



FACULTY OF LAW
University of Lund

**Master of European Affairs programme,
Law**

Antonello Romano

Will the SE Incentive the Process of
Harmonization or Determine the Opposite
Outcome?
A Critical Analysis of the SE's
Transnational Construction.

Master thesis
20 points

Lennart Johansson

EC Company Law

Spring 2007

Contents

1	INTRODUCTION	4
2	THE ORIGINS OF THE SE.....	6
2.1	AN APPROACH ALTERATION: THE CONCEPT OF APPROXIMATION	9
3	THE FORMATION OF A SE	13
3.1	THE COMPANY SEAT	15
3.2	SOCIETAS EUROPAEA'S MANAGEMENT: BETWEEN THE TWO-TIER SYSTEM AND THE ONE-TIER SYSTEM.....	16
3.2.1	<i>The two-tier system.....</i>	<i>16</i>
3.2.2	<i>The one-tier system.....</i>	<i>17</i>
3.2.3	<i>Council directive on the involvement of employees.....</i>	<i>18</i>
3.2.4	<i>The importance of the employees involvement.....</i>	<i>18</i>
3.2.5	<i>The content of the employees involvement in the SE.....</i>	<i>19</i>
4	THE SE TAXATION	21
4.1	THE EUROPEAN COMMISSION APPROACH	21
4.2	EXTENSION OF THE DIRECTIVE 435/90	22
4.3	INTRA-EU PAYMENTS OF INTERESTS AND ROYALTIES BETWEEN SE	24
4.4	DIRECTIVE 2005/19: TAXATION NEUTRALITY AND TRANSFER OF SEAT	25
4.5	THE SE AS CANDIDATE FOR C.C.B.T	28
4.6	CONCLUSION	30
5	THE SE –TRUE EUROPEAN ESSENCE?	31
5.1	RAPPOR OF THE SE WITH NATIONAL LAWS	31
5.2	THE SOCIETAS EUROPAEA AND THE EUROPEAN LEGAL CULTURES	35
5.3	DIFFERENT MEMBER STATES' EXPERIENCES: LEGAL DIFFERENCES	35
5.4	THE SE: DIFFERENT EUROPEAN EXPERIENCES	37
5.4.1	<i>The SE in Austria.....</i>	<i>37</i>
5.4.2	<i>The SE in the UK.....</i>	<i>40</i>
6	UNSUITABILITY OF THE SE'S CONSTRUCTION.....	44
7	FINAL OBSERVATION	48

Summary

In the beginning of the October 2004 a new legal entity made its debut in the European Community system: the SE or Societas Europaea.

The content of the regulation introducing this corporate form clearly shows how the SE project has been concretised in reality. First of all, it is possible to ascertain that the landmark legal framework is constituted essentially by two texts: the EC regulation 2157/2001 establishing the Statute of the Company and the EC directive 86/2001 which completes the latter regulating the employees' involvement. The scheme adopted for the SE, together with the cross-reference operated towards the corporate disciplines of the single Member States, seems to have reintroduced the competitiveness of the national systems in relation to the higher or lower degree of facility of putting into practice the directives within each one of them.

In conclusion, the impression is that the SE represents a missed chance to unify the European Company Law; the legislator has in fact failed in the creation of a completely self-sufficient statute and, therefore a company regulated in a uniform manner in all the Member States' legal systems.

Through this dissertation, after an initial depiction of the functioning of the SE, it will be possible to comprehend the leading reasons for affirming that its construction, as it was conceived, appears to be inappropriate in the light of the desirable growth of the Common Market (at least in a direction leaning towards an higher degree of harmonisation).

The main structural problems in the actual SE model have different nature and consistency; what appears to be most cogent is the subsistence of a fiscal discipline which has been proven profoundly inadequate. The consequent subjection to the national taxation provisions is a relevant drawback in due to the fact that the SE might not be considered more appealing than other forms of companies regulated by national legislations. The fiscal issue has to be added to the broader field of the European legal cultures. The differences between the concepts of corporate governance are

very well rooted in the legal tradition of the Member States and the SE regulation and directives have not been capable to surmount this obstacles. The European character of the SE appears to be very inconsistent: too much weight and influence is granted to the Member States. Hence, the leading question regards the consistency of the SE supranational nature together with the most plausible consequence of the ongoing orientation, namely, the possible growth of legal uncertainty tied to the unpleasant developments of the SE's discipline. This is witnessing a heavy defeat concerning the harmonisation process, in the light of the growing proliferation of the corporate disciplines delegated to govern the SE's affairs. The forthcoming investigations will try to clear some of the reasons for the unfortunate shift of legal balance towards the Member States which is putting the SE's European essence in serious peril.

Abbreviations

AktG	Aktiengesetz
CAG	Competitiveness Advisory Group
C.C.B.T	Common Consolidate Base Taxation
DTI	Department of Trade and Industry
EC	European Community (Communities)
ECJ	European Court of Justice
ECS	European Company Statute
EEC	Economic European Community
EU	European Union
GesRÄG	Gesellschaftsrechtsänderungsgesetz
MKT	Market
SE	Societas Europaea

1 INTRODUCTION

The legal form of the European Company, or *Societas Europaea*¹ (SE), was shaped by the European Council on the 8th of October 2001. This became subject to Community Law in all the EU Member States on the 8th of October 2004 as conclusion of a long and winding “iter” of negotiations which lasted for over 30 years after its first proposal back in 1970. The former supporters of the European Company visualized a corporate vehicle which would have assured the Freedom of Establishment laid down in the Treaty, averted the possibility of conflict of company rules between two Member States of the Community and represented an ideal means for an appropriate functioning of the European Capital Market. By December 2001, the European Company Statute (ECS, introduced by Regulation 2157/2001²) was completed by the directive 86/2001 on the employee involvement. The Commissioner, Mr. Bolkestein considers that : “The European Company will enable companies to expand and restructure their cross-border operations without the costly and time-consuming red tape of having to set up a network of subsidiaries. This is a practical step to encourage more companies to exploit cross-border opportunities and so to boost Europe's competitiveness. Moreover, according to Professor Winter , the cross-border traffic is the most attractive feature of the *Societas Europaea* (SE)”³. This vehicle characterized by ambitious supranational objectives, recognizes the limits of the harmonization process in the national company law systems, which do not exempt companies in the Member States from the juridical regimes envisaged in the different legal systems. The necessity to equip the Union with better tools to develop and strengthen the condition of the European company law structure in order to fulfil the requirements of the economic context, imposes a new European dimension,

¹ The decision to maintain the Latin name for the European Company is an interesting one. “*Societas Europaea*” seems to refer to the era of a unified Europe under Roman control and “*societas*” can be translated as fellowship, partnership, association or alliance.

² The provisions in question are found in the Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE), unless pointed out differently.

³ Gammie, *EU Taxation and the SE, Harmless Creature or Trojan Horse*, EU taxation, vol. 44, p 36, 01/2004.

redeemed from the barriers of the national legislations and their strict territorial applicability.

According to the regulation, the SE is accessible if it is fashioned following one of four prearranged schemes⁴. The SE is not to be considered a replacement of any corporate model on a national dimension but it constitutes an alternative as an additional entity in the field of the corporate business system.

Analyzing it in a pragmatic way, the regulation gives the impression of playing a modest part in order to harmonise the European company laws. Verifications in favour of this statement can be deducted from the regulation's exhaustive preface and stipulations. Moreover, the influence of the diverse legal apparatuses and legal traditions existing in the European Community is liable to be broad in view of the fact that the regulation systematically adopts references to national laws together with national administrative and judicial configurations. In fact, the disciplines regulating the creation of a European Company and its activities as a corporation are widely held in reserve for the Member States. This renders these aspects of the regulation as the predominant ones rather than smoothing the process of the growth of a European Company which then would be able to work on a European dimension liberated of the boundaries represented by the existing legal technical difficulties of the European company law.

In the light of what has previously been pointed out, it becomes clear that the main aim of this paper will be an in depth analysis of the influence of the law of the Member States and their legal cultures on the configuration and structure of the European Company. As consequence, the main purpose will be to demonstrate that the SE regulation will give a significant contribution to the proliferation of corporate laws within the European Community instead of giving incentives to its harmonisation.

⁴ Art 70.

2 THE ORIGINS OF THE SE.

The establishment of the SE was originally proposed in 1959 and the official proposal of its adoption was made in 1970. This proposal appeared “in the early hours” of the Community’s life and it had the prime objective of enabling companies to work in a more efficient and economical way on a trans-national level. Shortly after the entry in to force of the Treaty of Rome, which established the European Economic Community (EEC), two original proposals for the creation of the European Company were presented in 1959⁵. However the European Commission did not officially advocate the recommendation of a regulation for the Statute of a European public limited-liability company until 1970⁶. The recommendation was subsequently modified in 1975. In the following years, modest progress was made and the official approval of the regulation did not in fact happen until its implementation about 30 years later at the begin of the new millennium. This event was a result of the superior emphasis on the necessity to construct a SE⁷.

The most important factor to motivate the late fast-moving of the regulation seemed to be of economic nature. The Competitiveness Advisory Group (CAG) was instituted in 1995 as a reaction to the "apparently intractable competitiveness deficit between the European Union and its main trading partners and rivals, the United States and Japan"⁸. This new entity believed that “the disparities in the performance of the different parts of the world stem from their varying ability to meet the demands of economic globalisation”⁹.

⁵ Hopt, ‘Company Law in the European Union: Harmonization or Subsidiarity’, Saggi, Conferenze e Seminari, Centro di studi e ricerche di diritto comparato e strano, Roma 1998.

⁶ See Preface to the regulation par 9.

⁷ Schulz and Eickler, "The European Company Statute – the German View", Intertax, p. 332, 2001.

⁸ CAG, "Sustainable Competitiveness", Report to the President of the Commission and the Heads of State and Government, September 1999 at 1:

<http://europa.eu.int/comm/cdp/cag/publications/rapport4/indexen.htm>.

⁹ See supra. CAG, "Sustainable Competitiveness".

It acknowledged the acceleration of the process of constitution of the internal market and the abolition of excessively disproportionate regulations as two essential factors falling within the top 20 addressing EU competition and the competitiveness deficit¹⁰.

In 1999, with the development of the Financial Services Action Plan the main concerns to be taken care of, over a 5 year period were scheduled. The creation of this body had the main task of permitting the full achievement of benefits for the Community from the moment of the adoption of the Euro and guarantee the constant competitiveness of the EU financial markets. The Member States' accord on the form of the SE statute was also on the list of the Action Plan's central objectives. As pointed out before, when the regulation came into force on October the 8th 2004, it was considered to have accomplished one of the chief goals within the mentioned 5 year period.

The directive on employee involvement was considered as a precondition for the adoption of the Regulation¹¹. The EU Commission, made clear that the technical troubles in reaching an accord on facets related to corporate law originated the 3 decade postponement of the regulation approval. This delay did not come as unexpected in view of the fact that the EU Member States have an extensive variety of national laws principally in the field of employee involvement in the context of the company's executive¹². Furthermore, it is a sign of the crucial role displayed by the different legal cultures in the unravelling of the SE's history, and as evidence of the variety of traditional and cultural discrepancies related to the position of the workforce in a company¹³.

The concern of employee involvement had necessitated negotiations at the time when the European Council gathered in Nice in 2001 ensuing in the

¹⁰ Marychurch, *Societas Europaea: Harmonization or Proliferation of Corporations Law in the European Union?*, University of Wollongong, p 2, 2002.

¹¹ As the directive was approved on the same day as the regulation, it maybe looks more of a co-requisite than a pre-requisite.

¹² European Commission, "The European Company – Frequently Asked Questions", 19 December 2000 at 11; also refer "Why has it taken thirty years to approve this proposal?" at http://europa.eu.int/comm/internalmarket/company/company/news/ec_companyfaq.htm

¹³ For a detailed charting of worker participation in the harmonisation process see Kolvenbach, "EEC Company Law Harmonization and Worker Participation", *University of Pennsylvania Journal of International Business Law*, p. 709, 1990.

Council Directive 2001/86/EC on October the 8th ¹⁴. This directive was supposed to have been adopted since 1989. These data results are of utmost importance if contextualised in Ebke's chronological analysis on the evolution of European company law harmonisation process.

Ebke observes that the majority of the progresses were attained in the 1968-1978 decade, with much less growth in the subsequent one. From then on, advancements underwent practical languishment¹⁵.

In the 20 years elapsing from 1970 to 1989, numerous directives were adopted and put into operation with the purpose of harmonising the Member States' national corporate disciplines.

Seeing that there were intrinsic problems in achieving the accord of the 15 contracting States at that time, it was not unpredictable that steps forward in harmonisation, by means of directives, could have been lethargic and burdened with impediments. It appears remarkable that the regulation has called attention to what follows¹⁶:

“work on the approximation of national company law has made substantial progress, so that on those points where the functioning of an SE does not need uniform Community rules reference may be made to the law governing public limited-liability companies in the Member State where it has its registered office”.

This assertion puts forward an essential change in the SE's essential character in comparison with the original proposal. The expression “approximation” is employed where previously it might have been ordinary to see the word “harmonisation”. This solicits the matter of the alteration of terminology: does it symbolise a modification of the approach concerning the European corporate law and the expectations related to it?

¹⁴ See Council Directive 2001/86/EC of 8 October 2001 on Worker Involvement: Although made by the Council of the EU, a Directive must be implemented through national laws in each Member State to achieve full legal effect.

¹⁵ Ebke, “Company law and the European Union: centralised versus decentralised lawmaking” *The International Lawyer* p. 961- 963, 1997.

¹⁶ Preface to the regulation. par. 9.

2.1 An approach alteration: the concept of approximation

It appears remarkable the way language and intentions have produced "harmonisation" and "approximation" and its significance is enhanced when the term "approximation" seems to replace "harmonisation" in the regulation. The regulation's preface declares *inter alia*¹⁷:

“restructuring and cooperation operations involving companies from different Member States give rise to legal and psychological difficulties and tax problems”.

The approximation of Member States' corporate legal disciplines through the usage of directives issued on the basis of art 44 of the Treaty¹⁸ can surmount a number of these difficulties.

The concept of approximation does not, however, discharge companies created in accordance with diverse legal systems from the requirement to select a corporate structure presided over by a particular national law.

The "approximation" of the corporate laws of the different Member States has been depicted up till now as "harmonisation", even in official circles¹⁹.

The alteration in language has happened rather abruptly and it is referred to those directives meant to belong to the harmonisation process. It appears intrinsic to this situation the question of the utilization of the two expressions: are they identical in their meaning or does this transformation symbolise a change in attitude on how far-reaching the harmonisation process is estimated to be possible in the European Community? "Approximate" can signify “exact; inexact, almost accurate, rough, loose”²⁰. To "harmonise" stands for “to render or become harmonious, such as to combine parts in a logical or pleasing manner”²¹. According to these definitions, conceivably, at a first sight the expressions do not appear very

¹⁷ Preface to the regulation. par 9, (See *supra*).

¹⁸ Treaty establishing the European Community, as amended.

¹⁹ See European Parliament, Committee on Economic and Monetary Affairs, Report on the Commission communication on implementing the framework for financial markets: Action Plan (COM (1999) 232–C5-0114/1999 – 1999/2117 (COS)), 1 March 2000; Commission Communication of 14 November 1995 – Accounting harmonisation: a new strategy vis-a-vis international harmonisation (COM 95/508).

²⁰ *Dizionario Fondamentale Inglese-Italiano*, De Agostini, 1994.

²¹ *Dizionario Fondamentale Inglese-Italiano*, (See *supra*).

dissimilar. For example, given these similarities, will the two things not stay together without discordances? Unluckily, the response does not automatically agree.

Ebke mutually employs the two expressions when indicating the USA's process of harmonisation in the field of company law in contrast to the one espoused in the European Community during the initial 25 years after the birth of the original scheme of the SE.

In this context he asserts²²: "model laws and restatements have had considerable influence in the United States on the approximation of state laws in general and on company law in particular. Legal harmonization in the area of law of business associations is achieved not from the top down by means of federal legislation, but through the model act's or the restatement's persuasive force on both state legislatures and judges. The greatest advantage of this method is that, because of its pragmatic approach, it preserves the movement towards integration even if a Member State resists further sovereignty concessions. Model laws and restatements would allow the Member States more favourably disposed to legal integration to proceed despite dissent by other Member States. The benefits achieved through such voluntary approximation of the law might then convince the resisting Member States also to adopt the model act. It will ultimately be a question of Member State loyalty, economic pressure and legal pragmatism".

The closeness involving the chronological outline of Ebke's dissertation and the employment of a terminology analogous to the one eventually utilized in the regulation implies that the alteration in the utilization of the language in the Community's apparatuses when approving a regulation occurred throughout the early 1990's. In this phase it is possible to observe the most strenuous endeavours for accomplishing the realization of the SE from the time when it was initially proposed.

An issue that has come up is whether in the regulation the use of the term approximation has the equivalent sense that it finds in Ebke's suggestions.

²² Ebke, "Company Law and the European Union: Centralized versus Decentralised Law making", p. 961- 984-5 (see supra) .

The arguments discussed above hint that Ebke adopts a soft approach. Albeit the Commission opted for the continuous utilization of regulations and directives to complete the SE's scheme, the significant references to the Member States' laws (as in the regulation itself) also indicates a flexible, less authoritarian approach thus highlighting persuasion as the favoured manner to attain a consistent implementation.

In addition to the modification in the language appearing in the Regulation, the EU Commission has considerably changed its approach. Kolvenbach sees the Commission's attitude in 1989 in the following way²³:

“in the Green Paper, the Commission raises the rhetorical question of why it has proposed Community legislation in relation to the undeniably controversial and difficult issue of the role of employees in relation to the decision-making structures of companies? Is this not an issue which should be left to the Member States to handle in their own particular ways as an essentially domestic matter? In order to answer this rhetorical but very valid question, the Commission repeats: “If progress is to be made towards a European Community in the real sense of the word, a common market for companies is an essential part of the basic structure which must be created”.

The Green Paper was released before the adoption of the regulation and directive. In the space of a decade, the central considerations characterizing the SE's fundamental construction have undergone through noticeable changes. As an alternative to “the European scheme of harmonising company laws...supported by a federal position where the harmonisation outcomes in modest capacity of control by the Member States in these subjects”²⁴, the European Community has espoused a referral plan for them which concerns central facets of the configuration and regulation of the European Company. Practically, this indicates that the EU's flexible and

²³ Kolvenbach, on the Commission of the European Communities, Draft Regulation on Statute for a European Company, COM. No 268 Final 9 Aug. 25, 1989), published in 57 Common Mkt. L.R/ 120 (1990), Draft Directive on a Statute for a European Company: Commission of the European Communities, Proposal for a Council Directive Complementing the Statute for a European Company with regard to the Involvement of Employees in the European Company, COM 268 Final (Aug. 25, 1989), published in 57 Common Mkt. L.R. 274 (1990).

²⁴ Kolvenbach, on the Commission of the European Communities, Draft Regulation on Statute for a European Company, (See supra).

persuasive attitude is liable to determine the proliferation of corporate disciplines in its territory, instead of creating suitable conditions for their harmonisation. The divergences intrinsic to the approximation concept, although minor, could possibly obstruct or even render vain the SE's efforts for the achievement of success as a desirable corporate form. The legal traditions of all Member States will also display a significant role in determining the structure, substance and relevance of their local law in regard of the European Company. The unavoidable corollary of this could be the continuing discrepancy on how this entity must be regulated in relation to the different applicable laws. It is probable that, with no supplementary effort in achieving harmonisation, the potential consequence may be the "Delaware Syndrome"²⁵ in Europe. In order to avoid this risk the former quasi-federal attitude towards harmonisation, with less weight granted to the Member States' authority, could be followed.

The regulation essentially generates a supplementary stratum of law on a European level, where the national laws of Member States will exert substantial influence. Accordingly, a solution for a fruitful harmonisation process that can also represent a precondition for enhancing competitiveness and efficiency, specifically, the eradication of a disproportionate degree of regulation²⁶, has not been attained.

²⁵ The Delaware syndrome is referred to William Cary's assertion that the American state of Delaware's dependence on revenue obtained from incorporation charges guided it to engage in a so called race to the bottom against other States in order to adopt laws more favourable to managers over shareholders. For a summary of the debate see Romano R, *The Genius of American Corporate Law* AEI Press, Washington Chapter 2, 1993.

31 CAG, *Sustainable Competitiveness: Report to the President of the Commission and the Heads of State and Government*, September 1999.

²⁶ Art. 1(3).

3 THE FORMATION OF A SE

The structure of SE, in the view of an economic dynamic functioning on a supra-national dimension, is one of a public limited liability company equipped with legal capacity acquired by means of enrollment in the register designed by the law of the State where the seat of the company is located²⁷. The SE must communicate the enrollment or an eventual cancellation of the registration through a note published in the Official Journal of the European Union²⁸. Furthermore, the company structure must be of “reasonable entity”²⁹, this seems to be guaranteed by a subscribed capital of not less than 120.000 EUR divided into shares³⁰.

Only legal units can establish a SE. The legal units, taking part in the process of creation of a SE, must be recognized along with the law of a Member State. Direct ownership, prerogative of natural persons, is not allowed in the context of the SE. One more condition is that the registered office and head office of the legal units involved in the SE construction should be situated in the same Member State.

A SE can be created in four fundamental manners: merger, establishment of a holding SE, establishment of a subsidiary SE, or conversion of an existing public limited liability company into a SE. Additionally to the above mentioned alternatives, a European Company can be fashioned by a previously existing European Company³¹.

Given that each SE must be listed in the commercial register (or in any other similar register) of the Member State where its head office is placed, each Member State had, for that reason, to enact a pertinent legislation to permit the registration of European Companies in their national commercial registers.

²⁷ Art 12 and 16.1.

²⁸ Art 14.1.

²⁹ Pietro Paolo Onida, *Tensioni non Risolte nel Nuovo Diritto Societario: una Lettura Romanistica*, Tradizione Romanistica, 2004 p 4.

³⁰ Art 4.1.

³¹ Art 2.

As said previously, one way to form a SE is the merger of several limited liability companies provided that at least two of them are governed by the law of different Member States³².

A second modality is represented by the constitution of a holding SE related to more companies provided that they are governed by the law of different Member States or that they have had, for at least two years, a subsidiary subjected to the law of a different Member State or a branch located in another Member State³³.

A third manner is the creation of a SE subsidiary of legal bodies governed by public or private law which have the requirements mentioned for the constitution of a holding SE³⁴.

The fourth is represented by the transformation of a public limited liability company, formed pursuing the law of a Member State and having the seat within the territory of the Community, into a SE, provided that for at least two years it had a subsidiary regulated by the law of a different Member State³⁵.

A SE may itself set up one or more subsidiaries in the form of other SEs³⁶. A SE may be transformed into a public limited liability company governed by the law of the Member State in which its registered office is located. Decisions on conversion may be taken only after two years have elapsed since its registration or after the approval of the first two sets of annual accounts³⁷. All of these different methods of construction of a SE, except for the case of the creation of a subsidiary SE, are based on projects drawn up by the assembly members of all the companies concerned by the merger. As it has been correctly noticed, only the constitution of a holding SE is, in most European juridical systems, a concrete novelty, since the other constitutive processes were already well known and used in their

³² Art 2.1

³³ Art 2.2.

³⁴ Art 2.3.

³⁵ Art 2.4.

³⁶ Art 3.2.

³⁷ Art 66.

substance³⁸. It appears important to observe that in the in case of creation of a holding SE the companies do not incur into winding up processes³⁹.

3.1 The company seat

With the purpose of determining the law of the Member State to be applied to the SE, the seat of the company is the one where, within the European Community territory, it has its central administration. In this regard, a Member State could discretionally impose in the apparatus of a SE the coincidence of the central administration with the main seat of the company⁴⁰.

In order to facilitate the construction of a SE, the regulation forbids the Member States from imposing excessive restrictions for the constitution of the company or the transfer of the seat⁴¹.

In case of transfer of the seat of a SE from a Member State to another, the company maintains its own identity: the transfer of the seat, in fact, imposes neither the winding up of the company in its former Member State nor the creation of a new legal entity in the Member State of destination⁴². Furthermore, a SE, with the exception of the limitations entailed in the Member States company law provisions and in Community law, can freely transfer its seat in another Member State bearing in mind the rights of the shareholders and/or creditors, and the consequences that could be born by the employees⁴³. The necessary procedures required by the relocation of the company's seat, are regulated by a detailed system of guarantees in benefit of shareholders and third parties. The most important guarantees are the ones concerning employee involvement and publicity of the (transfer) operation, which must be proposed by the administrators and approved by the assembly. Specific conditions are required when a company, without the

³⁸ Rescio, *La Società Europea*, in *Diritto delle Società di Capitali. Manuale breve*, prefazione di Libonati, Milano, p. 181, 2003.

³⁹ Art 32.1.

⁴⁰ Art 3 and 7. In this context see also Rescio, *La Società Europea*, p. 160 (see supra).

⁴¹ Preface to the regulation par 5.

⁴² Art 8.1.

⁴³ Art 8.2 and 3.

central administration located within the Community, intends to participate to the constitution of a SE: in that case the company must, firstly, be constituted in accordance with the law of one of the Member States, secondly, it must have its registered office in that Member State and thirdly, it has to maintain a continuous and real link with the Member State's economy⁴⁴.

3.2 Societas Europaea's management: between the two-tier system and the one-tier system

The management models of a SE appears to have been shaped with the attributes of a two-tier system and with the aspects of a one-tier system⁴⁵.

The regulation, in regard to the two fundamental structure systems of a limited liability company, establishes that a SE can be discretionally constituted in accordance with the one considered as the most suitable, in consideration of the pursuit of its objectives. Only, the respective tasks of those responsible for management and those responsible for supervision should be clearly defined⁴⁶.

3.2.1 The two-tier system

The first system, classified as the two-tier system, concerns a SE equipped with an executive organ with management tasks⁴⁷ and a supervisory organ which is invested in the burden of controlling the unrolling of the management tasks⁴⁸. These two organs must be composed by different subjects⁴⁹. The supervisory organs are required to appoint or remove the management organs. The local legislation of a Member State may, however,

⁴⁴ Preface to the regulation par. 23 where we find a noticeable reference to the principles instituted in the 1962 by the General Programme for the abolition of restrictions on freedom of establishment. This connection exists particularly if a company has got an establishment in that Member State and runs operations there from.

⁴⁵ Art 43 and 44.

⁴⁶ Preface to the regulation par. 14.

⁴⁷ Art 39.1.

⁴⁸ Art 39.2

⁴⁹ Art 39.3 and 40.1.

require or permit the statutes to provide that the members of the management organ shall be appointed and removed by the general meeting under the same conditions as for public limited-liability companies that have registered offices within its territory⁵⁰.

Furthermore, the general meeting must appoint the members of the supervisory organ, which is supposed to receive reports from the management organ every three months on the progress and estimated development of the SE's business⁵¹. The supervisory organ has the power to request all the information and facilities which are deemed to be necessary for the fulfilment of its tasks.

3.2.2 The one-tier system

The second system, classified as one tier-system, concerns a SE equipped by a single executive organ with management tasks⁵². This system, characterised by substantial references to the local legislations⁵³, demands that the numbers of the members of the management organ, appointed by the general meeting, be of no less than three, in case of participation of the employees⁵⁴.

The members of the management organ are appointed by the general meeting, with the exception of the case in which they are already defined by the SE statute⁵⁵. The management organ has a duty to meet once every three months in order to deliberate and take decision regarding the business and the activities of the SE⁵⁶; each member has got the right to receive and examine all the information submitted to the organ⁵⁷.

⁵⁰ Art 39.2.

⁵¹ Art 40.2 and 41.1.

⁵² Art 43.

⁵³ Rescio, *La Società Europea*, p. 179 (supra).

⁵⁴ Art 43.2.

⁵⁵ Art 43.3.

⁵⁶ Art 44.1.

⁵⁷ Art 44.2.

3.2.3 Council directive on the involvement of employees

3.2.4 The importance of the employees involvement

It has already been mentioned that in the SE's scope the employees participation possesses a crucial significance, which is witnessed by the postponement of the adoption of the regulation in order to enable the Member States to fully incorporate the directive 2001/86 which regulates this subject.

The directive, given the fact that the regulation aims at creating a uniform legal framework within which companies from different Member States should be able to plan and carry out the reorganisation of their business on a Community scale, emphasizes, in order to achieve the social goals pursued by the Community, the focal role displayed by the employee involvement.

For what concerns the relationship between the regulation and the directive, it merits to be mentioned that the first circumscribes the scope of the second, establishing that the latter is designed to ensure that employees have rights of involvement in issues and decisions affecting the life of their SE⁵⁸.

The regulation establishes that the provisions of the directive form an inseparable complement to the regulation itself and must be applied concomitantly⁵⁹. Furthermore, the importance of the directive is underlined by several other provisions of the regulation and by its own dispositions (the enrolment of the SE is possible only after the conclusion of the agreement defining the modality of employee involvement⁶⁰, saved the possibility for the employees to refer, in this context, to provisions encompassed in the national legislations⁶¹, or to the moment following the expiring of the terms

⁵⁸ Preface to the regulation, par 21.

⁵⁹ Preface to the regulation, par 19.

⁶⁰ For the negotiations procedures see art 3 of the Council Directive 2001/86/EC of 8 October 2001 accompanying the Statute of the European Company concerning the employees involvement, (hereafter the directive).

⁶¹ Art 3.6 dir.

established in art. 5 of the directive for the conclusion of the negotiations⁶². In case negotiations between the employee representatives and the company directional organs fail, the right to receive information and the right to consult the central organs remains guaranteed⁶³).

3.2.5 The content of the employees involvement in the SE

For what concerns the practical issues of the involvement, the employees are guaranteed, by the directive, the right to carry out activities which could exercise a certain influence over the decisions to be adopted for the company. The directive refers directly to activities such as “information”, “consultancy” and “participation” where the term “information” concerns “life and activities” of the SE and the activities of other companies located in States other than the one with the social seat. Furthermore, “information” means the communication of issues related to competences which do not fall completely within the scope of the powers attributed to the main directional organs sited in a Member State, in order to consent the beginning of evaluations and consultations together with the employee representatives. “Consultancy” is meant to comprehend the exchange of opinions and the dialogue between the competent organ and the worker’s representatives in order to involve the latter in the decision making processes and in the company’s activities; “participation” means the influence of the body which represents the employees and/or of the individual employees' representatives in the activities of a company by way of: the right to decide on or appoint some of the members of the company's supervisory or administrative organ and the right to recommend and/or oppose the appointment of some or all of the members of the same organ⁶⁴.

Briefly, we can say that the employee involvement, in the context of the SE, is represented by the information and the consultation of a representative organ through the participation of the workers both in the managing and in

⁶² Art 12.2.

⁶³ Preface to the directive par. 11, art 3 and subsequent dir.

⁶⁴ Art 2 .h-k dir.

the supervisory activities⁶⁵. The competence of the representative organ is basically related to the issues concerning a SE or a branch located in another Member State. In regards of the right of the organ to be informed and consulted about the activities of the company, it involves the main aspects of the company life such as the economic and budgetary situation, the production and the employment situation also in relation to the working process and the methods of production, without forgetting the winding up and the termination of the employment contracts. The directive describes a negotiation process which appears to be quite complicated. The latter starts with the creation of a special negotiation body. Where the management or administrative organs of the participating companies concord on the establishment of an SE, they shall as soon as possible take the necessary steps, providing information about the identity of the participating companies, the concerned subsidiaries or establishments and the number of their employees, in order to commence negotiations with the representatives of the companies' employees on arrangements for their involvement in the SE⁶⁶. The detailed procedure and the extensive consideration dedicated to this subject, demonstrate the weight given to the involvement of the employees in the discipline of the SE. This demonstrates a new perception of the concept of company in the European perspective. The company is not seen only as one of the numerous objects of the property right, but it is a community characterized by different interests, behind which there are not only juridical fictions that the dogmatism imposes as reality; in a company we find people, with needs and objectives, collaborating to achieve common targets.

⁶⁵ Art 9 and 10 dir.

⁶⁶ Art 3.1 dir.

4 THE SE TAXATION

The relevance of all the declared objectives which led to the birth of the SE, did not direct to the creation of parameters for all the salient aspects of the SE: the regulation, in the field of the corporate discipline, adopt numerous references to national norms concerning limited liability companies and other areas not involved in the process of harmonization (i.e. liquidation, winding up...), and neglect almost entirely the tax systems. In particular, the only generic mention of taxation as operated in the preamble of the regulation evokes national provisions or appeals to future norms of EC law⁶⁷. There have been several dubious arguments coming up from different directions concerning the validity and the concreteness of an alternative vehicle such as the SE in comparison with national juridical models, in the absence of an adequate fiscal system⁶⁸. The benefits connected to choice of the SE do not seem to be more exclusive than those offered by the ECJ jurisprudence in matter of freedom of establishment of companies. Those have the possibility to constitute within the Community territory branches or subsidiaries and to exercise through these the whole company activities⁶⁹.

4.1 The European Commission approach

In order to give an appropriate answer to the necessity of ensuring a proper fiscal treatment to the SE, the Commission position was inclined to the idea of adapting the existing Community fiscal legislation in accordance with the needs of the new company model. This choice guided the Commission to propose, as short term measures, the modification of the Council directive 435/90, the merger directive and the interest and royalty directive.

⁶⁷ Regulation preamble, point 20.

⁶⁸ European Commission, Com (2003) 726 final, 24 November 2003, p. 24.

⁶⁹ See i.e. C-2127/1997 Centros, C-167/01 Inspire art LTD.

4.2 Extension of the directive 435/90

The directive 123/2003 EC of December 2003 - which had to be incorporated by the Member States within the 1st of January of 2005⁷⁰- brought several amendments to the so called directive “parents-subsidiaries” (directive 435/90) in order to broaden its the scope of application to new instances of intra-Community dividends distribution and to new company structures. Under the first profile, beside the distribution of profits made by the subsidiaries to the parent companies, it is now foreseen the possibility of profits distribution made in favour of other permanent establishments located in Countries other than the Member States of the subsidiary. Concerning the second aspect, the directive ascribes the SE, among the new typologies of companies, as object of its provisions. Consequently, the distribution of dividends, in harmony with the content of art. 1 as amended by the “parents-subsidiaries” directive:

A) made by a subsidiary SE located in a Member State to a parent SE located in another Member State;

B) received by a permanent establishment, located in Member State A, of a parent SE located in Member State B and coming from a subsidiary SE located in Member State C;

C) made by a subsidiary SE located in Member State A to a permanent establishment located in Member State B of a SE parent located in the same Member State A;

D) made directly (lt. A see supra) , or with either of the two “triangular” options (lt. B,C, see supra) between a SE and a company constituted and registered in accordance with the different national legislations, will benefit from the exemption of withholding tax in the State of the distributing company and of the elimination of the double taxation in the State of the payee company by means of exemption or tax credit on the received dividends⁷¹ in case the holding of the second company in the

⁷⁰ European Commission, Com (2003) 726 final p. 25, (See supra).

⁷¹ See art. 4.1 Directive 435/90.

capital of the first company reaches the threshold of 25 % which will be gradually lowered until 10%.

On the other hand, just like the companies regulated by national legislations, a parent SE which:

- receives profits paid by a lower-tier subsidiary; and/or

- holds shares in a subsidiary company which is considered by the State of the SE fiscally transparent,

could benefit from the elimination of the double taxation either:

- on the profits of the lower-tier subsidiary; or

- on the profits received by means of the shares held in the fiscally transparent subsidiary⁷².

In spite of the broader scope of the directive “parent-subsidiaries”, the directive 123/2003, does not vary a number of remaining aspects represented by certain options granted to Member States such as the possibility to subordinate the tax exemption or the benefit of the tax credit to the holding of the minimum holding percentage and right to vote quota for a limited period of time, or the deductibility of the expenses connected to the shares holding in the subsidiary company. The different treatment, consequence of the dissimilar implementation of these aspects in the Member States, entails a high degree of differentiation in dealing with the distribution of dividends between and with a SE. The most substantial difference appears to be tied to the minimum period of detention enclosed in the directive which the Member States can require in order to grant the parent company double tax exemption or tax credit as well as to favour the subsidiary with the withholding tax exemption, which could vary from 2 years (Austria, Portugal), or 1 year (Denmark, Italy, Luxembourg) while in some Member States no minimum period is required (Belgium, Finland, Netherlands, Germany).

On the whole, the extension of the directive 435/90 generates a quasi-complete equality of the status of the SE and the companies regulated by national legislations. A further implication is represented by the ECJ jurisprudence which displayed a consistent role from 1996 until today,

⁷² See art. 4.1-bis as amended.

clarifying controversial aspects for the directive application restricting the margins of discretion of the Member States concerning the interpretation of the provisions in favour of national company groups in the field of distribution of Intra-EU dividends; the ECJ jurisprudence so appears to be applicable to the fiscal treatment of the Intra-EU dividends among and with SE.

4.3 Intra-EU payments of interests and royalties between SE

The directive 48/2003 issued in June 2003 intends to avoid the double taxation burden on Intra-EU payments of interests and royalties between (partner) companies tied by the principle of exemption from any typology of taxation in their countries of origin in reason of the presence of determined subjective conditions pertaining to the companies themselves and objective conditions concerning the payments.

The subjective conditions show many similarities with those required by the parents-subsidaries directive (i.e. the 25% minimum holding share of a company in the capital of the other), while the objective conditions exclude determined instances of payments not commonly absorbed by interests and royalties negotiated in “normal” market conditions⁷³. The EU Commission proposed, at the end of 2003, the applicability of the interest-royalty directive to SE: payments between partner SE and between SE and companies regulated by national legislations should be, consequently, equated to payments which took place between companies of this last category.

⁷³ See art. 4 directive 48/2003.

4.4 Directive 2005/19: taxation neutrality and transfer of seat

The amendments adopted by the Commission to modify the directive 434/90 with the subsequent directive 2005/19 - (concerning the fiscal regime to be applied to mergers, divisions, transfers of assets, exchanges of shares in relation to companies located in different Member States) - emerge to be very important for the SE discipline, not only for its inclusion in the list of the companies benefiting from the common taxation neutrality regime, but also for the rules concerning the transfer of the legal seat from one Member State to another. Under the first point of view, the regime of taxation neutrality entailed in the directive 434/90 has been practically extended, as consequence on the enclosure of the SE in the catalogue of the typology of companies comprehended by the directive, to all the operations involving a SE as enlisted in art 2, namely:

- the merger of two existing companies regulated by national legislations which could result in the creation of a SE (in this regard, the entry into force of the SE Statute allows, as it has been observed, to surmount obstacles deriving from the lack of provisions in certain Member States, to originate cross-border mergers⁷⁴);
- the merger of existing SE resulting in a new SE or in a company regulated by national legislation;
- division of existing SE resulting in new SE or companies regulated by national legislation;
- division of companies regulated by national legislation resulting in the creation of, *inter alia*, new SE;
- the transfer of assets between a transferring company and a SE receiving company (and *vice versa*), and between two SE.

Analogous to the case of the directive parents-subsidiaries, the extension of the merger directive to SE rendered obvious the applicability to the

⁷⁴ Rolla, Valente, La Societas Europaea come strumento di pianificazione fiscale, *Commercio Internazionale*, p. 39, 1/2003.

operation concerning a SE of the ECJ jurisprudence which restrains the possibility for the Member States to employ the anti-abuse clause and the narrow interpretation of the content of the directive itself in favour of the companies involved⁷⁵.

Under the second point of view - the transfer of seat with the consequent change of the country of tax residence without incurring in the liquidation of the company or other tax barriers such as the taxation of unrealized gains - it has often been mentioned as one of the most convenient advantages of the SE⁷⁶. Adopting a compromise position between the juridical systems which identifies the nationality of a company through the so called “real seat theory” and the States that recur to the “incorporation theory”, the regulation instituting the SE has opted for the real seat theory (art. 7 imposes that the “effective seat” should be in the same State of the “legal” seat). However, it still renders possible the transfer of the “legal” seat to another Member State without winding up the company upon the condition that the “effective” seat has to also be moved to the same Member State. Art. 8 of the regulation contains the company law rules concerning such kind of operations, making possible the transfer of seat from one Member State to another with no modification of the corporate existence, but establishing a procedure which appears to be similar to those designed by the third and the sixth directive on corporate law harmonization in the matter of mergers and divisions.

Under the tax point of view - in accordance with the legal construction which defines the SE Intra-EU transfer equated to the so called “special measure” carried out by companies regulated by national legislations - the directive aims at the extension of the common tax system as treated by the directive 434/90 in matter of mergers, division and transfer of actives to the Intra-Community transfer of the seat, with the same identical conditions characterizing the “special” operations mentioned above. The adoption of the directive added to the merger directive at stake the new Title IVb which, in art. 10b to 10d, exempt from tax the gains deriving from the

⁷⁵ See C-28/95 Leur-Bloem and C-43/00 Andersen and Jensen.

⁷⁶ Wentz, *The European Company (the Societas Europaea)*, Legal Concept and Tax Issues, European Taxation vol. 44 issue 1, p. 4. 2004.

transfer operation, given the existence of the requirement necessitated by the “special” operations (mergers, divisions...etc.)⁷⁷:

-the upholding of a permanent establishment of the SE in the Member State of origin;

-an effective connection of assets and liabilities of the transferring company with this permanent establishment

-the computing of any new depreciation and any gains or losses in respect of the assets and liabilities transferred according to the rules that would have applied to the transferring company or companies if the merger or division had not taken place.

The tax system of the SE seat Intra-Community transfer operation, in this manner, would not result unconditional; the directive approach has in fact the purpose to conciliate the necessity to impede hindrances in regards of the transfer operation with the need to safeguard the financial interests of the Member States.

The adoption of the directive, however, caused relevant dilemmas.

art. 48 (2) of the EC Treaty equate, in the light of the freedom of establishment, the status of companies and firms formed in accordance with the law of a Member State with the status of natural persons who are nationals of Member States. The ECJ sentence in the *Lasteyrie du Saillant*⁷⁸

- concerning the transfer of the tax residence from France to Belgium of a French citizen and the legitimacy of exit tax, consisting on tax levied on gains which were not obtained by shares holding at the moment of transfer - stated the such charge was in contrast with the freedom of establishment as recognized by art. 43 of the Treaty, without specifying, however, the conditions which could legitimate that fiscal burden.

If the equation of companies formed in accordance with national law and natural persons entailed in art. 48 is intended as the concrete possibility given to all the national company to transfer the seat within the EU territory without any obstacles of fiscal nature - as a sort of confirmation of inadmissibility of the real seat criterion - the tax system adopted for the SE

⁷⁷ See art 4 .1 and 2 of the directive 434/90.

⁷⁸ *Lasteyrie du Saillant* C-9/2002, 11 March, 2002.

seat transfer could appear as inadequate for the reason that it subordinates its tax neutrality to the existence of conditions that - in the light of the interpretation offered by the sentence *Lasteyrie du Saillant* - are not equally imposed on companies formed in accordance with national laws⁷⁹.

The solution finally selected has a very relevant value, on a practical level, for all those companies interested in the formation of a SE, having noticeable repercussions on one of the focal elements - the possible tax implications of the intra-Community seat transfer - of the comparative analysis in terms of burdens and procedural obligations between the choice of the SE or that of a company formed in accordance with national law, which, as consequence of the ECJ jurisprudence, already find recognition in all the Member States.

4.5 The SE as candidate for C.C.B.T

In the view of the medium-long term, the Commission's favourite perspective for the tax system applicable to multi-national groups of companies consists in the introduction of the C.C.B.T (common consolidate base taxation) for all the gains and losses on Community level which could be made available on an optional basis for all the multi-national companies. The SE is considered the most suitable candidate for such a type of treatment, and a potential "test subject" for this "pilot-project".

As in the case of companies which have branches and subsidiaries in different Member States of the Community, constituted in accordance with the juridical forms entailed in the national legislations, also the gains and the losses of the SE will meet in a unique tax base which will be introduced by a new code of Community legislation applicable to the SE on request of the company itself.

On one side, though, bearing in mind the different modalities of creation of a SE as indicated in art. 2 of the regulation (merger of companies incorporated under the legislation of different Member States;

⁷⁹ R. Daininder, ECJ, September 2003, C-176/01, *Inspire Art*, in the European Legal Forum, p. 18 n. 01/2004.

transformation of an existing companies incorporated under national law having branches or subsidiaries in other Member States for at least two years; creation of a holding company among companies incorporated under different Member States national laws or having subsidiaries in other Member States for at least two years; creation of a common controlled company between companies incorporated in different Member States), the possibility to opt for a common base taxation inside the Community could be relevant only for the SE created through one of the first three modalities which would already be, by means of their constitution, present in different Member States; the other SE could very likely not have subsidiaries in other States. Under this circumstance the SE will remain subject to the same rules determining the base taxation applicable to companies incorporated under the law of a particular State. Consequently, the SE, even if existing in different Member States or only in one, will receive the same treatment of companies regulated by national legislations.

4.6 Conclusion

The potential tax system which will eventually be shaped for the SE as a consequence of the Commission binary orientation - in the short term the adaptation of the existing tax legislation, in the medium/long term the involvement of the SE among the subjects which could opt for the C.C.B.T - puts in evidence that, the taxation factor in itself, does not give the impression to render the SE option more convenient than the choice oriented towards a company incorporated under national law. The evolution of the ECJ jurisprudence regarding the latter and the versatility of the solution which will be adopted for the SE will represent the key aspects in the evaluation of convenience - in terms of costs, obligation and advantages - for the choice of the new company structure.

5 THE SE –TRUE EUROPEAN ESSENCE?

Although the Regulation has branded the European Company "the SE", it does not reflect precisely its supra-national status. Indication to sustain this observation will be discussed below, under three practical directions:

- the influence of Member States' laws over the European Company;
- the SE regulation , in particular the deficiency of central ruling in favour of national administrative and judicial organs; and
- the unsuitability of the configuration of the SE.

It will rise to attention that a frequent argument is the influence of the diverse Member States' legal cultures. Supplementary, the conclusions advocate that the SE is a less appropriate corporate form for global European business than initially foreseen.

5.1 Rapport of the SE with National Laws

The weight of the Member State's national laws over the life of the SE is perceptible from the moment of its birth. In accordance with the regulation the law overriding public limited liability companies in the Member State where the SE has its registered office presides over the procedure of its construction⁸⁰. Therefore, while the Regulation may advise a certain variety of systems for the creation of a SE, the concrete *modus operandi* is an issue for national laws.

This outcomes in identical SEs in the EU in view of the fact that the outline prescribed by the regulation applies to all public limited-liability companies. This implies that the Regulation's common prerequisites have been deliberated to provide every SE with equal basic features concerning assets and form.

⁸⁰ Art 15.

Article 16 regards the pre-registration in an uncomplicated way. Article 16.2 establishes that if operations have been carried out in the SE's name previous to its registration, "the SE does not assume the obligations arising out of such acts after its registration". This provision also states that "natural persons, companies, firms or other legal entities which performed those acts shall be jointly and severally liable therefore, without limit, in the absence of an agreement to the contrary."

If this is the global relevance of national laws to the SE, it may be claimed that the SE is certainly a SE. Yet, the responsibility of national laws goes further than that, predominantly with regards to the procedures for the SE's construction. This has important consequences on vital characteristics of regulation⁸¹.

If the SE is the product of a merger of different public limited-liability companies⁸² the national laws of the related Member States is relevant for their companies if the Regulation does not provide any discipline⁸³. As this occurs, the merger will be ruled by no less than three types of laws, specifically, the regulation itself and the pertinent laws of the interested Member States, which have to be at least two under the disposition entailed in art 2.1.

Member States might as well have control of the SE's creation under art 21, 24 and 25.

Art 21 regulates the case where a company registered in a Member State is implicated in a merger and that State calls for supplementary requirements on the details that must be divulged; these requirements necessitate to be publicized in the national gazette. Of more significance is the provision content in art 24.1, which establishes that the law of the Member State dealing with the merger of public limited-liability companies, will be relevant for each company interested by the merger. This is needed in order to safeguard the interests of the creditors and the holders of bonds or

⁸¹ *Societas Europaea: Harmonization or Proliferation of Corporations Law in the European Union?* p. 7, (see supra).

⁸² Under Article 17.2.a, a merger could be originated by acquisition. In this case the acquiring company will take the features of a SE when the merger occurs, or with the creation of a new legal entity, namely, the SE.

⁸³ Art 18.

securities (other than shares) who bear special rights in the merging companies⁸⁴.

Furthermore, supplementary discretionary power is prearranged for the Member States to "adopt provisions designed to ensure appropriate protection for minority shareholders who have opposed the merger"⁸⁵.

Further proof of the prominence granted to the Member States' local disciplines in this area is entailed in art 19. This stipulation permits a Member State to establish if a company governed by its laws could or could not participate in the creation of a SE by merger.

This may take place if any of the State's authorities⁸⁶ is in opposition to the merger before the certificate of completion is terminated. The certificate summarizes the pre-merger requirements as obliged by art 25.2. Opposition could stand on the basis that the merger could be against the public interest, even though a judicial reconsideration of the whole opposition is achievable by the interested companies.

If the opposition takes place without owing regards to the practical consistency of the structure and exercise of this power on a Community level, it could occur the risk of a considerable discrepancy in the form and application of the relevant provisions.

The regulation presents only a few details on the construction of a subsidiary SE outside art 2.3. The single provision of important consequences is art 36 according to which companies, firms and other legal entities are "subject to the provisions governing their participation in the formation of a subsidiary in the form of a public limited company under national law"⁸⁷. As a result, a Member State's national law acquires important prominence.

⁸⁴ *Societas Europaea: Harmonization or Proliferation of Corporations Law in the European Union?* p. 9, (see supra).

⁸⁵ Art 24.2

⁸⁶ Art 25.2 identifies them as the court, notary or other competent authorities. Article 68 states that "each Member State shall designate the competent authorities within the meanings of Articles 8, 25, 26, 54, 55 and 64 and it shall inform the Commission and the other member states accordingly."

⁸⁷ Art 36.

The influence of national law is emphasized when an existing public limited-liability company, active in a Member State, which also possesses a subsidiary regulated by a different Member State's law for at least two years, is transformed into a SE. As the conversion simply makes available an existing legal unit with a new form, it does not per se result in the company's winding-up or the creation of a new legal entity⁸⁸. A draft terms of the conversion and a report clearing up and explaining the legal and economic facets of the transformation are demanded; the company's management or administrative body (not independent experts) are responsible for setting them up⁸⁹. This awards the Member States a central responsibility.

On the basis of the wide references to the laws of Member States existing in the regulation, it seems that national laws will have a wide-ranging role in governing what is, at least in its nomenclature, a SE⁹⁰. Nevertheless, beyond the capacity to relocate its registered office and head office from one Member State to a different one, the SE has to be considered a “crossbreed” creation of the regulation, directives, and national laws of the Member States. As each SE will be governed by the pertinent authority in the Member State it is hard to perceive how it possibly will be recognized as being truly European in character.

⁸⁸ Art 37.2. See also *Societas Europaea: Harmonization or Proliferation of Corporations Law in the European Union?* p. 10, (see supra).

⁸⁹ Article 37.4. The only involvement of independent experts is in the form of the requirement of a certification that the company has net assets at least equivalent to its capital plus those reserves which must not be distributed under the law: Article 37.6.

⁹⁰ *Societas Europaea: Harmonization or Proliferation of Corporations Law in the European Union?* p. 11, (see supra).

5.2 The Societas Europaea and the European Legal Cultures

Although the Member States have many common concerns and objectives as demonstrated by the EU's success from the moment of its birth with the European Coal and Steel Community⁹¹, they have evidently dissimilar cultures, mainly their in their legal cultures. Their influences over the SE cannot be easily neglected. For instance, the diverse cultures concerning the participation of employees in the company management originated the long postponement of the SE's official adoption. The legal culture idea, brought here into play in the sociological-legal meaning, has been illustrated as “the sum total of conditions that impinge upon the law’s development and application, whether this be the procedural methods employed by institutions, the interests and professional qualities of the legal actors, or the general legal consciousness of the public”⁹².

European legal backgrounds are consequently essential to perceive and analyze the SE and its possible impacts and consequences.

5.3 Different Member States’ experiences: legal differences

As it has been said before, the SE’s statute generates a new legal type of a company regulated by a combination of European and national laws⁹³.

The innovative plan to fashion an integrative legal form independent from the national legislations could not be attained. Legal and social dissimilarities among the Member States are still too great to comprehend this design. Furthermore a European Civil Law where a unitary European

⁹¹ Signed in Paris April 18th 1951 and now expired.

⁹² Gessner and others, *European Legal Cultures*, Dartmouth Publishing, Aldershot, , xvii, 1996.

⁹³ *The Societas Europaea – A Step Towards Convergence of Corporate Governance Systems?* Braendle, Noll, Department for Business Administration, University of Vienna, p 5, 2003.

Corporation could be rooted is missing⁹⁴. Therefore the Regulation is limited to 70 articles - from the original 400 articles of the former draft of 1970⁹⁵. As a common regulatory modus operandi the “renvoi” method was adopted. This denotes that the SE regulation provides only for some of the issues concerning the European Company while it often simply consigns numerous other features to the legislations of the Member States. The latter have to fill the gap left open by the regulation itself.

It is obvious that the renvoi is the outcome of a political negotiation. In this circumstance, according to certain critics and comments it is unlikely that there will be a unitary European company form but it is foreseeable that every Member State will develop its own version thereof⁹⁶.

Therefore it is possible to predict a competition of the legislations on the subject of the European Company⁹⁷. As a result, where the national legislations will be unsuccessful to appropriately adopt provisions in order to fill the gaps originated by the implementation of the SE regulation, national courts will intervene by means of case law.

In the following part we will focus on that side of the SE’s statute mentioned before, which is highly significant in the field of corporate governance. As said before, the Statute permits companies that choose to utilize the legal structure of the SE to opt between a two-tier system - familiar in Austria and Germany - and a one-tier structure, which is leading in the Anglo-Saxon states. The environment which characterizes this choice is the national company laws which should not be ignored.

This political settlement presents new opportunities for the companies. We can discover an obligatory two tier system outside the German and Austrian borders in Denmark, Finland, Sweden, for larger corporations in the

⁹⁴ The Societas Europaea – A Step Towards Convergence of Corporate Governance Systems? p. 5,(see supra).

⁹⁵ Lutter, Europäische Aktiengesellschaft - Rechtsfigur mit Zukunft?, *Der Betriebsberater*, p 3. 2002

⁹⁶ Hommelhoff, Einige Bemerkungen zur Organisationsverfassung der Europäischen Aktiengesellschaft, *Die Aktiengesellschaft*, p 280, 2001.

⁹⁷ Lutter, Europäische Aktiengesellschaft - Rechtsfigur mit Zukunft?, p. 5. (see supra).

Netherlands and some of the new Member States. The legal systems of France, Portugal and Spain allow both systems⁹⁸.

Here we will examine the SE regulation as received in Austria, where a two-tier organizational structure is required for all the bigger limited liability companies. The policy-makers, therefore, had to consider provisions for a SE incorporated in Austria with a one-tier system. Opposite circumstances seem to subsist for the United Kingdom.

Here the legislator had to introduce provisions for the unusual two-tier system.

5.4 The SE: different European experiences

5.4.1 The SE in Austria.

Inside the modification of the Company Law, ratified in recent times, (“Gesellschaftsrechtsänderungsgesetz 2004” , hereafter GesRÄG) it is possible to find provisions regulating the two management models (4th chapter) beside the overall skeleton related to the transfer of the domicile of a SE in Austria (2nd chapter) and the incorporation (3rd chapter)⁹⁹.

The two-tier board system of the SE is largely influenced by the German and Austrian Public Corporations Act (“Aktengesetz”, hereafter AktG)¹⁰⁰.

Hence the provisions are analogous to the norms of the Austrian AktG (instituted in 1965). In brief, the general assembly that gets together on one occasion a year or in case of emergency, mitigates the role of the management and supervisory board according to par. 104 AktG¹⁰¹ and possesses the right to vote and elect the latter (par. 87 of the AktG).

⁹⁸ The Societas Europaea – A Step Towards Convergence of Corporate Governance Systems? p .6 (see supra).

⁹⁹ The Societas Europaea – A Step Towards Convergence of Corporate Governance Systems? p. 7 (see supra).

¹⁰⁰ See. also Hommelhoff, Einige Bemerkungen zur Organisationsverfassung der Europäischen Aktiengesellschaft, p. 283. (see supra).

¹⁰¹ Buchheim, Europäische Aktiengesellschaft und grenzüberschreitende

Since the supervisory board elects the management board (par. 75 of the AktG) and closes the contracts with each one of the members of the management board itself (par. 97 of the AktG), a direct election of the management board by the general assembly is not legitimate in Austria, differing from the provisions of the SE¹⁰². The management organ should be controlled by the supervisory organ (par. 95 of the AktG). Since the management board enjoys the right to recommend components of the supervisory board this arrangement is often disapproved because it can cause the collusion of these two bodies¹⁰³.

Usually the components of one board can not be or act as components of the other board (par. 90 AktG), which is as well reported in Art 39 par. 1 of the SE regulation. In addition, it is not possible to delegate administrative tasks to the supervisory board. The structure of the supervisory board is the mirror of the main standpoint in Germany and Austria, specifically the heavy influence of employee representatives, in particular since 1976, year of the Co-determination Act. Since then, it is mandatory the so called one-third system (for two members of the capital side, the labour side can delegate one board member¹⁰⁴). A large amount of block-holders (in Austria 33% of the capital) are able to also nominate some supervisory board components. The quantity of supervisory board components has, in accordance with art 40 par. 3 of the SE regulation, to be determined by means of law, and the Member States are given the possibility of determining the minimum and maximum amounts (in Austria, due to labour representation, the minimum is three, and the maximum can rise up to twenty, in relation to the share capital as established in par. 35.1 of the GesRÄG).

The one tier system on the contrary comprehends management and supervision inside one body, namely, the administrative body (in the

Konzernverschmelzung, Wiesbaden, 2001.

¹⁰² Jahn, Die Europäische Aktiengesellschaft - Societas Europaea, Der Betriebsberater, p. 635, 2001.

¹⁰³ The Societas Europaea – A Step Towards Convergence of Corporate Governance Systems? p. 8 (see supra).

¹⁰⁴ The Societas Europaea – A Step Towards Convergence of Corporate Governance Systems? p. 9 (see supra).

Anglo-Saxon countries is frequently named board of directors) which is assigned with general authority (management and representation overlap).

The components of the administrative body are, in accordance with par. 46.1 of the GesRÄG, selected and named by the general assembly for a period established by national legal provisions; however this time period can not exceed five years. Even though it is discretionary for the Member States to establish a minimum and maximum amount of components for the executive body, in Austria this organ must be composed by at least three and at most ten members according to par. 45.1 of the GesRÄG¹⁰⁵. The precise amount has to be decided by legal provisions.

It is possible to give an easy explanation of the minimum number by analyzing the provisions of the SE regulation concerning this issue; in accordance with the content of art 7.3 a) and b), the principle of co-participation of a Member State is largely relevant. Briefly we can say that the one third composition consisting of employees representatives happen to be effectual at the same time as this regulation will apply to a one-tier system as well.

If we consider the pragmatic-empirical analysis concerning the German co-determination model of Gorton and Schmidt¹⁰⁶, which claims that a conspicuous number of representatives of employees on the supervisory body guides to significant stock market price cut if weighed against companies in which the representatives of labour is low, we can better perceive the significance and the impact of which board system to opt. According to their analysis the stock market price cut was 31% for these companies equipped with equal number of representatives of employees and shareholders on the supervisory organ in contrast with companies in which the representation of labour fills merely one third of the places in the supervisory board.

In order to understand the function of control of the administrative body an essential difference has to be emphasized between administrative directors

¹⁰⁵ Buchheim, Europäische Aktiengesellschaft und grenzüberschreitende Konzernverschmelzung, (see supra).

¹⁰⁶ Gorton, Schmid, Capital, Labor, and the Firm: A Study of German Codetermination, Journal of the European Economic Association, vol .2 N. 5, p. 863-905 2004.

who are in employment as managers in relation to their directorate and non-executive directors who are not implicated in the running of the daily activities of the company¹⁰⁷.

Seeing that every director has equal power, non executive directors also have the possibility to engage the initiative and issue proposals in the executive choices and it is important to highlight that they do not have a position which is only confined to the approval of post-decisions, similar to the supervisory system as existing in Germany. In accordance with par. 50.2 of the GesRÄG the president of the administrative organ and his representative, must not be administrative directors. This follows the parameters of the majority of corporate governance systems.

5.4.2 The SE in the UK

The Department of Trade and Industry, which is the relevant British governmental department, in 2004, issued the European Public Limited-Liability Company Regulations about the implementation of the SE statute in the Country. Measured up to the paradigm of the British public limited companies, the SE differs in two points. Primarily, the existence of the option between a one-tier and two-tier system, subsequently, British public limited companies have never faced a situation involving the labour representation at board level.

With reference to the labour representation it is consequently not unexpected at all that the British policy-makers stand very close to the structure of the SE directives. Nonetheless, issues such as the process of selection of the employee representatives, which are most likely of large importance for the country in question, are opened for a certain degree of discretion of the Member States. Ever since the last 25 years of the 19th century the principal form of employee collective representation as opposed

¹⁰⁷ The Societas Europaea – A Step Towards Convergence of Corporate Governance Systems? p. 10 (see supra).

the employer has been collective negotiations through trade unions¹⁰⁸. Obligatory presence of employees at board level has never been a characteristic of the British Law.

So, in the UK the options for the involvement of the employees representatives have been the central policy subject left by the SE directives to the British government, which brought up the problem of how, the system of employees involvement in the SE should have been attached to the system of collective contracts. The UK government adopted an alternative method, with modest formal connection to collective bargaining¹⁰⁹. Regarding the central issue of the selection of the representatives on the Special Negotiation Body, which is required to bargain the method of participation with the administration of the SE, the canon is that these representatives will be nominated by the vote of the employees and the candidates will be restricted to the position of employees of the relevant company. If there is a previously formed consultative board in representation of all the employees, that board will choose the labour representatives. The regulations do not give priority in the selection process to the trade union normally recognised for the purpose of collective bargaining¹¹⁰.

For what concerns the board construction, it is significant to bare in mind art. 9 of the SE regulation. This establishes that where there are situations not regulated or only partially regulated by the SE regulation, the internal law (in the present case the law presiding over the public limited companies) will be relevant. Since art 39.5 entails provisions for the different board structures, the remarkable issue for the British system appears to be the one concerning the two-tier board construction. Here we find the special features of the UK law.

The British Department of Trade and Industry claims that a supplementary insertion of rules is not essential to facilitate a SE located in the UK to have a successfully running two-tier board system. This vision has its roots in the

¹⁰⁸ Davies, Implementation of the European Company in Great Britain, in: Baums, Cahn, Die Europäische Aktiengesellschaft – Umsetzungsfragen und Perspektiven, Berlin, 2004.

¹⁰⁹ The Societas Europaea – A Step Towards Convergence of Corporate Governance Systems? p. 10 (see supra).

¹¹⁰ Davies, Implementation of the European Company in Great Britain (see supra).

British Companies Act, which, as it presently does not require for companies registered in accordance with its discipline, to espouse the one-tier board system. The choice is discretionary. As Davies¹¹¹ notices, the fact that British companies do predominantly have a one-tier board system is a pragmatic matter, not a legal one. This denotes the possibility to comply without any problems with the Companies Act implementing a dualistic system. As a result different conditions for a dualistic system, in accordance with art. 39.5, do not appear to be indispensable for the reason that the Companies Act in its actual form results adequate to fill in for an insufficient SE regulation. The Company Law Review DTI¹¹² strongly affirmed that some UK companies already have implemented a two-tier board structure.

In contrast with the German or Austrian AktG the British Companies Act does not regulate in depth the configuration or the prerogatives of the board. What the Act states is that a public limited company must comprise at least two directors. This is the what we see in the 2004 European Public Limited-Liability Company Regulations: the management together with the supervisory board, the administrative board powers and its structure are then a creation of the shareholders by means of their influence on the corporate governance, rather than legal policies¹¹³. If a British company desires to have a two-tier board system, it might adopt this construction by declaring it in its statute of association.

That give the impression to underline the higher degree of independence of the British companies, but nonetheless, it would result important to pay attention to the plausible drawbacks present in the UK as well as in Austria.

This is intended to mean that no one of the corporate governance models are perfect. In the British Companies Act perhaps there is not a particular attention dedicated to the board systems in regards of its configuration and structure, while the Austrian legislator has standardized it excessively. However, the 2003 UK Combined Code, representing a overall standard of

¹¹¹ Davies, Implementation of the European Company in Great Britain, (see supra).

¹¹² DTI, Developing the Framework, Department of Trade and Industry Company Law Review (March), par. 3.15, ii 2000.

¹¹³ European Public Limited-Liability Company Regulations, regulations 61, 62 and 64, 2004.

good governance, strike another pass and drives both national regulations ad absurdum¹¹⁴. One requisite of the code in question is that the board shall be composed by a larger number of independent non executive directors although, at the same time, it shall as well include a noteworthy amount of executive directors.

This code clearly establishes parameters in order to indicate if a director, in theory, is not to be considered independent, i.e. the subsistence of an employment bond with the company in the last 5 years, a concrete business rapport in the last 3 years, supplementary compensation separate from the director's wage, substantial family liaisons, ties with an important shareholder, or a managerial position which lasted longer than 9 years.

This codification could play a significant role in the context of a one-tier board system ensuring a certain degree of shareholders' interests protection. However it is possible to state that it would simply result inconsistent in a dualistic board system, since by definition, only the supervisory board is entitled to explicate powers of control over the executive board and consequently standing for the independent non executive directors. However Anglo-Saxon's potential SEs with a dualistic board system would not satisfy the needs required in their domestic market. Certainly, this was not the purpose of the SE regulation. For an Austrian monistic board SE, conversely, it does not appear possible to pursue the Combined Code too, as employees representation obstructs a majority of independent directors¹¹⁵.

¹¹⁴ The Societas Europaea – A Step Towards Convergence of Corporate Governance Systems? p. 11, (see supra).

¹¹⁵ Braendle and Noll, , Die Societas Europaea – Droht ein Wettkampf der Führungssysteme?, Österreichisches Anwaltsblatt, p. 444, 09/2004

6 UNSUITABILITY OF THE SE'S CONSTRUCTION

Quite a few advantages were expected from the accessibility of this new structure in the EU corporate apparatus.

The most considerable benefits concern those stipulations which will favour and facilitate cross border mergers within the Union and the possibility for the SE to relocate its registered office in other Member States with no requirements for the company to wind up or originate a new legal person¹¹⁶.

Presently, a corporate entity, although capable to carry out business in any Member State, is bound to have its registered office in the State of registration¹¹⁷. With the purpose of relocating the site of the existing registered office in a different Member State, this company has to incur into the winding up process and a new legal person must be created. In view of the fact that this is a substantial encumbrance on companies functioning on a European basis, the SE is saddled with the burden of finding a solution to this problem. Nevertheless, in spite of the potential benefits which could stem from the SE, the regulation does not deal with the incongruities of the SE structure as it has been shaped.

The terms of the regulation concerning the relocation of the European Company's registered office demonstrate the structural problems regarding this operation. The most important prerequisite characterizing the transfer operation of the registered office are entailed in art 8. 2-13. The focal points that demonstrate these intrinsic problems are the following¹¹⁸: the capacity to relocate a European Company's registered office vanishes once procedures for liquidation, winding up, insolvency or deferment of payments or analogous operations begin against it, and the guaranteeing of the safeguard of the interests of parties who might have a cause of action

¹¹⁶ Art 8.1.

¹¹⁷ *Societas Europaea: Harmonization or Proliferation of Corporations Law in the European Union?* p. 14, (see supra).

¹¹⁸ Art 8. 15.

accumulated in opposition to an SE registered in a Member State after it moves its office to a different Member State.

Concerning the last point, the European Company's registered office shall be considered to be situated in the Member State of its registration preceding the relocation, even though the legal actions are not started against the SE until the moment after the transfer has become effectual¹¹⁹.

The indications that art 8 points out are coherent for the reason that the rules guiding the SE's operations will not be EU rules but the laws of the State where the Company is registered.

The corollaries of Article 8 are relevant and immediately perceptible for both European Companies and in prospective for the potential parts of a litigation. Essentially, given that the SE does not have a proper European substance, an exhaustive apparatus of rules is necessary to face the possible changing of jurisdiction of a SE. This issue would appear more cogent in case problems would arise. If EU law were the only codification designed for the control of the SE activities, this would not be discussed as an issue, but at this time such type of precedence of a superior and exhaustive EU regulation is not possible.

If at the present moment one would like to evaluate the impact that the SE has had as a corporate figure on the configuration and business of a company or group of companies within the Member States, it is of central importance to look back at the goals which led to the conception the SE itself. This evaluation should comprise the observation of the achievement of these goals in regards to the current substance of the regulation. A direction for this analysis might be discovered in the Regulation itself, precisely in the form of the ample preface where the objective of attaining a integrated internal market signifies that: obstacles to trade must be eliminated, but also that the organization of production must be modified and adapted to the Community standards. For this purpose it is indispensable that companies' business shall not be limited to the mere

¹¹⁹ *Societas Europaea: Harmonization or Proliferation of Corporations Law in the European Union?* p. 15, (see supra).

fulfilment of domestic needs, but it should be capable to plan and accomplish the reorganisation of its operations on a Community scale¹²⁰.

Accordingly, trading companies need to incur into a transformation to permit proficient manoeuvres on a global EU dimension and it has been for this reason that the SE's innovative model was conceived. Nonetheless, it is necessary, in the first place, to be recognized that: the legal structure within which business must be carried on in the EU is still mostly based on domestic laws and consequently it no longer matches up with the economic framework within which it must progress if the goals entailed in art. 18 of the Treaty have to be accomplished¹²¹.

That being said, it is possible to notice how this circumstance originates a significant obstruction to the construction of groups of companies located in different Member States.

These reflections generate many interrogatives, for instance, does the SE prevail over these hindrances? Will more companies effective on a global European dimension be expected to espouse this legal structure? Is this model able to present adequate benefits in order to permit in the future a larger adoption of the SE form? The arising question, which appears to be the most cogent, is until which degree the usage of the corporate form of the European Company will outcome as the most appropriate for the intra-Community businesses.

Undeniably, the principal benefits offered by the SE are on the first hand the opportunity to easily transfer its registered and main office, secondly the recognition of this company shape across the Community territory, and thirdly its characteristics which incentive the facilitation of the cross-border mergers operations.

On the one hand, all the above mentioned aspects alone are liable to determine the adoption of the SE form as the suitable one for companies currently performing or aspiring to perform trading activities on a pan-European dimension¹²². On the other hand, it emerges that the European

¹²⁰ Preface to the reg. par. 1.

¹²¹ Preface to the reg. par. 4.

¹²² *Societas Europaea: Harmonization or Proliferation of Corporations Law in the European Union?* p. 16, (see supra).

Company does not represent the proper solution for either small or medium companies prone to undertake trans-national businesses within the Community field. The reason for that would be that the requirements for the creation of a European Company include the basic requirements of recognized company relations present in different States either in reason of the presence of a subsidiary or of a linked company in another State, or in reason of a connection such that the creation of a SE by merger represents an option.

Further than the enhancement of flexibility in the status of registration and the question of the needed preservation for employees and shareholders and the higher degree of access to trans-national transactions, the SE regulation in its current position does not achieve what would have been a remarkable and desirable outcome: the simplification and rationalization of the EU company law. Presently, it is for national apparatuses the conduction of the uncompleted structure of the SE devoid of supervision and control displayed by a supra national European authority . The preference towards a State of registration is now expected to be matured in reason of the selection of the most favourable law in regards to the circumstances pertaining to each company.

With the growth of the process of harmonisation of company law across the EU, the selection of the State of registration will turn out to be less significant and it will be influenced more heavily by the situation of the trade itself.

7 FINAL OBSERVATION

It is now time to understand whether the foregoing investigations indicate a tendency in the direction of the harmonization or propagation of company disciplines in the ambit of the Community's corporation law. Actually, this analysis already summarises the predisposition of guaranteeing a certain degree of authority and control to the Member States, given above all, the tormented vicissitudes characterized by complications and hindrances that the evolution of the SE faced during its creation process. Nevertheless, two main factors give the impression that instead of reaching an higher degree of harmonisation, the implementation of the European Company statute has sourced the opposite effect (proliferation of corporate laws) within the Community.

These factors can be described as: (as mentioned before) the upholding of control and influence by the Member States and the existing schemes of creation of a SE which are liable to generate more companies in the different Member States (in fact merger represents the only construction process which has the consequent result of a reduction in the numeric presence companies. In spite of the fact that the merger happens by acquisition or creation of a new company, two or more of these entities in the Member States and exclusively in accordance with pertinent national laws will be converted into one European Company. The regulation together with the domestic provisions of the Member State in question will preside over it. In case of formation of a new holding SE or a subsidiary SE, two or more corporations at the national level will turn out to be three or more entities. For that reason, conversion is the only process of formation that will not modify the quantity of existing companies¹²³).

However, the SE model represents a noteworthy progress in the process towards the achievement of a corporate configuration suitable for the operations performed on a Community dimension.

¹²³ Societas Europaea: Harmonization or Proliferation of Corporations Law in the European Union? p. 17, (see supra).

In this regard, we can underline the fact that a SE is capable of moving the site of its registered and head office in accordance with the limits delineated above. In any case, this appears to be an enhancement if compared with the present conditions where a company must incur into winding-up procedures in a Member State if willing to implant a head office in a different Member State.

Nevertheless, numerous inconveniences are still at hand for the reason tied to the configuration of the regulation of the SE and to the precedence accorded to national rules. Therefore, it appears improbable that the regulation, as it is at the moment, will permit an enduring and consistent move towards the cogent problems of the companies structure in the light of a desirable enhancement of the business activities on a Community level. Anyhow, it embodies the foundations in favour of a more ambitious future itinerary and at the same time it is beyond doubt that more steps forward have been completed in reaching accords concerning the European Union structure from the moment when the aspiration of uniformity was dumped and substituted by the concept of mutual recognition of the various national laws and of their significance¹²⁴.

The international actors involved in the European trade and the legal experts have to confront numerous problems related to the functioning of the SE regulation.

They are primarily the problems of recognition and application of the pertinent national provisions and directives also counting the one on employees' involvement. Legal experts in the Community are not new to the nature of this legal configuration. Certainly, following Hopt's position, it is possible to claim that: simply a small part of the law governing the European Company is made up of actual European Law. Definitely, a considerable part of it is merely derivatively European: it becomes European Company Law in function of its transformation¹²⁵.

¹²⁴ Hopt., 'Company Law in the European Union: Harmonization or Subsidiarity', (see *supra*).

¹²⁵ Hopt., 'Company Law in the European Union: Harmonization or Subsidiarity', (see *supra*).

Practically, Hopt points at the directives about company law. At the same time as the SE regulation can be considered genuine European law, the national directives belonging to the States where the SE's seat is situated will still in principal govern it. For that reason, even in the time subsequent to the completion of the SE creation process, Member States domestic law and the European one are governing the new entity together.

When it comes down to the practice, this does not represent a concrete problem because, as pointed out previously, European practitioners are equally conscious and used to such a typology of circumstances. On the contrary, this does not automatically amount as the most proficient or most effectual arrangement in order to develop the legal status quo.

Given that European Companies will improbably be created in the same Member State, legal issues together with uniformity concerns will inexorably raise, since legal developments in the European Member States, are not happening in a way comparable to the one existing in Delaware in the USA. If stipulations for a higher degree of harmonisation will be lacking it could be possible that such development might take place even though there might be an incoherent custom in relation to the involvement of employees. In fact, as we have seen, a company's model can very well be laid down by a Member State even lacking labour involvement.

The kind of transformation which would result desirable and valuable, could be the growth of the regulation in order to cover provision for governing the SE in a less Member States-orientated way. For instance, if the SE's taxation will be still tied to national disciplines, the Member States will still require fiscal reports.

In spite of this, most of the SEs will not be impeded to perform business once they will be directed on a supra-national basis or, in fact, following a supra-national legal construction.

At this point, we can reprise the initial question concerning the status of the European Company: does the latter possess a true European essence? Even though it will possibly function in any of the Community's Member State, any subject carrying out business with it has the responsibility to become familiar with the characteristics of the State where the SE is located

in turn to recognize the related applicable law. These types of characteristics might not all the time appear immediately obvious; the question regarding the lack of transparency can be easily seen as a risk for the operations of an SE which would emerge ambiguous and unsafe in the sight of customers and creditors.

The SE regulation will be re-examined in about two years from now (October the 8th 2009¹²⁶). The re-evaluation will be shaped in the form of a report following the paradigm of the Commission's report to the Council and the European Parliament "on the application of the Regulation and proposals for amendments where appropriate" as illustrated in the regulation itself¹²⁷. The core of the re-evaluation will be centred on the analysis of the suitability of the following issues: consenting the setting of a European Company's head and registered office in the Community territory; amending Article 8.16, which contains the jurisdiction clause, in the view of any stipulation which could have been introduced in the Brussels 1 Regulation¹²⁸ or in any text adopted by the Member States or by the Council in order to modify such instrument; allowing provisions in the statutes of a SE adopted by a Member State in execution of authorisation given to the Member States by this Regulation or laws adopted to ensure the effective application of this regulation in respect to the SE which deviate from or are complementary to these laws, even when such provisions would not be authorised in the statutes of a public limited-liability company having its registered office in the Member State.

At the same time as the upcoming re-examination of the SE regulation five years after its birth will be necessary and praiseworthy, the reassessment of some of the existing stipulations have to go further than the particular concerns illustrated above. The focal point of the future modifications should be the consideration of the ensuing consequences of the attribution of considerable authority over the European Company to a Member State which will establish the pertinent law affecting it together with the provisions defining the moments of administration and enforcement of the

¹²⁶ Art 69.

¹²⁷ Art 69.

¹²⁸ Regulation 44/2002, March the 1st 2002.

law itself. In there we find no steering mechanisms to bring together the enhancement of the conducting principles for the functioning of the law in relation to the European Company's activities.

What one should see in the regulation is the actual prospective to stress the propagation of companies' disciplines in the European Community as a replacement of the promotion of a higher level of harmonisation. For itself, it emerges of significance that the regulation will be recognized as the primary move in the procedure towards the achievement of a corporate structure that will possess all the requirements such that its essence will arise and move to a true European dimension.

Bibliography

- Braendle, and Noll, *The Societas Europaea – A Step Towards Convergence of Corporate Governance Systems?*, Department for Business Administration, University of Vienna, 2003.
- Buchheim, *The European Company and Trans-national Mergers*, Wiesbaden, 2001.
- Davies, *Implementation of the European Company in Great Britain*, in: Baums, T., Cahn, A. *The European Company: Operational Issues and Prospective*, Berlin, 2004.
- DTI, *Developing the Framework*, Department of Trade and Industry *Company Law Review*, 3/2000.
- Daininder, ECJ, September 2003, C-176/01, *Inspire Art in the European Legal Forum*, n. 01/2004.
- Ebke, “Company law and the European Union: centralised versus decentralised lawmaking” *The International Lawyer*, 1997.
- Gammie, *EU Taxation and the SE, Harmless Creature or Trojan Horse*, in *EU taxation*, vol. 44, 2004.
- Gessner and others, *European Legal Cultures*, Dartmouth Publishing, Aldershot, , xvii, 1996.
- Gorton, Schmid, *Capital, Labor, and the Firm: A Study of German Codetermination*, *Journal of the European Economic Association*, 2004.
- Hommelhoff, *Einige Bemerkungen zur Organisationsverfassung der Europäischen Aktiengesellschaft*, *Die Aktiengesellschaft*, 2001.
- Hopt, ‘Company Law in the European Union: Harmonization or Subsidiarity’, *Saggi, Conferenze e Seminari, Centro di studi e ricerche di diritto comparato e straniero*, Roma 1998.
- Jahn, *Die Europäische Aktiengesellschaft - Societas Europaea*, *Der Betriebsberater*, 2001.
- Kolvenbach, “EEC Company Law Harmonization and Worker Participation”, *University of Pennsylvania Journal of International Business Law*, 1990.

- Lutter, Europäische Aktiengesellschaft - Rechtsfigur mit Zukunft?, Der Betriebsberater, 2002.

- Marychurch, Societas Europaea: Harmonization or Proliferation of Corporations Law in the European Union?, University of Wollongong, 2002.

- Onida, Tensioni non Risolte nel Nuovo Diritto Societario: una Lettura Romanistica, Tradizione Romanistica, 2004.

- Rescio, La Società Europea, in Diritto delle Società di Capitali. Manuale breve, prefazione di B. Libonati, Milano, 2003.

- Rolla, Valente, La Societas Europaea come strumento di pianificazione fiscale, Commercio Internazionale, 1/2003.

- Romano, The Genius of American Corporate Law AEI Press, Washington, 1993.

- Schulz and Eickler, "The European Company Statute – the German View", Intertax, 2001.

- Wentz, The European Company (the Societas Europaea), Legal Concept and Tax Issues, European Taxation, vol.44 issue 1, 2004.

Table of Cases

C-28/95 Leur-Bloem, 17 July 1997. Judgment of the Court. A. Leur-Bloem v Inspecteur der Belastingdienst/Ondernemingen Amsterdam 2. Reference for a preliminary ruling: Gerechtshof Amsterdam - Netherlands.

C-43/00 Andersen and Jensen, 15 January 2002. Judgment of the Court (Fifth Chamber). Andersen og Jensen ApS v Skatteministeriet. Reference for a preliminary ruling: Vestre Landsret - Denmark.

C-9/2002, Lasteyrie du Saillant 11 March, 2002. Judgement of the Court (Fifth Chamber). Reference for a preliminary ruling from the Conseil d'État: Hughes de Lasteyrie du Saillant v Ministère de l'Économie, des Finances et de l'Industrie.

C-212/1997 Centros, 9 March 1999 Judgment of Court. Centros Ltd v Erhvervs- og Selskabsstyrelsen. Reference for a preliminary ruling: Højesteret - Denmark.

C-167/01 Inspire art LTD, 30 September 2003. Judgement of the of Court. Kamer van Koophandel en Fabrieken voor Amsterdam, v Inspire Art Ltd.