Societas Europaea - the European Company

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On 8 October 2004 the European Public Limited Liability Company Regulations 2004 (the "2004 Regulations"), which give effect in Great Britain to the European Company Statute ("ECS"), came into force. Thus the Societas Europaea ("SE")—the Latin name was chosen to overcome any problems with linguistic preference—became a reality some 30 years after it was first proposed. The ECS, adopted by Member States in 2001, creates a legal framework for the SE and consists of a direct-effect Regulation (setting out the core company law framework) and a linked Directive concerning employee involvement in SEs. So far, only the UK, Belgium, Austria, Denmark, Sweden, Finland and Iceland have implemented enabling legislation. In Great Britain, the 2004 Regulations implement the Directive and also set out which Member State options contained in the ECS are being adopted. (The reference to Great Britain rather than the UK is deliberate as Northern Ireland has separate regulations implementing the ECS.)

The new form of company—which will be a European public limited company registered in one of the Member States with a minimum share capital of €120,000—will be available to commercial bodies with operations in more than one Member State. Its use will be entirely voluntary. It can be set up in one of four ways:

- By the merger of two or more existing public companies from at least two different Member States;
- By the formation of a holding company promoted by public or private limited companies from at least two different Member States;
- By the formation of a subsidiary of companies from at least two different Member States;
- By the transformation of a public company which has, for at least two years, had a subsidiary in another Member State.

The registered office of an SE must be located in the EU. Also, the registered office must be located in the same member state as the company's administrative head office though national law may permit a company with its head office located outside the EU to participate in the formation of an SE if the company has strong economic ties with the EU (and the 2004 Regulations do permit this). Thus, for example, a US company with established European operations may be permitted to participate in the formation of an SE.

An SE will be registered in a Member State in the same way as a public company in that state. In Great Britain this will mean making the required filings with the Registrar of Companies. There will be no central register of SEs. However, the registration of each SE must be published in the EU's Official Journal. Companies House has published a guidance leaflet on SEs being registered in Great Britain. This can be accessed on its website.

The ECS provides that an SE may operate with either a one tier or two tier management system. Two tier systems will have a supervisory board to supervise the second-tier management board that runs the day-to day business of the company. National law dictates whether the SE must follow the precedent set by companies subject to national law or whether the SE can independently choose the type of management structure. Under the 2004 Regulations SEs registered in Great Britain do have the choice.

The perceived advantage of the new structure is that, for example, a British company wishing to take over a company from, or establish a joint venture with a company in, another Member State will find it easier to reach agreement with the overseas company if it decides to form a joint holding company or joint subsidiary in the form of an SE. It also means that companies that incorporate in the form of an SE can restructure quickly and easily to take advantage of trading opportunities offered by the internal market. This is mainly because the ECS allows an SE registered in one Member State to move its registered office to another Member State without—as is the case now—having to wind up the company in one state and re-register in the other.

Perhaps the most controversial aspect of SEs, at least from a UK perspective, is that it is a condition of registration that all SEs must have some element of "employee involvement", which is something traditionally alien to English company law. As might be expected, the detailed procedures are complex, but in essence they require an SE to establish an employee "special negotiating body" and to negotiate in a spirit of cooperation to try to reach a voluntary agreement on what form the employee involvement should take. If agreement is not reached, then the default rules set out in Schedule 4 to the 2004 Regulations will apply.

In most cases employee involvement should be limited to informing and consulting with employee representatives and paying various expenses including that of an "expert". However, the 2004 Regulations introduce a mechanism for employee representatives to appoint directors to either tier of the management board—so called "employee participation"—which is something that is far more contentious. This will only be compulsory if employees in one of the participating companies already have pre-existing employee participation rights, which must then apply to the SE as a whole.

City commentators have observed that the new structure is unlikely to be popular with UK company clients mainly because of employee involvement. Vanessa Knapp, chairwoman of the Law Society's company law committee said "UK companies are worried about employee participation at board level. There is no tradition of that here and it looks unattractive." However, there is a growing trend towards increased employee involvement driven by the EU. Employees of large community-scale undertakings already have the right to request a European Works Council, and from 1 May 2005, employees in UK businesses have the right to request an Information and Consultation Agreement depending on the number of employees working in the business. As UK businesses get greater

exposure to employee involvement, then the prospect of having to establish employee involvement structures for SEs will be perceived as far less of an issue.

Richard Setchim, UK leader of corporate simplification and reconstruction at Price Waterhouse Coopers, thinks there are other drawbacks, however. "The SE gives companies a lot of flexibility, but there are still some hurdles, mainly in the field of taxation and merger law. At the moment, if a company in the UK or France decides to emigrate to another EU country, it is still subject to tax charges. Issues like these have not yet been addressed under the new rules. The benefits have to outweigh the costs before companies will migrate from existing structures to a new one."

Another perceived disadvantage is that, for lawyers, the structure will be a difficult one on which to advise as there will be inevitable uncertainty about how the applicable rules in the different Member States will interrelate.

Pan European structures have generally not had much success despite, for the policy-makers at least, being an important symbol of the single market and a way to break down national barriers to cross-border activity. The EEIG (European Economic Interest Grouping), brought into being in 1989, has never gained great momentum and it remains to be seen whether the SE has greater impact.