



Establishment of a Subsidiary European Company

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Abstract

One of the four exhaustively formulated legal means for the emergence of a European company, Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (Societies Europaea –SE) is the constitution of a Subsidiary European company. Compared to the other legal models for establishing this new organizational form for business association in the company typology within the European Union, the establishment of this particular entity possesses its own specific characteristics. The regulatory framework for the establishment of a Subsidiary European company is of a hybrid legal type. On the one hand, it takes account of the Community Act Regulation. However, in a number of cases the Community Act refers to the national law of the Member State where the company has its registered office under its constitution within the Union, and where its head office is located. The article discusses the legal prerequisites and the individual components of the procedure for the establishment of a Subsidiary European company.

Keywords: Subsidiary European company, European company, Societies Europaea – SE, participation of workers and employees in the business activities of European companies, informing and consulting the workers and employees

Introduction

Council Regulation (EC) № 2157/2001 of 8 October 2001 on the Statute for a European company (Societies European - SE)¹ [hereinafter Regulation (EC) № 2157/2001] establishes the legal mechanism for the creation of a European company [hereinafter SE] in a special Part Three entitled "Formation" comprising Articles 15-

¹ *OJ L 294, 10.11.2001, p. 1–21.B*

38 each with a number of paragraphs. The structural relation of the Regulation compared to the legal framework of the other components of the SE legal status is much more detailed and exhaustive.

The Community act imperatively establishes the rules for the establishment of the European Company (hereinafter referred to as the "ES"). It expressly states that 'subject to this Regulation the formation of an SE shall be governed by the law applicable to public limited-liability companies in the Member State in which the ES has its registered office. The Regulation thus establishes the primacy of its provisions over the national shareholder legislation of the individual countries. This is a new form of manifestation of the hierarchical structure of the sources of the legal framework of SE enshrined in Art. 9, para. 1¹. The defined regulatory framework is in line with the characteristics of the Regulation as a legal act of the Union that has general application. It is binding in its entirety and is also directly applicable in all Member States (Article 288 TFEU (former Article 249 TEC)). The Community imperative provision in question eliminates the possibility for national legislation to derogate from some of the established ways for creating an SE and to formulate new ones, taking into account the economic, demographic, historical, geopolitical and other specific characteristics of the respective country.

Methodology

In this research general and specific methods are used. The logical method of comparison and juxtaposition of the legal provisions concerning the matter in view are applied involving both induction and deduction. A historical and a systematic approach to the studied fragments of the establishment process and the functioning of the European subsidiary are combined. The comparative legal method is particularly extensively used in outlining the regulatory framework in the Member states of the European Union. This allows for further harmonization of the existing regulatory packages in these countries and raising the role of European subsidiaries in the sustainable competitive and intellectual development of the Community economic environment.

On the basis of the documentary method an analysis of the relevant provisions contained in the Regulations and Directives of the European Union, the national legislation and the jurisprudence of the European Union in the considered field that are related to the objectives of the research is conducted

¹ Draganov, J. European Union law, Sofia, UNWE, 2012, 288 p. (Драганов, Ж., Право на Европейския съюз, София, УНСС, 2012, 288 с.); Tormanov, Z. Sole entrepreneur, Sofia, Sibi, 2006, 544 p. (Торманов, З. Едноличен търговец, София, Сиби, 2006, 544 с.); Grozdanov, A. International commercial law. Short course. VFU, 2014 (Грозданов, А. Международно търговско право. Кратък курс. ВСУ, 2014).

Legal identity of the subsidiary European company (results of the analysis)

The Regulation exhaustively specifies the ways in which ES emerges:

- a) merger of joint stock companies into ES;
- b) establishment of a European parent company;
- c) formation of a European subsidiary; and
- d) transformation of an existing joint stock company into an ES.

By defining these four ways the possibility of the emergence of a new SE in a different way is excluded. Each of these methods has its own legal identity.

It is noteworthy that the Bulgarian lawmaker has excluded from the catalogue three of the imperatively regulated methods in the Regulation of the ways to establish an SE based in our country. These are: the establishment of a European parent company; the formation of a European subsidiary, and the transformation of an existing joint stock company into an ES.

I believe that this is a significant lapse in our legislation. However, this shortcoming has no serious legal consequences and does not hinder the establishment and functioning of SE in our country. Regulation (EC) (2157/2001 exhaustively regulates the nomenclature of methods for the emergence of SE in the Member States. It is an act of general application which is binding and directly applicable in all Member States (Article 288 TFEU¹, ex Article 249 TEC²). Therefore, regardless of the absence of the other three ways of establishing an SE in the Bulgarian legal system, they can be used to create ES. Along with this, it should be pointed out that according to Art. 5, para. 4 of the Constitution, the international treaties ratified in accordance with the constitutional order that promulgated and entered into force for the Republic of Bulgaria, are part of the country's domestic law. They have an advantage over those norms of domestic law that contradict them. The Treaty of Accession of the Republic of Bulgaria and Romania to the European Union³ meets all constitutionally established requirements. As a result, the Regulation as an Act of the Union takes precedence over the Commerce Act. Therefore, all the ways formulated by the Community act for the establishment of SE in Bulgaria will have legal effect on the territory of our country.

The possibility of setting up an SE in the ways set out in the Regulation, has found a *mutatis mutandis* expression in the current bylaws. Ordinance № 1 of 14 February 2007 on keeping, storing and accessing the Commercial Register and the Register of

¹ Treaty on the Functioning of the European Union, *OJ C 326*, 26.10.2012, p. 47–390.

² Treaty on European Union, *OJ C 326*, 26.10.2012, p. 13–390.

³ In force as of January 1, 200, State Gazette of the Republic of Bulgaria (hereinafter SG) № 103 and 105 of 20 December 2006, last amend. SG, № 17 of 28 February 2012.

non-profit organizations¹ issued by the Minister of Justice is a valid normative administrative act. The Ordinance is formulated by the central body of the executive power within its competence. It is in compliance with the established form, the administrative procedural rules are observed, and it corresponds to the purpose of the Regulation and to the law. Art. 33k para. 1 designates the necessary documents for the circumstances subject to entry at the establishment of an SE by merger/acquisition; para. 2 - upon the establishment of a European parent company; para. 3 - upon the establishment of a European subsidiary, and para. 4 - upon the transformation of a joint-stock company into an ES. This approach is even more clearly expressed in the template of the Application for the entry circumstances concerning a European company in form A 12 attached to the Ordinance. In item 70 it requires the applicant to indicate the manner of creation of the SE according to the relevant provisions of the Regulation:

by acquisition under Art. 2, para. 1 and Art. 17 to Art. 31;

by merger under Art. 2, para. 1 and Art. 17 to Art. 31;

by establishing a European parent company under Art. 2, para. 2 and Art. 32 to Art. 34;

by establishing a European subsidiary under Art. 2, para. 3 and Art. 35 and Art. 36 and

by transforming an existing joint stock company into a European company under Art. 2, para. 4 and Art. 37.

Three European companies have been established in our country: one through the establishment of a European parent company and two European companies through the transformation of existing joint stock companies. Unlike in other Member States, there is currently no European subsidiary registered in this country.

Regulation (EC) № 2157/2001 in the mandatory catalogue of the methods for creation of a European company provides for the possibility of setting up a European subsidiary. Compared to the other models for the emergence of ES², this method has

¹ SG, № 18 of 27 February 2007, last. ed. and ext. SG, № 23 of 14 March 2020. As of January 1, 2018, the said by-law shall give rise to legal consequences under a new title - Ordinance № 1 of February 14, 2007 on keeping, storing and access to the Commercial register and the register of non-profit organizations, SG, № 77 of 26 September 2017.

² The establishment of a subsidiary SE in different Member States is as follows: Austria - Gründung einer Tochter-SE; Belgium - Constitution d'une SE/filial; Bulgaria - Учредяване на дъщерно Европейско дружество; Croatia - Osnivanje društva kćeri u obliku SE; Cyprus - Σύσταση θυγατρικής SE; Czech Republic - Založení dceřiné SE; Denmark - Stiftelse af et SE-datterselskab; Estonia - Tütar-SE moodustamine; Finland - Tytäryhtiö-SE:n perustaminen; France - Constitution d'une SE/filial; Germany - Gründung einer Tochter-SE; Greece - Μετατροπή ανώνυμης εταιρίας σε SE; Hungary - SE leányvállalat alapítása; Ireland - Formation of a subsidiary SE; Italy - Costituzione di una SE affiliate; Latvia - SE meitas uzņēmuma dibināšana; Lithuania - Dukterinės SE steigimas; Luxemburg - Constitution d'une SE/filial; Malta - Formazzjoni ta' sussidjarja SE; Netherlands - Oprichting van een dochter-SE; Poland - Powstanie spółki zależnej SE; Portugal - Constituição de uma SE «filial»; Romania - Constituirea unei filiale a SE; Slovakia - Založenie dcérskej SE; Slovenia - Ustanovitev hčerinske SE; Spain - Tytäryhtiö-SE:n perustaminen; Sweden - Bildande av ett SE-dotterbolag.

its own specifics¹. A wide range of legal entities can participate in the process of establishing a subsidiary ES. It includes companies under Art. 54, para. 2 of the Treaty on the Functioning of the European Union. The regulation refers to Art. 48, para. 2 of the Treaty establishing the European Community. After the Lisbon Treaty this provision takes a new numbering in the TFEU. It therefore refers to "companies established in accordance with Civil or Commercial law, including cooperatives and other legal entities governed by Public or Private law, with the exception of non-profit institutions". This wide range of possible founders covers practically all corporate entities, except the non-profit legal entities. These should be established under the right of a Member State and under their Constitutional Act shall have their registered office² and headquarters in the territory of the European Union. This is a significant difference compared to the other ways of establishing a SE. A European company can be created by a merger through the acquisition or creation of a new company from existing joint stock companies only. The legal situation is different when establishing a parent SE, which can be created only by functioning joint stock companies and limited liability companies³.

It is necessary that either each of at least two of the companies be governed by the law of a different Member State, or, have had a subsidiary governed by the law of another Member State, or a branch located in another country of the European Union for at least two years⁴.

¹ Cathiard, C. La Société Européenne – Aspects de droit comparé, Droit et patrimoine, 125, avril 2004; Fouassier, Ch. Le statut de la société européenne: Un nouvel instrument juridique au service des entreprises. *Revue du Marché Commun et de l'Union européenne* 2001, n° 445. Grundmann, S. *Europäisches Gesellschaftsrecht: eine systematische Darstellung unter Einbeziehung des europäischen Kapitalmarktrechts*, Heidelberg (C. F. Müller), 2014.

² Vodenicharova, K. Headquarters of the company, Commerce and Competition Act, Sofia, 2010, vol. 8, pp. 5 – 11 (Воденичарова, К. Седалище на търговското дружество, Търговско и конкурентно право, София, 2010, кн. 8, стр. 5 – 11); Vodenicharova K. Systems for linking companies and their impact on their mobility in the European Union. Annual Scientific Conference 2014 "Problems of Legislation and Law Enforcement Related to Business Development in the Republic of Bulgaria and Europe". Sofia, Publishing Complex of the University of National and World Economy, 2015, pp. 194-204 (Воденичарова К. Системи за привръзка на дружествата и влиянието им върху тяхната мобилност в Европейския съюз. Годишна научна конференция 2014 „Проблеми на законодателството и правоприлагането свързани с развитието на бизнеса в Република България и Европа“. С., Издателски комплекс на Университета за национално и световно стопанство, 2015 с., 194-204.)

³ Rickford, J. The European Company: Developing a Community Law of Corporations: Collected Papers from the Leiden University Unilever Programme, 2013, 154 p.; Geens, K., Klaus J. Hopt. The European Company Law Action Plan Revisited. Leuven University Press, 2010. p. 376; Gubin, E.P., P.G. Lakhno. (Eds.). *Enterprise Law of the Russian Federation*. Moscow: Norma Publisher. 2018, p. 993 (Губин,Е.П., Лакно, П.Г. – отв. редакторы, Предприемательское право Российской Федерации. Москва, Издательство. Норма, 2018, 993 с.). Judgment of the Court (Second Chamber) of 21 June 2017. N. W and Others v Sanofi Pasteur MSD SNC and Others. Request for a preliminary ruling from the Cour de cassation (France). Case C-621/15., T-109/02, T-118/02, T-122/02, T-125/02, T-126/02, T-128/02, T-129/02, T-132/02, T-136/02, EU:T:2007:115, т. 132

⁴ Menjucq, M. La société européenne. *Revue des sociétés*, 2017, № 4; Wymeersch, E. Cross-Border Transfer of the Seat of a Company – Recent EU Case Law and the SE Regulation. – In: *The European Company: developing a Community Law of Corporations: collected papers from the Leiden University Unilever Programme*, 2002.

The European subsidiary is one of the effective legal instruments for exercising the right of association¹.

The Regulation does not provide a legal definition of a "European subsidiary" (Subsidiary SE, SE filial, Gründung einer Tochter - SE). The establishment procedure is simplified and facilitated for its implementation. Compared to other ways of creating European companies is less formal.

The Community act states that companies and other legal entities participating in the establishment of a subsidiary operation are subject to the provisions governing their participation in the formation of a subsidiary under their national law (Article 36)². In this connection, the Commercial Law stipulates that a subsidiary should operate in another Member State and its legal status will be regulated by the legislation of that country (Article 273, para. 3). In this respect, the "Rule of law" principle should be strictly observed³.

Based on these regulations, the regime for a subsidiary SE with its registered office in Bulgaria is determined by the Commerce Act⁴. It indicates that a subsidiary is one in which the parent company directly or indirectly owns or indirectly controls at least 25 per cent of the shares or units or may appoint directly or indirectly more than half of the members of the management board (Art. 277, para. 3 of the Commerce Act). This percentage is not large and therefore cannot have a decisive influence on the decisions of the General Meeting. Through it, however, the parent company can influence to some extent its sustainable development in a competitive business environment and receive comprehensive information about its activities⁵.

Council Directive 2011/96 / EU of 30 November 2011 on the common system of taxation applicable in the case of parent companies and subsidiaries in different

¹ Cherneva, B. The institutional essence of law as a manifestation of the limits of legal knowledge. - In: Law and Limits. Sofia, 2018, University Publishing House "St. Kliment Ohridski", pp. 46-53; Cherneva, B. The Pilot-Judgment Procedure of the European Court of Human Rights – Bulgarian Experience. In: Dei, M. (Ed.). Human Rights: Theory and practice. Collection of scientific papers. London: lashe, 2017, pp. 65-78 (Чернева, Б. Институционалната същност на правото като проявление на границите на правното познание. – В: Право и граници. С., 2018, УИ"Св. Климент Охридски", с. 46-53).

² Vodenicharov, A. European Company, Sofia, Siela, 2018, 448 p. (Воденичаров, А., Европейско дружество, София, Сиела, 2018, 448 с.); Vodenicharov, A. European Cooperative Society, Sofia, Siela, 2019, 388 p. (Воденичаров, А. Европейско кооперативно дружество, София, Сиела, 2019, 388 с.); Grozdanov, A. European Economic Interest Grouping. In: Notifications of Union of scientists-Varna. Series "Humanities science", 1st 2008, pp. 83-85. (Грозданов, А. Европейското обединение по икономически интереси", В: Известия на Съюза на учените - Варна. Серия „Хуманитарни науки“, 2008 г., No 1, стр. 83-85.).

³ Neykova, M. Basic democratic principles of public administration. Burgas, BFU, 2014 (Нейкова, М. Основни демократични принципи на държавното управление. Бургас, БСУ, 2014); Topchiyska, D., Rule of Law. Theoretical aspects. S., "Avangard Prima", 2016, p. 320 (Топчийска, Д., Върховенство на правото. Теоретични аспекти. С., Авангард Прима, 2016, с. 320); Topchiyska, D., Social Justice and the Rule of Law. In: Collection "The Law of Law and the Law of Law", Sofia: NBU, 2016, pp. 222 - 231.

⁴ SG. No. 48 of June 18, 1991, last. ed. and ext. SG. No. 83 of 22 October 2019.

⁵ Judgment of the Court (Second Chamber) of 21 June 2017. N. W and Others v Sanofi Pasteur MSD SNC and Others. Request for a preliminary ruling from the Cour de cassation (France). Case C-621/15., T-109/02, T-118/02, T-122/02, T-125/02, T-126/02, T-128/02, T-129/02, T-132/02, T-136/02, EU:T:2007:115, т. 132.

Member States¹ defines "parent company" stating that it is a company from a Member State with a minimum of 10% of the capital of a company from another Member State where the latter meets the same conditions as the company from the Member State which participates with a minimum of 10% in the capital of a company from the same Member State. Such participation shall be wholly or partly held by the place of business of the first company situated in another Member State. A "subsidiary" is defined as a company whose capital includes the above-mentioned participation. A subsidiary shall operate in another Member State and its legal status shall be regulated by the legislation of that country (Article 273, para. 3 of the CL).

A necessary precondition for the emergence of a subsidiary SE is that the founders subscribe for its shares. This is a mandatory condition, which means that if the subsidiary is by form a joint stock company, it is inadmissible for the entities participating in its establishment not to have the status of its shareholders.

The group of possible founders of a subsidiary includes *mutatis mutandis* the existing European companies. That is why they can set up a European subsidiary themselves. This hypothesis is explicitly regulated in Art. 31 para. 2, stating that the SE itself may establish one or more subsidiaries in the form of European companies. As the owner of the capital is the parent SE company, then the established subsidiary will be a sole European joint stock company. In this way, the founding SE becomes a parent SE. In all cases, the latter is imperatively obliged to have a legal organizational form of a capital trading company in the form of a joint stock company, a limited partnership with shares, or a limited liability company. Under this hypothesis, the parent European structure is created vertically from top to bottom. Initially, an SE is established, later a subsidiary (s) is established and this eventually leads to the establishment of a parent SE company.

When establishing a subsidiary SE from an already existing SE, there will be no requirement for the former to have shareholders from at least two Member States. This is especially evident in the case of a sole proprietorship subsidiary SE, whose capital belongs entirely to the already established SE.

It is particularly important that the provisions of the national law of the Member State in which the subsidiary is established set out in its Constituent Act, which require public limited-liability companies to have more than one shareholder, do not apply in the case of a SE subsidiary.

The European legislator has found a suitable solution in view of the identity of the number of holders of assets of sole proprietorship European subsidiaries and sole proprietorship companies with limited liability. It is explicitly emphasized that the legislation of the Member States transposing Directive 2009/102 / EC of the

¹ Official Journal of the European Union, L 345, 29.12.2011, pp. 8-16. The Directive has been transposed into Bulgarian legislation with an amendment to the Corporate Income Tax Act. SG, No. 40 of 29 May 2012.

European Parliament and of the European Council of 16 September 2009 in the field of Company Law concerning sole proprietorships with limited liability¹ also applies to European companies' *mutatis mutandis*. The Regulation refers to the Council Directive in the field of Company law of 21 December 1989 on sole proprietorships with limited liability (86/667 / EEC)², which was in force at the time of its adoption³. It has been substantially changed many times. In the interests of clarity and rationality, it has been codified by the said Directive.

The entity of a subsidiary is established in the regulatory area and the business practice in our country. A number of provisions regulate its legal position in various spheres of public life. The detailed regulatory framework of European subsidiaries is available in the Law on Information and Consultation of Employees in multinational enterprises, groups of enterprises and European companies⁴. Thirty-four provisions regulate the status of a European subsidiary with a view to the participation of employees in its management. It is stated that when the management bodies of the participating companies draw up a plan for the establishment of a European company and its European subsidiaries, immediately after the announcement of the merger, the acquisition plan, the creation of a holding company, or after the coordination of a plan for setting up a subsidiary or for a transformation of a company into a European one, the management body of the company or the companies operating in the territory of the Republic of Bulgaria and participating in the establishment of a European company shall provide to the managements of the trade unions in the enterprise and to the representatives of the employees information according to Art. 7, para. 2 of the Labor Code about the participating companies, the subsidiaries or branches and the number of the employees in them in order to establish a special body for negotiations.

Where the outcome of the negotiations results in a reduction of the rights to participate, the required majority shall be two-thirds of the members of the special negotiating body, representing at least two-thirds of the employees, including the votes of the members representing the employees in at least two Member States, where the European company is established by setting up a parent company or a subsidiary, if the participation covers at least 50 per cent of the total number of employees in the participating companies. There are a number of other provisions in the field of the regulated matter.

¹ Directive 2009/102/EC of the European Parliament and of the Council of 16 September 2009 in the area of company law on single-member private limited liability companies (Text with EEA relevance), OJ L 258, 1.10.2009, p. 20–25.

² Twelfth Council Company Law Directive 89/667/EEC of 21 December 1989 on single-member private limited – liability companies. No longer in force. OJ L 395, 30.12.1989 r. p. 40–42.

³ The Directive has been transposed into Bulgarian legislation by the Law on Amendments to the Commerce Act. SG, No. 66, August 12, 2005.

⁴ SG. No. 57 of July 14, 2006, last ed. and ext. SG No. 93 of November 21, 2017.

The entity of the subsidiary is subject to legal regulation in a number of laws and regulations, such as the Public Offering of Securities Act¹; The Law on the Activity of Collective Investment Schemes and Other Collective Investment Enterprises²; The Civil Aviation Act³; The Markets in Financial Instruments Act⁴; Law on Rehabilitation and Restructuring of Credit Institutions and Investment Intermediaries⁵, etc. They are also applicable to European subsidiaries registered in the Republic of Bulgaria.

Conclusion

The subsidiary European company has taken its significant place in the process of expanding and enriching the institutionalized European business partnership. It contributes to the sustainable and intelligent economic development of the European Union's economic segment, to enriching the diversity of its organizational structures, and to speeding up the integration processes between the Member States and the full completion of the internal Community market. They contribute to achieving optimal economic, technological, social and organizational outcomes. The rationalization of the legal regulatory framework for the formation of European subsidiaries is an effective legal instrument for their expansion on a Community and a national level.

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¹ SG. No. 114 of December 30, 1999, last. ed. SG. No. 44 of 13 May 2020.

² SG. No. 77 of October 4, 2011, last ext. SG. No. 26 of March 22, 2020.

³ SG. No. 94 of December 1, 1972, last. ed. SG. No. 62 of August 6, 2019.

⁴ SG. No. 15 of 16 February 2018, last ext. SG. No. 26 of March 22, 2020.

⁵ SG. No. 62 of August 14, 2015, as amended and ext. SG. No. 37 of May 7, 2019.

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- [16] Vodenicharova, K. Headquarters of the company, Commerce and Competition Act, Sofia, 2010, vol. 8, pp. 5 – 11