EUROPEAN COMMISSION
Directorate General Internal Market and Services

FREE MOVEMENT OF CAPITAL, COMPANY LAW AND CORPORATE GOVERNANCE
Company law, corporate governance and financial crime

SYNTHESIS OF THE COMMENTS ON THE CONSULTATION DOCUMENT OF THE INTERNAL MARKET AND SERVICES DIRECTORATE-GENERAL

ON

THE RESULTS OF THE STUDY ON THE OPERATION AND THE IMPACTS OF THE STATUTE FOR A EUROPEAN COMPANY (SE)

JULY 2010

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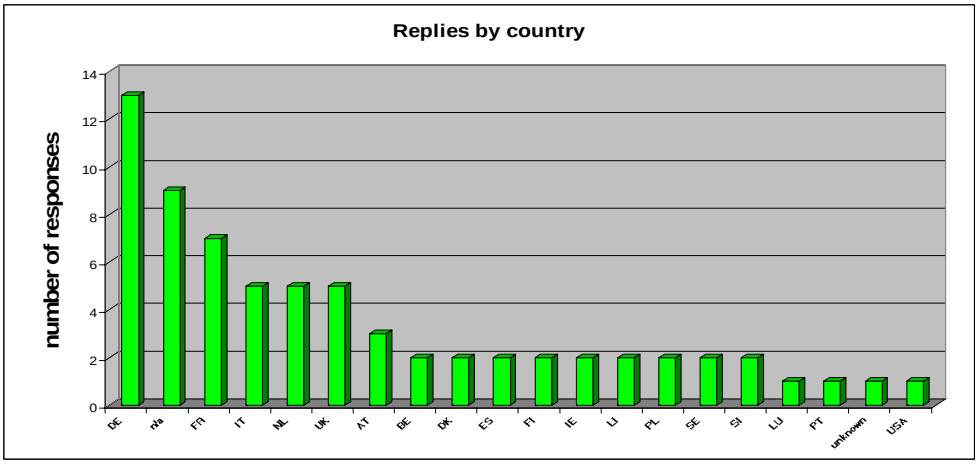
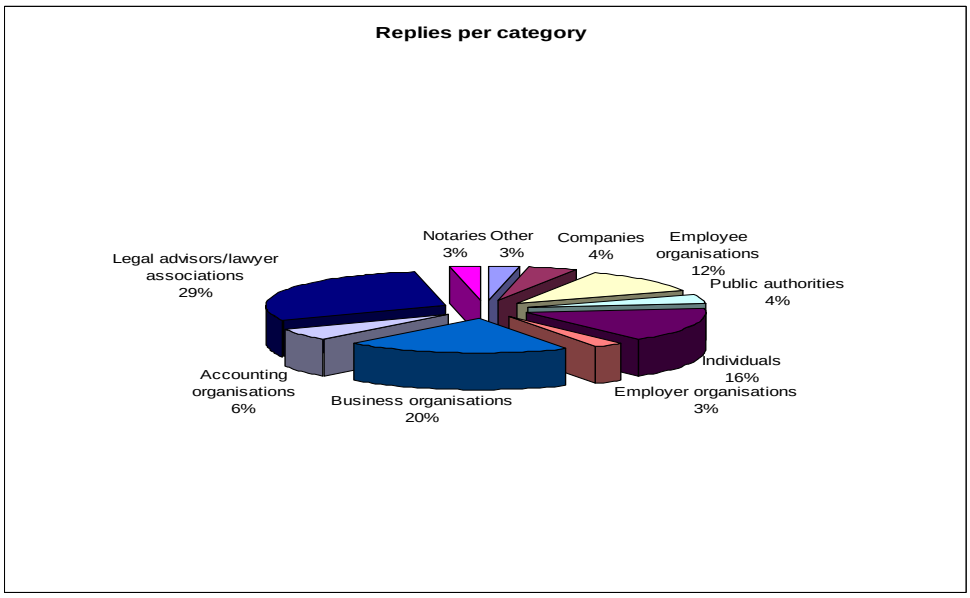
On 23 March 2010 the Directorate General for Internal Market and Services launched a public consultation on how the European Company Statute (SE) works in practice. The aim of the consultation was to test the findings of the external study provided by Ernst & Young ('E&Y') following a call for tender by the Commission and to provide the Commission with input on issues relevant for the assessment of the SE. The questions concern: positive and negative drivers for setting up an SE; main trends in distribution of SEs across the EU/EEA; practical problems encountered by companies in the course of setting up or running an SE; and possible improvements of the current legislative framework.

DG Internal Market and Services received 69 responses to the consultation that ended on 23 May 2010. Respondents from 18 different countries, including 16 Member States, submitted a response. Most contributions came from German respondents or European bodies and associations (these are denoted "n/a" in the table below).

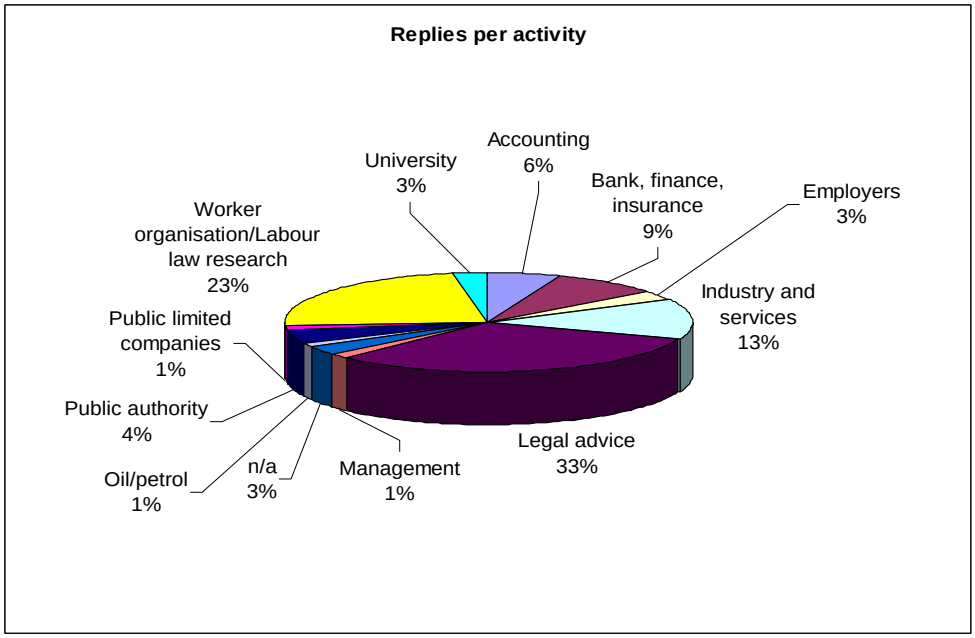


20 responses came from legal advisor/lawyer associations, 14 from business organisations, 11 from individuals and 8 from employee organisations. Other respondents to the consultation include public authorities, accountants, notaries, employer organisations and individual companies (including 2 SEs).



Most of the individual contributions came from researchers in the field of labour law (worker involvement). The number of replies from these respondents together with the

replies from employee organisations was 16 in total, only exceeded by replies from respondents working in the field of legal advice (22). There were 9 respondents from the "Industry and Services" sector and 6 respondents from "Bank, finance, insurance". Fewer responses were received from other sectors of activity.



EXECUTIVE SUMMARY

A large number of stakeholders representing a wide range of backgrounds (i.e. companies, employers, employees, legal advisers and the academia) responded to the consultation. In addition to contributing their views on the results of the study, they discussed the problems attached to the establishment and running of an SE and came up with recommendations for possible amendments to the SE Statute

Positive and negative drivers for setting up an SE

The respondents generally agreed with the findings of the study. In terms of the positive drivers, many of them placed the possibility to transfer the seat and the European image of the company at the top. Other positive drivers include an increased flexibility in corporate governance, the potential for corporate simplification and regulatory advantages in comparison with the equivalent national types of companies. It was also found that tax regimes may play some part in the decision to set up an SE. Most of the respondents highlighted the cost, complexity and uncertainty of the procedures linked to setting up and running an SE as negative drivers. In that context, they also referred to the lack of awareness on the SE form and criticised the obligation to have the real seat and registered office in the same place. Finally, the involvement of employees features under both positive and negative drivers depending on whether national law is more or less flexible on this issue than the SE Statute. However, the study's finding that employee involvement is a negative driver was contested by worker organisations and researchers working in the field of labour law.

Has the study assessed correctly the attractiveness of national legislation?

Around half of the respondents, mainly consisting of business associations and legal advisers, agreed with the study's assessment. Many also underlined the significance of certain additional elements, such as the fiscal framework, employment rules, the workers' involvement rights and minimum capital requirements. Only a few respondents questioned the suitability of some of the study's parameters for evaluation or claimed that certain ignored elements could have led to different conclusions.

Which factors guide decisions on where to locate an SE?

Around half of the respondents contributed their observations on the regulatory issues which are most important to a company in assessing location decisions. Business associations clearly classified taxation at the top of the rank with national employment law and company law featuring next on the list. It seems that the respondents often placed more weight on achieving a combination of key positive elements for investment rather than prioritising them. Thus, in addition to efficient tax rules, flexible employment law, legal certainty and simplicity, low registration costs and reliability of regulatory authorities feature highly on the list of factors which may determine the location of an SE.

Regarding the impact of national rules on employee participation, the respondents held divergent views. Business associations, companies and legal advisers agreed with the study that employee participation plays a major part in location decisions whilst worker organisations and researchers working in the field of labour law put more weight on the lack of regulatory uniformity and on the inadequate knowledge of the system.

Further, over a third of the contributing respondents doubted on the relevance of corporate governance to choosing a set-up location.

The majority of contributors agreed that the study has supplied explanations which justify the current distribution of SEs in the EU/EEA and some of them also put forward additional parameters. Those who disagreed with the reasoning of the study advanced the argument that, whilst employment issues were over-emphasised, the analysis underestimates genuine business reasons and does not sufficiently discuss shelf and empty SEs.

What are the advantages of buying shelf SEs as compared to setting up SEs?

The principal reasons for giving preference to a ready-made shelf SE relate to saving time in the process leading to the SE registration and avoiding complex and uncertain formation procedures. Further, the cost of setting up a shelf SE is relatively smaller, as compared to direct creation.

Which practical problems have you encountered in setting up and running an SE?

The 27 respondents who answered seem to agree that most of the problems stem from the complex relationship between the SE Statute and 27 national legal systems which the Statute often refers to. Specifically, the steps for implementing certain provisions of the Statute do not often provide enough detail and, consequently, remain equivocal. In addition, companies, having to go through administrative formalities in more than one jurisdiction, are commonly faced with clashes amongst disparate national laws.

Problems relevant to the formation of an SE cover, in particular, cross-border mergers, but also the conversion of a public company into an SE and the establishment of holding and subsidiary SEs. The respondents also identified restrictions to the methods of creating SEs (e.g. impossible to form an SE by way of division) as well as burdensome conditions, such as the requirement for a cross-border element. The complexities around employee involvement were also criticised.

According to the respondents, the running of an SE brings up numerous problems of which some are fundamental to the functioning of the system. By way of example, there are problems related to the activation of shelf SEs. Moreover, the obligation to keep the registered office and head office in the same Member State has attracted criticism from the business.

Recommendations for possible amendments of the SE Regulation

16 out of 53 respondents expressed that they fully or partly agree with the recommendations of the study whereas most other respondents made comments on the individual recommendations or made recommendations of their own. The following matters feature high on the list of suggestions for amendment to the SE Statute: the possible ways of creating an SE; the prerequisite for cross-border activity; the high threshold of the minimum capital requirement; and the prospects for separating the registered office from the real seat, making the registration and activation of shelf SEs contingent upon reaching an agreement on employee involvement. The recommendations also include a clarification of the steps leading to the conversion of an existing SE back into a national company.

In most cases, the majority seems to support the suggestions for amendments. The points which gave rise to most opposing views are the potential for a separate location of registered office and head office and the status of the negotiations on employee involvement in shelf SEs.

1. DRIVERS

Question 1: Do you agree with the findings of the study about the positive and negative drivers for setting up an SE and their importance? Please explain your answer.

Respondents in general agreed with the findings of the study concerning the positive and negative drivers. In a general manner, respondents underlined that the positive and negative drivers had to be analysed for each "business case". They also stressed the importance of having pioneers that showed the example and the benefits of this new European form.

Positive drivers

Most of respondents found that the main drivers to set up an SE are (i) its **mobility** and (ii) **European image**. The possibility to transfer the registered office to another Member State without liquidation is considered to be an essential driver in setting up an SE, at least in Member States where this possibility is not granted under their national legislation. Although the regime could be improved, the SE Regulation offers more legal certainty than the case law of the European Court of Justice (*Cartesio* case)[1], which by nature responds to specific facts and therefore does not put forward comprehensive solutions. The importance of the transfer of registered office in the SE Regulation would decrease if the 14th Company Law Directive ('CLD') on Cross-Border Transfer of Registered Office was adopted. For its part, the possibility of cross-border mergers on the basis of the SE Regulation is considered less interesting after the adoption of the Cross-Border Merger Directive[2]. The European image associated with the SE and linked to a uniform corporate identity is in general considered to be a positive driver, although its importance varies from one Member State to the other since, in some Member States, national forms would be better marketable.

Other positive drivers mentioned in the replies to the consultation are: (iii) an **increased flexibility in corporate governance**, with a more efficient management structure than some national forms. Thus the possibility to choose between one- and two-tier board systems is mentioned by some respondents as a positive driver, especially in Member States that allows only the two-tier system for national companies. However according to other respondents the advantage of choosing a board structure that is unknown and untested in the Member State of the SE's registered office is limited as often it is difficult to apply in practice[3]. (iv) In some cases, the procedures of **internal organisation of the SE are more flexible** in comparison with the equivalent national forms, for example concerning the organisation of the general meeting. (v) The potential for **corporate simplification and improvement in competitiveness**, since European groups can operate in a more efficient manner, including more efficient cross-border transactions, a rationalisation of supervision, simplified reporting rules and the possibility to create

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1 Judgement of the ECJ of 16 December 2008, Case C-210/06, Cartesio Oktató és Szolgáltató bt.

2 Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies. OJ L310 of 25 November 2005.

3 E.g. some respondents mentioned that changing a two-tier board structure with worker participation to a one-tier board structure would be very difficult in practice.

holding SEs, which are not available under national law (e.g. in Germany). (vi) In some cases, there are **benefits linked to financing**, both under the form of subsidies[4] and due to the stronger position in negotiations with banks within the EU. (vii) **Employee involvement** was seen as a positive driver in some Member States, since the SE Regulation could offer both more flexibility than some national regimes and a good framework for the dialogue with employees. This driver was considered to be neutral by some respondents (e.g. in Denmark).

Worker organisations or researchers working in the field of labour law underlined that (viii) **tax regimes** could also play a role, although limited, when deciding to set up an SE. Concerning the other positive drivers, this group of respondents argued that the existing figures could not prove the positive impact of the possibility to transfer the registered office given that only 10% of SEs have exercised this option. They also expressed a concern that the possibility to transfer the registered office of the SE could be used to escape certain national provisions. In their view the signalled regulatory advantages also had to be considered carefully, since they could lead to "regulatory shopping", determined, in particular, by reference to tax and labour rules. These respondents were sceptical about the advantages of the SE regime on employee involvement in relation to national regimes and underlined the advantage of having a uniform regime of employee involvement for all Member States. In relation to the Cross-Border Merger Directive, this group of respondents indicated that this Directive is not more flexible than the SE Regulation in terms of employee involvement. Finally, they argued that the SE form may have been successful in some Member States[5] due to the publicity given to the SE form by some consultants, specialised in the creation and sale of shelf SEs.

Negative drivers

Most of respondents agreed that the most important negative drivers were the **cost, complexity and legal uncertainty** related to the procedures of setting up and running an SE. In this respect, different issues were raised: the need of a cross-border element; the high minimum capital requirement, in particular in Member States where the minimum capital for national forms is lower; the complicated legal regime which is sometimes very different from one Member State to the other; the existing administrative burdens and language barriers; the uncertainties linked to taxation regimes; and the lack of experience at this stage. According to the respondents, in general terms, the time required and the uncertainty related to the procedures played a key role to the decisions of smaller companies for whom these concerns often outweighed the advantage of a European image. The impact of these factors was more striking in Member States with a large number of SMEs, such as Italy and Portugal.

The **lack of awareness of the SE form**, both within and outside the EU, was also mentioned as a negative driver. The same goes for the obligation under the SE Regulation to **have the real seat and registered office** in the same place. The **employee involvement regime** was considered to be a negative driver in Member States that do not

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[4] E.g. the subsidies from the Commission for the construction of the tunnel for the Berlin-Palermo railway were conditional on the adoption of the SE status. The SWARD Group, converted to an SE in 2009, recently signed the contract of €69 million for the delivery of computer services.

[5] In particular the Czech Republic and Germany.

have, or have a lower level of, employee participation in their national legislation (e.g. respondents from Italy, United Kingdom). This would be due to its high complexity and uncertainty about the outcome of negotiations with employees, in particular for listed companies.

With regard to employee involvement, worker organisations and researchers working in the field of labour law strongly opposed the study's statement that employee involvement process is considered to be a negative driver, especially in the Member States in which the national legislation does not provide for a system of employee participation. They argued that this is based on perceptions and not on real evidence, as employee involvement (in the form of information and consultation) is already well-known throughout the EU. In particular, the European Works Councils[6] are widespread, including in Member States with a low number of SEs (for example, the United Kingdom). This group of respondents claimed that stakeholders had insufficient knowledge of the provisions regulating employee involvement. In this context, they referred, in particular, to the "before and after principle", which ensures that employees would have participation rights in the board of an SE only if such rights existed in companies participating in the formation of an SE. Furthermore, the expertise of employees sitting in the board should be considered as an asset. Finally, they underlined that the negotiation with employees was not so cumbersome in practice in comparison with all the other SE procedures, entails benefits for both parts and its duration was often limited in time. According to a few respondents from this category, the lack of success of the SE in some countries was rather due to the developments in national and European law (e.g. the adoption of the Cross-Border Merger Directive, reforms of company laws in Member States) as well as in the jurisprudence of the European Court of Justice.

Question 2: Do you agree with the study's assessment on the attractiveness/non-attractiveness of national legislation for setting up an SE? Do you think that other or additional issues in the national legislation should be taken into consideration for assessment?

A majority of the respondents who contributed agreed with the study's assessment that the content of national legislation applicable to SEs does not seem to be the actual driver in choosing the SE form. The results of the study also appear to enjoy a wide approval, especially amongst business organisations, as only one raised doubts, and legal advisor/lawyer associations, two thirds of which were positive.

Amongst the respondents who fully or partly endorsed the assessment, many underlined the significance of certain additional elements which are missing from the study but could be crucial in assessing the attractiveness of national provisions, notably the fiscal framework, employment rules, the workers' involvement rights and the minimum capital requirement, as compared to those of domestic public limited liability companies.

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[6] Council Directive 94/45/EC. The recast Directive 2009/38/EC of the European Parliament and of the Council of 6 May 2009 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees will take effect in 2011. *OJ L 122, 16.5.2009, p. 28–44.*

Only 3 respondents explicitly disagreed with the conclusions of the study and around a dozen questioned the accuracy of the assessment. The latter either doubted the suitability of some of the options which the study has relied on (e.g. level of shareholder protection for evaluating flexibility in the system) or discovered that certain missing parameters could have led to different conclusions (e.g. regional distribution).

The insurance sector in particular, being the only industry to have questioned the value of the assessment, highlighted the need to take into account: (i) corporate law rules applying to public liability companies, including SEs; (ii) the degree of flexibility of existing domestic corporate law; and (iii) the quality of the domestic legal system in general. Further, at least 2 legal advisers disagreed with measuring the flexibility of national rules by reference to the degree of shareholder protection. In support of this view, it was also suggested that Member States with extensive minority shareholders' and creditors' protection may often be more attractive for start-up capital, venture capital and lenders.

Question 3: What are in your view the most important regulatory issues to consider for a company when assessing in which country to place its registered office and/or head office (both at the moment of formation and during the life of a company – taking into account the possibility to transfer the registered office)

Slightly more than half of the respondents, mainly business associations and legal advisers, contributed their observations whilst the rest of stakeholders abstained from providing an answer. Business organisations, in particular, ranked taxation at the top of the most important factors which a company would consider when assessing in which country to place its registered office and/ or head office. National employment law and company law feature next on the list.

In most cases, the replies prioritised the factors based on how influential those were perceived to be to companies' location decisions. With a few exceptions, about every business association gave a first vote to tax matters. Yet, it is also true that, in listing the key positive elements for investment, the respondents often placed more weight on achieving a combination of those rather than putting them in an order of priority. Thus, the majority of the contributing respondents seem to hold similar views about the main players: efficient tax rules, flexible employment law, legal certainty, transparency and simplicity in company law as well as low registration costs and efficient and reliable regulatory authorities. In the light of this, one could argue that it is hard to tell which aspects are more important in the minds of the respondents, even where those have typically been prioritised.

A few replies also stressed the importance of an economic approach to location decisions and, in that context, a couple of legal advisers went as far as suggesting that company law has little meaning, as compared to the market itself. In addition, a number of legal advisers highlighted the need to maintain a legal personality in the Member State of the transfer and, in that way, alluded to the burdensome requirement of the SE Regulation for keeping the registered and head offices in the same country. Other factors which were quoted less frequently include domestic bankruptcy and insolvency rules, IP and licences as well as listing requirements and Stock Exchange regulations.

2. MAIN TRENDS

Question 4: Do you agree with the study that the main reasons for the current distribution of SEs across the EU/EEA Member States are connected to the employee participation system and corporate governance system of the individual Member State? Please explain your answer.

Question 5: Do you agree with the possible explanations for the current distribution of SEs in the EU/EEA presented in the study? If you think there are other possible explanations please list them.

70% of the respondents that contributed agreed or partly agreed with the findings of the study. One in ten respondents disagreed about the relevance of the study's findings on corporate governance (CG) or stated that in their countries the choice of board system provided for by the SE Statute is not interesting for companies as it is available in national law (mentioned by some respondents from France, Italy, Denmark). A number of stakeholders mentioned additional reasons that could explain the current distribution of SEs in the EU/EEA, in particular: (i) The **size of Member State's economy**, the size of domestic companies and the scope of their businesses[7]; (ii) The **flexibility of certain aspects of the SE form compared to national legal forms**. For example, the popularity of the SE form in the Czech Republic could be due to certain limitations in Czech company law, i.e. the SE offers the possibility to create a wholly-owned subsidiary while national law does not and in Germany – due to the possibility to reduce the size of a supervisory board in the SE. Accordingly, the lack of success of the SE in Italy could be explained by the fact that Italian company law is more flexible than the SE in all aspects; (iii) The **tax systems** of Member States, as, in particular, groups would choose a tax advantageous scheme for tax restructuring. (iv) The **European label**, of particular importance in Eastern European countries. However, this is only true for the Czech Republic, Slovakia and Hungary but not for the Baltic states and Poland; (v) **Publicity and information on the SE** in a given Member State. A respondent stated that a relationship between the information made available and advice given to companies by legal practitioners and consultants and should have been examined in correlation with the number of SEs in a Member State, as they may be inter-related (e.g. no SEs in Member States where the information and publicity on the SE is lacking); (vi) **Differing set-up costs and transaction costs** of an SE in different Member States; (vii) **Geographical position of the Member States** towards the countries/regions outside the EU.

Worker organisations and researchers working in the field of labour law disagreed with the study's finding that the relative success or failure of the SE is due to the worker participation system and with the study's explanations of the current distribution of SEs in the EU/EEA. In their view other explanations are possible. These explanations have already been provided in Chapter 2 (drivers).

Question 6: What are in your view the main advantages for a company to buy a ready-made shelf SE compared to setting up an SE directly?

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[7] A respondent (an academic) stated that the study should have compared the current distribution of multinational enterprises (MNEs) and and the number of SEs in Member States. In this view, such a comparison would show that in Member States where there are a few MNEs (e.g. Portugal, Greece, Poland, Lithuania), the SE form has not been used.

Slightly more than half of respondents replied to this question. Half of the respondents who contributed said that buying a shelf SE saves time and allows setting a certain timeframe for the SE registration. About the same number of respondents stated that the acquisition of a shelf SE allows setting up an SE without going through a complex and uncertain formation procedure. A number of respondents also mentioned that the cost of setting up a shelf SE is relatively smaller if compared with the cost of a direct SE creation. One respondent in four stated that shelf SEs make it possible to create an SE without having to fulfil burdensome formation requirements of the SE Regulation, in particular the negotiations on worker participation (19 respondents) and the cross-border requirement (7 respondents). One respondent mentioned that a shelf SE could be used to avoid the payment of the minimum capital requirement.

Respondents from France and Italy said that shelf SEs are not really known or used in their countries. A few respondents noted that a disadvantage of a shelf SE is that it is not tailor-made and so a company that buys it has to adjust it to its own needs. One respondent mentioned that buying a shelf SE creates some risks as there are no clear rules on worker participation in that case. Moreover, using a shelf SE would imply the necessity of contributing the assets and liabilities of existing companies to such SE or establishing a holding structure by share-deal. Both operations would bring up specific issues of civil and tax law which can be avoided by a mere change of legal form.

3. PRACTICAL PROBLEMS ENCOUNTERED

Question 7: Practical problems in the course of setting up or running an SE

27 respondents answered this question. The majority focused on the problems related to **setting up an SE**, which is often considered to be a complex, expensive and time-consuming process. Most of the problems appear to stem from the complex relationship between the SE Statute and national laws, which, as a general principle, continue to apply to fill in the gaps of the Statute. The Statute contains a high number of references to national laws (65 references) and gives the Member States options (22 options) on specific matters. The respondents contributed their experience and views in connection with complications emerging from applying the SE Statute. Those mainly concern either uncertainties in interpretation or problems arising from the disparities amongst national laws. The issues raised by the respondents are listed below.

I. Issues related to the formation of an SE

(i) Definition of a subsidiary

- The Regulation does not define the concept and, given the different definitions at the national level, some respondents wondered whether lower-tier subsidiaries shall be included in the scope of a 'subsidiary'.

(ii) Formation through cross-border merger

- It is uncertain whether **a transfer of the seat** of the acquiring company to another Member State can take place at the same time as the merger.

- It is not clear whether national provisions on mergers which are not based on the Third Company Law Directive (CLD) may still apply to mergers leading to the creation of an SE. Neither has the interaction of national law with the Tenth CLD been clarified.

- The **share exchange ratio** may be difficult to determine due to the divergent (mandatory) national methods for determining the value of a business.

- The Regulation does not provide for a minimum content of **the certificate of legality** issued by the competent authority, which may cause problems to the final authority that receives certificates issued in different Member States for each merging company.

- It is questionable whether the requirement, in the case of conversion, for an expert report (certifying that a company's net assets are at least equivalent to its capital plus non-distributional reserves) shall be extended to mergers.

- **Language and translation requirements** increase the costs especially in the case of mergers.

(iii) Conversion of a public limited-liability company into an SE

- The fact that **the transfer of an SE's registered office** to another Member State may only follow the **conversion of a public limited liability company into an SE** and **cannot take place simultaneously** can be time-consuming and may create a high administrative burden for the company. It could also raise issues of compatibility with the freedom of establishment.

- It is not certain whether the information which justifies the conversion and indicates the implications for the shareholders shall appear in both the report and the draft terms of conversion.

(iv) Formation of a Holding SE

- It is not clear **how a holding SE becomes a shareholder** of its – future – subsidiaries.

(v) Formation of a Subsidiary SE

- The SE Regulation does not contain extensive provisions on the procedure for the formation of a subsidiary SE and this may lead to different interpretations.

(vi) Limited methods of setting up an SE

- **It is not possible to form an SE by way of cross-border division.**

- **Only public companies can be transformed into SEs** and the reporting requirements are strict, which favours larger entities.

(vii) Cross-border requirement

- Some respondents see the **two-year minimum holding period** that promoting or forming companies are required to own a subsidiary or branch in another Member State as an obstacle.

(viii) Minimum capital requirement

- The high threshold of the **minimum capital requirement** (EUR 120,000) is a disincentive and, in particular, for SMEs.

(ix) Date of creation of the SE

- **Delays between the shareholders' meeting which approves the conversion and the registration of the SE in the registrar** of the commercial court can be a problem, especially for listed companies.

(x) Employee involvement in the SE

Several respondents mentioned practical problems related to the rules on employee involvement in the SE. The procedures referring to the stage of setting up were seen as particularly complex and time-consuming.

- The requirement to have **concluded the negotiations on employee involvement before an SE can be registered** was criticised by several respondents because it creates substantial delays in, and uncertainty about, the registration of the SE. This timely process has to be followed even where a limited number of employees is involved, which makes the SE less competitive than a cross-border merger under the Tenth CLD.

- Some also criticised that the **rules do not take into account the possible existence of a supranational employee involvement body at a higher level than the SE**.

- The national rules which govern the establishment of the SNB and SE-works council may differ considerably (e.g. it is uncertain how to **calculate the number of employees** for the procedure).

- If **none of the employees is eligible or wishes to be elected for membership of the SNB**, a bottleneck would be likely to emerge in the process leading to registration since there would be no competent body to open and/or terminate negotiations with the employees.

- The SE Statute does not explicitly deal with employee participation where neither the (shelf) SE nor any of the participating companies has employees at the stage of establishing the SE.

(xi) Other problems

- The **insufficient knowledge and experience** on the SE legal form by Member States' authorities creates problems in carrying out the process of establishment.

II. Practical problems in running an SE

(xii) "Activation" of a shelf SE

- The **SE Directive does not contain specific rules on the role of employees when a 'shelf SE' is activated or structural changes occur after its formation,** which creates a risk of circumventing the legal framework on employee involvement.

(xiii) Place of the registered office and head office

- Some respondents find that the requirement to maintain both **the registered office and head office of an SE in the same Member State** is an obstacle which could even raise questions of compatibility with the freedom of establishment.

(xiv) Internal organisation of the SE

- It is not certain whether the Regulation allows the supervisory board total discretion about the **removal of members from the management board,** given that, in some Member States, the management can only be removed if there are good reasons. The question is here whether the Regulation is exhaustive or national law prevails instead.

- The requirement that the administrative organ shall **meet at least once every three months** and the management organ shall report to the supervisory organ **at least once every three months** may, in practice, be too cumbersome for small groups.

- In connection with the voting procedure at the general meeting, the SE Regulation applies except if national law requires a "larger majority". It is unclear what is meant by that since the SE Regulation only refers to "votes validly cast" and not to share capital represented in the vote.

(xv) Transfer of the registered office

- **Differences in national rules when transferring the seat of an SE**.

- National public authorities have the right of opposition, on **"grounds of public interest"**, to the establishment of an SE by way of merger or the transfer of an SE. Given the diversity of national practices and the fact that the Resolution does not define "grounds of public interest", discrimination issues could come to the fore.

- In the case of a transfer of the registered office of an SE or a conversion into an SE, **the competent authority in the other Member State should be notified**. Yet, the content of such notification as well as the language that it should be in remain unclear.

(xvi) Registration of branches

- Member States take different views as to whether an SE with a presence (i.e. branch) in another Member State is also required to register in that Member State.

(xvii) Conversion of an existing SE into a national company

- Respondents mention several problems in converting an existing SE into a national company.

4. POSSIBLE FOLLOW UP

Question 8: Recommendations for possible amendments of the SE Regulation.

53 respondents answered – at least partly - this question. Most respondents do not say clearly “yes" or "no” to whether they agree with the recommendations by E&Y, but comment only on some of the E&Y's recommendations or suggest other amendments. However, 16 respondents express that they "agree" or "agree to most" of the E&Y recommendations. Among these respondents there are an individual company (SE), legal advisors, business, accounting and lawyer associations. Around 10 respondents mostly focus on opposing one or more of the E&Y's recommendations. These respondents are all worker organisations and researchers working in the field of labour law.

Most of the explicit opinions related to recommendations for Article 2 (access to the SE form and the cross-border requirement); Article 4 (minimum capital requirement); Article 7 (place of the registered office and head office); Article 12 (registration and activation of shelf SEs and mandatory negotiations on employee involvement as a pre-requisite for registration of an SE); and Article 66 (conversion of an existing SE into a national company).

On the question of the cross-border requirement, seven respondents (i.e. a company, a legal advisor and several employer or business organisations) recommended no, or only a light cross-border requirement, whereas three respondents (i.e. two public authorities and a notary organisation) recommended maintaining a verifiable requirement.

A huge majority of respondents (21 vs. 1) suggested cancelling or reducing the 2-year minimum period of holding a subsidiary or branch in another Member State.

Most respondents also recommended allowing private limited liability companies to merge into an SE or convert into an SE (22-23 v. 2-3).

There has also been a majority in favour of allowing an SE to be set up ex nihilo (8 vs. 1) and reducing the minimum capital requirement (12 vs. 2).

On the question of the potential for separating the registered office from the head office, there has been a clear division of opinions. 26 respondents were in favour and 11 against.

Those in favour were respondents from individual companies (SEs), legal advisors, employer, business, lawyer and accounting organisations, whereas public authorities, notaries and several worker organisations and researchers working in the field of labour law were mostly against.

The respondents also held strong and differing views about whether shelf SEs shall hold negotiations on employee involvement as a pre-requisite for their registration as well as upon the shelf SE's activation.

Most respondents were in favour of clarifying that a shelf SE can be registered, even in the absence of any negotiations on employee involvement, provided that none of the companies involved have any employees. In addition, they wished to insert a provision ensuring that mandatory negotiations on employee involvement would have to take place when the shelf SE is activated and a certain threshold of employees is reached. However, there were strong reservations in this regard amongst worker organisations and some researchers working in the field of labour law. Their reservations mainly related to the risk of by-passing the requirement for an agreement on employee involvement once a shelf SE is 'activated'. Some of those respondents were therefore concerned about allowing shelf SEs' registration (without negotiation) altogether whilst others were in support of the idea of requiring negotiations only once the shelf SE is activated and a certain threshold of employees is reached. Some of the worker organisations preferred that the issues relating to shelf SEs are analysed further before any action is taken. Others called for consultations between the Social Partners at least on the question of potentially determining a threshold for the number of employees above which negotiations should be required.

The views of the stakeholders were similarly divided on whether the relevant organs of the merging companies shall have the right to choose, without any prior negotiation, to be directly subject to the standard rules on employee participation. Those in favour (19) consisted of individual companies (SEs), legal advisors, employer, business, lawyer and accounting organisations, whereas those against (10) came from worker organisations or from researchers working in the field of labour law.

Several respondents proposed clarification of Article 66, which deals with the conversion of an SE into a public limited liability company. A number of respondents suggested also shortening or removing the two-year period mentioned in the provision.

Some of the more general recommendations mentioned by several respondents include:

- To provide more uniform rules and thereby improve legal certainty, including when transferring the registered office to another Member State;
- To reduce the set up cost and make the SE easier to use;
- To raise awareness, explaining and clarifying the SE Statute and its advantages.

Some respondents also thought that increasing the popularity of SEs shall not be an aim in itself.

5. ANY OTHER COMMENTS

Worker organisations or researchers working in the field of labour law criticised the methodology of the study. In their opinion, the authors have chosen to focus the study on the point of view of the majority shareholders and hereby ignore the fact that a company is a conglomerate of various interests. These organisations also stressed that the study did not make any distinction between the different categories of companies (i.e. big and

small companies, SEs and non-SEs, and in particular, shelf and operational SEs). Some respondents from this group expressed concern that the study did not examine a big number of shelf and empty SEs and that it did not sufficiently analyse the situation in the Czech Republic. Furthermore, a few respondents indicated that the conclusions proposed by the study did not seem to be supported by statistical evidence. In addition, although the object of research ought to be focused on the SE Statute, the study includes suggestions for changes in the SE Directive, such as the proposal to simplify employee involvement. A few respondents had specific remarks on what they believed was a misleading categorisation of Member States as regards the correlation between the level of worker participation and the number of SEs.

Many of the respondents took a view in favour of better harmonisation of the rules governing the SE and, in particular, less references to national law which, in their opinion, impede the objectives of the SE. Currently, as one respondent pointed out, due to its large number of references to domestic laws, there is no uniform SE form but 27 different SE forms in the EU. One respondent suggested that harmonisation could be envisaged with regard to the liability of directors, bankruptcy law or the legal framework of financial services. A number of respondents recommended a more attractive and harmonised tax regime for SEs.

Other respondents pointed out the need for the adoption of an SPE Statute in the short run. In their view, the SPE should be a complement to the SE, which could enable companies to choose a legal form corresponding to the needs of the European market.

Some of the participants called for more publicity and information about the SE within and outside Europe and for improving transparency of information about registered SEs. In this regard, one of the respondents recommended coordinating company registration procedures across the EU, in order to avoid identification problems. A few respondents proposed the creation of a European Register for European legal forms.