PART I

The SE in its sixth year: some early impressions

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I Implementation by Member States

On 8 October 2007 it will be six years since the Statute for a European Company was adopted.[1] It is early days yet to come up with an assessment, but certain trends are already taking shape. First, however, it is worth looking at the implementation at national level of the relevant Community instruments. Although a regulation is directly applicable throughout the EC and need – indeed must – not be transposed into national law, Council Regulation of 8 October 2001 on the Statute for a European Company (SE) (the 'Regulation' or 'Reg.') leaves so many options to the Member States that it was necessary for the latter to enact their own laws to enable SEs to be registered in their territories. In addition, Article 64 Reg. imposes certain obligations on Member States to create legislation with respect to SEs. As to Council Directive of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees (the 'Directive' or 'Dir.'), this – of course – had to be transposed by each Member State. Due to the extremely convoluted wording of this directive, this turned out to be a very difficult and time-consuming job. Consequently, only eight of the (then) 25 EU Member States and one of the additional three EEA Member States managed to meet the deadline for transposition: 8 October 2004. This was also the date on which the Regulation entered into force and on which the first SEs could be registered in Member States where the implementing national legislation was in place. In January 2007, Ireland was the last Member State (apart from Romania, which had just acceded to the EU) to transpose the Directive. Thus, at the time of finalising this contribution (July 2007), 29 out of 30 EEA Member States had their

[1] In the form of Council Regulation (EC) 2157/2001 on the Statute for a European company (SE) and Council Directive 2001/86/EC supplementing the Statute for a European company with regard to the involvement of employees.

SE legislation in place.[2] As the national chapters in this and the previous volume of this book show, the 32 options given to Member States by the Regulation; the eight options given by the Directive; the 65 references to national law in the Regulation including the very broad Article 10, plus five such references in the Directive; and the obligations imposed on Member States to draw up their own rules of SE-law (three by the Regulation, see Art. 64, and 10 by the Directive) have – of course – resulted in substantial differences between the SE-laws of the various Member States.

II SEs created thus far

In spite of the publicity provided for in Articles 13 and 14 Reg., it is impossible to establish with any accuracy the number of SEs formed.[3] However, thanks to research carried out by the European Trade Union Institute (ETUI-REHS) (Project SEEurope – Worker participation at board level in the European Company (SE), www.worker-participation.eu) it is reasonably safe to say that at the end of June 2007 some 81 SEs had been formed and were still in existence.

A quick analysis of the available data reveals a few interesting statistics. The 81 SEs in question were registered in 17 different EEA Member States. 34 were formed in Germany,[4] 11 in the Netherlands,[5] 7 in Belgium, 7 in Austria, 5 in Sweden and one, two or three in each of the other 12 Member States. Only to a limited extent can these differences be explained by the respective delays in producing implementing legislation.

From the data collected by ETUI it would appear that, of the 81 SEs, there are around 13 'shelf companies' with no activity at all,[6] and around 30 SEs 'active' in various service industries (e.g. financial or real estate services), mostly without any employees. According to these data, 27 SEs had no employees

[2] It should be noted that, as at July 2007, Bulgaria had not passed any legislation to make use of the options and comply with the obligations under the Regulation.

[3] This is mainly due to two factors: (a) the lack of communication between the national registrars and the Office of Official Publications of the EC, and (b) the inaccessibility of the national registers. As to the lack of communication, experience with the European Economic Interest Grouping (EEIG) has shown that, in spite of Art. 39(2) of the EEIG Regulation (which is in essence identical to Art. 14 Reg.), national registrars do not always forward particulars of EEIGs or SEs with the required punctuality, if at all, while the Office of Official Publications apparently does not follow up glaringly incomplete communications by the registrars. Consequently, any statistic produced by the EC on EEIGs and SEs is unreliable. About 40% of the publications on SEs in the *Supplement to the Official Journal of the EU* do not even contain all of the (few) essentials required by Art. 14 Reg. As to inaccessibility, a search for all SEs in a particular Member State (in particular in another Member State than one's own) is, if at all feasible, an extremely cumbersome and costly activity.

[4] Three of these transferred their registered offices to other Member States and one was liquidated.

[5] Of these 11 SEs, one was transferred to Hungary, another to Germany and two were liquidated.

[6] See Section IV below.

when they were formed. Of another 27 SEs it was not known whether they had any employees. Only some 17 SEs appear to have more than 10 employees. These include:

Alfred Berg SE	Sweden	320	C[7]	Banking
Allianz SE	Germany	133000[8]	M[9]	Insurance
Conrad Holding SE	Germany	2300	M	Trade in electronics
Elcoteq SE	Finland	7500	C	Electronics manufacturing services
Graphisoft SE	Hungary[10]	250	C	IT
Hager SE	Germany	9500	C	Electric equipment
MAN Diesel SE	Germany	6400	C	Metal industry
Mensch und Maschine Software SE (MuM)	Germany	350	C	IT
PCC SE	Germany	3750	C	Chemicals, energy
Plansee SE	Austria	1420	C	Metal industry
SE Sampo Life Insurance Baltic[11]	Estonia	120	M	Life insurance
Strabag SE	Germany	33000	C	Construction

To these should be added five listed companies whose shareholders have already decided to convert into an SE:

BASF	Germany	65500	C	Chemicals
Fresenius	Germany	104000	C	Medical care
Porsche Automobil Holding	Germany	11500	C	Automotive
SCOR	France	700	C	Reinsurance
Surteco	Germany	2100	C	Paper/Plastics

[7] C means that the relevant SE was formed by conversion.

[8] Where I was able to ascertain, the number represents the employees of the SE and its branches and subsidiaries in the EU at the time of the SE's formation. The numbers for MAN and Fresenius are in any event for employees worldwide.

[9] M means that the relevant SE was formed by means of a merger.

[10] Formed in the Netherlands in 2005, it transferred its registered office to Hungary five months later. Interestingly, Graphisoft SE was the first to form an SE by means of a division. In 2006 it spun off its real estate business to a new company, Graphisoft Park SE. The Regulation does not provide for the formation of an SE by division, but under Art. 9(1)(c)(ii) and 10 Reg. an SE can divide if the law of the Member State where it has its registered office allows public limited-liability companies to do so.

[11] Part of a large Finnish insurance group.

It is interesting to note that all these 'large' SEs/future SEs (except Sampo and SCOR) have or will have their registered office in a country with some form of employee participation.[12] In addition, all of them (except Allianz, Conrad and Sampo) were/will be formed by conversion. In the case of the three exceptions, these were formed by merging two or more companies belonging to the same group. Therefore, the existing regime of employee participation either did not change at all (see Article 4(4) Dir. and Part 3(a) of the standard rules in the annex to the Directive) or changed in favour of the companies involved in that the number of supervisory board members could be reduced.[13] In any event, all these companies (SCOR to a lesser extent) were already familiar with employee participation rules, an aspect of the SE that may constitute a deterrent for companies from the 15 Member States where employee participation does not apply to companies – other than the SE – that are not state-owned or privatised.

III Why opt for an SE?

As discussed in my contribution to the first volume of this book, one of the main reasons for adopting the SE Statute has always been the desire expressed by (some) business people to have at their disposal an EU-wide corporate form for cross-border restructurings by means of mergers. To the extent that it was envisaged that these would be mergers between previously unrelated companies, there is as yet no evidence that the SE is fulfilling that desire. On the contrary, two recent developments seem to have rendered the SE redundant as a vehicle for cross-border mergers. Both events occurred after the first volume of this book had gone to press.

On 13 December 2005, the Court of Justice of the EC ('the Court') delivered a groundbreaking judgment[14] enabling all companies to merge across borders within the EU without having to comply with the complicated and burdensome provisions of the Regulation and the Directive. Meanwhile, on 26 October 2005, the European Parliament and the Council adopted the long-awaited directive on cross-border mergers[15] ('the CBM Directive'). Member States must transpose this Directive by 15 December 2007. It should be noted that the

[12] By 'employee participation' I mean the influence of representatives of employees in the structure of a company, in particular, the composition of the supervisory board or, in the case of a company with a one one-tier board structure, the composition of the board (see Art. 2(k) Dir.).

[13] German law requires a supervisory board to consist of 20 members if the number of employees is in excess of 20,000. Under the Directive (see in particular Part 3(b) of the standard rules) no fixed minimum applies. Both Allianz and BASF reduced their number of supervisory board members from 20 to 12, which of course is a more manageable number. MAN Diesel reduced the number from 12 to 10.

[14] Case C-411/03, *SEVIC Systems AG* ('*SEVIC*').

[15] Directive 2005/56/EC on cross-border mergers of limited liability companies (*Official Journal*, L 310, 25.11.2005, p.1).

rules on employee involvement are somewhat less cumbersome under the CBM Directive than they are under the Directive. To begin with, unlike the latter, the CBM Directive deals only with employee participation, and not with information and consultation. Secondly, although the participation regime laid down in the CBM Directive is largely copied from the Directive, there are situations where under the CBM Directive this regime does not apply or where the procedure may be simplified.[16]

Until 15 December 2007,[17] the Court's judgment in *SEVIC* applies to any cross-border merger, tempered only by the possible application of the 'rule of reason'.[18] The judgment essentially allows companies from different Member States to merge if each of them complies with its own country's law on mergers and provided that the merger does not constitute an abuse of the rights of shareholders, creditors or employees. For a Member State to be justified in preventing such a merger, it would have to establish such abuse on a case-by-case basis.[19] To determine what constitutes abuse, reference may be made to the common principles underlying the national provisions implementing Article 11 Dir. and, to some extent, those reflecting the last sentence of recital 18 of the Directive.[20]

What, then, has motivated the managements and shareholders of companies to opt for the SE so far? The Regulation requires companies that form a holding SE or convert into an SE to publish draft terms including a report that explains and justifies the legal and economic aspects of the SE's formation and indicates the implications for the shareholders and employees.[21] However, due to the inaccessibility of the national registers, in many cases (particularly in those of smaller SEs), it is almost impossible to trace such reports and, thus, the motives for the creation of the relevant SE. I therefore propose to give a short survey of the motives published by the promoters of 12 of the 17 'large' SEs (or future SEs) referred to above.[22] Most of these are or will be listed on a stock exchange. It should, of course, be borne in mind that there are wide differences in the circumstances of each company at the time of its decision to create an SE.

[16] See Art. 16 of the CBM Directive and Paul Storm, 'Cross-border Mergers, the Rule of Reason and Employee Participation', *European Company Law*, 2006/3, pp.130–138.
[17] or, in any Member State where the implementing legislation is in place at an earlier date, until that date,
[18] See the contribution referred to in footnote 16.
[19] See the Court's rulings in *Inspire Art* (Case C-167/01, para. 143 and operative part) and *Centros* (Case C-212/97, operative part).
[20] See Section IV below.
[21] See Arts. 32(2) and (3) and 37(4) and (5) Reg. Strangely, no such requirement applies in the event of formation by merger, even though it is laid down in Art. 9 of the Third Directive to which Art. 18 Reg. refers. This casts doubt upon the exhaustive nature of Art. 20(1) Reg., which sets out the contents of the draft terms of merger in such detail that it would appear to be exhaustive.
[22] I could not trace the motives of Graphisoft, Hager, Porsche, Sampo and Surteco.

- For nine out of twelve companies, the European and transnational image of the SE figures prominently among the reasons stated (a 'European identity').
- Other abstract reasons for opting for the SE include:
  - being seen to be a pioneer by adopting the new legal form
  - strengthening the company's economic, social and cultural position in Europe
  - enhancing an international and open enterprise culture
  - a perception that the SE is more conducive to thinking and acting on an international scale
  - a perception that the SE helps management to concentrate on critical strategic issues.
- Eight companies explicitly mention simplification of the organisational structure (e.g. a unified managing and reporting system).
- Other business reasons include:
  - enhancing corporate governance (management structure, including a reduction of the number of management/supervisory board members)[23]
  - enhancing efficiency and competitiveness
  - facilitating the raising of capital
  - involving all European employees (in these cases not just those in Germany) in employee participation.

The future will show to what extent these motives are realistic. Personally, I tend to question a number of them. For example, MuM expects the SE to simplify not only its legal and organisational structures, but also its operational business. How? Strabag states that the SE will meet Europe-wide legal acceptance and that it will make it easier to attract capital, especially for cross-border projects. I wonder whether banks will have more confidence in the rather obscure mix of European and national rules governing an SE than in the familiar national legal regimes.

Reverting to the envisaged role of the SE as an instrument for cross-border structural change, it would seem that this motive for creating an SE has been relevant only for Allianz, the Baltic subsidiaries of Sampo and the subsidiaries of SCOR. Allianz SE was created through a merger between Allianz AG and its Italian subsidiary RAS Holding SpA. Sampo merged its subsidiaries in three Baltic countries into an SE with registered office in Estonia. SCOR SA decided to merge some of its group companies in France, Germany and Italy to form two more SEs, SCOR Global P&C SE and SCOR Global Life SE, each with about 500 employees. Conversion into an SE *per se* has nothing to do with cross-border structural change.

[23] Interestingly, three German companies (Conrad, MuM and PCC) and one Austrian company (Plansee) changed their board structure from two-tier to one-tier.

Have other reasons having to do with cross-border mobility been given? The yield of my search for reasons is scant. Allianz and a company that wishes to remain anonymous stated that the SE would facilitate future cross-border mergers. After *SEVIC* and the implementation of the CBM Directive this no longer seems to be relevant. Elcoteq, SCOR and Strabag stated that the SE would facilitate future acquisitions, without indicating how. Only Strabag mentioned that the SE form would simplify a transfer of seat. Under current European law and most national laws, it is impossible for a company to transfer its *registered office* to another Member State. However, under European law,[24] which overrides national law, a transfer of the *head office*[25] of a company under national law is permitted. The Regulation (Article 8) expressly permits transfer of the *registered office* of an SE, albeit after a rather cumbersome procedure.[26] Therefore, where a company wishes to transfer both its registered office and its head office, the SE offers for the time being the only certain Europe-wide way to achieve this. In fact, apart from the formation by means of a merger, the ability to transfer the registered office is the only element of cross-border mobility offered by the SE. It is therefore somewhat surprising that Strabag was the only company to mention this as a motive for creating an SE. Or do companies with many employees and a system of employee participation fear that industrial unrest will ensue if they state that one of their motives for opting for the SE is to transfer their registered office and, by implication, their head office to another Member State?

Tax considerations have not been mentioned by any of these 'large' SEs. To the extent that they were formed by way of conversion, the reason is obvious: there was no change in the tax position. In the case of Allianz (the merger with RAS Holding SpA), tax issues do not seem to have posed serious obstacles. However, it is not known whether they were a motive for the formation of the SE.[27] Tax considerations may well have played a very significant part in the formation of the more than 60 SEs that have kept themselves out of the limelight.

My conclusion from the foregoing is that, on the rather scant evidence available so far and contrary to expectations, cross-border mobility does not appear to be the driving force behind the formation of SEs. Rather, the motives are of a more abstract (image) and/or an organisational nature.

[24] See Chapter 1 of the first volume of this book, p. 5 and 6.
[25] Also called 'real seat', see Chapter 1 of the first volume of this book.
[26] As has been shown on at least seven occasions, the difficulties can be overcome, but this was achieved by SEs that probably did not have any employees (the exception being Graphisoft SE which, with some 250 employees, transferred its registered office from the Netherlands to Hungary). The other SEs that transferred their registered offices are Afschrift SE (from Belgium to Luxemburg), Joh. A. Benckiser SE (from Germany to Austria), BIBO Zweite Vermögensverwaltungsgesellschaft SE and Bolbu Beteiligungsgesellschaft SE (both from Germany to Wales), Jura Management SE (from the Netherlands to Germany) and Narada Europe SE (from Norway to the UK).
[27] See Chapter 4 of the first volume of this book.

IV Some employee participation issues

In my chapter in Volume 1 of this book, I addressed the possibility of avoidance of employee participation in an SE. As the data collected by ETUI show, at least one-third but probably well in excess of half of the 81 SEs covered by the research have no employees. At least 13 have no activities at all and seem to have been formed for the purpose of being sold to parties that either do not meet the prerequisites for forming an SE or have no time (or think they have no time) to create, and negotiate with, a special negotiating body ('SNB'). Another possibility is that such parties do not wish to comply with the rules on employee involvement. They might contemplate purchasing the shares of a 'shelf SE' in order to avoid the creation of an SNB and then causing the empty SE to acquire a company with a large number of employees or the assets and employees of such a company. One could also think of a company with employees setting up in different Member States two subsidiaries without employees, causing these subsidiaries to form an SE by means of a merger, and then causing that SE to acquire a company with many employees. It should be noted that for the purposes of creating an SNB only the employees of the 'participating companies' and their 'concerned subsidiaries or establishments'[28] are relevant, and not any employees of the parent company or of other companies in the same group.

What restraints can be put in place against these mischievous but of course purely academic ideas? Let us first consider the scenario of the formation of an SE by companies that have no employees at all. In that event, it is impossible to comply with Article 3 Dir., which requires the participating companies to take the necessary steps as soon as possible to start negotiations with the representatives of the companies' employees. However, Article 12(2) Reg. provides that an SE may not be registered unless negotiations with those representatives have resulted in some (positive or negative) outcome. Does the absence of employees in the participating companies/company imply that the SE cannot be registered? Or does it not make sense to require the creation of, and conduct of negotiations with, an SNB when there are no employees?

At the request of the Hans Böckler Stiftung, a foundation allied to the German trade unions, the German professor Dr Thomas Blanke has written a legal opinion[29] on 'Reserve-SE's' (shelf SEs) in which he concludes that such an SE without employees cannot 'acceptably' be registered. His principal argument appears to be that, according to the express wording of Article 12(2) and (3) Reg., providing for employee involvement is a mandatory prerequisite for

[28] See Art. 2(b) and (d) Dir.: '*participating companies' means the companies directly participating in the establishing of the SE and 'concerned subsidiary or establishment' means a subsidiary or establishment (branch) of a participating company which is proposed to become a subsidiary or establishment of the SE upon its formation.*

[29] Publication 2005, nr 161 of the Hans Böckler Stiftung.