1 The Societas Europaea: a new opportunity?

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I Introduction

You have just started reading a book on a subject which, for around 35 years, was largely academic, as could even be seen from its Latin name: the *Societas Europaea*. Now it is no longer academic, but will it be a real opportunity for *you*? Let me give you my answer to this question upfront: it may be, depending on your requirements and your willingness to pay a price in the form of a considerable degree of legal uncertainty.

II The concept of the SE and shortcomings of national laws

It also depends on your expectations. If these are the same as those of the initial drafters of the Statute for a European Company, you will certainly be disappointed. The original concept of the SE was a truly European company governed by a single set of rules, irrespective of where its seat[1] was located, and having the freedom to move from one EU Member State to another without being

[1] The concepts of 'seat', 'registered office' and/or 'head office', denoting the place where a company is registered or from where it conducts its business, differ widely from one country to

bothered by the traditional obstacles faced by companies subject to national law. I will come back to the issue of a single set of rules later. But first, I will focus on the principal benefit expected from the SE: cross-border mobility. In order to assess the value of this benefit, it is appropriate to begin by considering the situation where there was no SE.

1 Cross-border mobility under national law

On several occasions, businesspeople have expressed regret that there was no EU-wide corporate form available for a *cross-border restructuring by way of merger*. Consider a scenario in which there are two companies of similar size and economic importance, each located in a different Member State, whose businesses are already more or less integrated. They could, however, be managed more efficiently and raise capital more easily if they were a single company. So far, these types of companies have had to use rather complicated dual structures, such as those of Unilever, Royal Dutch/Shell, Reed Elsevier, Fortis, Rothmans International, Smith Kline Beecham, Eurotunnel, RTZ-CRA and, earlier, AGFA/Gevaert, Pirelli-Dunlop, VFW-Fokker and Hoogovens-Hoesch (Estel). Some of the above groups have resorted to devices such as 'stapled stock' (by which the shares of two companies are traded as a single unit) or extremely complicated corporate structures. In all cases, however, the device or structure chosen has been considered to be only second best.

Under most national company laws, it is impossible for a company in state A to *merge* with a company in state B. Even where such a move is possible from a company law point of view, the tax regimes of the countries concerned usually form insurmountable obstacles. It should be mentioned that the *tax* problems are currently being addressed by various EU directives, as will be explained in Chapter 4. However, at the time of the adoption of the SE Statute (Regulation 2157/2001[2] ('the Regulation') and Directive 2001/86/EC[3] ('the Directive')), the *legal* problems had by no means been solved. It was only after the Statute (in particular the Directive) was adopted that a basis could be found for political agreement on a directive on cross-border mergers. The main obstacle to such agreement has always been the participation of employees in the corporate structure ('employee participation'). At the time of finalising this contribution (June 2005), it is not yet certain when the relevant directive will be adopted and what its terms will be. In any event, it is not expected to be due for implementation by Member States until 2007.

another. In this chapter, the word 'seat' is used as a general term (also covering registered and/or head office). The specific meanings of 'registered office' and 'head office' will be discussed further below.

[2] Council Regulation (EC) No. 2157/2001 of 8 October 2001 on the Statute for a European Company (SE).

[3] Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees.

On the other hand, with increased cross-border mobility of people and other production factors and with market opportunities moving from one country to another, the demand for cross-border mobility of companies, by way of *transfer of seat*, is growing. In most EU Member States, cross-border transfer of the *registered office* of a company[4] is impossible without loss of legal personality (liquidation and dissolution in the country of incorporation ('the home Member State') and formation of a new company in the country of immigration ('the host Member State'), with often prohibitive tax consequences). In 2004 the European Commission published a consultation document on the cross-border transfer of the registered office of companies, but by June 2005 this had not yet resulted in a proposal for a directive. The consultation document does not offer a clear solution for the problem of employee participation, which has been dogging the issue of cross-border transfers for decades. The legal situation with respect to transfer of the registered office is therefore unlikely to change in the near future, but in practice this may be less of an impediment to cross-border mobility than would appear at first sight.

Until the end of the twentieth century, transfer of a company's '*head office*' (as opposed to its registered office; head office being understood to be the company's actual centre of administration) was either prohibited or penalised by liquidation in most home Member States or, in many cases, penalised in the host Member State by non-recognition or by the application of that state's company law.

However, between 1986 and the end of 2003 the Court of Justice of the EC ('the Court') delivered a string of judgments which put a different complexion on the issue of cross-border transfer of head offices within the Community.[5] These judgments lead to the conclusion that companies from one Member State are free to set up branches in other Member States and pursue activities there, even if they do not pursue any activities in the home Member State and the sole purpose of such an arrangement is to evade the application of more severe or restrictive company law rules in the host Member State. This is inherent in the exercise, in a single market, of the *freedom of establishment* guaranteed by the EC Treaty. Setting up a branch in another Member State without pursuing any activities in the home Member State amounts, of course, to transfer of the head office.

As a result of these judgments, cross-border transfer of the head office of companies governed by national law has been secured to the extent that *host* Member

4 By 'registered office' I mean the place where the company's offices are located according to its official registration and/or its articles of association (called 'statutes' in the Regulation).

5 *Commission/France*, 28 January 1986, Case 270/83, ECR 1986, p. 273; *Segers*, 10 July 1986, Case 79/85, ECR 1986, p. 2375; *Daily Mail*, 27 September 1988, ECR 1988, p. 5483; *Centros*, 9 March 1999, Case C-212/97, ECR 1999, p. I-1459; *Überseering*, 5 November 2002, Case C-208/00, ECR 2002, p. I-9919; and *Inspire Art*, 30 September 2003, Case C-167/01, ECR 2003, p. I-10155.

States cannot impede such a transfer.[6] However, this does not hold to the same extent for impediments put up by the *home* Member State. In *Daily Mail*, the Court ruled that home Member States may restrict the freedom of their 'own' companies to transfer their head office to another Member State. In *Überseering* the Court repeated this, but I see no convincing justification for this exception to 'one of the fundamental provisions of the Community' (*Segers*). The distinction made by the Court between restrictions imposed by the host Member State and restrictions having exactly the same effect but imposed by the home Member State appears to be artificial.[7] In addition, the ruling by the Court in these cases was without any reservation, rendering this submission to national law quite atypical of the Court's case law. The Court's reasoning seems to be based on the idea that companies (other than SEs) owe their existence to the company law of the Member State in which they were incorporated and that therefore the relations between the relevant company and Member State are exclusively governed by that (company) law. I agree with this in principle. However, where the effect of that law is incompatible with Community law (in particular a fundamental provision thereof), I submit that Community law prevails in case a provision of national law purports to limit the full effect of the freedom of establishment or any of the other fundamental freedoms of the EC Treaty. I would not be surprised if, in a suitable case, the Court were to change its stand on this aspect of cross-border transfers of head offices. In any event, for the time being the issue of transfer of a company's head office is surrounded by some uncertainty.

2 Summary

My conclusion from the foregoing is that, with respect to cross-border mobility, there are substantial shortcomings in domestic company law. A distinction should be made between (a) cross-border mergers and (b) the cross-border transfer of a company's seat and, as to the latter, between (b)(i) cross-border transfer of a company's registered office and (b)(ii) cross-border transfer of its head office.

(a) With regard to cross-border mergers, tax and legal obstacles continue to prevail for the time being. It is currently uncertain when and exactly to what extent the legal problems for companies under national law will be solved by the Tenth Directive.

[6] The only proviso being that restrictions of the freedom of establishment may be justified if four conditions are met (these are listed in para. III. 1 below). So far, the Court has refused to accept any restrictions in this context, even where a company had been formed in Member State A with the sole purpose of pursuing activities in Member State B and thereby avoiding the application of B's company law which was considered to be more severe (see *Segers*, *Centros* and *Inspire Art*).

[7] This distinction is also at odds with the other freedoms guaranteed by the EC Treaty: Arts. 23 and 25 prohibit customs duties on imports *and exports* of goods between Member States, Arts. 28 and 29 prohibit quantitative restrictions on imports *and exports* and Art. 56 prohibits *any* restrictions on the movement of capital and on payments *between* Member States (i.e. irrespective of whether capital moves, or payments are made, into or from a Member State).

(b)(i) Regarding cross-border transfers of a company's registered office, it looks as though both the tax problems and the legal problems will take quite a few years to be solved for companies under national law.

(b)(ii) For the cross-border transfer of a company's head office, a further distinction must be made between restrictions imposed by the home Member State and those imposed by the host Member State. With regard to the latter, the case law of the Court has removed virtually all restrictions. However, the home Member State appears to be free to impose restrictions (although I expect this freedom to be limited in due course).

III Can the SE make up for these shortcomings?

One of the principal aims the SE has always been intended to achieve is cross-border mobility, in particular by way of merger and by way of transfer of registered office. Under the Regulation, the following options are offered:

(a) Two or more public limited-liability companies ('public companies') from at least two different Member States can merge, resulting in an SE as the surviving or the new company.
(b) In situation (a) above, one or more of the companies participating in the merger can themselves be SEs.
(c) Once an SE has been formed it can transfer its registered office to another Member State.
(d) An SE may itself set up one or more subsidiaries in any Member State.

So why not use the SE as a vehicle for a cross-border merger or transfer of seat? Let us consider the merits and demerits of this proposition. Again, I focus only on the cross-border aspect, leaving aside for the time being a whole range of other important ones.

1 Cross-border mergers

The Statute can be used for the merger of two or more public companies provided that at least two of them are governed by the laws of different Member States. Pursuant to Article 3(1) of the Regulation, an SE may take the place of one of these companies. The limitation to public companies does not seem to pose a serious obstacle for private limited-liability companies ('private companies', see Annex II to the Regulation) because in most Member States they can easily convert into a public company.

Article 2(1) of the Regulation sets out an additional requirement: all the public companies involved in the formation of an SE must have their registered offices and head offices within the Community. However, a Member State may allow a company the head office of which is not in the Community to participate in the formation of an SE if 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' (Art. 2(5) Reg.). According to recital 23 of the preamble to the Regulation, such a link 'exists in particular if a company has an establishment in that Member State and conducts operations therefrom'. Interestingly, the SE formed as a result of the merger may have its registered office (and head office, see below) anywhere within the Community, and not necessarily in a Member State where one of the merging companies had its registered and/or head office.

The Regulation does not give a definition of the term 'head office'. Although this is a Community concept, in the interpretation of which the Court has the final say, for the time being (and it may be a very long time before the Court is called upon to give a preliminary ruling on this issue[8]) the authorities and courts of Member States have some degree of latitude in interpreting the concept of 'head office'. The more broadly this concept is construed, the more hospitable the Member State is likely to be to SEs. The Dutch government, for example, has stated that what is important is from which country the company is run, that this requires an interpretation of the actual circumstances, and that the head office is likely to be deemed to be situated in the Netherlands when board meetings and general meetings of shareholders are held there. This condition can quite easily be met even if the day-to-day management is conducted, and/or important strategic decisions are made, outside the Netherlands.

What about an intermediate holding company? This type of company holds shares in one or more subsidiaries in a group of companies, but is itself a subsidiary of the company at the 'top' of the group. Its activities are often confined to administrative formalities, with strategic and other decisions being made at the 'top' of the group. Where is its head office? According to the Dutch point of view, it is at the place where formal meetings are held. Other Member States, however, may apply different criteria. In Germany, for example, more importance seems to be attached to the place where decisions are implemented. In all Member States, the concept of 'head office' appears to be rather vaguely defined. Ominously, Article 64(4) of the Regulation provides that '[w]here it is established on the initiative of either the authorities or any interested party that an SE has its head office within the territory of a Member State in breach of Article 7 [i.e., in a Member State other than that where its registered office is situated], the authorities of that Member State shall immediately inform the Member State in which the SE's registered office is situated'. Article 64(1) provides that the latter Member State 'shall take appropriate measures to oblige the SE to regularise its position within a specified period'. What if the two Member States disagree as to the interpretation of 'head office'? In order to protect yourself in such a

[8] In *Daily Mail* (see footnote 5) all the Court said was: 'the real head office, that is to say the central administration of the company.' This gives us little to go on, because it raises the question as to what the 'central administration' of a company is.

case, evidence will be of the essence, so make sure you can be seen to comply with all formalities, preferably those of the most restrictive Member State.

As will be set out in some detail in Chapter 2, the formation of an SE by means of a (cross-border) merger is by and large governed by the technical provisions of the Third Directive[9] on mergers within a Member State. The Regulation adds to the Third Directive's regime a number of provisions relating to the cross-border elements of a merger that is intended to result in the formation of an SE. The fact that the Regulation has direct effect in all Member States enables it to regulate such cross-border elements with binding force throughout the Community. I would like to draw your attention to a few of the provisions that may cause problems if you wish to form an SE by way of merger.

One such provision is Article 26, which requires the legality of the merger to be scrutinised as regards the *completion of the merger and the formation of the SE*. This must be done by the competent authority in the Member State in which it is proposed that the SE have its registered office, on the basis of certificates issued by the competent authorities in each Member State involved after these have scrutinised the *pre-merger acts and formalities*. The authority in the first Member State 'shall in particular ensure that the merging companies have approved draft terms of merger in the same terms and that arrangements for employee involvement have been determined pursuant to Directive 2001/86/EC',[10] and must also satisfy himself/itself that the SE has been formed in accordance with the requirements of the law of his/its own Member State.

This double scrutiny by authorities of at least two Member States may cost the participating companies quite a lot of effort, money and, above all, time. The exact translation of the terms of merger may be cumbersome, but the requirement that the competent authority in the Member State in which the SE is to have its registered office ensure that arrangements for employee involvement have been determined pursuant to the Directive could turn out to be an excessive burden. This could be the case if that authority considers it to be his/its duty to scrutinise the observance of all the complicated rules of the Directive (see Chapter 3) as transposed into even more complicated rules by the various relevant Member States. In several Member States this authority will be a notary. How will this poor man or woman acquit him/herself of this awful task without spending sleepless nights worrying about professional liability?

Another potentially problematic provision in the Regulation is Article 19, which permits a Member State to prohibit a company governed by its law from participating in the formation of an SE if any of that Member State's competent authorities[11] opposes that company's participation. Such opposition may only be based on grounds of public interest and must be open to review by a judicial

[9] Third Council Directive 78/855/EEC of 9 October 1978 based on Article 54(3)(g) (now 44(2)(g)) of the Treaty concerning mergers of public limited liability companies.
[10] I.e. the Directive. [11] See footnote 13.

authority. In the single market that the EC constitutes, it is very difficult to conceive how a merger of two companies (outside areas that are subject to government supervision e.g. financial services, where specific merger control rules may apply) could be against the public interest. (This is unless the issue of employee participation is considered to be one of public interest within the meaning of Article 19, which seems unlikely given the fact that the Directive and the Regulation, in particular Article 12(2) of the latter, contain an extensive set of rules to safeguard employee participation in relation to SEs.) Also, it would seem absurd that a Member State could oppose a merger between two companies while being unable to do anything to prevent one of them acquiring all the shares of the other. In any event, opposition under Article 19 would constitute a restriction of the freedom of establishment. It is important to note that, according to the Court's case law, such a restriction may only be imposed if it fulfils four conditions: (i) it must be applied in a non-discriminatory manner; (ii) it must be justified by imperative requirements in the general interest; (iii) it must be suitable for securing the attainment of the objective it pursues; (iv) and it must not go beyond what is necessary in order to attain that objective. These conditions will not be easily fulfilled; nevertheless, a Member State may have a different view and frustrate your merger if it is perceived as threatening vital national interests. Just imagine: you have been secretly negotiating a merger for many months, you go public with the draft terms of merger, the general meeting approves the terms, there is no opposition by any creditor, the competent authorities issue their certificates attesting to the completion of the pre-merger acts and formalities, you expect to receive the certificate as to the completion of the merger any day and then one of the Member States involved notifies you that it opposes the merger.

Under Article 24 of the Regulation, '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 interests of creditors . . . '. In addition, a Member State *may* adopt provisions designed to ensure appropriate protection for minority shareholders who have opposed the merger. It will be important to examine such provisions closely in each of the Member States involved. Bear in mind that any such protective provisions are subject to the above four conditions regarding restrictions on the freedom of establishment.

There is, however, some good news when it comes to the cross-border elements dealt with by the Regulation. Once the SE has been registered after all the scrutinising, it cannot be declared null and void (Art. 30 Reg.). In addition, Article 29 provides for *ipso jure* cross-border transfer to the SE of all the assets and liabilities of the disappearing company/companies, and for the shareholders of that company/those companies in Member State A *ipso jure* becoming shareholders of the SE in Member State B. The latter consequence, in particular, cannot be brought about by the legislation of a single Member State.

2 Transfer of an SE's registered office

Once an SE has been formed it can, pursuant to Article 8 of the Regulation, transfer its registered office to another Member State. The good news is that such a transfer will not result in the winding up of the SE or the creation of a new legal entity. The bad news is that the procedure is cumbersome.

Before I go into the issue of the procedure, I would like to draw your attention to what appears to be a major restriction on the cross-border mobility of SEs. Article 7 of the Regulation provides that the registered office of an SE shall be located in the same Member State as its head office.[12] This means that transfer of an SE's registered office must entail the transfer of the head office. It also means that an SE cannot transfer its head office while maintaining its registered office in the home Member State. Whereas every company created under national law is free to exercise its freedom of establishment, the SE appears to be denied this freedom to the same extent. Is this discrimination against the SE valid? Admittedly, it is provided for by a regulation adopted by the Council at the proposal of the Commission and in accordance with the opinion of the European Parliament. However, it follows from Article 230 of the EC Treaty that regulations may not be in violation of the Treaty. If they are, they can be annulled (either wholly or in part) by the Court at the request of a Member State. This is unlikely to happen. More realistically, any national court which is in doubt about the validity of Article 7 can request that the Court give a preliminary ruling on its validity. Such a ruling will be binding on the relevant national court as well as having the effect of a judicial precedent throughout the Community. I should reiterate that the Court has identified the Treaty provisions on freedom of establishment as 'fundamental provisions of the Community'.

One could argue that the SE, unlike companies under national law, is a creature of Community law and can therefore be made subject to any rules of that law. However, I submit that such rules must always be in accordance with the EC Treaty, which is the supreme source of Community law. Therefore, I am of the opinion that there is a valid case for an SE being free to transfer its head office to another Member State without at the same time transferring its registered office. However, I cannot deny there is quite some uncertainty on this point. It should be noted that Article 7 was one of the most controversial topics during the negotiations on the Statute. Indeed this is the first issue mentioned in the list of specific issues to be dealt with by the Commission under Article 69.

There is another major inconvenience connected with the transfer of an SE's registered office, namely that such a transfer inevitably entails a change in the company law rules applicable to that SE. This holds both for the provisions of laws adopted by the Member States in implementation of the Regulation

[12] Note also Art. 64 Reg., which requires Member States to take appropriate measures against, and possibly even liquidate, an SE that does not comply with Art. 7.

and the Directive, including any future additions and amendments thereto (see Art. 9(1)(c)(i) Reg.), and for provisions of national company law applicable to public companies to which the Regulation or the Directive refers either specifically (see, e.g., Arts. 5, 15, 51, 52, 53, 54, 56, 57, 61, 62 and 63 Reg. and Arts. 4(4) and 6 Dir.) or generally (see Arts. 9(1)(c)(ii) and (iii) and, probably, Art. 10 Reg.). In fact, the above two categories of provisions cover a very substantial part of the company law of each Member State. Apart from the fundamental subjects referred to in footnote 14, matters such as the following may radically change as a result of a transfer of registered office: the rules relating to groups of companies (including the right to give instructions to the board of a subsidiary and the consequences as to liability), voting agreements, validity and annulment of resolutions, enquiry into a company's affairs, compulsory acquisition of minority shares, etc. It is therefore essential to consider very carefully the possible consequences of a transfer in your particular situation. In addition, the SE's statutes (articles of association) will have to be adapted to the law of the host Member State. This is likely to involve a complete revision.

Let us now turn to the procedure for transferring the registered office of an SE. This is set out in the longest article of the Regulation: Article 8 consists of 16 paragraphs, many of which are longer than quite a few full articles of the Regulation. The procedure is similar to that for mergers: a transfer proposal, publication, a justificatory report, a waiting period of two months, a decision by the general meeting, protection of creditors and possibly minority shareholders, a certificate from a competent authority, registration in the host Member State only after submission of the certificate and production of evidence that the formalities required for registration in that country have been completed (what formalities?), and publication again. All these formalities take time and effort.

As in the case of formation of an SE by merger, Article 8(14) gives each Member State an option to provide that any of its competent authorities may oppose the transfer on grounds of public interest. Of course this provision, too, is a source of uncertainty and I cannot see any justification for it which would be acceptable under Community law.[13]

Finally, a piece of good news for the transfer of an SE's registered office is that the Directive dated 17 February 2005, amending Directive 90/434 on the common system applicable to mergers etc. (see Chapter 4 of this book), provides for special tax rules for the transfer of the registered office of an SE.

[13] It should be noted that there is a special sub-paragraph (the third sentence) of Art. 8(14) which gives a national financial supervisory authority the right of opposition where an SE is supervised by it. It follows from this that the 'competent authorities' referred to in the first sentence of Art. 8(14) are not just any national authority, but apparently only the authorities designated in accordance with Art. 68(2), i.e. the authorities in charge of issuing the certificate referred to in Art. 8(8). Interestingly, there is no such sub-paragraph in Art. 19 concerning formation of an SE by merger.