MYKOLAS ROMERIS UNIVERSITY

MYKOLAS ROMERIS LAW SCHOOL

INSTITUTE OF PRIVATE LAW

AUŠRINĖ TARASEVIČIŪTĖ

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EUROPEAN COMPANY (*SOCIETAS EUROPAEA*) SUCCESS OR FAILURE?

Master thesis

Supervisor:

Prof. Dr. Virginijus Bitė

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LIST OF ABREVIATIONS

AB – Akcinė bendrovė (Public Limited Liability Company in Lithuania)

EC - Treaty Establishing the European Community

EEC– Treaty of Rome

EEIG– European Economic Interest Grouping

EP – European Parliament

EU – European Union

ETUI - European Trade Union Institute

SCE– European Cooperative Society

SE – European Company, European Company Statute

SME – Small and medium-sized enterprise

SPE – European Private Company

SUP – Single Member Limited Liability Company

TEU – Treaty on European Union

TFEU – Treaty on the Functioning of the European Union

INTRODUCTION

In this globalized world, the movement of goods, services and people is an unceasing process. Because of these processes already established companies also run into the need expand its business abroad. However, these procedures can be not only costly but also time-consuming and complicated. This is mostly led by different national legal regulation in different states. Considering to this problem there was an idea of corporate governance harmonisation at least in European Union (EU) level. After more than 40 years of disputes the European Union Council of Ministers adopted the Regulation to establish a European Company Statute[1] on 8 October 2001 (hereinafter - SE Regulation, SE Statute). This Statute came into force on 8 October 2004. The European company (SE) also known as "*Societas Europaea*" provided companies operating in several EU member states with a tool to facilitate their cross-border activities with no obstacles. However, according database the number of registered European companies in Member States increased very slowly and till now there are just a little bit more than 3000 registered European companies across the European Union[2]. According to the provided data it looks like there might be some doubts about *Societas Europaea* efficiency.

Nowadays there are still debates about *Societas Europaea* efficiency and its future. At one point it is considered that "The SE structure is created to enhance the ease of doing business"[3]. European company provides many benefits for companies conducting their business in more than one Member State, it is also praised for provisions regarding transfer of seat within the EU internal market. Moreover, it also suggests flexible structure of the company and its management system[4]. On the other hand most scholars draw attention that *Societas Europaea* has some disadvantages that have a significant impact to such type of company practical use. These issues are mostly related to lack of common legislation on European level such as taxation harmonization, there are also discussions on workers involvement[5] and hurdles in the merger law[6].

Furthermore, European Company is not the only one European level corporate form. At this moment, two more forms of legal entities that are being governed by Community law already exist: European Cooperative Society (SCE) and European Economic Interest Grouping (EEIG).

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[1] Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE), (2001) OJ L 294.

[2] "European Company (SE) Database. The online SE inventory," ETUI, accessed 2019 March 28, https://www.worker-participation.eu/European-Company-SE/SE-Database-ECDB

[3] Nelly Doudina, "*Societas Europaea* – The European Company," 2015, http://www.istructuring.com/knowledge/article/societas-europaea-the-european-company/

[4] Ibid.

[5] Michaela Winter, "*Societas Europaea* – The new European Company. The one fits all Model, facilitating European Trade?" (dissertation, Metropolia university of applied sciences, 2008), 18-22, https://www.theseus.fi/handle/10024/4236

[6] "*Societas Europaea* - the European Company," Wilmer Cutler Pickering Hale and Dorr, 2004 November 12, https://www.wilmerhale.com/pages/publicationsandnewsdetail.aspx?NewsPubId=86840

Moreover, there were also proposals on European Private Company (SPE) and Single Member Limited Liability Company (SUP). It is obvious that each of these companies can provide benefits and disadvantages, but it also means that they might compete each other. Founder of European corporate form can also choose between SE and national level corporate forms, but it is questioned if *Societas Europaea* with all the provided advantages looks attractive enough to be chosen.

The Master thesis will investigate the most significant features of the SE in relation to company law, such as its mobility, structure, incorporation, employee participation. However, topics in other areas of law will be taken into account as much as it is needed to achieve objectives of this Master thesis, as for example, for European Company taxation new research should be performed.

Scientific novelty and **review of the literature.** European Company has always been actual topic in European corporate law since proposal of such type of the company. Despite the plenty of articles and literature with short analysis of European Company there are just a very few scientific works where the main attention is paid to the deep analysis of European Company. Such a deep research had been done by famous business law expert Noelle Lenoir in the report ("The *Societas Europaea* or SE The new European Company")[7] where the basic understanding about European Company is given, furthermore this scholar also has made research about European Company prospects in some articles[8]. Big attention to *Societas Europaea* was paid by lawyers Dirk Van Gerven and Paul Storm in their joint book ("European Company – *Societas Europaea* (SE)")[9], in their report authors comment on the most essential legal aspects concerning European Company, also the application of SE legislation in each Member State is provided, however, it is mostly connected with European Company legal framework only. Within the European Union scholars European company concept has been also analysed by Holger Fleischer[10], Terence L. Blackburn[11], Sanaa Kadi[12] and others. However, in Lithuanian academic society European Company has been analysed just in the context with others corporate forms[13]. Moreover, the

[7] Noëlle Lenoir, *The Societas Europaea or SE: The new European company* (Paris, France: HEC Europe institute, 2007).
[8] E.g. Noëlle Lenoir, "The *Societas Europaea* (SE) in Europe A promising start and an option with good prospects," *Utrecht Law Review* 4, 1 (2008): 13-21.
[9] Dirk V. Gerven and Paul Storm, *European Company – Societas Europaea (SE), Volume I* (Cambridge, England: Cambridge University Press, 2004) and Dirk V. Gerven and Paul Storm, *European Company – Societas Europaea (SE), Volume II* (Cambridge, England: Cambridge University Press, 2008).
[10] Holger Fleischer, "Supranational corporate forms in the European Union: prolegomena to a theory on supranational forms of association," *Common Market Law Review* 47 (2010): 1671–1717.
[11] Terence L. Blackburn, "The *Societas Europaea*: the Evolving European Corporation Statute," *Fordham Law Review* 61, 4 (1993): 695-772.
[12] Sanaa Kadi, "Advantages and Disadvantages of the SE-Statute," *LSEU 1 (2012): 113-121.*
[13] E.g. Sauliaus Katuoka and Vaida Česnulevičiūtė, "European Private Company: perspectives of legal regulation," *Jurisprudence* 1, 19 (2012): 159-178.

majority of researches regarding SE has been performed during the period from adoption of SE legislation till its review, while recently just a very few publications[14] were released.

According author this research is necessary not only to give better understanding of European Company but also to analyse it in more than one aspect, set its advantages, disadvantages and prospects.

Scientific research problem. Despite the wide debates about European Company efficiency the clear answer about it has never been given. There are lots of doubts considering European Company effectiveness as well as success. These doubts are mainly influenced by insufficient and uncertain regulation of SE. Therefore, the further analysis will be related with these problems also the question if the European Company meets its expectations will be taken into account.

Relevance. In legal literature European Company concept has been mostly analysed just to give to the reader basic view of such form of business subject and those scholars, who tried to dig deeper to set the main benefits and disadvantages of European Company, made their research just in very specific aspects. Moreover, more than 15 years passed since adopting Regulation to establish a European Company Statute but there are still continuing debates regarding perspectives of European Company. These discussions became even more intensive during the period of SE legislation review, lots of doubts about SE efficiency were brought, as the number of calls for changes and improvements were received. Moreover, European Commission presentation of proposal for a Council Regulation on the statute for a European private company on 25 June 2008 also encouraged debates about European Company efficiency, as it was suited for SMEs, but also could be used by larger enterprises. However, almost 11 years passed since presenting this proposal, but it never came into force. However, this fact does not necessarily need to be interpreted as European Company success, as failure of the project was led by many factors.

It is obvious that to ensure efficient business operation and promotion the optimal corporate form which meets founder expectation is needful. With respect to this need it is important to evaluate European Company effectiveness and to determine whether it is successful, needs to be improved or even replaced by corporate forms alternatives.

Significance. There are no doubts that in globalized world especially in European level it is important to ensure effective cross-border business development to raise the economic. Furthermore, complicated legal system of business movement and realization has significant impact to business efficiency, therefore it is important to create optimal form of business subject in European level. This research will provide suggestions of improving European Company

[14] Michala Meiselles and Marta Graute , "The *Societas Europaea* (SE) – Time to Start Over? Capturing the Zeitgeist of the 21st Century," *European Business Law Review* 28, 5 (2017): 667–688.

efficiency also it will reveal findings of possible European Company future view. Depending on the research results it also might promote discussion about establishing new corporate form or amending legislation of European Company.

The **aim** of the research is to evaluate the project of European Company (*Societas Europaea*) whether it is successful or unsuccessful.

The goal will be achieved using these **objectives**:

1. To introduce concept of European Company.
2. To reveal the main characteristics of European Company as a corporate form.
3. To perform comparative analysis of European Company and other European level corporate forms in order to assess its advantages and disadvantages.
4. To evaluate strong and weak points of choosing European Company instead of national level corporate forms.
5. To determine whether European Company meets expectations of such a project or not.

Defending statement. *Societas Europaea* succeeded in a very few Member States - it met expectations of entrepreneurs operating in Member States with less favourable company law provisions.

Methods of the Research. In order to implement the aims of this thesis following methods are used:

1) Method of systematic analysis. Systematic analysis method will apply to analyse relevant materials for the final thesis such as legal acts and literature.
2) The comparative method. This method will be used to compare different types of European and national level corporate forms as well as to compare advantages and disadvantages provided by European Company.
3) Historical method. This method will apply to analyse evolution of European Company, what was initial idea of this project, how it has changed from the date of suggestion to create such type of company till nowadays. Also, historical method will apply revealing what impact has been made by these changes to European Company efficiency.
4) Linguistic method. This method will allow understand and interpret the legal norms of the corporate law provisions.
5) Empirical method. In accordance with legal acts and legal literature final conclusions and recommendations will be summarized.

The Structure of the Master thesis. This research consists of introduction, three main chapters, conclusions and recommendations.

In the first chapter, the concept of *Societas Europaea* is analysed. In order to reveal concept of SE, the chapter is divided in three subchapters, each of them focusing on significant objects as the need of SE, historical and legal grounds of the SE. In order to reveal reasons for SE proposal, existed situation at the time when idea of SE was brought is reviewed. The historical ground of the SE introduces the issues that were outstanding during the negotiations on SE project and how it influenced the changes in SE Statute. Review of legal grounds and applicable law reveals the legal nature of the SE.

Taking into consideration that European Company efficiency and success are affected by its features, the second chapter is dedicated for revealing these features. Main characteristics are analysed to determinate whether they have positive or negative impact on European Company. Also, the comparison with already existing European corporate forms as well as proposed forms for serving small and medium sized enterprises needs are provided. This comparison helps to better understand SE form and to asses strong and weak sides of the SE in the context of other corporate forms.

In the third chapter of Master thesis, the main attention is being paid to the SE expectations and perspectives. In order to investigate if there are any calls for SE legislation improvement, the position of related parties is assessed. Popularity of SE in different Member States is also revealed in this chapter, to analyse and better understand the reasons for SE popularity or unpopularity in Member States, current legal environment for business in few Member States is analysed. Finally, the need of the SE is assessed.

1. THE CONCEPT OF *SOCIETAS EUROPAEA*

1.1 The need of such a corporate form as *Societas Europaea*

Movement to create a European company law has been pursued since early 1960s, however this is not surprising at all while having in mind that European Community has been established in 1957 by signing the Treaty of Rome (EEC)[15]. EEC was signed on 25 of March, the purposes of such a treaty are revealed on its Article 2 "It shall be the aim of the Community, by establishing a Common Market and progressively approximating the economic policies of Member States, to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increased stability, an accelerated raising of the standard of living and closer relations between its Member States." It can be noticed that one of the main purposes was minimum harmonization and internal market creation. Article 3 of the Treaty ensured free movement of persons, services, capital and goods.

With favour of mentioned article the cross-border purchasing and selling of goods or services with unrelated companies became easier, but those companies that were conducting business in several Member States through subsidiaries or branches still faced difficulties.[16] At that time European Community consisted of twelve Member States and each of them had different body of law, which was varying and even conflicting each over as well as at the same time making it very difficult or even impossible to operate or create cross-border enterprises.[17] Multinational enterprises seeking to run their activities through subsidiaries or branches abroad had to comply with national company law of each Member State where company was willing to operate through its branch. Moreover, it was very costly looking not only from financial but also from administrative point of view.[18]

Other issues that international enterprises faced with were merger of two companies based in different Member States as well as transferring seat from one member state to another. Usually merger was impossible without liquidation due to national law regulations. National company laws in most of the Member States did not allow for a company to merge with another one which is established and registered abroad. Moreover, even in such a cases where theoretically it seemed possible from the national company law perspective, different tax regimes in countries caused lots

[15] Treaty establishing the European Economic Community, accessed 2019 January 2, http://data.europa.eu/eli/treaty/teec/sign
[16] Blackburn, *supra note* 11: 702.
[17] *Ibid*
[18] Dominique Carreau and William L. Lee, "Towards a European Company Law," *North western Journal of International Law and Business* 9, 3 (1989): 506, https://scholarlycommons.law.northwestern.edu/njilb/vol9/iss3/25/

of obstacles and made it practically impossible.[19] With the same obstacle companies faced while willing to transfer its registered office to another state, the consequences of such a transferring were losing legal personality of the legal entity or so-called liquidation.[20] Looking from the prospect of law it does not seem that legal situation was promising for efficient business conducting across Member States.

With respect to already mentioned obstacles that companies faced with while carrying out their business internationally, it is not surprising at all that after establishing European Community the most attention was paid to large enterprises. It is more common for large enterprises, instead of small and medium enterprises, to expand their business in more than one country, however conflicting laws in each Member State and lack of supranational set of rules were the main barriers to conduct their business efficiently across European community. Moreover, here we can also see that Treaty of Rome was a beginning of creating single market[21], even if it has not been mentioned in the Treaty, it also gave a great start for European Company law and its harmonization.

1.2 From *Societas Europaea's* idea to its legal form

The idea of trans-national corporate form goes back to the end of nineteenth century. Concept of legal entity submitted to a single set of rules with an international personality was proposed by Italian Fedozzi in 1897, who at that time was a legal scholar. Following the Second Word War some international companies had been created by European States, however such a companies were set up on a case by case basis, taking into account diversity of nature of each enterprise as well as intervention of States.[22] As one of these companies can be mentioned "Eurofima" that was responsible for railway materials financing. This company was established by the signing Bern Convention in 1955, it should be also mentioned that Convention was signed by even fourteen European States. However, these types of corporation vehicles were far away from European Company principles based on status uniformity and safeguard against intervention of the State[23].

The possibility of establishing corporate form governed by single statute and State non-interference had been brought to discussions after establishing European Economic Community,

[19] Dirk V. Gerven and Paul Storm, *European Company – Societas Europaea (SE), Volume I* (Cambridge, England: Cambridge University Press, 2004), 4.
[20] *Ibid*, 5.
[21] Algis Junevičius and Helmut M. Schafer, *Europos Bendrijos bendrosios rinkos teisė* [European single market law] (Kaunas, Lithuania: KTU leidykla Technologija, 2005), 17.
[22] Karol Linmondin, "The European Company (*Societas Europaea*) – A Successful Harmonisation of Corporate Governance in the European Union?" *Bond Law review* 15, 1 (2003): 149-150.
[23] *Ibid.*

therefore it would be fair to say that European Company has almost such a long history as EEC and they are obviously closely related. It has been previously mentioned that establishing EEC gave a start for creating single market as well as European Company law. Shortly after signing the Treaty of Rome the first modern proposal of European corporation statute was brought. In 1959 French professor of comparative law Pieter Sanders during his inaugural lecture in Rotterdam school of Economy ventured an idea of establishing European Company, historically it was the first time of mentioning *Societas Europaea*. The main aim of this type of company was to simplify the process of conducting business in two or more Member States[24], though even more expectations from European Company had been revealed in the article written by Sanders[25]. Sanders was talking about possibility to constitute a company as such recognizable in each member state and which could be subject not to the national but to the uniformed European company law, by applying it directly alongside with Member States national law[26]. The idea seemed attractive enough and 6 years later European Commission, enforced by governance of France, concluded a group of experts led by professor Sanders to prepare a preliminary draft of limited liability corporate form, which could be used across Community without intervene of Member States national law.[27] This project was successfully concluded shortly and after one year since its beginning the formal proposal for a European Corporation Statute for the first time was submitted to the Council of Ministers by the Commission of European community in 1970.[28]

The preliminary draft of *Societas Europaea* by some lawyers[29] was described as quite daring and ambitious because of its' large volume. The Commission's 1970 Draft Statute consisted of 284 articles[30] and tried to regulate every single aspect of European Company starting with its' establishment and ending with its' liquidation. Nevertheless, it was not surprising at all considering the fact that at that time European Community used an old approach[31] for legislation. In the draft statute the great attention was also paid to European Company's capital, audit, government structure and role of the workers. The last two aspects, especially trying to put employees on supervisory board and involve them into making a decision of company caused lots of

[24] Blackburn, *supra note* 11.
[25] Pieter Sanders, "The European Company," *Georgia journal of international and comparative law* 6, 2 (1976): 367-394.
[26] *Ibid*
[27] Vanessa Edwards, *Europos Sąjungos bendrovių teisė* [EC Company Law] (Vilnius, Lithuania: Eugrimas, 2002), 401.
[28] Blackburn, *supra note* 11: 697.
[29] E.g. by Vanessa Edwards (see: Vanessa Edwards, *Europos Sąjungos bendrovių teisė* [EC Company Law] (Vilnius, Lithuania: Eugrimas, 2002), 401).
[30] Sanders, *supra note* 25: 370.
[31] During the period 1970-1985 legal acts of European Community were too much detailed because of aspiration to avoid technical issues (see: Algis Junevičius and Helmut M. Schafer, *Europos Bendrijos bendrosios rinkos teisė* [European single market law] (Kaunas, Lithuania: KTU leidykla Technologija, 2005), 17).

disagreements[32]. Nevertheless, at that moment EEC consisted of only 6 member states[33] and all of them had similar approach that it was important for employee to be enabled in the making significant decisions of the company, it was taken into account as interest defence right. So it might was expected more support than criticism for this proposal, because from the first sight it seemed like European Company was supposed to not only take this principle into account, but even more – to encourage it.[34] However the legal provisions of workers governing participation varied a lot in each member state, so it is not surprise that this provision provoke long disputes. More discussions arose because of the proposed dual board system which would consist of management board and supervisory board. In supervisory board employees played important role, it had to consist of at least one third of workers but no more than half. The supervisory board was supposed to control the Company's management carried out by management board. Moreover, even if it hadn't been involved in Company's direct management, it had a right to advice in any important question related with Company not only by request of management board, but also by its' own initiative without any requests given. These two aspects contributed a lot to the project's revision.[35]

Few years later, in 1972, Economic and Social Committee awarded SE proposal with favourable comments, moreover, the European Parliament (EP) after giving some remarks also tended to approve the project. Considering all given remarks and comments Commission amended proposal and for the second time issued it in 1975.[36] The provisions for a one third parity of the board was the most significant change. In revised draft the board had to consist of one third members appointed by employees, one third shareholders and at least one third jointly elected members by both – employees and shareholders[37]. This proposal was examined for 6 years, in 1976 Council concluded *ad hoc* working party[38] to examine the draft of European Company. However, this work was suspended in 1982. The reason for such a suspension was the need of review of the Commission's proposals that concerned the harmonization of member states applicable law to the companies' parent-subsidiary groups.[39] According to the Commission the work could be continued only after this review, but in reality it seemed that deadlock of the

[32] Blackburn, *supra note* 11: 698.
[33] Federal Republic of Germany, Belgium, Luxembourg, Italy, Netherlands and France.
[34] Sandra Schwimbersky and Michael Gold "*The European Company Statute: a tangled history,"* in the *A decade of experience with the European Company,* Jan Cremers, Michael Stollt and Sigurt Vitols (Brussels, Belgium: ETUI, 2013), 52.
[35] Edwards, *supra note* 27: 401.
[36] Blackburn, *supra note* 11: 699.
[37] "History of the European Company statute (ECS)" ETUI, accessed 2019 March 30, http://www.worker-participation.eu/European-Company-SE/History
[38] *Ad hoc* working party is one of Counsil preparatory bodies. *Ad hoc* working party of the Council can be concluded for a specific aim and cease to exist when the task is fulfilled.
[39] Terence L. Blackburn, "The *Societas Europaea*: the Evolving European Corporation Statute," *Fordham Law Review* 61, 4 (1993): 695-772 and Internal Market and Industrial Cooperation - Statute for the European Company - Internal Market White Paper, point 137. Memorandum from the Commission to Parliament, the Council and the Two Sides of Industry, Brussels 08.07.1988, ((COM/1988) 3/88) 320 final, 3/88.

proposal was resulted by Member States not being able to reach a consensus in substantial areas[40]. It should be also mentioned that in 1982 EU had more Member States[41] than in 1970 when primary preliminary draft of *Societas Europaea* was given, so it is understandable that to make a consensus between Member States became harder and harder.

Work on European Company statute project was suspended for six years, its revival didn't happen until 1988. In 1988, SE project came back on track when Commission announced a memorandum which was following an initiative of completing of internal market[42]. Moreover, this memorandum was also inviting comments on European Company statute project. The following year proposal was submitted to the Council by Commission, it had some significant changes. Taking into account all disagreements on the matter of mandatory two-tier board system the Commission proposed optional one tier system, so it was optional for each member state to choose one-tier or two-tier government system. A lot of work had been done with issue related with workers participation in SE government. Considering the fact that every Member State had different legal regulation of employees' participation in company's management, Commission made a logical decision, it relocated the matter of workers' participation from the core of prior proposed regulation and laid down an optional system in the separate legal document - Commission's Proposal for a Council Directive Complementing the Statute for a European Company.[43] In this case it should be reminded that directive unlike regulation is not applied directly in EU countries, first it has to be transposed into national law of Member States, so another smart step had been taken in favour of intention to reach consensus with workers participation issue.

Furthermore, Directive amended three models of employees' participation on board that could be limited or allowed by Member State in which registered office of European Company had been placed. The participation of SE employees should be determined in accordance with one of the models:[44] 1) no less than one third and no more than half of representatives of the supervisory board or the administrative board had to be appointed by employees or their representatives in that company[45]; 2) workers of the European Company should be represented by

[40] Maria C. Cauchi, "The European Company Statute: The *Societas Europaea* (European Company) as a New Corporate Vehicle," 2001, http://www.cc-advocates.com/pl/publications/articles/european-company-statute-1.htm#_Toc6293449

[41] Denmark, Ireland and United Kingdom joined to EU in 1973, the tenth member state – Greece joined in 1981.

[42] "History of the European Company statute (ECS)," ETUI, accessed 2018 Dcember 2, http://www.worker-participation.eu/European-Company-SE/History

[43] Cauchi, *supra note* 40.

[44] Proposal from the Commission to the Council for a Regulation on the Statute for a European Company. Proposal for a Directive complementing the Statute for a European Company with regard to the involvement of employees in the European Company, Brussels, 25.08.1989. COM (1989) 268 5/89, Article 3.

[45] *Ibid*, Article 4.

a separate body[46]; 3) in case of agreements between workers representatives and management the other model could be set up[47]. One of these three models had to be chosen by the representatives of workers as well as administrative and management boards of the founder companies[48]. Though, in accordance with workers participation model the Directive stated that "Where no agreement can be reached the management and administrative boards shall choose the model applicable to the SE." in that way leaving more freedom to the management organs of the founder company. So technically representatives of the employees were supposed to be involved in concluding agreement of workers participation on board model, but practically it had only the right to agree with choice of the board.

Commission proposal of European Company statute was revised again in 1991. This revision had been made after Economic and Social Committee gave its opinion[49] with request of the Council. Commission's Proposal for a Council Directive Complementing the Statute for a European Company relied on Article 54 of Treaty of Rome[50] (now Article 50 (2g) TFEU)[51], according to this article such an opinion was mandatory for issuing directives related with establishment and functioning of the internal market[52]. In the SE proposal some improvements were made with respect to given opinion not only by Economic and Social Committee, but also by European Parliament[53]. The most significant improvement highlighted by majority lawyers in their books[54] was permitting to establish of an SE in the event of limited liability organization merger with its branch or subsidiary founded in different Member State in which central administration of organization was placed. However, the proposal got stuck again for a couple of years due to the lack of political agreements related with three available models of employees' participation in the SE[55] as well as management structure. Again, these issues seemed unsolvable due to discrepancy across Member States national law, thought even making project provisions more flexible in some cases caused more mistrust instead of agreement. Some countries that did not possess workers participation in corporate management questioned such a provisions while others worried about competition between national level corporate forms and SE. Germany, which had two tier board

[46] *Ibid*, Article 5.
[47] *Ibid*, Article 6.
[48] *Ibid*, Article 3.
[49] Opinion of the Economic and Social Committee on "The proposal for a Council Regulation (EEC) on the statute for a European company," and on "The proposal for a Council Directive complementing the statute for a European company with regard to the involvement of employees in the European company," Brussels (1990) OJ C 124: 34–47.
[50] Blackburn, *supra note* 11: 711.
[51] Schwimbersky and Gold, *supra note* 34: 55.
[52] *Supra note* 15: Article 54.
[53] Blackburn, *supra note* 11: 713
[54] Eg. Terence L. Blackburn, "The Societas Europaea: the Evolving European Corporation Statute," Fordham Law Review 61, 4 (1993), 701 and Vanessa Edwards, Europos Sąjungos bendrovių teisė [EC Company Law] (Vilnius, Lithuania: Eugrimas, 2002), 401.
[55] Edwards, *supra note* 27: 404-405.

system, made a statement that possibility to choose board system might have influence of establishing SEs in Germany with purpose to avoid national law provisions of mandatory two tier systems. Germany proposed to lay down strict provisions in order to prevent establishing SE only with these purposes.[56]With respect to all the changes made in SE proposal and issues that were still outstanding, the European Company statute project became more and more flexible due to highly disagreements. However, on another hand flexibly and leaving the right of choice to the Member States in limiting or allowing management structure, could made the Statute go too far away from its goals while keeping in mind that the idea of SE was closely interconnected with supranational corporate form which could be used across Community without Member States national law intervene.

In 1995, the new period of SE statute formatting begun. This period, starting with 1995 and continuing till 2001, by some authors were called "flexibility and success"[57] stage. The period had been influenced by lots of factors like aspiration of common monetary system and willingness to allow companies use advantages provided by Single market[58], great impact in getting out from European Company statute deadlock was also given by Directive on European Works Councils (EWC) published in 1994.[59] The purpose of mentioned Directive was "[…] to improve the right to information and to consultation of employees in Community-scale undertakings and Community-scale groups of undertakings."[60] The Directive was orientated to large Community-scale group of undertakings with at least 1000 employees and which has at least two groups undertakings in different Member States with no less than 150 employees in each[61]. According to the fact that project of EWC directive just like proposal on SE had been stuck in the middle of disagreements for very long period of time - 25 years,[62] it was a big step taken forward to the making a compromise of SE statute and Workers participation directive. Moreover, the new procedure proposed in EWC Directive had a great importance to outgoing issues on SE employees' participation on management organs. The Directive was based on principle of applying obligatory standard rules in the event of failure on negotiations between the undertaking's management and

[56] *Ibid*.
[57] Sandra Schwimbersky and Michael Gold "*The European Company Statute: a tangled history,"* in the *A decade of experience with the European Company*, Jan Cremers, Michael Stollt and Sigurt Vitols (Brussels, Belgium: ETUI, 2013): 49-66, and Maria C. Cauchi, "The European Company Statute: The *Societas Europaea* (European Company) as a New Corporate Vehicle," 2001, http://www.cc-advocates.com/pl/publications/articles/european-company-statute-1.htm#_Toc6293449
[58] Edwards, *supra note* 27: 405.
[59] Council Directive 94/45/EC of 22 September 1994 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, (1994) OL L 254, https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A31994L0045
[60] *Ibid*, Article 1 (1).
[61] *Ibid.*
[62] *Supra note* 42.

worker representatives from the different Member States in which the undertaking had employees[63]. This Directive not only was a great example that even on the challenging issues, like workers participation on the board, it is possible to reach a compromise, but also it gave a kicking restart for revise of SE statute and directive.

During the following years after agreement was reached on EWC Directive, the European Commission not only published the Communication on workers information and consultation, but also convened a "high-level expert group on workers' participation and involvement"[64] in order to overcome with outstanding issues of the SE project[65]. The group was so-called Davignon group, because it was led by Etienne Davignon who at that time was a former Vice-President of the European Commission as well as a president of the *Société Générale de Belgique*[66]. The results of the group were published in 1997. In the European Systems of Worker Involvement final report[67] group of experts proposed the main stages of negotiation on workers involvement in company's management, parties and conduct of such negotiations. Moreover, the rules applicable in the absence of an agreement were also proposed in the Final report, it was suggested to apply set of reference provisions in the case of not reaching consensus[68]. These rules were supposed to cover not only consultation and information, but also information and the representation of employees in the relevant company bodies.[69] It seems that group proposal in some parts had been influenced by EWC Directive, because some similarities between Davignon group proposal and EWC Directive could be noticed, especially on principle of applying set of fall-back provisions in the event of failure on negotiations.

During the following three years deliberation on European Company statute and Workers participation directive continued. At the time of that period the revised proposal of Directive was produced by The Presidency of the Luxembourg Council. Revision of the Directive was mostly based on the Davignon group final report recommendations on worker involvement.[70] However, the negotiations still proceeded concentrating on the areas of existing public limited company conversion into SE, provision that both offices, the head and registered, must be placed in the same member state[71], the legal grounds of the regulation. Finally, in 2000, the consensus had been

[63] *Ibid.*
[64] "Davignon group", European Observatory of Working Life, 2007, accessed 2019 March 4, https://www.eurofound.europa.eu/observatories/eurwork/industrial-relations-dictionary/davignon-group
[65] Schwimbersky and Gold, *supra note* 34: 54-55.
[66] *Supra note* 64.
[67] Group of Experts report on the European Systems of Worker Involvement with regard to the European Company Statute and the other pending proposals (Davignon report), Brussels 21.05.1997 C4-0455/97, accessed 2019 March 4, http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A4-1997-0354+0+DOC+XML+V0//EN
[68] *Ibid*, Articles 70, 71, and 72.
[69] *Supra note* 64.
[70] Schwimbersky and Gold, *supra note* 34: 55-56.
[71] Cauchi, *supra note* 40.

reached. The European Company statute and Directive on workers' involvement in the European Company were adopted at the EU Council in Nice[72]. 2001 was the year when SE statute after so long proceedings finally saw the light of the day. Two statutory texts – SE regulation and so-called SE directive[73], have been published and adopted by the Council of the European Union on October 8th, 2001. The first one – the Regulation on the Statute for a European company was supposed to be applied directly since October 8th, 2004. Another statutory text - the Statute for a European Company with regard to the involvement of employees in the European Company, had to be transformed to the member states national law till the same day.

More than 40 years passed since mentioning SE for the first time and 31 years after its first draft had been made until SE statute became reality. Lots of improvements and changes had been made during the long proceedings and negotiations, even more from the idea to have one statutory text for the SE it was ended up with two texts. However, it is not surprising, because the company law is as fast facing as the rest of the world. During such a long period a lot of changes happened in Economy, Corporate law, employee legal regulations and other fields, so it is understandable that significant changes was made in the SE project too. Nevertheless, it would be hard to disagree with a statement that at those times in 1960's the introduction of SE had been ambitious and daring project[74].

1.3 Legal grounds of an SE and applicable law

The whole existence of an SE as a supranational corporate form is based on Treaty on the Functioning of the European Union (TFEU) article 352 (ex-article 308 of EC). This article serves as a safeguard of the whole TFEU at the same time giving the competence to the organs of EU to adopt the appropriate measures with regards to achieve the objectives of the Treaty. However, this article could be used as alternative legal ground for EU Company law if the purpose cannot be fulfilled by other relevant articles of the Treaty[75], therefore during long years of negotiations the article 352 has not been the only article of the Treaty which was attempted to be used as a base for SE proposal. Going back to 1970, when the first proposal of the SE has been given, at that time article 235 of EEC Treaty, which is now replaced by TFEU 352, did not confer any right to the Community for creating *Societas Europaea* under its authority, even though to the big amazement of the legal experts, Commission decided to found its actions with regard to creating SE on article

[72] *Supra note* 42.
[73] Karel V. Hulle and Harald Gesell, *European Corporate Law* (Mannheim, Germany: Nomos Verlagsgesellschaft, 2006), *371.*
[74] *Ibid.*
[75] Alexander J. Wulf, *Institutional Competition between Optional Codes in European Contract Law* (Berlin, Germany: Springer Gabler, 2014), 30.

235[76]. Despite the fact that two years later the missing justification was provided relying on Treaty's interpretation with regard to its conceptual aims, the Commission, however, based its revised proposal for the SE statute on the article 100 of EC Treaty (now article 114 of TFEU), once the Single European act has introduced extended Community's authority in mentioned article.[77] This decision caused controversial reactions due to questionable conformity between former regulations creating an optional regime such as European Company and the purpose of the TFEU article 114, which is harmonization of the law. Therefore, no long time after, the legal ground of SE has been switched back to Article 352 of TFEU which is now known as an article serving as the legal base of the European Company Statute.

After 18 years since adopting EC Regulation no. 2157/2001, shortly called SE Regulation, and EC Directive no. 2001/86, these two statutory documents still remain the basic legal acts to which questions in relation to the SE is referred. According French politician and professor of law Noëlle Lenoir next to the SE Regulation and Directive reference should be also made to EC directive no. 2005/19[78], this legal document refers to all stock corporations, but in some specific cases such as establishing the tax neutrality of cross-border transactions in European Community it is applied particularly to the SE[79]. However, in this section the main attention will be paid to SE Regulation and Directive as to the most important legal documents of European Company.

The current SE regulation consist of 7 titles and 70 articles in total, each of them concentrates on specific aspects as European Company such as description, establishing, requirements for this type of company, its structure, formation, liquidation. Comparing to primary Commission's 1970 Draft Statute which included 284 articles, the current regulation is much shorter, during long years of proceedings some parts have been excluded from the Regulation, for example sections related to sanctions, taxes or workers involvement. It seems that in the recent Regulation of the SE legal guidelines to the European Company is being drawn only from corporate law point of view, while leaving other areas to be regulated by their experts. Moreover, in the 9th article of Regulation it is said that SE shall be governed by the Regulation, by the provisions of its statutes where expressly authorized by SE Regulation or " […] in the case of matters not regulated by this Regulation or, where matters are partly regulated by it, of those aspects not covered by it, by: (i) the provisions of laws adopted by Member States in implementation of Community measures relating specifically to SEs; (ii) the provisions of Member

[76] Fleischer, *supra note* 10: 1684.
[77] *Ibid.*
[78] Council Directive 2005/19/EC of 17 February 2005 amending Directive 90/434/EEC 1990 on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States (2001) *OJ L 58.*
[79] Lenoir, *supra note* 8: 13.

States' laws which would apply to a public limited-liability company formed in accordance with the law of the Member State in which the SE has its registered office; (iii) the provisions of its statutes, in the same way as for a public limited-liability company formed in accordance with the law of the Member State in which the SE has its registered office." This article indicates that SE legal regulation is also based on the national Member States legislation, relying on the fact that those fields that are not being governed by the Regulation shall fall under the national law of that Member state within which territory registered office of an SE is established[80].

As already mentioned in a previous section, legal provisions of workers governing participation caused lots of discussions as well as it was hard to reach a consensus regarding these regulations so by the time the matter of employees' participation in SE was relocated to separate legal document and finally came out as SE Directive[81]. This Directive complement Regulation its main aim is revealed in Preface of the Regulation[82]: "Directive 2001/86/EC is designed to ensure that employees have a right of involvement in issues and decisions affecting the life of their SE. Other social and labour legislation questions, in particular the right of employees to information and consultation as regulated in the Member States, are governed by the national provisions applicable, under the same conditions, to public limited-liability companies". Here we can see that Directive does not cover any questions in relation with labour or social law, it only focuses on workers involvement in governing of an SE. It might seem quite short legal document comparing to the Regulation, since Directive consist of only 17 articles, but while having in mind that this Directive is focusing on only one aspect, it is detailed enough.

Even if the existence of the European Company is regulated by two supranational legal documents that are being applied particularly to the SE, it is not enough to know or rely on only these two texts in order to fully understand SE regulations across Member States. In the cases where some fields are not addressed by Regulation, it refers to the Member States national legislation, all in all plenty of such references are given in both Directive and Regulation, therefore it would be fair to say that SE is governed by both national and EU law, and the number of existing SE forms is equal to number of states which are Members of EU.

[80] *Ibid*.
[81] Directive 2001/86/EC of the Council of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees (2001) OJ L 294.
[82] SE Regulation, *supra note* 1: Preface (21).

2. *SOCIETAS EUROPAEA* – OPTIMAL EUROPEAN LEVEL CORPORATE FORM?

2.1. Main characteristics of SE

It is set by Regulation Article 1, that European Company is a legal entity, this also means that SE has a legal personality and is able to acquire rights and liabilities by law. By acquiring these rights and liabilities SE has not only freedom to enforce its rights by suing but also can be sued by other legal or natural persons in order of ensuring compliance with its obligations[83].It should be mentioned that legal personality of SE is being acquired at the day of its registration, however European Company is being registered not in the common register of SE used by all EU Member States, as such a register has not been created, but under the national register designated for national companies that are being set up. National law of Member State where SE have been registered will be applied directly to SE regarding matters not covered directly by EU law.

An SE can be only founded in the form of European public limited-liability company[84], it should be reminded that this type of legal entity has a capital that is open to public and a number of shareholders is unlimited for its capital[85]. This legal form also ensures that shareholders liability shall be no bigger than the amount that was subscribed by them[86] as well as it implies that SE assets and liabilities can be disposed under the name of the SE only. The attention should be also paid to the link "European". SE is directly linked to EU, it supposed to have substantial connection with at least one member state and such a connection can be justified by establishing of SE head office in European member state. The structure of European Company consists of general meeting of shareholders and either an administrative organ or supervisory and management organs[87].

After taking short overview of European Company as a legal person its most discussed and standing out characteristics will be analysed in order to understand better the form of SE as an unique corporate vehicle.

2.1.1. Establishing an SE and its capital requirements

The capital of European Company is divided into shares and is set by article 4 of SE Regulation, in its second part is stated that "The subscribed capital shall not be less than EUR 120000". In the same article it is also mentioned that in the cases where national laws of a Member State are requiring a greater subscribed capital for companies carrying out certain types of

[83] Gerven and Storm, supra note 19: 29.
[84] SE Regulation, *supra note* 1: Article 1.
[85] Gerven and Storm, *supra note* 19: 29.
[86] SE Regulation, *supra note* 1: Article 1.
[87] *Ibid*, Article 38.

business, those requirements shall apply to the SE as well if its registered offices is in that Member State, so it can be said that the minimum capital is 120000, but it can be more, depending on the laws of state where SE has been founded. However, it is still far away from the amount that was set in 1970 proposal for SE Regulation. In the mentioned Proposal two options for the capital were given, depending on the way of SE formation. In the cases where SE is founded through a merger or a holding company the capital of 500.000 European Currency Unit was required, half of this amount – 250.000 was required for those that is formed through by creation of a joint subsidiary[88]. According lawyer Karol Linmondin[89], these changes were in use as a tool while trying to make European Company form more widely available.

SE cannot be established by natural person, only a legal person has a right provided by Regulation[90] to found European Company, what means that this person must be already existing company. So in this case as mentioned before SE must be founded by existing company and can be formatted in several ways, these means are four and they are set by Regulation: formation by merger[91], formation of a European holding company[92], formation of a subsidiary SE[93], and conversion of an existing public limited-liability company into a European Company[94]. Listed ways of formation are inseparable from structural changes of the founding companies, moreover these already existing companies who are willing to form an SE besides restructuring must also have a cross border element. The range of required forms for the companies to act as an establisher of SE varies, just like the cross-border element. However, such a limitation according law scholar Stefan Grundman indicates unwillingness of Member States not only to accept freedom of choice of the founder, but also shows intention to avoid possible alternatives to the companies that are under their national laws.[95] Let's take a deeper look to each of possible ways to form an SE and discuss required types of founding companies depending on selected establishing way. The table below illustrates alternative means for an SE formation and specific requirements that applies to each of them.

[88] Linmondin, *supra note* 22: 161.
[89] *Ibid.*
[90] SE Regulation, *supra note* 1: Article 2.
[91] SE Regulation, *supra note* 1: Section 2.
[92] SE Regulation, *supra note* 1: Section 3.
[93] SE Regulation, *supra note* 1: Section 4.
[94] SE Regulation, *supra note* 1: Section 5.
[95] Stefan Grundman, *Europan Company Law; Organisations, Finance and Capital markets* (Mortsel, Belgium: Intersentia, 2007), 821.

Table 1. Ways to set up an European Company

The way to set up an SE	**What type of companies can participate?**	**What are the requirements of cross-border dimension?**
Cross border merger	✓ *Societas Europaea* ✓ Public limited liability company	At least two of participating companies are established in different Member States
Formation of a holding SE	✓ *Societas Europaea* ✓ Public limited liability company ✓ Private limited liability company	At least two of participating companies are established in different Member States **Or** these companies for at least two years have had branch or subsidiary governed by another Member State national law
Formation of a subsidiary SE	✓ *Societas Europaea* ✓ Companies or firms covered by civil or commercial law ✓ Other legal bodies that falls under public or private law	At least two of participating legal entities are established in different Member States **Or** these legal entities for at least two years have had branch or subsidiary governed by another Member State national law
Conversion	✓ Public limited liability company	Participating company that for at least two years has had subsidiary governed by another Member State national law

Source: Own composition according to SE Regulation and europa.eu website[96]

Cross border merger is one of alternatives for setting up an European Company. Such a merger is not only regulated in great detail by SE Regulation but also by Third directive, which is now transferred into Directive relating to certain aspects of Company Law[97] which includes six directives in total. Even though Third Directive, also known as Cross-board Merger Directive, was intended to make it easier for small and medium-sized enterprises to run its business while merging with other companies governed by different national laws[98], this Directive also applied in cases where SE is formed by merger, while European Company definitely does not fall under mentioned types of enterprises. However, there is nothing that wouldn't allow for SMEs to establish an SE, if it meets all the applicable requirements for a founder, there is also noticed that it is not so unusual for SE to be founded by SMEs since small companies are willing to benefit from the European

[96] "Setting up a European Company", accessed 2019 March 16, https://europa.eu/youreurope/business/running-business/developing-business/setting-up-european-company/index_en.htm
[97] Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law (2017) OJ L 169.
[98] Dirk V. Gerven, *Cross-border merges in Europe, Volume I*, (Cambridge, England: Cambridge University Press 2010) preface.

aura provided by SE, while large enterprises might avoid it due to long and difficult proceedings with respect to employees participation.[99] Nevertheless reference to the Directive is made by Regulation just for those matters that Regulation does not cover by itself or it is covered only partly[100].

The SE can be created by merger when at least two companies based in different countries are involved, moreover these establishers must have form of public limited liability company. The 17th article of Regulation sets two acceptable ways for merging: by acquisition and by the formation of a new company. Merger by acquisition is defined by 89 article of Company law Directive: "[…] merger by acquisition' shall mean the operation whereby one or more companies are wound up without going into liquidation and transfer to another all their assets and liabilities in exchange for the issue to the shareholders of the company or companies being acquired of shares in the acquiring company and a cash payment, if any, not exceeding 10 % of the nominal value of the shares so issued or, where they have no nominal value, of their accounting par value."[101] In this case the acquiring company will obtain SE form after merger, it will also gain all assets and liabilities from transferor company, while the transferor company is to be dissolved without winding up.[102] Another possible way to create SE by merge is merging by the formation of the new company, this procedure is defined by article 90 of the same Directive: "[…] the operation whereby several companies are wound up without going into liquidation and transfer to a company that they set up all their assets and liabilities in exchange for the issue to their shareholders of shares in the new company and a cash payment, if any, not exceeding 10 % of the nominal value of the shares so issued or, where they have no nominal value, of their accounting par value."[103] By the definition we can see that the main difference from acquisition here is that there are no acquiring company, all merging companies are transferors and both assets and liabilities of those companies are being transferred to newly formed SE, with merging companies being dissolved without winding up, just like in acquisition case. Irrespective of the form of the merger at pre-merger phase terms for merging must be drafted by management or administrative organs of each participating company[104] and to be presented to the general meeting for the shareholders' approval[105]. Report of such a draft shall be disclosed publicly, usually in national companies' register of the Member States[106], while draft terms of merger shall be examined by independent

[99] *Ibid.*
[100] SE Regulation, *supra note* 1: Article 18.
[101] Directive relating to certain aspects of Company Law, *supra note* 97: Article 89 (1).
[102] Andreas S. Eicker, "European Company Statute - The German View," *Intertax* 29 (2001): 334.
[103] Directive relating to certain aspects of Company Law, *supra note* 97: Article 90 (1)
[104] Directive relating to certain aspects of Company Law, *supra note* 97: Article 91 and SE Regulation, supra note 1: Article 20.
[105] SE Directive, *supra note* 81: Article 93 and SE Regulation, *supra note* 1: Article 23.
[106] SE Directive, *supra note* 81: Article 92 and SE Regulation, *supra note* 1: Article 21.

experts on behalf of each merging companies[107]. The merger as well as simultaneous establishment of SE take effect at the same date when European Company is registered[108].

Another way for founding of an SE is formation of a holding SE, according article 2 of the Regulation not only public limited companies, as in formation by merger case, but also private limited companies are allowed to be founders while forming an SE by this mean. Moreover, all companies involved in establishing of an SE must be formed under law of Member States of the Community and at least two of them have their registered office in two different EU countries or for at least two years have subsidiary company or a branch that falls under another EU country national law. Other important thing that the companies promoting the formation of SE shall continue to exist after establishing European Company by formatting of a holding SE. Steps of SE formation in this way are very similar to those that apply for the SE formatting by a merger, however it is not regulated by Company Law Directive, so it falls only under SE Regulation where lots of references are made to articles regulating forming SE by a merger. Whole process includes drafting terms of creating of a holding SE, making public report with a minimum content, examining draft by independent experts and finally approving the draft terms by general meeting[109]. Because of forming holding company nature issues regarding conversion of participating companies shares arose, so here it was set by Regulation that draft terms "[…] shall fix the minimum proportion of the shares in each of the companies promoting the operation which the shareholders must contribute to the formation of the holding SE. That proportion shall be shares conferring more than 50 % of the permanent voting rights."[110] Once the SE will be created shareholders in exchange will get shares in a holding SE[111]. Scholar of law Christine Hodt Dickens also notices that creating of a holding SE might be a solution where the final goal is gathering several corporate enterprises under one holding construction. It can be described as a bid made to the shareholders of the target companies, the bid is usually expressed in payment by shares in the holding company. In situations like this holding SE may be just an instrument in gathering several companies under one holding construction[112]. The holding European Company can be registered after showing that previously mentioned all four steps have been fully fulfilled just like formal requirements described by Regulation[113].

Formation of a subsidiary SE is so-called most liberal way to found an European Company, the reason is that this kind of SE creation is open to all companies as well as firms

[107] SE Directive, *supra note* 81: Article 96 and SE Regulation, *supra note* 1: Article 22.
[108] SE Regulation, *supra note* 1: Article 27.
[109] SE Regulation, *supra note* 1: Article 32.
[110] SE Regulation, *supra note* 1: Article 32 (2).
[111] Christine H. Dickens, "Establishment of the SE Company: An Overview over the Provisions Governing the Formation of the European Company," *Business Law Review* 18(2007):1444.
[112] *Ibid*.
[113] SE Regulation, *supra note* 1: Article 33 (5).

within the meaning of the second paragraph of Article 48 of the EC Treaty and other legal persons governed either by private or public law of a EU Member States, that is also founded under national law of Member state and have registered and head office within European Community[114]. However, the requirement for cross border element still remains, at least two companies involved in formation of a subsidiary SE must be subject of law of different EU Member States for no less than two years or one of the founding companies must have subsidiary or branch situated in different Member state, other than the one where its registered or head office is placed.[115] There is no special rules set in Regulation that is applicable to the formation of a Subsidiary SE, according fourth section of Article 36 of the SE Regulation companies, firms and other legal bodies participating in establishing of a subsidiary SE shall be subject to the Member States national law provisions that governs procedural requirements for the founding of a subsidiary in the form of a public limited-liability company. What is more, already existing SE can become a founder of subsidiary SE as well and at the same time whole process might be even easier, when talking about forming requirements, since parent SE ensures European Community dimension and cross-border element.[116]

The fourth mean for establishing SE is a conversion of an already existing public limited-liability company into an European Company, such a transformation shall not result neither the liquidation of the existing company nor the creation of the new legal person[117]. However, it wasn't considered as a one of the SE formation ways until very late due to prevailed scepticism. While economic benefits such as instance synergies did not look as considerable, high risk for using this tool to evade workers participation could be noticed. With respect to this reason several safeguards have been presented, alongside with restrictive rules on formation, public limited company conversion into an SE might not be connected to a cross-border transfer of seat[118]. Furthermore, the specific veto right in only this regard was granted to the organ within which employee involvement is organized[119], to ensure that the rights of individual employee are to be preserved[120]. In addition, regime of workers involvement in the SE managements is more demanding in context of other ways of forming European Company.[121]

An SE can be formatted through conversion alongside with requirements set to participating companies by Regulation Article 2 part 4, as we already know, the company that is to be converted to SE must be public limited liability, what's more this company must be

[114] SE Regulation, *supra note* 1: Article 2 (3).
[115] Eicker, *supra note* 102: 335.
[116] Dickens, *supra note* 111, 1452.
[117] SE Regulation, *supra note* 1: Article 37 (2).
[118] SE Regulation, *supra note* 1: Article 37 (3).
[119] SE Regulation, *supra note* 1: Article 37(8).
[120] SE Regulation, *supra note* 1: Article 37 (9).
[121] Grundman, *supra note* 95: 829.

established under the law of one of the Member states and with registered or head office within the Community, that shall also have subsidiary company governed by the national law of different Member State for at least two years.[122] The whole process in the conversion case does not seem to differ a lot from merger or holding SE formation, since it also consists of following steps: drawing up the draft terms[123], publishing those terms[124] as well as approving it by the general meeting, the only thing to differ here is the examination or in another words what is examined. While for merger and creating holding SE the draft terms are to be examined, during the formation by conversion independent experts are examining the assets ascertain that the participating company has net assets equivalent to its capital or more plus those reserves which must not be distributed either under law or the Statutes[125], so during conversion the main attention is paid to converting company's capital.

Even though freedom of establishment was one of the main cores of the SE proposal, we can see that there are several limitations when having in mind the formation of an SE. First of all, there is requirement for a capital which makes it impossible for legal bodies with a smaller assets to establish an SE, secondly even if the legal persons who are willing to found European Company meet that requirement it does not assure possibility to become a founder. Companies that do not have an European link or cross border element will be excluded, just like those using dependent or independent agents or franchise systems for running their pan-European business[126].

2.1.2. The Transfer of Seat of the SE

While cross-border transfer of seat still remains unresolved topic across European Community and cross-border transfer Directive, also known as 14th Directive of the Company law, got stuck somewhere in the middle of too big differences between Member States national company law rules and its application, an already existing European Company has a privilege to transfer its seat from one state to another.

This privilege is provided by article 8 of the SE Regulation. Such an exclusive right distinguishes European Company from other companies formatted under national law of Member States, where national companies in some cases are not awarded with a right to transfer their head office without liquidation or dissolution. According *Ernst and Young studies*[127] the options for

[122] SE Regulation, *supra note* 1: Article 2(4).
[123] SE Regulation, *supra note* 1: Article 37 (4).
[124] SE Regulation, *supra note* 1: Article 37 (5).
[125] SE Regulation, *supra note* 1: Article 37 (6).
[126] Eicker, *supra note* 102: 336.
[127] *Study on the cross-border transfers of registered offices and cross-border divisions of companies – Final Report* (Belgium, Brussels: Ernst & Young, 2018), JUST/2015/PR/01/0003.

cross-border transfers across EU are very limited. The companies can only choose between costly and time-consuming transfer of registered office relying on national legislation and Court of Justice of the European Union jurisprudence or to wind-up and start their business by afresh establish in the destination Member State. Nevertheless, just a very few countries clearly regulate cross-border transfers[128], while majority of remaining Members States has only authorized transfer of registered office without any, more detailed regulation, however in some countries, like Croatia, Ireland, United Kingdom, Finland, Romania and Lithuania, neither inbound nor outbound transfers are authorized or in other words such transfers are prohibited[129]. Some other countries – Bulgaria, Sweden, Hungary and Poland, permits only inbound[130], while transferring registered office from these countries to another Member State is not allowed. Taking into account development of Court of Justice jurisprudence[131] where several decision have been made regarding free establishing and transfer of company's seat, it is surprising that in some Member States cross-border transfer is still not permitted, it could be only explained by legal uncertainty while applying judgements of Court of Justice. With respect to these options left, it cannot be denied that cross-border mobility is one of the main features provided by European Company, on another hand it promotes competition among national laws of the Member states, however from business perspective it does not look as disadvantage at all.

Transfer of SE registered office shall result transferring of head office as well, since according Regulation, the registered office of an SE must be located in the same Member State within the Community[132]. These two terms might sound very similar, but the differences between them are obvious, the registered office of the company is where company's offices are placed according its statutes, while the head office is the place where main company's administration and management are located[133]. However, article 8 of the Regulation does not apply to transferring head office, it only gives the provisions to transfer of registered office, so it follows that the first one shall be governed by national law. Transfer of registered office consist of further steps: drawing up the proposal of transfer as well as its publication[134], drawing up justificatory report[135], transfer proposal's examination and approval by general meeting[136], attesting transfer's

[128] Spain, Denmark, Czech Republic, Cyprus, Malta.
[129] Earnst and Young Study, supra note 127: 41-42.
[130] *Ibid*.
[131] For example, cases: C-210/06, Cartesio Oktató és Szolgáltató bt, 2008 E.C.R. 723;; C208/00, Überseering BV v Nordic Construction Company Baumanagement GmbH (NCC), 2002 E.C.R. 632; C-378/10, VALE Építési kft., 2012 E.C.R. 440.
[132] SE Regulation, *supra note* 1: Article 7.
[133] Dickens, *supra note* 111:1426.
[134] SE Regulation, *supra note* 1: Article 8 (2).
[135] SE Regulation, *supra note* 1: Article 8 (3).
[136] SE Regulation, *supra note* 1: Article 8 (4).

completion by competent authority[137], registration of new and deletion of old registration[138] and publication of the transfer[139]. The transition period shall take no less than two months before registering a new SE, starting to count from the day when proposal of transfer have been published[140]. What is more, it must be approved by at least two thirds of the votes cast leaving the right to the Member State where SE's registered office is located to require a larger amount of the votes[141]. After transferring seat of an SE, the national law applicable for the company will change, but the identity of the European Company is to be left intact.

It should be reminded that it is only prohibited by SE Regulation to transfer registered office to another member state with simultaneous SE formation in the way of conversion of an already existing public limited-liability company into an European Company[142], with respect to it presumption can be made that SE seat may be transferred while formatting an SE by other means of formation. This alternative might seem attractive enough while having in mind that two separate procedures can be get done at once, however it is also more time-consuming as well as imposes a heavier administrative burden[143]. What is more, there are still continuous disputes regarding possibility of transferring SE seat during the period of its formation. While scholars are more likely to agree that transfer of SE seat simultaneously with formation by merger where an SE is created is possible, the possibility of such a transfer in the other ways of an SE formation is questionable[144] due to nature of each way separately[145].

Despite the fact that huge advantage of cross-border transfer of seat is provided exclusively by European Company, only around 4 percent[146] of already existing more than 3000 SE companies registered across EU, operated a transfer of registered office. Therefore, it can be said that even if this advantage distinguishes SE from national corporate forms, it does not necessarily mean that by establishing an SE founders are willing to benefit mainly from this advantage.

[137] SE Regulation, *supra note* 1: Article 8 (8).
[138] SE Regulation, *supra note* 1: Articles 8 (9) – 8(11).
[139] SE Regulation, *supra note* 1: Article 8 (12).
[140] SE Regulation, *supra note* 1: Article 8 (6).
[141] SE Regulation, *supra note* 1: Article 59.
[142] SE Regulation, *supra note* 1: Article 37 (3).
[143]Gerco C. Van Eck and Erwin R. Roelofs, "SE mobility: taking a short cut? A recomendation for amendment of the SE regulation," *European Company law* 6, 3 (2009): 108.
[144] *Ibid*.
[145] For example, it is discussed that the registered office in the way of merger by acquisition shall be the same as of acquiring company, which follows from the nature of this way of formation.
[146] European Company (SE) data base, accessed 2019 April 8, http://ecdb.workerparticipation.eu/

2.1.3. Employee involvement in the affairs of the SE

As already mentioned in the part 1 of the final thesis, employee involvement in the management of the SE was the controversial issue for a long time, which caused lots of disputes. Finally, innovative compromise has been reached and solution adopted in the Directive 2001/86/EC. The most important fact about the consensus is that employee involvement can be negotiable prior establishing an SE, moreover in the SE Directive the main attention is to be paid to the negotiation process also it reveals possible employee participation models depending on the outcome of negotiation and even on the way by which SE is being formatted.

Negotiations are not possible without special negotiation body. Once the plan of formatting a European Company is disclosed, the workers of all participating legal entities must be provided with an extensive information. Following from this, the workers are requested to set up a special negotiating body, which by the mean is the only authorised body that has a right and is obligated to negotiate on behalf of employees.[147] Negotiation process starts as soon as special negotiation body is formatted and last for a six months[148], however, negotiation period can be extended to one year duration in the cases where it is decided by the joint agreement of the participating parties – management and special negotiation body[149]. The final outcomes following the negotiation process can be three:

- The agreement is reached within the period of negotiations[150];
- Negotiation have not been opened or have been terminated by the decision made by special negotiation body[151];
- Failure to reach a consensus within the settled period of negotiations[152].

Each of these outcomes will result specific rules that will apply for the creation of the representative body of the employees that has certain consultation and information rights[153]. In the cases where consensus has been reached during the period of negotiations employee involvement shall be governed by the rules laid down in this agreement, the requirements for agreement in great detail are provided by the article 4 of an SE Directive. If negotiation have been terminated or have not been opened at all, such a decision of special negotiation body results excluding special employee participation provisions. However, to terminate or not open negotiation the majority

[147] Michael Stollt and Elwin Wolter, *Worker involvement in the European Company (SE) A handbook for practitioners* (Brussels, Belgium: ETUI, 2011), 25.
[148] SE Directive, *supra note* 81: Article 5 (1).
[149] SE Directive, *supra note* 81: Article 5 (2).
[150] SE Directive, *supra note* 81: Article 4.
[151] SE Directive, *supra note* 81: Article 3(6).
[152] SE Directive, *supra note* 81: Article 7 (1(b)).
[153] Jessica Schmidt, "The European Company (SE): Practical Failure or Model for Other Supranational Company Types," *Asian Journal of Law and Economy* 1, 2 (2010): 10.

decision is required, at least two thirds of votes of members representing employees is a must, another important thing is that negotiations termination is not applicable in the cases where an SE is formatted by conversion, if converting company has already existing employee participation system[154]. In the last situation – failure to reach an agreement at a time, the standard rules settled down in the annex of an SE-Directive shall apply, unless it will be decided by the management not to register an SE at all[155]. These provisions and the whole negotiation process might seem complex enough and are usually criticized by business due to its duration, complexity as well as cost[156], it becomes even more complicated when talking about level of the employee involvement in the management of the SE, since it is not only resulted by negotiations but is also attached to the type of the SE formation.

Employee participation level is described by the body of representatives, such a body must represent workers of each Member State. The standard rules of an SE Directive provide for a creation of representative body, this body enables consultation, information[157] and participation rights. In all cases of an SE formation, except for an establishing of an SE by conversion, employee involvement level for the SE that is being formatted depends on whether there was existing any participation rules in the establishing companies[158]. If such rules have not existed at all, there shall be no mandatory requirement for an SE to establish employee participation provisions. If the SE is being formatted through the merger and the existing involvement rules in one or more merging companies cover no less than 25 percent of the total number of workers, the level of employee involvement shall be equal to the highest in force in the founding companies concerned before SE is registered[159]. The same rule applies when founding an SE by the way of setting up a holding company or establishing a subsidiary SE, the only difference is that here the total number of workers, covered by the already existing employee participation rules in one or more participating companies, must be at least 50 percent[160]. If a substantial percentage of employees are not covered by participation rules, for example only 5 percent of employees are covered, then involvement level will depend on negotiation parties' agreement, nevertheless it doesn't eliminate possibility to apply standard rules. The different provisions apply in the matter of transformation, here the main attention is being paid to the rules applicable to the transforming company with regard to

[154] SE Directive, *supra note* 81: Article 3(6).
[155] SE Directive, *supra note* 81: Annex (part 1).
[156] Claire Leca, "Participation of Employees' Representatives in the Governance Structure of the *Societas Europaea*," *European Business Law Review* 18 (2007): 433.
[157] SE Directive, *supra note* 81: Annex (part 2).
[158] SE Directive, *supra note* 81: Annex (part 3).
[159] SE Directive, *supra note* 81: Annex (part 3 (b)).
[160] SE Directive, *supra note* 81: Article 7 (2(c)).

workers participation in the administrative or supervisory body, since the same provisions will be applied to the newly founded SE[161].

Hence, it is noticed that SE directive does not provide special uniformed rules regarding employee involvement that are applicable to every SE, instead it mostly concentrates on preserving already existing participation rights prior the SE is founded. Even so, concerns were raised regarding possible misinterpretations of SE Directive, that it might be used for an employee involvement evasion. Therefore the two main aims of the SE Directive have been set: evasion of Member States national law employee participation prevention and assurance that national regimes of workers involvement are not exported.[162] These two goals are referred to the *before and after* principle, this principle reflects in the preamble part 18 of the SE Directive. Having in mind that SE is not obligated to grant any of employee participation rights, the risk of employee involvement evasion might arise, when for example SE is being established with a purpose to move its registered office from let's say Germany, where employee participation is regulated by national laws and in most cases is mandatory, to United Kingdom, where such a provisions are less likely, in this way avoiding or decreasing employee involvement. Therefore, in addition *before and after* rule applies in this case by drafting the main condition that employee participation in the SE is not mandatory just in cases where none of the participating companies had pre-existing employee involvement.

The employee involvement in the affairs of European Company is more likely to be described as negative feature of the SE due to time consuming, complicated and costly procedure, moreover employee involvement usually does not look attractive by business perspective, as it is more common for companies not to be willing to involve the employees in the management, while national government is usually the one that is concerned by employee rights. However, the SE directive at least provide proper solution while taking into account the diversity of national legislation of Member States with regard to workers participation level and their rights. Above all, in some specific circumstances the employee involvement provisions might be seen as a positive driver while considering the opportunity to set up an SE. In the words of law scholar Jessica Schmidt, this is especially common for German companies which often see the mandatory standards of codetermination regime as too rigid in German law.[163] Therefore for many German enterprises, which due to strict national legislation are obligated to be managed by supervisory boards consisting of large number of board members and from whom even half can be employee representatives, founding an SE becomes a great option, when believing that such a board structure

[161] SE Directive, *supra note* 81: Article7 (2(a)).
[162] Adam Sagan, "Misuse of a European Company According to Article 11 of the Directive 2001/86/EC," *European Business Law Review 21* (2010): 17.
[163] Schmidt, *supra note* 153: 11.

is complicating the effectiveness and efficiency of the German corporate management functioning. Firstly, during the stage of the SE formation one of the questions that needs to be agreed is the structure of management, its model and of course number of the board members, hence by establishing an SE German companies are able to at least reduce number of board members at the same time reducing and number of workers representatives on the supervisory board.[164] Another thing is that employee involvement is negotiable and it provides an opportunity during the negotiation process with special negotiation body to agree on specific employee involvement level that might be far away from pre-existing model[165], even with respect to *before and after* principle. Thus, it would be inaccurate to say that SE directive and regulation of employee participation in SE management is negative driver, it depends from which point of view is being seen.

Taking into account what has been said, we can see that great attention to employee participation in the affairs of an SE has been paid since first proposal of an SE Statute, during the years of negotiations some changes has been done, but today, just like long time ago, involvement of employees still remains one of the main features of the SE. Even though there are still continuous disputes, whether this feature should be seen as disadvantage or advantage of an SE, it is hardly deniable that SE directive at least provides proper solution for employee participation and leaves enough spaces for negotiations.

2.1.4. Corporate government structures

The highest organ of the SE with no doubts is a general meeting, the most important decisions are being made exclusively by this organ. However, when talking about day-to-day management few options are available for governmental structure. With regards to two different corporate government structures existing across EU Members states, SE Regulation also provides two options for board structure: one tier, also known as monistic board structure, and two-tier system or in other words dualistic structure. Monistic system is in line with common law tradition, whilst two tier system comes from continental practice.[166] The main differences between these two systems are that in the case of one tier structure the business of enterprise is being governed by single administrative body, while in two tier system government consist of two bodies – management and supervisory[167], here management organ participates in day-to-day management, but at the same time is being supervised by supervisory organ. When it comes to choosing corporate governmental system for the SE that is under formation, depending on the individual

[164] Schmidt, *supra note* 153: 12.
[165] Leca, *supra note* 156: 423.
[166] Schmidt, *supra note* 153: 6.
[167] SE Regulation, *supra note* 1: Article 38 (b).

needs of the founding entities they have free choice provided by SE Regulation to decide whether an SE will be governed by monistic or dualistic system.

The dualistic system is regulated by title 3 section 1 of the SE Regulation. As already mentioned, the management organ is responsible for managing the business of an SE[168] and at the same time is responsible to the supervisory board. Management organ is supposed to provide any information or issues to the supervisory organ, that are likely to have an appreciable effect on the SE[169], moreover management board is obligated to report supervisory body at least once every three months period regarding the progress and foreseeable development of the business of an SE[170], or in the case if is asked by supervisory body, to provide any kind of information that is needed for supervision, management body must provide it any time when required[171]. The members of management board, as can be expected, are appointed and removed by supervisory body[172]. However, it is up to Member States to require or permit for the statutes of an SE to provide that members of management body shall be appointed or removed by the general meeting decision under the same conditions as given by a national law of Member State to a public limited liability company, which registered office is within that Member state territory[173]. The number of management members shall be laid down in the SE Statutes, though the maximum or minimum number of members may be fixed by the Member State[174].

The members of supervisory board are appointed by the highest body of an SE – general meeting or in the case if it is the first supervisory board, the members may be appointed by the statutes, this provision applies to the employee participation arrangements as well[175]. The number of supervisory board members, just like number of management organ members, is laid down in the statutes and may be restricted by the Member State within which territory the registered office is situated[176]. It is prohibited by the Regulation for a same person to be member of the supervisory and management board at the same time, exception might be made in the event of vacancy in the management board, in this case supervisory body may nominate its member to act as a member of management organ, however during that period the functions of such a person in supervisory board shall be suspended[177]. Hence, in two tier system the collaboration between two organs is continuous, both of them are taking an important role in the managing of SE, however when

[168] SE Regulation, *supra note* 1: Article 39 (1).
[169] SE Regulation, *supra note* 1: Article 41 (2).
[170] SE Regulation, *supra note* 1: Article 41 (1).
[171] SE Regulation, *supra note* 1: Article (3).
[172] SE Regulation, *supra note* 1: Article (2).
[173] *Ibid.*
[174] SE Regulation, *supra note* 1: Article 39 (4).
[175] SE Regulation, *supra note* 1: Article 40 (2).
[176] SE Regulation, *supra note* 1: Article 40 (3).
[177] SE Regulation, *supra note* 1: Article 39 (3).

looking from the powers allocation perspective, it can be noticed that the main power is being held by supervisory board.

In the case of monistic system all management functions belong to the administrative body only. One tier system provides a right and duty for administrative organ to be involved in the SE's day-to-day management under the same conditions as for public limited-liability companies with registered office within the territory of Member State[178]. Again, the number of board members is being laid down in the statutes of the SE and can be restricted by a Member State, also where employee participation is regulated with accordance to the SE Directive, at least three of those members must be employee representatives[179]. The requirements for appointment of members are the same as for supervisory board in two tier system, members are being elected by general meeting, or if it is the first administrative body, members shall be appointed by the SE's statutes[180]. The administrative organ meets every three months or more often, if it said in statutes, to discuss the progress as well as foreseeable development of the business of an SE[181], Another important thing, that each member of this body is obligated to examine submitted information[182]. The monistic system looks more simplified, comparing to dualistic system, here all business management is under supervision of the single organ, and therefore it might become less complex to manage the business when everything is being done by one body, on another hand due to more functions of the organ it might be complicated to allocate functions among its members.

The common rules applicable for both governmental structure systems are laid down in title 3 section 3 of the Regulation, there the maximum length for member appointed to take a place in the board is set – no longer than 6 years[183], moreover, Regulation provides possibility for a legal entity to be a member of one of the SE's organs, though the natural person of the entity shall be designated to exercise its functions in the governmental management body[184]. Questions with regards to persons who are not allowed to be appointed to the SE's organs[185], decision-taking in SE organs[186], liability of the board members[187] and authorisation for transactions[188] are also regulated under the same section of the SE Regulation.

As already known, it is up to general meeting to decide whether an SE is going to be governed by dualistic or monistic system and this right of free choice serves in favour of an SE as

[178] SE Regulation, *supra note* 1: Article 43 (1).
[179] SE Regulation, *supra note* 1: Article 43 (2).
[180] SE Regulation, *supra note* 1: Article 43 (3).
[181] SE Regulation, *supra note* 1: Article 44 (1).
[182] SE Regulation, *supra note* 1: Article 44 (2).
[183] SE Regulation, *supra note* 1: Article 46 (1).
[184] SE Regulation, *supra note* 1: Article 47 (1).
[185] SE Regulation, *supra note* 1: Article 47 (2).
[186] SE Regulation, *supra note* 1: Article 50.
[187] SE Regulation, *supra note* 1: Article 51.
[188] SE Regulation, *supra note* 1: Article 48.

a corporate form. It is important to mention that a great part of the Members States have only one corporate governance system existing in their national laws, and for national companies with registered offices in those Member States there is no other way just follow national legislation provisions. Even so, when it comes to an SE, those Member States are obligated by Regulation to adopt the appropriate measures for one tier or two-tier system in relation to the SEs[189]. According to the statistic[190], majority of the SEs stick to the management system that is common in the Member State where its registered office is situated, however in some countries e.g. German, almost half of the registered European Companies has chosen the management system that is contrary to the one that is existing in the national law of Member State. To sum up, it can be stated that for corporate forms, that are willing to be governed by different governance system, which is currently not available in the Member State, choice of management structure becomes one of the drivers when considering the possibly to establish an SE.

2.2. SE comparison with others European level corporate forms

The SE stands next to the others business entities forms that are being governed by Community law. All of them are part of EU company law harmonisation as well as share the same legal act as a legal ground – TFEU. As we already learned, the SE Statute is based on article 352 of TFEU, the same article also serves as a legal ground for SCE, EEIG and SPE, though proposals for SPE is based on article 50 of TFEU. Moreover, each of them has been proposed with a diversity of purposes, therefore it should not be surprising that those legal entities forms and their leading legal acts differ by its object, aims, terms etc. In general, all of them are unique and able to offer exceptional advantages or disadvantages. In order to find out whether SE can be proud or cannot of being superior in proportion to others corporate forms governed by EU law the comparison of SE with already existing or proposed European level corporate forms will be given. To be more accurate comparison will be done with regards to already discussed SE features.

2.2.1. European Economic Interest Grouping (EEIG)

The European Economic Interest Grouping is the first EU level legal entity form, it was inspired by a French entity introduced in France back in 1967, which was called *groupement d'intérêt économique.* This company is also considered as an intermediate company form in

[189] SE Regulation, *supra note* 1: Articles 43 (4) and 39 (5).
[190] European Company (SE) Database, accessed 2019 March 31, www.worker-participation.eu/

between of association and the s*ociété* – company or partnership.[191] Comparing to SE, the negotiations and consultation before EEIG Regulation[192] came into force last short enough, only three and a half years[193]. However, the Regulation was adopted in 1985 August 3, but became applicable only almost 4 years later, in 1989 1st of July. The EEIG, contrary to SE, primarily focuses on serving for small and medium enterprises' needs, still, it was created as a test case for an SE, as European Community has not been ready for SE yet.[194] In the opinion of scholar Michala Meiselles[195], this is the reason for both supranational EU level corporate forms, Societa Europaea and European Economic Interest Grouping, to be sharing certain similarities, but at the same time being substantively different.

It is hard to find an equivalent entity form for EEIG in national laws of the EU Member States due to its specific enough features. EEIG is similar to partnership because the agreement is being made by two or more legal or natural persons to manage their business and there might be or might not be legal personality[196] of the EEIG, just like in the cases of partnerships. However, at the same time grouping members must to be linked to each other with their economic activities as well as the purpose of the EEIG is facilitating or developing economic activities of its members or increasing the results of those activities, even more the purpose shall not be to make profits to itself[197]. These provisions sound more related to an association, where connection or cooperative link between participating members shall exist. Here we can see the main differences between SE and EEIG, since an SE without deny has legal personality, it can only be established by legal person and is free to choose its purpose, which can also be profit orientated. Contrary to an SE, EEIG Regulation is mainly focusing on small and medium enterprises, EEIG leaves the right for Member States to provide maximum number of 20 registered grouping members in its registry[198] restriction. Having in mind that founders and members of EEIG can be both, legal and natural persons[199], the 20 members does not look such a big number. Moreover, the grouping is not allowed to employ more than 500 workers[200]. These provisions imposing the possibility to restrict the number of groupings registered in one Member state, restriction for total number of employees

[191] Mads T. Andenæs and Frank Wooldridge, European Comparative Company Law (Cambridge, England: Cambridge University Press 2009), 377.
[192] Counsil Regulation (EEC) No 2137/85 of 25 July 1985 on the European Economic Interest Grouping (EEIG), (1985) OJ L 199.
[193] Fleischer, *supra note* 10: 1672.
[194] Michala Meiselles, "The European Economic Interest Grouping – A Chance for Multinationals?" *European Business Law Review* 26, 3 (2015): 393.
[195] *Ibid*.
[196] EEIG Regulation, *supra note* 192: Article 1.
[197] EEIG Regulation, *supra note* 192: Article 3 (1).
[198] EEIG Regulation, *supra note* 192: Article 4(3).
[199] EEIG Regulation, *supra note* 192: Article 4.
[200] EEIG Regulation, *supra note* 192: Article 3(2(c)).

employed by the grouping and absence of requirements for capital, is far away from the SE, where minimum numbers are more likely to be set instead of maximum.

There are no specific requirements for the persons establishing an EEIG, natural person or any type of legal entity are provided with a right to become member of grouping, however at least two participating persons shall have their registered offices or carry principal activities in the different Member states[201]. Just like for an SE, cross border element is essential for establishing EEIG, though in contrast its cross-border element remains mandatory even after EEIG has been founded, in other case, if this requirement is no longer met, EEIG is obligated for winding up[202]. EEIG also categorically rejects the possibility of a person from a third country to become a member[203], whilst an SE is not so categorical and leaves at least possibility for a legal entity with a head office outside community to participate in establishing of an SE[204]. The whole founding process of an EEIG is fairly straightforward affair which does not require time consuming, costly negotiations and most important, parties do not lose their autonomy afterwards. The group is usually established by signing agreement between all members and getting the grouping contract notarized, after this procedure contract must be filled and published in the national registry of Member State within which territory the EEIG has been formatted. Whether or not the registered EEIG will obtain legal personality is being left to the Member State determination[205]. However, independently to this, members of the grouping become fully liable at the moment EEIG is registered, leaving each separate individual liable with no financial limits for the EEIG debts and obligations. Facing this fact, the limited liability of shareholders ensured by an SE Regulations looks more than attractive.

Minimum provisions governing internal structure and managements of an EEIG is given by Regulation, leaving these questions to be decided by grouping members[206]. The grouping shall be managed by one or more legal or natural persons who are members of EEIG.[207] The manager or managers run day to day management of the grouping, represent grouping in respect of dealings with third parties[208] and by their own initiative or members requests provide consultations[209] and information[210] to the members. EEIG Regulation also pays attentions to unanimous decision

[201] EEIG Regulation, *supra note* 192: Article 4 (2).
[202] EEIG Regulation, *supra note* 192: Article 31 (3).
[203] EEIG Regulation, *supra note* 192: Article 4 (1).
[204] Article 2(5) of SE Regulation provides that „A Member State may provide that a company the head office of which is not in the Community may participate in the formation of an SE provided that company is formed under the law of a Member State, has its registered office in that Member State and has a real and continuous link with a Member State's economy".
[205] EEIG Regulation, *supra note* 192: Article 1.
[206] EEIG Regulation, *supra note* 192: Article 16.
[207] EEIG Regulation, *supra note* 192: Article 19.
[208] EEIG Regulation, *supra note* 192: Article 20.
[209] EEIG Regulation, *supra note* 192: Article 17.
[210] EEIG Regulation, *supra note* 192: Article 18.

making that is something similar to general meeting of an SE, here the most important decisions are being made by unanimous voting, where each of the members has one vote, unless it is provided differently by the contract, however no member is allowed to hold a majority of votes[211].

Another feature that should fall under comparison scope is registered office and transfer of seat. EEIG Regulations shows the similar tendency with regards to registered office and administrative office being established under the same national law of a Member State. The article 12 of EEIG Regulations provides that official address of a grouping referred to its contract must be situated within the EU and fixed either where the central administration of the grouping is situated or if one of the members has its central administration provided that the activity of a EEIG is being carried there, the same applies to the principal activity location of a natural person. The official address of EEIG might be transferred as well, within the territory of the same Member State where its seat is situated or to another Member State of the EU community. When transfer of administration within the Community does not result changes of applicable law the whole process is short and simplified enough, which is regulated with accordance of conditions laid down in the contract for the formation of EEIG[212]. In the case where transfer results in a change in the law applicable the procedure is more strictly regulated, the rules for transferring are laid down in the article 14 of EEIG Regulation. The decision to transfer administration of EEIG must be made by unanimous voting, the proposal for transfer must be drawn up, filed and published in the national registry of the Member State. At least two months after publication shall past before decision of transfer may be taken.[213] The transfer takes effect at the moment when new official address is registered at the registry and shall not result liquidation or winding up of a grouping. In sum, it can be agreed that in the context of registered office and its transfer, the SE and EEIG are sharing the same similarities, however SE Regulation does not go into further details whether provided provisions for transfer of seat applies to the transfer resulting changes in the law applicable or not.

When looking into these two supranational corporate forms while trying to compare SE and EEIG between themselves, lots of differences can be noticed. EEIG stands out with its light regulation, leaving lots of questions regarding its internal structure to be decided by the members of grouping, moreover it does not require any compulsory capital or employee involvement, founding, managing EEIG and even transferring of its seat is straightforward, not so costly and time-consuming as for an SE. Though, EEIG might not enjoy its legal personality or freedom to exclude its cross border element after grouping has been established, EEIG is even more dependent

[211] EEIG Regulation, *supra note* 192: Article 17.
[212] EEIG Regulation, *supra note* 192: Article 13.
[213] EEIG Regulation, *supra note* 192: Article 14.

on the national law than SE and it cannot be converted into any form of a company governed by a national law because equivalent form does not exist. The significant weakness of an EEIG is unlimited liability of its members that might be influenced by the absence of capital requirements which leads to securing creditors' rights by unlimited liability of grouping members. Since establishing of an EEIG seems risky due to full liability, members might wish to restrict range of activities of EEIG whilst trying to reduce possible financial risks at the same time reducing economic efficiency of the grouping, or they might also require tighter control over management, which might be a reason for slowing down EEIG activities and reduced ability to compete effectively in the market.[214] However, it is questionable if EEIG can be seen as a competitor from the SE point of view, as these two forms by their nature are serving for a different needs and it is more likely to be uncommon for a founder who is willing to establish supranational corporate form to see both forms as a possible options.

2.2.2. European Cooperative Society (SCE)

The name of European Cooperative Society perfectly describes the object of this supranational corporate legal form which is developing social and economic activities for cooperatives with a cross-border element. Here cooperative means an association or corporation which is being established with an aim to provide non-profit services to the members or shareholders of cooperative. It is agreed by the law scholars[215], that SCE shares the same history with an SE and can even be called a smaller sister of SE. SCE has been inspired by remarks regarding SE back in 1960s, that was given by Pieter Sanders[216] who brought an idea of establishing SE statute. Nevertheless, the first proposal for the Statute of SCE has been tabled by Commission only in 1992, Regulation of an SCE came into force on 18 August 2006. Moreover, the SCE Regulation, just like SE, is complemented by a Directive[217] governing Employee involvement in an SCE. There might arise the question why does EU need another supranational corporate statute that is smaller version of already existing one? It can be answered simply while relying on the preamble of SCE Regulation, where it is said that "The Council has adopted Regulation (EC) No 2157/2001(9) establishing the legal form of the European Company (SE) according to the general principles of the public limited-liability company. This is not an

[214] Meiselles, *supra note* 194: 408.
[215] Holger Fleischer, "Supranational corporate forms in the European Union: prolegomena to a theory on supranational forms of association," *Common Market Law Review* 47 (2010): 1677 and Luiza M. Teodorescu, "Cooperative Societies, European Forms of Organizing the Economic Activities," *Journal of Law and Administrative Sciences*, Special Issue (2015): 41.
[216] Fleischer, *supra note* 10: 1677.
[217] Council Directive 2003/72/EC of 22 July 2003 supplementing the Statute for a European Cooperative Society with regard to the involvement of employees, (2003) OJ L 207.

instrument which is suited to the specific features of cooperatives."[218] Quoted statement gives us an idea that the main difference between SCE and SE is the type of entity for which legislation is suited, to verify or deny it comparison between SCE and SE must be done.

Similar to an SE, the SCE is a limited liability company with a joint-stock and full legal personality. Formation ways of an SCE might seem relevant to the ones applicable for an SE as well, since SCE can be also formed through conversion or merger, though formation of a subsidiary or holding company is not possible in SCE case, instead, other mean of formation that SE statute cannot suggest is provided by SCE. The SCE can be also established directly by individuals, what means that no already existing companies are needed for founding of an SCE. If natural person is one of the founders then at least five persons are required to participate for establishing of an SCE, if only legal persons are involved then two persons are enough for formation[219]. Cross border element is essential for both, establishing an SCE and continuing its existence[220]. At least two founders must be governed by national law of different member states, or if it is a natural person – reside in different Member State. In addition, there is a requirement for a capital of 30 000 euros[221] that must be divided into shares[222]. We already learned from EEIG experience that one of the functions of the capital is to ensure creditors' rights, what also leads to the restrictions on shareholders liability, therefore in SCE case shareholders shall be liable for no more than the amount member has subscribed[223]. Moreover, according article 7 of the SCE Regulation the seat of SCE may be transferred, provisions governing this procedure are very similar to the ones provided by SE Regulation article 8, no significant differences are being noticed.

The SCE shares the same possibility to choose between one tier and two-tier management system that is also provided by an SE. The management structure of the SCE is being governed in accordance with chapter 3 of the SCE Regulation where in great details the functions, responsibilities and duties of management organs are regulated. For both government structures, whether SCE is being governed by only administrative board (one tier system) or management and supervisory board (two tier system), provisions provided by SCE Regulation is very similar to those provided by SE Regulation. Furthermore, decisions making organ in SCE is general meeting as well, though it would be fair to say that rules governing general meeting of an SCE are more detailed. Even more, when having in mind SCE's general meeting and its members' voting rights,

[218] Council Regulation (EC) No 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society (SCE), (2003) OJ L 207.
[219] *Ibid*, Article 2.
[220] *Ibid*, Article 73 (1).
[221] *Ibid*, Article 3.
[222] *Ibid*, Article 4.
[223] *Ibid*, Article 1 (2).

SCE provides contrary rules when comparing to the SE. Whilst in SE voting rights are usually attached to the shares being held by a person, one member of an SCE has one vote regardless of the number of shares that person holds[224], this distribution of votes comes from common principles for cooperatives. Nevertheless, reflecting on the Member States national law practice, which in some cases allows other grounds than one member-one vote for primary cooperatives, SCE voting rights might differ if it falls under that Member State national law where voting structures of the participation in cooperatives are other than provided by the Regulation of an SCE.[225] In the mentioned situations the statutes of SCE might provide the right for a member to have number of votes determined by individual's involvement in the activity of cooperative other than by way of capital contribution[226]. However, person is not permitted to have more than 5 votes or more than 30 percent of voting right in total[227].

Not surprisingly, provisions governing employee involvement in the management of SCE and negotiation process are relevant to those applicable for an SE. After the plan for establishing of an SCE has been drawn up the further steps to start the negotiations shall be taken, with this purpose special negotiating body representative of the employees must be created[228]. Interesting thing, that SCE Directive obligates Member States to ensure gender balance in special negotiation body as far as possible[229], we cannot find something similar in the SE Directive. Negotiations shall last for six months[230], outcomes of it will result rules applicable to employee involvement and there is more, the SCE also provides possibility for renegotiations in the cases where structural changes for an SCE has been made[231]. If no agreement was made, parties agreed so or special negotiation body decided not to open negotiations at all, then standard rules will apply[232]. Again, the participation level also depends on pre-existing employee involvement, so in general everything sounds just like SE Directive provisions adjusted for an SCE.

However, possibility to found an SCE by a natural persons reflect in SCE Directive as well and gives significant difference from what an SE can suggest. SCE Directive provides special rules in the cases where SCE is being established by natural persons only or by a single legal entity and individuals, which in total employ less than 50 employees, or employ 50 or more employees in only one Member State.[233] In this respect, employee involvement in the management of an SCE

[224] *Ibid*, Article 59 (1).
[225]Ian Snaith, "Employee Involvement in the European Cooperative Society: A Range of Stakeholders," *The International Journal of Comparative Labour Law and Industrial Relations* 22 (2006): 223.
[226] SCE Regulation, supra note 218: Article 59 (2).
[227] *Ibid.*
[228] SCE Directive, *supra note* 217: Article 3.
[229] SCE Directive, *supra note* 217: Article 3 (2 (b)).
[230] SCE Directive, *supra note* 217: Article 5.
[231] SCE Directive, *supra note* 217: Article 4 (2 (h)).
[232] SCE Directive, *supra note* 217: Article 7.
[233] SCE Directive, *supra note* 217: Article 8.

shall rely on the provisions of national law, which are applicable to the other entities of the same type in that Member State where registered office of SCE is situated or in subsidiary case, where its subsidiary is located. Nevertheless, the Directive provides two exemptions where its provisions shall be applied *mutatis mutandis* after SCE has been established: if one third of total number of employees across at least two member states request so or in at least two Member states total number of employees reaches or exceeds the number 50. Another important aspect is that SCE Directive provides provisions for the possibility for workers to participate in SCE's general meeting[234] and hold up to 15 percent of the total number of votes[235], it puts an SCE in a different position from its "bigger sister" SE, as we cannot find anything similar in the SE Directive. While relying on the fact that in cooperatives there might be situations where the dominant shareholders part is employees by them self, the advantage and usefulness of employee involvement in the affairs of SCE is questionable, however lawyer Ian Snaith[236] notices, that in all other cases employee involvement in the management is just as important as it is in an investor-controlled enterprise.

In sum, it can be agreed that the main and most significant difference between SE and SCE is the entity form for which their legal documents are suited. However, purposeful differences can be also noticed in relation with a capital requirement, means of formation, voting rules and employee involvement, yet these distinctions seem to be only modifications that was inspired by SE statute but were modified to serve for supranational form of cooperative needs. When comparing these two supranational corporate forms from the point of competition, it is more likely for them to compete each other by the means of legal certainty, integrity or complexity instead of competing between themselves in a single market as potential international legal forms to be chosen by the founders. Even if they would compete, an SE would be an obvious winner, since SCE remains unpopular. The reason for lack of success is definitely not an unpopularity of cooperatives, because it plays an important role in the market not only in EU but all around the world, mostly focusing on employment contribution, a sustainable economy and the well-being of employee at work, moreover, at the same time it employs almost 12 percent of workers across G20 countries.[237] Therefore, lots of other factors might be considered when it comes to unsuccessfulness of SCE, taking into account its capital, which for natural persons might be too big, legal complexity or just common features that applies for cooperatives. During the public consultation regarding Commission's Report on the implementation of the SCE regulation,

[234] SCE Directive, *supra note* 217: Article 9.
[235] SCE Regulation, *supra note* 218: Article 59 (4).
[236] Snaith, *supra note* 225: 228.
[237] Bruno Roelants, Eum Hyungsik and Elisa Terrasi, "Co-operatives and employment: a global report," CIPOPA, 2014, https://www.ica.coop/en/media/library/press-releases/co-operatives-contribute-resilient-employment-sustainable-economy-and

respondents replied that majority of cooperatives tend to be a small local business therefore the need and usefulness of SCE statute is questionable[238].

2.2.3. Steps taken to serve the needs of small and medium-sized enterprises (SMEs)

For a long period of time EU policy makers mainly focused on large and medium enterprises, at least from legislation prospect. The discussions regarding implementing company law environment in favour of SMEs were definitely existing, but it never came to real actions until this century. Of course, the EEIG could be mentioned in this context, as it serves for small and medium enterprises, however this form of supranational business entity is suited to a very specific part of entities that covers just a little number of all existing SMEs. The same applies to the SCE. Such a procrastination might seem irrational, while having in mind that SMEs are the ones that drives force of the EU economy and therefore are playing a significant role. Almost 99 percent of total number of companies across EU are SMEs as well as they are providing 70 percent of jobs in the EU.[239] Despite SMEs importance, the potential for the expansion on SMEs in the Single Market remained unfulfilled until very late.

Finally, with regards to help small and medium sized enterprises to exploit the full potential of the Single Market actions finally have been taken. SMEs and their expansion in the Market became topic in several documents[240] and even was integral part of Lisbon strategy[241], when in the long run Proposal for a Council Regulation on the statute for a European private company has been adopted by European Commission on 25 June 2008. However, not so long after the SPE proposal have failed and idea of another corporate form suited for SMEs was more likely to come. EU policy makers came up with an idea to adopt new entity – SUP. The European Commission adopted a Proposal for a directive on single member private limited liability companies on 9 April 2014, still, the Proposal of SUP Directive did not manage to avoid failure as well.

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[238] Report from the Commission to the European Parliament, the Council, the European Economic and Social Comitee and the Comitee of the Regions on the application of Council Regulation 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society (SCE), Brussels, 22.07.2003, COM/2012/072 final.

[239]"Entrepreneurship and small and medium-sized enterprises (SMEs)," European Commission official website, accessed 2019 April 21, https://ec.europa.eu/growth/smes_en and Commission Staff Working Document accompanying the proposal for a Council regulation on the Statute for a European Private Company (SPE) – Impact assessment, Brussels, 25.6.2008, SEC (2008) 2098 final.

[240] E.g. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. A single market for 21st century Europe, Brussels 20.11.2007, COM(2007) 724 final; "Public consultation," European Commission official website, accessed 2019 April 21, http://ec.europa.eu/internal_market/company/epc/index_en.htm

[241] Communication to the Spring European Council - Working together for growth and jobs - A new start for the Lisbon Strategy - Communication from President Barroso in agreement with Vice-President Verheugen (SEC(2005) 192) (SEC(2005) 193). COM/2005/0024 final.

Before going into deeper investigation of these two legal entities forms that are suited exclusively for SMEs, let me introduce the legal definition of SMEs in order to compare them with an SE. Commission recommendation concerning the definition of micro, small and medium-sized enterprises[242], at the first place, is focusing on the staff headcount and financial ceilings determining enterprise categories of enterprises, however it also gives the common definition for all of them: "The category of micro, small and medium-sized enterprises (SMEs) is made up of enterprises which employ fewer than 250 persons and which have an annual turnover not exceeding EUR 50 million, and/or an annual balance sheet total not exceeding EUR 43 million."[243] In contrast, large enterprises to whom SE is mostly serving shall employ at least 250 employees. Moreover, Recommendation also explains that to fall under SMEs category enterprise needs to be at least engaged in an economic activity, irrespective of its legal form, which includes "[…] self-employed persons and family businesses engaged in craft or other activities, and partnerships or associations regularly engaged in an economic activity"[244].

2.2.3.1. Proposal on the European Private Company (SPE)

Idea of European Private Company, in Latin *Societas Privata Europaea* – SPE, was developed by international group of lawyers in 1996[245]. After proposal of SPE was supported by European Economic and Social Committee, 2006 was the year when the project also received support from the European Parliament. In the explanatory memorandum of the SPE Regulation proposal[246] it was pointed out, that Commission in its communication on the Single Market for 21st century Europe[247] stressed the need for the continuous improvement of the framework conditions for businesses in the Single Market. Due to this improvement the importance of facilitating business activities across EU was emphasized, especially for SMEs, as single legal act providing a tool for SMEs to set-up companies abroad had not yet existed. After initial proposal of SPE Regulation has failed due to disagreements between parties, the several compromise improvements on the proposal has been suggested by Member States Presidencies of the Council

[242] Commission Recommendation 2003/361/EC of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises, (2003) OJ L 124.
[243] *Ibid*, annex (article 2).
[244] *Ibid*, annex (article 1).
[245] Heribert Hirte and Christoph Teichmann, *The European Private Company - Societas Privata Europaea (SPE)* (*Walter de Gruyter GmbH Berlin/Boston* , 2013), 34, accessed 2019 April 8 https://www.degruyter.com/view/product/177511
[246] Proposal for a Council Regulation on the statute for a European private company, Brussels, 25.6.2008 (SEC (2008) 2098) (SEC (2008) 2099), COM (2008) 0396 final - CNS (2008) 0130.
[247] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. A single market for 21st century Europe, Brussels 20.11.2007, COM (2007) 724 final.

of the EU[248], however all of them were rejected again, therefore in this part the main attention will be paid to the initial Commission's proposal on SPE Regulation.

The statistic revealed in the Proposal showed that at that time only 8 percent of total number of SMEs were engaged in cross-border trade, and only 5 percent had subsidiaries or joint ventures abroad. The concern about possibility for SMEs to run their activity beyond national borders was comprehensible whilst looking into KMPG[249] survey results, which indicated that despite the big potential among SMEs to develop their business across EU, SMEs did not fully benefit from the advantages provided by Single market since they faced many barriers hindering their expansion. Moreover, 40 percent of interviewed SMEs representatives said that they had interest in expanding their business abroad and such an expansion was important for their business. With regards to these concerns the aims of SPE Directive was to allow SMEs to set up an SPE following the same, simple and flexible company law provisions across the Member States of EU as well as reducing compliance costs associated with creation and operation of businesses arising from the disparities between Member States national rules during the formation and operation of enterprises.[250]

The SPE Regulation was to be dedicated for a simple form of private limited liability company with a share capital and legal personality. One of the arguments why SE Statute could not be used by most of the SMEs was of course its capital and it could be simply explained by symbolic capital requirement for the SPE in order to facilitate start-ups and to make it more accessible. The minimum capital of SPE was 1 EUR[251] and no shareholder should be liable for more than the amount subscribed. In contrast to the SE, it should be prohibited to the SPE to offer to the public or publicly trade in shares, this restriction was closely related with assurance of flexibility and providing more freedom for SPE shareholder, as public trading in shares usually results the higher degree of control of the legal entity and strict regulations with regards to the internal affairs[252].

Both, legal and natural persons were rewarded with a right to become a founder of SPE, even more, single person was allowed to establish SPE as well. The Proposal of SPE also provided another unique feature - absence of cross-border requirement, only European link was required there, on another hand this absence of requirement raises a question whether the SPE proposal could stand the Subsidiary Test set down in the Article 5 of EC Treaty[253]. Alongside with a fresh

[248] E.g. the French Presidency, Czech Presidency, Swedish Presidency, Hungarian Presidency.
[249] Survey presented at Business Europe's SME Action Day "Thinking big" on 21 November 2007.
[250] SPE Proposal, *supra note* 247: Explanatory memorandum (article 2).
[251] SPE Proposal, *supra note* 247: Explanatory memorandum (article 19).
[252] Saulius Katuoka and Vaida Česnulevičiūtė, "European Private Company: Perspectives of Legal Regulation Jurisprudence," *Jurisprudencija* 19, 1 (2012):161.
[253] Adriaan F.M. Dorresteijn and Odeaya Uziahu–Santcroos, "The Societas Privata Europaea under the Magnifying Glass (Part 1)," *European Company Law* 5, 6 (2008): 278.

creation of SPE, it was also possible to found the SPE by the transformation of an already existing company, merger of existing companies and by the division of an existing company[254], even more, with regards to make SPE more accessible the possibility to establish it by electronic means was also provided. Yet, transformation, merger or division should be governed by national law of the Member State which law was applicable to the transforming, merging or dividing company. Proposal also provided that in case of transformation transforming company should not lose its legal personality or wind up, at least it should not be consequences of transformation. Lots of attention in the SPE proposal was being paid to the formation, especially for the articles of the SPE, which for the big surprise seemed to play even more important role then the statutes of the SE when looking in the hierarchy of the documents governing SPE[255], as Proposal gave a priority for SPE regulation and articles equally, while leaving nation law only as an option in the situations where matters are not covered neither by Regulation nor by articles of the SPE. It sounds unusual, because when comparing small or medium sized and large enterprises, the large ones are more likely to have more detailed statutes, articles or other internal documents and to pay more attention for its creation. On another hand, such a decision to leave national law in the second plan could be also influenced by intention to avoid complex regulation of SPE, as it was suited for SMEs, but at the same time it also made it more difficult to reach a consensus on Proposal.

Contrary to the SE and other already existing European level corporate forms, proposal of SPE did not require for SPE to have its registered office in the same Member State as its head office. It should be reminded that SE Regulation not only requires for the head and registered offices to be situated within the same Member State territory but also leaves home Member State with a right to obligate an SE to locate both its offices in one place. Despite the fact that such a provision of SPE would provide more freedom for the companies it also led to disagreements, as for example in SE case restriction for placing head and registered offices within different Member States territory was mainly provided in order to prevent companies from choosing more favourable national law regimes in other countries and in this way circumventing less advantageous national laws[256]. The SPE, just like others business entities forms governed by Community law, would be also allowed to transfer its registered office within the EU, the procedure of transferring was very relevant to the provisions applicable to the SE.

The separate document complementing SPE Regulations with regards to employee involvement had not been created, but still some attention to workers participation in the affairs of SPE was being paid by the Regulation. Even though just a very few Member States[257] regulate

[254] SPE Proposal, *supra note* 247: Article 5.
[255] SPE Proposal, *supra note* 247: Article 4.
[256] Katuoka and Česnulevičiūtė, *supra note* 253: 167.
[257] E.g. Sweden, Denmark.

employee involvement in the small sized companies, increasing employment and workers mobility as well as quality of jobs, information and consultation of employees is the priority of European social policy[258]. Moreover, inclusion of workers participation provisions in the Regulation can be also explained by the possibility for medium sized companies to become a founder of the SPE as well[259]. The rules provided by SPE statute substantially corresponded to the ones settled down in SE Directive, yet, aiming to make SPE Regulation easy understandable and accessible for its addressee, those rules were shorter and simpler. However, contrary to the SE, it also included situations where representatives of employees were not appointed. The article 34 of the Proposal was quite straightforward with its statement that the SPE should be subject to the rules on employee participation, if such rules were applicable in the Member State within which territory registered office of SPE was placed, this means that SPE would be obligated with workers participation only in the cases where it was regulated so by the national law of the home country. This provision was criticized due to giving an opportunity for those companies operating in Member States with strict employee involvement regulations to avoid such obligatory rules while using SPE as a tool[260], therefore detailed rules regarding employee involvement in the case of seat transfer of the SPE were included in the Proposal. Moreover, SPE Regulation determined that SPE should be the subject of national law of hosting Member State in relation with employees participation if less than one third of the total number of employees were working in home country, including its subsidiaries and branches, in other case host country was obligated to confer on the employees of establishments of the SPE that were situated in other Member States the same entitlement to exercise the same participation rights as they enjoyed before the transfer and the legislation of the host Member State had to provide for at least the same level of employees participation.[261] It might seem that these provisions implemented the best balance between the interests of workers and shareholders, though it was criticized. The major concerns in relation to lack of adequate provisions regarding workers involvement protection have arisen, quickly becoming one of the main issues resulted failure of the SPE proposal[262]. Therefore, even if from entrepreneurs' prospect SPE provisions regarding employee involvement would look more advantageous, the question is if it is even possible for such provisions to see the light of day. In

[258] Mariya Pandova, "The European Private Company Statute," *Mémoire de recherche, Université de Strasbourg Strasbourg* (2010): 53, accessed 2019 April 9, http://www.europeanprivatecompany.eu/working_papers/download/SPE-Pandova.pdf
[259] Katuoka and Česnulevičiūtė, *supra note* 253: 171.
[260] Adriaan F.M. Dorresteijn and Odeaya Uziahu-Santcroos, "The Societas Privata Europaea under the Magnifying Glass (Part 2)," *European Company Law* 6, 4 (2009): 157.
[261] SPE Proposal, *supra note* 247: Article: 38
[262] „R.I.P. SPE – Welcome to the SUP!" *ETUI*, accessed 2019 April 18, https://www.worker-participation.eu/Company-Law-and-CG/Company-Law/European-Private-Company-SPE/R.I.P.-SPE-Welcome-to-the-SUP

sum, SE is usually criticized due to strict and complex provisions regarding employee involvement, but at least the legislation of SE has been adopted. Taking into account how many years it took to reach a consensus on workers involvement in the affairs of SE and how sensitive issue it was, it is a bit surprising that for SPE proposal not enough adequate rules are provided.

The SPE was supposed to be managed by management body, even more, SPE Regulation allowed for the shareholders to decide on the structure of the management. It could be managed by a single director or managing directors as well as by dualistic or monistic management structure. Any natural person or persons who were designated in the articles of association of the SPE as being responsible for the management of the SPE were management body[263]. With no doubts, this could be a huge advantage provided by SPE, since it was more flexible and provided more freedom to the founders.

To sum up, SPE could suggest several advantages to the small and medium sized enterprises, as well as to become a strong competitor of the SE, as it is suited for SMEs but could be also used by large enterprises as well as fit their needs. On another hand, not providing "cap" on maximum size of companies and leaving SPE available for large enterprises, shortly became an issue as SPE could be used by large enterprises with purpose to circumvent less advantageous national law legislation[264]. Moreover, proposal of SPE was also being criticised due to leaving aside questions related with stage of dealing with conflicts and protecting shareholders and third parties[265], while mainly focusing on the initial stage of setting up a SPE. What is more, failure of SPE project proves that even if this type of company could successfully serve for the needs of the SMEs and become that type of company which is attractive enough for entrepreneurs, this does not necessary mean that Member States found it attractive as well, since they were the ones rejecting this project due to several reasons in relation with their national company law. Another problem being seen, that this proposal just like all other proposals on Regulations requires unanimous agreement of the Member States in order to be adopted, however at the time when SE, SCE and EEIG has been adopted there was only 15 Member States. Even more, it can be only considered how significantly the plans for new Members to join the Community influenced SE adoption, as it was probably realized that after joining 10 more Members the chances for prestigious SE project to fail were really high. Hence, it is more likely that number of 27 Member States at the time when proposal of SPE Regulation has been adopted did not provide big hopes neither.

[263] SPE Proposal, *supra note* 247: Article: 1 (d).
[264] *Supra note* 263.
[265] Harm-Jan De Kluiver, "(Re) Considering the SPE," *European Company Law* 5 (2008): 112.

2.2.3.2. Proposal on the Single Member Limited Liability Company (SUP)

After preliminary failure of the Societas Privata Europaea, SMEs were still in need of uniform rules facilitating their cross-border activities. Due to this reason the European Commission presented proposal for a Directive on single-member private limited liability companies (*Societas Unius Personae*) in 2014, which was amended after the review in 2015. The proposal of SUP Directive used the similar approach as of SPE, however following the failure of SPE, the proposal of SUP was based on TFEU article 50, as to adopt documents based on this article only qualified majority of votes is required[266] . The overall aims of SUP were revealed in its proposal, it was explained that improving the business environment for all companies, especially for SMEs, is one of the main priorities of the EU's ten-year growth strategy as well as several calls from business community have been received regarding the creation of a truly European form of a private limited liability company, since SPE project has failed. As the main obstacles for SMEs to operate their business abroad were named legal, administrative or language barriers, as well as lack of trust in foreign companies amongst customers and business partners. Therefore, the proposal intended to offer for SMEs a tool facilitating their cross-border activities, which would be simple, flexible and uniformed in all Member States across EU. The object of the SUP Directive was very similar to the one provided by SPE, as its objective in general was making it easier for any potential company establisher to set-up companies abroad, particularly for the SMEs.[267] Moreover, unlike other proposals as SE, EEIG, SCE, the proposal of SUP did not aim to introduce another form of legal entity, in contrast it aimed to provide possibility for the EU Member States to make accessible in their national legislation a national company law form for single-member private limited liability companies with a several harmonised main requirements and provisions as well as common name,[268] it also reflected to the name of SUP, where European link was missing.

Contrary to the SPE, SUP proposal was paying its most attention to the limited harmonisation of those areas of Member States national law, which in the opinion of Commission, was essential to reduce the burden in relation with setting up a company[269]. This also reflected in

[266] Stefanie Jung, "Societas Unius Personae (SUP) – The New Corporate Element in Company Groups," *European Business Law Review* 26, 5 (2015): 646.
[267] Proposal for a Directive of the European Parliament and of the Council on single-member private limited liability companies, Brussels, 14.9.2016, COM (2014) 0212 final - 2014/0120 (COD).
[268] Hana Horak, "Societas Unius Personae - Possibility for Enhancing Cross Border Business of Small and Medium Sized Enterprises," in the *31 Economic and Social Development, International Scientific Conference on Economic and Social Development: The Legal Challenges of Modern World,* Marijan Cingula, Douglas Rhein, Mustapha Machrafi (Split, Croatia: Faculty of Law in Split University, 2018): 181.
[269] Virginijus Bitė and Gintarė Gumuliauskienė, "The Proposal for a Directive on Single-Member Private Limited Liability Company (SUP) from the Lithuanian Perspective," in the *Private companies in Europe: the Societas Unius Personae (SUP) and the recent developments in the EU Member States*, Jorge Viera Gonzalez, Christoph Teichmann (editors), (Madrid, Spain: Thomson Reuters Aranzandi, 2016), 123.

the proposal, as it was divided in two parts with each of them introducing separate level of legislation. Part 1 of the compromise text of the SUP proposal applied for all single-member private limited liability companies listed in the Annex 1 of the proposal, as well as to the companies referred by the Part 2, while Part 2 exclusively applied to the SUP only. Even more, it was provided by the Part 1 that in the situation where Member State allowed other companies than the ones listed in Annex I to be formatted as or become single-member companies the Directive should also apply to them.[270] We cannot find something similar in the SE Directive either. It should be reminded that in EU level there is already existing rules for the single-member companies – the Directive on single-member private limited liability companies[271], which provides for limited harmonisation on the national laws of Member States obligating them that companies may have a single shareholder as well as single-member, and at the same time Directive also regulates the powers of the single-member in relation to a company, but it does not cover other areas such as formation and registration of the company, its capital requirements, protections of the creditors, also it does not help to minimize the costs of founding abroad for the companies.[272]

Any natural or legal person was able to found a SUP *ex nihilo*, this also applied to the single-member limited liability company, no cross-border element was required. Still, in contrast to SPE, as well as to the SE, founding ways were limited by establishing an entirely new company or converting already existing private limited liability company. Only companies listed in the Annex 1 were provided with a right to convert into SUP. Similarly to other types of EU level companies, conversion should not result winding-up of the converting company, any loss or interruption of the legal personality[273], after the conversion company should preserve SUP legal personality. The process of formation was supposed to be governed by both, the Directive and national law, on another hand the requirements for conversion procedure were referred to national law of Member States. The capital of a SUP remained symbolic as well, as it had to be 1 EUR. The capital had to be equal to a single share, which could not be divided or be self-owned by the SUP. Again, member should not be liable for more than subscribed amount, however, to protect creditors' rights additional measures was being used - balance sheet test and a solvency statement.

The initial proposal of SUP suggested innovate way for the registration of the company – it could be completed electronically only.[274] Despite the fact that the main reason for this initiative was reducing of the cost and administrative burdens for the formation of the companies

[270] SUP Proposal, *supra note* 268: Article 1 (3).
[271] Directive 2009/102/EC of the European Parliament and of the Council of 16 September 2009 in the area of company law on single-member private limited liability companies, (2009) OJ L 258.
[272] European Commission, MEMO: Frequently Asked Questions: Proposal for a Directive on single-member private limited liability, Brussels, 9 April 2014, accessed 2019 April 19, http://europa.eu/rapid/press-release_MEMO-14-274_en.htm
[273] SUP Proposal, *supra note* 268: Article 9.
[274] SUP Proposal, *supra note* 268: Article 14.

as well as promoting their cross-border establishing[275], it still raised many disputes, mostly in regards of compliance with money laundering and terrorist financing prevention and lack of guarantees related with online registration. Therefore, the text of 2014 proposal was amended and in 2015 supplemented with additional provisions regarding these issues.

The proposal on SUP unlike others European level corporate types did not regulate transfer of its seat, leaving this issue to be regulated by Member States national law. However, it followed the same approach as for SPE regarding location of the seat, since article 10 of proposal provided that SUP should have its registered office and either its central administration or its principal place of business within the Union. It is not surprising, that this suggestion was criticized by Member States as well due to the similar reasons as proposal of SPE. Member States argued that this proposal gave an opportunity for single shareholder to evade national law on employee involvement. As the SUP did not provide any regulations in relations to workers participation it should fall under the Member State national law within which territory registered office of SUP was located, whilst employees might were working in another Member State.[276] This was extremely sensitive topic for the countries with co-determination rules, therefore Germany was of course the one that criticized this provision the most, while other countries felt less effected.

The proposed Directive on SUP left the right for the companies referred to Annex 1 decide by them own on the internal structure of the company, however when it came about SUP form the rules regulating management applied. Day-to-day business of SUP had to be managed by managing body which should consist from at least one director, while all important decisions had to be made by single member[277], who performed similar functions as general meeting in the SE case. The director of SUP could be appointed and removed in any time by single member. Even if all powers not exercised by single member should be performed by the management body, single member still had a right to give instructions to the management body. This right might sound controversial due to conflict of duties of the director and given instructions by a single member. To avoid such a conflicting situations proposal provided additional rules stating that the instructions given by the single shareholder shall not be binding for any director insofar in the case of articles of association violation or the applicable national law of Member States[278]. It can be discussed whether it solved the problem, as this kind of rules that were seeking to prevent from violation of articles of the company or law are common in general, but at least it is a nice try.

[275] Bitė and Gumuliauskienė, *supra note* 270: 129.
[276] Christoph Teichmann and Andrea Gotz, "How to make molehill out of the mountain: the single-member company (SUP) proposal after negotiations in the counsil," in the *Private companies in Europe: the Societas Unius Personae (SUP) and the recent developments in the EU Member States*, Jorge Viera Gonzalez, Christoph Teichmann (editors), (Madrid, Spain: Thomson Reuters Aranzandi, 2016), 35.
[277] SUP Proposal, *supra note* 268: Article 22.
[278] SUP Proposal, *supra note* 268: Article 23 (2).

Finally, the SUP was something very similar to the SPE, which used the similar approach and focused on the closely related objectives and goals at the same time providing some improvements that followed from the failure of SPE, therefore there is no need to go into further detailed comparison between SUP and SE. The SUP suggested to the entrepreneurs an attractive company form with advantages as limited liability of shareholder, symbolic capital, simple process of formation, on-line registration and internal structure. On another hand the need of SUP was questionable because of many references that are being made to Member States national law, thus some authors[279] were stressing out that proposal raised a possibility to have 28 different types of companies across EU with the same SUP name, which could create some elements of uncertainty for an investors.

2.3. Advantages and disadvantages of the SE

After introducing the main features and provisions of the SE, the main advantages and disadvantages of the SE might be finally revealed.

Transfer of seat of the SE, which is being governed by a single set of rules and at the same time allows to the SE freely change the legal regime by moving its seat, might be named as one of the main advantages. Even though legal acts of others already existing supranational company forms also regulate transfer of seat of the company, SE is the one that provides this possibly to the public limited liability companies. Of course, theoretically national limited liability companies supposed to be rewarded with a right to move their seat across EU, since free establishing and movement is a core of the Union. However, as discussed before, in most of the Member States this possibility is more likely to remain theoretical only, rather than being used in practice, therefore transfer of seat for a national public limited liability companies usually becomes costly and time-consuming burden. According to statistic, 149 of already existing 3185 SE companies[280] have successfully transferred their seat from one Member State to another, without being forced to wind-up or to create a new legal person. It is also noticed, that most of the transfers in the recent years have been made out of United Kingdom, since 2016 nearly 40 seats of SEs were moved out from United Kingdom, taking into account issues related to Brexit, it is not surprising at all.

The founder of SE can enjoy the right to freely choose the management structure of the SE, it enables a company to be structured accordingly with its needs. Establishing entities are allowed to choose either one-tier, with one administrative body, or two-tier, with management and

[279] Rolandino Guidotti, "Societas Unius Personae from the Italian Perspective," in the *Private companies in Europe: the Societas Unius Personae (SUP) and the recent developments in the EU Member States*, Jorge Viera Gonzalez, Christoph Teichmann (editors), (Madrid, Spain: Thomson Reuters Aranzandi, 2016), 89.
[280] European Company (SE) Database, accessed 2019 April 19, www.worker-participation.eu/

supervisory boards, management structure. It becomes a significant benefit to the companies being governed by national law of Member State which offers only one management structure for the public limited liability companies, in this case a founder willing to change internal structure of the company can easily benefit from this advantage of an SE.

When taking a look into employees' involvement in the affairs of an SE it is mostly associating with negative aspects, but, on another hand, it can be used as an advantage as well. It was previously discussed that thanks to the freedom of choice in relation to management structure and number of board members, founders with pre-existing employees participation, who are also willing to avoid workers participation or least to reduce the number of workers representatives on the supervisory board, can at some point benefit from the SE. Even if *before and after* principle ensures that there is no way to eliminate pre-existing employees' participation, founders at least are able to reduce the number of board members at the same time reducing and number of workers representatives on the supervisory board.

Another advantage of the SE is a wide range of ways for the formation of European Company that are also providing the secure legal grounds for companies situated in the Member States to undertake cross-border restructurings[281]. The SE Directive introduce four different means for SE formation making it more accessible to the companies that are willing to establish an SE.

The name of SE is widely recognizable, and it can also be a stimulus for the establishing European Company. The name of European Company provides by itself an image of a multinational culture company and demonstrates that the enterprise is European at heart[282]. Moreover, SE has better chances to attract investors not only inside but also outside its home country when comparing to national companies, because the name of SE is less likely to indicate company as a coming from abroad.

One more advantage to mention is limited liability of the shareholders, however it mostly applies not to the national forms of limited liability companies that are already enjoying limited liability of the shareholders, but more to other types of companies governed by EU law. The Directive of SE, differently from EEIG – the first supranational corporate form, ensures that no shareholder shall be liable for more than the amount subscribed.

Another advantage being offered by the SE is underlying the prospect to the companies of streaming their respective infrastructures.[283] All business operations of the SE can be grouped under the umbrella organisation[284] in this way reducing their operational cost with a benefit

[281] Dr Dirk Jannott, "*Societas Europaea* ",*CMS Hasche Sigle* (2016): 5, https://cms.law/en/DEU/Publication/Societas-Europaea
[282] Michala Meiselles and Marta Graute, "The *Societas Europaea* (SE) – Time to Start Over? Capturing the Zeitgeist of the 21st Century," *European Business Law Review* 28, 5 (2017): 676.
[283] *Ibid*, 679.
[284] *Ibid.*

provided by European business. Since, European Company as well as its subsidiaries and branches, in the cases where not covered by EU level legal acts, is being governed by home Member State national law, it reduces administrative cost and eliminates network complexity.

As significant negative aspect of the SE can be named its capital requirement. It should be reminded that at the time when negotiations regarding adopting SE proceeded, there was less Member States in the Union and majority of them at that time and now were known as a countries with a strong economy, therefore it was mainly focusing on the current situation in business environment and affordable capital for large enterprises in those Members States. However, shortly after more Members have joined to the EU, and not all of them could be proud of such a great economic situation or at least in most of them capital requirements for the national public limited liability companies were more accessible. Hence, it can be underlined that for some companies, especially for other types than large enterprises, the requirement of 120 000 EUR capital might be too big and restrict accessibly of the SE.

Another issue is long and complex formation process, which becomes ever more time-consuming and requires financial flows due to negotiations regarding employee participation, that can last 6 months or more and there will be no guarantees for the agreement. It is obvious that for average entrepreneur all the regulations in relation of SE might be hardly understandable, it should not be such a big difficulty for a companies with a armies of lawyers, advisors and experts, however just a very small part of enterprises have it and are able to afford it. Majority of the companies see it as negative driver, since none of them are willing to face large incorporation costs and legal complexity.

Unlike others supranational corporate forms as well as national public limited liability companies, SE cannot be created *ex nihilo* by a natural person. Four ways of SE formation are limited to the structural changes of establishing companies and it leaves no possibility for an as SE to be established as a completely new company. Moreover, cross border element is also essential for founding of an SE. On another hand, it can be explained by initial idea of SE Regulation which is facilitating cross-border activities of the companies, but still it makes the SE less accessible than other types of companies.

Finally, SE does not seem to meet expectations of a truly European Company governed by a single set of rules, as it refers a lot to Member State national law within which territory SE is being established. Therefore, I would like to stress out that sixty five references out of 70 articles of the SE Regulation is made to Member States national law as well as Regulation contains thirty-two options providing Member State with a right to choose out of them[285], it makes an SE half-

[285] Kadi, *supra note* 12: 117.

national and half-European level corporate form at the same time creating legal uncertainty for the investors. The Regulation of SE also leaves behind the issues in relation to taxes regulation and it could be called as a disadvantage of an SE as well, as it is widely known that one of the drivers for the companies is favourable taxes regimes, while an SE cannot suggest to the companies none of the ways for escaping from the national tax regimes and being governed by single set of rules.

All in one, an SE can provide several advantages to its founders, though, there are plenty negative drivers as well. While comparing an SE with already existing European level corporate forms, it can be said that the SE has become the most successful one, at least when looking at the numbers of already existing companies an SE is definitely a leader. On another hand the number of persons who are willing to incorporate specific type of company also depends on the number of addressees in general and it would be interesting to see how situation changes in case of SPE or SUP adoption, as majority of companies operating across EU are SMEs. It can be also noticed that at some parts an SE is sharing similar disadvantages with other types of European level corporate forms as for example all of them are being criticized due to legal uncertainty resulted by many references being made to national law of Member States. This also proves inability to create not only so-called form of legal entity governed by an EU law or by a single set of rules but form which is truly governed by Community law only with no exceptions.

3. *SOCIETAS EUROPAEA* EXPECTATIONS AND PERSPECTIVES

Almost 15 years of experience with an SE is enough for evaluating its perspectives and expectations. Several reports, consultations and researches had been done during the first decade after SE Regulation and Directive adoption.

The SE legislation includes provisions regarding obligatory review, article 69 of SE Regulation requires 5 years at the latest of entering into force to be reviewed by the Commission, while SE Directive is stricter and provides the deadline for the review which was no later than 8 October 2007[286]. The report from the Commission to the European Parliament and the Council regarding application of the Statute for European Company[287] was introduced in 2010, as despite the fact that SE legislation came into force on 8 October 2004, it was transported by all Member States into national law by mid-2007[288]. The review process for the Directive started earlier, however, due to the same reason as for Regulation review, the deadline was partially held off as majority of Member States as well as European social partners and European Commission concluded with a lack of practical experience of Directive application[289]. Finally, in 2008 the attention of the European Commission was paid to the SE Directive in the Communication of the Commission[290], where some issues regarding employee participation had been raised[291]. Shortly after introduction of the Communication, the Commission also commissioned the Ernst &Young to launch the Study on the operation and the impacts of the Statute for a European Company that was published in 2009. The results of the studies influenced European Commission for bringing public consultation that was held in March 2010 as well as during the next year Social Partners were consulted as well[292]. One year later ETUI (European Trade Union Institute) also summarized

[286] SE Directive, supra note 81: Article 15.
[287] Report from the Commission to the European Parliament and the Council - The application of Council Regulation 2157/2001 of 8 October 2001 on the Statute for a European Company (SE), Brussels, 17.11.2010, COM (2010) 0676 final.
[288] Jan Cremers, *Questions related to the review of the SE Directive – Basic considerations for the Social Partners' consultation. SE Europe summary report* (Brussels, Belgium: ETUI, 2011), 6.
[289] Jan Cremers, "The EU assessment of the SE corporate form," in the *A decade of experience with the European Company*, Jan Cremers, Michael Stollt and Sigurt Vitols (Brussels, Belgium: ETUI, 2013): 230.
[290] Communication from the Commission on the review of Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees, Brussels, 30.9.2008, COM(2008) 0591 final, accessed 2019 April 24, https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52008DC0591
[291] The issues raised were: Employee participation at group level; Changes occurring within the SE after its creation; Employees' participation rights when an SE converts to a public limited company; The complexity of the procedure for the involvement of employees.
[292] First phase consultation of Social Partners under Article 154 TFEU on the possible review of Directive 2001/86/EC supplementing the Statute for a European company with regard to the involvement of employees, Brussels, 5.7.2011 C(2011) 4707 final, accessed 2019 April 23, http://ec.europa.eu/transparency/regdoc/?fuseaction=list&coteId=3&year=2017&number=2611&language=EN

the collected national input through the SE Europe network[293] and provided a review of problematic areas.

However, it seems that during the last years the interest of the European Company has decreased at least from law scholars and EU level institutes perspective. It can be explained by the Commission Action plan 2012[294] where it is stated that despite the majority[295] of respondents being supportive of revising EU legal forms in general it was decided not to reopen revision at least in the short term. It was explained that expected benefits of reviewing SE legislation in terms of simplification and improvement, would not outweigh the potential challenges involved in reopening the discussions, instead Commission will launch an information campaign where the main focus area is going to be improving the awareness of companies and their legal advisers about the SE.

Hence, the recent situation does not sound promising at least from prospect of SE Regulation and Directive improvement. So, what are the perspectives of the SE, will it "survive" without further implementation or maybe, it is essential for the future of SE. In order to answer these questions, the opinion of related parties will be introduced as well as the current situation in relation with SE in some Member States will be revealed.

3.1. Position of EU institutions and related parties

When looking into position of EU institutions and related pasties it seems that at most parts they agree on the benefits provided by SE as well as on its negative drivers that could be called Achilles heel of the SE. However, as we have already learned it is hard for these parties to find a compromise for improving the weak points of an SE.

While one companies are calling for an improvement, others are praising an SE for its advantages. In the report of German stock corporation *Fresenius aktiengesellschaft* conversion into SE as the main reasons for the conversion were named the importance of international, particularly the European, business beyond the Germany, enabling the company to present itself as a European at the same time more strongly emphasizing the business activities orientating beyond Germany's borders and avoiding enlargement of the supervisory board which would be

[293] Cremers, *supra note* 289.
[294] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Action Plan: European company law and corporate governance - a modern legal framework for more engaged shareholders and sustainable companies, Brussels 12.12.2012, COM (2012) 0740 final, accessed 2019 April 21, https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52012DC0740
[295] 307 out of 496 respondents were in favor of revising EU legal forms in general.

affected by increased number of employees[296]. As a motive after merger to acquire SE form, the ERGO Life Insurance SE explained that "The status of European Company means the possibility to restructure the business using a single European Mark. Such a step manage the business more effectively, reduce internal costs, optimize capital, increase competitiveness in the market, motivate employees, enhance their competence and offer more attractive products to clients."[297] The listed motives for SE formation reveals the position of establishing companies in relation of SE, these companies see an SE as attractive corporate form with European flag, that also helps to conduct cross-border activities and avoid unfavourable national law. Thierry Breton, the CEO of Atos SE and chairman of Alliance for *Societas Europaea* promotion[298], would also agree with this positions, saying that "The European Company statute offers a real opportunity for businesses to position themselves within a European perspective and identity, while giving them more agility in the European area […]"[299], however in contrast he also highlights the need for improving the SE statute and making it more attractive while focusing on a relaxation of the conditions of SE formation in order for SE to reach its full potential[300].

The similar issues in relation to SE formations were also mentioned by Joelle Simon, the Chairperson of Legal Affairs Committee in Business Europe, during the conference on the Statute for the European Company. During her speech, Joelle also expressed critical view of complicated different means of setting up an SE, in the words of Joelle the methods of formation "[…] are so complicated and inconsistent. If the drafters have planned to put obstacles on the creation of SE, they have succeeded."[301] She also added that "Such high requirements go against the essence of the SE which is to provide a platform for companies enabling them to better conduct their business on a Community scale under a common label and a flexible corporate structure."[302] The speech of Joelle Simon was given in 2010, while Thierry Breton was calling for improvement of SE legislation in 2018, there is 8 years gap between the remarks in relation to the same issues were given, this proves that no efforts had been put by European institutions to at least make some improvements in relation of complex incorporation of the SE.

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[296] "Conversion report of the Management board of Fresenius aktiengesellschaft for the conversion of Fresenius aktiengesellschaft, Bad Homburg v.d.H., Germany, into a European Company *(Societas Europaea, SE)* as Fresenius SE, Bad Homburg v.d.H., Germany," Fresenius, 2006, https://www.fresenius.com/media/SE_Umwandlungsbericht_e.pdf

[297] European Company (SE) Database, accessed, 2019 April 25, http://ecdb.worker-participation.eu/show_factsheets_details.php?se_id=474&title=Established SEs

[298] Alliance for *Societas Europaea* promotion has been brought with regards to bring together companies that are willing to adopt an SE statute or have already adopted it.

[299] "European businesses call on the European Commission to increase the attractiveness of the statute of European company," *Alliance for Societas Europaea promotion*, Press release, 2018, accessed 2019 April 25, https://asep-european-companies.com/publications/

[300] *Ibid*.

[301] Joelle Simon speech, "Conference on the Statute for a European Company (SE)," *Charlemagne Building Brussels*, 26 May 2010.

[302] *Ibid*.

The similar approach of others business representatives was revealed in the Commission's report regarding SE Statute application[303], there set-up costs, time-consuming and complex procedures, were listed as the main disadvantages of the SE. Though, as the most significant negative driver of the SE was named a legal uncertainty alongside with the lack of hindsight and practical experience of the advisors and competent public authorities. Taking into account the fact that report was published in 2010, the situation regarding last issue in relation of lack of experience might has changed, since during the last decade the number of existing SEs has grown as well as more attention was paid for increasing awareness of the SE Statute, since it was a part of European Commission action plan 2012. However, the situation regarding complex and costly procedures of incorporation has not changed, as no implementations regarding SE Regulation have been done. The provisions regarding employees participation also received a criticism, as in the view of several companies, legal advisors and business associations the rules of workers participation are complex and time-consuming, especially in Member States without employee involvement provisions in their national legislation[304], though, two years earlier in the Communication from the Commission regarding review of SE Directive in contract, it was said that "The vast majority of Member States and the European Social Partners consider that, for the time being, the Directive does not require amendment or clarification.", so it seems that business representatives who are facing with an SE issues in reality while conducting their business cannot agree on this point with others institutions that are mostly caring about legislation issues only.

Finally, in the opinion of Commission the original objectives of the European Company Statute have been achieved to some extent, but whole situation in relation to SE could still be improved[305]. European Commission praises the SE Statute for making it easier for companies to transfer the seat of the SE from one Member State to another, also providing a possibility to better reorganise and restructure as well as to choose between two board structures, at the same time protecting the interests of employees, minority shareholders and creditors. However, despite all mentioned benefits Commission also admits that the application of the SE Statute poses a several problems in practice, highlighting big number of references to the Member States national law[306].

To sum up, it might be stated that European institutions and related parties mostly agree on the positive and negative drivers of an SE, but still, the discussions regarding efficiency of the SE statute were on peak during the SE legislation review period and after that period has passed, nothing have been heard from EU institutions side with regards to the improvement of the SE Statute. The Commission's action plan 2012 did not give any hopes neither, while providing that

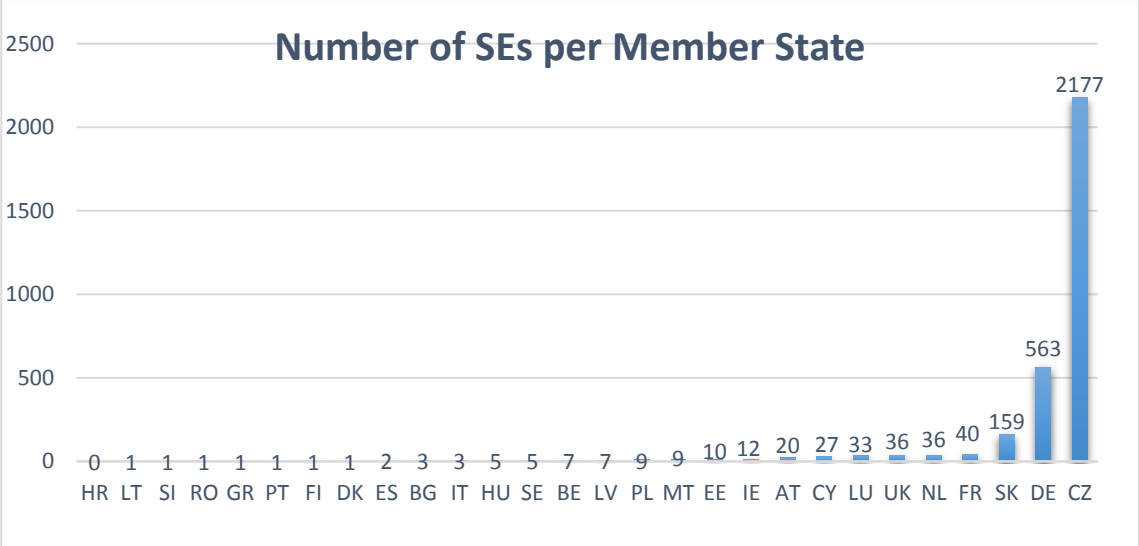
[303] Report from the Commission, *supra note* 288.
[304] *Ibid.*
[305] *Ibid.*
[306] *Ibid.*

at least in short period the review of SE legislation is not in the plans. Instead of focusing on the improvement of the Statute and disregarding business call for need of such an improvement, Commission was only able to suggest the improving awareness of an SE, whilst leaving aside issues as legal uncertainty, several numbers of references being made to national laws, time-consuming, costly and complex incorporation process, complicated and inconsistent methods of formation and burden of employees participation. At the moment situation remains the same making the future of the SE Statute uncertain.

3.2. Evaluation of SE popularity in different EU members

The number of European Companies per Member States varies from zero to more than two thousand at the same time raising a question in relation of reasons determining such a significant difference of the SE popularity. There might be several reasons, but it is more likely that they are related with a national law of home Member State as well as business environment in general. The chart below indicates popularity of SE in different Member States, revealing the number of existing SEs in each Member State.

Table 2. Number of SEs per Member State (30.04.2019)



Source: Own composition according to European Company (SE) Database[307]

[307] Available at http://ecdb.worker-participation.eu

The chart indicates that Czech Republic is definitely taking a leader's position with 2177 registered SEs out from 3180 existing SEs across the whole EU. Germany and Slovakia also stand out with a popularity of an SE. In these 3 countries together, more than 90 percent of SEs are registered, while remaining 25 EU Members are only sharing almost 10 percent of existing SEs. In order to reveal the possible reasons for great popularity or unpopularity of the SE in Member States as well as learn possible ways of SE improvement, the existing situation in a few Member States will be revealed, mainly focusing on national law, especially on the requirements applicable to national public limited liability companies. With respect to the data provided by chart above, the Czech Republic and Lithuania will fall under review scope, as Czech Republic has the biggest number of SEs and Lithuania at the moment has only one registered SE.

3.2.1. SE popularity puzzle in Czech Republic

After SE legislation coming into force the beginning in Czech Republic was slow, as there was none of registered SE until 2007. However, starting with 2007 the number of SEs within Czech Republic territory increased dramatically and soon it became a leader in the market for the SEs incorporation. It is also noticed that the majority of SEs within the Czech Republic territory are rather empty SEs[308] or "UFO"[309] (Unidentified Flying Objects)[310] companies, since only 114 from 2167 SEs were recognized as having more than 5 employees. The situation in Czech Republic shortly turned into highly discussed topic, as it became a puzzle for the scholars, since at the first look to the Czech business environment there was some signs to notice that might have an influence on SE popularity, but at the same time it was not so significant to result such a success of SE in Czech Republic. Moreover, it also imposes that most of the Czech SEs and SEs in general are micro enterprises, at least when looking from a perspective of workers employed, since they do not have employees or employ less than five. This issue also ruins the image of SE as a corporate form suited to meet larger enterprises expectations.

When comparing formation process of SE with a national form of public limited company, also called joint-stock company (in Czech *akciová společnost*), SE does not show any significant benefits for it to become superior form. The Commercial Code of Czech Republic

[308] The SE without any employees or with up to five employees.
[309] "UFO SEs" – SEs with insufficient information for categorization, it also includes shelf SEs.
[310] Due to insufficient information available for categorization this category of SEs soon has been referred as an "UFO" (Unidentified Flying Objects). In the *Benchmarking Working Europe 2011* (Brussels, Belgium: ETUI, 2011), 96 it is explained that "[…] due to the apparent lack of information in the absence of a European registry, many SEs have to be referred to as 'UFO SEs'('Unidentified Flying Objects'), there being insufficient information (e.g. on the number of employees) available for their classification." Accessed 2019 May 12 https://www.etui.org/Publications2/Books/Benchmarking-Working-Europe-2011

provides with the rules applicable to joint-stock company[311], while *evropská společnost* (European Company) is being governed by SE Regulation, Czech SE Act and Commercial Code. The provisions of Commercial Code impose that the incorporation cost for national type of public limited liability company might be lower than for SE as well as the whole registration process is simpler. The minimum amount of the capital of *akciová společnost* must be 2000000 Czech koruna (CZK)[312] (roughly 78000 EUR), the requirements for capital contributions are very similar to the ones of SE.[313] Moreover, the articles of company must be approved by notary, to entry in the company registration the application must be submitted to the competent court or the company can be also registered through the notary.[314] The joint-stock company can be established by a single person, if this person is a legal entity or in others cases by two or more persons[315]. What is more, national law of Czech Republic regulates cross-border transfer of company's seat, inbound and outbound transfers are allowed[316] as well as cross-border mergers that were implemented by the Directive on cross-border mergers, so these advantage also provided by SE might not be called a distinct benefits. Though, Transformation Act regulating transfer of seat came into force in 2012, while Directive on cross-border mergers was implemented in 2008, so until then SE mobility and cross-border merger were more likely to be a motive for establishing of Czech SE.

The Commercial Code provides with a rule for *akciová společnost* to be governed by dualistic management system[317], as the management of the company shall consist from supervisory and directors' boards. Even more, the board of directors[318] as well as supervisory board[319], each must consist from at least 3 members, the exclusion applies to board of directors in the cases where company has a sole shareholder. Here it should be reminded that, in SE case, the number of the board members can be reduced to one, since SE regulation provides a right to freely choose the number of board members unless Member State fix a minimum or maximum number. In Czech Republic, there is no such a limitation for two-tier system, but in one-tier case limitation exist, since board shall consist from at least three members where Czech SE is being governed by monistic management system. It can also help to answer the question why majority of Czech SEs have two-tier system, having in mind that almost 95 percent of those SEs are empty or UFO, it is

[311] The Commercial Code ('Obchodní zákoník') of Czech Republic, Law No. 513/1991, Coll of laws, articles 154-220zb, accessed 2019 May 1 https://wipolex.wipo.int/en/text/198074
[312] *Ibid*, article 162 (3).
[313] "Doing Business in the Czech Republic in 2019," ECOVIS, accessed 2019 May 1, http://www.ecovislegal.cz/en/czech-legal-services/doing-business-in-the-czech-republic-in-2019/
[314] *Ibid.*
[315] Commercial Code of Czech Republic, supra note 313: article 162 (2).
[316] Earnst and Young Study, *supra note* 127: 40.
[317] Commercial Code of Czech Republic, *supra note* 313: Article 200 (1).
[318] *Ibid*, Article 194 (1).
[319] *Ibid.*

more likely that they are looking forward to reducing board members number to minimum in order to avoid expenses in relation to board members.

Another important feature of *akciová společnost* is that one third of supervisory board must be elected by employees, if the company employs 50 workers or more. Hence, if company has at least 50 employees[320], the workers participation is mandatory. However, SE legislation and applicable *before and after* principle require negotiation on employees' participation before establishing an SE, unless neither participating companies nor the SE that is being established do not have any employees or at least not as many as needed for opening negotiations[321]. Law scholars Horst Eidenmuller and Jan Lasak in their joint research[322] noticed that even if under Czech national law mandatory co-determination rules would not apply to the joint-stock company, still the negotiations regarding workers' participation while founding an SE, in most cases, is a must where company is not established as a self SE. Therefore, for the companies with already existing employee participation it is only possible to reduce the number of board members at the same time reducing number of employees' representatives, instead of managing to avoid it at all. However, it is important to remind that a great number of SEs with headquarters in Czech Republic are empty SEs, thus it is very unlikely that majority of companies were founded with regards to reduce or avoid workers' participation in the management.

So, what is the "secret" of a big number of SEs as well as shelf SEs in Czech Republic? Horst Eidenmuller and Jan Lasak in their research[323] interviewed the users of the normal[324] Czech SEs asking to provide the motives of establishing an SE. It turned out that the most significant reasons for establishing an SE was image of the SE, simplification of internal structure and corporate mobility. As less important reasons, that were the motives of SE incorporation for some respondents included regulatory reasons, cross-border mergers and employee participation rules. The image of SE in most Member States is similar, it mostly consist of psychological relation with an SE, European flag, recognizable name and possibility to attract more investors, though in some countries the SE image might be overestimated or underestimated, it looks like the first option is

[320] There might be some exceptions for companies with fewer than 50 employees, as Article 200 (1) of Czech Republic Commercial Code provides:"The supervisory board shall consist of no fewer than three members; the number of its members must be divisible by three (without remainder). Two-thirds of its members shall be elected by the general meeting, and one-third by the employees of the company, provided that the company employs more than 50 people in an employment relationship and their working time exceeds half the weekly working time prescribed by other statutory provisions at the time when the general meeting is held. The statutes may stipulate that a larger number of members of the supervisory board shall be elected by the employees, but this number may not exceed the number of members elected by the general meeting. The statutes may also require that, even if there are fewer than 50 employees, they shall elect a member (members) of the supervisory board."

[321] Horst Eidenmuller and Jan Lasak, "The Czech Societas Europaea puzzle," *Journal of Corporate Law Studies* 12, 2 (2012): 245.

[322] *Ibid.*

[323] *Ibid.*

[324] SE with more than 5 employees and conducting any type of business activities.

more likely to apply in Czech Republic case. Simplification of internal structure has been already discussed, but it is also important to add that it may become a motive for SE foundation not only because of possibility to reduce board members number or to choose between monistic and dualistic systems, but also because respondents found SE provisions regarding two-tier management simpler when comparing to the national law provisions for the joint-stock company[325]. Again, when taking into account SE's mobility and cross-border merger, it should be not so significant at the moment, since Czech national law regulates related matters, but it has not always been so. For example, during the period 2007-2012[326] the number of founded normal SEs was 79 and starting with 2013 only 35 normal SEs were established till now, so during the same 6 years period the number of established normal SEs reduced more than a half. However, it can be only considered if these numbers were influenced by national level regulations in relation to transfer of seat that came in force in 2012.

As previously mentioned, the issue regarding Czech SEs is arising in relation to empty and UFO SEs. The first point to mention is that an SE Regulation leaves and open door for the shelf and empty SEs formation, as it does not require neither to have employees nor a newly established SE to be a commercial operating corporation, therefore once established the shelf SE can be acquired by third party. But again, why exactly in this Member State the shelf SEs are being established so intensively, especially when it is a country with an average strength of economy when comparing with other countries that have enormous economy as, for instance, UK, Germany or France. The majority of shelf and UFO SEs share the same signs, they have been established as a subsidiary, are being governed by two-tier system, have no employees[327], deal with a business in real estate trade and maintenance and have subscribed share capital of 120000 EUR divided into relatively small amount of shares, usually up to 20 pieces[328]. Moreover, we can find several professional providers across Czech Republic that suggest to purchase from them an already set-up SE, so it seems that it became a real business in the country and it can be only considered how many of already existing Czech SEs actually belongs to the profits makers of the SE establishment.

Another important issue in relation to shelf SEs established by professional providers was also introduced in the research of Horst Eidenmuller and Jan Lasak. The authors, in their publication, provide a financial scheme that was developed by providers, which explains that it does not need to have millions of euros to be able to establish several SEs in Czech Republic. Capital requirement applies to the SE only at the moment of establishing process, as SE does not

[325] *Ibid.*
[326] The first SE in Czech Republic was established in 2007.
[327] European Company (SE) Database, accessed, 2019 April 29, http://ecdb.worker-participation.eu
[328] Bernatík Werner and Tvrdoń Michal, "*Societas Europaea* as a New Legal Form of the Company - Next Stage or Dead End of the Entrepreneurial Environment's Development?" *Journal of Women's Entrepreneurship and Education* 1, 2 (2010): 12.

have further obligations to have 120000 EUR in its bank account after being established, so the same money can be reused for establishing another SE. Therefore, according to the authors, the most usual scenario of reselling Czech SE is to make cash withdraw that represents cash equity once company is established.[329] The client who wish to acquire shelf SE is required to pay the purchase price of the shares and a fee for the service provider, the fee range might vary from 2000 EUR to 6000 EUR depending on the price fixed by the seller and the purchase price of shares. In exchange, seller must to hand to the buyer the cash withdraw for the bank account of the SE, though surprisingly it was found that majority of the professional establishers do not require their customers to pay the equity capital so they do not need to withdraw cash to the SE's bank account.[330] Instead, they do everything fictitiously on the paper, as during the purchasing process provider confirms in paper that has received capital equity and buyer confirms that has received company's cash, on another hand, it raises legal issues.

The authors also reveal a dark side of this scheme in relation to law violation. First thing to mention is Czech Public law violation, as confirmation that buyer has handed over to service provider with 120 000EUR as purchase price for the SE shares violates the requirement of Czech law to clear cashless any transaction exceeding 350000 CZK (approximately 14000 EUR). Such a violation shall trigger a fine, however according Horst Eidenmuller and Jan Lasak it seems that it is only a law in paper.

Another issue is financial assistance, since financial assistance in the context of mentioned scheme, is definitely not permitted by a Czech law. Providing a loan to the buyer for the purposes of SE's shares purchase under such a condition might result in liability of SE board members. However, it is noticed that in the cases where buyer is sole shareholder it is more likely that nobody will seek any damages from the board members of SE unless the Company becomes insolvent.[331] Hence, this scheme raises questions in the context of law violation and possible liability. However, at the end the services provider receives profit and buyer receives already established SE for only 2000-6000 EUR, instead of subscribing 120000 EUR for the capital and paying for other steps included in foundation process. So, it should be not surprising that shelf SEs is prospering in Czech Republic, as it is cheap, simple and time-saving process for a person willing to purchase SE.

One more thing to notice about Czech shelf SEs, that might also have an influence for establishing such companies, is a gap of national legislation leaving a possibility to circumvent the

[329] Eidenmuller and Lasak, *supra note* 323: 248.
[330] *Ibid.*
[331] *Ibid*, 248-249.

provisions regarding employees' participation. Unlike Germany[332], which also has co-determination rules, Czech Republic does not provide any restrictions to the newly established empty SE to start hiring employees after establishment, in this way shelf SE can easily circumvent rules on both, national law and SE Directive, regarding employees' participation. So, in this case buyer of shelf SE not only saves money and time but also successfully avoids long, complex and costly negotiations regarding employee involvement in the affairs of SE as well as avoids any participation in general.

To sum up, Czech Republic takes leading position not only in relation with already existing SEs within its territory but also with shelf SEs. It is also noticed that the same shelf SEs issue is existing in other countries as well, especially in those with a great number of SEs[333]. It might be stated that for normal SEs to be founded in Czech Republic the main motives are European image of the company and simplified internal structure of the company. While taking into account shelf SEs, it seems that it became a good business for service provides who are seeking to make profit from such services, and it is unclear how many SEs of those already established in Czech Republic are still being owned by service providers. Moreover, the whole situation of shelf SEs misrepresents SE and is far away from the goals and objectives of the SE legislation.

3.2.2. Any perspectives for SE in Lithuania?

The transposition of European Company Regulation and of the SE Directive took separate paths in Lithuania, the law on SEs came into force on 11 May 2004[334], while transposition law on workers' involvement in European Companies (SE) came into effect on 28 May 2005[335]. However, since then till now the European Company has not became popular in Lithuania, as the only one SE has been established within territory of Lithuania. Such unpopularity with no doubts proves that at least in Lithuania the SE has not exceeded expectations of Lithuania's entrepreneurs, but at the same time it raises question why?

Public limited liability company equivalent in Lithuania is *akcinė bendrovė* (AB), it is governed by Civil Code of the Republic of Lithuania and Law on Companies. An AB can be

[332] The registrars in Germany requires undertakings by the founders of a shelf SE that the SE has no workers and will not hire any in the future.
[333] For example, only 345 out of 561 German SEs have more than 5 employees and just 18 out of 157 Slovak SEs has more than 5 employees.
[334] Republic of Lithuania Law on European Companies, 29 April 2004 No. IX-2199, Official Gazette 78-2710, https://e-seimas.lrs.lt/portal/legalActPrint/lt?jfwid=rivwzvpvg&documentId=TAIS.245697&category=TAD
[335] Republic of Lithuania Law on the employee participation in decision-making in European companies , 12 May 2005 No. Nr. X-200, Official Gazette 67-2407, https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/TAIS.256482?jfwid=q8i88mfcj

founded by one or more natural or legal persons, the minimum capital requirement for AB is 25000 EUR that must be divided into shares. Prior registering AB in the nation register of legal entities the articles of company and incorporation report of a company must be drawn, after that the meeting of incorporation must be called and the documents of company must be notarized. Moreover, national law of Lithuania does not provide mandatory rules for employee participation in the management of the company, which makes incorporation process of AB even easier, shorter and cheaper as founders do not need to face with long negotiations regarding workers' participation. What is more, company law of Lithuania leaves a founder with a right to freely choose management system of the company, establishers can choose monistic or dualistic systems. An AB shall be governed by general meeting of shareholders, manager of the company and by at least one supervisory or management board. The number of supervisory board's members shall be no less than 3 and no more than 15, for management board the minimum number of 3 members is set. Similar rules apply to Lithuanian SE where supervisory board consists of 3-15 members, while administrative and management organ must consist of at least 3 members. One more advantage that founder of AB can enjoy is the right to transfer company's seat to another country or from another country without liquidation or winding-up, law of Lithuania does not regulate transferring process in a great detail but at least it is allowed by the rules of Register of Legal Entities[336]. Finally, the last thing to mention, Lithuanian enterprises, just like the rest of other Member States are allowed for cross-border merger. Hence, at least now it is difficult to find something that SE can provide for Lithuanian entrepreneurs that AB cannot, not taking into account European image of course.

The representatives of ERGO SE, the only one Lithuanian SE, provided detailed explanation of their intention to establish European Company[337]. It was explained that ERGO company was conducting business in three Baltic countries – Lithuania, Latvia, Estonia, since it was willing to merger all three companies, establishing an SE by merger could also suggest possibility for all merging companies to be governed by the same legal and tax environment. Tendency for the SEs to be established by the merger is noticed in all Baltic countries, as in Estonia 6 of 10 SEs have been established by this mean, while in Latvia 4 of 7 SEs founded by merger and one more is planned to be established[338], even more, majority of participating companies were operating in all Baltic countries. Hence, it could be said that grouping business operations of the SE under the umbrella organisation became significant advantage of the SE in the Baltic countries,

[336] Available at http://www.registrucentras.lt
[337] Mindaugas Linkaitis, "ERGO pertvarkė verslą, arba pirmoji SE bendrovė Lietuvoje," [ERGO restructured business, or the first SE in Lithuania], Alfa, accessed 2019 May 3, https://www.alfa.lt/straipsnis/10436070/ergo-pertvarke-versla-arba-pirmoji-se-bendrove-lietuvoje
[338] European Company (SE) Database, accessed, 2019 April 29, http://ecdb.worker-participation.eu

as most of the large enterprises operating in one Baltic country is operating in others two as well, or at least willing to enter their market. The merger of the companies to the SE also allows to simplify and optimize the management of the company at the same time minimizing related expenses. Moreover, companies under supervision[339] gain additional benefit, as SE is being supervised by supervision organ of home Member State. However, in the ERGO SE case the incorporation process last for one and a half year, such a long period was also influenced by burden of employee involvement negotiations, lots of expenses occurred due to services of lawyers, audit and financial consultants[340], therefore companies willing to merge might be taking advantage of Merger Directive instead of establishing an SE.

Hence, as the main advantages of establishing SE in Lithuania could be named simplifying management of the company as well as where not covered by SE legislation, being governed by national law of one Member State. Again, as negative drivers could be listed long and costly incorporation process, negotiations regarding employees' participation, capital requirements and requirements applicable for the founders. The future of SE in Lithuania does not seem promising, as provided review does not show any signs that SE became successful in Lithuanian market, since it cannot suggest significant benefits outweighing its disadvantages to make entrepreneurs see SE as an attractive corporate form and be willing to establish it.

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While taking into account SE popularity in all Member States, it gives an idea that SEs are being established by both reasons, benefiting from the advantages provided by SE and circumventing unfavorable national law of Member States. Moreover, it seems that shelf SEs became a real issue in most of the Member States and the number of already established SEs does not reflect the real situation or in other words its success in the context of goals and objects of the SE Statute. The data shows that at the moment there is only 620 normal SEs within EU, from them only 301 employ more than 250 workers, 353 empty SEs, while the rest 2207 of SEs remain UFO, these numbers are probably not something that was foreseen and expected. Moreover, remembering the fact that SE legislation was orientated to large enterprises, which also resulted such disadvantages as capital requirement, requirements for founders and complex incorporation process, it is paradoxical that just a bit more than 9 percent of total number of SEs are actually large enterprises with more than 250 employees.

[339] For example financial institutions.
[340] Linkaitis, *supra note* 341.

3.3. Does EU really need such a corporate form as SE?

After revealing features of the SE, comparing it to others supranational and national corporate forms and reviewing positions of related parties, here comes the questions, was the European Company, that we have now, really worth all those long negotiations and efforts as well as does EU even need this form of enterprise? It is hard to evaluate such a matter as success, it is more likely to depend on what is being seen as a success or failure, if at least one SE per Member State could be called as incredible success then it might be said that it was quite successful as in 27 Member States of 28 Members there are at least one SE established. Also, when comparing number of existing SEs with other supranational forms – SCE and EEIG, the SE could be also praised for its successfulness. On another hand, when taking into account millions of legal entities existing across EU, a little bit more than 3000 existing SEs does not look that big number, the gap between existing SE and its initial goals and objectives also does not prove any sign of success, the shelf SEs issue does not improve the situation either.

The European Company Statute was quite daring project that was aimed to create a supranational corporate form being governed by single set of rules, but what we have now is 28 different forms of SE that are far away from being governed by a single act. At one point, surely, the SE performed its function as one of the tools for EU company law harmonization, it also drawn the guidelines for supranational corporate form equivalent to public limited liability company, but it does not provide possibility for any SE recognizable as such in any Member State to be actually governed by EU law only with no exceptions. But still, it is questionable if it was even possible to reach a consensus on the regulation that does not refer to national law at all and does not leave the right to the Member State to decide by its own on the most sensitive issues.

Previously provided data of existing SEs also shows that majority of SEs across EU do not meet the image of SE form for which SE legislation was dedicated. Just a very small part of SEs are large enterprises actively conducting cross-border business, instead majority of SEs are shelf or empty SEs. Moreover, founding an SE because of possibility to simplify management structure or to reduce number of board members or employees representatives indicates, that most of the SE's founders are using it as a tool to circumvent national law of Member States and just a very small part sees it as a true European corporate form that provides significant advantages for carrying business in more than one Member State.

Taking into account what is said, it can be stated that SE met expectations of a very small part of entrepreneurs and have succeeded only in a few countries. Hence, it is more likely that some of Member States needed such a corporate form as SE but not the whole Union. When having in mind the advantages that SE provides in relation to cross-border activities, the similar result

could be reached not by introducing new corporate form, but by providing harmonisation of those areas of Member States national law, that are essential for companies to conduct their business internationally with no obstacles. It is also noticed that law harmonisation at some point takes away the fame of the SE, as for example, after Merger Directive coming into force SE cannot be proud anymore of being the only corporate form that allows for public limited liability companies to perform cross-border merger. If 14th Directive were adopted, the possibility of cross-border transfer of seat would not be seen as a huge advantage as well. Therefore, it would be fair to say that future of SE also depends on EU company law harmonisation and the only advantage of SE that cannot be taken away is a true European Company image.

CONCLUSSIONS

Taking into account the topic of the Master thesis and analysing the project of *SE* in order to evaluate whether it is successful or unsuccessful, the following might be concluded:

1. The initial draft of SE was daring and ambitious, regulating every single aspect of the Company. However, long negotiations and disagreements between Member States resulted exclusion of other areas than corporate law from the SE Statute.
2. Current legal regulation of the SE is far away from its initial idea. The SE supposed to be a corporate form governed by single statute and state non-interference, though at the moment SE is being governed by SE Regulation, Directive, other EU legal acts as for example, Cross-border Mergers Directive and national laws of Member States. Instead of corporate form governed by single statute, SE is being governed by both – national law and EU law.
3. The SE might be praised for being most widely used supranational corporate form in context of already existing business entities forms governed by Community law. On another hand, it is also resulted by number of addressees of each type of supranational legal entity, as EEIG and SCE are very specific forms suited for limited amount of persons.
4. The SE barely competes with other supranational company types in context of possible options to choose from for the founders, it is more likely for them to compete only in legal certainty and perfection context. At the same time national forms of legal entities of the Member States are the main competitors of the SE.
5. As the most significant advantages of the SE can be listed its European image, corporate mobility and flexibility regarding internal structure. At the same time the main negative drivers of the SE are long and complex incorporation process, legal uncertainty, burden of employees' participation and capital requirements.
6. The SE has succeeded only in those Member States with a stricter and less favorable national law provisions in context of company law. The entrepreneurs of these Member States can benefit from SE with regards to simplifying internal structure of the company, reducing number of employees' representatives at board level as well as number of board members in general, in this way also reducing the expenses related with management of the company.
7. The significant benefits from the SE can be provided to the corporate forms that are willing to group all business operations under umbrella organization as well as to the ones that are under supervision of national supervision authorities. In this way, whole

operations are governed by one management, where not covered by EU law by national law provisions of one Member State and being supervised by one authority of supervision instead of number of authorities from each country where business operations are being performed.

8. The SE is more likely to be used to circumvent unfavorable national law of Member States instead of benefiting from initial SE advantages in relation to cross-border activities.
9. The performed analysis provides, that majority of the existing SEs across EU are considered to be shelf and empty SEs. This indicates that majority of the SEs are not being used with purposes that were expected to be the reasons for establishing an SE at the time when SE legislation was adopted. It also ruins the image of the SE and it might be expected that situation will remain the same in the future if no implementations will be done in SE legislation as well as legislation of Member States national law.
10. The future of SE also depends on EU company law harmonization. When Directive on cross-borders merger has been adopted, SE cannot be proud anymore of significant advantage regarding cross-border mergers, if 14th Directive would be adopted, the benefit provided by SE in relation to detailed regulation of cross-border transfer of seat is also more likely to fade.

The conclusions listed above indicates that SE succeeded just in a very few Member States, as it met expectations of entrepreneurs operating in Member States with less favourable company law provisions.

RECOMMENDATIONS

As European economy is being driven by small and medium-sized enterprises and there is no existing single legal act providing a tool for SMEs to facilitate their cross-border activities, it is recommended to review SE legislation and to make *Societas Europaea* more accessible for the SMEs. It could be done by reducing capital requirements, relaxing provisions regarding incorporation and negotiation process as well as relaxing requirements for a founders, as in 3 out of 4 means of formation only limited liability companies are allowed to establish an SE, and there is no way provided to establish an SE *ex nihilo.* These implementations might make SE more successful, accessible and efficient as well, since it could be used by all sizes of companies to conduct their cross-border activities.

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ANNOTATION

Keywords: *European Company, Societas Europaea, supranational corporate form, harmonization.*

In the Master thesis the explicit analysis of SE project is provided, mainly focusing on evaluation of SE whether it is successful or failure. The research not only introduces the concept of SE and its main characteristics, but also evaluates it in context of other corporate forms, in order to reveal possible positive and negative drivers of establishing an SE. The analysis also provides most outstanding issues of the SE, taking into account not only issues in relation to SE features, but also the ones related with SE being used as a tool to circumvent unfavourable national law provisions. The positions not only of EU institutions, but also of entrepreneurs, in relation to European Company are introduced in the research as well. Taking in to account all the findings, the perspectives of SE are evaluated. Finally, the research provides that SE project has succeeded only in a few Member States and it needs to be improved.

ANNOTACIJA

Reikšminiai žodžiai: *Europos bendrovė, Societas Europaea, viršnacionalinė juridinio asmens teisinė forma, harmonizavimas.*

Magistriniame darbe pateikiama Europos bendrovės projekto analizė, kurios metu didžiausias dėmesys skiriamas projekto įvertinimui kaip sėkmingo arba nesėkmingo. Tyrimo metu ne tik pristatoma Europos bendrovės koncepcija ir charakteristika, bet taip pat siekiant atskleisti galimus pozityvius arba negatyvius šios viršnacionalinės teisinės formos įsteigimo aspektus, Europos bendrovė taip pat vertinama kitų teisinių formų kontekste. Tyrime analizuojama ne tik probleminiai aspektai susiję su Europos bendrovės ypatybėmis, bet ir su tokiomis sritimis kaip Europos bendrovės panaudojimas kaip įrankio išvengiant teisiškai nepalankių nacionalinių rėžimų. Tiriamojo darbo metu pristatoma ne tik Europos institucijų, bet ir verslo atstovų nuomonė, remiantis tyrimo duomenimis įvertinamos Europos bendrovės perspektyvos. Galiausiai, Magistrinio darbo išvados parodo, jog Europos bendrovės projektas pasiteisino tik keliose valstybėse narėse ir yra tobulintinas.

SUMMARY

Tarasevičiūtė, A.: *"European Company (Societas Europaea) success or failure?"*

Establishing of European Economic Community promote a discussion regarding the need for a tool to facilitate cross-border activities of the companies operating in Single market. Shortly after the idea of *Societas Europaea* was brought. This type of supranational corporate vehicle was supposed to serve for large enterprises as a tool to conduct their business operations within the Community while being governed by single set of rules and State non-interference. However, during 40 years of negotiations there have been made number of changes in SE legislation until the SE Regulation and its supplementing Directive were adopted in 2001. During the first decade after SE legislation adoption lots of discussions have arisen, as the SE project was criticized due to legal complexity and uncertainty, negative drivers of the SE as a corporate form as well as its efficiency. Moreover, slowly increasing number of SEs established across EU also promote doubts about its success. At the moment, the need of the SE, its success and perspectives remain questionable.

As the Master thesis aims to evaluate SE project, in the first chapter the concept of the SE is revealed. The concept of SE project is analyzed taking into account the reasons for SE proposal, the historical grounds of it, as well as its legal nature. The chapter also introduces the initial idea of SE and its main objectives.

The second chapter is dedicated for SE main characteristics analysis. The main features that best describe SE as an unique corporate form are analyzed. Moreover, in the second part of this chapter SE is also compared with other existing supranational corporate forms as well as EU level proposals for business entities forms to serve for small and medium-sized enterprises' needs. Finally, based on research results the main advantages and disadvantages of SE are revealed.

In the third chapter perspectives and prospects of the SE are evaluated. The attention is being paid to positions of related parties in order to reveal most outstanding issues of the SE. The popularity of SE in Member States is also reviewed, at the same time introducing possible reasons for such disparities of SE popularity. Lastly, the need, success and perspectives of SE are evaluated.

Finally, taking into account all researches performed in the Master thesis, author provides overall assessment of SE project. Moreover, the recommendations of SE legislation improvement, in order to make it more accessible and successful, is also provided.

SANTRAUKA

Tarasevičiūtė, A.: *"Europos bendrovė (Societas Europaea) sėkme ar nesėkmė?"*

Europos ekonominės bendrijos įsteigimas paskatino diskusijas dėl poreikio pagerinti sąlygas įmonėms veikiančioms Bendrojoje rinkoje ir daugiau nei vienoje Valstybėje narėje. Neilgai trukus buvo pristatyta Europos bendrovės (SE) idėja, šia viršnacionalinio juridinio asmens teisine forma buvo siekiama palengvinti didelių įmonių tarpvalstybinę veiklą Bendrijoje, naudojantis vienu taisyklių rinkiniu ir be valstybės įsikišimo. Visgi, nuo SE idėjos pristatymo iki SE Reglamento ir Direktyvos priėmimo praėjo daugiau nei 40 metų, ilgos derybos ir kompromiso paieškos lėmė ir pakeitimus SE teisės aktuose. Pirmojo dešimtmečio metu po SE teisės aktų priėmimo 2001 metais, projektas sulaukė nemažai kritikos dėl sudėtingų teisinių normų ir teisinio netikrumo, taip pat buvo diskutuojama ir dėl neigiamų Bendrovės kaip korporacinės formos aspektų bei Bendrovės efektyvumo, abejones dėl projekto sėkmingumo paskatino ir palyginti mažas skaičius besisteigiančių SE. Šiuo metu situacija yra mažai pakitusi, kadangi SE projekto sėkmingumas ir perspektyvos vis dar diskutuotini.

Kadangi Magistriniame darbe yra siekiama įvertinti SE projektą, pirmajame skyriuje pristatoma SE koncepcija. Projektas analizuojamas apimant priežastis lėmusias SE poreikį, SE istorinius pagrindus ir Bendrovės kaip juridinio asmens ištyrimą.

Antras skyrius yra skirtas SE charakteristikų analizei, pagrindinės ypatybės kurios geriausiai apibūdina SE kaip korporacinę formą yra analizuojamos. Taip pat šiame skyriuje Bendrovė lyginama ir su kitomis jau egzistuojančiomis viršnacionalinėmis formomis bei su Europos Sąjungos lygmenyje pasiūlytomis formomis siekiant užtikrinti labai mažų, mažų ir vidutinių įmonių veiklą tarpvalstybiniame lygmenyje. Galiausiai remiantis tyrimo duomenimis, nustatomi reikšmingiausi SE privalumai ir trūkumai.

Trečiame skyriuje vertinamos SE perspektyvos. Skyriuje įvertinamos išsakytos susijusių šalių pozicijos SE klausimu, siekiama atskleisti problematiškiausius SE aspektus. Taip pat apžvelgiama SE populiarumas skirtingose Valstybėse narėse, pristatomos galimos priežastys tokiam netolygiam SE pasiskirstymui Sąjungoje. Galiausiai įvertinama SE poreikis, projekto sėkmingumas ir galimos perspektyvos.

Pabaigoje, atsižvelgiant į Magistriniame darbe atliktą analizę, pateikiamas bendras SE projekto vertinimas. Taip pat Baigiamojo darbo autorė pasidalina pasiūlymu, kuris prisidėtų prie Bendrovės prieinamumo ir efektyvumo gerinimo.

Annex No. 4
Form approved on 20 November 2012 by the decision No. 1SN-10
of the Senate of Mykolas Romeris University

HONESTY DECLARATION
16/05/2019
Vilnius

I, Aušrinė Taraševičiūtė, student of
(name, surname)

Mykolas Romeris University (hereinafter referred to University), Mykolas Romeris Law School, Institute of private law, European and International Business Law study programme
(Faculty /Institute, Programme title)

confirm that the Master thesis titled

"European Company (Societas Europaea) success or failure?":

1. Is carried out independently and honestly;
2. Was not presented and defended in another educational institution in Lithuania or abroad;
3. Was written in respect of the academic integrity and after becoming acquainted with methodological guidelines for thesis preparation.

I am informed of the fact that student can be expelled from the University for the breach of the fair competition principle, plagiarism, corresponding to the breach of the academic ethics.

_____ Aušrinė Taraševičiūtė
(signature) *(name, surname)*