

## TAX AND LEGAL ASPECTS OF SOCIETAS COOPERATIVA EUROPAEA

D. Nerudová

**Received: June 20, 2007**

### Abstract

NERUDOVÁ, D.: *Tax and legal aspects of Societas Cooperativa Europaea*. Acta univ. agric. et silvic. Mendel. Brun., 2007, LV, No. 6, pp. 107–114

The tax and legal aspects of the Societas Cooperativa Europaea are presented in the paper. The purpose of the establishment of this new law vehicle on the internal market is to create equal business conditions also for the subjects associated in cooperatives on EU level, and to improve and increase their competitiveness in the global economy. The aim of the paper is to introduce the statute of Societas Cooperativa Europaea and to highlight the selected tax consequences connected with its implementation into the Czech tax law and also present the main problems which can arise during the implementation process also in other EU member states.

Societas Cooperativa Europaea, transfer pricing, CFC regime, loss offsetting

The statute of European company and European Economic Interest Grouping are not suitable law vehicles for the fulfillment of the basic features of the cooperatives as the independent associations of individuals who have voluntarily associated in order to meet the common economic, cultural and social needs by means of the collectively owned business, which is administrated democratically by its members. Also the cooperatives should be able to benefit from the advantages connected with the multinational statute of the corporation in the future –the simplification of cross-border activities by means of the cooperation and merger with the existing cooperatives in other member states. The aim of the introduction of that new law vehicle is to create the equal business conditions for the subjects associated in cooperatives also on the EU level and to improve their position in global competition and their expectations in economic development.

The first ideas of multinational cooperative introduction has emerged in 1970s, nevertheless the main

works on this statute has begun in December 2000 after the EU summit in Nice. The works has been completed by the adoption of Council Regulation (EC) No. 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society (SCE). The delay in SCE introduction was mainly caused by the fact, that the Commission has preceived the adoption of European Company statute as the priority in comparison to European Cooperative Society statute. The final regulation is much more brief than the former suggestions. The approved regulation does not solve the taxation matters anyhow (except the provision about accounting and bankruptcy proceedings – i.m. that same as in the case of SE, SCE are facing 27 different taxation systems in EU).

The structure of the law regulation roughly follows the structure of SE law regulation. The questions connected with the SCE establishment, structure, seat and its structure are regulated by the Council Regulation (EC) No. 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society (SCE)<sup>1</sup> which

<sup>1</sup> Council Regulation (EC) No. 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society (SCE), Official Journal L 206 of 18th August 2003

is directly applicable in EU member state. The regulation does not comprise the complete law regulation of SCE, for it expects EU member states to introduce the implementary regulations, which also have to implement<sup>2</sup>.

The complete law regulation is not covered by the above mentioned Council Regulation. It is expected that also in case of this new law vehicle, the new national acts will be introduced. Those have to implement the Council Directive No. 2003/72 of 22 July 2003 supplementing the statute for a European Cooperative Society with regard to the employment of employees. The aim of directive is the same as in case of European company – to harmonize the national law regulation of employees participation on the activities of the European Cooperative Society.

In the Czech Republic the obligation was fulfilled by the approval of the act No. 307/2006 Coll. on the European Cooperative Society and the approval of the act No. 308/2006 Coll., which brings the changes in the other areas of law<sup>3</sup>.

## RESULTS

### **The basic characteristic of the European Cooperative Society**

SCE represents the legal entity of cooperative character, which differs from the classical cooperative societies defined by the national laws. The only similarity can be found in the definition of the purpose of the cooperative society for which they are established. The purpose of the establishment is the fulfill the needs of the members or the development of the economic and social activities, mainly by the conclusion of the agreement on the delivery of the goods or provision of the services. SCE can also fulfill the needs of its members by the support of their participation on the economic activity of one or more SCE or national cooperative societies<sup>4</sup>.

The basic capital of the SCE is amounted to 30 000 EUR at lest. The subscribed capital of SCE is allocated on the deposits of the members. As in case of the “national” cooperative society, the amount of the capital of the SCE can vary – it can be increased by the further subscription of the members or by the acceptance of the new members or it can be de-

creased as a result of buy out of the person who finishes his membership in SCE. The above mentioned amount represents the minimum which is necessary for SCE establishment. The basic capital can be subscribed in the Czech crowns in appropriate amount in the Czech Republic. In case that the national law requires basic capital higher than 30 000 EUR for some types of cooperative societies (usually with specific activities), than also SCE can practice such activity, but has to keep the condition of the minimum basic capital required by the special acts<sup>5</sup>.

There is expected in the Council Regulation (EC) No. 1435/2003 that the shares of the members can have the form of securities. According the articles of the society, the different shares can be emitted. Different shares represent different rights on the profit distribution. The investments into the SCE are usually monetary; there can be also the investments of other character, but under the condition that they are measurable and that they are paid at the moment of the subscription (in case of monetary investments, 25% has to be paid in the moment of subscription, the rest can be paid until five years). The members are liable for the SCE liabilities according the amount of their subscribed investments. The articles of the society can stipulate different regulation of the liability of its members – unlimited liability.

SCE can be transformed into the “normal” cooperative society, which will underlie to the national law according the place of its seat<sup>6</sup>. This transformation can be done two years after the establishment of SCE at first and also after the approval of two yearly financial statements by general assembly. The transformation is done according to the transformation project.

The membership share can be transferred under the conditions set by the articles of the society with the approval of general assembly or board of the directors. The acquirers can be members as well as third persons, who will gain the membership (based on the transfer) and has to be listed into the list of the members.

The founders of the SCE can decided between the one – tier and two – tier system of management of legal entity. The type of the system is connected with the size of the established society, cultural and historical law circumstances.

2 Council Directive No 2003/72/EC of 22 July 2003 supplementing the Statute for a European Cooperative Society with regard to the involvement of employees, Office Journal L 206 of 18th August 2003.

3 For example Commercial Code, Labour Code, Civil Code and others.

4 See Art. 1(3) of the Council Regulation no 1453/2003.

5 In the Czech Republic for example credit cooperatives.

6 See Art. 76 of the Council Regulation no. 1453/2003.

The general assembly representing the supreme body gathering all the members of the SCE is present in both systems of corporate governance. The basic rule (the exemptions are permitted) is that each member has one vote with no respect to the amount of the share. Under the one – tier system the management of the company is executed by one body – administrative organ. Under the two – tier system there exist executive body – management organ on one side, and on the other side there exist body, whose task is to control the activities of the board of the directors. The above mentioned control body is called supervisory organ.

SCE has to be registered in the Czech Republic in case that it has the seat on the territory of the Czech Republic (in other member states respectively). The national authorities are obliged to provide the information about the SCE registration to the Official Journal of the European Union.

One of the most typical common characters of SE and SCE is the definition of the law regulation, which should be applied on this legal entity. Hierarchy of SCE law regulation is following:

1. Council Regulation (EC) No. 1435/2003,
2. articles of the society,
3. national law<sup>7</sup>.

Neither Council Regulation (EC) No. 1435/2003 nor the Council Directive No. 2003/72 of 22 solve the questions connected with SCE taxation. In accordance with the Art. 16 of Preamble of Council Regulation (EC) No. 1435/2003 the areas which are not regulated by the above stated regulation should be regulated by the national and community laws.

#### **The establishment of the SCE as a new legal entity**

SCE as the new legal entity can be established by the following ways:

- five individuals with the permanent stay on the area of two member states at least can agree on the establishment – i.e. one individual at least must have the permanent stay in different member states than the others;
- also the legal entities can participate on the SCE establishment (in accordance with the Art. 48 (2) EC Treaty) and other bodies governed by public law – the condition of five founder is valid also in that case; the involved individuals must have the per-

manent stay in two member states at least, and also the legal entities has to be governed by the law of two member states at least – there can be different combination of the founders, but it is needed to respect the condition that one of the founders has to be individual and one of the founders must have permanent stay in different member state than the others (respectively has to be governed by the law of different member state);

- SCE can be established by the entities according the Art. 48 (2) EC Treaty and by other bodies governed by the public and civil law, governed by the law of two different member states at least; the founders can be two at least – either two companies or two different legal entities, or their combination.

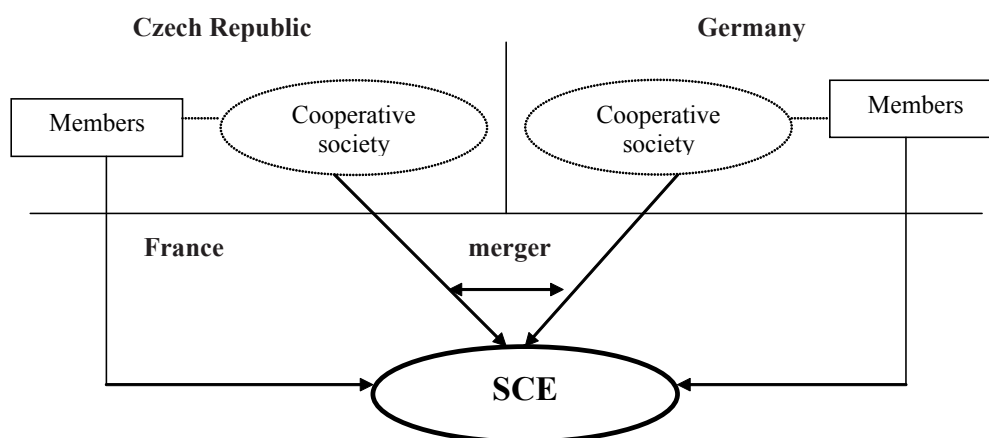
#### **The establishment of SCE by merger**

SCE can be established similarly as SE by the merger of two or more existing cooperative societies in case that at least two participating cooperative societies are registered and have headquarters on the area of the Community and are governed by the law of two different member states. The establishment of the SCE by merger is accessible only to the cooperative society not to the different types of companies or legal entities. The project of the merger, which has to be approved by the general assemblies, serves as the basis for the merger. The example of the SCE formation by the merger is shown on the figure 1 and 2.

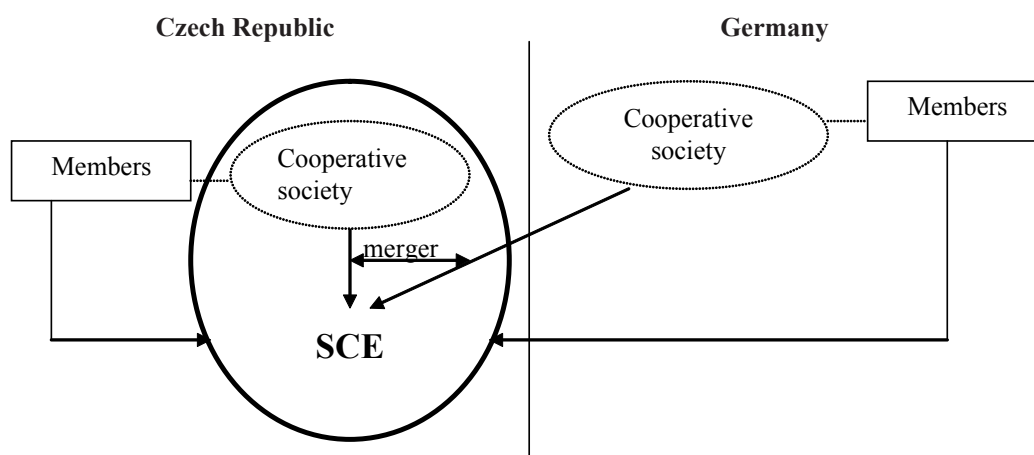
The taxation of cooperative societies mergers (leading to the establishment of SCE) is governed by the common system of merger taxation set by the Art. 23c of the Act. No. 586/1992 Coll. on income taxation. The following procedures are used:

- incomes (revenues) of the succession SCE which has arisen due to the revaluation of the assets and liabilities are not covered into the tax base for the purposes of merger;
- the acquisition price of the share in the succession SCE is defined in case of the merger as the value of the share in the expirable cooperative society on the day previous the day which is the decisive day for the merger;
- SCE continues in the depreciation and the amortization of the property, which has been transferred due to the merger or the split of the company, which was begun by the expirable cooperative society.

<sup>7</sup> I.e. Council Regulation no.1453/2003 and Directive No. 2003/72 (SCE is governed on the third placed by the act No. 307/2006 of Comp. in the Czech Republic).



1: The establishment of the SCE by the merger



2: The establishment of the SCE by the merger

The succession SCE can further:

- take over the provisions and adjustments of the expirable cooperative society, in case that the conditions for their creation still preserve;
- take over the amounts deductible from the tax base according the Art 34(3) and Art 34(5) of Income Tax Act of the expirable cooperative society, in case that they has not been applied yet and the conditions for they application still preserve;
- take over the tax loss of the expirable cooperative society, which has not been applied yet – the loss can be applied in the period remaining into the five years directly following the year, in which the loss has arisen.
- in case that the cooperative society has not been active 12 month before the merger.

The SCE established by the merger is not entitled to take over the loss in following situations:

- when the main purpose of the merger is the tax avoiding or tax decreasing;
- if there exists no economic reasons for the merger (as restructure or the increase of the effectiveness of the activities of the cooperative society);

In case of the loss take over it is needed to respect the special conditions set by the Art 38na of the Income Tax Act, which is stipulating other cases when the right for the loss deduction is dissolved. Based on the above mentioned article, the loss can not be deducted in case of the substantial change in the structure of the subjects who are participating on the control or on the capital. In case of the SCE the change in the structure of the subjects is defined as the change in the members or their shares on the capital or control. Substantial change is defined as the change of more than 25% of the basic capital or voting rights, or the change by which the member gains the substantial control.

In case that the taxpayer can prove to the tax authority that at least 80% of the incomes (revenues) gained in the period after the substantial change, in which the loss should be applied, is created by the same activities as were performed in the period in which

the loss has arisen, the right to deduct the loss is preserved. In case that the taxpayer doubts whether he can deduct the loss which has arisen before the substantial change he can ask the tax authority for the mandatory judgment.

The cooperative society which is not dissolved due to the merger can deduct the loss which has been assessed before the merger, but maximally at the amount of the part of the tax base falling on the activities performed in the period of loss assessment. In case that the cooperative society is dissolved due to the merger (and was assessed the loss), and the loss was taken over by the succession SCE, the loss can be deducted maximally at the amount of the part of the tax base falling on the activities performed in the period of loss assessment.

### **The establishment of SCE by the transformation**

The last way of SCE establishment represents similarly as in case of SE the transformation of the existing cooperative society established under the national law having the seat or the headquarters on the territory of Community on the SCE. The condition is that former cooperative society possesses the branch or subsidiary governed by the national law of the different member state for 2 years at least. In case of the transformation the inner organizational structure of the cooperative society is changed (no dissolution or establishment of the new subject takes place). In case of the transformation no revaluation of the assets and liabilities is needed – the transformation is tax neutral.

### **The transfer of the seat of SCE**

Similarly as in the case of SE, the law distinguishes the registered seat and the headquarters of the SCE. The registered seat of the SCE has to be on the area of the EU member state. It can be changed under the conditions set by the Art 2 of the Council Regulation No. 1453/2003.

SCE is considered to be the tax resident in the Czech Republic in case, that it has the seat and the headquarters on the territory of the Czech Republic. The headquarters is defined as the address or the place from which the taxpayer is managed. In case that the SCE is resident in the Czech Republic it underlies to the unlimited tax liability – it is obliged to tax the incomes with the sources on the territory of the Czech Republic and the incomes with the sources abroad. In case that the SCE participates on the international tax relations, it underlies also to the international double tax-

ation elimination treaties (mainly those concluded between the member states)<sup>8</sup>.

The process of SCE seat transfer is copying the process of SE seat transfer. The elaboration of the seat transfer project and the written report about the seat transfer by the board of directors serves as the base for transfer itself. Both of them should be deposited in the seat of the SCE and should be available to the members one month before the transfer at least. The decision about the seat transfer and the change of the articles of society has to be approved by the general meeting by two thirds majority. The condition for the transfer of the seat is the confirmation that in the state of the former seat were done all the acts which are required before the transfer. In the situation when SCE or SE is moving the seat from the Czech Republic, the confirmation has to be issued by notary. The transfer of the seat starts to be valid by the registration of the new seat in the country. The transfer of the seat has to be announced in the Official Journal of European Union as well. The result of the SCE seat transfer is not the dismissing of the legal entity and the establishment of the new one. The seat cannot be transferred in case of liquidation, bankruptcy adjudgement or any other similar process.

In case of the seat transfer and the change of the SCE tax residence, the SCE is obliged to submit a tax return for the period which is previous to the date of the transfer of the seat outside the territory of the Czech Republic. Further it is obliged to complete the financial statements (regular and irregular one) to the day previous the day of the transfer of the seat outside the territory of the Czech Republic. The above mentioned financial statements serve as the base for the tax base calculation. SCE is obliged to submit the tax return until the end of the month which is following the month in which was the day previous the day of the transfer of the seat outside the territory of the Czech Republic.

The possibility to transfer the seat of SCE without any tax impacts is stipulated in the Merger Directive amended by the Directive No. 2005/19. Even though it should be implemented in all the member states, some of them still require that in the case of SCE seat transfer permanent establishment should remain the one on the territory of the left state. The profits which are arising through the above mentioned permanent establishment are then still taxed in that state. The absence of the unified measurements in that area decreases the effectiveness of SCE business on the internal market again.

---

8 Those treaties can modify the rules for the taxpayer residency.



## DISCUSSION AND COCLUSION

SCE is going to face the same tax problems as SE and other companies with cross-border activities. The main obstacle is represented by the fact that at present the loss incurred in one member state cannot be offset against the profit reached in another member state (in the frame of the group). This situation can potentially cause international double taxation and it is not in accordance with the idea of fully functioning internal market<sup>9</sup>. The similar problem arises in case of offsetting between the foreign branches and subsidiaries<sup>10</sup>. The possibility of offsetting is based on the national tax laws for it is not included in Council Regulation No. 1453/2033. Similarly, the international double taxation between the SCE and its subsidiaries can arise, for there are no unified rules for transfer pricing<sup>11</sup>.

In case that SCE has the foreign subsidiaries situated in low tax jurisdictions, the profits can be taxed (based on national tax law) directly as the incomes of the owners of the foreign subsidiary in the country, where the taxpayers are residents (under the CFC – Controlled Foreign Regime).

Running business through the SCE does not decrease the difficulties connected with permanent establishment and its taxation. The community law does not provide the definition of permanent establishment and the national law is different. This situation in some cases can generate international double taxation; therefore also SCE has to follow international double taxation treaties (in that case SCE faces 27 different definitions of permanent establishment and its modifications in the international double taxation treaties).

In situation when SCE has the foreign subsidiary, it can also face the thin capitalization rules. The different taxation of capital and debt causes that multinational enterprises prefer the debt financing to equity financing of its subsidiaries. As a result of that, there arises the loss of tax revenues in the state where the subsidiary is resident. Based on the described above a lot of

member states does not allow to deduct the interests in that situation. The interests are from the taxation point of view treated as the paid dividends<sup>12</sup>.

The present state of SCE does not allow use the advantages provided by the internal market fully. The lack of unified system of taxation makes this new law vehicle more attractive from the corporate reasons rather than from taxation reasons. The law vehicle lacks the possibility of significant decrease in the compliance costs of taxation connected with the existence of 27 different taxation and accounting systems.

The approval of the Statute on Societa Europaea and of the Statute on the Societa Cooperativa Europaea seems to be the first step on the way towards the closer cooperation and coordination in the area of corporate taxation in the European Union.

## SUMMARY

Since 18 August 2006 there has been introduced the third type of multinational corporation in the Czech Republic – Societas Cooperativa Europaea (SCE). Similarly as in the case of Societas Europaea (SE), SCE has its origin in community law, which has to be amended by the national law of the member states. The SCE should contribute to the development of the internal market (and connected social and economic advantages) as well as SE by means that it will enable to create for the subjects acting on the internal market law vehicle which allows to plan, organize the production or the reorganization of the business on the community level. The present SCE regulation does not allow to use all the advantages provided by the internal market. The lack of unified system of taxation makes this new law vehicle more attractive from the corporate reasons rather than from taxation reasons. The approval of the Statute on Societa Europaea and of the Statute on the Societa Cooperativa Europaea seems to be the first step on the way towards the closer cooperation and coordination in the area of corporate taxation in the European Union.

9 Most of the member states do not allow offsetting the loss, or it allows only limited offset of the loss.

10 See ECJ decisions C-446/03 Marks & Spencer and C-307/97 Compagnie de Saint-Gobain.

11 The Convention No. 90/436/EEC should avoid the double taxation arising due to the different interpretation of the transfer pricing.

12 Also the Czech Republic limits the possibility of interest's deduction. The costs connected with the shares in the subsidiaries are limited to the amount of 5% of the incomes from the dividends and other shares on profit, in case that the taxpayer does not prove that the real amount of these costs is lower. The interest from the credits in the period of 6 months before gaining the share in the subsidiary are considered to be the costs connected with the share in subsidiary.

## SOUHRN

## Societas Cooperativa Europaea – daňové a právní aspekty

Od 18. srpna 2006 je v České republice zaveden již třetí typ nadnárodní korporace a tím je evropská družstevní společnost (SCE). Podobně jako v případě evropské společnosti (SE) má i evropská družstevní společnost svůj původ v komunitárním právu, které však musí být rozvedeno a doplněno vnitrostátní právní úpravou v jednotlivých členských státech. Stejně jako již dříve zavedená SE má i SCE přispívat k dalšímu prohlubování společného trhu (a výhod v oblasti ekonomické a sociální, které jsou s tím spojeny) tím, že se subjektům, kteří své aktivity nevykonávají pouze na lokálním trhu, umožní vytvořit takovou strukturu podnikání, která dovoluje provádět plánování, organizaci výroby či reorganizaci vlastního podnikání na komunitární úrovni. Současná úprava SCE neumožňuje využívat všech výhod, které podnikání na jednotném trhu přináší. Nejednotná úprava v oblasti daňové tuto formu podnikání činí atraktivnější pouze z hlediska korporátního. Přijetí statutu SCE lze tedy chápat jako první krok na cestě k užší spolupráci a koordinaci v oblasti daní z příjmů v Evropské unii.

Evropská družstevní společnost, transfer pricing, CFC režim, zápočet ztráty

## REFERENCES

- Act No. 307/2006 Coll., on the European company.  
Act No. 308/2006 Coll., which brings the changes in the other areas of law.  
Act No. 586/1992 Coll., on income tax.  
CERIONI, L.: The SE and the SCE: a comparison between two intended supranational instruments. *European Legal Forum*, Munich: IPR Verlag, No. 5, pp. 296–302.  
Council Regulation (EC) No. 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society.  
Council Directive No. 2003/72 of 22 July 2003 supplementing the statute for a European Cooperative Society with regard to the employment of employees.  
ENGLISCH, J.: Reform of the Reorganization Tax Act and Related Changes. *European Taxation*, Amsterdam: IBFD, Vol. 47, No. 7, pp. 339–346.  
KESTI, J.: European Tax Handbook 2003. IBFD, Amsterdam: 2003, 720 p. ISBN 90-76078-53-X.  
NERUDOVA, D., NERUDA, R.: Evropská družstevní společnost z pohledu daně z příjmu. *Daně a právo v praxi*, Praha: ASPI, roč. 11, č. 7, s. 18–24, ISSN 1211-7293.

## Address

Ing. Danuše Nerudová, Ph.D., Ústav účetnictví a daní, Mendelova zemědělská a lesnická univerzita v Brně, Zemědělská 1, 613 00 Brno, Česká republika, e-mail: d.nerudova@seznam.cz

