

Experience with the SE in Germany*

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1. Introduction

‘Every SE shall be an autonomous ship with different shapes and colors, depending on the home port that is marked upon its funnel.’¹ Those were the words the German corporate law professor Lutter used in 1990 to describe his vision of the SE. Today, the SE functions exactly as thus. His analogy illustrates well the two-fold nature of the *Societas Europaea*, the European company. The main characteristics of the SE are determined by the European SE Regulation² and SE Directive³ giving the SE its body – its nature. Important issues of governance, of the formation process and of transformation into different corporate forms are, however, governed by national law.⁴

After the very instructive speech on the SE in Europe of the former French Minister for European Affairs, Mrs. Lenoir, I will restrain my analysis to the application of the SE Regulation and SE Directive in Germany. This focus is, on the one hand, due to the fact that I am a German lawyer with experience and knowledge mainly in the field of German SEs. On the other hand, insight into the specifics of German SEs and chances or risks when German corporations participate in the formation of a SE may be helpful even for foreign lawyers.

2. SE formations in Germany

According to the data available to me, so far in the whole of Europe 88 SEs were established until July 2007, of which 85 are still in existence. This figure also includes formations of shelf companies. Amongst those 88 SEs, 39 were founded in Germany – representing more than 40% of all SEs.⁵ These figures show that the SE is in fact very successful in Germany. Amongst the 39 German SEs, 11 were founded as so-called shelf companies, meaning that they are not yet

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1 Lutter, *AG* 1990, 413, 414 (translated from German to English).

2 Regulation (EC) no. 2157/2001, *OJ L* 294/1, 10.11.2001, referred to throughout as ‘the SE Regulation’. Further information on those European Acts can be found in the precedent speech of Mrs. Lenoir.

3 Directive 2001/86/EC, *OJ L* 294/22, 10.11.2001, referred to throughout as ‘the SE Directive’.

4 Winding-up, liquidation, insolvency and suspension of payment and the taxation of corporations are to a large measure governed by national law. Besides, important issues of governance and minority and creditors' rights are governed by national law: Procedure of the review of the exchange-ratio in a formation of an SE (Sec. 6, 11 SEAG) and appraisal-right (Sec. 9 SEAG), other forms of protection of minority and creditors rights in a merger (Sec. 7, 8 SEAG), certain (pre-)registration formalities (Sec. 10(2) SEAG of the German Transformation Act) and see Wicke, *MitBayNot* 2006, 196, 203 *et seq.* for the application of national law in a general meeting.

5 See for all precedent data: J. Schmidt, “‘Going European’ – Die Europäische Aktiengesellschaft (SE) als attraktive Rechtsformalternative”, in W. Bayer (ed.), *Die Aktiengesellschaft im Spiegel der Rechtsstatsachenforschung*, 2007, pp. 51, 56 *et seq.*

being actively used.⁶ Two of the shelf companies have since been activated. Today, 36 German SEs are still in existence.⁷ 11 companies have made use of the option to elect a one-tier structure; however, these include 3 shelf companies which have not yet been activated.⁸

Company sizes and industries in which SEs may be found is very diverse. The relatively high minimum capital of € 120,000.00 has turned out not to be a deterrent for small and medium enterprises. A large number of the companies established so far are smaller enterprises.⁹ The first German SE, for example, was a small consulting firm: Go East Invest SE. Nonetheless, the focus of public interest is, of course, directed at the large company groups which meanwhile have discovered the SE: Allianz as the pioneer followed by Fresenius and now also BASF and Porsche.

Regarding the industries which decide in favour of the SE, there is also a broad and diverse range: Financial services companies can be found as well as asset management companies, companies from the chemical and medical industry, electronics distributors, software companies or paper refining companies.

3. The national face of the SE

So what do I mean if I speak of a national face of the SE and why are there national faces?

As I already mentioned, provisions governing the SE can be found on two levels: in European and in national law. Article 9 of the SE Regulation lays down which provisions are applicable to a specific problem of substantive law. Its para. 1 establishes a hierarchy of norms with five levels.

According to Article 9 para. 1 (a) the SE Regulation always comes first. The provisions of the SE Regulation therefore supersede all national laws within their scope of application whenever there is a conflict.

According to (b) of the same paragraph, second in precedence are provisions in the articles of association the SE Regulation explicitly allows for.

However, the provisions of the SE Regulation and the stipulations of the articles of association do not cover all areas of governance and formation of the SE; they are incomplete. In order to ensure an effective application, the SE Regulation therefore expressly allows and sometimes even requires the Member States to enact national rules applicable to SEs registered in their country. Germany enacted a set of such provisions in the SE Introductory Act¹⁰ called the SEEG that entered into force on October 8, 2004, the same day the SE Regulation entered into force. The SEEG is divided into two parts: first, an SE Implementation Act named SEAG;¹¹ and second, the SE Employee Involvement Act,¹² the SEBG. The SEBG implements the Directive on Employee Involvement – the so-called SE Directive – into German national law. Article 9 para. 1 lit. c) i) SE Regulation directs that national laws enacted particularly for the SE comes on the third level of the hierarchy of norms.

6 *Ibid.*, pp. 51, 57.

7 *Ibid.*, pp. 51, 56.

8 Leaving aside the shelf companies, the following SEs have opted for a one-tier structure: Conrad Electronic SE, Conrad Holding SE, Convergence CT SE, Donata Holding SE, Mensch und Maschine Software SE, PCC SE, Sevic Systems SE (before transformation: Sevic Systems AG – known from the famous *Sevic* decision of the ECJ) and World Wide Invest SE.

9 Bayer/Schmidt, *AG* 2007, R 192 ff.

10 *Gesetz zur Einführung der Europäischen Gesellschaft (SEEG)*.

11 *Gesetz zur Ausführung der Verordnung (EG) 2157/2001 des Rates vom 8. Oktober 2001 über den Statut der Europäischen Gesellschaft (SE) – SE-Ausführungsgesetz*.

12 *Gesetz über die Beteiligung der Arbeitnehmer in einer Europäischen Gesellschaft – SE-Beteiligungsgesetz*.

In the absence of specific provisions in the SE Regulation or the SEAG and SEBG, Article 9 para. 1 lit c) ii) of the SE Regulation declares the national law on stock corporations of the Member State where the SE is registered to be applicable, constituting the fourth level of the hierarchy of norms. This general reference is complemented by various special references to national law.¹³ Germany limited the scope of the SEEG to matters required for a transposition of the SE statute. Thus, many operative issues of the SE are governed by the German Stock Corporations Act.

On the last level of the hierarchy stand additional provisions of the articles of association, which are admissible under the national law of the Member State where the SE has its seat, Article 9 para. 1 lit. c) iii) SE Regulation. The SE Regulation therefore follows the so-called principle of formal statute stringency. This principle states that the articles of association may only contain stipulations that are obligatory or admissible under European or national law.¹⁴

4. Motives

Let me take a look at the motives behind the decision of companies in Germany to opt for the SE.

4.1. Facilitation of cross-border mergers

Naturally, the transformation of the first large enterprise – Allianz – into the corporate form SE was met by enormous public interest. Enabling or at least facilitating the merger of the German Allianz stock corporation with its Italian subsidiary Riunione Adriatica di Sicurtà (RAS) was actually one of the predominant motives for Allianz to opt for the corporate form SE. Before April 2007, cross-border transformations could be realized only through a complex, very costly and often time-consuming process that was attached with legal uncertainty. This was due to the fact that no rules existed in Germany governing the assumption of all of a company's assets and liabilities in cross-border transactions.¹⁵

Let me illustrate the complexity of a traditional cross-border transformation through the merger of the German Daimler Benz AG with the American Chrysler Corporation.¹⁶ In a triangular merger the shares of the Chrysler Corporation were first collected and brought into a NewCo in the form of a German stock corporation founded by the third party, Sal. Oppenheim. Newly issued shares of this NewCo were then transferred by Sal. Oppenheim to the former shareholders of Chrysler. In a third step, the NewCo made a takeover bid for the shares of the Daimler Benz stock corporation. The merger was a complex process and required the participation of the third person, Sal. Oppenheim, as founder of the new corporation. Compared to such complex transformation structures, the SE offers a legally certain transaction-pattern that does not imply the intervention of a third party.

With the transposition into German law of the Directive 2005/56/EC on cross-border mergers of limited liability companies on April 2007, the German Transformation Act now provides a procedure for cross-border mergers identical to that of the SE Regulation.¹⁷ Recourse to the SE is therefore no longer necessary to ensure legal certainty in cross-border mergers. Still, the SE remains a vehicle for legally certain cross-border transactions.

¹³ Arts. 5, 15 Abs. 1, 18, 51, 53 of the SE Regulation.

¹⁴ Wicke, *MitBayNot* 2006, 196, 196 f.

¹⁵ Sec. 1(1) of the German Transformation Act restrained its scope of application to transformations into other forms of national corporations.

¹⁶ See the description of Decher, FS Lutter, 2000, 1209; Reichert, in Semler/Vollhard, *Arbeitshandbuch für Unternehmensübernahmen*, 805 f.

¹⁷ The *Sevic* decision of ECJ (ECJ 13 December 2005, Case C-411/03, *Sevic Systems*, [2005] ECR I-10805) already opened the possibility of cross-border transactions into the German territory.

As is the case for all processes, forming an SE in view of a cross-border transaction is a mixed blessing. The formation procedure may be delayed through the period of negotiation on co-determination¹⁸ and the SE Regulation grants certain strict minority protection rights:¹⁹ the German SE Implementation Act SEAG provides in Sections 7 and 9 a right of appraisal in case of the formation of a holding-SE and of a merger into a SE. This means that the minority shareholders can exit the company in return for cash compensation. Another disadvantage derives from the fact that the formation of a holding-SE requires the prevalent agreement of the general meetings of all participating corporations which makes the procedure in that respect vulnerable to court challenges by shareholders.

4.2. Easy transfer of the registered office

An exclusive structural privilege of the SE is offered by Article 8 of the SE Regulation. It enables SEs to transfer their registered office to another Member State. Such a transfer is not possible for other corporations registered in Germany without dissolution and liquidation: according to German conflict-of-law-rules German corporate law is applicable to the transfer of the registered office of German corporations (head office theory). German corporate law does not provide any means to transfer the registered office of one corporation to another country. It follows that a German corporation has to be dissolved in order to transfer its seat out of the country.

At first sight, it might seem astonishing that national law can prescribe the dissolution of the corporation despite of the freedom of establishment in Articles 43, 48 EC Treaty. In its *Daily Mail* decision²⁰ the ECJ did not question the authority of Member States to allow a transfer out of its territory only after dissolution or liquidation. I cannot go into details of the question whether the already mentioned *Sevic* decision²¹ incites a different interpretation of the freedom of establishment. Hence, *de lege lata*, a German legal entity that wishes to transfer its registered office to another Member State must still first liquidate and then reincorporate. However, the transfer of the registered office of national corporations might soon be enabled through a European intervention:²² in the pending *Cartesio* case²³ the ECJ may elaborate on the question whether a Member State has the authority to hinder the transfer of registration out of its territory. Should the ECJ decide that companies have the right to transfer their registered office, the Commission may have to come forward with a proposal for a 14th Company Law Directive on the transfer of the registered office.²⁴

Today, only Article 8 of the SE Regulation provides the possibility to transfer the registered office of a corporation from Germany to another Member State without the need to dissolve and liquidate. An easy transfer of registered office enables a company to choose its seat uniquely according to contemporary economic aspects: the availability of human and financial resources, legal certainty, taxes and other advantages of being integrated into a certain national market. Furthermore, the transfer of the registered office of a corporation to another Member State brings about a change to a different national corporate and tax law whilst still maintaining the corporation and its main characteristics. The easy transfer of the registered office permits a company to

18 See *infra*, 4.4 and 4.5.

19 Brandes, *AG* 2005, 177, 179.

20 ECJ 27 September 1988, Case C-81/87.

21 ECJ 13 December 2005, Case C-411/03.

22 Oechsler, in *MünchKor-AktG*, 2. Ed. 2000, Art. 8 SE-VO, no. 6 and Reichert, *Der Konzern*, 821, 825.

23 Regional Court Szeged/Hungary 20 April 2006 (ECJ, Case C-210/06); *ZfP* 2006, 1536.

24 The Commission decided to shelve plans for such a Directive in October 2007. For criticism of this decision see the paper by Vossestein in this issue of the *Utrecht Law Review*.

choose its seat according to contemporary economic considerations and to revise the decision if those factors should change.

4.3. The European image – at least an ancillary motive

A further motive for the choice of the corporate form SE may lie in its European image. The SE gives an enterprise a European face, even though behind the European surface different national laws continue to apply. Almost all enterprises that transformed into SEs publicly cite their Europe-wide activities and the European nature of the SE amongst their reasons for their choice of the corporate form SE. Porsche, for instance, explicitly describes the SE as a modern and internationally oriented corporate form.²⁵ BASF stressed that it was the pioneer of the European chemical industry when it transformed into a SE²⁶ and that the SE was the corporate form for a global enterprise having its home market in Europe.²⁷ It is difficult to assess whether the European image is a decisive argument for the choice of an SE or rather an ancillary motive.

That the corporate identity is European and not primarily national is of the essence for the perception of the balance of powers in mergers and for the expectancies toward the future governance after the merger. When two corporations of different nationalities merge, it is not so likely that the deal is perceived as a takeover if they merge into a SE. In the public opinion, amongst clients and employees the process rather leaves the impression of a merger of equals.²⁸ Experiences of past mergers have shown that the acceptance of the new structure especially amongst employees is very important for the success of merger.

The perception as a European entity might also help to reduce national concerns in the public opinion if a company with a strategic role or long tradition in one country merges and the merger is registered in a foreign Member State. The relevance of this motive can be seen in the merger of Hoechst and Rhône-Poulenc. The article of incorporation of that merger stipulates that the corporation should be transformed into a European corporate form as soon as it is possible.²⁹ In that line of thought I dare to speculate that EADS, as a joint venture between French and German partners with a participation of the Spanish, would not have had to be founded in the Netherlands if the corporate form of an SE had already been available at the time of the foundation of EADS.

4.4. A more flexible form of co-determination in large companies: reduction of the number of supervisory board members

Certainly, the European identity of the SE plays a significant role when opting for the SE. However, it should be noted that the choice of the legal form of an SE is often also linked to other much more specific objectives.

With regard to large groups of companies, these objectives can be found, in particular, in the area of co-determination. German law provides for extensive involvement of employees in national companies through information and co-determination rights in the various Co-Determination Acts.³⁰ According to Sections 1(1), 4(1) of the One-Third Participation Act of May

25 Press-release of 24 March 2007 under www.porsche.com or <http://www.porsche.com/international/aboutporsche/pressreleases/?pool=international-de&id=2007-03-24>

26 Press-release of 26 April 2007 under www.basf.com (http://corporate.basf.com/de/presse/mitteilungen/pm.htm?pmid=2666&words=hauptversammlung&id=mPpMZAvWYbcp*eD)

27 http://corporate.basf.com/de/presse/mitteilungen/pm.htm?pmid=2588&n=10&id=V00-mPpMZAvWYbcp*eD

28 Wicke, *MitBayNot* 2006, 196, 199.

29 Brandes, *AG* 2005, 177.

30 The *Mitbestimmungsgesetz* (Co-Determination Act), the *Drittelbeteiligungsgesetz* (One-Third Participation Act) and the *Montan-Mitbestimmungsgesetz* (Montan Co-Determination Act).

2004, one third of the members of the supervisory board of a German stock corporation (AG) must be reserved for elected representatives of the employees if the company has more than 500 employees. The stricter Co-Determination Act applies if a company has more than 2000 employees. It provides in its Sections 1(1) and 4(1) for a coequal representation of employees and owners in the supervisory board.

The provisions on co-determination in the SE Directive on employee involvement have been transposed into the SE Employee Involvement Act (SEBG) in Germany. The SEBG offers more flexibility in employee involvement than the strict German Co-Determination Acts: a special negotiating body (SNB)³¹ of employee representatives and representatives of the company or companies involved in the formation of the SE negotiate on the form and extent of employee involvement.

If no agreement is reached within six months, Sections 22 *et seq.* and 34 *et seq.* of the SEBG provide for alternative rules that refer to the Co-Determination Acts. The applicability of those alternative rules depends on the number of employees that were subject to co-determination before the formation of the SE. The thresholds applicable vary in the different formation procedures of the SE and I cannot go into the details of each of those.³² Leaving aside certain specifics, I can generally conclude that the strictest law of co-determination of the participating companies applies. This means that if no solution is reached with the special negotiating body, German law on employee involvement is applicable if a German enterprise is involved in the SE-formation.³³ I have not heard of any case so far in which the SNB did not come to an agreement. Thus, the default provisions have not yet been applied in practice. However, due to their sheer existence, the level of co-determination generally does not descend under the level of its German founder corporation(s).

For a German company, nothing is won so far in the field of co-determination from the formation of the SE – but nothing is lost either.

However, on closer inspection, the SE has three advantages even for large German companies in the field of co-determination:

Firstly, even if the level of co-determination remains the same, the SE provides the opportunity to negotiate an employee involvement model tailored to the specific structure and needs of the company or group and does not burden the corporation with the straightjacket of an unspecific legal solution.³⁴

Second, the SE extends the co-determination to Europe. Corporate governance in the SE implies that employees from all countries must be represented in the supervisory body of the corporation – and that co-determination cannot be restricted to employees from countries with a co-determination regime. In that line of thought BASF stressed that its formation of an SE strengthened the involvement of European employees in the company.³⁵ And Porsche made known that ‘the employees’ seats on the SE Supervisory Board will be spread out on a fair and equitable basis among all companies within the Group.³⁶ The mixture of representatives from different Member States can be an advantage especially in Europe-wide group structures. It is unlikely that a bench of employee representatives from different European countries will pursue

31 *Besonderes Verhandlungsgremium (BVG)*, Sec. 4 *et seq.* SEBG.

32 See Sec. 34 SEBG and Weiss/Wöhlert, *NZG* 2006, 121 – 126 for further information.

33 Thoma/Leuering, *NJW* 2002, 1449, 1454.

34 Teichmann, in K. Oplustil & C. Teichmann (eds.), *The European Company – all over Europe*, 2004, pp. 109, 131.

35 http://corporate.basf.com/de/presse/mitteilungen/pm.htm?pmid=2588&n=10&id=V00-mPpMZA vWYbcp*eD

36 Press-release of 26 June 2007 under www.porsche.com or http://www.porsche.com/germany/aboutporsche/pressreleases/archiv2007/quarter2/?pool=germany&id=2007-06-26_03

mere national interests (*i.e.* in national trade disputes)³⁷ – especially if that would be detrimental to other European branches and thus to the group interest.

A third advantage lies in the possibility to reduce the size of the supervisory board. Within the leeway of the minimum and maximum size of the supervisory board prescribed by Section 17(1) and Section 23(1) of the German SE Implementation Act (SEAG), the founding company or companies are free to determine the size of the supervisory organ or the administrative organ. German law prescribes rather large supervisory boards for large stock corporations. The shortcomings of those large bodies in the fulfillment of its monitoring functions are often criticized. This is, amongst others, due to the fact that corporate bodies with more than 20 members are no longer capable of working efficiently. The opportunity provided by the SE to drastically reduce the number of supervisory board members represents therefore a strong incentive for large companies. It was, in particular, the reduction of the number of members of the supervisory board which was a decisive motive for the choice of the SE in the case of Allianz, Fresenius and, in particular, BASF.

4.5. Avoidance and freezing of co-determination for medium-sized enterprises

The leeway for negotiation and structuring of the SE in the area of co-determination is not only relevant for large companies. At first, the complicated negotiation procedure and the extension of co-determination to a European level were regarded as one of the major obstacles for widespread use of the SE in Germany. It now turns out that it is, in fact, the stipulations regarding co-determination which act as a major incentive also for small enterprises to choose the legal form SE. The reason for this is the following one:

If small or medium-sized corporations transform into SEs before crossing the threshold to a stricter form of co-determination, they can maintain their current state of co-determination.³⁸ This advantage follows from two aspects of the co-determination law of SEs. First, the threshold for the regime of co-determination is determined only on the basis of the employees that were subject to co-determination before the formation of the SE – therefore, foreign employees without co-determination do not count. Secondly, and mainly, the SE Regulation does not provide for a dynamic adaptation of co-determination to the number of employees. It must be noted that some uncertainty for this ‘freezing’ possibility follows from Section 18(3) of the SEBG. That section requires that negotiations are resumed on co-determination in the case of structural changes within the SE. There is however wide consensus though that the mere growth of the number of employees does not constitute a structural change.³⁹

It can be assumed that for a certain number of small to medium-sized enterprises the choice of the legal form SE might be based on the wish to prevent crossing the threshold for a more stringent regime of co-determination. Even though in many of these cases that wish might not be made public there is one explicit example: the medium-sized paper refining company Surteco AG currently falls within the scope of application of the One-Third Participation Act. In its management’s report for the conversion into a SE, it expressly stated that the conversion into a SE ensures maintenance of the current state of co-determination.⁴⁰

37 Rieble, *NJW* 2006, 2214, 2217.

38 See Wollburg/Banerjea, *ZIP* 2005, 277, 282 with further references.

39 Jacobs, in *MünchKomm-AktG*, 2nd ed., 2000 *et seq.* § 18 SEBG, no. 18 with further references.

40 III.2. of the management’s report for the conversion, p. 29.

4.6. The appeal of the one-tier system and its endangerment by German co-determination

An important incentive for the choice of the corporate form SE might also be its flexibility regarding the governing structure. In German stock corporations, governance is strictly regulated. It is split up between the general meeting, the *Vorstand* (management board) and the *Aufsichtsrat* (supervisory board). The management board manages the company and is empowered to represent the company in dealings with third parties and legal proceedings. Its work is supervised by the supervisory board. The supervisory board has the power to appoint and remove members of the management board and has to authorize certain important decisions.

As a stock corporation,⁴¹ the SE also has a general meeting, Articles 38 lit. a, 52 et seq. of the SE Regulation. Regarding the management structure of the company, the SE Regulation allows for the freedom to opt either for a two-tier model like the one I just described or for a one-tier model.

Governance in German two-tier SEs is largely regulated by the German Stock Corporations Act.⁴² Two-tier SEs are therefore governed largely like German stock corporations. However, the SE Regulation provides more leeway for structuring the governance. According to Article 50 of the SE Regulation, the statutes can determine the majority required for decisions of the governing organs and could even prescribe unanimity.⁴³ A high majority requirement can strengthen minority shareholders if it vests them with a blocking power. The articles of association can even attribute a veto power to the chairman of the management board.⁴⁴ But veto powers cannot be attributed to members of the supervisory board. Veto powers of certain board members would be contradictory to its nature as a collegial board.⁴⁵

In a one-tier system, the highest level of management authority rests with one organ, the administrative organ. The German SE Implementation Act (SEAG) prescribes, nonetheless, a certain separation of functions between the administrative organ and at least one managing director:⁴⁶

According to Section 22(1) SEAG, the administrative organ has to manage the company, to specify the guidelines for the company's activity and to supervise their implementation. As the highest management organ, it bears the final responsibility for the management of the company. In the absence of any stipulation in the articles of association, the administrative organ has three members.⁴⁷ SEs with a capital of € 3 million or less can reduce that number to one. Depending on the capital of the SE, the maximum number of members can go up to 21. The members are appointed by the general meeting, Article 43 para. 3 of the SE Regulation.

While the administrative organ determines the long-term business strategy and policy, managing directors are in charge of the day-to-day business. They have unrestricted representative authority for the company externally, Section 41 SEAG. Internally, they have to comply with instructions and restrictions decided by the administrative organ, Section 44(2) SEAG, and can be removed at any time without cause, Section 40(5) SEAG. Hence, they are dependant, personally and materially, on the administrative organ.

41 Art. 3 para. 1 of the SE Regulation.

42 The German SE Implementation Act SEAG contains few provisions on the SE in a two-tier system: Secs. 15 to 19 SEAG.

43 Schwarz, SE-VO, 2006, Art. 50, no. 16; Reichert/Brandes, in *MünchKomm-AktG*, 2nd ed., 2000 et seq., Art. 50 SE-VO, no. 22 et seq.

44 Teichmann, in Lutter/Hommelhoff, *SE*, 2008, Art. 50 SE-VO, no. 8; Reichert/Brandes, in *MünchKomm-AktG*, 2nd ed., 2000 et seq., Art. 50 SE-VO, no. 31.

45 Reichert/Brandes, in *MünchKomm-AktG*, 2nd ed., 2000 et seq. Art. 45 SE-VO, no. 29 and Art. 50 SE-VO, no. 33 et seq.; different opinion Teichmann, in Lutter/Hommelhoff, *SE*, 2008, Art. 50 SE-VO, no. 8.

46 This provision is based on the empowerment of Art. 43 para. 1 sentence 2 and Art. 4 of the SE Regulation.

47 The number of members of the administrative board is regulated by Sec. 23(1) SEAG.

Section 40(1) SEAG prescribes the appointment of at least one managing director. Managing directors may also be part of the administrative organ, which makes them executive directors. This opens up the possibility to establish a position like the one of an American Chief Executive Officer (CEO) or of a French Président Directeur Général (PDG). This position can be strengthened even more through the attribution of a second or decisive vote to the CEO/PDG in the event of a tie.⁴⁸ Moreover, the CEO/PDG can be entrusted with a right to nominate candidates for the posts of the other managing directors.⁴⁹ It must be noted that the number of non-executive directors on the administrative board must be greater than the number of administrative directors, Section 40(1) SEAG.

The derogation from the majority requirements⁵⁰ in co-determined SEs with a one-tier system is, however, problematic. It might lead to a necessity of the consent of the employee representatives. A dependence on the consent of employee representatives in management decisions is not permitted.

The leeway for structuring the governance in the SE may be advantageous in the following cases:

For smaller companies and groups with subsidiaries, the option to set up a tighter management structure in a one-tier system can be advantageous. In companies with a capital of € 3 million or less, the management board can be reduced to two people: an administrative organ of one member, and one managing director.

The one-tier model can also be of special interest for family companies. On the one hand, it enables the vesting of a strong head of family with the extended powers of a CEO/PDG. On the other hand it opens up flexible options for those leaders to retire slowly from active company management. It enables them to play a more active role than they would be able to assume in a normal supervisory board without having to assume responsibility for the business operations.

The one-tier structure has therefore been chosen in Germany for example by Conrad Holding SE, a medium-sized family enterprise which has installed, as managing director, a family member who, at the same time, is also a member of the administrative organ. Benckiser SE is another family-dominated enterprise which has opted for the one-tier system after conversion into the legal form of the SE.

Another example is Mensch und Maschine Software SE. It is an entrepreneurial public company. The founder and now CEO, together with the CTO, hold a virtual majority of votes at the general meeting. By opting for the one-tier system and establishing the position of a CEO, the founder vested himself with extended powers and ensured efficient corporate governance. The monistic board system appeared as the ideal board structure for an entrepreneurial public company with a general meeting majority held by members of the management board.

By contrast, Convergence CT is a privately held Delaware corporation, headquartered in Honolulu, Hawaii, with several international subsidiaries. Since it is a US corporation it has a one-tier structure and also the position of a CEO. For their German subsidiary, Convergence CT SE, they chose the monistic, one-tier structure. It can be presumed that the choice of the legal form SE might be motivated by the possibility of implementing the familiar one-tier structure.

48 See Art. 50 para. 2 s. 1 of the SE Regulation; J. Reichert, *Der Konzern*, 2006, pp. 821, 822.

49 J. Reichert, *Der Konzern*, 2006, pp. 821, 822 *et seq.*

50 Provided for in Art. 50 of the SE Regulation.

4.7. Flat and uniform structures for company groups

It is often cited as an advantage of the SE that it enables company groups to restructure their European group-structure and to operate with one single company instead of a grid of subsidiary companies. In the formation of an SE by means of merger, former foreign subsidiary companies become simple branches. Thus, the group's governing structure becomes less dissected and therefore less complicated and corporate governance becomes more efficient.⁵¹ In legal literature it is repeatedly being argued that introducing such flat structures would lead to considerable savings in the area of administrative costs and consultancy fees. The European Competitiveness Council even estimated that the savings could amount to US \$ 30 billion.⁵²

In that context, it is stated as another advantage of the SE that the SE enables European company groups to introduce uniform governing structures in the various different countries. The German Stock Corporations Act allows for a two-tier governing structure only where the SE Directive provides for flexibility regarding the governing structure: the company can opt either for a one-tier structure or for a two-tier structure. It is not entirely clear from the recent examples in Germany whether the uniform structure really has motivated any SE formations. Frankly, I do not find this argument to be truly convincing. In my view, such considerations fail to take into account that there are still very considerable differences between the individual SEs, depending on which national law applies.

5. Problems in applying the law

By way of conclusion, I would like to take a brief look at a number of problems which have come up in the course of the practical application of the relevant provisions applicable to the SE.

Naturally, a new procedure such as the complicated procedure regarding the negotiations on employee involvement entails considerable difficulties. When we established the first SEs, a large portion of the provisions concerning the election of the members of the special negotiating body had not even been transposed yet. It goes without saying that it is complicated and difficult to gather and coordinate the different laws in the individual countries. Many legal problems are not resolved yet; some have not even been raised.

5.1. The size of the supervisory board as subject matter of the negotiation on co-determination

It has turned out to be a key issue of discussion whether the size of the supervisory board is a subject matter of the negotiations regarding employee involvement, or whether in so far there is a prerogative of the shareholders as the body stipulating the statutes. In particular, a number of large companies had pursued the objective to reduce the number of members of the supervisory board through the transformation into the corporate form SE. Thereupon, labour unions have attempted to declare the size of the supervisory board a subject matter of the negotiations regarding employee involvement. They have presented legal opinions in favor of their position and have found supporters in German legal literature.⁵³ However, it is appropriate to leave this issue to be autonomously decided by the shareholders. I cannot go into this in more detail and would only like to point out the following: Following, amongst others, Habersack,⁵⁴ I cannot see that the SE Regulation or SE Directive transferred the power to the SNB to interfere with the

51 J. Reichert, *Der Konzern*, 2006, pp. 821, 825.

52 Monti, *WM* 1997, 607.

53 Oetker, *FS Konzern*, 2006, 650 f.

54 Habersack, *Der Konzern* 2006, 105, 107.

autonomy of the general meeting to lay down the articles of association. Article 40 para. 3 s. 1 of the SE Regulation is clear on that issue: the articles of association are established by the general meeting. Unlike Article 40 para. 2 p. 3 of the SE Regulation, this provision does not open any leeway for national legislation or negotiations in favor of employee involvement. Some authors argue that Article 12 para. 4 of the SE Regulation – stating that, in the case articles of association and the agreement on codetermination conflict, the agreement overrules the articles of association – indicates a primacy of the employee arrangement.⁵⁵ I cannot agree with that opinion. Article 12 para. 4 of the SE Regulation does not set any borders of employee involvement regarding the negotiations but assumes that the existing borders are observed.⁵⁶ Taking Article 4 para. 2 lit. g of the SE Regulation in consideration this result does not have to be changed. Article 4 para. 2 lit. g of the SE Regulation only refers to the quota of the members of the supervisory board to be nominated by the employees and does not state, however, a rule how to determine the absolute size of the supervisory board.⁵⁷

5.2. Admissibility of shelf SEs in Germany and the law applicable to shelf SEs

Also the question of whether it is permissible to establish an SE as a shelf company and make it available to interested parties was discussed very controversially in Germany.⁵⁸ A shelf corporation is a corporation that has not been set up for a specific purpose but is available and can be bought by a company that wants to set up its business very quickly. The purchase of a shelf SE can be a solution for those companies who refrained from the foundation of the SE because of its long registration procedure.

Meanwhile, it is generally accepted that it is possible to establish an SE as a shelf company.⁵⁹ What remains controversial is the impact of co-determination. How is co-determination supposed to be negotiated when there is no sufficient number of employees? And if co-determination is not negotiated, is there a risk that it could be circumvented? In any event, there can be no negotiations where there are no employees at all. The view based on Article 12 of the SE Regulation that without a negotiation on co-determination no SE could be established could not be maintained. Today, it is the prevailing opinion that the negotiation on employee involvement has to be conducted subsequently once the shelf company actively takes up operation as an enterprise and a respective number of employees is hired.⁶⁰ If the SE does not have ten or more employees for a reasonable time even after the purchase, it then remains free of employee involvement after the new economic foundation.

6. Conclusion

By way of conclusion, it can be stated that it is very well possible in practice to work with the legal regime of the SE. The large SE formations have been implemented as planned – without

55 Drygala, in Lutter/Hommelhoff, *SE*, 2008, Art. 40 SE-VO, no. 19; Krause, *BB* 2005, 1221, 1226.

56 Reichert/Brandes, in *MünchKomm-AktG*, 2nd ed., 2000 *et seq.*, Art. 40 SE-VO, no. 70.; quod see Habersack, *AG* 2006, 345, 351 *et seq.*

57 Habersack, *AG* 2006, 345, 351 *et seq.*; Oetker, *ZIP* 2006, 1113, 1116; Reichert/Brandes, in *MünchKomm-AktG*, 2nd ed., 2000 *et seq.*, Art. 40 SE-VO, no. 70.; different opinion Drygala, in Lutter/Hommelhoff, *SE*, 2008, Art. 40 SE-VO, no. 19 *et seq.*; Krause, *BB* 2005, 1221, 1226.

58 See the discussion at Casper/Schäfer, *ZIP* 2007, 653 *et seq.*

59 Schäfer, in *MünchKomm AktG*, 2. Ed., 2000 ff., Art. 16 SE-VO no 9 ff., Henssler, *RdA* 2005, 330, 334; Seibt, *ZIP* 2005, 2248, 2249; Kienast, in Jannott/Frodermann, *SE-Handbuch*, 2006, chapt. 12, no. 210 ff.; AG Düsseldorf of January 16th 2006, HRB 52618, *ZIP* 2006, 287; AG München of March 29th 2006, HRB 159649, *ZIP* 2006, 1300 f.; AG Berlin-Charlottenburg, HRB 69289 B (see Casper, *AG* 2007, 97).

60 Schäfer, in *MünchKomm AktG*, 2. Ed, 2000 ff., Art. 16 SE-VO, no. 13; Casper, *AG* 2007, 96, 99 f. with further references; Casper/Schäfer, *ZIP* 2007, 653, 657 f.

any considerable potential for problems. With the SE, German corporate law is enriched by an interesting alternative which – after a laborious launch – meanwhile has gained momentum.