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# The Belgian European Company : How to align Belgian company law?

## Abstract

*The discussions about a legal framework for the European company (SE) had continued for more than 30 years before the Council Regulation No 2157/2001 was finally adopted in October 2001. The national law of the Member States may not be inconsistent with the Regulation, must offer the necessary legal framework to establish an SE, and must allow for an optimal functioning of the SE. This paper focuses on the Belgian company law in force and indicates where new rules need to be established before October 2004. This paper starts with the basic rules for the establishment of an SE in Belgium. It continues with the rules on the management structure. It highlights the possibilities of a transfer of seat.*
*The Regulation refers to the rules on "national" public limited liability companies. for a large number of issues on the formation and the governance of an SE. Nevertheless, the paper indicates that the Belgian Companies' Code conflicts with the Regulation. In that case, the Belgian SE must apply the Regulation. Hence, due to the reference of the Regulation, it is a necessity to adapt the Belgian legislation by October 2004. A well-developed two-tier board structure must be offered by the Belgian Companies' Code. Furthermore, the Belgian rules that govern the general meeting and the transfer of the seat need to be modified. The involvement of employees must be studied.*

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# The Belgian European Company : How to align Belgian company law?

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## *Introduction*

The discussions about a legal framework for the European company had continued for more than 30 years before the Council Regulation No 2157/2001 (the "Regulation" or "RE-SE") was finally adopted in October 2001. The choice of a regulation as legal instrument presents the advantage that no further implementation in national law is needed. The European Company (SE) will exist by virtue of the Regulation. However, Article 9 of the Regulation states that the "Societas Europaea" will be governed not only by the Regulation (RE-SE), but also by its statutes, specific laws, and the company law of the Member State where the SE will be incorporated. Hence, the advantage of the choice of a regulation is in part neutralised by the numerous references to national law.
The national law of the Member States may not be inconsistent with the RE-SE, must offer the necessary legal framework to establish an SE, and must allow for an optimal functioning of the SE. However, so far, no specific Belgian legislation has been drafted. Due to the general elections that will take place on May 18, 2003, the Belgian parliament has not yet started discussions on this subject. Hence, this paper will focus on the Belgian company law in force and indicate where new rules need to be established before October 2004.

It remains unclear whether the Belgian government will opt for the approach of the High Level Group of Company Law Experts, whose report states "listed and open companies should have the choice between the two systems" (of management).[1] However, Belgian company law was amended in August 2002 and a new management structure introduced, after the publication of the RE-SE. Contrary to the new Italian Act, the Belgian approach has offered companies only the option of a one tier or a modified one-tier structure. Hence, in all probability Belgium will not offer all open and public companies a free choice between a one-tier or a two-tier management structure.

This paper starts with the basic rules for the establishment of an SE in Belgium. It continues with the rules on the management structure. Section C will then highlight the possibilities of a transfer of seat. The involvement of employees is discussed in section D. Finally, section E will draw conclusions on the abovementioned subjects.

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[1] The High Level Group of Company Law Experts, *Report on a Modern Regulatory Framework for Company Law In Europe*, Brussels, November 4, 2002, Recommendation III.9, p. 59. The report may be downloaded at: www.europa.eu.int/comm/internal_market/en/company/company/modern/index.htm

## Formation of the European Company

The Regulation offers four basic possible ways in which an SE may be formed: a merger of at least two companies, a holding SE, a subsidiary SE and the transformation of a "national" company. A detailed analysis of the legal procedures to establish an SE goes beyond the scope of this paper. This paper will focus on the general rules for establishing a Belgian SE and will provide some additional information on the rules that govern the merger SE the holding SE, the subsidiary SE and the conversion of a Belgian public limited liability company into an SE.

### *I. General rules*

The Societas Europaea must be set up in the form of a public limited liability company.[2] In Belgium, the SE will take the form of a "société anonyme" /"naamloze vennootschap" (SA/NV). The incorporation of this company type is subject to a number of conditions.

Firstly, the involvement of a notary is mandatory. The document of incorporation of an SA/NV must be enacted in the form of a deed drawn up by a notary. Depending on the area within Belgium in which the company will have its seat, the deed of incorporation must be enacted in Dutch, French or German.
Secondly, the company has to be incorporated by a minimum of two founders. These founders can be natural or legal persons, and Belgian citizens or foreigners. This rule is consistent with Article 2 RE-SE. Once incorporated, one shareholder can acquire all the shares. This will not result in the dissolution of the company. However, if this situation persists for a year without the entry of a new shareholder, the sole shareholder is deemed to guarantee all the obligations of the company arising from the time when the shareholder became a sole shareholder until the time of the entry of a new shareholder.[3]

Article 3, section 2 RE-SE has introduced an exception on the number of founders for the subsidiary SE of an SE. One shareholder, the parent SE, may set up a subsidiary SE. In that case the provisions of the Belgian law on the implementation of the Twelfth Company Law Directive will be applicable. Under Belgian law, the limited liability of the shareholder of the limited liability company ceases to exist: if a legal person sets up a private limited liability company (BVBA/SPRL), this shareholder is deemed to guarantee all the obligations of the subsidiary (SE).[4] This regime is consistent with the exception provided in Article 2 (2) of the Twelfth Company Law Directive[5], which allows Member States to lay down special

2 Article 1, §1 RE-SE.
3 Article 646 Belgian Companies Act (CA).
4 Article 213 Belgian CA.
5 Twelfth Council Company Law Directive (89/667/EEC) of 21 December 1989 on single member private limited-liability companies, *OJ L* No 395, 30 December 1989, p. 40.

provisions if a single member company or another legal person is the sole member of the company.

By obliging an SE to have a legal capital of minimum 120.000 Euro, the European Union has judged the advantages of the preservation of the legal capital higher than the disadvantages.[6] All the other legal requirements concerning the capital, its preservation, changes, shares, bonds and other similar securities of an SE, are, for the Belgian SE, governed by the Belgian company law.[7] Since the latter has implemented the Second Company Law Directive, the RE-SE refers to other European rules for a significant number of requirements.
At least one fourth of a Belgian SE shares' nominal value or accountable par has to be paid up in full.[8] In any event a minimum of 61,500 Euro must always be paid up in full.[9] The funds should be deposited into a bank account, which must be opened for this purpose at a bank, under the name of the company in formation. If an SE sets up a Belgian subsidiary, the Belgian rules on a single member private limited liability company forces the parent SE to pay up in full each share to at least 20% of its value.[10] Hence it is sufficient that a single member subsidiary SE has a paid up capital of only 24,000 Euro. It has already been argued that 120,000 Euro only prevents founders from making a "frivolous use of this form"[11]. If only 24,000 Euro is needed to establish a subsidiary SE, even this argument cannot be sustained.

Contributions in kind must be paid up in full within five years after the incorporation of the company[12]. The founders must appoint an auditor to report on the contribution in kind. The auditor's report must contain a description of the asset and the methods of valuation. Further, the report must contain information on the value of the asset and whether it corresponds with the number and nominal value or accountable par of the shares to be issued.[13]

The founding parties have to prepare a budget forecast in which they account for the amount of capital of the Belgian SE which is about to be incorporated. The draft budget must be submitted to and kept by the notary.

The founders of the Belgian SE can be held liable for the obligations- of the company if the company becomes insolvent within *three* years of incorporation, if it is found that the starting capital was obviously inadequate to sustain the normal course of its business over a period of

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6 The number of disadvantages is however large. For a brief overview see C. Van der Elst, Economic Analysis of Corporate Law in Europe: An Introduction, *Economic Analysis of Law*, A. Hatzis (ed.), Cheltenham, Edward Elgar, 2003, to be published.
7 Article 5 RE-SE.
8 Article 448, 1° Belgian CA.
9 Article 439 Belgian CA. See also Article 9, section 1 Second company law Directive.
10 Article 223, 1° Belgian CA.
11 R. Drury and A. Hicks, "The prospects for a European Private Company", *Journal of Business Law*, 1999, p. 440.
12 Article 448, 2° Belgian CA. See also Article 9, section 2 Second company law Directive.
13 Article 444 Belgian CA. See also Article 10, section 2 Second company Law Directive.

at least *two* years. The notary will hand over the draft budget to the court if the company goes bankrupt within a period of three years.

For certain types of activities, the subscribed capital has to be substantially higher. Banks, for example, must have a subscribed capital of at least 6,200,000 Euro.[14]

The shares of a Belgian SE must be in bearer or in registered form. The shares always have to be in registered form until they are paid up in full, even if the statutes of the SE require shares to be in bearer form. A shareholder of bearer shares may always request the conversion of the shares to registered shares at his cost. It is allowed under Belgian law to prohibit the conversion of registered shares to bearer shares. In 1995, the Belgian legislator introduced a third kind of shares, the incorporated shares ("gedematerialiseerde effecten"/"titres dematerialises"). The rights attached to the latter kind of shares are "incorporated" by way of entering the shares in an account with an authorised account holder under the name of the owner.[15]
A Belgian SE can issue several other financial instruments: shares without voting rights for a maximum of 1/3rd of the subscribed capital[16], founders' shares, bonus shares, bonds, convertible bonds, warrants or instruments for which no contribution is made. The statutes describe the rights attached to these instruments.

## *II. Formation by merger*

The Belgian legislator has already developed detailed rules on the merger by acquisition as well as on the merger by formation of a new company.[17] A Belgian limited liability company must prepare draft terms of the merger in a public deed or in a private instrument and deposit the terms at the clerk's office of the commercial court at least six weeks prior to the general meeting convened to decide on the merger. The information to be included in the draft terms is comparable with the particulars in Article 20 of the RE-SE. However, two differences must be mentioned. Firstly, the Belgian merger rules oblige the board of directors to mention the purpose of the merged company.[18] Under the RE-SE, not only the purpose of the SE, but also the statutes, which contain the purpose, must be included in the draft terms.[19] Secondly, information on the procedures of arrangements for employee involvement must be part of the draft terms to form an SE by means of a merger. Belgian company law contains no rules on employee participation.[20] It should be noted that, in the one-tier structure, the board of

14 See Article 16 Law of March 22, 1993 op het statuut van en het toezicht op de kredietinstellingen, *Offical Gazette* April 19, 1993, regularly modified.
15 Article 468 Belgian CA.
16 Article 480 Belgian CA.
17 See Article 671 and 672 Belgian CA.
18 Article 693, 1° Belgian CA.
19 Article 20, section 1, (h) RE-SE.
20 cf. infra part D.

directors is the organ to decide on the rules concerning employee involvement. It is unclear whether the same applies if a company has opted for the modified one-tier structure.[21]

Under Belgian law, the experts to examine the draft terms are the statutory auditor, the certified auditor or the registered accountant. The notary must review the legality of the operations.[22]

Belgian company law does not contain an exception to draft reports for a merger by acquisition, if the company already holds at least 90% of the shares. Only if a company holds all the shares, is a specific procedure available.[23]

The SE must be registered. Until recently, the registration was filed at the commercial register. The law of January 16, 2003 has changed this registration procedure.[24] From mid-2003, the SE will have to register with the "Kruispuntbank van Ondernemingen"/"Banque-Carrefour des Entreprises". Intermediaries, the "ondernemingsloketten"/"guichets-entreprises", will make the necessary filings. This electronic system will simplify the registration procedures. Companies only need to file once and one registration number will identify the company. This number can be used as a VAT number, social security number, trade registry number etc. Public services must contact the "Kruispuntbank" to ascertain the information they need.

After the procedure of the merger has been completed, the instruments can be invoked against third parties as soon as an extract or a notice is published in the Annexes of the Belgian Official Gazette.[25] The deeds establishing the merger must be filed for deposit. Belgian law imposes special formalities on the SE for the transfer of rights related to real estate, intellectual and industrial property rights.[26]

For minority shareholders who oppose a merger, Member States may adopt appropriate protection provisions.[27] The Belgian law requires a decision to be taken by three quarters of the votes cast and at least half of the subscribed capital to be represented at the first general meeting of the public limited liability companies involved in the merger. If a second general meeting is convened, there is no requirement of the subscribed capital to be represented.[28] Hence, minority shareholders have less than 25% of the votes. Up till now Belgian company law offers no protection for this group of shareholders. The right to leave the company is not open to these minority shareholders as case law shows that a merger is not a well-founded reason to leave the company. This reason is only present if there is continuous and severe disagreement between the shareholders of the company. It is not expected that the Belgian

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21 cf. infra part B.II.
22 Article 700 and 713 of the Belgian CA.
23 Article 676 Belgian CA.
24 Law of January 16, 2003; *Official Gazette* 5 February 2003, p. 4478.
25 Article 683 Belgian CA.
26 Article 683 Belgian CA.
27 Article 24 section 2 RE-SE.
28 Article 558 Belgian CA.

Parliament will adopt provisions designed to ensure appropriate protection for minority shareholders.

## *III. Formation of a holding SE or a subsidiary SE*

As for the formation by merger, the same procedure applies for the formation of a holding SE. Under Belgian law, at least 50% of the shareholders – i.e. 50% of the permanent voting rights - of each company must agree to the formation. A higher threshold can be set in the draft terms. Belgium company law does not impose additional requirements on, nor contains any inconsistencies with the rules in the Recommendation to set up a holding company..

The rules on the formation of a Belgian public limited liability company will govern the procedure to set up a subsidiary SE.[29]

## *IV. Conversion of a public limited liability company to an SE*

As for the other mechanisms to establish an SE, draft terms must be drawn up on the conversion of a Belgian public limited liability company into an SE.
Belgian company law is not (yet) in line with section 6 of Article 37 RE-SE. The latter states that the experts must certify that the company has net assets at least equivalent to its capital, plus those reserves, which must not be distributed under the law or the statutes. The former requires that the certified auditor or the registered accountant reports on the statement of the assets and liabilities and indicates whether it gives a full, true and correct view of the condition of the company. If the net assets of the company are less than the capital shown on the aforementioned statement, the difference must be stated in the conclusion of the report. In that case, the report cannot certify that the net assets are at least equivalent to the capital and the reserves.[30]

Under the Regulation, Member States can require that the conversion of a public limited liability company into an SE must be voted on in the organ within which employee participation is organised. However, since the Belgian works council cannot be qualified as such an organ[31], no such condition can exist in Belgium.

Under Belgian company law, the conversion has to be decided on by a general meeting that can deliberate and pass a valid resolution only if the shareholders and other persons in attendance represent not only one half of the company's capital, but also one half of the

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29 cf. supra A.I.

30 See Article 776 and 777 Belgian CA.

31 M. Olislaegers and B. Peeters, "De Europese Naamloze Vennootschap (SE): Een nieuwe vennootschapsvorm met een Europees en nationaal karakter", *Tijdschrift Fiscaal Recht* 2003, 156.

number of such securities that do not represent the capital, if there are such securities. If these conditions are notmet, a new convening notice is required. The second general meeting can deliberate and resolve if any part of the capital is represented. The decision is adopted only if it has obtained no less than four-fifths of the votes.[32] A unanimous consent of the shareholders is required if the company has not existed for at least two years or the articles provide that another legal form may not be adopted.

## Management systems

The Belgian Parliament has changed the management system of the public limited liability company in 2002.[33] Until September 1, 2002 the only model a public limited liability company could opt for was the one-tier board model. In this regime, the board of directors has the most extensive power to manage the company. The new Act introduced an optional system to make it possible to choose between the classic one-tier model and a modified one-tier structure.

### *I. One-tier structure*

According to Article 522 Belgian company law, the board of directors has the most extensive powers to manage the company and perform all acts which are necessary or useful for the accomplishment of the company's objects, except those reserved to the general meeting by the Companies' Code. This is in line with Article 43, section 1 RE-SE. Within the board of directors, the management functions can be distributed this distribution of responsibilities cannot be invoked against third parties. This rule does not seem to be in conflict with the SE-RE.

The Belgian Companies' Code does not impose an obligation to list in the statutes the categories of transactions that need an express decision of the board.[34] However, there is no reason why a list of such transactions requiring consent, should not be included in the statutes.

The board has a compulsory duty to draft minutes of its meetings.[35] If a board member has a conflict of interest, the minutes must include a justification of the decision.[36] If the company is listed, for each important decision - except intra group decisions at arm's length - a committee of *independent directors* has to be consulted and the board has to deliberate and explicitly

32 Article 781 Belgian CA.
33 Law of August 2, 2002, *Official Gazette* 22 August 2002, p. 36555.
34 See Article 48 RE-SE.
35 Tilleman, B., *Bestuur van vennootschappen*, Kalmthout, Biblo, 1996, p. 480.
36 Article 523 CA.

mention in the minutes of the meeting that the compulsory procedure has been followed.[37] Foreign companies, which would otherwise consider transferring their seat to Belgium, may see this burdensome procedure as a crucial disincentive.

Article 525 Companies' Code provides that the day-to-day management can be the responsibility of one or more managing directors. It is not required that a member of the board of directors be elected as managing director, nor does the managing director need to be a shareholder of the company. Day-to day management has not been defined in the Companies' Code, but the Belgian High Court has decided that day-to-day management is the power to manage the daily necessities of the company, which, due to their minor importance and the necessity to act quickly, do not reasonably require a board's decision.[38] This interpretation is not contrary to Article 43 RE-SE, as it allows the establishment of a management committee or managing director under the same conditions as for public limited liability companies. It might be expected that a new Belgian legislation will allow this option for an SE.

The board of directors of a Belgian public limited liability company must be composed of at least three members, in line with Article 43 SE-RE. The Belgian Companies' Code allows a two member board, if the company has been founded by two members or if it is resolved at a general meeting that the company shall not have more than two shareholders. Although not forbidden, Belgian companies have no employee representatives.

Since September 1, 2002, it is mandatory to designate a natural person to represent a legal entity which is elected as a member of the board. This natural person is liable as if he himself were the board member. Notwithstanding the important number of difficulties inherent in the implementation of this new rule[39], Article 61 Belgian Companies' Code is consistent with section 1, Article 47 SE-RE. However, one question remains unsolved. In Belgium, a natural person who represents a legal entity must be an employee, board member or shareholder of the entity he represents. Article 47 RE-SE does not contain additional requirements. On the other hand, the Member State can provide that legal entities may not be members of the board. Hence, one can argue that it must be possible to require that the legal entity is represented by the aforementioned classes of individuals.
Board members are not subject to professional secrecy under Belgian law, but there is the general duty not to divulge any information, which might be prejudicial to the company's interests. This is in line with Article 49 SE-RE.

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37 Article 524 CA.

38 Cass. 17 September 1968, *Pas.* 1969, I, p. 61, *R.P.S.* 1970, nr. 5578, p. 197 and Cass. 21 February 2000, *T.R.V.* 2000, p. 283.

39 E. Wymeersch, "Corporate Governance naar nieuw Belgisch recht – Een eerste commentaar", *T.B.H.* 2002, p. 604, noot 21; F. Hellemans en M. Wauters, "Het wetboek van vennootschappen gewijzigd door de wetten van 2 augustus en 4 september 2002: een overzicht", *T.R.V.* 2002, nr. 7, p. 478.

As provided in section 3, Article 43 RE-SE, the Belgian members are appointed by the general meeting. There are no specific rights for minority shareholders to appoint one or more members of the board. However, the statutes frequently stipulate that an important minority shareholder or holder of a class of shares can select a number or even the majority of the board members to be appointed by the general meeting. These rules do not conflict with section 4 Article 43 and 47 RE-SE.

Belgium board members are appointed for a renewable period of a maximum of six years, but the general meeting may terminate their appointment at any time without giving notice or stating reasons ("ad nutum").[40] This is a rule of public order.

Belgian company law contains no rules relating to quorums or decision taking by the management organs of the company. Section 1, Article 50 SE-RE is applicable. However, to avoid uncertainty, the Belgian SE might opt to indicate in the statutes that the decision will be taken if a majority of *all* members is present or represented, since it is generally accepted in Belgium that the majority of votes cast decides. In Belgium, if the statutes do not contain such provision, it is a general rule that the abstentions are not taken into account.

The SE's administrative organ has to meet at least four times a year. Under Belgian law it is sufficient to meet only once a year to draft the board's report.[41] Boards of listed companies have to meet twice, since listed companies must publish half-yearly reports. This rule forces these boards to meet at least twice a year. As soon as quarterly reporting becomes compulsory, four meetings will be the minimum.[42] Research has shown that the boards of Belgian public limited liability companies meet on average 7 times a year.[43] The only new element concerns the necessity to "discuss the progress and foreseeable development of the SE's business"[44]. Under the Belgian regime, it is only compulsory to discuss these items once a year. The board's report must disclose information on the circumstances that significantly influence the development of the corporation and important facts that have occurred after the end of the accounting period.[45] The Belgian Companies' Code does not need to be adapted. However, the minutes of at least four board meetings must contain information on the discussion of the SE's business. The statutes of the SE must disclose the intervals of the meetings at which these items must be discussed by the board.

The SE-RE does not contain any rules on the representation of the SE. The board of directors or, within its powers, the day-to-day management represent the Belgian public company and

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40 Cass. 22 januari 1981, *R.C.J.B.* 1981, p. 495; *Pas.* 1981, I, p. 543, *Arr. Cass.* 1980-81, p. 559, *R.P.S.*1981, nr. 6165, p. 285.

41 Article 95 Belgian CA.

42 See article 6 of the proposal for a Directive of the European Parliament and of the Council on the harmonisation of transparency requirements with regard to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC, March 2003.

43 C. Van der Elst, *Corporate Governance: de huidige praktijk*, voordracht studiedag 17 april 2002, IIR, Antwerpen.

44 Article 44, section 1 RE-SE.

45 Article 96 Belgian CA.

hence the Belgian SE. However, the statutes may provide that one or more board members will represent the company.[46] Frequently used statutory clauses requiring the signature of usually two directors are valid and effective against third parties, if published in the Annexes to the Official Gazette. Limitations of the power to represent the company, including *ultra vires* limitations, cannot be invoked against third parties. This is in line with section 3, Article 9 of the First Company Law Directive.[47]

Belgian company law does not contain specific rules to guarantee that board members have access to all information of the company. It is generally acknowledged that board members have a right and a duty to be informed.[48] The Regulation explicitly recognises the right to examine information. However, two important features limit this right. Firstly, only information submitted to the administrative organ is included. Secondly, only an examination right has been established. Thus, Belgian law does not conflict with the RE-SE. However, neither the Regulation nor the Belgian Companies' Code resolves the question as to what information should be submitted to the board, to whom the demand should be addressed, etc.

Under Belgian company law, the election of a chairman is not compulsory. However, the statutes frequently stipulate that the board of directors elects a chairman from among its members. To be consistent with the RE-SE, a statutory provision on the casting vote of the chairman is recommended. Belgian company law explicitly mentions that the statutory provision concerning the casting vote of the chairman is not valid if the company has only two board members.[49] Hence, in the absence of a statutory provision, the chairman does not have the casting vote under Belgian law, contrary to section 2, Article 50 SE-RE.

### *II. Modified one-tier structure*

The Act of August 2, 2002 has significantly modified the organisational structure of the public limited liability company. Companies can opt for a modified one-tier board structure with a board of directors ("raad van bestuur" – "conseil d'administration") and a management board ("directiecomité" – "comité de direction"). The management board must be composed of at least two members. The board of directors appoints and dismisses the management

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46 The Belgian Cour de Cassation has decided that the representation of the company can be delegated to one board member and one third party (employee), acting jointly. Cass. 22 December 1977, *Arr. Cass.* 1978, p. 498; *R.W.* 1977-78, p. 2199-2208, noot P. Crab.; *R.P.S.* 1978, nr. 5978.

47 First Council Directive 68/151/EEC of 9 March 1968 on co-ordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community, *O.J.* nr. 65, March 14, 1968, p. 8-12.

48 L. Simont, "L'administrateur d'une société anonyme agissant isolément a-t-il un droit d'investigation individuelle?", *R.P.S.* 1963, nr. 5148, p. 195; P. Colle, "Het (begrensd) recht op informatie van de individuele vennootschapsbestuurder", in *Liber Amicorum Yvette Merchiers*, Brugge, Die Keure, 2001, p. 451.

49 Section 1, Article 518 *in fine* Belgian CA.

board. It is also possible to provide for the appointment and the dismissal of the management board members in the statutes. This rule seems to be consistent with Article 39, section 2 RE-SE.

The powers vested in the management board are determined in Article 524 Belgian Companies' Code. All powers of the board of directors are included with the exception of deciding on the general policy of the company and those powers explicitly vested in the board of directors. The board of directors has the duty to supervise the management board.

The Belgian Companies' Code has imposed a significant number of duties upon the board of directors. The board is responsible for drafting the annual accounts,[50] calling the general meeting of shareholders[51], drafting the report on the basis of which the general meeting decides on a capital increase[52], deciding to distribute an interim dividend[53], etc.

The law does not indicate what "general policy" is. It might be clear that the decision by a real estate company to acquire a company with industrial activities is a major turnaround. It is up to the board of directors to decide upon this new development.[54] However, it can be questioned whether one can state that the management board of a real estate company specialising in commercial property contracted unlawfully when it acquired an industrial real estate property.

The introduction of the Act was the start of a vigorous debate between legal scholars.[55] Indeed, it is unclear whether the board of directors still has the power to manage the company once a management board has been installed. The discussion results from the difference between the Dutch and the French translations of the Act. The Act mentions, in Dutch, "overdragen" or "allocate" whereas in French it mentions "déléguer" or "delegate". It seems that only a new bill or a decision of the highest court can solve this question.[56]

The Belgian modified one-tier regime needs to be modified to serve as a two-tier SE system. Firstly, in the Belgian system, board members are allowed to be members of the management board at the same time. This rule is inconsistent with section 3, Article 39 RE-SE. However, the Belgian rules do not forbid a statutory provision with special conditions of eligibility. Hence, this provision can contain the prohibition of being, at the same time, a member of the management board and a member of the board of directors.

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50 Article 92 Belgian CA.

51 Article 532 Belgian CA.

52 Article 582 Belgian CA.

53 Article 618 Belgian CA.

54 If this possibility is included in the objects of the company.

55 For an overview of the discussion see P. Ernst en L. Van Den Eynden, "Het directiecomité in de Corporate Governance-Wet. Een eerste analyse", *T.R.V.* 2002, p. 567.

56 C. Van der Elst, "Belgisch vennootschapsrecht: op weg naar een alternatief Rijnlandmodel", *Ondernemingsrecht*, 2003, to be published.

Secondly, the division of powers between the board of directors and the management board is not in line with the RE-SE. Belgian law is deficient in several respects. First, the power to "manage" the company has not completely shifted to the management board. The board of directors still has a significant number of reserved powers. Second, the board of directors is empowered with the general policy. It can be argued that "general policy" is part of management as it includes the strategic decisions of the company.
Third, if the arguments of the concurring powers of the board of directors and the management board stands up to scrutiny, the Belgian law conflicts with section 1 of Article 39 and 40 RE-SE.

The rule on the number of meetings and the duties to report to the supervisory board[57] do not conflict with Belgian law but must be stipulated in the statutes. Belgian company law allows additional particulars, not contrary to article 41 RE-SE to be established in the statutes of the SE.
The modified one-tier board structure also conflicts with the one-tier system of the SE. Too many powers have been delegated to the "directiecomité".

## *III. The general meeting of shareholders*

The organisation and conduct of the general meeting of an SE is to be governed by the national laws of the member states.[58] The Regulation itself requires that one or more shareholders, who hold at least 10% of the subscribed capital, may request the calling of a general meeting[59] and/or put additional items on the agenda of a general meeting[60]. The Belgian Companies' Code provides that the board of directors or the statutory auditors have to convene the general meeting, if it has been requested by the shareholders that represent a sufficient amount of the subscribed capital.[61] These shareholders must hold at least 20% of the subscribed capital. The reduction of the threshold to 10% must be supported: Economic scholars have proved that this "anti-director right" can enhance the capital market.[62] A Belgian general meeting must be convened by three weeks notice.[63] The RE-SE adds that the period within which the general meeting shall be convened cannot be longer than 2 months.

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57 Article 41 RE-SE.
58 Article 53 RE-SE.
59 Article 55, section 1 RE-SE.
60 Article 55, section 1 and Article 56 RE-SE.
61 Article 532 Belgian CA.
62 R. La Porta, F. Lopez-de-Silanes, A. Shleifer and R. Vishny, "Legal Determinants of External Finance", *The Journal of Finance* 1997, p. 1134 and p. 1141.
63 The board of directors and the statutory auditors can be punished with a fine of up to 250 Euro (multiplied by 200) if they fail to convene the general meeting (Article 647, 1° Belgian CA).

## Transfer of seat

### *I. The Belgian real seat theory*

An important innovation of the Regulation concerns the transfer of seat of an SE. The seat of a company is similar to the nationality of a natural person.[64] Until now, a cross-border transfer of the seat of a public limited liability company was, if it was at all possible, extremely burdensome. The RE-SE allows a transfer of seat of an SE to another Member State, if the conditions of only one Article – although with sixteen sections – have been met. The transfer will not affect the continuity of its legal personality.

Belgium adheres to the real seat theory. A company the real seat of which is in Belgium is subject to Belgian law, even if it has been incorporated abroad.[65] The real seat theory connects a company to the jurisdiction where the company has its headquarters. The headquarters is the place where the important decisions are taken, the board of directors meet, the general meeting is convened and the offices are located. If the said meeting places are located in different areas, the place where the board meets is preferred[66]. The company must have a link with the state the legal system of which it claims to apply.[67] In some older decisions, the place of the general meeting was preferred[68], although in 1973, all the residual powers shifted to the board of directors. Hence the meeting of the latter is the starting point to determine the headquarters.[69]
Article 56 Belgian Companies' Code refers only to the application of Belgian law. However, the courts have given this article a multinational application. Not only do the courts decide whether a company is foreign or Belgian, they also decide the "nationality" of the company.[70] Once its nationality has been decided, the law of the (foreign) jurisdiction is the "*lex societatis*".

Finally, it is important to point out that the real seat of a company will be decided by the "Belgian" rules, i.e. the *legi fori*. From this rule it is clear that under Belgian law the

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64 V. Edwards, *EC Company Law*, Oxford, Clarendon press, 1999, p. 362.

65 Article 56 Belgian CA.

66 Kh. Hasselt 22 April 1998, *T.B.H.* 1998, p. 404; J.-P. Blumberg, „Over het grensoverschrijdende associatieconcern, zetelverplaatsing en internationale fusie", *T.P.R.* 1992, p. 815; G. Van Boxsom, *Rechtsvergelijkende studie over de nationaliteit der vennootschappen*, Brussel, Larcier, 1964, p. 185.

67 E. Wymeersch, *The transfer of the company's seat in European Company law* , Financial Law Institute, working paper, April 2003, p. 7.

68 See Brussel 23 March 1903, *R.P.S.* 1903, p. 175, note.

69 In older case law, the nationality or residence of the board members or shareholders have been taken into account (Brussel 25 June 1962, *Rec. Gen Enr. Not* 1966, p. 138, note M. Donnay; Brussels 27 March 1912, *R.P.S.* 1912, p. 311 note; Rb. Brussel, 26 February 1923, *R.P.S.* 1923, p. 185, note F. Paridant) but legal scholars deny these criteria (L. Fredericq, *Traité de Droit Commercial belge* (IV), Gent, Editions Fecheyr, 1950, p. 168, G. Schrans and H. Van Houtte, *Internationaal handels- en financieel recht*, Leuven, Acco, 1991, p. 77).

70 Cass. 12 April 1888, *Pas.*, I, 1888, p. 186, concl. Proc.-Gen. Mesdach de ter Kiele and Cass. 12 November 1965, *R.W.* 1965-66, p. 911, concl. Adv.-Gen. F. Dumon.

registered office can be different from the real seat. When this rule was enacted it was the purpose of the Belgian legislator to avoid the use of "letterbox companies". However, these rules are not always consistently applied. So far, no Belgian court has decided that, when a subsidiary of a foreign company goes bankrupt due to the behaviour of the foreign parent company, the parent company will also be declared bankrupt. The decision can be different if the parent company has its seat in Belgium.[71]

It is possible that the "*lex societatis*" applied by the Belgian court, refers to a third law regime. Legal scholars generally accept that this referral to the third law regime will be applied.[72] However, no Belgian case law can be found.[73] In France, it has been decided that a Turkish bank with its headquarters in the United Kingdom was nevertheless a Turkish company, as the United Kingdom applies the incorporation theory.[74]

The competent authorities in Article 8 RE-SE

The transfer of the SE seat is determined in Article 8 RE-SE. However, the RE-SE has left part of the procedure to transfer the seat to be decided by the Member States. Firstly, the Member States have to define the competent authority to issue a certificate attesting the completion of the acts and formalities before the transfer of the seat.[75] As the notary has already been appointed in the Dutch "ambtelijk Voorontwerp"[76] as the competent authority, it can be expected that the Belgian legislator will also appoint the notary as the competent authority.

Secondly, on grounds of public interest, a Member State can appoint the competent authority to oppose the transfer of the seat. The Dutch "ambtelijk Voorontwerp" has appointed the Minister of Justice as the competent authority to oppose the transfer. It is not yet clear whether the Belgian parliament will appoint a competent authority, though it is not unlikely that a minister, such as the Minister of Finance or the Minister of Justice, will be given this competence. The Minister of Finance could use this authority in order to prevent companies transferring their seats without paying taxes on the surplus value of their assets.[77]

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71 J. Meeusen, *Artikel 56*, Commentaar W. Venn., Mechelen, Kluwer, 2000, p. 35.

72 It is recognised that there are not many theoretical arguments to support this thesis. There are however a number of practical elements: preventing the nullity of the company and supporting the possibility of a cross border transfer.

73 J. Meeusen, *Artikel 56*, Commentaar W. Venn., Mechelen, Kluwer, 2000, p. 11.

74 Paris 19 maart 1965, *J.D.I.* 1966, p. 117, note B. Goldman.

75 Article 8, section 8 RE-SE.

76 Ambtelijk Voorontwerp – Wet houdende uitvoering van Verordening (EG) Nr. 2157/2001 van de Raad van de Europese Unie van 8 oktober 2001 betreffende het statuut van de Europese vennootschap (SE) (Uitvoeringswet verordening Europese Vennootschap).

77 cf. infra III.

### 1. The procedure to transfer the seat

Belgian does not prohibit a transfer of the seat of a company. In the *Lamot* case, the Belgian highest court, the Court de Cassation, decided that a transfer of the seat from the United Kingdom to Belgium will not force the winding-up of the company. The company maintains its corporate personality if both legal systems accept the transfer. In Belgium, there are no legal rules that prevent or prohibit the transfer of the seat of a foreign company to Belgium. The new legal rules, i.e. the Belgian law, will apply, as soon as the seat has been transferred.[78]

Looking at the corrollary, legal scholars argue that the transfer of the seat from Belgium to another country is possible, if both national legal systems accept the continuity of the corporate personality. This view is based upon a decision of the highest administrative court, the Conseil d'Etat.[79] The court decided that the Belgian company, *Vanneste,* remained a Belgian company as long as the general meeting of the company did not decide to transfer the seat. However, if one applies the real seat theory, an analysis of the exact location of the headquarters decides whether the seat has been transferred. No decision of the general meeting needs to be taken. Due to this specific case law, the question may be asked as to how and under what conditions the Belgian company can decide to move its seat and what sanction there is available under Belgian law if the decision process has been violated.[80]

The procedure for an authorised transfer of the seat of an SE can be compared with that for a merger of two public limited liability companies. First, a proposal to transfer the seat must to be drafted, together with a report explaining and justifying the legal and economic aspects for shareholders, creditors and employees.[81]

The SE should satisfy the interests of creditors and holders of other rights. This duty concerns the liabilities of the SE arising prior to the publication of the transfer proposal. Under Belgian law the creditors of a company that decides to reduce its capital[82] or to merge, have the possibility, within a period of two months after the publication of the decision to reduce the capital or to merge, to demand security for the claims that have not become due by the date of that publication. The company can avoid such a demand if it pays the claim at the nominal value, minus the rate of discount. Article 8, section 7 RE-SE is worded somewhat differently than Article 32 of the Second or Article 13 of the Third Company Law Directive. However, it might be expected that the Belgian legislator will copy the protective measures for creditors in the case of a capital reduction or a merger.

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78 In this case, the Lamot company had two « nationalities": the British and the Belgian. The United Kingdom supports the incorporation theory. Hence the transfer of the seat does not deprive the company of its British "nationality".

79 R.v.St. 29 June 1987, *T.R.V.* 1988, p. 110 note K. Lenaerts.

80 J. Meeusen, "Artikel 56", *Commentaar W. Venn*., Mechelen, Kluwer, 2000, p. 18.

81 Article 8, section 3 RE-SE.

82 Article 618 Belgian CA. See also Article 32 Second Company Law Directive.

The general meeting has to decide upon the transfer of the seat of an SE. It requires a decision taken by a majority of at least two thirds of the votes' cast.[83] The Belgian Parliament must resolve two problems. Firstly, the parliament must specify the majority required to decide on the transfer of the seat. To change the statutes of the company, Belgian law requires a decision to be taken by three quarters of the votes' cast and at least half of the subscribed capital represented at the first general meeting. If a second general meeting is convened, there is no requirement as to how much of the subscribed capital has to be represented.[84] The seat of the company must be mentioned in the statutes of the company.[85]
However, a Belgian legal scholar[86] has already proposed an 80% majority to approve the transfer of the seat. He refers to the majority required to change the objects of the company[87] and the transformation of the company to another company type.[88] This approach can be supported, as for both decisions, the transformation and the transfer, the same requirements must be applied. The only limitation is the prohibition on deciding to transform and to transfer at the same time.[89]

Secondly, for minority shareholders who oppose a transfer, appropriate protective provisions can be adopted by the Member States. In Belgium, it will be difficult to agree upon the appropriate measures and preserve the harmonious entirety of company rules. Every shareholder in a public limited liability company has the right to leave if well-founded reasons are present. Since the introduction of this rule in 1995, a significant number of court decisions have been published. These decisions refine the interpretation of well-founded reasons. It concerns continuous and severe disagreement between the shareholders of the company.[90] Neither a merger nor a transformation, nor a decision to change the purpose of the company have been accepted in case law or by the legislator as well-founded reasons to leave the company. If the transfer of seat by an SE were approved as a reason for leaving the company, this would imply that the legislator viewed the transfer of the seat as more important than other decisions. If no resignation is allowed, it remains unclear what measures the Belgian legislator might develop to protect the minority shareholders who oppose the transfer of the company seat.

After the proposal has been published, the SE has to wait for at least two months to decide upon the transfer.[91] After this period, the SE must be registered and the registration authority shall notify the register of the Member State where the SE previously had its registered seat.

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83 Article 8, section 6 RE-SE.
84 Article 558 Belgian CA.
85 An accurate description – street, number and community - of the seat of a Belgian company must be disclosed in the annexes of the official journal (Article 69)
86 K. Geens, "Zetelverplaatsing van de Europese Vennootschap" in *Liber Amicorum Lucien Simont*, Brussel, Bruylant, 2002, p. 1034-1035.
87 Article 558 Belgian CA.
88 Article 781, section 1, 2° Belgian CA.
89 Article 37, 3° RE-SE.
90 See an overview of a number of court decisions in K. Geens, M. Denef, F. Hellemans, R. Tas and J. Vananroye, « Overzicht van Rechtspraak – Vennootschappen (1992-1998) », *T.P.R.* 2000, p. 447-448.
91 Article 8, 7° RE-SE.

The registered office can be transferred if the head office is in the Member State to which it is intended to transfer the registered office. If the head office has been transferred "de facto" to another Member State, the Member State where the SE has its head office must immediately inform the Member State where the SE's registered office is situated.[92] The latter Member State must take the measures necessary to ensure the regularisation of the division of the two seats. If the Member State fails, the SE will be liquidated.

Not all problems have been resolved. For the first time, a cumbersome but clear legal company law procedure is offered for a cross-border transfer of seat. However, no tax solution has been offered. Article 210, section, 4° of the Belgian Code of Revenue Taxes, explicitly indicates that in the case of a cross-border transfer of the registered seat or the real seat of a Belgian company, the taxable profits of the company include the surplus value of the assets of the company.[93] "De facto" this rule prohibits a cross-border transfer.

## Involvement of employees

Under Belgian law two distinct legal frameworks enable employees to influence corporate decision making. Firstly, the works council has a number of powers. Secondly, different specific rules for the acquisition of shares by employees have been introduced since the beginning of the last decade.

The works council is composed of representatives of the employer and the employees[94] and has powers in relation to economic and financial affairs on the one hand, and social matters on the other.[95] The works council receives information concerning the operations of the company[96] and it acts as a consultative body. [97] A (statutory) auditor is required to submit its report concerning the annual accounts and reports and to certify the accuracy and comprehensiveness of economic and financial data of the company.[98] The works council has to be consulted before the election of a (statutory) auditor.

The council must be established in every company that employs at least 100 employees. Under certain conditions companies with less than 100 employees also have to establish such a council.

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92 Article 64, section 4 RE-SE.

93 Article 210 refers to Article 208 and 209 of the same Code.

94 The number of representatives of the employees must be higher or equal to the number of representatives of the employer.

95 For more information see the Law of September 20, 1948, houdende organisatie van het bedrijfsleven, *Official Gazette* September 27, 1948, regularly modified.

96 Information on general performance, financial results, etc.

97 advice on specific economic matters, to confer on the social impact of the introduction of new technologies, etc.

98 Article 184 to 191 Royal Decree of January 30, 2001 to execute Belgian company law(*Official Gazette* February 6, 2001).

The Belgian system does not have rules that ensure that employees are represented on the board of directors or at the general meeting of shareholders. Part 3 of the Standard Rules for participation of employees in the annex of the Council Directive 2001/86/EC states that the SE is not required to establish provisions for employee participation, if the participating companies are not governed by participation rules before registration. Until now, it is unclear and too early to evaluate whether and how Belgium will introduce a system of employee participation.

However, it must be mentioned that the collective bargaining agreement 32[99] applies to every change of employer which is the result of a transfer by virtue of an agreement of a company. The application of this collective bargaining agreement implies the automatic transfer of all employment contracts, the prohibition on dismissing employees except in case of serious fault or economic or technical reasons, the automatic transfer of all terms and conditions of all employment contracts and the joint and several liability of the former and the new employer, for all debts that existed at the time of the transfer.

### *E. Conclusion*

The Regulation on the European Company has required an enormous amount of effort for more than thirty years. The co-determination issue was a stumbling block for the adoption of the rules on the SE.[100] It was only at the Nice summit in December 2000 that an agreement could be reached.

The Regulation refers to the rules on "national" public limited liability companies. for a large number of issues on the formation and the governance of an SE. Nevertheless, the Belgian Companies' Code conflicts with the Regulation. In that case, the Belgian SE must apply the Regulation. Hence, due to the reference of the Regulation, it is a necessity to adapt the Belgian legislation by October 2004. A well-developed two-tier board structure must be offered by the Belgian Companies' Code. Furthermore, the Belgian rules that govern the general meeting and the transfer of the seat need to be modified. The involvement of employees must be studied.

The SE constitutes a number of major advantages. It allows the establishment of a company with which all in the European Union can easily become familiar. It settles rules on the cross-border merger and the transfer of seat. Hence, it can be the engine for a new competitive economic environment. However, some disadvantages must be mentioned. Except for the subsidiaries of an SE, there is no direct access to the SE regime. At least fifteen (twenty-five) kinds of European companies will be established. The Regulation does not cover the tax rules.

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99 See Royal Decree of 25 July 1985, *Official Gazette* August 9, 1985.

100 E. Wymeersch, "Company law in Europe and European Company Law", *First European Jurist Forum – Nürnberg 2001*, Nomos, 2001, p. 144.

This is a missed opportunity. If we refer to the Belgium situation, the tax rules concerning the transfer of seat or an international merger will, de facto, almost prohibit these operations. But let us end with a positive note: the SE is an important step forward in the development of a harmonised European company law.

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