NEWSSTAND

Using European Companies to Restructure Operations

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In the last issue of *Insurance and Reinsurance Review* we looked at how European legislation is tackling cross-border M&A transactions through the Cross-Border Mergers Directive, the Acquisitions Directive and the Takeovers Directive. This article looks at an alternative model: the formation of a European Company to consolidate the regulation of an insurer's European businesses in one European jurisdiction, and through it the capacity to move regulation of its operations between EU member states.

What is a European Company?

A European Company, or Societas Europaea (SE), is a public limited company formed under the European Company Statute (Council Regulation (EC) No 2157/2001) (the Regulation). The creation of SEs was intended to give companies operating in more than one EU member state the option of being established as a single company under Community law and so able to operate throughout the EU with one set of rules and a unified management and reporting system. It was hoped that introducing SEs would offer European businesses significant savings in administration and legal costs.

However, national laws of the EU member states still apply in all matters that are not covered by the Regulation, such as regulatory supervision, tax, accounts and insolvency. This means an SE needs to comply with the domestic law of each jurisdiction in which it operates, thus reducing the scope for savings. As a result, the use of the SE entity has not been as successful as originally envisaged and fewer than a dozen SEs had been registered in the UK by the end of 2008 (although at least two more have been formed already this year).

Nonetheless, the potential advantages an SE offers can still make it an attractive option. In the case of insurers wishing to consolidate their operations into one company regulated in one jurisdiction, it is a realistic alternative to a cross-border insurance business transfer. Moreover, depending on how the transfer is effected, there may be no transfer involved of the company's business to another entity – so no court-approved insurance business transfer scheme is required, although a court approval with a much more limited procedure and cost may still be required.

How Does a Company Become an SE?

An SE can be set up in four ways:

- merger of two or more existing public limited companies in different EU member states
- formation of a holding company by two or more public or private limited liability companies in different EU member states
- formation of a subsidiary by two or more public or private limited companies in different EU member states, or
- transformation (conversion) of an existing public limited company with a subsidiary in a different EU member state.

Only public limited liability companies can become SEs and they must comply with a minimum capital requirement of €120,000. The SE must be registered in the same member state in which the administrative head office is located.

In the last three of the four scenarios described above, at least two of the companies setting up the SE must have had subsidiaries in another member state for at least two years. This requirement makes those options impractical for creating an SE, unless the parent company already possesses companies within its group with the necessary operating history. In these circumstances, the first option may be favoured; a new public company can be created and it or the existing public company then becomes an SE by merger, depending on which is selected to be the successor. In the UK establishing a new public company is a relatively swift and straightforward process.

The different processes to be followed for SE creation are set out in the Regulation and will be subject to regulation by the authorities of the jurisdiction where the SE is formed. For an SE formed by merger, the procedure includes preparation of the draft merger terms, an expert's report, a meeting of shareholders, legal notices and a court certificate approving the legality of the merger. While this appears lengthy and complex, the time and costs involved are likely to be significantly less than an insurance business transfer scheme.

If the new SE is created by merger, the following consequences occur as soon as it has been formally registered:

- all the assets and liabilities of each company being acquired are transferred to the acquiring company
- the shareholders of the company being acquired become shareholders of the acquiring company
- the company being acquired ceases to exist
- the acquiring company adopts the form of an SE.

Redomiciling

Once an SE has been formed, Article 8 of the Regulation provides that its registered office may be transferred to another EU member state without such transfer resulting in either the winding up of the SE or the creation of a new legal person. The exact procedure for redomiciliation will be subject to the procedure in the jurisdiction where the SE was formed but this will in any event follow the Regulation.

A key requirement is that a management report is drawn up explaining and justifying the legal and economic aspects of the transfer and its implications for shareholders, creditors and employees. The basic details of the transfer, including the SE name and company statutes, the proposed timetable, an explanation of the implications for employees and any protection for shareholders or creditors must also be published in accordance with the rules of the member state where the SE has its registered office.

No decision on the transfer can be taken for two months after the proposal is published. The SE will then need a certificate from the competent authority (in England and Wales this is the High Court) attesting to the completion of the pre-transfer formalities.

The Regulation provides that a member state can stipulate that the transfer of the registered office of an SE registered in that member state shall not take effect if any of that member state's competent authorities oppose it. Such opposition may be based only on grounds of public interest. This right to oppose also applies to a national financial supervisory authority, such as the Financial Services Authority in the UK. The First Non Life Directive (73/239/EEC) requires that the head offices of insurance undertakings are situated in the same member state as their registered office. The Regulation contains a similar requirement. Regulators are therefore unlikely to object to a redomiciliation that unites the head offices and registered office under one regime. However, it should be noted that the regulator in the member state that the SE transfers into will need to be satisfied that the SE is compliant with local supervisory laws at the point the transfer occurs and the SE starts to carry on a regulated activity.

SEs in Practice

SEs are still far from common and the transfer procedure described above is rarer still. One notable insurer which has taken advantage of SE status is Swiss Re, which created an insurer SE by acquisition in the UK through the merger of a UK insurance company, SR International Business Insurance Company Plc, with Dutch insurance company Reassurantie Maatschaapij Nederland. The resulting SR International Business Insurance SE then redomiciled to Luxembourg, transferring from FSA regulation to Luxembourg regulation.

Chubb Reinsurance Company of Europe has also recently transferred its place of regulation from Belgium to the UK. Chubb created an SE through merger by acquisition as part of the process, but in Chubb's case the successor entity was a new UK public company so redomiciliation was not involved. Instead, Chubb used a cross-border merger and also effected a business transfer for its direct business under the applicable Belgian insurance business transfer legislation.

The main disadvantage of the SE model is that the Regulation only partially controls the operation of the SE and the national laws for each jurisdiction in which the company operates must still be considered. SEs may also differ markedly in terms of their structure: the management system may be either by a single board of directors or by a two-tier board made up of executive and supervisory organs; the choice is left to the SE founders. Employee involvement can also take two forms: employee representatives can be informed of key decisions and consulted on others; or they may have the power to recommend or oppose the appointment of some members of the management boards.

Conclusion

Use of the SE model by the large insurers mentioned above attests to its usefulness as a tool to restructure the pan-European operations of insurance groups. If Solvency II causes insurance groups to seek to rationalise their operations and consolidate their regulatory supervision to a single or smaller number of national authorities, it is likely that the use of SEs will increase. SEs are also likely to be bolstered by the proposed introduction of a sister regime, the European Private Company, or SPE, to enable small- and medium-sized enterprises to do business throughout the EU at a lower cost. The European Commission's SPE proposal (COM(2008) 396/3) is currently under review by member states.