



24 May 2010

CONFERENCE ON THE STATUTE FOR A EUROPEAN COMPANY (SE) CHARLEMAGNE BUILDING BRUSSELS, 26 MAY 2010 – 9.00H

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PANEL I: CREATION OF AN SE – PROBLEMS, CHALLENGES AND DIRECTIONS FOR THE FUTURE

Should the SE remain a company available only to businesses with a strong cross-border presence or a tool also for domestic businesses that would like to use the SE's European label to develop their European or international presence?

- Good morning, it is my great pleasure to take part in this conference on the European Company Statute on behalf of BUSINESSEUROPE.
- As you already know, UNICE, now BUSINESSEUROPE has been a strong supporter of the adoption of a European Company Statute since the inception of the debate, more than 40 years ago.
- When the legislation on the SE was adopted in 2001, we considered it as an important step towards the achievement of a real Single Market for companies, but we also deeply regret the complexities of the regime and its inadequacy to address all the expectations of businesses. That is why we have been in favour of a European private company statute since 1998.

Focusing on your specific question on the cross border element. We notice that it is the main requirement set forth by the SE regulation and that is in theory a high requirement. It is not expressly provided for in the SE regulation but results from the methods of formation listed in article 2 of the regulation.

To say the least, I have a lot of reservations regarding the different methods of setting up a SE.

Indeed, they are so complicated and inconsistent. If the drafters have planned to put obstacles on the creation of SE, they have succeeded.



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.

That is why, when as business organisations, we drafted our proposal for a European private company, we deliberately chose the liberal approach, i.e. no cross border requirement.

And this is also the approach retained by the European Commission in its regulation proposal for an SPE. *“An initial cross border requirement would significantly reduce the potential of the instrument. In addition, a cross border could be easily circumvented”*.

The Ernst & Young study has clearly confirmed that, for example, it is possible to use a newly formed public company subsidiary in a different Member State to fulfil the multi-nationality criterion and create an SE by merger. This makes it possible to escape the stricter requirements with regard to the two years minimum existence for conversion, formation of a joint holding SE or a joint subsidiary SE¹.

The Study shows that there are ways of getting around these limitations but they could be costly and cumbersome. However, to use this essential company law instrument it should not be necessary for companies to circumvent the law.

The SE is a legal European form in itself.

The SE, like the SPE, should also be available to companies which, as a first step, want to set up their business at national level and only later expand their business across borders. Because they are European forms, their formation requirements should not be tighter than the one existing for national company forms.

We are not naïve; we are aware of the resistance the Commission faces to the proposal on the SPE on this aspect. So in the last public compromise a cross border element has been reintroduced, but a light one which could be an intention to do business in Member States other than the one in which the SPE is registered or a cross border business object set out in the articles of association of the SPE or the ones set up for the SE.

We also know that the criterion of multinationality has been imposed to prevent the national legal forms from being in competition with supranational SEs in purely domestic situations. But looking at the set-up costs mentioned in the Study, from 100.000 € up to 2 and 4 millions €, we doubt that it is really a risk.

Of course, having a more liberal approach of the cross border requirement would not be sufficient in itself to boost the creation of SEs. A conjunction of different elements is necessary: BUSINESSEUROPE has submitted these and other views to the consultation launched by the Commission. In our opinion this consultation and today's Conference are timely and will certainly provide good solutions to increase the attractiveness of SEs and their expansion.

¹ All of these inconsistencies appear in the Ernst & Young Study, p. 253.



But in any case, we do not want the revival of the 5th directive that the authors of the study seem to regret!