THE EUROPEAN COMPANY STATUTE (SE)

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ABSTRACT

THE EUROPEAN COMPANY

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This thesis examines the European Company, which is by-product of 30 years of history as a result of difficulties and full of delays. The European Company Regulation has come into force on October 8, 2004, and the European Union has been opened to discussions as an legal personality in academic, business and political fields. In contrary to be devised between 1960-1970 to operate as a some sort of supranational company regulating all perspectives of company laws, which is independent from Member States' law and operate all over the Europe. It is from now just a sort of supranational company and legal framework that has lost its specialties and because of discussions and evolution period over draft statues. Due to complex procedures, the formation and transfer of registration place, *renvoi* technique, lack of unique rules about minority rights, responsible and duties of directors, winding up and hard rules about involvement of employees are very important in terms of company law and refers weak points of Regulation. In addition, taxation, intellectual property rights, and labour/pension law have not been arranged. It seems impossible that this sort of company could be used as an effective tool against the competitors of the European Union in today's globalizing world. However, it should be accepted that this supranational structure, which has 30 years of complex history and caused the Member States' traditional business/company law to be opened, should pave the way for supranational legislative activities to be done regarding the field in the future.

Keywords: The European Company, The European Company Regulation, The Societas Europea, The European Company Statute, Transfer of Registered Office.

ÖZET

AVRUPA ŞİRKETİ STATÜSÜ

Eren, Murat

Avrupa Çalışmaları Y.L: Uluslararası İlişkiler ve Avrupa Birliği Bölümü

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Bu tez 30 yıllık zorlu ve gecikmeler ile dolu bir çalışmanın ürünü olarak Avrupa Şirketi(SE) Tüzüğünün şirketler hukuku perspektifinden incelemektedir. Tüzük 8 Ekim 2004 itibari ile yürürlüğe girmiş Avrupa Birliği'nin akademik, iş ve politika sahnesinde işleyen bir kurum olarak kullanıma ve tartışmaya açılmıştır. 1960 -1970'lerde tasarlandığının aksine bütün üye ülke hukuklarından bağımsız faaliyet göstererek şirketler hukukunun bütün perspektiflerini düzenleyen supranasyonal bir şirket türü olacağı halde, 30 yıllık tartışma ve evrim sürecinde bu özelliklerini kayıp edip ulusal hukuklara yaptığı atıflar sayesinde işlevsellik kazanan bir çerçeve yapıdan öteye geçemeyen supranasyonal bir şirket türü olarak karşımıza çıkmaktadır. Karmaşık kuruluş ve tescil yerinin değiştirilme usulleri, ulusal hukuklara azınlık hakları, idarecilerin görev ve sorumluluğu ve tasfiye hükümleri gibi şirketler hukukunun çok önemli alanlarında karmaşık atıf sistemi tercih edilmesi Tüzüğün zayıf noktaları olarak karşımıza çıkmaktadır. Ayrıca, vergi, fikri ve sınai mülkiyet, iş ve emeklilik hukuku gibi alanların hiç düzenlenmemiş olması bu şirket türünün geniş ölçüde globalleşen dünyada Avrupa Birliği'nin rakipleri karşısında etkin bir unsur olarak kullanılması mümkün görülmemektedir. Ancak 30 yıllık çok karmaşık ve üye devletlerin geleneksel ticaret/şirketler hukuku prensiplerini tartışmaya açan ve en azından bir ölçüde uzlaşmanın sağlanmasına vesile olan bu ulus üstü yapının, gelecekte bu konu ile ilgili yapılacak olan diğer yasama faaliyetlerinin önünü açacağı kabul edilebilir.

Anahtar Kelimeler: Avrupa Şirketi, Avrupa Şirketi Tüzüğü, Societas Europea, Avrupa Şirketi Statüsü, Tescil Yerinin Değiştirilmesi

This thesis is dedicated to my mother Şükran EREN

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LIST OF ABBREVIATIONS

Art.	Article
EC	European Community
ECJ	European Court of Justice
EEA	European Economic Area
EEC	European Economic Community
EMU	European Monetary Union
EU	European Union
O.J.	Official Journal of European Union
Reg.	Regulation
SE	Societas Europea

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FIGURE 1: Formation of an SE by Merger by Acquisition

FIGURE 2: Formation of an SE by Merger by the Formation of the New Company

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ANNEX Council Regulation No. 2157/2001/EC of 8 October 2001 on the Statute for a European Company (SE), Official Journal L 294, 10/11/2001.

1. Introduction

On 20th December 2000, the EU's Council of Ministers reached a political agreement on a Regulation to establish "European Company Statute"[1], and its related Directive concerning employee involvement in the administration of European Company[2]. The European Company is also known by its Latin name "Sociates Europea" or by the acronym "SE" (from now on, European Company will be referred as SE).

The final version of this legislative process, of which the first proposal was put forth by the Council 30 years ago and has been subject to long discussions throughout years, was a successful outcome in terms of compromise. The final adoption of the Regulation and Directive was published on 10th November 2001. The SE package would than came into force in 2004, three years after its formal adoption.

The Regulation on the Statute for an SE aims to reduce for businesses the need to set up a complex network of subsidiaries in different countries. It gives multinational companies within the EU the opportunity to choose a company form under the community law that allows them to follow a single set of rules and to maintain only one management and one recording system[3]. According to the reports of the European Commission, existing companies may collectively save € 30 billions[4].

Taking in the account various company law traditions and the many differences in company law legislations between the different EU Member States, it is not surprising that the legislative procedure has taken so many years. Especially the question about employee

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[1] Council Regulation No. 2157/2001/EC of 8 October 2001 on the Statute for a European Company (SE), Official Journal L 294, 10/11/2001.

[2] Council Directive No. 2001/86/EC of 8 October 2001 complementing the Statute for a European Company with regard to the involvement of employees, Official Journal l 294/2, 10/11/2001.

[3] Klass, Susanne and Claudia Greda, " Die Europaische Gesellschaft (SE) österreichischer Pragung nach dem Ministerialentwurf", *Der Gesellschafter –GesRZ,*(Vol. 33, 2004), p. 91.

[4] Klaus, Eicher and Katja Nakhai, "Analysis of the Agreement on Statute for a European Company", *International Transfer Pricing Journal,*(July /August, 2001), p. 116.

participation, the conflict of laws matters, e.g. transfer of real seat and corporate governance system, have been seen as the main obstacles in achieving a compromise between the EU Member States.

Despite the SE's supranational character, the Regulation refers to the adopted EU company law directives and to the law applicable to a public limited-liability under the law of the Member State where the SE has its registered office[5]. Although the national laws on public limited-liability companies have many similarities such as the limited liability of shareholders, the right to be a member to the stock exchange market, etc., there are many differences as well in the area of corporate governance such as directors' functions and liability, the structure of the company, the protection of minority of shareholders and the creditors' rights. This means, contrary to the idea of supranational character of the SE, that the SE does not form a homogenous legal framework in the European Union.

When considering all variations, possibilities and problems involved in the new SE, one notes that the SE is indeed a demanding vehicle, but simultaneously, especially from a corporate and transaction point of view an interesting one, as it will deliver a new approach to the present and future structure of corporate regimes.

This thesis starts with the SE's historical evolution; it then goes into a considerably detailed description and analysis of the legal framework in question. Then thesis examines general rules for SE which, are legal personality, *renvoi* technique, transfer of its register office, its capital, registration and its effect, brief explanations about employee involvement. Later, the forms of incorporation of an SE, its structure, the company organs and their members as well as its different forms of termination will be explained respectively.

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[5] Bilgili, Fatih, "Avrupa Anonim Ortaklığı", *Elektronik Sosyal Bilimler Dergisi,* (Vol. 2, No.6, 2003), p. 19.

1. Historical Background and Legislative Outcome

2.1. 50's: The First Inception of Concept

After the Second World War, European States have by way of treaty set up some 'Europe-Wide' companies. Such as "Eurofima"[6] which is responsible for the financing of railway materials, was created in this way by the Berne Convention signed on 20 October 1955 by fourteen European States, which are Germany, France, Italy, Belgium, Netherlands, Spain, Switzerland, Sweden, Luxemburg, Austria, Greece, Turkey, Denmark and Norway . However, these companies have been created on a case-by-case basis, depending on the intervention of States and characterized by the differing nature of each company. Conversely, fundamental to the concept of a European company are the principles of status uniformity and state non-interference.

Some preliminary work to create a pan-European and uniform statute on companies was initiated by the Council of Europe in 1952. The subsequent creation of the EEC (European Economic Community) in 1957 immediately generated various proposals for the concept of a European Company. However, the initiatives did not come from the business community but from practitioners and academics[7]. The concept of a European Company has been in the Brussels machinery for many years. The idea was first put forward by Thibiérge at the 1957. Congress of French Notaries by Professor Sanders's speech was at the Rotterdam School of Economics in

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[6] EUROFIMA was established on November 20, 1956 based on an international treaty (the "Convention") between sovereign States. It is governed by the Convention signed by its member states, its articles of association ("Statutes") and in a subsidiary manner by the law of the country in which it is located. It was originally founded for a period of 50 years. The decision of the extraordinary General Assembly of February 1, 1984 to extend this period for an additional 50 years, until 2056, was approved by all member States. EUROFIMA's shareholders are railways of the European member States which are parties to the Convention. EUROFIMA's purpose is to support the railways which are its shareholders as well as other railway bodies in renewing and modernizing their equipment. See EUROFIMA 2005 Annual Report < http://www.eurofima.org/Annual_Report_2005_E.pdf> (last visited on) 13/04/2006.

[7] Linmondin, Karol, " The European Company(Societas Europea)- a Successful Harmonization of Corporate Governance in the European Union", *Bond Law Review*, (Vol. 15, No. 1, 2003), p. 150.

1959[8]. His aim was that "*to adopt, by means of an international convention, a comprehensive company law, probably restricted to* '*sociétés anonyms'* (Stock Corporation) *as done previously in the field of international transportation*"[9].

On 15 March 1965, the French government recommended the opening of negotiations between the Member States aimed at the conclusion of a convention for the establishment of a European Commercial Company. The proposal was indicated of French strategies of establishing large-scale European-wide industrial companies after World War II. The French argued that such a vehicle would increase scale and scope economies in European companies, as well as help companies to develop next-generation technologies like the United States and Japanese multinational corporations[10].

The Commission supported the idea and on 29 April 1966 presented a Memorandum on the creation of a European Commercial Company. In this document, the Commission pointed a first issue relating to the legal mechanism that would introduce the European Commercial Company in the Community. France was arguing in favour of a uniform law to be adopted not at a European level but by each Member State in its own legislation. In other words, every member country accepts single set of rules about European Commercial Company. Sources of this rule came from national law makers. Therefore, it did not a law of the supranational institution. Nonetheless, such a law would not have had supranational character on the other domestic laws. However, the Commission rejected this France option in favour of a supranational mechanism at

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[8] Edwards, Vanessa, "EC Company Law",(Oxford: Oxford University Press, 1999,1st Ed.), p. 399.

[9] Dominique, Carreau and L.William Lee, 'Doing Business in the European Internal Market : Towards A European Company Law' (1989) *Northwestern School of Law Journal of International Law & Business* p. 501 in Linmondin, p. 150.

[10] Edwards, Vanessa, " The European Company-Essential Tool or Eviscerated Dream?", *Common Market Law Review*, (Vol. 40, No. 2, 2003), p. 444, Poroy (Tekinalp, Çamoğlu), "Ortaklıklar",(İstanbul: Beta Basım Yayım Dağıtım A.Ş., 2000, 8th Ed.), p. 261.

the European level by way of Regulation. Therefore, "*it clearly appeared that the goal was not to achieve harmonization or unification of national company laws*"[11].

Finally, the Commission also created an advisory group which chaired by Professor Sanders, to analysis the feasibility of such corporate vehicle and to consider the potential advantages which a company governed by the same legal regime in all Member States would have. The advisory group of finalized a proposal for SE Statute in 1967. The Proposed Statute faced a number of obstacles and objections ever since its conception.[12]

2.2. 70's : First Draft Regulation

The Commission renewed the debate in 1970 when it presented the first formal Regulation proposal for a SE Statute[13]. This proposal include more than 400 articles and regulating very aspects of SEs[14]. Wide discussions over how to deal with the diverse national systems of interest representation, the Commission suggested that SEs have a mandatory structure that included executive and supervisory boards which reflected the German model named "two-tier structure"[15], and the Commission suggested that employees would select one third of its board-members and that two thirds be chosen by shareholders[16]. Following a generally favorable

[11] Linmondin, p. 151.
[12] Helminen, Sakari, "The European Company –SE", *Turku Law Journal* ,(Vol. 3, No. 2, 2001), p. 22.
[13] When we look at legal basis of proposed regulation of 1970 and 1975 were based on ex-article 235 of the EC Treaty which authorized the Council to "*take appropriate* measures" when the "*Treaty ha[d] not provided the necessary powers*" to attain "*one of the objectives of the Community*" for the realization of the common market. Under ex-article 235, unanimity was imposed for adoption of such measures[13]. In 1970, the Community was composed of only six Member States. However, the Proposed Regulation immediately provoked intractable oppositions due to the sensitive political issues dealt with. Successive waves of accession starting in 1973 rendered consensus completely unlikely.
[14] Lombordo, Stefano and Piero Pasarti, "The Societas Europaea: a Network Economics Approach", ECGI - Law Working Paper No. 19/2004, < http://ssrn.com/abstract=493422> , p. 3, Klass Susanne and Claudia Greda, p. 92.
[15] Poroy (Tekinalp, Çamoğlu), "Ortaklıklar", (İstanbul: Beta Basım Yayım Dağıtım A.Ş., 2000, 8th Ed.), p. 262. According to "two-tier structure"; the " management board" is responsible for managing the SE. the " supervisory board" is supervise the work of the management board. For further information below chapter 5.
[16] Lomordo and Pasati, p. 25.

reception in the Economic and Social Committee (1972) and the European Parliament (1974), Regulation proposal for SE Statute was presented in 1975.

The 1975 Proposed Regulations include specific provisions concerning SEs operating in a group of companies. Strong disparities of views existed in this area. For example, Germany had recognized the concept of 'group' with a correlative specific legislation. Conversely, countries like England had always strictly considered each company as a legally and independent entity therefore refusing any legal recognition of a 'group' of companies.

Proposal was produced endeavored to produce a comprehensive scheme of company law; yet this produced a result to complex and lengthy. The main point of this proposed regulation was to increase concerns about regulation proposal, whether they have weak or no systems of employee representation, the new Commission proposal suggested greater parity in terms of board appointments[17].

In addition, the European firms were generally opposed because of the suggested mechanisms for board representation. Moreover, the 1970s saw a general economic fall and companies reasoned that much benefits would be had from national industrial policies that were aimed at the modernization of national firms.

After member-states were unable to agree on the content of the revised proposal, it was shelved in 1982[18].

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[17] Edwards, (EC Company Law), p. 402.

[18] 1975 proposal contained 284 separate articles, a further 170 paragraphs and 4 annex.

2. 3. 80's : Debates over Draft Regulation

In the mid-1980s, the European Union (then European Communities) relaunched its efforts to create a single market for goods, services, and labor[19]. Interest in the SE Statute remerged, and was identified in the Commission White Paper[20] on the internal market as an "essential component" to ensuring that firms would gain the full benefits from an integrated market[21]. In 1988, the Commission thus prepared a new proposal for the SE Statute[22].

In its new proposal, the Commission offered an innovation to break the hard situation. It suggested that terms of company incorporation be dealt with in a Regulation that would be binding on all member-states, and that a separate Directive be devoted to the representation issue. The Regulation and the Directive were closely connected and an SE could not be registered until it had chosen a model of worker participation permitted by the domestic legislation of the State of registration[23]. This Directive, which was characterized by the Commission spelled out several optional systems of worker participation that Member States could chose from directive[24]. The Commission reasoned that the strategy of separating the Regulation and the Directive would isolate the controversial worker participation issue from the technicalities of how SEs would be formed, and that the optional nature of the Directive would decrease fears in member states with weak forms of worker representation. However, such a shift has been criticized in so far as a directive has a more limited impact, only "*binding, as to the result to be achieved, upon each*

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[19] *Statute for the European Company: Commission Memorandum to Parliament, the Council and the Two Sides of Industry* (1988*),* Bull. Eur. Comm., supp. 3/88, 20.

[20] Commission White Papers are documents including recommendations for Community action in a particular area.

[21] Lomordo and Pasati, p. 10.

[22] *Proposal for a Council Regulation on the Statute for a European company***,** 1989 Official Journal (C 263).

[23] *Amended proposal for a Council Regulation on the Statute for a European Company*, 1991 Official Journal (C 176), Arts. 8 (3) and 24 a (3).

[24] The new draft allows for considerable flexibility. On a primary level, an SE can decide its own structure of worker participation among three models: "*employee representation on the board of a company, the creation of a separate consultative body of employees, or the adoption of a negotiated system of worker participation in management*. M. Storm, Paul 'A New Impulse Towards a European Company' (1971) 26 *Business Law* p. 701 in Linmondin, p. 153.

Member State to which it is addressed" and leaving "*to the national authorities the choice of form and methods*"[25].

The new Commission proposal stressed the benefits from a single supranational framework for businesses, the advantages of the SE Statute over the complexity of existing merger arrangements[26], as well as significant tax advantages to companies. Member-states responded to the Commission proposal along different opinions. For example Germany, the Netherlands, Denmark and Luxembourg Systems include extensive worker participation; they expressed support for the proposal. Countries with liberal market economies—Ireland and the UK—were strongly opponents. Their opposition was anchored in worries that the SE statute would bring solutions antithetical to liberal designs and erode their competitive advantage[27].

Despite the Commission innovation and a rejected proposal that made several privileges to the UK, an agreement could not be reached over several years of negotiations. In substance, a deal could not be struck because Britain and Germany expressed their fears that the existing SE

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[25] Consolidated Version of the Treaty Establishing the European Community, Official Journal C 340, 10 November 1997.Art. 249.

[26]Third Council Directive No.78/855/EEC of 9 October 1978 based on Article 54(3) (g) of the Treaty concerning mergers of public limited liability companies, Official Journal L295/36, 8/10/1978; and Sixth No. 82/891/EEC Council Directive of 17 December 1982 based on Art 54(3) (g) of the Treaty, concerning the division of public limited liability companies ,Official Journal L378/47, 31/12/1978**.** The Directive applies to public limited companies. Any Member State may choose not to apply it to cooperatives in company form or where the merger would result in the disappearance of a company which is the subject of insolvency proceedings. To fall within the scope of the Directive a merger must result in the full absorption of one or more companies by another, or in the formation of a new company. As concerning with Sixth Directive governs division by acquisition, division by the formation of new companies and division under the supervision of a judicial authority. A division by acquisition is an operation whereby, after being wound up, but without going into liquidation, a company transfers all its assets and liabilities to more than one company. The shareholders of the company being divided are allocated shares in the companies receiving contributions as a result of the division ("recipient companies").Division by the formation of new companies is an operation whereby, after being wound up, but without going into liquidation, a company transfers all its assets and liabilities to more than one newly formed company. The shareholders of the company being divided are allocated shares in the recipient companies. Further information see Edwards; (EC Company Law),pp. 90-116, Villiers, Charhotte, " European Company Law- Towards Democracy ?", (Hampshire: Dartmouth Publishing/Asgate Publishing, 1st Ed.,1998) p. 46.

[27] Helminen, p. 22.

statute proposal would undermine central components of their respective corporate systems[28]. While the Britons feared that the SE statute would force a “a continental model” on their companies, the Germans raised concerns that companies would set up fictitious SE headquarters in places with laxer rules while continuing their operations at home. Even strong pressure from business and the impending completion of the internal market failed to convince governments to accept the new proposal.

The Commission decided to avoid the settlement of these issues and declared in 1988 that it was "*open to question (…) whether the European Company Statute is the proper place to create a body of rules governing groups*"[29]. Similarly, the Commission abandoned its efforts for a consensus on the very controversial taxation issues. As a result, the 1991 Proposed Regulation provided no taxation regime specific to an SE and its provisions dealing with losses from foreign establishments had a very limited impact.

2.4. 90’s : Revised Proposal and Final Report of the Group of Experts on European Systems of Workers Involvement

1989 Proposed Regulations provided flexibility with the aim of taking into account the variety of needs and interests that an SE could pursue through its preference for one specific management structure. However, the last amendment in 1991 was especially inappropriate for the European character of the SE, giving potential primacy to national legislatures over the founders themselves of the SE. Such a provision was representative of the will to reach a political agreement regardless of its impact[30]. On a practical level, this amendment seriously undermined

[28] Enriguies, Luca, “ EC Company Law Directives and Regulations: How Trivial Are They?”, ECGI - Law Working Paper No. 39/2005, <http://ssrn.com/abstract=730388>.
[29] See supra note 18.
[30] Edwards (EC Company Law), p. 404.

the usefulness of the SE form. A Member State could impose the "one-tier structure" and another Member State the "two-tier structure". As a result, an SE would not be able to move freely between these two Member States, such a transfer requiring first a whole restructuring of its management organs. On a conceptual level, what remains of the European uniform character of the SEs combined with the similar possibility offered to Member States to mandate one specific model of workers participation, the 1991 Proposed Regulation could result in various national regimes, each with its own domestic characters[31].

Regarding the 1989 Proposed Directives on worker participation, a "*qualified majority*"[32] of the Council would be sufficient. Yet, this new source of authority was challenged by some Member States as being in contradiction with the Maastricht Treaty signed in 1992 and already in preparation in 1991. The Maastricht provisions addressed, *inter alia*, social policies and under the amended EC Treaty, qualified majority would be sufficient for directives dealing with "*information and consultation of* workers" but unanimity required in the area of "*representation and collective defense of the interests of workers (…), including codetermination*" [33]. Thus, a controversy arose among Member States on the appropriate legal basis to be given to the Directive.

As a result of all debates, 1991 Regulation and Directive proposal failed. The EU Commission decided to solve problematic area especially employee involvement and tax issues of SEs and in later years.

In 1997, the Commission convened an experts group to find a solution to the European Company Statute impasse. The Group argued that member-states' systems of worker participation were too diverse and that attempts to foster harmonization were fruitless. Its main

[31] Villiers, p. 59.
[32] EC Treaty Art. 44 and 251.
[33] EC Treaty Art. 137.

solution to the participation issue was that management of each SE negotiates with its employees and jointly agrees on what system of representation should govern the company[34]. In the case of management and employees failed to reach an agreement, the group recommended that a set of standard rules be used as the default[35].

While the group's report received a favorable reception, member-states disagreed over the inclusion of a "zero-option"[36] which would allow managers and workers to agree not to have any formalized system of representation. While the Britain and Portugal strongly favored the zero-option, and Germany, Austria, Denmark, Finland, Sweden, Luxembourg, and the Netherlands opposed, no compromise could be reached[37]. Moreover, disagreement emerged on whether existing companies should be allowed to transform themselves into an SE. Germany and the others opposed such an arrangement for reasons they had long cited; they maintained that easy conversions would be a trojan horse that would allow companies to circumvent national laws by merely registering elsewhere.

SE Statute was considered in May 1999. Those efforts failed because of Spanish delegation maintained its reverse towards a key element of the proposed arrangement for the introduction of employee involvement within a newly formed SE. Therefore, Spain could not accept the overall compromise proposal now that there is finally a compromise between the Member States[38].

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[34] Group of Experts *European System of Worker Involvement (With Regard to the European Company Statute and Other Pending Proposal)*, Final Report, May 1997.

[35] Edwards (The European Company), p. 448.

[36] Keller, Berndt, " The European Company Statue: Employee Involvement-and Beyond", *Industrial Relations Journal,* (Vol. 33, No. 5, 2002), p. 431.

[37] Edwards (The European Company), p.449.

[38] Eicher and Katja Nakhai, p. 116.

2.5. Agreement among Member States over Regulation at Nice Summit in 2000

Renewed negotiations followed, with states central to an agreement each holding the Council Presidency over a three year period. Luxembourg, Britain, Austria, and Germany all gave European Company Statute a priority, but were unable to broken the an agreement. A compromise was finally reached at the Intergovernmental Conference in Nice (December 2000). The agreement maintains the separation of the Regulation and the Directive. The latter gives member states the option of whether or not to transpose into national law a fall-back reference provision (that would apply if agreements between management and employee representations cannot be reached). The final agreement also prevents existing companies from transforming themselves into SEs and excludes tax incentives[39].

The Internal Market Commissioner *Frits Bolkenstein* and the Commissioner for Employment and Social Affairs *Anna Diamantopoulou* have both welcomed the political agreement to establish the SE Statute, but their speeches highlighted two differing approaches to company law. *Bolkenstein* had a more corporate point of view: *'This political accord represents a major breakthrough for companies seeking an efficient structure to operate on a pan-European basis. The European Company will enable companies to expand and restructure their cross-border operation without the costly and time-consuming red tape of having to set up a network of subsidiaries. It is therefore a step forward in our efforts to make the Internal Market a practical reality for business, to encourage more companies to exploit cross-border opportunities and so to boost Europe's competitiveness in accordance with the objectives of the Lisbon Summit.'* *Diamantopoulou,* on the other hand, pointed out the social implications of the political agreement: *'I welcome this milestone agreement which marries the needs of business with the needs of workers and reflects the Lisbon Summit approach that good social policy is good*

[39] Edwards (The European Company), p. 450.

economic policy. Worker involvement helps to deal with social side effects of competition. Governments, business and workers should cooperate to respond positively to industrial change during this period of rapid globalization'. Both perspectives are valuable, although the concept and contents of the social dimension grows in accelerating speed within company law. When considering all variations, possibilities, and problems involved in the new SE, one notes that the SE is indeed a demanding vehicle, but simultaneously, especially from a corporate and transaction point of view, an interesting one, as it will deliver a new approach to the present and future structures of corporate regimes[40].

2.6. Post "Nice Summit" Developments

The Council Regulation gives companies the option of creating an SE, which can operate on a Europe-wide basis and be governed, instead of by national law, by European law directly applicable in all Member States. The Directive lays down the employee involvement provisions to apply to SEs, providing negotiations between management and employee representatives in each SE on the arrangements to apply, with a set of back-up statutory "standard rules" where no agreement is reached. Involvement means the information and consultation of employees and, in some cases, board-level participation.

The Council Regulation came directly into force across the European Union[41] but also the European Economic Area[42] (EEA, which includes Switzerland, Iceland, Norway and the

[40] Helminen, p. 20.

[41] European Community was established by Maastricht Treaty (Treaty on European Union) instead of European Economic Community which, was establish by Roma Treaty in 1956. One of main character of Maastricht Treaty is creation of a "pillar structure". First pillar contains main common policies. Such as Common Market, Customs Union, Common Agriculture and Fisheries Policy. This reflects "supranational quality". The SE regulation belongs to this pillar. Other two pillars are Common Security Policy and Common Justice and Home Affair Policy. This policies are operated "inter- governmental structure", instead of supranational. These three pillar structure officially named the European Union (EU). Further information see Weatherill, Stephen, " Cases & Materials on EU Law", (New York: Oxford University Press, 6th Ed.,2003).

Liechtenstein) on 8 October 2004[43]. By the same date, Member States had to transpose into national law the Council Directive, or ensure that by then management and labor had introduced the required provisions by agreement. However, all Member States have not transposed the SE Acts into their national law yet. For instance France still is discussing details about it. On 8 October 2004, only six countries had implemented the regulations at the national level. They are Belgium, Austria, Denmark, Sweden, Finland and Iceland. These countries have taken so far the necessary measures to allow European Companies to be founded on their territories. Until the rest do so, many corporations operating in more than one Member State will be denied the option of being established as an SE and thus of being able to operate throughout the EU with one set of rules and a unified management and reporting system.[44].

When we look existing SEs, we can found just eight registered company which are MPIT Structial Financial Services SE[45], Strabag Bauholding SE[46], Galleria de Brennero Brennerbasistunnel BBT SE[47], Schering-Plough Clinical Trials SE[48], Go East Invest SE[49], Elcoteq SE[50]and Artrium Erste Europaische VV SE[51]. Four companies planed to be SE in

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[42] Agreement creating the European Economic Area (EEA) was singed in 1992 between European Community Countries and Norway, Iceland, Liechtenstein. The EEA Agreement entered into force on 1 January 2004. The EEA Agreement is concerned principally with the four fundamental pillars of the Internal Market, "the four freedoms", i.e. freedom of movement of goods (excluding agriculture and fisheries, which are included in the Agreement only to a very limited extent), persons, services and capital. Regulation is also apply EEA member states. Further information see Kapteyn, P.J. G and VerLoren Van Themaat, "Introduction to the Law of the European Communities", (London: Kluwer Law International, 3rd Ed., 1998).

[43] Tollet, Nicolas, "The Societas Europaea: Europeanization via Americanization of Corporate Law. Corporate Governance: Only One Model?", *Global Jurist Topic,* (2005, Vol. 5, No. 2, Art. 3), p.30.

[44] Tollet, p. 3

[45]For a detailed information about MPIT Structial Financial Services SE visit <http://www.seeurope-network.org/homepages/seeurope/secompanies.html > (visited on 25/01/2006).

[46] For a detailed information about Strabag Bauholding SE visit <http://www.strabag.at> (visited on 25/01/2006).

[47] For a detailed information about BBT SE visit <http://www.bbt-ewiv.com> (visited on 25/01/2006).

[48] For a detailed information about Schering-Plough Clinical Trial SE visit <http://www.seeurope-network.org/homepages/seeurope/secompanies.html > (visited on 25/01/2006).

[49] For a detailed information about Go East Invest SE visit <http://go-east-invest.com> (visited on 25/01/2006).

[50]For a detailed information about Elcoteq SE visit <http://www.elcoteq.com > (visited on 25/01/2006).

[51]For a detailed information about Artium Erste Europaische VV SE visit <http://www.foratis.com/thema/000128/europ_aktiengesell_ag_se.html> (visited on 25/01/2005).

future which are Alfred Berg ABN AMRO, Allianz AG, Mensch und Machine Software and Nordea Bank AB[52].

[52] Morkve, Camilla Skore, " The European Company in Scandinavia: Nordea' Transformation to an SE", *European Business Law Review*, (Vol. 16, No. 2, 2005), pp.353-358.

3. General Rules about the SE

3.1. Organization

Organization of a company may be perceived as an artificial entity. It is occupied and controlled by its managements and membership for the purpose of pursing business goal. The human constitutes of the company will ultimately determine the route which is to be taken by the corporate enterprise. A company has several characteristic;

Firstly, the company is a separate legal entity[53], which named "Doctrine of Separate Personality". As result of this doctrine, companies possess rights and are subject to duties in much the same way as natural persons. The usually case cited in relation to separate legal personality is *Salomon v. Salomon & Co. Ltd.* Case (1897). Salomon had been in the boot and leather trade for sometime. Together with other members of his family he formed a limited company and sold his previous business to its. Payment was in the form of cash, shares and debentures (the latter is loan stock which gives the holder priority over unsecured creditors if the company is wound up). When the company was eventually wound up it was argued that Salomon and the company were the same and as he could not be his own creditors, his debentures should have no effect. Although previous courts had decided against Salomon, the House of Lords effect held that under the circumstances, in absence of fraud, his debentures were valid. The company had been properly constituted and consequently it was, in law a distinct legal person, completely separate from Salomon[54]. Considering this topic, the

[53] Griffin, Stephen, "Company Law- Fundamental Principles", (Dorchester: Longman/Pearson Education, 3rd Ed., 2000), p. 1.

[54] Judge, Stephen, "Business Law", (Basingstone :Macmillan Press, 2nd Ed.,1999), p. 191; It is important to note that, the Salomon case did not establish doctrine of separate personality. It merely permitted its application to one-man companies. Following, the EU Twelfth Company Law Directive (89/667) was enacted Single Member Private Companies. The Directive permit the in corporation of private companies by one person and with only one member see Kelly, David and Ann Holmes, " Principles of Business Law", (London: Cavendish Pub. , 2nd Ed., 1998), p. 292; in contrary, the SE Regulation constitutes four formation ways. Only Subsidiary SE can be formed by one person. Other ways require at least two legal entity; see Chapter 4.

company has the possibility of separating ownership from control. In other words, a person can be controller, managing director, and an employer of the company under separate contract[55]. This is named principle of the “the veil of incorporation”. Due to this principle, the incorporators of a company separate from the company itself. The members of the executive organ are the agents of the company. However, shareholders of the company have no right to be involved in the day-to-day operation of the business and they cannot bind the company in any way[56].

Secondly, a company continues to exist as a separate legal person despite changes in its membership or even the death of all of them until it is wound up[57]. This characteristic named “Perpetual Succession of Companies”. Members may die, be declared bankrupt on insane, or transfer their shares without any effect on the company. For example, the Hudson’s Bay Company has been running for well over 300 years[58]. As an abstract legal person the company cannot die, although its existence can be brought to an end through the winding up procedure[59].

Thirdly; the company itself and not shareholder own any business assets. This is normally a major advantage in that the company’s assets are not subject to claims based on the ownership rights of its member[60].

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[55] Judge , p. 163.
[56] Kelly, p. 293.
[57] Judge, p. 169.
[58] Bourne, Nicholas, “Principles of Company Law”, (London: Cavendish Pub. , 3rd Ed., 1998), p.1
[59] Kelly, p. 293.
[60] Griffin, p. 2.

3.1.1. Unlimited or Limited Liability of Companies

3.1.1.1.Unlimited Company

The unlimited company is a separate legal entity and posses the characteristic of a corporate entity[61]. As a result of a separate legal entity, this kind of companies make contracts and hold property. Moreover, perpetual succession rule is still valid for this company type[62]. Such companies receive all the benefits that flow incorporation except limited liability. The liability of members is unlimited in the event of the company becoming wound up[63]. Not many of these exist because of the unlimited liability of their members. However, the main advantage over the limited company is the unlimited companies do not have to file accounts with the Registration authority so that the public has no access for their financial statement[64] .

3.1.1.2.Limited Companies

Companies can also be classified by reference to their member's liability. Although, the company is always fully liable for its depts. The members of such companies have limited liability for the company's depths and liabilities[65]. Where the liability of the members at the company is limited by shares it means that once the members have paid the full nominal value of their shares[66]. However, company must pay its depths so long as it has any funds from which to do so. Most companies are limited by shares. Trading companies will need to

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[61] Griffin, p. 52.
[62] Keenan, Denis and Sarah Riches; "Business Law", (London: Financial Times / Pitman Pub. , 5th Ed.,1998), p. 11.
[63] Lawson, Richard; " Business Law", (London: Financial Times / Pitman Pub. , 1st Ed., 1998), p. 4.
[64] Judge, p. 159.
[65] Judge, p. 156.
[66] Richard, p. 3.

raise share capital with which to purchase assets which they need for running their business[67]. Limited liability status is characteristic of the very heart of modern company law[68].

3.1.2. Private or Public Limited-Liability of Companies

3.1.2.1. Private Limited-Liability Companies

Private companies tend to be small–scale enterprises owned and operated by small number individuals who are acting involved in the day-to-day running of enterprise[69]. The relationship between the members of a small private company is one, which is usually built upon mutual trust and confidence[70]. The basic distinction is that private companies cannot offer their shares to the public. So, their shares are not quoted any stock market and in practice tend not to freely transferable. Moreover, vast majority of limited-liability companies are private[71]. Further differences between private and public limited-liability companies examine below paragraphs.

3.1.2.2. Public Limited Liability Companies

Public companies tend to be large, and be controlled by directors and managers rather than owner. They are essentially a source of investment and have freely transferable shares which are quoted on the Stock Exchange[72]. As a consequence of the difference with regard to ownership and control many of the companies legislation designed the protect interest of shareholders in

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[67] Bourne, p. 5.
[68] Griffin, p. 5.
[69] Kelly, p. 295.
[70] Griffin, p. 50.
[71] Judge, p. 160.
[72] Kelly, p. 295.

public companies are not applicable to private companies. The most important diffirencies between private and public limited-liability companies are as follows[73]:

- The requirement to keep accounting records is shorter for private companies.
- The controls over distribution of dividend payments are relaxed in relation to private companies.
- Private companies may purchase their own shares out of capital whereas public companies are strictly forbidden from doing so.
- Private companies are less strictly regulated, including, restrictions on loans to directors, and regulation of raising and maintain of capital.
- Disclose requirements in the annual returns are less onerous the private company is classified as either "small or medium".
- A private company may be exempt from the statutory out of their accounts.

Most companies are initially incorporated as private limited-liability companies and will "go public" when they have increased sufficiently their size and need greater freedom to raise capital for expansion. Many public limited-liability companies seek access to the financial markets.

3.2. Legal Personality of the SE

An SE has legal personality (Art.1(3) Reg.) which means the SE has a separate legal identity, capacity to act, legal capacity and the capacity to take proceeding [74]. Indeed, it is treated as domestic public limited liability company, existing in its own right, with its own legal personality. Thus, shareholders may not be liable beyond the amount of subscribed capital. In

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[73] Judge, p. 160, Kelly, p. 296.
[74]Werlauff, Erik, "The SE Company –A New Common European from 8 October 2004", *European Business Law Review,* (Vol. 14, No. 1, 2003), p. 89.

other words, the shareholders are liable for only company debts to the value of the shares they own. A Public Limited-Liability Company has the right of access to capital markets and offers its shares for sale to the public through recognized stock exchange market. It can also issue advertisements offering any of its securities for sale to the public[75]. Most of the big companies undertake these methods in order to grow as they provide access to large amounts of capital that can be used for investment, expansion and acquisition[76].

Although an SE is a supranational company, due to the references of the Regulation to the national company laws, it is treated as a national public limited-liability company in many matters. Consequently, the domestic law of the Member State where the SE has its registered office will be applied for such matters (Art.3 (1) Reg.). For instance, an SE registered in Germany is subject to the German law pertaining to stock corporations (*Aktiengesetz* or AktG)[77] whereas in Netherlands, the Dutch Commercial Code will be applied.

3. 3. The *Renvoi* Technique

In order to diminish the gap between supranational and national legislation, SE Regulation creates a special hierarchy called the *renvoi* technique[78]. It determines a complex system of reference for the purpose of dictating the law that would be applied to an SE. As a rule, SE is a supranational company operating under the European Community and European Economic Area is regulated directly under the Regulation for European Company Statute. However, the Regulation also refers to the national legislations of Member States with respect to

[75] In contrast, a private company may not offer any shares to public.
[76] Slavin, Laurence, " 9 Key Points About Limited Liability", *Medeconomics*, (Vol. 26, No. 5, 2005), p. 22
[77] Eicher and Katja Nakhai, p.116.
[78] Klass and Claudia Greda, p. 92.

several aspects of company law[79]. Member State legislation is responsible for filling the gaps left open by the Regulation. In other words, *renvoi* procedure was devised in order not to leave any issues unaddressed in aspects and fields that the SE Regulation does not directly regulate even though they lie within its regulatory scope.

According to the Regulation, the primary law source for the SE is the Regulation for European Company Statute due to its supranational character. For instance, the type of formation of SE (Art 2.), basic capital structure (Art.4), registered and head office (including transfer) (Art. 8- Art. 64), board structure (Art. 39-51), shareholder rights (Art 55-56), employee participation (through Directive), certain requirements of company law directives (First and Third) and conversion from SE to public limited-liability company are directly governed by regulation[80].

On the other hand, the Regulation also offers three types of *renvois* defined in Article 9.1 (b) and (c). Therefore, an SE shall be governed:

(b) where expressly authorized by this Regulation, by the provisions of its statutes

or

(c) in the case of matters not regulated by this Regulation or, where matters are partly regulated by it, of those aspects not covered by it, by:

(1) the provisions of laws adopted by Member States in implementation of Community measures relating specifically to SEs;

[79] Bilgili, Fatih, "Avrupa Anonim Ortaklığı", *Elektronik Sosyal Bilimler Dergisi,* (Vol. 2, No.6, 2003), p. 22.

[80] Edwards, (The European Company); p. 451.

(2) the provisions of Member States' laws which would apply to a Public Limited-Liability company formed in accordance with the law of the Member State in which the SE has its registered office;

(3) the provisions of its statutes, in the same way as for a Public Limited-Liability company formed in accordance with the law of the Member State in which the SE has its registered office.

The kind of *renvoi* referred in (c) (2) indicates that Members States' national law provisions will be applied for the SE. Formation of the SE (Art. 15); capital maintenance and its changes, its securities (Art. 5); directors' liability (Art. 51); competence and procedure of general meeting (Art. 52); accounts, reporting standards and discourse requirements, rule of amendment of statute articles (Art. 59) are considered within this context[81].

The adoption of the SE Regulation has raised much criticism in the doctorial debate, mainly based on the legislative technique of *renvoi,* which may allegedly lead to great dissimilarity as to the way the Directive is concretely implemented in each Member State. This would most presumably result in many different models of SE to be created. The goal of single set of rule regulation would have consequently been missed[82]. Finally, this is important to remark that there could be the difficulty in distinguishing the supranational law from the national ones[83]. Most of national law would be applicable for different companies which are subject to another member state and jurisdiction.

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[81] Raaijmakers, Theo, " The Statute for a European Company; Its Impact on Board Structure, and Corporate Governance in the European Union", *European Business Organization Law Review*, (Vol. 5, No. 1, 2004), p. 165.
[82] Vaccaro, Enrico, " Transfer of Seat and Freedom of Establishment in European Company Law", *European Business Law Review,* (Vol. 16, No. 6, 2005), p. 1360.
[83] Klass and Claudia Greda, p. 92.

3. 4. The New Concept: Transfer of the SE's Seat to another Member State

As regards to transfer of the European Company's Seat, two theories need to be mentioned: "Incorporation Theory" and "Real Seat Theory." Following paragraphs will explain the transfer procedures of European Company Seat in the light of these theories as well as some important European Court of Justice decisions about freedom of establishment of companies.

According to the incorporation theory, a corporation is subject to the law of the country in which it is incorporated, i.e. registered[84]. In other words, this theory claims that the law of the state of incorporation has to be applied[85]. Once it is incorporated, it is irrelevant where the company does business or has its real seat (head office). Therefore, incorporation theory grant companies the right, in principle, to move their center of administration, or principle place of business, across state borders without any effects on their legal status as a company entity under the law of the State of incorporation, provided that the registered office remains in the state of incorporation. As *Wymeersch* pointed out, in the original jurisdiction of its formation, the company can transfer its registered office by lodging a document, approved by its directors, with the Companies Register[86]. This theory has been established since the early eighteenth century. British companies have ever since made use of it to forego the benefits of British Law while doing business in Common Wealth countries and the USA. In the nineteenth century, even French companies used the incorporation theory via companies in such countries as UK, Belgium or Switzerland to escape the rigors of their own country's corporate law[87]. This theory has been applied in the UK, Ireland, the Netherlands, Denmark, Finland, Iceland, Norway and Sweden.

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[84] Helminen, p. 21.

[85] Ebke, Werner F., " The European Conflict-of-Corporate-Laws Revolution: Überseeing, Inspire Art and Beyond", *European Business Law Review*, (Vol. 16 No. 1, 2005), p. 14.

[86] Wymeersch, Eddy, " The Transfer of the Company's Seat in European Company Law", *Common Market Law Review,* (Vol. 40, No. 3, 2003), p. 666.

[87] Tollet, p. 29.

One of the main advantages of the incorporation theory is that; Firstly Companies are free to choose legal system, they perceive as the least restrictive in terms of capital requirements, directors' liability, employee participation etc[88]. Secondly, incorporation theory offers certainty and simplicity for companies. Therefore, the company can act according to its original, familiar company law system. Even if a company exclusively operates in a foreign country, the rules of its domestic jurisdiction remain in force[89]. However, incorporation theory facilitates in the form of the so-called mailbox companies especially tax reasons[90]. It seems to be main disadvantage for incorporation theory.

On the other hand, the real seat theory dictates that the corporate law of the country in which companies principal place of business is located governs its internal affairs regardless of the country of incorporation. Under the real seat theory, a company's internal affairs are governed by the laws of the country where the company has its real seat or head office[91]. According to *Ebke*, the real seat theory recognizes that only one country should have the authority to regulate a company's internal affairs, while the most plausible country to supply that law is the country in which the company has its real seat[92]. Today, real seat theory in its different versions is applied in many countries such as Germany, Portugal, Austria, Greece, Italy, Spain, Belgium and Luxemburg[93]. For instance, the German Supreme Court interpreted the term "real seat" as referring to the place "*where the fundamental business decisions by the managers are being implemented effectively into day to day business activities"*[94]. After long discussions, the real seat theory was introduced and adopted in France too on the basis that French companies had

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[88] Vaccaro, p. 1349.
[89] Wymeersch, p. 666.
[90] Wymeersch, p. 662.
[91] Tollet, p. 28.
[92] Ebke, p. 13.
[93] Helminen, p. 21.
[94] Ebke, p. 13.

been emigrating to the legally more dement climate in Belgium, Switzerland and the UK in 19th century[95].

The Real Seat Theory provides countries with two advantages. First, it allows a country to apply its law to all companies incorporated in its territory. As a result, the transfer of seat is not possible as long as the company is not dissolved and then re-established in another country's jurisdiction[96]. For instance, if a German company wants to transfer its head office to another Member State of European Community (a state of arrival), it has to change its nationality. As a consequence, this company can no longer be recognized as a separate legal person in Germany. In order to reincorporate itself in the state of arrival, the company must either be dissolved voluntarily or it shall be dissolved by the competent authority in Germany[97]. The second advantage that the Real Seat Theory offers is that it prevents companies from evading legal controls through incorporation in a jurisdiction that has less stringent laws. As a result, under this theory, all companies concerned are subject to the same rules and principles of the corporate law and related laws, including law that aims specifically to protecting shareholders, creditors, employers and other stakeholders[98]. With regarding, the disadvantages of this theory two important points have to be mentioned. First, this theory constitutes a more sophisticated legal mechanism able to ensure that the socio-economic reality of a companies. Secondly, this theory is hardly compatible with the regime of free establishment enshrined in Art. 48 of the EC Treaty. ECJ did not hesitate in the latest case law to affects these implications as contrary to freedom of

[95] Wymeersch, p. 668.
[96] Wymeersch, p. 668.
[97] Helminen, p. 21.
[98] Ebke, p. 3.

establishment[99]. Following paragraphs mostly consider this trio relation between incorporation theory, real seat theory, and ECJ Case Law.

The ECJ, on the other hand, examines the transfer of seat issue from the point of view of the right or freedom of establishment[100] in these decisions *Case79/85, D.H.M. Sergers v. Bestuur van de Bedrijfsvereniging voor Bank-en Verze-keringen, Groothandel en Vrije Beroepen,[1985] ECR 2375*, *Case 81/87, The Queen v. H.M. Treasury and Commissioners of Inland revenue, ex parte Daily Mail and General Trust plc, [1988] ECR 2375, Case C-212/97,Centos Ltd v Erhvervs-og Selskabsstyrelsen,[1999]ECR I-1459, Case 208/00, Überseering BV v. Nordic Contraction Company Baumanagement Gmbh [2002],ECR I-9919,* and not in the direction of one theory or the other. Thus, it adopts different approaches to this issue in different cases. Consequently, different interpretations of these theories and transfer of seat can be seen in the decisions of the ECJ. In the following paragraphs, its specific decisions will be examined through several cases.

The ECJ *Case79/85, D.H.M. Sergers v. Bestuur van de Bedrijfsvereniging voor Bank-en Verze-keringen, Groothandel en Vrije Beroepen,[1985] ECR 2375* considered that a Dutch social security organization could not validly refuse to grant social security benefit to the director of a UK-based company that had its activity exclusively deployed in the Netherlands, on the mere basis that the employer company had its registered office in the UK. The Decision did not directly mention real seat or corporation theory, however, it was considered contrary to Article 58

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[99] Vaccaro, p.1350.

[100] The freedom of establishment is one of the fundamental rights provided by the EC Treaty for the free movement of persons, sevices and capital. This freedom consists of the prohibition of any restriction on the freedom of establishment of nationals of a Member State in the territory of another Member State. For further infomation see Moussis, Nicholas, "Access to European Union : Law, Economics, Policies", (Rixensart: European Study Service,10th Ed., 2001), pp. 100-118.

of EC Treaty (now Art. 48) to apply a different regime depending on whether the company seat was established in another Member State[101].

On the contrary, in another important case known as the *Case 81/87, The Queen v. H.M. Treasury and Commissioners of Inland revenue, ex parte Daily Mail and General Trust plc, [1988] ECR 2375,* the ECJ seemed to have frozen the issue of cross-border seat transfer due to immense differences in national law systems. The ECJ was of the opinion that "Articles do not confer a company incorporated under law of the a Member State the right to transfer its central management and control and its central administration to another Member State while retaining the status of a company incorporated under the UK Law. Differences in national laws regarding the connection factors cannot be solved on the basis of the Treaty Rules on freedom of establishment." In other words, the ECJ pointed out that this was not an issue to be solved under the Community Law Rules on freedom of establishment, but it must be dealt through future legislation or conventions.

However, concerning the *Case C-212/97,Centos Ltd v.Erhvervs-og Selskabsstyrelsen ,[1999]ECR I-1459,* Court interfered in the decision of the Danish *Hoejesteret* (Supreme Court) regarding the freedom of establishment, stating that through the freedom of establishment, a company formed in accordance with the law of a Member State, is entitled to carry on its entire business in another Member State through a branch or a subsidiary[23]. The Danish *Hoeyesteret* had overruled the request of the Brydes family who are nationals and residents of Denmark as well as the owners of Centros Ltd. to open a branch in Denmark on the basis that Centros Ltd., which was a UK company with a registered seat there, did not trade in the UK and was in fact attempting to establish a principal office rather than a branch in Denmark in order to evade from

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[101] Wymeersch, p. 664.
[23] Wymeersch, p. 664.

the paying-up the minimum capital requirement. Following the objection of Centros Ltd. to that decision, the Danish *Hoeyesteret* brought the issue to the Court, which in return, concluded that "It is contrary to Articles 52 and 58 of the EC Treaty for a Member State to refuse to register a branch of a company formed in accordance with the law of another Member State in which it has its registered office but in which it conducts no business where the branch is intended to enable the company in question to carry on its entire business in the State in which that branch is to be created, while avoiding the need to from a company there, thus evading application of the rules governing the formation of companies which, in that State, are more restrictive as regard the paying up of minimum share capital…".

In another and most recent case known as, *Case 208/00, Überseering BV v. Nordic Contraction Company Baumanagement Gmbh [2002],ECR I-9919,* the ECJ again applied the rules on freedom of establishment to impede German Company Law from refusing to recognize a Dutch company that had moved its head office into Germany, on the grounds of Art 43 and 48 of the EC Treaty.

This judgment is likely to exercise a lasting influence over European Company Law. The case deals with the question whether a company can be denied its legal capacity and, consequently its capacity to be a party to legal proceedings if its registered office is in one Member State whereas its actual center of administration has moved to another Member State without being incorporated in the latter.

Due to this judgment, the ECJ re-affirms its liberal attitude towards the freedom of establishment, which it had declared in the *Case C-212/97,Centos Ltd v. Erhvervs-og Selskabsstyrelsen ,[1999]ECR I-1459* decision by rejecting the company seat principle. If a company properly incorporated according to the law of a Member State "A", it has to be able to exploit its freedom of establishment in Member State "B" in the view of the ECJ on the basis of

Art. 43 and 48 EC Treaty. Therefore, the new host Member State referred as "B" has to recognize its legal capacity and its capacity to be parts to legal proceedings that the company enjoys under the law of its statute of incorporation in Member State "A"[102].

The ECJ decisions in *Case79/85, D.H.M. Sergers v. Bestuur van de Bedrijfsvereniging voor Bank-en Verze-keringen, Groothandel en Vrije Beroepen,[1985] ECR 2375* and *Case 81/87, The Queen v. H.M. Treasury and Commissioners of Inland revenue, ex parte Daily Mail and General Trust plc, [1988] ECR 2375* cases are demonstrative of how the ECJ narrowly interpreted the right of establishment. Therefore, it can be argued that the ECJ accepted Real Seat Theory. On the other hand, in *Case C-212/97,Centos Ltd v.Erhvervs-og Selskabsstyrelsen ,[1999]ECR I-1459* and , *Case 208/00, Überseering BV v. Nordic Contraction Company Baumanagement Gmbh [2002],ECR I-9919* decisions the ECJ expanded the rights of establishment for cross border transfers of seat, due to the lack of a regulation determining the limits of the rights of establishment and cross-border transfer of company seat. As a result, the ECJ adopted an approach similar to the Incorporation Theory.

However, in 2001, Member States accepted the Council Regulation on the Statute for a European company, which has been in force since 2004. This regulation provides SEs with the right of free cross-border transfer of seat[103]. The Seat transfer rules have an independent position in whole statute[104]and set out in Article 8. All this important issues on the transfer of seat have been discussed in Europe for decades. Ultimately, the SE statute provided itself as a major solution in this field. It determines that the company may transfer its seat to another jurisdiction,

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[102] Ebers, Martin, " Company Law in Member States Against the Background of Legal Harmonization and Competition Between Systems", *European Review of Private Law,* (Vol. 11, No. 4, 2003), p. 511.
[103] Enriques, Luca, "Silence Is Golden: The European Company Statute As a Catalyst for Company Law Arbitrage", ECGI - Law Working Paper No. 07/2003,< http://ssrn.com/abstract=384801>, p. 7 .
[104] Wymeersch, p. 664.

and that this change will not affect the continuity of its legal personality[105]. The regulation made significant contribution to once controversial issues of transfer of seat and applicable legislation. The SE is probably the only type of company that can move its real seat from one State to another without having to dissolve[106].

The procedure of transfer includes the SE seat is as follows.

A transfer proposal is to be drawn up by the management (in two-tier system) or administrative organ (in one-tier system) of the SE (Art.8 (2) Reg.). The proposal must state the current name, registered office and number of the SE. Moreover, it should cover:

- The proposed registered office of the SE,
- The proposed statutes of the SE including, in which appropriate, its new name,
- Any implication the transfer may have no on employees' involvement,
- The proposed transfer timetable,
- Any rights provided for the protection of shareholders and creditors.

The SE's seat transfer proposal of the SE is to be publicized in the manner laid down in the laws of the Member State where the SE has its registered office (Art.8 (2),(13) Reg.). The decision to transfer is to be taken at least two months after publication of the proposal. This deadline is aimed to ensure the protection of third parties rights, who, meanwhile, can take measures and provides guarantees, before the transfer of seat.

Moreover, the laws of a Member State may establish that, as regards SEs registered in its territory, the international transfer of its registered office shall not take effect if any of that Member State's competent authorities opposes it , based on grounds of public interest, within the two-month period after the publication of the transfer proposal (Art.8 (14) Reg.).

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[105] Bilgili, Fatih, "Avrupa Anonim Ortaklığı", *Elektronik Sosyal Bilimler Dergisi,* (Vol. 2, No.6, 2003), p. 28.
[106] Tollet, p. 34.

The management or administrative organ of the SE must draw up a report explaining and justifying the legal and economic aspects of the transfer and explaining the implications of the transfer for shareholders, creditors, and employees (Art.8 (3) Reg.).

The SE's shareholders and creditors are entitled, at least one month before the general meeting called upon to decide on the transfer, to examine at the SE's registered office the transfer proposal and the report prepared and, on request to obtain copies of those documents free of charge (Art.8(4) Reg.). A member State may adopt provisions designed to ensure appropriate protection for minority shareholders who oppose to transfer (Art.8 (5) Reg.).

The decision to transfer the seat of the SE may be taken after the expiration of two months following the publication of the proposal (Art.8 (6) Reg.). This requires the same procedure as applies in relation to amendment of the corporate statutes (Art. 59 Reg.). According to this provision, decision is taken a by majority that may not less than two-thirds of the votes cast by general meeting. Unless the law applicable to public limited-liability companies in the Member State, where an SE's registered office is situated, requires, or permits a larger majority. Furthermore, a Member State may provide that, where at least half of an SE's subscribed capital is represented, a simple majority of the votes shall suffice.

The general meeting's decision is publicized in the manner laid down in the law of the Member State, where the SE has its registered office.

Before the competent authority issues the certificate attesting to the completion of the acts and formalities to be accomplished before the transfer, the SE must ensure creditors and holders of other rights in respect of the SE have been adequately protected in accordance with requirements laid down by the Member State (Art.8 (7) Reg.).

In the Member State in which an SE has its registered office the court, notary or other competent authority must issue a certificate attesting to the completion of the acts and formalities to be accomplished before the transfer (Art.8(8) Reg.).

The SE is registered in the Member State of the new registered office, in a register designed by the law of the Member State.

The re-registration of the SE may not be effected until the certificate attesting to the completion of the formalities to be accomplished before the transfer has been submitted, and evidence produced that the formalities required for registration in the Member State of the new registered office have been completed (Art. 8(9) Reg.).

The transfer of the SE's registered office and the consequent amendment of its statutes will take effect on the date on which the SE is registered in the register for its new registered office (Art. 8 (10) Reg.).

The new registration and the deletion of the old registration are to be publicized in the Member States concerned in the manner laid down in the laws of these Member States (Art. 8(12) Reg.).

On publication of an SE's new registration, the new registered office may be relied on as against third parties. However, as long as the deletion of the SE's registration from register for its previous registered office has not been publicized, third parties may continue to rely on the previous registered office unless the SE proves that such parties were aware of the new registered office (Art.8 (13) Reg.).

Notice of an SE's transfer of registered office must be published for information purposes in the Official Journal of the European Communities. The notice must state the name, number, date and place of registration of the SE, the date and place of publication and the title of publication,

the registered office of the SE and its sector of activity, as well as information relating to the new registration (Art. 14 (2) Reg.).

An SE which has transferred its registered office to another Member State is to be considered, in respect of any cause of action arising prior to transfer taking effect, as having its registered office in the Member State where the SE was registered prior to the transfer, even if the SE is sued after the transfer (Art. 8 (16) Reg.).

As a result , according to Article 7 of the SE Regulation, registered office of the SE must be located within the Community, in the same Member State as its head office, which is in harmony with the Real Seat Theory[107], and in contrast to the principles laid down in the *Case C-212/97,Centos Ltd v. Erhvervs-og Selskabsstyrelsen ,[1999]ECR I-1459* and, *Case 208/00, Überseering BV v. Nordic Contraction Company Baumanagement Gmbh [2002],ECR I-9919* decisions. In other words, the SE does not permit the registered office and head office to be located in different States. Additionally, a Member State may require the head office and the registered office of the SE registered in its territory to be located in the same place. If the head office is no longer in the same Member State as its registered office, then the Member State in which the registered office is situated must take appropriate measures to ensure the SE adjusts its situation within a specified period (Art.64 Reg.). Therefore, the SE Regulation will help to prevent the head office and registered office being located in different Member States. As a result, an SE which is mainly active within the confines of one Member State cannot establish a mailbox company in order to choose a more beneficial legal regime[108].

Nevertheless, many details still have to be settled. The preamble 27 of the SE Regulation states that "in view of the specific Community character of the company, the *real seat*

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[107] Vaccoro, p. 1359.
[108] Ebers, p. 513.

arrangement adopted by the Regulation is without prejudice to Member States' law and does not pre-empt the choices to be made for other Community texts on company laws." This statement makes clear that the Regulation does not intend to make a decision between the Real Seat Theory and Incorporation Theory. It remains to be seen whether, in view of the *Case C-212/97,Centos Ltd v.Erhvervs-og Selskabsstyrelsen ,[1999]ECR I-1459* and, *Case 208/00, Überseering BV v. Nordic Contraction Company Baumanagement Gmbh [2002],ECR I-9919* decision of the European Court of Justice, Article 7 of the SE Regulation can endure, or whether the freedom of establishment embodied in Article 47 and 48 of the EC Treaty will have to be interpreted against the background of these rules.[109]

3. 5. Effect and Procedure of Registration

No European Register has yet been created within European Community. Therefore, each SE will be registered with the same register that the company set up under national law. However, the registration of each SE has to be published in the Official Journal of the European Communities (Art. 14 Reg.).

Regarding the effect of registration, first of all, the SE can only acquire its legal personality as of the registration date (Art. 16(11) Reg.). Secondly, the State of Registration will determine the national law applicable to the SE. Thirdly, if acts were performed on behalf of the SE before its registration takes effect, the SE shall not assume the obligations arising from such acts after its registration; but the natural persons, companies, firms or other legal entities which performed those acts shall be jointly and severally liable thereof, without limit, in the absence of an agreement on the contrary (Art. 16(2) Reg.).

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[109] Ebers, p. 514.

3. 6. Capital of the SE

According to SE regulation Article 4 (2), subscribed capital of SE shall not be less than €120.000. If the SE's registered office is a Member State to which the third phase of European Monetary Union (EMU) does not apply, it does not have to express its capital in euros (Art. 67)[110]. An SE's capital and securities are to be governed by national law (Art. 5), especially relating to maintenance and change of the capital of SE. Additionally, national law may require a greater subscribed capital for companies carrying on certain types of activities (Art. 4(3)) such as banking, insurance, financial and investment sectors.

Relatively, high capital requirement to establish an SE creates an obstacle that will reduce the utility of forming an SE for many small and medium size companies[111]. In other words, as a supranational legal form, the SE is namely deemed to be eligible only for large- scale companies[112]. Indeed, the justification expressed in paragraph 13 of preamble reads, "In other to ensure that such companies are of *reasonable size*, a minimum amount of capital should be set to they have sufficient assets without making it difficult for small and medium sized undertakings to form SEs".

In an attempt to provide the economically very significant medium-sized companies too with a vehicle for movement on the European Scale, a new regulation is being prepared for the creation of a "European Private Company"[113]. Referring to a study of the Paris Chamber of Commerce and Industry , a French Employers' Association produced a proposal to set up rules for the European Private Company in September 1998. A group of experts appointed by

[110] Such as Denmark ,which has not entered the EMU's third phase, may require an SE registered in that state to Express its capital in the national currency, by the SE may nevertheless also state its capital in euros. Further information see Werlauff (The SE Company), pp. 85–103.
[111] Edbury, Mike, "The European Company Statute: A Practical Working Model for the Future of European Company Law Making ?", *European Business Law Review,* (Vol. 15, No. 6, 2004), p. 1286.
[112] Bilgili, Fatih, "Avrupa Anonim Ortaklığı", *Elektronik Sosyal Bilimler Dergisi,* (Vol. 2, No.6, 2003), p. 21.
[113] Supra note 110.

European Commission reviewed this proposal for adoption. These experts prepared a final report and presented it to the Commission in 2002.

3. 7. Employee Involvement of the SE

One of the major issues solved during the Summit of Nice in 2000, was the involvement of employees, which is very important concern in Germany. Employees, who may seat on the which board of an SE, obviously cannot be considered as independent directors since they receive a salary from the company. This standard already exists in Germany[114] .

Indeed, the Article 3 of the Council Directive [115] requests the creation of a temporary "Special Negotiating Body" representative of the employees of the companies participating to the creation of the SE and at the time the SE is being established. Specific appointing rules of its members are stated by the Act. For example, it says that *"these members are elected or appointed in proportion to the number of employees employed in each Member State by the participating companies and concerned subsidiaries or establishments, by allocating in respect of a Member State one seat per portion of employees employed in that Member State which equals 10 %, or a fraction thereof, of the number of employees employed by the participating companies and concerned subsidiaries or establishments in all the Member States taken together."* Their role is to negotiate and to agree in writing with the organs of the corporations participating to the creation of the SE on the involvement of employees in the SE[116].

There are several possibilities of participation of employees in the SE that the Special Negotiating Body and the management can agree on. Employees can either be represented by a

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[114] Davies, Paul L., " Workers on the Board of the European Company?", *The Industrial Law journal,* (Vol. 32, No. 2, 2003) , p. 76.
[115] Supra Note 2.
[116] Keller, p. 436.

separate body, directly being part of the administrative or supervisory board (depending on the structure of the SE), or any other model that they may prefer[117]. The general meeting cannot approve the formation of an SE unless one of those models of participation defined in the Council Directive has been chosen. To reach this agreement, employees' representatives must be provided with all the financial and material resources and other facilities allowing them to perform their duty properly.

In case an agreement would not be reached, a set of standard principles set out in the Annex of the Council Directive becomes applicable. However, if the SE is formed through a merger, the standard principles will only apply where at least 25% of the employees had the right to participate in decisions before the merger[118].

Thus, if a company merges to form an SE, with another one (for instance an British one) where less than 25% of employees have the right to participate in the decision making, if there is no agreement between the management and the Special Negotiating Body, there will be no participation of employees in the SE. This provision is a political agreement at the Summit of Nice in December 2000[119]. This compromise allowed a Member State not to apply the Directive to SE formed through a merger, in which case no SE employee had the right of participation before the formation of the SE and the SE could not be registered in the Member State in question unless an agreement had been concluded between the management and employees. Thus, in a country like the UK where employees are not involved, the founders of an SE can avoid the provisions of the Council Directive.

[117] Reberroux, Antoine, "European Style of Corporate Governance at the Crossroads" , *Journal of Common Market Studies,* (Vol. 40, No. 1, 2002), p.128.
[118] Linmondin, p. 170.
[119] Keller, p. 440.

4. Formation of an SE

4.1. General

The formation of an SE is governed by two key elements. Firstly, an SE cannot be freely incorporated though in the investment of capital. In other words, at least two companies, which are already existence, must involve formation[120]. Secondly, as a rule, only companies whose registered and principles offices are located within the EEA may participate in the SE formation. A non-EEA company cannot be used to form an SE. However, it could do so by first incorporation a subsidiary in a Member State of EEA[121].

A Member State can provide that a company incorporated under the laws of Member State, which does not have its head office in the EEA, can participate in the formation of an SE. This kind of companies firstly has a registered office in the latter state. Secondly, it has a real and continuous link according to the principles established in the 1962 General Program for The Abolition of Restrictions on Freedom of Establishment; with the economy of the Member State (Art. 2(5) Reg.). Both requirements must be satisfied upon formation. A sufficient continuous economic link shall be found to exist if the company has an establishment in a Member State from which it conducts operation[122].

Regulation considers four different methods of formation:

(i) by merger,

(ii) by incorporation as a holding company,

(iii) by formation as a subsidiary,

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[120] Joris, Jean-Louis,“ Will the European Company Work”, *International Financial Law Review*, (Vol. 21, No. 19, 2002) , p. 4.

[121] Oplustil, Krzysztof and Crhistoph Teichmann, “The European Company: All Over Europe : A State-By-State Account of the Introduction of the European Company”, (Berlin: Walter de Gruyter, 1st Ed., 2004), p. 87.

[122] Twenty-third Recital of the SE Regulation.

(iv) conversion of existing public limited-liability company into an SE[123].

4.2. Formation of an SE by Merger

4.2.1. General Overview

The companies increase the size of their operations for number of reasons. They may wish to enlarge their physical plants, for example, to increase their property or investment holding. They may with to acquire the assets, know-how, or goodwill of another company. Sometimes, the acquisition of another company is motivated by a desire to eliminate a competitor, to accomplish diversification, or to ensure adequate recourses and markets for the acquiring company's product[124].

Mergers is the most important way for corporate restructuring and it is possible to affect them in four main ways[125]. The main possibility is to merge the two companies by putting together all their assets and liabilities and creating a new independent corporation. There is no buyer or seller[126]. The second alternative is that one firm assumes all the assets and liabilities of the other, with the selling company going out of business. Normally, this type of merger needs the approval of more than 50 percent of the shareholders in both companies. The buyer remains bigger than before and the seller disappears. Another possibility is to buy some or all of the seller's assets. In this case, the payment is made to the seller company and not directly to its

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[123] Joris, p.5.

[124] Miller, Roger LeRay and Gaylord A. Jents, " Business Law Today – Alternative Essentials Edition: Text &Hypothetical Examples-Legal, Ethical, Regulatory and International Environment", (Pasific Grove: Wets Pub., 4th Ed., 1997), p. 427.

[125] Cartwright, Sue and Cary L. Cooper, "*Mergers* and Acquisition: The Human Factor", (Oxford: Butterworth Heinemann, 1st Ed., 1992), p. 21.

[126] In the SE Regulation, according to Article 17 (2) provided merger by formation a new company, in the doctrine same procedure called by " Consolidation". This means that two or more corporations combine in such a way that each corporations ceases to exist, and a new one emerges. For further information see, Roger LeRoy Miller, William Eric Hollowell, "Business Law Text and Exercises", (St. Paul, Minnesota: West Publishing, 2nd Ed., 1999), pp.-286-289.

shareholders. The acquisition is the fourth alternative. The buyer purchases the seller's stocks in exchange for cash, shares, or other securities. In this merger, the seller's managers are not involved, although their cooperation is really appreciated. The buyer can deal directly with the shareholders of the selling company. The procedure to acquire a company is usually a takeover or a tender offer.

To merge, a company is a strategic decision[127] that will determine if the corporation will grow or survive in the future. This decision must involve consideration of the possibility of altering capital structure, product capacity, and owner structure, making it is a corporate-restructuring decision. The process to merge a company is included in the normal life cycle of businesses. For this reason, it could be considered as an investment, and the basic principles of capital investment decisions will be applied explains the possibility of what happens when a firm practices a merger as an economic investment when a company increases productivity assets[128].

One of the main reasons to merge a company is the need for assuming and taking advantage of scale economies[129], which occurs with the reduction in the average cost of producing and selling a product as production volume increases. Economies of scale allow the company to reduce the same duplicated cost, to make more investments, etc. Horizontal mergers often take advantage of reduced production cost by increasing the volume of production when there is a merger within the same activity or sector companies. Conglomerate mergers occur when unrelated businesses combine. Same overhead costs can typically be reduced, because what were formerly two departments are be collapsed into one by controlling suppliers or distributors, a vertical merger may take the advantage of enhanced scheduling and inventory opportunities.

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[127] Rowe, Alan J., " Strategic Management: A Methodological Approach", (University of Southern California: School of Business Administration, 4th Ed., 1994), p. 134.
[128] Brealy, Richard and Stuart Myers, "Principles of Corporate Finance", (New York: McGraw Hill, 2nd Ed., 1991), p. 818.
[129] J. M. Stern; D. M. Chew, "The Revolution of Corporate Finance", (Massachusetts: Blackwell Finance, 2nd Ed., 1992) p. 554.

4.2.2. Cross- Border Mergers in the EU

At the EU scale, there is no legislation superseding national legal systems and allowing for the merger of two or more companies governed by different national laws into a single legal unit. The consequence of the lack of rules applicable to cross-border mergers is the enforcement of national provisions by resorting to the principles of the conflict of laws. However, resorting to this technique does not always bring solutions, as the enforcement of the applicable national provisions often leads to an impasse.

The difficulties presented by the implementation of a cross-border merger concern the diversity of national provisions and the territorial limitation of their enforcement. In fact, in order to proceed to a merger, the company organs wishing to implement it must co-operate and their legal acts must be enforceable outside the territory of the State where they completed.

The Treaty of Rome laid down that Member States would enter into force negotiations with each other with a view to guarantee *"…the possibility of mergers between companies or firms governed by the laws of different countries*"[130]. With a view to drafting a convention aimed at remedying the absence of rules applicable to cross-border merges, government experts started exchanging views in March 1965. On 29 June 1973, the European Commission transmitted to Council a draft Convention on the merger of public limited-liability companies governed by the law of different Member States. The Report of draft Convention emphasized the discrepancies between the different national legislation and pointed out that it is not possible to regulate international mergers by designating the national law that would be competent to establish, on a case-by-case basis and their terms of conditions, mechanism and effects. Convention combined a method for the solving conflicts with a range of material rules. As it contained numerous

[130] EC Treaty Art. 293.

references to provisions of national law of the contracting States, the internal provisions applicable to merger would have to be harmonized.

The Community instrument aimed at harmonizing national legislation is the directive. For this reason, it was adopted in 1978 a Directive on internal mergers of public limited-liability companies (Third Directive)[131]. This Directive co-ordinates the different national provisions applicable to mergers, on the one hand, and introduces a merger technique for all Member States, on the other. It set forth a number of general principles and specifies organization of merger procedures[132]. This directive allowed for the harmonization of the rules applicable to internal mergers within the Community. Later, in 1982, the directive relating to internal divisions of public limited-liability companies (Sixth Directive)[133] was adopted[134].

At the same time, the work to prepare the Convention on cross-border mergers was abandoned in 1980. Discussions were resumed as a result of the Commission having present on the 14 January 1985 a proposal for a directive (Tenth Directive)[135], which greatly enhanced the directive on internal mergers and of that relating to internal divisions. This directive proposal points out the issue of cross-border mergers and division, by resorting to private international law methods and techniques: rules to specify the applicable national law, procedure co-ordination, non-redundancy of formalities, and lack of discriminatory necessities in line with the rules applicable to national mergers. Its most important rules are based on the Directive on internal

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[131] See supra note 23.

[132] Wouters, jan, " European Company Law: *Quo Vadis?*", *Common Market Law Review*, (Vol. 37, No. 2, 2000), p. 259.

[133] See supra note 23.

[134] Tavares Da Costa, Carla and Alexandra de Meester Bilreiro, " The European Company Statute", (The Hague: Kluwer Law International, 1st Ed., 2003), p.22.

[135] *Proposal for a Tenth Council Directive based on Article 54(3)(g) of the Treaty concerning cross-border mergers of public limited companies* COM(84) 727 final Official Journal 1985, C 23, p. 11.

mergers, to which the rules relating to the protection of shareholders and third parties were added[136].

A Tax Directive, forming a common system applicable to mergers and divisions[137], was adopted in 1990 and transposed into the national laws completed the Tenth Directive proposal. As a result of this Tax Directive, it is now to the advantage of cross-border groups to restructure and thus attain scale savings: upon completion of a merger, companies may wind up their subsidiaries in the different Member States and replace them with agencies or branches, the operating costs of which are lower. This directive has a wider scope of application than the Tenth Directive proposal, as it also covers divisions, transfers of assets and exchanges of shares concerning companies of different Member States[138].

For many years now, the discussions on the Tenth Directive proposal have been blocked as the European Parliament has refused to give its first reading opinion on the Commission proposal since 1985. The parliament is opposed to the decision-making process continuing without the issue of the employees' involvement being addressed within the scope of the proposed directive.

Currently, there is a curious situation in the Community: the fiscal neutrality of the cross-border mergers is guaranteed by a Tax Directive, however, the cross-border mergers are, from strictly legal standpoint, technically not possible.

The Regulation on SE Statute will no doubt let to the negotiations on the Tenth Directive proposal to be unblocked. A further proposal by the Commission to replace that presented in 1985, that will consider the progress in the debate on both the SE Regulation and Directive, is

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[136] Wymeersch, p. 663.

[137] Council Directive No. 90/435/EEC on the common system of taxation applicable to mergers, divisions, transfer of assets and exchanges of sharing companies of different Member States, Official Journal L 225, 20/8/1990, p. 1.

[138] Tavares Da Costa and Alexandra de Meester Bilreiro, p. 23.

expected. It seems very probable that this new proposal will transpose, with the necessary adjustment, the solutions adopted in the SE Directive regarding the involvement of employees, which will greatly facilitate subsequent debates.

Presently, despite the transposition of the Third Directive in all Member States which, resulted in a certain degree of harmonization of national legislation regarding internal mergers, there are still legal impediments to cross-border mergers. The law of certain Member State is not opposed to one of its companies acquiring one of another Member State or participating in the formation of the a new company registered in another Member State, but such an operation can only be implemented with companies of Member States where the law is also not possible in , Belgium, Austria, Finland, Denmark, Greece, Germany, Sweden and the Netherlands . As a result, an operation of this nature could only be completed by way of complex legal structures.

In fact, only cross-border mergers allow independent companies to get the substantial merging of business required to face business globalization. Where the offer of securities to the public are taken into account cross-border mergers present the advantage of allowing for the total control of the acquired company, without any concerns regarding the financial rights of minority shareholders and without disbursing funds to the shareholders of the acquired company.

The Statute for an SE presents the cross-border merger as the most suited way to create an SE[139]. The Regulation has found a way of overcoming the two technical obstacles, which, in practice, have prevented cross-border mergers from being implemented. Firstly, the change of nationality of the companies acquired or participating in the creation of a new company governed by a different law, which requires the unanimous consent of all the shareholder. Secondly, the application of the conflict of laws principles, which leads to an impasse when it comes to

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[139] Edbury, p.1283.

establish the laws that will govern all the companies concerned[140], and that their material provisions cannot be conciliated.

The SE Regulation provisions regarding mergers are inspired by the Third Directive on internal mergers and by the Tenth Directive proposal on cross-border mergers. Either by the re-use of provisions, considering the international nature of the merger, or by the explicit referral to the national provisions harmonized by the Third Directive.

In the light of above mentioned facts, the Regulation for an SE establishes two procedures for the creation of an SE by merger, in line with the Third Directive on internal mergers. Merges may be carried out according to the merger by acquisition procedure or according to the merger by the formation of a new company procedure.

In the case of a merger by acquisition, the acquiring company will take form of an SE when the merger takes place. In the case of a merger by the creation of a new company, the SE would be the newly created company.

According to Regulation Article 2(1), the SE may be formed by way of a merger. However, the same Article also considers two conditions for the formation of SE by merger: Firstly, two or more public limited-liability companies referred to in Annex I of the Regulation must be involved formation of the merger. Secondly, these companies must have their head offices or registered offices in one of the Member States, and at least two of these must be established and governed in line with different Member States' laws. In other words, public limited liability companies from the same Member State cannot merge according to this provision[141].

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[140] Ebert, p. 191.
[141] Werlauff, Erik, "SE-The Law of the European Company", (Copenhagen: DJOF Publishing, 1st Ed., 2003), p. 44.

4.2.3. Formation Procedure

According to Regulation Article 17, formation by merger can create two types: merger by acquisition and merger by formation of new company. The same Regulation concerning these two procedures also refers to the Third Company Law Directive on Mergers[142].

The merger by acquisition consists of one or more companies transferring all assets and liabilities to an exchange for the issue to the shareholders of the company or companies being acquired of shares in the acquiring company. After the transfer, the acquired company dissolves without being wound up. Finally, acquired company takes the form of an SE. In this way of formation, cash payment to the shareholders is an option. However, this payment may not exceed 10% of the nominal value of the shares[143] (Figure 1).

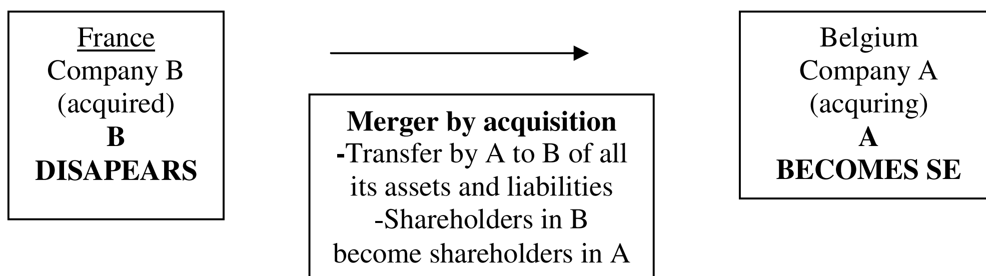

Figure 1 Formation of an SE by merger by acquisition

Source: Tavares Da Costa Carla and Alexandra de Meester Bilreiro; p. 24.

As to the merger by formation of a new company, it consists of one or more companies transferring all their assets and liabilities to the SE they have formed, which issues shares to the shareholders of transferring companies that had been then dissolved. In the merger by acquisition, cash payment is an option too [144](Figure 2).

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142 See supra note 23.
143 Oplustil and Teichmann, p. 15.
144 Van Gerven Dirk and Paul Storm, "The Europaen Company -Volume I", (New York: Cambridge University Press, 1st Ed., 2006), p.60.

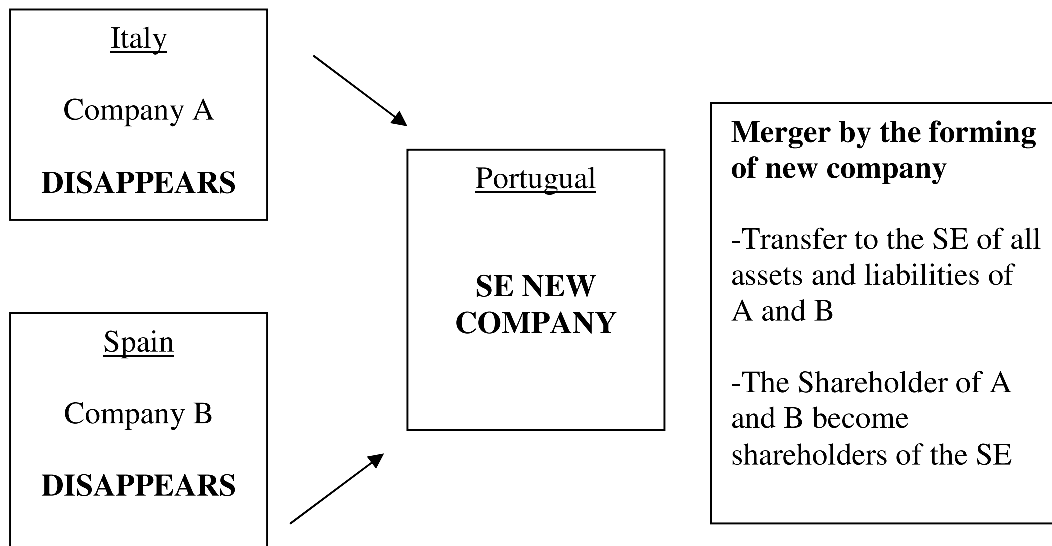

Figure 2 Formation of an SE by merger by the formation of the new company

Source: Tavares da Costa and Meester Bilreiro p. 25.

Regarding the formation procedure, five stages need to be mentioned in accordance with Regulation.

First Stage

Board of merging companies must prepare written draft terms of the merger to set out specified information (Art. 20 Reg.). These terms have to include a detailed description of the legal changes that will take place. This draft terms must include,

- The share exchange ratio.
- The terms for the allotment of shares in the SE.
- The date from which the holding of shares in the SE will entitle the holders to share in profits and any special conditions affecting that entitlement.

- The date from which the transactions of the merging companies will be treated for accounting purposes as being to those of the SE belonging to SE.
- The rights conferred by the SE on the holders of shares to which special rights are attached and on the holders of securities other than shares, or the measures proposed concerning them.
- Any special advantage granted to the experts who examine the draft terms of merger, or to members of administrative, management, supervisory or controlling organs of the merging companies.
- The proposed statute of the SE.
- Information on the procedures by which the form of employee involvement are determined pursuant to directive 2001/86/EC.
- The location of the SE's registered office.

In addition, merging companies may put further details in the draft terms of the merger. Also, following points must be published in Official Gazette of the Member State (Art.21 Reg.):

- The type, name and registered office of each merging company.
- The register in which the documents referred to in Article 3(2) of Directive 68/151/EEC[145] are filed in respect of each merging company, and the number of the entry in that register.
- An indication of the arrangements made in accordance with Article 24 for the exercise of the rights of the creditors of the company in question and the address at which complete information on those arrangements may be obtained free of charge.

[145] First Council Directive 68/151/EEE of 9 March 1968 on co-ordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community, Official Journal 1968 L 65/8. For further information see Edwards (EC Company Law); p. 15.

- An indication of the arrangements made in accordance with Article 24 for the exercise of the rights of minority shareholders of the company in question and the address at which complete information on those arrangements may be obtained free of charge.
- The name and the registered office proposed for the SE.

Article 24 concerns Member State initiative about creditors, holders of bonds, holder of securities and minority shareholders who oppose the merger. The purpose of this article is to protect the interests of these groups concerning the formation of cross border mergers. According to this article, the law of merger of public limited liability companies protects Member States' creditors, holders of bonds, and holders of securities. For minority shareholders, the Member State must consider appropriate law in case of a merger.

Second Stage

One or more independent experts have to evaluate the draft terms of the merger (Art.22 Reg.). These experts must either be appointed by one Member State's judicial or administrative authority, or by the management of the merging companies and must be approved by the Member State's judicial or administrative authority. In other words, the Member State's Law governs the procedure of appointing independent experts. Experts may examine the draft terms of the merger and prepare a written report for shareholders. This report has to include their opinion on whether the exchange ratio is fair and reasonable, and it will describe any special evaluation of the difficulties that have risen. According to the Regulation, independent experts are entitled to reach all relevant information and documents about merger procedure.

Third Stage

The draft terms of the merger about the merging companies must be approved in the general meeting of each company (Art.23 Reg.). The merger decision requires a majority of not less than two thirds of votes attaching either to the shares or to the subscribed capital represented[4]. Within this procedure, the protection of the rights of the minority and creditors' is subject to the Member State's law of each merging company. At the end of this procedure, the competent authority of each Member State must deliver a certificate attesting the completion of the whole merger procedure in its jurisdiction.

Fourth Stage

The mentioned certificates must be submitted within six months to the competent authority, which, are a court, a public notary, or other authorities of the State where the SE intends to have its registered office (Art 25 Reg.). The competent authority has to examine the procedure of the completion of the merger and the formation of the SE. Furthermore, this competent authority has to evaluate whether the issue of employee involvement is addressed in accordance with Directive 2001/86/EC[146]. According to Article 15, that authority has to check also whether the SE has been formed in accordance with the requirements of the law of the Member State where it has its registered office. In other words, the formation of the public limited liability company must be governed by the law of the country where it is registered[147].

[146] See supra note 2.
[147] Van Gerven and Storm, p.37.

Fifth Stage

If all formalities are completed, a merger and the simultaneous formation of the SE shall take effect on the date on which SE is registered in accordance with Article 12. For each merging companies the completion of the merger shall be published, as laid down by the law of the each Member State, in accordance with Article 3 of First Directive[148].

In merging by acquisition, following consequences shall take effect *ipso jure* and simultaneously (Art.29 (1) Reg.);

- All the assets and liabilities of each company being acquired are transferred to acquiring company.
- The shareholders of the acquired company became shareholders of the acquiring company.
- The company being acquired ceases to exist.
- The acquiring company adopts the form of the SE, if companies have chosen to form a new company, the following consequences shall take effect (Art.29 (2) Reg.).
- All assets and liabilities of the merging companies are transferred to the SE.
- The shareholders of the merging companies become shareholder of the SE.
- The merging companies cease to exist.

A merger may not declare null and void once the SE had been registered. However, before the registration any competent authorities of the Member States (court, notary or other competent authority) may oppose the merger, only on grounds of public interests (Art. 19 Reg.). National law can define and limit what constitute the public interest[149]. This possibility allows the Member State too oppose participation by certain types of entities such as banks and insurance companies,

[148] See supra note 125.
[149] Werlauff (SE- The Law of The European Company); p. 46.

in merger that could undermine their financial stability and consequently the interest of their stakeholders[150].

4.3. Formation of a Holding SE

4.3.1 General Overview

A holding company is a company that owns enough voting stock in another firm to control management and operations by influencing or electing its board of directors. A holding companies relates to the way in which large business enterprises tend to operate though a linked structure of distinct companies. Generally, though, the term signifies a company which does not produce goods or services itself, but, rather, whose only purpose is owning shares of other companies (or owning other companies outright). Holding companies allow the reduction of risk for the owners and can allow the ownership and control of a number of different. A holding company is at the head of a group of companies, all of which are subsidiaries of the holding company. The relation between holding companies and subsidiaries may be very complex.

4.4.2 Formation Procedure

According to Article 2(2), the formation of Holding SE is available for public limited liability companies and private limited liability companies (listed in Annex I and Annex II of the Regulation). Additionally, these companies must be formed under the Member State law and their registered and head offices must be in the European Economic Area (EEA). Furthermore, this provision also defines two optional conditions for the formation of a holding SE. Firstly, public or private limited liability companies forming the Holding SE must be registered in and governed by the law of at least two different Member States. Second, at least one of the public or

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[150] Van Gerven and Storm; p. 38.

private limited liability companies must have a subsidiary or branch, governed by the law of another Member State for at least two years. In other words, according to this provision, two different companies from the same Member State can only create a holding SE if they have had a subsidiary or branch in one of the Member States for at least two years[151]. The requirement of two years existence of a subsidiary or a branch should ensure that the international link of each of the promoting companies has a real character and that a foreign subsidiary or branch was established not only for the sake of promoting the formation of a holding SE. The requirement of an international link in the case of formation of a holding SE is less severe compared to the formation of a SE by merger [152]. (Figure 3).

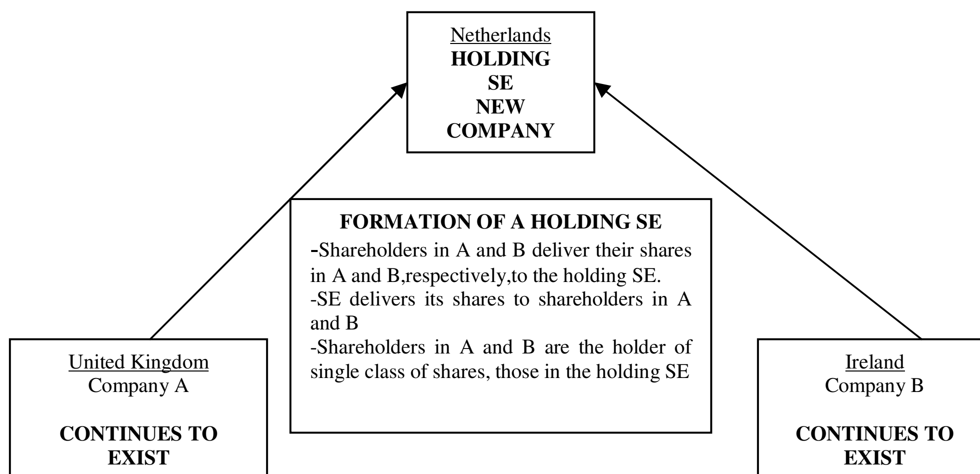

Figure 3 Formation of a holding SE **Source:** Tavares Da Costa and Meester Bilreiro p. 34.

In the matters not regulated in the Regulation the formation of an SE shall, in accordance with to the general provisions of Art. 15 be governed by the law applicable to public limited-liability companies in the state in which the SE establishes its registered office. One point to be observed that, this provision only refers to final phase of the SE formation, e.g. registration procedure and other provisions concerning the creation of a company, and not to the preliminary

[151] Oplustil and Teichmann; p. 115.
[152] Oplustil Krzysztof; " Selected Problems Concerning Formation of a Holding SE (Societas Europea), *German Law Journal,*(2003, Volume 4, Issue 2), p. 110.

phase of formation which is taking course in the promoting companies, e.g. the information of shareholders, manner of preparation and holding of general assembly in each of them. In the regulation of formation of a SE by merger, Art. 18 refers in matters not governed by formation of SE by merger, the national law provisions to which each company involved is subject and which apply to mergers of public limited-liability companies in accordance with the Third Directive[153]. The adequate provisions is missing in the regulation of formation of a holding SE. The general provisions of Art. 9 cannot be taken into account, because it determines the law applicable to the SE; but the SE is just being created and does not exist yet[154].

The formation of a Holding SE consists of three stages:

First Stage

The management and administrative organs of the companies must prepare the draft terms of the formation (Art.32(2) Reg.). This report has to clarify and justify the legal and economic aspects of the formation and indicate possible future effects for shareholders, employees and

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[153] Oplustil, p. 108, Bilgili, Fatih, "Avrupa Anonim Ortaklığı", *Elektronik Sosyal Bilimler Dergisi,* (Vol. 2, No.6, 2003), p. 26.

[154] An example from the Formation of a holding SE may help to further clarify the issue. In every formation of a holding company SE a resolution on the formation must be passed by each company promoting the formation. No majority by each company promoting the formation. No majority for the passing of these decisions is specified in the Regulation. The first impulse is to resort to national law. However, the Regulation provides no provision for such resort. According to Art. 15 Regulation, the formation of an SE shall be governed by the law applicable to public limited-liability companies in the Member State in which the SE establishes its registered office. For several reasons, this cannot be understood as a reference with relation to general meeting of the companies promoting the formation of the a holding SE. First of all, the provisions related to the merger indicate that the necessary steps to be taken in the companies involved in the formation of an SE shall be governed by national law. It is true, that a provisions like Art. 18 is missing in the provisions related to the holding SE. But a direct application of Art. 15 would lead to very strange results: a holding SE may be promoted not only by public limited-liability companies but also by private limited-liability companies; instead, the application of Art. 15 would exclusively refer to the law applicable to public limited liability companies in the state where the SE will be registered. Art. 15 of the Regulation, taken literally, would mean that a Danish *anpartselskaber* (private limited-liability company) and a German *Gesellschaft mit beschrankter Haftung* (private limited-liability company) both promoting the formation of a holding SE in Greece would have to convene and to organize the meeting of their shareholders in Denmark and Germany according to the law applicable to Greek public limited-liability companies further information see Teichmann, Christoph," The European Company-A Challenge to Academics Legislatures and Practitioners", *German Law Journal* ,(Vol. 4, No. 4, 2004), p. 327.

creditors. These draft terms must include the following items in accordance with Article 20 of the Regulation:

- The name and registered office of each of the involved companies together with those proposed for the SE.
- The share exchange ratio and, in the absence thereof, the amount of any compensation.
- The terms for the allotment of shares in the SE.
- The rights conferred by the SE on the holders of shares to which special rights are attached and on the holders of securities other than shares, or the measures proposed conserving them.
- Any special advantage granted to expert who examine the draft terms of merger or to members of administrative, management, supervisory or controlling organs of the involved companies.
- The statutes of the SE.
- Information on the procedures by which arrangements for employee involvement are to be determined.

Moreover, this provision also indicates minimum proportion of the shares in each of the companies promoting the operation. According to this provision, the draft terms must determine minimum proportion of the shares, which shareholders must contribute for the formation of the SE. Each one of the companies promoting the operation has to transfer more than 50% its shares conferring permanent voting rights. Finally, the draft terms must be published, in accordance with First Directive[155], at least one month before the general meeting (Art.32(2) Reg.).

[155] See supra note 125.

Second Stage

One or more independent experts are appointed or approved by a judicial or administrative authority in the Member States for each company (Art.33(4) Reg.). Experts prepare a report for shareholders of each company. The report must determine any particular difficulties concerning valuation, and, whether share-exchange ratio is fair and reasonable. If companies come to an agreement, one or more common experts can be appointed, and they can prepare a report for each company.

Third Stage

The draft terms must be approved at the general meeting of each company promoting the operation (Art.32 (6) Reg.). The shareholders of these companies must be allotted three months to inform the companies whether they intend to contribute their shares to the formation of the SE (Art. 33(1) Reg.). The SE shall be formed only if within that period the shareholders have assigned the minimum proportion of shares in each company in accordance with the draft term and if all the other conditions are fulfilled (Art. 33(1) Reg.). As for the registration, all the formalities laid down in Article 32 and the conditions referred above must be completed.

If the conditions mentioned above are all fulfilled, the formation of the holding SE shall be published in the manner laid down in the national law governing each of those companies adopted in implementation or Third Council Directive[156].

The procedure above shall be applied *mutatis mutandis* to private limited liability companies (Art. 37(7) Reg.).

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[156] See supra note 23.

4.4. Formation of a Subsidiary SE

4.4.1. General Overview

The Regulation itself doesn't contain any definition of notion of subsidiary. However, it seems to be justified to refer to the definition of the subsidiary contained in Art. 2 of the Directive of October 2001 supplementing the Statue for a European Company with regard to the involvement of employees. This provision refers to Art.3 of the Directive 94/45/EC on the establishment of a European Works Council[157].

According to this directive, the ability to exercise a dominant influence shall be presumed, without prejudice to proof to the contrary, when an undertaking in relation to another undertaking directly or indirectly holds a majority of that undertaking's subscribed capital, or controls a majority of the votes attached to that undertaking's issued share capital or can appoint more than half of the members of that undertaking's administrative or can appoint more than half of the members of that undertaking's administrative management or supervisory body[158]. In other words, a company must controlled by another company. A company is deemed to be a subsidiary of another if (but only if): (a) that other (i) is a member of it and controls the composition of its board of directors; or (b) holds more than half in nominal value of its equity share capital; or (b) the first-mentioned company is a subsidiary of any company which is that others subsidiary. "Equity share capital" means its issued share capital excluding any part of it which, neither as respects dividends nor as respects capital, carries any right to participate beyond a specified

[157] Council Directive No. 94/45/EC of 22 September 1994 on the establishment of a European Works Council or a procedure in Community scale undertakings and Community scale groups of undertakings for the purposes of informing and consulting employees, Official Journal , L 254/64, 30/9/1994. The European Work Council Directive does not contain any reference to participation. Yet, the European Work Council was thought to provide labor with a major institutional device to counteract the potential adverse effects of global capital. Although many other factors influenced the non-inclusion of worker participation in the directive, its limited scope was significantly influenced by the decision-making procedure used. Cernat, Lucian, " The Emerging European Corporate Governance Model: Anglo-Saxon Continental, or still the Century of Diversity", *Journal of European Public Policy*, (Vol. 11, No. 1, 2004) , p. 157, Wouters, p. 273.

[158] Oplustil, p. 111.

amount in a distribution. The composition of a company`s board is deemed to be controlled by another company if (but only if) that other company by the exercise of some power exercisable by it without the consent or concurrence of any other person can appoint or remove the holders of all or a majority of the directorships.

A subsidiary company is one in which another, generally larger, company, known as the holding corporation, owns all or at least a majority of the shares. As the owner of the subsidiary, the holding company may control the activities of the subsidiary. This arrangement differs from a merger, in which a company purchases another company and dissolves the purchased company's organizational structure and identity.

Subsidiaries can be formed in different ways and for various reasons. A corporation can form a subsidiary either by purchasing a controlling interest in an existing company or by creating the company itself. When a company acquires an existing company, forming a subsidiary can be preferable to a merger because the holding corporation can acquire a controlling interest with a smaller investment than a merger would require. In addition, the approval of the shareholders of the acquired firm is not required as it would be in the case of a merger.

When a company is purchased, the holding company may determine that the acquired company's name recognition in the market merits making it a subsidiary rather than merging it with the parent. A subsidiary may also produce goods or services that are completely different from those produced by the holding company. In that case, it would not make sense to merge the operations.

Companies that operate in more than one country often find it useful or necessary to create subsidiaries. For instance, a multinational company may create a subsidiary in a country to

obtain favorable tax treatment, or a country may require multinational company to establish local subsidiaries in order to do business there.

Companies also create subsidiaries for the specific purpose of limiting their liability in connection with a risky new business. The holding and subsidiary remain separate legal entities, and the obligations of one are separate from those of the other. Nevertheless, if a subsidiary becomes financially insecure, the holding company is often sued by creditors. In some instances, courts will hold the holding company liable, but generally the separation of corporate identities immunizes the holding company from financial responsibility for the subsidiary's liabilities.

One disadvantage of the holding-subsidiary relationship is the possibility of multiple taxation. Another is the duty of the holding company to promote the subsidiary's corporate interests, to act in its best interest, and to maintain a separate corporate identity. If the holding fails to meet these requirements, the courts will perceive the subsidiary as merely a business conduit for the holding, and the two companies will be viewed as one entity for liability purposes.

4.4.2. Formation Procedure

The Regulation allows that a subsidiary SE may be created by all companies and firms within the meaning of the Second paragraph of the Article 48[159] of the EC Treaty. In this respect, As a *Teichman* pointed out that the most liberal way to form an SE is formation of a subsidiary SE[160].

According to Article 2 (3) of the Regulation, an SE may be incorporated as a subsidiary by any two or more legal entities referred in the second paragraph of the Article 48 of the EC

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[159] Article 48 of EC Treaty: "*Companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community shall, for the purposes of this Chapter, be treated in the same way as natural persons who are nationals of Member States. "Companies or firms" means companies or firms constituted under civil or commercial law, including cooperative societies, and other legal persons governed by public or private law, save for those which are non-profit-making.*"
[160] Teichmann, p. 312 .

Treaty, formed under the national law of a Member State with registered and head offices within EEA. An SE may be formed if and only if either each of at least two of these legal entities is governed by the law of different Member State or has had a subsidiary or branch in one of the Member States for at least two years.

This very broad scope is in contrast to the restrictions imposed on the creation of an SE by merger and formation of a holding SE. The formation of a subsidiary SE is exactly the same as the formation of public limited company under national law of Member State.

4.5. Conversion of an Existing Public Limited Liability Company into an SE

According to Article 2(4), a public limited liability company, formed under the law of a Member State, which has its registered and head office within the EEA, may be transformed into a SE if it has had a subsidiary company governed by the law of the Member State for at least two years.

In the conversion of an existing company into the SE three stages need to be followed:

First Stage

The management or administrative organ of the company draws up the draft terms of the conversion and a report explaining and justifying the legal and economic aspects of the conversion as well as indicating its implications for the shareholders and employees (Art. 37(4) Reg.). The draft terms of the conversion shall be published in accordance with Article 3 of First Directive[161] at least one month ahead of the general meeting called upon to decide thereon.

[161] See supra note 125.

Second Stage

Independent experts are appointed or approved in accordance with the national provisions adopted in implementation of Article 10 of Directive 78/855/EC. These experts must examine whether the company being converted has net assets at least equivalent to its capital plus those reserves which must be not be distributed under the law or its Statutes.

Third Stage

The general meeting of the company must approve the draft terms and Statutes of the SE. The decision of the general meeting must be passed, in accordance with Article 7 of Third Directive[162] (Art. 32(5) Reg.), by at least two-thirds of the votes attaching either to the share or to the subscribed capital represented. However, for companies already operating with employee involvement system, Member States may consider taking conversion decision by a favorable vote of a qualified majority or unanimity for protecting employees' rights (Art. 32(8) Reg.).

Regarding to result of conversion, first of all, the conversion of an existing public limited liability company into an SE shall not mean the winding up of the company or the creation of a new legal person. Secondly, according to Article 8 of the Regulation, the registered office of the new SE may not be transferred to a different Member State after the conversion takes effect (Art.37(3) Reg.). The purpose of the Article 8 is to hinder national companies from abusing this provision in order not be to subject to their national law. Finally, the rights and obligations of the former public limited liability company as well as its liabilities arising from the terms and conditions of individual employment contract or employment relationships are transferred to the SE as of the date of the registration to the SE (Art. 37(9) Reg.).

[162] See supra note 23.

One cannot say in the advance that one method of forming on SE better than others. However one can point to elements which ought to be considered in the choice of methods. It should be remembered that the motives for forming an SE may differ widely. The simplest motive may be the wish to achieve this supranational company from partly because of its image and partly, perhaps, because it opens the possibility of moving to another state at some later stage. If this is the main motive, the strategy is to find the simplest way to reach the goal, and this will probably often choose the method involving the transformation of traditional public limited-liability company into SE[163].

One might even say that an SE may be the case that independent companies in several states want to combine across their frontiers. This has been seen with telecoms companies, airlines, insurance companies, banks, and the car sector. The situation may either involve a limited combination in which the participating companies retain their independence but merge central parts of their activities, and where the choice is consequently the formation of an SE subsidiary to which they transfer certain assets[164]. Or it could be a more extensive combination where participating companies either enter into a proper merger, i.e. the formation of a SE by merger , or where they invite their shareholders to transfer their shares in the national companies into a joint SE holding company regardless of the choice made among these methods, the results is quite an extensive participation, although it must be recognized that when all is said and done, an SE company, as the company is not truly supranational.

[163] Werlauff (The SE Company); p. 93.
[164] Bilgili, Fatih, "Avrupa Anonim Ortaklığı", *Elektronik Sosyal Bilimler Dergisi,* (Vol. 2, No.6, 2003), p. 27.

5. Structure of the SE

5.1. General

The Regulation is based on two alternative executive organ systems, which are two-tier or one-tier. According to Article 38, an SE shall comprise a general meeting of shareholders, a supervisory organ and management organ (two-tier) or an administrative organ (one-tier). A selection between these organ forms shall be made in the statutes of the SE. It must be assumed that this list of organ or possible organs are exhaustive, and thus, that it is not possible to establish an SE with other organs else than the kinds referred.

Moreover according to Article 39(5) and 43(4), a Member State shall adopt appropriate measures in relation to the system that does not prevail in the Member State(s) where the SE is registered[165].

5.2. Executive Organs

This chapter deals with the executive organs of an SE and their composition and functions. Two alternative systems are available for the executive organs of an SE: two-tier and one-tier. The former is divided into two subcategories as management organ and supervisory organ. The latter is only composed of an administrative organ. In addition , common rules for organs of an SE will also be examined within this context.

[165] Bilgili, Fatih, “Avrupa Anonim Ortaklığı”, *Elektronik Sosyal Bilimler Dergisi,* (Vol. 2, No.6, 2003), p. 23.

5.2.1. In Two-Tier System (Dualist System)

There are two bodies for governing public limited liability companies in the two-tier system: namely, the supervisory organ and the management organ. Their competencies are relatively clearly delimited by the law itself. The supervisory organ primarily supervises the management organ's operation, appoints and dismisses it. The management organ conducts the company's business operations. The law also restricts the option to transfer the authorities of the one body to the other. Two-tier system has developed in the Continental Europe and is characterized by powerful participation of the employee in the management, a less liquid market, a proportionate voting system.

5.2.1.1. Composition of the Management Organ

The management organ member(s) are appointed and dismissed by the supervisory organ. However, the Member State may require or permit that members of the management organ is appointed and dismissed in the general meeting of the shareholders under the same conditions as public limited-liability companies with registered offices within territory (Art. 39(2) Reg.).

The exact number of the management organ must be laid down in the SE's Statutes. However, the Member State may set the minimum and maximum numbers of members of the management organ (Art. 39(4) Reg.).

As a rule, no person may be, at any time, a member of both the management and supervisory organ of the same SE. Nevertheless, the supervisory organ may nominate one of its members to act as a member of the management organ in case of vacancy. However, his/her functions as a member of supervisory organ must be suspended during this period. A Member State may impose a time limit on this period (Art. 39(3) Reg.).

5.2.1.2. Functions of the Management Organ

The management organ is responsible for managing the SE (Art. 39(1) Reg.). This means that the management organ runs the SE on day-to-day basis. As a result, this management organ represents the SE and may become involved into obligations with third parties. In addition, a Member State may allow that one (or more) member(s) of the management organ shall be responsible for this current management under the same conditions as for public limited-liability companies that have registered offices within the same Member State's territory[166].

However, the management organ must report to the supervisory organ at least once every three months on the progress and development of the SE's business, and must promptly pass to the supervisory organ any information even likely to have an appreciable effect on the SE (Art. 41(1), (2) Reg.).

5.2.1.3. Composition of the Supervisory Organ

Its members are appointed by the general meeting of shareholders or, as in the case of the first members, by the statutes (Art.(40) Reg.). However, national law permits a minority of shareholder or other legal persons or authorities related to the SE to appoint some of the members of the SE's supervisory organ; it also permits any employee participation arrangement determined pursuant to the provisions of the Relevant Directive[167].

The number of members of the supervisory organ is laid down in the SE's Statutes. However, a Member State may fix the minimum and maximum number of members of the supervisory organ for the SE registered within its territory (Art. 40 Reg.).

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[166] Taraves de Costa and Alexandra de Meester Billero, p. 66.
[167] See supra note 2 .

The supervisory organ shall elect a chairman amongst its members appointed by the general meeting of shareholders. In other words, this chairman cannot be a member elected by the employees (Art. 42 Reg.). That means the power of the supervisory organ and therefore the power of management organ will be in the hands of the shareholders.

5.2.1.4. Function of the Supervisory Organ

The supervisory organ supervises the work of the management organ. It may not itself exercise power to manage the SE (Art. 38(1),(40)1 Reg.).

The regular report to the supervisory organ by the management organ, at least every three mounts, on the progress and foreseeable development of the SE's business, the management organ must also provide any information forthwith on event likely to have a significant impact on the SE (Art. 41(1) Reg.).

Further, the supervisory organ may require the management organ to provide any kind of information, which it considers relevant for the exercise of its supervisory powers. A Member State may provide that each member of the supervisory organ also be entitled to exercise this right (Art. 41(3) Reg.).

The supervisory organ may undertake or arrange for any investigations necessary for the performance if its duties and each member of the supervisory organ is entitled to examine all information submitted to it (Art.41(4) Reg.) .

5.2.2. In One-Tier System (Monist System)

The one-tier system is based on a one-body of governance, which is the board of directors (Administrative organ in SE Reg.). The authority of managing the company is held by the board of directors as the body of governance, however, it transfers this authority to the executive

directors, and retains the competence of supervising their work for itself. The one-tier system has thus been created in the Anglo-Saxon legal system, and is characterized by dispersed share structures, an active finance market, and a majority voting system.

5.2.2.1. Composition of Administrative Organ

Members of the administrative organ are appointed by the general meeting of the shareholders (Art. 43(1) Reg.). The members of the first administrative organ may be appointed by Statutes. However, according to the Regulation, the administrative organ shall consist of at least three employee representatives elected in accordance with the Directive[168]. Also, the national law permits a minority of the shareholder or other legal persons or authorities related to the SE to appoint some of the members of the administrative organ. The number of members of the administrative organ is laid down in the SE's Statutes. A Member State may, however, set a minimum and maximum number of members (Art. 43(2) Reg.) .

In addition, the administrative organ elects a chairman amongst its members appointed in the general meeting of the shareholders. In other words, this chairman cannot be a member elected by the employees (Art. 45 Reg.).

5.2.2.2. Functions of Administrative Organ

The administrative organ is responsible for managing the SE on day-to-day basis. In other words, it represents the company and becomes involved in obligations with third parties (Art. 43(1)Reg.).

The administrative organ must meet at least once every three months to discuss the progress and foreseeable development of the SE's business (Art. 44 Reg.).

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[168] See supra note 2.

A Member State may allow that one (or more) managing director(s) shall be responsible for the day-to day management under the same conditions as public limited-liability companies registered within that Member State's territory[169].

Each member of the administrative organ shall be entitled to examine all information submitted to the administrative organ (Art. 44(2) Reg.).

5.2.3. Common Rules for SE's Executive Organs

Article 46 to 51 of the Regulation put some common rules for both one-tier and two tier systems. These rules hold very important consequences for corporate governing bodies of an SE and apply to issues regarding the members of the SE organs, quorum, and decision taking in the SE organs, transactions subject to authorization, the confidentiality duty of the member of the SE organ and liability of the members in the management, supervisory and administrative organs.

5.2.3.1. Members of the SE's Organs

The members of the administrative, management and supervisory organs are appointed for a period stated in the SE's Statutes. However, this period may not exceed six years (Art. 46(1) Reg.). According to Regulation, the members of the SE organs who completed their period can be re-appointed one or more times, unless the Statutes states otherwise (Art. 46(2) Reg.).

A company or another legal entity may serve as a member in the SE's organs, provided that the Statutes expressly permits the appointment of such a legal entity. In other words, the law applicable to public limited-liability companies in the Member States in which the SE's registered office is situated must allow the membership of a company or another legal entity (Art.

[169] Oplustil and Teichmann, p. 34.

47 (1) Reg.). On the other hand, national laws can exclude this possibility; and if an ordinary company is not allowed to do this by national laws, neither is an SE[170]. Such a company or legal entity must designate a natural person to exercise the membership functions and represent the company or the legal entity before the organ (Art. 47 (2) Reg.).

According to the Regulation, the followings are ineligible to become such a member:

a) Those disqualified for serving in the corresponding organs (management and supervisory organs in two-tier system, and administrative in one-tier system) and a public limited-liability companies governed by the law of a Member State in which the SE's registered office is situated (Art. 47 (2) (a) Reg.). This provision considers usual requirements for legal capacity (competence, qualification) laid down in legislation of public limited-liability companies where the SE's registered office is situated, and is also applicable to SE companies. However, restrictions, based on residency and nationality, are strictly forbidden in EU and EEA Member States in accordance with the free movement of people in EC Treaty[171].

b) Those disqualified for serving in the corresponding organ of a public limited liability companies governed by the law of a Member State due to a judicial or administrative decision handed down in Member State (Art. 47(2) (b) Reg.).

The Statutes of an SE may consider special eligibility conditions for members of its organs in accordance with the law applicable to public limited-liability companies in the Member States in which the SE's registered office is located (Art. 47(3) Reg.). Clearly, such a requirement in the Statutes can only apply to members of a company organ elected in the general meeting of the shareholders, and cannot apply to employee representatives[172].

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[170] Werlauff (SE- The Law of The European Company), p. 81.
[171] Werlauff (SE- The Law of The European Company), p. 81.
[172] Werlauff (SE- The Law of The European Company), p. 84.

5.1.3.2. Duties of Executive Organs Members

Shareholders in public limited-liability company classically remain external to the actual operation of the enterprise in which the have invested. They also incline to evaluate the performance of their investment in relation to the level of dividend payment and related short-term movement at share prices of the stock exchange market rather than with regard to any long-term business strategy. These factors have led to the emergence of what is known as the separation of ownership and control. As put forward, this idea refers to the fact that those who provide a company's are not really concerned in determining how that capital is used within the specific business enterprise. In effect, the day-to-day operation of the business, enterprise is left in the hands of a small number of directors whilst the large majority of shareholders remain powerless to participate in the actual business form which they distribute their dividend payments[173].

In theory, the shareholders exercise final control over the directors through the mechanism of general meeting. The separation of ownership and control however has resulted in the concentration of power in the hands of the directors and has given rise to the likelihood that directors might operate as a self-perpetuating oligarchy who seek to run the company in their own interest rather than in the interest of greater part of shareholders. From this point of view, the lack of fit between theory and practice company laws has invited a number of particular controls in which directors act[174].

In the light of above mentioned explanations, firstly, members of executive organs and directors of companies have to protect their employees' interests. Secondly, executive organs

[173] Kelly, p. 307.
[174] Griffin, p. 245.

have to must give attention to the company's creditors' interests in order to protect them from losses. Thirdly, executive organs have to protect the interests of the shareholders.[175]

5.2.3.2.1. To act *bona fide* in best interest of the company

The pivotal duty of members of executive organs' actions must not only be honest, but also be in best interest of the company[176].In other words, members are under an obligation to act in what they genuinely believe to be the interest of the company[177]. The test to determine whether a member of executive organs acted in breach of the *bona fide* duty is a subjective one. Consequently, court have to consider whether the director believed that he was acting for the benefit of the company[178]. The duty of good faith operates to prevent directors fettering their discretion by, for instance, contracting with third party as to how a particular discretion conferred by the statute will be exercised. However, where the board is able to establish that it was in the best interests of the company to enter into such an treaty, the duty will not be broken. For instance, the directors should be able to point to some commercial benefit accruing to the company as a result if their undertaking to the third party[179].

5.2.3.2.2. To Avoid a Conflict of Interests and Not Profit from Their Position

The conflict of interest rule should be stated as a rule which bans a company director from using a corporate opportunity for his own personal use[180]. Members of executive organs

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[175] Adams Alix, "Law of Business Students", (Harlow: Person/Longman Education, 2nd Ed., 2000), p. 310.
[176] Lawson, p. 9.
[177] Kelly, p. 312.
[178] Griffin, p. 248.
[179] Lowry John and Dignam Alan, "Company Law",(Oxford: Oxford University Press, 3rd Ed., 2006), p. 329.
[180] Griffin, p. 252.

have to avoid any conflict between their own financial interest and those of the company. If they breach this duty, they have to account to the company for any resulting profit[181].

Moreover, members of executive organs have to take full disclosure of any personal interest, which they have, in company business. Usually, the statutes provide that as long as directors fully declare their interests they may retain them, but they must take not vote at an organ meeting on any issue relating to those interests[182]. As for contracts made with the company, the general rule is that a director should only enter into a contract with the company if this is allowed by the statutes or if this is endorsed by a general meeting.

5.2.3.2.3. To Act with Attention and Diligence to The Business of The Company

A member of executive organ would, by the very nature of business and commercial reality, sometimes be called upon to enter into business transactions which early a potential element of risk. A commercial activity may be required to secure economic stability or growth. Accordingly, the director would be expected to show a reasonable degree of care in the performance of his duties[183].

Even though a member of executive organ members owes duty to be diligent and to pay attention to the affairs of the company, the amount of time and attention given would vary from business to business.

Historically, "the judicial interpretation of the nature of the duty of care expected of the a director was based upon the judgment of Romer J. in *Re City Equitable Fire Insurance Co. ltd.* (1925). Romer J. identified the characteristics of the duty in the following way"[184]:

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[181]Adams, p. 311.
[182] Bourne, p. 140.
[183] Griffin, p. 260 .
[184] Lawson, p. 12.

- A director must show that degree of care and skill which might be reasonably expected a person with his knowledge and experience,
- A director is not bound to give continuous attention to the affairs of the company. He is not bound organ meetings, but should do so,
- A director may, in the absence of grounds for suspicion, trust company officials to perform duties which may property be designated.

However, the characteristics put forward by Romer J. have now been subjected to important shift towards a stricter approach to the construction of the duty. The first characteristic of the duty of care advanced by Romer J. has been modified to include objective considerations. The characteristic should now be said to comprise a standard whereby, a director need to exhibit in the performance of his duties any greater degree of skill than could be expected form a reasonable diligent person, the diligent person being imputed with the general knowledge, skill and experience that may reasonably be expected of the holder of position in question.

In relation to the second characteristic suggested by Romer J., this obviously does not apply in the case of executive directors, although in part it may still be applicable to non-executive directors[185]. The third characteristic is still probably applicable even though a director who depends on another officials in the company carry out delegated tasks may be neglectful in circumstance where he allows an officials to assume exclusive control over a part of the company's business without any form of supervision[186].

[185] In a company some of board of directors may be lay non-executive directors who provide their services on a voluntary basis and whose primary function is attendance at board meetings. They do not play any direct role in the day-to-day management of the company; this is in the hands of its executive directors. For further information see Adams, p. 307.
[186] Griffin, p. 161.

5.2.3.2.4. The Members of Executive Organ must Use Their Powers for the Proper Purpose

Directors have to exercise their powers the purposes for which they were best owed[187] which is called "proper purpose doctrine".[188] Although a director may honestly believe that in entering into a transaction, he is acting in the best interests of the company as a whole. He would nevertheless be held to be in breach of his duty if the purpose of the transaction was outside or an abuse of the director's allocated powers, even though the transaction may not have been outside the contractual capacity of the company[189].

There is a tension between the duty of good faith on the one hand, and the proper purposes doctrine on the other hand, in so far the latter operates to limit the authority of directors even if their action was carried out in what they *bona fide* believed to be in the best interest of the company. If a power is exercised primarily for some collateral purpose (which is objectively determined as a matter of construction of the statutes), the director are guilty of an abuse of power and their action can be set aside. Therefore, for example, while the directors may believe it is in to shareholders who will reject a takeover bid, that will probably not be capital and not to increase the voting rights of certain shareholders in the order to defeat a takeover. It is no part of the function of directors as such to favour one shareholder or group of shareholders by exercising a fiduciary power to allot shares for the purpose of diluting the voting power attaching to the issued shares held be some other shareholder or group of shareholders.

On occasion, the question of whether directors have exercised their powers for a proper purpose may arise. The most common example the exercise of directors powers that is subject to the power the issue shares and power to refuse to register a transfer of shares. The power of

[187] Lawson, p. 12.
[188] Lowry and Alan Diagnam, p. 331.
[189] Griffin, p. 249.

director that are subject to duties also broaden; to the power to borrow money and grant securities, the power to call general meeting, the power to provide information to shareholders, the power to make calls on party paid shares[190].

5.2.3.3. Quorum and Decision-Taking in the SE Organs

Unless the SE Regulation or the Statutes state otherwise, the quorum for all SE meetings must be at least half of the members present or represented (Art. 50(1) (b)Reg.). This statement clearly establishes that an absent member can authorize another member to represent it and vote on its behalf.

As for decision-taking (voting-majority), decisions shall be taken by the majority of the members present or represented, unless stated otherwise by the Regulation or the company Statutes (Art. 50(1) (b) Reg.). "Majority of the members present or represented" shows that there should be an absolute simple majority, which means at least half of the shareholders present or represented[191].

Where there is no relevant provision in the Statutes, the chairman of each organ shall have a casting vote in the event of tie[192]. There shall be no provisions to the contrary in the Statutes, however, where half or more of the supervisory organ consists of employees' representatives (Art. 50(2) Reg.). As mentioned above, the supervisory organ of a two-tier system shall elect a chairman from among its members (Art 42 Reg.) and the same applies to the administrative organ of a one-tier system (Art. 45 Reg.). However, if half of the members are appointed by employees only a member chosen by the general meeting of the shareholders may be elected chairman. When this is combined with the provisions that the chairman shall have a casting vote in the

[190] Bourne, p. 146- 147.
[191] Werlauff (SE- The Law of The European Company), p. 87.
[192] Werlauff (SE- The Law of The European Company), p. 88, Van Gevren and Paul Storm, p. 62.

event of tie, this ensures that the members having the deciding power in the organ are those appointed by the shareholders[193].

If employee participation is provided in accordance with the Directive, the national law applicable to the SE may provide that the quorum and decision making authority of the supervisory organ shall be governed by the rules applicable to public limited-liability companies subject to the laws of the Member States (Art. 50(3) Reg.)

5.2.3.4. Transactions Subject to Authorization

An SE's Statutes shall list the categories of transactions requiring the authorization of the supervisory organ in two-tier system, or by the administrative organ in the one-tier system. However, a Member State should provide that in two-tier system the supervisory organ may it self designate some categories of transaction subject to authorization (Art. 48 (1) Reg.).

Moreover, according to the Regulation, a Member State may determine the categories of transactions, which must at least indicated in the Statutes of the SE registered within its territory (Art. 48 (2) Reg.).

5.2.3.5. Confidentiality Duty of the Members of the SE's Organs

The members of the SE's organs, even after they have ceased to hold office, shall be under the duty of not divulging any information concerning the SE and the disclosure of which might be prejudicial to the company's interest, except where such disclosure is required or permitted under national legal provisions applicable to public limited-liability companies or is in the public interest (Art. 49 Reg.). This is important to note that, here public interest can be a matter of a member of a company organ being aware that there are illegal activities in a company which has

[193] Van Gerven and Storm, p. 62.

a certain a public profile, or that key personnel in a company are in the process of defrauding of the company and causing it serious loss for company[194]. It is interesting that there is no time limit for duty of confidentiality[195].

5.2.3.6. Liability of Members of the SE's Organs

Members of the SE's management, supervisory and administrative organs are liable for loss or damage suffered by the SE following any breach of their legal statutory or other obligations inherent in their duties, in accordance with the provisions applicable to public limited-liability in the Member State in which the SE's registered office is situated (Art.51 Reg.).

It is the national law, which determines whether such liability is civil or criminal in nature or joint or several[196]. The national law also decides the conditions for avoiding or obtaining a release liability, and as to who is entitled to file a claim for damages against members of those corporate bodies[197].

5.3. Decision Making Organ

5.3.1. General Meeting of Shareholders

In theory, the final control over a company's business lies with the members in the general meeting[198]. However the day-to-day management of the company is in the hands of the directors, and generally there is little that the shareholders can do influence this. For this reason, the general meeting is very significant corporate organ for the owner of company. The shareholders make that, the business of the company is transacted by means of passing decisions

[194] Werlauff (SE- The Law of The European Company), p.86.
[195] Van Gerven and Paul Storm, p. 64.
[196] Raaijmakers, p. 181.
[197] Van Gerven and Paul Storm, p.64.
[198] Kelly, p. 316.

at meetings. The meetings have be properly called and constituted according to rules contained in the statutes of the company and national law where SE's registered office is suited. All persons who have right to join a meeting must be informed that one is to take place. Such persons may have to be given a minimum length of the notice to join. In addition, there must be a quorum present at the meeting , which means there must be minimum number of people who must be present in order for a valid decision to be passed[199]. Sometimes it is also necessary that the members constituting a quorum must have no personal interest in the matters being discussed or at least must have disclosed interest they might have[200].

Every company must hold once a year a general meeting of shareholders at which the accounts of the company are present by the directors, who may have to submit to questioning from the shareholder. At this annual meeting, of which the shareholders must receive notice, they appoint or reappoint the directors and the auditors. They also confirm, or not as the cases may be, the dividend proposed by the directors to be distributed[201].

The SE Regulation states requirements for some aspects of the functioning of general meeting of the shareholders of the SE, such as its competency, its organization, and its conducts. Aspects of the company's organization not expressly provided for by the regulation are subject to the application of national law.

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[199] Adams, p. 323.
[200] Lewis, Arthur, *Introduction to Business Law,* (London: Tudor Business Pub., 1st Ed., 1998), p.47.
[201] Lewis, p. 48.

5.3.1.1. Organization of the General Meeting of Shareholders

The general meeting of shareholders must meet at least once each calendar year within six months following the closing of the companies' financial year (Art. 54(1) Reg.). This meeting should approve the annual accounts of the SE for the past financial year[202]. However, the law of the Member State, in which the SE is registered, may require more frequent meetings for public limited-liability companies undertaking the same type of activities as the SE (Art. 54(1) Reg.). According to the Regulation, the law of the Member State where an SE's registered office is located may allow the first general meeting of shareholders to be held at any time during the first 18 months following the incorporation (Art. 54(1) Reg.).

The general meeting of shareholders may be convened at any time by the management, the administrative, or the supervisory organ. The national law applicable to public limited-liability company in the Member State, in which the SE's registered office is situated, may stipulate any other organ or competent authority to convene the general meeting of shareholders (Art. 52 (2) Reg.).

According to *Werlauff*, the provision does not distinguish between the power to require a meeting to be convened and the actual power to convene the meeting. However, it must be assumed that first and foremost it regulates the power to require a meeting to be convened since the actual convening will often be undertaken by the management organ, the administrative organ or the supervisory organ[203].

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[202] Van Gevren and Paul Storm, p. 60.

[203] Werlauff (SE-The Law of The European Company), p. 98.

5.3.1.2. Responsibilities of General Meeting of Shareholders

The general meeting of shareholders decides on matters for which it is given sole responsibility by the Regulation, or on matters related to the implementation of the Directive concerning employee involvement, or on matters the responsibility of which is conferred to general meeting of shareholders of a public limited-liability company by national law of the Member State where the SE's registered office is located (Art.52 Reg.).

The Regulation reserves the following powers to the general meeting of shareholders:

- Transfer of the registered office of an SE to another Member State (Art. 8(6) Reg.).
- Amendments to the articles of an SE (Art. 59 Reg.).
- The appointment and removal of a member of the supervisory organ in two-tier system, and of the administrative organ in the one-tier system (Art. 40 (2), 43(3) Reg.).
- Decision of conversion of an SE into a public limited-liability company (Art. 66 Reg.).
- The right to elect the management organ in two-tier system if the national law allows it (Art. 39 (2) Reg.)

Other powers will follow national law on public limited-liability companies (Art. 52 (2)). The SE's national law thus governs disputes on an SE's general meeting powers, e.g., on the approval of the annual accounts, discharge and/or indemnification of board members, appointmet of the SE's auditor, remuneration of board members, amendments to the SE's capital, liquidation and other corporate reorganizations[204].

Finally, the Statutes can extend the powers of the general meeting of shareholders, unless these powers are reserved by the law to another corporate body, such as the administrative,

[204]Raaijmakers, p.176.

management or supervisory organs. In general, management of the SE may not be transferred to general meeting of shareholders[205].

5.2.1.3. Minority Rights in General Meeting of Shareholders

The Regulation establishes rules to protect the minority shareholders allowing them to convene a general meeting of shareholders and to request additional items to be included in the agenda[206].

One or more shareholders holding at least 10 % of the subscribed capital are entitled to request that general meeting of shareholders be convened and drown up an agenda for such general meeting (Art. 59(1) Reg.). If the relevant company's executive organ does not convene a general meeting in due time, that is, within two months following the proposal of such request, the competent judicial or administrative authority of the Member State where the SE's registered office is located may order the general meeting to be held within a given period of time. Such an order shall be without prejudice to any national provisions, which allow the shareholders themselves to convene general meetings (Art. 55(3) Reg.).

Moreover, one or more shareholders who together hold at least 10% of an SE's subscribed capital may request that one or more additional item be put on the agenda of any general meeting of shareholders (Art. 56 Reg.). The procedures and time limits applicable to such request shall be laid down by the national law of the Member State where the SE company is registered.

However, due to the possible large size of an SE, 10% threshold may be hard to reach for minority shareholders[207]. For this reason, the Regulation allows a reduction of this percentage by

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[205] Van Gerven and Paul Storm, p. 60.
[206] Tavares Da Costa and Alexandra de Meester Bilreiro, p. 63.
[207] Van Gevren and Paul Storm, p. 60.

the Statutes or by the law of the Member State, in which the SE's registered office is situated, under the same conditions applied to public limited-liability company (Art. 55(1)-56 Reg.).

5.2.1.4. Quorum and Voting in General Meeting of Shareholders

The decisions in general meeting of shareholders shall be taken by the majority of the votes validly cast (Art. 57 Reg.). This means that there is an assumption that there must be an absolute majority (at least half of the votes plus one) of the votes validly cast by those shareholders present or represent[208]. However, according Article 59 of the Regulation, amendment of an SE's Statutes requires a decision of a minimum two-third majority of the votes cast. However, the Regulation also indicates that the national law may necessitate or permit a larger majority.

No minimum attendance threshold is required unless stated otherwise. National law may require a quorum with respect to certain decisions. The SE's Statutes may also consider a quorum or increase the quorum provided by law [209].

Votes cast cover all possible voting procedures, such as a shows of hands and written procedures[210]. However, votes validly cast shall exclude votes attaching to shares in respect of which shareholders has not taken part in the vote, has abstained or has returned a blank or spoiled ballot paper (Art. 58 Reg.).

Finally, if a decision of the general meeting of shareholders affects the rights attached to a particular class of shares, the decision must be approved by a separate vote of each class of shares whose rights are affected (Art. 60(1) Reg.)[211]

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[208] Tavares Da Costa and Alexandra de Meester Bilreiro, p. 63.
[209] Van Gevren and Paul Storm, p. 61.
[210] Werlauff (SE-The Law of The European Company), p. 100.
[211] Further information see Enriques (Silence Is Golden), pp. 15-23.

6. Annual and Consolidated Accounts of the SE

For the preparation and approval of the annual and consolidated accounts of an SE, the same rules governing public limited-liability companies having their registered offices in the same State as the SE's will apply (Art. 61 Reg.).

SE companies, which are credit or financial institutions are governed by the accounting rules laid down by the Member State where they are registered in implementation of Directive 2000/12/EC (Art. 62 (1) Reg.) relating to the taking up and pursuit of the business of credit institutions as regard the preparation of its annual and, where appropriate, consolidated accounts, including the accompanying annual report and the auditing and publication of those accounts[212].

SE companies, which carry on businesses such as insurance, are governed by the accounting rules laid down by the Member States on the basis of Directive 91/674/EEC[213].

7. Winding up, Liquidation, Insolvency, and Cessation of Payments of the SE

Often the words insolvency, bankruptcy, cessation of payments and winding up or liquidation become intermixed in a person's mind. However, one should be aware of the differences implied by these terms. Insolvency simply means inability to pay one's depts. Assuming B owes A € 1000 then A may have to establish had right to that sum of money by going to a court. If A wins then he can say he has obtained judgment against B and so B becomes a judgment debtor and A is the judgment creditor. But A still has not received his money. If that is the case A must consider imposing his judgment against B and would have to seek the help of

[212] Directive No.2000/12/EC of the European Parliament and of the Council of 20 March 2000 relating to the taking up and pursuit of the business of credit institutions Official Journal, L126, 26/05/ 2000.
[213] Council Directive No. 91/674/EEC of 19 December 1991 on the annual accounts and consolidated accounts of insurance undertakings, Official journal L 374, 31/12/1991.

the court. This may consist of the court ordering the bailiffs to distain on B's goods, to sell then and from the proceeds to pay another method would be. If B owes money not only to A but also to C, D, E and F etc. It might mean by focusing on one creditor the other creditors can be unfairly treated and may not be able to recover any part of their dept. In that case, it might be advisable from the point of view of all creditors that a united front is maintained against B and the he is made bankrupt.

The most important aim of the bankruptcy proceeding is to guarantee that each creditors is dealt with fairly. When one considers the assets of B a personal action against him would only succeed in going control of asters he owns at that time. A feature of bankruptcy however, is that it may be possible in certain cases to follow asserts which previously belonged to the debtor and to recover them so that they can be distributed amongst the creditors.

In the case of companies, the procedure for collecting in their assets and distributing them amongst the creditor is called winding up or liquidation. In other words, winding up or liquidation is the process whereby the life to the company is terminated. It is the formal and strictly regulated procedure. One point to be observed is that a human person is made bankrupt because he cannot pay his depths; a company may be wound up for other reasons. For instance, on technical grounds such as the company did not commerce business within a year after it was included. A company may be wound up compulsorily by the court of voluntarily by, its members or creditors. Even though the insolvency of a company is probably the main reason for wound up a company, a company may be wound up merely because the shareholders wish it to be wound up[214].

The Regulation gives little detail regarding the winding up, liquidation, insolvency, and cessation of payments of the SE. It simply provides that these procedures with regard to an SE

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[214] Lewis, p. 316.

will be governed by the provisions applicable to public limited-liability companies in accordance with the law of the Member State in which its registered office is situated (Art.63 Reg.), as well the procedures regarding decision-making process of the general meeting of shareholders.

Moreover, the Regulation establishes that without prejudice to the provisions of the national law requiring additional publications, the initiation and termination of winding up, liquidation, insolvency or cessation of payments procedures and any decision to continue operating have to be publicized in the manner stipulated in the laws of the Member State in which the SE has its registered office (Art. 65 Reg.).

The Regulation contains two grounds for the winding up of an SE in addition to those that may exist under applicable national law: first, if the legality of a merger was not checked in accordance with the provisions concerning formation by merger (Arts. 25 – 26 Reg.), an SE can be wound up (Art. 30 Reg.); second, when an SE no longer has its registered office in the same Member State as its head office may be wound up in accordance with the law of the Member State where the SE's registered office is located (Art. 64(1-2) Reg.).

8. Conversion of an SE into a Public Limited-Liability Company

An SE may be converted into a public limited-liability company governed by the laws of the Member State where its registered office is located at any time (Art. 66(1) Reg.). The conversion of an SE (will be referred as 'conversion' from now on) into any other type of company is not permissible under the Regulation. However, an SE that was converted into a public limited-liability company can then be further converted into another corporate entity[215].

The conversion is only possible two years after the SE's registration, and after the approval of two sets of annual accounts (Art. 66(1) Reg.).

[215] Van Gerven and Paul Storm, p. 73.

The conversion shall not result in the winding up of on SE or in the creation of new legal person (Art. 66(2) Reg.). The conversion is merely a change in the corporate form and does not affect the legal personality, which continues without interruption.

The Regulation provides five stages in order to reach a successful conversation. The following paragraphs focus on this procedure;

<u>Stage One</u>

The management or administrative organ of the SE must first prepare draft terms of the conversion and a report defining and justifying the legal and economic aspects of the conversion as well as indicating the implications of the adoption of the public limited-liability company for the shareholders and for the employees (Art. 66 (3) Reg.). According to *Van Gerven,* the draft terms should also cover any changes in the Statutes, including proposed new statutes or amendments, and any requirements to comply with the rules applicable to public limited-liability companies[216].

<u>Stage Two</u>

The draft terms of the conversion must be published in accordance with the national law at least one month before the date of the general meeting of shareholders in which the voting on the conversion shall take place (Art. 66(4) Reg.).

[216] Van Gerven and Paul Storm, p. 74.

Stage Three

Before the general meeting of shareholders, one or more independent experts shall certify that the company has assets equivalent at least to its capital. In accordance with national law, these independent experts shall be appointed or approved by a judicial or administrative authority in the Member State to which the SE being converted into a public limited-liability company is subject (Art. 66(5) Reg.).

Stage Four

The conversion must be approved by the general meeting of shareholders, at which the shareholders must also approve the new articles of the public limited-liability company (Art. 66(6) Reg.)

The regulation refers to Third Company Directive[217] about this issue. According to Article 7 of the Directive, the majority required to approve the conversion is determined by the national law governing public limited-liability companies of the Member States where the SE's registered office is located. However, this majority should not be less than two-thirds of the votes attached to the shares or other securities of the company. Moreover, a simple majority of the votes is sufficient if at least 50% of the subscribed capital is present or validly represented. If there is more than one class of shares entitled to vote, a separate vote of each class of shareholders whose rights are affected by the decision of conversion is required[218].

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[217] See supra note 23.
[218] Werlauff (SE- The Law of The European Company), p. 170.

Stage Five

The conversion must be publicized in accordance with the legal provisions applicable to public limited-liability companies in the Member State of registration.

Conclusion

The SE Regulation represents a "breakthrough" for companies operating within several EU Member States. Before the new Regulation on SE, multinational companies and companies willing to operate abroad had to establish a whole net of subsidiaries throughout the territories in which they wanted to operate. Due to disparities between national legislations and the necessity of incorporating at least one legal entity for each country, cross border operations proved to be especially costly and time-consuming. Under the new SE Regulation, companies have the option of setting up a single company under the European Law with a single set of rules and unified management and reporting system.

However, the main purpose of the Regulation, namely to introduce a legal entity governed by a single set of rules throughout the EU, has already failed in many respects. This criticism is partly due to the fact that the legislation provides too many options and references to national company laws of Member States in such important areas as minority protection; directors' liability; audit and accounts; capital changes; insolvency rules and procedures. More importantly, taxes, pensions, competitions and intellectual property law, corporate finance, social security laws remained completely untouched[219]. This Regulation will fuel regulatory competition among Member States as they attempt to attract incorporations and retain existing ones[220]. Potentially, this competitive process will lead to the optimization of the elements of governance and business laws within each Member State on issues not governed by the Regulation[221].

Moreover, the SE's freedom to move its registered office may be regarded as conferring desirable flexibility to a legal entity which conducts business cross borders and may enable it to

[219] Joris, p. 6.
[220] Bilgili, Fatih, "Avrupa Anonim Ortaklığı", *Elektronik Sosyal Bilimler Dergisi,* (Vol. 2, No.6, 2003), p. 22.
[221] Raaijmakers, p. 161.

exploit local factors, thus increase efficiency and reduce cost. However, the procedure for moving the registered office is fairly cumbersome, and its complexity and uncertainty are the negative counterparts of the advantages of the Regulation.

The SE is designed to encourage the formation of independent companies in the form of an SE through merger or the formation of joint holding companies. However, the complexity and length of the formation process may severely discourage such formations due to the interaction between the rules on the formation of an SE and the public offering or take-over rules that would need to be followed, often in accordance with at least two jurisdictions. Therefore, it seems likely that those companies would be created by first maintaining the existing companies and then by the creation of an SE through conversion or merger if they wanted to adopt the SE form.

As a result, the SE may appear as a convenient vehicle to restructure existing European companies or non-EU multinational companies. However, because of the rules on compulsory employee involvement and complex formation procedures and transfer of registered office these restricting method and procedures likely to be attractive only for dominant large companies.

In its Substance, Turkish Commercial code has been codified by Prof. Dr. Ernest Hirsh in 19950s. Turkish Commercial Code resembles to German Commercial Code in terms of its specialties. However, in fact, they have also different specialties. In changing world and globalization legislator needs to re-prepare Turkish Commercial Code. Turkey's the EU candidate status has also increased this requirement. As we look at the situation from European Company Law, it is possible to see that Draft Turkish Commercial Code's some chapters are in harmonization with European Company Law Directives. In particular the abolishment of *ultra vires* doctrin, provisions about merger of companies and establishment of holdings and increased disclosure requirements of companies could be deemed as some examples. As we look at the situation form the Statute of European Company, it is impossible to observe this positive view.

Particularly, employees non-involvement in executive boards, non-definition and implementation of two-tier system, and non- known of transfer of registered companies seat in Turkish Commercial and also Draft Commercial Code make the situation more problematic in terms of subject implementation. In fact, this subject has been indicated in Turkish National Program which, stressed that the subject would be discussed after the beginning of negotiations between Turkey and the EU.

In terms of Turkish Commercial Law, the legislation process of the subject has been delayed to future so that, it could be argued, the Statute of European Company is a important development for comparative law now.

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ANNEX