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Abstract
A significant development was made recently to the range of corporate forms available to businesses operating in the European Union (EU). A company's incorporation, regulation and dissolution had hitherto been the sole domain of the EU's member states. On 8 October 2001, this changed when Council Regulation (EC) No 2157/ 2001 on the Statute for a European Company (the Regulation) was adopted, making the form of a European company or Societas Europaea (SE) open to some businesses in the EU after the Regulation enters into effect. This article will examine the form and analyse the likely impact the national law and legal culture of EU member states will have on the structure and form. It will demonstrate that the Regulation will contribute more significantly to the proliferation of corporate law in the EU than to its harmonisation.

Keywords
Societas Europaea, European Union, company law, harmonisation

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SOCIETAS EUROPAEA

HARMONIZATION OR PROLIFERATION OF CORPORATIONS LAW IN THE EUROPEAN UNION?

Judith Marychurch*

I. INTRODUCTION

A significant development was made recently to the range of corporate forms available to businesses operating in the European Union (EU). A company's incorporation, regulation and dissolution had hitherto been the sole domain of the EU's member states. An exception was the use of European Council[1] Directives to facilitate the harmonisation of corporate law in key areas. On 8 October 2001, this changed when Council Regulation (EC) No 2157/ 2001 on the Statute for a European Company (the Regulation)[2] was adopted making the form of a European company or Societas Europaea (SE) open to some businesses in the EU after the Regulation enters into effect.[3]

This article will examine the form and analyse the likely impact the national law and legal culture of EU member states will have on the structure and form. It will demonstrate that the Regulation will contribute more significantly to the proliferation of corporate law in the EU than to its harmonisation.

Under the Regulation, the SE is available as a corporate structure on 8 October 2004 if it is formed under one of four prescribed methods.[4] It does not replace any corporate form at the member state or national level but instead is a supplementary form for a corporate business organisation. It is intended to overcome some of the key obstacles facing the conduct of business on a pan-European basis.

In practical terms, the Regulation seems to achieve little to harmonise EU corporations law. Evidence in support of this observation is found in the Regulation's detailed Preface and substantive provisions. Furthermore, the impact of the various legal systems and legal cultures of the member states are likely to be extensive since the Regulation refers to their laws and administrative and judicial structures. In fact, the details governing the SE's formation and operation as a corporate form are largely reserved to the member states making this aspect of the Regulation particularly important. Instead of facilitating the development of a SE capable of operating on a pan-European basis free of the current jurisdictional difficulties

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[1] The European Council is the EU's highest political level: see the EU's website at <http"ue.eu.int/en/summ.htm> (visited February 2003).

[2] The provisions referred to in this article are found in the Regulation unless stated otherwise. For the text of the Regulation see <http://europa.eu.int/eur-lex/en/lif/dat/20 01/en_301R2157.html> (visited December 2001).

[3] The decision to retain the Latin name for the European company is interesting in itself. "Societas Europae" seems to refer to the days of a unified Europe under Roman control and "societas" may be translated as fellowship, partnership, association or alliance: <http://cheiron.humanities.mcmaster.ca/~barrette/latin/buildsection.cgi?LEX ICON> (visited November 2002).

[4] Article 70.

confronting companies seeking to do business across national boundaries, it supports the conclusion that it is more likely the SE will contribute to the proliferation of EU corporations law.

II. GENESIS OF THE *SOCIETAS EUROPAEA*

The original proposal to establish the SE was made in 1959 and the formal recommendation to adopt it in 1970. The proposal came early in the EU's history and the chief goal was a structure to enable companies to operate more efficiently and cheaply across the member states. In March 1957, the Treaty of Rome was signed establishing the European Economic Community (EEC). Shortly after, two initial proposals for the SE were put in 1959[5] but the European Commission (the Commission) did not formally recommend a Regulation on the Statute for a European public limited-liability company until 1970,[6] which was later amended in 1975. After this, little progress was made and the Regulation's formal acceptance did not actually occur until its adoption some 30 years later at the start of 2000. This event had followed renewed emphasis on the need to create a SE.[7]
The primary motivating factor to "fast-track" the Regulation appeared to be economic in nature. The Competitiveness Advisory Group (CAG) was established in 1995 in response to the "apparently intractable competitiveness deficit between the European Union and its main trading partners and rivals, the United States and Japan".[8] This body felt that “the disparities in the performance of the different parts of the world stem[med] from their varying ability to meet the demands of economic globalisation”.[9] It identified the acceleration of internal market process and elimination of excessive regulation as two crucial factors falling within the top 20 addressing EU competition and the competitiveness deficit.

In 1999, the Financial Services Action Plan was developed that identified the priorities to be accomplished over a five-year period. This was mainly to allow the EU to benefit fully from the Euro's introduction and ensure the continued competitiveness of EU financial markets.[10] Among the Action Plan's key goals was the member states' agreement on a SE statute. As stated above, when the Regulation enters into effect on 8 October 2004 it will be accomplishing one of the priorities within this nominated period.

The Directive on worker involvement has been made a pre-requisite for the Regulation's approval.[11] Indeed, the Commission explained that the difficulties in achieving agreement on aspects of company law caused the 30-year delay in the Regulation's adoption. This is not surprising since the EU has widely varying national

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[5] Hopt, ‘Company Law in the European Union: Harmonization or Subsidiarity’ Saggi, Conference e Seminari, Centro di studi e ricerche di diritto comparato e straneiro, Roma 1998 at 1.
[6] See Preface to the Regulation para 9.
[7] Schulz and anor, "The European Company Statute – the German View" (2001) 29(10) Intertax 332.
[8] CAG, "Sustainable Competitiveness", Report to the President of the Commission and the Heads of State and Government, September 1999 at 1: <http://europa.eu. int/comm/cdp/cag/publications/rapport4/indexen.htm> (visited October 2001).
[9] Ibid 2.
[10] Refer Financial Services Action Plan Progress Report, 10 October 1999 at <http://europa.eu.int/comm./internal_market/en/finances/actionplan/progress1en.pdf> (visited February 2001).
[11] Since the Directive was approved on the same day as the Regulation, it is perhaps more of a co-requisite than a pre-requisite in this case.

laws particularly on worker involvement in the company's management.[12] It also indicates the crucial role legal culture has played in the SE's history, testimony to the spectrum of historical and cultural differences affecting the role of employees in a company.[13]

The issue of worker involvement had ultimately required compromise when the European Council met in Nice in 2001[14] resulting in Council Directive 2001/86/EC on 8 October.[15] This Directive is the first to be approved since 1989, which is generally consistent with Ebke's timeline on the progress of EU company law harmonisation. Ebke notes that most of the progress was made in 1968-1978, with little progress in 1978-1988.[16] Thereafter, progress came to a virtual standstill.[17]

In 1970-1989, several Directives were approved and implemented aimed at "harmonising" the member states' national company law. At present, five Directives are aimed at achieving company law harmoni-sation (excluding the 2001 Directive on worker involvement)[18] while four others address the transnational aspects and corporate accounting principles applying to companies that are formed in the member states.[19] The latter four are intended to achieve consistent corporate accounting principles across the member states and as such may be described as directed toward harmonisation. In addition, three other Directives exist in draft form.[20]

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[12] European Commission, "The European Company – Frequently Asked Questions", 19 December 2000 at 11; also refer "Why has it taken thirty years to approve this proposal?" at <http://europa.eu.int/comm/internalmarket/company/company/news/ec ompanyfaq.htm> (visited October 2001).

[13] At one end of the spectrum is Germany with a long history of a two-tiered management structure involving employee participation in management. At the other end is the United Kingdom, most familiar to Australia, with no worker participation in corporate decision-making. For a detailed charting of worker participation in the harmonisation process see Kolvenbach, "EEC Company Law Harmonization and Worker Participation" (1990) 11 University of Pennsylvania Journal of International Business Law 709.

[14] Ibid. On 20 December 2000, the EU's Council of Ministers reached a political agreement on the Regulation to establish a European Company Statute (ECS) including the Directive concerning worker involvement in European Companies. This agreement was generally welcomed: see "European Company Statute: Commission welcomes formal adoption", 8 October2001 at <http://europa.eu.int/comm/intern almarket/en/company/company/news01-1376.htm> (visited December 2001).

[15] Refer Council Directive 2001/86/EC of 8 October 2001 on Worker Involvement: <http://europa.eu.int/eur-lex/en/lif/dat/2001/en_301L0086.html> (visited January 2001). Although made by the Council of the EU, a Directive must be implemented through national laws in each member state to achieve full legal effect.

[16] However, note that since the approval of the 11th and 12th Directives occurred in 1989, it may be more accurate to date this period from 1978-1989.

[17] Ebke, "Company law and the European Union: centralised versus decentralised lawmaking" (1997) 31 The International Lawyer 961, 963.

[18] Disclosure and the validity of obligations entered into by, and the nullity of companies with limited liability: 1st Directive (1968); The formation of public limited liability companies and the maintenance and alteration of their capital: 2nd Directive (1976); Domestic mergers of public limited liability companies: 3rd Directive (1978); Division of public limited liability companies: 6th Directive (1982); Single-member private limited liability companies: 12th Directive (1989).

[19] Annual accounts of companies with limited liability: 4th Directive (1978); Consolidated accounts of companies with limited liability: s7th Directive (1983); Qualifications of persons responsible for carrying out the statutory audits of accounting documents: 8th Directive (1984); Disclosure requirements in respect of branches: 11th Directive (1989).

[20] Structure of public limited companies: proposal for a fifth Directive; Cross-border mergers of public limited companies: proposal for a 10th Directive; Takeover bids: proposal for a 13th Directive.

Since there are difficulties inherent in obtaining the agreement of 15 member states, it is not surprising that progress in harmonisation through Directives has been slow and fraught with obstacles. It is interesting that the Regulation has noted the following:[21]

> [W]ork on the approximation of national company law has made substantial progress, so that on those points where the functioning of an SE does not need uniform Community rules reference may be made to the law governing public limited-liability companies in the member state where it has its registered office.

This statement suggests a fundamental shift in the SE's basic nature as originally proposed. The term “approximation” is used where one would have previously expected to see “harmonisation”. This begs the question on whether the change in terminology represents a shift in attitude regarding EU company law and its future.

III. FROM HARMONISATION TO APPROXIMATION

It is interesting how language and motive have shaped "harmonisation" and "approximation" and it is noteworthy that "approximation" appears to substitute "harmonisation" in the new Regulation. The Preface to the Regulation states *inter alia:*[22]

> Restructuring and cooperation operations involving companies from different member states give rise to legal and psychological difficulties and tax problems. The approximation of member states’ company laws by means of Directives based on Article 44 of the Treaty[23] can overcome some of those difficulties. Such approxima-tion does not, however, release companies governed by different legal systems from the obligation to choose a form of company governed by a particular national law.

The "approximation" of the member states' company laws has hitherto been described as "harmonisation", even in official circles.[24] The change in terminology has been quite sudden and refers to Directives aimed at harmonisation. This queries the use of the two terms: are they synonymous or does the change represent a shift in opinion on how far harmonisation is deemed possible in the EU? "Approximate" may be defined as almost accurate or exact; or inexact, rough, or loose, as in *only an approximate fit*.[25] To "harmonise" means to make or become harmonious, such as to have parts combined in an orderly or pleasing fashion.[26] In this sense, perhaps at first glance the terms are not very different. For instance, if one thing is almost the same as another, won't they work together harmoniously? Unfortunately, the answer is not necessarily so.

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[21] Preface to the Regulation para (9).
[22] Ibid para (3).
[23] This is the 1957 Treaty establishing the European Community, as amended.
[24] For example see European Parliament, Committee on Economic and Monetary Affairs, Report on the Commission communication on implementing the framework for financial markets: Action Plan (COM (1999) 232–C5-0114/1999 – 1999/2117 (COS)), 1 March 2000; Commission Communication of 14 November 1995 – Accounting harmonisation: a new strategy viv-a-vis international harmonisation, available at <http://europa.eu.int/scadplus/leg/en/lvb/l26060.htm> (visited October 2001).
[25] Collins English Dictionary (1991, 3rd edition, Harper Collins, Sydney) 74.
[26] Ibid 710.

Ebke uses both terms when referring to the United States' method of legal harmonisation in corporate law in comparison to that adopted in the EU within the first 25 years after the SE was proposed originally. He states:[27]

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

Ebke appears to use the term "approximation" in a way that suggests that there is less prescription when compared to the Directives and Regulation linked previously to the EU's harmonisation process. The proximity between the timeframe of Ebke's discussion and the use of terms similar to those ultimately found in the Regulation suggests that the turning point in the use of the terms and in the EU's approach when adopting a Regulation happened during the last five years. This time-frame corresponds with the most concerted efforts to achieve a SE since it was first proposed.

A question that has arisen is whether the Regulation uses "approxima-tion" in the same sense as Ebke. The discussion above suggests that Ebke has used persuasion instead of direction, a softer approach. Even though the Commission has chosen the continued use of the Regulation and Directives to achieve the SE, the heavy reference to the member states in the Regulation itself also signals a softer, less prescriptive approach thereby emphasising persuasion as the preferred approach to achieve consistency in implementation.

Besides changing the language used in the Regulation, the European Commission has substantially shifted its attitude. Kolvenbach identifies the Commission's position in 1989 as follows.[28]

> In the Green Paper, the Commission raises the rhetorical question of why it has proposed Community legislation in relation to the undeniably controversial and difficult issue of the role of employ-ees in relation to the decision-making structures of companies? Is this not an issue which should be left to the member states to handle in their own particular ways as an essentially domestic matter?

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[27] Ebke, "Company Law and the European Union: Centralized versus Decentralised Lawmaking" (1997) International Lawyer 961, 984-5.

[28] Kolvenabach, above n 14 check, 722, quoting Commission of the European Communities, Draft Regulation on Statute for a European Company, COM. No 268 Final 9Aug.25, 1989), published in 57 Common Mkt. L.R/ 120 (1990), Draft Directive on a Statute for a European Company: Commission of the European Communities, Proposal for a Council Directive Complementing the Statute for a European Company with regard to the Involvement of Employees in the European Company, COM No 268 Final (Aug. 25, 1989), published in 57 Common Mkt. L.R. 274 (1990).

> Answering this rhetorical but very valid question, the Commission repeats: "If progress is to be made towards a European Community in the real sense of the word, a common market for companies is an essential part of the basic structure which must be created.

The Green Paper preceded the recently adopted Regulation and Directive. In the space of ten years, the key parameters for the SE's basic structure have changed markedly. Instead of "[t]he European scheme of harmonising company laws…based on a "federal" approach [where] the harmonisation results in little influence by the member states in these matters",[29] the EU has adopted a referral scheme for its members on key aspects of the SE's structure and regulation. In essence, this means that the EU has used the persuasive approach that is more likely to result in the proliferation of company law in the EU instead of its harmonisation.

The differences inherent in the approximation, even if they are minor, may hinder or even prevent the SE achieving success as a corporate form. The legal culture of each member state will also influence the form, substance and application of their national law applicable to the SE. The inevitable consequence will be the gradual divergence on how the SE is regulated according to the law of the state of registration. It is possible that, without further effort to achieve harmonisation, the result will be the development of the "Delaware Syndrome"[30] in the EU. This is avoidable if the original quasi-federal approach to harmonisation, with little influence from member states, is followed. The Regulation creates essentially an additional layer of law at EU level, which the member states' laws will influence enormously. As a result, a key for successful harmonisation that is also a prerequisite for improving competitiveness and productivity, namely, the elimination of excessive regulation,[31] has not been met.

IV. THE FORM OF THE *SOCIETAS EUROPAE*

Article 2 provides that the SE may be formed by one of four methods summarised as follows:

- Article 2(1) – the merger of two or more existing public limited companies from a minimum of two different member states;
- Article 2(2) – formation of a holding company that is promoted by public or private limited companies from at least two different member states;
- Article 2(3) – formation of a subsidiary of companies from a minimum of two member states; and
- Article 2(4) – transformation of a public limited company that had a subsidiary in another member state for at least two years.

In each case, the company will be a European public limited-liability company with legal personality[32] to be known as a SE. The SE's capital is expressed in euro[33] and

[29] Ibid, 712

[30] The Delaware syndrome refers to William Cary's contention that the American state of Delaware's heavy reliance on revenue received from incorporation fees led it to engage in a "race for the bottom" with other states to adopt laws favouring managers over shareholders. For an overview of the debate see Romano R, The Genius of American Corporate Law (1993), AEI Press, Washington) Chapter 2.

[31] Competitiveness Advisory Group, Sustainable Competitiveness: Report to the President of the Commission and the Heads of State and Government, September 1999 at <http://europa.eu.int/comm/cdp/cag/publications/rapport4/index_en.htm> (vi-sited October 2001).

[32] Article 1(3).

divided into shares and the shareholders will not be liable for more than the amount subscribed.[34] The provisions of Directive 2001/86/EC govern employee involvement in a SE.[35]

Interestingly, it is possible for a member state to permit a company without a head office in the EC to participate in the formation of a SE. This is permitted so long as the company (1) is formed under a member state's law, (2) has its registered office in that state, and (3) has "a real and continuous link" with that state's economy.[36] Implicit in this provision is a distinction between a company's registered office and its head office. If not for the requirement of a real and continuous link, a company may be established in name only in a member state and also qualify to participate in the SE's formation.

Guidance on how "real and continuous link" may be determined is provided in paragraph 23 of the Preface to the Regulation. To establish this, the principle found in the 1962 General Programme for the Abolition of Restrictions on Freedom of Establishment will be used. In other words, the link will exist "if a company has an establishment in that member state and conducts operations therefrom".[37]

In light of the above, the reason for requiring the SE's registered office and head office to be located in the same member state pursuant to Article 7 may be questioned. If a company participating in the SE's formation does not need to have its head office in a member state, the question is why require both the head office and registered office to be in the same member state. It appears that this has been aimed at minimising the administrative difficulties caused by the registered office and head office being in different member states. In any case, the Regulation requires Article 7 to be re-evaluated within five years of the Regulation becoming effective,[38] which means that this exercise will require the regulatory issues posed by removing the requirement in Article 7 to be evaluated and appropriate action taken if necessary.

Within this legal framework for cross border mergers and the creation of holding and subsidiary SEs, every member state may impose on SEs registered in their territory the additional obligation to locate their head office and registered office in the same location,[39] not just in the same member state. This requirement seems to be aimed at promoting better efficiency when monitoring companies. Thus, depending on the circumstances of each SE, economic efficiency may dictate the same location or different locations for the registered office and head office.

The SE's annual and consolidated accounts will be governed by the laws of the member state where the SE has its registered office subject to Article 62. This provision applies to a SE that is a credit institution, financial institution or insurance undertaking.[40] The Regulation also provides for the SE's winding-up, liquidation, insolvency and cessation of payments in Title V. If the SE faces any such situation the legal provisions on public limited-liability companies in the relevant member state

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[33] Article 4(1). Article 4(2) provides that the prescribed capital shall be at least EUR 120,000.
[34] Article 1(2).
[35] Article 1(4). For the text of Directive 2001/86/EC see <http://europa.eu.int/eur-lex/en/lif/dat/2001/en_301l0086.html> (visited January 2002).
[36] Article 2(5).
[37] Preface to the Regulation para 23.
[38] Article 69(a).
[39] Article 7.
[40] Articles 61 and 62.

will apply.[41] Further, Article 13 requires the initiation of procedures that are "without prejudice to [the] provisions of national law" to be published. Title V also covers matters such as what happens if a SE's registered office and head office cease to be in the same member state.[42] Or when the SE becomes a public limited-company governed by the law of its state of registration two years after its registration as a SE or when its first two sets of annual accounts have been approved.[43] In this case, the location of the registered office determines the SE's state of registration.[44]

V. THE *SOCIETAS EUROPAEA* – EUROPEAN IN NAME OR SUBSTANCE?

Even though the Regulation has labelled the European company "the SE", it does not reflect accurately this status. Evidence to support this observation will be discussed below, under three useful headings:

- the influence of national laws over the SE;
- the regulation of the SE, in particular the absence of central regulation in favour of national administrative and judicial bodies; and
- the inappropriateness of the structure of the SE.

It will be seen that a common theme is the influence of the different legal cultures of the member states. Further, the conclusions suggest that the SE is a less suitable corporate form for pan-European business than originally envisaged.

(a) Relationship of the Societas Europaea *to National Laws*

The influence of a member state's national law on the SE is apparent from the moment it is born. According to the Regulation the law governing public limited-liability companies in the member state in which the SE has its registered office governs the procedure for its formation.[45] Thus, while the Regulation may prescribe different ways for creating a SE, the actual procedure is a matter for national law. This results in identical SEs in the EU since the form the Regulation prescribes applies to all public limited-liability companies. This suggests that the Regulation's general provisions have been designed to provide every SE with the same basic characteristics regarding capital and form.

Article 16 deals with pre-registration relations in a simple way. Article 16(2) provides that if acts have been performed in the SE's name before its registration, "the SE does not assume the obligations arising out of such acts after its registration." It also provides that "natural persons, companies, firms or other legal entities which performed those acts shall be jointly and severally liable therefore, without limit, in the absence of agreement to the contrary."

If this is the full extent of the relevance of national laws to the SE, it may be concluded that the SE is indeed a SE. However, the role of national laws extends far beyond this particularly in relation to the processes for the SE's formation. This has a bearing on key aspects of regulation.

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[41] Generally see Title V.
[42] See Article 66.
[43] Ibid.
[44] Ibid.
[45] Article 15.

If the SE results from a merger of different public limited-liability companies[46] the national laws of the relevant member states will apply to their companies if the Regulation is silent.[47] When this happens, the merger will be governed by at least three sets of laws, namely, the Regulation and the applicable laws of the relevant member states, which is a minimum of two under Article 2(1).

Member states may also influence the SE's formation under Articles 21, 24 and 25. Article 21 provides that if a company registered in a member state is involved in a merger and that state imposes additional requirements on the particulars that must be disclosed, this requirement must be announced in the national gazette. More importantly, under Article 24(1), the relevant member state's law on the merger of public limited-liability companies will apply to each merging company. This is to protect the interests of the merging companies' creditors and the holders of bonds or securities (other than shares) carrying special rights in the merging companies. Further, additional discretion is given to the member states to "adopt provisions designed to ensure appropriate protection for minority shareholders who have opposed the merger".[48]

Other evidence of the status given to the laws of the member states is found in Article 19. This provision enables a member state to determine if a company governed by its laws may or may not partake in the formation of a SE by merger. This may occur if any of the state's authorities[49] opposes the merger before the certificate of completion is issued. The certificate relates to the pre-merger requirements under Article 25(2). Opposition is based on the merger being against the public interest, although a judicial review is possible. If opposition occurs without due regard to consistency in practice on the structure and exercise of this power within the EU, it may risk significant divergence in the form and application of the relevant provisions.

The Regulation provides little detail on the formation of a subsidiary SE beyond Article 2(3). The only provision of major consequence is Article 36 under which companies, firms and other legal entities are "subject to the provisions governing their participation in the formation of a subsidiary in the form of a public limited company under national law".[50] Consequently, a member state's national law takes on an important status.

The influence of national law is demonstrated when an existing public limited-liability company formed in a member state, which also has a subsidiary governed by another member state's law for at least two years, is converted into a SE. Since the conversion merely provides an existing legal entity with a new form, it does not as such result in the company's winding-up or the creation of a new legal entity.[51] While draft terms of the conversion and a report explaining and justifying the legal and economic aspects of the conversion are required, the company's management or

[46] Under Article 17(2)(a) a merger may take place by acquisition, in which case the acquiring company takes the form of a SE when the merger occurs, or by the formation of a new company, namely, the SE.
[47] Article 18.
[48] Article 24(2).
[49] Article 25(2) cites them as the court, notary or other competent authority. Article 68 provides that "each member state shall designate the competent authorities within the meanings of Articles 8, 25, 26, 54, 55 and 64 [and it] shall inform the Commission and the other member states accordingly."
[50] Article 36.
[51] See Article 37(2).

administrative organ, and not independent experts, have to prepare them.[52] This provides the member states with a crucial role.

The draft terms of the conversion shall be made available according to the law of the relevant member state under Article 3 of Directive 68/151/EEC. This shall occur at least one month prior to the general meeting at which the decision on the approval of the draft terms of conversion is made.[53] The requirements for approval are those set by the member states to implement Article 7 of Directive 78/855/EEC.[54] Member states may make a conversion conditional on "a favourable vote of a qualified majority or unanimity in the organ of the company to be converted within which employee participation is organised"'.[55] For member states with a tradition of worker involvement, this ensures worker participation in the decision to form a SE.

Based on the extensive reference to the laws of member states in the Regulation, it appears that national laws will have an extensive role in governing what is, at least in name, a SE. However, beyond the ability to transfer its registered office and head office from one member state to another, the SE remains a hybrid creation of the Regulation, Directives, and national laws of relevant member states. Since each SE will be regulated by the relevant authority in the member state it is difficult to see how it may be classified as being truly European in character.

(b) The Societas Europaea's Regulation and Legal Cultures

While the member states share many common interests and goals as shown by the EU's success ever since its predecessor, the European Coal and Steel Community, came into existence[56] they have distinctly different cultures, particularly their legal culture. Their impact on the SE cannot be understated. For example, the varying cultures regarding worker participation in company management caused the 30-year delay in the SE's formal adoption. The legal culture concept, used here in the socio-legal sense, has been described as:[57]

> [the] sum total of conditions that impinge upon the law's develop-ment and application, whether this be the procedural methods employed by institutions, the interests and professional qualities of the legal actors, or the general legal consciousness of the public.

European legal cultures are therefore central to understanding the SE and its potential impact and it has been said:[58]

> …legitimacy and effectiveness of the law depend on how it is created and applied, and on the prevailing legal consciousness of those who enforce the law, those who make use of it, or those who merely refer to it to help them orient their actions.

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[52] Article 37(4). The only involvement of independent experts comes in the form of the requirement of a certification that the company has net assets at least equivalent to its capital plus those reserves which must not be distributed under the law: Article 37(6).
[53] Article 37(5).
[54] Article 37(7). While Directive 78/855/EEC concerns mergers of public limited-liability companies, Article 37(7) applies Article 7 of the Directive to the formation of a SE by conversion.
[55] Article 37(8).
[56] Signed in Paris on 18 April 1951 and recently expired.
[57] Gessner V and ors, European Legal Cultures (1996, Dartmouth Publishing, Aldershot) xvii.
[58] Ibid.

Assuming this is correct, then both the Regulation and how it is implemented in the member states will determine the SE's value as a corporate vehicle within the EU.

To facilitate a thorough understanding of the SE, it is therefore necessary to consider the concept's origins. A key aspect of the Regulation's success will be its implementation and application by administrative bodies through regulation. Although the Regulation is silent on a central regulator for the SE, Article 68 provides that "[t]he member states shall make such provision as is appropriate to ensure the effective application of this Regulation", including the designation of "competent authorities" as required by the Regulation.[59] However, reserving the SE's implementation and regulation to the member states' administrative bodies will lead to more inconsistencies when applying both the Regulation and relevant national laws.

In contrast to the SE formed by merger, which is likely to see the national law's greatest direct role during its life and operations, the legal culture of its state of registration will influence a SE formed as a holding company. This sphere of influence will come particularly from governing administrative and judicial authorities as intended by the Regulation's detailed provisions. To illustrate how far their legal culture may influence the SE's life and operation, it is therefore necessary to first examine the mechanics involved.

If a SE results from merger, the management or administrative organs of the companies proposing the holding SE will have to prepare draft terms for the SE's formation. The draft terms shall include a report explaining and justifying the holding SE's formation and indicate the implications for shareholders and employees.[60] Shareholders in every company promoting the holding SE shall own collectively at least 50% of the permanent voting rights that have to be also specified in the draft terms.[61] When shareholders contribute securities to the SE as part of the assignment process they will receive shares in the holding SE.[62]

One or more experts independent of the companies promoting the SE's formation will examine the draft terms.[63] A judicial or administrative authority in the relevant member state for each company partaking in the promotion shall approve the expert.[64] The expert's task is to examine the draft terms[65] **end here** and prepare a written report for the shareholders of each company. A single report for the shareholders of all companies involved in the promotion is an available option[66] and it will focus on difficulties of valuation and fairness of the proposed share-exchange ratio.[67] Finally, the general meeting of each company involved in the formation shall approve the draft terms reported by the experts and the scheme for employee

[59] Also, Article 68(2) provides that "Each member state shall designate the competent authorities within the meaning of Articles 8, 25, 2, 54, 55 and 64. It shall inform the Commission and the other member states accordingly."
[60] Article 32(2)
[61] Article 32(2).
[62] Article 33(4).
[63] Article 32(3).
[64] It is left to each member state to nominate the appropriate judicial or administrative body as the "expert".
[65] In accordance with national provisions implementing Directive 78/855/EEC: Article 32(4).
[66] Article 32(4).
[67] Article 32(5).

involvement in the holding SE shall be determined according to Directive 2001/86/EC.

While the Regulation specifies the minimum protection required for shareholders of the companies promoting the holding SE, a member state may protect "minority shareholders who oppose the operation, creditors and employees".[68] Under the Regulation, shareholders have three months to indicate to the promoting companies if they wish to contribute their shares to the holding SE's formation. The formation is contingent upon the promoting companies' shareholders assigning to the SE the required minimum proportion of shares in each company.[69] In this way, the shareholders retain a measure of power in determining whether the SE's formation goes ahead, but if a simple majority is required under the draft terms, minority shareholders will still be powerless. In this context, it appears that the member states have a role to supplement the base level of protection granted to shareholders and to give creditors and employees a voice, particularly when both worker involvement and worker protection in management are necessary.

While discussion on the legal culture's impact on the SE's operation has so far focussed on the holding SE form, legal culture will in reality influence all forms of SE through the management structure adopted. The Regulation prescribes either a single or two-tiered structure for the SE. Traditionally, this choice in structure stems from the worker's involvement in corporations in some European states where the norm is a two-tiered system for the management and supervisory organs. In a single-tiered system, an administrative organ manages the company, the SE in this case.

The choice in structure has overcome the major obstacle restricting worker participation in approving the SE as a corporate form. This is essentially a compromise that leaves the final decision on the structure to the promoting company or companies depending on the method of formation used. The regulation itself has guidelines on the appointment and removal of each organ's representatives, meetings and powers of the organs. Some details, such as the managing director's power,[70] appear to be left to the member states.

The Regulation grants the member states great influence to determine matters for which the general meeting is responsible.[71] Article 55 provides for the shareholder's right to request a general meeting and set the agenda for this. This provision is significant because it does not leave this issue to the individual member state to determine. However, the law of member states, at least to the extent of procedural requirements and time limits, affects the shareholder's right to add items to the general meeting's agenda.[72]

A distinct benefit of the structure the Regulation provides is the member state's power to reduce, but not increase, the proportion of shares that have to be held before items may be added to the agenda. Article 56 allows "one or more shareholders who together hold at least 10% of an SE's subscribed capital" to make such a request. As a result, a proportion of 10% is the maximum required for a shareholder or group of them to add items to the agenda. Despite this, Article 59

[68] Article 34.
[69] Article 33(2).
[70] Article 43(1).
[71] Article 52(b).
[72] Article 56.

reserves a power to member states to provide that a SE's statutes[73] may be altered by a simple majority in cases where at least half of the SE's subscribed capital is represented.

A clear link is evident between (1) the influence of the legal culture of the administrative and judicial systems in the member states on the SE and (2) the SE's lack of central regulation in the EU. This link may be illustrated by the Regulation's provisions on how a SE is formed by merger. Article 25 allows each member state whose laws govern a company involved in the merger to scrutinise the merger's legality. This power is important because Article 25(2) requires an appropriate representative[74] to "issue a certificate conclusively attesting to the completion of the pre-merger acts and formalities".

Finally, a member state where the registered office of the SE by merger resides has the power to scrutinise "the part of the procedure concerning the completion of the merger and the formation of the SE".[75] This power is reserved to an "authority"[76] and as part of its role is entitled to receive a copy of the certificates issued under Article 25(2).[77] The remaining provisions on this topic concern the more technical aspects of the merger's effect. This includes (1) the date on which the SE's merger and formation occur,[78] (2) the publication of the merger's completion[79] and (3) the effect the merger and formation of the SE has on the assets, liabilities and status of the merging companies and their shareholders.[80]

Thus, the SE will be in name only but capable of operating on a pan-European basis. A corporate body registered in every member state is not a pre-requisite for doing business there. Although there will be no central register for SEs in the EU, registration will be published in the EC's Official Journal[81] and occur only in the member state where the SE's registered and administrative head offices are located. Further, it will share the register used for companies established under national law. The means that parties dealing with SEs have to search more than one register to obtain the information needed and also know the member state of registration. Admittedly, this is not a difficult task but neither is the creation and use of a central EU register.

A SE is not permitted to register in any member state where it operates but only where it has its administrative head office. This is due to the underlying belief that the restriction will avoid the creation of an environment for criminal activities. According to the European Commission, this will be the "only system that allows for effective

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[73] Being the internal rules of the SE, similar to the Memorandum of Association or corporate constitution.
[74] Ibid.
[75] Article 26(1).
[76] It s defined as a "court, notary or other authority competent": Article 26(3). Note that the order of "competent" and "authority" are reversed in Articles 25 and 26 suggesting that the same meaning is intended in both provisions.
[77] Article 26(2).
[78] Article 27 provides for simultaneous merger and formation of the SE on the date of its registration in accordance with Article 12.
[79] Article 28.
[80] Article 29.
[81] European Commission, "The European Company – Frequently Asked Questions: Will there be a central register of European Companies?" 19 December 2000 at 5: see <http://europa.eu.int/comm/internalmarket/company/company/news/ecompanyfaq.htm> (visited October 2001).

supervision of the whole SE, so as to avoid the SE being used for doubtful practices such as tax fraud or money laundering".[82] However, the SE may transfer its head office to another member state. Although this may occur infrequently in practice it may result in difficulties in administering the law and detecting past corporate misconduct if there is no mechanism for sharing information among national regulators. Without a central coordinating mechanism of any kind, cross border investigations are also likely to meet with difficulties and corporate misconduct "falling through the cracks".[83] Consequently, only the existence of a central regulator will result in a truly unified system of European companies known otherwise as SEs.[84]

(c) Inappropriateness of the Societas Europaea's *Structure*

Several benefits flow from the SE's availability as a corporate form in the EU. They include the provision for what are, in essence, cross border mergers in the EU and the ability of the SE to transfer its registered office from one member state to another without requiring the SE to wind up or create a new legal person.[85] At present, a company, whilst able to operate in any member state, has to have its registered office in the state of registration. In order to change the registered office's location from one member state to another the existing company has to be wound up and a new one formed. Since this is a considerable burden on companies operating on a pan-European basis, the SE will be welcome to overcome this problem. However, despite this benefit, the Regulation does not address the structural problems and unsuitability of the SE form that has been approved.

The Regulation's provisions on the transfer of the SE's registered office illustrate the structural problems. The relevant requirements to effect a transfer of this office are set out in Article 8(2)-(13). Two key points demonstrate the inherent problem:[86]

- the ability to transfer a SE's registered office is lost once proceedings for winding-up, liquidation, insolvency or suspension of payments or other similar proceedings commence against it; and
- the granting of protection to parties who may have a cause of action accruing against an SE registered in one member state that subsequently transfers its registered office to another member state.

Regarding the second point about, the SE's registered office will be deemed to be in the member state of registration prior to the transfer, even if legal action is not commenced against the SE until after the transfer has become effective.

The points Article 8 makes are logical because the law governing the SE will not be EU law but the law of the state of registration. The consequences of Article 8 are important and readily apparent for both SEs and potential litigants. In essence, since the SE will not be European in character, a detailed mechanism is required to deal

[82] European Commission, "The European Company – Frequently Asked Questions: Can a European Company be registered in any member state in which it operates (eg where it has a mailbox) or must it be registered where it has its operational headquarters?" ibid at 6.
[83] As was common in Australia under the co-operative schemes prior to 1990, with each state having its own regulatory body. In 1979, the National Company and Securities Commission was established, to oversee and direct the various state regulatory bodies. The state bodies were replaced by the Australian Securities Commission, a national regulator, in 1990.
[84] This is beyond the scope of this paper and will be addressed in subsequent research.
[85] Article 8(1).
[86] Article 8(15).

with a SE possibly switching jurisdictions, perhaps to what is perceived as a more favourable jurisdiction if a problem arises. If only EU law is to regulate the SE, this will not be an issue but at this time such regulation is not possible.

In considering the SE's impact as a corporate form on the structure and operations of a company or group of them in the member states, it is important to note the objectives for introducing the SE. This includes whether the substance of the Regulation will achieve these goals and whether the SE form will be adopted on a large scale when it becomes available on 8 October 2004. Guidance may be found in the Regulation itself in the form of the substantial preface where the goal of achieving a unified internal market means that:[87]

> …not only…barriers to trade must be removed, but also that the structures of production must be adapted to the Community dimension. For that purposed it is essential that companies the business of which is not limited to satisfying purely local needs should be able to plan and carry out the reorganisation of their business on a Community scale.

As a result, business associations have to be transformed to enable efficient operation on a pan-European scale and it is this that spearheaded the SE's original concept. However, it must first be acknowledged that:[88]

> …the legal framework within which business must be carried on in the [European] Community is still largely based on national laws and therefore no longer corresponds to the economic framework within which it must develop if the objectives set out in Article 18 of the Treaty are to be achieved. That situation forms a considerable obstacle to the creation of groups of companies from different member States.

This raises many questions. For example, does the SE overcome this obstacle? Will companies operating on a pan-European scale be likely to adopt the SE form? Will the new structure offer enough advantages to warrant the SE's large-scale use? The answers will largely determine the SE's success. While the answers will not be clear until the form becomes available some reasoned predictions based on the SE's structure and planned regulation under the Regulation may be made.

It has been suggested that the Regulation will result in significant cost savings, especially administrative cost savings, totalling about US$30 billion per year.[89] If this is to be realised, it is most likely to occur when a merger results in a SE. This is the only formation method that will result in fewer companies. Regardless of whether the merger is by acquisition or formation of a new company, two or more companies in the member states and solely under relevant national laws will become one SE. The Regulation and national laws of the relevant member state will govern it. If a new holding SE or subsidiary SE is formed, two or more companies at the national level will become three or more companies. Therefore, conversion is the only method of formation that will not change the number of existing companies.

The obvious question that arises here is the extent to which the SE will be used as the corporate form most suitable for European businesses. The chief advantages are

[87] Preface to the Regulation (1)
[88] Preface to the Regulation (4)
[89] Schulz and Eicker, above n 4, 332.

(1) the transferability of the registered office and head office of the SE, (2) the recognition of the corporate form across the EU and (3) the facilitation of cross-border mergers. These factors alone are likely to result in the use of the SE as the appropriate form for businesses presently conducting or wishing to conduct business on a pan-European basis. However, it appears that the SE is not the appropriate structure for small to medium sized businesses wishing to engage in cross-border transactions within the EU. This is because the requirements for forming a SE encompass the pre-requisites of established corporate relations existing in other states either (1) in terms of a subsidiary or related company in another State or (2) in a relationship such that formation by merger is a possibility.

Beyond the additions of mobility in the state of registration and subject to desirable safeguards and the facilitation of cross-border mergers, the regulation introducing the SE has not simplified or streamlined EU corporations law. At present, national bodies will conduct the on-going regulation of SEs without oversight or direction by a supranational EU regulatory body. The choice of the state of registration is now likely to be settled by the choice of law most favourable to each company's circumstances. As harmonisation of corporations law across the member states continues the choice of the state of registration will become less important and determined more by the history of the business itself.

VI. CONCLUDING REMARKS

Does the preceding analysis point to the harmonization or proliferation of corporations law in the EU? In fact, it already points to a trend of reserving powers to the member states due primarily to the long history of obstacles the SE met in its creation. However, two reasons seem to suggest that instead of achieving harmonisation, the Regulation has caused a proliferation of corporations law in the European Union. The reasons are (1) the reservation of powers to the member states and (2) the methods of formation available to establish a SE are likely to create more companies in EU member states.

Nevertheless, the Regulation is a significant step forward in achieving a business structure capable of operating on a pan-European basis. The SE will be able to change the location of its registered office and head office subject to the restrictions outlined above. This is an improvement on the current situation where companies must wind-up operations in one member state in order to set up a head office in another member state.

However, several problems still remain because of the Regulation's structure for the SE and the priority given to national law. As a consequence, it is unlikely that the current Regulation will support a long-term and coherent approach to the problem of the corporate structure for pan-European activities. In any case, it is the basis for a way forward and it is indisputable that more progress has been made in achieving agreement on the SE form since the goal of uniformity has been abandoned in favour of the mutual recognition of the many national laws and their value.[90]

Many issues will face the business community and practitioners during the Regulation's implementation. They will be mainly those identifying and applying relevant national laws and Directives including the one on worker participation. Legal

[90] Hopt., above n 3,p.2, referring to the EC Commission, The Completion of the Internal Market, White Book, Luxemburg 1995, no's 67 et seq., 77 et seq.

practitioners in the EU are well familiar with this type of legal structure. Indeed, as Hopt states:

> Only a small part of SE law is made up of genuine European Law. By far the larger part is only derivatively European: it is SE law by virtue of its transformation.

Hopt is referring to company law Directives.[91] While the Regulation itself is European law, the national laws where the SE's registered office is located will still largely govern it. Therefore, even after the formation process is complete, both national and European laws will apply to it. In practice, this is not a big issue since, as noted above, European lawyers are both aware and familiar with this type of situation. Conversely, it is not necessarily the most efficient or most effective system for the law to develop. Since SEs are unlikely to be formed in the same member state and jurisdictional and consistency issues will inevitably result unless the law develops in a member state in a manner similar to what has occurred in Delaware in the United States. If further harmonisation programs are absent it is feasible that this development may occur although there may be an inconsistent practice concerning worker involvement. As seen in practice, a member state may set a company's standard with or without worker involvement.

The development that is preferable and worth considering is the Regulation's expansion to encompass provisions for regulation of the SE with less reference to member states. For example, if the SE continues to be taxed on a national basis, financial reporting to the member states is necessary. However, this will not prevent the majority of the SE's activities being governed on a pan-European basis or, indeed, under a pan-European regulatory body. It will be preferable for the EU to have a registration list compared to the current position where the law only requires the SE to be registered in the member state where it is formed or has its registered office. If so, can it be said that a SE really has European status? Although it may operate in any member state, a party dealing with it will have to know the state's identity in order to identify the relevant applicable law. This information may not always be readily apparent to the consumer or creditor in which case transparency regarding the SE's basis of operation becomes an issue.

The Regulation shall be reviewed within five years after its entry into force by 8 October 2009.[92] The review shall take the form of a report and an example is the Commission's report to the Council and the European Parliament "on the application of the Regulation and proposals for amendments where appropriate".[93] The focus of the review, though not exhaustive, shall:[94]

> …analyse the appropriateness of:
> (a) allowing the location of an SE's head office and registered office in different member states;
> (b) broadening the concept of merger in Article 17(2) in order to admit also other types of merger than those defined in Articles 3(1) and 4(1) of Directive 78/855/EEC;

[91] Ibid.
[92] Article 69.
[93] Article 69.
[94] Article 69

(c) revising the jurisdiction clause in Article 8(16) in light of any provision which may have been inserted in the 1968 Brussels Convention or in any text adopted by the member states or by the Council to replace such Convention;

(d) allowing provisions in the statutes of an SE adopted by a member state in execution of authorisation given to the member states by this Regulation or laws adopted to ensure the effective application of this regulation in respect to the SE which deviate from or are complementary to these laws, even when such provisions would not be authorised in the statutes of a public limited-liability company having its registered office in the member state.

While the provision to review the Regulation after five years is welcome and commendable, the review itself will need to go further than the specific issues noted above. The review's main focus shall be the resultant effect when significant regulatory power over the SE is referred to a member state to determine the relevant law applying to it and the administration and enforcement of that law. In there is no mechanism to coordinate the development of guiding principles for the application of the law to the SE's operation, the Regulation must be seen to have a real potential to accentuate the proliferation of corporations law's in the EU instead of further harmonisation. As such, it is important that the Regulation be acknowledged as the first step in the process to achieve a corporate form that is truly European in character.