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The Societas Europaea (SE) -Time to Start Over? Capturing the zeitgeist of the 21st century

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'Vitality shows in not only the ability to persist but the ability to start over.'
(F Scott Fitzgerald)

Key Words

European corporate law; European corporate forms; European Company; SE (Societas Europaea); internal market; foreign direct investment.

Abstract

A topic of discourse for over half a century, the Societas Europaea (the European Company)[i] has much to offer. Notwithstanding its merits, this supranational corporate form has attracted much criticism. One of the major issues that has emerged on a recurrent basis is the question of the functional worth of this structure. In this context a discourse has ensued about its advantages, and disadvantages from the perspective of its intended end-user.

This paper will discuss the pro-business aspects of this entity (Part 2) before giving due consideration to its structural and functional deficits (Part 3), ending with suggestions for reform (Part 4).

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1. Introduction[iiiiiiiv]

Confronted with the realisation that there was a need for a European stock corporation that would be governed by a single body of law irrespective of the locus of its seat, possessing the same rights and powers endowed upon national corporations by their respective countries,[v] economic exigency dictated the existence of such an 'international company'.[vi]

Between the instance when the idea of a European Company was first raised,[viiviii] and the inception of this structure[ixx] however almost half a century had elapsed.

2. Pro-business Aspects of the SE

Without any doubt the SE opens a new era in responding to the specific needs of multinationals, but what are the advantages of the SE in comparison to national corporate forms? Why should a multinational opt for the formation of an SE? This section will address these questions by highlighting the key advantages of the SE.

Functionality and the Economic Efficiency of the SE as a transnational corporate vehicle

Prior to the establishment of the SE, companies engaged in cross-border operations needed to remain based in one Member State, and had to cope with the difficulties and transactional costs associated with having to comply with the national company laws of the various Member States within which

they operated. It was almost impossible for companies based in different Member States to merge, and it was impossible for a company with a registered office in one Member State to move this office to another Member State without being subjected to 'a suicide' liquidation.[xi]

The main advantages associated with the SE from a business point of view are accessibility to a post-national corporate form with a 'transnational home base'[xii] enjoying limited liability (though the European Economic Interest Grouping proposes certain functional features, its key drawback is its lack of limited liability[xiii]) with a unified management system, and financial reporting rules, which may be used in order to maintain offices in different Member States, thereby avoiding the need to establish a costly, time-consuming, and complex network of affiliated companies governed by the national laws of the different Member States.[xivxv]

What is more, the SE is only answerable to one supervisory authority (in the Member State where it is registered) rather than several (in the different Member States where the company has subsidiaries).[xvi] The estimated annual saving in this context is in excess of thirty billion Euros.[xvii]

Cross-border Mobility

Notwithstanding the fact that the SE is a creature of national law possessing all the hallmarks of a public limited liability company of the Member State in which it has its registered office, it is endowed with European legal personality as well as 'unequalled freedom of movement.'[xviii]

In the context of mobility, a distinction can be made between 1) reincorporation (cross-border transfer of seat), and 2) cross-border merger.

1) Reincorporation (cross-border transfer of seat)

One of the key advantages associated with the SE form is its ability to engage in cross-border seat transfers (reincorporation).[xixxx] It is able to move from one Member State to another whilst 'fully retaining its legal personality'[xxi] ensuring that the act of reincorporation does not affect the continuity of its legal personality.[xxii] This procedure available to SEs allows for 'post-incorporation transfers of the registered office without winding up',[xxiii] permitting SEs to freely change 'the legal regime to which they are subject by moving both registered office and head office'.[xxiv]

Many jurisdictions condition cross-border transfer of the registered office of one of its companies on the loss of legal personality.[xxv] So that a company looking to transfer its registered office will be forced to liquidate in its jurisdiction of incorporation before the transfer takes place, which in turn necessitates the incorporation of a new company in the jurisdiction to which the company seeks to relocate (target jurisdiction).[xxvi] The act of liquidating (in the jurisdiction of incorporation) typically entails tax consequences,[xxvii] whilst the act of (re)incorporating (in the target jurisdiction) is both time-consuming and costly.

In contrast, with domestic corporate forms, the SE is able to transfer its seat from one Member State to another whilst fully retaining its legal personality meaning that the cross-border seat relocation will take place without the need to wind-up (in the Member State of incorporation), and to re-incorporate (in the target Member State).[xxviii]

This supranational corporate vehicle, which is operational on both the national and international spheres, enjoys the ability to migrate with relative ease. It may leave its country of inception in order to settle permanently or temporarily in another Member State. If it so wishes, it is free to relocate countless times throughout the EU. Its capacity to emigrate, and its ability to immigrate are rooted in supranational law.[xxix]

The jurisprudence of the Court of Justice of the European Union (CJEU) on the freedom of establishment has arguably taken some of the shine off this feature.

Building on the decision in *Centros*[xxx] the CJEU has enhanced the freedom of establishment, and 'has moved the European legal scene towards mutual recognition of companies.'[xxxi]

Notwithstanding the far-reaching implications of its decisions in *Centros,* and *Überseering*[xxxii] the CJEU[xxxiiixxxiv] has said that the Member State of incorporation may still impose certain restrictions on the transfer of the registered office.[xxxv]

2) Cross-border Merger

The possibility of a cross-border merger was an advantage associated with the SE until the adoption of the Cross-border Merger Directive[xxxvi] permitting all limited liability companies to proceed with cross-border mergers with conditions that are comparable to those of the SE.[xxxvii]

Pre-2005 most Member States did not permit a company of one Member State to merge with a company of another. And even where such a merger was legally possible under national law, there were still major obstacles to be surmounted such as tax regimes of the countries concerned.[xxxviii]

In order to address the hindrances to concentration of undertakings into larger units capable of operating across the whole of the EU, rather than merely within the borders of one Member State, and in the absence of a European instrument permitting international merger or consolidation without prior liquidation of the company to be absorbed by a foreign company, the SE was intended to be used an instrument by national companies looking to consolidate.[xxxix] The SE enabled such national companies to consolidate into an SE avoiding the need for prior liquidation. By forming an SE, groups could restructure themselves by converting their subsidiaries, from at the moment 31 states with 31 different jurisdictions, into establishments as a result of a cross-border merger.[xl]

Why would a multinational opt for a complex, time-consuming and costly SE restructuring with a high degree of legal uncertainty, when it could merge in the same way using national law, especially when bearing in mind the following facts?

Firstly, the Cross-border Merger Directive is open to all limited liability companies whereas the SE Regulation is only applicable to public limited liability companies.

Secondly, the Cross-border Merger Directive is more flexible than the SE Regulation, permitting 'letter-box' companies with third country origins to take the advantage of such a facility (the SE Regulation requires forming companies to have their registered office within the Union, unless the Member State allows otherwise).[xli]

Thirdly, the Cross-border Merger Directive contains more relaxed provisions in relation to employee participation than the SE Regulation (with a threshold of one-third, rather than the threshold of 25 per cent associated with the SE). If a negotiated solution fails, the more stringent co-determination standard only applies if at least one third of the employees participating in the merger are subject to this standard.[xlii]

Notwithstanding the appeal of the Cross-border Merger Directive, arguably the SE as a corporate structure adds value to multinationals by combining all the techniques of corporate mobility in one package (cross-border mergers, transfer of the registered office, and fiscal neutrality for cross-border transactions).[xliii]

Choice of Corporate Management Structure

The founders of the SE are free to select their management structure.[xliv] As such they may incorporate using a one-tier management structure (where management is entrusted exclusively to the administrative organ), or a two-tier management structure (with a management organ responsible for managing the company, and a supervisory organ entrusted with oversight).[xlv]

Pursuant to the SE Regulation[xlvi] those countries that do not know the two-tier system, or rather, do not have suitable legal norms, have the option of adopting such measures in relation to SEs.[xlvii] This applies respectively to countries that do not know the one-tier system.[xlviii] An illustration of this can be found in Germany, which adopted provisions applicable to SEs governed by a one-tier system, through Articles 20 - 49 SEAG.[xlix]

Both systems have their advantages and disadvantages. The main disadvantage of the one-tier system is the potential that insiders or even the CEO of the company will capture the board in order to retain their jobs, and maintain control of the company.[l] Whereas one may say that this risk is lower in a two-tier system as the members of the supervisory board are more independent.[li] However, the one-tier system facilitates a more flexible forum for decision-making relative to the two-tier system.[lii]

Using this freedom, the founders are able to construct a governance structure befitting their own unique organisational needs. A feature which is particularly valuable in situations where the SE is founded by two or more distinct entities with different corporate cultures, distinct modes of operation, divergent target markets and *clientele*. Since each firm 'exhibits its own complexity and business environment, market forces, if not disturbed, [it] will choose the system that is most efficient for each firm in equilibrium.'[liii]

Integrationist Approach to Corporate Governance

Employee participation in the SE is governed by the provisions of the SE Directive, which apply concomitantly with the provisions of the SE Regulation.[liv] The provisions of this Directive reflect the fact that an agreement between the Member States on a unified model regarding employee participation was not a possibility. The disparate and contrasting traditions of the different Member States acted as a key obstacle to an accord on this subject matter for many years.[lv] An illustration of this is the presence in Germany of a strict co-determination system,[lvi] while in the UK there is a complete absence of such a mechanism.

After more than three decades of parley, a two-prong solution was opted for which has since been incorporated into the SE Directive. This solution is based on two separate principles namely the 'before and after' principle, and the 'primacy of negotiations' principle.[lvii]

According to the 'before and after' principle, an SE is required to 'guarantee its employees the same level of protection as enjoyed prior to the adoption of the European Company status',[lviii] thereby guaranteeing that the establishment of an SE does not involve the disappearance or reduction of practices of employee involvement existing within the companies participating in the establishment of the SE.[lix]

Employee participation at board level is only mandated when similar structures previously existed within the founding companies.[lx] Where none of the companies involved in the incorporation of the SE was governed by employee participation rules, such rules need not apply to the SE after its incorporation.[lxi] The same approach will apply not only to the initial incorporation of the SE but also to any structural changes to an existing SE.

Recourse has also been made to the idea that it is best when the participants themselves agree upon the model that is suited to their needs. Consequently Article 13(2) of the SE Directive lays down the principle of the 'primacy of negotiation'.[lxii] [lxiii]

Where the management or administrative organs of the companies participating in the establishment of the SE are involved in the drawing up of a plan for the establishment of the said SE, they are responsible for taking the steps needed to start negotiations with representatives of the companies' employees in order to agree on arrangements for the involvement of employees in the SE.[lxiv] Such steps should be taken as soon as possible after publication of the draft plan.[lxv]

With this in mind, a special negotiating body (SNB) representing the employee in the participating companies, and the concerned subsidiaries or establishments must be convened.[lxvi] The SNB is responsible for negotiating the form and extent of employee involvement in the SE, and together with the competent organs of the participating companies will be entrusted with deciding by written agreement on the plans, and structures for employee involvement within the SE.[lxvii]

This system offers certain comparative advantages even though at first glance it may appear as if certain companies might not benefit in this context from the SE structure.

Companies are given the option of negotiating employee involvement, which is not only of value to the employees and trade unions, but also to the companies themselves, since they are effectively offered the opportunity to negotiate a model of employee involvement that is appropriate to their distinctive interests, structure and needs,[lxviii] and to formulate a bespoke solution adapted to their unique requirements.[lxix]

The SE extends the concept of co-determination to Europe, so that co-determination is no longer restricted to employees from countries with a co-determination regime.[lxx] As the SE structure extends the concept of employee involvement to all Member States, this concept which strengthens the involvement of the workforce in the company can be beneficial to Europe-wide group structures, as the mixture of representatives from different Member States can arguably be advantageous to the SE in terms of group interest, and group wide decisions.[lxxi]

The prospect of freezing pre-existing levels of employee involvement, or even avoiding the rules on participation altogether, is an option made available when using the SE structure. In accordance with 'before and after' principle, the threshold for the regime of employee participation is determined exclusively on the basis of the employees that were subject to participation pre-establishment. Consequently, it can be very interesting for SMEs to restructure themselves as SEs before crossing the threshold to a stricter form of employee involvement.[lxxii] This strategy of using the SE form 'to maintain the same system of employee involvement irrespective of an increase of the company's workforce'[lxxiii] has apparently been used by German companies in order to retain the same level of employee participation in the supervisory board 'even though the threshold for a national company (either 500 or 2,000 employees) would require a change in the board's worker representation.'[lxxiv]

Even for companies from countries where rules of employee participation do not exist, the SE with its 'low-level' of employee involvement may present some benefits.[lxxv] With employees sitting on the supervisory board, management is better informed of the internal problems within the company, which is advantageous from the point of view of corporate governance.[lxxvi] Moreover, since employees are part of the board, decisions having a negative effect on company employees might be easier to implement.[lxxvii] As such strikes or protests may be avoided.[lxxviii]

Employee representation the most controversial issue associated with the SE is arguably one of its key features and one of the main reasons for multinational companies to opt for an SE.

The 'European Flag'[lxxix]

At the present time, the SE is one of the sole legal forms available at the European level that is governed by a certain degree of unitary and directly applicable law. Notwithstanding the fact that a number of issues impacting upon the SE are governed by national law, there is still a certain level of legal certainty throughout all companies involved that did not exist before the creation of the SE structure.[lxxx]

Beyond the benefits that are more legal in nature, such as corporate mobility, and the flexible corporate governance structure, the ability to use the SE abbreviation also offers certain distinct business opportunities.

The supranational character, and identity of the SE are strong branding tools for a company or group of companies. The inclusion of the abbreviation SE in the name of the undertakings[lxxxi] inevitably means that as SEs they belong to an exclusive class of entities in a league of their own, quite apart from other undertakings operating within the European space.[lxxxii]

Beyond the fact that the SE tag adds a European flavour to the culture, and image of the company,[lxxxiii] this European affiliation is particularly important for companies as it provides them with an opportunity to re-brand themselves as European companies, a strategy that arguably offers them more visibility than national corporate forms.[lxxxiv][lxxxv]

Enhancing the Equity of the Company

Since the SE is likely to be an entity of stature, not only due to the conditions associated with its incorporation but also due to the ongoing obligations to which it is subjected, the formation of the SE is likely to send out a positive signal to potential investors and creditors, in turn offering the structure increased facilities for the raising of capital in the EU, and beyond.[lxxxvi] This is particularly important since the SE unlike the EEIG is able to raise capital investment from the public.

Flowing on from this, the European label may also have a positive impact on the share price of listed companies.[lxxxvii]

Market Integration in the European Union

With the possibility of obtaining a specific European corporate identity, the formation of SEs deepens the concept of the common European market.[lxxxviii] Thus, the SE makes Europe itself more attractive as a place to invest.

As Commissioner *Bolkestein* put it 'This "European identity" of a company will also be a way of removing the psychological barriers between Member States and prompt a more European outlook on doing business.'[lxxxix]

Psychological Benefits

The European affiliation of the structure is beneficial which is of consequence in situations where the SE is the product of a cross-border merger or consolidation or in the alternative a restructuring operation, in the process of which at least one of the participants is required to forfeit its 'nationality' in favor of the 'nationality' of another.[xc] Such a move could be a serious hindrance especially when the participating companies are more or less equal in size and enjoy significant national standing.[xci]

Thanks to the SE structure, national concerns become secondary to the more important European concerns. The supranational image of an SE 'helps to avoid the feeling of a national 'defeat' of the management and the staff in the absorbed company or previous subsidiaries'[xcii] whilst affording culturally distinct companies the opportunity to dilute if not eliminate an important source of tension.[xciii]

By using a single European banner, the founding company or companies are able to demonstrate that the entity is 'European 'at heart'',[xciv] highlighting 'the preeminence of its European identity over the national identities ... that make up the group',[xcv] whilst encapsulating the underlying corporate ethos and *raison d'être* of the company.

Speaking of the decision of the Airbus Group to become an SE, Tom Enders of the Airbus Group said that as 'a pioneer of European industrial integration; it is logical and the right time for our multinational culture to be reflected in our legal structure.'[xcvi]

The fact that the SE will not be considered as a 'foreign' entity is likely to mean that it will be able to raise capital in all Member States with comparatively more ease than a national entity.[xcvii]

***Renvoi* and Company Law Arbitrage**

At variance with the intentions of the drafters of the 1970 Proposal who formulated an autonomous legal form based purely on European company law, the contemporary SE is a fusion of European law and national law. The result is a collection of thirty-one different national variants of the SE.[xcviii]

Notwithstanding the fact that certain of its characteristics[xcix] are governed by EU law, other matters associated with the SE are addressed by reference to national law (*renvoi* technique). Besides the evident complexities associated with the *renvoi* technique,[c] this technique also offers certain benefits.

Due in part to the fact that the SE is a legal form in relation to which there is little to no law and experience comparatively with national companies,[ci] promoters are able to break new ground by establishing an SE. Until the establishment of a sufficient number of SEs the r*envoi* technique may limit the risks and high transactional costs associated with the establishment of the SE.

The lack of detailed rules (in the SE Regulation) on issues such as shares coupled with the divergencies between the different legal systems arguably means that such matters are left to national legislatures to address. This scope of discretion at the national level means that the promoters of the SE are able to select the jurisdiction that offers them the most competitive provisions (company law arbitrage).[cii] The *renvoi* technique accordingly creates the possibility for companies to forum shop in order to choose their Member State of registration with specific reference to the benefits offered by the said State.[ciii]

One of the consequences of this state of affairs is the fact that Member States that wish to be more competitive for the purpose of attracting leading European and non-European companies will have to adapt their legislation in order to better accommodate the specific needs of a European-wide legal entity.[civ] In the long run this state of affairs could lead to convergence amongst the Member States with flexibility becoming the norm.[cv]

Competitiveness of Companies

The SE also has the potential of enhancing the competitiveness of companies. What makes a company more competitive than its counterparts? The answer is: Divergency.

Bearing in mind the fact that an SE possesses a European character that a national company lacks means that arguably comparably with national corporate structures it is better equipped to compete not only within the EU but also further afield.

Coupled with this competitive advantage, the SE brand is arguably also a powerful marketing tool as investors are generally more likely to invest in companies that are perceived to be modern, innovative and future oriented, and arguably in turn sufficiently secure. As companies opting to incorporate as SEs are mostly large multinational companies, investors are more likely to invest in a European entity rather than its national counterpart.[cvi]

If the workforce of such multinationals are capable of identifying with, and getting behind this European entity they will be better able to work together towards a common goal of advancing their company, and its interests.

Lastly, by forming an SE companies may combine their potential, and pool their resources under the aegis of a single supranational company governed by one set of framework rules with a unified management and reporting system. With cumulative technology and knowledge, the SE will become more competitive than national equivalents.

Streamlining and Operational Efficiency

The SE offers underlying entities the prospect of streamlining their respective infrastructures.[cvii] By grouping together operations under the umbrella organisation, European-based businesses are able to reduce their operational costs.[cviii]

By removing the need for costly, and elaborate networks of subsidiaries, such businesses are able to make substantial savings. The ability to restructure rapidly and dynamically in a responsive fashion affords such entities the ability to capitalise on opportunities as they emerge.[cix] The SE allows for the establishment of a single legal entity with branches, removing the need for a complex network of subsidiaries governed by different national laws[cx] whilst at the same time streamlining operations by allowing corporate groups to modify their European group-structure using one single company rather than a network of subsidiary companies.[cxi]

Using one single company, the directors of the SE are no longer required to be involved in the corporate governance of a network of European-based subsidiaries. Accordingly, corporate governance becomes far more efficient.[cxii] By employing a single entity with branches, internal and external control requirements are centralised to one single entity at the level of the SE in turn enhancing operational transparency, reducing transactional costs and improving efficiency.[cxiii]

As the branches of the SE will be governed by the same body of substantive law, this will also have the effect of facilitating financial flows within the group, as the entity will only be answerable to the national authority where the SE is registered rather than being obliged to respond to all the national authorities where the group has subsidiaries.[cxiv]

The ability to move from one Member State to another with relative ease, without the need for dissolution and re-incorporation, will also mean that entities that utilise this corporate vehicle will benefit from optimisation in corporate mobility.[cxv]

The formation of an SE, and the inherent restructuring of the company associated with its formation may lead to rationalisation not only of the organisation but also of employee resources. In the case of a merger, for example, administration may be centralised at the level of the SE resulting in a reduction in the number of employees needed to run the new company.

This overall streamlining, and simplification of corporate operations will arguably result in a more appealing structure from the point of investors who are likely to prefer a single structure in lieu of 'a series of different companies regulated by different laws.'[cxvi]

National Treatment

Member States are obliged to treat an SE '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.'[cxvii] In turn, ensuring that Member States guarantee that the provisions of domestic law governing SEs do not result in discriminatory treatment of SEs resulting from a difference in treatment of European companies when compared with national public companies, or in disproportionate restrictions on the formation of a European company, or on the transfer of its registered office.[cxviii]

By virtue of the SE Regulation, mutual recognition of SEs in the various Member States is guaranteed thus ensuring that an SE validly incorporated under the laws of any one of the Member States is assured the same treatment as a public limited liability company validly incorporated under the laws of the host Member State. In this fashion, this Regulation effectively transposes the ruling of the CJEU in the *Überseering* case to SEs.[cxix]

As Member States must ensure that the SE is not discriminated against relative to traditional national companies this in turn guarantees the application of the traditional EU principles of anti-discrimination and efficiency.[cxx]

3. The Structural and Functional Flaws of the SE

After having highlighted several of advantages associated with the SE, this section of the article will consider some of its shortcomings from the perspective of its intended end-user.

Accessibility and its Limits

As the SE cannot to be formed *ex-nihilo,* it cannot be established directly by individuals.[cxxi] This structure accordingly requires prior incorporation of companies within different Members States.

This structure is accordingly reserved for companies looking to create an SE by means of a merger,[cxxii] as a holding company,[cxxiii] or as a subsidiary,[cxxivcxxv] or alternatively an existing EU-based national public company looking to transform into an SE.[cxxvi]

From the start there have been quite divergent national views on which businesses should be allowed to use the SE structure. By way of an illustration[cxxvii] at the time of the formulation of the 1970 Proposal, the French government were strongly supportive of the view that access to the SE should not be made more difficult than access to corresponding national corporate forms, whereas as the German government, fearful that businesses would select the SE form over the German corporate forms in a bid to circumvent the stringent provisions applicable to the latter forms, endorsed the view that SEs should only be made available if certain international factors were present.[cxxviii]

The upshot of this is that the SE as a corporate vehicle is exclusively reserved for those situations where there is a cross-border element present,[cxxix] where two or more public companies incorporated in different Member States intend to form an SE by means of a merger,[cxxx] or two or more (private or public) limited liabilty companies governed by the laws of different Member States aim to establish a holding[cxxxi] or subsidiary SE.[cxxxii]

In order to prevent public companies circumventing the cross-border prerequisite in circumstances where such a company aspires to transform itself into an SE,[cxxxiii] it will need to demonstrate a cross-border character by having for at least two years a subsidiary governed by the law of another Member State.

Dual Nationality

The contemporary SE is a structure created to accommodate the varied concerns of the Member States. Prime amongst these is the debate surrounding the question of whether an SE should be a company of 'European law' or rather a 'European type' company.[cxxxiv] In effect whether national laws should be harmonised or a supranational corporate form with its own dedicated body of law should be introduced.

The SE Regulation as it stands skirt around many of the concerns originally associated with the establishment of the European Company. The European authorities have according left Member States 'a margin of appreciation to introduce modifications, or have limited themselves to proposing instead of imposing' by allowing for substantive supplementation by express reference to national laws or bylaws.[cxxxv]

Contrary to the intention of the drafters of the 1970 proposal that championed the creation of an autonomous legal form based purely on European company law, the contemporary SE is a hybrid governed by European law, and national law.[cxxxvi]

Besides the common, substantive provisions set out in the Regulation, the SE is also governed by an array of national provisions.[cxxxvii] The SE Regulation contains 70 articles with numerous references to national law, and multiple options for Member States. For this reason it is perhaps more correct to say that there is no singular model for the SE but rather 31 variations on a theme.

Restriction on Mobility

Considering that one of the main advantages of the SE is its cross-border mobility, it is something of a paradox that one of the main disadvantages associated with this form is the restriction on its mobility.

The restrictions affecting use of this feature, and the procedures associated with its use, largely undermine the worth of the SE's ability to engage in reincorporation.[cxxxviii] Beyond the possible levy of exit taxes, mobility is impeded by procedural, and organisational restraints.[cxxxix]

Procedural restraints

The complex procedural requirements that must be followed by an SE looking to transfer its seat make the cost associated with the relocation prohibitive. This cost may have a dampening effect on mobility unless the legal regime in the target Member State is such that it offers 'significant cost or efficiency advantages'.[cxl]

The strict procedural rules associated with the transfer of seat, which are intended to protect the interests of minority shareholders, employees, and creditors,[cxli] effectively operate to undermine the benefit of the SE as 'a vehicle for choice of law' rendering 'arbitrage between different systems of company law less attractive.'[cxlii] Strategically this position arguably reduces the incentive amongst Member States to compete in a bid to attract SEs.[cxliii]

Organisational restraints

The requirement that the registered office of the SE shall be located in the same Member State as its head office, means that the transfer of the registered office of the SE must also involve the transfer of its head office.[cxliv][cxlv] Moreover, Member States may limit the discretion of the SE further by insisting that the registered and head offices of the SE not only be in the same Member State 'but also in the same place.'[cxlvi]

Severe sanctions can be imposed on SEs that deviate from this requirement pursuant to Article 64 SE Regulation.[cxlvii] Ultimately an SE that fails to regularise its position is likely to face domestic proceedings intended to bring about its liquidation.[cxlviii]

The requirement that there is 'territorial correspondence between registered office and head office constitutes a barrier to the recognition of primary establishment and restricts greatly the free movement of companies.'[cxlix]

Employee Participation

The question of employee representation has been a bone of contention from the very start, with the various Member States vying for different levels of employee representation. This disagreement eventually led to discord with the separate Member States adopting divergent opinions on the question.

Referring to this stumbling block in 1971 *Paul M Storm* states that '[u]p to now, the real *Mitbestimmung* is to be found in Germany only ... What if an SE is formed through consolidation of a German AG and a French SA? Should the SE have *Mitbestimmung* or not? If so, *Mitbestimmung* would be introduced into a country where it does not exist and is in fact fiercely opposed by both employers and trade' unions (which do not want to take responsibility for "capitalist" management). If not, German corporations could escape from the German *Mitbestimmung* law by forming an SE.'[cl]

The current position, according to the SE Directive, is that the formation of an SE is only possible after successful completion of negotiations towards employee involvement. No SE may be registered unless an agreement or an arrangement for employee involvement has been reached. The

procedure set out by this Directive and reviewed above is problematic for a number of reasons. Prime amongst these is the procedure involving the creation of the SNB, which can be both time-consuming and complex in practice. In the case of groups established in various Member States, the SNB has to consist of representatives from each company. Thus, the SNB will be multi-cultural and multi-geographical representing various interests which may mean that negotiations are intricate, and protracted, and that an agreement may not necessarily be reached.[cli]

If an agreement cannot be reached, several standard rules exist depending on the form of employee involvement in the involved companies pre-formation of the SE.[clii] Pursuant to the 'before and after' principle, if no agreement may be reached, the provisions of the company with the most severe provisions regarding employee involvement will be applicable to the SE. This principle is certainly a deterrent to companies incorporated in Member States with a low level of employee involvement or even without any provisions in this regard, and may prevent multinationals from forming an SE.

These rules are also deemed to be disproportionate notably where only a small part of the workforce is in fact concerned by the involvement process.[cliii] An added concern here is the requirement that registration of an SE be postponed until completion of negotiations,[cliv] which is especially worrisome for listed companies 'for whom the certainty of procedures and of the time-frame for registration is crucial.'[clv]

Absence of Tax Harmonisation

Since the SE Regulation does not cover taxation,[clvi] national tax law is applicable. As such an SE must be treated as a national company, and each of its subsidiaries or branches is subject to the tax law of the country within which it is situated.[clvii]

Whilst it is comprehensible why the Member States did not agree on a differential tax treatment for the SE; considering that the SE is comparable to a company with a cross-border subsidiary or branch, a differentiated treatment of the SE would have arguably represented an infringement of the non-discrimination principle enshrined in EU law,[clviii] the lack of a specific tax regime for SEs, and the absence of tax harmonisation across the EU together constitute serious impediments from the point of view of the SE. Referring to the concerns of the Commission in this regard, Commissioner *Bolkestein* states that

> The Commission was always determined to include tax provisions in the Statute. The relevant articles in the original proposal of 1970 were very complete. In the 1989 proposal, these comprehensive rules were reduced to just one provision on the taxation of the permanent establishments of the SE. In the negotiations running up to the final agreement on the statute, however, even this reference was removed. Member States considered that the tax questions relating to the SE should be considered separately. This leaves the SE-Statute without any tax rules. This is a rather unfortunate situation, which I regret very much. Clearly, the lack of appropriate tax rules significantly reduces the practical attractiveness of the European Company Statute. Business representatives emphasise this quite forcefully.[clix]

Erik Werlauff refers to taxation of SEs as one of the matters that the SE Regulation could have dealt with, which would have taken the European Union a step further towards its goal of 'genuine European harmonisation of company law which will allow a cross-border company or group to draw up a uniform, transnational plan in terms of company law.'[clx] In this regard, *Erik Werlauff* suggests that the integration friendly organs (*inter alia* the European Parliament) could have wished to see uniform taxation of SEs both with respect to tax base (the calculation of taxable income), and tax rate.[clxi]

Whilst the question of taxation is not addressed in the SE Regulation, this matter is addressed in detail in the 1970 Proposal. By formulating a comprehensive statute for European Companies, the drafters of the Proposal had hoped to provide companies operating in the Community with a range of

solutions to the raft of potential problems that they may face in future,[clxii] allowing such entities to adapt 'their legal structure to the dimensions and the needs of the European market', whilst permitting them to live 'not under nine national laws but under one European Company Statute.'[clxiii]

With fourteen distinct and detailed titles, the 1970 Proposal is designed to govern all aspects of an SE's activity without the need of the intervention of national legislatures.[clxiv] Whilst Title XII on taxation rules out the possibility of introducing dedicated tax provisions for European Companies,[clxv] it does recognise the importance of addressing the unique fiscal problems such companies are likely to encounter.[clxvi] The Proposal groups these concerns into three categories, namely those arising 1) at the time of formation, 2) during the lifetime of the company (concerning its status for tax purposes, and the method used to tax its profits), and 3) in relation to the tax domicile of the company.[clxvii]

On the question of indirect taxation on the capital raised on establishment, the Proposal makes reference to generally applicable instruments of European law addressing this particular issue,[clxviii] and highlights the importance of ensuring that the exchange of shares (required for the formation of a European holding company)[clxix] 'not give rise to any charge to tax.'[clxx]

The Proposal also suggests that 'the profits of a permanent establishment are taxable solely by the State in which that establishment is located'[clxxi] whilst allowing companies 'to opt for taxation of their profits computed on a world-wide basis'[clxxii] so losses incurred by such establishments abroad can be deducted in the country of domicile for tax purposes.[clxxiii]

The question of tax domicile and the related matter of a change to this domicile are both addressed within the 1970 Proposal.[clxxiv]

Since a European Company is likely to operate in more than one Member State, the Proposal highlights the importance of ensuring that it have only one domicile for tax purposes,[clxxv] for the purpose of determining the system of tax law applicable to the distribution of profits, the income generated by investments in companies in third countries, and the profits earned in such countries.[clxxvi]

The determination of the tax domicile of a European Company is addressed by the Proposal,[clxxvii] which states that the SE 'shall be treated as resident in the Member State in which the centre of its effective management is located.'[clxxviii]

The mobility of European Companies is protected by removing tax obstacles that could hinder planned transfers.[clxxix] After a minimum period of five years' residence for tax purposes in one Member State (preventing potential abuse), the Proposal provides for transfers to be made free from tax liability.[clxxx]

The complexity and detailed substance of the 1970 Proposal, and the fact it encroaches upon areas of law traditionally seen as the preserve of national legislatures (such as tax law), meant that it did not take long before the first difficulties started to become apparent. Coupled with disagreements upon the participation of workers, the Member States were unable to reach consensus, and the 1970 Proposal was finally rejected.

4. Time to Start Over?

The genesis of the European Company captured the zeitgeist of the post-war era. Infused with potential, and promise this entity captured the kinetic energy of the integrationist movement that epitomised the Communities during the period leading up to the late 1960s.

Confronted with segmentation along political lines, the ethos underlying this structure was compromised, and in the process, its foundations severely enfeebled. To ensure that the SE is an attractive option, it is important that we revisit this structure.

Though the Commission should draw inspiration from the flexibility made available to national corporate forms,[clxxxi] one should not forget that this entity is supranational, and as such distinct from domestic entities. Its untapped potential lies in its uniqueness.

With this in mind, it is imperative that we consider this structure as a vehicle for business. By considering the interests of businesses, we should be better able to develop the structure available addressing the specific needs of those that would hope to use it.

A later transformation into an SE has a major dampening effect, since such a move entails transactional costs, difficulties, and risks, especially when bearing in mind the rules on employee participation. By allowing an SE to be formed *ex-nihilo*, entrepreneurs looking to incorporate are likely to consider this form alongside national alternatives, increasing the competitiveness of this structure, and enhancing its take-up as a corporate vehicle.

By removing the cross-border component, companies will be able to access this structure with ease, ensuring organic development of the business, and access to the SE as a precursor to expansion and a tool in the expansion.

The need for more comprehensive European level provisions governing SEs, especially on the question of taxation, is arguably beneficial to business. However it is also worthwhile considering the value of *renvoi* in this context. A removal of national divergence will not only result in an erosion of autonomy at the national level (which is likely to block, or at least delay, reform of the law) but may also have a negative impact on business. By taking away the ability of nations to compete for inward investment, we are also likely to compromise the interests of businesses that are reliant on this race. The solution here could be to introduce more European level regulation on key issues, whilst leaving pockets of national discretion in a bid to guarantee internal competition amongst Member States.

Taxation of SEs is a concern and rightly so. Using the ideas put forth by the drafters of the 1970 Proposal, it would be sensible to consider the introduction of rules governing taxation of the SE during its lifecycle, and addressing the question of tax domicile. In order to preserve inter-state competition, tax rate could be a matter to be detemined by Member States individually. *Erik Werlauff* proposes the introduction of uniform rules 'under which the tax authorities of the home state were to compute the income for the entire group, including cross-border elements, levy the tax (based on different rates from state to state if necessary) which the entire group was to pay, and then distribute the tax to each of the states involved.'[clxxxii]

Employee participation offers certain benefits to the participating company or companies, its employees, and trade unions. In contrast, the procedures relating to the negotiation of such participation are usually protracted and complex, offering no guarantee of an agreement, and undermining the economic position of the parties involved (founder/s, and its/their stakeholders including employees and trade unions). Whilst the 'before and after' principle offers some relief, perhaps now is the time to reassess this requirement. Bearing in mind the value of employee participation (reviewed above), it is arguably important that the negotiation procedure be simplified, and streamlined.

A final issue to be considered is the requirement that the head and registered offices of the SE are located in the same Member State. By removing this requirement, SEs will enjoy the freedom to adapt their business to internal needs (the need for efficiency, streamlining, sourcing of new assets, and so forth), and external changes (including market conditions, the globalisation process, and competition).

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[i] SE hereinafter.

[ii] Historical background is based on official documents produced by the Commission, prime amongst these is Commission *'Proposal for a Council Regulation Embodying a Statute for European Companies (Submitted to the Council on 30 June 1970)'* COM (70) 600 final (Bulletin of the European Communities, Supplement 8/70) (1970 Proposal).

[iii] *Treaty establishing the European Economic Community* [1957] 11957E (Treaty of Rome).

[iv] Speech by Th. Vogelaar, *'Harmonization of Legal and Fiscal Provisions in the EEC – The Concept of the European Company, Fiscal Harmonization; Banking and Insurance'* delivered at the Conference 'Into Europe', 2-4 February 1971 (XIV/105/1/71/E) (Vogelaar 1971 Speech) (writer has a copy of this speech for inspection purposes), 3.

[v] Paul Storm, *'A New Impulse towards a European Company'* 26 Bus Law, 1443 (1970-1971).

vi Johan de Bruycker, *'EC Company Law – The European Company v the European Economic Interest Grouping and the Harmonization of the National Company Laws'* 21 Ga J Int'l & Comp L 191, 199 (1991).

[vii] The idea of a European corporate form straddling national boundaries was launched almost simultaneously (in 1959) in France by C. Thibierge (at the 57th Congress of French Notaries held at Tours in 1959), and in the Netherlands by Professor Pieter Sanders (in his inaugural a speech given at Rotterdam School of Economics in 1959) (Paul M Storm 1970-1971: fn 8).

[viii] Pieter Sanders, *'The European Company'* 6 Ga J Intl & Comp L 367, 367 ff (1976).

[ix] Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE) OJ L294/1(SE Regulation) (SE Regulation)

[x] Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European Company with regard to the Involvement of Employees OJ L294/22 (SE Directive).

[xi] Marios Bouloukos, *'Le Régime Juridique de la Société Européene (SE): Vers Une Société Européenne à la carte ? The Legal Status of the European Company (SE) Towards a European Company «à la carte »?'* Int'l Bus. L.J. 489, 490 (2004).

[xii] Casey, Fiedler, and Fath, *'The European Company (SE): Power and participation in the multinational corporation'*, European Journal of Industrial Relations 1-18, 2 (2015).

[xiii] David Donald, *'Company Law in the European Community: Towards Supranational Incorporation'* (1991) 9 Dick J Int'l L 1, 26. For a review of EEIGs see M.K. Meiselles, *'The European Economic Interest Grouping – A Chance for Multinationals?'* (2015) 26 European Business Law Review, Issue 3, 391– 415.

[xiv] Bouloukos 2004: 490.

[xv] Speech by Frits Bolkestein, Member of the European Commission in charge of the Internal Market and Taxation, *'The New European Company: Opportunity in Diversity'* Address to Conference at the University of Leiden 29 November 2002 (SPEECH/02/598), 2 (Bolkestein 2002 Speech).

[xvi] Report from the Commission to the European Parliament and the Council – The Application of Council Regulation 2157/2001 of 8 October 2001 on the Statute for a European Company (SE) (Text with EEA relevance) dated 17.11.2010 COM(2010) 676 final (Commission Report 2010), 4.

[xvii] Bouloukos 2004: 490.

xviii Noëlle Lenoir *'The Societas Europaea (SE) in Europe – A Promising Start and an Option with Good Prospects'* 4 Utrecht Law Review 13, 15 (2008).

[xix] Mario Bouloukos, *'SE as a Vehicle for Corporate Mobility within the EU - A Breakthrough in European Corporate Law?'* EBLR 535, 547 (2007).

xx SE Regulation Art 8(1).

[xxi] Bouloukos 2007: 537.

[xxii] Bouloukos 2007: 547.

[xxiii] Bouloukos 2007: 550.

[xxiv] Bouloukos 2007: 550.

[xxv] Bouloukos 2007: 549.

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[xxvi] Bouloukos 2007: 549.
[xxvii] Bouloukos 2007: 549.
[xxviii] Bouloukos 2007: 547.
[xxix] The specific procedures that must be followed before the registered office of the SE may be transferred are set out in the SE Regulation, specifically in Arts 8 and 59.
xxx Case C-212/97 *Centros Ltd v Erhvervs- og Selskabsstyrelsen* [1999] ECR I-01459 (*Centros*).
[xxxi] Philippe Pellé 'Companies Crossing Borders within Europe' 4 Utrecht Law Review 6, 10 (2008).
[xxxii] Case C-208/00 *Überseering BV v Nordic Construction Company Baumanagement GmbH (NCC)* [2002] ECR I-09919 (*Überseering*).
[xxxiii] Case 81/87 *The Queen v HM Treasury and Commissioners of Inland Revenue, ex parte Daily Mail and General Trust PLC* [1988] ECR I-5483 (*Daily Mail*).
[xxxiv] Case C-210/06 *Cartesio Oktato es Szolgaltato Bt* [2008] ECR I-9641 (*Cartesio*).
[xxxv] For more details regarding the transfer of the registered office see Paul Storm, *'The Societas Europaea: A New Opportunity'*, in Dirk Van Gerven and Paul Storm (eds) *The European Company Volume I* (Cambridge University Press 2006), 11 ff.
[xxxvi] Directive 2005/56/EC on cross-border mergers of limited liability companies (Cross-border Merger Directive).
[xxxvii] Lenoir 2008: 16.
[xxxviii] For an example of a traditional cross-border transformation see Jochem Reichert *'Experience with the SE in Germany'* 4 Utrecht Law Review 22, 24 (2008).
[xxxix] Storm 1970-1971: 1443-4.
[xl] Bouloukos 2007: 539-40.
[xli] Bouloukos 2007: 544.
[xlii] Bouloukos 2007: 545.
[xliii] Lenoir 2008: 17.
[xliv] Art 38(b), SE Regulation.
[xlv] The two-tier system is governed by Arts 39-42, SE Regulation. The one-tier system by Arts 43– 5. The rules common to both systems can be found in Arts 46 – 51.
[xlvi] Art 39(5), SE Regulation.
[xlvii] Christoph Teichmann *'The European Company – A Challenge to Academics, Legislatures and Practitioners'* 4 German Law Journal 309, 312 (2003).
[xlviii] Art 43(4), SE Regulation.
[xlix] Reichert 2008: 29.
[l] Caspar Rose *'The New Corporate Vehicle Societas Europaea (SE): Consequences for European Corporate Governance'* 15 Corporate Governance 112,115 (2007).
[li] Rose 2007: 116.
[lii] Rose 2007: 116.
[liii] Rose 2007: 116.
liv At time of writing all Member States have transposed the SE Directive into national law. Pursuant to the SE Regulation, recital 19 'the rules on the involvement of employees are laid down in Directive 2001/86/EC, and those provisions thus form an indissociable complement to this Regulation and must be applied concomitantly.'
lv Jessica Schmidt *'SE and SCE: Two new European Company Forms – And More to Come!'* 27 Comp Law 99, 104 (2006).
lvi Compulsory co-determination system according to § 96 I *Aktiengesetz* and § 1 I 1 *Mitbestimmungsgesetz*.
lvii Schmidt 2006: 104. Commission Report 2010: 4.
[lviii] Armand Grumberg and Claire Le Gall-Robinson *'Societas Europaea: Ombres et Lumières – Societas Euopaea: Shadows and Lights'* Intl Bus L J 741, 751 [2006] .
[lix] Recital 3, SE Directive.
lx Schmidt 2006: 104.
lxi SE Directive, Annex, pt 3(b) para 2.
lxii Teichmann 2003: 318.
[lxiii] Any national law on the participation of employees is superseded by the procedure for negotiations set out in Art 3 et seq, SE Directive.

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[lxiv] Art 3(1), SE Directive.
[lxv] Art 3(1), SE Directive.
[lxvi] Art 3(2), SE Directive on the composition of the SNB.
[lxvii] Art 3(3), SE Directive.
[lxviii] Reichert 2008: 27. Horst Eidenmüller, Andreas Engert and Lars Hornuf, *'Incorporating under European Law: The Societas Europaea as a Vehicle for Legal Arbitrage'* 10 EBOR 1, 8 (2009).
[lxix] Schmidt 2006:104.
[lxx] Reichert 2008: 27.
[lxxi] Reichert 2008: 27.
[lxxii] Reichert 2008: 28. Eidenmüller 2009: 8.
[lxxiii] Commission Report 2010: 4.
[lxxiv] Commission Report 2010: Footnote 5.
[lxxv] Teichmann 2003: 320.
[lxxvi] Teichmann 2003: 320.
[lxxvii] Teichmann 2003: 320.
[lxxviii] Teichmann 2003: 320.
[lxxix] Bolkestein 2002 Speech, 3.
[lxxx] Marcus Lutter and Peter Hommelhoff *Die Europäische Aktiengesellschaft* (Dr Otto Schmidt 2005), 3.
[lxxxi] Art 11, SE Regulation.
[lxxxii] Bolkestein 2002 Speech, 3.
[lxxxiii] Christina Di Luigi, *'An invasive top-down harmonization or a respectful framework model of national laws? A critique of the Societas European model'* 19 ICCLR 58, 62 (2008) .
[lxxxiv] Commission Report 2010: 3.
[lxxxv] Whilst a national label is of greater consequences in certain Member States and in specific sectors, in smaller Member States and export-oriented Member States (such as Germany), this European label is particularly consequential. With SEs registered in twenty-one out of the thirty EU/EEA Member States (at the time of the Report published in November 2010). With the bulk of these registered in the Czech Republic and Germany (roughly 70% of all registered SEs). (Commission Report 2010: 3)
[lxxxvi] Storm 1970-1971: 1444.
[lxxxvii] Grumberg et al 2006: 761.
[lxxxviii] Mathias Siems *'The impact of the European Company (SE) on Legal Culture'* 30 E L Rev 431, 434 (2005).
[lxxxix] Bolkestein 2002 Speech, 2.
[xc] Storm 1970-1971: 1444.
[xci] Storm 1970-1971: 1444.
[xcii] Commission Report 2010: 3.
[xciii] Lenoir 2008: 15.
[xciv] Lenoir 2008: 15 citing the CEO of Allianz SE.
[xcv] Lenoir 2008: 15 speaking of Arcelor.
[xcvi] *'Nous sommes un pionnier de l'intégration industrielle européenne; il est donc logique et grand temps que notre culture multinationale se reflète dans notre entité légale.'* (extract from Newsletter to Shareholders number 37, January 2014)
[xcvii] Storm 1970-1971: 1444.
[xcviii] Thirty-one EU/EEA Member States counting the twenty-eight Member States, and the three EEA Member States that are not EU members (Liechtenstein, Iceland and Norway). (Bouiloukas 2004: 501 citing Michel Menjucq, *Droit international et européen des société (*Domat, 2001) 128)
[xcix] Lenoir 2008: 13.
[c] For a detailed description of the types of *renvois*, see Stefano Lombardo and Piero Pasotti *'The Societas Europaea: a Network Economics Approach'* 2 ECFR 169, 176 ff (2004).
[ci] Luca Enriques *'Silence is Golden: The European Company Statute As a Catalyst for Company Law Arbitrage'* 4 J Corp L Stud 77, 85 (2004).
[cii] Enriques 2004: 86.
[ciii] Bouloukos 2004: 501. Joseph A McCahery and Eric P M Vermeulen *'Does the European Company Prevent the 'Delaware Effect'?'* 11 European Law Journal 785, 786 (2005) .

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[civ] Veronique Deau and Roland Montfort, *'Establishing an European Company ("SE"): a new Eldorado for European group companies and for practitioners? A French perspective'* 17 ICCLR 271, 271 (2006).

[cv] It has been debated whether this process of convergence will lead to a 'climb to the top' or rather a 'race to the bottom' (towards the lowest common denominator). (Eidenmuller et al 2009: 4)

[cvii] Bolkestein 2002 Speech, 2.

[cviii] Such savings were estimated at up to €30 billion per year. (Bolkestein 2002 Speech, 2)

[cix] Bolkestein 2002 Speech, 2.

[cx] Volker Triebel and Christopher Horton, *'Will more English Plcs take off in Germany?'* 25 Intl Fin L Rev 34, 36 (2006).

[cxi] Reichert 2008: 31.

[cxii] Reichert 2008: 31.

[cxiii] Grumberg et al 2006: 745.

[cxiv] Lenoir 2008: 18.

[cxv] Bolkestein 2002 Speech, 2.

[cxvi] Di Luigi 2008: 62.

[cxvii] Art 10, SE Regulation.

[cxviii] Recital 5, SE Regulation.

[cxix] By giving effect to the following extract from the ruling in *Überseering* 'it is not necessary for the Member States to adopt a convention on the mutual recognition of companies in order for companies meeting the conditions set out in Article 48 EC (now Article 54 TFEU) to exercise the freedom of establishment conferred on them by Articles 43 EC (now Article 49 TFEU) and 48 EC ... It follows that no argument that might justify limiting the full effect of these articles could be derived from the fact that no convention on the mutual recognition of companies has as yet been adopted on the basis of Article 293 EC (Article 293 TEC has now been repealed).'

[cxx] Erik Werlauff *'The SE Company – A New Common European Company from 8 October 2004'* 14 EBLR 85, 90 (2003).

[cxxi] Lenoir 2008: 17, citing Art 2, SE Regulation.

[cxxii] Art 2(1), SE Regulation (public limited liability companies incorporated in different Member States looking to form an SE by means of a merger be it a takeover or consolidation).

[cxxiii] Art 2(2), SE Regulation (companies looking to create an SE as a holding company).

[cxxiv] Art 2(3), SE Regulation (companies looking to form an SE as its subsidiary).

[cxxv] Art 3(2), SE Regulation (an SE that establishes one or more subsidiaries in the form of SEs).

[cxxvi] Art 2(4), SE Regulation (a public limited liability company formed under the law of one of the Member States, which has a registered office and a head office within the EU, is permitted to transform itself into an SE if it has had, for at least two years, a subsidiary company governed by the law of another Member State).

[cxxvii] Storm 1970-1971: 1448.

[cxxviii] Storm 1970-1971: 1448.

[cxxix] Art 2, SE Regulation.

[cxxx] Art 2(1), SE Regulation.

[cxxxi] Art 2(2), SE Regulation.

[cxxxii] Art 2(3), SE Regulation.

[cxxxiii] Mads Andenas and Frank Woolridge, *European Comparative Company Law*, 394 (Cambridge: Cambridge University Press, 2009).

[cxxxiv] Bouloukas 2004: 501.

[cxxxv] Bouloukas 2004: 500.

[cxxxvi] Bouiloukas 2004: 501 citing Michel Menjucq, *Droit international et européen des sociétés*, 128 (Paris: Domat, 2001).

[cxxxvii] Lenoir 2008: 13.

[cxxxviii] Bouloukos 2007: 535, 547.

[cxxxix] William W. Bratton, Joseph A. McCahery, and Erik P.M. Vermeulen, *How Does Corporate Mobility Affecting Lawmaking? A Comparative Analysis*, 57 Am. J. Comp. L. 347, 385 (2009).

[cxl] Bouloukos 2007: 556.

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Mis en forme ... [101]

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Mis en forme ... [103]

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Mis en forme ... [104]

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Mis en forme ... [105]

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Mis en forme ... [106]

Michala Meiselles 21/2/17 06:55
Supprimé: (2006)

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Mis en forme ... [107]

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Mis en forme ... [108]

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Mis en forme ... [109]

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Mis en forme ... [110]

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Mis en forme ... [111]

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Mis en forme ... [112]

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Mis en forme ... [113]

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Mis en forme ... [114]

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Supprimé: , recital 5

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Mis en forme ... [115]

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Mis en forme ... [116]

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Mis en forme ... [117]

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Mis en forme ... [118]

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Supprimé: , Art 2(1)

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Mis en forme ... [120]

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Mis en forme ... [121]

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Supprimé: , Art 2(2)

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Mis en forme ... [122]

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Mis en forme ... [123]

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Mis en forme ... [127]

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Mis en forme ... [128]

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[cxli] Bouloukos 2007: 552.
[cxlii] Bouloukos 2007: 556.
[cxliii] Bouloukos 2007: 556.
[cxliv] Bouloukos 2007: 552 referring to Art 7, SE Regulation.
[cxlv] It should be mentioned here that the SE Regulation does not include a definition of what constitutes a 'head office'. Since at the present time, there is no clear and definitive interpretation from the European Courts on this point, the Member States still have some degree of latitude when interpreting the term 'head office'. Other terms associated with 'head office' are 'central administration' and 'true centre of operations'. (Storm 2006: 8).
[cxlvi] Bouloukos 2007: 552 referring to Art 7, SE Regulation.
[cxlvii] Bouloukos 2007: 552.
[cxlviii] Art 64(2), SE Regulation.
[cxlix] Bouloukos 2007: 554.
[cl] Storm 1970-1971: 1449-50.
[cli] Grumberg et al 2006: 752.
[clii] Grumberg et al 2006: 752.
[cliii] Commission Report 2010: 4.
[cliv] Commission Report 2010: 4.
[clv] Commission Report 2010: 5.
[clvi] SE Regulation, recital 20.
[clvii] Di Luigi 2008: 64.
[clviii] Di Luigi 2008: 64.
[clix] Bolkestein 2002 Speech, 3-4.
[clx] Werlauff 2003: 86.
[clxi] Werlauff 2003: 86.
[clxii] Vogelaar 1971 Speech: 8.
[clxiii] Gundelach 1973 Speech: 2.
[clxiv] Keller 2002: 425.
[clxv] 1970 Proposal: 215.
[clxvi] 1970 Proposal: 215.
[clxvii] 1970 Proposal: 215.
[clxviii] The Proposal refers to Council directive of 17 July 1969 (Official Gazette of the European Communities L249 of 3 October 1969) which is seen as a way of addressing the rate of capital duty in the case of a merger, or of a subscription of capital in the form of part of an undertaking (1970 Proposal: 216).
[clxix] 1970 Proposal: 216.
[clxx] Art 275, 1970 Proposal.
[clxxi] 1970 Proposal: 215.
[clxxii] 1970 Proposal: 215.
[clxxiii] 1970 Proposal: 215.
[clxxiv] 1970 Proposal: 216.
[clxxv] 1970 Proposal: 216.
[clxxvi] 1970 Proposal: 217.
[clxxvii] 1970 Proposal: 217.
[clxxviii] Art 276(1), 1970 Proposal.
[clxxix] 1970 Proposal: 217.
[clxxx] 1970 Proposal: 217.
[clxxxi] Report of the Reflection Group on the Future of EU Company Law Brussels, 5 April 2011 (Reflection Group Report 2011), 31.
[clxxxii] Werlauff 2003: 87.

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Michala Meiselles 26/2/17 08:16 Mis en forme ... [147]
Michala Meiselles 26/2/17 08:16 Mis en forme ... [148]
Michala Meiselles 26/2/17 08:16 Mis en forme ... [149]
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Michala Meiselles 26/2/17 08:16 Mis en forme ... [154]
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