The Vernimmen.com newsletter

N° 1

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NEWS : The European company

After more than 40 years of preparatory work, the member states of the European Union reached agreement, at the Nice Summit in December 2000, on the principle of the creation of a European company (designated officially by its Latin name "*Societas Europeae*" or SE).

An EU regulation[(1)] dated 8 October 2001 defines the status of an SE. A Council Directive[(2)], also dated 8 October 2001, provides more details on employee involvement.

The Regulation entered into force on 8 October 2004. However, its provisions will only be applicable in a member state as of the date on which that member state transposes the EU Directive on Worker Involvement into domestic law, and adapts its domestic law to fit with the SE, on points which are not covered by the Regulation or on those for which member states have an option. Only 6 out of 28 EU and EEA members (i.e. Belgium, Austria, Denmark, Sweden, Finland and Iceland) have already done their duties, and the UK and the Netherlands are poised to do so soon.

Why create a European company? The aim behind the SE is to get rid of the legal, financial and practical constraints that are the result of 25 different legal systems, which hamper companies seeking to organise their business on an EU level. It will enable companies to cut administrative costs by reducing the number of companies that need to be set up to do business. The SE will result in a more fluid decision-making process.

The SE will make it possible to set up a company that is not Swedish German or Italian, etc., but "European". The SE will be a ready-made tool that will make it much easier for companies to carry out cross-border mergers, which are currently virtually impossible, given the distortions and incompatibility of legislation applicable in the different member states. What happens is that companies seeking to merge have to make takeover bids or asset contributions, or set up other complicated structures such as dual listing (Reed Elsevier, Shell).

(1) In theory, the Regulation is obligatory. It is directly applicable in all member states. This doesn't mean that member states are exempted from bringing their domestic law into line with the Regulation's provisions.
(2) A Directive sets out a certain number of goals to be achieved. It therefore has to be transposed into domestic law by EU member states.

Next month :

- NEWS : Purchase accounting

- TABLE : How do rating agencies rate?

- RESEARCH : Private equity performance

- Q&A

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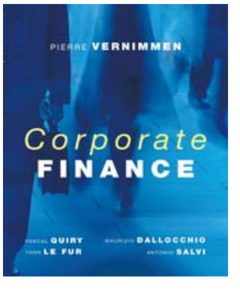

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For example, an Italian group could avoid launching a takeover of a Spanish group by simply merging with the latter, thus creating a company which would be neither Italian nor Spanish, but European. Moreover, the merger would not normally be perceived by the Spanish market as an Italian company seizing control of a Spanish asset, as a takeover bid might be.

How is a European company created? Technically, there are four ways of setting up an SE – by way of a merger, through the creation of a holding company, in the form of a joint subsidiary and by the transformation of a company organised under the laws of a member state (with activities in at least two member states).

Without providing an in-depth analysis of how the SE works, below we set out the main technical aspects involved in setting one up:

• Registered Office: even though the SE is above all a European company, its registered office must be located in only one of the member states of the EU. The choice of location of the registered office is important, as it will determine which laws will apply to the points that are not covered by EU laws (especially company law). This point should not be overlooked – even though the company is European, it will still be covered by the domestic laws of the country in which it has its registered office, for points that are not covered by European regulations.

In addition, the registered office must be located in the member state where the company has its central administration, i.e. its operational headquarters. The registered office can be transferred to another member state without the company being dissolved or a new legal entity being set up, on condition that the operational headquarters are transferred as well.

• *Corporate Governance*: the SE can have a dual system of corporate governance, with a board of directors and a supervisory board, or the standard system with a board of directors. The dual system is standard in Germany, but non-existent in Belgium; in France, this option already exists.

• *Worker involvement*: provision has been made to involve workers at a supervisory level and also in developing company strategy. Member states can choose between a number of different worker involvement models for transposition into domestic law:

- Worker presence on supervisory board or board of directors,
- Employee presence on separate staff representative body within the SE,
- Any other model that is set up by contract.

• *Share capital*: The SE should have a share capital of a minimum of €120,000, which should not act as a barrier to groups large enough to want to expand their business on a European scale.

However, it is important to remember that the establishment of an SE will have to be preceded by negotiations on worker involvement, with an organisation representing all of the staff of the participating companies. It will be impossible to set up an SE and for the SE to operate, until the issue of worker involvement has been settled.

If a satisfactory agreement cannot be reached, a set of "standard" principles will apply.

If an SE is set up as part of a merger process, the "standard" principles relating to worker involvement will automatically apply if at least 25% of workers had enjoyed a say in the decision-making process before the merger. In other words, groups located in countries with very protective labour laws (Germany), will not be able to take advantage of a merger into an SE in order to substantially reduce worker rights.

• *Tax issues*: European law relating to SE tax issues is still in the process of being defined. For example, for corporation tax, the SE will be treated like any other multinational, i.e., it will be subject to the applicable domestic tax regime and legislation, on both a company and branch level. The SE will thus remain subject to tax in all member states where it has stable establishments. Furthermore, the Directive aimed at introducing a tax regime that would be favourable to the payments of dividends, especially for SEs, is due to be transposed into national law by EU member states before 1 January 2005.

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In conclusion, although the SE would appear to be a vehicle which will make it easier for European groups to set up and manage companies, there are a number of issues that will not be settled until all member states have transposed the European regulations into domestic law. We can only hope that this will happen quickly. In theory, all draft legislation was supposed to be ready by 8 October 2004, but we'll probably have to wait a while longer before SE could be created in every European country.

Rome wasn't built in a day!

A listed Austrian company has already transformed itself into a SE (Bauholding Strabagis) as well as two private Dutch companies. The largest Scandinavian banking group, Nordea, has announced its will to do in the not-so-far future.

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THIS MONTH'S TABLE : Corporate income tax rate worldwide

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RESEARCH : How does joining or leaving an index affect a stock's price performance?

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Q&A : How to exit US stock exchanges?

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