040677/EU XXIV.GP
Eingelangt am 17/11/10

EUROPEAN COMMISSION

Brussels, 17.11.2010
SEC(2010) 1391 final

COMMISSION STAFF WORKING DOCUMENT

Accompanying document to the

Report from the Commission to the European Parliament and the Council on the application of Council Regulation 2157/2001 of 8 October 2001 on the Statute for a European Company (SE)

COM(2010) 676

1. INTRODUCTION

The European Company Statute ("SE Regulation")[1] was adopted on 8 October 2001 after more than 30 years of negotiations in the Council. It offered the possibility to create a new legal form called a European Company, also referred to as an SE after its Latin name *Societas Europaea*. The main idea behind the SE Regulation was to make it easier for companies and groups with a "European" dimension to combine, plan and carry out the reorganisation of their business on an EU scale.

Article 69 of the SE Regulation requires the Commission to present a report on its application including proposals for amendments, where appropriate, five years after the entry into force.

This Staff Working Document accompanies the Commission Report. It provides a description of the inventory of SEs and the implementation of the Member State options contained in the SE Regulation, as well as more detailed description of the practical problems encountered in the course of setting up or running an SE.

2. APPLICATION OF THE SE STATUTE

2.1. The inventory of SEs and their characteristics[2]

As of 25 June 2010, 595 SEs were registered in the EU/EEA Member States. The number of SEs increased in an exponential way from 2004 to 2008. In 2009 fewer new SEs were created than in 2008, but in 2010 the trend was again an increased number of new SEs created. The number of new SEs set up each year from 2004 to mid-2010 was 9 in 2004, 16 in 2005, 35 in 2006, 88 in 2007, 179 in 2008, 156 in 2009 and 112 in 2010 as at 25 June[3]. Reportedly 6 SEs have been liquidated[4] and 1 SE converted to a national legal form (German GmbH).

For the purpose of the inventory of SEs, four types of SEs can be distinguished: (1) SEs with more than a few employees; (2) SEs that have activities but no or very few employees; (3) SEs that seem to be operating but on which there is no information on the number of employees; (4) shelf SEs, i.e. SEs with no activities or employees that are usually set up by professional company providers with the purpose of selling them afterwards to interested buyers. SEs mentioned in points (1)-(3) are hereafter referred to as "non-shelf" SEs. The presentation of the inventory of SEs below is supplemented with more detailed information in Annexes 1 to 6.

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1 Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European Company (SE).

2 Facts and figures are extracted either from the database "The European Company (SE) Fact sheets" (hereinafter: "ETUI database") available at http://ecdb.worker-participation.eu/ (this database is managed and updated by the Research department of the European Trade Union Institute (ETUI), which is financially supported by the EU) or from the "Study on the operation and the impacts of the Statute for a European Company" of 2009, (hereinafter: "E&Y study") commissioned by the Commission to Ernst & Young (the complete study can be found at: http://ec.europa.eu/internal_market/company/se/index_en.htm).

3 The figures for the years 2004 to 2008 are extracted from the E&Y study. The data for 2009 and 2010 rely on the ETUI database.

4 2 German, 2 from Cayman Islands, 1 from UK, 1 Latvian.

As of 25 June 2010, SEs were registered in 21 out of the 30 EU/EEA Member States, with the vast majority (around 70%) in the Czech Republic or Germany. Very few SEs were registered in Southern European Member States, with the exception of Cyprus. Around 10% of the SEs were listed companies[5]. Approximately 25% of all SEs had five or more employees of which half were registered in Germany. 6% of all SEs, most of them registered in the Czech Republic, had less than 5 employees. 14% of all SEs were operating but seemed to have no employees. This type of SEs accounted for at least half of the SEs in the Netherlands, the United Kingdom, Ireland, Denmark, Poland and Spain. Around 42% of all SEs seemed to be operating but no information was available on the number of employees. A large majority of them were registered in the Czech Republic and a substantial percentage in France, Luxembourg, Cyprus, Belgium and Liechtenstein. The remaining 13% were shelf SEs not yet activated[6] as at 25 June 2010. 95% of these shelf SEs were registered in the Czech Republic, Germany or Slovakia. Further 36% of all SEs were originally set up as shelf SEs but had been activated[7].

49 SEs had **transferred their registered office** from one Member State to another. Whereas the United Kingdom (13) and Cyprus (6) were the most frequently chosen destinations, the largest number of SEs moved away from the Netherlands (17), Luxembourg (9), Germany (7) and the Nordic countries (6). Almost all SEs that had transferred their registered office were operating SEs. Most of them had no employees, but at least 20% of the transfers involved SEs with 5 or more employees. More than 80% of the SEs of which activities were known were active in the services sector (55% in the financial services sector alone) and 8% in the metal sector. The trend shows an increase in seat transfers from year to year[8].

Concerning the **method of creation** of an SE the trends vary considerably from one Member State to the other and depend on whether or not setting up of shelf SEs is excluded from the calculation of statistics. If shelf SEs are excluded, setting up an SE through conversion of a public limited-liability company was in general the most frequently used method (40%), followed by a cross-border merger between public limited-liability companies (25%), setting up a common subsidiary SE (18%), setting up a SE subsidiary by an existing SE (10%) and setting up a holding SE (7%)[9].

Regarding the **legal form of the founding companies**, apart from public limited liability companies, also private limited-liability companies have participated in the creation of SEs when it was legally possible (i.e. creation of a holding SE and a common subsidiary SE). Private limited-liability companies, of which a majority were German, participated in almost 60% of the cases of the creation of (non-shelf) holding SEs and close to 80% of the cases of the establishment of (non-shelf) common subsidiary SEs[10]. Private limited-liability companies have also participated in setting up SEs through merger and conversion, but only after first having transformed into a public limited-liability company[11]. Other types of companies were seldom founders of SEs.

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5 E&Y study, page 200.

6 i.e. had been sold and started to conduct activity.

7 See Annex 1 for more details on the distribution of different types of SEs across the EU/EEA Member States.

8 See Annex 2 for more details on the inventory of seat transfers.

9 See Annex 3 for more details.

10 These findings are extracted from the data contained in Appendix 2.3. of the E&Y study.

11 According to several German sources this is quite common in Germany.

Concerning the **nationality of the founding companies** there is a trend that in most cases where a German company participated in the founding of a non-shelf SE, the SE would be registered in Germany[12]. Only in 2% of all cases had an SE been set up in a Member State where neither of its founding companies was registered.

The SE is typically a corporate form chosen by groups of companies. 75% of the non-shelf SEs were parent companies, whereas only around 20% of them were subsidiaries and less than 5% were independent companies[13].

The **fields of activities** for non-shelf SEs mirror to a large extent the sizes of the economic sectors in the EU. However, there were even more SEs in the services sector as a whole compared to the economy at large (85% vs. 72%). On the other hand, there were fewer SEs, for instance, in the construction sector compared to the economy at large (2% vs. 6%). The most dominant field of SEs' activities were finance and insurance (31%) and other services (27%). Other fields of activities were real estate (14%), manufacturing (12%) and wholesale and retail trade (11%)[14].

Concerning the **board structure**, in almost all Member States (except the Netherlands and Spain) a majority of non-shelf SEs had chosen the same board structure (one-tier[15] or two-tier[16]) as the one available to or commonly used by the national public limited-liability companies in that Member State. Since most SEs were set up in Member States where the two-tier board structure is the most common system, the result is that a majority of SEs have also chosen a two-tier board structure. However, a one-tier board structure was chosen more often in Member States with a two-tier board system than the contrary. Furthermore in all Member States that allow both the one- and two-tier system for national public limited-liability companies, a majority of the SEs had chosen the one-tier system. In general, very few SEs are set up in countries that already allow both systems. The one-tier board structure was preferred by a majority of the SEs without employees and by around 40% of the SEs with 5 or more employees[17]. Most often the size of the board remained the same (in the vast majority of cases the board before and after the SE creation was composed of 2-5 members). In cases where the board's size had changed, the number of board members had more often increased than decreased[18].

Almost 70% of all SEs, most of them shelf SEs, were created with a **subscribed capital** equal to the minimum capital requirement of €120,000. Around one third of all non-shelf SEs, most of which came from Germany, were set up with an initial subscribed capital of above €10 million. 8% of the SEs had raised their subscribed capital after their formation[19].

The average **balance sheet total** of non-shelf SEs was €524 million, the highest average coming from German SEs (€1,586 million). In countries like Belgium and Slovakia the average balance sheet total was much lower (€17 million and €4 million respectively). Based

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12 According to the information in the "Factsheets on established SEs" of the "Study on the operation and the impacts of the Statute for a European Company" this was true in 57 out of 62 cases.

13 E&Y study, p. 206.

14 E&Y study; p. 183-184.

15 A board structure with only one administrative board.

16 A board structure comprising a management board and a supervisory board.

17 See Annex 4 for more details on the choice of board structure.

18 E&Y study, p. 199.

19 See Annex 5 for more details.

on the information on German SEs, the operating SEs with five or more employees had an average balance sheet total double the size of the overall average.

The average **net turn over** of non-shelf SEs was €366 million, the highest average coming from the German SEs (€1,351 million). Several SEs had no net turnover according to the annual accounts[20].

Most SEs were set up without **employees**, mainly due to the fact that around half of all SEs were originally set up as shelf SEs. Around 34% of all non-shelf SEs were set up with more than 250 employees. Half of these SEs were German[21]. Due to insufficient data no comment can be provided on the developments as regards the number of employees after the formation of the SEs.

2.2. The SE legislation applicable in the different Member States

Council Regulation 2001/2157/EC on the Statute for a European Company (SE) contains not only provisions that are directly applicable in all Member States[22], but also cross-references to the national legislation applicable to public limited-liability companies ("national companies")[23] as well as several Member State options[24]. As a result the legislation applicable to SEs varies, sometimes considerably, from one Member State to the other.

According to the external study conducted on behalf of the Commission[25] in general Member States have implemented the SE options in such a way as to align the SE rules with the rules for national companies. However, for some Member States there are more exceptions to this trend than for others. An analysis of the flexibility[26] of the rules applicable to the SE

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20 These were mainly SEs without employees.

21 See Annex 6 for more details.

22 For example Articles 2 and 3(2) contain an exclusive list of the methods possible to create an SE.

23 For example Article 24(1) of the SE Regulation, regarding the protection of the interests of creditors in companies participating in a merger to set up an SE.

24 For example Article 40(3) of the SE Regulation, concerning the minimum number of members in the supervisory organ.

25 The "Study on the operation and the impacts of the Statute for a European Company" analyses the references and options contained in the SE Regulation, which concerns rules related to (1) the formation of an SE; (2) the transfer of the registered office of an SE; (3) the management/organisation of an SE; and (4) other specific company law issues such as the options on requiring the registered office and head office in the same place and on the expression of the SEs capital when the SE is registered in a Member State located outside the Euro-zone.
The analysis performed in the Study includes information on whether or not the different Member States have implemented the different options, and a description of the relevant legislation applicable to SEs. It also includes an assessment on the main differences between the Member States and on the flexibility of the relevant legislation compared both to other Member States' legislation (inter Member States analysis) and to the legislation applicable to national public limited-liability companies (intra Member States analysis). The analysis covered 25 out of the 30 EEA Member States. Ireland, Lithuania, Malta, Iceland and Liechtenstein were not included.

26 Flexibility was assessed for each option by comparing on one side the rule applicable to the SE resulting from the implementation (or non-implementation) of the option and on the other side the equivalent rule applicable to national public limited-liability companies. Take for example the option in Article 43(2) (an option to fix a minimum and maximum number of members of the administrative organ of the SE) if a Member State has no fixed number applying to their national companies but nonetheless chose to have such a rule for SEs registered in their territory, the rule applicable to the SE would be assessed "less flexible" than the national rule. The assessment of « flexibility » was conducted on the basis of a majority shareholder perspective. If another perspective had been chosen, e.g. creditor or employee perspective, the assessment of « flexibility » would in some cases have been different.

compared to the rules governing the national companies shows that the United Kingdom, Denmark, Belgium and Greece have adopted the most flexible approach for the SE, while Romania, Bulgaria, Slovenia, Portugal, France and Cyprus rate lowest. A comparison of this rating with the distribution of SEs shows that only for the United Kingdom (23 SEs), Belgium (9 SEs), Portugal (1 SE), Bulgaria, Romania and Slovenia (all with no SE) there may be some positive correlation. On the other hand, the relatively high flexibility rating for Greece (no SE), Denmark (2 SEs) and to some extent Spain (1 SE) and Italy (no SE) does not match with the low number of SEs in those countries, especially if compared to e.g. France (19 SEs) and Cyprus (12 SEs) who have a low rating and a relatively high number of SEs.

The study also assessed the flexibility of the SE rules in each Member State *compared to the SE rules in the other Member States*. This assessment was based on how the Member States implemented the options provided for in the SE Statute and on the national legislation in cases where the SE Statute explicitly refers to it. The analysis indicates that Luxembourg, Italy and the United Kingdom have the most flexible rules for SEs and Cyprus, Germany, Portugal, Sweden, France and the Czech Republic have the least flexible rules compared to the other Member States. A comparison of this rating with the distribution of SEs shows that only for the United Kingdom (23 SEs), Luxembourg (16 SEs), Portugal (1 SE) and to a lesser extent, the Netherlands (24 SEs), Slovakia (22 SEs) and Belgium (9 SEs) is there some positive correlation. On the other hand, for the Czech Republic (281 SEs), Germany (134 SEs), France (19 SEs) and Cyprus (12 SEs), the correlation is rather negative and, therefore, the rating can not provide any explanation for the distribution of SEs in these Member States.

The different implementation of the options and the different national company law rules applicable to SEs could thus be one amongst other explanations for the distribution of SEs in certain Member States. However, the results of the above legal analysis should be looked at taking into account the following limitations: (i) the method of assessing flexibility[27]; (ii) the fact that the aggregated legal analysis does not capture the relative importance of the analysed rules for companies[28]; (iii) the scope of the rules analysed, e.g. it does not include all company law rules and other areas such as tax, insolvency, employee involvement or social security law. Moreover, the legal analysis does not take into account any non-legal drivers that could partially explain the distribution of SEs across the Member States, e.g. differences in the value of the European image for companies in different Member States or differences in the average size of national companies.

Close to half of the respondents to the public consultation stated that the content of national company law rules applicable to SEs does not seem to be the actual driver for choosing the SE form, however, according to many of them other rules such as fiscal law, labour law or the requirement on minimum capital could be important in assessing the attractiveness of national provisions applicable to SEs.

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27 For some of the rules analysed it is not very clear which variety of implementation should be considered the relatively more flexible.

28 For instance, if some companies find the rules on the management/organisation of the SE to be more important than the other rules analysed and if, as a result, differences in the Member States' rules on the management/organisation of the SE could (partially) explain the distribution of SEs across Member States, then the aggregated analysis would not capture this trend. In fact the Czech Republic and Italy have the most flexible rules in that area (both in the intra and inter Member State analysis). This could thus possibly partially explain the many SEs in the Czech Republic but not the 0 SE in Italy.

3. PRACTICAL PROBLEMS IN THE COURSE OF SETTING UP OR RUNNING AN SE[29]

In addition to the main problems highlighted in the Report, a more detailed presentation of the practical problems identified by the consulted stakeholders is provided below.

3.1. Practical problems related to setting up of an SE

3.1.1. Limited methods of setting up an SE

- **No possibility to form an SE by way of cross-border division**. It is argued that division is an obvious instrument for restructurings both within and across the boarders of a Member State and that a cross-border division whereby an SE will be formed would be easier and less time-consuming than the alternatives that already exist[30]. It is also argued that although there is no legislation at EU level on cross-border divisions, the jurisprudence of the European Court of Justice has already made it possible to carry out a cross-border division when the companies involved are governed by the laws of different Member States[31].

- **Only public limited-liability companies can be transformed into an SE and participate in a merger to set up an SE**. This makes the SE form more easily available only for larger entities, but makes it more difficult for smaller entities which would normally use a private limited-liability company form.

3.1.2. The cross-border requirement

- The **period of at least two years** during which the promoting or forming companies have had a subsidiary company or a branch in another Member State is considered an obstacle.

3.1.3. The minimum capital requirement

- The high level of the **minimum capital requirement** (€120,000) is a disincentive for SMEs to adopt the SE particularly in some Member States where SMEs account for about 99% of all companies (e.g. Italy and Portugal).

3.1.4. The date of creation of the SE

- For a conversion into an SE, **delays between the shareholders' meeting approving the conversion and the registration of the SE in the registrar** of the commercial court can be a problem, especially for listed companies (particularly when listed on several stock exchanges) where the time factor is of vital importance. Furthermore, the provisions of the Regulation differ from some national provisions, e.g. the effective date of conversion of

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29 The information is based on the public consultation on the Ernst&Young study (http://ec.europa.eu/internal_market/company/se/index_en.htm).

30 The current alternatives are: (i) national division and a subsequent cross-border merger, which can be carried out on the basis of the SE Regulation or the Cross-Border Merger Directive and the national laws implementing this directive and – if the cross-border merger is carried out on the basis of the Cross-Border Merger Directive – finally a conversion of the acquiring company into an SE, or (ii) a national division, followed by a conversion of the acquiring company into an SE and a subsequent transfer of the registered office of the SE.

31 See the "Sevic" Case (C-411/03).

French national companies can be the date of the shareholders' meeting approving the conversion.

3.1.5. The procedure on employee involvement in the SE

- The requirement to **conclude the negotiations on employee involvement before the registration of the SE** was mentioned by several respondents as a practical problem, because it creates substantial delays and uncertainty in the registration of the SE (3 months to set up the Special Negotiation Body (hereinafter: 'SNB') and then potentially 6-12 months to negotiate an agreement). It can especially create substantial problems in a merger scenario.

- **Registration of a 'shelf' SE**. The SE Statute does not clearly regulate a situation where neither the SE nor any of the participating companies has employees at the time of establishing the SE. A clarification in the SE Statute is suggested.

As well as the following ones concerning directly the SE Directive:

- The rules do not take into account if **the group** on a higher level than the SE **already has a supranational employee involvement body**, e.g. a European Works Council.

- National law is governing the rules for the establishment of the SNB and SE works council. However, the respective national rules differ considerably and there is uncertainty on how to **calculate the number of employees** relevant for the procedure. It is especially complex when the participating companies are large groups with several interdependent subsidiaries and branches in different countries.

- **Limited number of employees (in the case of merger)**. The rules with respect to employee participation upon the formation of an SE by merger also have to be followed in case only a limited number of employees are involved. This is not necessarily the case for a cross-border merger based on the Cross-Border Merger Directive. In such a case, said rules will in some cases only have to be followed if certain thresholds are met. As a result, parties will have a strong preference for such a cross-border merger and will not opt for the use of an SE.

- **Election of the member of the SNB**. In some cases, it could be possible that none of the employees is eligible or wants to be elected a member of the SNB. In that case, negotiations cannot be started and, due to its non-existence, the SNB also cannot decide to open negotiations or to terminate negotiations already opened and to rely on the rules on the information and consultation of employees in force in the Member States where the SE has employees. The absence of an agreement on arrangements for employee involvement or the absence of a decision not to open negotiations or to terminate negotiations would be an obstacle in the registration of the SE.

3.1.6. Problems stemming from the lack of clarity and complexity of the SE Statute (interpretational issues)

(i) Definition of a subsidiary:

- **Definition of subsidiary** (Article 2 of the SE Regulation). Article 2(3) and 2(4) make a reference to a 'subsidiary' but the Regulation contains no definition of this term. As a

result the Member States have different definitions of a subsidiary. It is not clear if a subsidiary could also be a subsidiary of the company's subsidiary.

(ii) Formation of an SE through cross-border merger:

- Article 17 of the SE Regulation in relation to Article 37(3). Article 17(2)(a) allows for the formation of an SE by means of a merger by acquisition. A relevant issue in practice is whether or not it is possible to do **simultaneously a merger by acquisition and a transfer of the seat** of the acquiring company to another Member State than the Member State of the acquiring company.

- Article 18 of the SE Regulation. It is not clear **which national rules apply to the formation of an SE by merger**. Article 18 refers to "the provisions of the law of the Member State to which it is subject that apply to mergers of public limited liability companies in accordance with Directive 78/855/EEC (the 'Third Directive')". It is unclear if the provisions of the applicable national laws on mergers which are not based upon the Third Directive (or even may deviate from it, if the Third Directive provides so) will also apply to an SE merger or whether only the provisions of national laws on mergers which are based upon and are in accordance with the Third Directive will apply. Furthermore, after the entry into force of the SE Regulation, also the Cross-Border Merger Directive became effective. Through Article 10 of the SE Regulation, the provisions of the Cross-Border Merger Directive and the applicable national laws in which this Directive is implemented are also applicable to a formation of an SE by a cross-border merger. It is uncertain to which extent such provisions will have to be applied and similar questions as to the relationship of the national laws on mergers which are based upon the Third Directive can arise.

- Article 20 par 1(b) of the SE Regulation. **The determination of the share exchange ratio (merger)**. Within the Member States different (mandatory) methods for determining the value of the companies are used (e.g. in Germany the capitalized earnings valuation method prevails, whereas in other countries valuation methods based on multiples prevail). The differences in the valuation methods may lead to different results which could lead to serious difficulties in determining the applicable share exchange ratio for the purposes of merger. In practice absorbing companies may need to acquire 100% of the share capital of the absorbed companies before conducting a merger.

- Article 25 par 2 of the SE Regulation. The Regulation does not provide for a minimum content of **the certificate of legality to be issued by the competent authority (merger)**. This situation is a source of problems for the authority that should receive the certificate issued by authorities from other Member States for each merging company. The same applies to the report of the independent expert examining the draft terms of merger (Article 22 of the SE Regulation).

- The relation between the formation of an SE through a *cross-border merger* and Article 37(6) of the SE Regulation (which requires an expert report certifying, in the case of *conversion* into an SE, that the company has net assets at least equivalent to its capital plus the non-distributional reserves). In an Austrian case of setting up of an SE by cross-border merger it was disputed whether or not such an expert report was also required on top of the merger requirements. Although it could seem contrary to the intentions of the legislator the Austrian court decided that **the formation by cross-border merger entails also a**

conversion from a public limited liability company into an SE and therefore the expert report mentioned in Article 37(3) was required in the particular case.

- **Language and translation requirements**. Such requirements increase the costs of setting up an SE through a cross-border merger. Another problem mentioned by one respondent is that some local laws apparently do not allow bilingual draft terms of merger, and if the laws allow bilingual draft terms of merger notarisation requirements can be another problem: it can be difficult to find a notary who will notarise bilingual terms of merger if the notary does not understand both languages.

(iii) Formation of an SE through conversion of a public limited-liability company:

- Article 37(3) of the SE Regulation. The **simultaneous conversion of a public limited liability company into an SE and the transfer of the registered office** to another Member State is expressly prohibited, but a consecutive transfer is allowed. A simultaneous conversion and transfer of the registered office would be less time-consuming and would reduce administrative burden for the company[32]. The current prohibition to transfer the registered office at the same time as the conversion might also not be in accordance with the freedom of establishment (article 43 EC) following the *Cartesio* case[33].

- Article 37 par 4 of the SE Regulation. The Regulation is not clear as to whether both **the report and the draft terms of conversion** have to explain and justify the legal and economic aspects of the conversion and indicate the implications for the shareholders and employees of the adoption of the form of an SE.

(iv) Formation of a Holding SE:

- The SE Regulation contains extensive provisions on the procedure for the formation of a holding SE in Articles 32 to 34 and references are made to the procedure in the case of a merger. However, **it is not entirely clear how the holding SE to be formed becomes a shareholder of its – future – subsidiaries**. On the face of Article 33 para. 1 it appears that the shares in the future subsidiaries of the holding SE will be contributed to the SE, but the way in which this contribution has to be structured is not described in the SE Regulation. The Regulation also does not provide practical and secure solutions in case **one shareholder of the contributing company becomes insolvent or if his shares are or become attached by one of his creditors**. Such procedure may stop the process of setting up the SE.

(v) Formation of a Subsidiary SE:

- Contrary to the formation of a holding SE, the SE Regulation does not contain extensive provisions on the procedure for the formation of a subsidiary SE. One can assume that the SE Regulation assumes that the participating companies pay up for the shares in the subsidiary SE. However, due to the **absence of a legal framework for the formation of a subsidiary SE** in the SE Regulation, it can be argued that the participating companies can,

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[32] Currently: one month for the conversion (Article 37 paragraph 5 of the SE Regulation) and two months for the transfer of the registered office (Article 8 paragraph 6 of the SE Regulation).

[33] Case 210/06.

not only form a subsidiary SE by paying up for its shares, but that they can also form a subsidiary SE e.g. by a national or cross-border division, however, it is not clear.

3.2. Practical problems related to the functioning of an SE

3.2.1. 'Activation' of a 'shelf SE'

The SE Directive does not contain specific rules on the role of employees when an SE is activated or structural changes occur after its formation, such as changes to the structure of the SE, or the employment of employees or the acquisition of (part of) another company and its employees. In this way, there is potentially a possibility to circumvent the rules on employee involvement by establishing a shelf SE or acquiring the shares of a shelf SE and then carrying out certain activities – also referred to as the 'activation' of a shelf SE. The national laws of the Member States concerning the subject of structural changes in the SE, such as the activation of a shelf SE, differ from each other. Therefore, it is not clear in all cases how it should be dealt with in practice if a shelf SE is activated. If the law of a Member State is not clear, this law could be interpreted in conformity with the SE Directive. However, the interpretation of the national laws of the Member States in conformity with the SE Directive offers little legal certainty. A clarification of the SE Regulation/Directive could resolve the current legal uncertainty and remove the potential risk of circumvention.

3.2.2. The requirement that the registered office and the head office of an SE are located in the same Member State

According to Article 7 of the SE Regulation, the registered office and the head office of an SE shall be located in the same Member State. It has the consequence, that, if the head office of an SE is moved, also the registered office has to be moved and vice versa. This is considered by many stakeholders as an obstacle in practice which is contrary to the nature of an SE as an international legal form designed for cross-border business and contrary to the practice of national regulations authorising the board of directors or the management board of companies to be held through videoconferencing or telephone conferencing systems. It is also argued that this requirement may be contrary to the freedom of establishment as mentioned in Article 49 of the TFEU Treaty.

3.2.3. Removal of members of the managerial board

According to Article 39(2) of the SE Regulation, members of the management shall be appointed and removed by the supervisory organ. In some Member States it is required that removal of management can only be done if there are "good reasons" to do so. It is not clear whether the Regulation's provision is exhaustive (i.e. allows the supervisory board total discretion as regards the removal of members of the management board) or whether national law prevails.

3.2.4. Frequency of meeting and reporting requirements

Articles 41(1) and 44(1) of the SE Statute set requirements for the administrative organ to **meet at least once every three months** and for the management organ to report to the supervisory organ at least once every three months. It is argued that this is too cumbersome in practice for small groups where national regulations only provide for a meeting and a report at least once a year to discuss or present the annual report and accounts.

3.2.5. The term of office of board members

Article 46 of the SE Regulation state that the members of company organs shall be appointed for a period laid down in the statutes not exceeding six years. It is argued that it should be clarified whether the term of office of board members must be fixed in the articles of association or whether the articles of association may fix a maximum term and leave it to the body appointing the board members to determine the individual term of office of the respective member.

3.2.6. The necessary majority to pass a vote in the general meeting

According to Articles 57 and 59 of the SE Regulation, the necessary majority to pass a vote in the general meeting shall meet the requirements in the SE Regulation, unless the national law requires - or permits - a larger majority. Some stakeholders have mentioned that it is uncertain what "a larger majority" covers. The SE Regulation only refers to "votes validly cast" but not to share capital represented in the vote. In the case of e.g. Germany this has created uncertainty as to whether the German rules apply or not[34].

3.2.7. The place to convene the SE's annual general meeting

One respondent to the public consultation finds that the lack of an explicit provision on this issue leaves uncertainty on where the SE can convene its annual general meeting.

3.2.8. Company secretary

Another respondent thinks it is not clear from the current drafting of the SE Statute whether an SE registered in the UK has to have a company secretary as normally required by UK law.

3.2.9. Transfer of seat of the SE

The current drafting of the SE Statute does not solve problems with **differences in national rules when transferring the seat of the SE**. Since the SE Regulation only provides for a basic framework for an SE that wants to transfer its seat to another Member State, there are uncertainties in relation to the differences in national legislation and the SE might be required to make amendments in order to fulfil the requirements of the new Member State. For example, during a transfer of an SE from the Netherlands to France the following questions arose in practice: after the shareholders' meeting approving the transfer, is it necessary in order to appoint the directors or members of the management board to hold a board of directors meeting or a supervisory board meeting of the company subject to the laws of the future territory of registration and the amended articles of association, at a time when the company is still subject to the legislation of its current registration? Since Dutch law allows an N.V. to be created with only one shareholder whereas French law requires at least 7 shareholders to create an S.A., when transferring an SE with one shareholder from the Netherlands to France, does the SE registered in the Netherlands have to transfer shares to 6 new shareholders before the registration of the SE in France?

[34] For amending the SE's articles of association Article 59 of the SE Regulation requires two thirds of the votes cast, whereas § 179 of the German Stock Corporation Act requires a majority of not less than three fourths of the share capital represented at the passing, and the Articles of association may provide for a different capital majority of the resolution.

3.2.10. The national public authorities' right of opposition to an SE being set up by way of a merger or to the transfer of the SE on "grounds of public interest"

Each national authority has its own practices and internal rules and the lack of definition in the Regulation of the "grounds of public interest" may create discrimination arising out of unjustified different treatment from one Member State to another. Furthermore, such opposition can be exercised late in the process and thus may create a risk for the company to have to stop the setting-up of the SE or its transfer at the end of the process, generating significant costs[35].

3.2.11. Notification to the competent authority in another Member State in the case of the transfer of the registered office of an SE or conversion into an SE

It is uncertain what information, and in which language, a notification by the registrar of one Member State to the other should include when transferring the SE's registered office. In case of conversion of e.g. a French S.A. into an SE having a branch registered in Germany, it is also uncertain if the registrar of the Commercial Court has to notify the registrar in Germany.

3.2.12. Registration of branches

Member States take different views as to whether an SE incorporated in one Member State that has a presence in a different Member State is required to register a branch there. The UK takes the view that it is not required, whereas other Member States think it is required.

3.2.13. Conversion of an existing SE into a national company (Article 66 of the SE Regulation)

Several problems with the application of this provision were reported. One is uncertainty of its scope, i.e. whether Article 66 of the SE Statute is an obstacle for an SE participating in domestic and cross-border restructurings, which is essential for an SE. Other problems concern the period of time after which a conversion of an SE into a public limited liability company can be effected. In some language versions of the SE Statute the two requirements for conversion mentioned in Article 66 are cumulative ("and") and in others they are alternative ("or")[36] . A more fundamental problem raised is that the restriction on conversion into a national company is an impediment in practice[37] and is not in line with the jurisprudence of the European Court of Justice[38].

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35 For example in the case of the merger, the opposition right can be exercised up until the issue of the certificate conclusively attesting the completion of the pre-merger acts and formalities (Article 19 of the SE Regulation).

36 The two requirements are 1) the decision on conversion may not be taken before two years have elapsed since the SEs registration; 2) the decision may not be taken before the first two sets of annual accounts have been approved. In some language versions such as the French and the Dutch the requirements are cumulative, whereas in others such as the English and the German the requirements are alternative.

37 E.g. a business might dispose of its European operations and decide to concentrate on a single national market or if on reflection the company wishes to revert to a more tested vehicle.

38 It is argued that in the *Cartesio* case (C 210/06), the European Court of Justice, *inter alia*, confirmed that cross-border conversions of companies within the meaning of article 48 EC are possible on the basis of the freedom of establishment (Article 43 EC), if the law of the 'host Member State' allows for such a cross-border conversion.

ANNEXES

Annex 1: The distribution of SEs across the different Member States[39]

The table below shows the distribution of SEs across the Member States as at 25 June 2010.

Table 1

Member State where the SEs registered office is located	Number of SEs						
	Total	Non-shelf SEs				Shelf SEs	Activated Shelf SEs
		Normal SE	Micro SE	Empty SE	Employees ? SE		
Czech Republic (CZ)	281	25	26	5	181	44	162
Germany (DE)	134	74	9	21	8	22	48
Netherlands (NL)	24	8	0	13	3	0	0
United Kingdom (UK)	23	2	0	15	6	0	1
Slovakia (SK)	22	2	5	2	6	7	3
France (FR)	19	9	0	1	9	0	0
Luxembourg (LU)	16	3	0	5	7	1	0
Austria (AT)	14	7	2	5	0	0	0
Cyprus (CY)	12	5	0	2	5	0	1
Belgium (BE)	9	3	0	2	4	0	0
Sweden (SE)	9	2	0	1	3	3	0
Ireland (IE)	7	1	1	3	2	0	1
Norway (NO)	5	3	0	2	0	0	0
Estonia (EE)	4	3	0	0	1	0	0
Liechtenstein (LI)	4	1	0	0	3	0	0
Hungary (HU)	3	2	0	1	0	0	0
Latvia (LV)	3	1	0	1	1	0	0
Denmark (DK)	2	0	0	2	0	0	0
Poland (PL)	2	0	0	1	1	0	0
Portugal (PT)	1	0	0	0	1	0	0
Spain (ES)	1	0	0	1	0	0	0
Bulgaria (BG)	0	0	0	0	0	0	0
Finland (FI)	0	0	0	0	0	0	0
Greece (EL)	0	0	0	0	0	0	0
Iceland (ICE)	0	0	0	0	0	0	0
Italy (IT)	0	0	0	0	0	0	0
Lithuania (LT)	0	0	0	0	0	0	0
Malta (MT)	0	0	0	0	0	0	0
Romania (RO)	0	0	0	0	0	0	0
Slovenia (SI)	0	0	0	0	0	0	0
Total	595	151	43	83	241	77	216

Table 1 shows that as at 25 June 2010 there were 595 SEs registered in the EU/EEA Member States[40].

[39] The information in Annex 1 is extracted from the data contained in the database "The European Company (SE) Factsheets" available at http://ecdb.worker-participation.eu/. This database is managed and updated by the Research department of the European Trade Union Institute (ETUI), see http://ecdb.worker-participation.eu/. ETUI is financially supported by the EU.

[40] For the purposes of this Staff Working Paper different types of SEs are distinguished:

- Normal SE: An SE known to be operating and to have 5 or more employees.

The Czech Republic and Germany accounted for around 70 % of all SE's registered in the EU/EEA Member States. The Netherlands, the United Kingdom, Slovakia, France, Luxembourg, Austria and Cyprus were the only other Member States with more than 10 SE's registered. There were nine Member States where no SE was registered, and a further 10 Member States with only between one and five SEs registered.

Around 25 % of all SEs, of which around half were from Germany, were "normal SEs", i.e. operating and with 5 or more employees. Other Member States with 5 or more "normal" SEs were the Czech Republic, the Netherlands, France, Austria and Cyprus. The "normal" SE was the most common type of SE in Germany, France, Austria, Cyprus, Norway, Estonia and Hungary.

Around 6 % of all SEs, of which 60 % were registered in the Czech Republic, were "micro SEs", i.e. operating and with less than 5 employees.

Around 14 % of all SEs were "empty SEs", i.e. operating but apparently with no employees. Such SEs accounted for at least half of the SEs in the Netherlands, the United Kingdom, Ireland, Denmark, Poland and Spain.

About 42 % were probably normal, micro or empty SEs, i.e. they were known or seemed to be operating, but the information on the number of employees was not available. The lack of information on the number of employees could, for instance, be a result of the fact that the SE had not yet published its annual accounts or that it had an exemption from publishing this information in the notes of its annual accounts due to its small size[41]. Around 72 % of these SEs were registered in the Czech Republic. Such SEs also accounted for a substantial percentage of the SEs registered in e.g. France, Luxembourg, Cyprus, Belgium and Liechtenstein.

- Micro SE: An SE known to be operating and to have 1-4 employees.
- Empty SE: An SE known to be operating, but without employees.
- Employees? SE: An SE known or believed to be operating, but where there is no information on the number of employees.
- Shelf SE: An SE with no activities or employees that is set up by a professional company provider with the purpose of selling it to interested buyers.
- Activated shelf SE: An SE originally set up as a shelf SE, but which had afterwards been sold and/or started operations.
- Non-shelf SE: An SEs that is operating and belongs to either of the following categories: "Normal SE", a "Micro SE", an "Empty SE" or an "Employees? SE".

41 Whereas other types of information on SEs are normally publicly available in the business register (e.g. the method of formation and the board structure) information on the average number of employees during the financial year is only available in the annual accounts. However the annual accounts are always published retrospectively and Member States can exempt small SEs from publishing more than abridged balance sheets and notes on their accounts, cf. Article 47(2) of Directive 78/660/EEC. Thus most SEs set up in 2009 and 2010 (which potentially totals 268 SEs as of 25 June 2010) would not yet have published any annual accounts, and shelf SEs set up earlier but only activated in 2009 or 2010 would often not have published updated annual accounts. Adding to this the possibility of small SEs being exempt from publishing more than abridged balance sheets and notes on their accounts explains the high number of SEs where there was no information on the number of employees. In those cases access to this kind of information is only possible if the company provides it on its website (if it has one) or delivers it on request. Since most new SEs have been set up in the Czech Republic, and most activated shelf SEs also are registered in the Czech Republic, this is the Member State where most SEs with lacking information on the number of employees can be found.

The remaining 13 % (95 % of which were from the Czech Republic, Germany and Slovakia) were shelf SEs not yet sold and/or activated on 23 June 2010.

The last column in Table 1 shows that 216 out of 518 operating SEs were originally shelf SEs. This means that around 40% of all non-shelf SEs were originally shelf SEs. Almost all activated shelf SEs were registered in either the Czech Republic or Germany[42]. A comparison of the data on the number of activated shelf SEs and on the number of shelf SEs shows that around 50 % of all SEs in the dataset were originally set up as shelf SEs.

[42] The activated shelf SEs registered in Ireland, the United Kingdom and Cyprus also originate from either the Czech Republic or Germany, see Annex 2 (transfer of seat).

Annex 2: Data on seat transfers of SEs[43]

Table 2[44]

Name of SE	Original registration	New registration	Non-shelf SEs				Shelf SE	Ex Shelf SE	Activities	Year transfer
			Normal SE	Micro SE	Empty SE	Employees?				
Graphisoft SE	NL	HU			1				Services IBITS	2005
DIAG Human SE	CZ	LI	1						Other	2006
Afschrift SE	BE	LU				1			Other services	2007
BIBO ZWEITE [..] SE	DE	UK			1				Financial services	2007
BOLBU Beteiligungsgesellschaft	DE	UK			1				Financial services	2007
Joh. A. Benckiser SE (JAB)	DE	AT	1						Financial services	2007
Jura Management SE (now transformed into GmbH)	NL	DE			1				Financial services	2007
MDM Holding SE	AT	CY			1				Financial services	2007
Narada Europe SE (liquidated)	NO	UK			1				Commerce service	2007
Prosafe SE	NO	CY	1						Other	2007
Swiss Re International SE	UK	LU	1						Financial services	2007
AmRest Holdings SE	NL	PL			1				Financial services	2008
Arcelor Steel Trading SE	NL	ES			1				Metal	2008
Atrium Dritte Europäische VV	DE	IE			1			1	Other services	2008
bluO SE	DE	AT			1				Unknown	2008
Elcoteq SE	FI	LU	1						Metal	2008
Imperio Regere SE	CZ	CY				1			Unknown	2008
MAI Luxembourg SE	LU	UK			1				Unknown	2008
Milium SE	LU	BE	1						Commerce service	2008
RSL COM Germany SE	DE	UK			1			1	Other	2008
SEKISUI NordiTube Technologies SE	SE	DE	1						Other services	2008
Spirall Solution SE	CZ	CY				1		1	Unknown	2008
UBM International Holdings SE	LU	UK			1				Unknown	2008
United Consumer Media SE	LU	UK			1				Financial services	2008
UPRN 1 SE	LU	NL			1				Financial services	2008
World Nordic SE	DK	CY			1				Financial services	2008
Allpar SE	LU	AT			1				Other services	2009
Ardanos Holdings SE	NL	FR				1			Medical services	2009
Bercy Charenton SE	NL	FR				1			Financial services	2009
Carthago Value Invest SE	DE	IE		1					Financial services	2009
Crius Capital SE	CZ	SK		1					Other services	2009
Equinox II SE	NL	FR				1			Financial services	2009
Europasta SE	NL	CZ				1			Food,Hotel,Cater	2009
Fotex Holding SE Nyrt	HU	LU			1				Financial services	2009
Guardian Middle East & Africa	DK	LU			1				Financial services	2009
GUS International Holdings SE	NL	UK				1			Unknown	2009
GUS Ireland Holdings SE	NL	UK				1			Unknown	2009
GUS Overseas Holdings SE	NL	UK				1			Unknown	2009
GUS Overseas Investments SE	NL	UK				1			Unknown	2009
GUS US Holdings SE	NL	UK				1			Unknown	2009
International Engineering SE	LU	AT		1					Financial services	2009
Marcel Pourtout SE	NL	FR				1			Financial services	2009
Nyckel 0328 SE	UK	SE			1				Financial services	2009
Philippe Auguste SE	NL	FR				1			Financial services	2009
Powergen LS SE	LU	UK			1				Unknown	2009
Songa Offshore SE	NO	CY	1						Other	2009
Elster Group SE	LU	DE	1						Metal	2010
James Hardie Industries SE	NL	IE	1						Financial services	2010
James Hardie Int. Holdings	NL	IE				1			Financial services	2010
Total	49	49	10	3	21	15	0	3		

[43] The information in this Annex is extracted from the data contained in the database "The European Company (SE) Factsheets" available at http://ecdb.worker-participation.eu/. This database is managed and updated by the Research department of the European Trade Union Institute (ETUI), see http://ecdb.worker-participation.eu/. ETUI is financially supported by the EU.

[44] Non-shelf SEs where the number of employees was unknown are denoted "Employees?" in table 2.

The table above shows the inventory of seat transfers of SEs as at 25 June 2010. It shows that as at 25 June 2010 there had been 49 cases of seat transfer of SEs. This corresponds to around 8% of all SEs (and 10% of all non-shelf SEs) that existed on 25 June 2010.

Whereas the United Kingdom (13) and Cyprus (6) were the most frequently chosen destinations, the largest number of SEs moved away from the Netherlands (17), Luxembourg (9), Germany (7) and the Nordic countries (6). However, several of the seat transfers were related. Almost all SEs that had transferred their registered office were operating SEs. Only in three cases did a shelf SE transfer its registered office. In around 30% of all cases it was not known if the transferring non-shelf SE had any employees. In around 30% of the cases where the number of employees in the SE was known, it was an SE with more than 5 employees ("normal SE"), but there were double as many cases where the SE had no employees ("empty SE").

The activities of 23% of the SEs that had transferred their registered office were unknown. More than 80% the SEs of which activities were known were active in the services sector (55% in the financial services sector alone) and 8% in metal sector. 88% of "empty" SEs were active in the services sector.

There has been an increase in the number of transfers per year. Whereas there was only 1 known transfer in both 2005 and 2006, there were 9 in 2007, 15 in 2008 and 20 in 2009. However, as the information on transfers is only detected with some delay, there might have been more transfers in 2009, and especially in 2010, than presented above.

Annex 3: Methods of formation of the SE[45]

The SE Regulation allows five different methods of formation. These five methods of creating an SE are:

- through a cross-border *merger* between public limited-liability companies, cf. Art. 2(1) of the SE Regulation;
- through two or more companies setting up a *holding SE*, cf. Art. 2(2) SE Regulation;
- through two or more legal bodies setting up a *common subsidiary SE*, cf. Art. 2(3) SE Regulation;
- through *conversion* of a public limited-liability company, cf. Art. 2(4) SE Regulation;
- through an existing SE company setting up an *SE subsidiary*, cf. Art. 3(2) SE Regulation.

The most commonly chosen methods of formation vary significantly depending on whether shelf SEs is excluded in the analysis or not. Therefore the analysis will present figures for all SEs, for shelf SEs[46] and for non-shelf SEs[47], respectively. Differences between the formation methods in different Member States will be showed with examples from some of the Member States where SEs have been set up relatively frequently.

Method of formation (all SEs)

369 SEs were analysed. The method of formation was unknown for 20.

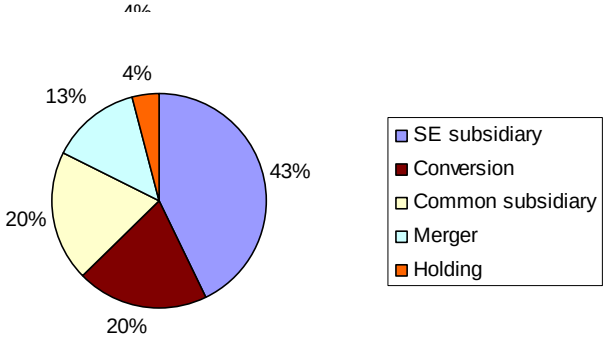

Chart 1: The pie chart shows that the clearly most commonly chosen method of setting up an SE in general is setting up an SE as a subsidiary of an existing SE (43%). Setting up an SE through conversion of a public limited-liability company or as a common subsidiary of two or more legal bodies are the second most popular methods of formation (20%). Setting up an SE through a cross-border merger between public limited-liability companies is less popular (13%) and setting up an SE as a holding SE for two or more companies is very rarely chosen (4%).

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45 The information in this Annex is extracted from the data contained in "Appendix 2.3.: Factsheets on established SEs" of the "Study on the operation and the impacts of the Statute for a European Company" commissioned by the Commission. It is based on the 369 SEs set up as at 15 April 2009.

46 These are SEs with no activities or employees, normally set up by professional company providers with the purpose of selling them to interested buyers.

47 All SEs that are not considered to be "shelf SEs" are referred to as "non-shelf SEs".

However, as will be seen from the following two charts, the trends change completely if we distinguish between the SEs that are believed to have been set up as shelf SEs and those that are believed to have been set up as non-shelf SEs.

Method of formation (shelf SEs)

187 (originally) shelf SEs were analysed[48]. The method of formation was unknown for 7.

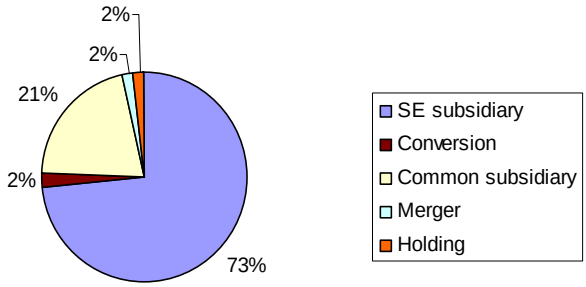
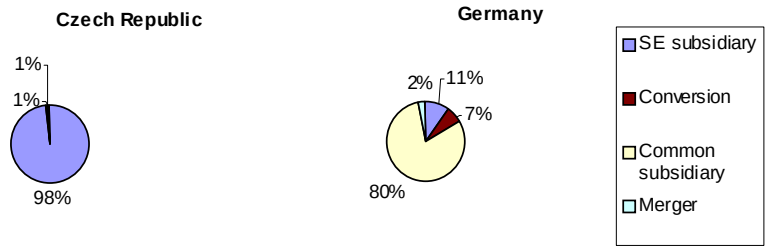


Chart 2: The pie chart above shows the formation method used to set up shelf SEs. It shows that shelf SEs are almost exclusively set up either as subsidiaries of an existing SE (73%) or as common subsidiaries of two or more legal bodies (21%). Given that around half of all SEs analysed seem to have been set up as shelf SEs these two methods of formation (and method of setting up an *SE subsidiary* in particular) are dominant if compared to other formation methods (see Chart 1).

The pie charts below show the SE formation methods used for setting up shelf SEs in the Czech Republic and Germany. It shows that the strong dominance of the method of setting up shelf SEs as *SE subsidiaries* in general can be explained by the fact that this method is commonly used in the Czech Republic for setting up shelf SEs (98%), whereas the prevailing method to set up shelf SEs in Germany is a *common subsidiary SE* (80%).



Out of all analysed SEs that are believed to have been set up as a shelf SE 92 % originated from either the Czech Republic (66 %) or Germany (26 %). In the Czech Republic shelf SEs

48 The contractors of the study categorised 140 out of the 369 SEs analysed as "shelf SEs" at the time of research. Based on the information provided in the fact sheets of Appendix 2.3 of the study it is reasonable to assume that around 47 of the "non-shelf SEs" were originally also set up as "shelf SEs". Such assessment is made, for instance, in cases like Kvido Chech SE where according to the fact sheet it was established as a shelf SE, then sold and subsequently changed its name. Thus, based on the information in Appendix 2.3 of the study the total number of SEs analysed originally set up as shelf SEs is around 187 (or around 50% of all 369 SEs analysed).

account for around 87 % of all SE formations and in Germany shelf SEs account for around half of all SE formations.

Method of formation (non-shelf SEs)

182 (originally) non-shelf SEs were analysed. The method of formation was unknown for 13.

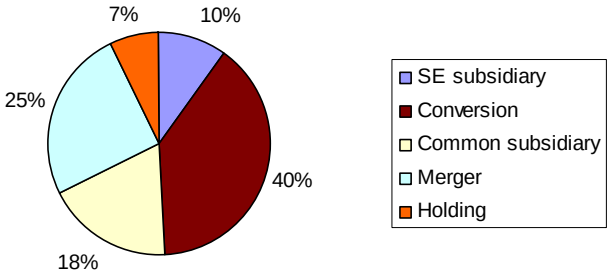
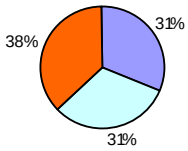


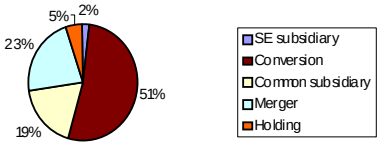
Chart 3: The pie chart above presents the methods of formation used for setting up non-shelf SEs. It shows that the most common methods used in these cases are different from the methods used to set up shelf SEs. The most common method for establishing non-shelf SEs is the *conversion* of a public limited-liability company into an SE (40 %), followed by cross-border *merger* between public limited-liability companies (25%) and setting up a *common subsidiary SE* (18%). Setting up an *SE subsidiary* of an existing SE (10 %) or setting up a *holding SE* (7 %) happens more rarely.

The four charts below show some of the differences between the methods used to set up non-shelf SEs in different Member States. The numbers in the brackets show the number of SEs forming the basis for the analysis.

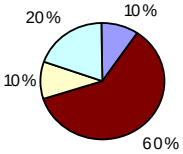
Czech Republic (16)



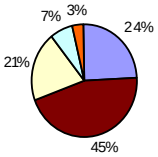
Germany (43)



France (10)



The Netherlands (29)



Annex 4: The board structure of the SE[49]

The table provides information on the board structure chosen by 595 SEs registered in the EU/EEA Member States as at 25 June 2010.

Table 3[50]

MS	Total SEs	Normal MS system	Board system chosen by SEs (total)			Board system chosen by SEs (per SE type)									
			1-tier	2-tier	Un-known	Normal SE		Micro SE		Empty SE		Employees? SE		Shelf SE	
						1-tier	2-tier	1-tier	2-tier	1-tier	2-tier	1-tier	2-tier	1-tier	2-tier
CZ	281	2-tier	2	279	0	0	25	1	25	0	5	1	180	0	44
DE	134	2-tier	57	58	19	25	48	3	0	16	3	4	3	9	4
NL	24	2-tier	14	7	3	2	5	0	0	11	1	1	1	0	0
UK	23	1-tier	5	0	18	2	0	0	0	3	0	0	0	0	0
SK	22	2-tier	5	17	0	1	1	2	3	0	2	2	4	0	7
FR	19	1-2 tier	13	4	2	6	3	0	0	0	1	7	0	0	0
LU	16	1-2 tier	12	2	2	2	1	0	0	5	0	4	1	1	0
AT	14	1-2 tier	9	5	0	5	2	2	0	2	3	0	0	0	0
CY	12	1 tier	6	3	3	5	0	0	0	1	1	0	2	0	0
BE	9	1 tier	8	1	0	3	0	0	0	2	0	3	1	0	0
SE	9	1-tier	9	0	0	2	0	0	0	1	0	3	0	3	0
IE	7	1 tier	4	2	1	0	1	0	1	3	0	1	0	0	0
NO	5	1-2 tier	5	0	0	3	0	0	0	2	0	0	0	0	0
EE	4	2-tier	1	3	0	0	3	0	0	0	0	1	0	0	0
LI	4	1-2 tier	2	0	2	1	0	0	0	0	0	1	0	0	0
HU	3	1-2 tier	2	1	0	1	1	0	0	1	0	0	0	0	0
LV	3	2-tier	1	2	0	0	1	0	0	1	0	0	1	0	0
DK	2	1-2 tier	2	0	0	0	0	0	0	2	0	0	0	0	0
PL	2	2-tier	0	1	1	0	0	0	0	0	1	0	0	0	0
ES	1	1-tier	0	1	0	0	0	0	0	0	1	0	0	0	0
PT	1	1-2 tier	1	0	0	0	0	0	0	0	0	1	0	0	0
BG	0	1-2 tier	0	0	0	0	0	0	0	0	0	0	0	0	0
EL	0	1-2 tier	0	0	0	0	0	0	0	0	0	0	0	0	0
FI	0	1-2 tier	0	0	0	0	0	0	0	0	0	0	0	0	0
ICE	0	1-tier	0	0	0	0	0	0	0	0	0	0	0	0	0
IT	0	1-2 tier	0	0	0	0	0	0	0	0	0	0	0	0	0
LT	0	2-tier	0	0	0	0	0	0	0	0	0	0	0	0	0
MT	0	1-tier	0	0	0	0	0	0	0	0	0	0	0	0	0
RO	0	1-2 tier	0	0	0	0	0	0	0	0	0	0	0	0	0
SI	0	1-2 tier	0	0	0	0	0	0	0	0	0	0	0	0	0
Total	**595**		**158**	**386**	**51**	**58**	**91**	**8**	**29**	**50**	**18**	**29**	**193**	**13**	**55**

Table 3 shows that around 71% of all SEs had a two-tier board structure as at 25 June 2010. This figure should be compared with the finding that around 79% of all SEs were set up in a

[49] The information in this Annex is extracted from the data contained in the database "The European Company (SE) Factsheets" available at http://ecdb.worker-participation.eu/. This database is managed and updated by the Research department of the European Trade Union Institute (ETUI), see http://ecdb.worker-participation.eu/. ETUI is financially supported by the EU.

[50] Non-shelf SEs where the number of employees was unknown are denoted "Employees? SE" in table 3.

Member State that only allows a two-tier board structure for national public limited liability companies. In fact, in all Member States, except for the Netherlands and Spain, a majority of SEs had chosen the board structure known to the national public limited-liability companies of that Member State, either the one-tier or two-tier board structure. However, a one-tier board was chosen more often in Member States with a two-tier board system than the contrary. Especially in Germany, the one-tier system was chosen very often by SEs, even though national German public limited liability companies (AGs) must have a two-tier board structure. Furthermore, in all Member States that allow both the one- and two-tier board system for national public limited-liability companies, a majority of SEs had chosen the one-tier system[51]. In general, there are less SEs registered in Member States that allow both the one and the two-tier board structure for national companies, i.e. these Member States already provide a choice on board structure (flexibility) for national companies comparable to the flexibility provided for SEs through the SE Statute.

The comparison of the data on the choice of board structure and the type of SE shows that around 75% of the SEs without employees ("empty SE") preferred the one-tier system, whereas around 40% of the SEs with 5 or more employees ("normal SE") had chosen the one-tier system. For all the other types of SEs the one-tier board structure was chosen by 20% or less of the SEs.

[51] Until 1 March 2010 Denmark was considered only to allow a 1-tier system. From 1 March 2010 a new companies act made it possible for national companies to choose also a two-tier system.

Annex 5: Subscribed capital of the SE[52]

The table below shows the initial subscribed capital in the SEs set up in the different Member States.

Table 4[53]

MS	SEs analysed	Subscribed capital at time of formation																	un-reported
		120,000				120,001-3 mio.				3 mio.-10 mio.			10 mio.-100			> 100 mio.			
		SE type				SE type				SE type			SE type			SE type			
		Normal	Empty	Employees?	Shelf	Normal	Empty	Employees?	Shelf	Normal	Empty	Employees?	Normal	Empty	Employees?	Normal	Empty	Employees?	
CZ	137	1	5	6	116	2	2	1	3	1	0	0	0	0	0	0	0	0	0
DE	91	5	5	3	43	3	2	1	2	4	0	0	11	1	0	10	1	0	0
NL	21	3	8	0	0	3	4	0	0	1	0	0	0	1	0	0	1	0	2
FR	15	0	1	0	0	1	0	6	0	2	0	0	1	0	0	3	1	0	0
UK	14	0	2	5	4	0	1	0	0	0	1	0	1	0	0	0	0	0	2
AT	13	1	1	0	1	2	1	0	0	0	0	0	2	0	0	2	1	2	1
SK	13	3	3	0	6	0	0	0	1	0	0	0	0	0	0	0	0	0	0
LU	11	0	0	1	1	2	4	1	0	0	0	0	0	1	0	1	0	0	0
BE	8	1	1	1	0	0	0	0	0	3	0	1	0	1	0	0	0	0	2
CY	8	1	0	0	2	0	2	0	0	0	0	0	1	0	1	0	1	0	2
HU	4	0	0	0	0	0	1	0	0	0	0	1	1	1	0	0	0	0	0
LV	4	2	0	0	0	1	0	0	0	1	0	0	0	0	0	0	0	0	0
NO	4	0	0	0	1	0	0	0	1	0	0	0	2	0	0	0	0	0	0
EE	3	0	0	0	0	1	0	0	0	2	0	0	0	0	0	0	0	0	0
LI	2	0	0	2	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1
PL	2	1	0	0	0	1	0	0	0	0	0	0	0	0	0	0	0	0	0
DK	1	0	0	0	0	0	0	0	0	1	0	0	0	0	0	0	0	0	0
ES	1	1	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
IE	1	0	0	0	1	0	0	0	0	0	0	0	0	0	0	0	0	0	0
SE	1	0	0	0	0	0	0	0	1	0	0	0	0	0	0	0	0	0	5
BG	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
EL	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
FI	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
ICE	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
IT	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
LT	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
MT	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
PT	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
RO	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
SI	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Total	354	19	26	18	175	16	17	9	8	15	1	2	19	5	1	16	5	2	15
		238				50				18			25			23			

[52] The information in this Annex is extracted from the data contained in "Appendix 2.3.: Factsheets on established SEs" of the "Study on the operation and the impacts of the Statute for a European Company" commissioned by the Commission. It is based on the information that was available on the 369 SEs contained in the study and set up as at 15 April 2009. Where the data indicated that the SE was originally a shelf SE, this was presumed.

[53] Non-shelf SEs where the number of employees was unknown are denoted "Employees?" in table 4 and table 6.

Table 4 shows that the majority of SEs (67%) had the minimum capital requirement of €120,000 at the time of formation. However, the setting up of shelf SEs accounts for most of these cases. Around 30% of all non-shelf SEs were set up with an initial subscribed capital above €10 mio. Around half of these had a subscribed capital above €100 mio, and also around half of them were German SEs. Most other SEs with a high initial subscribed capital came from Austria or France. The Czech SEs were almost exclusively present in the two smallest size-categories of subscribed capital.

The initial subscribed capital of SEs with 5 or more employees ("normal" SEs) were relatively equally spread across the different size-categories of subscribed capital. However, in all size-categories of initial subscribed above €3 mio these SEs accounted for a large majority of the SEs. SEs with no employees ("empty" SEs) were mostly represented in the two smallest size-categories of subscribed capital, but they also represent around 20% of the SEs in the two biggest size-categories.

Table 5

Sector of activity	Sector of activity compared to the subscribed capital					Total	Capital un-known
	120,000	120,001-3 mio.	3 mio.-10 mio.	10 mio.-100 mio.	> 100 mio.		
Finance/insurance	19	18	6	6	8	57	4
Other services	16	14	6	8	2	46	1
Real estate	12	3	1	2	2	20	0
Manufacturing	4	3	2	7	4	20	2
Wholesale/retail trade	3	5	1	1	2	12	2
Total	54	43	16	24	18	155	9

Table 5 above provides an indication of the different sectors of activity where originally non-shelf SEs operated depending on the size of their initial subscribed capital. The table is based on 183 SEs, but the table only presents the five most common sectors of activity (some SEs were operating in more than one sector of activity).

The table shows that "Finance/insurance" and "Other services" were generally well represented in all size-categories of subscribed capital, however the relative weight of these two sectors of activity decrease the higher subscribed capital. "Manufacturing" was a sector of activity that had more weight in the higher size-categories of subscribed capital.

Table 6

MS	Development in the subscribed capital since the formation of the SE										
	Stagnation					Increase					Un-reported
	Normal SE	Empty SE	Emplo-yees?	Shelf	Sum	Normal SE	Empty SE	Emplo-yees?	Shelf	Sum	
CZ	3	7	7	117	134	1	0		1	2	1
DE	30	9	3	36	78	3	0	1	9	13	
NL	7	9			16		5			5	2
FR	6	1	6		13		1			1	1
SK	2	3		7	12	1				1	
AT	6	2	2	1	11	1				1	1
LU	2	5	1	1	9	1		1		2	
CY	2	3	1	2	8						2
UK	1	3		3	7						9
BE	2	2	1		5	2				2	3
HU	1	2	1		4						
NO	2			2	4						
EE	3				3						
LI			2		2						1
LV	2				2	1				1	1
PL	2				2						
DK	1				1						
ES	1				1						
IE				1	1						
SE											6
Total	**73**	**46**	**24**	**170**	**313**	**10**	**6**	**2**	**10**	**28**	**27**

Table 6 above shows to what extent SEs had remained within their size-category of subscribed capital since their formation. It shows that around 8% of the SEs had moved to a higher size-category and thus increased their subscribed capital. Most of the SEs that had increased their subscribed capital were originally either normal or shelf SEs, and half of them were German.

Only one SE (from Austria) had reduced its subscribed capital.

Annex 6: Employees of the SE[54]

The table below shows the number of employees in the SEs at the time of formation of the SE.

Table 7

MS	SEs analy-sed	Employees at time of formation							
		0			1-9	10-49	50-249	> 250	Un-repor-ted
		SE type			SE type	SE type	SE type	SE type	
		Normal	Empty	Shelf	Normal	Normal	Normal	Normal	
CZ	115		3	108		3		1	22
DE	89	2	12	45	3	1	2	24	2
NL	22	1	14				2	5	1
SK	13	1	3	7		2			
UK	11		5	4		1		1	5
AT	10		3	1	1		1	4	4
CY	10		5	2		1		2	
LU	9	1	5	1				2	2
FR	8		1		2	1	2	2	7
BE	7		3		2	1		1	3
SE	6			4				2	
HU	3		2					1	1
NO	3			2				1	1
PL	2	2							
DK	1		1						
EE	1						1		2
IE	1			1					
LI	1		1						2
LV	1							1	3
BG	0								
EL	0								
ES	0								1
FI	0								
ICE	0								
IT	0								
LT	0								
MT	0								
PT	0								
RO	0								
SI	0								
Total	313	7	58	175	8	10	8	47	56
		240			8	10	8	47	

Table 7 shows that most SEs were set up without employees. However, this is mainly due to the fact that around half of all SEs were originally set up as shelf SEs. Around 34% of all non-

[54] The information in this Annex is extracted from the data contained in "Appendix 2.3.: Factsheets on established SEs" of the "Study on the operation and the impacts of the Statute for a European Company" commissioned by the Commission. Where the data indicated that the SE was originally a shelf SE, this was presumed. In five cases an SE was categorised by E&Y as "UFO" even though there was information that there were 0 employees at the time of formation. In table 7 these five cases have therefore been treated as "Empty" SEs.

shelf SEs were set up with more than 250 employees. Around half of these came from Germany.