

2. Importance

a) Expected Welfare Gains

5. Initially, two main types of welfare gain are expected from the creation of a European Company. First, it allows **decision and governance structures to be simplified**.¹⁶ The creation of one unitary structure is facilitated, for instance, because a cross-border merger into one sole company is possible and it is no longer necessary to choose a holding or group law solution.¹⁷ The specific advantage of the European Company with respect to mobility has been removed with the adoption of the 10th EC Company Law Directive (and before to some extent already with the ECJ judgment in the *Sevic* case), because they render cross-border merger possible also for limited liability companies created under national law (see §29 and §25 para. 33, 34). This advantage has, however, helped trigger the first important creations of an SE such as Allianz SE, and for cross-border transfer of seat, there is at least still the advantage of higher legal certainty in the case of the European Company (see next para.).¹⁸ Likewise, psychological problems faced in combining companies of different origins were expected to be reduced – because no national form is to be given preference with respect to the result of the merger.¹⁹ Finally, it also seemed possible to **present the enterprise on the market in a more uniform and impressive way**.²⁰ Even if all members of a

during British colonisation, then mainly during the Industrial Revolution: see by way of example Farrar/Hannigan, *Farrar's Company Law*, (4th ed. 1998), 16–21 (left out in later editions); Schmidt, *Gesellschaftsrecht*, 758 et seq.; broad survey on the development of the PLC in Bayer/Habersack (eds.), *Aktienrecht im Wandel – 1807–2007*, (2007).

¹⁶ Buchheim, *Europäische Aktiengesellschaft*, 60–68; Da Costa/de Meester Bileiro, *The European Company Statute*, 11; Hirte, NZG 2002, 1 (4); Kallmeyer, in: Deutsches Aktieninstitut (ed.), *Europa-AG*, 14 (16, 21); Menjucq/Fages/Vuidard, (2008) 9 EBOR 137 (145); Lenoir, (2007) 4 ECL 116 (116); in detail on the different possible uses: Wenz, in: Theisen/Wenz (eds.), *Europäische Aktiengesellschaft*, 655.

¹⁷ See, for instance, still: Daniels, in: Wouters/Schneider (eds.), *Current Issues of Cross-Border Establishment of Companies in the European Union*, (1995), 91 (95–98) (Azko, Reed-Elsevier, Eurotunnel); Petri, in: Deutsches Aktieninstitut (ed.), *Europa-AG*, 95 (Hoechst, Rhône-Poulenc, Aventis).

¹⁸ In this sense as well Braun, *JURA* 2005, 150 (no outdated model); Bouloukos, (2007) 18 EBLR, 535 (535, 537 et seq. and 543–547); van Eck/Roelof (2009) 6 ECL 105 (106); Menjucq/Fages/Vuidard, (2008) 9 EBOR 137 (144); see as well, for the advantage named first: *Abu-Taleb*, Die Haftungsverhältnisse bei der Gründung, 45 et seq. (in the case of the 10th directive, there is even the advantage that other company forms are covered as well); Kiem, ZHR 173 (2009) 156 (158).

¹⁹ 3rd Recital; Hirte, NZG 2002, 1 (3); report of the EU Commission on the implementation of the European Company Statute, COM(2010) 676 final, p. 3 ('avoid national defeats'); Kallmeyer, in: Deutsches Aktieninstitut (ed.), *Europa-AG*, 14 (20 et seq.); Theisen/Wenz, in: id. (eds.), *Europäische Aktiengesellschaft*, 1 (40 et seq.).

²⁰ Still important: Report of the EU Commission on the implementation of the European Company Statute, COM(2010) 676 final, p. 3; Bayer/Schmidt, BB 2008, 454 (454); Buchheim, *Europäische Aktiengesellschaft*, 60–68; Da Costa/de Meester Bileiro, *The European Company Statute*, 59; Edwards, (2003) 40 CMLR, 443 (464) (though critical in principle); Eidenmüller/

group of companies adopt the European Company type, they can all use the same name, even with respect to the name of the Company type (SE, Societas Europaea, European Company), and thus give the appearance of a unitary structure (one company).

6. The second type of welfare gain which was envisaged from the beginning has to do with the pre-existing European Company.²¹ It allows a cross-border transfer of seat and merger to be organised – the two forms of cross-border mobility which previously were difficult or even impossible to implement under national laws for the PLC or other types of companies (above §25 para. 31–38, 42–55 and §27). Thus, the new type enabled the advantages ascribed to these types of cross-border mobility: the **place of establishment could be chosen according to economic aspects** without incurring prohibitively high costs and risks of transaction (rendering a free choice of establishment possible in all Member States); **and the law best suited to the needs of the enterprise** could be chosen (rendering a free choice of the applicable law possible in all Member States) – all this before these transactions were actually possible under (most) national law(s) as well. The two freedoms, however, are not granted to the furthest possible extent if the location of the headquarters (as under Art. 7 of the Regulation) also determines (mandatorily) the applicable law, i.e. if both can only be chosen as a package.²² If, however, the Transfer of Seat Directive is adopted in the most liberal form proposed (see §27 para. 9–13), this transaction would become more liberal under national law (although then probably also the Statute would be changed).

7. **Other advantages became apparent only later, and certain anxieties turned out to be exaggerated.** The core advantage – namely for German enterprises –

Engert/Hornuf, AG 2009, 845 (847 et seq.); Kallmeyer, in: Deutsches Aktieninstitut (ed.), *Europa-AG*, 14 (16, 21 and 22–29, on company law arrangements which can still enhance this impression); v. Rosen, *Festschrift für Hopt* 2010, 1245 (1249 et seq.); Theisen/Wenz, in: id. (eds.), *Europäische Aktiengesellschaft*, 1 (40 et seq.).

²¹ On the advantages named in the following: Maraslis, SE – *Vor- und Nachteile*, 103–128; Schulz/Geismar, DStR 2001, 1078 (1079); recently again: Bouloukos, (2007) 18 EBLR, 535 (543 et seq.); v. Rosen, *Festschrift für Hopt* 2010, 1245 (1249, 1253, 1254 et seq., with doubts); until today, 49 out of the 500 European Companies (existing today) have already transferred their seat, i.e. approx. 10% in three to four years. See report of the EU Commission on the implementation of the European Company Statute, COM(2010) 676 final, p. 4, also p. 10 (characterising this as a 'very limited number' which would seem to be much too sceptical an assessment); and in more detail above §27 para. 3–5.

²² On this forced link under the Regulation see below §33 para. 29. See moreover already §27 para. 11–13 (for the more liberal regime envisaged for the Transfer of Seat Directive); besides the broader scope of application – catching all limited liability companies –, it could be precisely in this point that the 10th Directive offers advantages, because letter box firms can use it as well, see: Bouloukos, (2007) 18 EBLR, 535 (544).

would seem to be increased flexibility with respect to **employee participation**,²³ but also with respect to the freedom to shape the charter and questions of governance.²⁴ It is paradigmatic in this respect that about half of the SEs created adopted the one-tier model which is not accessible to the German Plc (until 2008 even 60.3%),²⁵ although these mainly involved companies which did not fall under the employee participation regime. If flexibility with respect to employee participation and shaping the charter were the main driving factors, it comes as no surprise that – contrary to what many authors forecasted – German companies were by no means excluded from the surge in SE creations. Quite the contrary, Germany with 106 creations (and the Czech Republic) is/are responsible for the bulk of new creations, 431 Europe-wide as of September/October 2009 – with a steep rise still in progress.²⁶ Another anxiety did not turn out to be well founded, namely, that the SE would not be attractive for SMEs.²⁷ It may, however, well be that competition from a (European) Private Limited Company (SPE) will change the SE's success in this segment.

²³ Study by: Eidenmüller, 'Warum unterstellen sich Unternehmen europäischem Recht?', *Finanzplatz* No. 5, September 2009, p. 20 (more than half of the answers, the inquiry covered more than ¾ of all European companies founded until June 2008); Eidenmüller/Engert/Hornuf, AG 2009, 845 (847, 848 et seq.); early already Fleischer, *AcP* 204 (2004), 502 (533–543); also Bayer/Schmidt, *BB* 2008, 454 (454); v. Rosen, *Festschrift für Hopt* 2010, 1245 (1249, 1251–1253).

²⁴ Namely the freedom of choice with respect to the board structure: early already Fleischer, *AcP* 204 (2004), 502 (521–533); also Bayer/Schmidt, *BB* 2008, 454 (454); Eidenmüller/Engert/Hornuf, AG 2009, 845 (847, 849–851); v. Rosen, *Festschrift für Hopt* 2010, 1245 (1249–1251, 1253 et seq.); more in detail on the increased flexibility with respect to shaping the board: Teichmann, *BB* 2004, 53; on the advantage of having increasingly lean structures see as well Maraslis, *SE – Vor- und Nachteile*, 93–96.

²⁵ Bayer, *AG-Report* 2008, R31 (R32); v. Rosen, *Festschrift für Hopt* 2010, 1245 (1253 et seq.); now (31 Oct. 2009) about 50%; Bayer/Hoffmann/Schmidt, *AG-Report* 2009, R480 (R482).

²⁶ See figures at http://ecdb.worker-participation.eu/European_Company_Factsheets (as of September 2009); Bayer, *AG-Report* 2006, R343; id., *AG-Report* 2007, R192; id., *AG-Report* 2008, R31; id./Hoffmann/Schmidt, *AG-Report* 2009, R480 (as of 31 October 2009); Bayer/Hoffmann, *AG-Report* 2010, R283, R286 (as of 1 June 2010, sub-divided into the single states in Germany); Eidenmüller/Engert/Hornuf, AG 2009, 845 (846) (increasing exponentially). From 2009 to 2010, in seven months, again an increase in Germany from 106 to 140 (AG-Reports); and very recently broad sample of figures in: Commission staff working document to the report by the Commission to the European Parliament and the Council on the application of Council Regulation 2157/2001 of 8 October 2001 on the Statute for the European Company (SE), COM(2010) 676 final (p. 3), Sec(2010) 1391 final. (595 European Companies in June 2010). On the anxiety named, see references below N. 140.

²⁷ In this sense as well Bachmann, *ZGR* 2008, 779 (782); Bayer/J. Schmidt, *AnwBl* 2008, 327; Heckschen, *Festschrift für Westermann* 2008, p. 999; model rules for articles of association for SMEs are given by: Lutter/Kollmorgen/Feldhaus, *BB* 2005, 2473; such anxieties had been expressed, for instance, by Braun, *JURA* 2005, 150 (155); and very recently again in the report by the EU Commission on the implementation of the European Company Statute, COM(2010) 676 final, p. 7 et passim; on the use of the Statute for administering private fortunes see: Waclawik, *ZEVI* 2006, 429.

b) Diversity and Unity: Problem or Chance

8. There were two reasons presented for the dramatic reduction in the number of provisions – 70 Articles compared with no fewer than 284 in the beginning – and the extensive **reference made to national (seat) law**: the principle of subsidiarity (29th, and also 16th and 20th Recitals) and harmonisation, which now exists for many questions. Because of the latter, so the argument goes, reference is actually made to equivalent solutions (9th Recital). Already at a relatively early stage, authors spoke of a European Company 'under national law'.²⁸ The evaluation of this process is divided: traditionally, it has been highly criticised, and at most it had been accepted that more uniformity did not seem politically possible.²⁹ However, anyone who welcomes the freedom of choice between different models of a PLC (or criticises the large extent of mandatory PLC law for instance in Germany, above §12 para. 7–10), has to see one important **positive aspect** in the currently reduced density of unification – at least as long as the cross-border transfer of seat of a PLC under national law is difficult or excluded: the lower the degree of unification within the European Company form (under different national laws), the greater the choice, mainly with respect to internal structure. Independently of one or the other evaluation, one question is of key importance. Has the uniformity needed for the mobility of the European Company been reached? Or does the diversity render transition to the same type under another national law overly burdensome? In the latter case, of course, the freedom to choose between different models would actually be rather reduced.

3. Interplay Between the European Company Statute, Harmonised Law and Other National Law (Art. 9 et seq. of the Regulation et al.)

a) Rules on the Interplay

9. The Regulation contains a rich system of rules on applicable law. The most important is **Art. 9(1) of the Regulation**, but Brandt/Scheifele count up to a total

²⁸ See the titles of the books of Grote, *Statut*; Jaeger, *Europäische Aktiengesellschaft*; also, for instance, Raiser, *Festschrift für Semler* 1993, 277; see also Art/Bervoets/Grechenig/Kalss, (2002) 3 *EBOR* 733; Bouloukos, (2007) 18 *EBLR*, 535 (536).

²⁹ Jaeger, *Europäische Aktiengesellschaft*, 215 et passim ('unacceptable'); Raiser, *Festschrift für Semler* 1993, 277 (295 et seq. et passim); and probably still today Bouloukos, (2007) 18 *EBLR*, 535 (536); Ebert, (2003) 14 *EBLR* 183 (191 et seq.) = (2003) 24 *The Company Lawyer*, 259 (263); Casper, *ZHR* 173 (2009) 181 (185 et seq.); Edwards, (2003) 40 *CMLR*, 443 (462–464); Lutter, *BB* 2002, 1 (3); Wooldridge, (2004) 25 *The Company Lawyer*, 121 (127) (complex regime for practitioners); seen as the core problem again in: report of the EU Commission on the implementation of the European Company Statute, COM(2010) 676 final, p. 1, 11; more differentiated (and positive) namely Fleischer, *AcP* 204 (2004), 502 (505–518); Sasso, (2007) 4 *ECL* 159.

of 84 individual rules containing references.³⁰ The more specific ones prevail. Of particular importance are Art. 15(1), 18 and 36 of the Regulation (formation of a European Company, including merger and creation of a subsidiary) and also Art. 52, 61 and 63 of the Regulation (the system of competences, accounting law and winding up and similar matters).

10. According to Art. 9(1)(a), a rule on any question asked that is contained in the Regulation applies with supremacy. The same is true for gaps which have to be filled by European law. But there is disagreement when it comes to the question of the gaps to which this applies. Some authors hold that there is a presumption against applying EU law here, or that the question is whether the gap has been opened intentionally. Others wish to always apply EU law when the question is such that in essence only a uniform rule seems conceivable.³¹

11. Provisions of the company statutes apply as a second source – still excluding national law – whenever the Regulation allows it (Art. 9(1)(b)). The most important example is the freedom given to companies to choose between a one-tier and a two-tier board (Art. 38(b)). Yet identification of the cases for which this freedom is granted is (again) a matter of interpretation.³²

b) National Implementation

12. The third source is national law (Art. 9(1)(c)), but only if and insofar as 'matters [are] not regulated by this Regulation' (priority of gap-filling and grant of party autonomy at the EU level; see above). National law enacted for the European Company in particular has to be applied with priority (Art. 9(1)(c)(i)),

and has to respect the corpus of harmonisation on the PLC (Art. 9(2); also 9th Recital). This is true for all the rules on the European Company, including those on taxation (see below §33 para. 60). Moreover, even if there is no harmonisation, national law may not provide less attractive arrangements for the European Company (prohibition on discrimination, Art. 10).³³ If no specific law is enacted, general company law applicable to the PLC also applies here, including provisions of the company statutes as far as they are possible under it (Art. 9(1)(c)(ii) and (iii)). National regulation for specific sectors, for instance credit institutions, also applies to the European Company if it acts in this sector (Art. 9(3)) – again respecting the corpus of EC/EU harmonisation. Among the national laws, German Law is in a singular situation – even from a European perspective.³⁴ The majority of European Companies are founded in Germany (and in the Czech Republic) (§33 para. 7) – and in particular some of the biggest ones such as Allianz SE, BASF SE, MAN SE, Porsche SE and Fresenius SE (the three largest ones and five out of the ten largest ones, *AG-Report* 2009). On the other hand, German law goes particularly far with respect to employee participation (§12 para. 19–23), and therefore the accompanying law on this regime is of particular importance here. It is indeed very detailed and even more so because there was the need to integrate it into the one tier-board system for which, moreover, there was no prior precedence – while all the other large Member States already had the choice between a one-tier and two-tier board. In France and then Italy, this choice was explicitly granted, while in the UK it exists more on a theoretical level and is based on general company law (see §12 para. 13). The transposition in Germany is composed of two acts, one on the implementation of the statute itself, the other one on the employee participation regime (with negotiated arrangement and default solution).³⁵ For of all these

³⁰ Brandt/Scheifele, *DSiR* 2002, 547; see moreover on the interplay: Ait/Bervoets/Grechenig/Kalss, (2002) 3 *EBOR* 733 (735 et seq.); Da Costa/de Meester Billeiro, *The European Company Statute*, 13–15; Werlauff, (2003) 14 *EBLR* 85 (88 et seq.); Grote, *Statut*, 57–189; Schwarz, *ZIP* 2001, 1847 (1849); Teichmann, *ZGR* 2002, 383 (394–409); Wagner, *NZG* 2002, 985. For applicable law in the relationship to third countries, see Engert, *ZygrWiss* 104 (2005) 444.

³¹ See Wagner, *NZG* 2002, 985 (988 et seq.) and Schäfer in *MünchKommAktG*, Art. 9 SE-VO para. 14 et seq. on the one hand and Brandt/Scheifele, *DSiR* 2002, 547 (553–555) and Schwarz, *SE-VO*, Art. 9 para. 16 and Intr. para. 92 on the other; see as well Lächler/Oplustil, 'Funktion und Regelungsbereich der SE-Verordnung', *NZG* 2005, 381.

³² If party autonomy is not guaranteed in the European Company Statute, the national law of the seat decides (lit. c iii); for instance German Law in the sense that the law governing the PLC is mandatory in principle: Hirte, *NZG* 2002, 1 (5); Hommelhoff, *AG* 2001, 279 (287); Lutter, *BB* 2002, 1 (4); more liberal France, at least for unlisted SE see Menjucq/Fages/Vuidard, (2008) 9 *EBOR* 137 (148). For interpreting lit. b, however, i.e. the relationship between the European Company Statute and party autonomy, it is not yet the law of the seat, for instance rigid German Law, which decides (contrary to what the authors cited would say). On the other hand, one can certainly not say that the rigid German approach has totally been overcome by the statute: in this sense, however: Maraslis, *SE – Vor- und Nachteile*, 96. Extensive discussion in: Hommelhoff, *Festschrift für Ulmer* 2003, 267; and standard commentaries on Art. 9 para. 1 lit. b European Company Statute.

³³ On the postulate not to discriminate against the national PLC as compared with the European Company see references below N. 167.

³⁴ Comparative law works at the end of the bibliography. For England, France, the Netherlands and Austria (for each section of the European Company Statute separately): Manz/Meyer/Schröder, *SE-VO*, for instance Schröder on Art. 9, para. 109–122.

³⁵ In German law see Gesetz zur Einführung der Europäischen Aktiengesellschaft (SEAG) of 22 December 2004, *BGBI.* 2004 I, 3675 with Art. 1: Gesetz zur Ausführung der Verordnung (EG) Nr. 2157/2001 des Rates vom 8.10.2001 über das Statut der Europäischen Gesellschaft (SE) (SE-Ausführungsgesetz – SE-AG) and Art. 2: Gesetz über die Beteiligung der Arbeitnehmer in einer Europäischen Gesellschaft (SE-Beteiligungsgesetz – SEBG); on this body of law(s) Neye, *Die Europäische Aktiengesellschaft: Einführung und Materialsammlung*; standard commentaries in the bibliography. For the largest Member States, the following survey can be given: For the UK see European Public Limited-Liability Company Regulations 2004, Statutory Instrument 2004 No. 2326 of 6 September 2004 and European Public Limited-Liability Company (Employee Involvement) (Great Britain) Regulations 2009, Statutory Instrument No. 2401 of 9 November 2009; *Tolley's Company Law Service* (December 2010), (Division E), para. [E7054]; *Airs, Tax Journal*, 14 February 2005; Schmidt, *Company Lawyer* 2006, 99, 105, in France see transposing laws Loi n° 2005–842 of 26 July 2005 pour la confiance et la modernisation de l'économie, *Journal Officiel* n° 173 of 27 July 2005 and decrees Nos. 2006–448 of 14 April 2006, 2006–1360 of 9 November 2006 and 2009–1559 of 14 December

reasons, these transposition laws will be used as examples slightly more extensively in the following text.

c) Overview of the Unified Rules (European Company Regulation)

13. In its two core chapters the Statute for a European Company (Regulation) regulates, uniformly for all Member States, the **formation** of a European Company, providing for rules on registration (Art. 11–14) and mainly a *numerus clausus* on means of formation (Title II: Art. 15–37, announced in Art. 2 et seq.; on this see below II.), and some core parameters for the **structure** (on this see below IV.). For the structure, national law applies much more extensively (Title III: Art. 38–60). There are still some important rules for the board, much less so for the general meeting. Some rules related to the structure are also to be found among the general ones contained in Title I, namely Art. 4 et seq. on capital. The structural change of the European Company formed (on this see below III.) – via transfer of seat (Art. 7 et seq., 64) or cross-border merger (Art. 3(1), 2(1), 17 et seqq.) – is the **third core issue regulated**, which is not as clearly visible from the layout of the Regulation. The rules on formation and those on structural change are (as has already been mentioned) aimed at helping the realisation of the two core welfare gains envisaged (above §33 para. 5).

*14. Apart from the rules on formation (Art. 2 et seq., 11–14, 15–37), cross-border structural change (Art. 7 et seq., 64, 3(1)) and the structure of the European Company (Art. 4 et seq., 38–60) and some rules on the problem of applicable law (Art. 9 et seq.) there are **very few other rules** with their own regulatory content, i.e. unifying a certain question at the EU level. In Title I, there are a few definitions contained in Art. 1 and 6; the European Company is a legal person with liability limited to the contribution subscribed and the term ‘statutes of the SE’ is defined. Almost no supranational content can be found in the rules contained in Titles IV–VII: the highly harmonised body of (national) law applies (Art. 61 et seq.) to the rules on accounting;³⁶ there are some rules on winding up, termination and insolvency where again national law applies and only the disclosure

2009); from the French perspective: Colombani / Favero, *Societas Europaea*, (2002) (still before transposition); in Belgium the Statute was implemented by ‘Arrêt royal’ of 14 May 2004: from the Belgian perspective: Logelain, *La Société Européenne – addenda au code des sociétés et son arrêté d’exécution*, (2003); broad survey in: working paper for the report of the EU Commission on the application of the SE Statute, COM(2010) 676 final, Sek(2010) 391 final (implementing laws). See as well N.135. On the new one-tier board under German Law in particular: Bachmann, ZGR 2008, 779; Bauer, *Organstellung*; Boettcher, *Kompetenzen*; Eder, NZG 2004, 544; Ihrig, ZGR 2008, 809; Scherer, *Dualistisches oder monistisches System?*; Schmidt, Ph., *Die monistische SE*; Schönborn, *Die monistische Societas Europaea*.
³⁶ On harmonised accounting law see above §915–18. There are exceptions only under Art. 62 of the Regulation for credit institutions and insurance undertakings; on the transition from the old regime (with specific accounting law for the European Company) to the regime by renvoi: Haller, ‘Die Jahresabschlussstellung der Europäischen Aktiengesellschaft nach dem Statut-Entwurf der EG-Kommission’, DB 1990, 1573; Plendl/Nielues, in: Theisen/Wenz (eds.), *Europäische Aktiengesellschaft*, 405; see also Da Costa/de Meester Bileiro, *The European*

rules contained in the First Directive are explicitly rendered applicable (Art. 63 and 65);³⁷ and there are also rules on re-conversion into a PLC under national law (Art. 66, see above §25 para. 55). The rest is composed only of additional, transitional and final provisions (Art. 67–70).

*15. This corpus of unified law in the Regulation is supplemented by the provisions on employee consultation and participation contained in the Directive on this issue (see below V.), whereas the Regulation is devoid of a separate tax regime (see below VI.). The report on the application and reform of the European Company Regulation which the EU Commission had to provide by 8 October 2009, i.e. five years after the adoption of the regulation and the directive on 8 October 2004, was published on 17 November 2010 – due to the fact that some national implementations were late and therefore also the external study (by Ernst & Young) could only be carried out with delay.³⁸

II. FORMATION OF THE EUROPEAN COMPANY

1. *Numerus Clausus and Common Rules (Art. 2 et seq., 11–16 of the Regulation)*

a) Restricted Number of Possible Means of Formation (Art. 2 et seq.)

16. The European Company, unlike limited liability companies generally, cannot be founded by natural persons. It can only be formed by **four types of (intensively regulated) structural changes of existing companies**. These companies either alone or as a whole must have a cross-border element which is specified in detail (Art. 2(1–4)). Depending on which means of formation is chosen – merger (below 2.), creation of a holding company or a common subsidiary (below 3.) or conversion (below 4.) – the **range of types of companies permitted to act as founders varies, as does the cross-border element** (despite recurring common patterns). The limitation (*numerus clausus*) imposed shows that the Member States did not want to accept free choice and an alternative to their national law company types,³⁹ i.e. they did not want to render the

Company Statute, 69; Edwards, (2003) 40 CMLR, 443 (458); Großfeld, ‘Europäische Unternehmensbewertung’, NZG 2002, 353.

³⁷ In more detail on the regime of termination/liquidation (in principle: national law), also from a comparative law perspective: Ludwig, *Beendigung*.

³⁸ COM(2010) 676 final, IP 1531 of 19 November 2010; on the delay, see explanation given by Commissioner Tajani in response to the question asked by Lehne (MEP) in the plenary session of the European Parliament on 7 Oct. 2009, CRE 07/10/2009 – 23.

³⁹ On this position see Hommelhoff, AG 2001, 279 (280 et seq.) (critical, suggesting that this be reviewed under Art. 69 of the Regulation); critical also Da Costa/de Meester Bileiro, *The European Company Statute*, 18 et seq.; Kallmeyer, AG 1990, 527 (528); Neun, in: Theisen/Wenz (eds.), *Europäische Aktiengesellschaft*, 57 (65 et seq.); Schulz/Geismar, *DSR* 2001, 1078 (1078); Werlauff, (2003) 14 EBLR 85 (91). After the decisions in the *Centros* and the *Überseering*

advantages envisaged with the advent of a European Company (mobility, unitary structures) freely accessible.

17. The **gradation** itself has also been criticised.⁴⁰ Formation by merger has only been allowed for PLCs – the model is mainly the Third (Merger) Directive, which also applies only to PLCs.⁴¹ Furthermore, the cross-border element for this means of formation is particularly demanding. The circle of founders must be subject to two or more laws.⁴² In all other means of formation, a cross-border element in only one of the founding companies may suffice: this applies most clearly to the case of formation by conversion. The company to be transformed must have had a subsidiary in another Member State for at least two years. In other respects, this means of formation is also regulated in a rather restrictive way; it was regarded with scepticism and indeed added only at the last moment (§33 para. 27). Again, only PLCs can use this means of formation, so the step taken by the conversion does not appear to be a large one, and other limited liability companies would first have to be converted into a PLC under national law.⁴³ The last two means of formation are regulated in a more liberal way. One of two cross-border elements is sufficient – two or more laws applicable to the founders as a whole or an international element in one founding company, which in this case may even be the existence of a branch in another Member State for more than two years. Moreover, the founding companies need not be PLCs: a holding SE can also be formed by private limited liability companies – this is reasonable because this type of company is often even better suited to be a subsidiary than a PLC.⁴⁴ It is even permitted for all (profit-making) associations,

cases (above §25 para. 25–30) this position is increasingly questionable; today these concerns are shared by report by the EU Commission über die Anwendung des SE-Statuts, COM(2010) 676 final, p. 7 et seq. (also with respect to the missing regulation of divisions), there as well concerns about the high costs of foundation (op. cit. p. 5 and 7; 800.000,- € on average, a figure which is, however, influenced by some very large creations which alone amounted to nearly 100 Mio. €).

⁴⁰ See, for instance, Schulz/Geismar, *DSiR* 2001, 1078 (1082); Teichmann, *ZGR* 2002, 383 (410 et seq.); contra Neun, in: Theisen/Wenz (eds.), *Europäische Aktiengesellschaft*, 57 (66 et seq.); more positive: Werauff, (2003) 14 *EBLR* 85 (91) on the different types of formation see e.g. van Eck/Roelofs, (2009) 6 *ECL* 105 (106); Menjucq/Pages/Vuidard (2008) 9 *EBOR* 137 (140–144).

⁴¹ See Lutter, *BB* 2002, 1 (4); Wooldridge, (2004) 25 *The Company Lawyer*, 121 (121 et seq.). Conversely, however, the Cross-Border Merger Directive applies to all limited liability companies (§29).

⁴² The merger (as even more so conversion) has been viewed quite critically from the perspective of maintaining employee participation: Heinze, *ZGR* 2002, 66 (79); critical on this regime of cross-border elements: Kallmeyer, *AG* 1990, 527 (528); Schulz/Geismar, *DSiR* 2001, 1078 (1081).

⁴³ On the scepticism with which this means of formation met see below references N. 70.

⁴⁴ Da Costa/de Meester Bileiro, *The European Company Statute*, 18; Schmidt, *Gesellschaftsrecht*, 1210 et seq.; on the law of groups of the European Company see the monographs by: Buchheim, *Europäische Aktiengesellschaft*, Maul, *Die faktisch abhängige SE*; id., in: Theisen/

within the meaning of Art. 54 TFEU (formerly Art. 48 EC), to found a subsidiary in the form of a European Company.⁴⁵ The critical perception mentioned above also influences the assessment of techniques which allow circumvention of the limitations described – namely, of the two year limitation or the requirement of having different nationalities. One such case is when a subsidiary is founded abroad and the parent-company then merged with it (thus creating a European Company) and then a subsidiary SE is founded (without respecting the two-years ‘cooling off’ period). Another such case is when two PLCs of the same country merge, one of them having a subsidiary abroad (since two years), and when they prepare this transaction by transforming this one PLC into a SE first, then transferring the seat abroad and completing the merger (now, but not initially as two PLCs from different Member States).⁴⁶ This type of ‘circumvention’ is not seen as being voidable, because no good policy reasons are seen behind the gradation which would require extending them also to the cases at hand (see last N.).

18. Moreover, founding companies have to be validly founded themselves under the law of one Member State – or already be a European Company (Art. 3(1)) – and have a continuous link (Art. 2(5)) in the EU. For the first requirement, the law chosen in the company statutes is relevant and determines validity. If, for instance, it applies the seat theory, the siège statutaire must be where the headquarters are situated. In any case, there is a continuous link in the EU if the headquarters are in the State where the siège statutaire is situated or in any other Member State, but also (if its instrument of incorporation allows the headquarters to be in a third country) if there is a real and continuous link to the economy of one Member State – this being the case if at least one secondary establishment is situated within the EU.⁴⁷

Wenz (eds.), *Europäische Aktiengesellschaft*, 457; Wenz, *Societas Europaea*; and most recently Ebert, (2004) 25 *The Company Lawyer*, 108; Hommelhoff, *AG* 2003, 179.

⁴⁵ It is not really possible to explain this difference by invoking the fact that this arrangement constitutes more particularly an exercise of the freedom of establishment. All means of the formation of a European Company have to be characterised as such an exercise. Critical as well Schulz/Geismar, *DSiR* 2001, 1078 (1082).

⁴⁶ See (also for more such arrangements): Casper, *AG* 2007, 97 (100–102); Lange, *EuZW* 2003, 301 (302 et seq.); Schäfer in: *MünchKorAktG*, Art. 37 SE-VO para. 3; Oechsler, *NZG* 2005, 697 (699 et seq.); for the combination of merger and transfer of seat, see also van Eck/Roelofs, (2009) 6 *ECL* 105 (106–109); more generally also by creating shell companies: Casper, *ZHR* 173 (2009) 181 (190 et seq.). Ground breaking for the lack of a (need of) protection against ‘circumvention’ in these cases: Casper, *NZG* 2005, 697.

⁴⁷ Da Costa/de Meester Bileiro, *The European Company Statute*, 18 et seq.; Edwards, (2003) 40 *CMLR*, 443 (452); Hirte, *NZG* 2002, 1 (4); Neun, in: Theisen/Wenz (eds.), *Europäische Aktiengesellschaft*, 57 (69). The German transposing act made no use of this option, see Schwarze, *SE-VO*, Art. 2, para. 108; Neye/Teichmann, *AG* 2003, 169 (170 et seq.).

19. The fifth means of formation is that of a European Company creating another European Company as its subsidiary (to be distinguished from a transaction under Art. 2(3), 3(1)), the creation of a common subsidiary. According to Art. 3(2), a single-member European Company must be accepted in all Member States for this purpose, although the single-member PLC has otherwise not been recognised EU-wide, especially not in group relationships (above §10 para. 5 et seq., 10, 19 et seq., 20–26). The legal personality of the subsidiary must be recognised by all Member States – including limited liability.⁴⁸

b) Common Rules, Particularly Registration (Art. 11–16 of the Regulation)

*20. Common rules for the formation of a European Company can be found in Title I (General Provisions), namely the disclosure rules (Art. 12–14, registration, publication), which are based on the regime of the First Directive: for registration, Art. 3 of that Directive applies (above §9 para. 36–52), and publication is also prescribed without exceptions (Art. 4 of the Regulation). Reference is also made to the other provisions contained in the First Directive (above §8 and 9); in Art. 9(1)(c) (generally) and in Art. 15 of the Regulation. There are two modifications: the registration and thus also the formation of the European Company (Art. 16(1)) is made dependent (in great detail!) upon compliance with the safeguards for employee rights (Art. 12(2–4)). However there is – as in the case of an EEIG (below §34 para. 15) – a second publication requirement, i.e. of publication in the EU Official Journal, albeit only concerning the fact that a company acquired (or lost) the form of a European Company under a particular Member State's law. In addition, there is a rule on the company's business name (again as in the case of an EEIG); the abbreviation SE has to be used in the company's name, and conversely, its use is prohibited in the names of national law companies (except in already existing names) (Art. 11). All other questions on business names are again regulated by national laws.

*21. There are other, rather general provisions to be found in Title II (Formation), rendering rather explicit what would have been the case anyway: Art. 9(1) on the applicable law has its equivalent specifically for formation in Art. 15(1), with one obvious exception: the rule does not yet refer to the company statutes. Also the duty to register (Art. 15(2)) would already have followed from Art. 2 and 3 of the First Directive and is moreover prescribed in all Member States for limited liability companies in general (above §7 para. 6). The general principle that legal personality is only acquired by registration is confirmed in Art. 16(1) of the Regulation.⁴⁹ Lastly, liability for those acting in

the name of the company in the pre-registration phase (Art. 16(2)) is identical to that under Art. 7 of the First Directive.⁵⁰ The liability regime requires, however, specification in the national laws and creditors are particularly affected by certain means of formation of a European Company, in particular when a European Company is founded as a subsidiary or a holding company – and one way to react would be to provide for liability of the founding companies (not their members directly) for all liabilities assumed for the SE before registration.⁵¹ On the other hand, it is not very convincing to argue that such a liability mandatorily presupposes – as a matter of European Law! – the existence of a pre-registration company.⁵² It must of course be possible also for national law to impose liability on the natural persons acting (which would not require the existence of a pre-registration company) and/or to provide for the possibility that the company once validly created takes over this liability – either by agreement or automatically by law.⁵³ In all this, it is easy to base the regime just on the reference to national law contained in Art. 9 para. 1 of the Regulation. Art. 16 of the Regulation does not presuppose a pre-registration company under European Law either – neither explicitly (of course not) nor via an inherent need to do so.

22. Initially, it was disputed whether a European Company can validly be created as a shell company (as has been the case with many of the companies created, particularly in the Czech Republic). After initial uncertainty, the clearly prevailing view and practice today are that this is indeed impossible⁵⁴ – (also) in the case where the founders do not have employees (or less than 10) so that no committee for the negotiations has to be created. Art. 12 para. 2 of the Regulation cannot be construed in the opposite sense although it makes registration of the

⁵⁰ On this parallelism see above §8 para. 18–20; on the rules contained in the Regulation see, for instance, Edwards, (2003) 40 CMLR, 443 (456); Kersting, DB 2001, 2079 (2081–2086); Schwarz, ZIP 2001, 1847 (1857 et seq.); and as well Drees, *Gründung der Europäischen Aktiengesellschaft* (SE), 226 et seq.; Jannott/Frodermann, SE-Handbuch, chap. 3 para. 304–320; and monograph (with comparative law Germany / UK): Abu-Taleb, *Die Haftungsverhältnisse bei der Gründung*, esp. 75–275.

⁵¹ Convincingly in this sense for Art. 767 (3) CA 2006 (application by analogy) or German Law: Abu-Taleb, *Die Haftungsverhältnisse bei der Gründung*, 172–206 and 240–263 (holding company) and 207–210 and 264–268 (subsidiary).

⁵² Kersting, *Die Vorgesellschaft im europäischen Gesellschaftsrecht*, (2000), especially 191–199; id., DB 2001, 2079 (2081–2086); similar Drees, *Gründung der Europäischen Aktiengesellschaft* (SE), 144 et seq.

⁵³ In this sense also Casper, *Der Konzern* 2007, 244 (246–251); Jannott, in: Jannott/Frodermann, SE-Handbuch, chap. 3 para. 311 et seq.; Schäfer in: *MünchKorAkteG*, Art. 16 SE-VO para. 6; and similarly as far as the result is concerned Hirte, NZG 2002, 1 (4) who, however, thinks that Art. 16 para. 2 Regulation would even preclude national law from assuming that there is a pre-registration company under national law – without explaining, however, why this rule should have this precluding effect, while national law supplements the Regulation in other ways and this is the principle.

⁵⁴ See (also with respect to the numerus clausus of founding forms, with further references to practice); Roelofs, (2010) 7 ECL 120 (esp. 126); Casper, AG 2007, 97 (99 et seq.); Schäfer in: *MünchKorAkteG*, Art. 16 SE-VO para. 9–13; Scheifele, *Gründung*, 89 et seq.; Seibt, ZIP 2005, 2248 (2249); emphasising the high number of such founding procedures: report by the EU Commission on the application of the SE Statute, COM(2010) 676 final, p. 6 et seq.

⁴⁸ Art. 3(2), third sentence of the Regulation makes the (national) rules on the single-member company (private limited company) apply and these have to contain a limited liability regime; see above §10 para. 1–3. See for France where the single-member PLC is not recognized otherwise: Menjuq/Fages/Vuidard, (2008) 9 EBOR 137 (145).

⁴⁹ Acquisition of the legal personality is based on the registration for all forms of foundation of a European Company (like in the national PLC laws), see Casper, *Der Konzern* 2007, 244 (246); Heckschen, DNotZ 2003, 251 (252); Schäfer in: *MünchKorAkteG*, Art. 16 SE-VO para. 3.

company dependent on a negotiated arrangement. This rule has to be teleologically reduced in this case (because otherwise companies with no or few employees could never create a European Company and Art. 12 para. 2 does not aim at this result but at protecting employee participation regimes).⁵⁵ On the other hand, once the shell company really starts to conduct business, this has to be seen as a de facto founding process in economic terms and as a consequence, the regime on employee participation now applies (where there are enough employees).⁵⁶ And if the founding companies themselves have enough employees, of course the employee participation regime then also applies to the creation of a shell company.⁵⁷

2. *Merger (Art. 2(1), 17–31 of the Regulation)*

23. The formation of a European Company by merger – by PLCs from at least two Member States (above §33 para. 17) – is regulated in great detail (Art. 2(1), 17–31). However, to a large extent it follows the **model of the Third (Merger) Directive**, even in the details, and indeed reference is made to (the transposition of) that Directive where the Regulation does not give answers (Art. 18).⁵⁸ This applies to: the existence of two basic forms (by acquisition and by formation of a new company; Art. 17 of the Regulation and above §28 para. 12 et seq.); the requirement for draft terms of merger and an explanatory report with a

⁵⁵ Roelofs, (2010) 7 *ECL* 120 (esp. 126); Seibt, *ZIP* 2005, 2248 (2249); AG and LG Hamburg *ZIP* 2005, 2017; Casper, *AG* 2007, 97 (99 et seq.); Frodermann/Jannott, *ZIP* 2005, 2251; Henssler, *RdA* 2005, 330 (335); Kiem, *ZHR* 173 (2009) 156 (164 et seq.); Kienast, in: Jannott/Frodermann, *SE-Handbuch*, chap. 13 para. 210–213; Jacobs and Schäfer in: *MünchKorAktG*, §3 SEBG para. 2 and Art. 16 SE-VO para. 13 respectively; Seibt, *ZIP* 2005, 2248 (2249); the report of the EU Commission on the application of the SE Statute, COM(2010) 676 final, p. 7–9 would seem to consider this too little when it assumes that such founding procedures have been practically impossible.

⁵⁶ In this sense (though not very outspoken) Roelofs, (2010) 7 *ECL* 120 (esp. 126); see (also on the many detailed questions which follow from this): Jacobs and Schäfer in: *MünchKorAktG*, §3 SEBG para. 2 and Art. 16 SE-VO para. 13 respectively; Casper, *AG* 2007, 97 (99 et seq.); Götzel/Winzer/Arnold, *ZIP* 2009, 245 (252); Henssler, *RdA* 2005, 330 (334 et seq.); opposite still Seibt, *ZIP* 2005, 2248 (2250); Blanke, *ZIP* 2006, 789; in more detail Forst, *NZG* 2009, 687; monograph by Schreiner, *Zulässigkeit und wirtschaftliche Neugründung einer Vorrats-SE*.

⁵⁷ Seibt, *ZIP* 2005, 2248 (2249); AG and LG (Court of First and Second Instance) Hamburg *ZIP* 2005, 2017; Casper, *AG* 2007, 97 (99 et seq.); Frodermann/Jannott, *ZIP* 2005, 2251; Henssler, *RdA* 2005, 330 (334 et seq.); Jacobs in: *MünchKorAktG*, §3 SEBG para. 2; in more detail Forst, *NZG* 2009, 687; monograph by Schreiner, *Zulässigkeit und wirtschaftliche Neugründung einer Vorrats-SE*.

⁵⁸ See Edwards, (2003) 40 *CMLR*, 443 (452–454); Lutter, *BB* 2002, 1 (4); Wooldridge, (2004) 25 *The Company Lawyer*, 121 (122); details in Bouloukos, (2007) 18 *EBLR*, 535 (540 et seq.); Schwarz, *ZIP* 2001, 1847 (1851 et seq.); different apparently Hirte, *NZG* 2002, 1 (3); in detail on the procedure under the regulation Da Costa/de Meester Bileiro, *The European Company Statute*, 18–33; Neun, in: Theisen/Wenz (eds.), *Europäische Aktiengesellschaft*, 51 (70–140). Reference could even have been made more extensively, because on the other hand the rather detailed rules cannot be read separately anyway because important pieces are missing, for instance the rules on minimum time limits, shareholders' inspection rights, etc.

minimum content which has to be made public (Art. 20 et seq. and above §28 para. 21–25),⁵⁹ the need for an independent examination, the appointment of a common expert for both companies being possible (only) provided additional conditions are met (Art. 22, relatively short, and above §28 para. 26–28); and the need for approval by a shareholders' meeting with one modification, i.e. the resolution on the employee participation regime which is also prescribed here (Art. 23 and above §28 para. 30 et seq.). Thus, the two basic means of formation and the four most important components of the information model are the same, and their implementation is identical in almost every detail. The model of the Directive also applies to the last steps, i.e. registration and publication (Art. 27 et seq. of the Regulation and above §28 para. 38 et seq.), and to the effects produced (transfer of all assets and liabilities, winding up without going into liquidation and compensation of shareholders in the form of shares, Art. 29 and §28 para. 39).⁶⁰ What had to be prescribed separately is that in the case of a merger by acquisition, the acquiring company became a European Company (Art. 29(1)(d)). The transfer of all assets and liabilities also covers the individual rights of employees, as has now been stated explicitly (Art. 29(3)). The nullity regime is still more restrictive than that found in the Merger Directive and similar to Art. 17 of the Cross-Border Mergers Directive later adopted: the only ground for nullity accepted is that of (complete) lack of preventive control, and not that of violation of rules on approval by the shareholders' meeting or other procedural rules (Art. 30 of the Regulation⁶¹ and above §28 para. 41, 43).

24. A second group of provisions is about conflict of laws and follows the **model of the then as-yet unadopted Cross-Border Mergers Directive**.⁶² For creditor and shareholder protection, again the national law governing each participating company applies (Art. 24 of the Regulation and above §29 para. 16). The powers of control and competences in the procedure again had to be distributed: each of the companies is subject to its own law for the preparatory steps and the requirements concerning it. The (positive) result is again certified by a court, administrative body or notary public (Art. 25 and above §29 para. 10,

⁵⁹ See Art. 5 Merger Directive. The statutes of the company to be created anew also have to be disclosed in a merger by formation of a new company (Art. 23(3) Merger Directive). The only characteristic where the Regulation indeed does deviate is Art. 20(1)(i) (the employee participation regime).

⁶⁰ Art. 31 on the peculiarities of mergers in the case of 100% and 90% shareholdings also has its parallels in the Merger Directive, see above §28 para. 20, 25 et seq. On the protection via a sell-out right and a mandatory bid/offer (under the German transposition of the EU Law standard) see in more detail: Teichmann, *AG* 2004, 67.

⁶¹ For such an interpretation of Art. 30 also Schwarz, *ZIP* 2001, 1847 (1852).

⁶² §29. This Directive is primarily aimed at regulating conflict of laws questions, see §29 para. 9. Moreover it contains some substantive law adaptations needed for international cases, for instance the rule mentioned on restricting nullity. On this rule in more detail (rejection of an application by analogy to the other three means of formations of a European Company): H. Zimmer, *Wbl.* 2008, 518.

13). Again, it is the law of the acquiring company, in this case a European Company, which applies to the control of the company being formed as well as to the final control, which consists of the examination of all individual certifications, and in the case of the European Company also of the employee participation regime (Art. 26 and above §29 para. 18 et seq.).

3. *Holding Company and Subsidiary (Art. 2(2) and (3), 32–36 of the Regulation)*

25. The same procedure – in principle – also applies to the formation of a holding company (Art. 32–34).⁶³ The regime is shorter, but all steps are now made explicit, because reference to the Merger Directive is not possible. The creation of a holding as a structural change decided by a (qualified) majority was previously unavailable in quite a few national legal systems (also German Law). In fact, it serves similar aims of generating synergies (external growth), although in the form of a group of companies.⁶⁴ The procedure, again, consists of draft terms, explanatory report, independent examination and approval by the shareholders' meeting. In this regime, it is now made explicit that publication has to be at least one month before the meeting and that the examination has to cover the exchange ratio as well (Art. 32(3) and (5)). There are modifications only in that the minimum percentage had to be fixed regarding which shareholders had to be willing to exchange. The minimum requirements are that at least 50% of the voting stock have approved and again that the employee participation regime has been fixed (Art. 32(2) and (6), final sentences). There is one completely independent part in this regime however, i.e. the **regime on offer and its acceptance**. The reason is that the formation of a holding company is structurally comparable to an exchange of shares or takeover rather than to a merger. The shareholders have sufficient time for reflection with respect to the offer (Art. 33(1)),⁶⁵ as well as an additional period (after the bid has proved to be successful) which, as previously explained, helps to mitigate the prisoner's dilemma, i.e. core problems of so-called collective action (Art. 33(3), second subparagraph, see above §30 para. 23, 38). The formation of a holding company which the Regulation thus allows may not, of course, be rendered illusory by national law, which, for instance, may not completely prohibit the buy-back of own shares when transposing the 2nd Directive – the competence here being allocated to the board as a whole in the monistic system with the dominant role of the

independent directors.⁶⁶ Of course, the success has to be disclosed and the shareholders have to be compensated in the form of shares (Art. 33(2) and (4)). In Art. 33(5) it is made explicit that, besides the four steps in the procedure (Art. 32), it is necessary that the minimum percentage be reached for registration of the holding European Company to be possible. Nevertheless, **further safeguards** for shareholders who have opposed it and for creditors are not excluded.⁶⁷ As in general (national) conflict of law rules, the law of the (now or in future) controlled company applies (Art. 34).

26. For the creation of a European Company as a (joint) subsidiary, no procedure needs to be set. Unless particularly important cases are to be treated differently by national law, this should be an act of the management of the two companies. The prerequisites are completely regulated by the laws of the founding companies (Art. 35 et seq.).⁶⁸ The aim here is somehow less far reaching than in the case of mergers and formation of a holding company, that of *partly* pooling energies of the two founding companies, for instance in the form of joint ventures or combined group structures.⁶⁹

4. *Conversion (Art. 2(4), 37 of the Regulation)*

27. Conversion was not considered a means for forming a European Company until very late. For a long time **scepticism** prevailed: economic advantages – for instance synergies – were not seen as considerable, but a high risk was seen that the tool would be used to evade employee participation.⁷⁰ **Several safeguards** have been introduced for this reason: besides the restrictive rules on formation (above §33 para. 17), the conversion may not be combined with a cross-border transfer of seat (Art. 37(3), to preserve the applicable law and thus in tendency also the employee participation regime). Moreover, the organ within which employee participation is organised was in this regard (and only in this regard) granted a specific veto right (Art. 37(8)), and, as explicitly emphasised, individual employee rights are to be preserved (Art. 37(9), similar Art. 29(4)). Additionally,

⁶⁶ On both issues quite convincingly: Oechsler, NZG 2005, 449 (449–451); on the procedure as such Koke, *Finanzverfassung*, p. 43–54.

⁶⁷ In more detail on the protection via a right to sell or the mandatory bid (in part under EU Law, in part under national law), see: Teichmann, AG 2004, 67.

⁶⁸ On the prerequisites imposed here as to the type of company and to the international elements needed see above §33 para. 17 et seq. On this particular means of formation of a European Company see Da Costa/ de Meester Bilreito, *The European Company Statute*, 37; Edwards, (2003) 40 CMLR, 443 (455); Hirte, NZG 2002, 1 (3); Schwarz, ZIP 2001, 1847 (1853).

⁶⁹ See, for instance: Abu-Taleb, *Die Haftungsverhältnisse bei der Gründung*, 54; Scheifele, *Gründung*, p. 386; Bayer, in Lutter/Hommelhoff (eds.), *Europäische Gesellschaft*, 25 (58).

⁷⁰ Herfs-Röttgen, NZA 2001, 424 (426); Köstler, in: Deutsches Aktieninstitut (ed.), *Europa-AG*, 36 (39).

⁶³ Lutter, BB 2002, 1 (4). On the prerequisites imposed here as to the type of company and to the international elements needed see above §33 para. 17 et seq. On the means of formation of a European Company in this instance see Da Costa/de Meester Bilreito, *The European Company Statute*, 33–37; Edwards, (2003) 40 CMLR, 443 (454 et seq.); Hirte, NZG 2002, 1 (3); Neun, in: Theisen/Wenz (eds.), *Europäische Aktiengesellschaft*, 51 (142–170); Schwarz, ZIP 2001, 1847 (1852 et seq.).

⁶⁴ See for instance Abu-Taleb, *Die Haftungsverhältnisse bei der Gründung*, 50.

⁶⁵ On the parallel rules in the Takeover Directive (there Art. 7(1)), see above §30 para. 26.

the employee participation regime is more demanding than for other means of formation (below §33 para. 53–57).

28. In substance, the regime follows structures already known. Conversion does not change the identity (no winding up, no new creation, Art. 37(2)). However, minimum capital has to be supplied in full again, i.e. it has to be contributed anew even if it has already been contributed, but was then consumed by losses (Art. 37(6), see also below §33 para. 36). Otherwise the procedure is the same as for other means of formation: draft terms of conversion and explanatory report (with a time limit and publication), examination by an independent expert and approval by the shareholders' meeting (Art. 37(4–7)).

III. TRANSFER OF SEAT AND CROSS-BORDER MERGER OF THE EUROPEAN COMPANY

1. *Seat and Cross-Border Transfer of Seat (Art. 7 et seq., 64 of the Regulation)*

a) Seat and Transfer of Seat

29. The seat of a PLC is defined differently in every Member State, either as the seat fixed in the company statutes (siège statutaire, incorporation theory), or as that of the headquarters (above §7 para. 6–10). Unlike in the case of founding companies (Art. 2(5), see above §33 para. 18), the European Company itself was not treated quite so liberally. According to Art. 7, the European Company is to have its siège statutaire at the seat of the headquarters, and according to Art. 64, the Member State has to step in against a subsequent divergence of the two at a later point. This is often interpreted as the result of unwillingness on behalf of the European legislature to decide the dispute between the incorporation theory and the seat theory.⁷¹ Indeed, the differences in approach do not often lead to differences in outcome, and at least where both theories characterise a transaction as a transfer of seat, it should also be rendered possible. In fact, however, the

Regulation requires what seat theory would require: that the PLC move its siège statutaire and registers where the headquarters are located (above §7 para. 6). The fact that the two locations diverge for a short period of time is irrelevant, because it cannot be avoided.⁷²

30. The transfer of seat is regulated in Art. 8: the principle in Art. 8(1), the procedure in Art. 8(2–4) and (6) (with registration in Art. 8(8–13)), and the safeguards in Art. 8(5), (7) and (16). The principle is – as in the draft Proposal for a Transfer of Seat Directive (above §27) – that the transfer leaves the identity of the European Company intact, but changes the applicable law. This is seen as a type of conversion.⁷³ Among the most important modifications is the change in the applicable accounting regime (Art. 61 of the Regulation), namely, if the law changes from a regime that follows the principle of prudence (as in Germany) to one which follows IFRS/IAS or a similar approach (as in the UK). This case would trigger a substantial need for revaluation. The change has to be made at the end of the financial year, in the next accounts. In the reverse case, revaluations once made remain, the last balance sheet would be the starting point from which point on the principle of prudence would apply and the amounts fixed there would serve as equivalents to the 'purchase price' or 'production cost'.⁷⁴ The procedure as well as the safeguards are also regulated in a highly similar way to that of the draft Proposal for a Transfer of Seat Directive. The two regimes have indeed been seen as a model for one another.⁷⁵ In the following, the (few) differences have to be highlighted. What has been said regarding the similarities also applies with respect to function (above §27 para. 1–5).

b) Procedure for a Transfer of Seat

*31. The transfer proposal and explanatory report (without examination by an expert) are regulated – in function, content and also with respect to publication – exactly as in the draft Proposal for a Transfer of Seat Directive (see above §27 para. 16–18, also on minimal discrepancies).

⁷¹ 27th Recital; Hirte, NZG 2002, 1 (4); opposing Da Costa/de Meester Bileiro, *The European Company Statute*, 49; Schulz/Geismar, *DSiR* 2001, 1078 (1079); highly interesting in his thorough analysis (also of EU Treaty law influences): Werlauff, (2003) 14 *EBLR* 85 (96–98). Following the *Überseering* case, there were disputes as to whether the rule in the Regulation did not violate fundamental freedoms as conceived there (above §25 para. 28–30); in this sense e.g. Drinhausen/Nohlen, (2009) 6 *ECL* 14 (esp. 16–19); see also García-Riestra, (2004) 15 *EBLR* 1295; Kübler, *ZHR* 167 (2003), 222 (228); Roth, (2003) 52 *ICLQ* 177 (192); Wynneersch, (2003) 40 *CMLR* 661 (690–695). After the judgement in the *Cartesio* case, this line of argument has perhaps been weakened again, see Casper, *ZHR* 173 (2009) 181 (208 et seq.) who, however, from a policy perspective, would nevertheless favour a complete freedom of choice of law – as now also reported by the EU Commission on the application of the SE Statute, COM(2010) 676 final, p. 8.

⁷²

Oechsler, AG 2005, 373 (379 et seq.) (as long as there is still the will to bring both types of seat together). See also references above in §27 N. 56 (for the draft proposal for a 14th Directive).

⁷³

See on all these questions already §27 para. 11. The change of the applicable law is not stated explicitly in Art. 8 of the Regulation, but it results from Art. 9(1)(c)(ii) and (iii); undisputed, see e.g. Drinhausen/Nohlen, (2009) 6 *ECL* 14 (15); van Eck/Rodolfs, (2009) 6 *ECL* 105 (106).

⁷⁴

For details (including the duty to explain in the notes), see: Knittel/Ehle, *BB* 2008, 2283; and as well Deimel, in: Jannott/Frodermann, *SE-Handbuch*, chap. 7.

⁷⁵

The exception for companies in liquidation (Art. 8(15)) also has its parallels in the draft Proposal (there Art. 13). The transfer of seat of national PLCs 'via' the European Company is, however, difficult: see Grundmann, in: Deutsches Aktieninstitut (ed.), *Europa-AG*, 36 (50); and §25 para. 48.

*32. Discrepancies worth mentioning are only with respect to approval by the shareholders' meeting and in particular the amendment of the company statutes: while the majorities and the time limits are unchanged (above §27 para. 19), the need for adaptation is different. Amendment of the company statutes is again the tool for such adaptation. Two problems, however, do not occur in the case of a European Company. First, the structure of the board may more easily remain unchanged. That is because the new law will always have to give the choice and thus offer the structure that the European Company used to have under its old law (shareholders' meeting and a one- or a two-tier board). Thus, the companies concerned enjoy more uniformity across Europe (uniform freedom of choice of the structure), i.e. more of a level playing field, than under the draft Proposal for a Transfer of Seat Directive. Second, the situation is similar with respect to minimum capital, which again need not be adapted (see Art. 4 et seq. of the Regulation). Minimum capital is considered to be an important parameter when deciding between two laws and in the case of potential competition of legal orders.⁷⁶ Registration procedures and registration itself are regulated in Art. 8(8–13), and are virtually identical to the structures and requirements under the draft Proposal for a Transfer of Seat Directive and the First Directive.

c) Interests Protected

*33. The protection of minority shareholders is regulated in Art. 8(5) of the Regulation in exactly the same way as in Art. 7 of the draft Proposal for a Transfer of Seat Directive – again with extensive competences given to the State of origin whenever a minority shareholder is opposed to the resolution. This also applies to the procedural arrangement of the rights involved (above §27 para. 24). The same also applies to creditor protection (Art. 8(7) of the Regulation), and to the competence of the State of origin in this respect. The regime again runs exactly parallel to the regulation in Art. 8 of the draft Proposal for a Transfer of Seat Directive – where (only) appropriate ('adequate') protection is possible (on this regime see above §27 para. 25). Both creditor and minority shareholder protection is again entrusted to national law, and therefore national law rules creating burdens in the case of a transfer of seat (leaving the identity of the company intact) are acceptable. The argument – made for instance by all authors in German literature – that the transfer also entails a change of company form and would therefore justify a sell-out right⁷⁷ conforms to European Law. In one respect Art. 8(16) of the Regulation goes further than this draft Proposal, i.e. in that the transfer does not affect a jurisdiction that has already been established.⁷⁸ This includes the legal claims available in the state of origin (for

instance, a separate legal claim for assessing the adequateness of the compensation) and has to apply also to a right of compensation which arises only at the point of registration of the merger.⁷⁹ The protection of creditors follows similar principles.⁸⁰ The public can be protected by the State of destination.⁸¹ The principle that the companies have to keep their identity would, however, be violated if any transfer of seat was treated like a new formation of the company.⁸² Therefore, it is impermissible to subject such a company again to the scrutiny of the formation procedure (and of the contributions made), because the various national transpositions have to be treated as equivalent under the 2nd Directive.⁸³

2. Cross-Border Merger (Art. 3(1), 2(1), 17–31 of the Regulation)

*34. The cross-border merger of an existing European Company follows the regime of the formation of a European Company via a merger of national PLCs (Art. 2(1), 17–31, above §33 para. 23 et seq.). Art. 3(1) refers to this regime. There are far-reaching similarities with the regime for the transfer of seat. The remaining key difference is that in the case of a cross-border merger, the transaction has to be examined by an independent expert (Art. 22, above §27 para. 18, §33 para. 31), because it raises not only the problem of the sensitivity of the transaction as such (as does the transfer of seat), but also that of the correct exchange ratio for the shares, i.e. valuation problems. On the other hand, in the case of intra-group mergers with a very high percentage of participation, the problems of creditor protection are considered minor and exceptions are allowed (Art. 31). Of course, the cross-border merger again does not lead to a change in the applicable law in the way that the transfer of seat does: the transferring company is wound up, while the acquiring company keeps its applicable law (in more detail, including on the fact that the law changes at least for the shareholders, above §25 para. 50). What is highly problematic, however, is the equal treatment of mergers of already existing European Companies with mergers of PLCs under national law. While it is accepted that European Companies may use national merger regimes when merging with a PLC under national law, and while this result is justified by the application of the non discrimination rule

⁷⁶ Theisen/Wenz (eds.), *Europäische Aktiengesellschaft*, 189 (241); and also the report by the EU Commission on the application of the SE Statute, COM(2010) 676 final, p. 9 et seq. As has been explained, creditor protection via the transfer report (explanations owed) is also increased in the European Company Regulation.

⁷⁷ In the same sense on both issues: Oechsler, AG 2005, 373 (375 et seq.); Schröder in: Manz/Mayer/Schröder, *SE-VO*, Art. 8 para. 133.

⁷⁸ On this protection, see in more detail: Oechsler, AG 2005, 373 (377–379).

⁷⁹ See Art. 8(14); on this in more detail Wenz, in: Theisen/Wenz (eds.), *Europäische Aktiengesellschaft*, 189 (247–252); Werlauff, (2003) 14 *EBLR* 85 (99 et seq.); and in the transfer of seat regime above §27 para. 26 (with further references).

⁸⁰ On this concept which the German Private Law Supreme Court uses when it wants to justify that it applies the protective standards imposed on the formation of a company also to this situation, see BGHZ (official reports) 153, 158 = NJW 2003, 892; BGHZ 155, 318 = NJW 2003, 3198; opposite K. Schmidt, *NJW* 2004, 1345 (1350 et seq.). The concept applies in particular in the case of a shell company (and namely with respect to employee participation), see above §33 para. 22.

⁸¹ Highly controversial, in the same sense as here: Oechsler, AG 2005, 373 (374 et seq.); opposite Priester, *ZGR* 1999, 36 (46); Wenz, in: Theisen/Wenz, *Handbuch*, 189 (253 et seq.).

⁷⁶ Bebchuk, 'Federalism and the Corporation – the desirable limits on state competition in corporate law', 105 *Harvard Law Review* 1435, 1490 and 1510 (1992); Kibbler, 'The Rules of Capital Under Pressure of the Securities Markets', in: Hopf/Wyrmersch (eds.), *Capital Markets and Company Law*, (2003), 95; Eidenmüller, 'Wettbewerb der Gesellschaftsrechte in Europa', *ZIP* 2002, 2233 (2242). The judgment in the *Centros* case was probably so disputed also because it was about minimum capitalisation.

⁷⁷ On the protection via a right to sell or the mandatory bid (in part under EU Law, in part under national law), see: Teichmann, AG 2004, 67.

⁷⁸ On this rule see Da Costa/de Meester Bileiro, *The European Company Statute*, 58; Jahn/Herfs-Röttgen, *DB* 2001, 631 (632); Teichmann, *ZGR* 2002, 383 (461 et seq.); Wenz, in:

contained in Art. 10 of the European Company Regulation,⁸⁴ the prevailing view nevertheless construes Art. 2, 3 and 66 of the Regulation in a way which adversely affects the European Company. It assumes that two European Companies with a seat in the same Member State cannot merge in a way which would allow them to remain European Companies.⁸⁵ This discriminates against PLCs under national law and the scope of Art. 2, 3 and 66 of the Regulation does not require such a restrictive interpretation if all safeguards have (already) been applied which would have had to apply had the companies now merging already participated first in the process of formation of a European Company. If, for instance, a European Company was formed by a merger of two national PLCs, such a creation would have been possible also if three PLCs had merged, and therefore also the European Company now merging with this third PLC can remain a European Company. Similarly, a European Company can be divided into two European Companies and is not barred from doing so (with this result) by Art. 3(2) of the Regulation.⁸⁶ This rule is only aimed at ensuring that a (cross-border) division is possible at all for the European Company (which is not necessarily the case under national law, see §28 para. 7 and 18), not at discriminating the European Company (once existing) against a PLC under national law. Also, those authors opposing the results advocated here allow the European Company to carry out the transactions mentioned above, but only by accepting that they have to adopt the form of a PLC under national law and then being subject to Art. 66 of the Regulation, albeit by analogy.⁸⁷ This opinion is correct insofar as, of course, any European Company can *choose* this result if it so wishes. It is incorrect insofar as it *forces* the European Company to do so and does not allow for a second path – leaving the legal form of a European Company intact.

⁸⁴ Justification in the ministry draft (Germany). *BT-Drucks.* 16/2919, p. 14; Casper, *AG* 2007, 97 (102); Oechsler, 'Die Richtlinie 2005/56/EG über die Verschmelzung von Kapitalgesellschaften aus verschiedenen Mitgliedstaaten', *NZG* 2006, 161 (161 et seq.).

⁸⁵ Casper, *AG* 2007, 97 (103) (however only if two European Companies merge, not if a PLC or Ltd. under national law is merged upon a European Company because in this case, the European Company just continues to exist); Oechsler, *NZG* 2006, 161 (161 et seq.); Oplustil/Schneider, *NZG* 2003, 13 (16); Schwarz, Art. 3 SE-VO para. 33, 35; in the sense advocated here: Bouloukos, (2007) 18 *EBLR*, 535 (545); Kalss/Hügel, SE, Intr. §17 SEG – Gründung, para. 35; Vell, in: Jannott/Frodermann, *SE-Handbuch*, chap. 10 para. 11, 16, 19 (admissible, but not clearly naming the form in which the transaction results); from a policy perspective in this sense also Casper, *ZHR* 173 (2009) 181 (194–196).

⁸⁶ Roelofs, (2010) 7 *ECL* 142 (esp. 143 et seq., at least if the *Sevic* requirements are met); Oplustil/Schneider, *NZG* 2003, 13 (17); Vossius, *ZIP* 2005, 741 (748 et seq.); Zollner, in: Kalss/Hügel, SE, §33 SEG para. 21; opposite Casper, *AG* 2007, 97 (104 et seq.); id., *ZHR* 173 (2009) 181 (192 et seq.); Ronfeld/Werlauff, (2006) 3 *ECL* 125 (127) (although not very explicitly); Schäfer in: *MünchKorAktG*, Art. 66 SE-VO para. 14; Vell, in: Jannott/Frodermann, *SE-Handbuch*, chap. 10 para. 18 et seq.; at least advocating this possibility: Study Group (2009) 10 *EBOR* 285.

⁸⁷ On the (unrestricted) possibility to merge European Companies under national law (like a PLC) and on the application of the two year cooling-off period, see: Casper, *AG* 2007, 97 (103–105); Oechsler, *NZG* 2006, 161 (161 et seq.); Oplustil/Schneider, *NZG* 2003, 13 (16 et seq.); Vossius, *ZIP* 2005, 741 (748 et seq.) (not applying the cooling-off period though); Zollner, in: Kalss/Hügel, SE, §33 SEG para. 21; Schäfer in *MünchKorAktG*, Art. 66 SE-VO para. 5, 14.

IV. STRUCTURE OF THE EUROPEAN COMPANY

35. In earlier Proposals for a European Company Statute its structure was still intensely regulated. The Statute was not only intended to regulate one specific type of company thoroughly (from aspects of formation via accounting to structural changes, taxation and also the law of groups, etc.). It was also intended to regulate the board intensively and its competences as well: a board which would have to have a two-tier structure and incorporate employee participation. Today, apart from the minimum capital figure, solely the board is regulated in any great detail, with freedom to choose the one-tier or two-tier structure. The general meeting is dealt with only for one or two (sets of) questions.

1. Capital (Art. 4 et seq. of the Regulation)

36. The European Company must have a **minimum capital of 120 000 euro** (Art. 4(1) and (2)) – much more than in Art. 6 of the Second (Capital) Directive (above §11 para. 15). This has been criticised as being prohibitively high for SMEs.⁸⁸ As a mere indication of seriousness, it is indeed rather high, while as a long-term safeguard it is insufficient, like other rules on minimum capital (see above §11 para. 7–9, 15). However, in the case of all means of formation, there is at least an independent examination of whether the capital presently contributed actually reaches the value of what has to be contributed nominally, i.e. 120 000 Euro; in other words, losses, if also affecting this figure, have to be covered by fresh capital.⁸⁹ Higher minimum capital requirements in certain sectors or rules on always keeping the capital at a certain ratio to the risk incurred, remain applicable in any case (Art. 4(3) of the Regulation). The other rules of the **Capital Directive** (above §11) – as transposed in the State in which the European Company is registered – apply as well (Art. 5 of the Regulation), as do, more generally, all rules on the raising and the protection of capital and on securities.

⁸⁸ On this problem and also on very complex structure as an additional problem see *High Level Group II*, 125; Arbeitsgruppe Europäisches Gesellschaftsrecht, *ZIP* 2003, 863 (879); Hirte, *NZG* 2002, 1 (9); Schulz/Gesmar, *DStR* 2001, 1078 (1082); also Neun, in: Theisen/Wenz (eds.), *Europäische Aktiengesellschaft*, 57 (65 et seq.); monograph by: Gutsche, *Eignung*; however, the minimum capital decreased over and over again, Blanquet, *ZGR* 2002, 20 (63 et seq.); see also Da Costa/de Meester Bilreiter, *The European Company Statute*, 44 et seq. In any case, it does not seem to have had prohibitive effects, see §33 para. 7; different, however, report by the EU Commission on the application of the SE Statute, COM(2010) 676 final, p. 7.

⁸⁹ See Art. 37(6) of the Regulation, the same has to apply in the case of merger by formation of a new company.

2. Board (Art. 38–51 of the Regulation)

a) Structure and Survey (Art. 38)

37. Probably the most important rule concerning the board is that the companies have the freedom to choose (not the Member States, as was still the case in 1991) whether the European Company should have only a one-tier board or a supervisory board as well (two-tier).⁹⁰ If a Member State does not give this choice to its PLCs under national law it may (and in most cases will have to) introduce specific rules for this system (otherwise not accepted in the State in question), i.e. for the European Company only (Art. 39(5), Art. 43(4)). The chapter falls into three parts, with rules on the two-tier board (Art. 39–42)⁹¹ and on the one-tier board (Art. 43–45) and general rules common to both systems (Art. 46–51). Most rules in the first two sections also follow common structures and can therefore be discussed in parallel.

b) Powers, Management and Supervisory Function, and Namely the One-Tier Model (Art. 39(1), 40(1), 41, 43(1), 44, 48)

38. Powers need to be distinguished between, firstly, those of the general meeting, and, secondly, those between the two functions within the board – executive and supervisory. In the two-tier board the latter are also separated institutionally. For the first question, a basic rule can be found: the board has its own independent responsibility in both systems for current business operation.⁹² The statutes can however, specify for which kinds of decisions the whole board (including the non-executive directors) have to assume responsibility (and which it may not delegate to individual directors). Moreover, under national law

competences (areas of responsibility) may be allowed to be allocated within the board (Art. 39(1) and 43(1)).⁹³

39. The split of competences between the two functions within the board – in a two-tier board with the two different organs – is regulated in Art. 40 et seq., 44 and 48. Only in this respect do the rules diverge more considerably for the one-tier and two-tier board systems. Still very similar are the systems as far as consultation goes, namely, consultation of non-executive directors. All board members – in the two-tier board (also of) the supervisory board – have to be called upon at least every three months (the initiative coming from the executive directors) to discuss the development of the company: by this time at the latest, all directors have to receive new information, possibly earlier under national law, and in the event of important developments, they must already receive it at once under EU law (Art. 41(1) and (2)), and have to meet for discussions (Art. 44(1)).⁹⁴ Moreover, they may ask for any information on their own initiative and receive all information that has been made available to the organ. If there is a supervisory board, at least the organ as such has a right to demand and examine any information at any time (Art. 41(3–5), Art. 44(2)).⁹⁵

40. The differences are considerable, however, with respect to the delineation of competences within the board (between supervisory board and managing board in the two-tier system and between executive and non-executive directors in the one-tier system). For the supervisory board, competence is clearly delineated; it is not competent to exercise executive functions itself, but only to supervise (Art. 40(1)).⁹⁶ Art. 40 et seq. do, however, not address the question of independence of members of the supervisory board. In the one-tier board system, the delineation is much less clearly addressed. This is quite astonishing

⁹³ On this possibility and on the repercussions for questions of liability, see Buchheim, *Europäische Aktiengesellschaft*, 147 et seq.; Hommelhoff, AG 2001, 279 (283 et seq.); and comparative law above §12 para. 26.

⁹⁴ In the typical case indeed such input by the executive directors will be paramount for an initiative having been taken, see Buchheim, *Europäische Aktiengesellschaft*, 145–148; and also Hirte, NZG 2002, 1 (7); Theisen/Hölzl, in: Theisen/Wenz (eds.), *Europäische Aktiengesellschaft*, 269 (293 et seq.).

⁹⁵ On this power see Da Costa/de Meester Bilreiro, *The European Company Statute*, 66 et seq.; Hirte, NZG 2002, 1 (7); Neye/Teichmann, AG 2003, 169 (176); Schwarz, ZIP 2001, 1847 (1855); Theisen/Hölzl, in: Theisen/Wenz (eds.), *Europäische Aktiengesellschaft*, 269 (293 et seq.); Wooldridge, (2004) 25 *The Company Lawyer*, 121 (123).

⁹⁶ On this divide see Da Costa/de Meester Bilreiro, *The European Company Statute*, 66; Edwards, (2003) 40 *CMLR*, 443 (457); Hirte, NZG 2002, 1 (7); Schwarz, ZIP 2001, 1847 (1855); Theisen/Hölzl, in: Theisen/Wenz (eds.), *Europäische Aktiengesellschaft*, 269 (290 et seq.) (some authors, however, reading German law too much into the rules contained in the Regulation). Where a system already existed under national law, for instance the two-tier board system in Germany, it applies mostly without considerable changes: see, for instance (for the German two-tier board): Seibt, in: Lutter/Hommelhoff (eds.), *SE-Kommentar*, Art. 39 SE-VO para. 2 (scheme also for the interplay between Regulation and national law).

⁹⁰ Art. 38(b) of the Regulation. On this (liberal) core decision taken by the EU legislature see Da Costa/de Meester Bilreiro, *The European Company Statute*, 61 et seq.; Edwards, (2003) 40 *CMLR*, 443 (456 et seq.); Hommelhoff, AG 2001, 279 (282 et seq.); Lutter, BB 2002, 1 (4); Werlauff, (2003) 14 *EBLR* 85 (94 et seq.); Wooldridge, (2004) 25 *The Company Lawyer*, 121 (122 et seq.); convergence according to Maraslis, *SE – Vor- und Nachteile*, 96–103; on the transposition in Germany, where this implies the most important deviation from existing law in one of the big Member States: Gruber/Weller, NZG 2003, 298. On the importance of such a right of choice for the mobility of the European Company see above §33 para. 32.

⁹¹ Europe-wide the system which is less used (above §12 para. 13), but historically the starting point for the European Company and still today the regime described first in the Regulation and in slightly more detail.

⁹² Although Art. 39(1) of the Regulation states this explicitly only for the two-tier board, the same has to be true a fortiori for the one-tier board. On this role see Da Costa/de Meester Bilreiro, *The European Company Statute*, 66 et seq.; Hommelhoff, AG 2001, 279 (283); Theisen/Hölzl, in: Theisen/Wenz (eds.), *Europäische Aktiengesellschaft*, 269 (286) (however, looking at the Statute too much from the German perspective of §76 AktG); Werlauff, (2003) 14 *EBLR* 85 (95); comparative law above §12 para. 29.

given that the one-tier board system is dominant all over Europe, and in the realm of the European Company, even in Germany, at least of equal importance.⁹⁷ In the one-tier system, non-executive directors on the board (outside directors), a significant number of whom, for instance under British law, have to be truly independent (above §12 para. 13), first and foremost supervise, but often also participate in strategic decisions. This clear divide – with respect to function, but also with respect to personal independence – is, however not enshrined explicitly in the Regulation. Under its provisions the non-executive director is not excluded from participating in current business operation generally. Not even the institution of non-executive directors as such is prescribed by the Regulation, and even less so that of independent non-executive directors.⁹⁸ A non-executive director is, however, nowadays typical for most jurisdictions in the Union and fits very well into the open framework set by the Regulation. Also the German legislature has now created a one-tier model for the European Company – in a particular **implementing law** (§§20–49 SEAG).⁹⁹ Any national law has to be tested against the prerequisite set out in the Regulation that there has to be a true choice given to the company between one-tier board and two-tier board structures. The choice of a one-tier board is, however, also guaranteed when the national model (such as in Germany with its §§40, 41 SEAG) prescribes that there has to be at least one executive director who represents the company and is responsible for the current business administration¹⁰⁰ – if at the same time the board retains the power to instruct this (or these) director(s) even in questions of current business administration.¹⁰¹ This (or these) executive director(s) (alone) may not have the competence to act (or only in a preparatory role) insofar as (i) the general meeting is competent, (ii) a competence is specifically reserved to the board as such (for instance for the accounts and for the auditing system under

§22 (2) and (3) of the German SEAG), and (iii) if the issue is no longer one of current business administration.¹⁰² And even if the issue is one of current business administration, there is still (iv) the right of the (entire) board to give instructions – a right which cannot even be restricted by the articles of association because it is constitutive for a one-tier board.¹⁰³ The right to give instructions can go so far that, in fact, the board as such takes on the current business administration. This is the consequence of the hierarchy between the different standard setters as established in the Regulation: companies must have the choice of a true one-tier board which they must be able to install in the articles of association.¹⁰⁴ Transactions subject to authorisation are determined by the company statutes, with the possibility of a minimum also being imposed by the Member State in the two-tier board system and the Member State also giving such a competence directly to the supervisory board (Art. 48 Regulation, in accordance with Art. 40(1)).¹⁰⁵ Although the same rule is missing for the one-tier board system, it would seem even more logical there that the board as a whole can ask for a decision by the board as a whole. Arrangements which do not restrict the power of the executive director(s) (as, for instance, a requirement of authorisation by the whole board), but which rather enlarge his (or their) powers, can be introduced only by the board as a whole and not by the articles of association – the board as a whole is competent for the business administration under Art. 43(1)(2).¹⁰⁶ In companies with a one-tier board, the board as a whole

⁹⁷ See above §33 para. 7. Under German Law this is the alternative which is independent of general company law (because inexistant under it).

⁹⁸ Buchheim, *Europäische Aktiengesellschaft*, 147 et seq.; Theisen/Hölzl, in: Theisen/Wenz (eds.), *Europäische Aktiengesellschaft*, 269 (288).

⁹⁹ On this system in more detail (besides the commentaries): Bachmann, ZGR 2008, 779; Bauer, *Organstellung*; Boettcher, *Kompetenzen*; Eder, NZG 2004, 544; Ihrig, ZGR 2008, 809; Scherer, *Dualistisches oder monistisches System?*; Schmidt, Ph., *Die monistische SE*; Schönborn, *Die monistische Societas Europaea*.

¹⁰⁰ Critical in this respect (because the scheme is seen as a hidden two-tier model): Hoffmann-Becking, ZGR 2004, 355 (372). That national law may, however, introduce such a scheme could also be a possible inference to be drawn from Art. 43(1)(2) of the Regulation – if 'administration' does not mean more than 'day-to-day management' in the sense of Art. 43(1)(2) (as does §40 para. 2 of the German SEAG). Therefore, most German authors do not see any problem in this scheme, see, for instance Boettcher, *Kompetenzen*, 37 et seq., 42–48; in more detail Thamm, NZG 2008, 132. Comparative law (UK, France and others) in: Boettcher, *Kompetenzen*, 54–73 et passim.

¹⁰¹ Bachmann, ZGR 2008, 779 (780 et seq.); Ihrig, ZGR 2008, 809 (810 et seq.); Casper/Eberspacher in: Stitz/Spindler, Art. 43 SE-VO para. 5; Reichert/Brandes in: *MünchKommAG*, Art. 43 SE-VO para. 175; Teichmann, in: Lutter/Hommelhoff (eds.), *Europäische Gesellschaft*, 195 (217–219); opposite Hoffmann-Becking, ZGR 2004, 355 (370).

¹⁰²

On the restriction to current business operation only, see: Bauer, *Organstellung*, 84–89; Ihrig, ZGR 2008, 809 (814 et seq.); Frodermann, in: Jannott/Frodermann (eds.), *SE-Handbuch*, chap. 5 para. 227; Merkt, ZGR 2003, 650 (657 et seq.); and for the areas which go beyond and may not be delegated (supervision, ultimate responsibility for the organisation, overall finance and personal and important transactions) see: Boettcher, *Kompetenzen*, 94–130 (with comparative law: UK, France and others).

¹⁰³

In more detail on this issue see: Ihrig, ZGR 2008, 809 (818–827); and as well Bachmann, ZGR 2008, 779 (780 et seq.); Schwarz Art. 43 para. 58 et seq.; Teichmann, in: Lutter/Hommelhoff (eds.), *Europäische Gesellschaft*, 195 (217 et seq.); Thümmel, *Europäische Aktiengesellschaft*, para. 246; see also references next N. There are limits, however, where the instructions are illegal or where the executive directors have to enforce claims against (non-executive) board members (on this competence see below §33 para. 47).

¹⁰⁴

In the same sense Hoffmann-Becking, ZGR 2004, 355 (369); Schwarz, Art. 43 para. 58 et seq. (however, only the inside directors taking part in this type of decisions); Teichmann, in: Lutter/Hommelhoff (eds.), *Europäische Gesellschaft*, 195 (206); Merkt, ZGR 2003, 650 (663 et seq.); J. Schmidt, "Deutsche" vs. "britische" SE, 607; opposite: Boettcher, *Kompetenzen*, 166–189; Casper/Eberspacher in: Spindler/Stilz, Art. 43 para. 16.

¹⁰⁵

On the system of transactions which require authorisation under the Regulation: Da Costa/de Meester Bilreiro, *The European Company Statute*, 64 et seq.; Hirte, NZG 2002, 1 (5 et seq.); Hommelhoff, AG 2001, 279 (283 et seq.); Neye/Teichmann, AG 2003, 169 (176); Schwarz, ZIP 2001, 1847 (1856); Theisen/Hölzl, in: Theisen/Wenz (eds.), *Europäische Aktiengesellschaft*, 269 (294 et seq.).

¹⁰⁶

Boettcher, *Kompetenzen*, 151–155; *BT-Drucks.* (Parliamentary Reports) 15/3405, p. 39 (justification of the government draft); Manz in: Manz/Mayer/Schröder, SE-VO, Art. 43 para. 139; Kallmeyer, ZIP 2003, 1531 (1532); Schwarz, Art. 43 para. 32, 54; opposite (articles of association can deviate): Boettcher, *Kompetenzen*, 39–41 (at least EU Law permits this); Neye/Teichmann, AG 2003, 169 (176); Teichmann, *Binnenmarktkonformes Gesellschaftsrecht*, 595;

bears the prime responsibility for the delineation of competences between the collective board and executive director(s).¹⁰⁷

*41. For Germany in particular, the European Company is characterised by an increased flexibility with respect to the articles of association. The management may be organised as a classical CEO – or more precisely PDG – model in which the president of the board is also the CEO,¹⁰⁸ or as a patriarchal model in which the board is organised hierarchically with a very strong president of the board¹⁰⁹ who leaves the current business operation to others or as a model giving power to several groups, for instance families, or distributing power evenly among the members of the board (the traditional model in Germany).¹¹⁰ Already as a matter of EU law, the chairman of the board, in the case of a draw, has a second vote – in order to secure prevalence to the side of the shareholders – and this has to apply already for the first nomination process and for the deputy of the chairman on the shareholders' side.¹¹¹ From a policy point of view, it is disputed which relationship between executive and non-executive directors is preferable: either one of overlapping offices (because of better information flows and higher integration of planning and of supervision) or one of strict segregation (enhancing independence).¹¹²

the articles can in any case require that the board as a whole take responsibility for certain questions by introducing a requirement of authorisation by the board for specific issues – this requirement only strengthens the character as a one-tier board.

¹⁰⁷ Boettcher, *Kompetenzen*, 42–48; Manz in: Manz/Mayer/Schröder, *SE-VO*, Art. 43 para. 41; Teichmann, in: Lutter/Hommelhoff (eds.), *Europäische Gesellschaft*, 195 (207 et seq., 217–219 et passim); Ihrig/Wagner, *BB* 2004, 1749 (1757 et seq.).

¹⁰⁸ For France see Menjucq/Fages/Vuillard, (2008) 9 *EBOR* 137 (147); in Germany, it is now permissible for the president of the board to be the CEO as well, see: Bachmann, *ZGR* 2008, 779 (788–790); Beckert, *Personalisierte Leitung*, 178, 208 (pleading, however, for separation: 188–202, 209 et seq.); Casper, *ZHR* 173 (2009) 181 (214–216); Ihrig, *ZGR* 2008, 809 (812 et seq.) (both also pleading for separation); Teichmann, in: Lutter/Hommelhoff (Hrsg.), *Europäische Gesellschaft*, 195 (207–210, welcoming the open range of possibilities). For the large flexibility provided with respect to how much hierarchy is built into the board structure, also between executive directors, see: Bachmann, *ZGR* 2008, 779 (789). Casper/Eberspächer in: Stülz/Spindler, Art. 43 SE-VO para. 40; Reichert/Brandes in: *MünchKommAktG*, Art. 43 SE-VO para. 136; Teichmann, in: Lutter/Hommelhoff (eds.), *SE-Kommentar*, Annex Art. 43 SE-VO §40 SEAG para. 38.

¹⁰⁹ Bachmann, *ZGR* 2008, 779 (789, 793, with references for other views); v. Rosen, *Festschrift für Hopt* (2010), 1245 (1251, veto right); more generally also Teichmann, *BB* 2004, 53.

¹¹⁰ Manz in: Manz/Mayer/Schröder, *SE-VO*, Art. 43 para. 42; Theisen/Hölzl, in: Theisen/Wenz (eds.), *Europäische Aktiengesellschaft*, 269 (301); Teichmann in: Lutter/Hommelhoff (eds.), *SE-Kommentar*, Art. 43 SE-VO, para. 30; more generally also Teichmann, *BB* 2004, 53.

¹¹¹ Drinhausen, in: Van Hulle/Maul/Drinhausen (eds.), *Handbuch zur europäischen Gesellschaft* (SE), p. 145, para. 51; Manz in: Manz/Mayer/Schröder, *SE-VO*, Art. 50 para. 28; for the tie-breaking vote (Art. 50(2)(l) of the Regulation) see: Teichmann in: Lutter/Hommelhoff (eds.), *SE-Kommentar*, Art. 50 SE-VO, para. 24 et seqq.; Schwarz, *SE-VO*, Art. 50, para. 26, 30–34; Kiem, *ZHR* 173 (2009) 156 (167 et seq.). This applies also the deputy chairman, see Teichmann, in: Lutter/Hommelhoff (eds.), *SE-Kommentar*, Annex Art. 43 SE-VO §34 SEAG para. 9 (however critical).

¹¹² On the advantages and disadvantages see already above §12 para. 16–18; now prominently COM (2011) 164 final, p. 5 (advocating separation); advocating in principle an overlap of the functions in the case of a European Company: Teichmann, in: Lutter/Hommelhoff (eds.),

- c) Number, Appointment and Removal of the Board Members (Art. 39(2–4), 40(2) and (3), 43(2) and (3), 46 et seq. of the Regulation)

42. The general meeting appoints the board in the one-tier system and the supervisory board in the two-tier system (Art. 43(3), 40(2)); in the latter case, national law can provide for the same with respect to the executive board or at least allow such a procedure (Art. 39(2)).¹¹³ The number of members is set in the company statutes (for all organs); national law can only fix a minimum and maximum in the one-tier board system if there is employee participation, at least three (Art. 39(4), 40(3), 43(2)).¹¹⁴ In most national company laws (and in Germany now in §40 (1)(2) SEAG of the specific implementing Act), there is a rule prescribing that non-executive directors must constitute the majority of the board¹¹⁵ – although the Regulation does not so state (but certainly neither excludes) this possibility.¹¹⁶

43. Disqualification for a seat on the board of a PLC under national law also entails disqualification for the European Company (Art. 47(2)). In the two-tier board system, moreover, membership of either the supervisory board or the management board is incompatible with simultaneous membership of the other; at most a member of the supervisory board can temporarily act as a substitute member of the management board (Art. 39(3)). With respect to the remaining questions of conflicts of interest (and independence), Art. 9 para. 1c lit. ii, 43 para. 3 of the Regulation refers again to national law. As previously explained, the Regulation does not prohibit overlapping offices between members of the board and executive directors (above §33 para. 41). This also implies that, of course, there are certain conflicts of interest, but that these are not to be characterised as cases of incompatibility.¹¹⁷ An additional implication is that

Europäische Gesellschaft, 195 (207); for the opposite view see: Ihrig, *ZGR* 2008, 809 (812 et seq.).

¹¹³ On this possibility Edwards, (2003) 40 *CMLR*, 443 (457); Bungert/Beier, *EWS* 2002, 1 (3); Hommelhoff, *AG* 2001, 279 (283); and comparative law above §3 para. 28.

¹¹⁴ In Germany, if the balance sheet sum is below 3 million € (and if the company is not subject to employee participation, Art. 43 (2)(3) of the Regulation), the board may also consist of one person only, although in addition there has to be a CEO (two persons lead structure); Bachmann, *ZGR* 2008, 779 (787); Beckert, *Personalisierte Leitung*, 134–138 (see §23 (1)(2) SEAG and Art. 54 (2)(2) of the Regulation, with comparative law survey); Teichmann, in: Lutter/Hommelhoff (eds.), *Europäische Gesellschaft*, 195 (208 et seq.).

¹¹⁵ See for the UK, on the basis of the Combined Code, now Corporate Governance Code ('Comply or Explain'): Kiarie, 'Non-executive directors in UK listed companies: are they effective?', *International Company and Commercial Law Review*, 2007, 17 (namely in the committees).

¹¹⁶ Manz in: Manz/Mayer/Schröder, *SE-VO*, Art. 43 para. 18; Schwarz, *SE-VO*, Art. 43, para. 81 et seqq., especially para. 86.

¹¹⁷ This is actually the prevailing view also in Germany, see, for instance: *BT-Drucks.* (Parliamentary Reports) 15/4053 (Committee on Legal Affairs); Bachmann, *ZGR* 2008, 779 (793 et seq.); Frodermann, in: Jannott/Frodermann, *SE-Handbuch*, chap. 5 para. 203; Siems, *NZG* 2007, 209 (209); Teichmann, in: Lutter/Hommelhoff (Hrsg.), *Europäische Gesellschaft*, 195 (216 et seq.); Thümmel, *Leitfaden*, para. 210.

persons with such overlapping mandates are not excluded from voting as long as the conflicts of interest are not of a kind which would exclude them from voting generally, for instance, if the person would have to 'assess own acts' (judging one's own affairs).¹¹⁸ In large countries with a one-tier board tradition (and indeed in most countries with such a tradition), **share option programmes** are excluded for non-executive directors. The same should apply where such a prohibition exists for members of the supervisory board (such as in Germany), but has not been prescribed explicitly for non-executive directors in the one-tier board system created for the European Company.¹¹⁹

*44. For the term of office, EU law itself guarantees rather extensive party autonomy (in the company statutes, also against more restrictive national law of the State in which the European Company is registered): the maximum of six years is higher than in most States, and re-election can only be excluded by the company statutes (Art. 46). Whenever national law guarantees that this maximum duration is respected, Art. 46 of the Regulation, which wants to provide flexibility, does certainly not prohibit a solution under national law which is still more flexible: for instance a provision which provides that the member is nominated until 'the general meeting which decides on the exoneration of the board for the fourth financial year after the year of nomination, but no longer than six years after the day of the nomination'.¹²⁰ Re-election can be excluded only in the articles of association (Art. 46 para. 2).

*45. Other rules on appointment and removal again follow the national law at the place of registration, which is then emphasised explicitly again for the question of whether legal persons may be a member of the board (if there is such a provision in the company statutes),¹²¹ and for the members who represent the shareholders, and for specific appointment rights or the admissibility of a proportionate vote¹²² (Art. 47(1), (3) and (4)). Art. 39(2), however, seems to contain a decision in favour of free removal of board members, in principle.¹²³

¹¹⁸ In more detail on this issue (also on the possibility of enhancing efficiency by installing committees for these issues): Bachmann, ZGR 2008, 779 (793); Siems, NZG 2007, 209 (130 et seq.) (permissible also under EU Law).

¹¹⁹ In this sense Oechsler, NZG 2005, 449 (451); Schönborn, *Die monistische Societas Europaea*, 277; opposite Bachmann, ZGR 2008, 779 (795–797); Lutter/Kollmorgen/Feldhaus, BB 2005, 2473 (2480).

¹²⁰ Prevailing view today, see: Drinhausen/Nohlen, ZIP 2009, 1890; Frodermann/Jannott, ZIP 2005, 2251; opposite AG and LG Hamburg (Local Court and Court of Appeals), ZIP 2005, 2017.

¹²¹ Some Member States like Germany, still do not allow legal persons to be board members (though there is dispute on policy grounds about this), see: Brandes, NZG 2004, 642; also (with short comparative law survey) Fleischer, AcP 204 (2004), 502 (529–531).

¹²² Under most company laws the majority of shareholders of a PLC appoints all members of the board, but many laws allow the company statutes to deviate from this; see §12 para. 31.

¹²³ Gutsche, *Eignung*, 79–83; Theisen/Hölzl, in: Theisen/Wenz (eds.), *Europäische Aktiengesellschaft*, 269 (288); brief comparative law survey above §12 para. 31.

d) Conduct of Business (Art. 42, 45, 49–51 of the Regulation)

*46. Under all national laws, the board itself regulates its internal affairs and elects the chairman from among its members. What is remarkable is that he has to come from the shareholders' list if the board incorporates employee participation (Art. 42, 45). Some key elements with regard to **decision-making** within the board(s) are also fixed (Art. 50), again changeable by a provision in the company statutes (no option given to the Member States): half of the members have to be present (quorum), and the majority of the members present or represented have to vote for a proposal. Abstentions and invalid votes are thus counted as rejection. Meanwhile, it obviously also follows from the rules set out in Art. 50 of the Regulation that the decisions of the board are to be taken collectively.¹²⁴ Moreover, it becomes clear from these rules that, unless a provision in the company statutes provides to the contrary, proxies are possible within the board(s). All other issues are regulated by national law. Conduct of business by the CEO is not regulated in any detail at all.¹²⁵

*47. For the conduct of business, a **duty of confidentiality** and a **liability for breach of duties** are set as guiding principles (Art. 49 and 51); these rules are indeed in principle undisputed from a comparative law perspective. For the outlines, however, i.e. mainly for exceptions from a duty of confidentiality and for the definition of cases in which there is a breach, and probably also for the standard of care owed, the national law of the State in which the European Company is registered applies again.¹²⁶ If national laws provide for an extra-contractual (tort) liability for the breach of duties owed by the executive directors, for instance in the case of wrongful trading, this liability extends to the executive directors in their personal capacity, but to other members of the board only if they have violated their duties to supervise.¹²⁷ The question is disputed as to who has the competence (and eventually also the duty) to enforce the obligations arising from the

¹²⁴ Beckett, *Personalisierte Leitung*, 133 et seq; Schwarz, *Europäisches Gesellschaftsrecht*, 455; Werlauff, *EC Company Law*, (1993), 260. In more detail (namely on the role of the president, also his right to a tie-breaking vote): Beckett, op.cit., 142–145 (with comparative law survey p. 139–142, on the US, UK and France).

¹²⁵ On this issue see Boettcher, *Kompetenzen*, 136–151 (with comparative law survey on the UK, France and Switzerland). Joint responsibility also with respect to administration (in the sense of Art. 43 (1)(2) Regulation) can be found in Germany (§40 (2)(2) SEAG) albeit only as a default rule; see Beckett, *Personalisierte Leitung*, 183–187 (also comparative law survey p. 145–177 and on the strong position of a CEO p. 187–202); see also Boettcher, op. cit., 162–164 (allowing the board virtually complete discretion).

¹²⁶ Da Costa/de Meester Billreio, *The European Company Statute*, 65; Edwards, (2003) 40 CMLR, 443 (457); Wooldridge, (2004) 25 *The Company Lawyer*, 121 (123); Hirte, NZG 2002, 1 (5); Hommelhoff, AG 2001, 279 (283); Schwarz, ZIP 2001, 1847 (1850); Theisen/Hölzl, in: Theisen/Wenz (eds.), *Europäische Aktiengesellschaft*, 269 (289); extensive comparative law survey in M. Roth, *Unternehmerisches Ermessen und Haftung des Vorstands – Handlungsspielräume und Haftungsrisiken insbesondere in der wirtschaftlichen Krise*, (2001).

¹²⁷ In more detail Oechsler, NZG 2005, 449 (452–454); more generally also Schwarz, Art. 43 para. 57.

liability of board members, be it the executive directors or the shareholders in a derivative claim ('actio pro socio').¹²⁸

3. General Meeting (Art. 38, 52–60 of the Regulation)

48. The Regulation deals only to a limited extent with the competence of the shareholders' meeting: Art. 59(1) provides for such a competence in the case of amendments to the company statutes, Art. 40(2) and 43(3) for the appointment of the members of the supervisory, and potentially also the management, board. More competences flow (only) from national law (Art. 52, also Art. 39(2)), which again often follows EU directives (for instance with respect to capital measures or structural changes: see for instance above §11 para. 41, 47, §27 para. 19, §28 para. 30 et seq.).

49. The organisation of the meeting, its course and thus also information and voting rights¹²⁹ are again subject to the law of the State in which the European Company is registered if there is no provision to the contrary (Art. 53). The Regulation itself broaches only two sets of questions: 'whether' there is a general meeting (also how to set the agenda) and the majorities needed. On the other hand, such complex and important issues as voting and the information rights remained open – which, however, the Shareholders' Rights Directive harmonised to a good extent (§13). What has been fixed is: there has to be one annual meeting, to be held, at the latest, six months after the end of the financial year (Art. 54(1)), which is nothing surprising from a comparative law perspective (above §13 para. 17); and a meeting can be called at any time by the board, including the supervisory board (!),¹³⁰ and under national law also by any other organ (Art. 54(2)). The last right is likewise given, again as a rather minimal standard from a comparative law perspective (above §13 para. 17), to a minority of (at most) 10% of shareholders (Art. 55).¹³¹ This minority also has – again hardly anything surprising from a comparative law perspective (above §13 para. 17) – the right to

¹²⁸ For the former see Ihrig, ZGR 2008, 809 (821 et seq.); for the latter (derivative claim in all cases of violation of duties, not only in cases of gross negligence): Ihrig, in Bachmann/Casper/Schäfer/Veil (eds.), *Steuerungsfunktionen des Haftungsrechts im Gesellschafts- und Kapitalmarktrecht*, (2007), p. 17 (27).

¹²⁹ See examples in Theisen/Hölzl, in: Theisen/Wenz (eds.), *Europäische Aktiengesellschaft*, 269 (281, 283); also Da Costa/de Meester Bileiro, *The European Company Statute*, 62 et seq.; Hommelhoff, AG 2003, 179 (183) (right to information); on these problems and other questions subject to national law see Hirte, NZG 2002, 1 (9) (who, however, thinks that EU law guarantees the voting right in this context).

¹³⁰ Also the supervisory board, Schwarz, ZIP 2001, 1847 (1856); Theisen/Hölzl, in: Theisen/Wenz (eds.), *Europäische Aktiengesellschaft*, 269 (284); see also: Da Costa/de Meester Bileiro, *The European Company Statute*, 63.

¹³¹ On this topic see Brandt, *Hauptversammlung*, 188–197, 208–222; for listed (European) Companies, the threshold has later been set at a lower level by the Shareholders' Rights Directive, at 5% (maximum), see §13 para. 15, 17.

add items to the agenda (Art. 56). There are in addition rules on the majorities needed: a majority of all votes (validly) cast (without abstentions), as Art. 57 et seq. requires as a minimum standard, is required everywhere in any case. Solely for the amendment of the company statutes, Art. 59 of the Regulation already requires a qualified majority.¹³² This majority is defined as it is elsewhere in EU law for structural changes: there has to be at least a two-thirds majority or – if national law opts for this possibility – a majority of the votes cast if half of the capital subscribed is represented at the meeting (quorum). These majority requirements apply separately to classes of shares if their specific rights are affected by the resolution (Art. 60).¹³³ Action for avoidance again follows national law, (violation of) the rules in the Regulation or in particular implementing laws can however, serve as additional grounds for such action.¹³⁴

V. EMPLOYEE PARTICIPATION IN THE EUROPEAN COMPANY (EMPLOYEE INVOLVEMENT DIRECTIVE)¹³⁵

1. History and Basic Principle

50. The dispute over the employee participation regime was for a long time the

¹³² In more detail on the amendments of the statute: Brandt, *Hauptversammlung*, 157–171; and standard commentaries on Art. 58 of the Regulation.

¹³³ This is the case when specific rights which are immune against amendment of the company statutes, are eliminated or restricted: Hirte, NZG 2002, 1 (8).

¹³⁴ In more detail Göz, ZGR 2008, 593.

¹³⁵ Bibliography: Braun, *Die Sicherung der Unternehmensmitbestimmung im Lichte des europäischen Rechts*, (2005); Buttmore, 'Societas Europaea and worker participation', (1994) 4 *International Sports Law Review*, 17; Davies, 'Workers on the Board of the European Company?', (2003) 32 *Industrial Law Journal*, 75; Dreher, 'Sockellösung statt Optionsmodell für die Mitbestimmung in der Europäischen Aktiengesellschaft', *EuZW* 1990, 476; Figge, *Mitbestimmung auf Unternehmensebene in Vorschlägen der Europäischen Gemeinschaften*, (1992); Forst, 'Die Beteiligung der Arbeitnehmer in der Vorrats-SE', NZG 2009, 687; Funke, 'Die Arbeitnehmerbeteiligung im Rahmen der Gründung einer SE – Praktische Tipps zu Planungsschritten und anzustellenden Überlegungen im Vorfeld', NZA 2009, 412; Goos, 'Ansätze zur Mitbestimmung der Arbeitnehmer in der europäischen Rechtsetzung', in: Oetker, Preis, Rieble (eds.), *50 Jahre Bundesarbeitsgericht*, (2004), 1179; Götz/Winzer/Arnold, 'Unternehmerische Mitbestimmung – Gestaltungsoptionen und Vermeidungsstrategien', ZIP 2009, 245; Grobys, 'Das geplante Umsetzungsrecht zur Beteiligung von Arbeitnehmern in der Europäischen Aktiengesellschaft', NZA 2004, 779; Gruber/Weller, 'Societas Europaea – Mitbestimmung ohne Aufsichtsrat? – Ideen für die Leitungsverfassung der monistischen Aktiengesellschaft in Deutschland', NZG 2003, 298; Günzel, *Die Richtlinie über die Arbeitnehmerbeteiligung in der Europäischen Aktiengesellschaft (SE) und ihre Umsetzung in das deutsche Recht*, (2006); Habersack, 'Schranken der Mitbestimmungsautonomie in der SE', AG 2006, 345; id., 'Grundsatzfragen der Mitbestimmung in SE und SCE sowie bei grenzüberschreitender Verschmelzung', ZHR 171 (2007) 613; Hanau, 'Neuer Anlauf zur mitbestimmten SE', RdA 1998, 231; Heinze, 'Ein neuer Lösungsweg für die Europäische Aktiengesellschaft', AG 1997, 289; Heinze/Seifert/Teichmann, 'Verhandlungssache – Arbeitnehmerbeteiligung in der SE – Vorschlag für eine Mustervereinbarung zu Unterrichtung, Anhörung und Mitbestimmung in der Europäischen Gesellschaft (SE)', BB 2005, 2524; Hellwig/