

# A New Start for the European Private Company: The Draft Statute for a “Société Européenne Simplifiée” (SES)

by

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*In February 2021, an international group of experts under the auspices of the French lawyers’ association Henri Capitant published a draft statute for a “European Simplified Company” (Société Européenne Simplifiée, SES). The draft intends no less than to revive the idea of a European Private Company (SPE), albeit in a modified manner. Unlike the SPE proposal, the SES initiative does not exclusively aim at adopting an EU regulation under Art. 352 TFEU that requires the consent of all 27 Member States. Instead, it is open for alternatives to EU-wide regulation, be it by way of enhanced cooperation under Art. 20 TEU or an international treaty between the interested Member States. In June 2021, the SES initiative gained the support of the Franco-German Parliamentary Assembly calling on the French and German governments to intensify their efforts in working towards a supra-national private company on the basis of the SES proposal. It is against this background that the present article seeks to analyse the objectives and main features of the Draft SES Statute. In the author’s view, the SES initiative should be welcomed as it seeks to fill an evident gap in the existing EU company law framework. The paper concludes that, despite several concerns that still need to be addressed, the Association Henri Capitant’s Draft SES Statute provides a solid and suitable basis for the consultations to come.*

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## I. Introduction

### 1. The Failure of the SPE and the SUP

Plans to introduce a European private (limited) company have a long history. As early as 1973, the Paris Chamber of Commerce and Industry's research institute conducted and published a study "Pour une s.a.r.l. européenne".<sup>1</sup> Since the 1990s, the idea of a supra-national private company also attracted the interest of the European Commission. In 1997, the Commission published a study of an international group of experts that strongly backed the idea.<sup>2</sup> More than a decade later, in 2008, the Commission finally presented a draft regulation on the Statute for a European private company (*Societas Privata Europaea*, SPE).<sup>3</sup> After the European Parliament had signalled its approval by a large majority<sup>4</sup> and several Council presidencies had tabled compromise proposals,<sup>5</sup> the adoption of the proposed SPE regulation appeared almost assured. However, in the decisive Council meeting in May 2011, the SPE draft failed to obtain the unanimous consent of all EU Member States required for regulations on supra-national companies under Art. 352 TFEU.<sup>6</sup> Germany and Sweden refused to give their consent, mainly because of unresolved issues of employee representation.

In 2014, as an alternative to the SPE, the Commission presented the draft directive on the *Societas Unius Personae* ("SUP").<sup>7</sup> This proposal did not aim at introducing a supra-national private company, but it provided for a far-reaching harmonisation of the Member States' laws on single-member companies. More specifically, it sought to create a special type of single-member company

1 *Jeanne Boucourechliev*, *Pour une s.a.r.l. européenne*, Etude du C.R.E.D.A. (Centre de Recherche sur le Droit des Affaires), 1973. "S.a.r.l." stands for "société à responsabilité limitée".

2 European Commission, *Propositions pour une société fermée européenne*, 1997.

3 European Commission, *Proposal for a Council Regulation on the Statute for a European private company*, COM (2008) 396 (hereinafter "Draft SPE Regulation COM").

4 European Parliament legislative resolution of 10 March 2009 on the proposal for a Council regulation on the Statute for a European private company, P6\_TA-PROV (2009)0094 (henceforth: "Draft SPE Regulation EP").

5 The most recent draft is the third proposal of the Hungarian Presidency of the Council of 23 May 2011; see Council of the European Union, *Proposal for a Council Regulation on a European private company – Political agreement*, Doc. 10611/11 (hereinafter: "Draft SPE Regulation HU3").

6 ECJ, 2 May 2006, C-436/03, *Parliament vs. Commission and Council*, ECLI:EU:C:2006:277 (on the European Cooperative Society, SCE).

7 European Commission, *Proposal for a directive of the European Parliament and of the Council on single-member private limited liability companies*, COM (2014) 212 (hereinafter: DD-SUP-COM).

in all Member States with the uniformed name SUP and harmonised rules on formation, capital maintenance and corporate governance. However, this proposal, based on Art. 50 TFEU, also remained unsuccessful. While a sufficient majority was reached in the Council (against resistance from Germany),<sup>8</sup> it was not reached in the European Parliament.<sup>9</sup> Once again, employee representation was disputed, but there was also the general concern that an only partially harmonised single-member company would not serve as an equivalent alternative to a truly supra-national private company.<sup>10</sup> Accordingly, the Commission decided to withdraw the SUP proposal as well.<sup>11</sup>

After this repeated failure, the Commission has been reluctant to launch a new initiative on the European private company. In Germany, the Federal Parliament (in 2015)<sup>12</sup> and the coalition agreements of the political parties forming the Federal Government (in 2013 and 2018)<sup>13</sup> declared their willingness to revive the SPE project, but the attempt to convince the Commission to do so remained without success.

## 2. *A New Start: The Draft SES Statute and the Resolution of the Franco-German Parliamentary Assembly*

However, there is now a fresh attempt to rekindle the idea of a European private company. For several years, the French lawyers' association *Association Henri Capitant* has been pursuing the ambitious project of working towards a "European Business Code".<sup>14</sup> In this context, the company law department of the *Association Henri Capitant* decided to elaborate a new proposal for a European private company statute.<sup>15</sup> The proposal titled "Draft Statute for the

8 Council of the European Union, general approach of 28 May 2015, doc. 9050/15.

9 The working documents prepared by the rapporteur of the Committee on Legal Affairs *de Grandes Pascual* (PE575.031v02-00 of 26 January 2016, and PE549.150v01-00 of 6 February 2016) were never put to the vote.

10 For a German perspective see the Federal Parliament's resolution of 7 May 2015, *Bundestags-Drucksache* (parliamentary document) no. 18/4843, p. 3 seq. (opposing the SUP proposal and calling for reviving the SPE project instead).

11 Official Journal of the European Union, 4 July 2018, C 233, p. 6, 7.

12 German Federal Parliament (*Bundestag*), resolution of 7 May 2015 (fn. 10).

13 Coalition agreements between CDU, CSU and SPD of 27 November 2013, p. 19, and of 7 February 2018, p. 131.

14 *Association Henri Capitant*, *The Integration of European Business Law: Acquis and Outlook*, 2016; *Matthias Lehmann*, "EU Law-Making 2.0: The Prospect of a European Business Code", *European Review of Private Law* 28 (2020), 73.

15 See *Christoph Teichmann*, "SPE 2.0 – Die inhaltliche Konzeption", *GmbH-Rundschau* 2018, 713, 716.

Simplified European Company (SES)<sup>16</sup> was prepared by a group of company law experts from France (5 members), Germany (2) and Spain (1).<sup>17</sup> It was first presented to a committee of the Franco-German Parliamentary Assembly on 23 November 2020 and published in French and German in early 2021. The acronym SES stands for *Société Européenne Simplifiée* or *Societas Europaea Simplificata* and is inspired by the French “SAS” (*société par actions simplifiée*). The SAS is a private company form that was introduced in the 1990s and is very popular in France. Due to the SAS’ great flexibility, newly founded companies in France often favour the SAS over the traditional private company *société à responsabilité limitée* (SARL).<sup>18</sup>

In June 2021, the SES initiative gained the support of a large majority in the Franco-German Parliamentary Assembly (FGPA). The FGPA is composed of fifty members from the German Federal Parliament (*Bundestag*) and fifty members from the French *Assemblée nationale*. In its resolution of 28 June 2021,<sup>19</sup> the FGPA addressed the idea of a Franco-German economic area with uniform rules (“Franco-German Business Code”), which was first suggested by President Macron in his famous Sorbonne speech,<sup>20</sup> and was incorporated as a guiding principle in the Franco-German Treaty of Aachen.<sup>21</sup> In this context, the FGPA identified the SES initiative as one of the projects worth further pursuing. The FGPA explicitly called on the French and German governments to consider the SES proposal and to coordinate their efforts to create a new supra-national company type easily accessible to and attractive for small and medium-sized enterprises (SMEs).<sup>22</sup>

16 “Avant-projet relatif à la Société Européenne Simplifiée (SES)”, “Regelungsentwurf zur Vereinfachten Europäischen Gesellschaft (SES)”. The full text including explanatory notes is available at [www.henricapitant.org](http://www.henricapitant.org).

17 The group was chaired by the President of the Association Henri Capitant *Philippe Dupichot*, professor of law at Paris 1 University (Panthéon-Sorbonne).

18 In 2017, the SAS accounted for 61% of new company formations (with an increasing trend compared to the previous year) while the SARL accounted for 36% (with a decreasing trend); see INSEE (Institut national de la statistique et des études économiques), *Tableaux de l’économie*, éd. 2019, p. 144 (available at [www.insee.fr/fr/statistiques/3676789?sommaire=3696937](http://www.insee.fr/fr/statistiques/3676789?sommaire=3696937)).

19 Franco-German Parliamentary Assembly, resolution of 28 June 2021, doc. no. 2021/4 (available at [www.bundestag.de/dfpv](http://www.bundestag.de/dfpv)).

20 Speech by President *Emmanuel Macron* of 26 September 2017, Initiative pour l’Europe, p. 17 (available at [www.elysee.fr/emmanuel-macron/2017/09/26/initiative-pour-l-europe-discours-d-emmanuel-macron-pour-une-europe-souveraine-unie-democratique](http://www.elysee.fr/emmanuel-macron/2017/09/26/initiative-pour-l-europe-discours-d-emmanuel-macron-pour-une-europe-souveraine-unie-democratique)).

21 Treaty on Franco-German Cooperation and Integration of 22 January 2019, Art. 20 (1) s. 1.

22 Franco-German Parliamentary Assembly (fn. 19), p. 3 seqq.

In light of the foregoing, there is ample reason to examine the Draft SES Statute more closely. In the following, we will first explore the main objectives of the draft, before considering what legal instrument could be used for its implementation (II.). After that, we will seek to analyse the draft's main features and discuss some of its key issues (III.).

## II. General Considerations

### 1. Main Objectives of the Draft: the SES as an “SPE 2.0”

The main objectives of the Draft SES Statute are essentially the same as those already pursued by the Draft SPE Regulation.<sup>23</sup> The list of existing supra-national corporate forms (SE, SCE, EEIG) shall be supplemented by a private company form that is attractive for SMEs and as simple and flexible to use as possible. Under the Draft SES Statute, the formation of an SES is much easier than in the case of an SE, the latter being tailored to large companies. For instance, the minimum capital in an SES is much lower than in an SE (EUR 12,000 instead of EUR 120,000), the formation process can be done online, and no cross-border element will be required to establish an SES (*infra* at III. 2.). In addition, the internal corporate governance rules are widely flexible (*infra* at III. 3.), in contrast to the SE, which is widely characterised by mandatory rules. Above all, however, the SES shall have the advantage over national company forms that it can be established and applied uniformly in all participating Member States under largely the same rules. This uniformity is rightly seen as the decisive “added value” of the SES compared to the national company forms. It promises significant cost and efficiency advantages, especially for corporate groups that operate subsidiaries in several Member States. If the subsidiaries are organised uniformly as SESs, the group will no longer have to deal (at least not nearly to the same extent) with the different national company laws.<sup>24</sup> In the interest of uniformity, the Draft SES Statute therefore seeks to be as comprehensive as possible and to limit references to national company law. However, there are several exceptions where the draft refers to the national

23 See Introduction to the Draft SES Statute on the one hand, and the European Commission's SPE proposal (COM [2008], 396, p. 2) on the other hand.

24 *Benoît Lecourt* (one of the co-authors of the Draft SES Statute), “Société européenne simplifiée : l'Association Henri Capitant remet son avant-projet à l'Assemblée franco-allemande”, *Revue des sociétés* 2021, 137, 139. The same advantage was already pursued by the Draft SPE Regulation; see *Gregor Bachmann/Horst Eidenmüller/Andreas Engert/Holger Fleischer/Wolfgang Schön*, *Regulating the Closed Corporation*, 2014, p. 214 seqq.

private company law of the State of the company's registered office.<sup>25</sup> Moreover, there is an important exception in favour of the State of the company's real seat in the sensitive issue of employee representation (*infra* at III. 3. e).

As stated in the introduction to the Draft SES Statute, the SES is intended to serve as a "new type of company for small and medium-sized enterprises". In the same vein, the FGPA's resolution also emphasizes the objective of promoting SMEs in particular.<sup>26</sup> However, while it is true that SMEs would clearly benefit from the option of choosing an easily accessible supra-national private company form that conveys an international image of the company's business and is known beyond national borders, the scope of the SES goes far beyond a legal form only for SMEs. For the reasons mentioned (namely efficiency advantages for corporate groups with subsidiaries in several Member States), an SES can also serve – and in practice will probably predominantly serve – as a *group component*. In this respect, it is no less interesting for large groups of companies than for smaller ones. The authors of the Draft SES Statute were well aware of this fact. For this reason, they inserted a special provision on corporate groups that seeks to facilitate group management in the interest of the group (Art. 3.1.6, *infra* at III. 5.). Besides that, as a simultaneously supra-national and flexible corporate form, the SES is also likely to be attractive for joint ventures of parties from different Member States.

With the objectives outlined above, the SES initiative may well be dubbed a type of "SPE 2.0".<sup>27</sup> Undoubtedly, an initiative with these objectives deserves full support. In the discussions on the SPE, despite all the controversy on individual issues, there was already a broad consensus that a supra-national private company form could make a valuable addition to the list of European corporate forms. Therefore, if a new attempt is now made this can only be welcomed, even though, as we shall see, there remains considerable room for improvement on a number of issues of the Draft SES Statute.

25 See, e.g., Art. 2.1.2. (3) (form of the deed of incorporation), 2.1.6. (2), (3) (registration proceedings), 3.1.5. (5) (supplementary rules on directors' liability), Art. 3.1.7. (4) (actions to set aside shareholder resolutions), 3.1.14. (1) s. 2 (form requirement for the transfer of shares).

26 Franco-German Parliamentary Assembly (fn. 19), p. 7.

27 *Stephan Harbarth*, "SPE 2.0 – Die rechtspolitische Perspektive", *GmbH-Rundschau* 2018, 657; *Teichmann*, (fn. 15).

## 2. *The International Scope of the SES Statute: Alternatives to EU-wide Regulation (Enhanced Cooperation, International Treaty)*

The draft is silent on what legal instrument the authors have in mind for the SES statute. The explanatory notes on Art. 1.1.1. merely state that the SES should be available “ideally not only in France and Germany, but in all Member States”. Thus, unlike the SPE proposal, the SES initiative does not exclusively aim at adopting an EU regulation in the traditional procedure under Art. 352 TFEU. The reason behind this is that the procedure under Art. 352 TFEU requires unanimity in the Council among all twenty-seven Member States. Unanimous consent will be tough to find, even more so, if one seeks to adopt a comprehensive statute and limit references to national company law as far as possible. During the SPE debates, one could observe that the initial idea of a comprehensive statute was watered down with each new draft providing additional references to national law; in the end, even this watered-down compromise failed. It is not without reason that the Commission, mindful of this experience, refused to take up the German Federal Government’s idea of submitting a new Commission proposal for an SPE regulation (*supra* at I. 1.).

If one looks for ways to implement an SES statute with a comprehensive uniform set of rules without relying on the unanimity of all Member States, the first option that comes to mind is the enhanced cooperation procedure under Art. 20 TEU and Art. 329 TFEU.<sup>28</sup> Using the enhanced cooperation mechanism would not be a novelty, it was applied successfully on various occasions.<sup>29</sup> It is only permissible as a “last resort” if the Council establishes that the objectives of such cooperation cannot be attained within a reasonable period by the Union as a whole (Art. 20 [2] s. 1 TEU). However, given the failure of the SPE and SUP initiatives, it seems fair to conclude that this requirement is met in the present case.<sup>30</sup> If a regulation were adopted through enhanced cooperation it would not apply in the entire EU, but only in the participating Member States (Art. 20 [4] s. 1 TEU), with at least nine Member States participating

28 Using this mechanism for the SES initiative is advocated by *Teichmann* (one of the authors of the SES draft fn. 15), 716, and *Harbarth*, (fn. 27), 662; *Stephan Harbarth*, in: Stefan J. Geibel/Christian Heinze/Dirk A. Verse (eds.), *Binnenmarktrecht als Mehrebenensystem*, 2023 (forthcoming), IV. 4.

29 See Regulation (EU) No 1259/2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation (Rome III Regulation); Regulation (EU) 1257/2012 implementing enhanced cooperation in the area of the creation of unitary patent protection; Regulations (EU) 2016/1103 and 2016/1104 implementing enhanced cooperation in matters of matrimonial property regimes and property consequences of registered partnerships.

30 *Harbarth*, in: Geibel/Heinze/Verse (fn. 28), IV. 4. a).

(Art. 20 [2] s. 1 TEU). While an agreement on truly uniform rules among all twenty-seven Member States does not seem very realistic in the light of the SPE and SUP experience, it may be more realistic in a smaller circle of Member States.

The initiative for starting the enhanced cooperation procedure would have to come from the interested Member States (by request to the Commission pursuant to Article 329 (1) para. 1 TFEU). It would require the consent of all three EU legislative bodies (the Commission, Parliament and – with a qualified majority of all Member States – the Council).<sup>31</sup> In the subsequent legislative procedure, the unanimity requirement of Art. 352 TFEU applies only to the participating Member States (Art. 330 [2] TFEU).<sup>32</sup> Member States not initially participating are entitled to join the enhanced cooperation at any time (Art. 20 [1] para. 2 s. 2 TEU, Art. 331 [1] TFEU). Conversely, a Member State may also withdraw from the enhanced cooperation procedure (at least by mutual agreement) if it becomes apparent that its views are incompatible with those of the other participating Member States. All in all, the enhanced cooperation procedure thus provides a sufficiently flexible framework that should facilitate finding an agreement on a uniform statute. Nonetheless, applying this option remains challenging; it is only realistic if alongside France and Germany at least seven other Member States are prepared to take the initiative and commit themselves to the SES project with the same objectives in mind.

Enhanced cooperation is, however, not the only alternative to a “normal” EU regulation. It is also conceivable that the interested Member States agree to act outside the EU law framework by entering into a bilateral or multilateral international treaty (as in the case of the Franco-German agreement on matrimonial property law<sup>33</sup>). This route may be an interesting option especially if it proves difficult to find the support of the minimum number of Member States required for enhanced cooperation. In this case, an international treaty between France, Germany and potentially several more Member States could serve as a first step for introducing the SES. If the new legal form proves successful and more Member States become interested over time, it would still be possible to

31 The Commission may (not, must) submit a proposal to the Council specifying the scope and objectives of the enhanced cooperation proposed (Art. 329 [1] para. 1 TFEU). On the Commission’s proposal and after obtaining the consent of the European Parliament, the Council resolves on the enhanced cooperation with a qualified majority (Art. 329 [1] para. 2 TFEU in conjunction with Art. 16 [3] TEU).

32 Theoretically, it would also be conceivable that the participating Member States agree that only a qualified majority among them shall be sufficient (Art. 333 [1] TFEU).

33 Accord entre la République fédérale d’Allemagne et la République Française instituant un régime matrimonial optionnel de la participation aux acquêts, 4 February 2010.



convert the international treaties into an act of EU legislation (by way of enhanced cooperation) as a second step.<sup>34</sup>

Like the draft, the FGPA's resolution is equally silent on which legal instrument it has in mind for the SES statute. Interestingly, it refers to a "Simplified Franco-German Company", not a European one. This may be read as an indication that the FGPA primarily envisages a binational agreement between France and Germany for the time being. This, however, is not surprising given that the FGPA is a binational institution focusing primarily on deepening the ties between these two countries. In any event, the fact that France and Germany press ahead should by no means exclude the participation of other interested Member States. The more Member States participate in the SES initiative, the greater are its benefits for businesses operating in the internal market.

### *III. Selected Issues of the Draft SES Statute*

#### *1. Legal Nature of the Company and Applicable Law*

Article 1.1.1. of the Draft SES Statute ("SES-DS") defines the essential characteristics of the SES: a legal entity with legal capacity with one or more shareholders; a limited company in which shareholders are not liable for the company's liabilities; and a private company whose shares are not tradable on a stock exchange. The SES acquires its legal capacity by registration (*infra* at III. 1. e). When Art. 1.1.1. (5) SES-DS states that all EU Member States will recognise the company's legal capacity, one wonders how this provision can be reconciled with the fact that the SES Statute may not be agreed by all Member States. In this case, the Statute cannot be binding on the non-participating Member States. At the end of the day, however, this is not crucial because it already follows from the freedom of establishment (Art. 49, 54 TFEU) that the non-participating Member States will be obliged to recognise the legal capacity of an SES.

Regarding the company law applicable to the SES, it was already noted that for the sake of uniformity, subject to some exceptions, the draft statute seeks to be comprehensive and to avoid references to national law as much as possible. Therefore, the draft statute emphasises the principle that the legal issues it regulates are exempt from the application of national law (Art. 1.1.2. (1) s. 2 SES-DSS). However, concerning the contentious issue of employee representation, the Member State of the company's real seat is permitted to apply its national

34 Such a staggered approach is also envisaged by *Harbarth*, in: Geibel/Heinze/Verse (fn. 28), IV. 4. c).

law (Art. 1.1.2. [3] SES-DSS, *infra* at III. 3. e). Further, the draft provides that in addition to the SES Statute, the private company law provisions of the State where the company has its registered seat (State of incorporation) shall apply, insofar as these provisions are compatible with the provisions of the SES statute (Art. 1.1.2. [2] SES-DS). However, the exact scope of this provision is far from clear. If one does not want to lose sight of the intended goal of the greatest possible uniformity of the SES, it will have to be construed narrowly in the sense that the national provisions are applicable only where the statute discernibly contains a regulatory gap.

## 2. Formation and Raising of Capital

### a) No Cross-border Element Required

For the formation of the SES, the draft grants wide flexibility. It accepts the formation *ex nihilo* just as well as the formation by way of conversion, merger or division (Art. 2.1.1. SES-DS). Moreover, in contrast to Art. 2 of the SE Regulation, the draft refrains from prescribing any type of cross-border element. The founders need not be residents in different Member States, nor does the company need to have a branch or subsidiary in another Member State or otherwise carry on or intend to carry on cross-border activities. This is reminiscent of the Commission's SPE proposal which did not insist on a cross-border element either. Yet, the SPE proposal was met with criticism from several Member States, as they feared that SPEs could be used to circumvent requirements of their national company laws. There was also the concern that abstaining from a cross-border element would be incompatible with the principle of subsidiarity (Art. 5 TEU).<sup>35</sup> Although this concern was arguably not conclusive,<sup>36</sup> the criticism had the effect that subsequent drafts of the SPE Regulation reintroduced the cross-border element.<sup>37</sup>

Similar concerns will likely be raised against the SES proposal. Nonetheless, this should not be an insurmountable obstacle for the SES initiative, since it should be possible to find a solution to formulate a cross-border element that does not overly restrict the possibilities for the use of an SES. For instance, following the example of the last compromise proposal on the SPE (Art. 3 [3]

35 Among others, this concern was raised by the German Federal Council (*Bundesrat*), Bundesrats-Drucksache (Federal Council document) 479/08 (Beschl.), p. 1 seq.

36 See Council of the European Union, Progress Report of 28 November 2008 (16400/1/08 REV 1), mn. 11; *Marcus Lutter/Walter Bayer/Jessica Schmidt*, *Europäisches Unternehmens- und Kapitalmarktrecht*, 6<sup>th</sup> edn. 2018, mn. 47.20, with further references.

37 See, e.g., Art. 3 (3) of the last draft of the Hungarian Presidency (fn. 5).

Draft SPE Regulation HU3), one could introduce a requirement that (i) either the company carries out or intends to carry out cross-border activities or (ii) one or more of its shareholders are resident in a Member State other than the State of the company's registered seat. The latter option would cover the case of a parent company wishing to organize its subsidiaries in other Member States in the form of an SES. However, if one insists on a cross-border element, it is advisable to go one step further and to provide that not only the subsidiaries in other Member States but also the domestic subsidiaries of a cross-border group should be able to adopt the form of an SES.<sup>38</sup>

### *b) Formation Procedure*

Concerning the formation formalities, the Draft SES Statute regulates the minimum content of the company's articles of association (Art. 2.1.2. [1] SES-DS). In the case of a single-member SES, the formation process shall be facilitated by providing a template of model articles (Art. 2.1.2. [2] SES-DS). Regarding the form required for the articles of association, reference is made to the law of the Member State where the SES is registered (Art. 2.1.2. [3] SES-DS). The certification of the articles of association of an SES with registered office in Germany would thus require notarisation, as in the case of a German limited liability company.<sup>39</sup> With this provision, as with the parallel provision on the form of the transfer of shares (Art. 3.1.14. [1] s. 2 SES-DS), the draft reacts to the fact that the Commission's SPE proposal, which only required written form, received harsh criticism especially in Germany.<sup>40</sup>

The registration proceedings are also widely left to the law of the company's registration state. In this respect, the Draft SES Statute only contains few provisions, namely on the content of the application for registration (Art. 2.1.6. SES-DS).

38 For example, a parent company domiciled in Germany with subsidiaries in France, Italy and Germany should be able to incorporate all three subsidiaries in the form of an SES.

39 § 2 (1) of the German Limited Liability Companies Act (*GmbH-Gesetz*, GmbHG). Note, however, that after the implementation of Directive (EU) 2019/1151 regarding the use of digital tools and processes in company law, the notarization can also take place online if the formation only involves cash contributions (§ 2 [3] GmbHG).

40 See German Federal Council (*Bundesrat*), Bundesrats-Drucksache (Federal Council document) 479/08 (Beschl.), p. 7, 14; German Notaries' Association (*Deutscher Notarverein*), opinion of 31 July 2008 (available at [www.dnotv.de](http://www.dnotv.de)), A. (3), C. I., C. II.; and the reaction thereto by *Philippe Dupichot*, "Une société européenne simplifiée pour la PFUE", Bulletin Joly Sociétés, Editorial 5/2021: "la forme (...) pourra rester notariée en Allemagne, afin de ne pas reproduire les blocages du passé."

*c) Minimum Capital and Raising of Capital*

As minimum capital of an SES, the draft requires a nominal capital of EUR 12,000 (Art. 2.1.3. [1] SES-DS), *i.e.* one tenth of the minimum capital of an SE (Art. 4 [2] SE Regulation). This amount only guarantees a modest participation of the shareholders in the company's business risk. At least, however, the draft does not go so far as the European Model Companies Act (Sec. 2.07 [1] s. 2 EMCA) and the laws of various Member States, which have abolished any substantive minimum capital for private companies.<sup>41</sup> Again, this decision can be seen as a reaction to the failed SPE negotiations, in which the Commission's original proposal for a minimum capital of only EUR 1 (Art. 19 [4] SPE Regulation COM) was received critically by several Member States. The last compromise proposal on the SPE contained a Member State option to set a minimum capital in the range between EUR 1 and EUR 8,000 (Art. 19 [3] Draft SPE Regulation HU3), but this did not receive the approval of all Member States either.<sup>42</sup> In contrast, the amount of EUR 12,000 in the Draft SES Statute should be acceptable also for those Member States who have not followed the international trend of (virtually) abolishing the minimum capital requirement. This is true namely for Austria, which insists on a minimum capital of EUR 10,000<sup>43</sup> and has persistently rejected a lower minimum capital in the negotiations on the SPE proposal,<sup>44</sup> and for Luxembourg, which allows the formation of a "1 Euro company" only for natural persons, but otherwise requires a minimum capital of EUR 12,000.<sup>45</sup> As far as apparent, no EU Member State currently requires a higher minimum capital than EUR 12,000 for a private limited company.

The rules on raising capital are relatively simple, in accordance with the intention of providing a "simplified" company statute. In the case of cash contributions, at least one quarter of the contribution must be paid prior to its registration; the remainder is due no later than five years after registration (Art. 2.1.3. [3]

41 For a comparative overview, see *Alessio Bartolacelli*, "Almost Capital-less Companies in Europe: Trends, Variations, Competition", ECFR 2017, 187; *Claudia Hartmann*, *Die Europäische Privatgesellschaft*, 2019, p. 523 seqq.

42 For details, see *Hartmann* (fn. 41), p. 51 seqq.

43 To be more precise, the regular minimum capital for private limited companies in Austria is EUR 35,000 (sec. 6 [1] s. 2 Austrian Limit Liability Companies Act, *GmbH-Gesetz*), but in 2014 a so-called "foundation privilege" was introduced which provides that the minimum capital may be reduced to EUR 10,000 in the first ten years of the company's existence (sec. 10b Austrian Limited Liability Companies Act).

44 *Hartmann* (fn. 41), p. 53 sq.

45 Art. 710-5, 720-2 (1), 720-4 Luxembourg Commercial Companies Act (*Loi concernant les sociétés commerciales*).

SES-DS).<sup>46</sup> Contributions in kind must generally be made in full before the company's registration, but somewhat surprisingly, an exception applies if the contribution consists of claims for money or fungibles (Art. 2.1.3. [6] SES-DS). An undertaking to supply services cannot form part of a contribution in kind (Art. 2.1.3. [2] SES-DS); this is modelled on Art. 46 s. 2 of the Company Law Directive (Directive [EU] 2017/1132), which contains the same rule for public companies.

Regarding the valuation of contributions in kind, the Draft SES Statute provides rules that are primarily inspired by French law. A valuation by an independent expert is not required if all founders agree (Art. 2.1.3. [7] para. 3 SES-DS). However, if (i) they agree not to mandate an independent expert and (ii) there is no case where a valuation is redundant under Art. 50 Company Law Directive (as, for example, in the case of a contribution of securities traded on the stock exchange), the shareholder owing the contribution in kind shall, in the first five years after registration, be personally liable to the company's creditors up to the nominal amount of the shares subscribed for (Art. 2.1.3. [7] para. 1 SES-DS).<sup>47</sup> Contrastingly, in the opposite case, *i.e.* where (i) an independent expert confirmed the valuation or (ii) the value was calculated in accordance with Art. 50 Company Law Directive, no liability shall ensue even if it later arises that the valuation was incorrect. This approach differs materially from the position under German law which provides that a shareholder owing a contribution in kind is under a strict liability to compensate for any difference in value if the actual value of the contribution falls short of the nominal amount of the shares subscribed.<sup>48</sup>

#### *d) Seat of the Company*

One of the most disputed issues in the discussions on the SPE and SUP proposals was whether the company's registered office must be located in the same Member State as its real seat (the seat of its head office).<sup>49</sup> The great importance of this question in the SPE and SUP debate stemmed from the fact that these proposals contained numerous references to the company law of the Member State of the company's registered office. Allowing companies to locate their

46 This is less strict than Art. 20 (1) para. 3 Draft SPE Regulation HU3 which provided that the remainder should be due after three years.

47 With respect to the French SAS, a similar provision can be found in art. L. 227-1 Abs. 7 code de commerce.

48 Sec. 9 (1) GmbHG.

49 See *Stephan Habersack/Dirk A. Verse, Europäisches Gesellschaftsrecht*, 5<sup>th</sup> edn., 2019, § 10 mn. 24, § 15 mn. 6, with further references.

registered office in another Member State than the real seat would have made it possible to opt-out of the company law applicable in the real seat Member State and thus bypass mandatory standards of creditor protection and employee representation in that State. Unsurprisingly, this fact triggered sharp criticism from some of the Member States.<sup>50</sup>

Despite this criticism, the Draft SES Statute again follows the Commission proposals on the SPE and SUP (Art. 7 Draft SPE Regulation COM, Art. 10 Draft SUP Directive COM) and merely requires that an SES must have its registered office and head office in the EU (Art. 2.1.5. SES-DS). Unlike in the case of an SE (Art. 7 SE Regulation) or SCE (Art. 6 SCE Regulation),<sup>51</sup> the Draft SES Statute does not provide that they must be in the same Member State. Member States following the real seat theory are, however, free to stipulate that an SES registered in their territory must have its head office in the same Member State.<sup>52</sup> Nonetheless, even where a Member State makes use of this option, this does not change the fact that it cannot prevent an SES with a head office in its territory to opt for a registered office in another Member State which does not require the SES to have its registered office and head office in the same State.

It is worth noting, however, that the issue has less significance under the Draft SES Statute than under the SPE and SUP proposals. This is due to the fact that the draft contains a special rule protecting the employee representation laws of the real seat Member State (*infra* at III. 3. e) and provides uniform standards of creditor protection without recourse to national company law. Nevertheless, the issue remains delicate since the Draft SES Statute still contains some references to the national company law of the State of the registered office, and in this respect there is again a risk of skirting mandatory provisions of the real seat State. For example, the requirement of notarisation for adopting the articles of association (III. 2. b) and the transfer of shares (III. 3. d) for an SES

50 For Germany, see the Federal Government's statement on the SPE negotiations of 7 June 2010, Bundestags-Drucksache (parliamentary document) no. 17/1933, p. 5; Federal Parliament (*Bundestag*) resolution of 7 May 2015 (fn. 10), p. 4 seq. (see also *ibid.* p. 7 on the Federal Government's position).

51 After the ECJ's ruling in the "Polbud" case (ECJ, 25 October 2017, C-106/16, *Polbud Wykonawstwo sp. zo.o.*, ECLI:EU:C:2017:804), doubts were raised of whether Art. 7 SE Regulation and Art. 6 SCE Regulation are compatible with the freedom of establishment (Art. 49, 54 TFEU). However, these doubts are arguably not conclusive, see *Rüdiger Veil*, in: *Kölner Kommentar Aktiengesetz*, 3<sup>rd</sup> edn. 2021, Art. 7 SE-VO mn. 7, with further references. For a different view, however, see *Jürgen Oechsler*, "Die Polbud-Entscheidung und die Sitzverlegung der SE", *Zeitschrift für Wirtschaftsrecht (ZIP)* 2018, 1269.

52 This follows from Art. 2.1.5. (2) in conjunction with Art. 1.1.2 (3) SES-DS and the explanatory notes on Art. 2.1.5. SES-DS.

domiciled in Germany could easily be avoided by locating the registered office in another Member State. Against this background, it will not come as a surprise if the issue sparks controversy again in the debates to come.

### *e) Transactions Prior to Registration*

The formation process ends with the registration of the company. It is only at this point that the SES comes into existence as a legal entity (Art. 1.1.1. [5], 2.1.6. [8] SES-DS). If a transaction was already entered into on behalf of the company prior to registration, the persons who acted on behalf of the company shall be jointly and severally liable therefor (Art. 2.1.7. [2] SES-DS). This rule corresponds with the equivalent rule for public companies in Art. 7 (2) Company Law Directive.

In contrast to German law,<sup>53</sup> the Draft SES Statute is not based on the concept of a legal entity *sui generis* that exists already prior to registration (“Vorgesellschaft”), and that merely changes its legal form upon registration. Instead, the draft provides that, subject to certain conditions, the SES is entitled to step into the transactions retroactively (Art. 2.1.7. [3] SES-DS). In this case, the liability of the persons who acted on behalf of the company expires (Art. 2.1.7. [4] SES-DS).

## *3. Corporate Governance and Employee Representation*

### *a) Principle: Freedom of Organisation*

As a matter of principle, the Draft SES Statute grants shareholders the flexibility and freedom to organise the company’s internal affairs in the way they want (Art. 1.1.2. [1] SES-DS), subject only to a few mandatory provisions. The only mandatory organs of an SES are usually the directors and the shareholders’ meetings. However, depending on mandatory employee representation under applicable national law (*infra* at III. 3. e), it may be necessary to also establish a supervisory board with a certain number of board members elected by the employees.

53 On the position of German law, see *Peter Ulmer/Matthias Habersack*, in: *Matthias Habersack/Matthias Casper/Marc Löbbe* (eds.), *GmbHG-Großkommentar*, 3<sup>rd</sup> edn. 2019, § 11 mn. 89.

### b) Directors

The SES must have at least one director (Art. 3.1.2. [1] SES-DS). As in a French SAS,<sup>54</sup> a legal person may also be appointed as director (Art. 3.1.4. [1] SES-DS). In this case, however, the legal person must nominate a natural person who exercises its powers and is subject to the same duties and liability as a director (Art. 3.1.4. [2], 3.1.5. [4] SES-DS). Also influenced by French law is the scope of the directors' power of representation. Under Art. 3.1.2. (3) SES-DS, the company is not bound where a director acts outside the objects of the company if it can prove that the other party was aware of this fact or was unaware of it as a result of gross negligence (it being understood that disclosure of the articles shall not of itself be sufficient proof thereof).<sup>55</sup>

The Draft SES Statute further provides – this time inspired by German law – that the shareholders' meeting has the power to issue binding instructions to the directors (Art. 3.1.2. [4] SES-DS). In doing so, the Draft SES Statute takes up an idea that was recommended in the course of the SPE negotiations, most notably by the European Parliament.<sup>56</sup> The directors are obliged to follow the instructions unless this would be unlawful (Art. 3.1.2. [4] s. 2 SES-DS). The exact boundaries of this right to give instructions are, however, not entirely clear under the draft. In particular, the question arises if and in which circumstances the directors are obliged to follow an instruction where its implementation would be economically disadvantageous for the company.<sup>57</sup> This issue is

54 Cf. Art. L227-7 Code com. For a comparative overview, see *Paula del Val Talens*, “Corporate Directors: In Search of a European Normative Model for Legal Persons as Board Members”, ECFR 2017, 609 (analyzing the laws of several further Member States who also accept legal persons as directors, namely Belgium, Italy, and Spain).

55 A similar rule for the French SAS is set forth in Art. L227-6 para. 2 Code com. Art. 9 (1) sub-section 2 Company Law Directive explicitly allows Member States to introduce such a rule. In Germany, such cases are dealt with under the more expansive doctrine of “Missbrauch der Vertretungsmacht” (abuse of power of representation); see *Schall*, in: *Vicari/Schall* (eds.), *Company Laws in the EU*, 2020, Part 2 mn. 236 seqq.; *Alexander Stöbr/Sophie C. Aufderheide*, “Missbrauch der Vertretungsmacht in der GmbH: Hintergrund und Unionsrechtskonformität der deutschen Konzeption”, *Zeitschrift für Wirtschaftsrecht (ZIP)* 2022, 1900.

56 Cf. Art. 26 (1) s. 2 Draft SPE Regulation EP; see also *Peter Hommelhoff/Christoph Teichmann*, “Die SPE vor dem Gipfelsturm”, *GmbH-Rundschau* 2010, 337, 347; *Lutter/Bayer/Schmidt* (fn. 36), mn. 47.69. A similar right to give instructions was also included in the Commission's SUP proposal (Art. 23 Draft SUP Directive COM), albeit only in an unclear form; see *Habersack/Verse* (fn. 49), § 10 mn. 30.

57 In German law, it is generally accepted that the directors must follow even an economically disadvantageous instruction, but only if it does not jeopardise the company's solvency and there is agreement amongst all shareholders; *Detlef Kleindiek*, in: *Marcus Lutter/Peter Hommelhoff* (eds.), *GmbH-Gesetz*, 20<sup>th</sup> edn. 2020, § 37 mn. 18. In con-



of particular relevance in corporate groups when a parent company pushes through an instruction that may be in the interest of the parent company but runs counter to the interest of the subsidiary (and its minority shareholders and creditors). It is, therefore, closely linked to the fundamental question of how the group interest and the interest of the subsidiary can be balanced out (*infra* at III. 5.).

Similar to the original SPE Commission proposal (Art. 31 Draft SPE Regulation COM), the SES Draft Statute regulates the duties and, at least partly, the internal liability of the directors towards the company for breaches of duty (Art. 3.1.5. SES-DS).<sup>58</sup> The directors' duty of care and the duty of loyalty are briefly mentioned in a general clause. For "entrepreneurial or strategic" decisions, the draft outlines a business judgment rule similar to provisions in the EMCA and German law.<sup>59</sup> According to this rule, the director is presumed to have complied with his duties if he acted in good faith, free of conflict of interest, and based on adequate information (Art. 3.1.5. [2] SES-DS). According to the explanatory notes, this presumption can be rebutted in the case of "irresponsible" actions of the directors.

Regarding liability, the draft stipulates that any breach of duty by a director causing damage to the SES results in liability to compensate the company's loss (Art. 3.1.5. [3] s. 1 SES-DS). If more than one director causes the damage, the liability is joint and several (Art. 3.1.5. [3] s. 2 SES-DS). In other respects, the directors' liability is governed by the national law of the State of the company's registration (Art. 3.1.5. [5] SES-DS). Accordingly, issues of general damage compensation law (compensable items, attribution of liability, contributory negligence, etc.) and the statute of limitations are left to national law. In principle, this self-restraint of the draft is well understandable since harmonising the entire law of directors' liability would overburden the SES initiative. Nonetheless, in further deliberations one should consider whether the provisions of

trast, if one or more minority shareholders disagree, they may be able to challenge the resolution on the ground that the majority is in breach of their fiduciary duty; *Dirk A. Verse*, in: Martin Henssler/Lutz Strohn (eds.), *Gesellschaftsrecht*, 5<sup>th</sup> edn. 2021, § 13 Anh. GmbHG mn. 48 with further references.

58 By contrast, due to the differences in the national regimes, the last SPE compromise proposal suggested that the directors' general duties and liability be governed by national law (Recital 14a Draft SPE Regulation HU3). For a comprehensive comparative analysis on directors' duties and liability in Europe, see *Carsten Gerner-Beuerle/Philipp Paech/Edmund-Philipp Schuster*, *Study on Directors' Duties and Liability*, 2013 (available at <http://eprints.lse.ac.uk/50438>).

59 Cf. Sec. 10.01 (3) EMCA and Sec. 93 (1) s. 2 German Stock Corporation Act (*Aktiengesetz*, AktG) (although this rule is only contained in the Stock Corporation Act, it is generally accepted that it also applies to limited liability companies).

the SES Statute can be expanded at least a little bit further. In particular, it would be desirable to have a clear statement on the extent to which directors' liability can be restricted by provisions in the articles of association or the employment contract.<sup>60</sup>

Finally, one further provision stands out; it is a provision that deals explicitly with the directors' duties in a subsidiary of a corporate group (Art. 3.1.6. SES-DS). This provision will be considered below in the context of the recognition of the group interest (*infra* at III. 5.).

### c) Shareholder Resolutions

The Draft SES Statute defines a list of items of particular importance that require a shareholder resolution (Art. 3.1.7. [1] s. 1 SES-DS). The articles of association may append additional items that require a shareholder resolution (Art. 3.1.7. [1] s. 2 SES-DS), but *e contrario*, they may not reduce that list. However, one may raise the question whether the list of mandatory shareholder resolutions under the Draft SES Statute is not too extensive. For example, while it is easy to see that a shareholder resolution is mandatory for fundamental changes such as amendments to the articles of association or mergers, divisions and conversions, it is far less clear why the draft provides the same also for the appointment and removal of directors (Art. 3.1.7. [1] s. 1 5<sup>th</sup> indent SES-DS). Why should it not be possible for the articles to delegate this competence to another corporate organ than the shareholders' meeting, e.g. a supervisory board or a shareholders' committee?<sup>61</sup> Interestingly, the Commission's SPE proposal initially also provided for a mandatory shareholder resolution on the appointment and removal of directors, but for good reason this was dropped in the further course of the deliberations.<sup>62</sup>

Concerning holding shareholders' meetings and passing resolutions, the Draft SES Statute hardly contains any mandatory provisions. There is a mandatory right for minority shareholders holding 5% or more voting rights to add items to the agenda and convene shareholders' meetings (Art. 3.1.8. [2] SES-DS). Moreover, there is a mandatory provision that imposes a ban – albeit unclearly worded – on the shareholder-director voting on decisions concerning “the ap-

60 Under German law, this issue is controversial; see *Dirk A. Verse*, in: Scholz, GmbH-Gesetz, 12<sup>th</sup> edn. 2021, § 43 mn. 421 seqq.

61 In a German limited liability company, this possibility exists and is sometimes used in practice; see *Thomas Liebscher*, in: Münchener Kommentar GmbH-Gesetz, 3<sup>rd</sup> edn. 2019, § 46 mn. 176 seqq.

62 Cf. Art. 28 (1) (i) Draft SPE Regulation HU3, as opposed to Art. 27 (1) (j) Draft SPE Regulation COM.

proval of his own management” (Art. 3.1.8. [3] SES-DS). Unless otherwise provided for in the articles of association, resolutions are adopted by a simple majority (Art. 3.1.7. [2] SES-DS). For amendments to the articles of association, the draft requires a qualified majority but leaves it to the articles of association to define what a qualified majority is (Art. 3.1.7. [3] SES-DS). If no provision is made in the articles, the law of the Member State of the company’s registration shall apply.<sup>63</sup> In the case of an amendment to the articles restricting the transfer of shares, the unanimous consent of all shareholders is required (Art. 3.1.14. [2] SES-DS).<sup>64</sup> Notably, the Draft SES Statute does not provide a form requirement for resolutions amending the articles of association (such as the notarisation requirement under German law<sup>65</sup>), and it does not refer to the law of the State of incorporation in this context. This is surprising because it contrasts with the provision on the form for certifying the articles of association in the company’s formation (*supra* at II. 2. b). It is difficult to see why the form for certifying the initial articles of association and subsequent amendments should be subject to different standards.

The Draft SES Statute does not contain rules on how shareholders can challenge shareholder resolutions that they deem in breach of the law or the articles of association. Instead, this issue is left to the law of the Member State of the company’s registration (Art. 3.1.7. [4] SES-DS).<sup>66</sup> According to the explanatory notes, the underlying reason is that the rules on challenging shareholder resolutions are closely linked to national civil procedural law. However, not all will be convinced that this reasoning justifies a complete lack of regulation in the SES Statute. This is all the more so since the EMCA offers a well-balanced model regulation that seems worth considering in the present context.<sup>67</sup>

63 More precisely: the law of the legal reference form in that State (i.e. the SAS in France, the GmbH in Germany, etc.). For an SES with registered office in Germany, this means that, in the absence of a provision in the articles, a majority of three quarters of the votes represented in the shareholders’ meeting will be required (§ 53 [2] GmbHG).

64 This in accordance with the position of French law (Art. L227-19 Code com.) and German law (§ 180 [2] AktG, which by analogy also applies to limited liability companies); Verse (fn. 57), § 15 GmbHG mn. 83 with further references.

65 § 53 (2) s. 1 GmbHG.

66 The same approach was already adopted in Art. 27 (4) Draft SPE Regulation and Art. 28 (4) Draft SPE Regulation HU3. By contrast, the European Parliament proposed to include rules on challenging shareholder resolutions into the SPE Regulation (Art. 27 [4] Draft SPE Regulation EP).

67 Sec. 11.28 EMCA distinguishes between voidable and void resolutions, a distinction that is familiar from German and Scandinavian law. Voidable resolutions must be challenged in court within three months, otherwise they will be valid. However, this does not apply to void resolutions. This category is confined to particularly severe infringements, especially breaches of requirements that the shareholders cannot waive. Note also that in Germany the rules on challenging shareholder resolutions were recently

*d) Shareholder Rights and Transfer of Shares*

The Draft SES Statute also contains only few mandatory provisions on shareholder rights. Beyond these provisions, the principle prevails that the shareholders are free to shape the articles of association according to their wishes. For instance, the draft expressly states that the voting and dividend rights associated with a share are in principle proportionate to the capital share, but the articles of association may provide otherwise (Art. 3.1.12. SES-DS).

Apart from the right to convene a shareholders' meeting and add items to the agenda (*supra* at III. 3. c), the Draft SES Statute provides a mandatory shareholder right to receive specific information from the company. If a shareholders' meeting is convened, the directors (or the chairman of the shareholders' meeting, as the case may be) are obliged to provide the shareholders with all information required to vote in an informed manner (Art. 3.1.9. [1] SES-DS). In the meeting itself, the shareholders have a right to ask questions on the items of the agenda (Art. 3.1.9 [2] SES-DS). In addition, the articles of association may provide that the shareholders are also entitled to ask questions outside a shareholders' meeting, in which case the directors must answer these questions in the next shareholders' meeting at the latest (Art. 3.1.9. [3] SES-DS). However, the Draft SES Statute does not provide for a shareholder's right to inspect the documents of the company, as recognised under the EMCA and German law.<sup>68</sup> It is not entirely clear under the current draft whether the shareholders are free to stipulate a right of inspection in the articles of the association because Art. 3.1.9 (3) SES-DS makes no mention of this option. In the light of the general principle of freedom of contract (Art. 1.1.2. [1] SES-DS), the better view arguably is that the draft does not wish to exclude this option. Nonetheless, it may be helpful to clarify this in a future version of the draft.<sup>69</sup>

The Draft SES Statute also includes several provisions on the shareholders' right to withdraw from the company in certain circumstances. On the one hand, Art. 3.1.15 (2)-(4) SES-DS grants each shareholder a right to withdraw for cause if certain narrowly defined fundamental changes occur, such as trans-

reformed for commercial partnerships along lines similar to the EMCA; see §§ 110 seqq. Commercial Code (*Handelsgesetzbuch*, HGB) as amended by the Partnership Law Reform Act (*Gesetz zur Modernisierung des Personengesellschaftsrechts*) of 10 August 2021.

68 See Sec. 11.24 EMCA, § 51 a GmbHG.

69 Note that the last SPE proposal explicitly provided that a shareholder's right to access company documents may be included in the articles of association; Art. 8 (1a) s. 1 and Annex I no. 21 Draft SPE Regulation HU3. In Germany, the Federal Council (*Bundesrat*) also advocated providing for this option in the SPE Regulation; Bundesrats-Drucksache (Federal Council document) 479/08 (Beschl.), p. 21 seq.

ferring the registered office to another Member State or an abusive decision favouring the majority at the expense of the withdrawing party.<sup>70</sup>

On the other hand, the draft also contains special exit provisions for companies whose articles of association impose restrictions on the transfer of shares (Art. 3.1.14. (2) SES-DS), as will often be the case. Typically, the restriction will consist in a rule that the share transfer requires the consent of the other shareholders, the shareholders' meeting or another company organ.<sup>71</sup> At first blush, it may seem that a shareholder, who applies for the consent to an intended transfer of his shares and such consent is refused, must keep his shares. However, Art. 3.1.14. (4) SES-DS offers a different solution: it grants the shareholder a right to transfer his shares to the company or a third party designated by the company. The "modalities" of this share purchase and transfer, including the criteria for determining the price, shall be regulated in the articles of association. If the parties cannot agree on the price, the dispute shall be resolved by an independent expert. This exit mechanism is modelled on similar rules in French law.<sup>72</sup> What is not entirely clear from the current draft, however, is whether the power to regulate the "modalities" in the articles of association also includes the possibility to reduce the scope of the exit right, *e.g.* to cases where a shareholder cannot reasonably be expected to stay a member of the company. Given that the effects of a low threshold exit right on the cooperation of the shareholders are ambivalent,<sup>73</sup> it is submitted here that the shareholders should indeed be free to restrict the exit right's scope in this manner.

Similar to German law,<sup>74</sup> the Draft SES Statute requires shareholders of an SES to be included with their shares in a list of shareholders, which is to be submitted to the national register (Art. 3.1.13. [1], [3] SES-DS). It is the directors' responsibility to maintain and update the list (Art. 3.1.13. [1] s. 1 SES-DS). In the internal relationship between the shareholders and the company, a person included in the list is presumed to be a shareholder unless proven otherwise (Art. 3.1.13. [2] SES).<sup>75</sup>

70 This provision is substantially narrower than the exit right contained in the Commission's SPE proposal (Art. 18 Draft SPE Regulation COM).

71 Under Art. 3.1.14. (3) SES-DS, it would also be possible to provide a strict prohibition of share transfers, albeit only for a limited time period.

72 Art. L228-24 Abs. 2 Code com. (SA, SAS), and Art. L223-14 Abs. 3 Code Com. (SARL).

73 For a closer analysis, see *Frauke Wedemann*, *Gesellschafterkonflikte in geschlossenen Kapitalgesellschaften*, 2013, p. 106 seqq., 475 seqq. (with a critical account of the named French provisions).

74 Cf. § 40 GmbHG.

75 In this respect, the Draft SES Statute differs from the prevailing opinion under German law (§ 16 [1] GmbHG) which assumes that, subject to certain restrictions, entry into the

The transfer of shares is not subject to a particular form required under the Draft SES Statute. Instead, as in the context of formation (*supra* at III. 2. b), the draft leaves it to the Member States to apply their national form requirements, if any, to share transfers in companies registered in their territory (Art. 3.1.14. (1) s. 2 SES-DS).<sup>76</sup> As a result, the transfer of shares in an SES registered in Germany would require notarisation (as in a German GmbH),<sup>77</sup> while the transfer of shares in an SES registered in France would not be subject to any statutory form (as in a French SAS). Since the draft only mentions the form of the “transfer” (“*cession*”, “*Übertragung*”), it is not entirely clear whether the reference to national law also applies to the form of the underlying purchase agreement.<sup>78</sup> While the answer is arguably in the affirmative, the point should be clarified in a future revision of the draft.

#### e) Employee Participation

As mentioned above (*supra* at I. 1.), employee representation on the supervisory or administrative board was the central stumbling block in the failed negotiations on the SPE and SUP proposals. Likewise, the SES initiative will only have a future if the participating Member States are able to reach an agreement on how to prevent the circumvention of national employee participation laws.

The Draft SES Statute takes a new approach to this issue. On the one hand, it does not follow the Commission proposals on the SPE and the SUP, which provided that, as a general rule, employee representation on the board should be governed by the national law of the State of the company’s registered office.<sup>79</sup> These proposals were unacceptable for the Member States with high em-

list causes an *irrebuttable* presumption of share ownership in the internal relationship between the company and its members; see *Verse* (fn. 57), § 16 GmbHG mn 11b with further references.

76 This corresponds with the approach taken in the last SPE proposal (Art. 16 [1] Draft SPE Regulation HU3). By contrast, the Commission’s SPE proposal provided for a requirement of the written form (Art. 16 (2) Draft SPE Regulation COM), but this was heavily criticized in particular in Germany; see German Federal Council (*Bundesrat*), Bundesrats-Drucksache (Federal Council document) 479/08 (Beschl.), p. 14; German Notaries’ Association (*Deutscher Notarverein*), opinion of 31 July 2008 (fn. 40), C. II.

77 § 15 (3) GmbHG.

78 Under German law, both the transfer itself and the underlying purchase agreement require notarisation under § 15 (3) and (4) GmbHG, respectively.

79 Cf. Art. 34 (1) Draft SPE Regulation COM (subject to exceptions in the case of a transfer of the registered office and in the case of cross-border mergers; Art. 34 (2), (3), 38 Draft SPE Regulation COM), and Art. 7 (4) Draft SUP Directive COM. On the criti-

ployee representation standards since it would have been straightforward to bypass these standards by placing the company's registered office in another Member State. On the other hand, the draft also does not follow the last compromise proposals on the SPE, which contained a complex set of rules that, with some modifications, was modelled on the employee participation rules for the European Company (SE) and for cross-border mergers (consisting of a negotiating procedure and a statutory standard rule).<sup>80</sup>

Instead, the Draft SES Statute provides that the Member State where an SES has its head office (real seat) is entitled to apply its domestic rules on employee board representation to that company even if its registered office is in another Member State (Art. 1.1.2. [3] SES-DS). In other words, the Draft SES Statute allows the real seat Member State to extend its provisions on employee participation to SESs with their registered office abroad. With this approach, the draft takes up an idea that has been discussed in Germany for some time. In the German debate, the proposal was made (but not implemented so far) to introduce a provision into the national law that extends the domestic employee board representation rules to foreign companies having their real seat in Germany.<sup>81</sup> It is precisely this solution that the Draft SES Statute now suggests for employee participation in an SES.

This new approach has the advantage of a relatively simple, straightforward solution at the European level. It should make it considerably easier for the Member States to reach a consensus on this difficult issue because it leaves it to the individual Member States to decide to what extent they wish to extend their domestic employee representation rules to an SES with a domestic real seat and a foreign registered office. In other words, there is no need for the Member

cism of these proposals, see the resolution of the German Federal Parliament (*Bundestag*) of 7 May 2015 (fn. 10), p. 4 seq.; *Lutter/Bayer/Schmidt* (fn. 36), mn. 47.84, 47.117.

80 See Art. 35 seqq. Draft SPE Regulation HU3. For an analysis of this proposal and the preceding compromise proposals, see *Rüdiger Krause*, Co-determination by Workers under the proposed European Private Company, in: Heribert Hirte/Christoph Teichmann (eds.), *The European Private Company – Societas Privata Europaea (SPE)*, 2013, p. 375.

81 See the proposals for a so-called Employee Participation Extension Act ("Mitbestimmungserstreckungsgesetz") by the parliamentary group of the Social Democratic Party of Germany of 16 June 2010, *Bundestags-Drucksache* (parliamentary document) 17/2122, and the parliamentary group of the Socialist Party ("Die Linke") of 21 April 2010, *Bundestags-Drucksache* (parliamentary document) 17/1413. For a discussion of these proposals and, in particular, the issue of whether they are compatible with EU law, see e.g. *Christoph Teichmann*, "Mitbestimmungserstreckung auf Auslandsgesellschaften", *Zeitschrift für Wirtschaftsrecht (ZIP)* 2016, 899; *Marc-Philippe Weller*, Unternehmensmitbestimmung für Auslandsgesellschaften, in: Bernd Erle (ed.), *Festschrift für Peter Hommelhoff zum 70. Geburtstag*, 2012, p. 1275.

States to agree on a uniform set of provisions on the negotiating procedure, the standard rule and the threshold (minimum number of employees) that triggers the application of this regime.

The suggested approach also has another significant advantage (from an employee representation-friendly perspective). In an SE and in the case of cross-border conversions, mergers and divisions, the standard rule leaves a loophole for companies who convert into an SE or a foreign legal form without employee participation shortly before reaching the domestic employee participation threshold. In this case, the company remains free of employee participation even when it later exceeds that threshold (“employee participation freeze”).<sup>82</sup> By contrast, the Draft SES Statute gives the Member State of the company’s real seat the power to block this escape route.<sup>83</sup>

Nevertheless, it is not hard to predict that the employee participation issue will likely cause controversial discussions in future deliberations on the SES. Although the draft is friendly towards employee participation, it was already criticised in Germany as allegedly insufficient to protect employee participation.<sup>84</sup> One criticism is that the protection does not take effect until the relevant Member State decides to act and extends its employee participation laws to the SES. A second criticism is that the Draft SES Statute cannot be

82 This is due to the “before-after” principle under Art. 7 of the SE Employee Participation Directive (Directive 2001/86/EC) and Art. 86l, 133, 160l of the Company Law Directive (Directive [EU] 2017/1132 as amended by Directive [EU] 2019/2121), which aims at maintaining the previous employee participation status; see *Klaus-Stefan Hohenstatt/Thomas Müller-Bonanni*, in: Matthias Habersack/Florian Drinhausen (eds.), *SE-Recht mit grenzüberschreitender Verschmelzung*, 3<sup>rd</sup> edn. 2022, § 35 SEBG mn. 10, § 43 SEBG mn. 3; *Matthias Habersack*, in: Matthias Habersack/Martin Henssler (eds.), *Mitbestimmungsrecht*, 4<sup>th</sup> edn. 2018, § 5 MgVG mn. 8. The possibility of “freezing” employee participation in the described manner continues to exist also after the recent amendments to the Company Law Directive by the so-called Mobility Directive (Directive [EU] 2019/2121). The amended Directive only extends the negotiating procedure to companies whose number of employees is equivalent to at least four fifths of the applicable employee participation threshold (Art. 86l [2], 133 [2], 160l [2] Company Law Directive), but it does not change the standard rule with its “before-after” principle; see *Titze*, “Unternehmensmitbestimmung bei grenzüberschreitendem Formwechsel und grenzüberschreitender Spaltung”, *Neue Zeitschrift für Arbeitsrecht (NZÄ)* 2021, 752, 754.

83 In doing so, the Draft SES Statute meets one of the key concerns of the German Federal Parliament concerning a future European private company; see Bundestag resolution of 7 May 2015 (fn. 10), p. 5.

84 On the following, see *Lasse Pütz*, Opinion on the Draft SES Statute for the meeting of the Franco-German Parliamentary Assembly’s working group on 1 March 2021 (available at [www.bundestag.de/ausschuesse/weitere\\_gremien/deutsch\\_franzoesische\\_ver\\_sammlung/hwir](http://www.bundestag.de/ausschuesse/weitere_gremien/deutsch_franzoesische_ver_sammlung/hwir)), p. 5 seq., 7 seq.



reconciled with the rules of the German Co-Determination Act because under the draft it is exclusively in the power of the shareholders' meeting to appoint and dismiss the directors in the SES (Art. 3.1.2. [1] s. 3, 3.1.7. [1] SES-DS; *supra* at III. 3. c). In contrast, the Co-Determination Act attributes this competence to the supervisory board (with half of its members being employee representatives).<sup>85</sup> Finally, a third criticism is that the possibility to appoint a legal entity as director (Art. 3.1.4. SES-DS) could be used to undermine the supervisory board's power under the Co-Determination Act to appoint and dismiss the directors. However, none of these concerns should pose an insurmountable obstacle. Of course, the draft's approach requires the Member States to act, but it is difficult to see why this should be inappropriate. The other two concerns can easily be met, if necessary, by adding punctual adjustments to the Draft SES Statute.

There are, however, three other issues that can only be hinted at here. First, from a systematic perspective, one may wonder why the employee participation in an SE, in a cross-border conversion, merger or division, and in an SES shall each be subject to a different set of rules. Second, if one accepts this incoherence, the question arises why the Draft SES Statute regards the place of the company's head office as the crucial element rather than the place of work of the company's employees. Since the extension of domestic employee participation rules to a company registered abroad derives its legitimacy from the fact that the domestic workforce is affected, it is not surprising that several authors argue that the place of work should be decisive.<sup>86</sup> Yet, in this alternative approach, it would be necessary to provide for a "conflict" rule for cases where the company has a significant number of employees in various Member States (e.g. by referring to the law of the Member State in which most employees have their place of work, or to the law of the highest level of employee participation among the affected Member States). Third, irrespective of whether the head office or the place of work is considered the crucial element, it is evident that any form of extension of national employee participation laws is to the detriment of the aspired uniformity of the SES. Therefore, it would be desirable to explore in further deliberations whether the interested Member States can at

85 § 31 Co-Determination Act (*Mitbestimmungsgesetz*, MitbestG). The Co-Determination Act only applies to companies with more than 2,000 employees in Germany, § 1 (1) MitbestG. However, if a company has fewer employees but still more than 500 employees in Germany, the so-called One-Third Participation Act (*Drittelbeteiligungsgesetz*, DrittelbG) applies. This Act also requires forming a supervisory board with employee representatives (one third of the supervisory board's members), but in this case, the power to appoint and dismiss the directors rests with the shareholders' meeting.

86 See *Krause* (fn. 80), 375, 390 sq.; *Teichmann* (one of the co-authors of the SES Draft Statute) (fn. 81), 903.

least agree on a uniform minimum threshold (even it is only a low threshold) below which no Member State is entitled to extend its national employee participation regime to an SES registered abroad.<sup>87</sup>

#### 4. Corporate Finance

In the context of formation, reference has already been made to the minimum share capital and the rules on capital raising (*supra* at III. 2. c). As regards capital maintenance, the Draft SES Statute provides a conventional balance sheet test (Art. 4.1.1. [2] SES-DS). Accordingly, neither open nor hidden distributions (Art. 4.1.1. [1] SES-DS) may result in the company's assets no longer covering the sum of liabilities and share capital after the distribution. Somewhat surprisingly, the explanatory notes on Art. 4.1.1. (2) SES-DS mention that this provision is also meant to contain a solvency test, but the provision's wording does not reflect this. If it is intended to require a solvency test in addition to a balance sheet test, this should therefore be clarified in a future revised draft.<sup>88</sup> In the author's view, in the interest of creditor protection there is much to be said for a combination of the two tests, as also provided for in Sec. 7.02 EMCA.<sup>89</sup> However, combining the two tests was a controversial issue in the consultations on the SPE and the SUP proposals.<sup>90</sup>

87 In this context, it is worth noting that the relevant thresholds vary considerably among the Member States providing for employee board representation. While in Germany the threshold lies at 500 employees (fn. 85), some other Member States have much lower thresholds, namely Sweden (25 employees, § 4 Board Representation [Private Sector Employees] Act), Denmark (35, § 140 Companies Act), Finland (150, §§ 2, 5 Act on Personnel Representation in the Administration of Undertakings), Hungary (200, § 38 Act on Business Associations), and Austria (300, § 29 Limit Liability Companies Act in conjunction with § 110 [1], [5] Labour Constitution Act).

88 For a concurring view, see *Harbarth*, in: Geibel/Heinze/Verse (fn. 28), IV. 3. b) bb). In line with this, the resolution of the Franco-German Parliamentary Assembly (fn. 19), p. 7 (*sub* I. 2. c.), considers it necessary to “deepen the provisions of the draft regarding the solvency test.”

89 For a detailed discussion of the pros and cons, see, e.g., *Schön*, “Balance Sheet Tests or Solvency Tests – or Both?”, *European Business Organization Law Review (EBOR)* 7 (2006), 181 with further references. For German law which also combines the two tests (balance sheet test under § 30 [1] GmbHG, solvency test under § 15b (5) Insolvency Statute [*Insolvenzordnung*, InsO], formerly § 64 s. 3 GmbHG), see *Dirk A. Verse*, in: Scholz (ed.), *GmbH-Gesetz*, 12<sup>th</sup> edn. 2018, § 30 mn. 13.

90 In the consultations on the SPE, the European Parliament was in favour of adding a mandatory solvency test to the balance sheet test (albeit only for companies with a share capital of less than EUR 8,000, Art. 19 [4], Art. 21 Draft SPE Regulation EP). In the consultations on the SUP, the Commission also took up the idea of combining the two tests (Art. 18 Draft SUP Directive COM). However, in the subsequent SPE and SUP

Unlike German law,<sup>91</sup> the Draft SES Statute does not include a special provision on upstream loans (including loans in a cash pool). The explanatory notes to Art. 4.1.1. Draft SES Statute, however, point out that granting a loan to a shareholder whose financial standing is doubtful may constitute a (hidden) distribution and that, therefore, the granting of upstream loans is to be measured against the general restrictions on distributions.

The provisions on capital increases and capital reductions are within the boundaries of what could be expected. A subscription right is provided only for capital increases in cash, with the possibility of excluding this right in the articles of association or by shareholder resolution (Art. 4.1.2. [2] SES-DS). The details, including majority requirements, are left to the articles of association. In the case of capital reductions, the Draft SES Statute distinguishes whether or not the reduction serves to offset losses incurred by the company. If this is not the case, the company's creditors are protected by a claim to obtain security for their claims (Art. 4.1.3. [2] of the SES-DS), mirroring the rule for public companies in Art. 75 Company Law Directive.<sup>92</sup>

### 5. *Last but not Least: Corporate Groups*

Given that the SES is designed not least as a legal form for subsidiaries of a corporate group (*supra* at II. 1.), it is of particular relevance that the Draft SES Statute also contains a provision that deals specifically with the SES as a group company (Art. 3.1.6. SES-DS).

#### *a) Management of the Subsidiary “in the Light” of the Interest of the Group*

In this context the key issue, much debated in European company law, is whether and in which circumstances the director of a subsidiary is entitled to take actions that are contrary to the interest of the subsidiary, but in the interest of the group. The Draft SES Statute addresses this fundamental issue, albeit only very briefly.

Art. 3.1.6. (1) Draft SES Statute starts by defining a corporate group. According to this definition, an SES forms part of a group if another company holding

drafts, the issue was left to be decided by the Member States; see *Lutter/Bayer/Schmidt* (fn. 36), mn. 47.40 seqq., 47.109 seq.

91 § 30 (1) s. 2, 2<sup>nd</sup> alt. GmbHG.

92 A similar provision was set forth in Art. 24 (2a), (3) Draft SPE Regulation HU3; cf. also Sec. 7.30 (3), (4) EMCA.

a majority of capital or voting rights (the parent company) exercises a controlling influence over the SES “within the framework of a coherent corporate policy”. Art. 3.1.6. (2) SES-DS further states that if an SES is a subsidiary of a group as just described, the duties of its directors are to be assessed “in light of the interests of the companies belonging to the group as a whole”. As can be seen from the explanatory notes, with this open wording the draft intends to refer to the famous *Rozenblum* principles developed by the French *Cour de Cassation*.<sup>93</sup> These principles have already been recommended several times as the basis for a European harmonisation of corporate group law.<sup>94</sup> According to the *Rozenblum* principles, which in a similar form have also been adopted in several other Member States,<sup>95</sup> the director of a subsidiary may subordinate his company’s interest to the interest of the group, if four requirements are met. (i) The group must be well established in a firm structure, (ii) the group must have a coherent group policy, (iii) the burdens and benefits from the integration into the group policy must be fairly balanced between the group companies when viewed as a whole over the long term, and (iv) the company must not be exposed to the risk of insolvency.<sup>96</sup>

93 The seminal case is *Cour de Cassation, chambre criminelle*, 4 February 1985, n° 84-91.581, *Recueil Dalloz/Sirey* 1985, 478.

94 See, in particular, *Forum Europaeum Corporate Group Law*, “Corporate Group Law for Europe”, *European Business Organization Law Review* (EBOR) 1 (2000), 165, 197 seqq.; cf. also Report of the High Level Group of Company Law Experts on a modern regulatory framework for company law in Europe, 4 November 2002, p. 97; Report of the Reflection Group On the Future of EU Company Law, 5 April 2011, p. 62 seqq. For a critical assessment of the *Rozenblum* doctrine, see however, e.g., *Matthias Habersack*, “Europäisches Gesellschaftsrecht im Wandel”, *Neue Zeitschrift für Gesellschaftsrecht* (NZG) 2004, 1, 7 seq.; *Tobias H. Tröger*, *Corporate Groups – A German’s European Perspective*, in: *Holger Fleischer/Jesper Lau Hansen/Wolf-Georg Ringe* (eds.), *German and Nordic Perspectives on Company Law and Capital Markets Law*, 2015, p. 157, 196 seqq. (both arguing the doctrine is too vague to ensure adequate minority protection); see also *Pierre-Henri Conac*, “The Chapter on Groups of Companies of the European Model Company Act (EMCA)”, *ECFR* 2016, 301, 303 (minority protection “arguably insufficient under French law”).

95 For an overview, see *Conac* (fn. 94), 304 seq.; *Jessica Schmidt*, “Europäisches Konzernrecht”, *Der Konzern* 2017, 1, 2; specifically on Czech and Hungarian law, see *Petr Čech*, *Neues tschechisches Recht für faktische Konzerne – vom deutschen Konzernrecht zu Rozenblum oder ein dritter Weg?*, in: *Peter Hommelhoff/Marcus Lutter/Christoph Teichmann* (eds.), *Corporate Governance im grenzüberschreitenden Konzern*, 2017, p. 67 seqq.; *Christian Schubel*, *Die gesetzgeberische Umsetzung des Rozenblum-Konzepts – dargestellt am Beispiel ostmitteleuropäischer Rechtsordnungen*, in: *ibid.*, p. 197 seqq.

96 For a detailed analysis of the *Rozenblum* principles, see *Forum Europaeum Corporate Group Law* (fn. 94), 197 seqq.; *Marie-Emma Boursier*, “Le fait justificatif de groupe de sociétés dans l’abus de biens sociaux : entre efficacité et clandestinité”, *Revue des sociétés*

This is not the place to revisit in depth the intensive debates on group law harmonisation in the EU. Therefore, only this much: A central goal of a supra-national recognition of the group interest is to provide the directors of the subsidiary and the parent company with a *clear, reliable legal framework* within which the group interest can prevail at the expense of the interest of the subsidiary.<sup>97</sup> Moreover, in line with one of the fundamental concerns of the SES (*supra* at II. 1.), the aim is to create a *uniform* regime that enables parent companies to operate their subsidiaries in different Member States with the same standards and without having to analyse if and to what extent the legislation in the other Member State does or does not recognise the interest of the group.<sup>98</sup>

Measured against these standards, one cannot help but notice that Art. 3.1.6. (2) Draft SES Statute fails to offer a satisfactory solution.<sup>99</sup> Its wording is very vague – it does not contain any indication of the limits of the prevalence of the group interest that must be observed in the interest of the subsidiary’s creditors and, if applicable, its minority shareholders. Due to this vagueness, there is also a substantial risk that the goal of uniformity will not be achieved. It is to be feared that, in the absence of clear guidelines in the SES Statute, the courts of the Member States will interpret the provision in different ways and may be guided by the different approaches to the recognition of the group interest in their respective national laws.

The EMCA demonstrates how a more convincing approach could look like. Sec. 15.16 (1), (2) EMCA sets forth a much more concrete model provision on the interest of the group that, at least in its basic structure, could serve as a basis for reaching a consensus on this issue. In contrast to the SES Draft Statute, the EMCA rightly differentiates between wholly-owned and other subsidiaries.<sup>100</sup> Given that minority shareholder protection is not an issue in a wholly-owned

2005, 273; *Pierre-Henri Conac*, Das französische Recht zur Anerkennung des Gruppeninteresses seit der Rozenblum-Entscheidung, in: Peter Hommelhoff/Marcus Lutter/Christoph Teichmann (eds.), *Corporate Governance im grenzüberschreitenden Konzern*, 2017, p. 89; *Anne Kristin Krafft*, Die Rozenblum-Doktrin, ihre Fortschreibung bis zur Gegenwart und ihr Vergleich zur Treuepflicht im faktischen GmbH-Konzern, 2020, p. 80 seqq.

97 See, e.g., Reflection Group (fn. 94), p. 60 (“A major advantage of the recognition of the group is that it provides more clarity to the directors of the subsidiary as to which transaction or operations they can approve.”); Informal Company Law Expert Group (ICLEG), Report on the recognition of the interest group, October 2016, p. 29.

98 Reflection Group (fn. 94), p. 61; ICLEG (fn. 97), p. 29 seq.

99 For a concurring view, see *Harbarth*, in: Geibel/Heinze/Verse (fn. 28), IV. 3. c).

100 This differentiation is also advocated by ICLEG (fn. 97), p. 40 seqq. It is also generally accepted in German limited liability company law; see *Verse* (fn. 57), Anh. § 13 GmbHG mn. 43 seqq.

subsidiary, the subsidiary's director is in this case entitled to act in the interest of the group at the expense of the interest of his company, as long as (in the interest of the subsidiary's creditors) the continued solvency of the subsidiary is not put in jeopardy (Sec. 15.16 [1] [a], [c], [2] EMCA). By contrast, in subsidiaries with minority shareholders, the prevalence of the group interest additionally requires that the director may reasonably assume that any disadvantage for his company will be balanced, within a reasonable period, by an equivalent advantage (Sec. 15.16 [1] [b] EMCA).

While it may be possible to refine the EMCA's approach further,<sup>101</sup> it already comes considerably closer to the desired legal clarity and uniformity than the current SES draft. It would be a significant step forward if further deliberations on the Draft SES Statute reached a consensus on a more specific and more ambitious provision for recognising the group interest. If successfully tested in the SES, such a provision could perhaps one day serve as a model also for harmonising the Member States' national laws.

### *b) Contractual Group*

The Draft SES Statute also briefly addresses the so-called contractual group (“*Vertragskonzern*”) that exists in some of the Member States.<sup>102</sup> It provides that the aforementioned provision on the group interest does not apply if the parent company is under a contractual obligation to cover any losses of the subsidiary (Art. 3.1.6. [3] SES-DS). As set forth in the explanatory notes, this means that in this case the prevalence of the group interest is not subject to the *Rozenblum* requirements. Implicitly, the provision recognizes that an SES can be part of a contractual group as a matter of principle. The prerequisite for this is that the law of the Member State of the company's registered office foresees this possibility also for its national private companies (Art. 1.1.2. [2] SES-DS).

101 For instance, the requirement that the subsidiary's continued solvency may not be put in jeopardy could be defined more precisely by providing that the subsidiary's director may only act in the interest of the group at the expense of the interest of his company if the same restrictions are observed as apply to distributions. In other words, (i) the non-distributable capital must remain unaffected (balance sheet test), and (ii) the requirements of the solvency test (which is still to be concretized) must be met. For a similar approach, see the proposals by ICLEG (fn. 97), p. 42 seq. (options 2 and 3), that also refer to the balance sheet test and the solvency test, albeit only alternatively rather than cumulatively.

102 Apart from Germany (domination agreement [“*Beherrschungsvertrag*”] under §§ 291 seqq. AktG), this applies to Portugal, Slovenia and Hungary; see *Christoph Teichmann*, “Konzernrecht und Niederlassungsfreiheit”, *Zeitschrift für Unternehmens- und Gesellschaftsrecht* 2014, 45, 51 seqq.

#### IV. Conclusion

Taken together, there are certainly several issues where the Draft SES Statute needs further thought, not only in detail but also in some of the central issues (such as the group interest or the solvency test). A critical reader may also observe that the attempt to present a draft as concise and simple as possible sometimes goes at the expense of precision, and that the number of references to national law could be further reduced (e.g. in the case of challenging shareholder resolutions).<sup>103</sup> Finally, one may note that the draft has a certain bias towards French law, while international developments and standards, such as the EMCA, could have been given greater consideration.

However, these concerns should not obscure the big picture. What is far more important is that the SES initiative gives a fresh impetus to revive the long-overdue idea of a European private company. This impetus is highly welcome, given that the merits of introducing a new supra-national legal form that fits the needs of SMEs and cross-border groups are obvious and undeniable. There is no doubt that, despite the concerns mentioned, the Draft SES Statute presented by the *Association Henri Capitant* provides a suitable basis for further work towards this goal. In a number of issues, the Draft SES Statute draws consequences from the failed SPE and SUP proposals in an attempt to avoid controversies of the past (e.g. with respect to minimum capital or the involvement of notaries in the company's formation and transfer of shares under national law). The same holds true for the notoriously difficult issue of employee participation. With the idea of allowing the real seat Member State to extend its employee participation laws to an SES registered in another Member State, the draft presents an innovative approach for a compromise that also meets the concerns of the participation-friendly Member States. It is for good reason, therefore, that a large majority of the members of the Franco-German Parliamentary Assembly have welcomed the SES initiative and called on the French and German governments to consider the SES proposal and coordinate their efforts to create a new supra-national private company on this basis. One can only hope that these supportive words for a private European company will eventually translate into action!

103 A reduction of the number of references to national law is also advocated in the resolution of the Franco-German Parliamentary Assembly (fn. 19), p. 7 (at 2. d).