BUSINESSEUROPE

POSITION PAPER

GO FOR GROWTH
AN AGENDA FOR THE EU IN 2010-2014

BUSINESSEUROPE
Representative Register
ID number: 3978240953 - 79

23 May 2010

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

BUSINESSEUROPE has been a strong supporter of the adoption of the European Company Statute since the inception of the debate, more than 30 years ago.

The existence of an optional legal form like the European Company (SE) can facilitate cross-border reorganisation and integration of business structures, aligning them as much as possible with the logic of the Single Market.

In June 2009, BUSINESSEUROPE organised a roundtable on the European Company Statute with representatives from companies, the European Commission and its member federations. The event followed up on previous seminars organised in 2004 and 2006 on the subject. It aimed at identifying the advantages and flaws that this legal form still presents, and at providing input for the Commission's future report on the implementation and effectiveness of the SE Statute.

Some of the main findings of this roundtable coincide with those set out in the *Study on the operation and impacts of the Statute for a European Company* recently published. Both revealed that after five years of implementation of the legislation on the SE Statute, the initial expectations have not been fully met. The number of SEs created is still small, which is a result of a number of shortcomings related to the Statute and to other regulatory issues.

BUSINESSEUROPE and its members are supportive of the main conclusions of the Study and believe it is key to address certain weak points of the Statute and bring forward amendments that could improve the attractiveness of this important instrument.

In this context, we would like to offer the following comments:

Drivers for setting up an SE

- BUSINESSEUROPE generally agrees with the main positive and negative drivers put forward by the Study for setting up a European Company.

- Regarding the positive drivers, BUSINESSEUROPE believes that the European label offered by the SE can also work as a powerful marketing tool. The Statute also facilitates internal restructuring and allows for a more efficient management structure.

For example, the supervisory board can be smaller than what is imposed by certain national laws on public limited-liability companies (e.g. Codetermination act in Germany) and the process for election of its members can be shortened.

- The Study reveals that since the implementation of EU legislation on cross-border mergers, the advantages linked to mobility and simplification of group structure have lost part of their importance. BUSINESSEUROPE considers that these findings should not be overestimated in view of the fact that:

  - Cross-border merger implies extra requirements when compared with a mere cross-border transfer of seat; it results in transfer of assets and liabilities as well as a change in shareholder structure, which may cause additional creditor and shareholder protection issues and related formalities (e.g. valuations, external auditor certifications);

  - Creditor/shareholder protection in connection with a cross-border merger is not the same as creditor/shareholder protection in connection with an SE transfer of seat. Member States may have introduced a higher level of creditor or shareholder protection for cross-border mergers than normally would apply to pure national mergers, to mergers pursuant to the SE Regulation or to transfers of seat under the SE Regulation. A reason may be the relatively easy access to the cross-border merger compared to the thresholds for conversion of a national stock company into an SE.

- In BUSINESSEUROPE's view the formation of an SE is still a complex, expensive and time-consuming process. This is due to:

  - Lack of public recognition and awareness of the SE legal form by Member States' public authorities. It has also proved difficult to explain the SE Statute to authorities outside the EU. The Statute is not very recognisable, a fact which can impose additional barriers to trade. Companies are hesitant to do business with the unknown;

  - High number of references to national Member States' laws (65 references) and options given to them (22 options) on particular aspects of the Statute;

  - The high-level of the minimum capital requirements (EUR 120,000). This is a disincentive for SMEs to adopt this company form particularly in some Member States where SMEs account about 99% of the national entrepreneurial fabric (e.g. Italy and Portugal);

  - Complex workers' participation arrangements. BUSINESSEUROPE's members believe that the overly complicated and structured provisions around employee participation and the creation of the special negotiating body, which are foreseen in the Directive accompanying the SE Statute, can be a substantial obstacle to companies wanting to make greater use of this instrument;

- Absence of appropriate tax provisions which is linked to the lack of openness by tax authorities to this form of company. For example, some SEs are faced with tax obligations in all Member States where they operate.

- In BUSINESSEUROPE's views, the most important regulatory issues for a company to consider when assessing in which country to place its registered office and/or head office are:

  - Tax related reasons;

  - National corporate law;

  - Equity and debt restructuring facilities (e.g. the UK scheme of arrangement);

  - Corporate restructuring facilities (e.g. the availability of a corporate division facility without mutual residual liability).

Main trends

- Flexibility is key when it comes to choose among different company forms available in Member States. The SE Statute provides such flexibility. As the Study shows, Germany and the Czech Republic, the two largest hosts of SEs, are good examples where the SE offers more flexibility when compared with national forms of company.

- However, BUSINESSEUROPE is in favour of creating conditions to extend the attractiveness of the SE to other Member States.

Possible follow-up

- BUSINESSEUROPE and its members would like to highlight the following recommendations aimed at improving the SE Statute and in general the attractiveness of this instrument:

  - Amendments to be made to Statute:

    - Opening the possibility for the SE to have its registered office and head office in different Member States;

    - Lowering the capital requirements for setting up an SE in order to make it more accessible for SMEs;

    - Opening up the method of formation of an SE by merger to private limited-liability companies;

    - Adopting the solution laid down in the cross border mergers directive and foresee that the approval of the merger by the general meeting of the acquired

company is not necessary when the acquiring company holds all the voting rights of the acquired company;

- Broadening the concept of mergers to allow creation of an SE by a company contributing part of its assets to another company (the SE) without ceasing to exist;

- Opening up the method of formation of an SE by allowing its creation *ex nihilo*;

- Opening up the method of formation of an SE by conversion to private limited-liability companies;

- Allowing cross-border mergers between a SE company and its subsidiary or a later acquired company (without having to form a new company).

- Adopt a more liberal approach of the cross border requirement modelled on the European Private Company Statute as provided for in the Swedish Presidency's compromise proposal of 27 November 2009 (art. 3.3) : the current or future exercise of an activity with an European dimension should be sufficient to fulfil the cross border requirement.

- Other necessary measures:

  - Promoting further the Statute of the European Company to raise awareness among entrepreneurs, Member States' authorities and third countries. The European Commission should have an important role in explaining and clarifying the SE Statute and its advantages;

  - Creating a European register for SEs. This would increase the transparency and visibility of the SE Statute;

  - Synchronising company registrations at the different business registers to avoid identification problems after converting to an SE;

  - Create appropriate tax provisions to facilitate the operation of cross-border activities;

  - Adoption of the European Private Company Statute.

- On the issue of workers' participation, since only a limited number of SEs have been established after the adoption of the SE Statute, BUSINESSEUROPE's members believe it is too early to engage in a revision process, which requires a significant experience of the Directive's weaknesses in order to identify valid points for further improvement.

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