Tax Issues and Tax Treatment of the Societas Europaea

by

Sanaa Kadi*

* LL.M Master of Laws in Contract and Commercial Law, 2009, University of Helsinki Doctoral Student, Faculty of Law, University of Helsinki

Nordic Journal of Commercial Law
Issue 2013#2

1 Introduction

According to the Treaty on the Functioning of the European Union (TFEU)[1], Companies of the Union do not actually have to be in a certain Member State in order to be associated with it. However, the question of companies' nationality has remained for a long time a subject of controversy in European company law. Although the question of transfer of the seat has been mentioned in the Treaty, experts and national representatives have not been able to issue an adequate solution. Some members like France, Germany and Italy are not always ready to accept the movement of the company headquarters without re-incorporation into the new legislative system, while some states as the United Kingdom (UK) or Denmark opt for company cross-border relocations without losing the legal identity. The difference in the application of national principles gives constantly rise to conflicts between national laws and are only resolved by the interference of the European Union's (EU) legal bodies.[2] For example, the *Centros* case describes very well the Danish reaction towards the creation of a branch of the English Centros Ltd in Denmark and considered that the founder of the company had the intention to circumvent the Danish minimum capital requirement, especially that the company was not engaged in any real activity in England.[3]

The common rule in the transfer of the seat of an Societas Europaena (SE) is that the transfer does not change the identity of the European Company; it only changes the applicable law.[4] The SE Statute provides that the company can transfer the seat to another State without affecting the legal person.[5] Until now, at least 60 SEs out of the overall number of registered SEs have transferred their seat from one State to another without any difficulty.[6]

However, if we take in consideration *the Cartesio case*'s decision[7], where a Hungarian limited partnership applied for transferring its seat to Italy but intended to continue its business activities under Hungarian law, the Hungarian Company Register refused to transfer the head office and the case was referred to the European Union Court of Justice (ECJ). However, the ECJ decision was surprising as it continued to support its previous *Daily Mail case* which gives a Member State the possibility to restrict the transfer of a company's central administration into

[1] Consolidated version of the Treaty on the Funtioning of the European Union, 30.3.2010, OJ C 83 p. 47-199.

[2]Robakov:pp.17-18

[3]see the Centros case C-212/97 of 9.3.1999

[4]Grundmann: pp.685

[5]Wymeersch: pp. 690

[6]http://www.worker-participation.eu/European-Company/SE-COMPANIES/Facts-and-Figures
page visited on 21.02.2012

[7]See Cartesio Case C-210/06 of 16.12.2008

another Member State.[8] This opinion has also been confirmed by the *Vale case (C-378-10)*. Therefore, freedom of establishment afforded in art. 49 and 54 of the TFEU, (previously 43 and 48 EC), accords the right to cross-border conversion for companies, however this right is not absolute, as the sovereignty of the Member State and its national laws may have important weight on the rights of the company to freedom of establishment. The decision would suggest that whether or not a Member State accepts the conversion of a foreign company into a national company depends on that Member State only.[9]

The mobility of the SE is probably the most important advantage of the company form. Besides its national founding and its similarity to a PLC of the state where it is registered, the SE enjoys a European legal personality, which allows it to benefit from an unequalled freedom of movement. The jurisprudence of the ECJ afforded this freedom for legal entities, but it has been until now more theoretical than real. Since the famous case of *Centros*[10] in 1999 until the *Sevic*[11] case in 2005, the Court has recognized the right for a company to register in any state it wants and then not to exercise its activities in this state but to carry out the entirety of its activities through a subsidiary based in another state (*Centros*). In *Überseering*[12] the Court stated that a Member State shall admit to a company of another state the possibility to be a party to legal proceedings in order to represent and defend their rights, although there is no European Convention on mutual recognition of legal entities . In *Inspire Art*[13], the Court provided that a Member State shall not introduce specific rules or impose obligations on foreign companies even if those rules are simple formalities. Then in the Sevic case, the Court decided against a Member State that refused a company resulting from a cross-border merger to be registered. Since that, it is required that all Member States should recognize the validity of cross-border mergers. This jurisprudence represents an important progress in the freedom of movement of companies. However the court recognized the validity of cross-border mergers only on the basis that the TFEU allows companies to establish 'agencies, branches and subsidiaries' in the internal market, companies were, in reality, unable to move freely in the EU.[14] So mobility is one of the substantive particularities that the SE company has compared to other companies. SE Regulation is beneficial for the banking and insurance sector, financial and insurance companies under the form of SEs are dominant, and this is due to the facility of managing their capital with total flexibility through their branches, as they can report only to the authority

[8]See Cartesio Case C-210/06 of 16.12.2008, see also Worker Participation (page visited on 11.7.2012) http://www.worker-participation.eu/Company-Law-and-CG/ECJ-Case-Law/Cartesio

[9]See Loyens: pp. 3-4 (visited on 11.07.2012) http://www.loyensloeff.com/en-US/News/Publications/Newsletters/EUTaxAlert/EU_Tax_Alert_84.pdf

[10]Case C-212/97, Centros Ltd v Erhvervs-og Selskabsstyrelsen [1999] ECR I- 01459

[11]Case C-411/03, SEVIC Systems Aktiengesellschaft v. Amtsgericht Neuwied

[12]Case C-208/00, Überseering BV v Nordic Construction Company Baumanagement GmBH

[13]Case C-167/01, Kamer Van Koophandel en Fabrieken Voor Amsterdam and Inspire Art LTD

[14]Lenoir: pp.15-16

which is at the level of the holding SE and reduce thereby the external capital control requirements.[15] This article discusses these relevant tax issues of the SE .

On the tax level, the SE is to be subject to the fiscal law of the country of residence, however, when the company will exercise its taxable activities by the intermediary of entities situated in another country, the losses suffered by these entities will be deducted from the profits of the SE.[16] As the legal characteristics of an SE will vary depending on the state where the company is registered, this concludes to the fact that different interpretations concerning tax treatment of an SE apply, since it will be mainly governed by the domestic tax laws as the SE Regulation contains no rules concerning tax law.[17] So, the question is, is there a role for the national regimes in preparing a harmonized treatment in order to prevent obstacles that can face the establishment of an SE in another Member State?[18] What kind of tax treatment does the SE get when it is created? And what are the problems faced during the running of an SE?

2 Tax Issues and Tax Treatment of the SE

The Internal Market aims at creating a free market where the mobility of persons, goods and capital is free, but the different tax systems of the Member States would lead to differences in the treatment between companies of the Member State on one hand, and between companies of different Member States on the other hand. In June 1967, the Commission published a "Programme for the Harmonisation of Direct Taxes". In order to adapt to the needs of the Common Market, neutral rules had to be set out, so that the companies are able to increase their productivity and significantly enhance their competitive strength. The Commission approved 3 Directives until 1990 and started different proposals as well to harmonize direct taxation rules.[19]

The SE is treated in the same way as any other multinational company; the SE is subject to the tax regime of the national legislation applicable to the company and its subsidiaries. Every SE is subject to taxes and charges in the Member State where its registered office is situated.

However, the original project drafted by Sanders aimed at creating a supranational corporate form with uniform rules at all levels, but, as far as the Member States were involved in the development if the idea, the realisation of the project was encountering serious obstacles, because any Member State would allow a national company to lump with another foreign

[15]Cathiard: See http://avocats.fr/space/catherine.cathiard/content/ C823A8F5-C663-4937-89B5-DD1F9899484F published on 30.08.2011

[16]Merle: pp.25

[17]Helminen, Mar: pp.28

[18]Wenz 1:pp.11

[19]Da costa & Bilreiro: pp.81–82

company prior to liquidation which will permit the taxation of hidden reserves.[20] Therefore, the rules that apply when taxing an SE are national; however, they are also influenced by EU law as well, starting from the common principles, the EU treaty requirements of equal treatment between domestic and foreign entities and the provisions of the Directives on taxation.[21] Member States are responsible for taking part in the process of introducing a new tax framework for the SE statute with regard to its uniformity and to prepare a harmonized treatment in order to prevent obstacles such as high costs that make the establishment of an SE in another Member State difficult.[22]

The idea of establishing a company in another state does not raise business considerations only, but it must also include tax considerations, because the corporate tax rate, the tax treatment of dividends or the tax deductions have their impact on the way of choosing the state where to establish a company. Tax considerations can influence also the decision of whether to own the company directly or through other foreign companies.[23] A simple example is the case of two shareholders A and B, living in two different Member States, one state is using "the imputation system"[24], and the other state is using "the classical system"[25], A and B are holding shares in the same company, but will be taxed unequally, and this would be considered as an obstacle to investment in the internal market.[26] The EU has always aimed at providing a free circulation of capital in the internal market without tax discriminations. It has been however difficult to harmonize the taxation of dividend payments in the EU.[27]

[20]Da costa & Bilreiro: pp.155, see also Werlauff 2, pp. 135, see Helminen,S : pp. 22

[21]Werlauff 1: pp.174

[22]Wenz 1: pp. 11

[23]Helminen, M: pp. 235

[24]For the imputation system: See Da Costa & Bilreiro: pp.85 "… both the company and shareholder are taxed, but in order to avoid double taxation of the company income, the shareholder is granted a credit against its income tax liability equal to all or part of the corporation paid on the profits from which the dividend derives."

[25]See Da Costa & Bilreiro: pp.85"…In the classical system, profits distributed in the form of dividends are fully taxed twice, once at corporate level and again at shareholder level. However, some Member States have introduced a shareholder relief in order to mitigate the double taxation of dividends. To achieve this effect, either a lower tax rate on the dividends is applied or a specific imputation tax credit established as a percentage of the dividend received is granted. The classical system results in double taxation more frequently. "

[26]Da costa & Bilreiro: pp.85

[27]Da costa & Bilreiro: pp.85

3 Tax Issues of an SE

3.1 The Development of Direct Taxation in the EU

Before going on the tax issues of the SE, one can ask whether Member States are really willing to harmonize tax rules in the EU and to what extent? Because it is likely evident that Member States will not easily withdraw their tax rights in favour of the EU's interests. Especially if the EU tax regime would be a neutral one, Member States would be left without guarantees concerning their national tax incomes. [28]

There has been less development in the field of direct taxation than in the field of indirect taxation, since the Treaty of the European Union (TEU)[29] does not contain an explicit formulation concerning harmonization of the direct taxation. For many years, several groups of experts have tried to examine and search for the best tax systems that would ameliorate competition in the EU. The Neumark Committee in 1962 issued the first proposal on corporate tax harmonization. The Van Den Tempel Report in 1970 advised to adopt a classical corporate tax system to afford tax equality and avoid double taxation situations. In 1990, non-tariff barriers to cross-border commerce were removed, and three Directives on corporate taxation were adopted.[30] A report was communicated in 1992 by Dr. Ruding about the conclusions recommendations on corporate taxation in the EU. Notingthe differences between the corporate tax systems and the tax rates and tax bases in the Member States, and the relief of double taxation and cross-border losses relief, the report recommended the introduction of a common system of corporate tax. Besides that, complete harmonisation was not recommended in the report, instead priority was given to creating a minimum standard to prevent distortion in the different tax regimes. In 1996, the Commission propsed a new tax plan in order to face the distortive tax competition and prevailing measures for the withholding tax on dividends, royalties and interests (the Monti package). In 1998, a request was made by the ECOFIN Council in Vienna to the Commission, to identify the principal provisions, which prevents the progress of cross-border business in the EU. In 1999, the Council of Ministers presented an assessment consisting of an analytical study of company taxation in the EU; the project resulted in 2001 in a comprehensive study and a communication supplementing that study. Thus, the Commission finally got a detailed mandate on the differences in business taxation and the tax rates between Member States and the principal distortions of company taxation in the EU. Notwithstanding the good report which included the Ruding recommendations, the globalization, development of e-commerce, the increase of cross-border companies in the EU and many other factors have completely transformede the point of view on the Internal Market

[28]Da Costa & Bilreiro: pp.83

[29] Consolidated version of the Treaty on the European Union, 9.5.2008, OJ C 115, p. 13-45.

[30]The Parent-Subsidiary Directive, the Merger Directive, and the Arbitration Convention.

of 1990. Tax policy again needed to be reviewed.[31] Contrary to what was planned in the 1970 and 1975 Statutes for a European Company and substantially the 1989 and 1991 Statutes, the actual SE Statute does not contain any provision on the tax regime that should be applied for an SE.[32]

3.2 Tax Aspects in the SE

The tax system of the SE has been discussed, especially questions that concern cross-border changes when forming the Company and also structural changes of SE companies that are already established. As there is no specific tax regime for the SE Company, we can still find company law issues for that kind of companies, because we can make reference to national and harmonized tax law as well as tax law of international agreements concerning double taxation for cross-border structural changes especially regarding transfer of seat and merger.[33] A SE is in fact subject to different regimes, several features of taxation will be examined in order to understand and explain the most important issues concerning taxation of an SE.[34]

When the creation of SE companies started in practice in October 2004, the experience showed that an international merger was likely to be the most problematic from the tax perspective and the area that needs to be most urgently solved because it involves not only an instrument of structural change as is the case for the transfer of seat.[35]

The tax issues concerning the establishment of an SE are not definitively harmonized in the Member States.[36] Different sources of taxation of an SE are introduced, in case where there is no specific tax rules the alternative is to go to the domestic tax rules applicable on PLCs. Different tax problems are raised, e.g. problems most often related to the different tax regimes of the Member States which are not in harmony with each other,[37] because the tax treatment is strongly dependent on the domestic law of the concerned state, and relating to the Merger Directive by which the requirements of tax treatment concerning the establishment of an SE was implemented by January 1st, 2006.[38] The Tax Merger Directive[39] which concerns a joint tax system applicable to mergers, asset contributions and share exchanges between entities in

[31] For further reading, see Da Costa & Bilreiro: pp. 149-154

[32] Wenz 1: pp. 6-7

[33] Grundmann: pp.696

[34] Wenz 1: pp. 7

[35] Grundmann: pp. 698

[36] Helminen, M: pp. 237

[37] Wenz 1: pp. 10

[38] Helminen, M: pp. 237

[39] Directive 2005/19/EC of 17 February 2005, which amended the Directive 90/434/EEC of 23 July 1990.

different Member States, will also apply to the SE by establishing the tax neutrality of cross-border transactions in Europe.[40] The SE is a new legal entities to which the Tax Merger Directive applies.

So if we resume the legal basis of the taxation of an SE, according to the SE Statute, the European Company on its tax issues is regulated by the national tax laws, tax treaties which have been concluded by the Member States and the general principles of the EU Treaty, for example the four freedoms, as well as the EC direct tax Directives such as the Merger Directive (90/434/EEC) amended by The 2005/19/EC Directive, and the Parent Subsidiary Directive (90/435/EEC).[41]

The Merger Tax Directive is considered as the most important harmonisation achievement in corporate tax law, thus an identical tax regime applies to the SE Company formation, change of structure and business operation to those of a PLC under national Law. A SE has however a more advantageous position compared to the PLC concerning some transactions under EU law and which are still impossible for a PLC under domestic law.[42] The Parent-Subsidiary Directive is also considered as one of the most significant instruments of taxation for multinational entities across the EU, the Directive provides a common treatment for companies having subsidiaries across the EU in order to prevent the double-taxation of the profits of a subsidiary set in one Member State supplied to its parent company situated in another State, the Directive guarantees thereby tax neutrality for investments across the internat market.[43]

3.3 The Role of ECJ Case Law in the Taxation of the SE

Besides the fact that Member States have complete sovereignty in direct taxation, they should always comply with EU law; national tax rules must not be discriminatory towards nationals of other Member States or be an obstacle in front of the four freedoms established by the TEU. Therefore a host state must treat the non-resident and the resident taxpayers equally when they are subject to the same taxation. Otherwise this would infringe the EU Treaty. The ECJ provides through its case law the same requirements from the Member States that there should be no barriers against nationals of other Member States, e.g. (*The Daily Mail case*[44]). However, it is unfortunate to observe that generally Member States do treat differently their taxpayers on the basis of their nationality and according to whether or not the counterparty to the transaction is subject to the origin State tax system. Normally, an origin State cannot tax

[40]Lenoir: pp.13

[41]Helminen, Mar: pp.28

[42]Grundmann: pp.697

[43]Da costa & Bilreiro: pp.85–86

[44]Case 81/87, R v. HM Treasury. Ex parte Daily Mail & General Trust plc [1987] 2 CMLR 1, see Craig & De Búrca: pp. 433

residents differently on the scale of domestic tax borders, if two taxpayers of the same State are subject to a specific tax rule, but the tax rule is different and less favourable when one taxpayer is resident and the other is a national of another Member State, then the discrimination is clear.[45]

When an infringement of the EC Treaty by a Member State occurs, the point is whether this Member State is able to justify the infringing measure. In general, Member State s refer to the clearly stated derogations of the Treaty which are very limited; the Member State often explain the measures as taken in the public interest. The very limited public interest justification provided in EU case law are the need to protect the cohesion of the tax regime, e.g., case C-204/90 *Bachmann v. Belgium*[46], and case C-300/90 *Commission v. Belgium*[47], the prevention of tax evasion, e.g., case C-264/96, *Imperial Chemicals Industries plc v. Colmer (Inspector of Taxes) ICI*,[48] and the effectiveness of tax supervision, e.g., case 120/78, *Rewe-Zentrale AG v. Bundesmonopolverwaltung für Brantwein* (*Cassis de Dijon*)[49]. But even if the ECJ has set criteria for justification for the Member State s, the possibility to use them is very restricted, as the Member State must establish a direct relationship between the discriminatory rule and the justified advantage presented by the Member State. Furthermore, the tax evasion justification is in contradiction with the freedom of establishment. The exercise of a fundamental right cannot be at the same time an abuse, thus, it is hard for a Member State to prove and justify a discriminatory or less favourable tax rule on the basis of tax evasion, because the tax avoidance must be proved within the scope of the internal market and not restricted to the concerned Member State. In addition to that, as the EU lawpermits each Member State to apply its tax system within its territory, the Member State cannot restrict the application of the Treaty freedoms to preclude nationals searching for advantages to reduce tax payment in other Member States. Therefore a Member State cannot successfully argue that the reduction of its tax revenues could be a justification for imposing less favourable tax rules. Moreover, a Member State must also prove how the restrictive measure taken against a national is going to achieve the aimed goal of the justification and would not constitute an excessive measure, as e.g. in, case C-118/96, *Safir*.[50]

So, it is clear that the ECJ case law has a relevant impact on the tax systems of the different Member States and plays an important role in keeping watch on the potential abuses and discriminatory or restrictive measures taken by the Member States.

[45]Gammie: pp.40

[46]Craig & De Búrca: pp. 670, 748, 754

[47]Craig & De Búrca: pp.670, 735

[48]See http://eur-lex.europa.eu/

[49]Craig & De Búrca: pp. 88, 324 (footnote 73), 581, 583, 604-608, 637-643, 746, 1105, 1116, 1128, 1132

[50]Gammie: pp.41

In order to understand the importance of the ECJ case law on the creation of an SE, it is necessary to understand the connection between the tax rules systems of the different Member States, the Merger Directive and the ECJ case law. If a Member State allows domestic mergers and reorganisations without imposing taxation, what could be the justification for taxing a similar cross-border transaction. If the Member State justifies the measure taken against the cross-border transaction on the basis of the protection of the State's tax incomes, the case law will likely deny this justification. Furthermore, the Merger Directive might guarantee a tax neutral treatment to the cross-border transaction especially in case of the existence of a permanent establishment in the Member State concerned. Member States can't therefore justify discriminatory measures on the basis of incapacity to collect future taxes, as future tax could be allocated to another Member State on the ground of a multilateral or bilateral tax treaty. Most corporate tax systems aim to arrange that there would no longer be taxation on incomes, profits and gains of cross-border mergers moving out of the State concerned. [51]

Concerning the re-registration of an SE in another Member State, a reference to the *Daily Mail* case[52] is relevant for its unambiguous statement. The ECJ examined the compatibility of the requirement of consent to move the central management of the company with Art. 43 of theTEU on the freedom of establishment. However, later case law exemplified that the *Daily Mail* -principle is valid for the state of incorporation, but not considered as a principle that every State can rely on, e.g., *Inspire Art Ltd*. Case C-167/01, and C-208/00*Überseering*[53] . There is no indication that the Court would conclude that the freedom of establishment includes the right to move the actual central administration of the company whereas the legal person remains under the domestic law of the State of origin which means that a Member State would be able to impose restrictions on movement when the company nationality and legal person are subject to its national law. However, under Art. 8 (1) of the SE Regulation, the SE is able to transfer its registered office from one State to another without losing its legal personality. If any restrictive measure is taken against an SE when transferring its registered office, it will be contrary to Art. 43 of the EC Treaty. Moreover, under Art. 8 of the SE Regulation, the procedure of transfer requires the delivery of a certificate of compliance with the transfer requirement from the State of actual registration, among the requirements, a certification that the creditors' interests are protected in case of tax debts. [54] According to the SE regulation, the transfer of a registered office of an SE which would result in a change in the applicable law shall not take effect if any competent authority of the Member State of registration opposes it,[55] which means that tax authorities may oppose the transfer of the registered office of an SE on

[51]Gammie: pp.42

[52]Craig & De Búrca: pp. 433

[53]See http://eur-lex.europa.eu/

[54]Gammie: pp. 42-43

[55]See Art.8 (14) of the SE Regulation.

the ground of public interest. However the Amendment Directive permits to an SE to defer tax registration if it maintains a PE in the State of origin, in order to protect future taxing rights.

It is obvious under ECJ case law that a host State should not apply less favourable treatment to a secondary establishment of a foreign company in the form of a branch or an agency, e.g., case 270/83 *Commission v. France*.[56] Actually, Member States apply different rules on how to treat corporate groups on the tax level, therefore the role of the ECJ case law would be determined on the basis of those specific national rules. In addition to group taxation treatment varying from one State to another, the SE benefits from its capacity to transfer its registered office in order to choose the host State that would be the most advantageous for tax matters and particularly for tax relief on losses.[57]

3.4 The Tax Residence of the SE

The condition that the registered office and the head office of an SE must be located in the same Member State is very important in company law because it connects the formal criterion which is the registered office and the factual criterion which is the head office as it constitutes the same rule in all Member States. This condition constitutes also the general rule in most of the Member States' national rules. However, the point is what the terms used for tax law purposes are? The most frequently used norm related to the tax residence of companies is the concept of "place of management" or "place of effective management". This concept is obviously different from the concept of registered office, but because the SE Regualtion requires the SE to have the registered office and head office in the same Member State, this difference does not constitute a big problem. However, it is not really clear whether the concepts "place of effective management" and "head office" have the same meaning. According to the commentaries of Art. 4 (3) of the OECD Model Law, the two concepts may have the same meaning, but it is not considered a final rule. Thus, it is important to define terms in tax treaties and national legislation. Generally, national tax legislation always defines the concept of place of effective management, and if its determination is not equivalent to the head office, there would be a negative result on the taxation of the SE.[58] So, different problems may result from that confusion of concepts and need to be examined for the good implementation of the SE especially for tax purposes as it is a relevant issue for both SEs and the Member States.

The easier solution in this respect is the interpretation of the concepts of place of effective management and head office by being the same concept. Furthermore, another solution could be the mutual agreement procedure. However, this method could apply only when dealing with problems of interpretation and to solve a dual residence conflict. Another option would be the

[56]Craig & De Búrca: pp. 755-756

[57]Gammie: pp.44

[58]Soler: pp.12

adoption of tax treaties at EU level, for example by complying with EU law criteria and adopting in this respect adequate tax treaties, and also to adopt a European model convention or a European multilateral tax treaty. Another revelatory solution could be to adopt particular tax regulation for the SE Regulation no matter if it was on EU level or on national level provided that the SE Regulation refer to both of them. For this solution, the best is to establish a Directive that would regulate tax aspects of the SE as its implementation would concern national laws as well.[59] This last suggestion would be a practical option from the point of view of its effect on the national laws of the Member States and its uniformity as a general rule as well.

4 Tax Treatment of an SE

4.1 Taxation of Current Business Operations

If we search for the problematic areas concerning the taxation of the SE, focus must be 1) the formation, 2) the subsequent structural change and 3) the current business operation. During those three phases relating to the running of an SE, and especially in domestic laws, the cross-border merger and transfer of seat are still the areas that cause most of the problems in the tax treatment of the SE.[60] The general problems that occur are for example double taxation or discriminatory taxation against cross-border transactions.

The most important question in relation to tax law is, should the SE benefit from different treatment under national law than the one given to other types of companies? The SE benefits from a tax regime that intends to eliminate the obstacles that may occur in cross-border business operations. Some scholars adopt an optimistic view by emphasizing the possibility to apply a model of taxation on a consolidated basis and dividing the revenues between the Member Staes concerned to start the experience with the SEs. This method would give national tax authorities the opportunity to test new tax treatment and make the transition to it easier.[61]

Regarding matters not regulated by the SE Regulation, Art. 9(1), explicitly points to the rules that would apply to a public limited-liability company (PLC) formed in the Member State where the SE is registered.[62] As the taxation of the SE is a matter which is not regulated by the Regulation, we can conclude that an SE could be treated as a PLC is treated in each Member State. This would mean that the direct tax position of an SE will be similar to the direct tax

[59]Soler: pp.12-13

[60]Grundmann: pp.697

[61]Grundmann: pp. 698

[62]Art. 9(1)c of the SE Regulation, see Helminen Mar: pp.28

position of a domestic PLC, an SE having its registered office in France, would consequently incur the same tax treatment as the Societe Anonyme, and an SE having its registered office in Germany would incur the same tax treatment as the Aktiengesellschaft. However, it is also provided in the Regulation that it does not cover tax issues[63] of the European Company, which could mean that the reference to PLCs in Art. 9(1) may not constitute an obligation. According to the TEU and the principle of equalilty , each Member State should give SEs registered in its territory the same tax treatment as national PLCs. So an SE's income will be taxed according to the national corporate income tax of the State of its residence. Either way, this does not mean that an SE would not run the risk of being taxed in another State and having therefore a double taxation problem. [64]

When the SE is formed by means of cross-border merger (Art. 2.1, 17-31), the situation becomes similarly problematic as is the case with cross-border mergers; the problem arises when there is a cross-border merger of an SE that already exists because the general tax regime applies and the direct application of the EU merger tax regime cannot be questioned. For the transfer of the seat of an already existing SE (Art. 8) the same rules apply as for the transfer of seat of domestic companies according to the Member States' domestic laws, and the question is; Does the regime of the Merger Tax Directive -which applies to cross-border transfer of an existing SE since 2005 - apply to these cases by analogy or not? [65]

The point is that there should be no problem relating to the place of residence of an SE, because the SE must always have its registered office and its central management in the same state-even in the same address. However, this point will not prevent a dual-residence conflict, as it is probable that another State may demand the residence of the SE. Notwithstanding, the majority of tax treaties will consider the residence of a corporation to be the place where the company's effective management is situated. Besides that, the difference between the two concepts of « central management » and « effective management » in relation to tax treatment may still remain different depending on the perspective of EU company law or the perspective of tax treaties. [66]

Furthermore, when an SE has permanent establishment (PE) income in several States, this would mean that the SE will be taxed in the states where it carries on business activities. An SE could also be taxed on the basis of the national source states withholding taxes in the states where the SE has income. Therefore, tax treatment of an SE would depend on the domestic corporate tax rules of each state.[67]

[63]See note 20 of the Preamble of the SE Regulation.

[64]Helminen Mar: pp.28-29

[65]Grundmann: pp.697-698

[66]Helminen, Mar: pp.30

[67]Helminen, Mar: pp.29

So, it is clear that the SE, which is supposed to be a uniform legal entity across Europe, will have to be subject to different national tax systems. And even if the tax regimes of the different Member States look identical, there are differences, for example concerning corporate tax rates. For example, the corporate tax rate in France is 33,33%, while in the UK it ranges from 21 to 28 %. Other differences may be observed in the system of tax deductions and amortizations. Also, the capital gains of a corporation from the sale of shares of another corporation may be exonerated from taxes in some Member States, like Germany, and taxable in other Member States, as in Italy. Also whether the exemption method or the credit method applies to PE income impacts on the choice of Member State in which to establish an SE. [68] The SE is also subject to tax treaties to which Member States have agreed respectively, in the same manner as any domestic PLC in the Member State concerned. An SE does not therefore benefit only from those tax treaties concluded by the Member State where it has its registered office, but would also benefit from tax treaties concluded by Member States where the SE is established through PEs.[69]

4.2 Tax Treatment

4.2.1 Tax Treatment when Forming an SE

As the SE may be formed by different means, every way would have its specific features concerning the tax treatment of the Company.

The merger between companies governed by the law of different states falls within the scope of the Merger Directive 90/434/EEC amended by the Amendment Directive 2005/19/EC when the assets and liabilities transferred represents a permanent establishment. The creation of a Holding SE is regulated by the Merger Directive, if the acquiring company and the acquired company are established in different Member States. The creation of a Subsidiary SE is subject to the Merger Directive if the contribution in kind is effected between companies resident in different Member States and has as its object a branch or a business of activity. Finally, the conversion of a PLC to an SE is treated tax-neutrally by all Member States.[70] Thus, where the requirements of the Tax Merger Directive are fulfilled; the establishment of an SE may be considered tax free.[71]

[68]Helminen, Mar: pp.29

[69]Helminen, Mar: pp.29

[70]Conci: pp.15

[71]Werlauff 1: pp.176

On the basis of the Tax Merger Directive, the conversion of a public limited company into a SE does not normally cause any tax consequences.[72] So as a matter of fact, the tax regime for the PLC applies to the SE. The same applies for corporate tax harmonisation measures, if we look at the reference made in art. 9(1)(c) of the SE Regulation, which points to the areas not governed by the Regulation by referring to the provisions of law adopted by the Member States whether these provisions are from EU law or domestic law in which the SE has its registered office. Furthermore, the SE has, at least in principle, under the national law the same status as a PLC and therefore an SE may not be discriminated against according to Art. 9(2) of the SE Regulation.[73]

The Merger Directive and the Amendment Directive[74] provide that the SE offers the possibility of a tax-neutral formation through the EU, and a tax-neutral transfer of seat across the borders. Tax-neutral means that there would be no discrimination between a national legal entity and a European legal one.[75]

However, forming an SE as a Holding Company (Art.2.2-4) or a Subsidiary (Art.32) or by Conversion (Art.37), does not cause problems because the Tax Merger Directive provides that the companies shall be authorised to continue the book values and benefit from tax-neutral treatment. Concerning the creation of an SE Subsidiary with compensation in the form of shares, the same prescription applies to the transfer of production units to the SE subsidiary. Finally, concerning the conversion of an existing Public-Liability Company into an SE, the identity is not affected and that's why the conversion does not impose any transfer of assets.[76]

4.2.2 Tax Treatment when Forming an SE by cross-border merger of PLCs

In the case of cross-border formation of a Merger SE, the SE will be treated as "tax neutral" on the level of the founding companies if the PE is in the outbound states. The SE is treated tax neutrally also on the level of the shareholders and on the level of the SE itself.[77]

The Tax Merger Directive guarantees normally a tax freedom and a tax succession to the transaction. But this guarantee is not always safe, because there are some cases where the transaction can be taxed. For example such a situation would occur when there is a higher quantity of cash payment than authorised by the Directive, or when a non-continuing company does not stay in its State of origin in the form of a subsidiary with tax liability, so that the

[72] Helminen, M: pp. 237

[73] Grundmann: pp.696

[74] Council Directive 2005/19/EC amending the Merger Directive.

[75] Wenz 2: pp.49

[76] Grundmann: pp.697

[77] Wenz 2: pp.50

operation of the succession's principle would apply to it. Or when a non-continuing company has a subsidiary in a third country, forasmuch as the subsidiary itself cannot have a subsidiary in a third country.[78]

In order to better understand what has been said above, an example can be presented, where we have PLC companies A and B, respectively from State A and State B, which have formed an SE with its registered office and head office in State A. The SE is regulated by the law of State A and, the SE has permanent establishments (PEs) in State B and in another, State C. According to Art.4 (2) of the Merger Directive, in the valuation of the PE located in State B subject to taxation of State B, the assets and liabilities must be transferred to the SE at the tax book value used immediately before the merger, if these assets and liabilities are really in relation with the PE situated in the State B and they have a role in generating the profits or losses of the PE. Therefore, State B must treat the PE neutrally as it can tax the profits of the PE within the scope of Art.7 (1) and 13(2) of the tax treaty with State A.[79] In the case of PE situated in State C for State C tax issue, the obligation imposed on State B is expanded to State C. The SE can take over the assets and liabilities of the PE situated in State C and can calculate potential new depreciations, gains and losses as if the merger did not exist. Tax neutrality is foreseen by all Member States.[80]

Now, if we try to measure the treatment of PEs situated in States B and C for State A tax purposes, the Merger Directive has no rules on the situation when the SE recieves assets and liabilities. This situation is relevant for Member States that apply the universal taxation principle[81]; some of those Member States impose the valuation of PEs at their previous tax book values, which permits those States to tax profits that accumulated outside their tax territory.[82]

France has implemented the Merger Directive correctly concerning both the formation of an SE by Merger by acquisition and the Merger by formation of a new company. However the UK did not implement the Tax Merger Directive correctly; as tax law in the UK does not contain rules allowing roll-over relief for assets and liabilities in the case of cross-border mergers, this constitutes an infringement of Art. 4 of the Tax Merger Directive. Concerning Art. 8 of the Tax Merger Directive, UK legislation affords for roll-over relief for the shares received by the transferring company only if the merger qualifies as reorganization, otherwise the shareholder will be taxed on income profits and capital gains.[83]

[78]Werlauff 1: pp.176

[79]Conci: pp.16

[80]Art 10(1) of the Merger Directive, Conci: pp. 17

[81]Such as Denmark, Finland, Sweden, Greece, Ireland, UK

[82]Conci: pp.17

[83]IBFD: pp. 38, 43, 53

4.2.3 *Tax Treatment when Forming a Holding SE*

When two or more public or private limited-liability companies in different Member States participate in the formation of a Holding SE, the rules of the Directive on tax free transfers of shares guarantee that there would be no rise to tax liability and right to succession for the shareholders, when the shares are placed in the SE as non-cash investments, since the transaction is regulated by the Directive.[84] Thus, the formation of a Holding SE is treated tax neutrally. Tax treatment on the level of the shareholders of the founding companies is also neutral.[85]Both France and the UK have implemented the Tax Merger Directive correctly concerning the formation of a Holding SE.[86]

4.2.4 *Tax Treatment when Forming a Subsidiary SE*

In order to benefit from tax freedom provided by the Directive, companies taking part in this transaction, must be public limited-liability companies or private limited-liability companies, as the Directive does not apply to other forms of entities, the investment must be an undertaking or a branch of an undertaking, and the payment shall be in the form of shares issued by the SE that received the investment.[87] The Subsidiary SE is treated tax neutrally on the level of the founding companies and on the level of the SE.[88]Both France and the UK have implemented the Merger Directive correctly concerning the formation of a Subsidiary SE.[89]

4.2.5 *Tax Treatment when Forming an SE by transformation of a PLC into an SE*

There is no provision in the Directive concerning this transaction. However, the continuity of legal personality when the transformation is performed would prevent tax liability. As the domestic laws do not levy taxes on the transformation of a public company to a private one, the principle of equal treatment of companies should ensure a tax freedom to companies transforming into SEs.[90] So in this case, there are no tax issues at the level of the converting

[84]Werlauff 1: pp.176

[85]Wenz 2: pp.50

[86]IBFD: pp. 38, 43, 53

[87]Werlauff 1: pp.176

[88]Wenz 2: pp. 50

[89]IBFD: pp. 38, 43, 53

[90]Werlauff 1: pp.177

company, at the level of the shareholders and at the level of the SE.[91] Both France and the UK legislations treat tax neutrally the formation of an SE by conversion of a PLC into an SE.[92]

4.3 Tax Treatment when Running an SE

The Member States have complete sovereignty on how to treat the SE company on the tax level, which means that every State is free to impose the tax treatment of its choice to the SEs registered in its territory.[93] What tax issues are involved when running an SE? It is important to determine the incomes and capital gains of an SE and their taxation, as well as the taxation of profits of the different PEs of an SE, the taxation of dividends, interests and royalties of an SE Group, transfer pricing issues of an SE Group as well as the cross-border balancing of an SE. Other tax issues are the tax consolidation of an SE Group, thin capitalisation in an SE Group, the application of CFC Regime with regard to the subsidiaries of an SE, and the shareholders taxation of an SE.[94]

4.4 Tax Problems Facing the SE Company

It is important to discuss some of the potential problems that the SE faces when carrying on its activities.

The first tax matter that constitutes a problem for the SE is that the company is not always relieved for the losses suffered in one Member State against profits gained in another Member State, which may lead to the double taxation problem. The problem is the same concerning the SE and its branches and subsidiaries established abroad when the balancing of profits and losses is not applied or might be applied at a limited scale. It is more possible for one single entity to be relieved from foreign tax losses than what would be for a parent company and its foreign subsidiary. One of the solutions could be the situation where a company with losses from one Member State merges into an SE with another company with benefits from another Member State; the merger would set off the losses if the SE took as the place of residence the State of the profitable company. [95]

Another problem the SE may face, as it has been faced by other cross-border companies, is the source state withholding taxes or the deduction at source on dividends, interests and royalties.

[91]Wenz 2: pp.50

[92]IBFD: pp. 43, 53

[93]Helminen, Mar: pp.28

[94]Wenz 2: pp.50

[95]Helminen, Mar: pp. 30-31

There is not only the problem of double taxation, but also the problem of differences from one Member State to another between the articles subject to source taxation as well as the difference of the amount imposed on each article. However, the SE benefits from the Parent-Subsidiary Directive which accords to the SE that no withholding taxes are imposed on SE when it pays dividends to its parent company in another Member State or got from its subsidiary in another Member State. [96]

The SE as a cross-border legal form may encounter also the problem of transfer pricing adjustments and double taxation, for example for overhead costs, or service fees, which may differ from one Member State to another. However, the Member State s have ratified the Convention on the Elimination of Double Taxation which applies to the SE as well. However, the procedure that the company must go through under the Convention, in order to solve the problem of transfer pricing, is very expensive and complicated.[97]

The SE is treated in the same way as any other domestic company as regards to the thin capitalisation, which may occur when there is a high use of debt from the entity, and therefore, causes losses in tax incomes of the State concerned. Thus, the State may ignore the deductibility of the debt interests. However, after the ECJ decision in the *Case Lankhorst-Hohorst GmBH v. Finanzamt Steinfurt*[98], the problem of thin capitalisation risk on SEs was limited. [99]

The SE may face another problem when having subsidiaries established in low-tax States. The State may tax directly the profits of a controlled foreign company situated in a low tax jurisdiction as incomes of the owners of the company, this situation is called the CFC regime and many Member States such as France, Germany and the UK have adopted this regime. However, CFC regimes are criticised on the point that they are against the freedom of establishment provided in Art.49 of the TFEU (ex Art. 43 of the TEU), and also in conflict with the free movement of capital principle set in Art. 63 of the TFEU (ex Art. 56 of the TEU). Notwithstanding, those regimes are still applied.[100]

Originally, one of the principal problems that businesses face in the EU is the lack of cross-border relief or full consolidation, because the domestic laws do not take in consideration losses suffered by the subsidiaries established abroad.[101] Thus, the difference between domestic tax systems in Europe makes it hard to know what the requirements are for a company not to

[96]Helminen, Mar: pp. 31

[97]Helminen, Mar: pp. 32

[98]See Case C 324/00 of 12 December 2002: http://curia.europa.eu/jurisp/cgi-bin/gettext.pl?lang=en&num=79978787C19000324&doc=T&ouvert=T&seance=ARRET&where=()

[99]Helminen, Mar: pp. 32

[100]Helminen, Mar: pp. 32

[101]Da Costa &Bilreiro: pp.139

suffer from a double taxation situation. Because an SE runs also the risk of being double-taxed like any other company having cross-border business.[102]

4.5 Tax Treatment when Transferring the Seat of an SE

As already mentioned an SE can transfer its registered office from one Member State to another and still not lose its legal personality. According to theTax Merger Directive the transfer of seat in Member States is possible without any direct tax consequences as the Directive provides that the establishment will permanently remain in the original State where the seat was first established.[103] The Amendment Directive contains provisions concerning tax treatment of a cross-border transfer of the corporate seat of an SE from one Member State to another.[104] However, some argue against the idea that the transfer of seat of an SE would raise the problem of changing tax residence and the possible obstacles for that transfer.

Besides the fact that Art. 8 of the SE Regulation does not provide any taxation rules, there is a particular connection between the SE and tax authorities. Concerning the latter to be a potential creditor of the SE before its transfer, as well as the position of the creditors and the guarantees afforded for them in order to protect their rights and their implications in the transfer. Depending on national tax provisions and tax procedures, when considering tax authorities as a creditor of the SE moving abroad, the question is whether the tax administration of the State of origin is a creditor for taxes that have not been evaluated yet. It is supposed that the tax authorities should be considered as tax creditor for the SE transferring its seat across borders only when taxes are officially computed and notified to the taxpayer.[105]

Another relevant point in the SE Regulation is Art. 8 (15) when the transfer of the SE is not permitted because of particular procedures such as the liquidation or insolvency. In this situation, tax authorities could be a creditor of the SE. Additionally, Art. 8 (15) refers to similar procedures which could be understood as a reference to tax procedures against the SE. Another situation is when the transferring SE would be considered as still resident because of any action brought before the transfer. It is important to know if the provision means only actions before the courts or also administrative tax procedures (as the tax authorities enjoy of special powers procured by the State). Finally, according to Art. 8 (14), Member States have the possibility to object to the transfer of the registered office on grounds of public interests for example for tax evasion reasons. However, ECJ case law has been clear,ruling against those Member State limitations that concern future taxes.[106] The transfer of seat of an SE from one State to another

[102] Helminen, Mar: pp. 32

[103]Helminen, M: pp. 237

[104]Wenz 2: pp.49

[105]Soler: pp.13

[106]Soler: pp.13-14

is normally treated tax neutrally in the inbound State and the outbound State. Nevertheless, according to the Amendment Directive,[107] it is recommended that a PE of the transferring SE stays subject to the taxation in the outbound State. Also at the level of the shareholders, there is no taxation when transferring the seat of an SE.[108]

It is provided in Art. 10b (1) and (2) that when the SE transfers its registered office from one Member State to another, in connection with the transfer of the registered office, when an SE ceases to be resident in the first Member State and becomes a resident of the second Member State, both actions of transfer and cessation of residence should not give rise to any taxation of capital gains calculated in the Member State from which the registered office has been transferred derived from those assets and liabilities of the SE which in consequence remains effectively connected with a PE of the SE in the original Member State and plays a part in generating the profits or losses taken into account for tax purposes. This should apply only if the SE calculates any new depreciation and any gains or losses in respect of the assets and liabilities that remain effectively connected with that PE, as though the transfer had not taken place or the SE had not so ceased to be a tax resident. However, Art. 10b (3), provides an exception which is that if the SE is entitled to have any new depreciation or any gains or losses in respect of the assets and liabilities remaining in that Member State calculated on a basis different from what has been previously stated, the paragraph one of the Art. 10b should not apply to the assets and liabilities in respect of which option is exercised.

Furthermore, when provisions or reserves properly constituted by the SE before the transfer of the registered office are partly or wholly exempt from tax and are not derived from PEs abroad, the Member State shall take the necessary measures to ensure that such provisions or reserves might be carried over with the same exemption, by a PE in the Member State from which the registered office was transferred. In addition to that, the Member State should allow the PE situated in its territory of the SE transferring its registered office to take over losses of the SE which have not been exhausted for tax purposes, provided that the loss carried forward or carried back would have been available in similar circumstances to a company which continued to have its registered office or which continued to be tax resident in that Member State.[109] Moreover, according to Art. 10d of the Amendment Directive, the transfer of the registered office of an SE should not of itself give rise to any taxation of the income, profits or capital gains of the shareholders. However, the application of this provision should not prevent the Member State from taxing the gain arising out of the subsequent transfer of the securities representing the capital of the SE that transfers its registered office.

[107] See the Amendment Directive, Title IV b on Rules applicable to the transfer of the registered office of an SE or an SCE, Art.10b (1)

[108] Wenz 2: pp.50

[109] See Art.10c of the Amendment Directive

However, some would argue that when the registered office of an SE is transferred, the result that follows this transfer is automatically the transfer of tax residence, this could lead to additional taxes that the SE would have to face even if in some Member State s change of residence with a remaining of a PE in the State of origin would be treated tax neutrally. In addition to that, some of the bilateral treaties have adopted new tax rules according to which capital gains that derive from the sale of shares are taxed in the State of origin; this should be regarded as a limitation of the EC Treaty freedoms. So, even if Art. 8 (1) removes company law obstacles in order to enable the transfer, the same provisions would not remove tax law obstacles. However, the Amendment Directive ensures the financial interests of the State when the transfer includes also a change for tax purposes, the guarantees ensured concern the assets connected with the PE in the State of origin.[110]

Besides, it is added in the Amendment Directive that a Member State may however, refuse to apply or withdraw the benefit of all or any part of the provisions stated in the Directive, if it appears that the merger, division, partial division, transfer of assets, exchange of shares or transfer of registered office of the SE has as its principal objectives tax evasion or tax avoidance, or if it resultsin a company no longer fulfilling the necessary conditions for the representation of employees on company organs according to which were in force prior to that operation.

This would mean that Member State s have the possibility to deny the provisions of the Directive, if they judge that an SE company is transferring its registered office in order to evade taxation. And as it has been mentioned before on many occasions, one of the advantages for SEs is to benefit from tax neutral treatment in some situations, which would makes it attractive for businesses. So, if at the end, the Member State will refuse to apply the provisions for which the company was attractive, there would be no purposes for businesses to transform or merge into an SE. In addition to that, the Amendment Directive is addressed to other companies as well, which means that not only the SE would benefit from tax neutral treatment.

5 Prospects and Tax Solutions for the SE

Actually, all companies engaged in cross-border business activities face different national tax systems in the so called single territory, which often leads to discrimination and double taxation situations as well as the extra costs for tax administrative procedures. The Commission provides that the corporate taxation systems need to be co-ordinated in order to tackle cross-border tax problems.[111]

It is important to consider the interest expenses when purchasing a company, thus knowing in which state a loan interests raised in order to acquire a foreign company will be tax deductible.

[110]Soler: pp. 14-15

[111]Da Costa & Bilreiro: pp.163

In some states,[112] if a foreign company is directly acquired by a corporation, the interest would be deductible in the corporation state, however, in the case where the foreign company is acquired through another foreign company, it is not possible to deduct the interest, instead of that and depending on the domestic tax law of the other state, interests could be deductible there. That is why it is very important to compare the corporate tax rate of the different states and their tax regimes before taking the final decision establishing an SE company, for example, if the tax rate is higher abroad than in the home State, it would be better and wiser to deduct the interests abroad than in the home State.[113]

Although the SE should not be considered as a tax planning tool, it has many advantages which may lead to see it as such. The SE has many advantages which may push businesses to choose it as a convenient instrument for their activities, especially when transferring the seat or in cross-border mergers. The SE is qualified to have better approach for the bilateral tax treaties as it is a transnational company with a larger dimension than the national companies. The SE also benefits from the credit versus exemption system to avoid double taxation, and to offset losses of foreign PEs or subsidiaries from profits in the State of establishment of the SE. An SE can benefit as well from the neutral tax treatment of the transfer of assets between its foreign PEs, the reduction of tax burden of its capital gains and the avoidance of CFC regimes.[114] However, not all critiques are from the same point of view in respect of tax advantages, because even if the SE seems to be a perfect tax planning tool, it may still encounter some tax problems in the same way as other national companies do.

The SE would be an opportunity for the EU to look forward the enhancement of the corporate taxation in the EU. One solution is the implementation of the European Union Company Income Tax (*The EUCIT*) which would constitute the adoption of a tax code applicable at the EU level.[115] Another solution could be to fix the same tax bases and tax rates for corporations in all of the European Union. Notwithstanding the fact that this solution should be impossible because of the political and practical obstacles, it could solve the biggest problem of corporate taxation in the EU.[116] Moreover, another prospect of a corporate tax system would be the single compulsory harmonized tax base which would consist of replacing all national tax codes for one single corporate tax code applicable for all companies across Europe without considering the size or the cross-frontier activities of those entities. It is obvious that this mechanism will eliminate the actual differences in tax bases and the determination of the applicable tax law on cross-border entities. This system would eliminate the double taxation situations and many

[112]In Finland for example, see Helminen, Marjaana: Finnish International Taxation, pp. 235

[113]Helminen, M: pp. 235

[114]Wenz 2: pp.48

[115]Da Costa & Bilreiro: pp. 165

[116]Helminen, Mar: pp. 33

other major obstacles. However, not all problems would cease to exist, such as the taxation of partnerships in relation to tax on persons.[117]

Home state taxation (HST) could be also a solution for the tax problems the SE faces, thus, an SE will face only the national tax system of its state of residence, and all profits gained in different Member State s would be taxed in the home state.[118] According to *Gammie*, HST is considered to be the most practical solution as a start, and that Member States would regret their unsuccessful attempt to adopt tax rules specific for the SE not only to make its adoption easier but also in order to avoid tax evasion of domestic systems.[119] However, a counterargument could be the fact that the Merger Directive and the 2005 Amendment Directive has brought considerable solutions for the SE. Furthermore, Member States still have the chance of future amendment of the SE Statute in order to find a solution for tax treatment of the SE that would be suitable for all Member States.

According to *Soler*, the Amendment Directive tries to disguise the free movement of the SE with the economical interests of the Member State. As the condition of the PE remaining in the State of origin is to ensure the taxation on capital gains, this leads to the result that the transfer of an SE and the transfer of a national entity would incur a similar treatment. *Soler* argues that in order to avoid tax problems when transferring the registered office of an SE is to eliminate completely exit taxation and any other tax barriers because the SE Statute benefits from the mobility without restrictions and that is why tax treatment should meet the requirements of such freedom.[120]

Another solution could also be the common-base taxation (CBT), where an EU group of companies would be taxed only once on its consolidated profits, the group's overall income is consolidated then allocated on the basis of a special scale, and every State will tax the income at its domestic tax rate. This way, the group's benefits are taxed once, and every state will preserve its tax sovereignty and get its tax revenue. [121]

6 Conclusion

It is worth pointing out that the SE is the company form which is most uniformall over Europe, so that companies are familiar with it if they want to establish themselves in another Member State.[122] However, the problem of different languages and legal traditions in the EU persists,

[117]Da Costa& Bilreiro: pp 166-167

[118]Helminen, Mar: pp. 33, see also Da Costa & Bilreiro: pp. 167

[119]Gammie: pp. 45

[120]Soler: pp. 15

[121]Helminen, Mar: pp. 33, see also Da Costa & Bilreiro: pp. 165

[122]Werlauff 3: pp.160

even for a common corporate form [123] like the SE, the establishment in a specific Member State or the transfer from one State to another will require certain knowledge of each Member State traditions, which would likely be an obstacle to SE mobility, and reduce its mobility across the internal market.[124]

Notwithstanding, the corporate tax problems facing the SE, we can also add the obligation for an SE to comply with many uncoordinated domestic tax regimes, and to be also subject to the expensive costs as a result of that. As a consequence, SEs will always take as a place of residence the State with the best choice of corporate tax system,[125] which once again may not be a good choice for example for employee involvement or for other issues.

The supporters of the positive integration propose a solution: to introduce concrete legislative actions that would tackle the problems of the European corporate taxation for example concerning the cross-border loss compensation in the EU. However, the negative integration has also a consequential role when interpreting the EU Treaty by the ECJ. Although, the ECJ decisions treat only the particular subject problem, the positive integration could handle the larger taxation issues.[126] The requirement of bringing a new tax framework in order to combat tax obstacles, with regard to the SE Company, must not be regarded as a preferential demand in favour of the SE at the expense of other national legal entities or business organisations, because this solution may in fact only lead to an excessive and exaggerated use of SEs to escape taxation and impede the functioning of the internal market because of harmful tax policy within the EU.[127]

The ability for an SE to choose the Member State of establishment that is the most advantageous for tax purposes and the possibility to move from a State to another without any restriction for the same reasons is considered an important feature within the single market.[128] So, besides all the tax problems, the SE will always have the issue of selecting the Member State that suits its tax purposes the best as a State of residence, unless Member State s find a common system to unify their different corporate tax systems. However, the Cross-Border Merger Directive offer the same possibility for all companies, therefore the SE cannot be considered as the only form of company with this advantage.

There are still some doubts whether the SE has achieved all of its objectives, especially concerning the uniformity and the mobility of the SE, uniformity has not been completely fulfilled yet, the indeterminable reference to national laws raises the same questions of

[123]Teichmann: pp.157

[124]Werlauff 3: pp.160

[125] Helminen, Mar: pp. 33

[126]Helminen, Mar: pp. 34

[127]Wenz 2: pp.50

[128]Gammie: pp.45

uncertainty about the uniformity of the Statute. For the mobility of the SE, the real seat principle which is against the freedom of establishment and other tax obstacles that considerably restrict the mobility of the SE need to be adjusted.

It is argued also that one can question whether there is a need for a supranational entity, and more supranational companies,[129] if it does not bring anything new to company law except its name and its European supranational identity.

The SE has not achieved many of practical objectives especially concerning the freedom of establishment and mobility and has fulfilled very little of what was theoretically expected. However, it is expected that the amendments of the SE Statute would bring new solutions for the different problems that have been faced in practice and also for the theoretical problems that may occur during the running of the SE. The solutions would certainly increase competitiveness in the EU company law as well.

Bibliography

Statutes and Treaties

TFEU: Treaty on the Functioning of the European Union

SE Regulation: Council Regulation no 2157/2001 of 8th October 2001 on the Statute for a European Company, OJ L294 10.11.2001

Employee Directive: Council Directive 2001/86/ EC of 8th October 2001 Supplementing the Statute for a European Company with Regard to the Involvement of Employees.

Parent-Subsidiary Directive: Council Directive 90/435/EEC of 23 July 1990, on the Common System of Taxation Applicable in the Case of Parent Companies and Subsidiaries of Different Member States.

Tax Merger Directive: Council Directive 90/434/EEC of 23 July 1990, on the Common System of Taxation Applicable to Mergers, Divisions, Transfers of Assets and Exchanges of Shares Concerning Companies of Different Member States.

[129]Grundmann: pp. 760

Double Taxation Convention: Convention 90/436/EEC on the Elimination of Double Taxation in Connection with the Adjustment of Profits of Associated Enterprises.

The Amendment Directive: Council Directive 2005/19/EC of 17 February 2005 Amending the Council Directive 90/434/EEC of 23 July 1990, on the Common System of Taxation Applicable to Mergers, Divisions, Transfers of Assets and Exchanges of Shares Concerning Companies of Different Member States.

The Cross-border

Mergers Directive: Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on Cross-border Mergers of Limited Liability Companies.

The preparatory works

Bulletin of The European Communities, supplement 5/89:

– Proposal for a Regulation on the Statute for a European Company.

– Proposal for a Directive complementing the Statute for a European Company with regard to the Involvement of Employees in the European Company. Presented by the Commission to the Council on the 25 August1989 http://aei.pitt.edu/8562/01/31735055261568_1.pdf

Law Reviews & Articles

Conci: Conci, Paolo, The Tax Treatment of the Creation of an SE, European Taxation 44/2004:1, p.15-27

Gammie: Gammie, Malcom, EU Taxation and the Societas Europaea- Harmless Creature or Trojan Horse? European Taxation 44/2004:1, p.35-45

Helminen, Mar: Helminen, Marjaana, The Tax Treatment of the Running of an SE, European Taxation 44/2004:1, p.28–34

Helminen, S: Helminen, Sakari, European Company SE, Turku Law Journal 2/2001, p.19–45

Lenoir: Lenoir, Noëlle, The Societas Europaea (SE) in Europe, A promising start and an option with good prospects. Utrecht Law Review, Volume 4, Issue 1 (March) 2008, Igitur, p13-21

http://www.utrechtlawreview.org/publish/articles/000057/article.pdf

Soler: Soler Roch, Maria Teresa: Tax Residence of the SE, European Taxation 44/2004:1, p.11-15

Teichmann: Teichmann, Christoph, "Law as a Product"- Regulatory Competition in The Common Market and The European Private Company, edited by Bartman, Steef M, European Company Law in Accelerated Progress, European Company Law Series, Volume 1, Kluwer Law International, (The Netherlands, 2006), p145-157

Wenz 1: Wenz, Martin, European Company, Societas Europaea, Legal Concept and Tax Issues, European Taxation 44/2004:1, p.4-11

Wenz 2: Wenz, Martin, Taxation of the European Company (Societas Europaea, SE) Key Tax Issues and FAQs on SE Taxation, Kluge, Norbert & Stollt, Michael, The European Company- Prospects for Worker Board- Level Participation in the Enlarged EU, (Brussels, 2006), p43-50 http://www.seeurope-network.org/homepages/seeurope/file_uploads/booklet2006.pdf

Werlauff 3: Werlauff, Erik, The SE as a Legal Form for Financial Companies, edited by Bartman, Steef M, European Company Law in Accelerated Progress, European Company Law Series, Volume 1, Kluwer Law International, (The Netherlands, 2006), p159-174

Wymeersh: Wymeersh, Eddy, The Transfer of the Company`s Seat in European Company Law, Common Market Law Review 40/2003, p.661-695

Legal Literature

Craig & De Búrca: EU Law, Text, Cases and Materials, Second Edition, (Oxford, 1998)

Da Costa & Bilreiro: Da Costa, Carla Tavares & Bilreiro, Alexandra De Meester: The European Company Statute, European Business Law and Practice Series, (Kluwer Law International, 2003)

Grundmann: Grundmann, Stefan, European Company Law: Organization, Finance and Capital Markets, Ius Communicatis Series, Volume 1, Interesentia, Antwerpen, (Oxford, 2007)

Helminen, M: Helminen, Marjaana, Finnish International Taxation, Second Edition, WSOY (Helsinki, 2005)

Merle: Merle, Philippe, Droit Commercial, Sociétés Commerciales, 2éme Edition, Précis Dalloz (Paris, 1990)

Werlauff 1: Werlauff, Erik, SE-The Law of The European Company, (Copenhagen 2003)

Werlauff 2: Werlauff, Erik, EU Company Law, Common Business Law of 28 States, Second Edition, (Copenhagen, 2003)

Internet

Cathiard: Cathiard, Catherine,The European Company (SE) : Good reasons to adopt the European Company Status, 30.08.2011

http://avocats.fr/space/catherine.cathiard/content/_C823A8F5-C663-4937-89B5-DD1F9899484F

Eur-Lex: http://eur-lex.europa.eu/

IBFD: Survey on the Societas Europaea, prepared by the International Bureau of Fiscal Documentation IBFD, Published on the European Commission's web site, September 2003, http://ec.europa.eu/taxation_customs/resources/documents/survey.pdf

Loyens: Loyens, Loeff, Preliminary Rulings Requested by the Hungarian Supreme Court on Cross-Border Conversion of Companies (Vale), EU Tax Alert, Edition 84, October 2010, http://www.loyensloeff.com/en-US/News/Publications/Newsletters/EUTaxAlert/EU_Tax_Alert_84.pdf

Robakov: *Robakov, Jevgeni, Societas Europaea, Analysis of adoption and practical functioning, Master Thesis, Jönköping University, (2007)* http://hj.divaportal.org/smash/record.jsf?pid=diva2:3511

SEEurope: http://www.seeurope-network.org/homepages/seeurope/secompanies.html

Worker-participation: http://www.worker-participation.eu