of an SE by merger, the fact that the corporate identity is European and not primarily national is of the essence for the perception of the balance of power in the merger (giving the impression of a merger of equals) and for the expectations concerning the future corporate governance after the merger[149]. This is also true when a domestic company is converted into an SE and transforms its former subsidiaries into direct branches of the SE. In the latter case, it is easier for the employees of the former subsidiaries to accept the dissolution of the subsidiary and transfer of the employment contracts to an SE rather than to a "foreign" entity. Thus, the image of the SE may in some cases be an actual driver, not necessarily due to its European image but rather due to its "supranational" character, the creation of the SE being thus presented as the constitution of a "multi-state" entity not attached to one particular nationality, avoiding the impression of a "national defeat".

Apart from minor exceptions, the European image cannot be considered to be the trigger or motive for the choice of the corporate form of the SE but is an essential criterion for the success of the new structure and acceptance of the latter, especially amongst employees. It is therefore very difficult and almost impossible to estimate the value of the European image (especially in monetary terms) connected with the choice of the SE.

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[147] Interview conducted by Luther RechtsanwaltgesellschaftmbH with a non-SE incorporated in Germany.

[148] Porsche SE can however be a counterexample in this respect but the reason why it converted into an SE was linked to corporate governance structure and not to the European image.

[149] Jochen Reichert, Experience with the SE in Germany, in European Company Law December 2008, Volume 5, Issue 6. "When two corporations of different nationalities merge, it is not so likely that the deal is perceived as a takeover if they merge into an SE. In the public opinion, amongst clients and employees the process rather leaves the impression of a merger of equals".

Nevertheless, a correlation between the announcement of the setting-up of an SE and the increase in the market value of its shares on the Stock Exchange has been established. Thus, it appears that "securities markets view the new corporate form favorably. Announcing the decision to re-incorporate as an SE leads to significant positive abnormal returns. In the week following the announcement, cumulative average abnormal returns are in the order of magnitude of one to three percent. Apparently, investors in European firms consider the European Company "good news"[150]".

In one specific case only, the company was able to assess the value connected to the European image of the SE. This concerns Galeria di Base del Brennero – Brenner Basistunnel SE (registered in Austria in 2004) which was formed for the purpose of building the Brenner Basis Tunnel between Austria and Italy. In this specific case, the formation of an SE was a condition precedent for obtaining the European funding for the project and helped to raise the financing share from 20% to 27% of the overall construction costs.

Finally, it should be stressed that it is too early to consider the SE as a real European flagship. This is due in particular to the lack of recognition and awareness of the SE corporate form. It is commonly recommended by the existing SEs and potential SEs that increased communication and public announcements in connection with this new legal form be made at European level. This would improve public recognition of the SE and thus provide a greater incentive for companies to opt for this new corporate form.

Apart from its European image, the other major feature of the SE lies in its objective to facilitate businesses' cross-border transactions and conduct of affairs. In practice, this possibility is offered by two mechanisms: first, the SE Statute allows the SEs to freely transfer their registered office within Europe (i.e. the EU / EEA Member States) and, second, an SE can be formed by cross-border merger. Both of these features are positive drivers for the choice of the SE legal form and will be examined hereafter.

.1.1.1.2 Possibility of transfer of the registered office

The possibility of transfer of the registered office provided by Article 8 of the SE Regulation appears to be a major advantage of the SE and hence a strong incentive for choosing this corporate form. At the time of adoption of the SE Statute, one of the objectives of the SE was to facilitate the freedom of establishment of companies and in particular to attempt to eliminate the barriers to the migration of companies within the European Union. This objective is shared by the companies which have chosen the SE corporate form, since among the interviewees, the possibility of transferring the registered office was ranked in first place among the positive drivers for the choice of the SE status (ranking 3.4/5).

The importance of this driver is particularly high for SEs and companies incorporated in Member States that do not allow companies to transfer their registered office outside their jurisdiction or in which such a transfer would result in the winding-up of the company in the departure Member State and new incorporation in the arrival Member State[151].

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[150] Horst Eidenmüller, Andreas Engert, Lars Hornuf, "The Societas Europaea: Good News for European Firms" (electronic copy available at http://ssrn.com/abstract=1409555).

[151] This concerns more particularly the following Member States: Austria, Denmark, Finland, Germany, Greece, Hungary, Latvia, Norway, Poland, Portugal, Slovakia, and the United Kingdom.

As described in Chapter 2, section .2.1.2, 38 SEs have transferred their registered office to a Member State other than the Member State of initial incorporation or are planning to do so, this representing 10% of the existing SEs (as at 15 April 2009). Conversely, as explained in Chapter 2, section 2.2.2., only 8 SEs (out of the 369 as at 15 April 2009) have been set in a Member State totally different from any of its founding companies (i.e. approximately 2%). This trend tends to show that the founders of SE generally prefer to set up the SE in the Member State of at least one of the founding companies and transfer the registered office of the SE to a third Member State afterwards, rather than incorporating the SE in the third Member State right at the time of formation. For a large number of these SEs, the transfer of their registered office was made almost immediately after the company's initial incorporation as an SE. Therefore, it seems highly probable that corporate mobility was the principal motive in these companies' choice of the SE form.

The SEs having transferred their registered office are the following:

Nb	Name of the SE	Current Member State of incorporation	Former Member State	Year of transfer	Estimation of time required
1	MDM Holding SE	Cyprus	Austria	2007	Not available
2	Afschrift SE	Luxembourg	Belgium	2007	Not available
3	Diag Human SE	Liechtenstein	Czech Republic	2006	Immediately after formation (1 month)
4	Imperio Regere SE	Cyprus	Czech Republic	2008	Not available
5	Spirall Solutions SE	Cyprus	Czech Republic	2008	8 months
6	Crius SE	Slovakia	Czech Republic	2009	Not available
7	Platio se	Slovakia	Czech Republic	2009	Not available
8	World Nordic SE	Cyprus	Denmark	2008	1 month
9	Guardian Middle East & Africa SE	Luxembourg	Denmark	Currently under transfer (May 2009)	Not available
10	Elcoteq SE	Luxembourg	Finland	2008	6 months
11	Bibo Zweite Vermogensverwaltungsg SE	United Kingdom	Germany	2007	2 months
12	Bluo SE	Austria	Germany	2007	Not available
13	Bolbu Beteiligungsgesellschaft SE	United Kingdom	Germany	2007	2 months
14	Joh. A. Benckiser SE (JAB)	Austria	Germany	2007	2 months
15	Atrium Dritte Europäische VV SE	Ireland	Germany	2008	6 months
16	RSL COM Germany SE	United Kingdom	Germany	2008	2 months
17	Allpar S.E.	Austria	Luxembourg	2008	6 months
18	Mai Luxembourg SE	United Kingdom	Luxembourg	2008	3 months
19	Milium	Belgium	Luxembourg	2008	1 month
20	UBM International Holdings SE	United Kingdom	Luxembourg	2008	3 months
21	United Consumer Media SE	United Kingdom	Luxembourg	2008	3 months
22	UPRN 1 SE	Netherlands	Luxembourg	2008	2 months
23	International Engineering Holding SE	Austria	Luxembourg	Currently under transfer	Not available
24	Graphisoft SE	Hungary	Netherlands	2005	8 months
25	Amrest Holdings SE	Poland	Netherlands	2008	3 months
26	Arcelor Steel Trading SE	Spain	Netherlands	2008	2 months
27	Ardanos Holdings SE	France	Netherlands	2008	4 months
28	Bercy Charenton SE	France	Netherlands	2008	4 months
29	Equinox II SE	France	Netherlands	2008	4 months
30	Marcel Pourtout SE	France	Netherlands	2008	4 months
31	Philippe Auguste SE	France	Netherlands	2008	4 months
32	Narada Europe SE	United Kingdom	Norway	2006	Not available
33	Prosafe SE	Cyprus	Norway	2007	9 months

Nb	Name of the SE	Current Member State of incorporation	Former Member State	Year of transfer	Estimation of time required
34	Odfjell Terminals SE	Netherlands	Norway	Currently under transfer	N/A
35	Songa Offshore SE	Cyprus	Norway	2009	2 months
36	Norditube Technologies SE	Germany	Sweden	2008	8 months
37	Swiss Re International SE	Luxembourg	United Kingdom	2007	3 months
38	Nyckel 0328 SE	Sweden	United Kingdom	2009	6 months

The average time taken for the process of transfer of registered office is 4 months, with the shortest length being 1 month and the longest 9 months. As regards the estimated costs, considering the responding SEs, the average cost incurred for transferring the registered office amounts to EUR 20,000, however this average cost does not include the case of the transfer of the registered office of shelf SE which is relatively easier.

Several of the SEs that have transferred their registered office were former shelf SEs that have been sold and supposedly activated after the transfer. This concerns for instance Atrium Dritte Europäische VV, Nyckel 0328 SE, RSL COM Germany, Spirall Solutions SE, Crius SE and Platio SE and explains the net out-bound migration of Czech and German SEs. The motive underlying the transfer of registered office is thus clearly the change of control and possible activation of the SE.

Even for SEs that were not former shelf companies, the change of control is one of the major explanatory factors for the transfer of the registered office. This has been the case for example for the five SEs that have transferred their registered office from the Netherlands to France[152]. These companies were former public limited-liability companies under Dutch law and have, after their acquisition by a French group, been converted into SE for the purpose of transferring their registered office to France, where the central administration of the group is located. In addition, by transferring these companies to France, it has been possible to include them in a tax consolidated group under French law[153].

Apart from the cases of change of control, the argument often put forward to explain the transfer of the registered office is the possibility to locate the company in a Member State allowing higher flexibility than the Member State of initial incorporation, the flexibility being widely interpreted as encompassing the corporate, tax and social areas. As an example, Elcoteq has converted into an SE and has then transferred its registered office from Finland to Luxembourg, which is considered as a country with flexible national legislation (in particular relating to the holding companies). In addition, several SEs have transferred their registered office to the United Kingdom (the most popular inbound Member State), which is characterized by a high degree of flexibility in the national legislation applicable to the SE[154]. Cyprus is the second most popular inbound Member State and is considered as having a tax favorable legislation (e.g.: the corporate income

[152] Ardanos Holdings SE, Bercy Charenton SE, Equinox II SE, Marcel Pourtout SE, Philippe Auguste SE.

[153] Frédéric Lemos and Cathereine Cathiard ; Premiers transferts transfrontaliers de sieges de Sociétés Européennes en France - L'expérience de Foncière LFPI, in La Semaine Juridique, édition Entreprise et Affaires, n°2 (22/01/2009) p. 35.

[154] See Chapter 1 – Mapping of the relevant legislation applicable in the EU/EEA Member States.

tax rate in Cyprus amounts to 10%, the lowest in EEA, see the table in section .1.1.2.2 below).

In addition, when interviewed, the SEs unanimously explained that the possible transfer of the registered office was considered to be a major incentive to choose the SE. The difference between the intentions expressed by the SEs and the actual number of cross-border transfers of their registered offices may lie in the fact that the SE Regulation does not cover the tax issues related to the transfer. In this area in particular, despite the European status of the SEs, they are still considered to be national companies for tax purposes. Thus, the simple fact of moving the tax residence to another Member State may make silent reserves subject to taxation in the original Member State.

In conclusion, and despite the complexity of its procedure, the possibility of the cross-border transfer of the registered office is one of the primary advantages of the SE Statute, and therefore one of the primary reasons for choosing the SE legal form. Until adoption and enforcement of the 14th EC Directive on the cross-border transfer of the registered office of limited-liability companies[155], the SE will maintain its competitive edge over national corporate structures.

.1.1.1.3 Particular case of formation by cross-border merger

The next positive driver identified for the choice of the SE legal form consists in the possibility of performing cross-border mergers. As described in Chapter 2, section .2.2.1, 13 % of all formations of an SE has been accomplished through the merger procedure. A chronological distinction must be made in this area, taking into consideration the entry into force of the EC Cross-Border Merger Directive[156] and its various dates of implementation in the national legislation of the Member States of the EU / EEA. In this respect, the Member States were required to adopt the implementation measures by 15 December 2007 in order to comply with the EC Cross-Border Merger Directive (however only in 2009 had all Member States implemented the Directive).

The table below shows the date of implementation of the EC Cross-Border Merger Directive in the various Member States[157] as well as the number of SEs which were incorporated in the Member States before entry into force of that Directive (as a reminder the date of implementation of the SE Directive and the number of SEs as at 15 April 2009 are also given):

[155] Draft 14th Company Law Directive on the cross-border transfer of the registered office of limited-liability companies.

[156] Directive 2005/56/EC of the European Parliament and the Council of 26 October 2005 on cross-border mergers of limited liability companies.

[157] The date of implementation of the EC Cross-border Merger Directive indicated corresponds to the date of entry into force of the law of transposition. In most cases, further decrees (adopted at a later date) were necessary for the full enforcement of the Cross-Border Merger legislation.

Countries	Reminder: Date of implementation of the SE Directive	Date of implementation of the EC Directive on Cross-border merger (entry into force)	Nb of SEs at the time of implementation of the EC Directive on cross-border merger	Nb of SEs (up to 15 April 2009)
Austria	June 2004	December 2007	9	13
Belgium	October 2004	June 2008	10	10
Bulgaria	July 2007	December 2007	0	0
Cyprus	December 2004	December 2007	4	10
Czech Republic	November 2004	April 2008	41	137
Denmark	April 2004	July 2007	1[158]	2
Estonia	January 2005	December 2007	2	3
Finland	August 2004	December 2007	1[159]	0
France	July 2005	July 2008	7	15
Germany	December 2004	April 2007	19	91
Greece	May 2006	July 2009	0	0
Hungary	May 2004	December 2007	2	4
Ireland	January 2007	May 2008	0	1
Italy	August 2005	June 2008	0	0
Latvia	March 2005	April 2008	4	4
Lithuania	May 2005	July 2008	0	0
Luxembourg	August 2006	June 2009	14	11
Malta	October 2004	December 2007	0	0
Netherlands	March 2005	July 2008	16	22
Norway[160]	March 2005	February 2008	4	5
Poland	March 2005	June 2008	1	2
Portugal	October 2005	May 2009	0	0
Romania	March 2007	April 2008	0	0
Slovakia	September 2004	January 2008	2	11
Slovenia	March 2006	January 2008	0	0
Spain	October 2006	July 2009	0	1
Sweden	May 2004	February 2008	4	6
United Kingdom	September 2004	December 2007	1	16
Total			70	361

Initially, the cross-border merger was a strong incentive to form an SE and, in several cases, the only incentive. At least 20% of the SEs were created before the entry into force of the law transposing the EC Cross-border Merger Directive in the various Member States. In Belgium, Latvia and Luxembourg in particular, all the SEs created in these Member States were incorporated before implementation of the EC Cross-border Merger Directive. This concerns also a large majority of the SEs incorporated in the Netherlands (16 out of 22).

Thus, an SE currently incorporated in the Netherlands and another SE that has its registered office in Germany both explained during the interview that they had opted for the SE legal form because at the time of creation (2007 and 2008, respectively) the SE Statute was the only option available for performing a cross-border merger of companies from different EU / EEA jurisdictions. Furthermore, they explained that if the EC Merger

[158] This concerns World Nordic SE which transferred its registered office to Cyprus in 2008.

[159] This concerns Elcoteq SE which transferred its regisitered office to Luxembourg in 2008.

[160] The other two Member States of the EEA have not implemented the EC Cross-border Merger Directive yet.

Directive had been implemented at the time of the performance of their transaction, their decision to set up an SE would never have been contemplated. The Allianz group also stated that the possibility of combining the German stock corporation Allianz AG and its Italian subsidiary Riunione Adriatica di Sicurtà (RAS) was the predominant motive for the group to opt for the SE corporate form.

Before the implementation of the EC Merger Directive in the various Member States, cross-border mergers could only be performed through a complex, costly and time-consuming process often tainted with legal uncertainty. Compared with cross-border transactions, the SE offered a legally-secured transaction template for combining two or more legal entities from various EU / EEA jurisdictions to form an SE.

With the transposition of the EC Merger Directive into national laws, the Member States' national legislation now provides a procedure for cross-border mergers (almost) identical to that of the SE Regulation. Recourse to the SE is therefore no longer necessary to ensure legal certainty in cross-border mergers. In addition, the provisions relating to employee participation are more flexible within the legal framework of the EC Merger Directive than in the SE Statute. According to Article 3 of the SE Directive, as soon as the plan for the establishment of an SE is drawn up, the management or administrative organs of the participating companies shall "take the necessary steps, including providing information about the identity of the participating companies, concerned subsidiaries or establishments, and the number of their employees, to start negotiations with the representatives of the companies' employees on arrangements for the involvement of employees in the SE". Article 16 of the Merger Directive provides that "the rules in force concerning employee participation, if any, in the Member State where the company resulting from the cross-border merger has its registered office shall not apply, where at least one of the merging companies has, in the six months before the publication of the draft terms of the cross-border merger [...], an average number of employees that exceeds 500 and is operating under an employee participation system"[161]. Thus, in short, the SE Statute does not fix any threshold in terms of number of employees for the requirement to start and conduct negotiations with respect to employee involvement, whereas the EC Merger Directive provides for the double requirement (i) of reaching a threshold of an average number of 500 employees in one of the merging companies (in the six months before the publication of the draft terms of the cross-border merger) and (ii) operating under an employee participation system in order to start and conduct negotiations with respect to employee participation.

In conclusion, the possibility of creating an SE by way of cross-border merger, which was originally a strong positive driver, is no longer an actual incentive. The reason for this is the adoption and implementation of the EC Cross-Border Merger Directive, which provides for simpler rules in terms of employee involvement and is open to more forms of companies.

[161] Nevertheless, it should be stressed that the scope of the rights of employees is not exactly the same in the SE Statute ("involvement") and the EC Merger Directive ("participation"). For further comments on this subject see Chapter 4.

.1.1.1.4 Possibility of cross-border groups adopting a simplified management structure

Two levels of analysis should be considered regarding the simplification of the structure of cross-border groups. First, the SE may sometimes be used to rationalise and streamline the structure of the group itself, by reducing and optimising the number of companies and legal entities belonging to the group. Second, the SE can also be a means to harmonise and optimise the corporate governance of a cross-border group, without modifying the organisational chart of the group itself.

.1.1.1.4.1 Simplification of the group structure

At the time of its adoption, the SE Statute aimed at facilitating the opportunity for groups to "plan and carry out the reorganisation of the business on a Community scale"[162]. Thus, the explanation is often that one of the advantages of the SE is that it enables company groups to reorganise their European group-structure and to operate with a single company instead of a web of subsidiary companies. The SE was therefore described as the appropriate vehicle for Europe wide groups, which have developed their activities in different industries and services in various Member States. Within the legal framework, these groups could restructure their business in different forms: they could, for example, form one SE for each geographical sector, for each sector of activity or for each product line. This first objective of the SE Statute was expected to result in more efficient and less costly management and thus lead to productivity gains and economies of scale[163]. The reality is very different from the expectations.

When interviewing the SEs on their motives for choosing the SE legal form, very few put forward simplification of the management structure (this driver obtained an average ranking of 1.5 out of 5), thus being one of the lowest-rated positive drivers identified. The majority of the SEs interviewed explained that the creation of the SE actually had no impact on the corporate structure of the group, which remained unchanged with respect to the number of legal entities, the respective level of integration within the group and the composition of the corporate organs of the companies concerned.

There are, however, a few cases in which the reorganisation of a cross-border group was a true incentive to form an SE.

A first case of reorganisation consists in creating an SE and simultaneously systematically replacing the former subsidiaries with branches of the SE. Two preliminary observations should be made in this respect. First, the assessment of appropriateness and decision to operate through branches rather than subsidiaries is, legally speaking, independent of the formation of an SE. A national public limited-liability company, as parent company, could choose to have all its subsidiaries contribute their operational business to the parent company, which will then wind up the subsidiaries and run the operational business through branches. As far as limited liability companies are concerned, this could be done by cross-border mergers of the subsidiaries with the holding company. To perform this

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[162] Paragraph 1 of the Preamble of the SE Regulation.

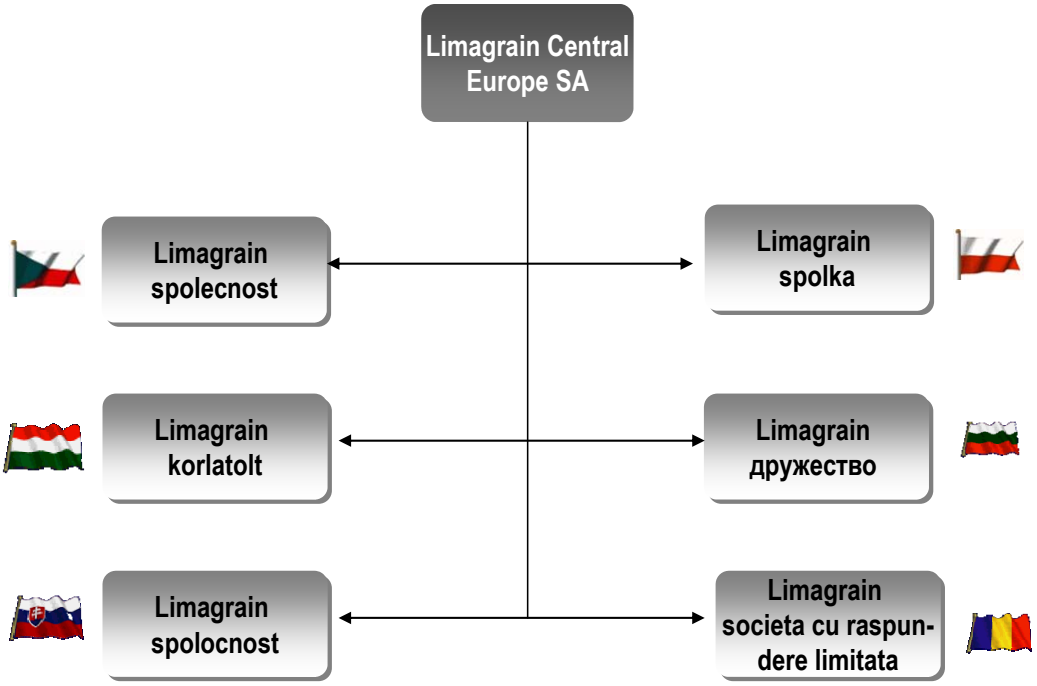
[163] The European Competitiveness Council even estimated that the savings could amount to USD 30 billion (Monti).

kind of reorganisation in parallel with the formation of an SE may, however, be positive due to the psychological effect (the choice of the SE legal form being a "signal" intended for the employees, customers, business partners or third parties in order to gain acceptance of the project within the company and the group concerned[164]). Second, this form of reorganisation is more suited for service businesses than for industrial businesses: branches are often considered not to be an appropriate operational medium for production sites (due in particular to the unlimited liability of the "parent" company towards its branches).

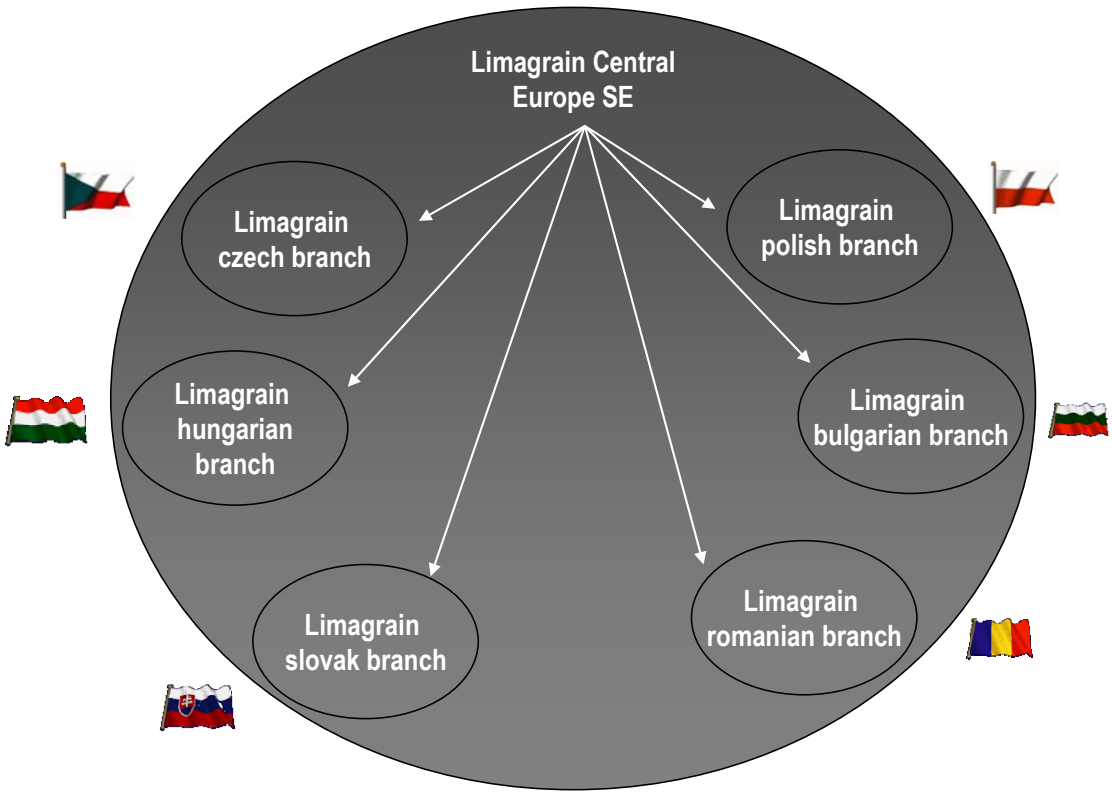
As an example, in 2007, Limagrain, a public limited-liability company, engaged in the export and marketing of cereals in Eastern Europe, chose to convert into an SE. The conversion was a first step in the process of restructuring this sub-group. The second step of the restructuring process consisted in replacing all of the subsidiaries with branches, with the process being broken down into the following steps: opening of a new branch of the SE in each Eastern European country, contribution of all assets and transfer of employees of the former subsidiary to the SE (through its new branch) and then dissolution of the subsidiary. This method of reorganisation is illustrated by the charts below:

[164] See paragraph 1 above.

Group structure before formation of the SE

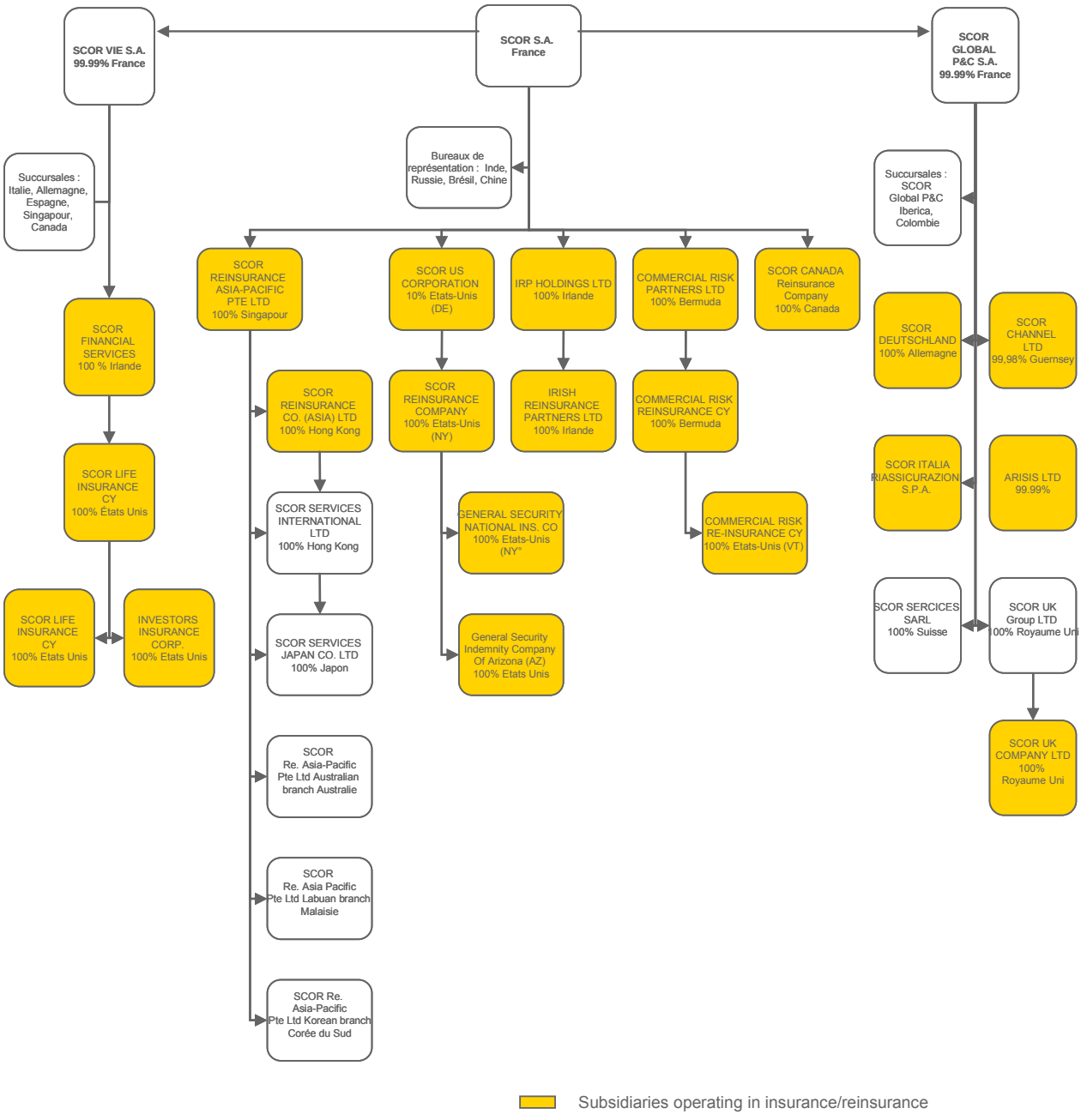


Group structure after formation of the SE

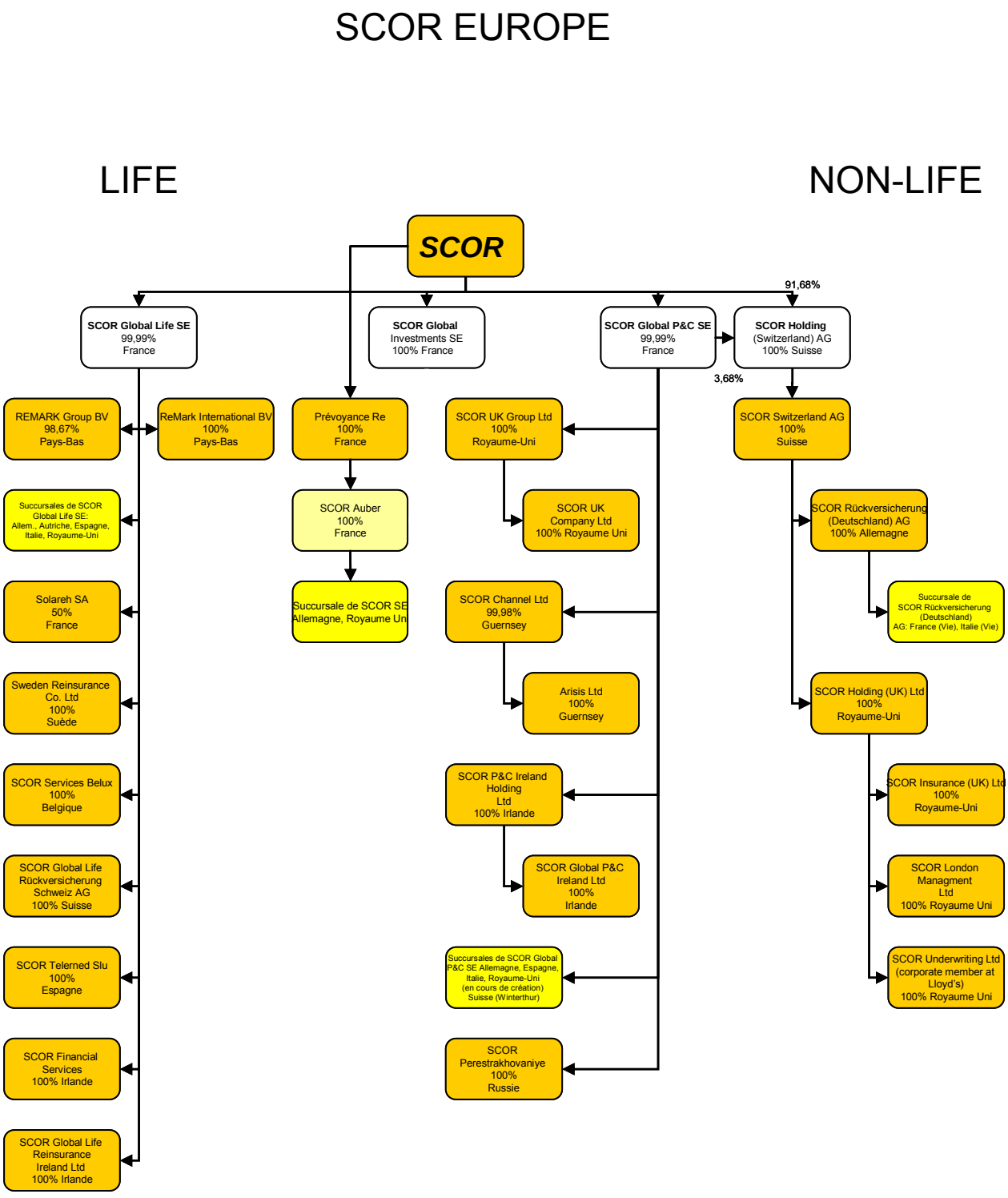


A second example of group restructuring by means of an SE is provided by the SCOR group, which restructured its business for each sector of activity. Thus, the SCOR group now distinguishes between its two main areas of activity in the reinsurance field, i.e. life reinsurance and non-life reinsurance. In the first field, SCOR Global Life was born out of the merger of SCOR Vie and Revios and offers a broad range of reinsurance for individual and group life insurance, long-term care, substandard risks, critical illness (United Kingdom and Asia) and financing products. SCOR Global P&C results from the merger of three operational companies (previously incorporated in France, Italy and Germany). These two SEs are now placed under the mantle of the parent company SCOR, as illustrated in the following charts:

Group structure before formation of the SE



Group structure after formation of the SE (only for Europe)



In conclusion, the simplification of the corporate structure of cross-border groups could be a very strong driver in the choice of the SE legal form if the SE vehicle were adapted for such a purpose, as the need for proper tools for group reorganisation across Europe is strong. The need for a proper and harmonised set of rules on the European groups has been frequently expressed during the interviews. The problem is that, within the framework of the SE Statute, no such rules and regulations have been provided for. As a consequence, even if the need for group restructuring is strong and the SE, as a supranational corporate form, could be an appropriate tool in this respect, this is a non-functioning driver. The advantages of SE Statute in terms of group restructuring (in particular the advantages in terms of tax and corporate harmonisation) do not outweigh the related drawbacks. In this respect, several main hurdles against the efficiency of the SE as a proper tool for group restructuring have been identified. First, the legal form of the "subsidiary" is a means to control and reduce the liability risks of the parent company; therefore, most groups are not prepared to replace their subsidiaries with branches of an SE, unless there are strong corporate and tax advantages linked to it. Second, the general statement that "business requires reactivity" often leads to a preference for subsidiaries over branches as the former can more easily be sold than the latter (the sale of shares held by a parent company being an easier operation than the assignment of assets). Third, a psychological aspect should be taken into account: corporate officers would be reluctant to give up their position as Chief Operating Officer of a subsidiary, which is an independent legal entity, to become Director of a branch. On the contrary, if the SE could present enough advantages in terms of tax, legal and social harmonisation across Europe, the drawbacks quoted above could be considered as outweighed.

.1.1.1.4.2 Simplification inside the cross-border group (rationalisation of corporate governance)

In a cross-border group organised into various legal entities present in different Member States, the question of corporate governance is of interest, insofar as in this particular field there has been no harmonisation of corporate law[165]. The SE Regulation provides for a limited number of standard corporate governance rules which will be common to all SEs and for the possibility of freely adopting certain rules in the articles of association. Therefore, the SE legal form enables cross-border groups to introduce quite a uniform governing structure in the various Member States, provided that the SE legal form is adopted by each subsidiary. "Indeed although SEs are not the same from one Member State to another due to national legislation, by adopting the corporate form of the SE for all or part of a group, the executive officers can use the legislation common to Member States in order to standardise SE rules of governance and use a "score board" to enhance group management"[166].

Thus, the SE Regulation enables cross-border groups to use a set of minimum common rules in all the SEs of the group, these rules including:

- Option of choosing between the one-tier or the two-tier system, in whichever Member State the SE has its registered office,
- Standard rules for appointment of the chairman of the administrative organ and the chairman of the management or supervisory organ,

[165] See hereabove, comments relating to the draft fifth Directive.

[166] Excerpt from the interview conducted with Professor Michel Menjucq.

- Maximum term of six years for the mandate of representatives in SE corporate bodies,
- Standard rules for quorum and the decision-making process in SE corporate bodies.

In conclusion, through the SE vehicle, a cross-border group may define and apply a standardised corporate governance structure for all or some of its companies, with variations still existing from one Member State to the next. Thus, the possibility of a standardised corporate governance structure is a potential advantage directly linked to the SE legal form. However, it should be observed that in practice, this possibility has not often been used by cross-border groups, which rather constituted only a single SE placed at the head of the group and under whose umbrella the local corporate form of public limited-liability companies was maintained (or in some cases turned into branches).

In analysing this outcome, one has to keep in mind that an existing group of national companies would have to be transformed into a group of SEs. As the methods of formation of an SE are limited, there may be no simple way for a subsidiary which itself is not a public limited-liability company and/or has no European cross-border relationships apart from its parent company, to transform into an SE. Thus, the group would have to establish (or acquire) a shelf SE in each Member State and merge the existing national company into this SE. It is evident that this process leads to additional costs and efforts which will hardly be outweighed by the advantage of a simplified and unified corporate governance structure, especially given that the corporate governance of the SE is linked to the national system of the respective Member State. It would be a great improvement for the purpose of simplification of group structures, if subsidiaries of an SE themselves were able to convert into SEs without preconditions apart from being a limited-liability company (public or private) and having a minimum share capital of EUR 120,000. If any, further conditions could be that the subsidiary must be 100% held by the holding company and that it (and/or the holding company) must have at least a certain number of employees.

.1.1.1.5 Regulatory reasons

Group restructurings using the SE vehicle are primarily performed by groups operating in the finance and insurance businesses[167]. This can be explained by the requirements imposed on this type of regulated activity: the combination of several legal entities into a single one (in most cases the SE) or the replacement of the previous subsidiaries with branches allows economies of scale in terms of capital allocation and calculation of solvency ratios. Thus, the structuring of a group through branches (instead of subsidiaries) facilitates the compliance with the two European Directives[168] having translated the so-called Basel II Accord[169] into a European regulatory framework that establishes a

[167] See Appendix 2 – List of SEs by economic fields of activity.

[168] Directive 2006/48/EC of the European Parliament and of the Council relating to the taking up and pursuit of the business of credit institutions and Directive 2006/49/EC of the European Parliament and of the Council on the capital adequacy of investment firms and credit institutions.

[169] The purpose of Basel II, which was initially published in June 2004, is to create an international standard that banking regulators can use when creating regulations about how much capital banks need to put aside to guard against the types of financial and operational risks banks face. Basel II uses a "three pillars" concept – (1) minimum capital requirements (addressing risk), (2) supervisory review and (3) market discipline – to promote greater stability in the financial system. A final package of measures to enhance the three pillars of the Basel II framework was issued on 9 July 2009 by the expanded Basel Committee.

prudential supervision on credit institutions and investment firms[170]. Moreover, this simplification of the structure of the cross-border group facilitates the movement of capital from subsidiaries transformed into branches to the head office.

This argument was explained as being the principal driver for the adoption of the SE legal form for an SE incorporated in Germany and active in the banking field. This is also one of the reasons put forward in the announcement by the Scandinavian bank, Nordea, to convert into an SE and thus to combine the four national banking groups (Sweden, Finland, Denmark and Norway) into a one-bank structure. In initially announcing the decision of formation of an SE, the Chief Executive Officer of the Nordea Group, Lars G. Nordström, stated that "the change will lead to improved operational efficiency, reduced operational risk and enhanced capital efficiency"[171].

In addition, the structure of banking institutions operating across national borders through branches could trigger issues for the regulatory and supervisory authorities, which are historically organised on a national basis. Such issues in the EU/EEA are cleared thanks to the so-called "European Passport"[172] which allows the restructuring of financial groups through branches. The passport allows the banking institutions in a Member State to operate freely in any country of the EU, either by establishing branches or by providing services, without the necessity of having to obtain a new authorisation from the host country. Thus, each branch operating abroad is subject to the sole control of the Member State of the registered office regarding the conditions of access to and exercise of the banking activity.

The SE is not the only available vehicle for the restructuring of banking groups, since the European regulation does not prescribe, in particular, a specific legal form for credit institutions. In practice, banking activities may be provided by commercial banks, mutual societies, cooperatives, saving banks, credit unions, partnerships, which can all benefit from the European passport. However, when combined with other drivers for the choice of this legal form (in particular the European image and the possibility to freely transfer the registered office), the SE can appear as an adequate vehicle for the restructuring of groups in the banking and financial sectors, as via the restructuring through branches, it facilitates the fulfilment of the regulatory requirements as regards capital and solvency ratio.

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[170] This European regulation on capital requirements, i.e. the amount of own financial resources that banks and investment firms must have in order to cover their risk exposures. The aim of these directives is to ensure the financial soundness of banks and financial institutions with a view to protect depositors and ensure the stability of the financial system.

[171] Interview with Lars-Olof Andreasson from Nordea Bank AB.

[172] The European Passport was created by the second Council Directive 89/646/EEC of 15 December 1989 on the coordination of laws, regulations and administrative provisions relating to the taking-up and pursuit of the business of credit institutions and amending Directive 77/780/EEC and by Directive 2000/12/EC of the European Parliament and of the Council of 20 March 2000 relating to the taking up and pursuit of the business of credit institutions.

.1.1.2 Reasons for setting up SEs – reasons linked to national legislation applicable to SEs

The positive drivers presented above relate directly to the SE Regulation. However, further factors in the final choice to set up SEs may in some cases be directly linked to national legislation.

.1.1.2.1 Considerations linked to the corporate law regime

.1.1.2.1.1 Flexibility of the relevant national legislation applicable to the SE (inter Member States)

The relevant national legislation applicable to the SE in the various Member States depends on how the options left open by the SE Regulation and SE Directive have been implemented and on the national legislation applicable to domestic public limited-liability companies referred to in the SE Regulation and the SE Directive. Such national legislation may be more or less flexible and attractive depending on the Member State[173].

Comparing the attractiveness of the national legislation applicable to the SE (see section .3.2.1) with the actual distribution of SEs (see section .2.1.1), it can be observed that Luxembourg is classified among the two most flexible and attractive Member States as regards both the conditions of implementation of the options left open by the SE Regulation and the national legislation referred to in the SE Statute. Interestingly, when relating the number of existing SEs in Luxembourg to the total population, Luxembourg appears to have the highest rate of SEs (one SE per 20,000 inhabitants)[174]. Also the United Kingdom scores well in the combined inter MS analysis (third best rating) and can be argued to have had some success in attracting SEs to be set up in or transferred to its territory (fourth most popular country looking only at the number of SEs registered, not taking into account the size of the country). The Netherlands, Belgium and Slovakia also score relatively well in the combined inter Member States analysis and can be argued to have had relative success in attracting SEs to be registered in their country.

However, there are also counter-examples with respect to the correlation between the attractiveness of the national legislation of a Member State and the number of registered SEs; some of the most striking examples being the Czech Republic, Germany and Austria, where many SEs have been formed although the related legislation is not measured to be flexible, and Italy where no SEs has been registered even though Italy's legislation measured our way is the second most flexible amongst the selected Member States.

In conclusion, with the possible exception of Luxembourg (and to a lesser extent the United Kingdom, the Netherlands, Belgium and Slovakia), the inter Member States level of attractiveness and flexibility of the national legislation applicable to the SE does not seem to be an actual driver in the choice of the SE legal form. This seems all the more true since,

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[173] For details, see Chapter 1 – section 3 –Flexibility and attractiveness of the legislation applicable in the EU / EEA Member States.

[174] Horst Eidenmüller, Andreas Engert and Lars Hornuf, Incorporating Under European Law: the Societas Europaea as a Vehicle for Legal Arbitrage.

during the interviews, the degree of inter MS flexibility of the national legislation applicable to the SE were not put forward as a positive driver.

.1.1.2.1.2 Specific incentive of national legislation applicable to the SE (intra Member State)

As a general principle, Article 10 of the SE Regulation provides that "subject to this Regulation, 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 States in which it has its registered office". Thus, by setting a general principle of non-discrimination between SEs and domestic public limited-liability companies, the goal of the SE Regulation was to avoid competition inside a Member State between the SE corporate form and that of the domestic public limited-liability company[175].

Nevertheless, the SE Regulation both has mandatory rules and provides some options that could lead to different rules for the SE compared to the national legislation applicable to public limited-liability companies. Comparing the intra Member State analysis (see section .3.2.2) with the actual distribution of SEs (see section .2.1.1), there is some correlation between the relative success of SEs in the United Kingdom and Belgium and their intra Member State rating. Similarly there is correlation between the lack of any SEs in Portugal, Bulgaria and Romania and their relatively poor intra Member State rating. However the intra MS analysis completely fails to give any potential partial explanation to the lack of success of the SE in Denmark, Spain and Greece, the big success in the Czech Republic and Germany, or the relative success in the Netherlands, Austria, Cyprus, France and Luxembourg.

As a supplement to these general correlation trends it should be recalled that the choice of the SE form according to the interviews builds on a specific business case. In such specific business cases not all differences in rules have the same importance. Therefore a major comparative advantage in only a few areas could potentially be decisive if these areas are sufficiently important for the particular company contemplating the SE form.

- In the Czech Republic, the corporate governance rules for SEs with a two-tier system, which requires no minimum or maximum number of members of the management or supervisory organs, have a major advantage over that of domestic public limited-liability companies, for which such requirements apply. Thus, Czech SEs can be created with the management board and supervisory board having only one member (whereas Czech public limited-liability companies must have a management organ with at least three[176] members and a supervisory board with three members). This could potentially be a strong incentive in the choice of the SE corporate form by Czech companies (and since these Czech rules are also amongst the three most flexible compared to the other

[175] It should however be pointed out that in the area of possible amendments to the SE Statute, Article 69 of the SE Regulation provides for the possibility of allowing "provisions in the statutes of an SE adopted by a Member State in execution of authorisations given to the Member States by this Regulation in respect to the SE which deviate from or are complementary to these laws, even when such provisions would not be authorised in the statutes of a public limited-liability company having its registered office in the Member State".

[176] Only one member is required in cases where the public limited-liability company is held by a sole shareholder.

countries, they could potentially also be an incentive for foreign companies to choose the Czech Republic as the country of registered office of the SE).

- In France, SEs which do not make public offerings enjoy increased freedom regarding the definition of their statutes. Thus, the statutes of a non-listed SE may subject any transfer of shares to restrictions on free negotiability. Such restrictions must not have the effect of rendering the shares inalienable for more than ten years. Any assignment made in breach of such provisions of the statutes is null and void. Furthermore, under the terms and conditions set forth in the statutes of a non-listed SE, a shareholder may be required to assign his / her shares. Likewise, that same shareholder's non-pecuniary rights may be suspended during the period of time he / she carries out the said assignment. Thus, the French legislation allows for increased statutory freedom for non-listed SEs over the domestic public limited-liability companies, and this freedom to organise relationships among shareholders is a feature of the "French" SE. However, in practice, these favourable provisions have never been cited as an incentive to create an SE in France. Therefore, they cannot be considered a real driver, neither in the choice of the SE nor in the choice of its location.

  Moreover, at the present time, the current provision of the French legislation could be considered to be an infringement of Article 10 of the SE Regulation.

In conclusion, with the possible exception of the United Kingdom, Belgium, Portugal, Bulgaria and Romania and specific cases of differences in rules that might be important for some companies but not for others, the intra Member State national corporate law regime of the SE does not in general seem to be an important positive driver explaining the choice and location of setting up an SE.

.1.1.2.2 Considerations linked to the tax regime

It should first be noted that the national tax regimes of the 27 Member States, along with the national tax regimes of the EEA Member States, are applicable to the SE, depending on the Member State where its registered office and places of business are located. This is a direct consequence of the fact that the final version of the SE Regulation does not include any tax provision[177], thus leaving the tax sovereignty of the Member States untouched.

As a direct consequence of Article 10 of the SE Regulation which sets forth the non-discrimination principle, the tax treatment of an SE will not differ from the tax treatment of any public limited-liability company of the EU / EEA Member State operating at a cross-border level. Thus, an SE will be taxed according to the national rules of each Member State in which it is active and will generally be subject to national corporate income tax on its worldwide income of its state of residence, i.e. usually in the State of the registered office and central management of the SE[178], subject to applicable conventions for the avoidance of double taxation.

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[177] See Paragraph 20 of the Preamble of the SE Regulation: "This Regulation does not cover other areas of law such as taxation, competition, intellectual property or insolvency".

[178] Prof. Marjaana Helminen, The Tax Treatment of the Running of an SE, European Taxation Vol. 44 Number 1, 01/2004.

Given that the SE Regulation does not contain any tax provisions, and that the tax position of an SE is aligned with the corresponding domestic public limited-liability companies, tax considerations should not impact the decision to set up an SE.

It is nevertheless necessary to analyse the effective impacts of national tax regime on reasons for setting up an SE. Concluding hastily that tax aspects do not impact the decision to set up an SE would certainly be a mistake, mainly considering the possibility to transfer the registered office of an SE.

To date, the SE is indeed the only form of company that has the ability to transfer its registered office beyond its national border within the EU / EEA. This advantage is particularly relevant as regards Member States that do not allow companies to transfer their registered office outside their jurisdiction or in which such a transfer would result in winding-up of the company in the departure Member State and new incorporation in the arrival Member State[179].

Some constraints, however, have to be taken into account as regards the possibility to transfer the registered office of an SE. According to the SE regulation and the Mergers Directive[180], the cross-border transfer of the registered office should clearly be neutral. The transfer of the registered office is a means of exercising freedom of establishment as provided for in Articles 43 and 48 of the Treaty Establishing the European Community. No assets are transferred and the company and its shareholders do not derive any income, profits or capital gains from it.

The tax implications linked to the possibility for an SE to transfer its registered office beyond its national border within the EU / EEA must be analysed further.

On this basis, aspects linked to the tax regime applicable to an SE in particular as a consequence of the transfer of its registered office will be presented. Secondly, an analysis of the empirical findings will indicate whether or not tax considerations appear to be a driver for the constitution of SEs.

.1.1.2.2.1 Principles linked to the tax regime applicable to an SE in case of transfer of registered office

Tax restraints to the transfer of the registered office of an SE

From a theoretical standpoint, two different conditions in which the registered office of an SE may be transferred must be analysed:

- The registered office of the SE is transferred to another Member State but the company maintains a permanent establishment in the Member State of origin so as to avoid exit taxes on the transfer of its assets.

In such a case, the non-transferred activities and assets remain taxable in the Member State in which they are located. However the head office of a company is considered as a permanent establishment according to the tax treaties. Thus, the activities of the SE will be subject to taxation in two Member States. The SE will then be required to split its profits and losses between the two Member States concerned. This may often be carried out only

[179] See above 1.1.1.2 Possibility of transfer of the registered office.

[180] Directive 90/434/EEC of 23 July 1990 amended by Directive 2005/19/CE of 17 February 2005, also applies to the transfer of the registered office of an SE.

through costly and time-consuming processes (e.g., a system analysis may be necessary at the very least).

- The SE transfers its registered office without maintaining a permanent establishment to which the assets of the relocated SE can be attributed in the Member State of origin. Accordingly, the Member State concerned may apply exit taxation such as capital gains tax on tangible and intangible assets.

It is, however, noteworthy that such taxations linked to cross-border transfers of the registered office might be considered as prohibited exit taxation contrary to the EU freedom of establishment principle. To date, this is the opinion of some of the legal commentaries[181] resulting notably from the ECJ decision Hughes de Lasteyrie du Saillant (C-9/02)[182].

The validity of exit taxes on companies in the national laws of EU Member States might indeed appear doubtful after the Hughes de Lasteyrie du Saillant case, since it may be construed as a sign that the ECJ would soon require Member States to allow companies to emigrate (i.e., leave their home jurisdiction) as well as immigrate (i.e., enter another EU jurisdiction) freely within the EU. Indeed the ECJ has ruled that this decision (i.e. the Hughes de Lasteyrie du Saillant case) should be applicable to any similar case that might arise concerning exit tax legislation.

From our point of view, the national taxation linked to transfers of the registered office including assets cannot be considered as a forbidden exit tax, notably for the following three reasons[183].

Firstly, the aforesaid case clearly concerns an individual whereas the SE is a legal person (entity).

Secondly, the Mergers Directive clearly makes tax deferral relief conditional upon the existence of a permanent establishment in the Member State where the SE was previously

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[181] See notably, The End of Exit Taxes in Europe by Christian H. Kälin and Christian Rödl in Tax Planning International Review, 09/2004, N° 9.

[182] Hughes de Lasteyrie du Saillant, an individual French tax resident, decided to move his residence to Belgium, after having resided in France. The French tax authorities taxed the unrealized appreciation of the shares (hold by Hugues de Lasteyrie du Saillant in a French company) under the reason of preventive tax evasion (exit tax). Hughes de Lasteyrie du Saillant appealed to the Conseil d'Etat, which in turn asked the European Court of Justice, whether the French exit tax provisions, which provide for taxation of increases in value only when tax residence is moved outside of France, may violate the principle of freedom of establishment guaranteed by Article 43 of the EC Treaty.

The ECJ rendered a judgment on March 11, 2004 (C-9/02) and ruled that the French exit tax provisions were likely to restrict the exercise of that right, at the very least deterring taxpayers wishing to establish themselves in another Member State, because they are subject, by the mere fact of transferring their tax residence outside France, to tax on a form of income that has not yet been realized, and thus to disadvantageous treatment in comparison with a person maintaining his residence in France.

[183] For more information on this purpose, see Study on the implementation of the Tax Merger Directive published in January 2009 by the Commission conducted by Ernst & Young, p.23-31, notably : "*some doubts still exist as to whether 'exit charges' as applied by the Merger Directive can be rebutted by companies as being incompatible with the EC Treaty. On the one hand, ECJ's 'exit charge' cases discussing the situation of individuals suggest so. On the other hand, arguments exist that the ECJ might apply different reasoning if it would have to decide cases involving companies*".

incorporated. Exit taxation may, however, be allowed in cases where the SE does not maintain a permanent establishment in its former Member State.

Thirdly, from a practical point of view, the possibility of transferring the registered office of an SE unconditionally would probably imply a risk of tax evasion due to the impossibility for the former Member State of incorporation to protect the tax bases until the income in question is realized.

It is noteworthy that the European Commission published a communication dated December 19, 2006 on exit taxation. Referring notably to the ECJ's findings in the Lasteyrie du Saillant case, the Commission states that Member States should provide for an unconditional deferral of collection of the tax due, until the gain is actually realized. According to the Commission, the tax base of the "exit State" can be protected through effective administrative cooperation.

In addition, the possibility for an SE to transfer its registered office from one Member State to another is subject to anti-abuse provisions and anti-treaty shopping rules[184].

Possible tax advantages linked to the transfer of the registered office of an SE

Apart from the different restraints mentioned above, it is clearly possible for an SE today to move its registered office from one Member State to another. The related tax consequences have to be taken into account.

Basically, strong differences between the rates of Corporate Income Tax in the different Member States can be observed[185]. Low tax rates are of course likely to interest some companies. An analysis of possible tax advantages related to the transfer of registered office of an SE cannot, however, be limited to Corporate Income Tax; other significant tax aspects must be analysed further[186].

[184] It has to be noted that in practice, many companies are set up in jurisdictions merely to obtain the tax benefits of specific tax treaties, although the chosen structure has in reality little commercial substance for example. Tax authorities worldwide are aware of these so-called treaty shopping practices and have become stricter in combating such misuse of tax treaties. Within the EU, each Member State notably has its own anti-treaty shopping rules. In this respect, the transfer of the registered office of an SE is in principle subjected to those anti-treaty shopping rules.

[185] For example, Cyprus applies a 10% Corporate Income Tax rate whereas Belgium applies a 33% rate.

[186] See notably, Paying taxes 2010 (assessment of both the cost of taxes and the administrative burden of tax compliance), study from PwC and the World Bank Group: *"Corporate income tax is only one of many taxes with which business has to comply. When considering the burden of taxes on business, it is important to look at all the taxes that companies pay. In a recession, company profits, and therefore corporate income tax payments, may fall, but the cost of taxes for business may still increase where other taxes paid are not linked to profitability"*.

In the table below, the applicable tax rates in the EU / EEA Member States are shown:

	Corporate Income Tax Rate (%)	Capital Gains Tax Rate (%)	Branch Tax Rate (%)	Withholding Tax (%)			Net Operating Losses (Years)	
				Dividends	Interest	Royalties	Carryback	Carryforward
AT	25	25		25	25	20	0	Unlimited
BE	33	33	33	25	15	15	0	Unlimited
BG	10	10	10	5	10	10	0	5
CY	10	20	10	0	0	0	0	Unlimited
CZ	20	0/20	20	0/15	0/15	15	0	5
DE	15	15	15	25	0	15	1	Unlimited
DK	25	25	25	28	25	25	0	Unlimited
EE	21	0/21	21	0/21	0/21	15/21		
EL	25	25	25	10	GLE 20 FLE 25	20	0	5
ES	30	30	30	18	18	24	0	15
FI	26	26	26	28	0	28	0	10
FL	20	34.02	20	4	4	0	0	5
FR	33[1]/3	0/15/33[1]/3	33[1]/3	25	0/18	33[1]/3	3	Unlimited
HU	10/16	10/16	10/16	0	0	0	0	Unlimited
IC	15	15	15	R 0 NR 10	R 0 NR 10	R 0 NR 10	0	10
IR	12.5	22	12.5	20	20	20	1	Unlimited
IT	27.5	0/27.5	27.5	0/1.375/12.5/27	0/12.5/27	22.5/30	0	5
LT	15	15	15	0/15	10	10	0	5/Unlimited
LU	21	21	21	15	0	0	0	Unlimited
LV	15	15	15	0/10	5/10	5/15	0	5
MT	35	35	35	0			0	Unlimited
NL	25.5	25.5	25.5	15	0	0	1	9
NO	28	28	28	25	0	0	0	Unlimited
PL	19	19	19	19	20	20	0	5
PT	25	25	25	20	15/20	15	0	6
RO	16	16	16	16	16	16	0	5
SE	26.3	26.3	26.3	30	0	0	0	Unlimited
SI	21	21	21	15	15	15	0	Unlimited
SK	19	19	19	0	19	19	0	5
UK	28	28	28	0	20	22	1	Unlimited

Sources: The 2009 worldwide corporate tax guide, Ernst & Young.

As regards dividends and withholding tax on outgoing distributions:

Directive 90/435 of 23 July 1990 (amended on December 22, 2003 with effect from January 1, 2005 to include the SE) established exemption rules for income taxation of cross-Community dividend distributions from subsidiaries to parent companies. Pursuant to EU Directive (90/435), the dividends withholding tax also ceases to apply to dividends that a EU subsidiary pays to a parent company established in another Member State, provided that the parent company holds at least a set interest in the subsidiary.

As a conclusion, tax aspects related to dividend distributions in the EU are in principle almost tax exempted between parent company and subsidiaries (provided the conditions of exemption are fulfilled) and should as a consequence not impact the transfer of the registered office of an SE.

As regards the network of tax treaties to which the Member State is a party[187]:

Due to globalisation, many groups are active around the world and not only within the boundaries of Europe. As a consequence, the EU tax exemptions on dividends or withholding tax no longer apply as soon as one company of the group is located outside the EU. Thus, the number and the nature of tax treaties to which the Member State is a party become determining criteria as regards the location of the registered office notably in case of transfer of the registered office of an SE.

As regards local taxes:

Local taxes may also have an impact on the decision to transfer the registered office of an SE due to high local taxes in certain Member States and no such taxes in others.

As regards cross-border tax loss relief:

It could also be advantageous for a company operating through branches in a variety of Member States, to locate its head office in a Member State where it will be possible to offset losses from some branches and sometimes even subsidiaries against profits from some others. The possibility for a company to offset the profits and losses of its subsidiaries and branches against its own results is allowed by certain Member States under various conditions[188].

Nevertheless, the recent Marks and Spencer ECJ case (C-446/03)[189] shows that the allowance for offsetting losses generally does not extend beyond the boundaries of the

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[187] As a matter of tax law, a double tax treaty will allow the distribution of dividends, interests and royalties to the shareholders with an exemption or with a lower withholding tax.

[188] Denmark and Austria notably.

[189] Marks and Spencer, a company registered in England and Wales, in 2001 ceased trading in Continental Europe owing to the losses recorded from the mid-1990s. Subsequently, the company claimed "group relief" for losses incurred by its EU subsidiaries. This claim was refused by the UK tax authorities: UK resident companies in a group may not offset their profits and losses against each other where the losses are incurred by subsidiaries which have no establishment in the United Kingdom and do not trade there.

On December 13, 2005, the European Court of Justice decided that Marks and Spencer could claim UK tax relief on losses incurred in other EU countries. According to the ECJ, the UK group relief provisions constituted a violation of the "freedom of establishment" in that the UK law applied different treatment to losses sustained by a resident subsidiary and losses sustained by a non-resident subsidiary. Regarding justification, the ECJ accepted that the preservation of allocation of taxing powers between Member States, the prevention of

Member State concerned. Cross-border loss relief in the EU is actually only a restricted reality to date.

The European Commission published a communication dated 19 December 2006 on cross-border loss relief. The Commission considers indeed that the absence of cross-border loss relief leads to overtaxation, which reduces competition within the single market. Thus, the Commission has requested the Member States to explore the ways of allowing companies to offset losses incurred in other Member States, notably losses incurred by a permanent establishment of a company situated in another Member State.

Irrelevant tax aspects

Before the implementation of EC Directives on cross-border mergers, cross-border restructurings were very difficult to implement due to legal uncertainties and costs. The possibility of merging on an international basis was clearly a driver for the constitution of SEs[190]. Nevertheless, the possibility of a cross-border merger is no longer an incentive to adopt the SE form since the EC Directive 2005/56/EC of 26 October 2005 on cross-border mergers of limited liability companies is now implemented in the Member States. The adoption of the above-mentioned Directive is indeed a significant development from the point of view of EC tax law, as it establishes the company law background for the practical application of tax neutral treatment of cross-border mergers provided for by the Directive 90/434/EEC of 23 July 1990 on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States. The purpose of this last Directive, added to by the Directive 2005/19/CE of 17 February 2005, is to facilitate mergers in the EU by harmonising the tax treatment afforded by the different Member States.

At this stage, it is noteworthy that many tax aspects must be taken into account in order to choose the relevant host Member State where the registered office of an SE will be located or transferred. For example, it cannot be denied that a company will always keep an eye on the rate of Corporate Income Tax applicable in its country of establishment even if the rate of Corporate Income Tax alone should not justify a transfer of registered office. The opportunity to transfer the registered office of an SE will thus always depend on concrete facts, notably on the type of activity to be carried out by the SE to be transferred.

On the other hand, tax considerations to be taken into account are not the same for a holding company and for a company running an activity. Firstly, it will be easier for a

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double relief and the risk of tax avoidance where a multinational seeks to offset losses against the highest tax rate profits, taken together allow a Member State generally to deny cross-border loss relief. However, the ECJ added that a non-resident subsidiary must exhaust its tax benefits in its resident state (carry back, current relief or carry forward) before those benefits are available in a non-resident state.

[190] For an example, see "Experience with the SE in Germany" by Dr Jochem Reichert in European Company law, December 2008, nº 5: "*Enabling or at least facilitating the merger of the German Allianz stock corporation with its Italian subsidiary Riunione Adriatica di Sicurta (RAS) was actually one of the predominant motives for Allianz to opt for the corporate form SE*".

holding company to transfer its registered office for obvious practical reasons. Secondly, some Member States are to date considered as attractive countries in view of their tax regime for holding companies[191]. Some Member States do not tax (or tax at a very low rate) capital gains on transfer of shares which, together with the tax exemption for cross-border dividends and the withholding tax exemption on outgoing distributions (Parent/Subsidiary Directive), give rise to an attractive tax regime for a holding company. In addition, some Member States even accept the deductibility of interest related to the acquisition of a participation in foreign companies.

In conclusion, the freedom of establishment allows SEs to transfer their registered office from one Member State to another and thus to be at least partially subject to a new tax jurisdiction. The question arises whether tax considerations could be a driver for such a transfer of the registered office and therefore for the constitution of SEs by way of conversion or merger, in particular. An analysis of the findings of the SE survey provides some initial answers.

.1.1.2.2.2 Case study

In practice, SEs, non-SEs and professional founders of SEs have often mentioned tax considerations as one of the drivers in the choice of the SE. Thus, several professional founders of SE companies, especially in the Czech Republic have put this argument forward to explain the great success of the SE. According to the Union of Czech Offshore Advisors (UOP) "the SE legal entity can be an effective means of tax optimization and is an ideal option for holding companies"[192]. This tax optimization is made possible by means of the cross-border transfer of the SE's registered office: "This legal form makes it possible to move a business to any EU Member State offering lower taxes or a better legal system. Also, it enables the company to change its registered office arbitrarily without the necessity of liquidating it before moving"[193]. Nevertheless, this principle finds its limits in the possible application of an "exit tax" as mentioned above.

A full-service provider in the field of incorporation of shelf companies operating in the Czech Republic indicated that tax optimization was mentioned by its clients as the main advantage in acquiring a "ready-made" SE. However, he added that only approximately 10% of those clients have actually moved their registered office outside the Czech Republic during the first year, the preferred destinations for tax purposes being Cyprus, the Netherlands and the United Kingdom.

The tax considerations were also put forward by the representative of Songa Offshore SE during the interview: the choice of the SE legal form is directly linked to the possibility of freely transferring the SE's registered office, thus enabling tax optimization depending on the Member State chosen. The reasons for transferring the registered office of Songa Offshore SE from Norway to Cyprus include the following: an opportunity for the SE to pay quarterly dividends instead of annual dividends, and the absence of withholding tax on dividends under Cypriot legislation.

Similarly, an SE incorporated in the Netherlands after leaving the Czech Republic mentioned that the choice of the location of the SE's registered office was driven, among

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[191] Luxembourg is notably known for its attractive tax regime as regards holding companies.

[192] Victor Velek, Local businesses becoming more « European » (Companies dreaming big adopt EU's Societas Europaea format), The Prague Post, February 13th, 2008.

[193] Adéla Vopenková, Czechs lead Europe in establishing new type of firm.

other factors, by the network of tax treaties in the Netherlands. Further, the founders of the SE chose to locate the latter in the Netherlands instead of the Czech Republic, in the light of negative tax developments in the Czech Republic.

Elcoteq SE transferred its registered office to Luxembourg where, in addition to a legal flexibility of the SE Statute and the flexible labour law, the tax regime for holdings is known to be attractive.

To understand the potential tax reasons related to the transfer of the registered office of an SE, or more generally the choice of location of an SE, the Study points out the founding companies established in a Member State that decided to "create" an SE not in their own Member State but in another one, by way of creation, merger or conversion. It is useful to understand why those companies decided to locate an SE in a foreign state and not in their own Member States bearing in mind that tax aspects are likely to influence such decisions.

As regards the companies that set up an SE in a foreign Member State by way of creation of a new company alone or with one or more other companies:

It results from our different interviews and investigations that tax aspects were not essential as regards the place of establishment of the new entity. In fact, it appears that tax aspects are taken into account exactly as for every other decision of establishment abroad and not especially because of the SE's form.

For example, Eurotunnel SE was set up in Belgium by a French company and a British company, whereas the tax regime in Belgium is not the most favourable within the EU. In such a case, it seems that issues of opportunity, image and lobbying are more likely to explain the location of Eurotunnel SE than tax aspects.

As regards the companies that set up an SE in a foreign Member State by way of merger with another company:

It results from our investigations that tax considerations if any are secondary.

For example, the SE Auto Group Baltic was created in Latvia by way of merger between three foreign companies, a German one, a Norwegian one and an Estonian one. Tax aspects linked to this merger may have been considered, as Latvia's corporate tax rate (15%) is quite low; however, considering that the activities are not transferred the taxable basis for the Member State of the registered office is not substantial. The choice of Latvia could have been linked to the willingness of the participating companies to have the merged entity located in a neutral country in order to avoid for each of the participating company the feeling of "national defeat" and rather in order to reinforce the feeling of European construction.

As regards the companies that set up an SE in a foreign Member State by way of conversion of an existing subsidiary in this Member State:

If a national corporate entity converts into an SE, there is technically no asset transfer as the company remains in its national country. In such a case, the conversion follows national tax laws. As a consequence, a conversion should trigger no further tax consequences. The situation should in fact be exactly the same on a national level, for national entities converting into another legal form of company in their own country.

Of more than three hundred SEs analysed, only about ten SEs were created by one or more foreign founding companies. These foreign founding companies are notably located in Belgium, Latvia, the Czech Republic, Slovakia, Poland and Germany.

Therefore, from a practical viewpoint, it is not possible for the time being to observe clear trends for the tax impacts on the location of SEs, though it is clear that the location of an SE in a Member State other than those of the founding companies is affected by the local tax regime in this respect.

In conclusion, the absence of harmonised corporate tax regimes in the different EU / EEA Member States is a significant factor to explain the reality of the SEs. Since the tax treatment of companies differs from one Member State to another, the location of an SE's registered office can indeed have an impact. Some SEs will be established in the Member States with the most suitable tax regime and there will be tax competition among the Member States. Thus an SE may benefit from tax optimisation due to the ease of the cross-border transfer of the registered office.

Furthermore, the mobility of the SE is clearly a positive driver for the SE and notably for tax reasons linked to other positive aspects. It is noteworthy that companies interviewed continue to keep a close watch on tax and legal developments in the various Member States, bearing in mind that the transfer of their registered office is possible. Considering the low number of SEs that have effectively transferred their registered office so far, however, it is difficult to draw conclusions on the efficiency of tax drivers on this matter. It is necessary to continue the observation on the tax aspects in the future as real trends might appear on this subject depending especially on future developments on the subject of EU direct tax harmonisation, notably regarding a common consolidated corporate tax base.

.1.1.2.3 Considerations linked to the labour law regime

During the process of formation of an SE, it is mandatory to organise the employee involvement in the SE[194]. Thus, before incorporating an SE, management and employee representatives are required to negotiate the terms of worker involvement in the company.

Though highly prescriptive, the SE regime can appear in some Member States to be a favourable alternative to the national co-determination regime and it may be used as a vehicle to optimise, reduce, freeze or in specific cases, avoid the national participation regime[195].

No persuasive considerations linked to the national labour law regimes have been identified as explaining the choice to set up SEs or the reality of the existing SEs. Instead, the SE corporate form can be used to loosen the grip of national co-determination laws or reduce their influence, thus leading to a "perverse incentive"[196].

[194] Article 1(4) of the SE Regulation.

[195] These aspects are described in more detail in the section 2 hereunder.

[196] Professor Jonathan Rickford, The European Company, Developing a Community Law of Corporations, Intersentia.

1.2 Negative drivers for not choosing the SE

For the purposes of the Study, the on-line questionnaire sent to existing SEs and the telephone interviews conducted with SEs and non-SEs were also used to identify and assess the impact of negative factors in the final decision on whether to opt for the SE legal form. Based on the answers to the questionnaire and interviews, several factors have been identified as negative drivers in the choice of the SE legal form, these factors relating either to the SE Regulation (1.2.1.) or to the national legislation applicable to the SE (1.2.2.).

.1.2.1 Reasons for not setting up SEs – reasons linked to the SE Regulation

.1.2.1.1 Cost, complexity and uncertainty of the SE

All those interviewed during the Study were unanimous in their comments on the complexity of the SE Statute. The lack of hindsight and experience relating to the SE Statute and the incorporation of SEs generates increased uncertainty, an administrative burden, and cost and time consumption in the creation of an SE.

First, with regard to the cost, the SE faces higher set-up costs than the corresponding domestic public limited-liability company. According to Article 12 of the SE Regulation, "every SE shall be registered in the Member State in which it has its registered office in a register designated by the law of that Member State in accordance with Article 3 of the first Council Directive (68/151/EEC) of 9 March 1968 (...)", the register being identical in each Member State for domestic public limited-liability companies and SEs. This provision prevents dissimilarities between the registration cost of the SE and that of national public limited-liability companies. However, even if there is no difference in the registration costs themselves, it should be pointed out that the commercial registrars are less familiar with the administrative formalities of incorporating an SE (in comparison with a national public limited-liability company); this lack of practical experience results in an increased administrative burden. Apart from the registration costs, high dissimilarities can be identified between SEs and domestic public limited-liability companies as regards the additional fees and the fees of legal advisors.

Regarding the additional fees mentioned above, one must bear in mind that the formation of an SE involves specific requirements which do not exist for domestic public limited-liability companies. These requirements concern in particular the necessity of setting up a special negotiating body and of conducting negotiations with the latter. The negotiation process generates specific travel and accommodation costs, translation costs and expert costs. In addition, the formation of an SE is a transnational operation, which often requires the translation of official documents (this is generally not necessary in the case of the incorporation of a national public limited-liability company) and, in the case of the

formation of an SE by merger, action on the part of the court, a notary or other competent authority to deliver a certificate on the legality of the merger[197].

Furthermore, the companies choosing to form an SE must also bear costs linked with the day-to-day running of the business (e.g.: printing of new letter heads, business cards, e-mail signatures) and must finance the communication process linked with the formation of the SE and/or restructuring of the group to explain how this new entity will impact/not impact on the running of the business[198].

As regards the tax and legal advisory fees, it is noteworthy that legal advisors are less familiar with the SE than with domestic public limited-liability companies and that the SE formation procedure is more complicated.

In addition to these constitution costs, it should be pointed out that the SE has a relatively high minimum share capital of EUR 120,000[199]. Nevertheless this requirement "turned out not to be a deterrent for small and medium enterprises" as a large number of the SEs set up so far are medium to small-sized companies or even shelf companies[200].

This increased cost in comparison with national public limited-liability companies may constitute a specific hurdle in certain Member States. In Poland and Cyprus for instance, the national companies tend to be small to medium sized enterprises, and prefer not to engage in the process of constituting an SE. Specifically in these two Member States, the existing SEs have been established by foreign-capital founders. This is also true for other Member States where the domestic economy is largely composed of small to medium-sized enterprises[201], e.g. Portugal, Greece, Italy.

As regards the actual amount of the set-up costs, well-known examples of the high cost of the formation of an SE include Allianz SE and BASF SE, whose costs for reincorporation as an SE amounted to EUR 95 million and EUR 5 million respectively. Leaving these specific cases aside, the average set-up costs for the SEs interviewed were approximately EUR 784,000 (including the tax and legal advisory costs, translation costs and registration costs). The overall set-up costs range from approximately EUR 100,000[202] up to figures comprised between EUR 2 and 4 million[203]. On the other hand, the advantages offered by the SE Statute, though difficult to assess, outweigh these high costs. In addition, it should be stressed that with increased practical experience of the SE, the burdens linked to high set-up costs and complex and time-consuming formalities will decrease.

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[197] Under French law, the competent authority which must deliver this certificate is a notary. In the case of a merger of French public limited-liability companies, the involvement of a notary is not necessary. This means an additional cost for the SE as compared to the national public limited-liability company.

[198] This type of costs is not specifically linked to the SE legal form and would in general be incurred for any conversion into another legal form and for any group restructuring. However, these costs cannot be separated from the overall costs of formation of an SE.

[199] Article 4 of the SE Regulation.

[200] Jochem Reichert, Experience with SE in Germany, European Company Law, December 2008, Volume 5, Issue 6.

[201] Small and medium-sized enterprises are generally defined as those enterprises employing fewer than 250 people (Eurostat yearbook 2009, p. 297).

[202] This was the case for six of the SEs interviewed.

[203] This was the case for four of the SEs interviewed.

Second, as regards the uncertainty of the SE Statute, this is directly linked to the recent nature of this corporate form and hence the lack of awareness thereof. Most of the SEs interviewed explained that when announcing the adoption of this corporate form, they had at the same time to enter into a process of communication towards third parties and business partners (customers, suppliers, employees, etc.) to explain the characteristics and nature of the SE. The lack of awareness of the SE is even greater in non-European countries, for instance in Asia or North America. Such lack of awareness and public recognition associated with the insecurity it generates are detrimental to the conducting of business.

.1.2.1.2 Employee involvement

The procedure relating to the negotiation of employee involvement as provided by the SE Directive is regarded as a complex procedure and is therefore often seen as a rather negative driver (in non-codetermination Member States) leading to the final decision not to opt for the SE corporate form. The process regarding employee involvement negotiations entails considerable difficulties, especially as it requires to apply collectively and to coordinate the different laws in the Member States.

In all cases, the SE Directive requires consultation through a representative body prior to the incorporation of the SE. This general principal applies notwithstanding the fact that the national legislation to which the founding companies forming the SE were subject may not require such consultation.

The consultation with the employees results in principle in an agreement on "employee involvement", which is composed of the following two aspects:

- The "information and consultation" of the employees[204], covering the information that must be submitted to employee representatives about material decisions concerning the company and the requirement for consultation of the said employee representatives in time for them to influence the outcome.
- The participation of the employees[205] which is the right for employees either to elect, or to recommend and / or to oppose the appointment of members of the supervisory board (two-tier system) or of the administrative organ (one-tier system).

The consultation procedure normally results in the conclusion of an agreement. If the negotiations fail, then standard rules apply, such standard rules being defined in an annex to the SE Directive and properly defined by the Member States through the implementation of the SE Directive.

The consultation requirement is all the more stringent as the negotiations may be a lengthy process extended over a theoretical maximum six-month period[206]. Thus, employee representatives that are members of the special negotiating body might, if they choose to do so, be able to delay the formation of an SE by six months. In practice the maximum six-month period is rarely reached or exceeded; or, if it is, this tends to be due to

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[204] As defined by Article 2 (i) and (j) of the SE Directive.

[205] As defined by Article 2 (k) of the SE Directive.

[206] Article 5 of the SE Directive provides that: "Negotiations shall commence as soon as the special negotiating body is established and may continue for six months thereafter. The parties may decide, by joint agreement, to extend negotiations beyond the period referred to in paragraph 1, up to a total of one year from the establishment of the special negotiating body".

the practical difficulties of organising a meeting of the members of the Special Negotiating Body, as the schedules of the management of the companies involved and the employee representatives of the different Member States may be subject to numerous constraints.

The employee involvement process is considered to be a negative driver especially in the Member States in which the national legislation does not provide for a system of employee participation. This is the case for the United Kingdom, Belgium, Italy, Bulgaria and the Baltic countries (Lithuania, Latvia and Estonia), and to a lesser extent for France, Spain, Portugal, Greece, Cyprus, Malta, Ireland, Poland and Romania, the national legislation of which provides for restricted employee participation.

A considerable impact of the employee involvement negotiation process also lies in the identity of the social partners with which the management has to negotiate the involvement and participation agreement. In this respect, Article 3.2. b of the SE Directive has left an option available to the Member States according to which "they may provide that [the members of the special negotiating body] may include representatives of trade unions whether or not they are employees of a participating company or concerned subsidiary or establishment". Most Member States in which the national legislation does not provide for a system of employee participation or only provides for restricted employee participation have implemented this option. This concerns the United Kingdom, Belgium, Italy, Latvia, France, Spain, Portugal, Cyprus, Poland and Romania. This option has also been implemented by the following countries, familiar with an employee participation regime: Austria, the Czech Republic, Germany, Hungary, Luxembourg, the Netherlands, Slovenia and Slovakia. It should be noted that in most of the countries which are unfamiliar with the employee participation system and which allow trade union representatives to participate in the special negotiating body, very few SEs have been incorporated. This tends to show that the rules relating to employee involvement within the framework of the formation and running of the SE constitute, in some countries, a hindrance to the creation of SEs (especially in comparison with the applicable rules in the case of formation of a national public limited-liability company)[207].

.1.2.1.3 Apparent reduced uniformity of the SE due to the number of references to national law

At the opening of the negotiations on the Statute for a European Company, the initial plan was to create a "truly European" corporate form, which would have been in a position to operate on an EU scale with a uniform system of corporate governance, and with a uniform taxation regime. This new corporate form was to be registered with a single European register and subject to uniform supra-national law, based on rules and principles deriving solely from a European Statute or from common and harmonised rules of the laws of the Member States. This ideal corporate form has turned out to be unachievable. Instead, "the SE has become, not a uniform European animal, but a chameleon, drawing its legal character largely from the law of its registration"[208].

In addition, the SE Regulation expressly excludes certain matters from its scope and leaves them to the national sovereignty of the Member States, even if in some of these matters Community law provides a basis for harmonisation. Thus, paragraph 20 of the Preamble of the SE Regulation stipulates that "this Regulation does not cover other areas of law such

[207] Interview conducted with Professor Dagmara Skupien.

[208] Professor Rickford, The European Company, Developing a Community Law of Corporations, Intersentia.

as taxation, competition, intellectual property, or insolvency. The provisions of the Member States' law and of Community law are therefore applicable in the above areas and in other areas not covered by this Regulation".

The low degree of uniformity of the SE Statute from one Member State to another therefore appears to be a counter-incentive, as the lack of harmonisation (from a tax, social and legal point of view) is a recurring criticism against the SE corporate form. In the interviews with non-SEs, the SE corporate form was sometimes described as a negative flagship due to the lack of harmonisation of the SE Statute; the advantages offered by the SE Statute being outweighed by this major drawback. Thus, as already mentioned above[209], groups of companies operating at the European level could be interested in running their structure as a group of SEs (in order to apply standardised and harmonised set of rules to all the group subsidiaries across the EU/ EEA). For this purpose, it is obvious that a uniform body of SE regulation across Europe would be preferred to the national differentiations of the rules that currently exist.

.1.2.2 Reasons for not setting up SEs – reasons linked to national legislation

As already established in the section above on the positive drivers linked to national legislation, the relative flexibility of the national legislation applicable to the SEs does not in general seem to have a major impact on the choice of setting up an SE or the location of its registered office. Only in Portugal, Bulgaria and Romania is there a correlation between the relatively poor intra Member State rating of these countries and the lack of any SEs.

In conclusion and as mentioned earlier in the section 1.1.2.1.1. above, the level of attractiveness and flexibility of the legislation of the Member States cannot, as a general principle, be regarded as a driver in the choice of the SE legal form.

2. Main trends and distributional effects

The comparison between the legal mapping giving a clear picture of the flexibility and attractiveness of the national legislation applicable to the SE according to the criteria used (Chapter 1), and the SE survey providing a panorama of the existing SEs, their characteristics and location (Chapter 2) based on the interviews and questionnaires conducted with SEs, non-SEs, experts and academics (identification of the positive and negative drivers), results in the identification of main trends and analytical conclusions.

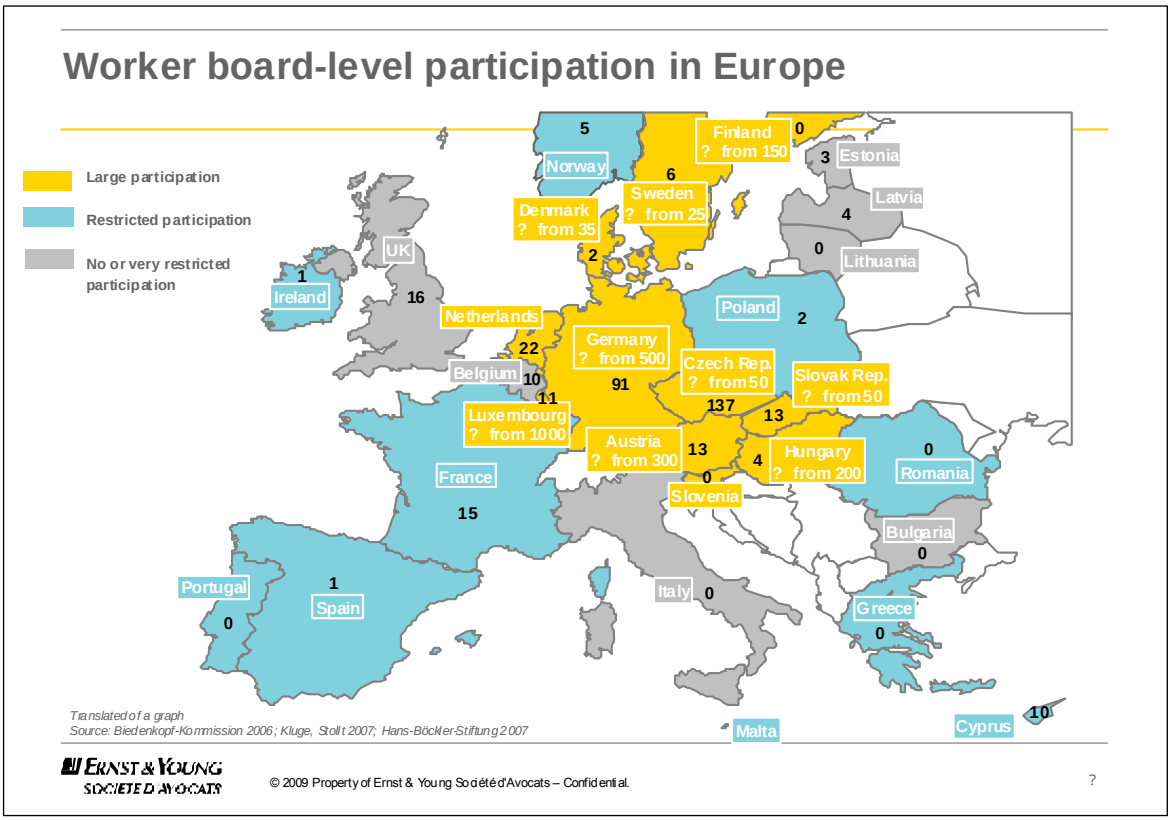
The primary conclusion lies in the acknowledgment of the importance of the criterion of employee involvement, as defined by the SE Statute, in the relative success or failure of the SE corporate form. The other criteria are very often overshadowed by this primary factor, these other criteria being the flexibility of the relevant national legislation, the European image of the SE, its capacity to freely transfer its registered office, the possibility of opting for a one-tier or two-tier system, as well as further considerations such as the applicable regulations, tax law and labor law.

[209] See section 1.1.1.4.2. of Chapter 3 above – Simplification inside the cross-border group.

2.1 The relative success of the SE in Member States with extensive employee participation

The positive drivers identified above play a significant role when setting up an SE. However, it should be noted that the choice of the SE corporate form is often linked to other objectives, the first one being, in some Member States, the possibility, through the compulsory negotiating process in the SE, of shaping the form of codetermination in a more individual and thus appropriate way for the company (compared to a rather uniform national codetermination regime).

The following map illustrates that the Member States with extensive employee participation are often the Member States in which the highest number of SEs have been incorporated and, conversely, very few SEs have in general been set up in the Member States with no or restricted participation.



In the map above, the number of SEs indicated correspond to the number of SEs incorporated in the Member States as on 15 April 2009 (and not to the number of SEs initially incorporated in the Member States and which might have then transferred their registered offices).

The above map shows a correlation between the number of SEs and the employee participation regime. There is a certain trend that the Member States in which there is a high number of SEs are also the Member States having large employee participation regime. This is particularly the case for Germany, Austria, the Netherlands, the Czech Republic and Slovakia.

Only Slovenia and Finland are an exception to this rule as these Member States apply a system of employee participation but does not have currently any SEs on their territories[210]. The specific cases of Slovenia and Finland may be explained by other factors, in particular relating to the corporate governance structure usually applicable[211].

Other Member States have a relatively high number of SEs but have restricted employee participation regime (e.g.: France and Cyprus) or no or very restricted employee participation regime (e.g.: the United Kingdom and Belgium). Other factors (legal and tax aspects) can explain the specific situation of these countries.

Among the Member States applying a large participation regime, Germany is a typical example. In Germany, the idea that the SE is a vehicle to model co-determination in a more favorable way than by application of the national co-determination laws is widespread[212].

The participation regime applicable in Germany can be summarised as follows. German law provides for extensive employee involvement in domestic companies through information and co-determination rights in the various Co-Determination Acts[213]. According to Sections 1(1) and 4(1) of the One-Third Participation Act of May 2004, one-third of the members of the supervisory board of a German joint-stock corporation (*Aktiengesellschaft – AG*) must be reserved for elected representatives of the employees if the company has more than 500 employees. Stricter co-determination applies if a company has more than 2 000 employees. The Co-Determination Act (*Mitbestimmungsgesetz*) provides in its Sections 1(1) and 7(1) for coequal representation of employees and owners on the supervisory board. Should the number of employees exceed 20,000, then coequal representation is applied and the supervisory board will have 20 members.

The provisions of the SE Directive on employee participation provide, in principle, for more flexible arrangements than the national legislation of the Member States which have extensive (and mandatory) employee participation regimes. Thus, the social partners (the special negotiating body and the management of the founding company) will negotiate on employee involvement and, in general reach an agreement on employee participation which is an alternative to the national rules. This alternative aspect results from Article 13(2) of the SE Directive which states that "Provisions on the participation of employees in company bodies provided for by national legislation and/or practice, other than those implementing this Directive, shall not apply to companies established in accordance with Regulation (EC) No 2157/2001 and covered by this Directive".

As regards employee participation, the SE Statute might help to optimise the national rules on employee participation. Such optimization can be multi-faceted.

The level of co-determination may remain the same as prior to the formation of the SE.

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[210] One SE (Elcoteq) has been initially incorporated in Finland but then transferred its registered office to Luxembourg.

[211] See hereunder paragraph 2.2. of the present Chapter.

[212] This comment results from our interview with Professor Klaus Hopt. For examples, see also: Jochen Reichert, Experience with SE in Germany, European Company Law, December 2008 / Horst Eidenmüller, Andreas Engert, Lars Hornuf, Incorporating under European Law: the Societas Europeae as a vehicle for Legal Arbitrage.

[213] The Mitbestimmungsgesetz (Co-Determination Act), the Drittelbeteiligungsgesetz (One-Third Participation Act) and the Montan-Mitbestimmungsgestez (Montan-Co-Determination Act).

Even then, the SE Statute provides the opportunity "to negotiate an employee involvement model tailored to the specific structure and needs of the company or group and does not burden the corporation with the straightjacket of an unspecific legal solution"[214].

For example, the SE may promote the European co-determination in Europe. On the one hand, in the special negotiating body itself, the members must be distributed proportionally to the number of employees in the participating companies, subsidiary, companies and establishments in each Member State such that, in each Member State, there is "one seat per portion of employees employed in that Member State which equals 10 or a fraction thereof of employees employed throughout the Member States"[215]. Most of the SEs interviewed described this special negotiating body as a real "team-building tool" extending its benefits across the various participating countries. On the other hand, the corporate governance in the SE implies that employees from all countries can be represented on the supervisory board of the company and that co-determination cannot be restricted to employees from countries with a co-determination regime. The mixture of representatives from different Member States can be an advantage especially in Europe-wide group structures, as it helps to build European employee consciousness. In Germany, on the contrary, the representation model in force involves only German labour representatives, this model being described as outdated in this respect by the German trade unions themselves[216].

Another advantage of the SE Statute relating to employee involvement consists of the possibility of reducing the size of the supervisory board. This is, for instance, one of the strong incentives put forward by Allianz, Fresenius and BASF in the choice of the SE corporate form, as the latter has enabled them to streamline the size of the supervisory body, thus increasing the efficiency of the working process of this body.

If small or medium-sized companies opt for the SE legal form before crossing a compulsory national threshold to a stricter form of co-determination, they can maintain their current state of co-determination[217]. This results from two aspects of the SE co-determination law. First, the threshold for the co-determination regime is determined only on the basis of the employees who were subject to co-determination before the formation of the SE; therefore foreign employees not subject to co-determination do not count. Second, the SE Regulation does not provide for a dynamic adaptation of co-determination to the number of employees. Paragraph 18 of the Preamble, in correlation with Article 11 of the SE Directive providing for the prevention of misuse of procedures, stipulates that "it is a fundamental principle and stated aim of this Directive to secure employee's acquired rights as regards involvement in company decisions. (…) Consequently, that approach should apply not only to the initial establishment of an SE but also to structural changes in an existing SE and to the companies affected by structural change processes." In the case of structural changes, the procedure for employee participation shall resume. However, the legal theorists unanimously acknowledge that the notion of "structural change" must be

[214] Jochen Reichert, Experience with SE in Germany, European Company Law, December 2008.

[215] Article 3.2.a. i) of the SE Directive.

[216] Interview with Dr. Roland Koestler from Hans Böckler Foundation.

[217] Jochen Reichert, Experience with the SE in Germany, European Company Law, December 2008.

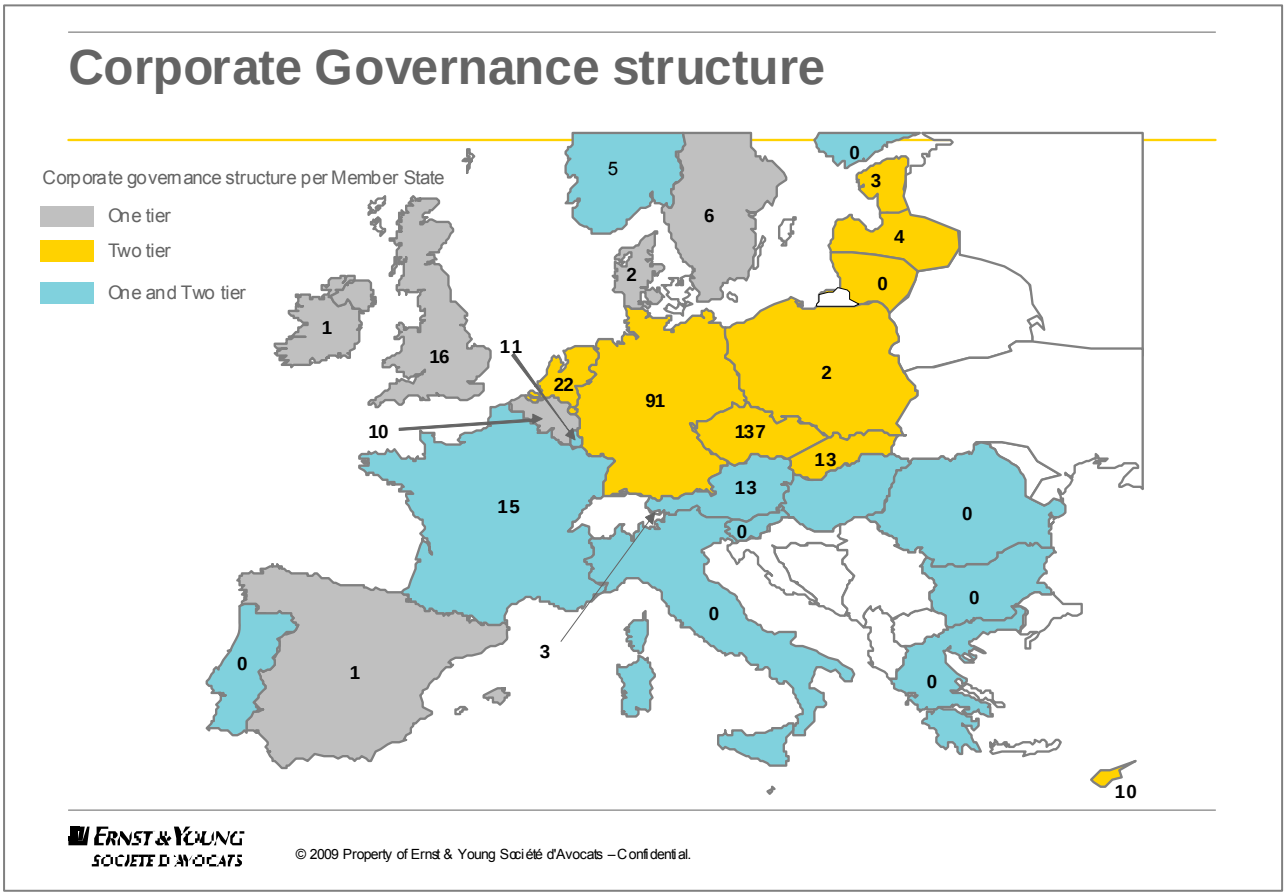
interpreted restrictively and hence does not apply to the mere growth of the number of employees of the SE[218].

This motive was clearly expressed by several German SEs that were interviewed and were close to reaching the threshold of 2,000 employees and thus to being subject to the requirement of coequal representation of employees and owners on the supervisory board. By converting into an SE and thus negotiating an agreement on employee participation, the management of these companies maintained the rules on employee participation independent from further growth in the workforce.

The lack of success of the SE in most of the Member States with no or restricted employee participation is often explained by the complex, costly and time-consuming negotiations required in order to organise employee involvement in Member States where the national legislation does not foresee the obligation for domestic companies to organise such involvement. As a direct consequence, this appears to be an incentive against the SE.

2.2 The relative success of the SE in Member States with the two-tier system

As a corollary to the previous trend, a second trend, explaining the distribution of SEs in the EU / EEA, is for SEs to be located predominantly in the Member States with a tradition for the two-tier corporate structure. The map below illustrates this distributional effect:



Interestingly, the Member States with a tradition for the two-tier corporate structure are also generally the Member States which apply national regimes for extensive employee participation, except for the Baltic countries which have a system with no or very restricted employee participation. This can be explained by the fact that the one-tier structure is ill-adapted to the system of employee participation. As a matter of law, in the two-tier system, management authority is vested in the board of directors, whereas the supervisory board exercises controlling authority. The scope of employee participation is limited to the supervisory organ. On the other hand, in the one-tier system, the highest level of management powers are vested in the administrative organ. It is also within this latter organ that the employee participation is organised. Thus, in the one-tier system where employee participation is implemented, employee representatives are usually vested with powers exceeding simple supervisory functions and participate in the managerial functions, which is generally not desired. In the hypothesis that the employee participation is organised within the administrative organ on the basis of coequal representation, this could result in the employees being in a majority or exceeding the majority (if one managing director is excluded from the vote due to the nature of the decision – e.g.: an appointment decision) in the decision-making process. This case does seem rather hypothetical. However, to avoid such a situation, one possible amendment could consist in limiting coequal representation to the sole members of the administrative organ in charge of the supervisory activities (thus, excluding the "managing" members).

The above elements may, at least partially, explain why the SE corporate form has not really spread in Member States where there is a tradition for the one-tier corporate structure.

Conversely, it can be observed that the SE corporate form has encountered greater success in Member States predominantly applying the two-tier corporate structure. One explanation may lie in the fact that the one-tier model can be of special interest for family businesses. On the one hand, it makes it possible to vest a strong head of family with the extended powers of a CEO. On the other hand, it opens up flexible options for those leaders to retire gradually from active company management. It enables them to play a more active role than they would be possible on a normal supervisory board without having to assume responsibility for the business operations[219].

As can be seen on the map in Chapter 2, section .2.3.1, in Member States with a one-tier corporate structure, the possibility of organizing the company according to a two-tier structure is only very exceptionally considered to be an incentive for the SE. Finally, in the Member States allowing both the one-tier and the two-tier corporate structures, the large majority of SEs created have adopted the one-tier system.

[219] Jochen Reichert, Experience with the SE in Germany, European Company Law, December 2008.

2.3 The correlation between the degree of employee participation and the corporate governance structure

When correlating the above two factors, i.e. degree of employee participation and corporate structure, the following trends can be identified and may partly explain the varying success of the SE as far Member State of first incorporation is concerned[220]:

Corporate governance structure / Degree of employee participation	One-tier structure	One and Two-tier structure	Two-tier structure
No participation	Few SEs: United Kingdom (16) Belgium (10)	No SEs: Italy (0)	Very few SEs: Estonia (3) Latvia (4) Lithuania (0)
Restricted participation	Very few SEs: Ireland (1) Spain (1)	Very few or few SEs: France (15) Norway (5) Romania (0) Greece (0) Portugal (0)	Very few or few SEs: Poland (2) Cyprus (10)
Extensive participation	Very few SEs: Sweden (6) Denmark (2)	No success or relative success of the SE Statute: Austria (13) Finland (0) Luxembourg (11) Hungary (4) Slovenia (0)	Success of the SE Statute: Germany (91) Netherlands (22) Czech Republic (137) Slovakia (13)

The above table illustrates the correlation between the employee participation regime and the corporate governance structure to explain the degree of success of the SE in the various Member States. This table must be considered with caution as it only highlights a trend identified in the course of our Study. It must be borne in mind that there is rarely one single reason leading a company to adopt the SE legal form and thus rarely one single factor explaining the take-up or conversely the little success of the SE legal form in some Member States.

[220] See Chapter 2 – Section 2.1.1. SEs by country (SE by Member States of first incorporation).

2.4 Other explanations for the current distribution of SEs

The correlation presented above between the degree of employee participation and the corporate governance structure cannot by itself explain all of the current distribution of SEs across the EU/EEA. It is important to highlight that the choice of the SE form according to the interviews generally builds on a specific business case and cannot therefore be reduced to one general theory.

The specific business case generally explains the use of the SE vehicle for the purpose of group restructuring, either to reduce the number of legal entities inside a cross-border group (simplification of the group structure)[221] or to rationalise and harmonise the corporate structure of the cross-border group (simplification inside the cross-border group)[222].

Other factors account for the varying success of the SEs. Thus, the possibility to freely transfer the registered office of an SE can be a strong incentive to explain the success of this corporate form. Thus, companies in Member States with a strong tax burden may be tempted to adopt this corporate form to freely transfer their registered office, even if the tax benefits in this respect are not as high as commonly expected[223]. In addition, the SE can sometimes be used as a vehicle to transfer towards Member States with more flexible legal systems, such as the United Kingdom or Luxembourg[224].

Even if not the primary factor, the European image seems also to be a strong factor explaining the varying success of the SE across Europe. Thus, the smaller the country is the greater this factor will play a role in the choice for the SE legal form. This is presumably one of the reasons accounting for the take-off of the SE in Eastern European countries (for example in the Czech Republic and in Slovakia). In Belgium, the Member State being located at the heart of the European institutions, the European image plays a major role in the relative success of the SE in this relatively small country (10 SEs registered in Belgium). As an example, Eurotunnel SE was founded by a French company and a British company and incorporated in Belgium due to the location of this Member State at the heart of Europe.

Conversely, the increased cost[225] and complexity in the constitution of an SE as compared to a public limited-liability company may constitute a specific hurdle in certain Member States where the national companies tend to be small to medium sized enterprises. This is particularly true for Poland, Cyprus, Portugal, Greece and Italy, where small to medium sized enterprises (mainly composing the economies of these countries) may prefer not to engage in the process of constituting an SE, thus explaining the relative little success of this corporate form in these Member States.

In addition, and as explained in section 1.2.1.1. above, the SE suffers from both a lack of public recognition and generally a lack of hindsight and experience. Thus, the date of

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[221] See section 1.1.1.4.1. of Chapter 3 – Simplification of the group structure.

[222] See section 1.1.1.4.2. of Chapter 3 – Simplification inside the cross-border group (rationalization of corporate governance).

[223] See section 1.1.1.2. of Chapter 3.

[224] See section 1.1.2.1.2. of Chapter 3.

[225] In particular the minimum share capital required for the constitution of an SE is generally higher than that of national public limited-liability companies.

implementation of the SE Directive differs from one Member State to the other[226], which could partly explain the varying success of the SEs in the EU / EEA Member States. There could as well be a positive spiral effect linked to the SE Statute: if a few SEs are set up in a Member State, it could raise the awareness of the SE legal form in the business and the legal community of that Member State, which could result in more SEs being formed in that Member State. It is probable that this positive spiral effect partly explains the take up of the SE legal form in Germany and the Czech Republic and the geometrical growth in the number of formations of SEs in these two Member States. However, it is too early to assess the effectiveness and impact of such effect.

2.5 The development of shelf SEs

The SE Survey shows that as at 15 April 2009, approximately 98 SEs in the Czech Republic and 23 SEs in Germany were shelf SEs. Shelf SEs represented more than one third of the total number of SEs, 37.7% to be precise (139 shelf SEs in total). These figures do not take into consideration the SEs which were initially constituted as shelf SEs but were then sold and became operational.

These shelf SEs are created by professional company founders for the sole purpose of being sold: they have not been set up for a specific purpose but are available and can be bought by any company. They are usually placed for sale on the multilingual websites of professional founders. The shelf SE instrument can be used by companies that are interested in the SE legal form but are discouraged by the complex process of the formation of an SE.

The possibility of setting up a shelf SE is not a bone of contention as such and is generally acknowledged. However, the impact of the shelf SE on the question of employee involvement is more controversial. This controversy can be summed up in two questions: "how is co-determination supposed to be negotiated if there are no employees?" and "if co-determination is not negotiated, is there a risk that it could be circumvented [on purpose]?"[227].

To answer these two questions, one should refer to Article 12(2) of the SE Regulation which provides that "an SE may not be registered unless an agreement on arrangements for employee involvement pursuant to Article 4 of Directive 2001/86/EC has been concluded, or a decision pursuant to Article 3(6) of the Directive has been taken, or the period for negotiations pursuant to Article 5 of the Directive has expired without an agreement having been concluded". Furthermore, paragraph 6 of the SE Directive stipulates: "information and consultation procedures at transnational level should nevertheless be ensured in all cases of creation of an SE" and Article 1 paragraph 2 states that "arrangements for the involvement of employees shall be established in every SE (…)". These provisions of the SE Statute do not contradict the principle that there is no necessity for negotiations when there are no employees in the companies concerned at the time of creation of the SE. This is for example the case for all the shelf SEs incorporated in the

[226] See Chapter 2, Section 2.1.5. SE by year of creation.

[227] Jochen Reichert, Experience with the SE in Germany, European Company Law, December 2008.

Czech Republic as subsidiaries of another SE[228]. This is also the case for several shelf SEs incorporated in Germany and which were created as a common subsidiary of companies with no employees[229]. This position is enhanced by a decision of the jurisdiction of Düsseldorf acknowledging the formation of an SE without any negotiation procedure on employee involvement as the SE and its founding companies did not have any employees[230]. However, according to the Hambourg court, as soon as at least one of the founding companies has employees and even if the SE itself has no employees, negotiations on employee involvement must be conducted[231].

Thus, the possibility of creating shelf SEs without any negotiation process when there are no employees at all cannot be perceived as contravening the SE Statute. Nevertheless, some argue that such a situation might become contrary to some of the objectives of the SE Statute as soon as the company hires employees. However, as pointed out above, the notion of "structural change"[232] is unanimously interpreted restrictively by the legal doctrine: it applies to a statutory modification of the SE but does not apply to the mere "activation" of the SE and subsequent growth in the number of its employees[233].

Considering shelf SEs specifically, there is a prevailing opinion[234] that in order to clarify and improve the SE Statute, in particular as regards the requirement for employee involvement, the negotiation relating to the latter should be conducted subsequently once the shelf company actively operates as an enterprise and employees are hired[235]. In this respect however a problem remains as to the concept of "activation" of the shelf SE and the threshold number of employees from which the requirement for conducting a negotiation procedure should apply. One possibility, often suggested, would be to align the SE rules with the provisions applicable in various texts of European Company Law, such as the EC Cross-Border Merger Directive and the SCE Directive[236]. Another suggestion, by a German lawyer Jochen Reichert, would be to put a threshold at around 10 employees: "If the SE does not have ten or more employees for a reasonable time even after purchase, it then remains free of employee involvement after the new economic foundation"[237].

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[228] A large number of Czech SEs are subsidiaries of Soffice SE, Euromater SE, Quick Start Europea SE, Ready made companies SE or CHAMR Enterprise SE.

[229] All the "Atrium" SEs were created as a common subsidiary of Lavend GmbH and Atrium Vermögensverwaltungs Ltd. All the "Blitz" SEs were created as a common subsidiary of Blitz BeteiligungsGmbH and Blitzstart Beteiligungs Ltd.

[230] AG Düsseldorf, ZIP 2006, 287.

[231] LG Hamburg, ZIP 2005, 2017.

[232] Paragraph 18 of the Preamble, in correlation with Article11 of the SE Directive providing for the prevention of misuse of procedures, stipulates that "it is a fundamental principle and stated aim of this Directive to secure employees' acquired rights as regards involvement in company decisions. (…) Consequently, that approach should apply not only to the initial establishment of an SE but also to structural changes in an existing SE and to the companies affected by structural change processes."

[233] Dr. Martin Henssler, Erfharung und Reformbedarf bei der SE – Entwicklungstand.

[234] This results from a unanimous position of the Steering and Scientific Committees of our Study and from the experts interviewed on this question.

[235] Jochen Reichert, Experience with the SE in Germany, European Company Law, December 2008. Interview with Roland Köstler from Hand Böckler Foundation.

[236] For further discussions relating to this suggestion, see paragraph 3.1.2. of Chapter 3.

[237] Jochen Reichert, Experience with the SE in Germany, European Company Law, December 2008.

3. Practical problems in implementation and application of the SE Statute

On the basis of the questionnaires and the interviews conducted, the Study has identified the main practical problems encountered in the implementation and the application of the SE Statute, i.e. at the time of constitution of the SE (3.1.), and in the running of the SE (3.2.).

3.1 Practical problems in the constitution of the SE

The first practical problem encountered in the process of constitution of the SE is unanimously cited as being the complex and time consuming procedure along with the lack of hindsight and practical experience of the advisors and competent public authorities. This is also a negative driver which has sometimes been put forward as the main explanation for abandoning the project of adopting the SE legal form[238].

Two further major practical problems have been identified as regards the formation of the SE, namely the limited methods of formation (3.1.1.) and the requirement as regards employee involvement (3.1.2).

.3.1.1 Limited methods of formation of the SE

First of all, it should be observed that none of the SEs or non-SEs interviewed has cited the limited methods of formation of the SE as a negative driver. This might be due to the fact that all of the SEs fulfilled all the conditions set out by the SE Regulation for the creation of an SE and that only the companies which fulfil these conditions actually consider setting up an SE.

The main requirement set forth by the SE Regulation consists of the criterion of activity in different Member States. This requirement is not expressly provided for in the SE Statute but results from the methods of formation of the SE as listed in Article 2 of the SE Regulation. Thus, in the event of formation of an SE by merger or the creation of a holding SE or a joint subsidiary SE, at least two of the founding companies must be governed by the law of different Member States, or for the joint holding or joint subsidiary SE, have had, for at least two years, a subsidiary or a branch situated in another Member State. In the event of conversion into an SE, the public limited-liability company must have had for at least two years, a subsidiary company governed by the law of another Member State.

In order to explain these "cross-border credentials"', the primary purposes of the SE must be recalled: "it is essential that companies the business of which is not limited to satisfying purely local needs should be able to plan and carry out the reorganisation of their business

[238] See paragraph 1.2.1.1. of Chapter 3.

on a Community scale". If the objectives of Community scale reorganisation and promotion of the common market remain legitimate, the multi-state criterion is appropriate. However, the limits of this criterion lie in the fact that it is required at the time of the creation of the SE but is not maintained during the course of its existence.

Certain inconsistencies in respect of the conditions of formation of an SE can be highlighted:

- First, the nature of the legal entities which can be involved in the formation of an SE is not identical, depending on the method of formation. Thus, only public limited-liability companies may take part in the formation of an SE by merger or by conversion whereas both public and private limited-liability companies may promote the formation of a holding SE. Moreover, a joint subsidiary SE may be formed by any companies and firms within the meaning of the second paragraph of Article 48 of the Treaty and other legal bodies governed by public or private law. These requirements are sometimes circumvented. For example, several of the SEs interviewed which were created by conversion explained that the original company was a private limited-liability company having at least one subsidiary in another Member State and that, as a consequence, the process of the creation of the SE was preceded by the conversion of the private limited-liability company into a public limited-liability company for the sole purpose of meeting the requirement set forth in Article 2.4 of the SE Regulation.
- Second, in the event of formation of a joint subsidiary or a joint holding SE, the SE Statute admits the presence of subsidiaries or branches of the companies concerned, whereas for conversion, the presence of subsidiaries (and not mere branches) is required.
- Third, contrary to the requirements set out for the formation of an SE by way of a joint holding company, joint subsidiary or conversion, there is no requirement as regards the minimum existence of the merged companies in the process of formation of an SE by merger. It is therefore possible to use a newly formed public company subsidiary in a different Member State to fulfil the multi-nationality criterion and create an SE by merger. This makes it possible to escape the stricter requirements for conversion, formation of a joint holding SE or a joint subsidiary SE.

As a result of the inconsistencies as regards the methods of formation of the SE, consideration could be given to the following open issues:

- The alignment of the definitions of the legal entities which may be involved in the formation of an SE should be considered. In particular, it could be appropriate to extend the possibility of formation of an SE by conversion to the private limited-liability companies meeting the express requirements.
- The possibility of simply having a branch in another Member State (and not a subsidiary) could also be granted in the case of formation of an SE by conversion, in the same way as for formation of a joint holding SE or a joint subsidiary SE.
- As regards the time requirement in the various methods of formation of the SE, the minimum period of existence required should be aligned, either by extending the two-year existence requirement for the merging companies or by abolishing the requirement that branches or subsidiaries must have existed for two years prior to the formation of the joint holding SE or joint subsidiary SE.

In addition, further consideration should be given to the possibility to open up the access to the legal form of the SE by easing its modalities of formation. In this respect, it must first be recalled that the primary purpose of the SE was to enable groups to reorganise their business on a Community scale. Therefore, initially, additional pre-requisites and requirements have been imposed on the SE (for example: the criterion of multi-nationality as above mentioned) to prevent the national legal forms from being in competition with supranational SEs in purely domestic situations. As a consequence, the questions raised by a possible enlarged access to the SE are first whether the initial objectives assigned to the SE Statute remain unchanged and second whether the legal form of the SE can be seen as an alternative to domestic corporate forms.

Leaving this question aside, two further aspects of the limited conditions of formation of the SE should be analysed:

- On the one hand, the SE Statute provides for a precise definition of the concept of merger by reference to the third Council Directive (78/855/EEC of 9 October 1978). Thus, within the meaning of the SE Regulation, formation of an SE by means of merger refers to either a merger by acquisition, meaning "the operation whereby one or more companies are wound up without going into liquidation and transfer to another all their assets and liabilities in exchange for the issue to the shareholders of the company or companies being acquired of shares in the acquiring company and a cash payment, if any, not exceeding 10 % of the nominal value of the shares so issued or, where they have no nominal value, of their accounting par value"[239] or a merger by formation of a new company, meaning "the operation whereby several companies are wound up without going into liquidation and transfer to a company that they set up all their assets and liabilities in exchange for the issue to their shareholders of shares in the new company and a cash payment, if any, not exceeding 10 % of the nominal value of the shares so issued or, where they have no nominal value, of their accounting par value"[240]. Such definition is also that which prevails in the EC Directive 2005/56 on cross-border merger of limited-liability companies[241].

  Thus, contrary to the Council Directive 90/434//EEC as amended by EC Directive 2005/19 extending the rules in the Directive also to the situation of transfer of the registered office of an SE(the Merger Directive), no further cases of merger are provided for in the SE Regulation, such as, for instance a division, meaning an operation whereby a company, on being dissolved without going into liquidation, transfers all its assets and liabilities to two or more existing or new companies, in exchange for the pro rata issue to its shareholders of securities representing the capital of the companies receiving the assets and liabilities, and, if applicable, a cash payment not exceeding 10% of the nominal value or, in the absence of a nominal value,

[239] Article 3.1. of the Third Council Directive of 9 October 1978 based on Article 54 (3) (g) of the Treaty concerning mergers of public limited liability companies (78/855/EEC).

[240] Article 4.1. of the Third Council Directive of 9 October 1978 based on Article 54 (3) (g) of the Treaty concerning mergers of public limited liability companies (78/855/EEC).

[241] In its Article 2(2), the Directive on Cross-border merger of limited-liability companies adds to the cases of a merger by acquisition and a merger by formation of a new company, the "operation where a company, on being dissolved without going into liquidation, transfers all its assets and liabilities to the company holding all the securities or shares representing its capital".

of the accounting par value of those securities or a "partial division", meaning an operation whereby a company transfers, without being dissolved, one or more branches of activity, to one or more existing or new companies, leaving at least one branch of activity in the transferring company, in exchange for the pro-rata issue to its shareholders of securities representing the capital of the companies receiving the assets and liabilities, and, if applicable, a cash payment not exceeding 10% of the nominal value or, in the absence of a nominal value, of the accounting par value of those securities.

First, it must be stressed that these two sets of Directives do not have the same object. The Council Directive concerning mergers of public limited-liability companies and the Directive on cross-border merger of limited-liability companies regulate the legal consequences of the merger operations whereas the Council Directive of 23 July 1990 as amended provides for a common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States.

Considering the comprehensive definition of the merger provided by the SE Regulation, thus excluding *ab initio* other ways of forming an SE by merger, the question arises of the appropriateness of broadening the concept of merger to other cases such as the division or a contribution of a branch of activity.

If the concept of merger is extended to division, this could result in the following situation: a limited-liability company conducting business in more than one Member State could, via division, reduce its activities to one Member State only[242]. Similarly, the operation of contribution of a branch of activity could refer to the case where a company has a branch of activity located in a different Member State from that of its place of principal business and that such company decides to contribute all assets and liabilities relating to that branch to another company - presumably a newly formed company.

These two operations appear at first sight contrary to the initial objective assigned to the SE consisting in the simplification of group structure. In fact, instead of simplifying the group, these operations will lead to the creation of a new legal entity to the group, thus dividing further the economic and legal unit of the group[243]. Consequently, there is no need to extend the legal definition of merger as a means to form an SE by considering a contribution of a branch of activity or a division[244]. On the other hand, a conversion into an SE of a public limited liability company having a branch in another

[242] For example if a company is operating in a Member State A and in a Member State B, it could decide to divide its operational business by locating its activity relating to A in a legal entity incorporated in Member State A and its activity relating to B in a legal entity incorporated in Member State B.

[243] As explained in Section 1.1. of Chapter 4, one of the initial objectives assigned to the SE was precisely to allow cross-border groups to structure and reorganise so as to ensure as far as possible that the economic unit and the legal unit of business in the Community coincide.

[244] If an enlargement of the methods of formation of the SE was nevertheless contemplated, it could be by providing for cases of contribution of a branch of activity or of division by reference to the Council Directive 82/891 concerning the division of public limited liability companies. Such an amendment should however be made under the conditions that all other requirements for the SE are and will remain fulfilled (for example: the criterion of multi-nationality).

Member State should be made possible, which would be closer to the initial objective assigned to the SE[245].

- On the other hand, the limited methods of formation of an SE exclude an *ex nihilo* constitution, by the creation of an SE directly by natural persons. This possibility is however open to other European bodies such as the European Cooperative Society (SCE)[246]. The explanation for this restriction appears to have been the cautious reasoning that the diversity and the escape from national law which this new European corporate form offers should only be applicable where the need for cross-border co-ordination arises and the Member States' fear that the new corporate form might be abused. However, this restriction might be easily circumvented as individuals may, in certain Member States, such as the United Kingdom or the Czech Republic, easily form public limited liability companies as vehicles for further formation of an SE at relatively low cost, or even buy shelf SEs. Thus, even though this restriction may be relatively easily circumvented, the fact that only corporate entities may participate in the formation of an SE reflects the initial objectives of the SE Statute, being the creation of a European corporate legal form that provides companies with the option to structure, reorganise and expand, or combine their pan-European operations on a Community scale[247]. Depending on the development of the objectives assigned to the SE legal form, the possibility may be envisaged to open up this corporate form to individuals by authorising the *ex nihilo* creation of SEs.

.3.1.2 Requirement as regards employee involvement

In the course of formation of an SE, a special requirement is set forth in the SE Regulation and the SE Directive as regards the necessity to conduct negotiations on employee involvement[248]. In this respect, two practical problems arise:

- First, the process of employee involvement is considered to be complex and time-consuming, especially in the Member States in which the national legislation does not

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[245] See above in this paragraph.

[246] The Statute for a European Cooperative Society (SCE) provides for the possibility of creating an SCE *ex nihilo* with the participation of natural persons. See: Article 2 of the Council Regulation (EC) No 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society (SCE), stipulating that "an SCE may be formed as follows:
- by five or more natural persons resident in at least two Member States,
- by five or more natural persons and companies and firms within the meaning of the second paragraph of Article 48 of the Treaty and other legal bodies governed by public and private law, formed under the law of a Member State, resident in, or governed by the law of, at least two different Member States".

[247] See paragraph 1 of the Preamble to the SE Regulation.

[248] See Article 12(2) of the SE Regulation providing that "an SE may not be registered unless an agreement on arrangements for employee involvement pursuant to Article 4 of Directive 2001/86/EC has been concluded, or a decision pursuant to Article 3(6) of the Directive has been taken, or the period for negotiations pursuant to Article 5 of the Directive has expired without an agreement having been concluded" as well as paragraph 6 of the SE Directive stipulating: "information and consultation procedures at transnational level should nevertheless be ensured in all cases of creation of an SE" and enhanced by Article 1 paragraph 2 stating that "arrangements for the involvement of employees shall be established in every SE (…)".

provide for a system of employee participation[249] and in cases where very few employees are concerned by the involvement process.

- Second, one may observe that in some cases the SE form is used to elude the negotiations on employee involvement[250].

Considering the two aforementioned practical problems, there is a prevailing opinion[251] that the requirement to conduct negotiations on employee involvement should be triggered only once a threshold of a certain number of employees is reached. In determining such a threshold, one should take into account:

- the objectives of the SE Statue, i.e. that the right of employees to involvement is ensured in the SEs once the shelf company actively takes up operation as a business and a substantial number of employees has been hired[252];
- The need for a balance in the negotiating power of the management and the employees involved.

Within the above-described framework, the appropriateness of aligning the requirement regarding the negotiation of employees' rights in the various European legislative texts should also be examined.

According to the text of the Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited-liability companies, "the participation of employees in the company resulting from the cross-border merger and their involvement in the definition of such rights shall be regulated by the Member States, *mutatis mutandis*, in accordance with the principles and procedures laid down in Article 12(2), (3) and (4) of SE Regulation" in cases "where at least one of the merging companies has, in the six months before publication of the draft terms of the cross-border merger [...], an average number of employees that exceeds 500 and is operating under an employee participation system within the meaning of Article 2(k) of SE Directive [...]"[253].

Concerning the SCE, in the event that the latter is established "exclusively by natural persons or by a single legal entity and natural persons, which together employ at least 50 employees in at least two Member States, the provisions of Articles 3 to 7 shall apply"[254].

One may be tempted to consider the above two thresholds of 500 and 50 employees in setting up a possible threshold for triggering the requirement for the negotiation of employee involvement in the event of formation of an SE. However, the following limitations must be taken into account:

- The Cross-Border Merger Directive relates exclusively to the question of employee participation, which is the right for employees either to elect, or to recommend and / or

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[249] See paragraph 1.2.1.2. of Chapter 3.

[250] Paragraph 2.3. of Chapter 3.

[251] This results from a unanimous position of the Steering and Scientific Committees of our Study and from the experts interviewed on this question.

[252] Jochen Reichert, Experience with the SE in Germany, European Company Law, December 2008. Interview with Roland Köstler from Hand Böckler Foundation.

[253] Article 12 of the Merger Directive.

[254] Article 8 of the Council Directive 2003/72/EC of 22 July 2003 supplementing the Statute for a European Cooperative Society with regard to the involvement of employees.

to oppose the appointment of members of the supervisory board (two-tier system) or of the administrative organ (one-tier system), whereas the SE Directive encompasses employee involvement in a broad sense, i.e. both the employee participation and the "information and consultation" of the employees. Therefore, the scope of the Merger Directive is more restricted and cannot be strictly compared to that of the SE Directive.

- The only cases of formation of an SCE which allow negotiation on employee involvement to be avoided (under the express provision that the number of employees in at least two Member States does not exceed 50) are *ex nihilo* creations of SCEs. This is not possible in the formation of SEs.

In conclusion, it appears difficult to align all the procedures of negotiation of the employees' rights in the various European legislative texts, due to the variations in the scope of application. According to the different interviews conducted in the course of the Study, it seems that a threshold could be found between 50 and 250 employees. Requests are also often made to allow the registration of an SE even if the negotiation on employee involvement is still in progress[255]. However, as an argument against this, it appears that the position of the employees in the negotiation would be weakened[256].

Finally, the outcome of the negotiations on the draft proposal for a Council Regulation on the Statute for a European Private Company (SPE) should be taken into account in this respect. The European Parliament in its resolution of 10 March 2009 has suggested introducing certain thresholds below which the rules on the negotiations on employee involvement will not be applicable[257]. However, the outcome of the SPE proposal is uncertain, since the negotiations in the Council are on-going.

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[255] This results from the interviews with Professor Michel Menjucq and Professor Klaus Hopt.

[256] This is in particular the position expressed during the interview by Roland Köstler (Hans-Böckler Stiftung, Germany) and Luc Triangle (Expert for employee representatives, Belgium).

[257] See new drafting of Article 34 as suggested by the European Parliament in its legislative resolution of 10 March 2009 (Consultation procedure). The general rule is that the SPE shall be subject to the rules on employee participation, if any, applicable in the Member State in which it has its registered office. Those rules shall apply to the entire workforce of the SPE. However, this general rule will not apply where:

a) the SPE employs altogether more than 1,000 employees and more than 25% of the total workforce habitually works in a Member State or Member States which provide for a greater level of employee participation than the Member State in which the SPE has its registered office;

b) the SPE employs altogether between 500 and 1,000 employees and more than 33⅓% of the total workforce habitually works in a Member State or Member States which provide for a greater level of employee participation than the Member State in which the SPE has its registered office;

c) the SPE has been founded through the transformation of an existing company, the merger of existing companies, or the division of an existing company (i.e. the SPE is not created in accordance with the Regulation), and it employs altogether fewer than 500 employees, and more than 33⅓% of the total workforce habitually works in a Member State or Member States which provide for a greater level of employee participation than the Member State in which the SPE has its registered office;

d) the SPE has been created in accordance with the Regulation and employs altogether fewer than 500 employees, and more 50% of the total workforce habitually works in a Member State or Member States which provide for a greater level of employee participation than the Member State in which the SPE has its registered office.

3.2 Practical problems in the running of the SE

The first practical problem encountered in the running of the SE is unanimously cited as being the lack of public recognition of this legal form.

Three further major practical problems have been identified as regards the running of the SE, namely the issue of the location of the registered office and head office of the SE (3.2.1.), the tax provisions applicable to the SE, in particular as regards the transfer of the registered office (3.2.2.) and the requirement concerning the renegotiation of employee involvement (3.2.3).

.3.2.1 Location of the registered office and head office of the SE

Article 7 of the SE Regulation stipulates that "the registered office of an SE shall be located within the Community, in the same Member State as its head office"[258]. The requirement to have the registered office and head office in the same Member State is also dealt with in Art. 64 of the SE Regulation which requires the Member State in which the SE has its registered office to take the appropriate measures to oblige the SE to regularise its position within a specified period of time either by re-establishing its head office in the Member State in which its registered office is situated or by transferring the registered office by means of the procedure set forth in Article 8 of the SE Regulation.

Considering the significant progress of the case law of the ECJ, the question is raised as to whether this rather rigid treatment of an SE regarding a possible distinction between the place of its registered office and the place of its head office is in line with the more liberal approach adopted recently by the ECJ.

Case law of the European Court of Justice (ECJ)

On the basis of Article 43 of the EC Treaty on the freedom of establishment and Article 48 of the EC Treaty on the application of the freedom of establishment to business organisations, the European Court of Justice has issued several decisions on the question of international transfer of registered offices. The trend in case law is towards a Europe-wide recognition of the cross-border transfer of the registered offices of limited-liability companies. An overview of the main ECJ decisions will be provided before analysis of the impact of this case law on the specific feature of the SE.

In the event that any of these exceptions apply, certain specified provisions of SE Directive 2001/86/EC and Directive 2005/56/EC will apply. An adaptation clause provides for rules to be applied in the absence of provisions on employee participation.

[258] The Member States may impose that the registered office and head office be located in the same place.

In the Daily Mail decision[259], the ECJ had to decide on the question of the extent to which a company incorporated in the United Kingdom could be refused the possibility of transferring its central management and control to another State (since the company should have obtained the consent of the Tax Authorities of the United Kingdom before moving its place of management to the Netherlands). On the basis of a very elaborate argument, the ECJ concluded that Article 58 (now Article 48) of the EC Treaty did not confer the express right on a company incorporated in one Member State to transfer its registered office, central administration or principal place of business to another Member State, in the absence of an agreement on the basis of Article 220 (now Article 293) of the EC Treaty concluded with a view to securing, inter alia, the retention of legal personality in the event of a transfer of registered office.

In the Centros decision[260], the ECJ held that it was contrary to Articles 43 and 48 of the EC Treaty for a Member State to refuse to register a permanent establishment of a company formed in accordance with the law of another Member State in which it has its registered office and in which it conducts no business. The fact that a national of a Member State who wishes to set up a company chooses to form it in the Member State whose company law rules seem to him the least restrictive and to set up branches in other Member States cannot, in itself, constitute an abuse of the right of establishment. However, the authorities of the Member State concerned are not precluded from adopting appropriate measures for preventing or penalising fraud.

In the Überseering decision[261], the ECJ clearly held that the German "real seat theory" was contrary to the EC Treaty, as it would have resulted, in the negation of the existence of a Dutch company (and the denial of its legal capacity) in Germany, even though it had been validly formed and incorporated under the laws of the Netherlands.

In the Inspire Art Ltd decision[262], the ECJ held that the fact that the company was formed under the laws of the United Kingdom for the sole purpose of enjoying the benefit of more favourable legislation did not constitute an abuse, although the company conducted its activities entirely or primarily in the Netherlands. To require companies formed in other Member States to have minimum capital and director's liabilities infringed the freedom of establishment.

In the Sevic decision[263], the ECJ observes that the freedom of establishment for companies includes, in particular, the establishment and management of those companies under conditions laid down by the legislation of the State of establishment for its own companies. Cross-border merger operations constitute particular forms of exercise of the freedom of establishment. Therefore a difference in treatment between companies according to the internal or cross-border nature of the merger constitutes a restriction on the right of establishment and can be allowed only if it pursues a legitimate objective compatible with the Treaty and is justified by imperative reasons in the public interest, such as protection of the interests of creditors, minority shareholders and employees, preservation of the effectiveness of fiscal supervision and the fairness of commercial transactions.

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[259] The Queen v. H.M. Treasury and Commissioners of Inland Revenue, ex parte Daily Mail and General Trust plc (C-81/87) on 27 September 1988.

[260] Centros Ltd v. Erhvervs- og Selskabsstyrelsen (C-212/97) on 9 March 1999.

[261] Überseering BV v. Nordic Construction Company Baumanagement GmbH (NCC) (C-208/00) on 5 November 2002.

[262] IKamer van Koophandel en Fabrieken voor Amsterdam v. Inspire Art Ltd (C-167/01) on 30 Jaunary 2003.

[263] Sevic Systems AG (C-411/03) on 13 December 2005.

In the Cartesio decision[264], the ECJ held that a company incorporated under the law of one Member State may not transfer its seat to another Member State while continuing to be registered in the first Member State[265]. However, it decided that a company registered in a Member State has the right to transfer its registered office to another Member State if the company is to be converted into a company governed under the law of the other Member State (if such other Member State accepts the transfer with the correlative modification of the applicable law). Thus, it is not yet possible for a company registered in a Member State that applies the real seat theory to transfer the effective place of management across the border unless the registered office is changed accordingly. Conversely, under the respective national law, it is possible to transfer the head office from a Member State that applies the incorporation principle to another Member State that also applies this principle.

In conclusion, in its most recent case law, the ECJ adopts a liberal approach and does not allow Member States to refuse access to their territory to companies originating from other Member States, provided the latter have at least a minimum connection with the EU / EEA, and not only with the Member State according to which the company has been formed. Thus, a company formed in a Member State that applies the "state of incorporation" theory will have to be admitted in another state, and this will apply without change in the applicable legal regime. For companies incorporated in Member States that apply the "real seat" theory, the transfer of the seat will normally lead to a loss of legal status under the home state jurisdiction. According to the recent ECJ Decisions, the Member State of arrival will however have to admit this migrating company.

Compatibility of Article 7 of the SE Regulation with the case law of the European Court of Justice (ECJ)

Considering the significant progress of the case law of the ECJ[266], one could question if the requirement for SEs to have "the registered office [..] located within the Community, in the same Member State as its head office"[267] should be maintained. A distinction between the Member State of the head office and the Member State of the registered office could lead to severe sanctions: according to Article 64 of the SE Regulation, after having been offered the possibility of regularising its "illegal" status, the contravening SE will be subject to a mandatory liquidation[268].

The same principle applies in the case of the transfer of the SE's registered office to another Member State. According to the SE Regulation, transferring the head office of an SE to another Member State will require the transfer of the registered office of the said SE, and vice versa: it will not be possible to transfer the registered office and maintain the head office where it was.

Considering the apparent incompatibility between the ECJ case law and the requirement set forth by Article 7 of the SE Regulation, the opportunity to mitigate this requirement

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[264] Cartesio Oktató és Szolgáltató Bt (C-210/06) on 16 December 2008.

[265] This possibility is not granted by the SE neither as Article 7 of the SE Regulation provides that « the registered office of an SE shall be located within the Community, in the same Member State as its head office ».

[266] See Paragraph 1.1.1.2. of Chapter 3 here above.

[267] Article 7 of the SE Regulation.

[268] Article 64.2 of the SE Regulation: "The Member State in which the SE's registered office is situated shall put in place the measures necessary to ensure that an SE which fails to regularise its position in accordance with paragraph 1 is liquidated".

and allow SEs to have registered and head office in different member States is often debated.

First, it must be noted that the decisions of the ECJ have no overruling implications for the treatment of an SE according to Articles 7 and 64 of the SE Regulation as they concern national legal forms. However, the SE Statute was adopted in 2001, i.e. before the ECJ delivered Centros and other decisions liberalising the mobility of companies.

Second, it must be recalled, that the SE is a specific company form constituted for the special purpose of allowing companies to reorganise their business on a Community scale[269] and that, to fulfil this purpose, Member States are obliged to ensure that the provisions applicable to SEs under this Regulation do not result in discrimination arising from unjustified differences in the treatment of SEs[270].

On the contrary, it must be stressed that as the registered office and head office of an SE must be located in the same Member State, the SE is compelled to relocate its head office in another Member State if the registered office is also transferred there. This might constitute a deterrent to the actual conduct of transfer of the registered office of an SE and this is also complex because it leads to a partial change of the corporate law applicable to the SE and protective regulations in favour of the creditors and minority shareholders must adhere to it.

As mentioned above, as the SE is known and enforced in all Member States of the EU/EEA, a group could be interested in running its whole corporate structure as a harmonised group of SEs[271]. In this respect, allowing an SE to relocate its head office to another EU/EEA Member State independently from the location of its registered office would open up new potentialities of restructuring for enterprises across Europe. It might be considered advantageous to run a group of SEs under one legal regime, thus having a uniform SE body of regulations instead of the current national differentiations. The possibility of distinguishing the registered office and head office would precisely enable groups of companies to organise in the form of SEs which are subject to one and the same legal system. For example, a Spanish parent SE could create subsidiaries throughout Europe (in the form of SEs) with their registered office in Spain. The head office of these SE subsidiaries would be located "on site" where the actual business is conducted in the various Member States. Then the parent and subsidiary SEs would be subject to the same corporate statute (in the example the Spanish one). Such a uniformly structured SE group would not only lead to lowering of legal consultation costs from a corporate point of view, it would also enable tight and efficient group management[272].

As long as the SE is not governed by one set of uniform rules across the EU/EEA independently from the Member State of its registered office, it might be an advantage that the companies can opt for one set of regulations, and maintain it independent from the actual head office of the SE[273].

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[269] Paragraph 1 of the Preamble of the SE Regulation.

[270] Article 10 of the SE Regulation states that "Subject to this Regulation, 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".

[271] See section 1.1.1.4.2. of Section 3.

[272] Marc-Philippe Welter, The reform of the SE Regulation, Deutsches Aktieninstitut.

[273] This possibility will however remain limited by the fact that some aspects of law (public law in general, insolvency law, tax law) depend mainly on the place of the head office and not on that of the registered office.

.3.2.2 Tax provisions of the SE

In connection with the previous practical problem, consideration should be given to the absence of specific tax provisions applicable to the SE, especially with regard to the transfer of the registered office. This factor has often been mentioned as one of the drivers which may negatively influence the decision to set up an SE.

The SE Regulation provides however that SEs can transfer their registered office across the EU / EEA without any extra taxation applying. In the absence of specific tax provisions in the SE Regulation in this respect, it is necessary to refer to the national tax laws of the respective Member States. Accordingly, in the event of the transfer of the registered office and head office of SEs outside their jurisdiction, most Member States apply a liquidation treatment which results in the full disclosure and taxation of the silent reserves. Nevertheless, the Member States must not apply exit taxation if the respective SE retains, in its former Member State of incorporation, a permanent establishment to which the assets of the relocating SE can be attributed. This principle of the "permanent establishment" also reflects the provision of the Merger Directive[274] which makes tax deferral relief conditional upon the existence of a permanent establishment in the Member State where the SE was previously incorporated. It is possible that the application of exit taxation in cases where the SE does not maintain a permanent establishment in its former Member State of incorporation might be considered to be contrary to the freedom of establishment[275]. However, considering that the EC Merger Directive is clear on this point, it should be considered that it constitutes an appropriate means of safeguarding the financial interests of the Member States and does not constitute an infringement of the free establishment principle. It is nevertheless noteworthy that the European Commission published a communication dated December 19, 2006 on exit taxation in which the Commission states that Member States should provide for an unconditional deferral of collection of the tax due, until the gain is actually realized. According to the Commission, the tax base of the "exit State" can be protected through effective administrative cooperation.

To resolve this issue relating to taxation in the event of transfer of the registered office of the SE, the European legislator will have to achieve a subtle balance of interests between protecting the freedom of establishment and free mobility of SEs and countering tax planning and tax law arbitrage.

During the interviews one negative aspect has also been mentioned as far as the income taxation of SE employees is concerned. If an employee of an SE with registered office in the Member State "A" usually works in a SE branch in Member State "B", then the employee is taxed in the Member State "B". If he works some days a month for instance in the head office of the SE, i.e. in the Member State "A", then he is subject to income tax in

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[274] See the Council Directive (90/434/EEC) of 23 July 1990 on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States in its Article 4: "A merger or division shall not give rise to any taxation of capital gain calculated by reference to the difference between the real value of the assets and liabilities transferred and their values for tax purposes. The following expressions shall have the meaning assigned to them:

- transferred assets and liabilities: those assets and liabilities of the transferring company which, in consequence of the merger or division, are effectively connected with a permanent establishment of the receiving company in the Member State of the transferring company […]".

[275] This might result from the former ECJ decision Hughes Lasteyrie du Saillant (C-9/02), in which the ECJ prevented a Member State from applying exit taxation to an individual exercising his freedom of establishment and without requiring a connection to be maintained with the Member State of origin.

the Member State "A" for the part of his salary related to this activity. On the contrary, if instead of having a branch the SE had a subsidiary in Member State "B" then the employee concerned would not be subject to income tax in the Member State "A" for the part of his salary related to this activity.

This means that having an SE in Member State "A" with a branch in Member State "B" results in a less favorable tax situation for employees who are partially seconded from the SE branch to the SE head office, compared to the situation where the SE would have a subsidiary.

.3.2.3 Renegotiation of employee involvement

As previously explained, the SE Statute does not provide for a dynamic adaptation of the regime of employee involvement to the number of employees and further developments of the SE. Through the employee involvement negotiation process, the SE Statute grants significant flexibility as compared to some equivalent national legislation and offers the possibility of tailoring the terms and conditions of employee involvement (information, consultation and participation) to the particular needs and circumstances of the companies involved at the time of the creation of the SE. However, such flexibility is restricted to a specific period limited to the time of formation of the SE. Thus, after the formation of the SE, hardly any cases of renegotiation of the employee involvement are provided for, unless the negotiation agreement itself provides for such obligation or such renegotiation is agreed by the involved parties.

Paragraph 18 of the Preamble, in correlation with art 11 of the SE Directive providing for the prevention of misuse of procedures, stipulates that "it is a fundamental principle and stated aim of this Directive to secure employees acquired rights as regards involvement in company decisions. (…) Consequently, that approach should apply not only to the initial establishment of an SE but also to structural changes in an existing SE and to the companies affected by structural change processes." In the event of structural changes, the employee participation negotiation procedure will resume.

However, the legal theorists unanimously acknowledge that the notion of "structural changes" must be construed restrictively and hence do not apply either to the "activation" of former shelf or dormant SEs or to the mere growth of the SE's workforce[276]. For example, it would be possible for a shelf SE (having, by definition, no employees and no operational activity at the time of its incorporation) to acquire a public limited-liability company without triggering the application of the notion of "structural changes" and the necessity to start the negotiation of employee involvement.

In conclusion, concerning the renegotiation of employee involvement, it could be considered to clarify the definition of "structural changes". Such clarification should be made taking into account the general objective stated by the SE Statute that employees must have a right of involvement in issues and decisions affecting the life of their SE"[277].

[276] Mathias Habersack, La Cogestione nella Società Europea, Konzern 2006, 105 ss.

[277] Paragraph 21 of the Preamble of the SE Regulation.

4. Overview of the main drivers (positive and negative), main trends and main problems of the SE Statute

The table below provides an overview of the main drivers in choosing (or not choosing) the SE legal forms:

Positive Drivers		Negative Drivers	
Linked to the SE Regulation	Linked to national legislation	Linked to the SE Regulation	Linked to national legislation
Value of the European Image: - It is rarely a primary driver for the choice of the SE but always a key factor in this decision. - It helps easing the acceptance of the employees, shareholders, creditors and other parties involved.	**Flexibility of the relevant national legislation applicable to the SE:** - It is generally a non-operating driver for the decision whether or not to create an SE, but it could potentially be a positive driver in specific cases.	**Cost, complexity and uncertainty of the SE:** - The lack of hindsight and experience relating to the SE Statute generates increased uncertainty, complexity and cost in the creation of an SE. - The SE suffers from a general lack of awareness and public recognition.	**Inflexibility of the relevant national legislation applicable to the SE:** - The inflexibility and unattractiveness of the SE regime in some Member States has generally little impact on the final decision not to create an SE. - The differentiated level of flexibility and attractiveness of the SE regime may in specific cases impact on the decision where to locate the SE.
Possibility of transfer of the registered office: - It is considered as the major advantage of the SE and hence a strong incentive for choosing this corporate form. - Many SEs consider the mere potentiality to freely transfer their registered office as a strong positive driver.	**Considerations linked to tax regime:** - Considering the absence of tax provisions in the SE Regulation, the tax considerations should as a general rule not impact the decision to set up (or not to set-up) an SE. However, some companies might consider the SE as an appropriate vehicle to transfer	**Employee involvement:** - In many Member States (especially those having no or low employee involvement), the negotiation procedure on employee involvement is considered as time consuming and complex.	

Positive Drivers		Negative Drivers	
Linked to the SE Regulation	Linked to national legislation	Linked to the SE Regulation	Linked to national legislation
	their registered office to Member States with favourable tax legislation.		
Formation of an SE by cross-border merger: - It was a strong incentive until implementation of the EC Cross-Border Merger Directive but it no longer is.	**Considerations linked to labour law regime:** - Contrary to the national co-determination laws in certain Member States, the negotiation procedure with the special negotiating body in the SE allows for tailor made solutions for each company as regards employee involvement.	**Apparent reduced uniformity of the SE due to the number of references to national law:** - The low degree of uniformity of the SE Statute from one Member State to another appears to be a high counter-incentive. The lack of harmonisation (tax, social and legal) is a recurring criticism against the SE legal form.	
Possibility of cross-border groups simplifying and harmonising their structure: - Despite a certain degree of corporate governance harmonisation across the EU / EEA, the SE form is presently not considered as offering enough advantages in terms of group restructuring.			

The drivers above constitute the main factors identified during our Study and explaining the final decision for a company to adopt (positive drivers) or not to adopt (negative drivers) the SE legal form. They must not be considered on a separate basis but consist rather of a set of reasons that are related to each other. These main drivers relate to a "business case" that might explain the final decision for choosing or not choosing the SE.

Further to these "individual" drivers, main trends partly explaining the geographical distribution of the SEs per Member States have been identified. These main trends are twofold. First, there is a positive correlation between the degree of employee participation in a Member State and the number of SEs incorporated in its territory[278]. Second, another positive correlation has been observed between the two-tier corporate governance structure and the number of SEs incorporated in a Member State[279]. When combining these two elements, i.e. degree of employee participation and corporate governance structure, we reach the conclusion that the Member States having a tradition for the two-tier corporate structure and a compulsory strong employee participation regime are also those having the highest number of SEs incorporated in their territories[280]. This is particularly true for Germany, the Czech Republic, the Netherlands and Slovakia.

The current reality of the SEs and their distribution can be explained by the combination of the main drivers constituting individual "business cases" (microeconomics level) and of the main trends (macroeconomics level). In most of the cases, these two sets of explanatory factors reinforce one another.

As regards the main practical problems in the implementation and the application of the SE Statute, the table below shows the main problems identified in the course of our Study both at the time of constitution of the SE and in the running of the SE:

Practical problems at the time of constitution of the SE	Practical problems in the running of the SE
Limited methods of formation of the SE: - It has not been cited as a major problem by the SEs interviewed. - Certain inconsistencies have been identified as regards the conditions for formation of an SE, i.e.: - the kind of legal entities involved - the requirements as regards branches or subsidiaries - the different time requirement depending on the methods of formation	**Location of the registered office and head office of the SE:** - It has not been cited as a major problem by the SEs interviewed. - From an academic perspective and considering the apparent incompatibility between the ECJ case law and the requirement set forth by Article 7 of the SE Regulation, the question of the appropriateness to mitigate this requirement and allow separation of the registered office and the head office is often disputed.

[278] See Section 2.1. above – The relative success of the SEs in Member States with large employee participation (map).

[279] See Section 2.2. above – The relative success of the SEs in Member States with the two-tier system (map).

[280] See Section 2.3. above – The correlation of the degree of employee participation and the corporate governance structure (table).

Practical problems at the time of constitution of the SE	Practical problems in the running of the SE
Requirement as regards employee involvement: - The process of employee involvement is considered to be complex and time-consuming, especially in the Member States in which the national legislation does not provide for a system of employee participation and in cases where very few employees are concerned by the involvement process.	**Tax provisions of the SE:** - The SEs interviewed have often expressed disappointment as regards the absence of specific tax provisions for the SE, especially with regard to the transfer of the registered office.
	Renegotiation of employee involvement: - After the formation of the SE, hardly any cases of renegotiation of the employee involvement are provided for (especially in the case of growth of the workforce), unless the negotiation agreement itself provides for such an obligation or the relevant parties agree to renegotiate.

Chapter 4: Analytical conclusion

This chapter provides an analytical conclusion focusing on the effectiveness of the provisions of the SE Statute, by comparing the situation in 2004, the objectives pursued by the SE Regulation and the results attained (1). Finally, some recommendations for possible amendments to the current Statute for the European Company are made (2).

1. Analysis of the efficiency of the SE Statute

In respect of the efficiency of the SE Statute, there is a discrepancy between the initial objectives of the SE Statute (1.1.) and the current reality of the SEs (1.2).

1.1 Initial objectives of the SE Statute

The efficiency of the SE Statute must be measured by the degree to which the initial aims set by the European legislator when adopting the SE Statute have been fulfilled.

In principle, the main objective of the SE was to complete the internal market in order to enhance efficiency and competitiveness, due to the SE being a legal corporate form that corresponds to the economic framework of the EU / EEA[281].

Whereas the free movement of persons, goods, services and capital had already been achieved, the organisational "structures of production must be adapted to the Community dimension" as well[282]. Consequently, according to the Preamble of the SE Regulation, the aim of the SE was:

- to allow cross-border groups with a "European" dimension to structure, reorganise and expand, or combine their pan-European operations on a Community scale[283] and freely transfer their registered office to another Member State[284] while ensuring adequate protection of the interests of shareholders and third parties and "ensuring as far as possible that the economic unit and the legal unit of business in the Community coincide"[285].
- to allow cross-border groups with a "European" dimension to adapt their organisational structure, and to choose a suitable system of corporate governance ensuring efficient management, proper supervision[286] and the maintaining of the rights of employees to involvement[287].

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[281] Paragraphs 1, 4 and 8 of the Preamble of the SE Regulation.

[282] Paragraph 1 of the Preamble of the SE Regulation.

[283] Paragraph 1 of the Preamble of the SE Regulation.

[284] Paragraph 24 of the Preamble of the SE Regulation.

[285] Paragraph 6 of the Preamble of the SE Regulation.

[286] Paragraph 14 of the Preamble of the SE Regulation.

[287] Paragraph 21 of the Preamble of the SE Regulation.

1.2 Reality of the SEs

In order to assess whether the above objectives have been reached, the reality of the SEs within the EU / EEA must be faced.

From a practical point of view, the SE legal form has not yet encountered the success anticipated: the overall number of SEs as of 15 April 2009 is lower than initially expected, with 369 SEs created up to that date. The number of SEs created has however accelerated considerably from year to year (there was an increase of 103 % between 2007 and 2008 – with a real boom in the Czech Republic where the number of new SEs created between 2007 and 2008 rocketed by 343%)[288].

In addition, there are strong contrasts in the success encountered by the SE legal form, when taking into consideration the following factors:

► Geographical distribution[289]:

The geographical distribution of the existing SEs varies greatly. In two Member States the number of SEs created is high (Germany and the Czech Republic with 91 and 137 SEs incorporated in their territories respectively), whereas in all the other Member States, the SE legal form has not really taken off, certain States having between 6 and 22 SEs (e.g.: the Netherlands, France, Belgium, Luxembourg, the United Kingdom, Sweden, Austria and Cyprus), others having between 1 and 5 SEs (Denmark, Estonia, Hungary, Ireland, Latvia, Norway, Poland, Slovakia, Liechtenstein and Spain), and some having no SEs (Bulgaria, Finland, Greece, Iceland, Italy, Lithuania, Malta, Portugal, Romania and Slovenia).

► Fields of activity[290]:

As regards the fields of activity of the SEs, the majority of SEs operate in the services sectors, the banking and financial sector ranking first with other services coming second. On the other hand, the SEs operating in the manufacturing sector represent only 14% of the normal SEs (and 7% of all SEs). It is interesting to note that the distribution of SEs in the various economic sectors is close to the average distribution of companies per economic sector in the EU/EEA. There are slightly more SEs in the services sector compared with the European average (85% for the SE against 71.7% overall). In addition, the SE vehicle is often used by groups operating in the finance and insurance businesses. This is partly due to the fact that for regulatory reasons (calculation of the capital and solvency ratios), the conduct of business through an SE having branches across Europe

[288] See section 2.1.5. of Chapter 2 – SE by year of creation. This increase has been confirmed in the period from 15 April to 10 September 2009. Over this period, 62 new SEs have been created and the major trends identified have been confirmed, since the new SEs are distributed as follows: 33 in the Czech Republic, 18 in Germany, 4 in Slovakia, 3 in Sweden, 1 in France, 1 in Liechtenstein, 1 in the Netherlands and 1 in the United Kingdom. Thus, the overall number of SEs amounts to 431 as at 10 September 2009.

[289] See section 2.1.1. of Chapter 2 – SEs by country.

[290] See section 2.1.3. of Chapter 2 – SEs by activity.

can be an appropriate tool for group restructuring in this sector[291]. The most striking factor is that the majority of the existing SEs are in fact currently shelf SEs or were previously shelf SEs which were then sold. This is particularly true in certain Member States such as the Czech Republic, Slovakia and Sweden. Conversely, even if Germany is characterised by a high number of shelf SEs (23 SEs), this is also the Member State where most of the normal SEs are located, including several large, well-known enterprises[292].

► Reorganisation of groups:

The SE is typically a corporate form chosen by groups (only 5% of non shelf SEs are independent companies) and its position within the group is generally that of parent company (approximately 75% of non shelf SEs). Conversely, 20% of non shelf SEs are subsidiaries.

Apart from the creation of a subsidiary of an SE (which is the dominant method due to the high number of shelf SEs), the methods of formation of an SE are fairly evenly distributed between conversion, merger and the creation of a joint subsidiary.

Thus, the SE is a vehicle often used as part of a group strategy (i.e. simplification of group structure or streamlining of corporate governance)[293] rather than with the objective of bringing together formerly independent companies.

► Transfer of registered office:

Already 38 SEs have transferred their registered offices and the most frequently chosen destinations are the United Kingdom, Cyprus, France and Luxembourg. The actual transfer of the registered office of an SE is often explained by objective reasons: for example, a change of control of the SE or the sale of shelf SEs that then become operational. In addition, the possibility of freely transferring the registered office to a Member State considered as having flexible legislation (from a corporate, tax and labour point of view) is often the primary argument put forward by SEs to explain their decision to adopt this corporate form[294].

► Protection of the interests of various stakeholders[295]:

The legal mapping presented in Chapter 1 of our Study results in the conclusion that the protection of the interests of the various stakeholders was one of the primary concerns of the Member States in the implementation of the options of the SE Statute. The protection of these interests consists generally in an alignment of the rules applicable to the SE with those of the national domestic public limited-liability company, with the exception that increased protection has sometimes been chosen for the stakeholders of the SE due to the latter's international character, especially when the Member State does not allow the cross-border transfer of the registered office for national public limited-liability companies.

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[291] See section 1.1.1.5. of Chapter 3 – Regulatory reasons

[292] For example, Allianz, Porsche, MAN Diesel and Deichmann.

[293] See section 1.1.1.4. of Chapter 3 – Possibility of cross-border groups adopting a simplified management structure.

[294] See section 1.1.1.2. of Chapter 3 - Possibility of transfer of the registered office and section 1.1.2.2. of Chapter 3 – Considerations linked to the tax regime.

[295] See Chapter 1 – Mapping of the relevant legislation applicable in the EU/EEA Member States.

Thus certain Member States appear as more protective of the interests of various stakeholders (in particular, Germany, Portugal and Cyprus) than others where legislation in this respect is more flexible from the standpoint of the majority shareholder (in particular the United Kingdom, Luxembourg and Belgium).

► Harmonisation of corporate governance structure[296]:

European groups of companies have rarely chosen the SE corporate form to harmonise their corporate governance structure. Such harmonisation implies first that the European group of companies be transformed into a group of SEs, which cannot be done without taking certain immediate steps. In addition, as the SE must have its registered office and head office in the same Member State, a cross-border group cannot use only one SE but has to use the respective SEs in each Member State, leading to (minor) differences from one SE to another. The gain in reducing complexity is not as high as it could be with a really uniform SE across the Member States.

► Employee involvement:

Even if sometimes considered as a complex, time-consuming and ill-adapted procedure[297], the employee involvement negotiation procedure allows for tailor-made solutions for each company and the "standard rules" provide for sufficient security for the employees in order for them not to lose the level of involvement they had prior to the formation of the SE (before/after principle). However, many SEs have been formed as shelf companies without employee involvement even when they have started an activity later on[298].

1.3 Efficiency of achievement of the objectives

When comparing the initial objectives of the SE Statute with the reality of the latter, the following conclusions can be drawn as regards the first objective:

► Reorganisation and restructuring of groups with a "European" dimension.

The formation of an SE, especially in the case of formation by cross-border merger, can help the group to restructure and reduce the number of its legal entities. However, reducing the number of entities leads to decreased levels of limited liability which is not always sought by European groups[299]. Furthermore, since the implementation of the cross-border merger directive, the reorganisation and restructuring of groups may also be conducted through cross-border mergers[300]. Consequently, even though the SE Statute facilitates the reorganisation and restructuring of cross-border groups, it is still too

[296] See section 1.1.1.4. of Chapter 3 – Possibility of cross-border groups adopting a simplified management structure.

[297] See section 1.2.1.2. Employee involvement.

[298] See section 2.5. of Chapter 3 – The development of shelf SEs.

[299] See section 1.1.1.4.1. of Chapter 3 – Simplification of the group structure.

[300] See section 1.1.1.3. of Chapter 3 – Particular case of formation by cross-border merger.

complex and lacks harmonisation in the areas of tax, competition, intellectual property and insolvency[301].

► Possibility of freely transferring the registered office.

The SE Statute offers the possibility to transfer both the head office and the registered office to another country according to a harmonised procedure. So far this possibility has not been available to national companies. The 38 transfers of registered offices[302] and the fact that the possibility to transfer the registered office is mentioned as the main driver for choosing the SE[303] provides good evidence of its effectiveness. This is particularly true for the Member States which do not allow their domestic public limited-liability companies to transfer their registered office outside their jurisdiction[304], but this also applies to the Member States that offer this possibility to their national public limited-liability companies because the rules provided by the SE Regulation are generally more flexible in this respect than the corresponding national rules. In addition, the actual transfers of the registered offices of SEs have generally benefited Member States with more flexible legislation, from a corporate, tax and labour point of view. This concerns more specifically the United Kingdom (7 incoming SEs), Cyprus (6 incoming SEs) and Luxembourg (4 incoming SEs).

► Protection of the interests of various stakeholders.

Since mostly the protection of the interests of the various stakeholders of the SE is aligned (or slightly reinforced, mainly due to the international nature of the SE) with that of the national public limited-liability company, these rules ensure adequate protection for the stakeholders, without deterring companies from creating SEs. Thus, with the possible exceptions of Cyprus, France, Portugal, Bulgaria and Romania[305], the intra Member State national corporate law regime of the SE does not in general seem to be an important negative driver in opting for the SE and choosing its location.

► Possibility of having the economic unit and the legal unit of business in the Community coincide.

The SE has not yet allowed groups to have their economic unit and legal unit coincide, apart from some exceptions[306]. As the SE is not a uniform legal form but differs from one Member State to another, to some extent the "SE" label does not show the full picture, the SE being necessarily subject to national legal requirements.

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[301] See section 1.2.1.3. of Chapter 3 – Apparent reduced uniformity of the SE due to the number of references to national law.

[302] See section 1.1.1.2. of Chapter 3 - Possibility of transfer of the registered office.

[303] See section 1.1.1. of Chapter 3 – Reasons for setting up SEs – Reasons linked to the SE Regulation.

[304] This concerns Austria, Denmark, Finland, Germany, Greece, Hungary, Latvia, Norway, Poland, Portugal, Slovakia and the United Kingdom. See section 2.2. of Chapter 1 – Comparison as regards the transfer of the SE's registered office.

[305] These Member States rank low in the intra Member State comparison and are also characterised by the fact that they have no or few SEs incorporated in their territories. Thus, Portugal Bulgaria and Romania do not have any SEs in their territories whereas Cyprus has only 4 initial incorporations (against 10 SEs registered) and France has 10 initial incorporations (against 15 SEs registered).

[306] See the example of the restructuring of Limagrain SE.

Thus, the SE Statute allows cross-border groups with a "European" dimension to restructure and reorganise, and above all to freely transfer their registered office to another Member State, while ensuring adequate protection of the interests of minority shareholders and third parties. However, so far this has not led to the possibility of having the economic unit and the legal unit of business in the Community coincide.

As regards the second objective fixed by the SE Statute, comparison with the reality of the SEs results in the following conclusions:

- Possibility for cross-border groups with a "European" dimension to choose a suitable system of corporate governance ensuring efficient management.

The SE offers additional choices for companies from Member States where only one of the two corporate governance systems is available to public limited-liability companies[307]. In this respect, the SE Statute has provided a basis for harmonisation across Member States of corporate governance and of the concept of efficient management. It must be noted that the SE generally encounters greater success in the Member States where the one-tier system is not available to domestic public limited-liability companies[308] than in those where this system is available[309].

- Possibility for cross-border groups with a "European" dimension to choose a suitable system of corporate governance ensuring proper supervision.

Overall, proper supervision is ensured in both corporate governance systems provided for by the SE Statute. However, some uncertainties remain especially regarding the one-tier system, as there is no common understanding in Europe on its definition. In addition, this sometimes results in difficulties in combining proper supervision with employee participation as far as the administrative organ is concerned[310].

- Maintaining of employees' rights to involvement.

Adequate protection of employee rights is generally ensured, apart from cases where the negotiation procedure on employee involvement appears difficult or not adapted to certain situations (e.g.: shelf SEs which are activated later)[311]. It seems, nevertheless, that some SEs (in particular shelf SEs) are created without negotiation procedure for employee involvement. This is considered by some as not fully complying with certain objectives pursued by the SE Statute. In addition, a specific difficulty linked to the one-tier system as far as the structure of employee participation within the board is concerned should also be noted[312].

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[307] See section 2.3. of Chapter 1 – Comparison as regards the management and the organisation of the SE.

[308] This concerns Estonia, Latvia, Lithuania, Poland, Cyprus, Germany, the Netherlands, the Czech Republic and Slovakia.

[309] This concerns the United Kingdom, Belgium, Ireland, Spain, Sweden and Denmark.

[310] See section 2.2. of Chapter 3 – The relative success of the SE in Member States with the two-tier system.

[311] See section 3.1.2. of Chapter 3 – Requirement as regards employee involvement.

[312] See section 2.2. of Chapter 3 – The relative success of the SE in Member States with the two-tier system.

Thus, the SE Statute allows cross-border groups with a "European" dimension to adapt their organisational structure, and to choose a suitable system of corporate governance ensuring efficient management, proper supervision and the maintaining of the rights of employees to involvement. But two limits should be noted. First, behind the unified image of the SE, many different national legislations apply and uncertainty remains about the legal effect of directly applicable law and its interface with applicable national law. Second, the employee involvement system provided for by the SE Statute ensures, in most cases, the adequate protection of employees' rights, but may appear, on the one hand, as too stringent and, on the other, as not fully adapted to all situations (e.g.: shelf companies which are activated subsequently).

In conclusion, the SE Statute has set the basis for a coherent and appropriate system which should help to reach the objectives initially fixed. Nevertheless, this basis is still insufficient to achieve the ultimate objective to have the economic unit and the legal unit of business in the Community coincide and to provide for harmonised management and supervision systems. Having been set, this basis could be further improved.

2. Recommendations for possible amendments to the SE Statute

2.1 Possible amendments to the SE Statute

The Study conducted on the efficiency of the SE Statute does not expressly encompass the suggestion of possible amendments or adaptations of the SE Statute. However, on the basis of the legal mapping and interviews conducted with the SEs, non-SEs, various experts and academics, several areas for possible modification have been identified and may lead to an improvement of the SE Statute. We also draw attention to the question of whether an option should be maintained in cases where 80% or more of the Member States have either implemented it or not implemented it. The decrease in the number of options left open by the SE Regulation would result in a higher degree of harmonisation between the Member States. Thus, for each article of the SE Regulation, the following table gives guidelines for possible amendments and modifications to the SE Statute which have been identified during our Study. We also highlight further areas for the improvement of the SE Statute and point out the principal reasons for or against a modification. In the areas where no specific suggestions are made, we simply draw attention to the existing academic debates. Finally, we have not analysed in detail the technical aspects of the amendments suggested and especially the impacts on other EC Regulations and Directives.

Therefore, this table should be considered with caution, also bearing in mind that the decision of whether to amend a specific provision is a political one.

Article of SE Regulation	Possible amendments
TITLE I – GENERAL PROVISIONS	
Art. 1.	This article refers to the definition of the SE, being a European public limited-liability company. No specific amendment.
Art. 2.	This article refers to the four methods of formation of the SE. Currently, the conditions for the formation of an SE are limited, depending on the method of formation chosen, to certain specific legal entities that can create an SE. The current situation is the following: • Formation by merger: limited to public limited liability companies, with at least two of them governed by the law of different Member States. • Formation by holding SE: limited to public limited-liability companies and private limited-liability companies provided that each of at least two of them are governed by the law of a different Member State or that each of at least two of them has had for at least two years a subsidiary governed by the law of another Member State or a branch situated in another Member State.

Article of SE Regulation	Possible amendments
	• Formation by subsidiary SE: limited to companies and firms (within the meaning of art. 48 §2 Treaty) and other legal bodies governed by public or private law provided that each of at least two of them are governed by the law of a different Member State or that each of at least two of them has had for at least two years a subsidiary governed by the law of another Member State or a branch situated in another Member State. • Formation by conversion: limited to public limited-liability companies which have for at least two years had a subsidiary company governed by the law of another Member State. The conditions for creating an SE are major issues for debate, as regards, in particular, the appropriateness of maintaining the requirement of having an activity in at least two Member States and the possibility of extending access to the SE legal form to individuals (case of the *ex nihilo* creation of an SE). These questions are the subject of debate and the results of our Study did not provide any practical indication on this issue. Conversely, several points deserving amendment in order to allow wider harmonisation and consistency (to avoid circumventions of the SE Statute) have been identified as follows: • Formation by merger. First, the formation of an SE by merger is strictly limited to public limited-liability companies. In view of the merger directives (both tax and legal), the possibility of opening up the method of formation of an SE by merger to private limited-liability companies could be envisaged. Therefore, one amendment could be to extend the possibility of formation of an SE by merger to private limited-liability companies, providing of course for the necessary protection of the interests of shareholders and third parties in this case. Second, in the case of formation of an SE by merger, there is no requirement as regards a minimum period of existence prior to the merger. On the other hand, in the cases of formation of a subsidiary SE, a holding SE or conversion into an SE, the SE Regulation sets a requirement of a minimum two-year period of existence either for the branch or subsidiary (holding SE and subsidiary SE) or for the subsidiary (conversion). In practice, these requirements may sometimes be circumvented through the use of the merger mechanism, with a newly-formed public limited-liability company being merged with another public limited liability company to create an SE. Therefore, one amendment could be to provide for the cancellation or reduction of the two-year period of existence requirement in the case of formation of a holding SE, subsidiary SE or converted SE. In addition, with regard to the concept of merger as such, several amendments could be introduced (see the comments on Article 17). • Formation by holding SE. The formation of a holding SE is strictly limited to public limited-liability companies and private limited-liability companies, whereas for other methods of creation (in particular the formation of a subsidiary SE) the definition of the legal entities that may participate in the SE is much broader. No specific amendment for this method of formation.

Article of SE Regulation	Possible amendments
	• Formation by subsidiary SE. No specific amendment for this method of formation. • Formation by conversion. The formation of an SE by means of conversion is strictly limited to public limited-liability companies. However, practice has shown that several private limited-liability companies have converted into an SE, first going through a preliminary conversion into a public limited-liability company. Therefore, an amendment could be made so as to allow the conversion of private limited-liability companies into SEs, providing for the necessary protection of the interests of shareholders and third parties in this case. In the case of formation of an SE by conversion, the SE Regulation requires that the public limited-liability company to be transformed has had for at least two years a subsidiary company governed by the law of another Member State, and not a simple branch located in another Member State (as is allowed for the formation of a holding SE or a subsidiary SE). The objective underlying this requirement was initially to have two legal entities involved in the process of formation of the SE (similarly to the merger, formation of a holding SE and formation of a subsidiary SE). However, the conditions for the formation of the SE could be relaxed in this respect. The objective is to create an SE developing its activities at Community level (in several Member States) rather than obligatorily having at least two legal entities involved in the process of the formation of an SE. Therefore, an amendment could be made to allow the conversion of a public limited-liability company into an SE, provided that such company has had for two years either a subsidiary or a branch located in another Member State.
Art. 3.	This article provides for the possibility of creating an SE as a 100% subsidiary held by another SE by referring to the twelfth Council Company Law Directive (89/667/EEC) of 21 December 1989 on single-member private limited-liability companies. It would be possible to consider extending the possibility of owning 100% of the shareholding of an SE that was initially formed by two or more shareholders.
Art. 4.	This article refers to the share capital of the SE. An amendment to reduce the minimum share capital required for the SE could be considered (our study does not provide any practical indications on this issue).
Art. 5.	This article refers to the shares constituting the capital of the SE. No specific amendment.
Art. 6.	This article refers to the statutes of the SE. No specific amendment.

Article of SE Regulation	Possible amendments
Art. 7.	This article refers to the location of the registered office and head office of the SE within the same Member State. Considering recent developments in the ECJ case law, it could be questioned if the requirement to locate the registered office and the head office of the SE in the same Member State should be maintained. To depart from this requirement would allow the SE the same flexibility (in terms of freedom of establishment) as is allowed to public limited-liability companies in some Member States. However, it should be noted that eight Member States have implemented the option left open by Article 7 of the SE Regulation, requiring that the registered office and head office of the SE be located in the same place (in addition to the same Member State). This could suggest that those Member States are unlikely to be in favour of allowing the possibility of separation of the registered office and head office of the SE. On the other hand, the regulatory developments in the field of company mobility over the eight years since the adoption of the SE Statute, in particular the case law of the Court of Justice, the accession of new countries to the EU and changes in national legislation, may have changed the perception of this issue among Member States. If an amendment allowing the separation of the registered office and head office of the SE is introduced, appropriate measures ensuring the protection of the interests of the various stakeholders (in particular the employees) should be established.
Art. 8.	This article refers to the registered office of the SE and its possible cross-border transfer. No specific amendment.
Art. 9.	This article refers to the sources of law governing the SE. No specific amendment.
Art. 10.	This article refers to the principle of non-discrimination between the SE and public limited-liability companies. Article 69 of the SE Regulation provides for the analysis of the appropriateness of allowing provisions in the statutes of an SE (in accordance with the laws of a Member State) even when such provisions would not be authorised in the statutes of a public limited-liability company having its registered office in the Member State. On the one hand, such an amendment could lead to more flexibility for the SE and to constructive company law competition inter and intra Member States. In particular, the possibility for the Member States to allow SE rules to depart from the rules applicable to domestic public limited-liability companies and, thus, to grant more contractual freedom to the founders and shareholders of the SE, is a key element because the SE would be much more flexible and would be able to compete efficiently with the future SPE. However, the Study has brought to light the fact that the flexibility and attractiveness of the national legislation applicable to the SE play a secondary role in a company's decision of whether to choose the SE legal form. On the other hand, authorising the Member States to allow SE rules to depart from domestic public limited-liability rules would lead to the creation of further variations in the form of the SE, depending first (as is already the case) on the law of the Member State in which the registered office is located, but also on the statutory decisions of the founders and shareholders, which

Article of SE Regulation	Possible amendments
	would result in less harmonisation. An amendment to this article could be considered; however this question is a subject of debate..
Art. 11.	This article refers to the abbreviation SE. No specific amendment.
Art. 12.	This article refers to the compulsory negotiation of employee involvement prior to the registration of the SE. Thus, under the current wording of Article 12, an SE may only be registered if: • an agreement or arrangements for employee involvement have been concluded • or a decision by the special negotiating body (by a vote of 2/3 of the members of the special negotiating body representing at least 2/3 of the employees) not to open negotiations or to terminate negotiations, by relying on the rules on information and consultation of employees in force in the MS where the SE has employees (N/A if the SE is created by conversion of a public limited-liability company where employee participation applies) • or if the 6-month period for the negotiation has elapsed without an agreement being reached. Practice and the current case law in Germany have shown that the incorporation of an SE without prior negotiation on employee involvement is possible when none of the companies involved have any employees (making it impossible to conduct negotiations). Therefore, the article could be amended to allow the registration of an SE even in the absence of any negotiation on employee involvement, provided that none of the companies involved have any employees. At the same time, to ensure appropriate protection of the rights of the (future) employees, an article should be added providing that, as soon as the SE is activated and a certain threshold number of employees is reached, negotiations on employee involvement shall obligatorily be conducted. In this respect, the amendment could refer to the proposal for a Council Regulation on the Statute for a SPE. Another modification that gives rise to debate is the possibility of providing that the relevant organs of the merging companies have the right to choose, without any prior negotiation, to be directly subject to the standard rules (see Article 16.4 a) of Merger Directive).
Art. 13.	This article refers to the publicity required for the SE. No specific amendment.
Art. 14.	This article refers to publication for information purposes in the Official Journal of the European Communities. This article is not drafted as a requirement imposed on the national trade and companies registries to forward the information on the incorporation of SEs to the EU Office for Official Publications. In practice, several SEs incorporated have not been recorded at Community level. Therefore, the article could be amended to provide for a requirement imposed

Article of SE Regulation	Possible amendments
	on the national trade and companies registries to forward the information on the incorporation of SEs to the EU Office for Official Publications in particular, similarly to Article 46 of the current Commission Proposal for a Council Regulation on the Statute for an SPE[313].
TITLE II – FORMATION	
Section 1 – General	
Art. 15.	This article refers to the general rules applicable to the formation of an SE. No specific amendment.
Art. 16.	This article refers to the acquisition of legal personality. No specific amendment.
Section 2 – Formation by merger	
Art. 17.	This article refers to the conditions of merger to form an SE. In its current wording, the merger is limited to: • A merger by acquisition • A merger by formation of a new company The above definition of the merger could be extended to the case of a partial contribution of assets (a branch of activity located in a Member State) to an SE located in another Member State as it would result in conducting the operational business at transnational level. The possibility of extending the definition of the merger to the case of division could also be envisaged, provided that the company concerned maintains its activities in more than one Member State, and consequently continues to fulfill the definition and objectives of an SE. Therefore, the article could be amended to extend the definition of the merger to cases where an SE is formed through a partial contribution of assets (a branch of activity). In addition, and as indicated as a possible amendment to Article 2, Article 17 could be amended so as to encompass mergers involving private limited-liability companies. This amendment would, at the same time, require the adaptation of the third Council Directive (78/855/EEC) of 9 October 1978 concerning mergers of public limited-liability companies. Articles 17 and 18 refer to this Directive which should be adapted so as to include private limited-liability companies in its scope.
Art. 18.	This article refers to the supplementary rules applicable to the merger. In order to be consistent with the amendments required for Articles 2 and 17, Article 18 should also be amended so as to include private limited-liability companies.
Art. 19.	This article refers to the possibility for competent authorities to oppose the formation of an SE by merger. This could be amended as mentioned in the Merger Directive, to give

[313] Article 46 of the proposal for a Council Regulation on the Statute for a SPE provides:"The authorities responsible for the register referred to in Article 9(1) shall notify the Commission before 31 March each year, of the name, registered office and registration number of the SPEs registered in and removed from the register in the preceding year as well as the total number of registered SPEs."

Article of SE Regulation	Possible amendments
	competent authorities the possibility of opposing the formation of an SE, only when this possibility exists for internal mergers in the Member State laws of one of the companies participating in a merger leading to the creation of an SE.
Art. 20.	This article refers to the draft terms of the merger. No specific amendment.
Art. 21.	This article refers to the publicity required for the merger. No specific amendment.
Art. 22.	This article refers to the publicity required for the SE. No specific amendment.
Art. 23.	This article refers to the experts who can be appointed in the process of formation of an SE by merger. No specific amendment.
Art. 24.	This article refers to the protection of the interests of various stakeholders in the process of formation of an SE by merger. No specific amendment.
Art. 25.	This article refers to the scrutiny of the legality of the merger. No specific amendment.
Art. 26.	This article refers to the competent authority for the scrutiny of the legality of the merger. No specific amendment.
Art. 27.	This article refers to the date of effect of the merger. No specific amendment.
Art. 28.	This article refers to the publicity of the merger operation. No specific amendment.
Art. 29.	This article refers to the consequences of the merger. No specific amendment.
Art. 30.	This article refers to the cases of nullity and voidance of the merger. No specific amendment.
Art. 31.	This article refers to the simplified merger procedure. The second paragraph of Article 31.2. of the SE Regulation provides for the possibility of extending the provisions on simplified mergers to mergers where a company holds shares conferring 90 % or more but not 100 % of the voting rights. Few Member States have implemented this option (Cyprus, Luxembourg and Romania). The removal of the option could therefore be considered.

Article of SE Regulation	Possible amendments
Section 3 – Formation of a holding SE	
Art. 32.	This article refers to the conditions of formation of a holding SE. Apart from the possible amendment to Article 2 (extension of the definition of the legal entities that may participate in the formation of a holding SE), no specific amendment is recommended
Art. 33.	This article refers to the consequences of the formation of a holding SE. No specific amendment.
Art. 34.	This article refers to the protection of the interests of various stakeholders in the process of formation of a holding SE. No specific amendment.
Section 4 – Formation of a subsidiary SE	
Art. 35.	This article refers to the conditions of formation of a subsidiary SE. No specific amendment.
Art. 36.	This article refers to the supplementary rules applicable to the formation of a subsidiary SE. No specific amendment.
Section 5 – Conversion of an existing public limited-liability company into an SE	
Art. 37.	This article refers to the conditions of conversion into an SE. Article 37.8 of the SE Regulation provides for the possibility for the Member States to make the conversion of a public limited-liability company into an SE conditional upon a favourable qualified-majority or unanimous vote by the organ of the company to be converted within which employee participation is organised. None of the Member States have implemented this option. The removal of the option could therefore be considered. Apart from the possible amendment to Article 2 (extension of the definition of the legal entities which may convert into SEs to private limited-liability companies and extension of the conditions required to a simple branch), no further amendment.
TITLE III – STRUCTURE OF THE SE	
Art. 38.	This article refers to the general provisions on the structure of the SE. No specific amendment.
Section 1 – Two-tier system	
Art. 39.	This article refers to the management organ. In its last paragraph, Article 39 provides for the possibility for the Member States in which no provision is made for a two-tier system in relation to public limited-liability companies to adopt appropriate measures in relation to SEs. Considering paragraph 14 of the Preamble, such a provision should not be drafted as an option but in the sense of a requirement. Therefore, Article 39(5) could be amended so as to be redrafted as a requirement for all Member States in which no provision is made for a two-tier system in relation to public limited-liability companies to adopt appropriate measures in relation to SEs.

Article of SE Regulation	Possible amendments
Art. 40.	This article refers to the supervisory organ. No specific amendment.
Art. 41.	This article refers to the right of information of the supervisory organ. No specific amendment.
Art. 42.	This article refers to the chairman of the supervisory organ. No specific amendment.
Section 2 – One-tier system	
Art. 43.	This article refers to the administrative organ. The first paragraph of Article 43 is drafted in a similar way to the article referring to the two-tier system and thus it stipulates a possibility for the Member States to allow the provision that a managing director or managing directors shall be responsible for the day-to-day management under the same conditions as for public limited-liability companies. Considering paragraph 14 of the Preamble, it is questionable whether the responsibilities of those responsible for management and those responsible for supervision is clearly defined when no managing director is appointed. Therefore, Article 43(1) could be redrafted as a requirement to appoint a managing director or managing directors to be responsible for the day-to-day management so as to ensure that the responsibilities of those responsible for management and for supervision are clearly defined. In addition, on the assumption that employee participation is organised in the administrative organ and that such participation must be organised in the sense of coequal representation, the article could be amended to limit coequal representation only to the members of the administrative organ in charge of the supervision activities (thus, excluding the "managing" members). In its last paragraph, Article 43 provides for the possibility for the Member States in which no provision is made for a one-tier system in relation to public limited-liability companies to adopt appropriate measures in relation to SEs. Considering paragraph 14 of the Preamble, this provision should not be drafted in the sense of an option but as a requirement. Therefore, Article 43(4) could be redrafted as a requirement for all Member States in which no provision is made for a one-tier system in relation to public limited-liability companies to adopt appropriate measures in relation to SEs.
Art. 44.	This article refers to the general functioning of the administrative organ. In its current wording, the frequency of the meetings of the administrative organ is fixed at every three months. In practice, increased flexibility has often been recommended to reduce the frequency of the meetings. Therefore, Article 44(1) could be redrafted to provide for increased flexibility with regard to the frequency of the meetings of the administrative organ.
Art. 45.	This article refers to the chairman of the administrative organ. No specific amendment.

Article of SE Regulation	Possible amendments
Section 3 – Rules common to the one-tier and two-tier systems	
Art. 46.	This article refers to the duration of the functions of the corporate organ. No specific amendment.
Art. 47.	This article refers to the requirements for qualification of members of the corporate organs. No specific amendment.
Art. 48.	This article refers to the transactions subject to the authorisation of the supervisory organ. Article 48(2) of the SE Regulation provides that the Member States may determine the categories of transactions which must at least be indicated in the statutes of SEs registered within their territories. Few Member States have implemented this option (Austria, the Czech Republic, France and Portugal). Whether or not it is appropriate to maintain such an option may be questioned.
Art. 49.	This article refers to the confidentiality obligations of the members of corporate organs. No specific amendment.
Art. 50.	This article refers to the rules on quorum and decision-making. Article 50(3) of the SE Regulation provides that where employee participation is provided for in accordance with the SE Directive, the Member States may provide that the supervisory organ's quorum and decision-making shall, by way of derogation from the provisions referred to in paragraphs 1 and 2, be subject to the rules applicable under the same conditions, to public limited-liability companies governed by the laws of the Member States concerned. Few Member States have implemented this option (Cyprus, the Czech Republic and Spain). Whether or not it is appropriate to maintain such an option may be questioned.
Art. 51.	This article refers to the liability of the members of the corporate organs. No specific amendment.
Section 4 – General meeting	
Art. 52;	This article refers to the competence of the general meeting. No specific amendment.
Art. 53.	This article refers to the organisation and conduct of the general meetings. No specific amendment.
Art. 54.	This article refers to the frequency and periodicity of the general meetings. No specific amendment.
Art. 55.	This article refers to the convening and agenda of the general meeting. No specific amendment.
Art. 56.	This article refers to the rights of minority shareholders as regards the agenda of general meetings.

Article of SE Regulation	Possible amendments
	No specific amendment.
Art. 57.	This article refers to the decision-making of the general meetings. No specific amendment.
Art. 58.	This article refers to the casting of votes of the general meetings. No specific amendment.
Art. 59.	This article refers to the amendments to the statutes of the SE. No specific amendment.
Art. 60.	This article refers to the classes of shares. No specific amendment.
TITLE IV – ANNUAL ACCOUNTS AND CONSOLIDATED ACCOUNTS	
Art. 61.	This article refers to the annual and consolidated accounts. No specific amendment.
Art. 62.	This article refers to specific requirements linked to the activity (credit and financial institution and insurance). No specific amendment.
TITLE V – WINDING UP, LIQUIDATION, INSOLVENCY AND CESSATION OF PAYMENTS	
Art. 63.	This article refers to the winding-up, liquidation, insolvency and cessation of payments. No specific amendment.
Art. 64.	This article refers to the possible sanction if an SE does not fulfil the requirement set forth by Article 7 according to which the registered office and head office of the SE shall be located in the same Member State. This article should be amended in accordance with a possible amendment of Article 7.
Art. 65.	This article refers to publicity in the case of winding-up, liquidation, insolvency and cessation of payments. No specific amendment.
Art. 66.	This article refers to the conversion of an SE into a public limited-liability company. This article provides, in particular, for a two-year period during which the SE cannot convert into a public limited-liability company. The purpose underlying this period is the protection of the rights of the various stakeholders (in particular the employees). A clarification could be made to the effect that this provision (and the two-year period) is not limited to the conversion of an SE into a public limited-liability company but is also applicable to other legal forms. Therefore, Article 66 could be redrafted so as to extend the two-year period to other cases of the restructuring of the SE.

Article of SE Regulation	Possible amendments
TITLE VI – ADDITIONAL AND TRANSITIONAL PROVISIONS	
Art. 67.	This article refers to the specific requirements for the Member States to which the third phase of the economic and monetary union does not apply. No specific amendment.
Art. 68.	This article refers to the obligation for Member States to take appropriate measures to ensure the effective application of the Regulation. No specific amendment.
Art. 69.	This article refers to the possible amendments to the Regulation. This article should be deleted or consistently adapted for the future.
Art. 70.	This article refers to the entry into force of the Regulation. No specific amendment.

As highlighted in the table above, the possible amendments to the SE Regulation should not be considered on a separate basis but, on the contrary, should be placed in the overall context. At the same time, amendments of the SE Regulation could be taken into consideration in order to adapt the SE Directive. As regards the latter, the main driver for amendments should be the consistency of the new SE Statute with the SPE Statute to be adopted. In practice, employee involvement should be linked to the size of the company and not to its public or private nature.

2.2 Future of the SE

In conclusion, the SE legal form and its Statute have had the advantage of re-opening the debate on several issues of European company law which, in the past, did not produce any concrete result. This is the case, for instance, with the non-adopted fifth Directive which left a kind of harmonisation loophole in European company law. Thus, the SE can be perceived as providing the impetus leading, firstly, to greater harmonisation within EU / EEA company law and, secondly, to constructive company law competition inter and intra Member States, these two trends not being contradictory but complementary.

The SE legal form, however, has not encountered the success initially expected. It is therefore essential in the future to work on improving the attractiveness of the SE Statute which could be a key factor towards increasing harmonisation between Member States.

The future of the SE Statute is not only linked to the possible amendments of the SE Regulation and SE Directive (as listed above). The other EC Regulations and Directives are of high importance, notably the cross-border merger directive and the currently negotiated proposal for a Council Regulation on the Statute for a European Private Company (SPE).

Principal Abbreviations

AT	Austria
BE	Belgium
BG	Bulgaria
CY	Cyprus
CZ	Czech Republic
DE	Germany
DK	Denmark
EE	Estonia
EL	Greece
ES	Spain
FI	Finland
FR	France
HU	Hungary
IT	Italy
LU	Luxembourg
LV	Latvia
NL	Netherlands
NO	Norway
PL	Poland
PT	Portugal
RO	Romania
SE	Sweden
SI	Slovenia
SK	Slovakia
UK	United Kingdom

Index

G

H

I

L

M

N

O

P

S

T

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