Federation of European Accountants
Fédération des Experts comptables Européens

European Commission
DG Internal Market and Services
Unit F2
B-1049 Brussels
Belgium

markt-consultation-se@ec.europa.eu

19 May 2010

Ref.: CLC/HvD/HB/LA/SH

Dear Sir or Madam,

Re: FEE Comments on the European Commission Consultation on the Results of the Study on the Operation and the Impacts of the Statute for a European Company (SE)

FEE (the Federation of European Accountants) is pleased to provide you with its comments on the European Commission Consultation on the Results of the Study on the Operation and the Impacts of the Statute for a European Company (SE).

FEE welcomes the initiative by the European Commission to analyse how the statute on the European Company (SE) has been operating in practice in Europe since its entry into force and appreciates the comprehensive and informative study prepared by Ernst & Young.

FEE believes that the European Company has merits, especially for companies that are operating cross border. However, when considering how to move forward with regards to the European Company FEE would encourage the European Commission to consider the attractiveness of this legal form of companies compared to other forms. FEE considers that a reassessment of the requirements related to involvement of employees, the relationship between the European legal requirements and national law and tax considerations could be particularly relevant in this respect.

FEE's comments on questions raised in the Commission consultation are attached in the appendix.

FEE's ID number on the European Commission's Register of Interest Representatives is 4713568401-18. For further information on FEE's name, country of origin, legal form, size, field of activities and cross-border activity, please refer to footnote 1.[1]

For further information on this FEE letter, please contact Hilde Blomme at +32 2 285 40 77 or via email at hilde.blomme@fee.be or Lotte Andersen at +32 2 285 40 80 or via email at lotte.andersen@fee.be from the FEE Secretariat.

Yours sincerely,

Hans van Damme
President

[1] FEE is the Fédération des Experts comptables Européens (Federation of European Accountants). It represents 43 professional institutes of accountants and auditors from 32 European countries, including all of the 27 European Union (EU) Member States. In representing the European accountancy profession, FEE recognises the public interest. It has a combined membership of more than 500.000 professional accountants, working in different capacities in public practice, small and big firms, government and education, who all contribute to a more efficient, transparent and sustainable European economy.

FEE's objectives are:

- To promote and advance the interests of the European accountancy profession in the broadest sense recognising the public interest in the work of the profession;
- To work towards the enhancement, harmonisation and liberalisation of the practice and regulation of accountancy, statutory audit and financial reporting in Europe in both the public and private sector, taking account of developments at a worldwide level and, where necessary, promoting and defending specific European interests;
- To promote co-operation among the professional accountancy bodies in Europe in relation to issues of common interest in both the public and private sector;
- To identify developments that may have an impact on the practice of accountancy, statutory audit and financial reporting at an early stage, to advise Member Bodies of such developments and, in conjunction with Member Bodies, to seek to influence the outcome;
- To be the sole representative and consultative organisation of the European accountancy profession in relation to the EU institutions;
- To represent the European accountancy profession at the international level.

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Appendix

Drivers

Question 1

Do you agree with the findings of the study about the positive and negative drivers for setting up an SE and their importance? Please explain your answer.

FEE believes that the European Company clearly has merits, especially for companies that are operating across borders in more than one European Union (EU) Member State. It has the potential of achieving the integrated single market objective as it is meant to offer the possibility of establishing and conducting business on a genuinely European basis.

However, with a total of less than 400 SE companies across the European Union the survey indicates that the statute for the European Company has not been the success that was anticipated prior to coming into force. Other means of forming companies that are equivalent to the SE appear, to the best of our knowledge, to be more appreciated in Europe, such as the possibility for cross-border mergers and the freedom to use the legal form of "company" in any EU Member State which was confirmed by the European Court of Justice with its ruling in the CENTROS case[2] and others. In addition, the European Commission proposals for a European Private Company (EPC or SPE) seem also to be relevant in this context and FEE would therefore encourage the European Commission to consider whether it would be more beneficial to European companies to explore these other options with the aim of forming European companies in further detail.

When considering the results of the Ernst & Young survey, FEE would agree with the drivers identified by the survey and can understand that the limited number of companies in the various EU Member States can result in difficulties in finding common conclusions at European level. The grouping of the drivers in positive and negative drivers could therefore also be considered in another context. For example, simplification of group structure and the flexibility and attractiveness both inter-member state and intra-member state have not been greatly used and can therefore not necessarily be seen as positive drivers in practice although they might be in theory.

In addition, involvement of employees has been categorised as a negative driver which might not be the case in all Member States across Europe. FEE would be of the view that the involvement of employees as such can be seen as a benefit and as quite positive for establishing an SE in some Member States, whilst the complexity surrounding the involvement of employees can be a significant problem in practice in other Member States.

FEE would therefore be of the view that the main negative driver in relation to SE companies is the cost and the complexity of the formation of an SE company which is also clearly indicated by the number of shelf (coathanger) SE companies created.

[2] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61997J0212:EN:HTML

Question 2

Do you agree with the study's assessment of the attractiveness/non-attractiveness of national legislation for setting up an SE? Do you think that other or additional issues in the national legislation should be taken into consideration for that assessment?

FEE agrees with the assessment of the attractiveness and non-attractiveness of national legislation for setting up an SE company as the number of SEs created indicates that there are some severe obstacles in establishing such a company. To our knowledge, the main attractiveness appears to be the possibility to transfer the registered office which is also the main reason for choosing the legal form of an SE.

Considerations on the attractiveness not directly related to company law could be tax considerations which are often the driving factor for companies in selecting the legal form of the company. This relationship needs full consideration when looking into further developing a more attractive legal form of a European company.

Question 3

What are in your view the most important regulatory issues to consider for a company when assessing in which country to place its registered office and/or head office (both at the moment of formation and during the life of a company – taking into account the possibility to transfer the registered office).

The study does not appear to have identified the main drivers in those EU Member States where the majority of the SEs have been created. FEE would expect that the regulatory issues to consider at the date of formation are the costs and the speediness of the formation process, for instance in relation to registration and filing of documents compared to the costs and procedures related to the creation of companies under national law.

During the life of the company the regulatory issues should not hinder the running of the company to a greater extent with more complex procedures than what applies to companies set up in accordance with national legislation. As mentioned in the response to question 2 the main driver for establishing an SE appears to be the possibility to transfer the registered office, although this possibility has not been the main driver in the two EU Member States, the Czech Republic and Germany, where the majority of the SEs have been created according to the study by Ernst & Young.

Main trends

Question 4

Do you agree with the study that the main reasons for the current distribution of SEs across the EU/EEA Member States are connected to the employee participation system and corporate governance system of the individual Member State? Please explain your answer.

FEE agrees that the main reasons for the current distribution of SEs across the European Union are connected with the employee participation and corporate governance systems. As mentioned earlier in the response to question 1 FEE is of the view that the main reason

for the current number of SEs are the restrictions related to the involvement of employees at the date of formation and during the life of the SE. This appears to be due to the fact that negotiations with different employee organisations in various EU Member States can be very complex and time consuming although involvement of employees is in some countries seen as a positive aspect of the SE legal form. In addition, the costs and the complexity of setting up an SE also appear to be the main reasons for the current distribution of SEs. The interplay of these different reasons compared to the national legal requirements usually heavily influences the decision for setting up an SE or not.

Question 5

Do you agree with the possible explanations for the current distribution of SEs in the EU/EEA presented in the study? If you think there are other possible explanations please list them.

As mentioned in the response to questions 1 and 4 FEE agrees with the views of the study regarding the current distribution of SE companies across Europe.

Question 6

What are in your view the main advantages for a company to buy a ready-made shelf SE compared to setting up an SE directly?

The main advantages for buying a shelf SE appear to be saving financial and human costs and time on the legal formation of a company. Another advantage is that an already registered shelf SE already fulfils the requirement of internationalism which is important in particular cases where multi-nationality rather than subsidiary structure is preferred.

When considering the SE statute it seems that the requirements related to the compulsory negotiations on employee involvement prior to the registration of the SE is a main issue. Shelf SEs do normally not have employees and can therefore be established without employee participation negotiations. When a shelf SE is purchased, the employee participation involvement structure (or lack thereof) established upon formation can usually be retained. As the majority of the SEs created (81%[3]) do not have any employees it appears that this issue is the main reason for buying a shelf SE compared to setting up an SE directly.

[3] Ernst & Young study, page 196

Practical problems encountered

Question 7

Please provide examples of practical problems you have encountered in the course of setting up or running an SE (please focus only on company law related problems).

A number of significant practical problems with the application of the SE statute have been brought to the attention of FEE. Most appear to stem from legal uncertainty related to the interpretation of the statute itself. The main issue is the relationship between the EU regulation and national law causing difficulties in practice as the general principle of the regulation is that national law applies when the EU statute is not exhaustive. A few examples can be highlighted:

- The assessment of employee involvement under article 23 of the Regulation which refers to the Directive supplementing the statute for a European Company with regard to the involvement of employees[4] is quite complex and results in practice in a significant amount of uncertainty as to how the calculation of the number of employees should be done. This is especially complex in relation to determining the level of employee involvement in various EU Member States in case of large groups with a number of interdependent subsidiaries and branches in different countries.
- According to article 39 of the Regulation, members of the management (board) shall be appointed and removed by the supervisory organ. In some EU Member States it is required that removal of management can only be done if there are good reasons to do so. The question in such a situation is therefore whether the Regulation is exhaustive (no need for good reasons) or whether national law (need for good reasons) prevails. This issue remains unsolved.

Possible follow-up

Question 8

Do you agree with the study's recommendations for possible amendments of the SE Regulation? Which recommendations are the most important in your view? Do you have any other suggestions for amendments of the SE Regulation that would increase its attractiveness for businesses (e.g. for SMEs, groups operating across borders)?

The legal form of the SE was created to facilitate business activity in the European Union (EU) internal market, to grant companies the possibility to organise their business more efficiently across different jurisdictions.

In order to transform the SE in an attractive vehicle for legal arbitrage there should be certain advantages offered to the SE compared to companies established under national law. As mentioned by the study some Member States did not set specific legal, tax or social measures to encourage the creation of SEs or to provide for more flexibility for the SEs which can have had an impact on the attractiveness of the legal form SE. The

[4] Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European Company with regard to the involvement of employees
http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:294:0022:0032:EN:PDF

intention of the SE Regulation should therefore be to create a more appealing environment to facilitate corporate mobility within the EU assuring at the same time the necessary level of protection of different constituencies, including shareholders and creditors.

Some specific areas of possible improvements in order to reach the objective of the SE initiative are highlighted below.

Size of relevant companies

The survey analyses only the number of employees in the SEs formed and does not indicate whether the SEs created under the statute meet the definition of Small and Medium-sized Entities (SMEs) as such. The survey states that the number of employees exceeds 250 in only 10% of the SEs with 81% of the SEs having no employees at the time of formation. In addition, the survey states that 20% of the SEs have changed their employee structure since their creation[5] which still leaves the majority of the existing SEs having no employees. Therefore, the survey indicates that the majority of the SEs could potentially meet the definition of being an SME.

The legal form of the SE seems therefore to be particularly relevant for SMEs. This legal form of companies could also be considered particularly relevant if these companies are listed on a regulated market as such companies could have a specific interest in attracting investors that are not exclusively domestic but have a broader European perspective.

For non-listed SMEs where the European brand would be relevant, the European Private Company (EPC - SPE) could be an appropriate approach. FEE has previously supported the proposal for a statute on EPC - SPE and would again encourage the completion of such an initiative as this corporate form appears to be a truly European company, provided that not too many provisions are left to national law.

Relationship between EU regulation and national law

FEE is of the view that for increasing the attractiveness of the Regulation on the Statute for a European Company, the relationship between the EU legislation and national law should be reassessed as this relationship seems to create difficulties in practice. FEE would recommend that the linkage to national law is reduced and instead the approach used for the European Private Company (EPC - SPE) where more is left to the European level is considered.

Tax considerations

As already indicated in the response to question 2, tax considerations are for companies often the driving factor in selecting the legal form of the company. This relationship needs full consideration when looking into further developing a more attractive legal form of a European company. This issue should also be considered in relation to reducing the

[5] Ernst & Young survey, page 205 (50 or more people employed during the first fiscal year)

uncertainty on the legal and tax consequences of the transfer of seat under the current requirements.

Setting up costs

Setting up a company inevitably involves paying fees and carrying a certain administrative burden which will also be the case when setting up an SE. Depending on the method used and the size of the company, the costs of switching to the SE corporate form can be significant. The regulation should prevent the creation of cost barriers for SEs.

Capital requirements

The minimum capital requirement of €120.000 could be one aspect that affects the attractiveness of the legal form of the company compared to other legal forms at national level. A way to increase the attractiveness of the SE possibilities by introducing alternatives to the current minimum capital requirement of this fixed amount could be to offer companies more flexibility in the making of distribution decisions. An alternative capital maintenance regime in the form of a solvency-based regime, which would involve both a “snapshot” test and a “forward-looking” test could be considered in this context.

The linkage and the transfer of the registered office

At the moment, the formation of an SE offers the possibility for companies to transfer their registered office between Member States. But the mandatory linkage of the head office to the registered office within the same Member State according to Article 7 of the Regulation can risk violating EC primary legislation. Furthermore, the detailed rules laid down in Article 8 and its 16 paragraphs regarding the registered office can on occasion be seen as overprotective in practice and can significantly reduce the attractiveness of the SE’s mobility.

In addition, the “real seat” principle having a registered office in a specific Member State can be viewed as hampering the simplification of the management structures of companies operating in the EU which would be contradicting the objective of the SE regulation in a way that underlines the link to one specific Member State of the European company in question.

The formation of an SE

Presently, it is not possible to create an SE *ex nihilo*. The SE cannot be formed directly by individuals and the companies at the basis of its formation must also have a trans-European dimension. The same goes for the possibility of transforming into an SE, where the company involved must have had a subsidiary for at least two years, which is subject to the laws of another Member State. Relaxing the conditions for the formation of an SE could therefore increase the attractiveness of the company.