A THIRD WAY: REGIONAL RESTRUCTURING AND THE *SOCIETAS EUROPAEA*

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Abstract

The *Societas Europaea* (SE) harmonized minimal amounts of company law and assigned employee representation to a supplementary negotiation process. Commentators predicted that it would introduce cross-border regulatory competition within the EU. Others suggested that companies would choose the SE over other national corporate structures, in order to mitigate the requirements of mandatory codetermination. This paper reports case-study evidence to argue that companies are utilizing the SE in a third, more significant way: to facilitate within-group restructurings that enable them to submit to a simplified, integrated regulation at the level of the parent company. This generates pressure for the unification of additional areas of law and more national-level regulation. Empowering the SE therefore represents a first step towards streamlining the regulation of European companies.

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I. Introduction

The European Union (EU) recently implemented the *Societas Europaea* (SE), a transnational, pan-European form for company law.[1] The initial goal for the SE was to offer companies a complete set of European company law rules to facilitate their operations across the region.[2] Differing attitudes towards employee involvement on company boards, board structure, and taxation, however, made it impossible for the Member States to accede to a single standard.[3]

In order to reach an agreement, the European Member States compromised on a framework structure that harmonized only minimal amounts of company law and left the rest to national law.[4] It also assigned the level of employee representation to a complicated, supplementary negotiation process.[5] Thirty distinct types of SE resulted,[6] with some opportunity for changes to the composition of employee representation on company boards.

A first wave of commentators predicted the introduction of cross-border regulatory competition within the EU.[7] Another line of scholarship has suggested that companies choose the SE over other national corporate forms, in order to mitigate the requirements of mandatory codetermination.[8]

This paper reports case-study evidence to argue that companies are utilizing the SE in a third, more significant way: to facilitate within-group restructurings that enable them to submit to a simplified, integrated regulation at the level of the parent company.

Regulatory Competition

Historically, the EU has acted to minimize competition among countries.[9] Most Member States have adopted the real seat principle, which requires the laws of the country where a company bases its operations to govern all of its activities.[10] This has deterred European companies from registering in countries with favorable legal regimes,[11] and almost no charter market has developed in Europe.[12]

A series of decisions by the European Court of Justice (ECJ), starting in 1999, however, began to shift the political landscape in which the debate over the SE and regulatory competition was taking place.[13] The ECJ clarified that a company incorporated in one Member State may open a branch in another Member State and use it to conduct the entirety of the company's business.[14] It expanded the Freedom of Establishment to include rights to a more favorable

company law and tax law.[15] The Court also rejected the rights of Member States to refuse to recognize the legal personality of companies that have moved their central administration into the State but remain registered elsewhere.[16]
The final SE legislation, in force since October 8, 2004, explicitly enables companies to transfer their registered seats,[17] provided that they also move their headquarters.[18] This represents the first means for reincorporating in Europe.[19] As Luca Enriques first noted,[20] the ability to move combines with the SE's references to national law to create new possibilities for Member States to compete for corporate charters.[21] Many commentators, consequently, have forecast a new European market based on regulatory competition.[22] Others who have analyzed the possibilities, however, have hypothesized that the SE is not a sufficiently attractive tool.[23]

Internal Arbitrage

In addition, and unlike in the U.S., where federal law generally preempts state law entirely,[24] the SE legislation exists alongside national law, and therefore presents companies a choice between the form's rules and the laws of their home country.[25] As a result, companies may opt for the SE and leverage its Directive to reorganize their boards, raising concerns that the SE may contribute to the diminution of workers' rights in Europe.

Codetermination developed from the efforts of European trade unions to secure for their members a direct say in the affairs of the companies for which they worked. Many European Member States specify a level of worker participation required on boards of different types of companies of different sizes, while others have no equivalent systems.[26] As a result, passing EU-level initiatives that affect workers' rights and representation has posed a persistent challenge.[27]
To win approval for the SE, the European Commission similarly struggled to craft provisions on worker participation sufficiently liberal to win approval from Member States that have not mandated representation without threatening its continuation in Member States with strong participation schemes.[28] Its first proposed legislation, in 1970,[29] mimicked the strictest national form of requirements.[30] The Commission's next draft, in 1989,[31] divided the legislation into a Regulation and a Directive, and relegated the provisions on employee participation to the Directive.[32] When this failed to gain support from Member States, the Commission created the High Level Expert Group, chaired by former Commission President Etienne Davignon. The Group laid the groundwork for an eventual solution to the deadlock on employee participation by judging the varied levels of involvement among the Member States too diverse for harmonization and devising a process, rather than a system of compromise rules for the SE.[33] The final Directive sets out a compulsory negotiation period

between management and employees, with a new principle known as "before-after" to take effect should negotiations fail. According to the principle, management must guarantee that the same level of involvement that existed before the transition to the SE form will remain in effect afterwards,[34] so that companies with representation will have a difficult time escaping it, while companies without it will not open themselves to its introduction through conversion to the SE.[35]

Horst Eidenmüller and others have noted that this system nevertheless creates opportunities for arbitrage within individual Member States, as regards their board structures, in addition to the potential for arbitrage among Member States.[36] Eidenmüller, Engert, and Hornuf (2009) posed fourteen questions to SE companies in Germany during twenty-minute telephone surveys and found strong evidence that firms use the SE to mitigate the effects of mandatory codetermination.

A more comprehensive, empirical analysis of the reasons that companies incorporate as SE's has not, however, been conducted until now. This paper presents empirical data gathered through a year-long series of in-person interviews with corporate decision makers, union leaders, legal advisors, and policymakers in several Member States and at EU headquarters.[37] The paper emphasizes conversations with representatives of companies that have adopted the SE form, as well as those that have not.

European companies generally continue to report to national regulators, even as the strategies they pursue and the risks they assume take place on an increasingly regional or global level.[38] A mismatch has therefore resulted between national oversight and international activity. The interview data shows that in the insurance and reinsurance industries, several leading multinational companies have successfully utilized the SE to address the disparity, by employing it as a tool for achieving supervision in one European location.[39] The SE facilitates regional restructuring by allowing for legal, cross-border mergers and international transfers of operational centers. Insurance and reinsurance companies have used SE conversions to replace their subsidiaries with branches, submitting to an integrated regulation at the level of the parent company.[40]

The legislation has not been as effective as expected: Today, a substantial number of the 112 registered SE companies remain non-operational.[41] While the framework structure harmonized only minimal amounts of company law, leaving the rest to national law, law does not appear to be so easily circumscribed from its broader systems. The SE has therefore not been as relevant in other sectors, where national-level legal schemes have impeded the attractiveness of SE conversions.[42]

Harmonizing additional areas of company law has become increasingly crucial for improving the viability of regional regulatory initiatives, such as the SE. Empowering the SE represents a first step towards streamlining the regulation of European companies. The form could become far more relevant, assuming that European Member States can agree to harmonize additional areas of law.

II. Methodology

This article is based on data I gathered in seventy-five interviews, with general counsels, chief financial officers, and other legal advisors at one half of the active SE's.[43] The companies included have headquarters in Austria, Belgium, China, Cyprus, Estonia, France, Finland, Germany, Luxembourg, Norway, the United Kingdom, and Sweden and comprise the biotechnology, chemicals, electronics, financial services, insurance, medical equipment, metals, oil, paper, real estate, and reinsurance industries.[44]

For context, I also interviewed legal academics, representatives to the European Commission, company lawyers, labor advocates, journalists, and policy analysts at European think tanks and non-governmental organizations. Directors and officers of companies that considered SE conversions but decided against them, in Bermuda, the Czech Republic, Germany, Hungary, Ireland, the Netherlands, Norway, the United Kingdom, Sweden, and Switzerland offered additional viewpoints.

Case study evidence of European companies' perceptions of the SE sheds light on their decision-making processes and the mechanisms by which EU legislation can promote integration of the European market, or introduce cross-border or within-country arbitrage. Alternative methodologies to conducting fieldwork in multiple jurisdictions introduce significant limitations, in this context. The wide variation in numbers of SE companies across countries, in the total numbers of companies in each Member State eligible to transform, and also in the numbers of companies that operate transnationally and for which conversion would therefore be attractive makes country-level comparison difficult. The number of non-operational SE's also complicates meaningful quantitative analysis. The SE's recent implementation further precludes gathering time-series evidence in order to demonstrate causation. Furthermore, because all of the European Member States have transcribed the SE Directive, no variable exists to use for a control. The in-depth interviews also reveal disparities between companies' intentions in converting and the legal obstacles they have encountered in following through on their aims: while companies may state their interest in moving or recalibrating their boards, investigating the legal mechanisms required can expose unexpected costs and obstacles.

My data suggest that most companies have converted to the SE to rationalize their multinational operations and reduce their regulatory obligations. This generates pressure for the unification of additional areas of law and more national-level regulation. I found that if the SE is to remain viable, it will spur further harmonization of company law in the EU, decreasing legal diversity between Member States. In addition, specific features of the SE legislation limit companies from using it for arbitrage, and it has introduced only minimal regulatory competition. Member States seeking to keep and attract new companies will likely move towards a closer equilibrium in the terms they offer to them, leading to less overall variability in the law over the long term. While the SE does not appear to threaten the perpetuation of employee representation on company boards, it has diversified and also decreased the number of workers serving on boards, bringing the Member States into closer alignment on this issue and challenging labor unions to expand their focus to the regional level.[45]

III. Empirical Data

In the four years since the SE's inception,[46] conversions have increased nearly exponentially. [Figure 1.] The two chief innovations the legislation offers are the possibility to transfer the corporate seat throughout Europe[47] and to effect cross-border mergers,[48] as well as the ability to elect a one-tier or two-tier board structure,[49] with worker representatives[50] appointed pursuant to a negotiated process.[51] In most other respects, however, SE's follow the same national laws as other public limited-liability companies.[52]

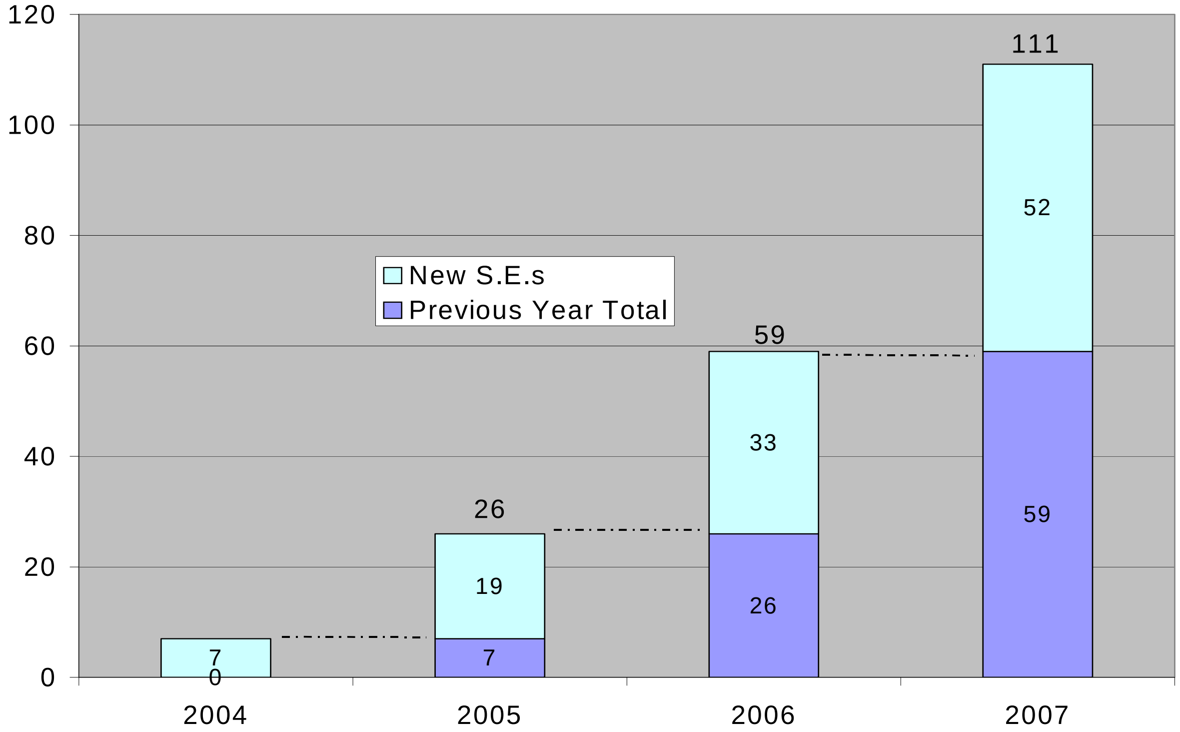


Figure 1. Timeline

A. Harmonization?

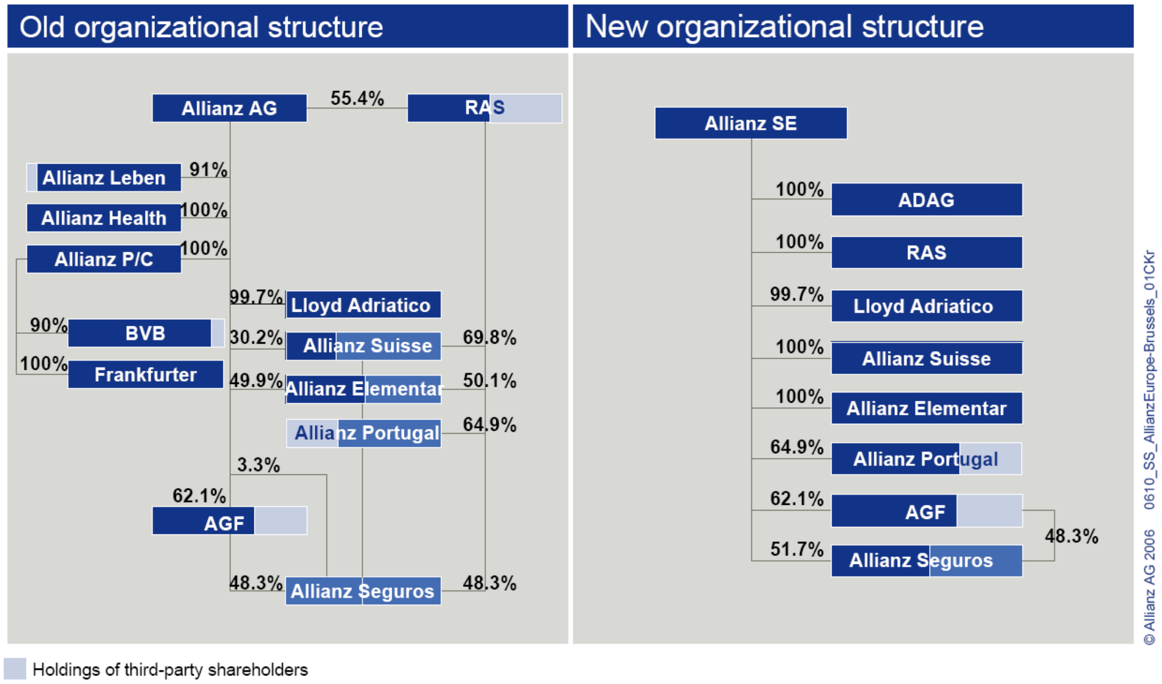
The SE's facilitation of regional restructuring has attracted a large proportion of companies. The ability to complete cross-border mergers has liberated companies from the legal contortions they had previously engaged in and has also enabled them to absorb their subsidiaries and establish branches.[53] The branch structure has helped to streamline companies' international operations, saved VAT taxes, and allowed for supervision in one location in specific industries, at the level of the parent company. In the financial, insurance, and reinsurance sectors, for example, regulation by a single supervisor has allowed for savings in administrative and compliance costs and the pooling of regulatory capital.[54] Companies in industries that are not regulated at the European level, however, have been less likely to convert to the SE. The broader legal environment within which the SE legislation operates necessarily constrains what companies can use it to accomplish. Pressure for increased harmonization and European-level regulation will build as companies interested in converting to the SE encounter the limitations of what it can offer them, stimulating the progress of the EU.

1. SE Capabilities

a. Cross-Border Merger

Before the adoption of the Directive on Cross-Border mergers in October 2005,[55] the SE provided the only tool with which companies could carry out legal mergers across national boundaries.[56] Allianz, the German asset management and insurance company and flagship company to convert to the SE, adopted the form to enable a cross-border merger with its 55.4%-owned Italian subsidiary, Riunione Adriatica di Sicurtà (RAS).[57] RAS owned substantial holdings in other Allianz subsidiaries in Switzerland, Austria, Portugal, and Spain. Fully integrating RAS into the Allianz parent company simplified Allianz's structure, as it gained close to full ownership of the four other subsidiaries. [Figure 2].

Figure 2. The Organizational Structure of Allianz



Converting to the SE took Allianz more than a year and cost the company €95 million. Without the new form and its capacity to complete a cross-border merger, however, Allianz would have needed to acquire RAS through a more expensive, riskier takeover bid.[58] Companies need only gain the approval of two-thirds of their targets' shareholders in order to carry out a merger;[59] takeover bids require the cash acquisition of all of their targets' shares, in order to initiate a squeeze-out process. National law proscribes the squeeze-out threshold, and in Italy the threshold is 98%.[60] Buyers must frequently make premium payments to hold-out shareholders to win sufficient support. Many observers of the Allianz deal maintain that the company would not have been able to buy enough shares in RAS at a realistic price. Becoming an SE thus formed a necessary step in its acquisition of RAS.[61]

b. Branching

In the fields for which centralized regulation is now available,[62] companies must adopt a branched configuration in order to qualify for it, as Member States retain individual oversight of a company's subsidiaries.[63] Each subsidiary must report to its national regulator, which multiples costs and allows for conflicting obligations.[64] As a result, companies have used the SE to absorb their subsidiaries through cross-border mergers and establish branches.

Scor, a French reinsurance company, created three SE's in order to take advantage of the EU's 2005 Reinsurance Directives.[65] It transformed Scor SA, a French holding company at the head of the group, into Scor SE. Over a year and a half, it merged its German, Italian, and Dutch subsidiaries into Scor Global Life SE and Scor Global P&C SE and replaced them with branches.[66]
The Reinsurance Directives permit unified supervision of reinsurance companies and their branches in their home country.[67] Reinsurance concerns global risk and its distribution, and the EU sought oversight of companies' overall strategies, rather than their activities within individual Member States.[68] Branches, unlike subsidiaries, do not amount to independent legal entities and need not make separate corporate filings, convene separate boards,[69] or pay VAT taxes on transactions with their parent companies.[70] Scor, in using cross-border mergers to reconstitute its subsidiaries as branches, gained a centralized regulator as well as savings in compliance and corporate governance costs.[71] As one lawyer explained, however, "Each regulated industry is different; selling tractors would be different [from the reinsurance industry]. The SE was sold to the public as a one-size fits all tool, and it's not."[72] The SE would not have offered these advantages in other sectors.

c. Capital Reserves

Scor's conversion to the SE has, furthermore, eased its capital-reserve obligations under the Solvency II Directive.[73] Solvency II generally increased the amount of regulatory capital that insurance and reinsurance companies must reserve.[74] All of the capital that Scor's subsidiaries held is now held by its branches and counts as the company's own, reducing the total amount of money necessary.[75]

For this reason, Sampo Life, the Finnish life insurance company, formed an SE company, Sampo Life Insurance Baltic. It merged its Estonian, Lithuanian, and Latvian subsidiaries into a single European company headquartered in Estonia, and established branches in the other two countries.[76] The money the subsidiaries previously held now counts as part of the SE's total pool of regulatory capital, reducing the amount Sampo must reserve by one third.[77]
Use of the SE mitigated the concerns of Sampo's regulators. While structural changes within the life insurance sector typically elicit heightened scrutiny, the SE conversion signaled a legitimate, European-level restructuring.[78] Scor also chose the SE, rather than the Directive on Cross-Border Mergers, to absorb its subsidiaries for the impression it would make on its supervisor.[79] As the CFO of a multinational reinsurance company explained, "It's much brighter to say we're becoming an SE – we consider Europe a unique market and we will act through branches – than it is to say we're pulling out our subsidiaries." Many companies in this study characterized the SE as an important cover in carrying out reorganizations that would otherwise trouble clients and regulators.[80]

Areas touching on consumers' rights remain subject to national-level regulation.[81] As a result, Sampo Life Insurance Baltic was not able to achieve the same centralized supervision as Scor. In order to comply with the separate regimes, Sampo offers different insurance products in each country.[82]

d. Consolidation

Swiss Re, the insurance and reinsurance multinational, has used the SE in a broad restructuring. To benefit from EU legislation, it shifted its insurance and reinsurance businesses from their original headquarters in Switzerland to two new centralized, Luxembourg-based entities.[83]

By using the SE, Swiss RE consolidated its insurance subsidiaries without disturbing their licenses to conduct business in the U.S.[84] The company combined its Dutch and British non-life insurance subsidiaries into a UK-based SE, moved the SE to Luxembourg, and then established a German branch. UK law does not include provisions for mergers, so Swiss Re formed the SE through a cumbersome, court-approved transfer of assets and liabilities. Without the SE, though, it would have had to liquidate each business, establish new companies in Luxembourg, and apply and pay for new licenses.[85]

The company used the 2005 Directive on Cross-Border Mergers, rather than the SE, to relocate its reinsurance subsidiaries. It formed a private company in Luxembourg and merged into it its UK, Irish, Dutch, and German entities. Next, it will integrate its Danish, French, Italian, and Spanish reinsurance subsidiaries into this structure.[86]

Partner Re, another reinsurance company, bypassed the SE when it moved its headquarters from Switzerland to Ireland to qualify for the EU Reinsurance Directives. It avoided the form in order to eliminate exposure to employee involvement and to gain predictability on taxation, particularly its rights to offset losses in one jurisdiction against total profits. The company also hesitated to adopt new legislation for which potential gaps or mistakes could be remedied only by petitioning national courts, jurisdiction by jurisdiction, rather than by directly lobbying a single regulator.[87]

2. SE Limitations

In order to pass the SE legislation, the Member States opted for a framework structure with many references to national law. To attract more companies, the SE must drive further legal harmonization.[88] Otherwise, companies in regulated industries lacking regional supervisory regimes will not convert to the SE.

a. Deposit Guarantees

In 2003, Nordea Bank publicized plans to become an SE. Its goal has been to integrate its subsidiaries into a single Swedish entity and operate through branches. A branch structure would enable it to gain centralized supervision, reduce spending on compliance and corporate governance requirements, and lend more money.[89] A bank may not loan more than 10% of its total capital to a single customer. Capital held by branches counts as the parent company's.[90] National-level deposit guarantee schemes, however, have impeded Nordea's SE conversion. European banks must contribute to funds guaranteeing their savings in every country in which they operate.[91] Each country has different rules on coverage limit, priority given to deposits, ex ante or ex post financing, and other features.[92] If Nordea became an SE, all of its deposits would shift to the Swedish parent company, along with the risks associated with them. The funds that Nordea has already transferred to the other countries' systems, however, would not flow with the deposits to Sweden. This has constrained Nordea's plans, as it is compelled to allocate substantial funds in these countries' schemes. Nordea has actively petitioned the European Commission for a harmonized, European-level system of deposit guarantees, but so far the Member States have not agreed on a solution.[93]

b. National Regulation

For the SE to attract more companies in additional industries, further harmonization will be necessary. Telecoms, for example, do not currently benefit from the form. They must operate a subsidiary in each country in which they do business; Member States license individual companies, and not their branches, to operate at specific frequencies.[94] Pharmaceutical companies, too, have to register their drugs separately, in each Member State, and report the high cost of applying for new approvals.[95] Allianz, despite becoming an SE, left its Italian subsidiary in place rather than establishing a branch because Italy only allows independent, Italian license holders to underwrite insurance there.[96] Protectionist attitudes also dampen enthusiasm for the SE. A lawyer advised an executive search company against converting to the SE, explaining that Eastern European regulators would view restructuring as a means for taking money out of the region and therefore block the conversion of Eastern European subsidiaries into branches.[97] Companies House, the government register of UK companies, notified an Austrian SE that it could not establish a branch in England.[98] The suggestion that PepsiCo might buy Danone caused French politicians to ask the Prime Minister to retain the national "jewel" for France.[99] In 2007, the German energy company E.ON dropped its bid for Endesa, a Spanish utility company, after the Spanish government opposed the deal in favor of a rival bid from another Spanish company.[100] The European Commission criticized Spain's actions to thwart the merger, and referred the case to the European Court of Justice. "Europe continues to fight yesterday's battles; there is very little community of purpose," says one policy analyst.[101]

c. Taxation

Protectionism kept the European Member States from attaining consensus on a harmonized tax regime for SE companies. The decision to leave taxation to national law helped secure the passage of the legislation.[102] Member States with low corporate tax rates, such as Estonia, with no tax on retained earnings, Ireland, with a 12.5% tax rate, and Slovakia, with a 17% tax rate, feared elimination of their competitive advantage.[103] The lack of harmonized taxation for the SE form, however, has been extensively criticized,[104] even by the European Commission.[105] Operating across multiple tax regimes leads to double taxation and under-taxation, overly tax-driven arrangements, and extra compliance costs.[106] Uncoordinated national tax regimes hinder the development of the single European market.[107] Many more companies would be interested in adopting the SE if it offered a unified system of taxation.[108] For this reason, the SE has begun to generate discussions of what a European-level tax regime might look like.[109] A proposal called the Common

Consolidated Corporate Tax Base (CCCTB) has been most popular,[110] and most companies in this study favor it.[111] The CCCTB first consolidates a business's income across all of its European operations, using a uniform set of rules for deductions and other accounting issues. It then assigns the consolidated amount among the locations in which the business has operated according to a standard formula.[112] The CCCTB thus sets out a common definition of what constitutes a taxable profit and allocates that profit between Member States, but it allows each Member State to retain its own rate of taxation. Currently, each country taxes a company's subsidiaries and branches individually, and companies have no ability to consolidate their overall profits and losses.[113]

B. Regulatory Arbitrage?

While the SE presents a novel mechanism for European companies to move their headquarters[114] and the legislation leaves to national law such core subjects as directors' liability, insolvency, auditing, and criminal rules, few companies have actually utilized the SE to move and take advantage of national differences in these areas. Robust predictions of the future remain premature, but based on my empirical data it appears that the totality of the legislation and the broader context of European law limits the benefits that companies can achieve by relocating.[115] The companies that have relocated have done so for unique reasons, and others that are similarly situated and have adopted the SE form have not moved. All of the companies in the study reported that they would have preferred for the SE to have offered the uniform system of European-level law originally intended.

1. SE Requirements

The core of the SE legislation developed prior to the *Centros* line of cases, when the mood in Europe was to prevent U.S.-style charter competition. Article 7 of the Regulation requires companies to establish their headquarters in the Member State where they register, in line with the real seat theory. This has limited the SE's flexibility and impeded the freedom of companies to move. Many companies in this study explained that they were unlikely to reincorporate so long as they also had to relocate their operational headquarters.[116]

Moving a head office entails practical obstacles. Sufficient numbers of employees must be willing to follow. Smaller companies tend to be strongly tied to their local economies,[117] and larger companies tend to form part of the political establishment of the original home country.[118] Conspicuously redomiciling a head office can pose a threat to a company's public image.[119] A

Finnish corporation decided not to move, in spite of its interest in avoiding Finnish bid rules, explaining that "headquarters are political."[120] In Finland, the mandatory bid threshold is unusually high, at two-thirds of voting rights.[121]

These concerns were irrelevant for Narada, a battery manufacturing company originally based in Norway. It structured a joint venture with its main customer, the Norwegian telecommunications company Eltek, as an SE so that it could move the new entity to any place it hired staff. It selected a British citizen to run the venture, and transferred the SE to the UK.[122]

2. SE Expenses

While the SE eliminates legal barriers to relocating,[123] it does not address obstacles posed by national taxation.[124] Exit taxes frustrate the movement of European companies.[125] Germany, for example, requires companies that terminate their unlimited tax liability by moving to pay full liquidation taxes.[126] Portugal is the only Member State that does not charge exit taxes.[127] Directive 2005/19/EC,[128] however, allows companies that retain a permanent establishment in their original location to which their assets can be attributed for continuing taxation to defer their payment of capital gains.[129]

Furthermore, the SE legislation allows Member States to establish compensation mechanisms for minority shareholders who oppose reincorporation and additional protections for creditors.[130] Few companies have been willing to risk the unpredictable costs of complying with these provisions. Elcoteq, an electronics manufacturing company originally located in Finland and a main supplier to Nokia, the Finnish electronics company, was the first company to become an SE to transfer its seat. Its shareholders voted to approve moving the company's headquarters in 2005. It created a Luxembourg-domiciled SE by merging the Finnish parent company with a Luxembourg subsidiary. The SE established new branches in Switzerland and in Finland.[131] Elcoteq moved to Luxembourg chiefly to benefit from a bilateral tax treaty between Luxembourg and Switzerland,[132] although the company also describes the difficulty of recruiting top talent to Finland.[133] Most of its officers were based in Switzerland, and Finnish employees accounted for only one percent of its workforce. Under the tax treaty, income allocated to the Swiss branch of a Luxembourg-based company is not taxed at the head-office level. Interest on loans originating from the Swiss branch also qualify as costs for tax purposes, reducing overall taxable income.[134]

Shareholders opposed to the move had the right to sell their shares back to the company. Elcoteq could not predict in advance how many would do so and, therefore, how much money to reserve. The legislation, furthermore, did not clarify whether the dissenting shareholders should receive the average share price of the period leading up to the shareholder vote or the price on the day of the vote.[135]

The transfer of seat contributed to convergence between the laws of the two countries.[136] Finland, like most European countries, has not proscribed a nominal share value, but Luxembourg has. [137] To speed negotiations, Luxembourg repealed its rules, aligning itself with the rest of the continent.[138] Luxembourg law also contains a "one share-vote" clause,[139] but Finnish law does not.[140] Elcoteq originally issued two series of shares, with the one held by the founders carrying ten times the other's votes. It amended its share structure to match Luxembourg's.[141]

The SE's provisions on employee involvement also exposed Eastern European Member States to Finland's strong tradition of worker's rights. Elcoteq struggled to negotiate with representatives of its Baltic subsidiaries. Progress stalled while some countries drafted laws delineating a process for choosing worker representatives,[142] and other countries lacked translations for basic collective-bargaining vocabulary.[143]

Prosafe, a Norwegian shipping company, also incurred large costs using the SE to move.[144] It transferred its headquarters to Cyprus to avoid changes to Norway's national tonnage tax system.[145] In 1996, Norway adopted a permissive scheme of tonnage taxation to make itself a competitive shipping base. It did not tax companies' operating profits unless they paid taxable dividends to shareholders or moved their assets out of the country.[146] In September 2006, however, the government announced a new plan to reclaim the tax credits. It demanded payment on all tax liabilities deferred under the 1996 law over a period of ten years and moved to impose forward taxes on shipping companies.[147]

When it left Norway, Prosafe paid the full amount of its deferred tax liabilities.[148] Since then, Norway has passed additional legislation taxing exiting companies as if their full valuation has been realized. Odjfell, another Norwegian shipping company, converted to the SE in contemplation of a move, but for now remains in Norway.[149]

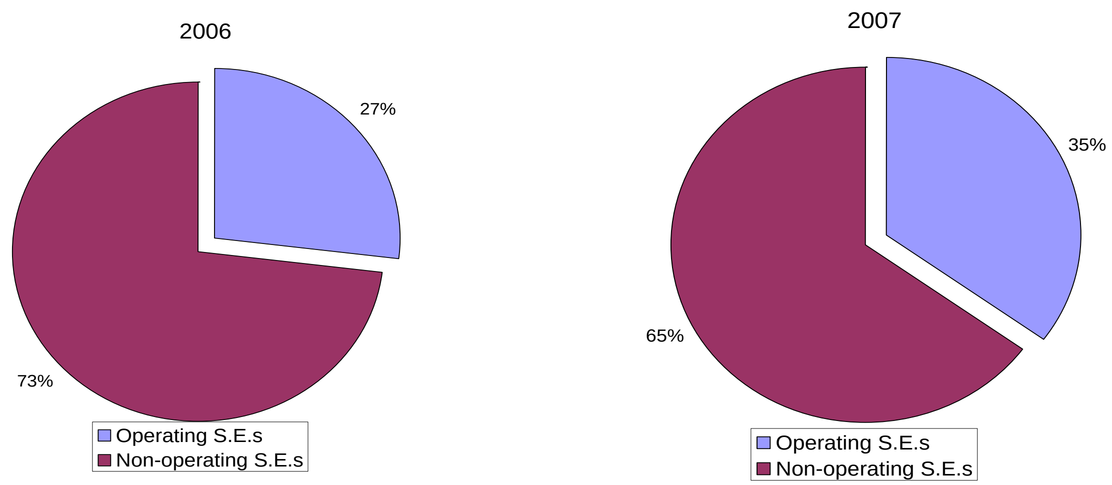
3. SE Limitations

The SE allows for seat transfers, but only limited benefits redound to companies from pursuing them. Most European business and labor regulations apply based on where a company operates, not where it incorporates.[150] Many aspects of the securities laws pertain to where shares are traded,[151] and companies pay taxes wherever they earn income.[152]

The majority of registered SE's are non-operational "shelf companies" that exist legally but do not yet conduct business or employ anyone.[153] Private companies, such as Foratis AG in Germany, create the empty structures to sell.[154] Their buyers can move the shelfs to any other Member States and then begin to run them.

Many commentators cite the existence of shelfs to dismiss the SE.[155] The percentage of operational SE companies, however, has grown. [Figure 3]. The shelfs remaining suggest the possibility for future movement of companies across Europe.[156]

Figure 3. Operating vs. Non-operating



To date, only four companies have transformed a shelf into an operational company, but shelfs should appeal to companies in Member States with complicated rules for forming SEs.[157] The companies can buy the pre-made forms, established under the laws of another country, and move them to their home countries. Conducting business through a company that was once a shelf saves buyers time, and, in some jurisdictions, increases access to investment capital and other contracts.[158]

While shelf companies seem to indicate a wait-and-see attitude, and while companies have shown hesitance in reincorporating, many smaller companies have utilized the European Court of Justice's case law on the Freedom of Establishment to incorporate, in the first instance, in the UK. Between 2003 and 2006, more than 67,000 new, private limited companies (plcs) were established there from other EU Member States. The average number of incorporations per year increased from 146 firms per country in the pre-*Centros* period to 671 firms per country afterwards. The largest flow of firms has been from France, Germany, the Netherlands and Norway, and 42,000 German firms have incorporated.[159] Air Berlin, the low-cost German airline, became a high-profile example of the trend when it formed as a UK plc before going public and listing on the German DAX.[160]

UK plcs gain access to the country's capital markets and court system and avoid employee participation rules, although workers must continue to serve on national subsidiary boards in countries that require it.[161] France,[162] Spain,[163] Germany,[164] and the Netherlands have all recently eliminated or lowered their minimum capital laws to match the UK's more lenient system.[165] The Dutch and German consultation documents explicitly reference the need to compete with UK company law and incorporation procedures.[166] The German government has also reformed its national rules to allow for the establishment of German corporations on UK limited terms,[167] and the Dutch Parliament has launched a review of its private limited company law.[168] European companies, however, have not used the SE in great numbers to transfer their seats to the UK.

C. Internal Arbitrage?

The SE legislation operates in conjunction with national law, and companies may choose not only a different Member State in which to reincorporate but also between the SE's rules and the laws governing national corporations in their home countries.[169] Some, therefore, have converted to the SE for the opportunities it presents to select between a one-tier and two-tier board structure[170] or to adjust the number and makeup of employee representatives on boards.[171]

Employee participation on Supervisory Boards is required to varying degrees in many European companies, although Germany's rules are the strictest.[172] In Germany, one half of the Supervisory Board seats in large companies must be allotted to workers.[173]

The interview data suggests that while some European companies have utilized the SE to negotiate smaller, more international Supervisory Board, the form appears unlikely to bring an end to employee participation on two-tier boards.

Most companies with codetermination appear committed to the stakeholder model from which it derives, in which companies serve the interests of many groups, including employees,[174] rather than focusing solely on the maximization of shareholder wealth.[175] More likely is a new equilibrium of smaller, more diverse Supervisory Boards.

1. SE Limitations

Every company that participated in this study emphasized that large corporations with significant employee participation would not convert to the SE to adopt a one-tier board. Doing so would eliminate the division between the Management and Supervisory Boards. The national laws of some Member States with dual board structures do not delineate how a one-tier board with worker representatives should operate, although Germany has explicitly legislated codetermination in one-tier SE companies.[176]

The only SE companies that have chosen a one-tier board have been companies too small for codetermination.[177] One-tier boards have helped them to streamline operations and to increase executive power, aligning them more closely with companies from other European Member States.

Plansee, an Austrian metalworks company, adopted the SE in order to substitute a one-tier board for its two-tier structure, even though this required it to increase the number of outside directors. Plansee forms one of a group of three related companies. The others, based in Luxembourg, previously had one-tier boards, and their Managing Directors served on the Supervisory Board of Plansee. The new, one-tier SE allows for all of the Managing Directors to sit on the same level in all three companies, eliminating any impression that the Managing Directors of the Luxembourg companies exert control over Plansee's Managing Director. According to company lawyers and officers, the new organization also appears more understandable to foreign investors and potential venture partners.[178]

PCC, a German energy company, also used the SE to create a unitary board. The new board structure has helped the owner of this closely held company to increase his control. While previously, his decisions were ratified by a Supervisory Board of three outsiders, the new, integrated board includes only the owner; a former member of the Management Board; and one external member, a previous representative to the Supervisory Board. Under this arrangement, the owner more easily wins support for the initiatives he proposes.[179]

Many companies mention the European branding inherent to the SE as an additional benefit of conversion.[180] PCC has failed in two takeover bids for Polish chemical companies and blames Polish perceptions of German corporate ownership as a threat to employment. PCC enthusiastically supports the European status the SE confers.[181]

2. SE Expenses

Every German company with employee representation to have converted to the SE – Allianz, BASF, Carthago Value Invest, Fresenius, Hager, Man Diesel, Max Boegl International, Porsche Holding, and Surteco – has continued to maintain a two-tier structure, but many have negotiated a reduced size and changed composition of the Supervisory Board.[182] The SE Directive allows agreements with workers that reduce the size of the Supervisory Board, even though the overall proportion of employee representation may not change.[183] These companies have not, however, utilized the SE to eliminate codetermination entirely, by transferring their seats to Member States without employee involvement.[184] They described employee participation, in interviews for this study, as an important instrument of legitimacy during decisions adverse to employee interests.[185] Although more concentrated systems of decision-making could allow companies to more quickly make choices and implement them, codetermination helps companies to defuse conflicts and generate consensus.[186]

Two key thresholds exist in German codetermination: companies with employees numbering between 500 and 2,000 must offer one third of their Supervisory Board seats to workers;[187] companies with more than 2,000 employees must offer them one half of the seats.[188] In the latter case, not only employee codetermination but also the size of the supervisory board is fixed by mandatory law.[189] As a result, companies with less than 2,000 employees have converted to the SE in order to hold the percentage of worker representatives to the lower level. Those with more than 2,000 employees have utilized the SE as an opportunity to renegotiate the size of their Supervisory Boards, even though the SE does not permit them to change the percentage of representation on the board.[190]

Fresenius, a healthcare company with 1,000 employees in 100 countries, converted to the SE to freeze the number of workers on its Supervisory Board in advance of growing to more than 2,000 employees. It planned to acquire a new hospital business, and the addition of its employees would have enlarged Fresenius' Supervisory Board to twenty people from twelve.[191]

Allianz, with more than 181,000 employees, is obliged by German law to place workers in half of its Supervisory Board seats. In transforming to an SE, it decreased the size of its Supervisory Board from twenty to twelve, thereby reducing the number of workers on the Board from ten to six.[192] The new Supervisory Board also includes a French and a British employee, whereas it used to be entirely German.[193]

All companies, with and without codetermination, emphasized in interviews the ease of coordinating smaller Supervisory Boards. Fewer people more easily reach decisions, maintain confidentiality, and cost less in salaries for board service. Conversion to the SE also endows Supervisory Board chairs with new rights to veto board decisions and to cast tie-breaking votes, redistributing power to the chair from the employee representatives.[194]

Adopting the SE to adjust board requirements comes at significant cost. Allianz paid a total of 95 million Euros for its conversion.[195] The Directive sets out a complicated process for establishing the level of worker representation in the new SE company.[196] It took BASF, the German chemical company, three months to nominate and elect representatives to the Special Negotiating Body from the thirty-two countries in which it operates.[197] All of the German companies that have transformed into SE's have used the entire six-month period for which the Directive allows negotiations. The Before-After Principle may mandate a company to make no changes, despite its having undertaken the costs of negotiating,[198] so some German companies have elected to bypass the process and simply continue their original employee participation scheme.[199]
The Directive also leaves uncertain various aspects of the negotiation process. Allianz, and BASF, maintain that a company's Articles of Association determine the size of its Supervisory Board.[200] Other legal commentators, however, have argued that the size of the Supervisory Board can itself be established by the Special Negotiating Body.[201]

The reduction in the size of Allianz's Supervisory Board to twelve and the internationalization of its members tracks the experience of other large German companies that have made the transition to the SE form.[202] Some fear the SE will weaken labor strength, as employees of different Member States have no common history of acting together and hold divergent national interests.[203] Others argue that internationalization serves to enhance the legitimacy of employee representation because it reflects the actual composition of modern workforces.[204]

According to the European Trade Union Institute for Research, Education, and Health and Safety (ETUI), SE-related changes have been useful in forcing a parallel internationalization of union activities.[205] The European Trade Union Confederation (ETUC) has begun to intermediate in the negotiation process provided for in the SE Directive. Coordinating translators has become a new priority for helping workers to act collectively at the European level. Unions are acting to school workers in a broader conception of their rights and goals, as companies who speak an international language of business increasingly pay little attention to national-level unions who refer to national laws and also leverage regionalization to play national unions off against one another.[206]

Unionization levels among the European Member States vary widely,[207] and the SE has triggered discussions of employee involvement in countries without similar traditions. Every country in which an SE operates must provide representatives to the Special Negotiating Body. Sampo Life Insurance Baltic SE, for example, a Finnish life insurance company, had difficulty finding candidates from its Estonian, Latvian, and Lithuanian subsidiaries. The process created a new awareness of representation in these countries.[208]

In contrast to the Baltic States, Scandinavia has a strong tradition of labor organization. More than 80% of Sweden's population belongs to a union, and companies with more than twenty-five employees must place workers on their boards.[209] Nordea, the largest financial services group in the Nordic and Baltic Regions, and its principal union, the Confederation of the Nordic Bank, Finance and Insurance Unions (NFU), worked closely to strengthen union organization in Baltic subsidiaries, in preparation for the company's planned conversion to the SE. The NFU received a grant from the European Union to support a series of meetings at Nordea's non-Nordic entities. Nordea's directors participated, stating their desire to develop reliable employee contacts in the region.[210]

IV. Conclusion

Companies have chosen the SE for the "third way", the within-group restructuring possibilities and regulatory efficiencies that it offers, especially if they can achieve regulation at the European level. Others that have decided against the SE have flagged their desire for more harmonization of both company law and regulation.

Some additional companies have transformed into SE's in order to reincorporate or to adjust the organization of their boards, as Enriques and Eidenmüller predicted. The legislation's drafting, however, limits the actual gains companies can realize through these uses.

The SE thus reveals the challenges the Member States face in creating mechanisms for sharing sovereignty, even as European businesses have ranked among the greatest supporters of European integration.[211] Its approach to creating a transnational market is both indirect and subtle. The SE was unveiled in the absence of true European company law or company-law tribunals, after an acknowledgment of the political impossibility of creating a fully harmonized body of regional law.

While the "third way" has significance for the streamlining of the regulation of European companies, because the legislation did not subsume national-level laws into a complete regional structure, the results have been selective, and the form has captured the interest only of certain companies. It therefore appears to have become a test of what European company law could represent and the sectors and Member States most likely to want it.

The EU's program to reconcile sovereign regimes into a regional entity, and the ensuing tension between national and regional levels, has measurable effects in the corporate law arena. If companies can document increased revenues, benefits to other stakeholders, or improved transparency from regionalization, they provide support for the overall goal of regionalization and the objectives of the European Union itself.

Notes

[1] Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European Company (SE) [2001] O.J. L 294/1. [hereinafter SE Regulation].

[2] Proposition de reglement (CEE) du conseil portent status de la societe anonyme europeene, 13 E.E.C. J.O. C124(1970).

[3] *See, e.g.*, Claire Leca, *The Participation of Employees' Representatives in the Governance Structure of the Societas Europaea*, 18 Eur. Bus. L. Rev. 403, 403-404 (2007); *further compare* Art. 133 of the Proposed COM (89) 268 final For a Council Regulation on the Statute for a European Company, as amended by Proposal of 16 May 1991, COM(91) 174 final.

[4] SE Regulation Recital (4), (12), (20), (21), (26); arts. 4(3); 13; 15(1); 47(1) para. 1; 51; 52(1)(b), (2); 53; 54(1), (2); 57; 59(1); 61; 62(1), (2). *Further*, Frits Bolkestein, Member of the European Commission in Charge of the Internal Market and Taxation, *The New European Company: Opportunity in Diversity,* Address to Conference, University of Leiden, Leiden, The Netherlands, November 29, 2002 (". . . initial idea and the tangible achievement we have today, namely 'the new European Company', are worlds apart.").

[5] *See* Recital (5), (6), (8), (11), and Section II, Council Directive 2001/86/EC of 8 October 2002 Supplementing the Statute of a European Company with Regard to the Involvement of Employees, OJ(EC) L[2001} 294/22. [hereinafter the SE Directive].

[6] One for each of the twenty-seven EU Member States and one for each of the three additional Member States of the European Economic Area: Iceland, Lichtenstein, and Norway.

[7] *See, e.g.*, Luca Enriques, *Silence is Golden: The European Company Statute as a Catalyst for Company Law Arbitrage*, 4 Journal of Corporate Law Studies 77 (2004)The theory of regulatory competition is described by Charles M. Tiebout, *A Pure Theory of Local Expenditure*, 64 Journal of Political Economy 416 (1956). According to Catherine Barnard and Simon Deakin "the mechanism through which competition operates is the mobility of persons and resources across jurisdictional boundaries. In [Tiebout's] 'pure theory' of fiscal federalism, local authorities compete to attract residents by offering packages of services in return for levying taxes at differential rates. Consumers with homogenous wants then 'cluster' in particular localities. The effect is to match local preferences to particular levels of service provision, thereby maximizing the satisfaction of wants while maintaining diversity and promoting information flows between jurisdictions." (Catherine Barnard and Simon Deakin, in Catherine Barnard and Joanne Scott, eds., *The Law of the Single European Market: Unpacking the Premises* 199 (2002).). *Further*, Daniel Esty and Damien Geradin, eds., *Regulatory Competition and Economic Integration: Comparative Perspectives* xxiii (2001).

[8] H. Eidenmüller, A. Engert and L. Hornuf, *Die Societas Europaea: Empirische Bestandsaufnahme und Entwicklungslinien einer neuen Rechtsform*, 53 AG 721 (2008).
[9] *See* Treaty Establishing the European Economic Community art. 54(3)(g) (now TEC art. 44(3)(g)); Treaty Establishing the European Economic Community art. 220 (now TEC art. 293); Luca Enriques, *Company Law Harmonization Reconsidered: What Role for the EC?*, Working Paper No. 53/2005, University of Bologna (2005) at p. 5.
[10] *See, e.g.*, Eddy Wymeersch, *The Transfer of the Company's Seat in European Company Law*, 40 Comm. Mkt. L. Rev. 661, 668 (2003). ("The 'siege reel' criterion was introduced in France after discussion about French companies emigrating to the legally more clement climate in Belgium in the 19th Century.").
[11] *See, e.g.*, RR Dury, *The Regulation and Recognition of Foreign Corporations: Responses to the 'Delaware Syndrome'*, 57 Cambridge L. J. 165, 186 (1998); Inne G. F. Cath, *Freedom of Establishment of Companies: A New Step Towards Completion of the Internal Market*, 7 Yearbook of Eur. L. 247 (1987).
[12] *See, e.g.*, Ronald Gilson, *Globalizing Corporate Governance: Convergence of Form or Function*, 49 Am. J. Comp. L. 329, 350 (2001).) (stating that while U.S. law converged on Delaware, the real seat principle kept Europe from regulatory competition and hence from convergence of its company laws).
[13] Wulf-Henning Roth, *From Centros to Überseering: Free Movement of Companies, Private International Law, and Community Law*, 52 Int'l & Comp. L. Q. 177 (2003); Kilian Baelz and Teresa Baldwin, *The End of the Real Seat Theory (Sitztheorie): The European Court of Justice Decision in Überseering of 5 November 2002 and its Impact on German and European Company Law*, 3 German L.J. 12 (2002); Sebastian Mock, *Harmonization, Regulation and Legislative Competition in European Corporate Law*, 3 German L.J. 12 (2002); Ronald Gilson, *Globalizing Corporate Governance: Convergence of Form or Function*, 49 Am. J. Comp. L. 329, 351 (2001); Larry Ribstein, *The Evolving Partnership*, 26 J. Corp. L. 819, 821 (2001). *But see Cartesio Oktató és Szolgáltató BT*, Case C-210/06 [2008] WLR (D) 400. [hereinafter *Cartesio*.]
[14] *Centros Ltd. v. Erhvervs-og Selskabsstyrelsen*, Case C-212/97[1999] ECR I-459. [hereinafter *Centros*.] In *Centros*, the ECJ held that Denmark could not refuse to register a branch of a company incorporated in the UK, despite the fact that its Danish owners did not intend to conduct operations there and had incorporated in the UK in order to evade Denmark's minimum capital requirements.
[15] *See Centros* and *Cadbury Schweppes v. Commissioners of the Inland Revenue*, Case C-196/04 [2006] ECR I-7995. [hereinafter *Cadbury*

Schweppes.] In *Cadbury Schweppes*, the ECJ upheld the right of Cadbury Schweppes plc, a UK company, to establish a subsidiary in Ireland so that certain profits would fall under the more favorable Irish tax regime. The Court, in Sevic Systems, also affirmed the right of a German company to undertake commercial activities in another Member State, by way of a merger with a local company. German law had previously only recognized this form of merger among German firms. *See SEVIC Systems Aktiengesellschaft v Amtsgericht Neuwied*, Case No: C-411/03 [2005] ECR I-10805.

[16] *Überseering BV v. NCC Nordic Construction Company Baumanagement GmbH*, Case C-208/00 [2002] ECR I-9919. [hereinafter *Überseering.*] In *Überseering*, the ECJ ruled that if a company incorporated in State A moves its center of administration to State B, State B can't deny the company the right to bring legal proceedings there. More recently, the ECJ has appeared to reverse course. *See Cartesio*, denying a Hungarian company the right to remain subject to Hungarian law after moving its central headquarters to Italy.

[17] SE Regulation art. 8.

[18] Id. Art. 7.

[19] Following the transformation of the Tenth Directive, the cross-border merger is another possible mechanism for reincorporating. It allows companies to merge into empty companies in other jurisdictions.

[20] Luca Enriques, *Silence is Golden: The European Company Statute as a Catalyst for Company Law Arbitrage*, 4 Journal of Corporate Law Studies 77 (2004).

[21] *See* SE Regulation arts. 4(3); 13; 15(1); 41(1) para 1; 51; 52(1)(b), (2); 53; 54(1), (2); 57; 59(1); 61; 62(1), (2).

[22] *See, e.g.*, Marios Bouloukos, *The European Company (SE) as a Vehicle for Corporate Mobility within the EU: A Breakthrough in European Corporate Law*, 18 Eur. Bus. L. Rev. 535, 549 (2007); Clark D. Stith, *Federalism and Company Law: A 'Race to the Bottom' in the European Community*, 79 Geo. L. J. 1581, 1611-12 (1991).

[23] J.A. McCahery, E.P.M. Vermeulen, *Does the European Company Prevent the 'Delaware Effect'?*, 11 Eur. L. Rev. 785, 792 (2005); W. Bratton, J. McCahery and E. Vermeulen, *How Does Corporate Mobility Affect Lawmaking? A Comparative Analysis*, Law Working Paper No. 91, European Corporate Governance Institute (2008).

[24] U.S. preemption doctrine precludes state laws that are inconsistent with federal legislation or that impinge on areas that Congress has previously "occupied". Under *Business Roundtable v. SEC*, federal regulatory agencies require clear Congressional authorization and may not unilaterally preempt state law.

[25] *See, e.g.*, Jaap Winter, *Thalassa! Thalassa! – the SE as a Glimpse of the Future*, in Jonathan Rickford, ed., *The European Company* 122 (2003), Carla Tavares Da Costa and Alexandra de Meester Bilreiro, *The European Company Statute* 11 (2003).
[26] *See* European Commission, ed., *Industrial Relations in Europe*, 30 (2000).
[27] *See, e.g.*, Manfred Weiss, *Living Up to the European Concept of Employee Involvement*, 47 Managerial Law 42 (2005) (surveying historical compromises on worker participation in EU Directives).
[28] Employee involvement has posed a similar obstacle to the adoption of the Fifth Directive and the Cross-Border Merger Directive. (*See, e.g.*, Geoffrey Fitchew, *Political Choice*, in Richard M. Buxbaum, et al., *European Business Law: Legal and Economic Analysis on Integration and Harmonization* 12 (1991).
[29] Proposition de reglement (CEE) du conseil portent statut de la societe anonyme europeene, 13 E.E.C. J.O. C124 (1970). The Commission amended this draft in 1975, *see* 8 Bull. Eur. Communities Supp. no. 4 (1975).
[30] *See* 1970 Proposed Regulation arts. 62-82 at 55-71 (mandating a two-tier board structure, with employees filling at least one third of the seats on the Supervisory Board, along with a European Works Council that would hold power to block management decisions on such core subjects as employment conditions and company changes). *See also* Pieter Sanders, *The European Company*, 6 Ga. J. of Int'l & Comp. L. 367, 376 (1976).
[31] O.J. 1989, C 263/41; COM(89)268. The Commission amended this draft in 1991, *see* O.J. 1991, C 176/1; COM(91)174.
[32] The provisions offered Member States three separate models of participation from which they could choose: representation on corporate boards parallel to the German model of workers' rights, representation on a separate works council according to the French system, or a negotiated arrangement for representation as suggested by Swedish practices. It also offered SE companies the ability to select between a one and two-tier board.
[33] 24 O.J. 1991, C 176/1; COM(91) 174.
[34] Recital 18 of Council Directive 2001/86/EC of 8 October 2002 Supplementing the Statute of a European Company with Regard to the Involvement of Employees, OJ(EC) L[2001} 294/22.
[35] *See, generally*, Klaus J. Hopt, *Labor Representation on Corporate Boards: Impacts and Problems for Corporate Governance and Economic Intergration in Europe*, 14 Internat'l Rev. of L. and Econ. 203 (1994).
[36] *See* H Eidenmüller, A Engert, and L Hornuf, *Incorporating Under European Law: the Societas Europaea as a Vehicle for Legal Arbitrage*, 10 Eur. Bus. Org. L. Rev. 1 (2009); Paul L. Davies, *Workers on the Board of the European Company?* 32 Industrial Law Journal 75 (2003).

[37] The interviews were not intended as a random sample but rather as a means for collecting first-hand accounts with which to understand the dynamics driving corporate decision-making. (Robert K. Yin, *Case Study Research: Design and Methods* (1993); K.M. Eisenhardt, *Building Theories from Case Study Research*, 14 Acad. of Mgmt. Rev. 532, 534 (1989).).

[38] *See, e.g.*, Nicolas Veron, *Farewell National Champions*, Bruegel Policy Brief, Issue 2006/04, June 2006.

[39] For a continually updated list of established SE companies, *see* ETUI-REHS, *SE Fact Sheet Overview, available at* http://ecdb.worker-participation.eu/show_overview.php?letter=A&orderField=se_name&status_id=3&title=Established%20SEs.

[40] *See* Section III.C. for a full discussion.

[41] *See* http://ecdb.worker-participation.eu/show_overview.php?letter=A&orderField=se_name&status_id=3&title=Established%20SEs (last visited August 4, 2008).

[42] For a discussion of this idea, see Section III.A.

[43] One half as of August, 2008. By that date, 112 total SE's had been established, with 36 actually conducting operations. The remainder exist legally but do not conduct business or employ any workers.

[44] The interviews were not intended as a random sample but as a means for collecting first-hand accounts with which to understand the dynamics driving corporate decision-making. (Robert K. Yin, *Case Study Research: Design and Methods* (1993); K.M. Eisenhardt, *Building Theories from Case Study Research*, 14 Acad. of Mgmt. Rev. 532, 534 (1989).).

[45] *See, e.g.*, Udo C. Braendle and Juergen Noll, *The Societas Europaea – A Step Towards Convergence of Corporate Governance Systems?* (2005, available at SSRN: http://ssrn.com/abstract=704881 (discussing trends toward global convergence); Henry Hansmann and Reinier Kraakman, *The End of History for Corporate Law*, in Jeffrey Gordon and Mark Roe, eds., *Are Corporate Governance Systems Converging?* (2003); Andrei Shleifer and Robert Vishny, *A Survey of Corporate Governance*, 52 J. Fin. 737 (1997); *but see*, Douglas M. Branson, *The Very Uncertain Prospect of 'Global' Convergence in Corporate Governance*, 34 Cornell Int'l L. J. 321, 329 (2001).

[46] Note: only Austria, Belgium, Denmark, Finland, Iceland, Sweden, and the United Kingdom passed the necessary implementing legislation by the three-year deadline.

[47] SE Regulation art. 8.

[48] *See* Carla Tavares Da Costa and Alexandra de Meester Bilareiro, *The European Company Statute* 21 (2003) ("With the sole exception of Italian law, most national laws render cross-border mergers almost impracticable.").

[49] SE Regulation art. 7.

[50] SE Directive, Section II.

[51] Should negotiations fail, the "Before-After" principle takes effect. *See* Recital 18 of Council Directive 2001/86/EC of 8 October 2002 Supplementing the Statute of a European Company with Regard to the Involvement of Employees, OJ(EC) l[2001] 294/22. [hereinafter the SE Directive]. According to the principle, management must guarantee that the same level of involvement existing before the transition to SE status will remain in effect afterwards.

[52] SE Regulation art. 9(1)(c)(ii).

[53] *See, e.g.*, Marios Bouloukos, *The European Company (SE) as a Vehicle for Corporate Mobility within the EU: A Breakthrough in European Corporate Law?*, 18 Eur. Bus. L. Rev. 535, 539 n.11 (2007) (explaining the complicated methods companies used instead).

[54] *See*, *e.g.*, Stephen Weatherill, *Pre-emption, Harmonisation and the Distribution of Competence to Regulate the Internal Market*, in Catherine Barnard and Joanne Scott, eds., *The Law of the Single European Market: Unpacking the Premises* 41 (2002) (". . . the dominant legislative preference is for a system of 'home State control', according to which harmonized rules of proper regulatory conduct are agreed at Community level but enforced at national level and pursuant to which it is assumed that 'home States' will subject firms based on their territory to the agreed Community rules while "host States', in which target consumers of the firm are based, are excluded from actively applying not only domestic rules, but even in some circumstances the agreed Community rules. The host State's competence is pre-empted; the home State is expected to perform the job of supervision.").

[55] Directive 2005/56/EC of the European Parliament and Council of 26 October 2005, on cross-border mergers of limited liability companies. The Directive took 20 years to complete: *compare* first draft COM (1984) 727 and final, OJ 1985 C23/11.

[56] *See* Carla Tavares Da Costa and Alexandra de Meester Bilreiro, *The European Company Statute* 21 (2003) ("With the sole exception of Italian law, most national laws render cross-border mergers almost impracticable.").

[57] Interview #21, transcript on file with the author.

[58] The Cross-Border Merger Directive had not yet taken effect.

[59] Two thirds being the minimum quorum set by the third directive on mergers, other countries, such as Germany, apply a higher proportion of the capital (three quarters).

[60] [60] Christian E. Decher, *Cross Border Mergers: Traditional Structures and SE-Merger Structures*, 4 Eur. Co. & Fin. L. Rev. 5, 8-10 (2007); Marco Ventoruzzo, *Cross-border Mergers, Change of Applicable Corporate Laws and Protection of Dissenting Shareholders: Withdrawal Rights under Italian Law*, 4 Eur. Co. & Fin. L. Rev 47, 50-55 (2007); Eddy Wymeersch, *Do We Need a Law*

on Groups of Companies, Conference on Company Law and Capital Market, Siena, 30-31 March 2000.
[61] Interviews #3, 4, 5, 29, 30, 31, 39, and 65, transcripts on file with the author.
[62] *See, e.g.*, Second Banking Directive, 89/646/EEC.
[63] *See, e.g.*, Jean Dermine, *Don't Put the Cart Before the Horse*, paper presented at conference on Cross-Border Banking, Regulatory Challenges, 6-7 October 2005, at p.4; European Commission, *Supervision of Branches*, MARKT/G/3/MV D (2007). Even so, the host country remains responsible for liquidity issues as well as monetary policies. (*See* art 27 of Directive 2000/12/EC).
[64] Ample reasons to retain subsidiaries persist, however. Subsidiaries boast limited liability, a separate, "local" legal entity, and predictable tax treatment, among other features. *Further*, Paul Storm, *The Societas Europaea: A New Opportunity?*, in Dirk van Gervan and Paul Storm, eds., *The European Company* 15 (2006) ([I]rrespective of the existence of a single market, the international management literature predicts that international firms will operate with a mix of branches and subsidiaries . . . .").
[65] Directive 2005/68/CE of the Council, of 16 November 2005, concerning reinsurance and amending Council directives 73/239/EEC and 92/49/EEC and also directive 98/78/CE and 2002/83/CE. [hereinafter Reinsurance Directives].
[66] Interviews #20, 45.
[67] Reinsurance Directives recital (9) ("This Directive . . . mak[es] it possible to grant a single authorization valid throughout the Community and apply the principle of supervision by the home Member State."); art. 15 ("The financial supervision of a reinsurance undertaking, including that of the business it carries on through branches . . . shall be the sole responsibility of the home Member State.").
[68] Id. recital (4).
[69] *See, e.g.*, *Adams v. Cape Indus., plc*, (1991) Ch. 433, 536 (U.K.); *Bosal Holding*, 2003 E.C.R. at para. 62; Cases 6-7/73, *Instituto Chemioterapico Italiano SpA v. Comm'n* [1974] 1 C.M.L.R. 309 (1974).
[70] *See Ministero dell'Economia e delle Finanze, Agenzia delle Entrate v. FCE Bank plc*, 23 March 2006 (services rendered by a company in one member state to its branch in another member state are outside of the scope of VAT).
[71] As the CFO of one SE said in an interview, "The FSA tried to make us have independent directors in our tiny UK subsidiary. I said go to hell and established a branch."
[72] Interview #45.
[73] Proposal COM (2008) 119 Final.
[74] Id. at Pillar I.

[75] *See id.* Annex IV for the calculation of solvency capital requirements; interviews #20, 30, and 45.
[76] Interview #57.
[77] Interview #56.
[78] Interview #57.
[79] Interview #20.
[80] Interviews #4, 28, 30, 34, 43.
[81] *See* Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees; *Green Paper on European Union Consumer Protection*, COM (2001) 531 at p. 7 ("Considerable divergences exist in the laws applied to business-consumer commercial practices in the internal market, whether resulting from national specific regulations, differences in general principles or from different jurisprudence."); *Communication on sales promotions in the Internal Market* COM (2001) 546 at p.7 (blaming low cross-border consumer demand on national-level regulation).
[82] Interview #57.
[83] Interview #64.
[84] SE Regulation art. 29.
[85] Interview #65.
[86] Interview #64.
[87] Interview #43.
[88] *See, e.g.*, Ernst Haas, *The Uniting of Europe* (1958) (positing spillover pressure to expand authority of central institutions into neighboring policy sectors); Malcolm Gommie, *EU Taxation and the Societas Europaea – Harmless Creature of Trojan Horse?*, 44 Eur. Taxation 35, 36 (2004).
[89] The Second Banking Directive, Directive 89/646/EEC allows for home country supervision of foreign bank branches under a single license. Foreign bank subsidiaries continue to be regulated by their host state. *Further*, Alfred Lewis and Gioia Pescetto, *EU and US Banking in the 1990s* 12-13 (1996).
[90] Interview #7.
[91] The Directive on Deposit Guarantee Schemes, 94/19/EC, as adopted by the Council of Ministers in 1994.
[92] For example, the Danish scheme guarantees a maximum of 300,000 Danish Krone for ordinary deposits, the Swedish scheme guarantees a maximum of 250,000 Swedish Krona, and the Norwegian scheme guarantees a maximum of 2,000,000 Norwegian Krone. In Denmark, a bank makes current payment but is repaid them on withdrawal. In Finland, Norway, and Sweden, banks pay nonrefundable premiums.
[93] Interviews #8, 27, 33.
[94] Interview #46.

[95] Interview #42.
[96] Interview #21.
[97] Interview #47.
[98] Interview #53.
[99] *See* Gillian G.H. Garcia, *Inter-State Banking in the EU and the U.S.: Similarities, Differences and Policy Lessons*, Oxford Business & Economics Conference, June 24-26, 2007; Deborah Orr, *Danone: Not For Sale*, Forbes, July 25, 2007.
[100] Carter Dougherty, *E.ON Lowers Sights on Endesa Takeover*, International Herald Tribune, March, 7, 2007.
[101] Interview #15.
[102] *See, e.g.*, Pieter Sanders, *The European Company*, 70 J. Bus. L. 184, 192 ("The creation of a European company is one thing and the solution of the tax problems involved is another.").
[103] CEPS Task Force Report, *Corporate Taxation and the European Company Statute* 16 (2008). *Further*, Daniel Shaviro, *Some Observations Concerning Multijurisdictional Tax Competition*, in Daniel Esty and Damien Geradin, eds., *Regulatory Competition and Economic Integration: Comparative Perspectives* 52 (2001) ("A related Tiebout argument would suggest that tax competition permits jurisdictions to specialize in catering to diverse consumer preferences or local needs, such as by collectively offering a choice between high-tax, high-service and low-tax, low-service options.").
[104] *See, e.g.*, Malcolm Gammie, *EU Taxation and the Societas Europaea – Harmless Creature or Trojan Horse*, 44 Eur. Taxation 1, para 1.3 (2004); Frits Bolkestein, *The New European Company: Opportunity in Diversity*, in J. Rickford, ed., *The European Company, Developing a Community Law of Corporations* 43-4 (2003); C. Hampton, *European Company Law Reforms Make Uneven Progress*, 14 EuroWatch 1, 1 (2002).
[105] Frits Bolkestein, Member of the European Commission in charge of the Internal Market and Taxation, *The New European Company*, Address to Conference at the University of Leiden, Leiden, the Netherlands, 29 November 2002. ("I concede that work remains to be done in some areas: in particular, I refer to the taxation aspects, which, quite rightly, are of concern to potential users . . . This leaves the SE-Statute without any tax rules. This is a rather unfortunate situation, which I regret very much. Clearly, the lack of appropriate tax rules significantly reduces the practical attractiveness of the European Company Statute. Business representatives emphasize this quite forcefully.").
[106] Marjaana Helminen, *The Tax Treatment of the Running of an SE*, 44 Eur. Taxation 28, 30 (2004).
[107] *See, e.g.*, Roderik Bouwman and Jan Werbrouck, *International Tax Aspects of the Societas Europaea*, in Dirk van Gervan and Paul Storm, eds., *The*

European Company 102 (2006) ("The absence of special tax provisions in the Regulation, coupled with the principle of equal treatment, means an SE is subject to the tax laws of the Member State of which it is considered a resident for tax purposes and, when operating internationally, applicable international regulations, treaties, and the laws of the (Member) States in which it operates. Consequently as a tax resident of the EU, an SE is potentially subject to the tax laws of [30] countries.").

108 Interviews #2, 4, 5, 9, 25, 29, 32, 33, 40, 42, 51, 66.

109 *See, e.g.*, Roopa Aitken and Chris Morgan, *Societas Europaea: Is Tax an Incentive or a Barrier?*, 15 Eur. Bus. L. Rev. 1343, 1347 (2004) ("Because the introduction of the SE will not eliminate the current tax problems faced by multinational groups, its introduction has fuelled the debate for a more tax efficient method for operating within Europe."); Carla Tavares Da Costa and Alexandra de Meester Bilreiro, *The European Company Statute* 176 (2003) ("The adoption of the European Company . . . has made it more urgent to define the tax framework at the European Union level. TO become an attractive vehicle, it is not enough to ensure that the existing body of European Union tax company legislation is fully applicable to the European Company. The full benefits in establishing a European Company may only be achieved if existing companies can form such a company without any imposition of additional tax pre-incorporation expenses and avoid the outstanding tax obstacles impeding their cross-border operations.").

110 Bela Balassa, ed., *European Economic Integration* 247 (1975) ("Although the Treaty of Rome does not contain specific provisions on the harmonization of [business] taxes, Article 100 of the Treaty can be interpreted as a mandate for harmonization.").

111 *See* Communication from the Commission to the Council, the European Parliament and the Economic and Social Committee, *Towards an Internal Market Without Tax Obstacles – A Strategy for Providing Companies with a Consolidated Corporate Tax Base for Their EU-wide Activities*, COM(2001) 582 final at p.18. ("The Commission has proposed testing the consolidated EU tax base with a European Company pilot programme.").

112 Emrah Arbak, *Will the CCTB Be Stillborn?*, CEPS Commentary (2008) at p. 2.

113 *See* Roopa Aitken and Chris Morgan, *Societas Europaea: Is Tax an Incentive or a Barrier?*, ?, 15 Eur. Bus. L. Rev. 1343, 1347 (2004) (stating that because it causes Member States to give up a degree of sovereignty, even though it does not require harmonization of the tax rate itself, the CCTB is unlikely to pass soon).

114 *See, e.g.*, Carla Tavares Da Costa and Alexandra de Meester Bilreiro, *The European Company Statute* 50 (2003) ("Most national legislatures providing for

the international transfer of seat require that the transfer to another Member State of a company registered in their territory- and consequently subject to their laws – should be accompanied by the dissolution of the company at stake, as well as the constitution of the company in the Member State of arrival according to its national laws. This operation implied a change of the applicable law to the company, and therefore, the loss of its legal personality. Without the continuity of the legal personality of the company, there is in reality no transfer of seat, but a sole dissolution and subsequent reformation of the company.); Eddy Wymeersch, *The Transfer of the Company's Seat in European Company Law*, 40 Comm. Mkt. L. Rev. 661, 661 (2003) ("For decades, the transfer of the seat of a company has been the subject of controversy in European company law. Although the subject was expressly mentioned in the European Treaty, experts have not been able to agree on a workable solution. Also, in most States, national company law has not been able to come forward with acceptable solutions. As a consequence, companies were prevented from enjoying the same freedom of movement as natural persons, and this notwithstanding their express assimilation in the Treaty.").

[115] *See, e.g.*, Klaus Heine and Wolfgang Kerber, *European Corporate Laws, Regulatory Competition and Path Dependence*, 13 Eur. J. L. & Econ. 47, 64 (2002) ("due to the above-mentioned path dependencies much time will be needed before a dynamic competition process can develop, and it can be expected that this competition will have to tackle with a whole set of serious problems.").

[116] Interviews #2, 4, 9, 10, 16, 17, 27, 29, 30, 46, 74. *But see* Luca Enriques, *Silence is Golden: The European Company Statute as a Catalyst for Company Law Arbitrage* 4 Journal of Corporate Law Studies 77 (2004) ("The provision requiring the SE's registered office to be located in the same Member State as its central administration should be no serious obstacle to using the SE as a vehicle for company law shopping.)

[117] *See, e.g.*, John C. Coffee, Jr., *The Future as History: The Prospects for Global Convergence in Corporate Governance and its Implications*, 93 Nw. U. L. Rev. 641, 655 (1999) ("Law and culture are important constraints . . . Even after the Common Market, Europe is criss-crossed by national borders that, as a social matter, restrict the mobility of labor. Hence, labor is more resistant to corporate migration in Europe than in the United States.").

[118] *See, e.g.*, Clark D. Stith, *Federalism and Company Law: A 'Race to the Bottom' in the European Community*, 79 Geo. L. J. 1581, 1611 (1991).

[119] *See, e.g.*, Lucian Arye Bebchuck and Mark J. Roe, *A theory of Path Dependence in Corporate Ownership and Governance*, 52 Stan. L. Rev. 127 (1999) (discussing "souces of path dependence in a country's patterns of corporate structure").

[120] Interview #46.

[121] *See* Finnish Securities Market Act (495/1989). Directive 2004/25/EC of the European Parliament and of the Council on Takeover Bids displaces the Act.

[122] Interview #69.

[123] SE Regulation art. 8(1).

[124] *Hughes de Lasteyrie du Saillant v. Minister de L'Economie,* Case C-9/02, however, has raised questions over the legality of exit taxes. While the European Court of Justice made a clear distinction between people and corporations, it held that France could not charge exiting residents taxes that it did not apply to domestic residents without violating the Freedom of Establishment.

[125] *See, e.g.*, Anne Fairpo, *Societas Europaea and Mobility*, 892 Tax J. 24, 24, (2007); Roderik Bouwman and Jan Werbrouck, *International Tax Aspects of the Societas Europaea*, in Dirk von Gerven and Paul Storm, eds., *The European Company* 104 (2006); Carla Tavares Da Costa and Alexandrea de Meester Bilreiro, *The European Company Statute* 161 (2003) ("Despite Article 8 of the Regulation, the majority of the Member States continue to tax such transfers as if the company was being wound up or liquidated. The reason for this widespread practice is that, in most Member States, with the transfer of the company's registered office to another Member State, i.e., the host State, the SE will cease to be subject to unlimited tax liability in the home country. Therefore, the objective is to prevent any capital gains, which have accrued in the home State, evading taxation. The taxation of capital gains upon the transfer of the company's registered office to another Member State is the last chance to tax the appreciation and gains in such assets upon their actual transfer.").

[126] § 12(1) of the Einkommensteuergesetz (Income Tax Act).

[127] *See Survey on the Societas Europaea* (2003), available at http://www.europe.eu/int/comm/taxation_customs/taxation/company_tax/development.htm.

[128] amending Council Directive 90/434/EEC on a common system of taxation applicable to mergers, divisions, transfer of assets and exchanges of shares concerning companies of different Member States

[129] Title IVb, Articles 10b to 10d.

[130] *See* SE Regulation arts. 8(2)-(4) (endowing creditors with prior information rights); 8(16) (allowing creditors to litigate claims arising prior to the transfer in the departure State); and 8(15) (blocking transfers when proceedings for winding up, liquidation, insolvency, or suspension of payments have taken place). SE Regulation 8(7) also allows Member States to legislate additional rules. Under Article 13 of the German Act on the SE, 22 December 2004, for example, creditors are entitled to a deposit security.

[131] Interview #63.

[132] *See, e.g.*, Roopa Aitken and Chris Morgan, *Societas Europaea: Is Tax an Incentive or a Barrier?*, 15 Eur. Bus. L. Rev, 1343, 1346 (2004) (stating that because tax treatment of an SE is equivalent to that of a national private limited company "the relevant double tax treaties concluded between the country and other countries will apply to an SE . . . .").

[133] Interview #63.

[134] *See, e.g.*, Daniel Shaviro, *Some Observations Concerning Multijurisdictional Tax Competition*, in Daniel Esty and Damien Geradin, eds., *Regulatory Competition and Economic Integration: Comparative Perspectives* 58 (2001) ("The main mechanism for such [non-mandatory] harmonization is a web or more than 1,500 bilateral tax treaties that provide complicated rules for coordinating the claims of 'source' countries where income is earned and 'residence' countries where business owners are found. However, rather than emerging spontaneously without broader harmonizing institutions, these treaties generally follow, in their broad outlines, a set of model treaties first developed in the 1920s through intensive multilateral negotiations under the auspices of the International Chamber of Commerce and the League of Nations. The global setting of these agreements lowered transaction costs for individual countries to agree on specific terms of mutual forbearance. In addition, to businesses that were anxious to avoid double taxation, the global institutions offered a forum at once more favorable than national politics and yet able to be leveraged into such politics through the argument: this is what everyone else is doing; you'd better join the club.").

[135] Interview #63.

[136] *See, e.g.*, Simon Deakin, *Regulatory Competition versus Harmonisation in European Company Law*, Working Paper No. 163, March 2000 (questioning whether regulatory competition strengthens diversity or leads to convergence).

[137] *See* Limited Liability Companies Act – Finland, 624/2006; oxakeyhtiölaki Ch. 3, sec. 5(2), (3).

[138] *See Law of 10 August 1915 on Commercial Companies*, amended with effect from 31 December 2006.

[139] *See id.*, Sec. IV Art. 46.

[140] *See* Limited Liability Companies Act – Finland 624/2006; oxakeyhtiölaki Ch. 3, sec. 1(2)(1), sec. 3(1).

[141] Interview #63.

[142] SE Directive art. 3(b) requires worker representatives to be elected pursuant to national legislation.

[143] Interview #63.

[144] The SE enabled Prosafe to avoid the capital gains taxes its shareholders would have paid, though, had it needed to establish a brand new company in

Cyprus, buy it, and liquidate the Norwegian company. By using the SE, Prosafe could continue business without interruption. *See also* Paul Storm, in D. von Gerven and P. Storm, eds., *The European Company* 11 (2006) (detailing cumbersome administrative procedures for moving a head office but emphasizing the lack of need to wind up the old company or create a new legal personality).

[145] Interview #52.

[146] *See* Sec. 51A of the law on wealth and income tax No 8 of 18 August 1911; Ch. 5 of Annual Tax Decree by the Parliament.

[147] *See* Ministry of Finance, *Press Release: Proposed Amendments to the Norwegian Special Tax Regime for Shipping Companies, No. 64/2007.*

[148] Interview #52.

[149] Interview #54.

[150] *See, e.g.*, Brian Cheffins, *Company Law: Theory, Structure, and Operation* 435-37 (1997).

[151] *See, e.g.*, Simon Deakin, *Regulatory Competition versus Harmonisation in European Company Law*, Working Paper No. 163, March 2000 at p. 23. *But see* The Prospectus Directive (2003/71/EC of the European Parliament and of the Council of 4 November 2003).

[152] *See, e.g.*, Roderik Bouwman and Jan Werbrouk, *International Tax Aspects of the Societas Europaea*, Dirk van Gervan and Paul Storm, eds., *The European Company* 102 (2006) (". . . an SE is potentially subject to the tax laws of [30] countries."); Marjaana Helminen, *The Tax Treatment of the Running of an SE*, 44 Eur. Taxation 28,29 ("Consequently, the introduction of the SE legal form will not eliminate the fact that each company engaged in cross-border activities in the EU Single Market must comply with a large number of different national tax regimes.").

[153] See ETUI-REHS, *SE Fact Sheet Overview, available at* http://ecdb.worker-participation.eu/show_overview.php?letter=A&orderField=se_name&status_id=3&title=Established%20SEs (last visited August 4, 2008).

[154] *See, e.g.*, www.foratis.com/tehma/00129/index.html; press release of Beiten Burkhard, www.bblaw.com/Single_Press_Releases.571.0html?&L=1&cHash=0d7757209d&tx_ttnews[tt_news]=488; and www.czechcompanies.cz/en.

[155] *See, e.g.*, CEPS Task Force Report, *Corporate Taxation and the European Company Statute* 16 (2008); Interviews #4, 9, 15, 17, 25, 29, 33, 43.

[156] Note: While SE Regulation art. 14, para. 1, mandated the Member States to implement the SE Directive prior to October 8, 2004, only five member states – Austria, Belgium, Denmark, Finland, and Sweden – met the deadline.

[157] Atrium Erste Europaische VV SE became Convergence CT SE, Atrium Funfte Europaische VV SE became Donata Holding SE, Pro-Jura 0407 SE became Orchestra Service SE, and Sarpedon 2006/01 Vermogensverwaltungs became Max Boegl International SE.
[158] Interview #27, 55, 74.
[159] Marco Becht, Colin Mayer, Hannes Wagner, *Where Do Firms Incorporate? Deregulation and the Cost of Entry*, ECGI Working Paper Series in Law, Working Paper No. 70/2001, August 2007 at p. 5.
[160] Volker Triebel and Christopher Horton, *Will More English PLCs Take Off in Germany?*, 25 Int'l Fin. L. Rev. 34, 34 (2006).
[161] *See, e.g.*, Simon Deakin, *Regulatory Competition versus Harmonization in European Company Law*, in D Esty and D. Geradin, eds., *Regulatory Competition and Economic Integration* 205-06 (2001); Brian Cheffins, *Company Law: Theory, Structure, and Operation* 441 (1997).
[162] *See* Loi pour l'Initiative economique of 1 August 2003.
[163] Ulrich Seibert, *Close Corporations – Reforming Private Company Law: European and International Perspectives*, 8 Eur. Bus. Org. L. Rev. 83, 87 (2007).
[164] Gesetzentwurf der Bundesregierung, Entwurf eines Gesetzes zur Neuregelung des Mindestkapitals der GmbH (MindestkapG), 1 June 2005 (Draft Bill of the Government, Draft law on the Reform of the minimum capital of the limited company).
[165] *See supra* note 77.
[166] *See* www.justitie.nl.themas/wetgeving/dossiers/BVrecht/Information_in_English.asp and *supra* note 272.
[167] Entwurf eines Gesetzes zur Modernisierung des GmbH-Rechts und zur Bekampfung von Missbrauchen (MoMiG), drafted in May 2006; Patrick Leyens, *German Company Law: Recent Developments and Future Challenges*, 6 German L. J. 10 (2005).
[168] *See* Final Report of the Expert Group, *Simplification and Flexiblisation of Dutch Private Company Law*, 6 May 2004, available at http://www.ez.nl/content.jsp?objectid=150534&rid=150535; Hylda Boschma, et al., *The Reform of Dutch Private Company Law: New Rules for the Protection of Creditors*, 8 Eur. Bus. Org. L. Rev. 567, 567-569 (2007).
[169] *See, e.g.*, Jaap Winter, *Thalassa! Thalassa! – the SE as a Glimpse of the Future*, in Jonathan Rickford, ed., *The European Company* 122 (2003), Carla Tavares Da Costa and Alexandra de Meester Bilreiro, *The European Company Statute* 11 (2003).
[170] SE Regulation art. 38.

[171] *See, e.g.*, C. Leca, *The Participation of Employees' Representatives in the Governance Structure of the Societas Europaea*, 18 Eur. Bus. L. Rev. 403, 417 (2007); C. Teichmann, *Restructuring Companies in Europe: A German Perspective*, 15 Eur. Bus. L. Rev. 1325, 1334 (2004).
[172] *See* European Commission, ed., *Industrial Relations in Europe*, 30 (2000).
[173] *See, e.g.*, Theodor Baums and Peter Ulmer, eds., *Employees Co-Determination in the Member States of the European Union* (2004); Jan von Hein, *Between a Rock and a Hard Place – German Codetermination Under Pressure*, 3 Kyoto J. L. & Politics 1, 2 (2007).
[174] For a discussion of the stakeholder philosophy *see, e.g.*, Friedrich Kubler, *A Shifting Paradigm of European Company Law*, 11 Colum. J. Eur. L. 219, 219 (2005).
[175] *See Dodge v. Ford Motor Co.*, 204 Mich. 459 (1919) ("A business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end."). *Further*, Mark J. Roe, *The Shareholder Wealth Maximization Norm and Industrial Organization*, 149 U. Pa. L. Rev. 2063, 2065 (2001) ("Shareholder wealth maximization is usually accepted as the appropriate goal in American business circles."). *But see Revlon v. MacAndrews & Forbes Holdings*, 506 A. 2d 173 (Del. 1986) (deferring to the business judgment of directors and seemingly requiring shareholder interests to be primary only in cases of a sale of control).
[176] *See SE-Ausführungsgesetz*, available at www.bmj.bund.de.
[177] For example, Mensch und Maschine Software, a German SE with 350 employees, and Sevic Systems, another Germany company with approximately 100 employees.
[178] Interviews #53, 59.
[179] Interviews #55, 58.
[180] *See, e.g.*, Matthias Siems, *The Impact of the European Company (SE) on Legal Culture*, 30 Eur. L. Rev. 431, 435 (2005). For a theoretical analysis of what it means to give legal expression to identity, *see* Hans Lindahl, *European Integration: Popular Sovereignty and a Politics of Boundaries*, 6 Eur. L. J. 239 (2000).
[181] Interview #55.
[182] Using the political system to reduce the burden of German codetermination has not been possible. (*See, e.g.*, Angel R. Oquenda, *Breaking on Through to the Other Side: Understanding Continental European Corporate Governance*, 22 U. Pa. J. Int'l L. 975 (2001). Since its enactment in 1952, the German Codetermination Act has been revised only once in 1976. According to Oquenda, "during the debate that led to the enactment of the 1998 Corporate Control and Transparency Act, the acting Minister of Justice, businessmen, and

legal experts unanimously supported reducing the size of the supervisory council. Nonetheless, unions and the Minister of Labor opposed this position. They eventually carried the day and blocked the reform."

[183] SE Directive Art 3(4).

[184] *See, e.g.*, K. van Hulle and H. Gesell, *European Corporate Law* 372 (2006). Friedrich Kubler describes the process of using the SE to eliminate codetermination entirely in *A Shifting Paradigm of European Company Law*, 11 Colum. J. Eur. L. 219, 232-33 (2005). ("If we assume that a German stock corporate with more than 2000 employees, Widget AG, wants to get rid of the German regime of worker participation on the supervisory board, it can merge with a British plc by forming a European Company, Widget SE, to be registered in the UK. The British partner in the merger could be small and unimportant; it cold be a wholly owned subsidiary of Widget. This move will not free Widget from codetermination; it will have to negotiate with its employees and their union the agreement provided for in the Directive . . . But two years after the date of the registration Widget can make the next move: now the firm is able to transform the (British) SE into a British plc. UK law does not impose any form of employee participation on companies. Neither the SE-Regulation nor the SE-Directive require the preservation of codetermination in such a case.").

[185] Interviews #2, 4, 10, 17, 21, 25, 26, 27, 29, 30, 38, 42, 45, 74.

[186] *See, e.g.*, Christoph Teichmann, *Restructuring Companies in Europe: A German Perspective*, 15 Eur. Bus. L. Rev. 1327, 1333 (2004) ("Some claim that employee representatives reduce efficiency because they may leak information to the workforce or act in the mere interest of their constituency; others maintain the viewpoint that employee representatives are a valuable source of information and that their insight into the company's affairs contributes to a better performance of the Supervisory Board. One difficulty of assessing the efficiency of co-determination is that within the sample of companies of a certain size there is, at least in Germany, no comparable sample of companies *without* codetermination.").

[187] Drittelbeteiligungsgesetz of May 18, 2004.

[188] German Codetermination Act of 1976, Gesetz ueber die Mitbestimmung der Arbeitnehmer of May 4, 1976, Bundesgesetzblatt BGB1 I 1153.

[189] § 7 Codetermination Act: 12 members in companies with a workforce not exceeding 10.000 employees, 16 members in companies with a workforce not exceeding 20.000 employees, 20 members in companies with a workforce exceeding 20.000 employees.

[190] *See, e.g.*, Jeffrey N. Gordon, *Pathways to Corporate Convergence? Two Steps on the Road to Shareholder Capitalism in Germany*, 5 Colum. J. Eur. L. 219, 222 (1999) ("Supervisory boards are unwieldy – commonly twenty seats . . . ."); Mark Roe, *German Codetermination and German Securities Markets*, 5

Colum. Bus. L. Rev. 199, 200 ("... information flow to the board is poor, and the board is often too big and unwieldy to be effective.").
[191] Interview #31, 29, 74.
[192] *Statutes of Allianz SE*, version dated November 2007, § 6.1.
[193] Interviews #21, 29, 74; www.allianz.com/en/allinaz_group/about_us/employees/page1.html.
[194] Interviews #5, 10, 14, 17, 21, 23, 28, 29, 30, 31, 36, 37, 39, 55, 58.
[195] *Statutes of Allianz SE*, version dated November 2007 § 18.1.
[196] *See, e.g.*, Christoph Teichmann, *Restructuring Companies in Europe: A German Perspective*, 15 Eur. Bus. L. Rev. 1327, 1335 (2004) ("To be sure, the negotiation procedure of the Directive is burdensome and time consuming. Given the time pressure usually involved in international mergers and acquisitions, the negotiation period of six months provided for by the directive may fatally affect the dynamics of such transactions.").
[197] Interview # 29.
[198] SE Regulation Recital (18). *See also*, *Position Paper of 13 June 2003*, available at www.bdi-online.de.
[199] Interview # 28.
[200] This view is supported by *Mathias Habersack*, Die Aktiengesellschaft 2006, 345 et seq.
[201] For this approach see *Hartmut Oetker*, Zeitschrift für Wirtschaftsrecht (ZIP) 2006, 1113 et seq. and, with a focus on party autonomy based on the SE Directive, *Christoph Teichmann*, Die Aktiengesellschaft 2008, 797 et seq.
[202] Man Diesel SE, for example, also reduced its Supervisory Board from 20 to 12 and internationalized its employee representatives.
[203] Interviews #4, 5, 9, 12, 26, 35, 38, 41.
[204] Interviews #10, 14, 17, 21, 27, 31, 37.
[205] Interview #74; *see also* Richard M. Buxbaum, et al., *European Business Law: Legal and Economic Analyses on Integration and Harmonization* 48 (1991) (discussing the "national organizing vision" of American labor unions and the likelihood that "the emergence of vigorous competition across national borders within the EC will turn the attention of European labor leaders to the community level").
[206] Interviews #26, 38, 41, 74.
[207] The union density rate in Norway is nearly 80 percent, while in France it is only 10 percent. Collective bargaining coverage in Slovenia is nearly complete, while in Lithuania it is only ten percent. *Further, Industrial Relations in the 25 EU Member States and Norway*, in Norbert Kluge and Michael Stollt, eds., *The European Company – Prospects for Worker Board-Level Participation in the Enlarged EU* 64-65 (2006).
[208] Interviews # 6, 7, 26, 38, 41, 43, 56, 57, 63, 74.

[209] *Industrial Relations in the 25 EU Member States and Norway* and *Worker Board-Level Participation in the EU-25*, in Norbert Kluge and Michael Stollt, eds., *The European Company – Prospects for Worker Board-Level Participation in the Enlarged EU* 64-65, 83-85 (2006).
[210] Interviews #7, 8; *Nordiska Finansanstalldas Union: Nordea SE Project*, available at www.nfufinance.org/Resource.phx/plaza/nordea/nordea.htx.
[211] *See, e.g.*, Paul Stephan, *The Futility of Unification and Harmonization in International Commercial Law*, 39 Va. J. Int'l L. 743, 744-45 (1999) (discussing "the impulse to reduce diversity among the legal systems governing commerce"). The most significant achievements of the EU have occurred in the field of business law. (For example the First Directive (information disclosure, contracts, dissolution); Second Directive (capitalization of public companies); Third and Sixth Directives (mergers and divisions of public limited liability companies); Fourth, Seventh, and Eighth Directives (accounts and auditing); Eleventh Directive (company branches and disclosure); and Twelfth Directive (private limited liability companies)). European businesses showed interest in a European-level corporation, independent of the laws of the individual Member States, even before the formation of the European Community itself as early as 1910.

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