4.2. European Company and European Cooperative Society

4.2.1. Formation

4.2.1.1. Company law

*Regulation*

Since 8 October 2004 it has been possible to form European Companies based on the Regulation on the Statute for a European Company (SE) ("the SE Regulation")\(^{756}\) and since 18 August 2006 European Cooperative Societies based on the Regulation on the Statute for a European Cooperative Society ("the SCE Regulation")\(^{757}\). The same provisions apply both in the EU Member States and in EFTA States. In addition to the EU Member States, European Companies or European Cooperative Societies may also be established in Iceland, Liechtenstein or Norway.

*European Company*

A European Company is a public limited liability company the detailed company law characteristics of which depend on the national laws of the state of its registration. According to Art. 1 of the SE Regulation, an SE is a legal person with capital divided into shares. The liability of each shareholder is limited to the amount the shareholder has subscribed.

According to Art. 10 of the SE Regulation, an SE must be treated in every Member State as if it was a public limited liability company formed in accordance with the law of the Member State in which it has its registered office.\(^{758}\)

According to Art. 9 of the SE Regulation, an SE is governed in the case of matters not regulated by the Regulation or, where matters are partly regulated by it, of those aspects not covered by it, by the provisions of laws adopted by Member States in implementation of Community measures relating


\(^{758}\) See e.g. Jauhiainen and Kaisanlahti 2005 about European Companies from the company law perspective and Wenz 2004 pp. 4–11 about their relevant characteristics from a tax law perspective.
specifically to SEs and the provisions of Member States’ laws which would apply to a public limited liability company formed in accordance with the law of the Member State in which the SE has its registered office.

There are different ways to create an SE. The simplest way is to transform a public limited liability company into a European Company. Public limited liability companies may also form an SE by means of a merger in which the receiving company becomes a European Company. Alternatively, a holding SE or a joint venture SE may be established. 759

**European Cooperative Society**

A European Cooperative Society is a legal person with members from at least two Member States. The subscribed capital of an SCE is divided into shares. The number of members and the capital of an SCE are variable. Unless otherwise provided by the statutes of the SCE when that cooperative society is formed, no member is liable for more than the amount it has subscribed. Where the members have limited liability, the name of the SCE must end in “limited”. 760 The detailed company law characteristics of an SCE depend on the national laws of the state of its registration. 761

An SCE has as its principal object the satisfaction of its members’ needs and/or the development of their economic and social activities. This objective is met in particular through the conclusion of agreements with them to supply goods or services or to execute work of the kind that the cooperative carries out or commissions. An SCE may not extend the benefits of its activities to non-members or allow them to participate in its business, except where its statutes provide otherwise. 762

Subject to the SCE Regulation, an SCE is treated in every Member State as if it was a cooperative formed in accordance with the law of the Member State in which it has its registered office. 763

There are five ways in which an SCE may be founded. 764 It may be formed by five or more natural persons who are residents in at least two Member

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759. See Art. 2 of the SE Regulation and e.g. Jauhiainen and Kaisanlahti 2005 p. 33 about the different possibilities to establish a European Company.
760. Art. 1 of the SCE Regulation.
761. Arts. 1 and 8 of the SCE Regulation.
762. Art. 1 of the SCE Regulation.
763. Art. 9 of the SCE Regulation.
764. Art. 2 of the SCE Regulation.
States. A cooperative society may also be formed by five or more natural persons and companies and firms and other legal bodies governed by public or private law formed under the law of a Member State resident in, or governed by the law of, at least two different Member States. Further, an SCE may be formed by companies and firms and other legal bodies governed by public or private law formed under the law of a Member State that are governed by the law of at least two different Member States. An SCE may also be formed by a merger between cooperatives formed under the law of a Member State with registered offices and head offices in the EU, provided that at least two of them are governed by the law of different Member States. Lastly, an SCE may be formed by conversion of a cooperative formed under the law of a Member State, which has its registered office and head office within the EU, if for at least 2 years it has had an establishment or subsidiary governed by the law of another Member State.

A Member State may provide that a legal body, the head office of which is not in the EU, may participate in the formation of an SCE, provided that the legal body is formed under the law of a Member State, has its registered office in that Member State and has a real and continuous link with a Member State’s economy.

4.2.1.2. Tax treatment

*Regulation*

The tax consequences of the establishment of a European Company or a European Cooperative Society is not completely harmonized in the Member States. The tax treatment partly depends on the state concerned. There are, however, several possibilities for a tax-neutral establishment of a European Company in accordance with the principles of the Merger Directive. The Member States had to implement the amendments to the Merger Directive (2005/19/EC) concerning European Companies and European Cooperative Societies no later than 1 January 2006. Before that date the tax consequences depended on the state concerned.
Transformation

In most countries a tax-neutral transformation of an existing public company limited by shares to an SE or a tax-neutral transformation of an existing cooperative society to an SCE is possible. The tax consequences of such a transformation, however, depend on the national laws of the state concerned.

Merger

A tax-neutral formation of an SE or an SCE is possible by a merger in accordance with the Merger Directive. The merging and the receiving company must be companies that come under the scope of application of the Merger Directive.770

Picture 4.1 A mergers into B, which becomes an SE

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770. See supra at 3.3.2.2.
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Picture 4.2 A and B merge into a new company, which becomes an SE

Holding European Company

A holding SE may be formed without direct tax consequences by an exchange of shares covered by the Merger Directive.\(^{771}\) The participating companies must come under the scope of application of the Merger Directive in order for the operation to be tax neutral.\(^{772}\)

Picture 4.3 SE acquires 50% of the shares in A and B

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\(^{771}\) See e.g. Järvenoja 2007 pp. 278–280.
\(^{772}\) See supra at 3.3.2.2.
**Joint venture European Company**

A transfer of assets covered by the Merger Directive may be used for a tax-neutral formation of an SE. The participating companies must come under the scope of application of the Merger Directive in order for the operation to be tax neutral.\(^\text{773}\)

Picture 4.4 A and B transfer a branch of business to an SE

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**EFTA**

The scope of application of the Merger Directive does not cover the EFTA States. The EFTA States, however, may apply principles similar to the principles based on the Merger Directive under their national laws. Many EU Member States allow tax-neutral formation of an SE or an SCE in

\(^{773}\) See supra at 3.3.2.2.