# European Women Lawyers Association Congress

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## The Future of Europe: Enlargement

## Line 2 Company Law
## Societas Europeae SE, the European Company

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# Introduction

- What is Societas Europeae? Public limited company with European nationality
- What connection with accession? entering into force on in 2004 (8 October), system may be still more interesting with more Member States

# A. Genesis of the SE

one of the oldest projects of the EC – EU : 40 years!

- 1959/1960 two congresses in France and Sanders Commission of 1959: first presentation of idea; lead to Commission‘s proposals from 1970 to 1975: about 300 articles with complete own regime for SE: rejection by Council in 1982 as too independent from national provisions; problem of employees’ involvement
- Initiative by Delors in 1987: new proposals from 1989 to 91; finally rejected 95 (again because of involvement of employees)
- Davignon report of 1997: first negotiation of employees’ involvement, then system “before/after”
- European Council in Nice 2000: consent about new approach → adoption of Regulation and Directive in October 2001
- three years of time in order to implement: entering into force on 8 October 2004

# B. Aims of the possibility to create a SE

- Symbolical value (European identity)
- Facilitate transfer of registered office (free movement of companies)
- Facilitate transnational merger
- International reorganisation of activities for companies active in more than one Member State

# C. How does SE work? (I)

## I. Who can create a SE?

Limited access to SE, no creation *ex nihilo* but only four ways and only when transnational context exists:

- **Creation by merger**
  - of two public limited liability companies
  - two of them at least having their registered office in two different Member States (Telia and Sonera would have been example)

# C. How does SE work? (I)

- **Creation of a holding SE**
  - by two public or private limited liability companies
  - having their registered offices in two different Member States or
  - having for at least two years a subsidiary company or branch office in another Member State
- **Creation of a subsidiary SE**
  - by companies of all kind and also legal bodies governed by public law
  - if at least two are governed by law of another Member State or
  - have had a subsidiary company governed by law of other Member State or branch office

# C. How does SE work? (I)

- **Creation by transformation**
  - only public limited liability company
  - if for at least two years company had a subsidiary in another Member State
- Member State may provide another possibility for companies having their head office not in the Community but if registered office is in this Member State and company is linked to this Member State
- once created, SE can set up subsidiaries in the form of an SE
- for the purpose of creation of new SE, the SE is considered as a national company of Member State where it has its registered office

# C. How does SE work? (II)

## II. Basic texts / Legal framework

Different legal provisions apply on SE

- Council Regulation 2157/2001 of 8 October 2001 about the statute for the SE
- Council Directive 2001/86/EC about the statute of the SE regarding the involvement of employees
- Statutes of SE as far as authorised by Regulation
- Provisions of Member States implementing community measures relating specifically to SE
- Provisions of Member States relating to their local public limited companies
- Statutes of the SE itself

# C. How does SE work? (II)

- SE therefore ruled by different set of provisions
- for those issues which are not provided for in the Regulation, national provisions of Member State where SE has its registered office apply
- provisions of international private law may also apply insofar
- system may be complicated as different rules apply in Member States and SE will be governed by new provisions every time it transfers its registered office

# C. How does SE work? (III)

## III. Share Capital

- minimum share capital is EUR 120,000
- more if special provisions apply on companies having particular activities (credit institutes, insurances, …) pursuant to national provisions
- provisions regarding increase in capital or maintenance of share capital and issuing of bonds etc., national provisions for public limited liability companies of Member State where SE is registered apply

# C. How does SE work? (IV)

## IV. Registered office, head office and transfer of offices

- registered office shall be located within Member State of Community
- in the same Member State as head office → interesting, as Regulation follows in a certain way the “theory of the effective head office” which causes problems at present and has in a certain way not be accepted by the ECJ in its Überseering-ruling
- transfer of registered office is possible without liquidation, winding up and loosing the legal entity of the SE
- Regulation contains a detailed set of rules about the procedure to be followed
- however, SE will be governed in part by new provisions, i.e. those national provisions applicable also on SE of Member State where it has new office

# C. How does SE work? (V)

V. Corporate Governance of SE / Structure

- choice between One-tier board system (one administration organ) and
- Two-tier board structure (management organ and supervisory organ)
- important issue for those Member States (such as the Netherlands, Austria and Germany) which do not know the one-tier system
- Regulation contains some provisions about the minimum requirements and some common rules (e.g. appointment of members of organs shall not exceed a period of six years)
- Regulation contains also provisions about minimum rights of the General meeting of shareholders; Regulation leaves important issues to the national provisions, such as the competences of General meeting or who votes the organs

# C. How does SE work? (VI)

VI. Controlled undertakings

- in general liability of organs governed by national provisions
- no particular provisions in Regulation about controlled undertakings
- only national provisions, under application of the general provisions of private international law

# C. How does SE work? (VII)

## VII. Accounts of the SE

- national rules of Member State where SE has its registered office apply for the rules regarding the preparation of annual accounts
- harmonisation for quoted companies in the future as application of IAS
- particular rules for credit institutions

# C. How does SE work? (VIII)

VIII. Involvement of Workers

- crucial point in negotiations , present solution (laid down in Directive) is criticised
- system is very complicated
- negotiation between social partners (representatives of employees and of organ of company), special body elected for negotiation
- negotiation for about six months (extension possible to at maximum one year)
- no inscription of SE in registers until no agreement found or negotiations did not succeed
- if no agreement found or negotiating partners decide so, general provisions apply (those standard rules have to be fixed by Member States implementing the Directive according to annex to the Directive)

# C. How does SE work? (VIII)

- if no agreement found, application of “before – after system “:
  - creation of international representation of employees which has information rights and the right to be heard
  - in the case of transformation of a national company, the rules applicable before apply
  - in the case of merger: national provisions of national apply if before, at 25% of employees had the right of participation
  - in the other cases: at least 50% of all employees had the right of participation

# D. Status of implementation

- not always easy for Member States to implement
- some fear a competition between Member States

Two examples: France and Germany

- France: parliamentary commission has been created; to submit report to government which will submit draft implementation act; scope of discussion:
  - Render France attractive as state for registered office
  - Understand which margin legislator has (eg SA /SAS)
- Germany: German Government submitted in February 2003 a “draft for the purpose of discussion”; draft implementation act to be submitted in the course of this year; main issues:
  - One tier – two tier-system
  - Involvement of employees

# E. Future of SE / Who will use it?

- Which interest after the latest development of decisions of ECJ (i.a. Überseering)?
  - Development of national and EU-legislation and EC-decisions facilitate cross-border mergers and could make SE obsolete
  - But: not clear how far new court decisions go; meaning of Überseering not clear, not implemented in national legislation
- Share capital too high?
- system of “mixture” of applicable provisions (EU-national) too complicated
- Tax legislation must follow

# E. Future of SE / Who will use it?

- Advantages:
  - high interest for larger firms, but also interesting for smaller firms with subsidiaries in different states,
  - System is user-friendly, large freedom
  - Savings because of easier structure, only one headquarter and one board
  - more flexibility because of easy transfer of registered office
  - Only one legal structure
  - Board shopping

# E. Future of SE / Who will use it?

Françoise Blanquet (DG Common Market):

> „The SE became a cruise ship which left its home harbour to cruise along the costs of the Member States and to take on board all those who whish to benefit from its advantages".
>
> (*translation)*

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