



The referral system of Art. 9 I Regulation  
(EC) No 2157/2001 – a model for the further  
development of European Private Law?  
Wendelin August Mayer

Thesis submitted for assessment with a view to obtaining the degree of  
Master in Comparative, European and International Laws (LL.M.)  
of the European University Institute

Florence, [01 October 2015]



European University Institute

**Department of Law**

The referral system of Art. 9 I Regulation (EC) No 2157/2001 – a model for the further development of European Private Law?

Wendelin August Mayer

Thesis submitted for assessment with a view to obtaining the degree of  
Master in Comparative, European and International Laws (LL.M.)  
of the European University Institute

**Supervisor**

Prof. Dr. iur. Dr. phil. Stefan Grundmann LL.M. (Berkeley), European University  
Institute

© Wendelin August Mayer, 2015

No part of this thesis may be copied, reproduced or transmitted without prior  
permission of the author



## Summary

Following the Nice compromise in 2000, the European Union adopted the legislation which constitutes the legal framework for the Societas Europaea (SE) on a European level. To this date, many gaps on the European level remain which are filled with national law, as is the main content of Article 9 SE-regulation. Article 9, however, is much more complex, leaving many questions open to discussion. The thesis undertakes it to assess the suitability of Article 9 and, thereby, if similar solutions in parallel processes of legislation are recommendable, in a two-step approach: in a first part, the problems of interpretation are discussed. This reveals a number of obscurities which have led to discussion in legal literature. Some of these problems can be reduced to national peculiarities, while others can be solved using traditional legal methods of interpretation. In a second step, the results of these discussions are used to assess – among other criteria – the suitability of Article 9. While some points could be formulated more clearly, the workability of the current legislation may be below the expectations, but is still given. The present form of the SE-regulation can be seen as slightly improving the possibilities for regulatory competition, but in a manner where a „race to the bottom“ is not a threat. While more regulations on the European level remain desirable, the result of the Nice compromise constitutes a stepping stone towards this end. With the establishment of the SE, growing acceptance in the legal practice and attention in the literature are to be expected. Both will provide incentives for the legislator to develop further the current legislation. The solution of Article 9 therefore has to be seen as a viable legal solution to an intricate political process.



Content – Overview

- Summary..... 5
- Content – Overview..... 7
- Table of Contents..... 9
- A. Introduction..... 13
  - I. The Nice compromise ..... 13
  - II. Question and Outline ..... 14
- B. First Part. Interpretation of Article 9 SE-regulation ..... 17
  - I. Methodology ..... 17
  - II. Applicability ..... 21
  - III. Content ..... 40
  - IV. Preliminary Result ..... 54
- C. Second Part. Advisability of Article 9 ..... 55
  - I. Clarity..... 56
  - II. Workability ..... 58
  - III. Regulatory competition and regulatory arbitrage..... 60
  - IV. Prospect of an extension to a comprehensive optional instrument ..... 69
- D. Summary and Final Conclusions..... 75
  - I. Consequences of a comprehensive instrument for regulatory competition ..... 75
  - II. The Nice compromise: Stepping stone or dead end? ..... 76
  - III. Towards a balance between regulation and competition in Europe ..... 77
- Bibliography..... 79
- Annex ..... 89





## Table of Contents

Summary.....	5
Content – Overview.....	7
Table of Contents.....	9
A. Introduction.....	13
I. The Nice compromise.....	13
II. Question and Outline.....	14
B. First Part. Interpretation of Article 9 SE-regulation.....	17
I. Methodology.....	17
1. Wording.....	18
2. Teleology.....	18
3. System.....	19
4. History.....	19
5. Legal comparison.....	21
6. Economic Analysis of Law.....	21
7. Preliminary result.....	21
II. Applicability.....	21
1. Level of private international law: application of private international law before applying Article 9?.....	22
2. Level of substantive law: “ambit of regulation” of Article 9?.....	23
a. Is the idea of such an ambit a useful idea?.....	23
(i) Wording.....	23
(ii) History.....	24
(iii) Systematic interpretation.....	25
(iv) Teleology.....	27
b. Preliminary result: Discussion in the literature.....	27
c. Determination of the ambit.....	28
(i). Methods to determine the ambit.....	28
(ii). Areas of law within and outside of the ambit.....	31
d. Law of Groups: specific questions I.....	32
(i). First approach: comprehensive referral.....	35
(ii). Second approach: exemption from the ambit.....	36
(iii). Third approach: SE-Regulation only applies to the controlled company ...	37

e.	Takeover law: specific questions II.....	40
3.	Preliminary result.....	40
III.	Content .....	40
1.	Freedom to adopt statutes .....	40
a.	Wording and history.....	41
b.	Systematic interpretation .....	42
c.	Teleology .....	43
2.	The question of the use of principles in Art. 9.....	44
a.	Overview over the discussion .....	44
b.	Arguments used so far in the discussion.....	45
c.	Resolving the dispute: an intermediary approach.....	46
3.	“And” or “or” between Art. 9 para. 1 lit. (b) and (c).....	48
4.	Comprehensive referral or transmission provision .....	49
a.	Wording.....	49
b.	History .....	50
c.	Systematic interpretation .....	50
d.	Teleology .....	51
5.	Other discussions .....	53
IV.	Preliminary Result.....	54
C.	Second Part. Advisability of Article 9 .....	55
I.	Clarity.....	56
1.	A word on compexity .....	56
2.	Problems in interpreting Article 9.....	56
3.	The role of Legal Literature.....	57
II.	Workability .....	58
III.	Regulatory competition and regulatory arbitrage.....	60
1.	Does Article 9 SE-regulation favour regulatory competition?.....	61
a.	Comparison EU – USA .....	61
b.	Legal Literature.....	63
c.	Empirical data.....	65
d.	Conclusion .....	66
2.	Is regulatory competition desirable?.....	67
a.	Discussion in the US .....	67

b.	Conclusion for Europe .....	68
IV.	Prospect of an extension to a comprehensive optional instrument .....	69
1.	Evaluation of the status quo: are more rules desirable?.....	69
2.	Probability of a comprehensive instrument .....	71
3.	Excursus: Comparison to PECL / CESL / CISG .....	71
4.	Preliminary evaluation: desirability of a comprehensive optional instrument.....	73
D.	Summary and Final Conclusions.....	75
I.	Consequences of a comprehensive instrument for regulatory competition .....	75
II.	The Nice compromise: Stepping stone or dead end? .....	76
III.	Towards a balance between regulation and competition in Europe .....	77
	Bibliography.....	79
	Annex.....	89



## A. Introduction

### I. The Nice compromise

It may appear shocking or amusing that what was later do be dubbed “the flagship”<sup>1</sup> of European company law<sup>2</sup> might not have come about without the involvement of Basque terrorists, but it is reported that only in exchange against a promise by Chirac to step up French cooperation in hunting down said terrorists, Spain gave up its resistance against any labour law in the statute of the Societas Europaea (SE) and made the “Nice compromise” possible<sup>3</sup>. As is commonly known, this resulted a short year later in the passing of the European legislation for the SE, consisting in the SE-regulation<sup>4</sup> and a directive dealing with the worker participation issue<sup>5</sup>. This compromise set an end to a weary legislation process which had gone on for some 40 years, reaching back to the enthusiastic period of the 1960s<sup>6</sup> and 1970s when drafts of more than 400 articles were discussed. When passed in 2001, the SE-regulation had been narrowed down<sup>7</sup> by the need to political compromise to 70 articles, in which up to 84<sup>8</sup> provisions referring to national law of the member states were counted, all centered around what can be called the “backbone”<sup>9</sup> of the law of the SE, Article 9:

#### Article 9

##### 1. An SE shall be governed:

(a) by this Regulation,

(b) where expressly authorised by this Regulation, by the provisions of its statutes

(c) in the case of matters not regulated by this Regulation or, where matters are partly regulated by it, of those aspects not covered by it, by:

(i) the provisions of laws adopted by Member States in implementation of Community measures relating specifically to SEs;

(ii) the provisions of Member States' laws which would apply to a public limited-liability company formed in accordance with

---

<sup>1</sup> Hopt, “Europäisches Gesellschaftsrecht - Krise und neue Anläufe,” 99.

<sup>2</sup> In this thesis, the term „European company law“ will be with lower-case „company“ and „law“ if referring to the company law of the European Union, including the Council Directives, and with upper-case “Company Law” if referring to the law of the European Company (Societas Europaea).

<sup>3</sup> Hopt, “The European Company (SE) under the Nice Compromise: Major Breakthrough or Small Coin for Europe?,” 467 f.

<sup>4</sup> Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE).

<sup>5</sup> Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees.

<sup>6</sup> Two prior drafts stem from 1970 and 1975. As the hour of birth is commonly quoted Sanders, “Auf dem Weg zu einer europäischen Aktiengesellschaft?”

<sup>7</sup> Cf. to the development of the SE and the parallel development of company law harmonization Schürnbrand, “Vollharmonisierung im Privatrecht.”

<sup>8</sup> Brandt and Scheifele, “Die Europäische Aktiengesellschaft Und Das Anwendbare Recht,” 547; Storm, Paul M., “The Societas Europaea: A New Opportunity?,” 14 counts “65 references to national law and 32 options for Member States.”

<sup>9</sup> Colangelo, “La ‘Società Europea’ alla prova del mercato comunitario delle regole,” 166 (“la colonna vertebrale”).

the law of the Member State in which the SE has its registered office;  
(iii) the provisions of its statutes, in the same way as for a public limited-liability company formed in accordance with the law of the Member State in which the SE has its registered office.

[...]

This complex “eldorado of methodology”<sup>10</sup> has to be read in context with the rest of the SE-regulation which mainly regulates formation and structure of the SE, leaving even there many details to national law. This has led to the disappointed verdict that now there exist 15 types of SE (one for each member state – today there would be 28) rather than one truly supranational legal form<sup>11</sup>.

But however desirable a true supranational company may have been, the terrorist anecdote casts light on this showpiece example of difficulties in European politics, so that the Nice compromise was probably the best solution that could be reached.

Or was it? Given that the European legislator is currently discussing parallel projects<sup>12</sup>, the question rises whether one should advise the legislator in a similar situation not to pass any legislation at all to prevent the abovementioned disappointment. No legislation may be better than an unsatisfactory legislation.

## II. Question and Outline

In this thesis, I will try to answer the question if the Nice compromise led to such unsatisfactory legislation in the shape of the cited Article 9, or if instead the current SE-regulation constitutes a true step forward: it appears possible that the compromise on the one hand becomes “fossilized” and hard to ever overturn, but on the other that it paves the way for greater acceptance of the SE which in the future may then well be further harmonized. If the legislator comes to a similar point in the political process like in December 2000 in Nice, is the model of the current Article 9 a feasible way to overcome lack of agreement on substantive law? What could be made better? Or should the legislator refrain from legislation altogether?

My approach to answer this question will be split in two parts. In the first part of the thesis (B), I will dwell in the “eldorado” of Article 9 to assess how many problems of interpretation it poses and how they can be solved. Results I hope to draw from this discussion will help in

---

<sup>10</sup> Casper, “Ulmer-FS 2003,” 72; similarly (“lawyer’s paradise”) already Sanders, “Structure and Progress of the European Company,” 89.

<sup>11</sup> E.g. Hopt, “Europäische Aktiengesellschaft - per aspera ad astra?,” 1; Lutter, “Europäische Aktiengesellschaft - Rechtsfigur mit Zukunft?,” 1.; Menjucq, “La société européenne, Règlement CE n° 2157/2001 et directive 2001/86/CE du Conseil du 8 octobre 2001”, under I.B.1.; along the same lines Colangelo, “La ‘Società Europea’ alla prova del mercato comunitario delle regole,” 172, footnote 62.; underlining more the core communities between the different SEs Rescio, “La Società Europea Tra Diritto Comunitario E Diritto Nazionale,” 977 (footnote 25).

<sup>12</sup> Cf. e.g. the similar wording of the parallel Art. 8 SCE-regulation (draft). See to other projects in general Grundmann, *European Company Law* § 34.

the second part (C), alongside other criteria, to evaluate the advisability of Article 9 (or parallel solutions) to the European legislator.





## B. First Part. Interpretation of Article 9 SE-regulation

The first part which will deal with the interpretation of Article 9 will be divided into three parts – after a short introduction into the methodology (I, p. 17) I will use in the following examinations I will look at questions regarding the cases in which Article 9 is applicable (II, p. 21) and, thirdly, what it says in these cases, ie the content (III, p. 40). By doing so, I will follow the thinking process of any lawyer who is concerned with a case and has first to ask him- or herself whether Article 9 is applicable in the case at hand and (only) if so, what it says.

By choosing this structure, I have found myself confronted with the problem that many factual problems are discussed in the literature at different parts of this structure, i.e. different approaches to one problem – e.g. the concern that the applicable law of groups should be the one for the controlled company, not the controlling company<sup>13</sup> – are solved on different levels. This holds true for the mentioned exemplary problem. Some<sup>14</sup> see it as a problem of the ambit on the level of substantive law (then below B II 2 d, p. 32), others<sup>15</sup> as a problem of the content of Article 9 (comprehensive referral) (then below B III 4, p. 49). Because it makes sense to discuss all approaches together, and because the place I believe is the right one to discuss the problems does not always come first, I had at some points refer to answers I would give later or give a short justification and repeat it again later (cf. for the exemplary problem B II 1 at the end). I still decided to stick to this structure since I believe it to clarify already some of the issues that may exist with Article 9.

### I. Methodology

First, an overview over the methods used in interpreting European Law shall be provided, paying special attention to the peculiarities of the SE-Regulation. Starting point is that the European Law constitutes a legal order of its own right<sup>16</sup>, independent of the Member States' legal orders, with which comes an autonomous understanding of the European terminology<sup>17</sup>. Nevertheless, the ECJ too, rests on the traditional methods (or “elements”, as *von Savigny* called them) of interpretation, namely literal, teleological, systematic and historical interpretation. The following overview will therefore be structured along these lines, paying at each step special attention to the peculiarities of European Law (which affect all elements of interpretation<sup>18</sup>), the SE-Regulation in general and Art. 9 SE-Regulation in special.

---

<sup>13</sup> This is a unanimous concern, cf. p. 20 ff.

<sup>14</sup> E.g. Lächler and Oplustil, “Funktion Und Umfang Des Regelungsbereichs Der SE-Verordnung.”

<sup>15</sup> E.g. Habersack, “Das Konzernrecht Der Deutschen SE - Grundlagen.”

<sup>16</sup> Teichmann, “Die Einführung Der Europäischen Aktiengesellschaft, Grundlagen Der Ergänzung Des Europäischen Statuts Durch Den Deutschen Gesetzgeber,” 402; Grundmann and Riesenhuber, “Die Auslegung Des Europäischen Privat- Und Schuldvertragsrechts,” 529.

<sup>17</sup> Cf. ECJ of 06.10.1982, case 283/81, *CILFIT*, [1982] ECR 3415 (recital 19): “Community law uses terminology which is peculiar to it”.

<sup>18</sup> Grundmann and Riesenhuber, “Die Auslegung Des Europäischen Privat- Und Schuldvertragsrechts,” 529.

### 1. Wording

The starting point for interpretation of European Law is the wording. In nearly all cases, the ECJ starts out with quoting the provisions in argument<sup>19</sup>. The wording is binding in all 24 official languages, not just in the language of the case or in the language of the member state<sup>20</sup>. This means that in applying the law, all language versions have to be taken into account. If they divert, a simple resort to alleged translation mistakes is not possible; differences have to be bridged with the help of the other interpretation methods. This adds another difficulty and possible source of divergent outcomes to the interpretation of European law.

Especially in the SE-Regulation, divergences of language versions would be detrimental. While in many other fields of European Private Law, differences between language versions may not crop up in everyday cases, the SE-Regulations provides for cases which necessarily have a bearing on at least two different legal orders<sup>21</sup>. For companies who seek to do business on an at least European level, spanning borders and maybe aiming at cross-border transfer of seat or merger, legal uncertainty caused by possible different interpretation of law in different member states is deterrent<sup>22</sup>.

Article 9 SE-Regulation is situated at a crucial fulcrum since the question which law has to be applied has to be taken into account as a first step in every question regarding the SE. This makes every language diversion more delicate and may help to explain why there was confusion especially over (the absence of) one word in the provision, a problem which I will discuss later when assessing the content of Article 9 (B III 3, p. 48).

### 2. Teleology

The teleological interpretation is usually regarded as the most important and distinct interpretation method of European Law<sup>23</sup>. This holds true especially for the European company law where the ECJ makes use of this method in all cases it has to decide<sup>24</sup>.

In European Private Law, the interpreter will resort to the Recitals and the legal basis for the norm<sup>25</sup>. In the second degree, the formal regulation goals of every private law convergence come into play, namely the unification of law and the establishment of the internal market<sup>26</sup>.

---

<sup>19</sup> Ibid.

<sup>20</sup> Cf. Article 1 of Council Regulation No 1 of 15 April 1958 determining the languages to be used by the European Economic Community, amended by Council Regulation (EU) No 517/2013 (dealing with the accession of the Republic of Croatia).

<sup>21</sup> Cf. Article 2 of the SE-Regulation for the different scenarios.

<sup>22</sup> See, to that effect, "Ernst & Young, Study on the Operation and the Impacts of the Statute for a European Company (SE), - 2008/S 144-192482, Final Report, 9 December 2009," 241.

<sup>23</sup> Grundmann and Riesenhuber, "Die Auslegung Des Europäischen Privat- Und Schuldvertragsrechts," 531; Lutter, "Die Auslegung angeglichenen Rechts," 602 f.

<sup>24</sup> Hommelhoff, "Die Auslegung angeglichenen Gesellschaftsrechts, Eine Analyse der EuGH-Rechtsprechung," 37.

<sup>25</sup> Grundmann and Riesenhuber, "Die Auslegung Des Europäischen Privat- Und Schuldvertragsrechts," 531; Teichmann, "Die Einführung Der Europäischen Aktiengesellschaft, Grundlagen Der Ergänzung Des Europäischen Statuts Durch Den Deutschen Gesetzgeber," 405.

<sup>26</sup> Grundmann and Riesenhuber, "Die Auslegung Des Europäischen Privat- Und Schuldvertragsrechts," 531.

The principle of *effet utile* is decisive as well. For the SE-regulation, the goal of creating a supranational legal form is vital. This is also<sup>27</sup> reflected in Recital 6 of the SE-Regulation which underlines the importance of the coincidence of economic and legal unit of business in the Community, therefore aiming at the creation of companies “formed and carrying on business under the law created by a Community Regulation directly applicable in all Member States”. Any interpretation, and especially that of Article 9, therefore has to aim at the functioning of the supranational legal form<sup>28</sup>.

### 3. System

It is widely accepted that the legal order of the European Union constitutes a more and more systematic entity which allows for systematic interpretation. Being one of the classical four methods of interpretation, the importance of the systematic interpretation in European law may not be as big as the one of the teleological interpretation (from which is it not always clearly distinguished<sup>29</sup>), but is still paramount<sup>30</sup>.

From a systematic point of view, it is imaginable to interpret secondary legislation either by establishing a system within one legal act (here, the SE-regulation) or by drawing on other legal acts, both of primary or other secondary law.

The importance of interpretation in conformity with primary law is widely acknowledged<sup>31</sup>. As concerns the interpretation of European company law, the right of establishment (and the principle of free movement of capital) as laid down in articles 49 (and 63) TFEU are considered to be of main importance<sup>32</sup>.

I will come back to questions of systematic interpretation when discussing the content of Art. 9, especially the question to what extent principles should be used in interpreting Article 9 (B III 2, p. 44).

### 4. History

The historical interpretation does not play a major role in European law<sup>33</sup>. This may be due to the shorter historical background of European law, but also reflects the lower grade of availability of legal documents and drafts on the European level as opposed to national legislation<sup>34</sup>. In European company law, the ECJ usually does not give effect to the role of the

---

<sup>27</sup> Cf. also Recital 10: “the essential objective of legal rules governing SEs is [...] it must be possible at least to create such a company”.

<sup>28</sup> Teichmann, “Die Einführung Der Europäischen Aktiengesellschaft, Grundlagen Der Ergänzung Des Europäischen Statuts Durch Den Deutschen Gesetzgeber,” 406; Casper, in: Spindler and Spilz, *Kommentar zum Aktiengesetz* Art. 9 SE-VO, Recital 17.

<sup>29</sup> Casper, in: Goette, Habersack, and Kalss, *Münchener Kommentar zum Aktiengesetz* Art. 9 SE-VO recital 16.

<sup>30</sup> Grundmann, “‘Inter-Instrumental-Interpretation’, Systembildung durch Auslegung im Europäischen Unionsrecht,” 884 ff.

<sup>31</sup> *Ibid.*, 895 f.

<sup>32</sup> Schön, “Das Bild Des Gesellschafters Im Europäischen Gesellschaftsrecht,” 2.

<sup>33</sup> Lutter, “Die Auslegung angeglichenen Rechts,” 599; less strong Grundmann and Riesenhuber, “Die Auslegung Des Europäischen Privat- Und Schuldvertragsrechts,” 530.

<sup>34</sup> Grundmann and Riesenhuber, “Die Auslegung Des Europäischen Privat- Und Schuldvertragsrechts,” 530; Teichmann, “Die Einführung Der Europäischen Aktiengesellschaft, Grundlagen Der Ergänzung Des Europäischen Statuts Durch Den Deutschen Gesetzgeber,” 404.

history in its judgments<sup>35</sup>, even though there are cases when the Advocate General predicated its opinion on previous drafts of the provision at issue<sup>36</sup>. The reasoning behind the emergence of the provision, though, can be of importance, referring to the legal situation in the member states at the point of time when the provision was adopted<sup>37</sup>. This may, on the other hand, not result in the simple adoption of member state interpretation; as can be seen from the example of the Tomberger case<sup>38</sup>, where the “true and fair view” was, regardless of its British derivation, interpreted by the ECJ independently from this origin<sup>39</sup>.

The SE-regulation may to a certain degree constitute an exception to this rule<sup>40</sup>, given the abundant drafts and opinions which have accrued over decades. In every single case, though, it is necessary to ascertain to which degree it is helpful to draw on previous drafts. Historical interpretation cannot mean to bring to bear the content of drafts which were purposefully *not* adopted in the end<sup>41</sup>. In some cases, rather an argumentation *e contrario* may be appropriate. A changed wording may be interpreted as a hint towards a change in the intention of the legislator<sup>42</sup>. The role of historical interpretation may be flawed by the fact that most provisions bear the character of political compromise<sup>43</sup>.

As to Article 9, the previous drafts have been published<sup>44</sup> and discussed<sup>45</sup> in abundance. The drastic changes that it underwent on the one hand reflect the process of political negotiation: in parallel with the shrinking of the SE-Regulation, Article 9 had to refer to member state law for more and more purposes. On the other hand, even the first draft reflects the need for a “vertical norm of conflict” between different layers of regulation so

---

<sup>35</sup> Hommelhoff, “Die Auslegung angeglichenen Gesellschaftsrechts, Eine Analyse der EuGH-Rechtsprechung,” 33.

<sup>36</sup> *Ibid.*, refers to ECJ of 12.11.1974, case 32/74, *Haaga*, [1974] ECR I-1201, opinion of the Advocate General Mayras on page I-1209.

<sup>37</sup> *Ibid.*, 33 f. gives the example of ECJ of 19.11.1996, case 42/95, *Siemens/Nold*, [1996] ECR I-6017 where the argument that to most member states, a pre-emptive right of shareholders in case of capital increase through a contribution in kind was not known was used to argue that this question was left to the member states.

<sup>38</sup> ECJ of 27.06.1996, case 234/94, *Tomberger*, [1996] ECR I-3133.

<sup>39</sup> Grundmann and Riesenhuber, “Die Auslegung Des Europäischen Privat- Und Schuldvertragsrechts,” 530; Luttermann, “Juristische Übersetzung als Rechtspolitik im Europa der Sprachen, Eine wirtschaftsrechtlich-linguistische Betrachtung.”

<sup>40</sup> Teichmann, “Die Einführung Der Europäischen Aktiengesellschaft, Grundlagen Der Ergänzung Des Europäischen Statuts Durch Den Deutschen Gesetzgeber,” 404; Casper, in: Spindler and Spilz, *Kommentar zum Aktiengesetz SE-VO Art. 9, Recital 17*.

<sup>41</sup> In this direction, though, goes Oechsler, in: Goette, Habersack, and Kalss, *Münchener Kommentar zum Aktiengesetz Art. 5 SE-VO Recital 3* (referring to the notion of shares).

<sup>42</sup> Casper, “Ulmer-FS 2003,” 56.

<sup>43</sup> Sceptical also Teichmann, “Die Einführung Der Europäischen Aktiengesellschaft, Grundlagen Der Ergänzung Des Europäischen Statuts Durch Den Deutschen Gesetzgeber,” 404; Casper, in: Spindler and Spilz, *Kommentar zum Aktiengesetz SE-VO Art. 9 Recital 17*.

<sup>44</sup> Published and politically discussed were the drafts of 1970 (COM(70) 600), 1989 (COM(89)268 final – SYN 218) and 1991 (COM(91)174 final – SYN 218), cf. annex. The draft of 1975 (COM(75) 150 final) was never subject of a (serious) political discussion, Grundmann, *European Company Law* § 33 Recital 2.

<sup>45</sup> Lindacher, “Maßgebendes Recht, Auslegung und Lückenschließung”; Schwarz, *Europäisches Gesellschaftsrecht*; Grote, *Das neue Statut der Europäischen Aktiengesellschaft zwischen europäischem und nationalem Recht*; Raiser, “Die Europäische Aktiengesellschaft und die nationalen Aktiengesetze”; Kreuzer, “Die Europäisierung des Internationalen Privatrechts - Vorgaben des Gemeinschaftsrechts.”

that the comparison with previous versions might help shed light on the interpretation of Article 9.

#### 5. *Legal comparison*

Legal comparison is not mentioned by von Savigny and does not constitute a traditional method of interpretation in national methodology. In European methodology, however, the importance of legal comparison, even though not always visible e.g. in the judgments of the ECJ, is often underlined, maybe not as a distinct “element” of interpretation, but as a consideration to take into account in the course of the other methods of interpretation<sup>46</sup>. While this would mean for the SE as a whole to draw on comparisons with the member states’ public limited companies, for Article 9 in special, there seems to be hardly any comparison since this vertical norm of conflict would be unparalleled in the law of a single member state with only one layer of legislation<sup>47</sup>.

#### 6. *Economic Analysis of Law*

Economic analysis of law is no traditional method of interpretation, but that does not mean that it cannot be a means of interpretation especially in the European context which is methodologically independent from national legal orders. In the realm of European private law, the admissibility of economic analysis of law is promoted by the fact that most rules have as background the idea to further the internal market of the European Union. In the case of the SE-regulation, the Recitals (esp. 1, 4, and 10) refer to such an idea such as does the empowering provision of Art. 308 EC Treaty<sup>48</sup>. The dispute whether economic considerations can only be made if the legislator had such a concept in mind at least to a certain degree<sup>49</sup> seems therefore to be not relevant in the case of the SE-regulation.

For the questions in this paper, the economic analysis seem so far to be of lesser importance, given the rather concrete questions of adjective nature. Where economic considerations were in place, they could mostly be discussed under the heading “teleology”. Economic analysis of law will, though, constitute an important tool to assess the “suitability” of Art. 9 in the second part of the master thesis.

#### 7. *Preliminary result*

In the course of the following assessment, I will mainly follow the classical methods of interpretation, but wherever helpful also draw on the methods mentioned under (5.) and (6.).

### II. *Applicability*

In the following part, I will assess in which cases Article 9 is applicable. By the subsections of this chapter, I again follow the order in which a lawyer would check the applicability. Article

---

<sup>46</sup> Henninger, *Europäisches Privatrecht und Methode*, 293 ff.; Brandt, *Hauptversammlung*, 18 f., 23; Colneric, “Auslegung Des Gemeinschaftsrechts Und Gemeinschaftsrechtskonforme Auslegung,” 28 f.

<sup>47</sup> Brandt and Scheifele, “Die Europäische Aktiengesellschaft Und Das Anwendbare Recht,” 551.

<sup>48</sup> To the background of the empowering provision and the dispute between the Parliament and the Council cf. Neye, “Kein neuer Stolperstein für die Europäische Aktiengesellschaft.”

<sup>49</sup> Cf. Grundmann and Riesenhuber, “Die Auslegung Des Europäischen Privat- Und Schuldvertragsrechts,” 532 f. with further references.

9 poses first questions of private international law, which I will deal with first (under 1), and secondly, given that the applicability is affirmed from a private international law point of view, questions of an “ambit of regulation” which is discussed in legal literature, will be discussed (under 2).

*1. Level of private international law: application of private international law before applying Article 9?*

Private international lawyers tell us that the first question which one always has to ask is whether or not to apply private international law in a case – regardless of the question if the case is an international one<sup>50</sup>. This question must be distinguished from the question whether Article 9 refers to substantive law with or without the law of conflicts of the respective member state (cf. below B III 4, p. 49). In both cases, questions of private international law are raised, but one belongs to the applicability of Article 9, the other one is a question of its content, its applicability already provided.

If any legal dispute concerning the SE is brought before a national court in Europe<sup>51</sup>, the priority of European law over national law includes also the rules of private international law. Where there is no European private international law – like is the case for the areas covered by the SE-regulation, where especially the Rome-I and Rome-II regulations do not apply – the result is always that harmonized substantive law is applicable within its ambit without respect to national provisions on the conflict of laws<sup>52</sup>. This can be construed as harmonized substantive law overruling private international law<sup>53</sup>. Another possibility to construe this is that the rules which determine the ambit of the harmonized substantive law (on the level of substantive law) are seen also as special provisions on the law of conflicts<sup>54</sup>. Since both approaches reach the same abovementioned conclusion, I will here not decide this argument which in its doctrinal nature seems to be a rather German discussion<sup>55</sup>. Since the second approach, however, is more tangible, I want to point to the possibility of construing Article 9 – which, as we will see later (cf. below 2), determines the regulatory ambit – determines also the ambit of applicability on the level of private international law along the same lines<sup>56</sup>. I will dwell on the delimitation of this ambit in more detail below (in B II 2 c, p. 28).

For the level of private international law it suffice to mention that the ambit is the principally the same, but limited for some areas which are explicitly exempt in the Recitals. This is the case for the law of groups, where Recital 16 declares that the “rules and general principles of

---

<sup>50</sup> Kegel and Schurig, *Internationales Privatrecht*, 6 f. (§ 1 III); Kropholler, *Internationales Privatrecht*, 7 (§ 1 IV).

<sup>51</sup> See for details on the situation before courts outside Europe: Engert, “Der international-privatrechtliche und sachrechtliche Anwendungsbereich des Rechts der europäischen Aktiengesellschaft,” 452 f.

<sup>52</sup> E.g. Caemmerer, “Rechtsvereinheitlichung und internationales Privatrecht,” 74.

<sup>53</sup> Early already Zweigert and Drobnič, “Einheitliches Kaufgesetz und internationales Privatrecht,” 148; Sonnenberger, in: Sonnenberger, *MünchKommBGB Volume 11 5th ed.* Einl. IPR Recital 125; with further references (footnote 63) Fornasier, “»28.« versus »2. Regime« – Kollisionsrechtliche Aspekte Eines Optionalen Europäischen Vertragsrechts,” 417.

<sup>54</sup> Kropholler, *Internationales Privatrecht* § 12 I a and § 13 I.

<sup>55</sup> Sonnenberger, in: Sonnenberger, *MünchKommBGB Volume 11 5th ed.* Ein. IPR Recital 124.

<sup>56</sup> E.g. Engert, “Der international-privatrechtliche und sachrechtliche Anwendungsbereich des Rechts der europäischen Aktiengesellschaft,” 455.

private international law should therefore be applied both where an SE exercises control and where it is the controlled company”. For reasons of clarity I will deal with the applicable law on groups in one section below (in B II 2 d, p. 32), where I will give more reasoning for the result which I for reasons of structure had to be mentioned here already.

## 2. *Level of substantive law: “ambit of regulation” of Article 9?*

The next question is whether article 9 is applicable as opposed to other substantive law of the same legal order, i.e. national law of the respective member state. The question is mostly formulated asking for a “regulatory ambit” of Article 9 para. 1 lit. (c) (and sometimes further limited to (ii)) – because all the contentious cases fall under lit. (c). The reason for this is that the cases of lit. (a) and (b) are limited by the regulation itself and therefore clearer; the reference in lit. (c), however, is so wide that doubts arise whether there should not be a further restraint – the “regulatory ambit”. I will formulate the question wide, as stated above, but confess that most argumentation is taken from the narrow case of restricting Article 9 para. 1 lit. (c) (ii).

### a. *Is the idea of such an ambit a useful idea?*

If the question is asked in a narrow sense, asking for the ambit of Article 9 para. 1 lit. (c) – i.e. the content of the requirements laid down before the first (i) – one has first to distinguish between two alternatives. In the English version, these are firstly, “the case of matters not regulated by this Regulation”, and, secondly, “where matters are partly regulated by it, [...] those aspects not covered by it”. Both alternatives pose a number of questions – the second one especially when it comes to its application in detail (e.g. law of groups or takeover law, cf. below B II 2 e, p. 40)<sup>57</sup>.

#### (i) *Wording*

The wording – “in the case of matters not regulated by this regulation” – appears clear at first glance. It can be interpreted as meaning all possible matters that an SE could encounter in its legal life. The provision is often rendered in this way, while it often remains unclear if this is just a mere repetition of the words of Article 9 para 1 lit. (c) or if this is supposed to assert the apparent content of the provision<sup>58</sup>. In fact, this is the case in most literature where Article 9 is mentioned. But there are still some cases where the question is raised whether the ambit of Article 9 para. 1 lit. (c) should not be read in a more restrictive way<sup>59</sup>.

---

<sup>57</sup> Cf. for more problematic areas Kuhn, in: Jannott and Frodermann, *Handbuch der Europäischen Aktiengesellschaft* Chapter 2 Recital 26; Lächler and Oplustil, “Funktion Und Umfang Des Regelungsbereichs Der SE-Verordnung,” 385 f.

<sup>58</sup> This is true for nearly all literature which is not from Germany and for most of the German literature, too. For the German literature, cf. only (also otherwise very attentive to details) Teichmann, “Die Einführung Der Europäischen Aktiengesellschaft, Grundlagen Der Ergänzung Des Europäischen Statuts Durch Den Deutschen Gesetzgeber,” 395 ff.; and (in more detail, but nevertheless without any mentioning this problem) Teichmann, “European Company-A Challenge to Academics, Legislatures and Practitioners, The,” 326 ff. From the literature from abroad: cf. Colombani and Favero, *Societas Europaea*, 52 (Recital 176); da Costa and Bilreiro, *The European Company Statute*, 14; van Gerven, “Provisions of Community Law Applicable to the Societas Europaea,” 75; Beguin, “Le rattachement de la société européenne,” 40.

<sup>59</sup> Most explicitly the German legal literature, especially Brandt and Scheifele, “Die Europäische Aktiengesellschaft Und Das Anwendbare Recht”; Lächler and Oplustil, “Funktion Und Umfang Des

This, again, is a question which is most explicitly and in the most detailed way discussed in German Legal literature, but there are also contributions from other countries, especially in Italy<sup>60</sup>.

The question is in Germany often linked to the catchphrase of “regulatory ambit” (“*Regelungsbereich*”), a term which I will avoid in the following discussion, since I believe that the term further obfuscates the already complex discussion<sup>61</sup>. The problem is whether Article 9 para 1 lit. (c) should, notwithstanding the wide wording, be applied only in a limited number of cases (there will then, in a next step, be discussion about the delimitation of cases, cf. below B II 2 c, p. 28), while the rest of the cases should not be determined by Article 9. The applicable law for these cases would, as normally, be determined by the application of private international law and the respective substantive law to which private international law refers.

#### (ii) History

In my understanding, a closer review of the provision shows that this is indeed the case. A historical view at the previous versions of the text shows that at least in the draft of 1989, the contrasting juxtaposition of “matters covered by this Regulation” (Art. 7 para. 1 Draft (1989)) and “matters which are not covered by this Regulation”<sup>62</sup> (Art. 7 para. 3 Draft (1989)) was to be read as opposing two different areas, only one of them being covered by the regulation. For the other, the provision referred to “Community law and the law of the Member States”<sup>63</sup>. This juxtaposition could have been taken over by the final version of 2001, where indeed some versions repeat a similar or identical wording as that of 1989 in what is now Art. 9 para. 1 lit. (c)<sup>64</sup>. This argumentation would support the view that Article 9 para. 1 lit. (c) should be applied to all cases regarding the SE which are not covered by the regulation, now referring only to law of the Member States (which could be seen as a consequence of the lesser regulatory density of the finally adopted SE-Regulation). On the other hand, other language versions, most prominent the English and French version, differ largely and make

---

Regelungsbereichs Der SE-Verordnung”; Wagner, “Die Bestimmung Des Auf Die SE Anwendbaren Rechts”; previously with regard to the European Economic Interest Grouping Wagner, *Der Europäische Verein*.

<sup>60</sup> Rescio, “La Società Europea Tra Diritto Comunitario E Diritto Nazionale,” 989; Colangelo, “La ‘Società Europea’ alla prova del mercato comunitario delle regole,” 167, more clearly on p. 168.

<sup>61</sup> The term is used differently by Wagner, “Die Bestimmung Des Auf Die SE Anwendbaren Rechts,” 988., on the one hand, who applies it only to the second alternative of Article 9 para. 1 lit. (c), and on the other hand Brandt and Scheifele, “Die Europäische Aktiengesellschaft Und Das Anwendbare Recht,” 548; following them Lächler and Oplustil, “Funktion Und Umfang Des Regelungsbereichs Der SE-Verordnung,” 382., who apply the term to both alternatives of Article 9 para 1 lit. (c) but are not attentive to the different conceptions (cf. the wrong quotation of Wagner in *Ibid.*, 382 (footnote 14). This may be the reason why both sides believe to disagree with each other (cf. below).

<sup>62</sup> In other languages: German: die „von dieser Verordnung nicht geregelten Bereiche“; French: „les matières qui ne sont pas régies par le présent règlement“; Italian: “le materie non disciplinate dal presente regolamento” ; Spanish : “las materias no reguladas por el presente Reglamento”.

<sup>63</sup> Grote, *Das neue Statut der Europäischen Aktiengesellschaft zwischen europäischem und nationalem Recht*, 90 ff.; Brandt and Scheifele, “Die Europäische Aktiengesellschaft Und Das Anwendbare Recht,” 548.

<sup>64</sup> Cf. German: “die nicht durch diese Verordnung geregelten Bereiche“; the Italian and Spanish version are identical.



the similarities in other language versions look rather accidental<sup>65</sup>. Furthermore, the relation between the drafts of 1989 and 2001 is interrupted by the draft of 1991, which does not reflect any similarity in the wording. If the new draft had really been supposed to reenact the 1989 juxtaposition, a clearer reference would have been likely. The historic comparison, therefore, is at least not cogent in pointing to a wide application of Article 9 para. 1 lit. (c).

(iii) Systematic interpretation

Most fruitful seems to be the systematic point of view. One can cite Recital 20 which provides that this “Regulation does not cover other areas of law such as taxation, competition, intellectual property or insolvency. The provisions of the Member States’ law and of Community law are therefore applicable in the above areas and in other areas not covered by this Regulation”. Since “this Regulation” includes also Article 9, it would indeed be strange if Article 9 could determine the applicability of law in an area where Article 9 itself is not applicable<sup>66</sup>. Article 9 can therefore not be applicable to the areas enunciated by Recital 20, but since this provision is commonly understood as an open-ended list, this may not be the only limitation to the ambit of Article 9 para. 1 lit. (c).

Indeed it leads to further problems if Article 9 para. 1 lit. (c) is understood as regulating all matters of the SE. First, such a wide use application of Article 9 would run counter to the principle of subsidiarity to which the European legislator is bound<sup>67</sup>. Furthermore, Article 9 para. 1 lit. (c) (ii) can only be either a comprehensive referral – referring to a member state including its private international law – or a transmission provision, referring to substantive law of the member state where the company has its seat, regardless of what this state’s private international law would say. However this question is decided – being a matter of the content of Art. 9, I will deal with it later, cf. B III 4, p. 49 – it leads to problems if the ambit of Article 9 is supposed to be unlimited.

To consider Article 9 para. 1 lit. (c) (ii) as comprehensive referral would run counter to Recital 9, stating that “the approximation of national company law has made substantial progress”, which only refers to the substantive law, not the law of conflicts<sup>68</sup>. Thus, it would only make sense for Article 9 para. 1 lit. (c) to refer to the substantive law, which is also in line with other literature on the conflict of laws<sup>69</sup>. The resorting to private international law would also add another source of insecurity, which might lead to the application of the

---

<sup>65</sup> “les matières non réglées par le présent règlement”, “matters not regulated by this Regulation”. Brandt and Scheifele, “Die Europäische Aktiengesellschaft Und Das Anwendbare Recht,” 548 point to the differences in the English version.

<sup>66</sup> Ibid.; Lächler and Oplustil, “Funktion Und Umfang Des Regelungsbereichs Der SE-Verordnung,” 383; Jaecks and Schönborn, “Die Europäische Aktiengesellschaft, das Internationale und das deutsche Konzernrecht,” 255.

<sup>67</sup> Lächler, *Das Konzernrecht der Europäischen Gesellschaft*, 84.

<sup>68</sup> Lächler and Oplustil, “Funktion Und Umfang Des Regelungsbereichs Der SE-Verordnung,” 384. To the differing concepts on the connecting factor in company law in Europe cf. Grundmann, *European Company Law* § 7 Recitals 4 - 10.

<sup>69</sup> Lächler and Oplustil, “Funktion Und Umfang Des Regelungsbereichs Der SE-Verordnung,” 384 with further references.

provisions of different member states, depending on which member state court would try the case<sup>70</sup>.

Of course, in the matter of company law, this would not hold true since Article 7 provides that the *siège statutaire* and the headquarters have to be in the same place. This means that the two main theories in international company law in Europe would come to the same result. This is also mentioned in the literature<sup>71</sup> but can be countered with the argument that the European legislator might want to change the provision again to give more freedom to the companies, especially given the recent ECJ judicature moving towards the admissibility of differing *siège statutaire* and headquarters<sup>72</sup>. In the case of the SE, this would take away a lot of the clarity that Article 9 provides for easy cases. The “insertion of yet another floor into the already delicate building of Article 9” would severely damage the practical use of the SE-regulation<sup>73</sup>.

The other possibility is to read Article 9 para. 1 lit. (c) (ii) as a transmission provision. Since it would refer to all cases and since the private international law of the member states does not play a role for the applicability on the level of private international law (cf. above B II 1, p. 22), this would result in the fact that private international law would not play a role for any question regarding the SE. Already on the face of it, this alternative would run counter to the intention of the legislator, as laid down e.g. in Recitals 15 and 16, to respect the private international law. But it would also furthermore lead to intolerable results in cases which are only loosely connected to the fact that one participant in a legal quarrel is an SE. If e.g. all property which belongs to the SE, even real estate in another country than the seat of the SE, is regulated by the law to which Article 9 refers – i.e. the law of the seat – this would run counter to one of the (few) (nearly) unanimously accepted principles of private international law<sup>74</sup> and create intolerable confusion and legal uncertainty. Still, the aim of having a completely harmonized law of the SE could not be achieved, since the European law would not have the power to determine the applicable law of third countries. Every court within Europe<sup>75</sup> (both national and European) would then apply to the property of an Italian-seated SE in real estate situated in Switzerland – already strangely enough – Italian law, but a Swiss court would apply Swiss law, following Swiss private international law.

Both alternatives are not convincing, which means that private international law has to be taken into account to answer the applicability of Article 9 for some questions, while within Article 9 (regarding its content), private international law should not apply for the sake of

---

<sup>70</sup> Schwarz, *Europäisches Gesellschaftsrecht* Recital 960; Brandt and Scheifele, “Die Europäische Aktiengesellschaft Und Das Anwendbare Recht,” 549.

<sup>71</sup> Teichmann, “Die Einführung Der Europäischen Aktiengesellschaft, Grundlagen Der Ergänzung Des Europäischen Statuts Durch Den Deutschen Gesetzgeber,” 397.

<sup>72</sup> Lächler and Oplustil, “Funktion Und Umfang Des Regelungsbereichs Der SE-Verordnung,” 384.

<sup>73</sup> Ibid.

<sup>74</sup> To the nearly universal ambit of the so-called „situs-rule“ Wendehorst, in: Sonnenberger, *MünchKommBGB Volume 11 5th ed.* Art. 43 EGBGB Recitals 3, 4.

<sup>75</sup> To the situation before non-European courts cf. Engert, “Der international-privatrechtliche und sachrechtliche Anwendungsbereich des Rechts der europäischen Aktiengesellschaft,” 452 f. with hints to further problems (e.g. the application of international agreements).

increased clarity. The solution to this is that the application of Article 9 has to be restricted to a certain ambit.

(iv) Teleology

A teleological view on the questions seems to me to be supportive to this conclusion. Mindful of the bigger goals of private law, the harmonisation and unification of European private law, both alternatives of an unlimited application of Article 9 – the application of private international law in all cases, or in none – are not helpful. Both would in my opinion overreach the mark, the first one by giving away the advantages achieved through the approximation of company law in Europe, the second one by creating utter confusion even in easy cases.

This leads me to the conclusion that indeed Article 9 para. 1 lit. (c) does not determine the applicable law for all legal questions that the SE might encounter in its legal life. The Recital 20 points already to this fact, but more importantly the systematic cohesion shows that the ambit of Article 9 para. 1 lit. (c) is limited to the ambit of the SE-Regulation itself. Other questions are left to the private international law.

b. Preliminary result: Discussion in the literature

This view is shared by the dominating opinion among scholars in Germany<sup>76</sup>. The discussion goes back to earlier scholars who dealt with previous drafts of Article 9<sup>77</sup>, but was taken up again after the final version of the SE-Regulation. Even if some scholars seem not to agree at first glance, this is often due to conceptual differences<sup>78</sup>, but there is no or not much difference in the matter. Brandt and Scheifele want to draw the “*Regelungsbereich*” (regulatory ambit) very wide<sup>79</sup>, while Wagner wants to apply Article 9 para. 1 lit. (c) up to a point “where the SE is affected as any other participant in legal transactions”<sup>80</sup>. The discussion is not limited to Germany, but seems to be most coherent here, in the sense that the authors note and refer to each other. Where the matter is mentioned or similar questions are touched upon, there seems to be no awareness of this discussion. This is apparently the case for Rescio<sup>81</sup> (of 2003), who seems to be – other than the prevailing

---

<sup>76</sup> Casper, in: Spindler and Spilz, *Kommentar zum Aktiengesetz SE-VO* Art. 9 Recital 15; Schäfer, in: Goette, Habersack, and Kalss, *Münchener Kommentar zum Aktiengesetz VO (EG) 2157/2001* Art. 9 Recital 7; Brandt and Scheifele, “Die Europäische Aktiengesellschaft Und Das Anwendbare Recht”; Wagner, “Die Bestimmung Des Auf Die SE Anwendbaren Rechts”; Lächler and Oplustil, “Funktion Und Umfang Des Regelungsbereichs Der SE-Verordnung.”

<sup>77</sup> Lindacher, “Maßgebendes Recht, Auslegung und Lückenschließung,” 4 to whom dates back the term of “Regelungsbereich” (or “vocation européenne”); referring to the draft of 1991 (COM 91/174/FINAL): Schwarz, *Europäisches Gesellschaftsrecht* recital 955; Raiser, “Die Europäische Aktiengesellschaft und die nationalen Aktiengesetze,” 282 f.; Grote, *Das neue Statut der Europäischen Aktiengesellschaft zwischen europäischem und nationalem Recht*.

<sup>78</sup> Brandt and Scheifele, “Die Europäische Aktiengesellschaft Und Das Anwendbare Recht,” 548 quote Wagner as representing the “wide interpretation” (which they repudiate) (p. 548, footnote 16) and say that he would “circumnavigate the problem” (p. 549, cf. footnote 21). Wagner, “Die Bestimmung Des Auf Die SE Anwendbaren Rechts,” 988 quotes in footnote Brandt / Scheifele as “having another opinion” but admits that they would probably reach the same result in most of the cases.

<sup>79</sup> Brandt and Scheifele, “Die Europäische Aktiengesellschaft Und Das Anwendbare Recht,” 551.

<sup>80</sup> Wagner, *Der Europäische Verein*, 68; Wagner, “Die Bestimmung Des Auf Die SE Anwendbaren Rechts,” 988.

<sup>81</sup> Rescio, “La Società Europea Tra Diritto Comunitario E Diritto Nazionale,” 989.

opinion in Germany – of the view that in such cases as of the law concerning e.g. the winding-up of companies (which would, due to Recital 20, not be regulated by Article 9 at all), the private international law is not applicable and the reference to the national (material) law is made by the European legislator. Although in his article he quotes a lot of literature in German, he does not explicitly refer to the discussion at this point; in fact, he does not quote the relevant articles. A similar lack of awareness is also the case for Colangelo<sup>82</sup> (of 2005), who presents similar results like the German prevailing opinion but does so without referring neither to the German discussion nor to Rescio.

The fact that the question is not raised in more literature is somewhat startling and may be due to the superficial treatment in many articles. Although the answer appears to be somewhat obvious, the argumentation is rather difficult, given that the wording points in a different way. For this specific question, the result is that the provision is not as clear as it could be and that so far, the doubts are not avoided neither by independent discussions in the single literatures nor by a common pan-European discussion.

### c. Determination of the ambit

To determine the ambit, I will take a two-step approach: first, I will discuss possible methods to come to more concrete conclusions, and secondly, I will apply them to the different areas of law.

#### (i). Methods to determine the ambit

As for the methods, there is at least unanimity about one point which goes without much saying: the interpretation of the ambit has to be the same in all of Europe<sup>83</sup>, which rules out drawing e.g. on national codifications to determine the ambit. Otherwise, it would not be possible to realise the legal unity demanded by the European law as a functioning legal order in general – and repeated in Recital 6 of the SE-regulation in special (cf. above B I 2, p. 18 to both issues). Needless to say as well that the ECJ is the authority to ask in case of doubt, as has been affirmed already in the earliest writings on the SE<sup>84</sup> and has been undisputed ever since, if the question was mentioned<sup>85</sup>.

---

<sup>82</sup> Colangelo, “La ‘Società Europea’ alla prova del mercato comunitario delle regole.” Not entirely clear is in my opinion the statement on page 167, stating that in addition to the law of the seat, the private international law has to be taken into account for all matters beyond the ambit of the regulation (“che non trovino la loro disciplina nel regolamento”). Clearer on p. 168 (to the example of groups, the same example which also Lächler and Oplustil, “Funktion Und Umfang Des Regelungsbereichs Der SE-Verordnung,” 386. use with the same result): the application of national law brings with itself the applicability of the provisions on the conflict of laws from the respective legal order.

<sup>83</sup> With the most detailed justification Brandt and Scheifele, “Die Europäische Aktiengesellschaft Und Das Anwendbare Recht,” 550; Ficker, “‘Hilfsweise geltendes Recht’ für ‘Europäische Aktiengesellschaften’?,” 45; Schürnbrand, in: Habersack and Drinhausen, *SE-Recht mit grenzüberschreitender Verschmelzung* Art. 9 SE-VO Recital 26; Schäfer, in: Goette, Habersack, and Kalss, *Münchener Kommentar zum Aktiengesetz VO (EG) 2157/2001* Art. 9 Recital 7; Kuhn, in: Jannott and Frodermann, *Handbuch der Europäischen Aktiengesellschaft* Chapter 2 Recital 36. See for further justification above p. 3 ff. on the interpretation of the SE-regulation in general.

<sup>84</sup> Namely Ficker, “‘Hilfsweise geltendes Recht’ für ‘Europäische Aktiengesellschaften’?,” 45.

<sup>85</sup> Cf. especially the authors mentioned below in footnote 83.

There is, however, dissent among scholars which methods the ECJ (and, therefore, lawyers in general, too) should apply.

Some approaches which the literature has discussed in European company law in general have proven to be not very helpful in the specific context of the SE. This holds especially true for the confine proposed for the EEIG-regulation<sup>86</sup> to distinguish between rules covering the internal relations of the company and such covering its external relations<sup>87</sup>. This may work for partnerships, but is difficult, or even impossible to apply to corporations, as they are legally more complex. This is because the SE-regulation also contains a number of rules whose purpose is the protection of persons outside the company – namely creditors –<sup>88</sup> and it would be very strange to ban these rules from the ambit of the SE-regulation<sup>89</sup>. Such a result may be tolerable for the non-profit EEIG, but creditor protection has a higher importance in corporations, where there is no personally liable shareholder<sup>90</sup>.

The ambit, therefore, has to be drawn wider, and most scholars would probably agree that whatever is “company law” should be within the ambit<sup>91</sup>. This term needs, of course, further specification. One thought though seems undeniable: wherever national law mentions the word for the national public limited company (instead of using the word “SE”), the SE-regulation has to step in to declare this provision applicable for the SE<sup>92</sup>. This task would be fulfilled by Article 9. Otherwise, there would not exist any law applicable to that question, since without Article 9 SE-regulation, the national law would only apply to companies of national type, not to the SE. This may serve for the following as a rule of thumb to distinguish “company law” – to be understood as: law which deals with the peculiarities of companies – from “general law on legal transactions” – which treats companies the same as any other participant in legal transactions. Coached in another terminology, there should be a distinction between the “rules on organization” (within the ambit) and the “rules on behavior in legal transactions” (outside the ambit)<sup>93</sup>: this points in the same direction and is therefore true, but does not bring any further clarification in my opinion.

---

<sup>86</sup> Council Regulation (EEC) No 2137/85 of 25 July 1985 on the European Economic Interest Grouping (EEIG).

<sup>87</sup> As proposed by Meyer-Landrut, *Die Europäische Wirtschaftliche Interessenvereinigung*, 16 – 20. In the draft of 2008 (COM (2008) 396), a similar distinction was realised with a view to the SPE (cf. to that Schürnbrand, “Vollharmonisierung im Privatrecht,” 285 f.).

<sup>88</sup> To mention only a few: Art. 8 para. 4, para. 7, Art. 24 para. 1, Art. 34.

<sup>89</sup> On the draft of 1989 Grote, *Das neue Statut der Europäischen Aktiengesellschaft zwischen europäischem und nationalem Recht*, 101 f.; with reference to the SE-regulation Brandt and Scheifele, “Die Europäische Aktiengesellschaft Und Das Anwendbare Recht,” 550.

<sup>90</sup> Brandt and Scheifele, “Die Europäische Aktiengesellschaft Und Das Anwendbare Recht,” 550.

<sup>91</sup> Ficker, “‘Hilfsweise geltendes Recht’ für ‘Europäische Aktiengesellschaften’?,” 45; Wagner, “Die Bestimmung Des Auf Die SE Anwendbaren Rechts,” 988; Engert, “Der international-privatrechtliche und sachrechtliche Anwendungsbereich des Rechts der europäischen Aktiengesellschaft,” 456; Schürnbrand, in: Habersack and Drinhausen, *SE-Recht mit grenzüberschreitender Verschmelzung* Art. 9 SE-VO Recital 25; Kinler, in: Sonnenberger, *MünchKommBGB Volume 11 6th ed.* IntGesR Recital 82.

<sup>92</sup> See for an example below B II 2 d (ii), p. 23.

<sup>93</sup> Lindacher, “Maßgebendes Recht, Auslegung und Lückenschließung,” 3 f.; with doubts Grote, *Das neue Statut der Europäischen Aktiengesellschaft zwischen europäischem und nationalem Recht*, 102 f.; Ficker, “‘Hilfsweise geltendes Recht’ für ‘Europäische Aktiengesellschaften’?,” 45; similar Wagner, “Die Bestimmung Des Auf Die SE

The rule of thumb needs further adjustment – this is already due to the fact that the member states may refer to the national type of public limited company in different cases; but the interpretation nevertheless has to be consistent throughout Europe.

It is for the same reason hard to draw on the law of conflicts to find more concrete results<sup>94</sup>, since this is for the most part national law, and the progress in approximation of the laws of conflicts is by far not as big as the one regarding the approximation of substantive law<sup>95</sup>. Even though the methods of determining the ambit will have to be parallel to the processes used in private international law<sup>96</sup>, the results of the latter cannot – due to their national nature – be transferred without further ado to the ambit of the SE. They can be of help, however, if one ascribes them firstly only a supporting function, and resorts to them, secondly, after comparison of the laws of conflicts of several member states, as is also proposed by some scholars<sup>97</sup>.

The SE-regulation itself can, however, provide further help in concretizing the ambit.

One possibility is to look at the historical predecessors of the SE-regulation. The earlier drafts – this is most true for the first drafts of 1970 and 1975 – contained many more provisions, so that their ambit was also drawn in a clearer way. However, since there was never political consent about these earlier drafts, their ambit cannot simply be transferred to the SE-regulation of 2001<sup>98</sup>. Areas may have been omitted either because they are now supposed to be filled with national rules, to which Article 9 refers – meaning that these areas would still form a part of the ambit – or because the legislator decided that these areas are not supposed to be part of the ambit anymore<sup>99</sup>. However, a look at the history can be helpful insofar as it is likely to assume that whatever was not a part of the drafts in the 1970s is not supposed to be part of the ambit of the SE-regulation of today<sup>100</sup>.

There has furthermore been – with reference to other legal frameworks – the proposal to draw on the density of regulation to determine the ambit<sup>101</sup>. For the current SE-regulation, however, this is not a very useful approach, since the idea of having a vastly applicable

---

Anwendbaren Rechts,” 988 (“an end of the ambit is there, where the SE is affected like any other participant in legal transactions”); Geßler, “Grundfragen der europäischen Handelsgesellschaft,” 384.

<sup>94</sup> As is done by Lindacher, “Maßgebendes Recht, Auslegung und Lückenschließung,” 5; Caemmerer, “Kronstein-FS,” 193.

<sup>95</sup> Lächler and Oplustil, “Funktion Und Umfang Des Regelungsbereichs Der SE-Verordnung,” 384; Lächler, *Das Konzernrecht der Europäischen Gesellschaft*, 84.

<sup>96</sup> Wagner, *Der Europäische Verein*, 53.

<sup>97</sup> Engert, “Der international-privatrechtliche und sachrechtliche Anwendungsbereich des Rechts der europäischen Aktiengesellschaft,” 457; apparently similar already Ficker, “‘Hilfsweise geltendes Recht’ für ‘Europäische Aktiengesellschaften’?,” 45.

<sup>98</sup> Too far therefore Schürnbrand, in: Habersack and Drinhausen, *SE-Recht mit grenzüberschreitender Verschmelzung* Art. 9 SE-VO Recital 27. The references he quotes are either more cautious than him (Brandt and Scheifele, “Die Europäische Aktiengesellschaft Und Das Anwendbare Recht,” 551.) or do not refer to the drafts, but to a fictional full regulation (Casper, “Ulmer-FS 2003,” 65 f.; Schäfer, in: Goette, Habersack, and Kalss, *Münchener Kommentar zum Aktiengesetz VO (EG) 2157/2001 Art. 9 Recital 7.*)

<sup>99</sup> Brandt and Scheifele, “Die Europäische Aktiengesellschaft Und Das Anwendbare Recht,” 551.

<sup>100</sup> Ibid.

<sup>101</sup> For the EEIG Meyer-Landrut, *Die Europäische Wirtschaftliche Interessenvereinigung*, 17 f.; for the European Association Wagner, *Der Europäische Verein*, 55.

general reference provision comes with many intended gaps within the ambit. The absence of provisions on the European level does therefore not necessarily mean a gap in the ambit as well<sup>102</sup>.

The system of the SE-regulation give some hints as to what is supposed to be part of the ambit. One can look at the legal matters which are regulated by the single provisions, but also at the headings which describe on an abstract level the legal areas which are may be deemed to be part of the ambit of the SE-regulation in any case<sup>103</sup>.

(ii). Areas of law within and outside of the ambit

If one tries to put these methods into practice, it is clear that especially the areas of formation and structure of the SE are within the ambit, as they constitute the largest part of the SE-regulation and as these are the titles given to Titles II and III of the SE-regulation. The latter includes especially features of the shares, rules on the liability, legal personality, agreements between shareholders, capital preservation, rules on raising capital and questions of liability<sup>104</sup>.

Outside the ambit, since it is part of the “general law on legal transactions”, there is especially the law on contracts and on torts<sup>105</sup>. These legal areas do not distinguish between SEs and other participants in legal transactions and affect the SE like any other participant in legal transactions. The same holds true for the law merchant in general<sup>106</sup>, whereby the case of commercial registry law should be treated separately. Since it is regulated in Article 11 SE-regulation, it falls inside the ambit<sup>107</sup>.

The same holds true for the more specific areas mentioned in Recital 20: the SE-regulation does not cover taxation, competition, and intellectual property law<sup>108</sup>.

The fourth area mentioned in Recital 20 – insolvency – may, however, deserve some closer attention, since Article 63 SE-regulation refers to legal provisions of the member states for “winding up, liquidation, insolvency [and] cessation”. This is at least at first glance surprising and seems to be contradictory to Recital 20<sup>109</sup>. Furthermore, it is not clear how the SE-

---

<sup>102</sup> Brandt and Scheifele, “Die Europäische Aktiengesellschaft Und Das Anwendbare Recht,” 551.

<sup>103</sup> Ibid., 550; Wagner, “Die Bestimmung Des Auf Die SE Anwendbaren Rechts,” 988; Kindler, in: Sonnenberger, *MünchKommBGB Volume 11 6th ed.* IntGesR Recital 82.

<sup>104</sup> Schäfer, in: Goette, Habersack, and Kalss, *Münchener Kommentar zum Aktiengesetz VO (EG) 2157/2001* Art. 9 Recital 7; Schürnbrand, in: Habersack and Drinhausen, *SE-Recht mit grenzüberschreitender Verschmelzung* Art. 9 SE-VO Recital 27; similarly (for the European Association) Wagner, *Der Europäische Verein*, 54.

<sup>105</sup> Schürnbrand, in: Habersack and Drinhausen, *SE-Recht mit grenzüberschreitender Verschmelzung* Art. 9 SE-VO Recital 28.

<sup>106</sup> Schäfer, in: Goette, Habersack, and Kalss, *Münchener Kommentar zum Aktiengesetz VO (EG) 2157/2001* Art. 9 Recital 7; Casper, “Ulmer-FS 2003,” 66.

<sup>107</sup> Schürnbrand, in: Habersack and Drinhausen, *SE-Recht mit grenzüberschreitender Verschmelzung* Art. 9 SE-VO Recital 27.

<sup>108</sup> Kindler, in: Sonnenberger, *MünchKommBGB Volume 11 6th ed.* IntGesR Recital 83; Schürnbrand, in: Habersack and Drinhausen, *SE-Recht mit grenzüberschreitender Verschmelzung* Art. 9 SE-VO Recitals 25, 28.

<sup>109</sup> Frege / Nicht, in: Jannott and Frodermann, *Handbuch der Europäischen Aktiengesellschaft* Chapter 12 Recital 10.

regulation relates to the Insolvency Regulation<sup>110</sup>. Scholars express indeed different opinions on how to solve these puzzles<sup>111</sup>. However, since Article 9 SE-regulation is not affected by this dispute – since Article 63 SE-regulation is the *lex specialis* – I will, given the limitation of space and of the chosen topic, not discuss this problem in this thesis.

Co-determination law may as such be part of the ambit of the SE-regulation<sup>112</sup>, which contains some rules on co-determination questions (Art. 42 sentence 2, Art. 43 para. 3 sentence 2, Article 45 sentence 2). However, the area is regulated in detail by the Worker participation directive.

Transformation law deals with companies in particular, and its applicability does in wide parts depend on the specific legal form which an enterprise has chosen. Therefore, it seems convincing to include it into the ambit of the SE-regulation<sup>113</sup>. The fact that this legal area is regulated in some member states in a separate code can be of no importance, since a consistent interpretation for all of Europe is needed. In these cases, the SE-regulation would not only refer to the Stock Code of a member state, but also to its Transformation Code. However, it has to be noted that in the case of international transformations, it is acknowledged that both legal orders have to cooperate. If an SE is to be part of such a transformation, the SE-regulation determines only the transformation law applicable to the SE, not to that of the other company<sup>114</sup>.

More disputed are the areas of the law of takeover and the law of groups, so that I will now dedicate each of them a short section.

#### d. Law of Groups: specific questions I

Of the four possible ways to establish an SE<sup>115</sup>, three lead ineluctably to an involvement of the new company in a group<sup>116</sup>, and in the case of the fourth way, too, it is probable that the SE will form part of a group of several enterprises<sup>117</sup>. Therefore, the law of groups has a special importance for the legal form of the SE which is more than likely to find itself embedded in such a structure. The SE-regulation itself, though, exerts “abstinence with

---

<sup>110</sup> Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings; Kuhn, in: *Ibid.* Chapter 2 Recital 27.

<sup>111</sup> Cf. Casper, in: Spindler and Spilz, *Kommentar zum Aktiengesetz SE-VO* Art. 63 Recital 1 ; Schäfer Goette, Habersack, and Kalls, *Münchener Kommentar zum Aktiengesetz VO (EG) 2157/2001* Art. 63 Recital 1; Bachmann, in: Habersack and Drinhausen, *SE-Recht mit grenzüberschreitender Verschmelzung* Art. 63 Recitals 64 ff. Kiem, in: Kiem, *Kölner Kommentar Zum Aktiengesetz, Volume 8 SE-VO* Art. 63 Recitals 7 ff., 26.

<sup>112</sup> Schürnbrand, in: Habersack and Drinhausen, *SE-Recht mit grenzüberschreitender Verschmelzung SE-VO* Art. 9 Recital 29.

<sup>113</sup> Schürnbrand, in: *Ibid.* SE-VO Art. 9 Recital 27; Kindler, in: Sonnenberger, *MünchKommBGB Volume 11 6th ed.* IntGesR Recital 82.

<sup>114</sup> Engert, “Der international-privatrechtliche und sachrechtliche Anwendungsbereich des Rechts der europäischen Aktiengesellschaft,” 458 f.

<sup>115</sup> As in Article 2: merger (para. 1), formation of a holding SE (para. 2), formation of a subsidiary SE (para. 3), transformation of a company with a subsidiary (para. 4).

<sup>116</sup> Namely the possibilities 2 – 4 (Article 2, para.s 2 – 4).

<sup>117</sup> Brandi, “Die Europäische Aktiengesellschaft im deutschen und internationalen Konzernrecht,” 890.



regard to law of groups”<sup>118</sup> and only provides a few marginal norms (Art. 61 f. broach on the question of consolidated accounts, Art. 31 para.s 1 and 2 provide rules for the merger within a group). This has led to a comparatively broad range of dispute about whether the SE-regulation covers question on the law of groups at all. Special interest is paid to the impact of the SE on relationships between companies from different member states, a rather common problem since the provisions on the set-up of an SE provide that the companies need to stem (at least in the moment of the set-up) from different member states.

The interest in the question may well be triggered by concerns that rules to protect the controlled company (respectively its minority shareholders and creditors) are circumvented if the company is controlled from abroad, so that in the end, rules from the legal order of the controlling company might apply<sup>119</sup>. To this date, no unified European law or idea about the law of groups exists<sup>120</sup>. Tentatives have so far not come to results<sup>121</sup>. Special legal provisions on a national level exist mainly in Germany and Portugal<sup>122</sup>, recently (since the Company Law Reform of 2004) also in Italy<sup>123</sup>, which might help explain the fact why most literature on this topic, too, is German. (The other countries rely on the law of torts and general means of civil and company law<sup>124</sup>.)

Nevertheless, on the European level, there is at least consensus on the rules of private international law with regard to the law of groups, which state unanimously that the legal order of the controlled company shall be applicable<sup>125</sup>. This holds true for the discussion on the SE as well, where the problematic case is the one in which the SE is the controlling company and controls a company from another country. For the law of groups, commentators agree that in this case, the legal order (of the country) of the controlled

---

<sup>118</sup> Hommelhoff, “Einige Bemerkungen zur Organisationsverfassung der Europäischen Aktiengesellschaft,” 282 (“konzernrechtliche Enthaltbarkeit”); with reference to him Brandi, “Die Europäische Aktiengesellschaft im deutschen und internationalen Konzernrecht,” 890; same phrase used by Habersack, “Das Konzernrecht Der Deutschen SE - Grundlagen,” 737.

<sup>119</sup> Engert, “Der international-privatrechtliche und sachrechtliche Anwendungsbereich des Rechts der europäischen Aktiengesellschaft,” 445; Jaecks and Schönborn, “Die Europäische Aktiengesellschaft, das Internationale und das deutsche Konzernrecht,” 256.

<sup>120</sup> The Ninth Directive exists only as preliminary drafts from 1974/5 (DOK XI/328/74 and DOK XI/593/75) and 1984 (DOK III/1639/84). For the SE, too, the rules on the law of groups (Artt. 220 – 240 in the draft of 1970 and Artt. 225 – 240d in the draft of 1975) were abandoned since the draft of 1989. The Seventh Directive (Seventh Council Directive 83/349/EEC of 13 June 1983) at least presupposes the existence of groups. For the international gamut of solutions cf. also Lutter, *Konzernrecht Im Ausland*.

<sup>121</sup> For the history of European law on groups cf. Schwarz, *Europäisches Gesellschaftsrecht* Recitals 887 - 920. The Forum Europaeum Konzernrecht, therefore, restricted itself to proposing only a core harmonization, Forum Europaeum Konzernrecht, “Konzernrecht für Europa,” 767.

<sup>122</sup> So (with reference to the Member States of the EU at the time) Habersack, “Das Konzernrecht Der Deutschen SE - Grundlagen,” 740; Brandi, “Die Europäische Aktiengesellschaft im deutschen und internationalen Konzernrecht,” 890 Footnote 18; Schwarz, *Europäisches Gesellschaftsrecht* Recital 868.

<sup>123</sup> Sasso, “The European Company: Does It Create Rules for the Market or a Market for the Rules?,” 298.

<sup>124</sup> Schwarz, *Europäisches Gesellschaftsrecht* Recital 867 f.

<sup>125</sup> As is reflected by Recital 15. See for the different possibilities to justify this Einsele, “Kollisionsrechtliche Behandlung des Rechts verbundener Unternehmen,” 41 ff.; Kindler, in: Sonnenberger, *MünchKommBGB Volume 11 6th ed.* IntGesR Recital 681; Brandi, “Die Europäische Aktiengesellschaft im deutschen und internationalen Konzernrecht,” 891.

company should govern the group relationship<sup>126</sup>. The Recitals 15 and 16, too, seem to reflect similar concerns<sup>127</sup>. However, given the wording of Art. 9 which refers – without visible exemption for the law on groups – to the “law of the Member State where the SE has its registered office”, this view seems to run counter to the existing law.

In legal literature, there exist three different approaches (which, as mentioned, come to the same conclusion, but differ with regard to the doctrinal argumentation). Still, I believe it fruitful to engage in the argumentation with them since I believe the doctrinal questions posed by the law of groups to be a good opportunity to clarify the structure of Art. 9<sup>128</sup>. This is because the doctrinal structure developed so far does not suffice to answer the questions regarding the law of groups, because the problem investigated here is special because of the following features:

First, the SE figures in a group possibly as controlled and / or controlling company. This means that it is not enough to distinguish between what is company law and what is not. Even if the law of groups is included in “company law” (for which there are good reasons<sup>129</sup>), it has to be distinguished whether the ambit of Article 9 includes the law of groups for the SE in all situations or not. (Otherwise, it might come to the cumulative application of different regimes, e.g. when one SE controls another SE seated in another member state – Article 9 would then refer to the law of groups of both member states.) This is why it is not enough to simply point to the fact that the law of groups is part of company law.

The other specialty is that the SE-Regulation is part of all national legal orders of member states. Therefore, the answer to the question which legal order to apply is not a step forwards if the result is always the SE-regulation. This is the reason why private international law alone cannot give the answer to the questions raised here.

The third feature of the problem is that there is no law of groups in the SE-regulation, but member state law for the law of groups is not necessarily applicable to the “SE”, but may be geared towards national legal forms. The answer which legal form to apply would then have to be given by Article 9.

---

<sup>126</sup> Jaecks and Schönborn, “Die Europäische Aktiengesellschaft, das Internationale und das deutsche Konzernrecht,” 256 f.; Engert, “Der international-privatrechtliche und sachrechtliche Anwendungsbereich des Rechts der europäischen Aktiengesellschaft,” 445; Habersack, “Das Konzernrecht Der Deutschen SE - Grundlagen,” 728.

<sup>127</sup> Recital 15 acknowledges the principle that „where one undertaking controls another governed by a different legal system, its ensuing rights and obligations as regards the protection of minority shareholders and third parties are governed by the law governing the controlled undertaking”. Recital 16 states that these rules and principles of private international law should apply for the SE as well, without saying how precisely this should be accomplished.

<sup>128</sup> A similar approach is taken by Engert, “Der international-privatrechtliche und sachrechtliche Anwendungsbereich des Rechts der europäischen Aktiengesellschaft,” 444 (abstract before “I.”).

<sup>129</sup> Ibid., 446; Lächler and Oplustil, “Funktion Und Umfang Des Regelungsbereichs Der SE-Verordnung,” 386; Schürnbrand, in: Habersack and Drinhausen, *SE-Recht mit grenzüberschreitender Verschmelzung* Art. 9 SE-VO Recital 31.

The first two approaches which try to answer the question have in common that they apply in the end the rules of private international law to all cases of the law of groups, but do so in different phases of the application of the provision.

(i). [First approach: comprehensive referral](#)

A first way is to read the reference in Art. 9 to national law (at least) for questions regarding the law of groups as a comprehensive referral<sup>130</sup>. They start from Recital 15 (the reference to the general principles of private international law) and read it so that by way of exception, Article 9 refers to the private international law of the member states for the law of groups.

I will give reasons why Art. 9 has to be read as a transmission provision in a later chapter (B III 4, p. 49). For the purpose of this chapter, I will therefore only point out that such an exception is not justified even if taking into account Recitals 15 and 16.

Any exception to the principle that Article 9 refers to substantive law needs very good reasons as it would destroy the delicate structure of the already complex provision. The idea sometimes to apply private international law in the application of Article 9 and sometimes not would be unexpected and complicated for any lawyer who has to work with the provision. The wording of Article 9 does not give any clues to this distinction either. The functioning of Article 9 would be bifurcated completely – on the one hand, it would be a provision of private international law, on the other hand a provision *sui generis* with a function decisively different<sup>131</sup> from the law of conflicts. It is true that Recitals 15 and 16 point to the fact that private international law has to be taken into accounts for these questions, but this point of the application is the wrong place. It would presuppose the applicability of the SE-regulation as a whole on the level of private international law (also for questions on the law of groups), but call this into question on the next level. The private international law would therefore be situated at a very unexpected place. Proponents of this view also have trouble of explaining the sense of Recital 17<sup>132</sup>. Furthermore, it has been pointed out that to read Article 9 as a comprehensive referral does not always provide for

---

<sup>130</sup> Lächler and Oplustil, "Funktion Und Umfang Des Regelungsbereichs Der SE-Verordnung," 385 f.; Lächler, *Das Konzernrecht der Europäischen Gesellschaft*, 107; Brandi, "Die Europäische Aktiengesellschaft im deutschen und internationalen Konzernrecht," 890. Jaecks and Schönborn, "Die Europäische Aktiengesellschaft, das Internationale und das deutsche Konzernrecht," 257 see this as one of two possible ways (the other one being what is here referred to as the second approach). Teichmann, "Die Einführung Der Europäischen Aktiengesellschaft, Grundlagen Der Ergänzung Des Europäischen Statuts Durch Den Deutschen Gesetzgeber," 398 footnote 80 does in my opinion not take sides. The quote in Engert, "Der international-privatrechtliche und sachrechtliche Anwendungsbereich des Rechts der europäischen Aktiengesellschaft," 446 (footnote 10) is therefore wrong in my opinion. Teichmann's statement on p. 445 (after footnote 220), though, is probably meant in this sense ("the wording of the regulation" can only refer to Article 9, after which Teichmann applies private international law).

<sup>131</sup> Teichmann, "Die Einführung Der Europäischen Aktiengesellschaft, Grundlagen Der Ergänzung Des Europäischen Statuts Durch Den Deutschen Gesetzgeber," 396; Kindler, in: Sonnenberger, *MünchKommBGB Volume 11 6th ed.* IntGesR Recital 78.

<sup>132</sup> Teichmann, "Die Einführung Der Europäischen Aktiengesellschaft, Grundlagen Der Ergänzung Des Europäischen Statuts Durch Den Deutschen Gesetzgeber," 445 calls it "irritating" and its meaning "obscure." For a in my opinion more coherent interpretation of Recital 17 cf. below.

the result which everybody aims at especially in the law of groups<sup>133</sup>. For the lack of good reasons to do otherwise, it is therefore better to see Article 9 as a transmission provision in this area, too.

(ii). Second approach: exemption from the ambit

The second way<sup>134</sup> is to exempt questions regarding the law of groups from the ambit of Art. 9 altogether. They draw on Recital 15, too, but read this as exempting the law of groups from the ambit, parallel to the areas mentioned e.g. in Recital 20 (taxation, competition, intellectual property, insolvency)<sup>135</sup>.

One problem with this approach is that law of groups and company law are intertwined<sup>136</sup>. In many member states, the law of groups consists in the modification of general company law, and the use of the law of groups of a different member state would run counter to legal certainty so that the exemption of the law of groups from the ambit is not helpful<sup>137</sup>. It would also mean to ascribe to Recital 15 constitutive effect, which it should not have, being merely a recital, and would result in a hardly convincing bifurcation of the general provision<sup>138</sup>.

Further problematic with this second approach is that it is then not clear how the applicable law of groups should be determined. Habersack speaks of the “substantive law which is determined by the rules of private international law”<sup>139</sup>. The problem is that private international law does not determine a specific law of groups for the SE. The answer that private international law gives us would be “German law” or “Dutch law”. But e.g. in German law, there exist different provisions regarding the law of groups for Aktiengesellschaften or GmbHs. The private international law does not tell us which rules to apply, which is by no means surprising since it is not its task. National law outside the SE-regulation, i.e. the provisions on the law of groups, if they exist, do not tell us either, since they would not mention the “SE” at all. The answer has to come from the SE-regulation, and indeed, Habersack turns to the SE-regulation, but strangely applies Art. 10 to determine that the applicable law of groups is the one applicable to the Aktiengesellschaft<sup>140</sup>. It is not only

---

<sup>133</sup> Engert, “Der international-privatrechtliche und sachrechtliche Anwendungsbereich des Rechts der europäischen Aktiengesellschaft,” 446 f.

<sup>134</sup> Habersack, “Das Konzernrecht Der Deutschen SE - Grundlagen,” 724 ff., 742; Casper, “Ulmer-FS 2003,” 67; Veil, in: Jannott and Frodermann, *Handbuch der Europäischen Aktiengesellschaft* Chapter 11 Recital 3; with this tendency already (but less decisive) Veil, “Das Konzernrecht der Europäischen Aktiengesellschaft,” 2172; Ebert, “Das anwendbare Konzernrecht der Europäischen Aktiengesellschaft,” 1856; following Habersack without own argumentation Maul, “Konzernrecht der ‘deutschen’ SE - Ausgewählte Fragen zum Vertragskonzern und den faktischen Unternehmensverbindungen,” 743; and Maul, “Das Konzernrecht der Europäischen Gesellschaft”; similarly Lind, “Die Europäische Aktiengesellschaft, Eine Analyse der Rechtsanwendungsvorschriften,” 130.

<sup>135</sup> Habersack, “Das Konzernrecht Der Deutschen SE - Grundlagen,” 728; Casper, “Ulmer-FS 2003,” 67.

<sup>136</sup> This is also admitted by Habersack, “Das Konzernrecht Der Deutschen SE - Grundlagen,” 727 f.

<sup>137</sup> Engert, “Der international-privatrechtliche und sachrechtliche Anwendungsbereich des Rechts der europäischen Aktiengesellschaft,” 449.

<sup>138</sup> Schürnbrand, in: Habersack and Drinhausen, *SE-Recht mit grenzüberschreitender Verschmelzung* Art. 9 SE-VO Rn. 36.

<sup>139</sup> Habersack, “Das Konzernrecht Der Deutschen SE - Grundlagen,” 742.

<sup>140</sup> *Ibid.*, 728 f.

contradictory to what he argued before<sup>141</sup> – that the SE-regulation is not applicable to these questions – it is also not clear why it should now be Article 10 instead of Article 9 to determine the applicable law, given that Article 10 declares itself subsidiary to Article 9<sup>142</sup>.

It is further not possible to read Recital 16 as referring directly to the national law on groups, thereby taking the law on groups out of the ambit of the SE-Regulation<sup>143</sup>. Admittedly, in its German version, Recital 16 refers to the “rules and general principles”<sup>144</sup> which could be read as a reference to the substantive law of the member states, which would then apply in line with private international law. However, the German version is probably the outcome of a mistranslation<sup>145</sup>, since other language versions refer to the “rules and general principles of private international law”<sup>146</sup>. Independently from the number of language versions which have the one or other version (which usually is not a valid criterion), the reference to private international law in Recital 16 makes more sense. This is what Recital 15 refers to, and the reference to “the” or “these” principles (like in the German or Spanish version: “*die allgemeinen Vorschriften*”, “*esas normas y principios generales*”) seems to refer to something mentioned before.

(iii). Third approach: SE-Regulation only applies to the controlled company

The third way is to say that the SE-regulation is on the level of substantive law only applicable to the law of groups for the controlled company, i.e. that it only determines the applicable law if the SE is the controlled company. Where this position is contended in literature, for the most part I have found in the literature no precise justification<sup>147</sup>. Still, this is the view which I find the most convincing view.

It was already mentioned that on the level of private international law, the SE-Regulation does not provide for the applicable legal order in the field of the law of groups. This question

---

<sup>141</sup> Ibid., 727 (“the law of groups does not belong to the real ambit of the SE-Regulation”).

<sup>142</sup> It is doubtful if Article 10 has any ambit at all next to Article 9. If there is one, one needs to look for it outside the scope of company law (or interpret Article 10 as addressing the other member states), Schäfer, in: Goette, Habersack, and Kalss, *Münchener Kommentar zum Aktiengesetz VO (EG) 2157/2001 Art. 10*; Casper, in: Spindler and Spilz, *Kommentar zum Aktiengesetz SE-VO Art 10 Recitals 1 f.* In any case, there is no room for such an interpretation as done by Habersack.

<sup>143</sup> This is the argumentation of Veil, in: Jannott and Frodermann, *Handbuch der Europäischen Aktiengesellschaft* Chapter 11 Recital 3.

<sup>144</sup> „Es empfiehlt sich daher, [...] auf die allgemeinen Vorschriften und Grundsätze zurückzugreifen.“

<sup>145</sup> Lächler and Oplustil, “Funktion Und Umfang Des Regelungsbereichs Der SE-Verordnung,” 386 footnote 40.

<sup>146</sup> Like the English version: French, Italian, further apparently Danish, Romanian, Dutch, Maltesian. The Swedish, Portuguese and Spanish version are like the German version. A reason for this mistake could not be found even by asking the translation service of the Commission, Lächler, *Das Konzernrecht der Europäischen Gesellschaft*, 99 f. (footnote 428).

<sup>147</sup> This holds especially true for Wagner, “Die Bestimmung Des Auf Die SE Anwendbaren Rechts,” 988; furthermore, I think that Kindler, in: Sonnenberger, *MünchKommBGB Volume 11 6th ed.* IntGesR, is of this view. This is because he says in Recital 81 that all references are to be read as transmission provisions and in Recital 82 that the law of groups is part of the ambit insofar as the SE-Regulation determines that the legal order of the controlled company is applicable. He does, however, not give a more precise doctrinal structure for his interpretation. Not quite clear, either, is Schürnbrand, in: Habersack and Drinhausen, *SE-Recht mit grenzüberschreitender Verschmelzung* Art. 9 SE-VO Recital 37. The only real reasoning can be found in Engert, “Der international-privatrechtliche und sachrechtliche Anwendungsbereich des Rechts der europäischen Aktiengesellschaft.”

is left to the private international law of the member states. This clearly follows from the Recitals 15 and 16. Recital 16 refers to the “rules and general principles of private international law” for “both where an SE exercises control and where it is the controlled company”. This means that the ambit of the SE-Regulation as a whole – including Article 9, logically – is restricted when answering questions of private international law: it does not provide answers for the law of groups. This answer would be provided by the private international law of the member states, which would usually refer to the legal order of the controlled company.

The ambit of the SE-Regulation on the level of substantive law, however, is different and does include the law of groups. This is not only because if the ambits on both levels were the same, there would hardly be any value in the distinction. It is because there is need for an answer on the level of substantive law which only the SE-Regulation can give, but neither private international law (i) nor other substantive law (ii) can.

(i) Firstly (as set out already above), the answer received by the rules of private international law – e.g. “German law” or “French law” – is not sufficient, because national law may, as in the case of Germany, distinguish between laws for the Aktiengesellschaft (the German pendant to the European Company) and other companies. Here, an “intra-personal law of conflicts”<sup>148</sup> is needed on the level of substantive law, a task which only the SE-Regulation can fulfil.

(ii) Secondly, national law outside the SE regime (i.e. other substantive law: in Germany e.g. the AktG) does not give an answer either. It simply does not mention the SE and does not give any rules for a group including an SE because it only regulates the national types of companies.

There is therefore need for Article 9 to determine that, on the level of substantive law, the law of groups for the Aktiengesellschaft is applicable, not that of the GmbH. (Article 10 is not the correct norm to apply here, cf. B II 2 d (ii), p. 36.) This is exactly what is meant by Recital 17 which reads:

The rule thus applicable where an SE is controlled by another undertaking should be specified, and for this purpose reference should be made to the law governing public limited-liability companies in the Member State in which the SE has its registered office.

Since the recital itself is not binding, it can only announce such a reference, not give it itself. As many scholars noticed<sup>149</sup>, it used to refer to Article 114 in the previous draft of 1989, which stated:

1. Where an undertaking controls an SE, that undertaking’s consequent rights and obligations relating to the protection of minority shareholders and third parties shall

---

<sup>148</sup> Engert, “Der international-privatrechtliche und sachrechtliche Anwendungsbereich des Rechts der europäischen Aktiengesellschaft,” 451 (“interpersonelle[s] Kollisionsrecht”).

<sup>149</sup> Ibid., 449; Jaecks and Schönborn, “Die Europäische Aktiengesellschaft, das Internationale und das deutsche Konzernrecht,” 255; Habersack, “Das Konzernrecht Der Deutschen SE - Grundlagen,” 740.

be those defined by the law governing public limited companies in the State where the SE has its registered office.

2. [...]

This provision was omitted in the following versions of 1991 as well as in the final version of 2001 because the legislator believed that because of the general reference provision (Art. 7 in the draft of 1991, now Article 9), Article 114 was not needed<sup>150</sup>. The same idea applies to the present regulation where Article 9 fulfils the task of referring to the law which would apply to a public limited-liability company. The problem is just that Article 9 now refers to this public limited-liability company also in the case that the SE is the controlling company. This is indeed somewhat “surprising and irritating”<sup>151</sup> and has been deemed a clerical error<sup>152</sup>. Indeed, the wording seems to point to a result which – as the history shows – was not intended by the legislator. This lack of consistency in the teleology is also apparent from the Recitals 16 and 17: Recital 16 states that private international law should be applicable. Even in the case that the controlling company is an SE, this could result in the applicability of the legal order of a member state, which would include the SE-regulation. Nevertheless, Recital 17 sees a need to declare applicable the laws for a special public limited company only for the case of a controlled SE. Even though the wording of Article 9 is therefore misleading, the clear intent of the legislator can be assessed using judicial methods. This means that given the history and the teleological background of the provision, Article 9 is on the level of substantive law only applicable for the controlled SE, not for the controlling SE<sup>153</sup>.

Cases where both the controlling and the controlled company are SEs with seats in different member states would be decided along the same lines. Private international law would refer to the legal order of the controlled SE. This would be a national legal order including the SE-regulation which refers to law of the seat of “the SE”, which could in theory indeed be both the controlling or the controlled SE. Applying the same thoughts and ideas, it would be clear that the reference is only made for the case that “the SE” is the controlled SE.

In this way, the result which everybody aims for would be reached, but I believe this justification to be in line with the Recitals, the historical background of the SE-Regulation and the system which Article 9 presupposes, even if it is not spelled out clearly.

---

<sup>150</sup> As evident e.g. from the briefing of the German Federal Government versus the German Parliament (Bundestag) regarding the Draft of 1991, BT-Drs. 12/1004, p. 11.

<sup>151</sup> Habersack, “Das Konzernrecht Der Deutschen SE - Grundlagen,” 740. What is indeed irritating, though, is the fact that Habersack himself takes this view – that Art. 114 of the draft of 1989 was superfluous – in one of his earlier publications: Habersack, *Europäisches Gesellschaftsrecht* Recital 402.

<sup>152</sup> Teichmann, “Die Einführung Der Europäischen Aktiengesellschaft, Grundlagen Der Ergänzung Des Europäischen Statuts Durch Den Deutschen Gesetzgeber,” 445; Habersack, “Das Konzernrecht Der Deutschen SE - Grundlagen,” 740; Lächler, *Das Konzernrecht der Europäischen Gesellschaft*, 100.

<sup>153</sup> Similar result in Engert, “Der international-privatrechtliche und sachrechtliche Anwendungsbereich des Rechts der europäischen Aktiengesellschaft,” passim, esp. p. 458 ((on the level of substantive law), the SE-regulation does not intend to regulate the law to protect minority shareholders in a company controlled by an SE).

#### e. Takeover law: specific questions II

The law on capital markets in general is (and as far as I see it, all scholars agree to that) outside the ambit in as far as it regulates the behavior and the functioning of markets in general. The takeover law, however, has a bearing on company law questions insofar as it partly regulates the behavior of organs of the involved companies.

This has led some scholars to differentiate between takeover law which has a bearing on such organs (which should be within the ambit of Art. 9) and takeover law which has not (this should be applied according to private international law)<sup>154</sup>. This distinction, however, appears artificial and tears the takeover law apart<sup>155</sup>. It seems more convincing to regard the provisions that regulate organs' behaviour, too, as part of the takeover law which as a whole is not part of the ambit of Article 9<sup>156</sup>.

#### 3. Preliminary result

The discussed problems show that the applicability may not be clear at first glance, but clarification can be reached through discussion. More problems, though, are to come in the field of content.

#### III. Content

In this section, I will deal with a couple of questions concerning the content of Article 9. I will focus on four discussions and only broach or mention remaining discussion due to lack of space (B III 5, p. 53).

#### 1. Freedom to adopt statutes

One question that arises when interpreting Art. 9 SE-regulation is how far the party autonomy goes. Art. 9 declares twice that a European company is regulated by the "provisions of its statutes", in Art. 9 para. 1 lit. b and in Art. 9 para. 1 lit. c (iii). In lit. b, however, the reference to the statutes is made "where expressly authorized by this Regulation", in lit. c, the reference depends on the member state law that would apply to a Public Limited company. Both levels of reference, although referring to the same legal source<sup>157</sup>, have to be distinguished when it comes to the question of how far the party autonomy goes. This is, if the matter is mentioned at all, undisputed<sup>158</sup>. (The question,

---

<sup>154</sup> First of all Lächler and Oplustil, "Funktion Und Umfang Des Regelungsbereichs Der SE-Verordnung," 386 f.; and Lächler, *Das Konzernrecht der Europäischen Gesellschaft*, 92; following them Hommelhoff, "Normenhierarchie für die Europäische Gesellschaft," 14; Teichmann / Hommelhoff, in: Lutter and Hommelhoff, *SE-Verordnung, Kommentar* Art. 9 SE-VO Recital 24; the same, but apparently without awareness of the problem Kalss, "Der Minderheitenschutz bei Gründung und Sitzverlegung der SE nach dem Diskussionsentwurf," 638.

<sup>155</sup> Veil, in: Kiem, *Kölner Kommentar Zum Aktiengesetz, Volume 8* Art. 9 SE-VO Recital 45; Kuhn, in: Jannott and Frodermann, *Handbuch der Europäischen Aktiengesellschaft* Chapter 2 Recital 28.

<sup>156</sup> In addition to the authors from the previous footnote also Schürnbrand, in: Habersack and Drinhausen, *SE-Recht mit grenzüberschreitender Verschmelzung* Art. 9 SE-VO Recital 28.

<sup>157</sup> Casper, "Ulmer-FS 2003," 70; Casper, in: Spindler and Spilz, *Kommentar zum Aktiengesetz* Art. 9 SE-VO Rn. 5; less clear ("one source of law... of bifurcated nature") Wagner, "Die Bestimmung Des Auf Die SE Anwendbaren Rechts," 986.

<sup>158</sup> Teichmann, "Die Einführung Der Europäischen Aktiengesellschaft, Grundlagen Der Ergänzung Des Europäischen Statuts Durch Den Deutschen Gesetzgeber," 388 (footnote 24); Grundmann and Möslein, "Die Goldene Aktie Staatskontrollrechte in Europarecht Und Wirtschaftspolitischer Bewertung," 362 (footnote 147);



though, seems to be only discussed in countries, i.e. against a national background, which provides stricter limitations to the freedom to adopt statutes, namely Germany and, to a lesser extent, France.) The second level (lit. c (iii)) is clearly dependent on the member state law<sup>159</sup>, meaning that in countries like Germany where the rigid Art. 23 para. 5 of the German Stock Code (*AktG*) applies, or in France<sup>160</sup>, there is less freedom than in other countries like Ireland or the United Kingdom<sup>161</sup>. The European level, on the other hand, establishes a rule of its own, at first glance not less strict than e.g. the German rule, or even stricter<sup>162</sup>.

Nevertheless, the question has arisen if there could not be a wider interpretation of lit. b, saying that only rules which deviate from the European law are forbidden, while complementary rules (understood as rules that cover matters not regulated by the European law) could be allowed<sup>163</sup>. Even though this distinction appears to be clearly inspired by a member state legal order, in this case Art. 23 para. 5 (sentence 2) of the German Stock Code, the question is justified. This is because because the previous provision, Art. 7 of the Draft of 1991 – the first draft to mention the Statutes of the SE – did not contain any clarification either, compared to the finally adopted version<sup>164</sup> and in the meantime, the clarification, especially against the background of the rather solitarily strict German provision, was declared a goal of further legislation<sup>165</sup>.

#### a. Wording and history

Starting from the wording, the word “authorizes” implies that at this level, the statutes need “permission” to apply. Complementary provisions, i.e. provisions on matters which are not mentioned by the regulation, are not “expressly authorized” and therefore not covered by Art. 9 para. 1 lit. b. The wording in other languages, as French, German, Italian, or Spanish, appears not less clear.

---

Fleischer, “Der Einfluß der Societas Europaea auf die Dogmatik des deutschen Gesellschaftsrechts,” 517; Blanquet, “Das Statut der Europäischen Aktiengesellschaft (Societas Europaea SE), Ein Gemeinschaftsinstrument für die grenzübergreifende Zusammenarbeit im Dienste der Unternehmen,” 48 f.; Brandt and Scheifele, “Die Europäische Aktiengesellschaft Und Das Anwendbare Recht,” 555; Hirte, “Die Europäische Aktiengesellschaft,” 5; Menjuq, “La société européenne, Règlement CE n° 2157/2001 et directive 2001/86/CE du Conseil du 8 octobre 2001,” sub II A 3.

<sup>159</sup> This is, if the questions is raised, answered in this way with unanimity. Representatively for many others: Colangelo, “La ‘Società Europea’ alla prova del mercato comunitario delle regole,” 169.

<sup>160</sup> Menjuq, “La société européenne, Règlement CE n° 2157/2001 et directive 2001/86/CE du Conseil du 8 octobre 2001,” sub II A 3.

<sup>161</sup> Blanquet, “Das Statut der Europäischen Aktiengesellschaft (Societas Europaea SE), Ein Gemeinschaftsinstrument für die grenzübergreifende Zusammenarbeit im Dienste der Unternehmen,” 49 (with implications for possible regulatory competition).

<sup>162</sup> Hommelhoff, “Satzungsstrenge und Gestaltungsfreiheit in der Europäischen Aktiengesellschaft,” 272; Lutter, “Europäische Aktiengesellschaft - Rechtsfigur mit Zukunft?,” 4.

<sup>163</sup> The question was first posed by Hommelhoff, “Einige Bemerkungen zur Organisationsverfassung der Europäischen Aktiengesellschaft,” 287; already more doubtful Hommelhoff, “Satzungsstrenge und Gestaltungsfreiheit in der Europäischen Aktiengesellschaft,” 272; the question was especially picked up by Casper, “Ulmer-FS 2003,” 70 f.; and Schäfer, in: Goette, Habersack, and Kalss, *Münchener Kommentar zum Aktiengesetz* Art. 9 VO (EG) 2157/2001 Rn. 26.

<sup>164</sup> Cf. COM(91) 174 final in the annex.

<sup>165</sup> Wiesner, “Überblick über den Stand des Europäischen Unternehmensrechts,” 624.

The historic argument is not very helpful. The draft of 1991 contained the same constellation. Although the question had been raised already<sup>166</sup> and the legislator apparently knew this need for further clarification<sup>167</sup>, the lack of amendments is somewhat startling, but in any case no clear hint to either interpretation. At best, the argument that the prevailing view on the previous drafts was that there were no complementary rules in the statutes allowed<sup>168</sup>, could be used to support the view that – since the legislator saw no need for change – now, too, complementary rules are not supposed to be covered by lit. b.

#### b. Systematic interpretation

From a systematic point of view, it leads to an ambiguous result to resort to the other reference provisions in the regulation. Provisions which explicitly refer to the statutes (such as Article 39 para. 4, Article 40 para. 2, 3, Article 43 para. 2, 3, Article 44 para. 1), would not be obsolete if lit. b. would be interpreted in a wider way. They could still disambiguate some cases where the statutes can or have to provide rules, in the sense of a non-exhaustive list. Other cases could exist, because they were intentionally neglected by the legislator or because he foresaw the possibility that he might not see some cases. But these reflections do not provide cogent arguments, either, to support the view that complementary provisions in the statutes have to be taken into account.

The most telling provision to draw on may be lit. c (iii). If the complementary rules of the statutes would fall under lit. b, they would also prevail against national law which would be cogent for any normal Public Limited-Liability Company of the respective member state. Moreover, national law is, as states lit. c, only applicable where European law “does not regulate a matter”. But this would also be the definition of the complementary provisions above, meaning that these and national law would have exactly the same ambit. This would not leave any room for a coherent and senseful interpretation of lit. c.

This system might become more plain in languages such as French or English where there is an “or” dividing the lit. a and b on the one hand from lit. c, stressing hereby the condition for lit. c “matters not regulated by this Regulation”. This could explain why legal literature in these languages apparently finds it sufficient to just quote wording and repeating – before lit. a and b – the condition “matters regulated by the Regulation”<sup>169</sup>.

---

<sup>166</sup> Lindacher, “Maßgebendes Recht, Auslegung und Lückenschließung,” 8; to the draft of 1989 Hommelhoff, “Gesellschaftsrechtliche Fragen im Entwurf eines SE-Statuts,” 434.

<sup>167</sup> Wiesner, “Überblick über den Stand des Europäischen Unternehmensrechts,” 624 stating further need for clarification.

<sup>168</sup> E.g. Schwarz, *Europäisches Gesellschaftsrecht*, Recitals 1097, 1101; Raiser, “Die Europäische Aktiengesellschaft und die nationalen Aktiengesetze,” 283 (“freedom to adopt statutes falls prey to nationalism”); less peremptory Hommelhoff, “Gesellschaftsrechtliche Fragen im Entwurf eines SE-Statuts,” 434.

<sup>169</sup> Colombani and Favero, *Societas Europaea*, 52; Beguin, “Le rattachement de la société européenne,” 40; da Costa and Bilreiro, *The European Company Statute*, 14; Werlauff, “The SE Company - A New Common European Company from 8 October 2004,” 88 f.

### c. Teleology

Teleologically, it is not clear whether the legislator favours member state law (meaning that lit. (b) does not over complementary provisions) or the statutes<sup>170</sup>. The recitals remain tacit on this specific topic. Even if one takes into account the big goals – to establish a functioning legal order, to unify law and to establish a common market (see above) – this would favour as far as possibly unified legal order. Alone, it is not clear if this goal is better achieved by restricting freedom to adopt statutes – this freedom could be used to have even within one country interminably many different kinds of companies – or by allowing it (since it is possible that the market would lead to a “best” solution which could be adopted uniformly transnationally). However desirable a larger amount of freedom to adopt statutes may be<sup>171</sup>, this is not clearly enough reflected as a goal of the legislator in the law. Only the principle of subsidiarity, mentioned in Recital 29, could be used as an argument in favour of the opinion that member state law should prevail: only in so far as necessary, European provisions would prevail against member state provisions. If the freedom that the European provision could provide by allowing “complementary provisions” is not necessary to achieve the goals of unification and establishment of a common market, the teleological argument, too, shows a (slight) prevalence for not allowing “complementary provisions”.

This view would be supported by a legal comparison, which shows that the German provision is a mere exception<sup>172</sup>. Since apart from this result there is, as laid out above, less that would support the concept of “complementary provisions”, this rather supports the view that the question is born against a national background.

This result is supported by the fact that the question is, as far as I see, only discussed by German scholars where – given the peculiarities of the strict German law – the wish to obtain the desired freedom with help of European law may have been father to the thought. In other discussions, there is just a mere repetition of the wording. Even where the questions of Art. 9 are discussed in width, there is no mentioning of the question<sup>173</sup>. Since all arguments, as seen above, point rather to the view that there should not be any such thing as “complementary provisions” on level lit. b, I find this view convincing also given the

---

<sup>170</sup> Casper, “Ulmer-FS 2003,” 71. maintains that „the body stipulating the statutes is in principle deprived of the competence to regulate by the European provisions“ and that „Art. 9 para. 1 lit. c (iii) entrusts first the national law with the task of filling out the gaps“, but does not give any specific reasons. He quotes Schwarz, *Europäisches Gesellschaftsrecht*, Recital 1096., but he who wrote before Hommelhoff posed the question in the first place. Casper’s argumentation seems to rely mainly on the wording, but given the problem posed by Hommelhoff, his argumentation appears to me to merely beg the question.

<sup>171</sup> This wish is especially uttered by Lutter, “Europäische Aktiengesellschaft - Rechtsfigur mit Zukunft?,” 4; and Hommelhoff, “Satzungsstrenge und Gestaltungsfreiheit in der Europäischen Aktiengesellschaft,” 272; on the questionable historic reasons for the German provision Spindler, “Regeln für börsennotierte vs. Regeln für geschlossene Gesellschaften - Vollendung des Begonnenen?,” 598 ff.; Werlauff, Erik, *SE, The Law of the European Company*, 24; from a French point of view Menjucq, “La société européenne, Règlement CE n° 2157/2001 et directive 2001/86/CE du Conseil du 8 octobre 2001,” sub II A 3.

<sup>172</sup> Wiesner, “Überblick über den Stand des Europäischen Unternehmensrechts,” 624.

<sup>173</sup> Rescio, “La Società Europea Tra Diritto Comunitario E Diritto Nazionale,” 979 – 982 even though there is a wide reception of German legal literature regarding other questions (cf. footnotes 25, 33, 43 f., 51).

specific European background. It is also in line with the prevailing opinion in Germany<sup>174</sup> and, as far as the question is discussed, abroad<sup>175</sup>.

## 2. *The question of the use of principles in Art. 9*

One special feature of the SE-regulation is the lack of content, result of the politically delicate negotiations and transposed into law by bountiful use of referential provisions. The lack of legislative content can be used to argue in two main ways.

### a. *Overview over the discussion*

One possible line of argumentation would be that this lack increases the need of systematically relying on other secondary law because the SE-regulation itself often remains tacit. To this day, there exist a number of attempts to establish a systematic framework within the European company law which do not start from single judgments but aim at establishing a doctrinal framework for the existing European company law<sup>176</sup>. There has been research in this area regarding procedural rules regarding restructuring<sup>177</sup>, the liability of those acting on behalf of a company prior to registration<sup>178</sup> and the “image of the shareholder in European company law”<sup>179</sup>. Undertakings like these are facilitated by the increasing inclination of national legislators to open up towards comparative approaches, filling the lacunae of European company law with content<sup>180</sup>. This has led many scholars to endorse the use of principles as a mean of systematic interpretation<sup>181</sup>.

Nevertheless, it has been argued that Article 9 SE-regulation does not aim at a full harmonization of the legal matter<sup>182</sup>. Some claim that therefore it is not possible to draw on other secondary law to find by means of interpretation a legislative content which was not

---

<sup>174</sup> Schäfer, in: Goette, Habersack, and Kalss, *Münchener Kommentar zum Aktiengesetz* Art. 9 SE-VO Rn. 26; Casper, in: Spindler and Spilz, *Kommentar zum Aktiengesetz* Art. 9 SE-VO Rn. 5; Grundmann, *European Company Law*, § 33 Recital 11 (footnote 32); apparently also Göz, “Beschlussmängelklagen Bei Der Societas Europaea (SE),” 594 f.; and Kiem, “Erfahrungen und Reformbedarf bei der SE - Entwicklungsstand,” 169; tendentially otherwise, but not entirely clear Bachmann, “Die Societas Europaea und das europäische Privatrecht,” 36 f.

<sup>175</sup> Menjuq, “La société européenne, Règlement CE n° 2157/2001 et directive 2001/86/CE du Conseil du 8 octobre 2001,” sub II A 3; Werlauff, Erik, *SE, The Law of the European Company*, 24; Colangelo, “La ‘Società Europea’ alla prova del mercato comunitario delle regole,” 168 f.

<sup>176</sup> Schön, “Das Bild Des Gesellschafters Im Europäischen Gesellschaftsrecht,” 5 f.; Teichmann, “Die Einführung Der Europäischen Aktiengesellschaft, Grundlagen Der Ergänzung Des Europäischen Statuts Durch Den Deutschen Gesetzgeber,” 405.

<sup>177</sup> Hommelhoff and Riesenhuber, “Strukturmaßnahmen, insbesondere Verschmelzung und Spaltung im Europäischen und deutschen Gesellschaftsrecht.”

<sup>178</sup> Kersting, “Societas Europaea: Gründung und Vorgesellschaft.”

<sup>179</sup> Schön, “Das Bild Des Gesellschafters Im Europäischen Gesellschaftsrecht.”

<sup>180</sup> Montalenti, “La società per azioni a dieci anni dalla riforma: un primo bilancio,” 420 f.

<sup>181</sup> Teichmann, “European Company-A Challenge to Academics, Legislatures and Practitioners, The,” 327; Teichmann, “Die Einführung Der Europäischen Aktiengesellschaft, Grundlagen Der Ergänzung Des Europäischen Statuts Durch Den Deutschen Gesetzgeber,” 408 f.; Raiser, “Die Europäische Aktiengesellschaft und die nationalen Aktiengesetze,” 283 and 297; Wulfers, “Allgemeine Rechtsgrundsätze als ungeschriebenes Recht der supranationalen Gesellschaftsrechtsformen,” 106; similar, but without any argumentation Engert, “Gesellschaftsrecht” Recital 110; Rescio, “La Società Europea Tra Diritto Comunitario E Diritto Nazionale,” 979 (footnote 32).

<sup>182</sup> Schäfer, in: Goette, Habersack, and Kalss, *Münchener Kommentar zum Aktiengesetz* VO (EG) 2157/2001 Recital 15.

supposed to exist on a European level at all<sup>183</sup>. National law rather than European unwritten principles is meant to be applied. Resorting to secondary law should therefore be allowed only to a very limited extent (only insofar as it is possible to draw on other, concrete provisions; so-called “rule-conducted analogy” as opposed to “principle-conducted analogy” where one can only draw on principles)<sup>184</sup>.

b. Arguments used so far in the discussion

There are two main lines of argumentation to support this view.

One line of argumentation runs like this: in the previous drafts of 1970<sup>185</sup> and 1989<sup>186</sup>, there was an explicit referral to the principles of the Regulation. This reference was omitted in the draft of 1991 and is now not part of the SE-Regulation. This has caused many scholars to refuse the application of general principles<sup>187</sup>. Others, however, point out that there is no need for such a reference, since the Community law bears such a character due to the member states’ tacit consent to the judiciary of the ECJ<sup>188</sup>. The change as opposed to the versions of 1989 and 1970 has also been attributed to the insight that at this moment, there existed too few principles, and that tasking literature and jurisprudence with the finding of such principles would have been asking for too much. Such an insight would then, of course, be bound to the time of the legislation and by no means irrefutable, and would merely have to be seen as a challenge for literature and jurisprudence<sup>189</sup>. To me it seems most convincing to argue that a clear distinction between the acts of ascertaining a lacuna (where the application of general principles of European law is undoubtedly needed) and filling it is hardly possible in practical life<sup>190</sup>. Any theoretically possible distinction between them would seem purely conceptual and of no help in solving problems of interpretation.

---

<sup>183</sup> Especially Casper, “Ulmer-FS 2003”; Casper, in: Spindler and Spilz, *Kommentar zum Aktiengesetz SE-VO* Art. 9 Recital 10; Bachmann, “Die Societas Europaea und das europäische Privatrecht,” 54 f.; Schäfer, in: Goette, Habersack, and Kalss, *Münchener Kommentar zum Aktiengesetz VO (EG) 2157/2001* Recital 15.

<sup>184</sup> Casper, “Ulmer-FS 2003,” 56, follows the terminology (in the original: “regelgeleiteter Analogieschluß” as opposed to “prinzipiengeleiteter Analogieschluß”) of; Langenbucher, “Jahrbuch Junger Zivilrechtswissenschaftler 1999,” 77; following Casper in matter (but using different terms) Bachmann, “Die Societas Europaea und das europäische Privatrecht,” 54.

<sup>185</sup> There exists no official English version of the relevant document, COM(70) 600, since English was not an official language of the Community at the time. The German, French and Italian versions of Article 7, para. 1 read: “[...]Ist eine Rechtsfrage nicht ausdrücklich geregelt, wird sie entschieden a) nach den allgemeinen Grundsätzen, auf denen dieses Statut beruht; [...]” „[...] Lorsqu'un point n'est pas expressément réglé, il doit être tranché: a) selon les principes généraux dont ce statut s'inspire; [...]” „[...] Le questioni non espressamente disciplinate vengono decise: a) secondo i principi generali cui s'informa il presente statuto; [...]”.

<sup>186</sup> Article 7 (Scope of Regulation) of COM 89/268/FINAL – SYN 218 reads: “(1) Matters covered by this Regulation, but not expressly mentioned herein, shall be governed: (a) by the general principles upon which this Regulation is based [...]”

<sup>187</sup> Namely Bachmann, “Die Societas Europaea und das europäische Privatrecht,” 55; Casper, “Ulmer-FS 2003,” 56.

<sup>188</sup> Wulfers, “Allgemeine Rechtsgrundsätze als ungeschriebenes Recht der supranationalen Gesellschaftsrechtsformen,” 106.

<sup>189</sup> Teichmann, “Die Einführung Der Europäischen Aktiengesellschaft, Grundlagen Der Ergänzung Des Europäischen Statuts Durch Den Deutschen Gesetzgeber,” 409 who unfortunately does not support his view with further references.

<sup>190</sup> Brandt and Scheifele, “Die Europäische Aktiengesellschaft Und Das Anwendbare Recht,” 552 (footnote 61).

Another argument is the risk of legal uncertainty that allegedly an adoption of “principle-conducted analogies” would pose. Clarity is beyond doubt a most important feature, especially at the crucial point of Article 9 and given the aims of the SE-Regulation to establish a functioning legal order (cf. B I 2, p. 18). According to those who are reluctant towards an application of principles, only in the case of “rule-conducted analogy”, the benefits of using an analogy would outweigh the risk of legal uncertainty<sup>191</sup>. But the distinction between “rule-conducted analogy” and “principle-conducted analogy” is far from clear either<sup>192</sup>. If legal certainty is the aim, it seems counterproductive to introduce a new distinction into the already complex Article 9. Furthermore, with the already high and growing density of regulation on the European level in European company law, there is less and less space for legal uncertainty even if principles from European law are to be applied.

### c. Resolving the dispute: an intermediary approach

To find a final answer to this problem, one has first of all to take into account the peculiarities of the European legislation. The national (esp. German) methodology to distinguish between intended and unintended gaps in the law does not fit in the European context<sup>193</sup>. The provision of Article 9 does purposefully refer to member state law and is as a measure of “vertical law of conflict” as such unparalleled in the member state laws<sup>194</sup>. It is therefore of limited use to look for “unintended” gaps in the SE-Regulation<sup>195</sup>. Furthermore, Brandt and Scheifele have pointed to the fact that the distinction between intended and unintended gaps is hazy and hard to apply and that the long history of legislation might have undisclosed most gaps in the concept already, so that most gaps would have to be treated as intended gaps anyway<sup>196</sup>.

As for the gaps, may they be intended or unintended, the differing opinions may not be as far apart from each other as it initially seems<sup>197</sup>. As has already been said, the distinction between “rule-conducted analogies” (which both sides would agree upon to allow) and “principle-conducted analogies” seems blurred right from the start. Furthermore, many possible questions may be beyond discussion as it is commonly agreed that lacunae which can only be filled on a European level need to be filled with analogy to other European law, not by resorting to member state law<sup>198</sup>. An example of this would e.g. be the subsequent

---

<sup>191</sup> Casper, in: Spindler and Spilz, *Kommentar zum Aktiengesetz SE-VO* Art. 9 Recital 10.

<sup>192</sup> This is also admitted by those who endorse it: Casper, “Ulmer-FS 2003,” 55 (footnote 30); Bachmann, “Die Societas Europaea und das europäische Privatrecht,” 55.

<sup>193</sup> Brandt and Scheifele, “Die Europäische Aktiengesellschaft Und Das Anwendbare Recht,” 551 f.; not convincing on the other hand Wulfers, “Allgemeine Rechtsgrundsätze als ungeschriebenes Recht der supranationalen Gesellschaftsrechtsformen,” 108.

<sup>194</sup> Brandt and Scheifele, “Die Europäische Aktiengesellschaft Und Das Anwendbare Recht,” 551 (for the German Civil Law).

<sup>195</sup> See for problems in applying the „national“ methodology to this aspect Teichmann, “European Company-A Challenge to Academics, Legislatures and Practitioners, The,” 326 ff.

<sup>196</sup> Brandt and Scheifele, “Die Europäische Aktiengesellschaft Und Das Anwendbare Recht,” 552.

<sup>197</sup> Somewhat in between both opinions also Kuhn, in: Jannott and Frodermann, *Handbuch der Europäischen Aktiengesellschaft* Chapter 2, Recital 16.

<sup>198</sup> Wagner, “Die Bestimmung Des Auf Die SE Anwendbaren Rechts,” 989; Casper, “Ulmer-FS 2003,” 59; Brandt and Scheifele, “Die Europäische Aktiengesellschaft Und Das Anwendbare Recht,” 552; Wulfers, “Allgemeine

lack of fulfilling the criterion of multiple nationality, laid down in Article 2 of the SE-Regulation<sup>199</sup>.

As for the remaining contentious points, it has to be noted that the if and how of passing the SE-Regulation point to the fact that the European legislator favours a solution on a European level as far as possible. By establishing a European legal form which is supposed to provide a legal and economic unit for businesses (Recital 6) the legislator gave effect to his will for a unity on a European level. Furthermore, the European legislator referred in the SE-regulation in 22 provisions (in just 70 articles) to provisions of European company law other than Directive 2001/86/EC<sup>200</sup> and by doing so apparently presupposed the coherence and system of the legal order<sup>201</sup>. The reference in Recital 9 to the progresses in the approximation of national company law, too, stresses the belief of the European legislator in the coherence of company law on a European level<sup>202</sup>. It would therefore be in line with the will of the legislator to draw on other secondary law, especially the other Company Law Directives, to interpret the Regulation in line with the will of the European legislator. Even if there may not be many cases to apply these principles, scholars and courts alike are called upon to develop principles wherever possible<sup>203</sup>.

Finally, it is without doubt that the whole context of the SE-regulation has to be taken into account to ascertain the content and ambit of Article 9. This means that the recitals that play an important role in the interpretation of European law can have a bearing on the interpretation of Article 9. Some recitals may help to determine the ambit of Article 9 (as already seen above, B II 2 c and d). The other, more specific, referential provisions – as mentioned, some scholars count up to 84 of them<sup>204</sup> – of the regulation have to be considered, too. They would prevail over Art. 9 para. 1 SE-Regulation not only due to the principle of speciality<sup>205</sup> but already because Art. 9 para. 1 itself declares that the provisions

---

Rechtsgrundsätze als ungeschriebenes Recht der supranationalen Gesellschaftsrechtsformen,” 108; Bachmann, “Die Societas Europaea und das europäische Privatrecht,” 55.

<sup>199</sup> Brandt and Scheifele, “Die Europäische Aktiengesellschaft Und Das Anwendbare Recht,” 553. Bachmann, “Die Societas Europaea und das europäische Privatrecht,” 55 (footnote 136) believes this example to be an exception; while Wulfers, “Allgemeine Rechtsgrundsätze als ungeschriebenes Recht der supranationalen Gesellschaftsrechtsformen,” 108 apparently believes that there will be many examples like this.

<sup>200</sup> Recital 9 (“work on the approximation of national company law has made substantial progress”), Recital 26, Art. 3 para. 2, Art. 9 para. 2, Art. 12 para 1, Art. 13, Art. 17 para. 2, Art. 18, Art. 21 lit b, Art. 22, Art. 28, Art. 31 para. 1, Art. 32 para. 3, 4, Art. 33 para. 3, Art. 37 para. 5, 6, 7; Art. 62 para. 1, 2; Art. 66 para. 5, 6; Art. 67 para. 2; Art. 69 lit. b, not to speak of Directive 2001/86/EC (15 references). The quoted directives are both Company Law Directives (the twelfth, (89/667/EEC) of 21 December 1989, the first (68/151/EEC) of 9 March 1968, the third (78/855/EEC) of 9 October 1978, and the second Directive (77/91/EEC) of 13 December 1976) and others, relating to financial institutions (2000/12/EC) and annual accounts (91/674/EEC, 90/604/EEC). The directives most often referred to are the Third (11 times) and First (8 times) Directive.

<sup>201</sup> Schön, “Das Bild Des Gesellschafters Im Europäischen Gesellschaftsrecht,” 7 (to the previous draft of 1991).

<sup>202</sup> Teichmann, “Die Einführung Der Europäischen Aktiengesellschaft, Grundlagen Der Ergänzung Des Europäischen Statuts Durch Den Deutschen Gesetzgeber,” 409.

<sup>203</sup> Similar appeals in Raiser, “Die Europäische Aktiengesellschaft und die nationalen Aktiengesetze,” 283; Teichmann, “Die Einführung Der Europäischen Aktiengesellschaft, Grundlagen Der Ergänzung Des Europäischen Statuts Durch Den Deutschen Gesetzgeber,” 409.

<sup>204</sup> Brandt and Scheifele, “Die Europäische Aktiengesellschaft Und Das Anwendbare Recht,” 547.

<sup>205</sup> To this effect Schwarz, *Europäisches Gesellschaftsrecht*, 574 (Recital 957).

of “this regulation” shall have the highest rank<sup>206</sup>. This can result in a sequence of several provisions which have to be checked in a specific order<sup>207</sup>.

3. “And” or “or” between Art. 9 para. 1 lit. (b) and (c)

Another – minor – problem of interpretation concerns the relationship between the different parts of Art. 9 para. 1.

The German Notary Association<sup>208</sup> mentioned differences between the German (and, e.g., Dutch) version of the text, which does not contain a word between lit. (a) and (b) of Art. 9 para. 1, on the one hand, and e.g. the English, French, Italian or Spanish version (cf. annex), which contain an “or” or its respective equivalents<sup>209</sup>. The German Notary Association draws from this the conclusion that in all other language versions, the lit. a – c of Article 9, paragraph 1 would interact, couched in Boolean terms, as follows:

A AND (B OR C),

the parenthesis being represented by the “or”; while in the German (and Dutch) version, this would come to

A AND B AND C<sup>210</sup>.

But since both alternatives, lit. (b) and (c), are, due to the conditions that introduce them, mutually exclusive (a case can only be either explicitly referred to – it would then be covered by lit. (a) or (b) – or not, then (c)), it would make no difference for their application even if, as suggested, the German text would have to be read as containing an “und” (*and*)<sup>211</sup>.

Therefore, even if there should be difference in interpretation, these differences would not have any effect on the clarity or workability in the second part of the thesis.

---

<sup>206</sup> Brandt and Scheifele, “Die Europäische Aktiengesellschaft Und Das Anwendbare Recht,” 553.

<sup>207</sup> *Ibid.*, 554 f. with a concrete example.

<sup>208</sup> Deutscher Notarverein, *Stellungnahme zum Diskussionsentwurf eines Gesetzes zur Einführung der Europäischen Gesellschaft vom 24. Juni 2003*.

<sup>209</sup> In theory, all 24 versions should have to be compared, which I will not undertake in the course of this work due to linguistic reasons. Given, though, that these are the most commonly used languages and that most of the discussion will be around these versions, I will refrain from drawing on translations. The German Notary Association, too, restricts itself to these five languages. With the exception of the Dutch version, which is like the German one, most other language versions seem to follow the English / French and so on. The Polish version explicitly has an “enclitic” or (“lub”), Boolean: “AND/OR”, as opposed to “albo”, which would be “either – or”.

<sup>210</sup> Deutscher Notarverein, *Stellungnahme zum Diskussionsentwurf eines Gesetzes zur Einführung der Europäischen Gesellschaft vom 24. Juni 2003*, 3.

<sup>211</sup> To answer in Boolean terms to the so-couched criticism: (B AND X) OR (C AND -X) = (B AND X) AND (C AND - X).



#### 4. *Comprehensive referral or transmission provision*

Regarding the content of Article 9, especially the question whether Article 9 refers to member state law including its rules of private international law (comprehensive referral) or directly to its substantive law (transmission provision) has been disputed. Although most scholars agree that the rule should be understood as a transmission provision<sup>212</sup>, this is at least not entirely clear at first glance and there are scholars which take the opposite view<sup>213</sup>.

##### a. *Wording*

The wording refers to “(i) the provisions of laws adopted by Member States in implementation of Community measures relating specifically to SEs” and “(ii) the provisions of Member States' laws which would apply to a public limited-liability company”. “Provisions of law” appears to be a rather ambiguous term which could refer to both substantive law only or to the whole legal order of a member state including its private international law.

In the EEIG-regulation<sup>214</sup>, contrariwise, the European legislator still distinguished between different wordings for “national law”<sup>215</sup> (used e.g. in Article 24 EEIG-regulation, to express a comprehensive referral) and “internal law”<sup>216</sup> (used e.g. in Article 19 EEIG-regulation, the counterpart to Article 9 SE-regulation, to express a transmission provision). In the SE-regulation, however, the wording “national law” does sometimes appear<sup>217</sup>, but in some cases seems to refer to purely substantive law. For example, in Article 3 para. 2<sup>218</sup>, it is referred to the “provisions of national law implementing the twelfth Council Company Law Directive” – but this Directive will be only implemented by the means of substantive law, not in the member states' private international law<sup>219</sup>. (There is then, indeed, the common

---

<sup>212</sup> Engert, “Der international-privatrechtliche und sachrechtliche Anwendungsbereich des Rechts der europäischen Aktiengesellschaft,” 447; Lächler, *Das Konzernrecht der Europäischen Gesellschaft*, 84 f.; Lächler and Oplustil, “Funktion Und Umfang Des Regelungsbereichs Der SE-Verordnung,” 384; Brandt and Scheifele, “Die Europäische Aktiengesellschaft Und Das Anwendbare Recht,” 553; Casper, “Ulmer-FS 2003,” 67 (footnote 66); Kuhn, in: Jannott and Frodermann, *Handbuch der Europäischen Aktiengesellschaft* Chapter 2 Recital 19; Wagner, “Die Bestimmung Des Auf Die SE Anwendbaren Rechts,” 987; to the draft of 1989 Grote, *Das neue Statut der Europäischen Aktiengesellschaft zwischen europäischem und nationalem Recht*, 50; to the European Association Wagner, *Der Europäische Verein*; generally speaking Schwarz, *Europäisches Gesellschaftsrecht* Recital 960.

<sup>213</sup> Expressing sympathy for this position already Teichmann, “Die Einführung Der Europäischen Aktiengesellschaft, Grundlagen Der Ergänzung Des Europäischen Statuts Durch Den Deutschen Gesetzgeber,” 396 f.; decidedly then *ibid.*, in: Lutter and Hommelhoff, *SE-Verordnung, Kommentar* Art. 9 SE-VO (§ 1 SEAG) Recitals 28 ff. The discussion is apparently not known to Panico, “Il Regolamento della società europea e le fusioni transfrontaliere,” 38 – 41, esp. p. 40 who consider this solutions “more logical”; and Malatesta, “Prime osservazioni sul regolamento CE N. 2157/2001 sulla società europea,” 617 (footnote 12).

<sup>214</sup> Above footnote 86.

<sup>215</sup> In German: „einzelstaatliches Recht“, in French: „loi nationale“, in Italian: „legge nazionale“, in Spanish: „ley nacional“.

<sup>216</sup> In German: “innerstaatliches Recht”, in French: „loi interne“, in Italian: „legge interna“, in Spanish: „ley interna“.

<sup>217</sup> E.g. in the Articles 9 para. 3, 29 para. 4, 31 para. 1, 32 para. 3, 33 para. 3, 37 para. 9, 47 para. 4, 49, 54 para. 2, 56, 62 para. 1 and 2, 65, 66 para. 6

<sup>218</sup> Similar Art. 37 para. 7.

<sup>219</sup> Thus – speaking for all references to implementing provisions of directives - Schwarz, *Europäisches Gesellschaftsrecht* Recital 960; with reference to the special references in the SE regulation in general Brandt and Scheifele, “Die Europäische Aktiengesellschaft Und Das Anwendbare Recht,” 553.

understanding that these special reference provisions are to be read as transmission provisions, and most scholars simply refer for most cases to the wording to support this view<sup>220</sup>.) In any case, there is no use of the wording “internal law” which is somewhat inconsistent<sup>221</sup>. The wording is therefore not really helpful.

#### b. History

A look at the history – the preliminary drafts of the SE-regulation – reveals that in the draft of 1991 (and similarly in that of 1989), the respective provision referred to “the provisions of the law on public limited companies of the Member state in which the SE has its registered office”. While Engert suggests that this wording could have been kept if the legislator had wanted to refer to substantive law<sup>222</sup>, I do not see why this wording should have been a statement. (Maybe, the German wording has a stronger tendency towards this direction, referring to “dem im Sitzstaat [...] geltenden Recht”.) In fact, commentators on this previous draft, too, do agree that the provision was meant to be a transmission provision, but do not draw mainly on the wording, but on the teleology<sup>223</sup>. However, since it is not known why the legislator changed the wording in the current version, and because of the absence of a systematic use of the wording in the current regulation, it is hard to draw any conclusions from this change of words.

#### c. Systematic interpretation

If compared to other provisions, a systematic interpretation yields that usually, European provisions refer to substantive law<sup>224</sup>, and exceptions are usually marked as such<sup>225</sup>. As another systematic point, one could mention the fact that before the application of Article 9, there is already an application of private international law. It could appear strange to apply European law in the first place without the application of collision provisions, but then to apply such provisions when the European law refers to member state law. This, however, does not constitute a cogent justification.

Not clear is the role of the fact that Article 7 SE-regulation demands that registered office and head office of the SE be in the same member state. This is geared towards the dispute between the two big theories in European private international company law – which choose as the connecting factor either the actual seat of administration (seat theory) or the

---

<sup>220</sup> Brandt and Scheifele, “Die Europäische Aktiengesellschaft Und Das Anwendbare Recht,” 553; Schürnbrand, in: Habersack and Drinhausen, *SE-Recht mit grenzüberschreitender Verschmelzung SE-VO* Art. 9 Rn. 8; Schwarz, *Europäisches Gesellschaftsrecht* Recital 1004 (referring to the draft of 1991).

<sup>221</sup> Teichmann, “Die Einführung Der Europäischen Aktiengesellschaft, Grundlagen Der Ergänzung Des Europäischen Statuts Durch Den Deutschen Gesetzgeber,” 396 f.; Lind, “Die Europäische Aktiengesellschaft, Eine Analyse der Rechtsanwendungsvorschriften,” 62.

<sup>222</sup> Engert, “Der international-privatrechtliche und sachrechtliche Anwendungsbereich des Rechts der europäischen Aktiengesellschaft,” 447.

<sup>223</sup> Thus Schwarz, *Europäisches Gesellschaftsrecht* Recital 960, speaking generally of referencing provisions in European Law; partially different Grote, *Das neue Statut der Europäischen Aktiengesellschaft zwischen europäischem und nationalem Recht*, 50 f. with reference to the draft of 1989 (similar in the relevant passage).

<sup>224</sup> Lächler, *Das Konzernrecht der Europäischen Gesellschaft*, 84; Engert, “Der international-privatrechtliche und sachrechtliche Anwendungsbereich des Rechts der europäischen Aktiengesellschaft,” 447 (footnote 15).

<sup>225</sup> Cf. e.g. Art. 7 para. 2 CISG.

place of registration (incorporation theory)<sup>226</sup>. This dispute was supposed to be overcome by the requirement that the head office has to remain where the registered office is. If the requirement is fulfilled, both theories would come to the same result. Therefore, the legislator also believed not to have taken sides in the conflict, as is apparent from Recital 27<sup>227</sup>. This neutrality of the SE-regulation, however, can be used to argue in two different ways: on the one hand, one can say that this neutrality makes the application of private international law easier, so that Article 9 now can be understood as referring to private international law without creating too much confusion or legal uncertainty<sup>228</sup>. But this argument can be countered by saying that the provision of Article 7 could well be subject to review. Even if now, with the European Commission's refusal to any further reform steps in the near future<sup>229</sup>, the reference to Art. 69 SE-regulation may not be of much more relevance<sup>230</sup>, it is still valid to point to the recent developments of the ECJ judgments, which may soon be reflected<sup>231</sup> – or have to be reflected, as some say<sup>232</sup> – in the SE-regulation.

Most decisive from a systematic point of view seems to be after all the rule that usually, European provisions refer to substantive law. There is no clue in the SE-regulation nor is it apparent from its broader context that this should be different in the case at hand.

#### d. Teleology

The teleology behind the SE-regulation – and Article 9 in special – is the goal to create a legal form as uniform as possible. While some state that the current outcome of the SE-regulation is now expression of the re-nationalisation of the SE<sup>233</sup>, it has to be maintained that currently, too, the legislator aimed at a functioning legal order, where economic and legal unit of a business coincide as far as possible, as is reflected in Recital 6 (cf. also Recital 10). To

---

<sup>226</sup> Cf. Grundmann, *European Company Law* § 7 Recitals 4 - 10.

<sup>227</sup> Recital 27 reads as follows: "In view of the specific Community character of an SE, the 'real seat' arrangement adopted by this Regulation in respect of SEs is without prejudice to Member States' laws and does not pre-empt any choices to be made for other Community texts on company law"; supporting this view: Schäfer, "Das Gesellschaftsrecht (weiter) auf dem Weg nach Europa - am Beispiel der SE-Gründung," 787 ("SE-regulation does not take position"). However, doubts have been raised as to whether the legislator did not in fact adopt a variant of the incorporation theory, given the procedure laid down in Article 64 SE-regulation which deals with the infringement of the requirement of Article 7. Such doubts were expressed first in Roth, "Der Einfluß des Europäischen Gemeinschaftsrechts auf das Internationale Privatrecht," 629 f. (referring to the parallel situation for the EEIG); with reference to the SE Engert, "Der international-privatrechtliche und sachrechtliche Anwendungsbereich des Rechts der europäischen Aktiengesellschaft," 455.

<sup>228</sup> Teichmann, "European Company-A Challenge to Academics, Legislatures and Practitioners, The," 397; Hommelhoff / Teichmann, in: Lutter and Hommelhoff, *SE-Verordnung, Kommentar Art. 9 SE-VO (§ 1 SEAG)* Recitals 31 f.

<sup>229</sup> Cf. Document COM(2012) 740 final from the 12.12.2012, "Action Plan: European company law and corporate governance - a modern legal framework for more engaged shareholders and sustainable companies", p. 14.

<sup>230</sup> So still Lächler, *Das Konzernrecht der Europäischen Gesellschaft*, 85.

<sup>231</sup> Ibid.

<sup>232</sup> Various authors claim that Art. 64 para. 2 SE-regulation may not be in line with primary European law: Wymeersch, "The Transfer of the Company's Seat in European Company Law," 692 f.; Ziemons, "Freie Bahn für den Umzug von Gesellschaften nach Inspire Art?!", 1918. Against them: Bachmann, "Die Societas Europaea und das europäische Privatrecht," 43 with further references (footnote 114).

<sup>233</sup> Hommelhoff / Teichmann, in: Lutter and Hommelhoff, *SE-Verordnung, Kommentar Art. 9 SE-VO (§ 1 SEAG)* Recital 28.

function, it is necessary that courts in all member states would apply provisions of the same legal orders to the one concrete SE at issue. This is secured in the safest way by reading Article 9 as a transmission provision<sup>234</sup>. Otherwise, it might be possible that the law of third countries could be applicable in some cases<sup>235</sup> or that courts in different countries would apply the laws of different countries to the same SE<sup>236</sup>. At least, any additional application of laws of conflicts would further complicate the matter which would be detrimental to the desired legal clarity of the provision. The argument that the discussion about the regulatory ambit is complicated, too, and that in some cases (as is argued by some), interpretation along the lines of private international law is needed (e.g. in the context of the law of groups)<sup>237</sup>, is in my opinion not convincing. Both questions are settled on different levels, and the answer to the latter question does not influence the need to discuss the first question. When applying Article 9, the interpretation of it as a comprehensive referral does by no means exempt the lawyer from the application of its regulatory ambit. The comprehensive referral, too, could only be applied within the ambit of regulation of Article 9.

Another argument which is brought forward by the proponents of a comprehensive referral is the equal treatment with regard to companies of national law<sup>238</sup>. They argue that – as already Article 9 encapsulates the principle of equal treatment, not only Article 10<sup>239</sup> – for SEs, the same rules apply which would apply for companies of national law. Since with regard to the latter, rules of private international law would undoubtedly apply in all cases which have a bearing on a foreign country, this should also be the case for an SE. Admittedly, rules of private international law should apply to the SE. However, this does not mean that the reference in Article 9 should be read as a comprehensive referral; private international law should instead be applied before entering into the application of the SE-regulation (cf. above B II 1, p. 22). Moreover, it would not lead to completely equal treatment if Article 9 was understood as a comprehensive referral: in this case, courts of all member states would apply to an SE with its seat in Denmark the Danish provisions on the conflict of laws, while they would apply the provisions on the conflict of laws of their own member state on a Danish *aktieselskalber*<sup>240</sup>.

Another point is that Recital 9 reflects the legislator's intent to benefit from the "substantial progress" that has been made in the field of national company law approximation since the drafts from 1970 and 1975. This progress, however, has been made only in the field of

---

<sup>234</sup> Kindler, in: Sonnenberger, *MünchKommBGB Volume 11 6th ed.* IntGesR Rn. 81; Wagner, *Der Europäische Verein*, 987; Grote, *Das neue Statut der Europäischen Aktiengesellschaft zwischen europäischem und nationalem Recht*, 50; Kuhn, in: Jannott and Frodermann, *Handbuch der Europäischen Aktiengesellschaft* Chapter 2 Recital 19.

<sup>235</sup> Wagner, *Der Europäische Verein*, 58 f.

<sup>236</sup> Wagner, "Die Bestimmung Des Auf Die SE Anwendbaren Rechts," 987; Schwarz, *Europäisches Gesellschaftsrecht* Recital 960.

<sup>237</sup> Hommelhoff / Teichmann, in: Lutter and Hommelhoff, *SE-Verordnung, Kommentar* Art. 9 SE-VO (§ 1 SEAG) Recitals 30.

<sup>238</sup> Hommelhoff / Teichmann, in: *Ibid.* Art. 9 SE-VO (§ 1 SEAG) Recital 29.

<sup>239</sup> Hommelhoff / Teichmann, in: *Ibid.* Art. 9 SE-VO (§ 1 SEAG) Recital 6.

<sup>240</sup> Schürnbrand, in: Habersack and Drinhausen, *SE-Recht mit grenzüberschreitender Verschmelzung* Art. 9 SE-VO Rn. 34.

substantive law where the Company Law Directives apply, not in the field of private international law. Therefore, it would make more sense to understand the reference which “may be made to the law governing public limited-liability companies in the Member State where it has its registered office” (Recital 9) as referring to the approximated substantive law<sup>241</sup>. Indeed, the purpose of private law approximation is to overcome the difficulties linked to the application of private international law<sup>242</sup>.

Furthermore, it should not be forgotten that the consequences of an infringement of the requirement in Article 7 are by no means that the company ceases to exist<sup>243</sup>. As is laid down in Article 64, the member state where the registered office is has the task to “chase” the SE’s head office, i.e. to take measures to force the SE to either transfer its head office or to amend its registration. For this period, however, the different theories on the connecting factor in Europe would indeed yield different results if private international law were to be applied. This is not the case if Article 9 would be read as a transmission provision, since in that special situation, too, its reference to the law of “the Member State in which the SE has its registered office” (Art. 9 para. 1 lit. c (ii) ) would be unambiguous.

Therefore, while wording and history seem not to provide any results, system and teleology support the view to read Article 9 as a transmission provision. This view, hence, appears to be more convincing. It also seems to be the view of the ECJ<sup>244</sup> which has – admittedly, without nearer justification and with regard to the parallel provision of Art. 2 para. 1 EEIG-regulation – applied substantive law<sup>245</sup>.

#### 5. Other discussions

I will not deal some other smaller discussions with here. Partly, these discussions are relevant only for one country, as is the case for the question to what extent the German “*Holz Müller/Gelatine-Rechtsprechung*”<sup>246</sup> is transferrable to the SE, or the question if the “traditional” Italian model could be adopted in an SE as well<sup>247</sup>. An interesting problem which cannot be dealt with because of lack of space is the question of a “SE-specific

---

<sup>241</sup> Lächler and Oplustil, “Funktion Und Umfang Des Regelungsbereichs Der SE-Verordnung,” 384; Lächler, *Das Konzernrecht der Europäischen Gesellschaft*, 84.

<sup>242</sup> Lächler, *Das Konzernrecht der Europäischen Gesellschaft*, 84; Grote, *Das neue Statut der Europäischen Aktiengesellschaft zwischen europäischem und nationalem Recht*, 45; early already Rault, quoted in Bärmann, “Einheitliche Gesellschaftsform für die Europäische Wirtschaftsgemeinschaft, Ein kritischer Bericht,” 100.

<sup>243</sup> But even in this case, the measures of winding-up would pose questions of private international law.

<sup>244</sup> ECJ of 18.12.1997, case C-402/96, [1997] ECR I-7521 (recital 22).

<sup>245</sup> Schürnbrand, in: Habersack and Drinhausen, *SE-Recht mit grenzüberschreitender Verschmelzung* Art. 9 SE-VO Recital 35; and Kindler, in: Sonnenberger, *MünchKommBGB Volume 11 6th ed.* IntGesR Recital 81 point to this verdict in the context of Art. 9 SE-regulation.

<sup>246</sup> Cf. for references Schürnbrand, in: Habersack and Drinhausen, *SE-Recht mit grenzüberschreitender Verschmelzung* Art. 9 SE-VO Recitals 22 and 38; Teichmann, “Zum Geburtstag viel Buch: Eine Literaturlauslese zum fünften Jahrestag der Societas Europaea (SE),” 89 f.

<sup>247</sup> Most recently denying (but without argumentation) Cavasola / Zischg in Jannott and Frodermann, *Handbuch der Europäischen Aktiengesellschaft* Chapter 15 Recital 1482. References to both sides of the discussion already in Rescio, “La Società Europea Tra Diritto Comunitario E Diritto Nazionale,” 990 f.; affirmative Ferrarini, “Societas Europaea and The Limits of Harmonisation: A View from Italy,” 85 f. (seeing the traditional model as a sub-form of the one-tier model).

interpretation of national public company law”, well-contended in German<sup>248</sup> (and Austrian<sup>249</sup>) legal literature. Other discussions seem to be far less contended<sup>250</sup>, especially the concise description of the “pyramid of norms”. Although different scholars count different numbers of levels (from 3 to 7), there is no real disagreement between them, and the divergence can be reduced to differing degrees of distinction<sup>251</sup>.

#### IV. Preliminary Result

This chapter shows that Article 9 indeed gives rise to several discussions. While some can be solved rather easily or are of not much interest for the European provision as they stem from a particular background, other discussions point to unclarities in the provision which have to be overcome by the use of logic and juridical reasoning. While part of the fact that mainly German literature was used may be due to the nationality of the author, the discussion seems, to say it cautiously, indeed not to lead all over Europe with the same intensity. I will leave it for a later chapter to draw conclusions from this finding (C I 3, p. 57).

---

<sup>248</sup> Cf. only Schürnbrand, in: Habersack and Drinhausen, *SE-Recht mit grenzüberschreitender Verschmelzung* Art. 9 SE-VO Recital 44 with further references to both sides of the discussion.

<sup>249</sup> To give justice to Lind, “Die Europäische Aktiengesellschaft, Eine Analyse der Rechtsanwendungsvorschriften.”

<sup>250</sup> An interesting incentive for a discussion gives e.g. Werlauff, Erik, *SE, The Law of the European Company*, 23 f. with his interpretation of the function of directives and regulations given the reference in Art. 9 para. 2 SE-regulation. However, I have not found any reaction to this interpretation. Similar is the situation to the opinion of Kallmeyer, “Europa-AG: Strategische Optionen für deutsche Unternehmen” (Art. 9 para. 1 lit. c allows member states to pass SE-specific legislation even without special authorisation). This view is unanimously rejected, cf. only Schürnbrand, in: Habersack and Drinhausen, *SE-Recht mit grenzüberschreitender Verschmelzung* Art. 9 SE-VO Recital 39 with references.

<sup>251</sup> Thus the result of Schürnbrand, in: Habersack and Drinhausen, *SE-Recht mit grenzüberschreitender Verschmelzung* Art. 9 SE-VO Recital 2. An overview give Veil, in: Kiem, *Kölner Kommentar Zum Aktiengesetz, Volume 8* Art. 9 SE-VO Recital 2 footnote 5; Casper, in: Spindler and Spilz, *Kommentar zum Aktiengesetz* Art. 9 SE-VO Recital 5 footnote 23.

### C. Second Part. Advisability of Article 9

Having assessed the major issues in interpreting Article 9, I want to assess the suitability of Article 9 as a whole. The question I want to answer is: if the European legislator was to face a similar question again, could a solution like Article 9 be recommended? Or would it be better to advise against any such regulation, so that the legislator should refrain from similar undertakings rather than to pass a similar compromise again?

An answer to that question cannot be a simple value on a scale of “suitability”. What “good law” actually is has always been subject to discussions in the political sphere. There are several criteria to measure “good law”, and not all of them are undisputed. An answer therefore will have to point out the implications of Article 9 in several dimensions which will be discussed below.

Among the rather uncontested yardsticks for “good law”, clarity may rank first. It should go without saying that any law should try to be as clear as possible and not give rise to disputes, misunderstanding and a variety of possible interpretations. Some authors may even go as far as to claim a constitutional right to clarity in law<sup>252</sup>. This is why the assessment will start with assessing the clarity of Article 9 in section C I, p. 56, drawing from the results of the first part (above “B”) of this thesis.

Another criterion which does not need much justification is the workability of the regulation. Since the legislator announced in the Recitals that the Regulation would “permit the creation and management of companies with a European dimension, free from the obstacles arising from the disparity and the limited territorial application of national company law” (Recital 7) and that it would “be possible at least to create such a company” (Recital 10), this can be taken as a yardstick to assess in C II, p. 58, whether the European legislator met his own expectations.

More discussion is necessary to assess the implications of Article 9 for regulatory competition. Given that there is still discussion about whether regulatory competition leads to a “race to the top”, “to the bottom” or “to nowhere in particular”, a two-step approach seems adequate: firstly, I will try to assess how much Article 9 contributes to regulatory competition in European company law. It will take a second step to clarify if such regulatory is desirable at all or if the legislator should not rather try to avoid it to ban the danger of a “race to the bottom” (C III, p. 60).

A similar approach seems in place when it comes to discussing the prospect for the extension of the SE-regulation to a complete optional instrument (C IV, p. 69). Not only does it seem unclear if a compromise as embodied in Article 9 is a stepping stone on the way to a more harmonised company law or rather puts an end to harmonisation: The latter seems possible since compromises on the European level are often hard to overcome (danger of “fossilisation”). But here, too, it is not clear if the complete optional instrument would in all

---

<sup>252</sup> So for France Lenoir, *La Societas Europaea Ou SE*, 33 (having recourse to Article 6 of the Declaration of Human and Civil Rights of 1789).

aspects be a better solution than the instrument available at present. Here, again a two-step approach would try to answer both parts of the question.

After all, I will sum up the results of the assessments and draw conclusions on the suitability of Article 9 (next chapter D, p. 75).

## I. Clarity

To assess the clarity, I will first briefly dwell on the implications of the provision's complexity (1), then touch on some problems in interpreting the provision (2) and end by giving a brief outlook to what role legal literature can play in improving the clarity (3).

### 1. A word on complexity

Art. 9 SE-regulation is undoubtedly complex in that it creates a delicate "pyramid of norms" with (this depends on the way it is counted) up to 7 hierarchical levels. However, complexity in itself is not a problem to the modern man who is "familiar with complexity"<sup>253</sup>, and indeed, there is hardly any real divergence of opinions as to the hierarchical structure introduced by the norm (cf. above B III 5, p. 53).

### 2. Problems in interpreting Article 9

The real problems lie somewhere else. As is clear from the discussion above in B II, p. 21 ff., Article 9 first does not clearly state what its regulatory ambit is. It has to be deduced using logical reasoning, the Recitals and other provisions of European company law. Even though thusly a convincing result can be reached, a clearer mentioning in the law would be in place. By way of a juxtaposition similar to the draft of 1989 (cf. B II 2 a (ii), p. 24), the existence of such a regulatory ambit could be made more clear, but it holds also true for the most contended areas, e.g. the law of groups. To this end, Recital 15, 16 and 17 should be restated with regard to the fact that on the level of substantive law, the SE-regulation determines only the law for the controlled company.

The same goes for the use of principles in the interpretation of the SE-regulation. Given the history of the wording and the growing density of regulations and thus principles in European company law, the provision could state more explicitly if principles are to be applied or not – similar like Art. 7 para. 1 (a) of the draft of 1970 (in the first case) or by inserting the words "without recourse to" (in the second case)<sup>254</sup>.

A third complex of questions regards the private international law. The relation between the reference in Article 9 and private international law should be clarified by the legislator, too. This concerns both questions of the applicability of Article 9 (and the SE-regulation as a whole) as well as its content (the question whether it contains a comprehensive referral or a transmission provision). The first question could be answered already in the Recitals, in a similar way that Recital 20 is worded now, the second question could be clarified by a non-equivocal use of the wording (like the way it was done in the EEIG-regulation).

---

<sup>253</sup> Rescio, "La Società Europea Tra Diritto Comunitario E Diritto Nazionale," 989.

<sup>254</sup> Cf. below C IV 3, p. 60, to the parallel problem of reference to national law (not to principles) which CISG and CESL answer differently. Both, however, do include general principles as a means of interpretation.



### 3. *The role of Legal Literature*

Legal literature has certainly a key role in pointing to these points. In fact there is a vivid discussion about the abovementioned questions especially in Germany. Legal literature therefore could fulfil a warning function to draw the legislator's attention to the issues that need clarification.

Legal literature, however, at this point does not seem able to overcome the problems alone. This is not because for many questions several opinions exist; this is a fact that is encountered in most legal areas. The real reason is that not all of those affected by the SE-regulation engage in the discussion. As has been mentioned above several times, most discussions remain a mainly German affair. The real border seems to be the language, as also Austrians share the same discussions<sup>255</sup> (and partly even Swiss scholars<sup>256</sup>, even though in Switzerland as of now no SE can be founded). In other member states, affected by the same regulation, many of these problems are not mentioned at all. This may be due to another understanding of legal literature in other countries. While in Germany many scholars see it as their task to anticipate possible legal problems once the legislation is passed, this may be so to a lesser degree in other countries where the literature merely follows or accompanies the case law. The fact that there is not yet much case law about the SE may hinder a richer discussion in other countries.

Legal literature does not seem to have reached a stage where its discussions can freely cross language barriers. Even though several of the problems discussed in German language are accessible to scholars in other member states through translations or parallel publications of books<sup>257</sup>, English language journals<sup>258</sup> or via quotations by scholars from abroad<sup>259</sup>, there are few contributions to the problems from other countries<sup>260</sup>. At the same time, much of the German legal literature does not seem to show much more interest in literature from abroad.

There may not even be a development towards a more European discussion. While language barriers may become more and more permeable, barriers in mentality may persist. The rather technical and anticipating reflection about future problems may remain a mainly German affair. A look at other discussions may confirm this: in discussions like about the utility of regulatory competition (cf. below C III, p. 60), also German scholars seem to unhesitatingly draw on foreign literature to a far more vast extent than they do in doctrinal affairs. The discussion about the SE has, in my judgment, even lost internationality: the 1976 book, edited by Lutter, still drew heavily also on foreign literature, culminating in a

---

<sup>255</sup> Lind, "Die Europäische Aktiengesellschaft, Eine Analyse der Rechtsanwendungsvorschriften."

<sup>256</sup> Fountoulakis and Jung, "Die Societas Europaea als Option für multinationale Unternehmen"; Mäscher and Fountoulakis, "Societas Europaea - ein Vehikel für den Schweizer Investor?"

<sup>257</sup> E.g. Grundmann, *European Company Law*.

<sup>258</sup> E.g. the German Law Journal, with reference to the SE: Teichmann, "European Company-A Challenge to Academics, Legislatures and Practitioners, The."

<sup>259</sup> Vast drawing on German legal literature: Rescio, "La Società Europea Tra Diritto Comunitario E Diritto Nazionale"; Enriques, "Silence Is Golden: The European Company as a Catalyst for Company Law Arbitrage."

<sup>260</sup> Cf. Teichmann, "Zum Geburtstag viel Buch: Eine Literaturlause zum fünften Jahrestag der Societas Europaea (SE)," 86; Kindler, in: Sonnenberger, *MünchKommBGB Volume 11 6th ed.* Einl. IPR Recital 124 (although he quotes a lot of foreign literature, including Menjuçq and Malatesta, he admits that the discussion on questions of private international law is only hesitatingly arriving in Europe).

bibliography where out of 364 titles, only 134 were in German language, 94 in French, 51 in Italian, 39 in Dutch and 37 in English<sup>261</sup>. But it seems that with time, not only the enthusiasm about the “truly European” legal forms slackened, the discussions became more national, too. A bibliography about the year of 1988 already lists 22 purely German titles for “European company law” (few of which deal with the actual SE)<sup>262</sup>. Another list from 1990 in a German journal lists 58 titles, out of which 52 were German<sup>263</sup>. In today’s more technical treatises in Germany, however, mainly German literature is quoted: e.g. in the “handbook” by Habersack and Drinhausen (eds.), the literature quoted at the beginning of each Article contains 140 titles for the introduction and the first 9 Articles (sometimes overlapping), of which only 2 are not in German (but in English). Similar numbers arise for the Münchener Kommentar (184 titles for the introduction and the first 9 articles, of which 176 are in German; the 8 English titles are all mentioned in a section on “Legal comparison”) or for single articles in treatises (the “Kölner Kommentar” mentions 70 only German titles for Article 9, the “SE-Kommentar” by Lutter and Hommelhoff mentions 40 titles, among them 3 English titles). Often even where there is an English version or translation of a book or essay, only the German version is quoted<sup>264</sup>.

Although these numbers can only give a first superficial glance at the literature in the different countries, they suggest that the discussion might even have developed from a rather pan-European discussion to a rather isolated German discussion in German dealing with the interpretation in high technical and doctrinal detail. At this point, I do not want to give a verdict whether the discussion should move on to more European topics in Germany, too, or whether other countries should tackle the problems posed by the German scholarship as well.

For the purpose of this paper, it may suffice to conclude that it would be wrong to pose too many hopes in the literature as a means to overcome the discussion. Currently it looks as if only ECJ judgments could fan a pan-European discussion. Since any such verdict requires a certain acceptance in the practice and since such acceptance will heavily depend on the clarity<sup>265</sup>, the legislator should – in case it were to adopt a similar provision again – better try to clarify the abovementioned points in the first place.

## II. Workability

Where this question is addressed in the literature, there is both light and shadow. On the negative side, the lack of clarity and bigger legal uncertainty are mentioned as probably deterring when firms want to incorporate as an SE. On the other hand, the fact that now

---

<sup>261</sup> Cf. Timm, “Bibliographie zur S. E.” The remaining 9 titles were in Spanish (5), Danish (2), Greek (1) and Czech (1). Many authors had published in several languages, most prominent Pieter Sanders with publications in German, English, French and Dutch.

<sup>262</sup> Kirchner, “Bibliographie zum Gesellschaftsrecht, Bücher und Aufsätze aus dem Jahre 1988 - nebst Nachträgen aus den vorangegangenen Jahren -,” 606 f.

<sup>263</sup> “Literaturauswahl zur Europäischen Aktiengesellschaft.”

<sup>264</sup> E.g. works like Grundmann, *European Company Law*; Enriques, “Silence Is Golden”; Sanders, “Auf dem Weg zu einer europäischen Aktiengesellschaft?”

<sup>265</sup> Rescio, “La Società Europea Tra Diritto Comunitario E Diritto Nazionale,” 977; cf. also in more detail below p. 73.

many rules remain on the national level is seen positive from a psychological point of view. A company which is still national in its core may easier be accepted<sup>266</sup> by possibly eurosceptic workforce and customers. Another reason that the absence of rules is even seen as positive are “positive network externalities”<sup>267</sup>: the fact that now many rules apply which are already known (to the firms or their respective legal counsels) could make the transition smoother and therefore create greater acceptance for the SE<sup>268</sup>. Thus, the higher transaction costs caused by the complex delimitation can be alleviated<sup>269</sup>.

When we turn to the facts, we see that the SE is accepted to a certain degree. Until today, 2410 SEs have been established<sup>270</sup>, including many big companies like MAN SE, Porsche Holding SE, Fresenius SE and BASF SE. The continuous growth of the number of SEs is well documented in literature<sup>271</sup>; only in the first half of 2015, 165 new SEs were founded<sup>272</sup>.

This numbers, however, look more moderate if compared to other figures. Out of the 2.399 companies founded until the 1<sup>st</sup> of July 2015, only 346 were “normal” SEs, i.e. operating companies (not shell companies) with 5 or more employees<sup>273</sup>. Out of these 346 companies, 170 were in Germany<sup>274</sup>, the country which has been leading the SE statistics for a long time now. Indeed, there exists a big gap between countries where so far no SE has been founded, like Italy where only two SEs exist as a result of cross-border mergers<sup>275</sup>, and countries which account for most of the SEs, like Germany. But even there, the number of SEs looks small compared to other types of company which are still by far predominant even in Germany

---

<sup>266</sup> Fleischer, “Der Einfluß der Societas Europaea auf die Dogmatik des deutschen Gesellschaftsrechts,” 509.

<sup>267</sup> Schürnbrand, in: Habersack and Drinhausen, *SE-Recht mit grenzüberschreitender Verschmelzung* Art. 9 SE-VO Recital 5; Fleischer, “Der Einfluß der Societas Europaea auf die Dogmatik des deutschen Gesellschaftsrechts,” 509 f.

<sup>268</sup> Like this already Sagasser and Swienty, “Die Gründung Einer Europäischen Aktiengesellschaft Im Wege Der Verschmelzung – Zur Praktikabilität Des SE–Statuts in Der Entwurfsfassung Vom 6./16. 5. 1991,” 1226.

<sup>269</sup> Enriques, “Schweigen Ist Gold,” 745.

<sup>270</sup> “European Trade Union Institute (ETUI), European Company Database.” Cf. to general problems with statistics in this area Bayer and Hoffmann, “Statistiken zur AG - eine kritische Bestandsaufnahme.”

<sup>271</sup> Cf. the serieses of articles by Bayer and Schmidt, “Die SE und ihr Erfolg in der Praxis - eine Zwischenbilanz”; Bayer and Schmidt, “‘Going European’ - die SE europaweit auf dem Vormarsch”; Bayer and Schmidt, “Europäische Gesellschaft (SE) als Rechtsform für den Mittelstand?!”; Bayer, Hoffmann, and Schmidt, “Ein Blick in die deutsche SE-Landschaft fünf Jahre nach Inkrafttreten der SE-VO”; focusing on the situation in Germany (where the SE has been the strongest-growing legal form in the last years) Kornblum, “Bundesweite Rechtstatsachen Zum Unternehmens- Und Gesellschaftsrecht, Stand 1.1.2007”; Kornblum, “Bundesweite Rechtstatsachen Zum Unternehmens- Und Gesellschaftsrecht, Stand 1.1.2008”; Kornblum, “Bundesweite Rechtstatsachen Zum Unternehmens- Und Gesellschaftsrecht, Stand 1.1.2009”; Kornblum, “Bundesweite Rechtstatsachen Zum Unternehmens- Und Gesellschaftsrecht (Stand 1.1.2010)”; Kornblum, “Bundesweite Rechtstatsachen Zum Unternehmens- Und Gesellschaftsrecht (Stand 1.1.2011)”; Kornblum, “Bundesweite Rechtstatsachen Zum Unternehmens- Und Gesellschaftsrecht (Stand 1.1.2012)”; Kornblum, “Bundesweite Rechtstatsachen Zum Unternehmens- Und Gesellschaftsrecht (Stand 1.1.2013)”; Kornblum, “Bundesweite Rechtstatsachen Zum Unternehmens- Und Gesellschaftsrecht (Stand 1.1.2014).”

<sup>272</sup> “Hans-Böckler-Stiftung, Statistik: SEs in Europa, Stand: 01.07.2015 (pdf).”

<sup>273</sup> Ibid.

<sup>274</sup> Ibid.

<sup>275</sup> “European Trade Union Institute (ETUI), European Company Database.” This may be due to the lack of implementation of the SE-regulation, cf. Francesco Gianni, in: van Gerven and Storm, *The European Company, Volume II*, 204. It is still possible to set up an SE in Italy, cf. Rescio, “La partecipazione di società italiane alla costituzione di SE (Società Europee).”

(e.g. as of the 1<sup>st</sup> January 2010, out of 17.935 public limited companies, only 116 were SEs, 236 were organised as a KGaA<sup>276</sup>. In the meantime, the SEs have overtaken the KGaA<sup>277</sup>).

Two main factors can in my eyes not be belittled: the continuous growth of the number of SEs (higher than that of national companies), and the fact that numerous global players chose the SE. Both factors will result in a greater acceptance of the SE in the future, the latter because of the role model function of the bigger companies. But while there is growth, the absolute numbers may still be below of what was accepted. Here it may hold true what has been assumed already in the literature: indeed, a case study by auditors Ernst & Young mentions legal uncertainty about the applicable law as one of the biggest obstacles for enterprises seeking to adopt the legal form of an SE<sup>278</sup>, a result which has been confirmed by other reports as well<sup>279</sup>.

The result for the “workability” question therefore is: Article 9 does work in practice, but it could work better if the provision was more clear.

### III. Regulatory competition and regulatory arbitrage

The showpiece example of regulatory competition is the company law of the United States, where Delaware famously holds the top position with most incorporations for nearly 100 years now<sup>280</sup>. The question whether this system can be exported to Europe has been much discussed<sup>281</sup>. However, since there have already been at least a few examples for regulatory competition in European company law<sup>282</sup>, this chapter will try to assess the impacts of Article 9 on a possible regulatory competition (1) and then assess its desirability (2).

Given the abundance of legal literature on the topic of regulatory competition, it does not come as a surprise that different mechanisms are discussed under the same term. The following paragraphs will thereby have recourse to a definition which understands regulatory competition as a situation where the persons concerned by a legal rule are able to choose the legal order which is supposed to be applicable for the matter at issue – be it a purchase, the inception of a company or a marriage. The person can thus be termed as a “customer” who chooses “law as a product”. The supply side is represented by those providing the law – if they want to attract as many customers as possible, they will try to

---

<sup>276</sup> Kornblum, “Bundesweite Rechtstatsachen Zum Unternehmens- Und Gesellschaftsrecht (Stand 1.1.2010).”

<sup>277</sup> Kornblum, “Bundesweite Rechtstatsachen Zum Unternehmens- Und Gesellschaftsrecht (Stand 1.1.2014).”

<sup>278</sup> “Ernst & Young, Study on the Operation and the Impacts of the Statute for a European Company (SE), - 2008/S 144-192482, Final Report, 9 December 2009,” 241.

<sup>279</sup> Husson, “Contribution de Renault”; Requillart, “Contribution de PSA Peugeot Citroën”; von Rosen, “Die SE - ein europäisches Zukunftsmodell,” 1255 with further references.

<sup>280</sup> 40 % of the NYSE-listed corporations are e.g. seated in Delaware, Merkt, “Das Europäische Gesellschaftsrecht Und Die Idee Des »Wettbewerbs Der Gesetzgeber«,” 549 ff.

<sup>281</sup> Cf. also below C III 1 a, p. 50 ff.; most prominent: Kieninger, *Wettbewerb der Privatrechtsordnungen im Europäischen Binnenmarkt*; Merkt, “Das Europäische Gesellschaftsrecht Und Die Idee Des »Wettbewerbs Der Gesetzgeber«”; Kirchner et al., “Europäischer vs. US-amerikanischer Wettbewerb der Gesellschaftsrechte, Abschied vom alten Delaware-Verbundprodukt”; Grundmann, “Wettbewerb Der Regelgeber Im Europäischen Gesellschaftsrecht - Jedes Marktsegment Hat Seine Struktur.”

<sup>282</sup> Schön, “Mindestharmonisierung im europäischen Gesellschaftsrecht,” 233 mentions the corporation tax reductions in the 1980s across Europe.

design the law as suitable to the customers' needs as possible<sup>283</sup>. The discussion will be, as far as the supply side is concerned, limited to those providing *the law* - the question whether there is competition between different statutes<sup>284</sup> will not be a subject of this chapter. Furthermore, the discussion will mainly focus on the demand side, sometimes termed "regulatory arbitrage"<sup>285</sup> as opposed to "regulatory competition", i.e. the question whether those concerned by the law exert choice. The question whether legislators actually do compete for "customers" may be different from the United States for some reasons (see below C III 1 a and b, p. 61 ff.), but is of lesser importance for assessing the suitability of Article 9.

Several aspects of regulatory competition can be distinguished, and the following chapter will distinguish and focus on two of them: "horizontal competition", which means the choice between the legal orders of different member states (e.g. French-style company or *Societas Europaea* on the one side vs. German-style company or *Societas Europaea* on the other), and "vertical competition" (French-style public corporation vs. French-style *Societas Europaea*)<sup>286</sup>. Other forms of competition, e.g. that between different company structures (one-tier vs. two-tier model)<sup>287</sup>, will not be subject of the following discussion, since it is of lesser general interest. As far as data is available, it suggests that decision making in this question is mainly dependent on national peculiarities<sup>288</sup>.

#### 1. Does Article 9 SE-regulation favour regulatory competition?

The history of the SE-regulation is still young, and there is not much empiric evidence whether companies in Europe exert regulatory arbitrage. Before touching upon empirical data (c), I will therefore first discuss the literature. Since heretofore, the primary example of regulatory competition is the situation in the US, I will dedicate a section to comparison between EU and US (a) before focusing on the European side (b) and concluding (d).

##### a. Comparison EU – USA

When looking at the United States, comparisons often reveal that most features which are seen as furthering regulatory competition in the US do not exist in Europe.

---

<sup>283</sup> E.g. Bachmann, "Hommelhoff-FS," 24 f.; Sasso, "The European Company: Does It Create Rules for the Market or a Market for the Rules?," 292.

<sup>284</sup> Fiorio, "Lo statuto della società europea: la struttura della società ed il coinvolgimento dei lavoratori," 829 distinguishes between a "concorrenza tra ordinamenti" (restricted) and a "competizione delle regole" (favoured by the SE regulation).

<sup>285</sup> Enriques, "Schweigen Ist Gold," 737 and 742; Sasso, "The European Company: Does It Create Rules for the Market or a Market for the Rules?," 292.

<sup>286</sup> Heine and Röpke, "Vertikaler Regulierungswettbewerb und europäischer Binnenmarkt - die Europäische Aktiengesellschaft als supranationales Rechtsangebot," 158; Grundmann, "Kosten und Nutzen eines optionalen Europäischen Kaufrechts," 505 ff.; Bachmann, "Hommelhoff-FS," 32 with further references. I will also speak of „vertical“ and „horizontal arbitrage“, meaning the respective decisions which firms have to take.

<sup>287</sup> Fleischer, "Der Einfluß der *Societas Europaea* auf die Dogmatik des deutschen Gesellschaftsrechts," 511 mentions this as a third type of competition which may be stimulated by the SE.

<sup>288</sup> Eidenmüller, Engert, and Hornuf, "Vom Wert der Wahlfreiheit: Eine empirische Analyse der *Societas Europaea* als Rechtsformalternative," 849 f.; Eidenmüller, Eidenmüller, and Engert, "Incorporating under European Law," 25; Köstler and Werner, "Die SE unter der Lupe," R105 f.

This certainly holds true for a lot of features. It has been said that the US company law regulatory competition is the outcome of a historical development. Momentum has built and the path dependency that comes with it perpetuates the situation, a factor absent in Europe<sup>289</sup>. In Europe, the capitalisation of companies depends to a higher degree upon borrowed capital, which empowers banks usually not interested in changing the company law<sup>290</sup>. Furthermore, company law in Europe is not geared unilaterally towards the interests of the shareholders, but is meant to strike a balance between the interests of such different groups as shareholders, workforce and creditors. Even if the shareholders wanted to choose a company law more favourable to them, they might find it hard to enforce such a change with the creditors or the employees if the new company law is less favourable to them<sup>291</sup>. Other authors see rather the managers as the driving force between the regulatory arbitrage in the US. While more powerful in the US due to a more dispersed ownership, in Europe their power is more often restricted by majority shareholders<sup>292</sup>. Furthermore, it has been argued that changing the company seat in the US remains largely without changes to the taxes. In Europe, however, the tax regime does change and may constitute the main reason for (re-)incorporation. The legal arbitrage, if exerted, may therefore be an expression of a search for the lowest tax rate, not for the best company law<sup>293</sup>.

Other arguments which have been brought forward so far can be countered. Some scholars<sup>294</sup> e.g. point to the fact that in the US, the incorporation theory is applied, which means that companies can relatively freely choose the applicable law by simply choosing another place for incorporation. Indeed is the legal arbitrage under the incorporation theory much higher, because the place of incorporation can be chosen without much relevance to other factors. Under the seat theory, on the other hand, choosing a legal order means that the company has to move its seat and therefore expose itself to the economic conditions that come with it: e.g. infrastructure, workforce etc. A change of incorporation in Europe especially has implications on the tax regime, while changes in the US remain irrelevant. The arbitrage is therefore not one merely concerning the company law, but is part of the general arbitrage which firms can make between different EU member states<sup>295</sup>. On the other hand, it has been argued that the seat is a weak criterion, since in the times of modern communication – where e.g. conferences of the management board can be held via telephone conference – it can easily be circumvented<sup>296</sup>. Even in cases of breach of the criterion, the enforcement lies according to Art. 64 SE-regulation with the state where the

---

<sup>289</sup> Merkt, "Das Europäische Gesellschaftsrecht Und Die Idee Des »Wettbewerbs Der Gesetzgeber«," 566 f.

<sup>290</sup> Ibid., 565 f.

<sup>291</sup> Ibid., 554 ff.

<sup>292</sup> Sasso, "The European Company: Does It Create Rules for the Market or a Market for the Rules?," 295.

<sup>293</sup> Ibid., 296.

<sup>294</sup> Merkt, "Das Europäische Gesellschaftsrecht Und Die Idee Des »Wettbewerbs Der Gesetzgeber«," 560 ff.; Kieninger, *Wettbewerb der Privatrechtsordnungen im Europäischen Binnenmarkt*, 168; Sasso, "The European Company: Does It Create Rules for the Market or a Market for the Rules?," 294.

<sup>295</sup> Schön, "Mindestharmonisierung im europäischen Gesellschaftsrecht," 233 f.

<sup>296</sup> Enriques, "Schweigen Ist Gold," 740.

registered office still is. These states, it is argued, have no or little interest in actually “chasing” the companies<sup>297</sup>.

When discussing the supply side of regulatory competition, the main incentive for states to attract companies in the US is the franchise tax. In the US, companies pay this tax periodically to the state of their incorporation. Delaware earns 15 – 20 % of its state budget by means of this tax<sup>298</sup>. In Europe, conversely, no such tax exists, as is pointed out<sup>299</sup>, and furthermore, there is no member state in the EU which is so small that it could make a comparable share of its state budget with a similar tax<sup>300</sup>. On the other side, however, one can argue that in the US, too, most states do not actively compete any more for “customers” of their law: The race is decided (to the favour of Delaware)<sup>301</sup>. This may make it more promising to focus on the demand side, where the absence of the franchise tax does not make a difference.

A similar argument aims at the effects of company law legislation: while Delaware is so small and has so many corporations that most of its company laws mainly affect people outside Delaware, this is not the same for the EU, where a larger part of the effects would be borne by the people of the member state which makes the law<sup>302</sup>. However, I do not see why people in Delaware would be less affected by a deregulated legislation than people in any EU member state.

Concluding one may say that the regulatory competition in Europe will in any case be much different from the one in the United States, and less intense. Nevertheless, this does not rule out completely the possibility of a European-style competition, maybe taking place rather at the incorporation stage than through re-incorporations<sup>303</sup> and starting from a bigger diversity and reaching different results – not a concentration on one spot like Delaware, but maybe rather a co-evolution<sup>304</sup>.

#### b. Legal Literature

In addition, a look at the literature which focuses on the European legislation without comparison to the US reveals an overall slightly more optimistic view on the possibilities for regulatory competition in Europe.

The tendency is more reluctant in the case of horizontal competition, i.e. the competition two member states who try to attract an enterprise, or – couched in the terms of the demand side – the decision in which member state an SE wants to (re-)establish its seat. In

---

<sup>297</sup> Ibid.

<sup>298</sup> Kieninger, *Wettbewerb der Privatrechtsordnungen im Europäischen Binnenmarkt*, 178.

<sup>299</sup> Merkt, “Das Europäische Gesellschaftsrecht Und Die Idee Des »Wettbewerbs Der Gesetzgeber«,” 564 f.; Kieninger, *Wettbewerb der Privatrechtsordnungen im Europäischen Binnenmarkt*, 177 ff.

<sup>300</sup> Kieninger, *Wettbewerb der Privatrechtsordnungen im Europäischen Binnenmarkt*, 191 with reference to Luxembourg and Ireland. Even if in the meantime, the relations have shifted due to the enlargement of the EU with now Malta as the smallest member state, the general thought still holds true.

<sup>301</sup> Kahan and Kamar, “The Myth of State Competition in Corporate Law”; Armour, Hansmann, and Kraakman, “The Essential Elements of Corporate Law,” 25 (footnote 77).

<sup>302</sup> Kieninger, *Wettbewerb der Privatrechtsordnungen im Europäischen Binnenmarkt*, 192.

<sup>303</sup> Sasso, “The European Company: Does It Create Rules for the Market or a Market for the Rules?,” 297.

<sup>304</sup> Ibid., 293.

Italian literature, the discussion starts with Rescio who sees legal certainty as a major criterion in what he calls “the archipelago game”<sup>305</sup>. His conclusion is undecided: while complexity itself is not already negative, he sees (too much) room for interpretation especially if it comes to the “matters... partly regulated”<sup>306</sup>. Undecided is also the conclusion of Sasso who deems it “highly unlikely”<sup>307</sup> that the SE will be chosen for subsidiaries, joint ventures or EU groups and believes that legal arbitration will rather be exerted with a view to tax law. On the other hand, he considers possibilities of cross-border merger provided by the SE interesting<sup>308</sup>. Even more negative is Fiorio who does not see much room for regulatory competition: apart from the real seat requirement, this is in his opinion mainly because the SE-regulation leaves freedom especially in areas where the law is harmonised anyway. However, he admits that there will be competition in the area of co-determination<sup>309</sup>. In German legal literature, horizontal competition is seen more positively, following Enriques who is Italian, but publishes in German and English, too<sup>310</sup>. He sees the SE as a “catalyst” for legal arbitration, a view which several German scholars share<sup>311</sup>. Notwithstanding the liberalizations in the recent years due to the ECJ judicature, in Europe the transfer of a company to another country is still subject to obstacles which can be overcome by the SE<sup>312</sup>. It provides a safe framework for regulatory arbitration and can thus further horizontal competition and arbitration and helps to overcome path dependencies<sup>313</sup>.

Vertical competition, i.e. the concurrence between a member state’s public limited company and the same member state’s SE, is generally viewed more positively as a peculiarity of the European market with no direct counterpart in the US<sup>314</sup>. Other than to realise horizontal arbitration, in the case of vertical arbitration the company has to bridge no language barriers which makes a substitution easier and therefore more likely<sup>315</sup>. The fact that both vertical levels are intertwined does not constitute an obstacle<sup>316</sup>. The role of Article 9 is in this context sometimes judged critically by scholars who deem the SE as too thin to constitute an actual alternative to the national public limited company<sup>317</sup> (which is sometimes blamed on

---

<sup>305</sup> Rescio, “La Società Europea Tra Diritto Comunitario E Diritto Nazionale,” 974, and 977.

<sup>306</sup> *Ibid.*, 989 ff.

<sup>307</sup> Sasso, “The European Company: Does It Create Rules for the Market or a Market for the Rules?,” 300.

<sup>308</sup> *Ibid.*, 302.

<sup>309</sup> Fiorio, “Lo statuto della società europea: la struttura della società ed il coinvolgimento dei lavoratori,” 829.

<sup>310</sup> Enriques, “Schweigen Ist Gold”; Enriques, “Silence Is Golden: The European Company as a Catalyst for Company Law Arbitrage”; Enriques, “EC Company Law and the Fears of a European Delaware.”

<sup>311</sup> Heine and Röpke, “Vertikaler Regulierungswettbewerb und europäischer Binnenmarkt - die Europäische Aktiengesellschaft als supranationales Rechtsangebot,” 167 f., 167 ff.; Bachmann, “Hommelhoff-FS,” 25 f., 35 f.

<sup>312</sup> Schön, “Mindestharmonisierung im europäischen Gesellschaftsrecht,” 357 f.

<sup>313</sup> Heine and Röpke, “Vertikaler Regulierungswettbewerb und europäischer Binnenmarkt - die Europäische Aktiengesellschaft als supranationales Rechtsangebot,” 168.

<sup>314</sup> Bachmann, “Hommelhoff-FS,” 32 (“importing ideas from the US narrowed down the perspectives” in the European discussion, too); Grundmann, “Kosten und Nutzen eines optionalen Europäischen Kaufrechts,” 510.

<sup>315</sup> Bachmann, “Hommelhoff-FS,” 42.

<sup>316</sup> *Ibid.*, 38 against this critique brought forward by; Heine and Röpke, “Vertikaler Regulierungswettbewerb und europäischer Binnenmarkt - die Europäische Aktiengesellschaft als supranationales Rechtsangebot,” 178.

<sup>317</sup> Heine and Röpke, “Vertikaler Regulierungswettbewerb und europäischer Binnenmarkt - die Europäische Aktiengesellschaft als supranationales Rechtsangebot,” 165, 179; Grundmann, “Kosten und Nutzen eines optionalen Europäischen Kaufrechts,” 506 f.



the Council, functioning as a “cartel” of the national legislatures<sup>318</sup>). However, one has to see that some rules do provide more liberty for the company (at least of some countries) – especially in the fields of co-determination or the choice between the one-tier and the two-tier model. If the alternatives of the SE are restricted to some areas only, this means that the regulatory arbitrage can be exerted more precisely, as the choice of these alternatives does not imply changes to many other fields of law, unlike it is normally the case for horizontal arbitrage. Therefore, the lack of regulation in the SE-regulation should be seen as rather favouring regulatory arbitrage<sup>319</sup>.

Concluding, the possibilities for legal arbitrage in the EU are judged far less skeptically in legal literature focusing on the European legislation as opposed to such literature which juxtaposes the EU and US situation.

### c. Empirical data

As opposed to the US, until this day there exist only very scarce data about the existence of regulatory arbitrage in Europe. One study, conducted in 2009, dealt with the question whether the possibility for legal arbitrage was one of the reasons for companies to incorporate as an SE – a hypothesis which could not be verified when referred to the whole company law<sup>320</sup>. There seem to be hints, however, to a forum shopping with regard to co-determination and to the choice between the one-tier and the two-tier model<sup>321</sup>. But the question answered by the study is not the same as the one this chapter deals with – while they asked if the possibility was a reason to incorporate as an SE, here the question is rather whether SEs do exert regulatory arbitrage. Hints to this fact can be seen in the cross-border transfers of seats which do occur<sup>322</sup>, sometimes proving “an even bigger mobility of the SE than expected”<sup>323</sup>. Other studies, too, have delivered prove for regulatory arbitrage in the area of company law<sup>324</sup>. Furthermore, there are numerous examples of member states reacting to foreign company law or generally trying to make their company law more attractive<sup>325</sup>. This holds true even if there is no such thing as a franchise tax in the EU (cf.

---

<sup>318</sup> Schön, “Playing Different Games? Regulatory Competition in Tax and Company Law Compared,” 362; criticizing him Bachmann, “Hommelhoff-FS,” 38.

<sup>319</sup> Similarly Schön, “Playing Different Games? Regulatory Competition in Tax and Company Law Compared,” 362; Enriques, “Schweigen Ist Gold,” 750.

<sup>320</sup> Eidenmüller, Eidenmüller, and Engert, “Incorporating under European Law,” 10, 27.

<sup>321</sup> Ibid., 28; Eidenmüller, Engert, and Hornuf, “Vom Wert der Wahlfreiheit: Eine empirische Analyse der Societas Europaea als Rechtsformalternative,” 848 ff.

<sup>322</sup> Eidenmüller, Engert, and Hornuf, “Die Societas Europaea: Empirische Bestandsaufnahme und Entwicklungslinien einer neuen Rechtsform,” 729 mention 18 cross-border seat transfers, mainly from the time after 2007.

<sup>323</sup> Cf. to two examples of semi- or even illegal seat transfers from Luxemburg to the Cayman Islands Schmidt, “‘Offshore in drei Zügen’ - Die Europäische Aktiengesellschaft (SE) als ‘Fähre’ auf die Cayman Islands”; Heuschmid and Schmidt, “Die Europäische Aktiengesellschaft - Auf Dem Weg in Die Karibik?”

<sup>324</sup> Becht, Mayer, and Wagner, “Where Do Firms Incorporate?” investigate the Ltd.-incorporations in the UK after the Centros-judgment of the ECJ.

<sup>325</sup> Bachmann, “Hommelhoff-FS,” 25 points to the establishment of the German 1-€-GmbH (reaction to the British Ltd.); Wouters, “European Company Law,” 286 (footnote 120) (introduction of the S.A.S. in France “partly a reaction to the success of the Netherlands “B.V.” ”); von Rosen, “Die SE - ein europäisches Zukunftsmodell,” 1258 (proposal of the Arbeitskreis “Unternehmerische Mitbestimmung” (to allow the downsizing of German Aufsichtsräte) as a reaction to the SE); Wiesner, “Der Nizza-Kompromiss zur Europa AG -

above C III 1 a, p. 61), on the one hand because of the influence of lobby groups of legal advisors<sup>326</sup>, on the other as states seem to have certain political ambitions not to have an outdated company law<sup>327</sup>. Thus, one encounters the paradox situation that even if this constitutes a reaction to an only assumed or non-existing regulatory arbitrage, there may be regulatory competition without or to a higher degree than regulatory arbitrage.

#### d. Conclusion

Thus, as soon as one detaches oneself from the US origins, possibilities for legal arbitrage show up. Indisputably they will be less intense than in the US, but at least from a theoretical perspective the furthering effects of the SE for regulatory arbitrage are evident, and there is – however scarce and scattered it may be – some empirical evidence to support these theories. Regulatory arbitrage in Europe may depend on the respective field of company law<sup>328</sup>, and the seat requirement may be an obstacle for horizontal competition. However, there is still the possibility of vertical competition, and in cases like cross-border mergers via an SE, a decision for one of the two seats is inevitably taken. This may be the case even though the real seat requirement is still in place: in the case of international groups, the decision where the seat actually is may be of minor importance, given that big enterprises will probably have branch offices in several member states and that modern means of communication may render the allocation of a seat rather flexible.

These details shape a picture of a different regulatory competition which takes place in Europe: it is far less competitive than that in the US. Maybe only big firms actually do exert legal arbitrage because of the high transaction costs and the few questions where such a legal arbitrage is possible. The cases where legal arbitrage occurs may be limited to only few occasions – e.g. cross-border mergers. Since it is far less possible to exert legal arbitrage than in the US, these mergers may not even be triggered by the possibility for legal arbitrage, the case may rather be the other way round: legal arbitrage is a question simply posed by such mergers<sup>329</sup>. In Europe, therefore, legal arbitrage may not cause a run to one or few member states – other than in the US. Even if the company law of the UK is often deemed more attractive than that of, say, France or Germany, or if some minor member states like Luxemburg and Ireland are known for attracting companies, a situation like that in the US is not to be expected in the near future<sup>330</sup>. In Europe, legal arbitrage may rather influence the cross-border streams of companies which might have occurred anyway. But as usually big

---

Triumph oder Fehlschlag?," 398 (expecting further co-determination harmonisation in the wake of the SE regulation).

<sup>326</sup> Schön, "Playing Different Games? Regulatory Competition in Tax and Company Law Compared," 343 f.

<sup>327</sup> Bachmann, "Hommelhoff-FS," 25; Grundmann, "Wettbewerb Der Regelgeber Im Europäischen Gesellschaftsrecht - Jedes Marktsegment Hat Seine Struktur," 795.

<sup>328</sup> As suggested by Grundmann, "Wettbewerb Der Regelgeber Im Europäischen Gesellschaftsrecht - Jedes Marktsegment Hat Seine Struktur."

<sup>329</sup> Cf. to a similar approach to trace regulatory arbitrage and competition with "event studies" which focus on critical moments in a company's life where the question of (re)incorporation is posed in an intensified manner Romano, "Law as a Product," 233 ff.; Romano, "The State Competition Debate in Corporate Law," 731 ff.; Romano, *The Genius of American Corporate Law*, 17 ff.

<sup>330</sup> Sasso, "The European Company: Does It Create Rules for the Market or a Market for the Rules?," 293 with further references in footnote 18.

players take these decisions, even these few cases may push member states to adjust their legislation in small steps – not to strive for a dominance like Delaware, but rather to maintain the balance<sup>331</sup>. Given the higher transaction costs, Europe may be expected to see a competition at a slower pace than America, with less extremes and less strident, but still existent.

But while there could be less regulatory competition, there could undoubtedly be much more. There are numerous voices in the literature which demand the abolition of obstacles which hinder the access to the SE such as the “real seat requirement” (Art. 7 SE-regulation)<sup>332</sup> or the requirement of a transnational element (Art. 2 SE-regulation)<sup>333</sup>. But before these demands can be supported, one has to turn to the question whether more regulatory competition is a desirable goal at all.

## 2. *Is regulatory competition desirable?*

A look at the discussion in the US seems in place, before turning to what can be said about the situation in Europe.

### a. *Discussion in the US*

In line with the origin of the idea of regulatory competition in the US, there exists since many years a vivid discussion about the effects of regulatory competition. Since there are considerable differences between the US regulatory competition and its equivalent in Europe, for the purposes of this paper it shall suffice to re-draw the major lines of this discussion.

In 1974, Cary complained about the charter competition which, in his eyes, had led to a “race for the bottom with Delaware in the lead”<sup>334</sup>. Here, as the least common denominator, fiduciary standards and standards of fairness generally had been relaxed over and over again to attract as many companies as possible<sup>335</sup>. Regretful about this “deterioration of corporation standards”<sup>336</sup>, he called for higher federal standards<sup>337</sup>.

Winter in 1977<sup>338</sup> replied to Cary’s essay, arguing that the competition would instead lead to the best law (“race to the top”, as it was later called). The powers of the market for management control would make the managers strive for a high stock price and therefore

---

<sup>331</sup> Several scholars speak of a „defensive competition“: Klöhn, “Supranational Legal Entities and Vertical Regulatory Competition in European Corporate Law The Case for Market-Mimicking EU Corporate Forms,” 303; Grundmann, “Kosten und Nutzen eines optionalen Europäischen Kaufrechts,” 509 with further references.

<sup>332</sup> Casper, “Erfahrungen und Reformbedarf bei der SE - Gesellschaftsrechtliche Vorschläge,” 209.

<sup>333</sup> Schön, “Mindestharmonisierung im europäischen Gesellschaftsrecht,” 238; Study Group for German Stock Corporation and Capital Markets Law, “The Eight Most Important Recommendations for Modification of the SE Regulation,” 285 (none of these eight recommendations, however, includes a change to Article 9, which is apparently not seen as hindering regulatory competition); Casper, “Numerus Clausus und Mehrstaatlichkeit bei der SE-Gründung,” 98; Oechsler, “Der Praktische Weg Zur Societas Europea (SE) - Gestaltungsspielraum Und Typenzwang,” 698 f.

<sup>334</sup> Cary, “Federalism and Corporate Law,” 705.

<sup>335</sup> *Ibid.*, 670.

<sup>336</sup> *Ibid.*, 663.

<sup>337</sup> *Ibid.*, 696 ff.

<sup>338</sup> Winter, “State Law, Shareholder Protection, and the Theory of the Corporation.”

maximize the shareholders' interest, since, otherwise, their jobs would be endangered by facilitated takeovers. Any intervention from federal side would disturb the competition for the best corporate law.

There has in the years to follow been a lot of discussion between these two extremes and not reached a final conclusion. After Cary and Winter, there have been intermediary approaches, too: Romano speaks of the "Genius of American Corporate Law"<sup>339</sup>, thereby denying negative effects of the market powers (in line with Winter). She claims, however, that firms are rather attracted not by the content of the Delaware law, but rather by other factors, such as the predictability of its law, given the large amount of case law and the especially qualified judges<sup>340</sup>. Other authors accordingly have doomed the competition as a "race to nowhere in particular"<sup>341</sup>. Thus, the domination of Delaware can also be explained with network externalities<sup>342</sup>, i.e. the fact that the large number of firms incorporated in Delaware e.g. provide for a high density of case law, which inures to the benefit of the company law package. In more recent time, the strict anti-takeover measures that Delaware law provides for and which aim rather at the interest of the management than that of the shareholders – which may well be interested in a takeover offer, given that it usually increases the share price – have made some more critical voices doubt the mere efficiency of charter competition<sup>343</sup>. Concluding, however, one may say that the discussion has left the extremes it started from and now mainly takes place on the "middle ground"<sup>344</sup>.

#### b. Conclusion for Europe

However, the transferability of these views to the European market remains questionable. This holds e.g. true for the critique on the strong anti-takeover measures which are in place in Delaware: on the one hand, as mentioned above in C III 1 a, p. 61 ff., ownership in (most of) the EU member states is far less dispersed than in the US, which means that the managers would be less powerful in relation to the shareholders than their American colleagues. On a normative level, the situation is different, too: "good corporate law" in Europe does not only consider the shareholders' interests, but is generally recognized as such which strikes a just balance between the interests of diverse groups, including, other than shareholders, also creditors and the employed. But also the focus on Delaware's dominance is not in place in the European discussion where there is no such dominating member state. Given the high transaction costs, a similar development is not to be expected, either. This contains the dangers of a "race to the bottom"<sup>345</sup>, while positive effects – like that of states reacting to other states' legislature – may be scarce, but can be seen. In this way, the company law of the European member states may profit from the experiences of other states and show signs of a bottom-up harmonisation at least in some questions, while outgrowths may be fought by the legislator (on the federal or national level) since a panic

---

<sup>339</sup> Romano, *The Genius of American Corporate Law*.

<sup>340</sup> Romano, "Law as a Product," 279 ff.

<sup>341</sup> Bratton, "Corporate Law's Race to Nowhere in Particular."

<sup>342</sup> Klausner, "Corporations, Corporate Law, and Networks of Contracts," 842 ff.

<sup>343</sup> Bebchuk and Cohen, "Firms' Decisions Where to Incorporate."

<sup>344</sup> Bratton, "Corporate Law's Race to Nowhere in Particular," 401 f.

<sup>345</sup> Schön, "Mindestharmonisierung im europäischen Gesellschaftsrecht," 234 f.

run to single member states is most unlikely. Similarly, the dangers of a misallocation of resources<sup>346</sup> do not seem to provide an argument against the present regulatory competition: at the worst, resources may remain inefficiently allocated where they are – so the allocation will not improve. That it actually worsens seems highly unlikely, given that company law is only one (minor) factor of many and that transaction costs remain high. This may be the reason why the (slightly stimulating) effect that Article 9 has on the competition is, in my view convincingly, almost unanimously seen as positive<sup>347</sup>.

#### IV. Prospect of an extension to a comprehensive optional instrument

In this section, the extension to a comprehensive instrument shall be discussed, i.e. a (more) complete SE-regulation which, as opposed to the current state, could do without any or with only very few referrals to national law. This would be an alternative version of the SE-regulation that could do without Article 9 or at least would have to use a similar clause of referral only in a very limited ambit. Although in this chapter some arguments from the discussion of the full harmonisation will be used, both concepts have to be distinguished: the comprehensive instrument – an SE without references to national law – will not constitute an example of full harmonisation as it will still be optional. Full harmonisation would mean that there is only one model of public limited liability company in Europe, the optional instrument means that in addition to the (28) member state models, there is another 29<sup>th</sup> model, independent and self-contained.

To discuss this prospect, after an evaluation of the status quo (1) and the probabilities of change (2), I will discuss the desirability of such a step (4), where it may be of help to have a look at comparable projects in the general area of European private law (3).

##### 1. Evaluation of the status quo: are more rules desirable?

While the evaluation of the status quo is subject of the whole second part of this paper, this section will deal with the question if “more” rules would be good. The questions if a comprehensive (complete) regulation is desirable is saved for a later section (C IV 4, p. 73), as is the final decision on whether the current regulation is preferable to no regulation at all (D).

Looking at the current state of the SE-regulation, most scholars utter regretful opinions on the lack of rules provided for<sup>348</sup>. This holds true especially for the lack of rules regarding the organisational structure<sup>349</sup>, but also for the tax regime, since especially “many cross-border corporate structures are dictated by tax considerations more than any other factor”<sup>350</sup>. As

---

<sup>346</sup> As broached by *ibid.*, 236 (with undecided result).

<sup>347</sup> Schürnbrand, in: Habersack and Drinhausen, *SE-Recht mit grenzüberschreitender Verschmelzung* Art. 9 Recital 6; Bachmann, “Hommelhoff-FS,” 23, 36 ff.; Fleischer, “Der Einfluß der Societas Europaea auf die Dogmatik des deutschen Gesellschaftsrechts,” 510.

<sup>348</sup> Eidenmüller, Eidenmüller, and Engert, “Incorporating under European Law,” 27; Schürnbrand, “Vollharmonisierung im Privatrecht,” 285; Schürnbrand, in: Habersack and Drinhausen, *SE-Recht mit grenzüberschreitender Verschmelzung* Art. 9 Recital 5; Lenoir, *La Societas Europaea Ou SE*, 32 f.; Bachmann, “Hommelhoff-FS,” 22 f.

<sup>349</sup> Schürnbrand, in: Habersack and Drinhausen, *SE-Recht mit grenzüberschreitender Verschmelzung* Art. 9 SE-VO Recital 5.

<sup>350</sup> Edwards, “The European Company Essential Tool or Eviscerated Dream?,” 463.

the most detrimental consequences of the lack of regulation, the lack of clarity and the loss of workability (cf. above C I and II, p. 58 ff.) are mentioned; the latter often with reference to the self-proclaimed goals of the legislator as evident from the Recitals<sup>351</sup>.

A number of advantages are seen in the current regulation instead (not because) of its lack of regulation. Even with the few rules it has, the SE is held to constitute a common ideal for Europe and to thus influence the legislation in the member states<sup>352</sup>. Others see it rather as a common reference point – similar to what the Structure Directive failed to become – without the ambition to constitute an “ideal model”<sup>353</sup>, but nonetheless with a positive function in the harmonisation process in European private law.

Some scholars even find positive aspects in the absence of rules itself. Insofar as they mention the possibility to further regulatory competition<sup>354</sup>, I refer to the last section D I, p. 75 ff., where I will deal with this idea in more detail. Another reason which was already mentioned above (C II, p. 58) are the “positive network externalities”. While this may be true for an “easing-in period”, one has to see that with time, such effects would vanish<sup>355</sup>. A full regulation might have a more difficult start, but with emerging case law and more practical experience also among legal counsels, acceptance for the genuinely European rules would grow. The current form of positive network externalities does therefore in my opinion not constitute an advantage in comparison to a comprehensive instrument.

Concluding one has to state that the disadvantages of the absence of rules are still high. The main view is that the benefits, which often remain vague, do not outweigh the disadvantages, mainly in terms of high transaction costs, which come with such a structure<sup>356</sup>. Even to profit from possible advantages like an enhanced regulatory competition, a higher density of rules appears desirable. This is because even to fulfil functions like that of opening competition, a certain amount of rules is necessary<sup>357</sup>. With more rules on the European level, regulatory arbitrage could even be more specific, as the national law for the few remaining gaps could be more purposefully picked (without too many implications in other fields of law). More rules appear even desirable if the rules on the European level may not in all cases be as convincing as they could be<sup>358</sup> and are so

---

<sup>351</sup> Fiorio, “Lo statuto della società europea: la struttura della società ed il coinvolgimento dei lavoratori,” 835 („...sembra potersi affermare che il legislatore comunitario abbia sostanzialmente mancato gli obiettivi che si era prefissato”); Schürnbrand, in: Habersack and Drinhausen, *SE-Recht mit grenzüberschreitender Verschmelzung* Artikel 9 Recital 5.

<sup>352</sup> Schürnbrand, “Vollharmonisierung im Privatrecht,” 284.

<sup>353</sup> Bachmann, “Hommelhoff-FS,” 33; Bachmann, “Die Societas Europaea und das europäische Privatrecht,” 50.

<sup>354</sup> Fiorio, “Lo statuto della società europea: la struttura della società ed il coinvolgimento dei lavoratori,” 836; Schürnbrand, in: Habersack and Drinhausen, *SE-Recht mit grenzüberschreitender Verschmelzung* Art. 9 SE-VO Recital 5.

<sup>355</sup> Casper, “Erfahrungen und Reformbedarf bei der SE - Gesellschaftsrechtliche Vorschläge,” 185.

<sup>356</sup> Fiorio, “Lo statuto della società europea: la struttura della società ed il coinvolgimento dei lavoratori,” 836; Schürnbrand, “Vollharmonisierung im Privatrecht,” 285.

<sup>357</sup> Grundmann, *European Company Law* § 33 Recital 8.

<sup>358</sup> Schürnbrand, “Vollharmonisierung im Privatrecht,” 285; Casper, “Erfahrungen und Reformbedarf bei der SE - Gesellschaftsrechtliche Vorschläge,” 185 f., 219.

especially in the sector of organisation, where the lack of regulation is hardly justifiable<sup>359</sup>. But while “more” rules appear desirable, it remains for a later chapter to discuss whether “all” rules should be given on the European level (C IV 4, p. 73).

## 2. *Probability of a comprehensive instrument*

Art. 69 SE-regulation promises the re-assessment of the regulation after 5 years and poses the question of how flexible norms on a European level actually are. As of now, the 5 years have lapsed and, as is commonly known, the Commission intends no amendments to the SE-regulation in the short term<sup>360</sup>. This and the fact that the legislative process in the EU can take a long time – as impressively illustrated by the example of the SE itself, cf. above A I, p. 13 – have led to concerns that the absence of rules may hem the harmonisation process<sup>361</sup> – the current status would then be a “dead end”. Other voices remain more optimistic and point to the fact that the introduction of the SE speeds up the rhythm of reforms in the area of European company law<sup>362</sup>.

Even if political processes are impossible to predict, a few factors may favour later amendments to the regulation. There is on the one hand the fact that now that the new legal forms is applicable, it has become a focal point of critical review in legal literature<sup>363</sup>. Where critique is uttered in a unanimous manner like in some cases – e.g. the “real seat requirement” or the requirement of a cross-border element, cf. above C III 1 d, p. 66 ff. – it is more likely to be taken into account by the European legislator. On the other hand, its growing acceptance in the legal practice may sharpen the demand for certain rules, and case law of the ECJ may help pave the way for future amendments, too. I therefore do not share the sceptical view of Fleischer and remain slightly optimistic that we may actually see amendments to the SE-regulation in the medium term.

A comprehensive instrument, however, does not appear to be in sight. In politically delicate areas like co-determination, it seems highly unlikely that the differences between member states will be overcome, and be it only for the purpose of an additional optional instrument. While further steps towards a more comprehensive SE-regulation remain likely, there are still too many gaps in the regulation to hope for a comprehensive instrument any time soon. It appears even likely that there may be a general political reluctance to allow a general competition.

## 3. *Excursus: Comparison to PECL / CESL / CISG*

This political reluctance may be a reason why similar projects have never had the impact in the practice that they could have had. One has to turn one’s eye to other areas of civil law to find similar projects, especially in the area of contract law.

---

<sup>359</sup> Schürnbrand, in: Habersack and Drinhausen, *SE-Recht mit grenzüberschreitender Verschmelzung* Art. 9 SE-VO Recital 5.

<sup>360</sup> Action Plan: European company law and corporate governance - a modern legal framework for more engaged shareholders and sustainable companies, COM(2012) 740 final, p. 14 (under 4.5).

<sup>361</sup> Fleischer, “Der Einfluß der Societas Europaea auf die Dogmatik des deutschen Gesellschaftsrechts,” 507 f.

<sup>362</sup> Lenoir, *La Societas Europaea Ou SE*, 33.

<sup>363</sup> An overview over the vast amount of literature published already until then gives Teichmann, “Zum Geburtstag viel Buch: Eine Literaturlauslese zum fünften Jahrestag der Societas Europaea (SE).”

As opposed to the PECL, the SE-regulation is legally binding. The closest comparable norms are the UN Sales Law (CISG) and the proposal for a Common European Sales Law (CESL)<sup>364</sup>.

A connecting factor between the three regulations can be seen in the fact that in each case, access is not as easily granted as would be theoretically easily possible and as literature often demands. As for the SE-regulation, the main obstacles to the access are namely the real seat requirement and the requirement of a cross-border element. Similarly, the CESL is only applicable for cross-border contracts (Art. 4 para. 1 CESL-Regulation) and only in specific B2B and B2C-relations (cf. Art. 7 CESL-Regulation). The CISG, too, requires cross-border sales (Art. 1 CISG)<sup>365</sup> and excludes B2C-contracts for most cases (Art. 2 lit. a CISG).

All these obstacles have in common that they reduce the choice of those concerned by the law. For the scope of this paper, an in-depth analysis of the reasons of such obstacles is not possible. I will therefore restrain myself to the hypothesis that there is a general political reluctance to pass on important areas of their civil law to a supranational legislator, and be it only for the sake of an optional instrument. Such reluctance may be motivated by fears that a similar development like in Canada<sup>366</sup> or in the US – with Delaware taking the place of a federal legislator – may happen<sup>367</sup>.

As opposed to the SE, however, both instruments – CISG and CESL – are comprehensive regulations of its respective ambit.

This means that they rely on national law not at all or to a far lesser degree only. According to Art. 4 para. 1 CESL, the “Common European Sales Law is to be interpreted autonomously and in accordance with its objectives and the principles underlying it”, any recourse to national law is explicitly excluded in Art. 4 para. 2 CESL. The CISG has recourse to national law, since cases not settled by the rules “are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law” (Art. 7 para. 2 CISG). However, these cases are far fewer than in the case of the SE-regulation, since with a hundred articles, the CISG reaches a similar density of regulation like national civil codes.

The question of the use of principles in the SE-regulation has been discussed already (cf. above B III 2, p. 44). Here it suffice to note that the commentators who compare the SE-

---

<sup>364</sup> Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on a Common European Sales Law, 11.10.2011 – COM(2011) 635 final.

<sup>365</sup> Even if the parties can dispose of this requirement by virtue of their party autonomy, cf. Bachmann, “Die Societas Europaea und das europäische Privatrecht,” 52 (footnote 117, with further references). The PECL do not require a cross-border element, too (but may, on the other hand, not reflect all the political input that passed (or even proposed) legislation does).

<sup>366</sup> Cf. to the development in Canada, where federal legislation in the area of corporate law eviscerated the provincial legislation Grundmann, “Kosten und Nutzen eines optionalen Europäischen Kaufrechts,” 507 f. with further references.

<sup>367</sup> Cf. Bachmann, “Die Societas Europaea und das europäische Privatrecht,” 52 who mentions the fear of a “flight from co-determination” as well as the principle of subsidiarity as the most probable reasons in the political process.



regulation reach from regretful to delighted when looking at the SE-regulation, depending on their point of view<sup>368</sup>.

This character as comprehensive regulations enables them to constitute a “model” for further legislation. Thus, even if the CISG was usually excluded in the first years in German legal practice, the German legislator shaped the 2002 reform of the German Civil Code (*Schuldrechtsmodernisierungsgesetz*) in some aspects after the CISG. Even if the SE, notwithstanding its young age, has already started inspiring national legislators – cf. only the Italian company law reform<sup>369</sup> – its lack of substantive regulations makes it less interesting as such a model, since most questions are left for the national legislators to deal with anyway. Thus, the SE-regulation will not have the same influence as a “model” regulation like the CISG<sup>370</sup>.

Concluding one has to state that, while a higher density of regulation in the SE-regulation would certainly also improve its function as a “model” for further legislation, a side-looking glance at similar projects reveals that the introduction of complete optional instruments is politically apparently hard to realise. Reason for the described reluctance may be concerns that Europe as a community of values may not yet be ripe for such a step<sup>371</sup>.

#### *4. Preliminary evaluation: desirability of a comprehensive optional instrument*

Even though a comprehensive optional instrument may not be seen any time soon, I will shortly dwell on the question whether it would be desirable at all. The question is not whether there should not be more rules in the regulation (cf. to this question above C IV 1, p. 69) or whether the regulation should have been passed in the present form at all (cf. to this question below D, p. 75 ff.), but whether it would be a good thing to have all questions of company law answered on the European level.

Some arguments from the discussion about full harmonisation can be used in this chapter, too. It is to be noted that a comprehensive instrument has to be consistent with the member states’ national legal orders. While it may not – if it is supposed to be an instrument completely of the federal level – be orientated along the lines of national law, it must pay respect to the structure, functioning and established rules of national law. Gsell and Herresthal point to this fact when speaking about private law in general<sup>372</sup>, but it holds even more true when applied to a company like the SE which is interconnected with many areas of law, such as the law of groups, capital market law, antitrust and competition law, labour law, contract law, criminal law, banking and insurance supervision and many others. While at its current state, the many referrals to national law, foremost Article 9, ease the transitions with national law, it would be a far greater challenge to create a comprehensive instrument for such a central area of private law. On the other hand, it has to be taken into account that

---

<sup>368</sup> Ibid., 58; Fleischer, “Der Einfluß der Societas Europaea auf die Dogmatik des deutschen Gesellschaftsrechts,” 508 f.

<sup>369</sup> Striking a balance 10 years into the reform Montalenti, “La società per azioni a dieci anni dalla riforma: un primo bilancio” with more details on the impact of the SE-regulation under 11. (p. 419 ff.).

<sup>370</sup> Bachmann, “Hommelhoff-FS,” 33.

<sup>371</sup> Such concerns expressed in *ibid.*, 43.

<sup>372</sup> Gsell and Herresthal, “Einleitung,” 8 f.

many of the mentioned areas are now already harmonised to a higher degree than company law, which would ease the transition in numerous cases.

Another economic factor to take into account are the costs of implementing a comprehensive instrument. They have to be set off against the gains in efficiency due to e.g. lower costs of identifying the applicable law<sup>373</sup>. While this is true, in the case of the SE it is to be expected that the balance would soon turn positive<sup>374</sup>.

I cannot detect a clear tendency in the discussion as far as it was depicted so far. Indeed, the clincher usually is the argumentation with regulatory competition. As soon as full harmonisation poses an alternative to regulatory competition, many scholars plead for the latter<sup>375</sup>. However, in the case of optional instruments (and perforated regulations) like in the case of the SE, the discussion is not so easy. I will leave it for the next chapter to distinguish between vertical and horizontal competition, decide the argument and draw a final conclusion also between this and the last chapter.

---

<sup>373</sup> Ibid., 7.

<sup>374</sup> As has been discussed above, cf. C IV 1, p. 58 ff.

<sup>375</sup> Tamm, "Das Grünbuch Der Kommission Zum Verbraucheracquis Und Das Modell Der Vollharmonisierung – Eine Kritische Analyse"; Gsell and Herresthal, "Einleitung," 6 f.

## D. Summary and Final Conclusions

In this last section, I will try to sum up the results and to draw final conclusions. To this end, I will first draw a synthesis between the last two subsections (C III and IV, p. 60 ff.) by asking what a comprehensive instrument would mean for regulatory competition (75I). Afterwards I will try to answer the core question if the Nice compromise should not better not have been passed (II). A summary will be given in the last section (III).

### I. Consequences of a comprehensive instrument for regulatory competition

While we have seen in a previous chapter (C III 2, p. 67 ff.) that regulatory competition cannot be seen as overall good or bad, one has also to distinguish the implications of a comprehensive regulation for regulatory competition. The at first glance surprising result of a glance at legal literature reveals that some scholars are against more rules because they would hem more regulatory competition<sup>376</sup> – others are in favour of such rules, with the argument that they would fuel such competition<sup>377</sup>. The result is not surprising any more if one looks at the already introduced (above C III, p. 60 ff.) distinction between vertical and horizontal competition: while a comprehensive instrument would constitute a full-fledged alternative on the federal level, there would be much more possibility for vertical arbitrage as many more rules would change. (Cf. above C III 1 b, p. 63 ff. to the lack of federal rules as an obstacle to vertical competition.) Horizontal competition, on the other hand, is now facilitated only by the gaps in the SE-regulation – with their disappearance, there would not be any more horizontal competition by means of the SE.

Since there is no clear preference between vertical or horizontal competition – none is better than the other one, they are just different – the question is undecided at this level.

Given, however, that the introduction of a comprehensive instrument appears not yet in sight (cf. above C IV 2, p. 71 ff.), but that on the other hand more provisions are to be expected, the question is whether this “more” could not constitute a compromise between both positions. The easier part of the answer is that a “more” of provisions would also mean “more” vertical competition. Even few more options offered by the European legislator could “improve” the situation<sup>378</sup> – i.e. create more of the European competition which may well be regarded as positive (cf. above).

As far as the horizontal competition is concerned, I believe that more rules would to a certain degree favour competition, too. This is because with more rules on the European level, in the case of a transfer of seat, more rules would remain the same. This would make transfers more easy, since for more questions of law, the choice would not have any implications. For the remaining questions – i.e. the gaps which would still remain even in an enhanced regulation – the choice could be exerted in a more purposeful manner. While now the decision between a seat in France and Germany equals more or less the decision: French

---

<sup>376</sup> Enriques, “Schweigen Ist Gold,” 746 ff., 750 (underlining that the lack of rules on bonds were crucial for the success of the SE).

<sup>377</sup> Heine and Röpke, “Vertikaler Regulierungswettbewerb und europäischer Binnenmarkt - die Europäische Aktiengesellschaft als supranationales Rechtsangebot,” 165, 179.

<sup>378</sup> Schön, “Playing Different Games? Regulatory Competition in Tax and Company Law Compared,” 362.

or German corporate law?, in a near future, that decision could e.g. come down to the question: French or German capital requirements and rights of shareholders in the general assembly? For these specific areas, the competition could then be much more effective.

While undecided for the option of a comprehensive optional instrument, I believe therefore that more provisions would create more desirable competition.

## II. The Nice compromise: Stepping stone or dead end?

In a previous section, I have answered the forward-looking question whether there will be further amendments to the SE-regulation in a slightly affirmative manner (cf. above C IV 2, p. 71 ff.) – the Nice compromise does not constitute a “dead end”, even if a comprehensive instrument is not to be expected any time soon. In this section, I will try to answer the retrospective question if the Nice compromise – including Article 9 as it is – was a good development or if it hindered (potential) legislation in the area.

Given the difficulties to assess political processes, there cannot be a decisive answer to this question. Several arguments, though, suggest that the Nice compromise did not block a potential agreement on a comprehensive regulation. The difficulties of the political process cast doubt on any hope that in the meanwhile, any such agreement could have been reached. To the opposite, I believe that we now are not only one step further than we would have been without the Nice compromise. Given that now the SE is in place, acceptance in legal practice (led by some of Europe’s biggest enterprises), attention in legal literature and treatment in emerging case law will grow (cf. to these points already above C IV 2, p. 71). Furthermore, where there remain differences between the SEs from different member states, the company laws enter into a (reduced) form of regulatory competition (cf. above C III 1 d, p. 66 f.) which will exert pressure on those member states with the most incongruous company law features. Even if the regulatory competition will not lead to a “race” to anywhere – like Delaware in the US – it can improve the political will of member states of the EU to strike compromises when re-negotiating the SE-regulation. In a next step, the expected rise in regulatory density (cf. above C IV 2, p. 71 ff.) could then in fact be reached.

There are sometimes concerns that any provision on a European level could lead to a “fossilisation”<sup>379</sup>. However, even in member states the process can be blocked in a similar manner (and even worse) – there are even cases when member states have recourse to the European level to overcome hold-ups on the national level<sup>380</sup>. The “fossilisation”-argument therefore does in my opinion not speak against provisions on a European level.

Thus, the Nice compromise, including Article 9 as it is, would prove to have been a stepping stone. This regulatory technique of first offering a non-complete regulation may therefore

---

<sup>379</sup> Bachmann, “Hommelhoff-FS,” 43. Cf. furthermore above C IV 2, p. 60 Fleischer to similar concerns of a “dead end”.

<sup>380</sup> Schön, “Mindestharmonisierung im europäischen Gesellschaftsrecht,” 236 f.

indeed constitute an interesting political option for later difficult legislation processes, concerning e.g. contract law or smaller companies<sup>381</sup>.

### III. Towards a balance between regulation and competition in Europe

When summing up the results of the previous chapters, I cannot but conclude optimistically. Assessing the impact of Article 9 SE-regulation, I find that the provision is complicated, but understandable. Even though more clarification would be warmly welcomed in some questions which literature has discussed so far, the legal transposition seems to not unnecessarily further complicate the already complicated political decision. Various practical examples prove its workability.

If the compromise which had to be struck between regulation and non-regulation has sometimes been decried as “uniting all possible disadvantages”<sup>382</sup>, I optimistically counter: given the circumstances, in Nice a result at least not far from the optimal solution was passed. The fact that the SE was finally made possible gave rise to review in literature as well as respectable practical success, which, for its part, will inure to the benefit of the image of the SE as well as give rise to case law. The still existing gaps in the regulation further a genuinely European form of competition – less aggressive than in the US, with less danger of a “race to the bottom” or to some single member state, and with slower, but in the long term positive developments to be expected. While more provisions would certainly be helpful for this competition – of whatever kind – I believe that these provisions will be introduced in the mid term, in any case more likely with the Nice compromise than we would have had it without. Thus, the Nice compromise will prove not to be an obstacle to further development, but a stepping stone towards a balance between competition and regulation in Europe.

---

<sup>381</sup> Heine and Röpke, “Vertikaler Regulierungswettbewerb und europäischer Binnenmarkt - die Europäische Aktiengesellschaft als supranationales Rechtsangebot,” 180 f.

<sup>382</sup> Schön, “Mindestharmonisierung im europäischen Gesellschaftsrecht,” 249 (on the previous draft of 1991); more optimistic (“initial step towards the harmonisation of the law”) is Sasso, “The European Company: Does It Create Rules for the Market or a Market for the Rules?,” 302 f.



## Bibliography

- Armour, John, Henry Hansmann, and Reinier Kraakman. "The Essential Elements of Corporate Law." SSRN Scholarly Paper. Rochester, NY: Social Science Research Network, July 21, 2009. <http://papers.ssrn.com/abstract=1436551>.
- Bachmann, Gregor. "Die Societas Europaea und das europäische Privatrecht." *Zeitschrift für Europäisches Privatrecht*, 2008, 32–58.
- . "Vertikaler Regulierungswettbewerb im Europäischen Gesellschaftsrecht." In *Festschrift für Peter Hommelhoff zum 70. Geburtstag*, edited by Bernd Erle, 21–44, 2012.
- Bärmann, Johannes. "Einheitliche Gesellschaftsform für die Europäische Wirtschaftsgemeinschaft, Ein kritischer Bericht." *Archiv für die civilistische Praxis* 160, no. 2 (1961): 97–134.
- Bayer, Walter, and Thomas Hoffmann. "Statistiken zur AG - eine kritische Bestandsaufnahme." *AG-Report, Sonderteil der Zeitschrift Die Aktiengesellschaft*, no. 13–14 (2010): R283–86.
- Bayer, Walter, Thomas Hoffmann, and Jessica Schmidt. "Ein Blick in die deutsche SE-Landschaft fünf Jahre nach Inkrafttreten der SE-VO." *AG-Report, Sonderteil der Zeitschrift Die Aktiengesellschaft*, no. 22 (2009): R480–82.
- Bayer, Walter, and Jessica Schmidt. "Die SE und ihr Erfolg in der Praxis - eine Zwischenbilanz." *AG-Report, Sonderteil der Zeitschrift Die Aktiengesellschaft*, 2006, R343–46.
- . "Europäische Gesellschaft (SE) als Rechtsform für den Mittelstand?!" *Anwaltsblatt*, 2008, 327–33.
- . "'Going European' - die SE europaweit auf dem Vormarsch." *AG-Report, Sonderteil der Zeitschrift Die Aktiengesellschaft*, 2007, R192–200.
- Bebchuk, Lucian Arye, and Alma Cohen. "Firms' Decisions Where to Incorporate." *Journal of Law & Economics* 46 (2003): 383.
- Becht, Marco, Colin Mayer, and Hannes F. Wagner. "Where Do Firms Incorporate? Deregulation and the Cost of Entry." *Journal of Corporate Finance*, Special Issue: Contractual Corporate Governance European Corporate Governance Institute (ECGI) Symposium on Contractual Corporate Governance, 14, no. 3 (June 2008): 241–56. doi:10.1016/j.jcorpfin.2008.04.002.
- Beguin, Jacques. "Le rattachement de la société européenne." In *La société européenne, Organisation juridique et fiscale, intérêts, perspectives*, edited by Klaus J. Hopt, Michel Menjucq, and Eddy Wymeersch, 31–58, 2003.
- Blanquet, Françoise. "Das Statut der Europäischen Aktiengesellschaft (Societas Europaea SE), Ein Gemeinschaftsinstrument für die grenzübergreifende Zusammenarbeit im Dienste der Unternehmen." *Zeitschrift für Unternehmens- und Gesellschaftsrecht*, 2002, 20–65.
- Brandi, Tim Oliver. "Die Europäische Aktiengesellschaft im deutschen und internationalen Konzernrecht." *Neue Zeitschrift für Gesellschaftsrecht*, 2003, 889–96.
- Brandt, Ulrich. *Die Hauptversammlung der Europäischen Aktiengesellschaft (SE), Eine Untersuchung der methodischen Grundlagen und der Unterschiede zu den nationalen Aktiengesellschaften, insbesondere zur deutschen Aktiengesellschaft*, 2004.
- Brandt, Ulrich, and Mathias Scheifele. "Die Europäische Aktiengesellschaft Und Das Anwendbare Recht." *Deutsches Steuerrecht*, 2003, 547–55.

- Bratton, William W. "Corporate Law's Race to Nowhere in Particular." *The University of Toronto Law Journal* 44, no. 4 (October 1, 1994): 401–40. doi:10.2307/825892.
- Caemmerer, Ernst von. "Europäische Aktiengesellschaft." In *Das Unternehmen in der Rechtsordnung, Festgabe für Heinrich Kronstein aus Anlass seines 70. Geburtstages am 12. September 1967*, edited by Kurt H. Biedenkopf, Helmut Coing, and Ernst-Joachim Mestmäcker, 1967.
- . "Rechtsvereinheitlichung und internationales Privatrecht." In *Probleme des Europäischen Rechts: Festschrift für Walter Hallstein zum 65. Geburtstag*, edited by Ernst von Caemmerer, Hans Jürgen Schlochauer, and Ernst Steindorff, 63–95. Frankfurt a M: Klostermann, 1966.
- Cary, William. "Federalism and Corporate Law: Reflections Upon Delaware." *The Yale Law Journal* 83, no. 4 (1974): 663.
- Casper, Matthias. "Der Lückenschluß Im Statut Der Europäischen Aktiengesellschaft." In *Festschrift Für Peter Ulmer Zum 70. Geburtstag Am 2. Januar 2003*, edited by Mathias Habersack, Peter Hommelhoff, Uwe Hüffer, and Karsten Schmitt, 51–72. Berlin: W. de Gruyter Recht, 2003.
- . "Erfahrungen und Reformbedarf bei der SE - Gesellschaftsrechtliche Vorschläge." *Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht* 173 (2009): 181–221.
- . "Numerus Clausus und Mehrstaatlichkeit bei der SE-Gründung." *Die Aktiengesellschaft*, 2007, 97–105.
- Colangelo, Margherita. "La 'Società Europea' alla prova del mercato comunitario delle regole." *Europa e diritto privato*, 2005, 147–78.
- Colneric, Ninon. "Auslegung Des Gemeinschaftsrechts Und Gemeinschaftsrechtskonforme Auslegung." *Zeitschrift Für Europäisches Privatrecht*, 2005, 225–33.
- Colombani, Jacques-Louis, and Marc Favero. *Societas Europaea*. Pratique Des Affairs. Paris: Joly, 2002.
- da Costa, Carla Tavares, and Alexandra de Meester Bilreiro. *The European Company Statute*. European Business Law & Practice Series, v. 19. The Hague ; London ; New York: Kluwer Law International, 2003.
- Deutscher Notarverein. *Stellungnahme zum Diskussionsentwurf eines Gesetzes zur Einführung der Europäischen Gesellschaft vom 24. Juni 2003*, 2003. [http://www.gesmat.bundesgerichtshof.de/gesetzesmaterialien/15\\_wp/SocEuropeae/dnotv\\_stn\\_013.pdf](http://www.gesmat.bundesgerichtshof.de/gesetzesmaterialien/15_wp/SocEuropeae/dnotv_stn_013.pdf).
- Ebert, Sabine. "Das anwendbare Konzernrecht der Europäischen Aktiengesellschaft." *Betriebsberater*, 2003, 1854–59.
- Edwards, Vanessa. "The European Company Essential Tool or Eviscerated Dream?" *Common Market Law Review* 40, no. 2 (April 1, 2003): 443–64.
- Eidenmüller, Horst, Andreas Eidenmüller, and Lars Engert. "Incorporating under European Law: The Societas Europaea as a Vehicle for Legal Arbitrage\*." *European Business Organization Law Review* 10, no. 1 (March 19, 2009): 1–33. doi:10.1017/S1566752909000019.
- Eidenmüller, Horst, Andreas Engert, and Lars Hornuf. "Die Societas Europaea: Empirische Bestandsaufnahme und Entwicklungslinien einer neuen Rechtsform." *Die Aktiengesellschaft* 53, no. 20 (2008): 721–30.
- . "Vom Wert der Wahlfreiheit: Eine empirische Analyse der Societas Europaea als Rechtsformalternative." *Die Aktiengesellschaft* 54, no. 23 (2009): 845–55.



- Einsele, Dorothee. "Kollisionsrechtliche Behandlung des Rechts verbundener Unternehmen." *Zeitschrift für Unternehmens- und Gesellschaftsrecht* 25 (1996): 40–54.
- Engert, Andreas. "Der international-privatrechtliche und sachrechtliche Anwendungsbereich des Rechts der europäischen Aktiengesellschaft." *Zeitschrift für Vergleichende Rechtswissenschaft* 104 (2005): 444–60.
- . "Gesellschaftsrecht." In *Europarechtliche Bezüge des Privatrechts*, edited by Katja Langenbucher, 2nd ed., 225–80, 2008.
- Enriques, Luca. "EC Company Law and the Fears of a European Delaware." *European Business Law Review* 15, no. 6 (2004): 1259–74.
- . "Schweigen Ist Gold: Die Europäische Aktiengesellschaft Als Katalysator Für Regulative Arbitrage Im Gesellschaftsrecht." *Zeitschrift Für Unternehmens- Und Gesellschaftsrecht* 33, no. 6 (2004): 735–59. doi:10.1515/zgre.2004.33.6.735.
- . "Silence Is Golden: The European Company as a Catalyst for Company Law Arbitrage." *Journal of Corporate Law Studies*, 2004, 77–95.
- . "Silence Is Golden: The European Company Statute as a Catalyst for Company Law Arbitrage." SSRN Scholarly Paper. Rochester, NY: Social Science Research Network, March 1, 2003. <http://papers.ssrn.com/abstract=384801>.
- "Ernst & Young, Study on the Operation and the Impacts of the Statute for a European Company (SE), - 2008/S 144-192482, Final Report, 9 December 2009." Accessed November 26, 2014. [http://ec.europa.eu/internal\\_market/consultations/docs/2010/se/study\\_SE\\_912200\\_9\\_en.pdf](http://ec.europa.eu/internal_market/consultations/docs/2010/se/study_SE_912200_9_en.pdf).
- "European Trade Union Institute (ETUI), European Company Database." Accessed August 15, 2015. <http://ecdb.worker-participation.eu/>.
- Ferrarini, Guido. "Societas Europaea and The Limits of Harmonisation: A View from Italy." In *Die Europäische Aktiengesellschaft, Umsetzungsfragen Und Perspektiven*, edited by Theodor Baums and Andreas Cahn, 79–93. Institute for Law and Finance Series. Berlin: De Gruyter Recht, 2004. [http://opacplus.ub.uni-muenchen.de/InfoGuideClient.ubmsis/start.do?Login=igubm&Query=540="3-89949-182-3](http://opacplus.ub.uni-muenchen.de/InfoGuideClient.ubmsis/start.do?Login=igubm&Query=540=).
- Ficker, Hans Claudius. "'Hilfsweise geltendes Recht' für 'Europäische Aktiengesellschaften'?" In *Quo vadis, ius societatum? Liber amicorum Pieter Sanders, 21 september 1912-1972*, edited by Pieter Zonderland. 's-Gravenhage: Kluwer, Deventer Martinus Nijhoff, 1972.
- Fiorio, Paolo. "Lo statuto della società europea: la struttura della società ed il coinvolgimento dei lavoratori." *Giurisprudenza Italiana* 155 (2003): 828–36.
- Fleischer, Holger. "Der Einfluß der Societas Europaea auf die Dogmatik des deutschen Gesellschaftsrechts." *Archiv für die civilistische Praxis* 204 (2004): 502–43.
- Fornasier, Matteo. "»28.« versus »2. Regime« – Kollisionsrechtliche Aspekte Eines Optionalen Europäischen Vertragsrechts." *Rabels Zeitschrift Fuer Auslaendisches Und Internationales Privatrecht* 76, no. 2 (April 1, 2012): 401–42. doi:10.1628/003372512800133507.
- Forum Europaeum Konzernrecht. "Konzernrecht für Europa." *Zeitschrift für Unternehmens- und Gesellschaftsrecht*, 1998, 672–772.
- Fountoulakis, Christiana, and Peter Jung. "Die Societas Europaea als Option für multinationale Unternehmen." *Schweizerische Zeitschrift für internationales und*

- europäisches Recht - Revue suisse de droit international et de droit européen*, 2006, 525–39.
- Geßler, Ernst. "Grundfragen der europäischen Handelsgesellschaft." *Betriebsberater*, 1967, 381–87.
- Goette, Wulf, Mathias Habersack, and Susanne Kalss, eds. *Münchener Kommentar zum Aktiengesetz*. 3rd ed. Vol. 7, 2012.
- Göz, Philipp. "Beschlussmängelklagen Bei Der Societas Europaea (SE)." *Zeitschrift Für Unternehmens- Und Gesellschaftsrecht* 37, no. 4 (2008): 593–629. doi:10.1515/ZGRE.2008.593.
- Grote, Ralf. *Das neue Statut der Europäischen Aktiengesellschaft zwischen europäischem und nationalem Recht*, 1990.
- Grundmann, Stefan. *European Company Law: Organization, Finance and Capital Markets*. 2nd ed. Ius Communitatis, v. 1. Cambridge ; Portland, Ore: Intersentia, 2012.
- . "'Inter-Instrumental-Interpretation', Systembildung durch Auslegung im Europäischen Unionsrecht." *Rabels Zeitschrift fuer auslaendisches und internationales Privatrecht* 75, no. 4 (October 1, 2011): 882–932. doi:10.1628/003372511797638251.
- . "Kosten und Nutzen eines optionalen Europäischen Kaufrechts." *Archiv für die civilistische Praxis* 212 (2012): 502–44.
- . "Wettbewerb Der Regelgeber Im Europäischen Gesellschaftsrecht - Jedes Marktsegment Hat Seine Struktur." *Zeitschrift Für Unternehmens- Und Gesellschaftsrecht* 30, no. 6 (January 20, 2001): 783–832. doi:10.1515/zgre.2001.021.
- Grundmann, Stefan, and Florian Möslin. "Die Goldene Aktie Staatskontrollrechte in Europarecht Und Wirtschaftspolitischer Bewertung." *Zeitschrift Für Unternehmens- Und Gesellschaftsrecht* 32, no. 3 (2006): 317–66.
- Grundmann, Stefan, and Karl Riesenhuber. "Die Auslegung Des Europäischen Privat- Und Schuldvertragsrechts." *Juristische Schulung*, no. 6 (2001): 529–36.
- Gsell, Beate, and Carsten Herresthal. "Einleitung." In *Vollharmonisierung im Privatrecht, Die Konzeption der Richtlinie am Scheideweg?*, edited by Beate Gsell and Carsten Herresthal, 1–12, 2009.
- Habersack, Mathias. "Das Konzernrecht Der Deutschen SE - Grundlagen." *Zeitschrift Für Unternehmens- Und Gesellschaftsrecht* 32, no. 5–6 (2003): 724–42. doi:10.1515/zgre.2003.028.
- . *Europäisches Gesellschaftsrecht: Einführung Für Studium Und Praxis*. München: Beck, 1999.
- Habersack, Mathias, and Florian Drinhausen, eds. *SE-Recht mit grenzüberschreitender Verschmelzung*. Beck'sche Kurzkommentare 66, 2013.
- "Hans-Böckler-Stiftung, Statistik: SEs in Europa, Stand: 01.07.2015 (pdf)," July 14, 2015. [http://www.boeckler.de/pdf/pb\\_mitbestimmung\\_se\\_2015\\_07.pdf](http://www.boeckler.de/pdf/pb_mitbestimmung_se_2015_07.pdf).
- Heine, Klaus, and Katarina Röpke. "Vertikaler Regulierungswettbewerb und europäischer Binnenmarkt - die Europäische Aktiengesellschaft als supranationales Rechtsangebot." *Jahrbuch für die Ordnung von Wirtschaft und Gesellschaft* 56 (2005): 157–85.
- Henninger, Thomas. *Europäisches Privatrecht und Methode, Entwurf einer rechtsvergleichend gewonnenen juristischen Methodenlehre*, 2009.
- Heuschmid, Johannes, and Claudia Schmidt. "Die Europäische Aktiengesellschaft - Auf Dem Weg in Die Karibik?" *Neue Zeitschrift Für Gesellschaftsrecht*, no. 2 (2007): 54–56.

- Hirte, Heribert. "Die Europäische Aktiengesellschaft." *Neue Zeitschrift Für Gesellschaftsrecht*, no. 1 (2002): 1–10.
- Hommelhoff, Peter. "Die Auslegung angeglichenen Gesellschaftsrechts, Eine Analyse der EuGH-Rechtsprechung." In *Auslegung europäischen Privatrechts und angeglichenen Rechts*, edited by Reiner Schulze, 29–46, 1999.
- . "Einige Bemerkungen zur Organisationsverfassung der Europäischen Aktiengesellschaft." *Die Aktiengesellschaft*, 2001, 279–88.
- . "Gesellschaftsrechtliche Fragen im Entwurf eines SE-Statuts." *Die Aktiengesellschaft*, 1990, 422–35.
- . "Normenhierarchie für die Europäische Gesellschaft." In *Die Europäische Gesellschaft, Prinzipien, Gestaltungsmöglichkeiten und Grundfragen aus der Praxis*, edited by Marcus Lutter and Peter Hommelhoff, 5–23, 2005.
- . "Satzungstreue und Gestaltungsfreiheit in der Europäischen Aktiengesellschaft." In *Festschrift für Peter Ulmer zum 70. Geburtstag am 2. Januar 2003*, edited by Mathias Habersack, Peter Hommelhoff, Uwe Hüffer, and Karsten Schmitt, 267–78, 2003.
- Hommelhoff, Peter, and Karl Riesenhuber. "Strukturmaßnahmen, insbesondere Verschmelzung und Spaltung im Europäischen und deutschen Gesellschaftsrecht." In *Systembildung und Systemlücken in Kerngebieten des Europäischen Privatrechts*, edited by Stefan Grundmann, 259–82, 2000.
- Hopt, Klaus J. "Europäische Aktiengesellschaft - per aspera ad astra?" *Europäische Zeitschrift für Wirtschaftsrecht*, 2002, 1.
- . "Europäisches Gesellschaftsrecht - Krise und neue Anläufe." *Zeitschrift für Wirtschaftsrecht*, 1998, 98–106.
- . "The European Company (SE) under the Nice Compromise: Major Breakthrough or Small Coin for Europe?" *Revue Européenne de Droit Bancaire et Financier*, 2000, 465–75.
- Husson, Christian. "Contribution de Renault." In *La Societas Europaea ou SE: pour une citoyenneté européenne de l'entreprise*, by Noëlle Lenoir, 234–35. Collection des rapports officiels. Paris: Documentation française, 2007.
- Jaacks, Jörg, and Christoph Ansgar Schönborn. "Die Europäische Aktiengesellschaft, das Internationale und das deutsche Konzernrecht." *Recht der Internationalen Wirtschaft*, no. 4 (2003): 254–65.
- Jannott, Dirk, and Jürgen Frodermann, eds. *Handbuch der Europäischen Aktiengesellschaft, Societas Europaea, Eine umfassende und detaillierte Darstellung für die Praxis unter Berücksichtigung sämtlicher Mitgliedstaaten der EU und des EWR*. 2nd ed., 2014.
- Kahan, Marcel, and Ehud Kamar. "The Myth of State Competition in Corporate Law." *Stanford Law Review* 55 (2002): 679.
- Kallmeyer, Harald. "Europa-AG: Strategische Optionen für deutsche Unternehmen." *Die Aktiengesellschaft*, no. 4 (2003): 197–203.
- Kalss, Susanne. "Der Minderheitenschutz bei Gründung und Sitzverlegung der SE nach dem Diskussionsentwurf." *Zeitschrift für Unternehmens- und Gesellschaftsrecht*, 2003, 593–646.
- Kegel, Gerhard, and Klaus Schurig. *Internationales Privatrecht*. 8th ed., 2000.
- Kersting, Christian. "Societas Europaea: Gründung und Vorgesellschaft." *Der Betrieb*, 2001, 2079–86.
- Kiem, Roger. "Erfahrungen und Reformbedarf bei der SE - Entwicklungsstand." *Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht* 173 (2009): 156–80.

- , ed. *Kölner Kommentar Zum Aktiengesetz, Volume 8*. 2nd ed. Kölner Kommentare Zum Unternehmens- Und Gesellschaftsrecht. Köln: Heymann, 2012.  
[http://opac.bibliothek.uni-augsburg.de/InfoGuideClient.ubasis/start.do?Login=iguba&Query=540="3-452-17035-7."](http://opac.bibliothek.uni-augsburg.de/InfoGuideClient.ubasis/start.do?Login=iguba&Query=540=)
- Kieninger, Eva-Maria. *Wettbewerb der Privatrechtsordnungen im Europäischen Binnenmarkt : Studien zur privatrechtskoordinierung in der Europäischen Union auf den Gebieten des Gesellschafts- und Vertragsrechts*. Beiträge zum ausländischen und internationalen Privatrecht 74. Tübingen: Mohr Siebeck, 2002.
- Kirchner, Christian, Richard Painter, Wulf Kaal, and Sven Höppner. "Europäischer vs. US-amerikanischer Wettbewerb der Gesellschaftsrechte, Abschied vom alten Delaware-Verbundprodukt." *Die Aktiengesellschaft*, 2012, 469–77.
- Kirchner, Hildebert. "Bibliographie zum Gesellschaftsrecht, Bücher und Aufsätze aus dem Jahre 1988 - nebst Nachträgen aus den vorangegangenen Jahren -." *Zeitschrift für Unternehmens- und Gesellschaftsrecht*, 1989, 564–616.
- Klausner, Michael. "Corporations, Corporate Law, and Networks of Contracts." *Virginia Law Review* 81, no. 3 (April 1, 1995): 757–852. doi:10.2307/1073499.
- Klöhn, Lars. "Supranational Legal Entities and Vertical Regulatory Competition in European Corporate Law The Case for Market-Mimicking EU Corporate Forms." *Rabels Zeitschrift Fuer Auslaendisches Und Internationales Privatrecht* 76, no. 2 (April 1, 2012): 276–315. doi:10.1628/003372512800133499.
- Kornblum, Udo. "Bundesweite Rechtstatsachen Zum Unternehmens- Und Gesellschaftsrecht, Stand 1.1.2007." *GmbHHR*, 2008, 19.
- . "Bundesweite Rechtstatsachen Zum Unternehmens- Und Gesellschaftsrecht, Stand 1.1.2008." *GmbHHR*, 2009, 25.
- . "Bundesweite Rechtstatsachen Zum Unternehmens- Und Gesellschaftsrecht, Stand 1.1.2009." *GmbHHR*, 2009, 1056.
- . "Bundesweite Rechtstatsachen Zum Unternehmens- Und Gesellschaftsrecht (Stand 1.1.2010)." *GmbHHR*, 2010, 739.
- . "Bundesweite Rechtstatsachen Zum Unternehmens- Und Gesellschaftsrecht (Stand 1.1.2011)." *GmbHHR*, 2011, 692.
- . "Bundesweite Rechtstatsachen Zum Unternehmens- Und Gesellschaftsrecht (Stand 1.1.2012)." *GmbHHR*, 2012, 728.
- . "Bundesweite Rechtstatsachen Zum Unternehmens- Und Gesellschaftsrecht (Stand 1.1.2013)." *GmbHHR*, 2013, 693.
- . "Bundesweite Rechtstatsachen Zum Unternehmens- Und Gesellschaftsrecht (Stand 1.1.2014)." *GmbHHR*, 2014, 694.
- Köstler, Roland, and Frank Werner. "Die SE unter der Lupe." *AG-Report, Sonderteil der Zeitschrift Die Aktiengesellschaft*, 2008, R105–6.
- Kreuzer, Karl Friedrich. "Die Europäisierung des Internationalen Privatrechts - Vorgaben des Gemeinschaftsrechts." In *Gemeinsames Privatrecht in der Europäischen Gemeinschaft*, edited by Peter-Christian Müller-Graff, 1st ed., 371–447. Schriftenreihe des Arbeitskreises Europäische integration e.V. 33. Baden-Baden: Nomos, 1993.
- Kropholler, Jan. *Internationales Privatrecht*. 5th ed., 2004.

- Lächler, Christoph. *Das Konzernrecht der Europäischen Gesellschaft (SE), Unter besonderer Berücksichtigung der Mitgliedsstaaten Deutschland, Frankreich, England und Polen.* Nomos, 2007.
- Lächler, Christoph, and Krzysztof Oplustil. "Funktion Und Umfang Des Regelungsbereichs Der SE-Verordnung." *Neue Zeitschrift Für Gesellschaftsrecht*, no. 9 (2005): 381–87.
- Langenbacher, Katja. "Vorüberlegungen zu einer Europarechtlichen Methodenlehre." In *Tradition und Fortschritt im Recht, Jahrbuch Junger Zivilrechtswissenschaftler 1999*, edited by Thomas Ackermann, Arnd Arnold, Diederich Eckardt, Richard Giesen, Oliver Klose, Gerd Krämer, Panajotta Lakkis, et al., 65–83, 2000.
- Lenoir, Noëlle, ed. *La Societas Europaea Ou SE: Pour Une Citoyenneté Européenne de L'entreprise.* Collection Des Rapports Officiels. Paris: Documentation française, 2007.
- Lindacher, Walter F. "Maßgebendes Recht, Auslegung und Lückenschließung." In *Die Europäische Aktiengesellschaft, Eine Stellungnahme zur Vorlage der Kommission an den Ministerrat der Europäischen Gemeinschaften über das Statut für Europäische Aktiengesellschaften vom 30. April 1975*, 1st ed., 1–15. Köln Berlin Bonn München: Carl Heymanns, 1976.
- Lind, Michael. "Die Europäische Aktiengesellschaft, Eine Analyse der Rechtsanwendungsvorschriften." Graz, 2004.
- "Literaturauswahl zur Europäischen Aktiengesellschaft." *Die Aktiengesellschaft*, 1990, 447–48.
- Luttermann, Claus. "Juristische Übersetzung als Rechtspolitik im Europa der Sprachen, Eine wirtschaftsrechtlich-linguistische Betrachtung." *Europäische Zeitschrift für Wirtschaftsrecht*, 1998, 151–57.
- Lutter, Marcus. "Die Auslegung angeglichenen Rechts." *Juristen Zeitung* 47 (1992): 593–607.
- . "Europäische Aktiengesellschaft - Rechtsfigur mit Zukunft?" *Betriebsberater*, 2002, 1–7.
- . , ed. *Konzernrecht Im Ausland.* Sonderheft Der Zeitschrift Für Unternehmens- Und Gesellschaftsrecht 11. Berlin: W. de Gruyter, 1994.
- Lutter, Marcus, and Peter Hommelhoff. *SE-Verordnung, Kommentar.* 1st ed., 2008.
- Malatesta, Alberto. "Prime osservazioni sul regolamento CE N. 2157/2001 sulla società europea." *Rivista di diritto internazionale privato e processuale*, 2002, 613–24.
- Mäsch, Gerald, and Christiana Fountoulakis. "Societas Europaea - ein Vehikel für den Schweizer Investor?," 2005, 49–58.
- Maul, Silja. "Das Konzernrecht der Europäischen Gesellschaft." In *Die Europäische Gesellschaft, Prinzipien, Gestaltungsmöglichkeiten und Grundfragen aus der Praxis*, edited by Marcus Lutter and Peter Hommelhoff, 249–60, 2005.
- . "Konzernrecht der 'deutschen' SE - Ausgewählte Fragen zum Vertragskonzern und den faktischen Unternehmensverbindungen." *Zeitschrift für Unternehmens- und Gesellschaftsrecht*, no. 5–6 (2003): 743–63.
- Menjucq, Michel. "La société européenne, Règlement CE n° 2157/2001 et directive 2001/86/CE du Conseil du 8 octobre 2001." *Revue des sociétés*, 2002, 225–46.
- Merkt, Hanno. "Das Europäische Gesellschaftsrecht Und Die Idee Des »Wettbewerbs Der Gesetzgeber«." *Rabels Zeitschrift Für Ausländisches Und Internationales Privatrecht* 59, no. 3/4 (October 1, 1995): 545–68.
- Meyer-Landrut, Andreas. *Die Europäische Wirtschaftliche Interessenvereinigung*, 1988.
- Montalenti, Paolo. "La società per azioni a dieci anni dalla riforma: un primo bilancio." *Rivista delle Società*, 2014, 404–28.

- Neye, Hans-Werner. "Kein neuer Stolperstein für die Europäische Aktiengesellschaft." *Zeitschrift für Unternehmens- und Gesellschaftsrecht*, no. 3 (2002): 377–82.
- Oechsler, Jürgen. "Der Praktische Weg Zur Societas Europea (SE) - Gestaltungsspielraum Und Typenzwang." *Neue Zeitschrift Für Gesellschaftsrecht*, no. 17 (2005): 697–702.
- Panico, Ruggiero Cafari. "Il Regolamento della società europea e le fusioni transfrontaliere." In *La società europea: problemi di diritto societario comunitario*, edited by Ugo Draetta and Fausto Pocar, 29–50. ISDACI 14. Milano: EGEA, 2002.
- Raiser, Thomas. "Die Europäische Aktiengesellschaft und die nationalen Aktiengesetze." In *Festschrift für Johannes Semler zum 70. Geburtstag am 28. April 1993: Unternehmen und Unternehmensführung im Recht*, edited by Marcus Bierich, 277–99. Berlin [u.a.]: de Gruyter, 1993.
- Requillart, Gilles. "Contribution de PSA Peugeot Citroën." In *La Societas Europaea ou SE: pour une citoyenneté européenne de l'entreprise*, by Noëlle Lenoir, 224–34. Collection des rapports officiels. Paris: Documentation française, 2007.
- Rescio, Giuseppe Alberto. "La partecipazione di società italiane alla costituzione di SE (Società Europee)." *Società*, no. 3 (2007): 359–67.
- . "La Società Europea Tra Diritto Comunitario E Diritto Nazionale." *Rivista Delle Società* 48 (2003): 965.
- Romano, Roberta. "Law as a Product: Some Pieces of the Incorporation Puzzle." *Journal of Law, Economics, & Organization* 1, no. 2 (1985): 225–83.
- . *The Genius of American Corporate Law*, 1993.
- . "The State Competition Debate in Corporate Law." *Cardozo Law Review* 8 (1987): 709.
- Roth, Wulf-Henning. "Der Einfluß des Europäischen Gemeinschaftsrechts auf das Internationale Privatrecht." *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 55, no. 4 (1991): 623–73.
- Sagasser, Bernd, and Claus Swienty. "Die Gründung Einer Europäischen Aktiengesellschaft Im Wege Der Verschmelzung – Zur Praktikabilität Des SE–Statuts in Der Entwurfsfassung Vom 6./16. 5. 1991." *Deutsches Steuerrecht*, no. 37 (1991): 1188–94; 1222–26.
- Sanders, Pieter. "Auf dem Weg zu einer europäischen Aktiengesellschaft?" *Außenwirtschaftsdienst des Betriebsberaters*, 1960, 1–5.
- . "Structure and Progress of the European Company." In *The Harmonisation of European Company Law*, edited by Clive M. Schmitthoff, 83–100. United Kingdom Comparative Law Series, v. 1. London: United Kingdom National Committee of Comparative Law : distributed by the British Institute of International and Comparative Law, 1973.
- Sasso, Lorenzo. "The European Company: Does It Create Rules for the Market or a Market for the Rules?" In *The European Company Statute, A New Approach to Corporate Governance*, edited by Michael Gold, Andreas Nikopoulos, and Norbert Kluge, 279–307, 2009.
- Schäfer, Carsten. "Das Gesellschaftsrecht (weiter) auf dem Weg nach Europa - am Beispiel der SE-Gründung." *Neue Zeitschrift für Gesellschaftsrecht*, 785 - 791, 2004.
- Schmidt, Jessica. "'Offshore in drei Zügen' - Die Europäische Aktiengesellschaft (SE) als 'Fähre' auf die Cayman Islands." *Der Betrieb*, no. 41 (2006): 2221–22.
- Schön, Wolfgang. "Das Bild Des Gesellschafters Im Europäischen Gesellschaftsrecht." *Rabels Zeitschrift Für Ausländisches Und Internationales Privatrecht* 64 (2000): 1–37.

- . “Mindestharmonisierung im europäischen Gesellschaftsrecht.” *Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht* 160 (1996): 221–49.
- . “Playing Different Games? Regulatory Competition in Tax and Company Law Compared.” *Common Market Law Review* 42, no. 2 (April 1, 2005): 331–65.
- Schürnbrand, Jan. “Vollharmonisierung im Gesellschaftsrecht.” In *Vollharmonisierung im Privatrecht, Die Konzeption der Richtlinie am Scheideweg?*, edited by Beate Gsell and Carsten Herresthal, 273–88, 2009.
- Schwarz, Günter Christian. *Europäisches Gesellschaftsrecht, Ein Handbuch für Wissenschaft und Praxis*, 2000.
- Sonnenberger, Hans Jürgen, ed. *Internationales Privatrecht, Internationales Wirtschaftsrecht, Art. 25 - 248 EGBGB*. 5th ed. Münchener Kommentar Bürgerliches Gesetzbuch 11, 2010.
- . , ed. *Internationales Privatrecht, Internationales Wirtschaftsrecht, Einführungsgesetz zum Bürgerlichen Gesetzbuche (Art. 25 - 248)*. 6th ed. Vol. 11. Münchener Kommentar Bürgerliches Gesetzbuch, 2015.
- Spindler, Gerald. “Regeln für börsennotierte vs. Regeln für geschlossene Gesellschaften - Vollendung des Begonnenen?” *Die Aktiengesellschaft*, no. 17 (2008): 598–604.
- Spindler, Gerald, and Eberhard Spilz. *Kommentar zum Aktiengesetz*. 2nd ed. Vol. 2, 2012.
- Storm, Paul M. “The Societas Europaea: A New Opportunity?” In *The European Company*, edited by Dirk van Gerven and Storm, Paul M., Vol. I, 2006.
- Study Group for German Stock Corporation and Capital Markets Law. “The Eight Most Important Recommendations for Modification of the SE Regulation.” *European Business Organization Law Review (EBOR)* 10, no. 02 (June 2009): 285–89. doi:10.1017/S1566752909002857.
- Tamm, Marina. “Das Grünbuch Der Kommission Zum Verbraucheracquis Und Das Modell Der Vollharmonisierung – Eine Kritische Analyse.” *Europäische Zeitschrift Für Wirtschaftsrecht*, no. 24 (2007): 756–61.
- Teichmann, Christoph. “Die Einführung Der Europäischen Aktiengesellschaft, Grundlagen Der Ergänzung Des Europäischen Statuts Durch Den Deutschen Gesetzgeber.” *Zeitschrift Für Unternehmens- Und Gesellschaftsrecht*, 2002, 383–464.
- . “European Company-A Challenge to Academics, Legislatures and Practitioners, The.” *German Law Journal* 4 (2003): 309–31.
- . “Zum Geburtstag viel Buch: Eine Literaturlauslese zum fünften Jahrestag der Societas Europaea (SE).” *Zeitschrift für Gemeinschaftsprivatrecht*, 2010, 85–92.
- Timm, Wolfram. “Bibliographie zur S. E.” In *Die Europäische Aktiengesellschaft, Eine Stellungnahme zur Vorlage der Kommission an den Ministerrat der Europäischen Gemeinschaften über das Statut für Europäische Aktiengesellschaften vom 30. April 1975*, 1st ed., 439–59. Köln Berlin Bonn München: Carl Heymanns, 1976.
- van Gerven, Dirk. “Provisions of Community Law Applicable to the Societas Europaea.” In *The European Company*, 1st ed., 1:25–76. Cambridge, New York, Melbourne, Madrid, Cape Town, Singapore, Sao Paolo: Cambridge University Press, 2006.
- van Gerven, Dirk, and Paul M. Storm, eds. *The European Company, Volume II*. Law Practitioner Series. Cambridge, UK ; New York: Cambridge University Press, 2008.
- Veil, Rüdiger. “Das Konzernrecht der Europäischen Aktiengesellschaft.” *Wertpapiermitteilungen*, 2003, 2169–75.
- von Rosen, Rüdiger. “Die SE - ein europäisches Zukunftsmodell.” In *Festschrift für Klaus J. Hopt zum 70. Geburtstag am 24. August 2010: Unternehmen, Markt und*

- Verantwortung*, edited by Stefan Grundmann, Brigitte Haar, Hanno Merkt, Peter O. Mülbert, Marina Wellenhofer, Harald Baum, Jan von Hein, et al., 1245–59. Berlin ; New York: De Gruyter, 2010.
- Wagner, Jens. *Der Europäische Verein : Eine Gesellschaftsform Europäischen Oder Mitgliedstaatlichen Rechts?* 1. Aufl. Ius Europaeum. Baden-Baden: Nomos-Verl.-Ges., 2000.
- . “Die Bestimmung Des Auf Die SE Anwendbaren Rechts.” *Neue Zeitschrift Für Gesellschaftsrecht*, no. 21 (2002): 985–91.
- Werlauff, Erik. *SE, The Law of the European Company*. Copenhagen, 2003.
- Werlauff, Erik. “The SE Company - A New Common European Company from 8 October 2004.” *European Business Law Review* 14, no. 1 (2003): 85–103.
- Wiesner, Peter. “Der Nizza-Kompromiss zur Europa AG - Triumph oder Fehlschlag?” *Zeitschrift für Wirtschaftsrecht* 22, no. 10 (2001): 397–98.
- . “Überblick über den Stand des Europäischen Unternehmensrechts.” *Europäische Zeitschrift für Wirtschaftsrecht*, 1998, 619–35.
- Winter, Ralph K. Jr. “State Law, Shareholder Protection, and the Theory of the Corporation.” *Journal of Legal Studies* 6 (1977): 251.
- Wouters, Jan. “European Company Law: Quo Vadis?” *Common Market Law Review* 37, no. 2 (April 1, 2000): 257–307.
- Wulfers, Christian. “Allgemeine Rechtsgrundsätze als ungeschriebenes Recht der supranationalen Gesellschaftsrechtsformen.” *Zeitschrift für Gemeinschaftsprivatrecht*, 2006, 106–14.
- Wymeersch, Eddy. “The Transfer of the Company’s Seat in European Company Law.” *Common Market Law Review* 40, no. 3 (June 1, 2003): 661–95.
- Ziemons, Hildegard. “Freie Bahn für den Umzug von Gesellschaften nach Inspire Art?!,  
Zugleich Besprechung EuGH, Urt. v. 30. 0. 2003 - Rs C-167/01, ZIP 2003, 1885 - Inspire Art.” *Zeitschrift für Wirtschaftsrecht*, 2003, 1913–20.
- Zweigert, Konrad, and Ulrich Drobniig. “Einheitliches Kaufgesetz und internationales Privatrecht.” *Rebels Zeitschrift für ausländisches und internationales Privatrecht* 2 (1965): 146–65.



**Comparison of language versions and previous drafts of Art. 9 SE-Regulation**

	German	English	French	Italian	Spanish
Société anonyme européenne, Projet d'un statut d'une société anonyme européenne, par M. le professeur Pieter Sanders, doyen de la faculté de droit de Rotterdam, Décembre 1966 Europäische Aktiengesellschaft, Vorentwurf eines Statuts für eine europäische Aktiengesellschaft von Professor Dr. Pieter Sanders, Dekan der Juristischen Fakultät Rotterdam, Dezember 1966	Artikel I – 7  1. Bei der Anwendung und Auslegung dieses Statuts ist seinem Zweck, ein Gebiet einheitlichen Rechts in den Vertragsstaaten zu schaffen, Rechnung zu tragen. 2. Rechtsfragen, die sich auf die im vorliegenden Statut behandelten Gegenstände beziehen, werden, sofern sie dort nicht ausdrücklich geregelt sind, entschieden: a) nach den allgemeinen Grundsätzen, auf denen dieses Statut beruht; b) falls diese allgemeinen Grundsätze keine Lösung bieten, nach den gemeinsamen Regeln oder den allgemeinen Grundsätzen, die in den Rechtsordnungen der Vertragsstaaten überwiegend gelten. 3. Die im vorliegenden Statut nicht behandelten Gegenstände werden nach dem im Einzelfall anwendbaren nationalen Recht beurteilt.	n/a	Article I-7  1. L'application et l'interprétation de ce Statut doivent respecter son but qui est la formation, par tous les Etats contractants, pour ce droit uniforme, d'un territoire unique. 2. Les questions concernant des matières régies par le présent Statut et qui ne sont pas expressément tranchées par celui-ci seront réglées : a) selon les principes généraux dont ce Statut s'inspire ; b) dans le cas où ces principes généraux n'offrent pas de solution, selon les règles communes ou les principes généraux prépondérants dans les ordres juridiques des Etats contractants. 2. Les matières qui ne sont pas régies par le présent Statut sont soumises au droit national applicable en l'espèce.	n/a	n/a
1970 (COM(70)600 final	Artikel 7 (1) Vorbehaltlich entgegenstehender Vorschriften sind die von dem Statut behandelten Gegenstände selbst hinsichtlich der Rechtsfragen, die nicht ausdrücklich geregelt werden, der Anwendung des Rechts	n/a	Article 7 1. Sauf disposition contraire, les matières que le présent statut régit, même sur les points qu'il ne règle pas expressément, sont soustraites à l'application des droits des États membres. Lorsqu'un point	Articolo 7 1. Salvo contraria disposizione sono sottratte agli ordinamenti degli Stati membri le materie che sono disciplinate, anche se non espressamente, dal presente statuto. Le questioni non espressamente	n/a

	<p>der Mitgliedstaaten entzogen. Ist eine Rechtsfrage nicht ausdrücklich geregelt, wird sie entschieden</p> <p>a) nach den allgemeinen Grundsätzen, auf denen dieses Statut beruht;</p> <p>b) falls diese allgemeinen Grundsätze keine Lösung der Rechtsfragen bieten, nach den gemeinsamen Regeln oder den gemeinsamen allgemeinen Grundsätzen der Rechte der Mitgliedstaaten.</p> <p>(2) Die in dem vorliegenden Statut nicht behandelten Gegenstände werden nach dem im Einzelfall anwendbaren Recht der Mitgliedstaaten beurteilt.</p>		<p>n'est pas expressément réglé, il doit être tranché:</p> <p>a) selon les principes généraux dont ce statut s'inspire;</p> <p>b) si ces principes généraux ne permettent pas de trancher la question, selon les règles ou principes généraux communs aux droits des États membres.</p> <p>2. Les matières qui ne sont pas régies par le présent statut sont soumises au droit national applicable en l'espèce.</p>	<p>disciplinate vengono decise:</p> <p>a) secondo i principi generali cui s'informa il presente statuto ;</p> <p>b) qualora tali principi generali non soccorrano, secondo le regole o i principi generali degli ordinamenti degli Stati membri.</p> <p>2. Le materie non disciplinate dal presente statuto sono soggette al diritto nazionale applicabile nel caso di specie.</p>	
1975 (COM(75)150 final)			<p>Article 7</p> <p>Article 7</p> <p>1. Sauf disposition contraire, les matières que le présent statut régit, même sur les points qu'il ne règle pas expressément, sont soustraites à l'application des droits des États membres.</p> <p>Lorsqu'un point n'est pas expressément réglé, il doit être tranché:</p> <p>a) selon les principes généraux dont ce statut s'inspire;</p> <p>b) si ces principes généraux ne permettent pas de trancher la question, selon les règles ou principes généraux communs aux droits des États membres.</p> <p>Pour l'application du présent règlement, les</p>		

			<p>règles ou principes généraux des droits des Etats membres visés au paragraphe b) ci-dessus en font partie intégrante.</p> <p>2. Les matières qui ne sont pas régies par le présent statut sont soumises au droit national applicable en l'espèce.</p>		
<p>1989 (COM(89) 268 final) (Vorschlag für eine Verordnung (EWG) des Rates über das Statut der Europäischen Aktiengesellschaft COM(89) 268 endg. — SYN 218 (Von der Kommission dem Rat vorgelegt am 25. August 1989) (89/C 263/07))</p>	<p>Artikel 7 (Anwendungsbereich)</p> <p>1. In den der Verordnung unterliegenden Bereichen werden die nicht ausdrücklich geregelten Fragen wie folgt entschieden:</p> <p>a) nach den allgemeinen Grundsätzen, auf denen diese Verordnung beruht;</p> <p>b) falls diese allgemeinen Grundsätze keine Lösung aufzeigen, nach dem im Sitzstaat der SE für Aktiengesellschaften geltenden Recht.</p> <p>2. Besteht ein Staat aus mehreren Gebietseinheiten, von denen jede ihre eigene Regelung für die in Absatz 1 genannten Bereichen besitzt, so wird zum Zwecke der Ermittlung des nach Absatz 1 Buchstabe b anwendbaren Rechts jede Gebietseinheit als Staat angesehen.</p> <p>3. In den von dieser Verordnung nicht geregelten Bereichen finden die Vorschriften des Gemeinschaftsrechts und des Rechts der Mitgliedstaaten auf die SE Anwendung.</p> <p>4. Hinsichtlich ihrer Rechte, Befugnisse und Verpflichtungen</p>	<p>Article 7 (Scope of the Regulation)</p> <p>1. Matters covered by this Regulation, but not expressly mentioned herein, shall be governed:</p> <p>(a) by the general principles upon which this Regulation is based;</p> <p>(b) if those general principles do not provide a solution to the problem, by the law applying to public limited companies in the State in which the SE has its registered office.</p> <p>2. Where a State comprises several territorial units, each of which has its own rules of law applicable to the matters referred to in paragraph 1, each territorial unit shall be considered a State for the purposes of identifying the law applicable under paragraph 1(b).</p> <p>3. In matters which are not covered by this Regulation, Community law and the law of the Member States shall apply to the SE.</p> <p>4. In each Member State and subject to the express provisions of this Regulation, an SE shall have the same rights, powers and obligations as a public limited company</p>	<p>Article 7 (Champ d'application)</p> <p>1. Dans Les matières que le présent règlement régit, Les points qui ne sont pas expressément réglés doivent être tranchés :</p> <p>a) selon les principes généraux dont ce règlement s'inspire,</p> <p>b) si ces principes généraux ne permettent pas de trancher la question, selon la loi applicable aux sociétés anonymes dans l'Etat du siège de la SE.</p> <p>2. Lorsqu'un Etat comprend plusieurs unités territoriales dont chacune a ses propres règles applicables aux matières visées au paragraphe 1, chaque unité territoriale e est considérée comme un Etat aux fins de la détermination de la loi applicable selon le paragraphe sous b).</p> <p>3. Dans les matières qui ne sont pas régies par le présent règlement, Les dispositions du droit communautaire et du droit des Etats membres sont applicables à la SE.</p> <p>4. En ce qui concerne ses droits , facultés et obligations , La SE est</p>	<p>Articolo 7 (Campo d'applicazione)</p> <p>1. Nelle materie disciplinate dal presente regolamento i punti non espressamente regolati sono risolti:</p> <p>a) secondo i principi generali cui si informa il presente regolamento;</p> <p>b) qualora tali principi generali non permettano di risolvere la questione, secondo la legge applicabile alle società per azioni nello Stato della sede della SE.</p> <p>2. Se uno Stato comprende più unità territoriali ciascuna delle quali ha le proprie norme applicabili alle materie previste dal paragrafo 1, ogni unità territoriale è considerata come uno Stato ai fini della determinazione della legge applicabile secondo il paragrafo 1, lettera b).</p> <p>3. Nelle materie non disciplinate dal presente regolamento, si applicano alla SE disposizioni del diritto comunitario e del diritto degli Stati membri.</p> <p>4. Per quanto riguarda i diritti, le facoltà e gli obblighi che ad essa competono, la SE è trattata, in ciascuno Stato membro e fatte salve le disposizioni</p>	<p>Artículo 7 (Ámbito de aplicación)</p> <p>1. En las materias a las que se aplique el presente Reglamento, los puntos que no estén expresamente regulados se resolverán:</p> <p>a) con arreglo a los principios generales en los que el presente Reglamento se inspira,</p> <p>b) si estos principios generales no permiten resolver el asunto, con arreglo a la ley aplicable a las sociedades andnimas en el Estado del domicilio de la SE.</p> <p>2. Cuando un Estado tenga diversas unidades territoriales, cada una con sus propias reglas para las materias contempladas en el apartado 1, cada unidad territorial se considerará como un Estado a efectos de la determinación de la ley aplicable a tenor de la letra b) del apartado 1.</p> <p>3. En las materias no reguladas por el presente Reglamento, se aplicarán a la SE. las disposiciones del Derecho comunitario y del Derecho de los Estados</p>

	wird die SE in jedem Mitgliedstaat und vorbehaltlich der besonderen Bestimmungen dieser Verordnung wie eine Aktiengesellschaft nationalen Rechts behandelt.	Incorporated under national law.	traitée , dans chaque Etat membre et sous réserve des dispositions spécifiques du présent règlement, comme une société anonyme du droit national.	specifichel del presente regolamento, come una società per azioni di diritto interno.	miembros. 4. Por lo que respecta a sus derechos, facultades y obligaciones, se considerará a la SE, en cada Estado miembro y sin perjuicio de las disposiciones específicas del presente Reglamento, como una sociedad anónima de Derecho nacional.
1991 (COM(91) 174 final)	<p>Artikel 7 (1) SE unterliegen: a) — den Bestimmungen dieser Verordnung; — sofern diese Verordnung dies ausdrücklich zuläßt den von den Parteien in der Satzung der SE frei festgelegten Bestimmungen. b) anderenfalls: — dem im Sitzstaat der SE für Aktiengesellschaften geltenden Recht; — den von den Parteien in der Satzung frei festgelegten Bestimmungen unter den gleichen Voraussetzungen wie im Fall von Aktiengesellschaften, für die das Recht des Sitzstaates der SE gilt.</p> <p>2. Besteht ein Staat aus mehreren Gebietseinheiten, von denen jede ihre eigene Regelung für die in Absatz 1 genannten Bereichen besitzt, so wird zum Zwecke der Ermittlung des nach Absatz 1 Buchstabe b anwendbaren Rechts jede Gebietseinheit als Staat angesehen.</p> <p>3. Hinsichtlich ihrer Rechte, Befugnisse und Verpflichtungen wird die SE in jedem Mitgliedstaat und</p>	<p>Article 7</p> <p>SEs shall be governed: (a) - by the provisions of this regulation; - where expressly authorized by this regulation, by the provisions freely determined by the parties in the statutes of the SE; (b) failing this: - by the provisions of the law on public limited companies of the Member state in which the SE has its registered office; - by the provisions freely determined by the parties in the statutes, in accordance with the same conditions as for public limited companies governed by the law of the Member State in which the SE has its registered office.</p> <p>2. Where a State comprises several territorial units, each of which has its own rules of law applicable to the matters referred to in paragraph 1, each territorial unit shall be considered a State for the purposes of identifying the law applicable under paragraph 1(b) .</p> <p>3. In each Member State and subject to</p>	<p>Article 7</p> <p>Les SE sont régles par: a) – les dispositions du présent règlement - lorsque le présent règlement l'áautorise expressément, les dispositions librement déterminées par les parties dans les statuts de la SE, b, à défaut, par : - Les dispositions de la loi de L'Etat du siège de la SE relatives aux sociétés anonymes ; - les dispositions librement déterminées par les parties dans les statuts, dans les mêmes conditions que pour les sociétés anonymes relevant du droit de l'Etat du siège de la SE.</p> <p>2. Lorsqu'un Etat comprend plusieurs unités territoriales dont chacune a ses propres règles applicables aux matières visées au paragraphe 1, chaque unité territoriale e est considérée comme un Etat aux fins de la détermination de la loi applicable selon le paragraphe sous b).</p> <p>3. En ce qui concerne ses</p>	<p>Articolo 7</p> <p>1. La SE è disciplinata: a) – dalle disposizioni del presente regolamento; - ove espressamente previsto dal presente regolamento, dalle disposizioni liberamente stabilite delle parti nello statuto della SE; b, in difetto: - dalle disposizioni di legge dello stato della sede della SE riguardanti le società per azioni; - dalle disposizioni liberamente stabilite dalle parti nello statuto, alle stesse condizioni previste per le società per azioni soggette alla legislazione dello Stato della sede della SE.</p> <p>2. Se uno Stato comprende più unità territoriali ciascuna delle quali ha le proprie norme applicabili alle materie previste dal paragrafo 1, ogni unità territoriale è considerata come uno Stato ai fini della determinazione della legge applicabile secondo il paragrafo 1, lettera b).</p>	n/a on EURLEX

	vorbehaltlich der besonderen Bestimmungen dieser Verordnung wie eine Aktiengesellschaft nationalen Rechts behandelt.	the express provisions of this Regulation, an SE shall have the same rights, powers and obligations as a public limited company incorporated under national law.	droits , facultés et obligations , La SE est traitée , dans chaque Etat membre et sous réserve des dispositions spécifiques du présent règlement, comme une société anonyme du droit national.	3. Per quanto riguarda i diritti, le facultà e gli obblighi che ad essa competono, la SE è trattata, in ciascuno Stato membro e fatte salve le disposizioni specifiche del presente regolamento, come una società per azioni di diritto interno.	
2001 Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE)	<p>Artikel 9</p> <p>(1) Die SE unterliegt</p> <p>a) den Bestimmungen dieser Verordnung,</p> <p>b) sofern die vorliegende Verordnung dies ausdrücklich zulässt, den Bestimmungen der Satzung der SE,</p> <p>c) in Bezug auf die nicht durch diese Verordnung geregelten Bereiche oder, sofern ein Bereich nur teilweise geregelt ist, in Bezug auf die nicht von dieser Verordnung erfassten Aspekte</p> <p>i) den Rechtsvorschriften, die die Mitgliedstaaten in Anwendung der speziell die SE betreffenden Gemeinschaftsmaßnahmen erlassen,</p> <p>ii) den Rechtsvorschriften der Mitgliedstaaten, die auf eine nach dem Recht des Sitzstaats der SE gegründete Aktiengesellschaft Anwendung finden würden,</p> <p>iii) den Bestimmungen ihrer Satzung unter den gleichen Voraussetzungen wie im Falle einer nach dem Recht des</p>	<p>Article 9</p> <p>1. An SE shall be governed:</p> <p>(a) by this Regulation,</p> <p>(b) where expressly authorised by this Regulation, by the provisions of its statutes</p> <p>or</p> <p>(c) in the case of matters not regulated by this Regulation or, where matters are partly regulated by it, of those aspects not covered by it, by:</p> <p>(i) the provisions of laws adopted by Member States in implementation of Community measures relating specifically to SEs;</p> <p>(ii) the provisions of Member States' laws which would apply to a public limited-liability company formed in accordance with the law of the Member State in which the SE has its registered office;</p> <p>(iii) the provisions of its statutes, in the same way as for a public limited-liability company formed in accordance with the law of the Member State in which the</p>	<p>Article 9</p> <p>1. La SE est régie:</p> <p>a) par les dispositions du présent règlement;</p> <p>b) lorsque le présent règlement l'autorise expressément, par les dispositions des statuts de la SE,</p> <p>ou</p> <p>c) pour les matières non réglées par le présent règlement ou, lorsqu'une matière l'est partiellement, pour les aspects non couverts par le présent règlement par:</p> <p>i) les dispositions de loi adoptées par les États membres en application de mesures communautaires visant spécifiquement les SE;</p> <p>ii) les dispositions de loi des États membres qui s'appliqueraient à une société anonyme constituée selon le droit de l'État membre dans lequel la SE a son siège statutaire;</p> <p>iii) les dispositions des statuts de la SE, dans les mêmes conditions que pour une société anonyme constituée</p>	<p>Articolo 9</p> <p>1. La SE è disciplinata:</p> <p>a) dalle disposizioni del presente regolamento:</p> <p>b) ove espressamente previsto dal presente regolamento, dalle disposizioni dello statuto della SE;</p> <p>o</p> <p>c) per le materie non disciplinate dal presente regolamento o, qualora una materia lo sia parzialmente, per gli aspetti ai quali non si applica il presente regolamento:</p> <p>i) dalle disposizioni di legge adottate dagli Stati membri in applicazione di misure comunitarie concernenti specificamente le SE;</p> <p>ii) dalle disposizioni di legge degli Stati membri che si applicherebbero ad una società per azioni costituita in conformità della legge dello Stato membro in cui la SE ha la sede sociale;</p> <p>iii) dalle disposizioni dello statuto della SE, alle stesse condizioni previste per una società per</p>	<p>Artículo 9</p> <p>1. Las SE se regirán:</p> <p>a) por lo dispuesto en el presente Reglamento;</p> <p>b) cuando el presente Reglamento lo autorice expresamente, por las disposiciones de los estatutos de la SE;</p> <p>o</p> <p>c) respecto de las materias no reguladas por el presente Reglamento o, si se trata de materias reguladas sólo en parte, respecto de los aspectos no cubiertos por el presente Reglamento:</p> <p>i) por las disposiciones legales que adopten los Estados miembros en aplicación de medidas comunitarias que se refieran específicamente a las SE;</p> <p>ii) por las disposiciones legales de los Estados miembros que fuesen de aplicación a una sociedad anónima constituida con arreglo a la legislación del Estado miembro en</p>

	<p>Sitzstaats der SE gegründeten Aktiengesellschaft.</p> <p>(2) Von den Mitgliedstaaten eigens für die SE erlassene Rechtsvorschriften müssen mit den für Aktiengesellschaften im Sinne des Anhangs I maßgeblichen Richtlinien im Einklang stehen.</p> <p>(3) Gelten für die von der SE ausgeübte Geschäftstätigkeit besondere Vorschriften des einzelstaatlichen Rechts, so finden diese Vorschriften auf die SE uneingeschränkt Anwendung.</p>	<p>SE has its registered office.</p> <p>2. The provisions of laws adopted by Member States specifically for the SE must be in accordance with Directives applicable to public limited-liability companies referred to in Annex I.</p> <p>3. If the nature of the business carried out by an SE is regulated by specific provisions of national laws, those laws shall apply in full to the SE.</p>	<p>selon le droit de l'État membre dans lequel la SE a son siège statutaire.</p> <p>2. Les dispositions de loi adoptées par les États membres spécifiquement pour la SE doivent être conformes aux directives applicables aux sociétés anonymes figurant à l'annexe I.</p> <p>3. Si la nature des activités exercées par une SE est régie par des dispositions spécifiques de la législation nationale, celles-ci s'appliquent intégralement à la SE.</p>	<p>azioni costituita conformemente alla legge dello Stato membro in cui la SE ha la sede sociale.</p> <p>2. Le disposizioni di legge adottate dagli Stati membri specificamente per la SE devono essere conformi alle direttive applicabili alle società per azioni indicate nell'allegato I.</p> <p>3. Se la natura delle attività svolte da una SE è disciplinata da disposizioni specifiche delle normative nazionali, queste ultime sono integralmente applicate alla SE.</p>	<p>el que la SE tenga su domicilio social;</p> <p>iii) por las disposiciones de los estatutos, en las mismas condiciones que rigen para las sociedades anónimas constituidas con arreglo a la legislación del Estado miembro en el que la SE tenga su domicilio social.</p> <p>2. Las disposiciones legales que adopten los Estados miembros específicamente para las SE deberán ser conformes con las Directivas aplicables a las sociedades anónimas a que se refiere el anexo I.</p> <p>3. Si el carácter de la actividad que desarrolle una SE estuviere regulado por disposiciones específicas de leyes nacionales, dichas leyes serán plenamente aplicables a la SE.</p>
--	--	--	---	---	--