Selected problems concerning formation of a holding SE (societas europaea)

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A. Introduction

Formation of a holding SE is one of the four ways of establishing a European Company (*societas europaea* - 'SE') as regulated in the Council Regulation No 2157/2001 on the Statute for a European Company (cited below: SE-Reg.).[1] It is also an original way of European company law to create a joint stock company. It´s true that companies are making use of the holding structure in order to combine their economic potentials and to create international groups of enterprises.[2] But, as it was in the case of the formation of the *Aventis S.A.*,[3] the holding structures usually come into existence by means of an increase of the subscribed capital in an existing company.[4] The new shares are issued to the shareholders of another company who pay for it with the shares of their company. The operation results in formation of a holding structure in which the company that increased its capital, becomes a holding company dominating a company or companies the shares of which were contributed. The formation of a holding SE is guided by the similar idea: an exchange of the shares of national private or public limited liability companies into the shares of a European Company. However, in contrast to the Aventis like-cases, the dominant company, i.e. the SE, does not exist yet but has to be created by the

[1] O.JL. 2001 No 294 p. 1. The other ways of SE formation are: merger, formation of a subsidiary SE, conversion of an existing public-liability company into an SE. See Art. 2 SE-Reg.

[2] Advantages, especially fiscal ones, of creating a holding structure on the European level are presented by J.-L. Colombani, M. Favero, *Societas Europaea. La société européenne,* Paris 2002, pp. 86 et seq. On economic aspects of an international concentration of enterprises see also R. Buchheim, *Europäische Aktiengesellschaft und grenzüberschreitende Konzernverschmelzung*, Wiesbaden 2001, pp. 52 et seq.

[3] On the formation of Aventis S.A. as a result of concentration between the French company Rhône-Poulenc S.A. and the German company Hoechst AG see J. Hoffmann, *Die Bildung der Aventis S.A. – ein Lehrstück des europäischen Gesellschaftsrechts*, Neue Zeitschrift für Gesellschaftsrecht (NZG), 1999, pp. 1077 et seq. See also G. Thoma and D. Lauering, *Die Europäische Aktiengesellschaft – Societas Europaea*, Neue Juristische Wochenschrift (NJW) 2002, pp. 1449, 1452.

[4] On various models of holding formation see: H. Theißen, *Die Gründung einer Holdinggesellschaft de lege ferenda. Vorschlag einer zukünftigen Regelung im Umwandlungsgesetz*, Berlin 2000, pp. 11 et seq.; E.-T. Kraft in: M. Lutter, *Holding Handbuch. Recht, Management, Steuern,* Köln 1998, pp. 69 et seq.

https://doi.org/10.1017/S2071832200015790 Published online by Cambridge University Press

companies according to the provisions of the SE-Regulation. This fact as well as many legal gaps existing in the scanty regulation of holding formation and the necessity to apply both the provisions of European and national law concomitantly may lead to many legal problems some of which will be presented below.

B. The law applicable to the formation of a holding SE

Formation of an SE as a holding company is governed first of all by the provisions of the SE Regulation. The formation procedure is regulated in articles 32-34 SE-Reg. The kind of companies which can promote the formation and the conditions which have to be fulfilled are determined in Art. 2 par. 2 SE-Reg. Furthermore, Art. 34 SE-Reg. empowers Member States to adopt provisions designed to ensure protection of minority shareholders who oppose the operation as well as creditors and employees of promoting companies. In the matters not regulated in the Regulation the formation of an SE shall, in accordance to the general provisions of Art. 15 SE-Reg., be governed by the law applicable to public limited-liability companies in the state in which the SE establishes its registered office. As has been pointed out in the German legal doctrine[5], the cited provision only refers to the final phase of the SE formation, e.g. registration procedure and other provisions concerning the creation of a company, and not to the preliminary phase of formation which is taking course in the promoting companies, e.g. the information of shareholders, manner of preparation and holding of the general assembly in each of them. The question is: Which law is applicable to the preliminary phase ? In the regulation of formation of a SE by merger, Art. 18 SE-Reg. SE-Reg. refers in matters not governed by section 2 of title II to the national provisions to which each company involved is subject and which apply to mergers of public limited-liability companies in accordance with the Third Directive (78/855/EEC)[6]. The adequate provision is missing in the regulation of formation of a holding SE. The general provision of Art. 9 SE-Reg. cannot be taken into account, because it determines the law applicable to the SE; but the SE is just being created and does not exist yet.

Among academics two proposals were made to close the existing legal gaps by means of a systematic analogy on the level of European company law.[7] Like merger and division, the formation of a holding is a measure of companies´ restructuring

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[5] Ch. Teichmann, *Die Einführung der Europäischen Aktiengesellschaft. Grundlagen der Ergänzung des europäischen Statuts durch den deutschen Gesetzgeber*, Zeitschrift für Unternehmens- und Gesellschaftsrecht (ZGR) 2002, p. 383, 416 with regard to the formation by merger; J. Neun in: M. R. Theisen and M. Wenz (eds.), *Europäische Aktiengesellschaft. Recht, Steuern und Betriebswirtschaft der Societas Europaea*, Stuttgart 2002, pp. 66 et seq.

[6] Third Council Directive of 9 October 1978 based on Article 54 (3) (g) of the Treaty concerning mergers of public limited liability companies, O.JL. 1978 No 295 p. 36.

[7] Ch. Teichmann, supra (n. 5), p. 434.

regulated in European law.[8] The regulations of the mentioned measures contained in the Third (78/855/EEC) and the Sixth Directive (82/891/EEC)[9] as well as in the SE-Regulation follow the same pattern: preparation of the draft terms including the explaining report, its publication and examination by an independent expert. The enumerated steps are aimed at protecting the shareholders and creditors of the companies taking part in the restructuring. It justifies the conclusion that the legal gaps in the regulation of a holding SE can be closed by means of an analogy to adequate provisions contained in the Third and the Sixth Directives or, precisely speaking, to provisions of national law, to which the promoting companies are subject, in accordance to these Directives. It seems also possible to close the legal gaps by means of an analogy within the Council Regulation, i.e. an analogy to the regulation of the formation of SE by merger including the cited provision of Art. 18 SE-Reg.[10] This may also result in the application of the national law to which the promoting companies are subject and which implements the provisions of the Third Directive. Such an analogy can be based on the general similarity of both procedures of the SE formation as well as on the significance and extent of the merger regulation.[11]

C. Companies promoting the formation of a holding SE

The formation of a holding SE can be promoted not only by public limited-liability companies as it is the case in the formation of an SE by merger, but also by private limited-liability companies as referred to in Annex II of the Regulation. There have to be at least two companies which are willing to promote the formation of a holding SE (in the following: promoting companies); they have to meet the requirements of Art. 2 par. 2 SE-Reg. First of all each of them must be formed under the law of a Member State and must have its registered as well as its head office within the Community, but not necessarily in the same Member State. However, the Regulation empowers a Member State to enact a provision that a company which has its head office outside the Community may participate in the formation of an SE if it is formed under the law of a Member State, has its registered office in that Member State and has a real and continuous link with a Member State's economy (Art. 2 par. 5 SE-Reg.). As it seems, the cited provision is of significance

[8] On the frames of the European restructuring law see: P. Hommelhoff and K. Riesenhuber, *Strukturmaßnahmen, insbesondere Verschmelzung und Spaltung im Europäischen und deutschen Gesellschaftsrecht*, in: S. Grundmann (ed.), *Systembildung und Systemlücken in Kerngebieten des europäischen Privatrechts*, Tübingen 2000, pp. 259, 263 et seq.

[9] Sixth Council Directive of 17 December 1982 based on Article 54 (3) (g) of the Treaty, concerning the division of public limited liability companies (82/891/EEC), O.JL.1982 No 378 p. 47.

[10] See J. Neun, supra (n. 5), p. 139.

[11] See also J.-L. Colombani, M. Favero, supra (n. 2), p. 83 who refer to the regulation of SE formation by merger in the case of ambiguity.

only for the Member States where the so called incorporation theory is in force and where it is admitted that the registered office and the head office of a company are in different countries.[12]

The further requirements the promoting companies have to meet are determined alternatively: At least two of them either have to be governed by the law of different Member States or must have had, for at least two years, a subsidiary governed by the law of another Member State or a branch situated in another Member State.[13] It will therefore be possible that a holding SE is created by companies which are registered as well as are having their head office in the same Member State, if each of them has a subsidiary or a branch in another Member State. The requirement of an international link in case of formation of a holding SE is less severe compared to the formation of a SE by merger. The requirement of two years existence of a subsidiary or a branch should ensure that the international link of each of the promoting companies has a real character and that a foreign subsidiary or branch was established not only for the sake of promoting the formation of a holding SE. It is also not excluded that a holding SE will have its registered office in another Member State than the state or states where the promoting companies have their offices. So for example two companies with their registered office in Germany and meeting the requirements of Art. 2 par. 2 SE-Reg., will be able to establish a holding SE in France.

In connection with cited art. 2 par. 2 SE-Reg. the question arises what should be understood under the notion "subsidiary" used in this provision. The SE Regulation itself doesn´t contain any definition of this notion. However, it seems to be justified to refer to the definition of the subsidiary contained in art. 2 lit. c of the Directive of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees (2001/36/EC).[14] This provision makes a reference to art. 3 par. 2-7 of the Directive 94/45/EC on the establishment of a European Works Council.[15] According to art. 3 par. 2 lit a)-c) of that Directive the ability to exercise a dominant influence shall be presumed, without prejudice to proof to the contrary, when an undertaking in relation to another undertaking

[12] Ch. Teichmann, supra (n. 5), p. 414; J. Neun, supra (n. 5), p. 65.
[13] G.Ch. Schwarz, *Zum Statut der Europäischen Aktiengesellschaft*, Zeitschrift für Wirtschaftsrecht (ZIP) 2001, pp. 1947, 1850; J. Neun, supra (n. 5), p. 63; Ch. Teichmann, supra (n. 5), p. 411. The opposite opinion takes P. Hommelhoff, *Einige Bemerkungen zur Organisationsverfassung der Europäischen Aktiengesellschaft*, Die Aktiengesellschaft (AG) 2001, pp. 279, 281, n. 15: only one of the participating companies being subject to the same national law has to have an international link in form of a subsidiary or a branch in another Member State.
[14] O.JL.2001 No 294 p. 22. See J. Neun, supra (n. 5), p 64 who also takes into account the definition of the subsidiary contained in art. 3 sec. 1 of the Directive of 23 July 1990 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States (90/435/EEC), O.JL.1990 No 225 p. 6.
[15] O. JL. No 254 from 30.09. 1994 pp. 0064 – 0072.

directly or indirectly holds a majority of that undertaking's subscribed capital, or controls a majority of the votes attached to that undertaking's issued share capital, or can appoint more than half of the members of that undertaking's administrative, management or supervisory body.

D. The process of forming a holding SE

I. Preparation and publication of the draft terms

The process of forming a holding SE as regulated in the Council Regulation commences with a drawing up of the draft terms (art. 32 par. 2 SE-Reg.). By negotiating and working in common the management or administrative organs of the promoting companies draw up the draft terms in the same terms; nevertheless small differences which are due to the difficulties in the translation seem to be unavoidable and admissible. For each of the companies promoting the operation, the draft terms for the formation of the holding SE shall be published in the manner laid down in each Member State´s national law in accordance with Art. 3 of the First Directive (68/151/EEC)[16] at least one month before the general meeting which is called to decide thereon. According to the mentioned provision of the First Directive, the draft terms shall be kept in file in the commercial or companies register and be obtainable by application in writing (Art. 3 par. 2 and 3 of the First Directive). Furthermore it is necessary that at least a reference to the document which has been deposited in the register is published in the national gazette appointed for that purpose by the Member State (Art. 3 par.4 of the First Directive).

One can formally differentiate three obligatory parts in the draft terms which are regulated in Art. 32 par. 2 SE-Reg. The first one has to meet the requirements determined in Art. 20 par. 1 lit. a, b, c, f, g, h and i SE-Reg. to which Art. 32 par. 2 SE-Reg. refers. The statutes of the planned SE, the share-exchange ratio and the amount of any compensation are probably the most important points for the shareholders of promoting companies. The second one is a report explaining and justifying the legal and economic aspects of the formation and indicating the implications for the shareholders and for the employees of the adoption of a holding SE. The addressees of the report are the shareholders and employees of the promoting companies. Therefore it should be comprehensible also for people having no legal or economic education. In particular the report should explain economic and legal situation of the participating companies, the suitableness and reasons of the formation of SE-holding from their point of view, procedure of the holding formation, the rights of the shareholders and employees in this procedure

[16] First Council Directive of 9 March 1968 on co-ordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community (68/151/EEC), O.JL.1968, No. 65, p. 8.

and in the planned SE as well as its functioning and organ structure. Besides, it is necessary to describe and explain the methods of evaluation of the promoting companies´ shares as well as the assumed share-exchange ratio.[17]

The third part of the draft is a determination of the minimum proportion of the shares in each of the promoting company which the shareholders must contribute to the formation of the holding SE. That proportion shall be as follows: shares conferring more than 50 % of the permanent voting rights, i.e. at least 50% plus one vote (art. 32 par. 2 last sentence SE-Reg.). The notion "shares conferring the permanent voting rights" may cause difficulties. Such shares are defined neither in the SE-Regulation nor in the national law of many present and future Member States (f.e. German and Polish law). As it seems, only such shares cannot be regarded as "shares conferring the permanent voting rights" which are, as a rule, in a permanent way deprived of the voting rights according to the provision of the statutes of a promoting company. Such shares are known to the national law of many Member States as shares without voting rights or so-called "silent shares" (e.g., *stimmrechtslose Vorzugsaktien*, sec 140 of German Stock Corporation Act 1965 – "SCA"; *acciones sin derecho de voto*, Art. 91 of Spanish Stock Exchange Act 1989; *akcje nieme*, art. 353 sec. 1 of the Polish Commercial Companies Code 2000– "CCC"). The depriving of the voting rights has to be balanced by special privileges attached to them in regard to the dividend to be paid by the company (e.g sec. 139 par. 1 German SCA, art. 353 par. 3 Polish CCC). Such shares cannot be taken into account to determine the proportion according to the last sentence of Art. 32 par. 2 SE-Reg. On the contrary, it seems not to be excluded that a promoting company contributes its one shares to the formation of the SE in exchange for its shares. According to Art. 22 par. 1 lit. a) of the Second Directive (77/91/EEC)[18], which has been implemented in all actual and future Member States, the voting rights attached a company's own shares shall in any event be suspended. However, this suspension of voting rights has an exceptional character and does not deprive them of the quality of permanency. The contribution of own shares by a promoting company in exchange for shares of the SE will lead to mutual participation between these two companies. Applicable in this case are the national provisions of the law of the Member State, to which the holding SE is subject, concerning subscription or acquisition of shares of the dominant company (here: SE) by a dependent company (here: promoting company) adopted in accordance to Art. 24a of the Second Directive (e.g., sec. 71d German SCA).

[17] Details of the draft terms are discussed by J. Neun, supra (n. 5), pp. 131-136.

[18] Second Council Directive of 13 December 1976 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent (77/91/EEC), O.JL.1977, No. 26, p. 1.

One of the particularities of the statutes included in the draft terms is the amount of the legal capital which, according to Art. 4 par. 2 SE-Reg., shall not be less than 120.000 Euro. However, in the most cases it will not be possible to precisely determine the legal capital of a holding SE in the draft terms because it will not be known how many shareholders will exchange their shares for the shares of the SE and how many of those shares must adequately be issued. All that can be determined in the draft terms in advance, at the beginning of the operation, is the minimal amount of the legal capital resulting from the multiplication of nominal value of each share and the amount of the shares of the SE which have to be issued in exchange for the minimal proportion of shares of the promoting companies to be contributed according to the draft terms. Two questions arise: When can the ultimate amount of the capital be fixed ? And who is formally empowered to do this? These questions will be answered below (under V).

Like in the case of forming an SE by merger, the SE Regulation does not precisely describe the form which the draft terms of holding SE have to comply with. It should be considered whether the written form is sufficient or whether the obligation to meet a qualified form should be derived from the national law to which each of the promoting companies is subjected.[19] One might argue, in particular, that similar as in case of draft terms of merger which, accordingly to some of the national laws (e.g. sec. 6 of German Restructuring Act), should be drawn up in the qualified form (notary form), the same requirement should be met in case of draft terms of holding. From the mere fact, that the Regulation does not contain any provisions concerning the form of the draft terms of holding SE, cannot be followed that the European legislator left the participating companies the total liberty in this domain. If one acknowledges the existence of a legal gap with regard to the form of the draft of holding SE, it could be closed by the reference (by means of analogy to Art. 18 SE-Reg., see above under B) to the national provisions adopted in implementation of the Third Directive. Such an analogy can also be based on the general similarity of contents and function of the draft terms of merger and of holding, which should inform the shareholders and employees of promoting companies in a certain and legally correct way. Moreover, the assistance of the public notary institutes the additional control of the legality of holding formation supplementing the judicial control of the register court. However, the obligation to observe the qualified form concerns only the one of promoting companies which is subject to the national law prescribing such a form for the merger draft (merger contract).

[19] With regard to the form of draft terms of merger see Ch. Teichmann, supra (n. 5), p. 420, J. Neun, supra (n. 5), p. 91 on the one hand, A. Schulz and B. Geismar, *Die Europäische Aktiengesellschaft*, Deutsches Steuerrecht (DStR) 2001, pp. 1078, 1080 on the other hand. The latter ones deny the necessity of observance of the special form prescribed in the national law for the merger contract.

II. Negotiations with the employees

According to Art. 3 of the Directive supplementing the SE Regulation with regard to the involvement of employees (2001/86/EEC), the management or administrative organs of the participating companies shall, as soon as possible after publishing the draft terms of creating a holding company, take the necessary steps to start negotiations with the representatives of the companies´ employees on arrangements for the involvement of the employees in the SE.

Those negotiations will be subject of the considerations below only to the extent of its significance for the process of the forming a holding SE.[20]

III. Experts examination and report

Different to the SE-Regulation draft of 1991[21] the finally accepted Regulation prescribes the obligatory examination of the draft terms of formation by one or more experts independent of the promoting companies (art. 32 par. 4 SE-Reg.).[22] The experts have to be appointed or approved by a judicial or administrative authority in the Member State to which each company is subject in accordance with national provisions adopted in implementation of the Third Directive (78/855/EEC). They control the draft terms including the explaining report of organs of the promoting companies on rightness and completeness. The core of their examination is the proposed share-exchange ratio and the evaluation of shares of the promoting companies.[23] The experts draw up a written report for the shareholders of each company which indicates any particular difficulties of valuation and states whether the proposed share-exchange ratio is fair and reasonable, indicating the methods used to achieve it and whether such methods are adequate in the respective case (Art. 32 par. 5 SE-Reg.). It is possible that, by agreement between the promoting companies, a single written report will be drawn up for shareholders of all the companies by one ore more independent experts appointed or approved by a judicial or administrative authority in the Member State to which one of the companies promoting the operation or the proposed SE is subject. The mentioned alternative indicates the possibility of formation of a holding SE in a Member State other than the one in which the promoting companies have their registered or head office (see

[20] See S. Pluskat, *Die Arbeitnehmerbeteiligung in der geplanten Europäischen AG*, DStR 35/2001 pp. 1483; M. Heinze, *Die Europäische Aktiengesellschaft*, ZGR 1/2002, pp. 68 et seq.; R. Köstler in: M. R. Theisen and M. Wenz (eds.), supra (n. 5), pp. 301 et seq. From the historical point of view: G. Mävers, *Die Mitbestimmung der Arbeitnehmer in der Europäischen Aktiengesellschaft*, Baden-Baden 2002.

[21] Third amended draft from 16.5.1991, O.JC. from 8.7.1991, pp. 1 et seq.

[22] J. Neun, supra (n. 5), p. 107, 136; Ch. Teichmann, supra (n. 5), pp. 423 and 433. Different G. Ch. Schwarz, supra (n. 13), p. 1851 who takes the opinion (with regard to the merger), that one or more expert examining the draft terms should not be compulsory independent from the promoting companies.

[23] For details, see J. Neun (n. 5), supra, pp. 137 et seq.

above under C).

In connection with the experts examination the following problem may arise: From the point of view of the SE being created the shares of the promoting companies should be regarded as consideration in kind to be contributed to the SE in exchange for its shares.[24] After the formation of the holding SE the shares of the promoting companies will be either the only or in any case the main assets of the SE. According to the continental principle of the legal capital expressed and regulated in regard to the public limited-liability companies in the Second Directive to which the SE is also subjected (Art. 5 SE-Reg.), at the point of formation of a public limited-liability company the assets must be raised which at least balance the legal capital fixed in the statutes and on the passive side of the balance sheet of the company. If the contributions other than cash are to be brought to the company, special requirements harmonised in the Second Directive have to be met. *Inter alia* it is required that one or more independent experts appointed or approved by an administrative or judicial authority draw up a report which shall at least describe each of the assets comprising the consideration as well as the methods of valuation used and shall state whether the values arrived at by the application of these methods do correspond at least to the number and nominal value or, if there is no nominal value, to the accountable par and, if appropriate, to the premium on the shares to be issued for them (art. 10 par. 1 and 2 SE-Reg.). The question arises whether the experts examination and their report as regulated in Art. 32 par. 4 and 5 SE-Reg. meet the cited requirement of the Second Directive implemented in the national law of all Member States. The question can be denied because the function and aim of both examinations are quite different.[25] The experts examination prescribed in the SE-Regulation only aims at protecting the interests of the shareholders of the promoting companies while the examination of contributions in kind serves the protection of the company´s creditors. One can argue that according to art. 32 par. 5 SE-Reg. the experts shall examine whether the proposed share-exchange ratio is fair and reasonable and therefore its examination does not only serve the protection of the shareholders but also, as a reflection, of the SE´s future creditors. Consequently the function of the report prescribed in art. 32 par. 4 and 5 SE-Reg. would correspond to the function of the experts report from the Second Directive and would make the latter one superfluous. However, this view can be disputed. From the shareholders´ point of view the proposed share-exchange ratio will surely not be fair and reasonable, if the real value of the SE´s shares is less than the value of the shares to be contributed for it or, with other words, when they will

[24] The unanimous opinion in the German literature: J. Neun, supra (n. 5), pp. 147 et seq.; E.-T. Kraft, supra (n. 4), pp. 69; H. Theißen, supra (n. 4), pp. 29 et seq.; U. Trojan-Limmer, *Die Geänderten Vorschläge für ein Statut der Europäischen Aktiengesellschaft (SE). Gesellschaftsrechtliche Probleme*, Recht der Internationalen Wirtschaft (RIW) 1991, pp. 1010, 1014 et seq.

[25] See J. Neun, supra (n. 5), p. 148.

get less than they shall contribute. It is doubtful whether the experts should examine as well whether the real value of the shares to be contributed to the SE corresponds at least with the nominal value of the shares of the SE to be exchanged for them. Art. 32 par. 5 SE-Reg. does not indicate that the examination of the experts should also prevent the underpari issue of the SE´ shares.

IV. Preparation and holding of the general meeting

The SE-Regulation does not contain any provision concerning the preparation of the general meeting which shall decide on the formation of a holding SE. This justifies the conclusion that, as a rule, this matter is governed by adequate provisions of the national law the respective promoting company is subject to.[26] However, the referring to the national law will not help when the formation of the public limited-liability company as a holding is not subjected to the special national regulation as it is the case in many Member States. So, e.g., one of the practical questions is how to inform the shareholders about the draft terms and report of the experts. There is no provision in art. 32 SE-Reg. in which manner and when this documents should be made accessible to the shareholders of the promoting companies. As stated above (under B) the regulation of a holding SE´s formation, contrary to the one of the formation of a SE by merger (art. 18 SE-Reg.), does not contain a general provision which would refer to the national provisions applying to mergers in the matters or aspects not governed by the SE-Regulation. The existing gap should be closed by means of systematic analogy undertaken on the level of European law; it should be referred to the regulations of the other restructuring measures following the same regulatory pattern. In the case of a merger as well as a division of the companies European law provides that all shareholders shall be entitled to inspect the draft terms, the reports of the administrative or management bodies of the participating companies and the reports of experts at the registered office of the company at least one month before the general meeting takes place which is to decide on the draft terms of restructure (art. 11 par. 1 Third Directive and art. 9 par. 1 Sixth Directive). The national provisions adopted in implementation of the cited regulations serving the protection of shareholders should per analogy be applicable as well in the case of formation of a holding SE.[27] We will come to the same result using an analogy to the provision of art. 18 SE-Reg. which refers to the national law enacted when the Third Directive was implemented.

According to art. 32 par. 6 SE-Reg. the general meeting of each promoting company shall approve the draft terms of formation of the holding SE. However, there is no provision determining the majority which is required to pass this decision. The express reference to art. 7 of the Third Directive, as it was contained in art. 31 par. 3

[26] Ch. Teichmann, supra (n. 5), pp. 415-416; J. Neun, supra (n. 5), p. 139.
[27] Ch. Teichmann, supra (n. 5), p. 434.

of the SE Regulation draft of 1991, is missing in the finally adopted Regulation. There are two ways to solve the problem. One is to regard the lack of the reference to Third Directive as an omission of the European legislator and to try to close the legal gap by means of a systematic analogy to other European regulations of restructuring measures.[28] So the decision of the general meeting about formation of an SE by merger or by conversion of an existing company into an SE shall be taken with a majority laid down in the national provisions adopted in accordance to art. 7 of the Third Directive, i.e. not less than two third of the votes attaching either to shares or to the subscribed capital represented. If there is more than one class of shares, the decision shall be subject to a separate vote by at least each class of shareholders whose rights are affected by the transaction (art. 7 par. 2 of Third Directive).[29] The same conditions have to be fulfilled in case of a decision concerning approval of the draft terms for the formation of a holding SE as one of the restructuring measure regulations which follows the same regulatory pattern as the regulations of merger and division. However, there are some arguments speaking against this interpretation and for the assumption that only a simple majority of votes in each of the promoting companies is sufficient to pass the approving decision. In contrast to the case of merger and division the approving decision does not touch the legal existence of the promoting companies and also a change of the statutes of the promoting companies is not needed either.[30] After the approving decision of the general meeting each shareholder is free to decide whether or not to contribute his shares to the SE being created. Besides, art. 32 par. 2 SE-Reg. requires that the minimum proportion of shares of each company which has to be contributed to the SE is only 50 % plus one share. Therefore it is plausible that the European legislator consciously waived a reference to art. 7 of the Third Directive wanting to introduce a convergence between the minimal amount of shares to be contributed and the majority of votes needed to approve the draft terms.[31] It is to the European Court of Justice to decide, which of these two presented interpretations is right.

According to art. 32 par. 6 last sentence SE-Reg. the general meeting of each promoting company may reserve itself the right to make registration of the holding SE conditional upon its express ratification of the arrangements about the employee involvement in the holding SE. Here the question also arises what majority is

[28] See Ch. Teichmann, supra (n. 5), p. 435

[29] In the German law this provision is implemented in sec. 65 of the German Restructuring Act. It requires the majority of ¾ of the capital represented (par. 1); if there are shares of different classes the separate decision should be taken with that majority in each of them (par. 2)

[30] See also J. Neun, supra (n. 5), p. 142.

[31] See also J. Menjucq, *Société européenne*, (*Règl. CE no 2157/2001 et Direct. No 2001/86/CE du Conseil du 8 oct. 2001)*, Rép. sociétés Dalloz, june 2002, p. 7, who takes the opinion that the general meeting of each promoting company approves the draft on conditions of quorum and majority which are required for resolutions not changing the articles.

required to ratify the arrangements. This gap can not be closed by means of a systematic analogy to similar European provisions because there is no such provision in European law. With regard to the formation of SE by merger art. 23 par. 2 sentence 2 SE-Reg. contains the same regulation also without determining the majority which is required for the ratification. The plausible answer to the question is: As a rule the ratification requires the same majority as the approval of the draft terms because the arrangements of the employees have essential significance for the functioning of the SE and therefore should be regarded as a part of the draft terms. However, if we assume that for the approval resolution the same majority is required as in the case of merger, it should also be possible that the general meeting may, in the same decision in which it makes a reservation concerning the ratification, determine a smaller (simple) majority for the ratification of the arrangements. Such an interpretation finds its justification in the wording of art. 32 par. 6 sentence 3 SE-Reg. (also art. 23 par. 2 sentence 2 SE-Reg.): If the general meeting may not make use of its right of ratification at all, it may also determine smaller majority required to ratify arrangements with employees (conclusion *a fortiori*).

V. Contribution of shares of the promoting companies and allotment of shares of the SE

The exchange of shares of the promoting companies into the shares of the SE runs in two steps.[32] The shareholders of the promoting companies have a period of three months in which to inform the promoting companies whether they intend to contribute their shares to the formation of the holding (art. 33 SE-Reg.). That period is strict: it can neither be shortened nor, as it seems, prolonged by the promoting companies. It shall begin on the date upon which the terms for the formation of the holding SE have finally been determined. The question arises what event decides about the final determination of that terms. It should be assumed that the day of approval of the draft terms by the general meeting in the promoting company can be regarded as the earliest date.[33] However, one has to keep in mind that the general meeting can make use of its right of final ratification of the arrangements with the employees. If it does make this reservation, the approval of the draft terms cannot be regarded as final because the final formation of the SE is conditional on the express ratification of that arrangements. The terms of formation are finally determined as soon as the general meeting has decided to ratify the arrangements.[34]

The next interpretation problem is connected with the expression used in art. 33 subs. 1 SE-Reg. According to that regulation the shareholders of the promoting

[32] For details see also J. Neun, supra (n. 5), pp. 145 et seq.
[33] Such a date on which the period for shares exchange starts to run was laid down in Art. 31a par. 1 of the draft of the SE-Regulation from 1991. See also Ch. Teichmann, supra (n. 5), p. 436; J. Neun, supra (n. 5), p. 146.
[34] Ch. Teichmann, supra (n. 5), p. 436; J. Neun, supra (n. 5), pp. 145 et seq.

companies have to inform the companies whether they intend to contribute their shares to the formation of the holding SE. The question is: What legal meaning must be attributed to the shareholder's information about that intention ? Does it have no binding power and is it revokable without consequences for the shareholders or should it be regarded as a legally binding declaration of will which won´t be subsequently withdrawn ? As it was rightly stated in the German doctrine the second alternative is true.[35] Therefore, the declaration of intention is a kind of legal obligation which has to be completed before the petition on registration of the SE is handed over to the register court. However, the ultimate character of the contribution of shares can be regarded as being conditional on the fact, that the minimum proportion of shares of each company assigned in the draft terms will be contributed within that period and that the general meeting will ratify the arrangement with employees if it has made use of its ratification right.

According to art. 33 par. 2 SE-Reg., the SE shall be formed only if the shareholders of the promoting companies have contributed the minimum proportion of shares in each company within the mentioned period of three months in accordance with the draft terms of formation and if all the other conditions are fulfilled. The "other conditions" are especially the requirements laid down in art. 32 SE-Reg. It should be stressed that, in contrast to the case of the formation of the SE by merger, in case of a holding formation the Regulation neither provides for an obligation to obtain a special certificate issued by the court or other legal authority (see art. 25 par. 2 SE-Reg.) nor does it introduce a possibility of an opposition of the Member State´s competent authority (see art. 19 SE-Reg.). If all conditions for the formation of the holding SE are fulfilled, that fact shall, in respect of each of the promoting companies, be published in the same way as the draft terms, i.e. in accordance to art. 3 of the First Directive.

As mentioned above, the SE Regulation provides for a second step in the process of the share exchange. The shareholders of the promoting companies, who did not contribute their shares within the three months period laid down in art. 33 par. 1 SE-Reg., namely become a second chance to do so. Within the period of one month beginning from the date of publication according to art. 33 par. 3 sentence 1 SE-Reg.[36] they can make their shares available to the promoting companies for the purpose of forming the holding SE. The cited regulation is functionally similar to the regulation known to the German takeover law – so called "Zaunkönigregel" of

[35] Ch. Teichmann, supra (n. 5), p. 436.

[36] See Ch. Teichmann, supra (n. 5), p. 437, J. Neun, supra (n. 5), p. 147 who also assume that the additional period starts to run before the registration of the SE. The contrary opinion (one month period starts to run after the registration of a holding SE) takes Ch. Kersting, *Societas Europaea: Gründung und Vorgesellschaft*, Der Betrieb (DB) 2001, pp. 2079, 2084.

sec. 16 par. 2 of German Takeover Act (WpÜG)[37] which also gives shareholders of the target corporation who have not accepted a takeover bid an additional period of two weeks to do so. All shareholders who have contributed their shares to the formation of the SE shall receive shares in the holding SE. A question arises, at what point of time the allotment of SE shares should be completed. According to art. 33 par. 5 SE-Reg. the holding SE may be registered after the formalities determined in art. 32 SE-Reg. have been completed and the minimum proportion of shares in each company assigned in the draft terms has been contributed. It follows from the cited provision that it is not necessary to wait with registration until the additional one month period has passed.[38] However, as it was stated above (under D.I) it is characteristic for the formation of a holding SE that the ultimate amount of its legal capital cannot be determined in advance, at the beginning of the whole operation. It is also not possible to do so after the period of three months has passed because one cannot be sure how many shareholders will exchange their shares in an additional period of one month. Still, this fact should not hinder to start registration of the SE. The shares can be allotted to the shareholders of the promoting companies who contributed their shares in the first period and the petition on registration of the SE can then be handed over to the register court. The court can register the SE the legal capital of which is determined only as a minimum ("at least") amount as determined in the statutes draft and really covered in the period of three months. After the additional period has passed and the ultimate amount of the capital can be determined the management or administrative organ of the SE should inform the register court accordingly. The latter one will then correct adequately the minimum amount of the legal capital of the SE in the register.

VI. Other requirements to be fulfilled according to the national law of the Member State of the registered office of the SE being created

According to art. 15 SE-Reg. the formation of the SE shall be governed by the law applicable to public limited-liability companies in the Member State in which the SE establishes its registered office. Applying this provision to the holding formation the question arises, what provisions are relevant in that case. As mentioned above (under D.III) the formation of a holding SE is a kind of formation of a public limited-liability company with a contribution in kind, which in this case are the shares of the promoting companies. The national laws of many Member States prescribe a special procedure which is also partially regulated in the Second Directive (Art. 10). So, e.g., German as well as Polish law provides that the founders of a public limited-liability company, i.e. the persons who have drawn up and

[37] Gesetz zur Regelung von öffentlichen Angeboten zum Erwerb von Wertpapieren und von Unternehmensübernahmen vom 20.12.2001. English version in: J. Adolff, B. Meister, Ch. Randell, K.-D. Stephan, *Public Company Takeovers in Germany*, Munich 2002, pp. 341 et seq.
[38] Ch. Teichmann, supra (n. 5), p. 437.

*signed its statutes, have to draw up a special founders report (see sec. 32-35 German SCA, Art. 312-313 Polish CCC). Then it has to be examined by the first organs of the company and by independent experts who has to draw up their own report to be delivered to the register court. One can ask, whether that national law provisions should be also met in the case of formation of a holding SE. It could be denied only, if one assumes that the report in the drafts terms as prescribed in Art. 32 par. 2 SE-Reg. corresponds functionally with the founders report to be drawn up according to the provision of national law. With regard to the different aims of those two reports (*the holding report*: information of shareholders and employees of promoting companies about the legal and economics aspects of holding SE;* the founders report*: indication that the assets brought in the company is of value and balance its legal capital) their functional correspondence is questionable.*[39] *As stated above also the experts examination and report according to art. 32 par. 4 and 5 SE-Reg. does not replace the examination of the contributions in kind regulated in national law according to the Second Directive. However, one has to keep in mind that the attempt of an exact application of national provisions about a formation of a public limited liability company on the formation of a holding SE may cause essential difficulties because this formation is a peculiar one. Therefore this peculiarity has to be taken into account when national law is applied which Art. 15 SE-Reg. refers to.*

One of the peculiarities of the holding formation is the difference in persons of the founders and of the first shareholders of the SE.[40] National laws concerning the formation of a public limited-liability company often use the termin "founders of the company" [41], e.g. in provisions determining their liability (see sec. 46 German SCA) or imposing on them other duties in connection with the formation like, in German law, the appointment of an auditor (sec. 30 German SCA). Because that provisions are applicable to the holding SE according to Art. 15 SE-Reg., the question arises: who are its founders ? The most plausible answer is: The companies promoting the formation. They play the most dominant role in the formation procedure preparing the statutes of the SE and determining the condition of the minimum proportion of shares to be contributed in order to create the SE.[42] The shareholders who approved the draft terms including the statutes are acting also as the general meeting of the promoting companies, this is: as its organs. Those arguments speak for the assumption that the promoting companies functionally corresponds with the term "founders" often used in the national law. Only the promoting companies, not its shareholders who are willing to exchange the shares, should be also liable for the obligations arising out of acts performed in an SE´s name before its registration, according to Art. 16 par. 2 SE-Reg. The shareholders of

[39] For details of contents of the founders report see J. Neun, supra (n. 5), pp. 148 et seq.
[40] Ch. Kersting, supra (n. 36), p. 2083.
[41] See also sec. 2 of German SCA from which follows that the founders of the company who signed its statute also have to subscribe all its shares. U. Hüffer, *Aktiengesetz. Kommentar*, 5.ed., Munich 2002, p. 13, marginal number 12.
[42] J. Neun, supra (n. 5), p. 148; Trojan-Limmer, supra (n. 24), p. 1015.

the promoting companies who declare the intention to contribute their shares to the formation of the holding SE (Art. 33 par. 1 SE-Reg.) do act in their own name and not in an SE´s name, what is required in Art. 16 par. 2 SE-Reg. [43]

E. Protection of minority shareholders, creditors and employees

The SE Regulation itself does not contain any provision with regard to the protection of minority shareholders who oppose the operation, and of creditors and employees of the promoting companies. However, the European law empowers Member States to regulate that questions in their national laws (Art. 34 SE-Reg.).

Taking into account the interests of the opposing shareholders their protection can be considered in two parallel ways.[44] Firstly, national law can provide for a special judicial proceedings in which the readjustment of an exchange ratio as determined in the draft terms and approved by the general meeting of the promoting company can be sought. The result of that proceedings should have no influence on the validity of the approval decision and will not prevent the holding SE´s registration. However, it is astonishing that the European legislator has not provided for the regulation adequate to the provision of Art. 25 par. 3 SE-Reg. allowing the merging companies situated in Member States which don´t provide for such procedure to oppose the making use of that procedure by shareholders of other company being subject to the national law which regulates that procedure. The situation of the shareholders of the merging companies and companies promoting formation of a holding SE is comparable because the readjustment of an exchange ratio to the advantage of the shareholders of one of the promoting companies happens *de facto* at the cost of the shareholders of the other promoting company who haven´t had the chance to start up a similar readjustment proceedings according to the national law to which their company is subject. Therefore one can consider to apply the cited regulation of Art. 25 par. 3 SE-Reg. by analogy in the case of formation of a holding SE.[45]

In addition the national legislator may oblige the promoting companies or the SE to acquire shares from shareholders demanding correspondingly. However, one can consider if such a provision would go too far in the protection of opposing shareholders and would also cause additional costs for the promoting companies impeding formation of a holding SE. Otherwise as in the case of a merger, especially if an acquiring company has a legal form different from that of a merging company (see, e.g., sec. 29 of German Restructuring Act), the legal situation of

[43] Opposite opinion takes Ch. Kersting, supra (n. 36), p. 2084.
[44] See Ch. Teichmann, *Vorschläge für das deutsche Ausführungsgesetz zur Europäischen Aktiengesellschaft*, ZIP 2002, pp. 1109, 1113.
[45] For such an analogy cf. Ch. Teichmann, supra (n. 5), p. 437; J. Neun, supra (n. 5), p. 143.

shareholders of the promoting company is not a subject of such far-reaching change that would justify their right to leave the company for cash.[46] On the other hand, such a right will enable the opposing shareholders to leave the promoting company without endangering and postponing the whole expansive formation process of holding SE by challenging the decision of general meeting of promoting company.[47]

Apart form the two mentioned ways to be taken into account by the national legislator, opposing shareholders of promoting companies will usually have the right to bring an action in order to set aside the approving decision of general meeting on conditions determined in national law to which each of the promoting companies is subjected. If successful, the action will result in the revocation of the decision with retroactive effect resulting as well in the invalidity of the whole operation of the holding formation. Therefore it is questionable whether the SE can be registered before the judicial proceedings concerning such actions are finished.

As mentioned, the provision of Art. 34 SE-Reg. empowers the Member States also to adopt regulations protecting the creditors and employees of promoting companies. However, one can doubt whether the adoption of provisions protecting that stakeholders is desirable. The creditors of the promoting companies are not deprived of their debtors in result of an SE formation, because the promoting companies shall continue to exist (Art. 32 par. 1 sentence 2 SE-Reg.). Of course, the legal situation of that companies has changed: they became corporations dependant from the SE just created. But in order to protect the creditors from the results of a detrimental influence which may be exercised on them by the dominant SE, it seems sufficient to refer to a national law of corporate groups of the Member State, which the controlled companies are subject to (see motive number 15 of SE-Reg.). Especially, if a Member State, like Germany, has an extensive regulation of the law of company groups, it seems superfluous to adopt special regulations with regard to a holding SE. For the similar reasons it does not seem necessary to adopt special regulations protecting the employees of the promoting companies. Firstly, they have a chance to protect their rights by themselves when negotiating before the formation of a holding SE. Secondly, the Directive complementing the SE Regulation contains provisions ensuring them information and consultation procedures at transnational level (Art. 9 of Directive).[48]

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[46] Different: Ch. Teichmann, supra (n. 44), p. 1113.

[47] Ch. Teichmann in: M. R. Theisen and M. Wenz (eds.), supra (n. 5), p. 588. See also H. Theißen, supra (n. 4), pp. 150 et seq. who propose such a right de lege ferenda with regard to the regulation of holding formation in the German law.

[48] See Ch. Teichmann, supra (n. 44), p. 1113 who also denies the necessity of introducing into German law special regulations protecting creditors and employees of promoting companies.

F. Formation of a Holding SE and Takeover Law: Outline of the Problem

Under some Member States´ national law the relation between takeover law and the provisions concerning the mergers of public limited-liability companies is being disputed. Especially among Austrian and German academics the view seems to be prevailing that a shareholder who has gained control over a listed company in result of a merger is obliged to make a public mandatory offer to the shareholders who had already held their shares before he dominated the company.[49] Application of this rule to the listed SE created by merger by acquisition and having its registered office in Austria or Germany will probably result in the obligation of the controlling shareholder to make a public offer to all other shareholders of the listed SE. With regard to the formation of the SE as a holding company the following questions arise:

- Does national takeover law have to be applicable during the process of forming of an SE beside the provisions of SE-Regulation, if one of the promoting companies is a listed company ?
- Does the registered holding SE have to make a public mandatory offer to the shareholders who did not exchange their shares of the promoting companies into the SE´s shares and remained in the promoting companies if the latter are listed ones ?
- Does the shareholder who gained control over the SE in result of a shares exchange during the formation process have to make a mandatory offer to other shareholders of the created SE if it will be publicly listed ?

It is necessary to analyse the mechanism of capital market law, especially takeover law, and mutual relation between the provisions of company law and capital market law before answering these difficult questions. Such an analysis would

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[49] With regard to Austrian law see S. Kalss and Winner, *Übernahmerecht und Umgründungsrecht – Versuch einer Synthese*, Österreichisches Bank Archiv (ÖBA) 2000, p. 51; Opinion of the Austrian Takeover Commission from 12.09.2000, Neue Zeitschrift für Gesellschaftsrecht (NZG) 2001, pp. 282 et seq.
In German literature see: Ch. Seibt and K.J. Heiser, *Regelungskonkurrenz zwischen neuem Übernahmerecht und Umwandlungsrecht*, Zeitschrift für das gesamte Handels- und Wirtschaftsrecht (ZHR) 165 (2001), pp. 466 et seq.; D. Kleindiek, *Funktion und Geltungsanspruch des Pflichtangebots nach dem WpÜG. Kapitalmarktrecht – Konzernrecht – Umwandlungsrecht*, ZGR 2002, pp. 546, 564 et seq.; K.J. Hopt, *Grundsatz- und Praxisprobleme nach dem Wertpapiererwerbs- und Übernahmegesetz*, ZHR 166 (2002), pp. 384, 397; H. Fleischer, *Schnittmengen des WpÜG mit benachbarten Rechtsmaterien – eine Problemskizze*, NZG 2002, pp. 545, 549; P. Hommelhoff and C.-H. Witt in: W. Haarmann, K. Riehmer and M. Schüppen (eds.), *Öffentliche Übernahmeangebote. Kommentar zum Wertpapiererwerbs- und Übernahmegesetz*, Heidelberg 2002, pp. 671 et seq.
The contrary view is presented by: Ch. Nowotny, *Zur Auslegung des Übernahmegesetzes*, Recht der Wirtschaft (RdW) 2000, pp. 330 et seq. (with regard to Austrian law); D. Weber-Rey and B. G. Schütz, *Zum Verhältnis von Übernahmerecht und Umwandlungsrecht*, AG 2001, pp. 325, 328 et seq.; J. Adolff, B. Meister, Ch. Randell, K.-D. Stephan, supra (n. 35), p. 243.

require a separate scientific elaboration. Therefore, the proposed answers given below are of provisional character and the author is conscious of their disputability.

As to the first question the view expressed in German literature should be shared that the parallel application of the SE Regulation and the national takeover law is excluded because in this case we are not dealing with a takeover bid.[50] Companies promoting formation of a holding SE can not be regarded as bidders because they do not indent to acquire the shares for themselves. The examination of exchange ratio by the independent experts as regulated in the SE Regulation does sufficiently protect the interests of shareholders in the phase of formation of an SE holding. In result, the first of the above questions should be denied.

On the contrary, positive answer should be given to the second question. The created SE is a new subject controlling the companies that promoted its formation or, with other words, the SE gained control over the promoting companies in the moment of its creation. One can argue that the shares exchange proceedings as regulated in the SE-Regulation have the same function as the proceedings regulated in national takeover law and therefore makes the latter one superfluous.[51] However, the proceedings of holding formation including examination of the exchange ratio by an independent expert is considerably similar to the proceedings of the SE´s formation by merger. Therefore, if, according to the national law, the acquiring control as a result of a merger does not exclude the obligation to subsequently make a mandatory bid, the same should be assumed in case of a holding creation. Moreover, the proceedings of holding formation as regulated in the SE Regulation does not protect the interests of the investors to the same extent as the regulations of the takeover law. According to the provisions contained in the newest draft of the Thirteenth Directive[52] the consideration proposed by a bidder in the public offer shall consist either in cash or in liquid securities (Art. 5 par. 5 of the draft). The same provision has already been implemented in the national law of the majority of Member States (see e.g. sec. 31 par. 2 German Takeover Act). Meanwhile, in the formation of a holding SE the shareholders of the promoting

[50] U. Brandt, *Überlegungen zu einem SE-Ausführungsgesetz*, NZG 2002, pp. 991, 995.

[51] See e.g. Ch. Nowotny, supra (n. 49), p. 331 who takes the opinion that the concentrations of enterprises which are completed according to legal provisions guaranteeing its transparency and control are equivalent to the protection mechanism of take over law ("*Als allgemeine Leitlinie lässt sich festhalten, dass Unternehmenszusammenschlüsse, die unter gesetzlicher Aufsicht erfolgen und bei denen die Transparenz des Vorgangs und seine Überprüfbarkeit gewährleistet sind, über einen Schutzmechanismus verfügen, der dem Übernahmegesetz gleichwertig ist.*").

[52] See Proposal for a Directive of the European Parliament and of the Council on takeover bids from 6 December 2002, Interinstitutional File 2002/0240, accessible on the website: http://register.consilium.eu.int/pdf/en/02/st15/150/15078en2.pdf For an overview see in German doctrine: H.-W. Neye, *Der Vorschlag 2002 einer Takeover-Richtlinie*, NZG 2002, pp. 1144 et seq.; Ch.H. Seibt and K. J. Heiser, *Der neue Vorschlag einer EU-Übernahmerichtlinie und das deutsche Übernahmerecht*, ZIP 2002, pp. 2193 et seq.; H. Krause, *Der Kommissionsvorschlag für die Revitalisierung der EU-Übernahmerichtlinie*, Betriebs-Berater (BB) 2002, pp. 2341 et seq.

companies do only have a chance to exchange their shares into the SE´s shares which are not liquid because the SE does not exist yet and its shares are not listed yet. Therefore, the assumption that the exchange proceedings in the formation of the SE holding makes superfluous the subsequent mandatory offer of the created SE to the shareholders who remained in the promoting companies, does not convince.

The last of the above questions should be denied because in the moment when a shareholder gains control over an SE by exchanging his shares, the SE is not yet a listed company, i.e. its securities are not yet admitted to trading on an organised market. The mere fact that a company being already controlled by one shareholder is going public and gets its shares listed does not trigger the obligation of the controlling shareholder to make a public offer to the minority shareholder.[53] A shareholder of a holding SE who controls the SE from its beginning should not either be obliged to make such mandatory offer if the SE later gets its shares listed at the stock exchange. However, the answer may be opposite if the SE starts to list its shares in the very moment of its creation i.e. when registered in a Member State.

[53] P. Hommelhoff and C.-H. Witt, supra (n. 49), p. 670.

https://doi.org/10.1017/S2071832200015790 Published online by Cambridge University Press