The European Company
From a Swedish private company perspective

Master’s thesis within International Company Law
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Abstract

The development within the European Union is that we are heading towards a common internal market. The law has during the year become more harmonized within the Union in many areas.

The company law within the European Union has become harmonized through several company law directives and the freedom of establishment, which is included in the EC Treaty.

The aim of an internal market is about to be achieved, but there are still differences between the systems of law within the Member States. To avoid these differences within the area of company law a common European company type became reality in 2004, the European public limited-liability company.

Companies within the European Union have the possibility to create a European public limited-liability company (SE Company). The SE Company is mainly governed by the SE Regulation.

The SE company has advantages like the possibility to move the registered office from one Member State to another without losing its legal personality. It can also make the company structure easier and relief administrative costs for a company with activity in the European Union.

The company was supposed to be governed by one single set of rules, the SE Regulation, no matter where in the Union the company has its registered office. This has not become reality since the SE Regulation on several occasions refers back to the national company law.

The SE Company has not been a success, only a few SE companies have been created. The advantages do not seem to be that important reasons, the companies do not seem to think that it is worth the cost and the trouble to change type of company.
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<tr>
<td>ECJ</td>
<td>European Court of Justice</td>
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<td>EPC</td>
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1 Introduction

1.1 Background

The aim of the European Union is to establish a common market and an economic and monetary union. The Community wants to promote a balanced and sustainable development of economic activities. An important area within EC law is the freedom of establishment. Business wants as much freedom and choices as possible, for example the freedom to choose the nationality of the company.

Company law is to a certain extent harmonised within the Union. There are many company law directives adopted by the Member States, but there are still differences in the way the Member States regulate companies. With the option to create Societas Europaea (SE), there are new possibilities for companies to do cross-border businesses. The idea of creating a company governed by a supra-national company law has existed in over 50 years. The SE Regulation contains common rules for this new company type and is binding in its entirety in all Member States.

With the possibility for European companies to create an SE there are new opportunities for restructuring and internationalisation for European businesses. Since 8 October 2004 this new European Company form has been available for companies wanting to operate within the EU and the idea of an SE is that the company is based and regulated in the Union as a whole instead of a single country.

The interest of creating an SE has not been very high. So far only a few SE companies have been created within the EU and the development is still uncertain. Only 13 SE companies have been registered within the whole Union. Why is the interest not higher when this seems to be such a good idea? To find the answers we will look at the legislation within the area and we will also look into Volvo Car Corporation (hereinafter called VCC) to see how the SE company would work for a Swedish company. VCC which is one of the world’s

1 EC Treaty art.2
6 SE Regulation art. 70.
7 Werlauff E, 2003 (a), p 1.
leading suppliers of transport solutions for commercial use was created in 1927 and it has production in more than 25 countries and sells cars in over 100 countries. VCCs’ head office is located in Gothenburg together with the product development, marketing and administration functions. Since 1999, VCC has been a wholly-owned subsidiary of Ford Motor Company. VCC is a good example of a company that has its registered office in one Member State and subsidiaries in other different Member States and it is a company that perhaps would gain from creating an SE. VCC has been kind enough to give us all the necessary information that is needed for this written exercise.

1.2 Purpose
The purpose of the paper is to analyse why this new form of company type Societas Europaea (SE), has not yet been quite that success that was hoped for. In order to get an answer to this question we will examine if VCC would gain by creating an SE and if so, how? We will also compare the SE with the Swedish limited company (Aktiebolag) to see the advantages and disadvantages for VCC to establish an SE instead of remaining as a parent company with subsidiaries in different countries.

1.3 Method
We have used primary sources of law to compare the different situations between an SE Company and the Swedish Aktiebolag when it comes to operating at a Community wide level. We have also used literature and articles to find out the purpose of the SE and to analyse advantages and disadvantages with an SE. Not much has been written in this area and therefore the literature is limited. To examine whether a company can gain by creating an SE we have looked into the organisation of VCC and we have compared their situation today with the situation they would have VCC created an SE.

1.4 Delimitation
We will concentrate this paper from a company law perspective and will therefore not look into areas which concern taxation and employment law. But these areas are of importance to look into for a company that wants to examine their possibility of creating an SE. We will examine one company and that will be VCC, but we will also make comparisons to other companies. We will also concentrate this paper from a Swedish ultimate and therefore not take in to consideration that Ford Motor Company (a US company registered in Dearborn, Michigan) is the owner of VCC.

1.5 Outline i this is only a draft for the essay
In the first chapter there is background, purpose, method, delimitation and outline. In the next chapter we will describe the activity and history of Volvo Car Corporation. The third chapter will describe the background of the SE company and the chapter after that will describe the SE company. In the fifth we will compare the SE company with the Swedish limited-liability companies. The following chapters will describe the formation of an SE

company and the applicable law to the company type. In chapter eight we will look into the
differences of creating an SE for different sectors. The following chapter will show on the
advantages and disadvantages with an SE. Chapter ten will show the possibilities for a pri-

tive company to create an SE and the following chapter will describe VCC’s options of
forming an SE company. In chapter twelve we will look specific into how VCC could form
an SE with their existing company structure as writing and it ends with a conclusion where
we share the final thoughts with the readers.
2 Volvo Car Corporation

2.1 The history of Volvo Car Corporation

Volvo was founded on April 14th 1927 in Gothenburg when the first Volvo car left the factory, but the development of this new form of series-manufactured cars and the idea of a Swedish car manufacture had started some years before.\textsuperscript{12} Assar Gabrielsson who was a Bachelor of Science in economics and Gunnar Larsson who was an engineer and designer, where the two men that started Volvo.\textsuperscript{13} They had worked together at SKF and had both been considering the manufacturing of a Swedish car for several years and when they started their collaboration in 1924 their aim where to create a car with a high quality and a good design.\textsuperscript{14} In 1926 ten prototypes where built at Galaco AB in Stockholm and three of this cars where driven to Gothenburg.\textsuperscript{15}

The same year as Volvo was started, the first car where exported to Denmark and in 1928 the volume of exports increased and Volvo’s first subsidiary, Volvo Auto OY AB, was established in Finland.\textsuperscript{16}

In August 1929 Volvo made its first profit and Assar Gabrielsson convinced SKF that Volvo was a company which production and profits would increase and SKF became interesting of the work and they provided guarantees and credit for an initial series of 1000 vehicles and it was SKF that gave Volvo their name, which had been used in earlier business operation.\textsuperscript{17} Volvo is Latin and means, “I roll”.\textsuperscript{18}

In 1932 the exports increased even more and Volvo cars where sold to Denmark, Finland, Norway, Netherlands, and cars where also shipped to countries in Africa.\textsuperscript{19} 1955 the exports to the USA became reality\textsuperscript{20} and almost ten years later, in 1963 Volvo started a car

\textsuperscript{12} Olsson C, Moberger H, 1996, p. 15.
\textsuperscript{13} Olsson C, Moberger H, 1996, p. 6-7.
\textsuperscript{14} Company Information, History, media.volvocars.com/75thanniversary/subpage.asp?year=1924&lang=text_en, 2006-03-21
\textsuperscript{15} Olsson C, Moberger H, 1996, p. 11.
\textsuperscript{16} Company Information, History media.volvocars.com/75thanniversary/subpage.asp?year=1928&lang=text_en, 2006-03-21
\textsuperscript{17} Olsson C, Moberger H, 1996, p. 20.
\textsuperscript{19} Company Information, History media.volvocars.com/75thanniversary/subpage.asp?year=1932&lang=text_en, 2006-03-21
\textsuperscript{20} Olsson C, Moberger H, 1996, p. 91.
production in North America. In 1965 another assembly plant was opened in Belgium and the development of Volvo was growing. Volvo wanted to be a part of the European market and when this plant was opened, Volvo became a European product. The new activity in Belgium was going to be organised as a separate company “Volvo Europe” and it was going to increase the sale numbers within Europe.

The Volvo Group has acquired a large number of other companies throughout its history and it still does, and in 1972 Volvo acquire shareholding in the Dutch company’s car operation and later in 1975 Volvo increased its shareholding and the company was renamed Volvo Car B.V. Volvo Car Corporation was formed in 1978 and was then a part of the Volvo Group and in 1999 VCC was bought by Ford Motor Company.

### 2.2 Volvo Car Corporation today

VCC is one of the world’s leading car creators and it has its markets all over the world, including the European Union. Its headquarter together with product development, marketing and administration functions are based in Gothenburg and it is in round-the-clock contact with all Volvo service facilities by computerised communications and satellites.

Today VCC has the vision of being the world’s most desired and successful premium car brand and their mission is to create the safest and most exciting car experience for modern families. The year 2004 where the most successful year for VCC ever and they sold a total of 456224 cars around the world, with Europe accounted for the biggest growth.

In the end of 2005 the total amount of employees around the world where over 27000 with almost 20000 employees only in Sweden and over 446000 cars where produced at the manufacturing units in Sweden and Belgium.

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VCC is a global company with activity in over 120 countries, when including the network which is composed of independent companies working with VCC as a business partner.\textsuperscript{30} VCC’s four largest markets are the USA, Sweden, Britain, Germany and it has its major plants in Sweden and Belgium.\textsuperscript{31} Most of the manufacture of cars is based in Sweden and Belgium and since the foundation in 1927, VCC has produced more than 13 million cars.\textsuperscript{32}

Today VCC is a part of Ford’s Premier Automotive group (PAG).\textsuperscript{33} Volvo Car Corporation and Volvo Group (AB Volvo) own the “Volvo” brand name together in a joint trademark company (Volvo Trademark Holding); besides this VCC and Volvo Group have nothing in common.\textsuperscript{33}

Today VCC has subsidiaries all over the world and their activity within the Union is of great importance. VCC also owns parts of other companies all over the world and this makes VCC a very global company with activities in many different countries and a company that might get advantages of creating an SE company.

### 2.3 Final words

The creation of Volvo started in 1924 and it has until today experienced an enormous development has now activity in over 120 countries. Most of their manufacture of cars is based in Sweden and Belgium and three of their four largest markets are placed in the Union.

VCC’s head office is based in Gothenburg and most of their employees are situated in Sweden and Belgium.

VCC’s activity within the European Union might make them a suitable company for creating an SE. Could a global private limited company, such as VCC, get advantages if VCC chose to create an SE company? Are the advantages that good and would VCC gain from creating an SE company in comparison to what the company have today?

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\textsuperscript{32} Volvo Pocket Guide, 2006, Production, p. 18.

\textsuperscript{33} Olsson C, 2000, p. 8.

\textsuperscript{34} Volvo Pocket Guide, 2006, Part of Ford Motor Company, p. 15.
In this essay we will try to answer this question by examine the SE company and its advantages and disadvantages. We will also examine whether this is suitable company form for VCC and if they would gain from creating an SE company.
3 Background to the SE company

3.1 Is there a need for a common European Company?

Some people maintain the importance of a common European company type, while others say that there is no need and that a harmonisation of the company laws of the Member States is enough to secure the freedom of establishment within the European Union. Now when the possibility of creating an SE company within the Union exists\(^35\), one way of explaining why there is a need is: “There is a need for a company which (A) is as uniform as possible from state to state so that business enterprises may move into familiar ground when they apply a foreign company of this type and in which (B) the special feature is inherent that the company may change nationality, i.e. move to another country without the need of dissolution in the state from which it moves nor need of re-formation in the state to which it moves.”\(^36\)

Barriers to trade must be removed within the Union and the structure of production must be adopted to the Community dimension so the internal market could be complete and for that reason it is of importance that companies working within the whole Union can plan and carry out the reorganisation of their business on a Community scale.\(^37\)

There are different ways of removing barriers to trade and securing the freedom of establishment and one way is to introduce a new form of company type, but is it the right way and would it be a real opportunity for companies acting within the European Union? “It might be, depending on your requirements and your willingness to pay a price in the form of a considerable degree of legal uncertainty”\(^38\)

3.2 History of the European company

The idea of having a common European company dates back 50 years.\(^39\) In 1957 Professor Sanders, at the Rotterdam School of Economics created the idea and he wanted a common European company type which would bring about considerable administrative relief for business undertakings. In 1965, on the initiative of the French government the European Commission set up a working group to examine the idea and they came up with proposal which led to the Commission publishing a draft proposal for a regulation in 1970 the main

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\(^35\) Werlauff E, 2003 (a) p. 2.

\(^36\) Werlauff E, 2003 (b) p. 135.

\(^37\) Werlauff E, 2003 (a) p. 2.

\(^38\) Gerven D, Storm P, 2006, p. 3.

\(^39\) Werlauff E, 2003 (b) p. 135.
idea of which was a wide-ranging liberation from national company law and the creation of a supra-national company law.\textsuperscript{40}

This draft proposal that was based on one prepared by the group of experts that the Commission set down in 1965 was then discussed in different working groups and in 1989 the Commission issued a new proposal.\textsuperscript{41} This new proposal was a bit different from the one created in 1970 but the main aim was still the creation of a supra-national company law.\textsuperscript{42}

An amended proposal was prepared by the commission in 1991\textsuperscript{43}, but after that the work of creating a new form of European company form where put aside and not much happened until the meeting of heads of states in Nice in December 2000.\textsuperscript{44} At this meeting it was decided that this form of incorporation should become a reality within relatively few years.\textsuperscript{45} After much negotiation between the Member States and numerous amendments, the proposal from 1991 finally resulted in the Regulation of October 2001.\textsuperscript{46}

It took 30 years for Community lawmakers to develop a complete set of rules, which appears to regulate the Societa Europaea only in part and refers to national law on many key issues.\textsuperscript{47} This delay was dependent on a deadlock in the Council of Ministers that dependent on the question of board-level representation of employees and unanimity was required to be able to continue the work of the SE Regulation.\textsuperscript{48} This delay is unfortunate considering the cooperation between the Member States and also considering the common market’s need for swift regulation.\textsuperscript{49}

The SE company is the second legal entity introduced by Community law.\textsuperscript{50} As early as 1985 the European economic interest grouping were introduced and recently (2003) a third

\textsuperscript{40} Werlauff E, 2003 (a) p. 2.


\textsuperscript{44} Werlauff E, 2003 (b) p. 136.

\textsuperscript{45} Werlauff E, 2003 (a) p. 2.


legal entity, the European cooperative society were introduced and these legal entities are regulated by a more or less uniform set of rules adopted at the Community level, which apply throughout the European Union and the European Economic Area.\footnote{Council Regulation No. 2137/85 of 25 July 1985, Council Regulation No. 1435/2003 of 22 July 2003}

### 3.3 The aim of the European Company

When first starting to discuss this new form of European Company type the original idea was to create an SE company that was a truly European company governed by a single set of rules, irrespective of where its seat was located, and having the freedom to move from one EU Member State to another without being affected by the traditional obstacles faced by companies subject to national law.\footnote{Gerven D, Storm P, 2006, p. 3-4.} The first proposal from 1970 did also include special tax provisions for the SE company but in the 1989 proposal, these comprehensive rules were reduced to just one provision on the taxation of the permanent establishments of the SE.\footnote{Bolkestein F, The new European Company: opportunity in diversity, Leiden 29/11 2002, http://europa.eu.int/comm/internal_market/company/se/index_en.htm, 2006-03-30}

Over the decades of negotiation between the Member States it became clear that this original idea was not going to be achieved at this time, because if the big differences in the company laws of the Member States and some of the Statute’s own rules were deleted and replaced with references to the laws of the Member States.\footnote{Gerven D, Storm P, 2006, p. 14.} This means that instead of one single set of rules governing the SE company, which was the original idea, there is now as many sets of rules that are Members in the Union\footnote{Gerven D, Storm P, 2006, p. 14.} and it could be questioned whether the SE company type can really be characterised as supra-national.\footnote{Werlauff E, 2003 (b) p. 136.} This is because the SE company will be governed by the company law in that state where it has its registered office.\footnote{How can a European Company (SE) be established?, Frequently asked questions, SE Europe, http://www.seeurope-network.org/homepages/seeurope/europeancompany/faq.html#4, 2006-03-08}

### 3.4 Aims that have not yet been achieved

The aim of the SE statute is to create a cross-border corporation in the form of a limited company to make it easier for companies that are acting within the Community to plan and organise their businesses in different countries with a more or less uniform set of rules\footnote{Werlauff E, 2003 (a) p. 2.}
The aim is also to offer a company type which is subject to independent legislation and therefore makes it possible for companies which are incorporated in different Member States to merge, establish a common holding company or subsidiary company, while avoiding the legal and practical problems caused by the existence of as many legal systems as Members in the Union.59

The SE company is intended to offer a company with a European dimension and it should also permit business active across borders within the Union to incorporate using a legal entity subject to the same rules in each Member State and this would give the European enterprises a more effectively compete with their US and Japanese counterparts.60

The European company statute also include rules for the involvement of employees in the supervisory board and one aim with the SE company has been to lay down this kind of rules to be able to secure their place and role in the business.61 The participation of employee representatives in the boards has from the beginning been an obstacle to agreement and was one reason to why it took so long for the Member States to come to an agreement.62

The aims of the SE company were set high and a lot of those aims have been achieved already in regard to uniform capital protection requirements, merger rules, division rules etc. in the individual countries on the basis of EU rules in the form of company law directives, but still there are things remaining before a real European company law is complete.63 The renvoi technique which the SE Regulation uses leads to a certain lack of uniformity from country to country because of the references to the law applicable in the state where the SE company has its registered office.64 The renvoi technique means that when there are no independent rules for SE companies, references is made to the conditions that apply in the SE company’s home country.65

As already mentioned, the original idea with one single set of rules for the SE company has not yet been achieved and a lot of work still has to be done if this aim ever would be fulfilled. Today the rules governing the SE company is very incomplete and in many ways still unclear, because of the numerous specific and general references to national company

59 Werlauff E, 2003 (a) p. 2.
60 Gerven D, Storm P, 2006 p. 28.
61 Werlauff E, 2003 (a) p. 2.
63 Werlauff E, 2003 (b) p. 136.
64 Werlauff E, 2003 (a) p. 8.
65 Werlauff E, 2003 (a) p. 16.
Before the SE company can be truly supranational the references to national company laws (renvoi technique) must be done away with, there must be one single set of rules for the SE company and there must also be a common registration authority.  

As mentioned in 2.3, the first proposal from 1970 contained special tax provisions but this has not yet been fulfilled and a uniformed taxation of SE companies does not exist. The European Parliament and other integrationist bodies wanted a uniform taxation of the SE company and in the future this could be a possible goal for the SE statue and it would harmonise the EU company law even more and it would probably make the SE company more attractive for companies working within the Union.

### 3.5 In the future

When the SE Regulation became applicable there were still things remaining before the SE company could be seen as a wholly supranational company with one single set of rules. Because of the European Parliament’s acceptance of an SE Regulation without provisions on taxation and with requirement that the actual and the legal domicile should concede etc. the Commission, before 8 October 2009, shall examine whether the SE Regulation is in need for further developments in a number of specified areas.

Then the Commission must present a report to the Parliament and the Council on whether the SE Regulation has been successfully applied and whether there are grounds for taking further steps towards a totally harmonisation of the European company law and also put forward proposals for amendments.

If the report leads to further developments in those specified areas this would be one step closer to a total harmonisation with one single set of rules for the European company and the SE company would become a highly attractive alternative to national company types.

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67 Werlauff E, 2003 (a) p. 15.
69 Werlauff E, 2003 (a) p. 8.
70 Werlauff E, 2003 (b) p. 137.
71 Werlauff E, 2003 (a) p. 12.
3.6 Final words

It took more than 50 years to conclude a proposal for a common European company type and since 8 October 2004, SE companies can be set up under the SE Regulation. The first idea when starting to discuss the creation of a common European company type was to create one European company type that was governing by one single set of rules and therefore became identical in every European country regardless of where it was registered. This aim had to be abandoned and today when the idea has become reality the rules governing the SE company are not totally uniform and the SE Regulation refers to national law on many issues.

There is no need for totally uniform rules for the SE company to be able to exist but it would make it more effective and the situation for companies acting within the community would be more equal. Another question is whether an SE company is the right way of making the situation for companies acting within the Union more equal, or if this aim could be attained in another way, for example by harmonisation of the company law within the European Union.

Still there are things that have not been achieved by the SE Regulation, but at the same time the SE Regulation has created new opportunities for European companies acting within the Union and the Commission report will show if there are grounds for taking further steps towards a truly supranational company law and if so make the SE company a truly European company governed by one single set of rules.
4 Societas Europaea

4.1 SE company

As mentioned in chapter two, the original idea with the SE company was to create a company form which is regulated under EC law and not by the national company law. The purpose with the common European company law is to make the activities and the cooperation between companies easier through equivalent legal conditions for companies operating in different Member States. 73 Common to the SE companies is that they have activities in different Member States within EU, which results in high administrative costs. An SE company makes it possible to have activities in more than one Member State without bureaucracy complications. 74

An SE company is a company type for cross-border activities in a limited company. 75 The company has the form of a European public limited-liability company 76 and the name of the company shall include the letters ‘SE’. 77 An SE company shall be registered in the Member State in which it has its registered office. 78 That means that the head office must be in the same Member State as the registered office. Certain information about the company must be published, for example the name of the company, the number of the company, date and place of registration and registered office. 79

The SE company is a public company; it is open to the public which means that it has shareholders. 80 The capital of the SE shall not be less than 120 000 euro. 81 For those EU countries which do not have the euro as currency, the company can choose to express the capital in the national currency or in euro. 82

74 Aronsson C, 2005.
76 SE Regulation art.1(1).
77 SE Regulation art. 11(1).
78 SE Regulation art 12(1).
81 SE Regulation art.4 (2).
82 SE Regulation art.67(1).
4.2 Legal person

The SE company is a legal person.\(^8^3\) A company being a legal person means that it has its own legal capacity, capacity to make contracts, capacity to be a part in legal proceedings and procedural capacity.\(^8^4\) It means that the SE company is the bearer of rights and duties in its own name. It also has the capacity to act through commitments in the name of the company and there is also a possibility for a legal person to sue and be sued in the court. The shareholders are not responsible for the activities within the company, it is the company itself. The SE acts through its organs and expresses itself through them.\(^8^5\)

4.3 The nationality of the SE company

The idea with the SE company is that it is going to be supranational, but we are not there yet. The supranationality will exist first when the renvoi technique is done away with\(^8^6\), both common rules for the SE company and a common registration authority is introduced. The renvoi technique makes the SE company close to a national limited company in the Member State, because they are governed by the same law in some aspects.\(^8^7\) The renvoi technique is expressed in the SE Regulation and says that when there is no specific rule for an SE company, the rules and general principles of private international law should apply to the SE.\(^8^8\)

4.4 The law governing the SE company

The law that the SE company is governed by is

1. The SE Regulation
2. If the regulation gives the SE a choice in for example the statutes of the company, then these apply
3. The laws in the Member States where the SE has its registered office apply\(^8^9\)

When the law of a Member State applies, it is the law applying to public limited-liability companies which shall also be applicable to the SE company.\(^9^0\) As mentioned above the consequence can be that the same rules apply to the SE company as to the ordinary limited

\(^{83}\) SE Regulation art.1(3).

\(^{84}\) Werkauff E, 2003 (b) p.1.


\(^{86}\) Renvoi technique= at some points there are no independent rules for an SE-company, and the law of the SE:s home country is applicable. Werkauff E, 2003 (a), p. 16.

\(^{87}\) Werkauff E, 2003 (a), p. 15-17.

\(^{88}\) SE Regulation preamble (16).

\(^{89}\) SE Regulation art.9(1).

\(^{90}\) SE Regulation art. 9(1(c)(ii))
company within the Member State.\textsuperscript{91} The consequence of that is that there is not only one form of the SE company, there are as many forms of an SE as there are Member States within the EU.\textsuperscript{92}

For an SE company which is registered in Sweden this means that in the first place “Lag om europabolag” and otherwise the Swedish “Aktiebolagslagen” is applicable when the law of the Member States should apply.\textsuperscript{93} Lag om europabolag is applicable to SE companies with a registered office in Sweden and is supplementary to the SE Regulation.\textsuperscript{94}

\subsection*{4.4.1 SE Regulation}

The SE-company is governed by the SE Regulation.\textsuperscript{95} It is binding in its entirety and directly applicable in all the Member States.\textsuperscript{96} The SE Regulation does not cover areas of law such as taxation, competition, intellectual property and insolvency are excluded areas.\textsuperscript{97}

The regulation includes seventy articles and entered into force on 8 October 2004.\textsuperscript{98} The regulation contains independent rules for the SE company, but it also refers to the law of the Member States on a number of occasions, for example within the areas which is mentioned above.

\subsection*{4.5 Registered office}

The registered office of an SE shall be located within the EU and it should be located in the same Member State as the head office of the company.\textsuperscript{99} The head office is where the central management and administration are located.\textsuperscript{100}

\begin{thebibliography}{99}
\bibitem{91} Werlauff E, 2003 (a), p. 33-34.
\bibitem{92} Rickford J, 2003 p.18 (paper: Inaugural lecture- the European company, author Rickford, J).
\bibitem{93} Lag om europabolag 1§ and Aktiebolagslag 1§.
\bibitem{94} Lag om europabolag 1§.
\bibitem{95} Werlauff E, 2003 (a), p. 33.
\bibitem{96} Art.249 EC.
\bibitem{97} SE Regulation preamble (20).
\bibitem{98} SE Regulation art.70
\bibitem{99} SE Regulation art.7.
\bibitem{100} Gerven D, Storm P, 2006, p. 33.
\end{thebibliography}
It is possible for an SE to move the registered office to another Member State. The company can make a transfer to another country and maintain its legal personality. This means, that if a company moves from one state to another it still remains as the same company and this makes the company mobile. It does not have to shut down the business in one state and re-start it in another, which a regular company within a Member State has to.

4.6 The management of an SE

The SE company shall have a general meeting of shareholders and either a supervisory organ and a management organ, the two-tier system, or administrative organ, the one-tier system. In both systems the Member State may provide that a managing director shall be responsible for the day to day management of the company, under the same conditions as for the public limited-liability companies which have their registered company in the Member State.

In the one-tier system the administrative organ shall manage the SE and the members of the organ shall be appointed by the general meeting. The administrative organ shall meet at least every three months to discuss the progress and development within the SE.

In the two-tier system the management organ is responsible for the managing of the SE and the supervisory organ shall supervise the work of the management organ. The members of the management shall be appointed and removed by the supervisory organ. A person can not be a member in both organs. The management organ shall report to the supervisory organ at least every three months about the progress and the development within the SE. The two-tier system exists in Austrian and German law, an SE company with its registered office in Germany will look like an ordinary German “Aktiengesellschaft”.

There are also common rules for the two systems. The members of the organ shall be appointed for a period laid down in the statute. A person can be disqualified under a law of a Member State and can in some cases not be a member of an organ. A member of a com-

101 SE Regulation art.8.
103 SE Regulation art. 38 (a) and (b).
104 SE Regulation art. 39(1) and 43(1) and Werlauff E, 2003 (a) p. 79.
105 SE Regulation art. 43-44.
106 SE Regulation art. 39-41.
108 SE Regulation art.46-47.
pany organ must be silent about information which concerns the SE, if there is not permitted under national law or in the public interest to go public with.\textsuperscript{109} If members of the management in the SE cause the company damage or loss, they are liable for that.\textsuperscript{110}

\section*{4.7 Final words}

The original thought with the SE company was as above mentioned, that it was going to be a supranational company but that aim has not become reality. The fact that the law in not all areas such as the taxation area, are not harmonized make the company forced to take more than one legal system into consideration, which with the original thought the company was not supposed to have.

If the rules was completely similar for the SE company within the whole European Union, the SE company would probably be a more attractive alternative to the national company types. A common registration authority would give a good overview over SE companies instead of using the national authority in each Member State.

The possibility for the SE company to choose between the one- and the two-tier systems opens up new possibilities for companies for which the national law earlier only aloud one of the systems, which some companies can see as a new possibility and advantage.

The fact that the SE Regulation refers back to national law applicable to public companies make the SE company similar to a national public company within several areas and can not be consider as a totally new company type.

\textsuperscript{109} SE Regulation art.49.

\textsuperscript{110} SE Regulation art.51.
5 SE company compared to the Swedish limited company

5.1 Relevant company law in Sweden

In Sweden, the limited companies are governed by the Aktiebolagslag.\textsuperscript{111} It is an extensive law which contains of thirty-two chapters.\textsuperscript{112}

5.2 The SE’s equality of status with ñordinaryò EU companies in general

The Member States shall make sure that the SE company is not discriminated against when compared to public limited-liability national companies.\textsuperscript{113} The provisions applied to the SE company in accordance with the regulation must not lead to:

- an unequal treatment because SE companies are treated differently from national companies, or
- Disproportionate restrictions on the setting up of an SE company or the transfer of the registered office.\textsuperscript{114}

This shows that the requirements within the EC law such as the non-discrimination principle and the efficiency principle shall be applicable to SE companies.\textsuperscript{115}

The SE Regulation provides that an SE company shall be treated in the Member States as if it were a public limited-liability company formed in accordance with the law in that Member States were the registered office of the company is.\textsuperscript{116}

5.3 The SE:s similarities and differences with the Swedish limited company in general

An SE company must be set up as a European public limited-liability company.\textsuperscript{117} This means that if a private Swedish limited company wants to set up such a company, it can choose to go public or to set up a public holding company or a public subsidiary SE.

\textsuperscript{111} Aktiebolagslag 1§.
\textsuperscript{112} Aktiebolagslag.
\textsuperscript{113} SE Regulation preamble (5).
\textsuperscript{114} SE Regulation preamble (5), Werlauff E, 2003(a) p. 29 and Werlauff E, 2003 (b), p. 141.
\textsuperscript{115} Werlauff E, 2003 (b) p. 141.
\textsuperscript{116} SE Regulation art. 10.
\textsuperscript{117} SE Regulation art.1(1).
As above mentioned, one out of two possibilities for a private limited company to create an SE is to go together with another company and promote a formation of a holding SE. The other company must be governed under the law of another Member State or the limited company must since two years have a subsidiary governed by the law of another Member State or a branch placed in another Member State.

The capital in a Swedish limited company is 100 000 SEK (minimum amount), which is equivalent to approximately 10 450 euro. To compare with the capital of an SE which is almost ten times higher. The owners of both companies do not have a personal liability for the commitments of the company. The Swedish limited company has to be registered in Sweden as the SE company.

### 5.4 The SE:s similarities and differences with the Swedish public limited-liability company in general

There is a difference between the amounts of capital in the two different company types. The capital of an SE shall not be less than 120 000 euro, while the Swedish public limited liability company prescribes a lower capital, 500 000 SEK. As the time of writing 500 000 SEK is equivalent to approximately 53 400 euro. The capital of the SE company is more than twice as much as the capital of the Swedish public limited liability company.

Both company types have shareholders, which mean that they are open to the public. Another similarity is that the shareholders within both company types are not liable for more than the amount he/she has subscribed, as it is today in Swedish limited companies.

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118 A branch is not a legal person, it is a part of the owner company. The branch do not have any shares, the assets and debts belongs to the company which owns the branch. www.bolagsverket.se 2006-05-17.

119 SE Regulation art. 2(2).

120 Aktiebolagslag 5§ 1 st.

121 Aktiebolagslag 3§.

122 Aktiebolagslag 27 kap. 1§. and SE Regulation art.12(1).

123 SE Regulation art. 4(2) and Aktiebolagslag 1 kap 14§ 2 st.

124 www.di.se, 2006-03-16 (1euro=9.57 SEK)

125 SE Regulation art.1(2) and Aktiebolagslag

126 SE Regulation art.1(2) and Aktiebolagslag 1 kap. 3§.
The Swedish public limited-liability company shall be registered, and an SE company shall be located in the country where it has its registered office. In other words, both companies shall be registered at Bolagsverket in Sweden.

The rules for members, which cause the company damages or loss, in the management or supervisory and administrative organs of the SE are the same as for public limited-liability companies within the Member State where the SE has its registered office. This means that Aktiebolagslagen is applicable to the members of the management in SE companies and in public limited-liability companies in Sweden.

5.5 The differences and similarities between Swedish companies and the SE company regarding the mobility of the companies

The difference, which is most obvious, between "aktiebolag" and SE company is the SE:s possibility to transfer its registered office. An SE registered in Sweden has the possibility to move to another Member State and an SE in another Member State has the possibility to move to Sweden, and remains as the same legal person. A national company does not have the same possibility, if such a company wants to move to another state it must, if the national law does not say otherwise, undergo dissolution and make a re-formation in the new company. There is a proposal to a 14th EU Company law directive, which allows companies to transfer the registered office.

Since the “Aktiebolag” does not have this ability, this quality makes the SE unique. This ability can be very useful, for a national company which makes cross-border businesses, because it makes the company mobile.

127 Aktiebolagslag 27 kap. 1§.
128 SE Regulation art. 12(1).
129 Aktiebolagslag 27 kap 1§ and Lag om europabolag 7§.
130 SE Regulation art.51.
132 Werlauff E, 2003 (b) p. 151.
133 Proposal for a 14th company law directive is a proposal for aloud companies to make cross-border transfer of the registered office of limited companies.
5.6 The differences and similarities between the Swedish companies and the SE company regarding the management

A shareholder has the right to participate in the general meeting according to Aktiebolagslagen, and the same rules apply to the SE company, the SE Regulation refers to the national law applicable to public limited-liability companies. The regulation says that the organisation and conduct of the general meeting shall be governed in the same way as a public limited-liability company under that law where the SE has its registered office. The rules concerning the private and the public limited-liability company are broadly the same in Aktiebolagslagen, but there are some articles which only are applicable to public companies. Since the rules concerning the general meeting in private limited liability companies and public limited liability companies there are no big differences between the Swedish limited companies and the SE company in this area.  

Both public and ordinary private companies must according to "aktiebolagslagen" have a board of directors which manage the company. The board of directors shall be appointed by the general meeting. This is equivalent to the one-tier system in the SE company. 

The organisation of the SE company agrees with the Swedish rules applicable to public limited-liability companies. Before the implementation of the regulation, only the one-tier system was existing in Sweden. The SE company can choose between the one-tier system and the two-tier system according to the regulation, because of that Sweden introduced rules regarding the two-tier system in the Lag om europabolag. As earlier mentioned the "Lag om europabolag" is an extensive Swedish law to the SE Regulation, since the two-tier system didn’t exist in the Swedish legislation before an extensive law was needed. "Lag om europabolag" also mention that the Swedish register authority is Bolagsverket.

Lag om europabolag includes the rules about the one-tier and the two-tier system, and this law is only applicable to SE companies. An SE company with a registered company can choose between the two systems but this possibility does not exist for national companies.

135 SE Regulation art. 52-53 and Aktiebolagslag 7 kap mainly 1§.
136 Aktiebolagslag 8 kap. 4 and 8§§.
137 Aktiebolagslag 8 kap. 4 and 8§§ compared with SE Regulation art. 38 and 43.
140 Lag om europabolag 7§.
5.7 The differences and similarities between the Swedish companies and the SE company regarding the law

Lag om europabolag refers to Aktiebolagslagen in many parts and it also refers to the SE Regulation and there are not many independent rules in that law. The law does include some rules about the one-tier and two-tier systems which concerns SE companies registered in Sweden.\footnote{Lag om europabolag 16-23§§.}

An Aktiebolag is governed by Swedish law, mainly by the Aktiebolagslagen. The company law within EU is however harmonised in several areas through directives. For that reason the company laws within the EU is rather similar. Most of the directives are only applicable to public limited-liability companies but a few of them also applies to private limited liability companies in some aspects. This means that areas covered by company law directives are more or less harmonized within the union, since the directives mainly applies to public limited-liability companies and also SE companies (when the national law on public limited-liability company shall apply to the SE) the ordinary aktiebolag is not governed under the directives in many cases.

5.8 Final words

The mobility, which appears with the possibility to move the registered office, can be of great use for a company which operate at a community-wide level. It does not only give the company the possibility to move within the union, it also shows that the company has a positive view on internationalisation and the willingness to make cross-border business.

There are differences in the management, since Sweden only recognized the one-tier system before, there is a change when both the one-tier and the two-tier systems are accepted in the Swedish law regarding SE companies. The two-tier system is new in Sweden and the public limited-liability companies in Sweden are governed by the one-tier system, but if they create an SE they have a possibility to choose between the systems. There are not that big differences in the systems, the most obvious difference is that a supervisory organ exists in the two-tier system and supervise the management organ, whilst the administrative organ in the one-tier system are “supervised” by the general meeting.

The applicable law on public limited-liability companies and SE companies are similar, since the law applicable to public limited-liability company shall apply when there are no other rules which can apply on the SE. The law on private companies are not harmonized to the same extent within the Union like the law applying to public companies, and the law applying to the public companies are not totally harmonized either. The law on private companies are for that reason not similar to the law applying to national public limited-liability companies and SE companies.
If the proposal to the 14th company law directive become reality and come into force, there can be discussed if the SE is a special company type. If the option to move the registered office also is given to the public companies there are not very many big differences between the SE and the Swedish “Aktiebolag”.
6 Formation

6.1 Formation of an SE company

In order to assess the possibilities for VCC to form an SE company we will look at the different methods that can be used when forming an SE company. We will also explain the differences between the methods and how they can be used.

An SE company can not be formed freely through the investment of capital, at least two limited liability companies must already exist and they must have a cross-border character due to their different nationalities. This requirement sets up certain barriers to the formation of SE companies and their aim is to ensure that SE companies are set up to avoid the individual country’s legislation of employee representation, etc. According to the SE Regulation, an SE company can only be registered in a Member State if an agreement on employee involvement has been concluded. This means that an agreement on employee involvement must be reached and a resolution must be passed by the general meetings of all companies involved to apply the reference provisions of the Directive, before the SE company can be established. This shows the impotence of the employee involvement and summarizes a part of what was an important question when the SE Regulation was formed.

In general, an SE company can only be created by companies incorporated under the laws of a Member State of the European Union and which have both their head office and registered office in the European Union and it is also required that at least two of the companies involved be subject to the laws of different Member States. This means that an SE company can not be formed between companies from the same Member State.

A Member State can provide that a company incorporated under the laws of a Member State and having its registered office in that Member State, but having its head office outside the Union can participate in the formation of an SE if the company also has a real and continuous link with the economy of a Member State. For matters not dealt with in the Regulation, the formation of an SE shall be governed by the law applicable to public limited-liability companies in the Member State in which its registered office is located.

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144 Werlauff E, 2003 (b), p. 142.
means that it is up to the state where a participating company has its registered office to decide under its laws whether such a company can participate in the formation of an SE company, regardless of whether it has its actual head office within the Union.

6.2 Different ways of forming an SE company

There are four different ways of establishing an SE company: by merger; by incorporation as a holding company; by formation as a subsidiary; and by conversion.\(^\text{149}\) An SE can be formed in any Member State of the European Union and it must be registered in the same Member State in which the administrative head office is located.\(^\text{150}\)

All these four different ways of forming an SE company share a cross-border element because they must always involve companies from at least two different EU Member States.\(^\text{151}\) Regardless of which method the companies use for the formation, there are two requirements for each company participating in the formation. 1) The company must have its registered office in the Union, and 2) it must have its (actual) head office in the Union although this does not have to coincide with the registered office.\(^\text{152}\)

After an SE company has been created it shall be registered in the Member State in which it has its registered office in a register designated by the law of that Member State.\(^\text{153}\) Registration is required for a newly formed SE to enjoy legal personality which means that an SE only exists once it has been registered.\(^\text{154}\)

6.2.1 Formation by merger

Public limited-liability companies (as referred to in Annex 1 of the SE Regulation) which are formed under the laws of one Member State, with registered office and head office within the Community (though not necessarily in the same Member State) may form an SE company by means of a merger, provided that at least two of them are governed by the law

\(^\text{149}\) Council Regulation (EC) No 2157/2001 of October 2001, on the statute for a European company (SE)


\(^\text{152}\) Werlauff E, 2003 (b), p. 142.


of different Member States.\textsuperscript{155} A Member State can provide a company formed under the laws of another member State.

Member State having its head office outside the Community to participate in the formation of an SE if it has a real and continuous link with that other Member State.\textsuperscript{156}

Article 17 in the SE Regulation refers to the Merger Directive, which means that a merger can take place by acquisition\textsuperscript{157} or by merger by the formation of a new company.\textsuperscript{158} Where a merger takes place by acquisition, the acquiring company becomes an SE company at the same time as the merger takes place and where the merger takes place by the formation of a new company, the SE company shall be the newly formed company.\textsuperscript{159}

If a company takes part in a formation of an SE through merger, and where matters are not covered by the SE Regulation or are only partially covered by the Regulation, the provisions of the laws of the Member State by which that company is governed which implement the terms for mergers of public limited-liability companies in accordance with Directive 78/855/EEC.\textsuperscript{160}

Only public limited-liability companies can form an SE by merger.\textsuperscript{161} An SE is a continuation of the merged companies and all the assets and liabilities of these companies will be owned by that newly formed SE company, and all the assets and liabilities are transferred by operation of law to the acquiring company.\textsuperscript{162} The rules of the Third Company Law Directive of 9 October 1978 on mergers involving public limited-liability companies and the SE Regulation are applicable to the Merger.\textsuperscript{163}


\textsuperscript{163} Gerven D, Storm P, 2006, p. 38.
In case of a merger of a public limited-liability company the national legislation on the protection of creditors, bondholders and the holders of other securities shall apply and the Member States can adopt provisions whose aim is to secure the protection of minority shareholders. The formation of an SE company by merger always requires the approval of the general meeting of shareholders and this is the case even if the national law allows a merger of public limited-liability companies to be approved solely by the boards of directors.

The management or the administrative organs of the merging companies must prepare a merger plan. This document is identical for all participating companies and it must include details about the companies and information for the shareholders (see further Art. 20:1).

6.2.1.1 Formation by merger when the parent company holds at least 90% of the share capital of a subsidiary

When a public limited-liability company holds at least 90% of another public limited-liability company it is not necessary for the management of the companies or from an independent expert to participate in the merger by preparing a detailed report explaining the draft terms of merger. In other usual merger cases, this is needed from the management of each company when a merger takes place. No other documents for security are needed in this matter, if not the national law provide otherwise.

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6.2.1.2 Formation by merger when the parent company wholly owns the subsidiary

In this matter it is required that both companies are public limited-liability companies and that the parent company hold all the shares and other voting securities issued by the subsidiary.\textsuperscript{171} There is no need for a report from an independent expert but there is still a need for a management report on the draft terms of merger if the national law requires.\textsuperscript{172} Other documents for security are only needed if the national law provides it.\textsuperscript{173}

6.2.2 Formation by incorporation as a holding company

Formation of an SE as a holding company is governed first of all by the provisions of the SE Regulation\textsuperscript{174} and the procedure for the formation is stated in Articles 32-34 of the Regulation.\textsuperscript{175} In matters not dealt with by the Regulation, the national law applicable to public limited companies of the Member State where the SE has its registered office will apply.\textsuperscript{176}

A company promoting the formation of a holding SE in accordance with Article 2:2 shall continue to exist\textsuperscript{177} and the SE becomes a separate legal entity with its own assets and liabilities.\textsuperscript{178} A formation of a holding SE means that the companies whose shares are transferred as non-capital contributions to the holding company continue to exist as a legal person, in comparison of formation of an SE by merger, where the transferred companies ceases to exist.


\textsuperscript{175} Council Regulation (EC) No 2157/2001 of October 2001, on the statute for a European company (SE), Art. 32-34.


\textsuperscript{178} Gerven D, Storm P, 2006, p. 47.
When forming an SE as a holding company the companies taking the initiative must ask their shareholders if they would like to contribute their shares to an SE, and that SE would then become the parent company, in exchange for shares in the holding SE.\footnote{Gerven D, Storm P, 2006, p. 46.}

Public and private limited-liability companies (as referred to in Annex 2 of the SE Regulation) which have been formed under the laws of a Member State and which have their registered office and head office within the Community may promote for the formation of a holding SE provided that at least two of the companies: (a) is governed by the law of at different Member State, and (b) have for at least two years had a subsidiary company governed by the law of another Member State or a branch situated in another Member State.\footnote{Council Regulation (EC) No 2157/2001 of October 2001, on the statute for a European company (SE), Art. 2:2.} This means that it will be possible for a company which are registered as well as are having their head office in the same Member State to create a holding SE, as long as each of them has a subsidiary or a branch in another Member State. The aim of the requirement of two years existence of a subsidiary or a branch is to make sure that the international link of each of the promoting companies has a real character and that the subsidiary or branch were not established by the companies to be able to promote the formation of a holding SE.\footnote{Oplustil K, Selected problems concerning formation of a holding SE (societas europaea), German Law Journal Vol.4 No. 2-1 February 2003, http://www.germanlawjournal.com/article.php?id=230, 2006-04-03} This means also that a company formed under the laws of a Member State and having its head office outside the Union can only participate in the formation of a holding SE if the Member State so allows and such company has its registered office in the Member State in which it is formed and has a real an continuous link with the economy of a Member State.\footnote{Council Regulation (EC) No 2157/2001 of October 2001, on the statute for a European company (SE), Art. 2:5.} Nothing in the Regulation excludes that a holding SE can have its registered office in another Member State than the state or states where the promoting companies have their offices.\footnote{Oplustil K, Selected problems concerning formation of a holding SE (societas europaea), German Law Journal Vol.4 No. 2-1 February 2003, http://www.germanlawjournal.com/article.php?id=230, 2006-04-03} So for example two companies with their registered office in Sweden and meeting the requirements of Art 2:2 SE Regulation, will be able to establish a holding SE in Denmark, because the requirement forming a holding SE is less severe compared to the formation of an SE by merger.

The meaning of “public and private limited-liability companies” is not that it includes all kinds of business entities which have limited liability. The company must have share capital, and the company types that are covered and can form a holding SE are listed in Annex

\footnote{Gerven D, Storm P, 2006, p. 46.}

\footnote{Council Regulation (EC) No 2157/2001 of October 2001, on the statute for a European company (SE), Art. 2:2.}


\footnote{Council Regulation (EC) No 2157/2001 of October 2001, on the statute for a European company (SE), Art. 2:5.}

2. It is underlined by Article 32:7 of the SE Regulation that only companies with liability linked shares that can form a holding SE.

For the Member States from which an SE company wishes to transfer to another Member State when forming an SE by merger, has the right of veto on the grounds of “public interest” whilst formation of a holding SE does not give the Member State the right of veto because than the companies does not transfer from one Member State to another.

As also required when forming an SE by merger the management or administrative organs of the companies promoting the formation of a holding SE must prepare draft terms for the formation. This is a document that is identical for all companies involved and it shall include a report explaining and justifying the legal and economic aspects of the formation and indicating the implications of the formation for shareholders and employees of the adoption of the form of a holding SE.

6.2.3 Formation by incorporation as a subsidiary

Companies and firms within the meaning of the second paragraph of Article 58 of the EC Treaty, and other legal bodies governed by public or private law, formed under the law of a Member State, with registered offices and head offices within the Community (but not necessarily within the same Member State) may form a subsidiary SE by subscribing for its shares, i.e. by forming an SE Company as a joint subsidiary, provided that at least two of the companies (a) are governed by the laws of different Member States, or (b) have for at least two years had a subsidiary company governed by the law of another Member State or a branch situated in another Member State.

Also when it comes to formation of an SE by forming an subsidiary SE, a company formed under the laws of a Member State and has its head office outside the Union can take part in the formation if the Member State in question so allows and that company has its registered office in that Member State in which it is formed and has a real and continuous link with the economy of a Member State.\footnote{Council Regulation (EC) No 2157/2001 of October 2001, on the statute for a European company (SE), Art. 2:5.}

There must be at least two companies when forming a subsidiary SE and there must be a cross-border element which can be fulfilled in two ways, (a) at least two of the founding companies must be governed by the laws of different Member States, or (b) two of these entities must, for at least two years, have owned a subsidiary company governed by the law of another Member State or operated a branch situated in another Member State.\footnote{Council Regulation (EC) No 2157/2001 of October 2001, on the statute for a European company (SE), Art. 2:3.} The Regulation includes only two provisions about the subsidiary SE, Articles 35 and 36.

This method of forming an SE is a possibility to all legal entities.\footnote{EC Treaty, Art. 58.} The formation of a subsidiary SE is governed by the provisions of national law applicable to public limited-liability companies\footnote{Council Regulation (EC) No 2157/2001 of October 2001, on the statute for a European company (SE), Art. 2:3. and Art 36.} and a subsidiary SE shall be governed by the rules applicable to public limited-liability companies of the Member State where its registered office is located.\footnote{Council Regulation (EC) No 2157/2001 of October 2001, on the statute for a European company (SE), Art. 10.}

### 6.2.4 Formation by conversion

A public limited-liability company, formed under the law of a Member State and having its registered office and head office within the Union can be transformed into an SE if for at least two years it has had a subsidiary company governed by the law of another Member State.\footnote{Council Regulation (EC) No 2157/2001 of October 2001, on the statute for a European company (SE), Art. 1:4.} The subsidiary company can be any form of company.\footnote{Werlauff E, 2003 (a), p. 67.}

The possibility for a public limited-liability company formed under the law of a Member State with its registered office in a Member State but having its head office outside the Union to be converted into an SE can only be done if the Member State where its registered
office is located so provides and it has a real and continuous link with the economy of a Member State.\textsuperscript{198}

This method of forming an SE company was established to reserve the corporate form of an SE to multinational entities and a conversion means that the same company continue in a different form and not in the dissolution of the company and the incorporation of a new one.\textsuperscript{199} Therefore, in order for a public limited-liability company to become an SE, it must have a subsidiary in a different Member State. This could be a suitable form for multinational entities because it does only mean that the company converts into another company, remaining with its assets and as a legal entity. This means also that nothing disappears from the area of the Member State and the Member State could therefore not have a right to veto the transformation on than grounds of public interest as above mentioned when a company is formed by merger.\textsuperscript{200} The registered office may not be transferred to another Member State during the conversion process but it could take place after the conversion process.\textsuperscript{201}

The management or administrative organ of the company must prepare draft terms of the conversion, but the Regulation does not specify what should be included in these draft terms but they should at least contain the proposed articles.\textsuperscript{202} The management of the company must also prepare a report on the draft terms of conversion, explaining and justifying the legal and economic aspects and indicating the implications of the conversion for shareholders and employees.\textsuperscript{203}

6.3 Final words

There are four methods of forming an SE company and when making a choice there are some factors that need to be taken into consideration. Depending on what the motive is and what company form that is existing today the choice would be different. These four methods are depending on what the company/companies participating in the formation wants to achieve.


There are some general remarks applying to all four methods but there are also some differences depending on which method the company/companies will choose.

All four methods are applicable to public limited-liability companies, whilst only two of the methods can be used if a private company would create an SE company. In three out of four methods there is a need for the management or administrative organ of the company to prepare draft terms for the formation. When creating a subsidiary SE there is no need.

When creating an SE by merger, this leads to a transfer of the company from one Member State to another and this gives the Member State from where the company wishes transfer the right to oppose the transfer of a company from it to another Member state on the grounds of public interest. This means that a creation of an SE by the creation of a holding SE, by the creation of a subsidiary SE or by conversion can not be hindered on the grounds of public interest because it does not include the transfer of the company from one Member State to another.

The formation of an SE by merger or by conversion results in the dissolution of the company/companies concerned and the incorporation of a new company, whilst the formation of an SE by the creation of a holding SE or a subsidiary SE means that the concerned companies continue to exist as a legal person.

When considering VCC which is a private limited-liability company they can use two of these four methods to create an SE company. VCC can create a holding SE or a subsidiary SE depending on what they want to achieve. VCC will need to take into consideration how their company structure looks today and how they want it to look if they would create an SE company. There will be some differences depending on the method they choose which we will look into in more detail below, and we will also try to explain how the choice of method would affect VCC and their company structure.
7 Applicable law

7.1 Freedom of establishment

Restriction on freedom of establishment of nationals from one Member State to another Member State shall be prohibited. The restrictions are also prohibited if an agency, branch or subsidiary is established by a national of a Member State in another Member State. A company formed under the law in one Member State and having its registered office or place of business within the EU shall be treated in the same way as nationals in that Member State. This means that companies has the possibility to have activities in other Member States and act on the same conditions as companies under that Member States law. This means that there are a lot of rules and laws to consider for a company which act in many different Member States.

In VCC’s case, which is a company that acts outside the market in the European Union as well, there are many different systems of law to pay attention to. If VCC created an SE company, the law in that Member State where they choose to register their office would mainly govern the company. VCC acts on other markets, creating an SE would maybe lead to administrative relieves and easier company structure on the market within the Union, but still the companies outside EU is governed by another law and VCC does still have to consider more than one legal system.

A private limited company, in a Member State, is able to establish themselves in another state within the Union. They can carry on their business in another state within EU in a branch, agency or subsidiary. There are needs for private limited liability companies to make cross-border establishments, and they have the possibility to do so. VCC is today a private limited liability company acting through cross-border establishment during totally or partly owned subsidiaries in the European Union and outside the union. The Centros case shows that a company can be set up in one country, and use that states law in a favourable way, (in the Centros case make use of Great Britain’s advantageous rules concerning the minimum capital) and then only act in another Member State.

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204 EC Treaty art.43.
205 EC Treaty art.48.
206 C-212/97 Centros v. Erhvervs og Selskabsstyrelsen p.20.
208 VCC company structure
7.2 Harmonized law today

The company law directives harmonize a lot of company law areas today, but all directives are not applicable to private limited companies. Some of the directives are only applicable to public limited companies, and this make the company type more equal with other public companies within the union than the similarities between private limited companies with different European nationalities.

Rules about annual accounts are harmonized within the EU through the fourth company law directive. The reason for harmonized rules within this area is because the members and the third parties need protection.\textsuperscript{209} The annual accounts must include the balance sheets and the loss and profit account and the notes of the account.\textsuperscript{210} There is fair if companies in competition with each other must go public with minimum financial information.\textsuperscript{211} The rules about the consolidated accounts are also common within the Union to protect the parties with interest in the company.\textsuperscript{212}

The proposal on a 14\textsuperscript{th} company law directive which only is, as mentioned a proposal, would allow all limited companies to transfer their seat.\textsuperscript{213} If the proposal will become reality, transfer of the registered office will be a possibility in the future without the company first to be wound up in the home Member State, the personality of the company will be moved to the new Member State and will not be lost.\textsuperscript{214} If the 14\textsuperscript{th} company law directive will come into force, VCC can remains as a private limited company and have the same rights as a public limited liability company to move the registered office within the Union. The advantages of having the possibility to move the registered office is for example that the company can make benefits by market changes and choose the market which meets the requirements of the company.\textsuperscript{215}

All kind of limited liability companies have the possibility to make cross-border mergers with companies from other Member States if the Member State allows that.\textsuperscript{216} To complete a single market within EU, there are necessary to have the possibility for companies to make cross-border mergers. Rules about cross-border mergers are since the tenth directive came into force harmonized. Before the tenth directive came into force the companies was

\begin{itemize}
\item 209 Directive 78/660/EEC preamble.
\item 210 Directive 78/660/EEC art. 2(1).
\item 211 Directive 78/660/EEC preamble.
\item 212 Directive 83/349/EEC preamble.
\item 213 Proposal for a 14th company law directive background 4.
\item 214 Proposal for a 14th company law directive background 1.
\item 215 Proposal for a 14th company law directive background 1.
\item 216 Directive 2005/56/EC preamble (2).
\end{itemize}
encounter legislative and administrative difficulties when making cross-border mergers.\textsuperscript{217} With common rules within this area it is easier to make those kind of mergers, and the same rules are applicable when merging with companies from different Member States, when the issues is dealt with in the directive.

Even if the law is more harmonized for public limited liability companies within the Union, the most important directive is also applicable to private limited liability companies. The directive which aloud cross-border mergers are the most important directive for a company which operate on the internal market, and VCC can use the possibilities this directive gives today. If the proposal which aloud the companies to transfer the registered office becomes reality, the directive will apply on VCC, even if it is a private company.

### 7.3 The difference with an SE

Today, only the SE company has the possibility to move the registered office.\textsuperscript{218} This make it possible to “jurisdiction-shopping”,\textsuperscript{219} the company become flexible and have the freedom to move around within the Union to use the most favourable rules at the moment. The Centros case and other cases from the ECJ have already agreed on “jurisdiction-shopping” to a certain degree.\textsuperscript{220} A company can again to a certain degree use the more favourable rules in another Member State as it is today,\textsuperscript{221} without creating an SE company.

An SE company can in its statute choose between one- and two-tier systems.\textsuperscript{222} Before the SE Regulation came into force and gave the SE companies a chance to choose between the two systems, Sweden only recognised the one-tier system.\textsuperscript{223} If VCC choose to create an SE company, they have the possibility to choose between the two management systems. There are no big differences between the systems, as mentioned earlier the one-tier system means that the board of directors manage the company, and they are supervised by the general meeting. The other system, the two-tier-system, means that a management board manage the company, and is supervised by a supervisory board.\textsuperscript{224} In both cases, there are a board which is responsible to manage the company and they are supervised. A thought is that the shareholders have a bit more to say about the management in the one-tier system where the general meeting supervises the board of directors. In the two-tier system the general

\textsuperscript{217} Directive 2005/56/EC preamble (1).

\textsuperscript{218} SE Regulation art. 8(!).

\textsuperscript{219} Bücken, T 2005. p.3.

\textsuperscript{220} Bücken, T 2005. p. 15. and judgement in C-212/97 Centros v. Erhvervs og Selskabsstyrelsen.

\textsuperscript{221} C-212/97 Centros v. Erhvervs og Selskabsstyrelsen para 39.

\textsuperscript{222} Werlauff, E (a). 2003. p. 75 and 79.

\textsuperscript{223} Storm P and Gerven D, 2006, p. 440.

\textsuperscript{224} Storm P and Gerven D, 2006, p.442-443.
meeting choose the members of the supervisory board.\textsuperscript{225} This can maybe be seen as a detour, the one-tier system can make the shareholders feel like they have a better view into the company.

### 7.4 Final words

VCC has many subsidiaries both outside and inside the European Union.\textsuperscript{226} The possibility to make branches of subsidiaries and the possibility for the company to act under only one legislation would probably save a lot of money for the company. Since VCC also has a lot of subsidiaries outside the EU, they must consider several legislations even if they create an SE.

The fact that an SE is a European company and has a European nationality can maybe show that the willingness of the company to act on the European market. A re-organisation to an SE is costly and takes a lot of time, and even if this can be seen as an advantage, this is a very small advantage and can only be seen as a plus. The European market is more or less harmonised today and the psychological trade barriers is already over won, a common European market can already before the introduction of the SE company be seen as completed.

Without forming an SE, VCC has the possibility to do cross-border mergers. Since they already have this possibility, they can operate international without creating an SE. If the 14\textsuperscript{th} directive becomes reality, it is a possibility to move the registered office as well, this is maybe not of that importance, move the registered office is not as necessary for a company as the cross-border mergers.

Many companies state that one motive to create an SE is to simplify the structure of the company group.\textsuperscript{227} There is an option to turn subsidiaries within the Union into branches, but the subsidiaries outside the EU must remain subsidiaries.

\textsuperscript{225} Storm P and Gerven D, 2006, p.444.

\textsuperscript{226} VCC company structure

\textsuperscript{227} www.seurope-network.org 2006-05-01.
8 Different sectors

8.1 Introduction
As mentioned above the interest of creating an SE has not been very high. Both advantages and disadvantages can be found with the SE and the question is if the advantages are so good, that the already existing companies think there is an idea to structure their business to the new company form?

8.2 Existing and planned SE´s and companies interested to start SE´s
Today only four SE companies are registered in Sweden. Three of them are shell companies and one is a financial company. Alfred Berg, an investment bank active in the Nordic countries, has become an SE company, the company was registered 30 September 2005. The SE Regulation allowed the subsidiaries in Denmark, Finland and Norway to turn into branches of the Swedish company. According to the managing director of Alfred Berg Holding there will be advantages to operate with a structure of branches instead of separate companies. It will also reduce operational risks, enhance capital efficiency and increase the operational efficiency; it will be less accounting procedures and reduced internal and external reporting with only one entity.

Nordea is planning to set up an SE company in 2006. As an SE company Nordea can act as one legal unit and because of that the costs expects to decrease. Other companies which operate in Sweden and are interested to create an SE are reported to include SEB and TeliaSonera. The companies in the financial sector seems to be eager to create an SE, is that just a coincidence or do that sector have more advantages than other sectors?

8.3 Difference between sectors
Most of the companies in Sweden which are interested to create an SE are in the financial sector. Alfred Berg is as mentioned already an SE and Nordea and SEB have planned or are interesting to become an European company. There are special rules applicable to fi-

229 Press release Alfred Berg 2005-04-12
nancial companies which not are applicable to companies within other sectors. Existing banking groups can through forming an SE streamline their operations.233

The law of the home country is applicable when it comes to guarantees for deposit and investment. This means that if a foreign bank becomes a branch of an SE company with a registered office in Sweden, the Swedish law for deposits and investments are applicable to the branch. Their law are harmonized within the most important areas of financial companies, stability in the financial system and consumer protection, through directives. 234 The national law on deposits and protection for investments are based on EC directives. The consequences of financial SE companies are that the system of guarantees where the company has its registered office takes over the responsibility from the law of other countries.235

Not much can be said about the other sectors, there is no specific information about other sectors than the financial that we have found. A thought is that there are more rules and national laws applicable to that sector than to another ordinary company. Also businesses in other sectors could simplify their administration and “obtain a solid legal framework for their operations”.236

8.4 Final words

Since the rules within the areas of deposits and protection for investments only are going to be governed under one law in the SE company, money can be saved. If an SE in the financial sector acquires a company in another Member State it does not have to get to know about the system in the new country and that will save a lot of money.

Of course there are administrative relieves for all types of companies, when only the law of the state where the SE has its registered office is applicable. In the financial sector there are more rules than in a company operating in another sector, there can therefore be more money to save for a company active in that sector.

Advantages and disadvantages

9.1 Advantages

A benefit the SE company, with activity in more Member State, has towards national companies, is that the SE is organized under a supra-national European law rather than the law of each Member State. The SE can operate on the internal market within EU with one set of rules and do not have to comply with all different laws of the Member States where these companies have subsidiaries. To fully use the advantages of the European single market, it is important to see the European perspective of the market. With a common company form within the Member State it is easier for a company to act at a community wide level.

Another advantage is that there are a unified management and reporting system within the SE. The administrative and legal costs will therefore be reduced. The companies do not longer need to set up a network of subsidiaries governed by different national laws. An SE company has branches in other states and they are governed by the law of the Member State where the SE has its registered office. There is only one legal system instead of legal systems for each country which the company operates within.

Only the SE company can transfer the registered office to another Member State without losing its legal personality. The national company is more bound to its home state and has to undergo a dissolution and re-formation in the new country. The SE company does not need to undergo a restructure to be set up in a new Member State, it can move its registered office easy and make use of the advantages the internal market offers. The mobility which comes with the creation of an SE company can be of even greater use when the aim of a European single market is reached. To act under one set of rules within the union, no matter of which country you are doing business with, is an advantage for a company.

The SE company has a European nationality. This shows that the company has willingness to trade within the Union, and wants to act on an international arena. The barrier between different nationalities can be less visible and it can be seen as easier to do businesses with a company with a recognizable personality.

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“... the only way to achieve viable competitive size as the European markets integrates—at least for the smaller European countries like the Nordic- will be through cross-border mergers of significant domestic competitors.”¹⁴¹ For a large company there can be competitive advantages to make cross-border mergers and expand on the European market. The SE makes it easier for such events. All companies can be of benefit to merge and make more competitive structures and compete with companies in larger countries in another way if they create an SE company.

“This political accord represents a major breakthrough for companies seeking an efficient structure to operate on a pan-European basis. The European Company will enable companies to expand and restructure their cross-border operations without the costly and time-consuming red tape of having to set up a network of subsidiaries.”²⁴⁴ The SE company makes it possible to act like one legal unit, which will save both a lot of time and money for a company.

9.2 Disadvantages

The SE company was going to result in a European jurisdiction in company law with its own legislative base and case law. This has not been the case, there are as many forms of an SE as it is Member States within EU.²⁴⁵ The way the SE company is formed today makes it impossible to see the European company as a common company type within the Union, there are too many differences. The renvoi technique makes it impossible to see the SE as one uniform company type. “The SE as a result only partly has a European character”.²⁴⁶

The SE shall be registered in the Member State where it has its registered office.²⁴⁷ There is no common European public authority for the registrations. That makes it a bit difficult to get an overview over the companies. There would be easier if there were one authority for registration of the companies, it is not very easy to find an updated version on existing SE’s.

For a company which for many years has operated within the same legal system, it can be seen as natural to continue operate under that well known law, instead of learning a new set of rules. It can feel safe to continue to operate in a way that have worked in many years be-

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²⁴⁷ SE Regulation art. 12 (1).
fore and not change the company type to an SE, even if it can save the company some money in the long term.

9.2.1 In a Swedish perspective
The SE could be an interesting alternative for corporate groups with European-wide operations. When there are no specific rules for the SE company in the SE Regulation, the rules governing a public “aktiebolag” applies to the SE. This means that in some cases there will be no big difference between a Swedish company and an SE. Otherwise no special advantages or disadvantages can be seen for an SE established in Sweden compared with an SE established in another Member State.

9.3 Final words
What some people may see as an advantage can other see as a disadvantages, for example the rules which applies to the SE. Since the SE Regulation refers to national law in more than one area, it can not be seen as one set of rules which is applicable to the SE. In the reality there are differences between SE companies depending on where there are registered, because of the referring to national law from the regulation. What may have been seen as the greatest advantage before the SE Regulation entered into force, the supra-nationality of the company, is not the reality today.

The SE Regulation is though supranational, and rules within several areas are the same for SE companies not depending on where they are registered. There is a weakness that the regulation refers to national law at many points, but since the company law within EU becomes more and more harmonized, the rules are still quite similar. If the company act on the European market, it can be seen as an advantage to act under the SE Regulation, since some rules are the same for SE companies no matter on where they are registered. The SE Regulation are supra-national and when the SE company is a recognizable company type within Europe, companies must see it as an advantage with a common company type, governed by one law within the Union.

If the European Union one day is going to be one single market, there is a great advantage if the companies which act on the market only are governed with one single set of rules. It will make it easier for companies to trade if all rules are the same on the market. If a company shall enter a market in another Member State it does not have to learn about that states legal system and that will save time and money.

The mobility, and the possibility to move the registered office, which can be seen as the greatest advantage will not be that important if the proposal for a 14th directive becomes reality. If a public limited-liability also can move the registered office there are not that

many differences between the SE and the national public companies. Today only the SE has this possibility and if the 14th directive stays as a proposal there can be a point to create an SE, but if the directive comes into force there are not that necessary, since the differences between the companies types in that case not are of that much importance.

It can be a great advantage for a company which is on the way to expand businesses in other Member States. Instead of learning the new legal systems within those states, an SE is created and the company can operate under the law they had before the expanding. But if the company already has subsidiaries and know the law within all states where they are operating, there is maybe not such a good idea to form an SE of the already existing company, if the system already works well. There is a process to create an SE, but it can reduce the costs, since the rules become more similar within several areas.
10 Alternative for private companies

10.1 Private-public company

A company is public when they have the possibility to offer shares to the public, otherwise the company is private.\textsuperscript{249} VCC is as earlier mentioned a private company.

The SE company is a European public limited-liability company.\textsuperscript{250} As a private company VCC has an option to create an SE company\textsuperscript{251}, but the SE company must be public.

A private company can become public through change the articles of association and register the change at Bolagsverket.\textsuperscript{252} That means in practice that VCC also has an option to change from being a private company to become a public company and create an SE through a merger with another company, if the companies are governed by the law of different Member States.\textsuperscript{253} If VCC becomes a public company, they have the possibility to be transformed into an SE, because they have had an subsidiary governed by the law of another Member State in at least two years.\textsuperscript{254}

If VCC would like to operate as a public company, they would probably already have chosen this type of company. If there is no interest to open up the company and sell out shares to the public, there are no obvious advantages to create an public company if you already have a private company which works well.

In the future, there may be a common European company law for private companies as well and it can be a possibility for VCC to create an European private company.

\textsuperscript{249} Regler vad gäller publika kontra privata aktiebolag, www.bolag.org, 2006-05-08.

\textsuperscript{250} SE Regulation.

\textsuperscript{251} SE Regulation art.2.

\textsuperscript{252} www.bolagsverket.se 2006-05-06.

\textsuperscript{253} SE Regulation art.2(1).

\textsuperscript{254} SE Regulation art.2(4) and VCC company structure.
10.1.1 Small and medium sized companies

Most of the companies within the European Union are of small or medium size. The possibility to create a European company is most suitable for larger enterprises.\(^{255}\) The EPC would be an SE for smaller companies.

The EPC is a minor European Company for small and medium sized companies, which for example means that the company not can have more than 250 employees. The EPC should be seen as a complementary form of company to the national companies and the SE. There is a proposed regulation on the EPC.\(^{256}\) There is a need for an EPC because they should, like the larger companies, have the possibility to reach maximum development.\(^{257}\)

10.2 Advantages

An introduction of an EPC as a new European Company form would lead to a modernization of national rules for private companies. It would also make the efficiency and competitiveness of the business for private companies.\(^{258}\) The EPC is also needed to guarantee the private companies equal opportunities to larger public companies, which have the possibility to create an SE.\(^{259}\) For a fair competition on the European market an SE company for smaller, not public companies must exist. Private companies should have the same possibilities as larger public companies to act on the market within the European Union.

Most advantages of an EPC do small and medium sized enterprises have, which are active in more than one Member State, like the SE company. Just like the SE company will the administrative costs be reduced and deeper knowledge in the system of law in the home country is necessary, but no deep knowledge in other legal systems is necessary, since the company is under supra-national law.

With European companies only, there is only a need for the company to have knowledge about one company law system, even if you are operating on a European level. To only operate less than one legal system will reduce costs a lot. Even if it can be like for the SE, that the company is governed by national law when the question not is regulated in the Regula-


\(^{256}\) Werlauff E, 2003. (b) p.160.


tion, there still are supra-national rules which applies in the first hand. The rules on the European company are probably going towards a development with more harmonized rules, and the rules governing these companies will probably be fully harmonized in the future. The aim with a supra-national company will come closer in the future, since the company laws within the Member States going towards one single set of company rules.

The EPC has been drafted like a European company which not are subject to any national law. That is an enormous advantage compared to the SE company. A totally European company form, which the thought with the SE was from the beginning, will lead to enormous relieve for private companies to operate on a European market. Only one common law system would be necessary to know about, and for a small company this can open up new possibilities to enter new markets, which the company maybe not could afford before.

Further, for example, engineering companies must operate on a community-wide level because of their specialisation to serve niche markets. It could be expensive for a private companies to set up subsidiaries in different countries and therefore an EPC would be an interesting option for these companies. The companies also think there is an advantage to not have to deal with many different company law systems, there is costly both to set up and manage companies under different systems of law.

10.3 Disadvantages

If there is a possibility to start an EPC in the future, there will be a further type of company to choose for companies within the EU. There are already several company types to choose between if you are going to set up a company within a Member State in EU, both the national types and the SE company can be set up. Maybe there already are enough company types to choose between, and no other type such as an EPC is necessary.

As for the SE company the EPC would be of little use if cross-border mergers and transfer of the seat can be allowed by national law, which will be the case if the new directives become more than proposals.


10.4 Final words

Is there a need for a further type of European company? The SE company has not been very popular so far and if there is a lot of work put into the idea of the EPC, it might be a thought to wait and see the development of the use of SE companies, before a lot of effort is put into the law of an EPC. The advantages and disadvantages are similar to the SE, and therefore there would be a good idea to first evaluate the SE and then take a position whether EPC should be a reality or not.

One thought is that a private company could have less money than a larger public company, and can therefore maybe have a better use of a common European company law. It might be the case that smaller companies try the luck on the European market, and do think it is less risky to act under a law system which is already known. The reduce of administrative costs can have more effect on a smaller company than a larger and can strengthen the competition on the European market.
11 Possibilities for VCC to form an SE

11.1 Formation of a holding SE

One possibility for VCC to form an SE company is to do it by forming a holding SE. This type of formation is applicable to private limited-liability companies and is therefore one of two possibilities for VCC to set up an SE company.

Swedish public or private limited-liability companies may participate in the formation of a holding SE, in which case shareholders of the participating companies contribute their shares to the SE in exchange for shares in the latter and the SE becomes the parent company of the participating companies.\(^{263}\)

The shares contributed by the shareholders must represent more than 50% of the voting rights. Shareholders that contribute their shares to a holding SE shall receive shares in the latter. A holding SE shall be registered in the Member State where its registered office is located.

The newly formed holding SE is a separate legal entity with its own assets and liabilities.\(^{264}\) The draft terms shall fix the minimum proportion of shares in each company promoting the operation which its shareholders must contribute to the SE; this should be more than those shares conferring 50% of the permanent voting rights.\(^{265}\) After the formation of a holding SE the shares of the promoting companies will be either the only or in any case the main assets of the SE.\(^{266}\)

The formation of a holding SE requires (as mentioned in chapter 6.2.2.) that the management or the administrative organ of the participating companies prepare draft terms for the formation and that an independent expert gives an opinion on the draft terms.\(^{267}\) It also requires that an arrangement for employee involvement is concluded.\(^{268}\) When the draft

\(^{263}\) Storm P and Gerven D, 2006, p. 437.

\(^{264}\) Storm P and Gerven D, 2006, p. 47.


\(^{267}\) Council Regulation (EC) No 2157/2001 of October 2001, on the statute for a European company (SE), Art. 32:2 and 32:4

terms of formation of the holding SE have been approved, the shareholders of each company promoting the operation have three months to make a decision on whether they wish to contribute their shares to the holding SE in exchange for shares in the latter.  

In Article 32 it is explicitly stated that the companies that are promoting the formation of a holding SE continue to exist. It should be kept in mind that the holding SE is a new entity, which to some extent is superordinate to the companies forming it. This means that the companies setting up the holding SE only continue to exist as subsidiaries and central decisions are likely to be made at the level of the holding and also take effect from there.

It is possible for companies which are registered as well as are having their head office in the same Member State to create a holding SE, if each of them has a subsidiary or branch in another Member State. This means that VCC in this case has the possibility to create a holding SE together with another company that also has its head office in Sweden, if also this other company has a subsidiary or branch in another Member state.

The SE Regulation does not exclude that a holding SE will have its registered office in another Member State than the state or states where the promoting companies have their office. This means that VCC would be able to establish a holding SE in another Member State.

### 11.2 Formation of a subsidiary SE

To set up a subsidiary SE is perhaps the fastest and less restrictive method for VCC to form an SE company. The formation of a subsidiary SE does not require that the management or administrative organ of the company must prepare draft terms for the formation.

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274 Werlauff E, 2003, (a)
The formation of a subsidiary SE is a matter that is totally left to be governed by the national law. This means that the rules on formation of a Swedish limited-liability company apply to the formation of a subsidiary SE with its registered office in Sweden. The Companies Act permits the shares in a subsidiary SE to be held by a sole shareholder.

The formation of a subsidiary SE is only governed by two Articles in the SE Regulation, which means according to the renvoi technique (explained in chapter 3.4) that a subsidiary SE will be governed by the rules applicable to public limited-liability companies of the Member State where its registered office is located. The Regulation refers to national law for the conditions and formalities for incorporation of a subsidiary SE.

The capital of a subsidiary SE will be held by founding entities or founding SE. In the event there are two founders, each will hold a number of shares in proportion to its capital contribution to the SE.

Forming a subsidiary SE means that the participating companies have the possibility to choose how the shares should be owned. The SE Regulation says nothing about how large a proportion of the SE company’s capital shall be subscribed by the individual founding companies. This means that the SE company can either be the subsidiary of one of the founding companies, if it has more than 50% of the voting rights in the SE company, or none of them, if none of them obtains such a majority of voting rights.

The SE Regulation also says nothing about what shall be invested in the SE company. The investment could be in cash, or it could be a non-capital contribution, as for example one or more undertakings or branches of undertakings which belong to one or more of the participating companies. This could be one of the reasons to choose this method when forming an SE company.

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280 Werlauff, E, 2003 (a), p.65.
281 Werlauff, E, 2003 (a), p.65.
11.3 Conversion into an SE company

VCC also has the possibility to convert into an SE company. This method requires that VCC first convert into a public company\textsuperscript{282} which means that this is not an immediate option for VCC, but the option still exist.

A conversion would mean a continuation of VCC in another form and it does not result in the dissolution of the company and the incorporation of a new entity.\textsuperscript{283} This method would mean less restructuring of VCC’s legal structure because it would not lead to the creation of another company, rather a conversion of one company into another.

We will not go deeper into this alternative because it is not an option to VCC if they wishes to remain as a private company.

11.4 Final words

As above mentioned, the least restrictive way to form an SE company is to set up a subsidiary SE. The formation of a subsidiary SE require less than the formation of a holding SE, but VCC would still be able to receive the advantages that apply to an SE company.

Both when forming an SE company by setting up a holding company or a subsidiary, the SE’s country of registered office does not have to be identical to the country or countries of the registered office of the promoting entities.\textsuperscript{284}

The formation of a holding SE requires more from the participating companies in comparison with the formation of a subsidiary SE. The management or the administrative organ of the participating companies must prepare draft terms for the formation, which is not needed when forming a subsidiary SE. This draft terms are comprehensive the formation of a holding SE is therefore more complicated than the formation of a subsidiary SE.

It would also be easier to form a subsidiary SE when considering that the formation is governed by the provisions of national law applicable to public limited-liability companies.\textsuperscript{285}

\textsuperscript{282} Council Regulation (EC) No 2157/2001 of October 2001, on the statute for a European company (SE), Art. 2:4

\textsuperscript{283} Council Regulation (EC) No 2157/2001 of October 2001, on the statute for a European company (SE), Art. 37:2

\textsuperscript{284} The European public limited company, Lovells 2004, (2006-05-01)
The SE Regulation refers to national law for the conditions and formalities for incorporation of a subsidiary SE. This also has the advantage that the knowledge of the own national law often is higher and the formation in that perspective would therefore not result in higher costs for the company.

Whether VCC chooses to form an SE company by forming a holding company or by forming a subsidiary, they have to have in mind that an SE company always has to be formed as a public company. This means that the subsidiary SE or the holding SE would become a public limited liability company.

In the next chapter we are going to show different ways of how Volvo Group legal structure could look like after the formation of an SE company.

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12 Volvo Car Group Legal Structure

12.1 Introduction

VCC has as mentioned above and according to their situation today (remaining as a private company) two possible ways to form an SE company. Both options would mean a restructuring of VCC’s company structure in different ways. This two options is based on VCC’s current company form. In this chapter we will give two different examples of how VCC’s company structure could look like after the creation of a holding SE or subsidiary SE.

VCC also has the possibility to convert to an SE company in accordance with Art. 2:4, but as stated in the Article this requires that VCC first converts to a public company. Perhaps this is not an alternative for VCC but the possibility still exists.

12.2 Volvo Car Group legal structure 2006

This is a slightly simplified version of Volvo Car Group legal structure as it looks today and shows only the VCC shareholdings.

```
  Sweden
     ┌────────────────────┐
     │ Ford VHC AB       │
     │                  100% │
     │ Sweden            │
     └────────────────────┘

  Sweden
     ┌────────────────────┐
     │ Volvo personvagnar holding ab |
     │                  100% │
     │ Sweden            │
     └────────────────────┘

  Sweden
     ┌────────────────────┐
     │ Volvo Car Corporation |

  Sweden
     ┌────────────────────┐
     │ S                 |
     │                  100% |
     │ S                 |
     │                  100% |
     │ S                 |
     │                  100% |
     │ S                 |
     │                  100% |
     │ S                 |
     │                  100% |
     │ S                 |

S = Subsidiary
```
VCC wholly or partly owns a number of subsidiaries. The company legal structure of VCC is complicated and a restructuring after a creation of an SE company could simplify the structure. There may be various reasons for the complicated company structure, such as strategic, tax and historical, but we are explaining it from one perspective only, the company law perspective.
12.3  **Volvo Car Group legal structure after the creation of a holding SE, in accordance with Art. 2:2**

VCC together with another company established in the European Union can ask their shareholders to contribute their shares to an SE, which will become the parent company in exchange for shares in the holding SE\(^{287}\).

\[\text{Art 2:2; Public and private limited-liability companies such as referred to in Annex II, formed under the law of a Member State, with registered offices and head offices within the Community may promote the formation of a holding SE provided that each of at least two of them:}\]

\((a)\) is governed by the law of a different Member State, or
\((b)\) has for at least two years had a subsidiary company governed by the law of another Member State or a branch situated in another Member State.

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\(^{287}\) Storm P and Gerven D, 2006, p. 46
S = Subsidiary

S 1; could be placed in another Member State or in Sweden if it has got a subsidiary or a branch in another Member State for at least two years.

VCC also has the possibility to make the creation together with more than one subsidiary.

The holding SE could also be the owner of numbers of branches (future company acquisitions or start ups).

VCC holding SE now has the possibility to turn their subsidiaries inside the European Union into branches in a way that will mean that the same law would be applicable to those branches. If VCC turn their subsidiaries inside the European Union into branches, VCC could get a full benefit from the SE company form. Of course VCC could turn their subsidiaries into branches without first create an SE company but then the same law would not apply to the branches in other Member States. The same law could never be applicable to the subsidiaries outside the European Union.

This is an example of how Volvo Car Group legal structure could look like after the creation of a holding SE. This is only one example and means that this could be done in other ways.
12.4 Volvo Car Group legal structure after the creation of a subsidiary SE, in accordance with Art. 2:3

VCC together with another company established in the European Union can form a subsidiary SE and become the parent company/companies of the SE company.\(^{288}\)

\textit{Art. 2:3; Companies and firms within the meaning of the second paragraph of Article 48 of the Treaty and other legal bodies governed by public or private law, formed under the law of a Member State, with registered offices and head offices within the Community may form a subsidiary SE by subscribing for its shares, provided that each of at least two of them:}

\begin{itemize}
  \item[(c)] is governed by the law of a different Member State, or
  \item[(d)] has for at least two years had a subsidiary company governed by the law of another Member State or a branch situated in another Member State.
\end{itemize}

\(^{288}\) Werlauff E, 2003 (a), p. 65.
S = Subsidiary

B = Branches (future company acquisitions or start ups). The same law would be applicable to those branches as to the SE company.

S 1; could be placed in another Member State or in Sweden if it has got a subsidiary or a branch in another Member State for at least two years.

VCC also has the possibility to make the creation together with more than one subsidiary.

The Swedish Aktiebolag permits the shares in a subsidiary SE to be held by a sole shareholder. This means that the SE company could either be the subsidiary of one of the founding companies, if it has more than 50% of the voting rights in the SE company, or none of them, if none of them obtains such a majority of voting rights. This means VCC could be the wholly owner of the subsidiary SE.

The SE regulation refers to national law for the conditions and formalities for incorporation of a subsidiary SE. The rules on formation of a Swedish limited-liability company apply to the formation of a subsidiary SE with its registered office in Sweden.

This is an example of how Volvo Car Group legal structure could look like after the creation of a subsidiary SE. This is only one example and means that this could be done in other ways.

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289 Aktiebolagslagen


12.5 Volvo Car Group legal structure after a conversion into an SE company, in accordance with Art. 2:4

For VCC to be able to convert into an SE company, VCC first has to convert into a public company. Article 2:4 states that this is only an option for a public limited-liability company.

Art. 2:4; A public limited-liability company, formed under the law of a Member State, which has its registered office and head office within the Community may be transformed into an SE if for at least two years it has had a subsidiary company governed by the law of another Member State.

This method would mean that the SE company sits centrally in the structure and would lead to a simplified company structure for VCC. Today this is not an immediate option for VCC because this is as mentioned earlier only an option to public limited-liability companies.

If VCC after a conversion into an SE company turn its subsidiaries inside the European Union into branches, the branches would be governed by the same law as VCC SE.
12.6 Final words

This is as mentioned above only examples of how to restructure VCC’s company structure after the creation of an SE company. Which method VCC should choose is depending on what the company wants to achieve. Most simple to create is the subsidiary SE, because this creation is as mentioned earlier governed by the rules on formation of a Swedish limited-liability company and does not require the preparation of draft terms.

One motive is the desire to acquire a supranational form of incorporation and perhaps also the possibility of moving the registered office. If the motive is to gather together several companies under one company the holding SE could be the right method. The motive could also be to join together companies in different countries across boundaries. In this case the participating companies maintain their independence, but merge common parts of their undertakings and the formation of a subsidiary SE could be the right method. So, as earlier said the choice of method is depending on the motives for the formation and VCC has to consider this if they would form an SE company.

If VCC converts to a public company, an SE company could also be formed by conversion. This would mean that VCC would convert into an SE company and could after that turn their subsidiaries into branches. This method would lead to the most simplified company structure but it would also require the effort of convert a private company into a public company. This method could only be an option if VCC converts into an public company.

This is as mentioned earlier a slightly simplified illustration and a large number of other factors would need to be taken into consideration, such as for example tax law and employee law, if VCC chooses to form an SE company.

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13 What would a creation of an SE company mean for VCC?

13.1 Advantages that would apply to VCC if they form an SE company

The creation of an SE company for VCC would mean that they would have the possibility to transfer its registered office from one Member State to another Member State with relative ease, and this transfer would not result in the winding up of the SE or in the creation of a new legal person. This could be useful if the need arises in response to the changing needs of their business.

If VCC choose to form an SE company they have to turn the subsidiaries into branches and run the business under one common SE company to be able to use the advantage of having the same law applicable. This kind of restructure could lead to reduced administrative costs and a simplified company structure. The meaning of turning the subsidiaries into branches is to be able to operate throughout the European Union with one set of rules and a unified management and reporting system rather than all the different national laws of each Member State where they have subsidiaries. This would mean that VCC would have a better opportunity to expand and restructure their cross-border operations without the costly and time-consuming red tape of having to set up a network of subsidiaries all governed by different national laws.

One advantage that often is mentioned is the one that companies that create an SE company could save the business community up to 30,000 million pound per year in legal and administrative costs. This could be done because the SE would avoid the need to set up a financially costly and administratively time-consuming complex network of subsidiaries governed by different national laws and instead set up a single SE with branches in the other Member States where it conducts business. This advantage has been subject to lots of discussion and there are many different opinions of whiter this is true or not. Sure, some money could be saved but as to the numbers of how much it is just speculations and there has not been any clear case yet.

A formation of an SE company would also mean that VCC could restructure fast and easily and take the best possible advantage of the trading opportunities offered by the Internal Market and if they wish to operate in a series of different Member States they will not have to respect a series of national laws governing company start-ups, often at considerable legal and administrative cost.\textsuperscript{301}

Another advantage for VCC if they create an SE company would be that this new business form may have a value in publicity terms if they can show their international identity and work as a European company instead of a Swedish company. In such way it indicates that this company is a “real European undertaking” thereby possibly removing e.g. psychological barriers.\textsuperscript{302}

Another advantage is the flexibility with regard to the applicable legal system (jurisdiction shopping). This means that VCC after a formation of an SE company would have the possibility to transfer the SE company’s registered office to the Member State with the best options for VCC.\textsuperscript{303}

The creation of an SE company would mean that VCC could choose between a one-tier and a two-tier system.

Are these advantages interesting for VCC? Would VCC use them if they had the possibility to, or are these advantages more interesting to other companies or other sectors?

13.2 Disadvantages that would apply to VCC if they form an SE company

The original idea with the SE company has not yet become a reality and this leads to a considerable degree of legal uncertainty.\textsuperscript{304} This is because the SE Regulation on many occasions refers to the law of the Member State where the SE company has its registered office.


\textsuperscript{302} Stoldt M, Frequently asked questions (FAQ), SE Europe, www.seeurope-network.org/homepages/seeurope/secompanies.html, 2006-05-11,

\textsuperscript{303} Bäcker T, The European Company – A corporate lawyer’s perspective?, 12 April 2005, SEEurope Network

\textsuperscript{304} Gerven D, Storm P, 2006, p. 3.
The Tenth Company Law Directive provides a legal basis on cross-border merger. This means that VCC can do cross-border merger without first have to form an SE company.

If VCC form an SE company and turn their subsidiaries into branches, they would achieve a unified legal system for those entities, but their activity outside the European Union would still be governed by different national laws.\(^\text{305}\)

Another rather important question that has not been dealt with in the SE Regulation is the tax issue of this new European company type. The first proposal included the tax issue, but it had to be abandoned even if the European Parliament did not want so.\(^\text{306}\) This means that this question still has to be dealt with and it is a disadvantage that no one knows what will happen in this area. Hopefully in the future it will be an advantage instead of a disadvantage.

One important factor that has not been dealt with in this thesis is the relatively large participation of employees in the SE. This could from the view of VCC be seen as a disadvantage because this rule sets the obligation to ensure the participation and rights of the employees.\(^\text{307}\)

The formation of an SE company could be a complex and possibly time consuming formation procedure.\(^\text{308}\)

### 13.3 Final words

As you can see there are some advantages that come with the creation of an SE company but there are not that many disadvantages. But the question is whether those advantages are useful to VCC and if they are enough for VCC to be willing to create an SE company?

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\(^\text{308}\) Bücker T, The European Company – A corporate lawyer's perspective?, 12 April 2005, SEEurope Network
A creation of an SE could give VCC cost reductions as a result of a clear and streamlined company structure but on the other hand could the formation of an SE company be a complex and costly formation procedure.

One of VCC’s motives to form an SE company could be to simplify their company structure. Another could be to save money and to have the possibility to move its registered office. In the future, if VCC would form an SE company VCC would have the possibility to start or acquire branches with the SE company as an owner and thereby not have to learn about the legislation of another Member State and therefore save money.

Earlier ECJ case law gives companies in a Member State the right to establish themselves in another state within the Union. They can carry on their business in another state within EU in a branch, agency or subsidiary without first having to create an SE company.

Are VCC in need of those advantages and is it enough advantages for VCC to be willing to invest time and money to be able to form an SE company?
14 Conclusion

The SE company has not so far been a success. The idea with an European company with common company rules for all European companies within the Union has not really become reality. The SE company is not supranational, which it was supposed to be after the initial idea. Not many companies has started or shown interest in the new company type, even if it today is a couple of well-known larger enterprises which show interest to create the new company type.

The companies within the financial sector have shown a greater interest of the SE company than other sectors. A reason for that can be that companies within this sector have more rules to consider and they can maybe make more administrative relieves than companies within other sectors.

The fact that the SE Regulation not covers areas of taxation, competition, intellectual property rights and insolvency make the rules different between SE companies depending on where they are registered. The rules applicable to the areas above are Community law and the law of the Member State where the SE has its registered office. The referring to national law make it hard for companies to foresee what the rules are if the SE company is placed in a state where the company are not familiar with the legal system. If the rules within this area become harmonised, there would not be this legal uncertainty as it actually is today.

The legal uncertainty comes up because the SE Regulation does not cover all areas and it also refers to national law on several occasions. The SE companies are therefore not similar in the Member States, they look different in all Member States, and it still does not exist one company type within the Union, as was the thought from the beginning. If the areas which are excluded from the SE Regulation today become implemented in the Regulation and the referring back to national law ends, we think this company type would be more interesting to create.

A totally, supranational company type with one single set of rules can become an attractive alternative for companies to create, but not like it is today, a “half-european” company with equal rules only in some areas. As mentioned in chapter 8, the SE company only partly has an European character. To reach the aim with one internal market within EU, there is a need for a common company law so the companies are able to compete on the market on equal conditions. The thought with an European company is good but the rules governing the company must be equal within all Member States, to reach a supranational company, which was the thought from the beginning.

The SE company is public. Most companies within the European Union are private and to become an SE company they must change company type into a public company, since the
SE must be public. The EPC is only a proposal but the private company should have the same possibilities to have an European nationality as larger, public companies.

VCC is a private company, which means that they only have two options to create an SE. The most important differences for VCC if they set up an SE company instead of acting as a private company today would be that they have the possibility to move the registered office of the SE without losing its legal personality and in the future create branches under the SE company instead of subsidiaries under VCC. This are really good advantages for a company which operate in many countries. The same law are applicable to branches as to the SE.

The possibility to move the registered office without creating an SE company could be a possibility if the 14th company law directive becomes reality. This advantage could in other words be possible to make in the future for ordinary companies anyway. There is a lot of work to move the registered office and it is not likely with companies moving around their registered offices even if they have the possibility. Moving the registered office can give the company possibility to operate from the country which has most favourable rules for the moment. Since the company law is getting more and more harmonized within the EU, maybe all Member States will have about equal rules within this area and the possibility to move the registered office will not be a very good advantage.

If VCC choose to create an SE, VCC would still remain as a private limited company and the SE company would be a subsidiary to VCC or a holding company. One of the greatest advantages for a company to create an SE must be the possibility to turn the subsidiaries into branches and have the same law applicable to the branches. VCC does not really have this possibility, since they remain as a private company and therefore must create an SE and have branches under the new SE company. The SE would become a public company and future companies which are bought by VCC could instead be bought of the SE company and become a branch under the SE. The subsidiaries of VCC today would remain as subsidiaries if you don’t make them subsidiaries owned by the SE company and turn them into branches instead. If the subsidiaries today is going to be turned into branches, which would be owned by the SE company, VCC have to change the company structure totally, which are a costly process.

Since VCC operate world wide, they still have to consider many different legal systems. Even if they create an SE company, it is only the companies they own which are placed within the EU, which they can turn into branches. The subsidiaries outside the Union remain as subsidiaries and are still governed by their national law. For a company which only operate within the EU and through creating an SE have the same law applicable to the whole company group can make a greater advantage than companies which act on a world wide market.

If VCC already was a public company, they could convert or merge and become an SE. This would put VCC in a totally different position. VCC could in that case turn their sub-
subsidiaries within the European Union into branches and have the same law applicable to the branches as to VCC. This would make the company structure easier within the European Union, but VCC still have to consider other laws for the companies placed outside the EU.

After the tenth company law directive came into force, cross-border mergers can be made between companies within the EU without creating an SE company. Today VCC already as a private limited-liability company has the possibility to make cross-border mergers with companies within different Member States in the European Union.

If VCC creates an SE, there is a possibility to choose between the one- and the two-tier system. The two-tier system is news for Swedish companies and means that the supervisory board will control the management. Germany recognized the two-tier system before. An advantage is that now companies within EU have the possibility to have the same system of management. This can make it easier for companies to only have one common system, even if operating in more than one Member State. An unified management and reporting system could as mentioned in the chapter above lead to a reduce of the administrative costs.

Some people mean that there are psychological trade-barriers that must be over won and a company with European nationality will show the willingness of the company to act on not only a national market. In VCC’s case we think that the company already is very well-known as an international company and do not have to show the world through creating an SE that VCC wants to act on the European and the world market.

In the future when VCC wants to buy or start up new companies within the EU, there is an advantage if they make this under the SE company and make branches of the companies and mainly operate under one common law system within the European Union. When entering a new market within the European Union VCC do not have to learn about a new legal system, the law of the country where the SE company have its registered office will be applicable and that can save a lot of money.

The motives for VCC to create an SE could be that the company get more mobile, there is a possibility to move the registered office and act under one common law system within EU. Probably will the company law within EU become even more harmonized and the referring to national law may not be a problem in the future since the law within the Member State will be even more equal in the future. The company can have an easier structure within the European Union and a more common management, since branches can be used in a wider sense.

We think that if VCC should create an SE company the formation of a holding SE should be the best solution. The holding SE will have a better position in the company structure and it feels more logical to put branches and subsidiaries under a holding SE than under a
subsidiary SE. If VCC would like to turn existing subsidiaries into branches it will simplify the company structure more to put them under a holding SE rather than under a subsidiary SE.

One advantage for VCC to set up a subsidiary SE is that the company structure can look similar like today and the SE subsidiary will have a place besides the other subsidiaries to VCC, and future company acquisitions can be placed under the subsidiary SE. The formation of a subsidiary SE could also be easier since the formation is governed by provisions of national law applicable to public limited-liability companies.

We think that VCC should wait and remain as a private company as it is today. The development of the EC law is that we are heading towards a common European law. In a near future we can see a common company law within EU, and VCC could maybe enjoy the benefits the SE have today without changing company type. If the development turns out that way, VCC could remain as a private company and act on the market within the EU, on the same conditions as an SE.

There are not really any disadvantages of the SE, the question is instead if it is advantages enough to change company type or if it is too much trouble and cost too much. The thought with an European company is good, but maybe in the future all national company within the EU gets an European nationality.
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