

## ***Scenario of the Moot Court***

# ***"Societas Europae's travels"***

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The company ARCO SE was formed as a joint venture company by a French SAS and an Austrian GmbH. The company has its registered office (and its head office) in Paris and is currently employing 550 employees.

Its purpose is to manufacture medical products.

ARCO was formed by COS SAS (51%), AR GmbH (40%) and UNPOL (9%).

The company HAMEK SE was formed by a merger between a Danish PLC and a Swedish PLC. The company has its registered office in Copenhagen. The company has 250 employees. The company produces a special type of drip, which is patented as a European patent.

One year ago HAMEK SE entered into a cooperation with a German company, TEC AG, which also produces a special medical products. This cooperation resulted in the transformation of the TEG AG into a SE and formation of the holding company ARCOTEC SE. The holding company has its registered office in Heidelberg. The management of ARCOTEC SE is organized as a two tier system, while the managements of all subsidiary-SEs are organized under the one-tier system. The members of the supervisory organ of ARCOTEC SE meet at different locations (Copenhagen, Heidelberg and Paris), while the management organ is situated in Heidelberg. The company currently has 300 employees.

The share capital of ARCOTEC is fixed at a nominal value of (1.000.000 euros). The shares are divided between the three groups of shareholders as follows (nominal value) :

ARCO shareholders : 200.000 euros

HAMEK shareholders : 800.000 euros

TEC shareholders : 500.000 euros

The reserved capital is 500.000 euros

An Italian public limited company, PERNA SA, which produces a variety of medical products, is interested in incorporating the special type of drip, which is produced by ARCOTEC SE, in its own line of products. As a result, PERNA SA has decided to make a bid for the shares in ARCOTEC SE, which are owned by ARCO-shareholders. The management of ARCOTEC SE invites the management of PERNA SA to negotiate the possible transfer of shares. As an alternative, the management in ARCOTEC SE proposes

to formalize the cooperation with PERNA SA, since the range of products produced by PERNA SA supplements the products of ARCOTEC SE very well.

CO SAS acquired recently the shares owned by AR GmbH in the holding.

UNPOL has the opportunity to invest again.

The management of CO SAS proposes a response to the Italian bid to the board of ARCOTEC : the use of a French private Company as a vehicle in order to transfer the Italian assets in the holding following the best fiscal scheme and under the current applicable law.

The management of CO SAS proposes to use the next seminar of the supervisory organ of ARCOTEC SE, which takes place in Odense, Denmark, on October 8th 2004, to discuss a number of options for the future cooperation between the ARCOTEC -group and the PERNA-group. On October 7th 2004, members of the management of the three subsidiary-Se's have planned a seminar of their own , where they are to discuss the available options, before they are presented before the supervisory organ of the holding company. Members of the management of PERNA SA are invited to join the management seminar on October 7th.

Consider the following questions for the future cooperation between the participating companies :

### **1. Merger with PERNA SA**

Describe if and how it is possible to merge PERNA SA with ARCOTEC SE, and consider the major legal effects of such a merger with respect to the company law and tax law problems.

### **2. Transfer of Head office and/or registered office**

Describe if and how it is possible to transfer of head office and/or registered office of ARCOTEC SE to either Italy (Rome), or Denmark (Copenhagen). Consider also a transfer of the registered office/head office seat of ARCO SE to Germany or Denmark.

### **3. Change of structure**

Consider the possibility to change the structure of ARCOTEC SE from a two-tier system to a one-tier-system. Consider the options for the management structure for any holding companies.

### **The supervisory organs of the group have requested a statement on the following issues :**

**For the Italian team** : develop a strategy for the cooperation between PERNA SPA and ARCOTEC SE. Present this for a debate with the other teams.

**For the French National Support Team** : J-L. FLAMAND, CFO, Valve Precision Europe ; Julie CADIN DEA M&A-avocat-Paris : visio conference and presentation of a response to the board from a practical approach:

The bilateral tax conventions (i.e. FR/DK of 1957)

How to use of a national element as a vehicle in order to help the merger between PERNA and ARCOTEC (J-L. COLOMBANI) ?

**For the German team** : prepare the formal procedure of the transfer of seat of ARCOTEC SE from Germany.

**For the Danish team** : explain the features of the Danish management system and what reasons they have to propose a change of the management system from a two-tier to a one-tier system once ARCOTEC SE has transferred its seat to Denmark. Include a presentation of the Danish system of workers participation.

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# *"SE, the European Company - Denmark, and the history"*

Professor Soren Friis Hansen

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## 1. **National Rules**

SE-Regulation, Article 9:

- National SA's: Aktieselskaber (A/S)
- Consolidated Act, nb. 9, February 9th 2002
- 1973-reform
- Common Nordic reform
- (ApS [= SARL] introduced in 1973)

## 2. **Introduction of the SE in Danish law**

### A: **Act nb. 363, May 19th 2004 (SE-act)**

Departmental working group

Extensive hearing, SE-Report

Implements the options in the SE-Regulation

Contains a number of technical provisions

### B: **Act nb. 281, April 26th (Employees representation)**

Implements the directive

Under Danish law the employees elect representatives for the supervisory organ (if more than 35 employees)

## 3. **Specific Danish rules:**

Capital: DKK or Euro (SE-act, § 2)

Head office must be located at the same municipality as the registered office (SE-act, § 3)

If registered office is transferred to another Member State, minority shareholders can require the majority to buy their shares (SE-act § 6)

The competent national authority is the national authority that is normally responsible for registration of other companies (Erhvervs- og Selskabsstyrelsen)

### **Management System of Danish SE's**

The Danish (Nordic) management system for SA is a mixture of the continental and the British systems

- The supervisory organ has the competence to make decisions that falls within the scope of the management organ
- A manager may be a member of the supervisory organ (although not the chairman)

This means that under the SE-regulation, the management system of Danish SA is considered to be a **one tier** system

- This was the one point that caused considerable discussion in the SE-Report
- An alternative two-tier system is introduced for Danish SE's (SE-act, § 8)

### **Annual Accounts**

A Danish SA must enter its annual accounts within 5 (4 if listed) months after the end of the financial year

- Within one month after this time limit, if the annual accounts have not been entered, a procedure will begin, resulting in the liquidation of the company.
- The authorities consider that this procedure can be maintained with respect to a Danish SE
- BUT: SE-Regulation Art 54 does not give the Member States an option!

## **The History of the European company (SE)**

- 1. The idea is born**
- 2. 2nd Generation Drafts**
- 3. The SE becomes a reality**
- 4. Formation of a SE**
- 5. Transfer of registered office**
- 6. Which rules govern a SE**
- 7. Structure of a SE**
- 8. Perspectives**

## **1. The Idea is born**

Aim of the EC was total harmonization of company law

1959 Prof. Sanders proposes idea of supranational company-form

- Regulation should cover every aspect of a company's life
- Regulation should equal a national companies Act.

1966 Sanders presents unofficial proposal for the Commission

- Heavily inspired by German Law (AktG 1965)
- included for instance rules on Konzernrecht

1970 Commission drafts first official proposal

- based on 1966 draft

1975 Commission presents modified draft Regulation

1968-1976: "the golden age" of European Company Law

## **2. 2nd Generation drafts**

1989 Commission presents new draft Regulation

- Complete change of methodology
- Reduced number of articles
- Widespread use of renvoi

1991 Commission presents revised draft Regulation

1989-2001: Crisis in European Company law

No new initiatives adopted by the Council in this period

Trend towards deregulation for non-listed companies

The problems of Mitbestimmung and management systems

Principle of subsidiarity introduced

March 1999; Centros (C-212/97); Accept of "competition among rules"?

2002 Überseering (C-208/00); the death of the real-seat theory

2003 Inspire Art (C-167/01); Competition among rules is now a reality

Regulation on the European Cooperative Society (SCE)

2004 Hughes du Lasteyrie (C-9/02), companies moving out?

SE-regulation enters into force on October 8th

### **3. The SE becomes a reality**

#### **Council adopts regulation (december 2000)**

Compromise found on Mitbestimmung

- before and after principle
- Workers participation regulated in separate directive
- SE-regulation enters into force on October 8th 2004 !!
- Technical problems; amendment of tax directives not completed in time
- Regulation must be revised before October 8th 2009 (article 69)
- Regulation is based on renvoi (to national PLCs)
- From today there are 25 (+3) different types of SE
- Each of those has a choice between the one tier and the two tier system !

Possible problem: Article 7 requires that the registered office of an SE shall be located in the same Member State as its head-office

### **4. Formation of a SE**

Formation methods are covered by the Regulation

- Article 2 contains an exhaustive list of formation methods
- A SE cannot be formed "directly"
- A (formal) cross border element is required

#### **A: Formation by merger (articles 17-31)**

- PLCs formed under the law of a Member State
- PLCs from two different states

#### **B: Formation of a Holding SE (articles 32-34)**

- two or more PLCs and private limited types of Member States
- from two different Member States, OR
- Two of them have had a branch / subsidiary for two years

**G: Formation of a Subsidiary SE** (Articles 35-36)

- Any companies which fall under Article 48 EC, if at least two:
- are from different Member States OR
- have had a branch /subsidiary in another Member State for at least two years

**D: Formation by transformation of existing PLC** (article 37)

- National PLC if it has had a subsidiary for two years
- SE may convert to national PLC (article 66)
- but not before two years after its registration

**5. Transfer of Registered Office**

A SE may change nationality by transferring its registered office from one Member State to another (article 8)

- without winding up or losing its status as a legal person

Protection of:

- creditors
- shareholders
- employees

public authorities may be given the right to oppose the transfer

**6. Which rules governs a SE?**

Company law provisions: Article 9

- a) The SE regulation
- b) the statutes if expressly authorised by the regulation
- c)
  - Member state implementation rules
  - Member state rules on national PLCs
  - provisions in the statutes, authorized by national law

Non-company law provisions:

- Decided by international private law rules

## **7. Structure of the SE**

Organs of the SE:

General meeting +

- 1) Supervisory organ + management organ (two tier), OR
- 2) Administrative organ (one tier)

The company must adopt either 1) OR 2) in its statutes

Member States may adopt appropriate measures for the system, that does not apply to national PLCs

Member states must:

- Decide whether their national PLS are one tier or two tier
- Decide if they will adopt appropriate measures

## **8. Perspectives**

- The free movement of companies will be confirmed by the ECJ
- It will probably cover moving-out and cross border mergers
- Additional European company law types??
- The European private company
- The European foundation

Who will use the SE?

Will the SE be used by business??

Is there a need for European company-forms??

- I would guess: YES

*"Lack of implementation of the Regulation and Directive on the SE in Italy and participation of an Italian spa to the formation of an SE"*

Federico PERNAZZA and Valentina ALLOTTI

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1. The Regulation on the Statute for a European Company (SE) no. 2157/2001 and the Directive 2001/86/EC supplementing the Statute with regard to the involvement of employees entered into force on October 8, 2004.

Member States were required to adopt the laws, regulation and administrative provisions necessary to comply with the Directive within that date at the latest. Alternatively, Member States were required to ensure that management and labour introduce the required provisions by way of an agreement, taking all necessary steps enabling them at all times to guarantee the results imposed by the Directive (Art. 14, Directive).

Although the Regulation is immediately and directly applicable, Member States were required to set up within the same date the necessary machinery for the formation and operation of Ses with registered offices within its territory, so that the Regulation and the Directive could be applied concomitantly. In particular, Member States were required to designate the competent authorities to (i) issue a certificate conclusively attesting to the completion of the pre-merger acts and formalities (Art. 25, Regulation); (ii) ensure that the merging companies have approved draft terms of merger in the same terms and that arrangements for employee involvement have been determined pursuant to the Directive (Art. 26, Regulation). Moreover, Member States could adopt specific measures where the Regulation allowed them to choose different solutions from those provided for by its own rules, i.e. those concerning the governance structure.

Italy has provided for the implementation of the Directive by L. 306/2003, assigning the Government the task to adopt a legislative decree within 18 months from its entry into force (that is within May 2005). At present, no specific provisions has been taken to ensure the effective application of the Regulation.

Nevertheless, the Regulation was considered during the preparing works of the recent reform of the Italian company law and the new Italian corporate governance models take into account the perspective of implementation of the European Company.

2. The reform of Italian company law (enacted on January 2003 and into force from January 2004) aims at finding a balance between the need for protection of minority shareholders and third parties and the degree of private autonomy granted in shaping the internal governance structure of companies.

A different balance between mandatory and default rules is given depending on the kind of

company considered, whether it is a private or public limited-liability company and, among the latter, whether their shares are widely distributed among the public or not.

In any case, the new company law grants a wider degree of private autonomy, which plays an important role in the drafting of statutes of any company.

In particular, the following aspects of Italian company law appear to be relevant:

i) the statute can choose between three different governance systems; the one-tier system, the two-tier system and the traditional system (art. 2380); as to the one-tier system, specific provisions on the composition and functions of an internal audit committee are provided for by Italian law (art. 2409 octiesdecies). The Regulation on SE does not deal with the issue of the internal control on the management of an SE;

ii) the statute can provide for limits on the transfer of shares. In particular, the validity of any transfer may be submitted to the approval of shareholders or of a company organ; in this case, however, a right of withdrawal must be granted to shareholders (art. 2355 bis);

iii) the company may issue different classes of securities with different administrative and pecuniary rights, if the statute so provides (artt. 2346, 2348, 2351); at this regard, the shareholders' meeting may also decide the issue of special securities to be assigned to employees of the company or of its subsidiaries (art. 2349);

iv) the statute may provide for arbitration and a conciliation clause to settle intra-company disputes.

The new company law on many respects enhances shareholders protection.

In particular, a shareholder derivative suit has been provided for by article 2393 bis: shareholders representing 1/5 of the capital or the lower percentage provided for by the statute are entitled to sue directors for their liability.

Shareholders representing 1/10 of the share capital or 1/20 of the share capital if the company's securities are widely distributed among the public may file the complaint to the tribunal where they have a well-founded suspicion of serious irregularities in the directors' performance of their duties; statute may provide for lower percentages (art. 2409).

A new discipline on withdrawal rights has been introduced: beside mandatory provisions defining when the right of withdrawal arises, parties may discipline the issue by providing for special clauses in the statute (art. 2437 and following).

The new company law has amended the discipline on shareholder meeting in order to make it easier the meeting itself and the adoption of decisions. In particular, postal voting and participation to the meeting through telecommunication devices are allowed (art. 2370).

Finally, in relation to the workers' involvement Italian law already provides for information and consultation procedures, deriving from European laws (Cfr. Directive n. 94/45/CE on the establishment of European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees), from national laws (cfr. L. 29 December 1990, n. 428, art. 47 on the transfer of undertakings and L. 23 July 1991, n. 223 on collective redundancies) and

from collective agreement practices. Italian law does not provide for any participation procedure for employees.

3. According to the described Italian law the actual possibilities for Italian companies to take part in a SE are drastically limited.

In the drafted Scenario, an Italian spa is asked to formalize its cooperation with a SE by means of a merger. Considering the lack of any implementing measure in Italy, the question is whether an Italian company can participate in the formation of an SE by merger. We assume that the registered office of the SE is not in Italy.

a. First of all, we should address the issue of workers' involvement, since an SE may not be registered unless an agreement on arrangements for employee involvement has been concluded (Art. 12.2 Regulation). At this regard, it may be argued that an agreement between the management and workers of Italian spa introduces the provisions required by the Directive and that an arrangement on workers' involvement within the meaning of Art. 12.2 of the Regulation is reached.

As to the procedure for merger by acquisition, assuming that the SE registered office is not in Italy, the relevant provisions are Articles 17-25 of the Regulation. The lack of definition of the Italian authority competent to issue the certificate conclusively attesting to the completion of the pre-merger acts and formalities according to Art. 25 (in breach of a specific obligation arising from Art. 68) hampers the participation of Italian spa to the merger.

In order to ensure effective application to the Regulation, one could argue that the gap could be filled by the provisions of the directive 78/855/EC concerning domestic mergers of public limited liability companies, to which Art. 18 of the Regulation makes reference. According to Art. 16 of the directive 78/855/EC, where the laws of a Member State do not provide for judicial or preventive supervision of the legality of mergers, the minutes of the general meetings which decide on the merger and, where appropriate, the merger contract subsequent to such general meetings shall be drawn up and certified in due legal form. According to Italian law, the notary is competent to draw up and certify the existence and validity of the legal acts and formalities.

In any case, it is doubtful whether this scrutiny can validly take the place of the certificate required by Art. 25 of the Regulation, on which the competent authority of the Member State of the registered office of the SE shall rely on according to Art. 26.

b. As an alternative, we may imagine to formalize the cooperation between Italian spa and the SE by the formation of a SE holding with registered office in a country where the SE Regulation has been implemented. The procedure for the formation of an SE holding does not require the adoption of any special provision by Member States.

The only gap in the Regulation concerns majority requirements of the general meeting approving the draft terms of the formation of the holding SE (Art. 32.6). We assume that this is a gap to be filled by national law. Italian company law does not provide for a comparable procedure for the formation of a holding company; therefore, the question would be to determine whether the "ordinary" shareholder meeting or the extraordinary shareholder meeting, deciding with the qualified majority requested for the amendment of the articles of association should be competent in this case. According to the general

principle of Italian company law, the ordinary meeting is competent unless it is provided in a different way by the law.

The formation of an SE holding by an Italian company renders the latter a “controlled company” in the meaning of article 2497 quater c.c. on exit rights within group of companies. According to this provision, when a company becomes part of a group (or is no longer part of a group) and it engenders an alteration of the conditions of the business carried out, shareholders are granted an exit right.

c. Finally, we may imagine a participation of the Italian company in a SE holding having the seat abroad by an exchange of shares. The SE Regulation does not provide specifically for this kind of procedures and, by consequence, the exchange of shares is not hampered by the lack of implementation of the Regulation. However, it has to be noted that following this scheme the minority shareholders may exercise the exit right as provided in article 2497 quater c.c., if the Italian company enters in the group of the SE holding, whether no specific protection is granted to the employees.

Odense, 8 October 2004