



BDO Seidman, LLP  
Accountants and Consultants

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## Subject:

### European Limited-Liability Company Regulations – “*Societas Europaea*” (SE)

# International Tax Alert

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## Date\Timing:

Effective October 8, 2004 this new corporate entity is available in selected countries within the European Union. Belgium, Austria, Denmark, Sweden, Finland, and Iceland are the only European nations that have taken the legislative actions needed to allow the establishment of *Societas Europaea* within their borders.

## Details:

### *The Societas Europaea (SE)*

The European Company (*Societas Europaea* - SE) has finally arrived. This new corporate entity, governed largely by European law, rather than the company law of any particular member state, becomes available in the UK for example, on October 8, 2004, when the implementing regulations (the European Limited-Liability Company Regulations) take effect.

### *What are the benefits of an SE?*

According to the European Commission, the potential savings from the new legislation in terms of administrative costs have been estimated as up to €30 billion per annum. The potential savings arise from the ability of companies in different member states to merge and operate throughout the EU under a single company law regime.

From a tax perspective, each country will, of course, retain its own tax system for the moment, and the compliance savings will be less pronounced. Tax opportunities may arise, however, and amendments to the EU Mergers Directive should lead to further tax legislation facilitating cross-border restructuring.

### *What are SEs?*

SEs are limited liability companies, registered in one member state with a minimum share capital of €120,000.

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*Details:...(continued)*

## ***What are SEs?...***

SEs have their own separate and distinct legal personality and must register in the member state where their head office is located. The new framework allows an SE to move its registered office from one member state to another without the winding up of the SE or the creation of a new legal person.

## ***Who can establish an SE?***

There are a number of conditions which companies must fulfill before an SE can be created. As a basic guide, the rules can be summarized as follows:

- SEs can be created by converting or merging existing entities, or establishing a new entity.
- An SE can be established at either the EU holding company or subsidiary level.
- Typically there is a requirement that there be operations in at least two EU member states.

## ***What about the administrative requirements?***

Under the EU Directive, the SE must form an "employee negotiating committee" which must agree with management what level of involvement (if any) the employees will have in running the business. Generally, this must be agreed within 6 months of the establishment of the SE. There are detailed requirements regarding the negotiating committee to reflect the EU wide employee make-up of the group and the information to which the negotiating committee is allowed access.

## ***How are SEs going to be taxed?***

The SE will be taxed in the country in which it is resident. Foreign permanent establishments and foreign source income of the SE would of course still be taxed in the overseas territory in which it arises, subject to relevant double tax treaty protection.

Thus if an SE is resident in the UK, it will be taxed in the UK. The Inland Revenue notes that from October 8, 2004, for most purposes, SEs will be able to operate within the UK under existing tax legislation.

Additional legislation will be needed once changes to the Merger Directive, currently being debated by the European Commission, are finalized. The Inland Revenue is then expected to issue draft tax legislation covering these matters for inclusion in the 2005 Finance Act.

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*Details:...(continued)*

Interestingly, the European Commission has indicated that it would like to set up a common EU wide tax regime covering SEs. It intends to establish a working group charged with devising a common EU tax base for SEs. Establishing a separate tax regime for SEs, however, may well be in contravention of EU discrimination law.

## ***What are the implications for VAT?***

From a VAT perspective, an SE will be similar to a corporate entity with branches, rather than subsidiaries, throughout the EU. Most intra-EU transactions in services between establishments of an SE will not be seen as supplies for VAT purposes as they will take place entirely within the same legal entity.

This will be particularly attractive for businesses which are unable to recover all of the VAT which they incur - for example, banks and financial sector institutions - or other businesses which create non-recoverable VAT costs by virtue of inter company cross-charging. However, where SEs move their own goods cross-border within the EU, our current view is that the normal rules applying to intra-EU movements of goods will continue to apply.

## ***What are the implications for US Multinationals?***

In response to the EU directive, the IRS has announced (Notice 2004-68) that it will amend the check-the-box regulations to add some European business entities to the per se corporations list. The notice provides that as of October 8, 2004, the SE will be treated as a corporation for U.S. tax purposes since it will effectively function as a public limited liability company. Similar business entities in Estonia, Latvia, Liechtenstein, Lithuania, and Slovenia will be treated as per se corporations as of October 7, 2004. According to the IRS, an SE's status may be relevant to the application of various federal income tax provisions, such as the subpart F same-country exception under IRC section 954(c)(3). (Notice 2004-68; 2004-43 IRB 1) The rapid rate of change in corporate tax in the EU is likely to require U.S. multinationals to begin reconsidering existing structures.

Some pan European companies are considering transforming into SEs because they believe that they will be able to achieve significant administrative savings - for example by only having one legal entity listed on one European stock exchange.

A reduction in the number of group entities which might follow the use of an SE could give rise to significant indirect tax savings, par-

ticularly for partially exempt businesses. From a direct tax perspective, opportunities might arise through more efficient transfer pricing models and cross-border loss offsets. The introduction of a common EU tax base for SEs could of course be attractive, and the possibility of being able to move the registered office of an SE between member states could be exciting once the direct tax consequences become more certain.

The legislation regarding SEs is new and a number of uncertainties remain. The above summary is based on our understanding at the date of publication. This briefing should not be relied on in relation to any actual transaction or situation, where specific advice should be sought.

The above analysis was prepared by Nick Udal, a London-based partner with BDO International Member Firm, BDO Stoy Hayward, and Shawn Carson, a New York-based partner with BDO Seidman, LLP.

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