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THE SOCIETAS EUROPAEA IN THE PRINCIPALITY OF LIECHTENSTEIN

The Societas Europaea (SE) has been a reality in the European Union since 8 October 2004. As Liechtenstein has been a member of the European Economic Area (EEA) since May 1995, it is also able to use this legal form and so a Societas Europaea with registered office in Liechtenstein can be incorporated for clients who are seeking access to the European market.

In August 2006 the first SE was entered in the public register on the basis of Liechtenstein law, prompting us to provide following details on the SE and to highlight a number of specific advantages.

Legal basis

The basis of the SE is Regulation (EC) No. 2157/2001 of the Council dated 8 October 2001 on the Statute of the Societas Europaea (SE Reg.) and the Directive 2001/86/EC of the Council dated 8 October 2001, complementing the Statute of the Societas Europaea in respect of Employee Participation (SEB Reg.). Although the SE Reg. is directly applicable law in all Member States, it does require enforcement legislation in the respective Member State. Liechtenstein enacted the law (SEG) on the Statute of the Societas Europaea (SE) with effect from 10 February 2006 and the public register simultaneously produced a data sheet for the new registration of an SE in Liechtenstein. The law on employee participation in the Societas Europaea (SE Participation Act or SEBG) also took legal effect on 10 February 2006.

Purpose

The SE is a supranational company under European law which provides companies with an alternative to the domestic forms of companies. It is not created through the formation of a new company in the Member States, for example in Liechtenstein. Instead, companies may adopt a new structure, reorganise and merge their activities and transfer their registered office across national borders whilst preserving their identity according to rules that are, in principle, uniform throughout the European Union.

Forming an SE with a Liechtenstein structure

The SE is a company whose capital is divided into shares. The subscribed capital must amount at least to EUR 120,000 and each shareholder is liable only up to the amount of the capital subscribed by him.

It must be noted that only companies limited by shares are authorised to form an SE. Natural persons or partnerships are barred from forming an SE as sole founders. Accordingly, a domestic company limited by shares must first be formed so this can subsequently be merged with another company limited by shares or converted to an SE. However, an existing Liechtenstein establishment can first be converted to a company limited by shares without any additional requirements and subsequently used for the purpose of forming an SE.

As a fundamental rule the provisions for domestic companies limited by shares in the Member State in which the registered office of the SE is to be

located are definitive for forming an SE. The SE acquires its own legal personality when it is entered in the national register. However, the SE can be formed exclusively in accordance with the types of companies with specific legal forms, as defined in the Regulation, also taking into account plurality of state aspects, the geographic and time-related nature of which are precisely defined. There is consequently a numerus clausus for the forms of incorporation.

In all there are four different types of company formation:

- Merger across national borders by at least two domestic companies limited by shares (merger through takeover or formation of new company);
- Formation of a joint holding SE by at least two domestic companies limited by shares. Unlike in the case of a merger, the companies involved in forming the holding company remain intact;
- Formation of a joint subsidiary SE by at least two domestic companies limited by shares;
- Conversion of a domestic company limited by shares, provided that the domestic company limited by shares has owned a subsidiary which has been subject to the law of another Member State for at least two years.

Organisational structure of the SE

With regard to corporate management and control (corporate governance), two organisational structures, namely the monistic or the dualistic system, are available to choose from.

Under the monistic system, which is normally found in Liechtenstein, there is only one administrative body (board of directors) whose powers can be defined in more detail in the articles of association or in a special regulation. Delegation of management authority, for example to a board of management, is permitted. The board of directors can comprise one or more persons; however, an SE with subscribed capital of at least CHF 1 million must have a board of directors comprising at least three members unless the sole business activity of the company is asset management within national borders (to the exclusion of any other activity). The dualistic system makes provision not only for a management body (managing board) but also an additional supervisory body; this system was previously virtually unknown in Liechtenstein law (exception: for example banks).

In both the monistic as well as the dualistic system the general meeting of shareholders (in the SE Reg. known as general meeting) is the supreme body of the SE. It represents the shareholders and takes the fundamental decisions.

Relocation of registered office across national borders

The SE draws a general distinction between the registered office of an SE for the articles of association and the registered office of an SE for administration purposes. The registered office of the SE must be situated in the same place as its headquarters; this must be in a Member State. A headquarters does not necessarily have to equate to a large staff of employees and/or a production site. For example, a UK company which is inactive in the UK and has no staff there can be merged with a Liechtenstein domicile company to form an SE with registered office and headquarters in Liechtenstein.

The SE is able not only to freely determine the location of its registered office at the time it is formed but can also relocate this registered office within the EEA across national borders without requiring the SE to be dissolved and a new SE formed. Unlike a company limited by shares under domestic law, the SE is recognised beyond national borders and benefits from the degrees of freedom specific to the EU internal market and the Economic Area. The SE can likewise take full advantage of existing differences in the domestic systems of company law, an option which is not open to an ordinary company limited by shares.

Influence of the employees

The employee participation in the SE is one of the central aims of the European Union (EU), consequently the law on employee participation in the SE should not be underestimated.

The SE Directive (SEB Reg.) ensures that representatives of the employees of the SE, its subsidiary companies and business establishments may influence the decision-making within the SE to the extent that the information, consultation and participation of the employee representatives can be negotiated at the individual company

level as a requirement for the formation of the SE (so-called negotiation solution). However, to the extent that agreement cannot be reached in this regard, the provisions of the SE Directive and of its Annex which must be transposed into domestic law shall be applied by way of substitution (so-called alternative provisions). These rules ensure at least a minimum degree of information and consultation in accordance with the Directive applicable to European works councils.

The employee participation in the SE required the EU Member States to reach a compromise. For instance, the differences between co-determination in Germany (based on joint bodies) and complete freedom in the UK are too great. Agreement was accordingly reached with regard to the co-determination of the employees on the administrative or supervisory body, in the form of the «before and after» principle, i.e. co-determination providing co-determination rights had already existed in the original companies prior to their conversion to an SE or, with other types of company formation, providing co-determination already existed in one of the participating companies and this extended to 25% (merger) or 50% (holding, subsidiary) of the employees.

It will therefore be possible in future to have an SE with registered office in Germany with no rules on co-determination, whilst another SE in the UK may be subject to joint co-determination on the German model. It follows that, despite the directives, no uniform system of employee participation exists in Europe.

Statutory rights of co-determination do not exist in the Lichtenstein system. However, if an SE is created by conversion, merger or the formation of a holding company from abroad where these foreign companies made provision for certain types of co-determination, the latter shall likewise apply in Liechtenstein. Where no provisions on co-determination existed in any of the participating companies before the registration of the SE in Liechtenstein, then the SE is under no obligation to adopt an agreement on co-determination for employees. In Liechtenstein there would then simply remain the right to information and consultation without an entitlement of the employees to co-determination.

Taxation

The SE Reg. contains no provisions on taxation. The SE will therefore be taxed according to domestic rules. In the case of Liechtenstein this means that an EU Member State must not place a Liechtenstein SE in a worse position than its own companies.

The current taxation of the SE is consequently determined by the law of the country in which the registered office for the articles of association of the SE is located, putting it in the same position for tax purposes as the domestic companies limited by shares. Whilst the SE is liable to tax unconditionally in the country of domicile, its business premises and branches in the respective countries are subject to a conditional tax liability. The SE must therefore calculate its profits for tax purposes separately for each country in which it maintains business premises and/or a branch, in accordance with the domestic rules applicable in each country. Domestic law also applies with regard to the allocation of profits.

As a legally integrated, European-wide standard company with free choice of registered office, the SE can be utilised for tax planning purposes. In the individual case the choice of country of domicile can be planned and withholding taxes as well as flat rate taxes avoided, or advantage taken of dual taxation treaties and group taxation systems to the company's own benefit.

Summary

Alongside the existing forms of company under domestic law, the SE makes provision for the creation of companies whose structure and method of operation are governed by an EU Regulation which is directly applicable in all Member States. This consequently provides both for the formation as well as the management of companies on a European scale without the existing differences between the legal provisions of the individual Member States applicable to commercial companies and their geographically limited scope being an obstacle to such activities.

The much simpler SE can now provide an alternative to extremely complex legal structures and take account of the changes in the framework conditions within the EEA. For example, a business can now operate throughout Europe via one single SE with legally dependent branches in the other Member States. This not only provides for shorter decision-making routes but in particular also eliminates or at least significantly

reduces the costs for numerous subsidiaries and their respective organisation, administration, management, supervision, controlling, reporting, accounting, auditing, advertising as well as general or shareholders meetings. This will enable companies to take unlimited advantage of the freedom of establishment guaranteed by the EC Treaty and the EEA Agreement in the same way as natural persons.

Liechtenstein is very well placed in this respect. For example, Liechtenstein company law is extremely liberal and unlike other legal systems leaves the decision on structure, in particular the right of organisation, extensively to the individual articles of association. In addition, Liechtenstein has taken advantage of the authorisation provided for in the SE Reg. to create the scenarios for forming companies in such a way that a company whose headquarters is not located in the EEA can also participate in the formation of an SE providing it has been incorporated in accordance with the law of a Member State, its registered office is located in this Member State and it has a genuine and permanent connection with the economy of a Member State. This also means that companies incorporated in Liechtenstein (purely) with registered office for the articles of association and whose headquarters is located outside the EEA, can participate in the formation of an SE. This will make Liechtenstein very attractive as a location for Liechtenstein subsidiaries of Swiss companies as well as for those from third party countries.

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