Twenty Years Societas Europaea

JESSICA SCHMIDT: PROF. DR. LL.M. *ON THE 8TH OF OCTOBER 2021, THE SOCIETAS EUROPAEA (SE) TURNS TWENTY – TIME TO CELEBRATE AND REFLECT ON TWO DECADES OF A EUROPEAN COMPANY TYPE THAT ALMOST NEVER WAS**

The idea of a European company is as old as the European dream itself. Nonetheless, it took more than four decades, one preliminary draft (1966), four different official drafts (1970, 1975, 1989, 1991) and ultimately some 'good old horse-trading' until an agreement was finally reached in December 2000 at the summit in Nice – after decades of struggle, this truly seemed like a 'Nice wonder'. From there, agreement on the last finishing touches felt (almost) like plain sailing. The Regulation on the Statute of a European Company (SER) and the supplementing Directive (SED) were finally adopted on the 8th of October 2001.

Twenty years later, there are – despite all initial prophecies of doom ('too expensive', 'too complicated', 'no need') – more than 3000 Societas Europaea (SEs) all over Europe. Many large and well-known European enterprises now operate as an SE – *Airbus SE, BASF SE, Porsche Holding SE, SAP SE, Schneider Electric SE, SCOR SE, Strabag SE* and *TotalEnergies SE* are just a few prominent examples. In fact, eight of the thirty DAX companies (26.6 %), eight of the CAC forty companies (20 %) and eight of the EURO STOXX fifty companies (16 %) are now SEs. But there are also many smaller European 'hidden champions' which have discovered the SE as an attractive legal form for themselves. Moreover, in the context of the recent boom of special purpose acquisition companies (SPACs), the SE has quickly become the legal form of choice for such SPACs in Europe.

Indeed, the SE has much to offer: a European corporate identity, the option to transfer the seat to another Member State (although this will no longer be a 'unique selling point' once the Mobility Directive has been fully implemented), the choice between a one-tier and a two-tier board system, and the possibility to negotiate employee involvement and thus achieve a tailor-made solution. Especially the options regarding employment involvement proved to be a huge factor for the success of the SE in Germany (where more than 700 SEs are registered). By changing into an SE, companies can reduce the size of their supervisory board; moreover, if a company converts into an SE before it reaches the national threshold for co-determination, it remains free of co-determination even when the number of employees rises above the national threshold later ('co-determination freeze'). Similarly, the comparative popularity of the SE in the Czech Republic seems to be (at least partly) due to the fact that it allowed simpler governance structures than Czech law did (at least until 2014).

Apparently, the rather high minimum capital of 120 000 Euros did not turn out to be a real hurdle. Nor did the rather complex 'hodgepodge' of EU law and national law governing the SE prove to be a real obstacle in practice. Quite surprisingly, it also did not really generate a lot of litigation. In fact, the first preliminary reference concerning SE law (precisely: a co-determination issue) was made in 2020 and is yet to be decided by the CJEU (case C-677/20).

Yet, the past twenty years have also shown that there is still room for improvement. First, the *numerus clausus* of formation methods limited to certain types of legal entities (Article 2 SER) is an unjustified 'straight-jacket' which only generates costs and effort and has led to the practice of using 'shelf SEs'. It should be possible to form an SE *ab initio* or by way of a cross-border division. Secondly, the framework for the formation of an SE by merger, as a holding or by conversion should be aligned with the new framework for cross-border operations introduced by the Mobility Directive into Title II of the Company Law Directive (in particular: digitalization, harmonization of creditor and minority shareholder protection). Thirdly, the requirement that the registered office shall be located in the same Member State as the head office of the SE (Article 7 SER) is – although in line with EU primary law – outdated and places the SE at a disadvantage compared with the public limited liability companies of most Member States. Finally, in light of the experiences and developments in the past twenty years, the rules on employee involvement should be updated and optimized (e.g., possibility for the relevant bodies of the companies to choose directly to be subject to the standard rules without prior negotiations, minimum number of employees to trigger the negotiation requirement, clear rules with respect to structural changes after formation).

Notwithstanding, on its twentieth birthday, the SE undoubtedly has reason to celebrate. From a company type that almost never was it has blossomed into a European success story. *Ad multos annos!*

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