Die Europäische Aktiengesellschaft
Umsetzungsfragen und Perspektiven

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Edited by

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Vorwort

Im Oktober dieses Jahres wird die Europäische Aktiengesellschaft oder Societas Europaea (S. E.) in der EU als europäische Gesellschaftsform zur Verfügung stehen. Die Diskussion über eine Europäische Aktiengesellschaft reicht bis in die 50er Jahre des vorigen Jahrhunderts zurück. Nach verschiedenen gescheiterten Versuchen, eine einheitliche Europäische Aktiengesellschaft zu schaffen, kam es im Jahr 2001 dann zu einer überraschenden Einigung.

Diese Einigung konnte jedoch in vielen, zum Teil entscheidenden Bereichen nur durch weitgehende Kompromisse erzielt werden. Daher ist zu befürchten, dass es nicht eine einheitliche, sondern eine Vielzahl national ausgeprägter und zum Teil sehr unterschiedlicher Europäischer Aktiengesellschaften geben wird.

Die von der Stiftungsgastdozentur für Internationales Bankrecht ausgerichtete Tagung am 6. und 7. November 2003 in Frankfurt sollte aus rechtsvergleichender Sicht Aufschluss über Stand und Inhalt der Umsetzungsarbeiten in maßgeblichen Mitgliedstaaten der EU geben. Der vorliegende Band gibt die auf der Tagung gehaltenen Referate wieder.

Theodor Baums *Andreas Cahn*

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The Societas Europaea—Implementation and Perpectives[1]

Einführung

Friedrich Kübler

I. Welcome

In less than a year, on October 8, 2004, the Council Regulation on the Statute of the European Corporation (Societas Europaea—or abbreviated: the SE)[2] will become law. At the same time the Member States should have transformed the Directive, dealing with the participation of workers, into their national laws.[3] In part we know and for the rest we assume that all Member States are preparing legislation in order to implement the Regulation and to transform the Directive, and that this process is supported by an exchange of expert views and opinions in each country. But we see much less of such a debate taking place between the Member States, although we have very good reasons to assume that such an exchange of information and ideas is more relevant than ever. The SE is designed to allow European enterprises to move freely throughout the Common Market.[4] As will be seen more clearly later the legislative implementation by the Member States can to some extent either support or undermine this policy. In such a situation it is for obvious reasons

[1] This paper was presented as an introduction to the Symposium on "The Societas Europaea—Implementation and Perspectives" which was organized and funded by the Stiftungsgastdozentur für Internationales Bankrecht, a trust fund of Frankfurt University, supported primarily by Commerzbank, Deutsche Bank and Dresdner Bank.

[2] Council Regulation (EC) No. 2157/2001 of Oct. 8, 2001 on the Statute for a European Company (SE), O.J. EC L 294/1 of 10. 11. 2001 (SE-Reg.).

[3] Council Directive 2001/86/EG of Oct. 8, 2001 supplementing the Statute of a European company with regard to the involvement of employees, O.J. EC L 294/22 of 10. 11. 2001 (SE-Dir.).

[4] See whereas clauses (1) and (24) of the Regulation.

highly interesting to learn how the other Member States will react to the new challenge. Therefore, the presence and the participation of our expert colleagues coming from other countries is particularly appreciated.

II. The SE: Vehicle for Corporate Change?

1. There are two different perspectives of the SE. On the one hand it can be viewed as a mere addition to the arsenal of forms of organization available to entrepreneurs and/or investors who wish to adapt the structure of their enterprise to changing conditions. On the other hand the SE could prove to be much more important than such an addition or extension; the new form could function as a catalyst of corporate change throughout Europe. In fact, under the Regulation and the Directive the structure of the SE is quite different from that of all corporations and other business entities we have known in Europe so far. There are in particular two features distinguishing the SE from the other traditional forms of business organization; they can be summarized by the notions of multiplicity and complexity.

2. The aspect to be discussed is multiplicity. The 5th whereas clause of the Regulation indicates that the SE is conceived as a "legal unit" of its own. But at the same time it is obvious that the Regulation generates more than just *one* clearly defined legal entity. In fact, the Regulation and the Directive merely provide for a framework which is or has to be implemented by the existing corporate statutes of the Member States *and* by the rules they have to enact before October 8, 2004.[5] For this reason it is assumed that in future there will be 25 different forms of SEs, that is: as many as there are, or: will be, Member States. This is far from being wrong; but there will be many more choices than this. Under the Regulation each Member State is obliged to offer the one-tier as well as the two-tier system:[6] an SE in the UK can opt for the German type separation of a supervisory from a managing board, an SE in Germany for a British style board structure. In addition, Art. 66 of the SE-Regulation allows to transform an SE—not before two years after its establishment—into a national

[5] Art. 9 1. (c) (i), 68 1. and 70 SE-Reg.

[6] Art. 38 (b) SE-Reg. requires the Member States to allow the founders of a SE to adopt either form in the statutes.

stock corporation. This is to say: the number of available options is much higher than the number of Member States.

3. The second specific feature of the SE is complexity. Its organization is formed by a hierarchy of norms, exceeding those mentioned in Art. 9 of the SE-Regulation. There are nine levels to be distinguished; on each of them different actors have some power to determine how a specific enterprise will be organized:

a) The top of the pyramid is formed by the mandatory provisions of the SE-Regulation.

b) At the next level we find the provisions of the statute of the SE, of its articles of incorporation, as far as they are specifically authorized by the Regulation. They take precedence over Member State law, even if it is mandatory. A good example is presented by Art. 38 (b): the choice between the one-tier system and the two-tier system is explicitly assigned to the statutes.

c) Step 3 from the top is formed by the non-mandatory or default rules of the Regulation: they give way to the statutes, but again not to the laws of the Member States.[7]

d) It is only then, on step 4, that the mandatory rules authorized by the Regulation and enacted by the Member States in order to implement the legal regime of the SE are to be applied. Art. 43 4. SE-Regulation authorizes Germany to enact specific rules for the one-tier system. These rules will have precedence over the mandatory provisions of the German stock corporation and codetermination statutes.

e) The next element is the agreement which is designed to determine the participation of the workers in the decision making process of the enterprise. This agreement interacts in a rather complex way with the rules already mentioned. The procedure for the formation of the agreement is laid down by the SE-Directive which has to be transformed by the Member States into their own national laws; in doing so they enjoy a certain amount of discretion. The agreement is to be negotiated between a "special negotiating body" representing the workers and—on the other side—management of the companies participating in the merger or other

[7] Examples are to be found in Art. 46 2., 50 1. and 2., 55. 1 and 56, and to a limited extent equally in Art. 40 2. and 43 3. SE-Reg.

transaction.[8] The Directive imposes an enormously complicated regime which determines how the "special negotiating body" is to be formed and by which majorities specific decisions can be taken.[9]

f) On level 6 we find the "Standard Rules" which are to be applied in case that the "special negotiating body" and the companies do not succeed to form such a codetermination agreement.[10] The essence of the "Standard Rules" is provided for in the Annex to the Directive. Parts 1 and 2 of the Annex prescribe a sort of works council with powers limited to information and consultation. Part 3 requires to retain or adopt the codetermination regime of the participating companies which gives the highest degree of participation to the workers. This presents an obvious problem for German industries: whenever a German company is among the founders, the SE will have to adopt Germany's codetermination regime. This could be a serious handicap for German companies: nobody may want to enter into a merger or into similar arrangements with them.

g) The next step are the mandatory corporate law rules of the Member States. These provisions apply where the Regulation imposes no rules of its own, does not require the Member States to generate specific rules for the SE and does not provide for the authorization to settle specific points by agreement or in the articles of incorporation.[11]

h) Level 8, then, are the "statutes" or articles of incorporation.

i) And at the bottom we find the default rules of the corporate laws of the Member States; these are the rules which can be replaced by the "statutes" or articles.

4. This list is impressive. It shows that there are many players—legislators, existing companies, unions, investors—who will be able to exercise influence on how the structures of a specific enterprise will be fixed. For the corporate players the opportunities are enhanced by the choice between different types of the SE: they can opt for a specific country as well as for the one-tier or two-tier system. And their strategies may be anticipated by national legislators. I think this is a major issue to be discussed:

[8] Art. 4 1. SE-Dir.
[9] Art. 3 SE-Dir.
[10] Art. 7 1. (b) SE-Dir.
[11] Art. 10 and 15 SE-Reg.

is it possible to identify priorities, that is: specific legislative strategies in the drafts of the statutes which are designed to implement the SE-Regulation and the SE-Directive in the Member States?

III. Implementation: Basic Strategies

This important point should be addressed in some more detail. The main purpose of the SE is to allow companies to move more freely within the common market; in the terms of the first whereas clause of the Regulation they "should be able to plan and carry out the reorganization of their business on a community scale". This allows new strategies: a corporation will be able to leave a Member State with a less desirable legal system and opt for another Member State offering a more inviting legal environment.

One of the questions open so far is: to what extent will there be incentives for the Member States to engage in the regulatory competition for incorporation. In the US it is obvious that the small State of Delaware is benefited by fees charged for incorporation[12] and by the volume of business performed by its corporate bar.[13] But it is much less obvious that this is really hurting bigger States like New York or Illinois; in fact it appears that they are no longer competing in this race. The importance of this comparison may, however, be limited. For the moment we do not know and have difficulties to guess what it may mean for a country like Germany if—in 10 or in 20 years—the rules for the incorporation of its industries are made in Luxemburg or in the United Kingdom. And there is one lesson to be learned from the American experience: once the race is over it will hardly be possible to start it again. Delaware does not have to compete anymore; its advantage is based on network effects; they include the expertise and qualification of its corporate law judges, the bulk and the sophistication of its case law, and the reliability of its legislation.[14] For these reasons it is to be assumed that the Member States will have incentives perhaps not so much to win corporate business but primarily to avoid losing it to their neighbors. If this is true, each Member State will

[12] *Kahan/Kamar* 86 Cornell L. Rev. 1205, 1211, 1225 and 1252 estimate that this amoutns to ca. $ 500 mio. per year.

[13] For details see *Romano* 1 J. L. Econ. Org. 1985, 225, 240 f.

[14] *Kahan/Kamar* doc. Cit. 1212 f.; *Klausur* 81 Virginia L. Rev. 1995, 757, 842 ff.

be faced with the challenge to opt for one of the two following strategies:[15]

1. The first would be to preserve and to strengthen a system which will make it very difficult and costly to leave the country. Such an approach of barring exit moves may offer considerable advantages. A country like Germany could stick to the major elements of its traditional system. It could avoid the burden of fundamental legal changes as well as the political costs of conflicts with and between major interest groups like the unions. But there are a number of problems which should be carefully taken into consideration. First: will the barriers really work and prevent the corporate exodus? If they prove to be unable to achieve this effect, the country could end up with a sophisticated system of mandatory corporate law, but without major corporations living by these rules. And second: even if the system succeeds in blocking the exit moves of its firms, the regime may turn out to be so cumbersome and costly that the industries operating under it are faced with a serious disadvantage compared to their competitors in other Member States.

2. The other strategy would be to make the country to a friendly place for incorporation in order to retain business which is already there and—in addition—to attract companies from other Member States. Here, the first question would be: what are the elements and the features of a particularly attractive corporate law system? Again, helpful information can be gained from the American experience. Corporate law should refrain from containing too many mandatory rules; basically it should be a default regime allowing investors and managers considerable discretion in tailoring the organization of the company. Investors and minority shareholders should be protected against fraud and other violations of the duty of loyalty, but managers should not be discouraged from engaging in risky activities as long as the risk is outweighed by the chance to make a profit. If this is true, at least some—if not many—of the continental European systems will be faced with a tremendous challenge; and Germany may provide the most obvious illustration. Its system is completely shaped by a stakeholder philosophy: a very comprehensive and rigid regime of mandatory rules is designed to balance the interests of shareholders, creditors and employees within the organization. It will not be easy to move away from this system. There will be political opposition,

[15] For a more detailed analysis and additional reference see *Kübler* 167 ZHR 2002, 222, 229 ff.

mostly from the unions. And there may be considerable problems to establish a more market oriented regime in an environment not used to it.

IV. Implementation: Specific Issues

Finally I should like to turn to a few specific issues of implementation. The board structure, minority protection and codetermination are to be briefly addressed.

1. As mentioned before, the Regulation requires the Member States to allow the founders of an SE the choice between the one-tier and the two-tier system. Even if there is no such duty, all Member States admitting so far only one of these options will probably enact some rules for the use of the other solution by an SE. It may be that this will create less problems for countries like the UK who have known so far only the board system. Here, a two-tier structure—separating a managing board from a supervisory board—may offer an attractive solution where a company coming from a country like Germany with a codetermination regime takes part in the formation of the SE: it is to be assumed that it will be much easier to arrange the participation of employees within a supervisory board compared to a single or unitary board. On the other hand countries like Germany will face greater difficulties in providing for a one-tier structure. The main reason again is codetermination, the participation of workers within the board. This cannot be left exclusively to the agreement which is to be formed by the "special negotiating body" representing the employees and by the management of the companies generating the SE. In case there is no such agreement Part 3 of the Annex to the Directive will apply imposing worker participation according to the "highest proportion" offered by any national system involved in the foundation process. As German law requires (quasi) "parity", that is: the same number of shareholders' and employees' representatives, the question will arise, how this count is to be achieved for an administrative board: should the workers be entitled to fifty percent of all members or only of the independent or outside directors? But this issue can also come up in other countries; for instance if a German corporation participates in a merger generating a British SE with a one-tier board.

2. The second specific issue is protection of minority shareholders.[16] The SE-Regulation provides for general safeguards of minorities. The formation of an SE requires the approval of the shareholders of the participating companies by qualified majority; and the drafting, reporting and reviewing duties of the management are designed to ensure that this approval is based on an informed decision. In addition, Art. 8 5., 24 2. and 34 SE-Regulation allow the Member States to enact rules in order to provide adequate protection for those shareholders who oppose the transfer of the registered office of an SE to another Member State, or the formation of an SE by merger or as a holding company. The first draft of a German statute designed to implement the SE-Regulation[17] provides for two additional safeguards. Shareholders should have the right to a court review of the rate applied to the exchange of their old into new shares, and have a claim for a cash payment if a correction is appropriate. And: shareholders opposing the transfer of an SE to another Member State or the formation of an SE by merger or as a holding company will be protected by rights of appraisal, giving them a claim for cash in exchange for their shares. These appraisal rights can be viewed as a problem; they go far beyond anything provided for the protection of shareholders of a German stock corporation; they may burden the use of the SE with prohibitive risks and they may be contrary to Art. 10 SE-Regulation as they could be discriminating against the SE. It will be very interesting to see how other Member States are going to use the authorization for additional measures of minority protection in Art. 8, 24 and 34.

3. The third and last specific issue is worker participation. The agreement procedure, which is established by the SE-Directive, is designed not only to preserve but even to expand the existing regimes of codetermination into countries with less or with no participation of employee representatives. And in case there is no agreement, Art. 7 and the Annex to the Directive in Part 3 mandate the most comprehensive codetermination regime of all participating companies for the emerging SE. Prima facie, it appears that there is no escape from codetermination in all the Member States imposing such a regime for their national corporations. But this may not be altogether true. Art. 66 SE-Regulation explicitly allows to convert an SE into a public limited-liability company governed by the law of the Member State in which its registered office is located. There is only one restriction: such a conversion or transformation is not allowed to

[16] For more details see *Kübler* 167 ZHR 2002.
[17] Published in AG 2003, 204 ff.

occur before two years have elapsed since the registration of the SE. This is to say: a German corporation will be able to merge with a much smaller foreign company, which may be its subsidiary, into an SE under British, Dutch or Luxemburg law. Under the Directive the SE will in all likelihood be forced to retain the German regime of codetermination. But after two years, this SE can be transformed into a corporation under UK, Dutch or Luxemburg law. Thereafter, the status of the employees within the company would no longer be determined by German law, but by the legal system of its registered office. Art. 37 8. SE-Regulation authorizes the Member States to subject a conversion to a favorable vote of a qualified majority by the organ within which employee participation is organized in Germany, this would be the supervisory board. But the headline of Art. 37 makes it very clear, that this condition applies only to the conversion from a national company **into** an SE and not **from** an SE into a national company. But it will still be interesting to see if there is any Member State intending to make use of this authorization.

V. Conclusion

I hope that I have been able to clarify what we hope to get from this symposium. The SE-Regulation certainly changes the traditional structure of corporate law in the EU Member States. It has the potential to open up the old systems by allowing new strategies of the major players; they include legislatures as well as private actors. These strategies could be interrelated: they could affect each other. The private actors will react to the new rules not only of the Regulation and the Directive, but also of the implementing statutes enacted by the Member States. And the legislators may anticipate these reactions in order to accommodate private interests. We would certainly like to see more clearly how far this is going to happen and to what extent our traditional regimes are going to change.

Implementation of the european company (SE) in Great Britain

Paul Davies[1]

In October 2003 the Department of Trade and Industry, which is the relevant British governmental department, published its consultation document on how it proposes to implement the SE rules in the UK.[2] The end of the period for the receipt of responses to the consultation document was set at January 9, 2004, so that, at the time of writing, it is unclear how far the Government will depart, if at all, from the proposals set out in that document. Nevertheless, the document put out by the Department justifies comment at this stage.

If one compares the SE with a standard British public limited company (plc), there are obviously two points which stand out. The first is that the SE is to be given a choice between a one-tier and a two-tier board, whereas a domestic plc normally operates with a one-tier board. The choice for the SE is based on art 38 of the Regulation.[3] The second outstanding point of comparison is that the SE in some circumstances is required to have employee representation at board level, whereas British plcs are never subject to this requirement. The provisions relating to the SE are to be found, of course, in the Directive.[4]

So, these are the two major points of interest for the British lawyer, one based in the Regulation and one in the Directive. I intend to devote the majority of this paper to these two points, though there are a number of minor issues which are worthy of comment.

1 Cassel Professor of Commercial Law at the London School of Economics and Political Science.

2 Implementation of the European Company Statute: the European Public Limited-Liability Company Regulations 2004, Consultative Document, October 2003, available on: www2.dti.gov.uk/cld/condocs.htm. As with the main Act (Companies Act 1985) the proposals apply only to Great Britain. Northern Ireland will have separate legislation, although on the same model.

3 Council Regulation (EC) No. 2157/2001.

4 Council Directive 2001/86/EC.

When one opens the consultative document to see what in particular on these two issues the DTI has to say, it quickly becomes clear that the answer is 'not very much', and so one comes away from the con doc with a sense of disappointment. What explains the approach taken in the consultation document on these two central issues? The reasons are rather different in the two cases.

I. Employee involvement

Let me take the Directive first and the issue of mandatory board level representation of the employees. The Directive obviously needs to be transposed into British law and indeed the draft domestic legislation, which is set out in the consultation document, gives proportionately much more attention to the Directive than to the Regulation, most of which applies automatically in domestic law. Thus, though the Directive deals with only one aspect of the SE, albeit an important one, about half of the provisions of the proposed national rules are devoted to the topic of employee involvement.[5]

Even so, there is less to comment on in relation the transposition of the Directive into British law than one might expect, because the proposed domestic legislation sticks very closely to the terms of the Directive itself. This is not, I think, surprising. The provisions which have ended up in the Directive, as we all know, were the most contentious ones in the history of the negotiations of the SE. Far from being a mere statement of principles, as one might expect from the definition of a directive in Art. 249EC, the Directive in fact embodies in rather detailed language the compromise arrived at. It seems to me to be in accordance with that history for Member States not to seek too much to elaborate on the Directive's provisions.

Of course, some points are left by the Directive for the Member States' decision. In the UK context, probably the most important is the method of choosing the employee representatives. As is well known, in the UK the predominant form of collective representation of the employees as against the employer has been, ever since the last quarter of the nine-

[5] Part 3 of the Draft Regulations (regs 15–50) deal with employee involvement, out of a total of some 57 draft regulations.