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# Problems of Introduction of *Societas Europaea* in Estonian Law

## 1. Historical and legal background of creating SE as type of company

The inauguration speech, delivered by Professor Piet Sanders at the University of Rotterdam in 1959 may be regarded as the moment of the first announcement of the idea to establish a pan-European type of company. Six years later, the European Commission established a working group to develop the standards required for introducing a relevant legal body.<sup>1</sup> At that time, a European company<sup>2</sup> (*Societas Europaea* or SE) as a transnational type of company was called the “flagship of European company law” in literature, and in 1970, when the European Commission submitted its proposal on the basis of the developed project<sup>3</sup>, the related ambitions did indeed soar. The initially planned provisions governing the SE, in principle, served as a code for European company law. The hope was to develop the SE into a legal body that was completely detached from national legal systems and based solely on European corporate law, independent of the legal systems of the Member States.<sup>4</sup> At the same time, it was forgotten to what extent company law and especially the corporate governance in each Member State was intertwined with the economic, political and cultural history of the relevant state.<sup>5</sup>

The draft statute of the SE consisted of 284 articles and contained provisions that determined its smooth enforcement to fail from the start. Namely, the draft provided for a mandatory two-tier management structure with the employee involvement obligation characteristic of the German model.<sup>6</sup> A more important reason why the draft failed at that time was the principally different approach of the Member States to the management

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<sup>1</sup> V. Edwards. The European Company — Essential Tool or Eviscerated Dream? – *Common Market Law Review* 2003 (40) 2, pp. 443–444.

<sup>2</sup> Although the name of the legal form contains the common notion ‘company’, in essence, it is still a form of public limited-liability company.

<sup>3</sup> COM (70) 600 final, 24.07.1970. OJ C124.

<sup>4</sup> C. Teichmann. The European Company: A Challenge to Academics, Legislatures and Practitioners. – *German Law Journal. Private Law*. 2003 (4), 4, p. 309.

<sup>5</sup> P. Zumbansen. Spaces and Places: A System Theory Approach to Regulatory Competition in European Company Law. – *Law Research Institute Research Paper Series. CLPE Research Paper/2006, Vol. 02 No. 02, p. 21*. Available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=902695](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=902695).

<sup>6</sup> V. Edwards (Note 1), pp. 444–445.

structure — opposition to the requirement of two-tier management and employee involvement obligation was so great in some Member States that it took nearly 25 years before the SE was finally supplied with a legal framework.<sup>\*7</sup>

The Member States have acted in accordance with the specific trends in company law of the relevant state upon implementing the SE-Statute. According to the press release of 8 October 2004, only Belgium, Austria, Denmark, Sweden and Finland had introduced the necessary changes to their national law by that time.<sup>\*8</sup> The relevant Act (*Gesetz zur Einführung der Europäischen Gesellschaft, SEEG*<sup>\*9</sup>) entered into force in Germany at the end of 2004 and rules concerning the SE were also enforced in Great Britain at about the same time.<sup>\*10</sup> In order to implement the SE-Statute, Estonia adopted on 10 November 2004 the Council Regulation (EC) No. 2157/2001 on the Statute for a European Company Implementation Act<sup>\*11</sup>, whose objective was to regulate the legal status of the SE registered in Estonia, insofar as it is not governed by the Regulation.

It has been opined in legal literature that the main output of the SE regarding implementation should be to facilitate cross-border mergers<sup>\*12</sup>; however, the effects resulting from the creation of the SE have also been labelled as merely psychological.<sup>\*13</sup> Although it is true, to a certain extent, that the SE enables companies operating in different Member States to act as a single company under uniform rules, the SE as a special and uniform type of company is largely imaginary because, for example, the SE registered in Germany cannot be identical to its equivalent registered in England, since pursuant to the 8 October 2001 (SE-Statute) Council Regulation No. 2157/2001 on the Statute for a European Company<sup>\*14</sup>, a company is unavoidably, to a certain extent, subject to the national law of the state in which the SE has been registered.<sup>\*15</sup>

It has been the primary task of the Member States to ensure that the SE is not discriminated against, compared to similar national public limited-liability companies, and to avoid the unequal treatment of the SE and disproportionate restrictions upon the establishment of the SE or the transfer of its registered office from one Member State to another. As a result, the general principle is that the SE must be treated equally with a public limited-liability company of the Member State in which the registered office of the SE is located.<sup>\*16</sup> A number of provisions of various levels apply to each SE depending on the nature of the relevant company. Firstly, the Regulation itself contains mandatory provisions; secondly, the Regulation entitles the SE to make certain choices (e.g., the choice between one-tier and two-tier management); thirdly, the Regulation also contains a number of non-mandatory provisions. The right to regulate particular issues has been given to the Member States, an entry into a relevant agreement governed by a separate directive has been stipulated in case of employee involvement<sup>\*17</sup>, and standard rules are applied when negotiations fail. In issues not governed by the Regulation, the Member States may impose mandatory rules by their national law (including applying general company law provisions); in addition, the SE has the right to use its statute to establish rules in cases where issues are not governed by law and, provided that this has not been done, the non-mandatory provisions of the Member State shall apply.<sup>\*18</sup> Although such a multi-level legal regulation involving many provisions may leave an impression that all issues should be covered by provisions, the result may be quite the contrary, and due to the number of regulation levels and different provisions, gaps are unavoidable. Paradoxically, the creation of a large number of norms for regulating social relations also produces gaps. Any strategy for reforming law generally also means that additional provisions are created, and as law is used to try to solve all problems found in a society, each gap requires the creation of a new provision. However, society develops faster than law and consequently there are more and more situations that need to be regulated.<sup>\*19</sup>

<sup>7</sup> C. Teichmann (Note 4), p. 310.

<sup>8</sup> Company law: European Company Statute in force, but national delays stop companies using it. IP/04/1195. Available at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/04/1195&format=HTML&aged=0>.

<sup>9</sup> Gesetz zur Einführung der Europäischen Gesellschaft. – Bundesgesetzblatt. Jahrgang 2004, Teil I, Nr. 73, ausgegeben zu Bonn am 28. Dezember 2004.

<sup>10</sup> P. Mäntysaari. Comparative Corporate Governance. Berlin, Heidelberg 2005, p. 59.

<sup>11</sup> RT I 2004, 81, 543; 2005, 57, 451 (in Estonian). Hereinafter: SECIA.

<sup>12</sup> P. Mäntysaari (Note 10), p. 59.

<sup>13</sup> P. L. Davies. Gower and Davies' Principles of Modern Company Law. Seventh edition. Tallinn 2003, pp. 24–25.

<sup>14</sup> OJ L 294, 10.11.2001, pp. 0001–0021.

<sup>15</sup> P. Davies (Note 8), p. 26.

<sup>16</sup> E. Werlauff. The SE Company — A New Common European Company from 8 October 2004. – International Themes in Business Law, London 2007, Vol. 1, p. 297.

<sup>17</sup> Council directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees. – OJ L 294, 10.11.2001, pp. 22–32.

<sup>18</sup> F. Kübler. The Societas Europaea — Implementation and Perspectives. – Die Europäische Aktiengesellschaft. Umsetzungsfragen und Perspektiven. T. Baums, A. Cahn (Hrsg.). Berlin: De Gruyter Recht 2004, pp. 3–4.

<sup>19</sup> S. Kaugia. Õigusnormide kohast eri kultuuriruumides (About the Position of Legal Norms in Different Cultural Spaces). – Riigikogu Toimetised 2002, No. 6, p. 75 (in Estonian).

The objective of this article is to examine how the Member States have introduced the regulation governing the SE to their national law and whether the declarative options of choice have been in fact realised as SE provisions. As differences of opinion concerning the management model have constituted one of the most problematic areas in the past, an important question discussed is how the legal system representing the classical two-tier management system has created a one-tier system for the SE and vice versa.<sup>\*20</sup> In addition to that, some other problems highlighted in the theory have been analysed, such as how the potential supplementation of the powers of the general meeting has been regulated in one-tier management, how the issue of independent supervision has been addressed, as well as how, in case of different establishment options of the SE, to solve certain situations not regulated by national law. The issues to be discussed have been selected based on some problems also found in Estonian law, focussing, above all, on finding solutions that are important with regard to complementing Estonian law.

## 2. Limits of developing the structure of SE's management organs

E. Werlauff notes when analysing various models of the SE that the monistic or one-tier management structure encompasses the origins of company law disputes that are simply suppressed in the dualist or two-tier structure so that the supervisory body (supervisory board) has a possibility to relatively easily recall the inconvenient members of the management board and compel such persons to leave the company. In the one-tier structure, the non-executive members of the management board have no right to exclude executive members from the administrative organ because only shareholders are competent to do that.<sup>\*21</sup> Although the monistic system may seem more democratic from the point of view of a member of the management organ, we cannot forget that the relationship between the management organ and the company can be defined as a special trust relationship because of its mandatory nature, so it should be possible to terminate the relationship promptly if needed. In that sense, the dualist system may be considered more efficient since lack of trust and long-lasting disputes about whether a member of the management organ has performed his or her duties or not should not impede the further normal functioning of the company. However, instead of opposing various management structures to each other, they have recently been implied to also converge.<sup>\*22</sup>

According to article 38 of the SE-Statute, the SE shall comprise firstly a general meeting of shareholders and secondly either a supervisory organ and a management organ (two-tier system) or an administrative organ (one-tier system) depending on the form adopted in the statute. Thus, any public limited-liability company operating in the form of the SE has been declared to have an option to use either a one-tier or two-tier management structure. The dualist model considerably resembles the management structure of a German public limited-liability company, whereas it is somewhat more difficult to draw exact parallels for a one-tier model, but the British system may generally be considered as an example.

According to article 43 (1) of the Regulation, the administrative organ shall manage the SE in the case of one-tier management structure. The Member States may provide that a managing director or managing directors shall be responsible for the day-to-day management under the same conditions as for public limited-liability companies that have registered offices within that Member State's territory. According to subsection 2 of the same article, the number of members of the administrative organ or the rules for determining it shall be laid down in the SE's statutes, but a Member State may, however, set a minimum and, where necessary, a maximum number of members.<sup>\*23</sup> The member or members of the administrative organ shall be appointed by the general meeting (article 43 (3) of the Regulation). The administrative organ shall elect a chairman from among its members. Thus, when examining the provisions applied to one-tier management of the SE, only article 44 indirectly refers to the model containing the origins of supervision or the internally structured monistic model; according to subsection 1, the administrative organ shall meet at least once every three months, at intervals laid down by the statutes, to discuss the progress and foreseeable development of the SE's business. The provision implies that the duties of the administrative organ or the management board in a wider sense include control,

<sup>20</sup> The United States of America and the United Kingdom above all have been referred to as the representatives of the monistic model in literature, whereas Germany is pointed out as the representative of the dualist model. See Grossfeld, B. Management and Control of Marketable Share Companies. – International Encyclopedia of Comparative Law. Volume XIII. Business and Private Organizations. *Sine anno*. Chapter 4, p. 7.

<sup>21</sup> E. Werlauff. EC Company Law. The common denominator for business undertakings in 12 states. Copenhagen 1993, p. 85.

<sup>22</sup> See, for example, H. M. Ringleb, T. Kremer et al. Kommentar zum Deutschen Corporate Governance Kodex. 2. Auflage. Munich, 2005, Präambel, Rn. 111.

<sup>23</sup> Germany, for example, has used such a possibility in SEEG § 23.

supervision and the setting of more general goals. The Regulation does not provide for special competence for the chairman of the administrative organ.<sup>\*24</sup>

Proceeding from the formulation of article 43 (4) of the SE-Statute, one may ask whether it obliges the Member State to create the necessary alternative management rules (provided that it differs from that of a national public limited-liability company) or only recommends this be done. Namely, the provision referred to provides that where no provision is made for a one-tier system in relation to public limited-liability companies with registered offices within its territory, a Member State may adopt the appropriate measures in relation to SEs. It may probably be claimed, based on grammatical interpretation, that it is a recommended provision; yet it is questionable whether the conceptual objective of the SE supports such an interpretation. The interpretation problem mainly concerns the countries in which national law provides only one possible management model (e.g., Germany and Great Britain, but also Estonia). Before enforcing the SEEG, C. Teichmann expressed the opinion that the interpretation should not proceed from the outcome of the academic discussion but from pragmatic considerations and in making the German legal environment attractive for potential SEs, it would be reasonable to provide for a one-tier model. At the same time, Teichmann rightly concluded that it required resolution of several complicated problems, such as the creation of a special employee involvement model for the one-tier structure, adaptation of group rules, etc.<sup>\*25</sup>

Nevertheless, when analysing how the German legislator has approached the task of creating a one-tier management model, it appears that the system developed is far from what could be considered to be a one-tier management structure, for example, in the context of company management in Great Britain.

According to SEEG § 20, the SE that has chosen a one-tier management structure is subject to the special provisions contained in this Act instead of §§ 76–116 of *Aktiengesetz*.<sup>\*26</sup> Pursuant to § 22 (1) of the same Act, a company is managed by the administrative council (*Verwaltungsrat*) that, inter alia, specifies the main directions of the activities of the company and exercises supervision of adherence thereto. Subsections 2 and 5 of this section provide that the administrative council also has the right and duty to call a general meeting, subsection 4 grants the administrative council, similarly to the council of the two-tier model, the right to inspect all the documents and assets of the company. According to SEEG § 40 (1), the administrative council shall appoint one or several managing directors (*geschäftsführende Direktor*), who may simultaneously belong to the administrative council but may not form the majority. At the same time, it is allowed to appoint a third party as the managing director. SEEG § 40 (2) sets out that it is the task of the managing directors to carry out the daily management of the company and also, according to § 41 (1), its representation. There are several provisions in the Act, which indicate that managing directors actually serve analogous to the management as an organ (for example, §§ 40 (7), 45, 46 (3), etc. directly point out that the provisions of the AktG governing the activities of the management board are applicable to managing directors). Thus, the administrative council does not represent a single management organ in the meaning of the monistic model, but rather an analogue to the supervisory board where some admissions have been made regarding the separation of powers.<sup>\*27</sup> When comparing the above-described one-tier management structure with the monistic management rules contained in the Cadbury Report<sup>\*28</sup> that is recommendable for British listed companies, it appears that the SEEG has indeed created an alternative model but it resembles more of the GmbH structure transformed into a two-tier one than the actual alternative to the dualist model.<sup>\*29</sup>

Naturally, it may be asked why British law should be taken as an example when creating a one-tier management structure and why the German one-tier management model could not represent anything new compared to what is meant by the classical one-tier model. On the European scale, the question could be answered by referring to the need to increase the flexibility of the provisions concerning the SE as well as the objective to eliminate unjustified differences. The model proposed in the SEEG currently fails to achieve the goal since it

<sup>24</sup> The potential supervision problems related to listed SEs have been solved, since the majority of countries demand the introduction of a supervision system functioning within the framework of the management organs via the codifications of company management practices. The regulatory nature of such practice may be disputed but European listed companies follow them quite closely according to literature. See E. Wymeersch, *Implementation of the Corporate Governance Codes*. – Financial Law Institute Working Paper Series. WP 2004-08. Available at <http://www.law.ugent.be/fli/WP/WP2004-pdf/WP2004-8.pdf>.

<sup>25</sup> C. Teichmann (Note 4), pp. 323–325.

<sup>26</sup> *Aktiengesetz* vom 6. September 1965 (BGBl. I S. 1089), zuletzt geändert durch Artikel 3 des Gesetzes vom 19. April 2007 (BGBl. I S. 542). Available at <http://www.gesetze-im-internet.de/bundesrecht/aktg/gesamt.pdf>. Hereinafter: AktG.

<sup>27</sup> Comment on § 43 of the SE-Statute also indicates that when interpreting the SE-Statute, German authors had considered the administrative council not as an organ engaging in daily management but in long-term planning and supervision. See J. Reichert, S. Brandes, *Münchener Kommentar zum Aktiengesetz*. 2. Auflage 2006. Band 9/2. *Europäisches Aktienrecht*. A. Die Europäische Gesellschaft. II. Die Verordnung (EG) Nr. 2157/2001 des Rates über das Statut der Europäischen Gesellschaft (SE) – SE-VO vom 8. Oktober 2001 (ABl. EG Nr. L 294, S. 1), geändert durch Verordnung (EG) Nr. 885/2004 vom 26. April 2004 (ABl. EG Nr. L 168/1) Art. 43, Rn. 80.

<sup>28</sup> Report of the Committee on the Financial Aspects of Corporate Governance. 1.12.1992. Available at <http://www.ecgi.org/codes/documents/cadbury.pdf>.

<sup>29</sup> It should be specified that the authors of the article have considered it necessary to refer to the principles expressed in the Cadbury Report because it is the codification that most clearly conveys the nature of the balanced monistic model.

is obviously a derivative of the two-tier model, which may continue to remain strange and hard to understand for people familiar with the one-tier management structure. On the world scale, the creation of a one-tier structure similar to the British model would perhaps be even more justified since it is the British model that is also more easily understandable for investors coming from elsewhere in the world (USA, for example). Such an opinion has, among other things, also been expressed in the legal literature discussing the relevant topics.<sup>\*30</sup> The simple structure of the British company management model has been highlighted compared to the heavy German rules and it has been indicated that the management model of large British companies now already contain features characteristic of the supervision theory.<sup>\*31</sup>

When examining, in turn, how British law has developed a two-tier system of management rules for the SE, a similar problem appears. The legislative Act governing the SE (The European Public Limited-Liability Company Regulations 2004<sup>\*32</sup>) has, in creating the management provisions, mostly focussed on the major debatable issue of the past — the problem of employee involvement. The Act does not contain the specific and detailed rules of the two-tier management structure; it confines itself to a reference to the general principle, according to which the provisions applicable to the board of directors in other Acts also apply to the members of the management and supervisory organs (article 78 (3)), and to a few individual special provisions (for instance, articles 60 and 61 provide the minimum number of members for the management and supervisory organs and article 63 sets out the right of the council to receive from the management board information about the management of the company). Hence, it may be claimed that British legislation has, by default, attempted to retain its customary model with a single management organ.<sup>\*33</sup>

Returning to Estonian law, we must note that due to the SE-Statute, the SE may also choose between a one-tier and two-tier management structure in Estonia. When analysing the provisions of the SECIA, it is clear that the regulation is very general as far as the one-tier management structure is concerned, and its application regarding the legal environment, aimed at the two-tier management structure of the Estonian public limited company, is apparently problematic, and thus, it may be easier here to choose the two-tier management structure for the SE to be registered here. However, this gives rise to the question of whether the provisions enforcing one-tier management constitute efficient and applicable provisions.<sup>\*34</sup> SECIA § 18 (1) directly provides that if the SE is managed through a one-tier administrative council, the relevant provisions of the SECIA shall apply instead of §§ 306–327 of the Commercial Code.<sup>\*35</sup> The problem is that the provisions of Estonian company law governing the structure of the management organs proceed from the theory of independent supervision that serves as the basis for all the rules on the management of a public limited company operating in the jurisdiction of Estonian law.<sup>\*36</sup> When the SE chooses the monistic model that is an option for national private limited companies, according to the Commercial Code, the entire legal background shifts. Thus, on the basis of the current regulation, it may be said that the Estonian solution regarding the rules of the one-tier management structure is not sufficient. However, the authors are of the opinion that instead of German law described above, we might consider the development of a simpler solution that focuses more on the idea of a single organ, taking into account the fact that such a model would firstly be simpler and secondly easier to understand for the Anglo-American legal system.

<sup>30</sup> See N. Tollet. *The Societas Europea: Europeanization via Americanization of Corporate Law. Corporate Governance: Only One Model? – Global Jurist Topics* 2005 (5) 2, article 3. Available at <http://www.bepress.com/gj/topics/vol5/iss2/art3>.

<sup>31</sup> P. Davies. *Board Structure in the UK and Germany: Convergence or Continuing Divergence? – London School of Economics and Political Science. Department of Law. Working Paper Series.* Available at SSRN <http://ssrn.com/abstract=262959>.

<sup>32</sup> The European Public Limited-Liability Company Regulations 2004 No. 2326. *European Communities.* 8.10.2004. Available at [http://www.bailii.org/cgi-bin/markup.cgi?doc=/uk/legis/num\\_reg/2004/20042326.html&query=societas+and+europaea&method=boolean](http://www.bailii.org/cgi-bin/markup.cgi?doc=/uk/legis/num_reg/2004/20042326.html&query=societas+and+europaea&method=boolean).

<sup>33</sup> The most detailed link between the special Act governing the SE and national company law has most likely been developed in the relevant Swedish Act: its § 16 provides a list of the provisions of Aktiebolagslag directly applicable to the council of the two-tier model. See Lag (2004:575) om Europabolag. Available at <http://www.notisum.se/RNP/SLS/lag/20040575.htm>, Aktiebolagslag (2005:551). Available at <http://www.notisum.se/index2.asp?iParentMenuID=236&iMenuID=314&iMiddleID=285&top=2&sTemplate=/template/sok.asp?DokTyp=1>.

<sup>34</sup> A question about the efficiency of a provision relates to whether the relevant provision or system of provisions in reality regulates those social relationships that it was originally intended to regulate. When formal validity implies the relations within the legal system, then the efficiency is indicative of the actual impact of the provisions on society. See A. Aarnio. *Õiguse tõlgendamise teooria (The Theory of Interpretation of Law)*. Tallinn, 1996, pp. 71–78 (in Estonian).

<sup>35</sup> *Äriseadustik.* – RT I 1995, 26–28, 355; 2006, 61, 456 (in Estonian).

<sup>36</sup> For the theory of independent supervision, see A. F. Conard. *The Supervision of Corporate Management: A Comparison of Developments in European Community and United States Law.* – *Michigan Law Review* 1984 (82), pp. 1459–1488.

### 3. Corporate Governance Recommendations as a regulator of the management of SE

The potential collision of the Corporate Governance Recommendations<sup>\*37</sup> and the SECIA may be pinpointed as a further problem. Based on law, the SE registered in Estonia must have the possibility to create a one-tier management structure if it so wishes. Hence, in that case, national provisions should apply to the administrative organ in the one-tier structure (article 18 (2) of SECIA); in addition, a company registered in Estonia, operating in the form of the SE and listed on the Tallinn Stock Exchange, that has chosen the monistic management model, must generally also proceed from the CGR. The problem is, however, that the regulation of the CGR is based on the two-tier management structure prescribed in the Commercial Code. Consequently, there is no mechanism compelling the SE that has decided to organise its management through an administrative council to distinguish between the executive and non-executive members within the administrative council in Estonia and ensure the balance of powers in the form it is provided for in the one-tier management structure of British public limited-liability companies in the Cadbury Report and later codifications of corporate governance recommendations.<sup>\*38</sup> A listed company operating in the form of the SE may naturally deviate from the CGR, explaining the reasons for choosing a one-tier management structure; yet it would be correct if the CGR took direct account of the possibility that a listed company may have a one-tier management structure in certain cases, and could also provide clearer instructions for ensuring the separation of management and supervision in a situation in which the law fails to do so. As an example, we could use Dutch law, where the relevant circle of issues is clearer because the Netherlands have, for a long time, used in parallel several different structural models.<sup>\*39</sup> Clause 10 of the preamble to the Dutch Corporate Governance Code<sup>\*40</sup> notes that there are real and operative listed companies having one-tier management, so the Corporate Governance Code has been developed in line with the relevant particularities.<sup>\*41</sup>

### 4. Determination of the powers of SE general meeting

According to § 298 of the Commercial Code, the powers of a general meeting are limited by the matters provided by law. Clauses 1–9 of the relevant clauses lists the areas of competence of the general meeting; pursuant to clause 10 of the same subsection, the powers of the general meeting may also include other matters prescribed by law (several decisions related to equity capital, such as use of the legal reserve, but also other matters clearly placed in the competence of the general meeting by the Commercial Code or any other Act). According to § 298 (2) of the Commercial Code, a general meeting may adopt resolutions on other matters related to the activities of the public limited company only on the demand of the management board or supervisory board. This means that in a situation where there is no supervisory board in the management structure of the public limited company, the management board is, in principle, free to decide on everything related to the activities of the company. In the management model comprising two organs, the supervisory board shall exercise supervision of the activities of the management board as the result of several mechanisms separately provided therefore. When the SE, however, is managed by a one-tier structure, this gives rise to the question of how the supervision of the activities of the management board is ensured. It must be noted that in some issues, the legislator has also prescribed for the SE using a one-tier management structure more specific provisions ensuring the separation of powers; for example, deciding on the entry into a transaction with a member of the administrative council and holding a legal dispute have been placed in the competence of the general meeting (SECIA § 26) along with the provision of consent to the competing activities to a member of the administrative council (SECIA § 27).<sup>\*42</sup> Yet the solutions offered by the SECIA are partially also questionable. It is not clear, for instance, whether and how it would be possible to transfer deciding on certain transactions to the general meeting without a conflict with the above-mentioned provisions of the Commercial Code. According to § 18 (2) of the SECIA, the provisions relating to the management board and supervisory board of the public limited company shall be applied to the administrative council insofar as it is possible in the case of a company hav-

<sup>37</sup> Available at [http://www.ecgi.org/codes/documents/cg\\_recommendations\\_2005\\_ee.pdf](http://www.ecgi.org/codes/documents/cg_recommendations_2005_ee.pdf). Hereinafter: CGR.

<sup>38</sup> The Combined Code on Corporate Governance. Financial Reporting Council, 23.07.2003. Available at [http://www.ecgi.org/codes/documents/combined\\_code\\_final.pdf](http://www.ecgi.org/codes/documents/combined_code_final.pdf), Corporate Governance: A Practical Guide. London Stock Exchange, 24.08.2004. Available at [http://www.ecgi.org/codes/documents/rsmi\\_lse\\_guide2004.pdf](http://www.ecgi.org/codes/documents/rsmi_lse_guide2004.pdf).

<sup>39</sup> A. Dorresteijn, I. Kuiper, G. Morse. European Corporate Law. Stockholm, 1995, p. 125.

<sup>40</sup> The Dutch Corporate Governance Code. Principles of Good Corporate Governance and Best Practice. Corporate Governance Committee 09.12.2003. Available at [http://www.ecgi.org/codes/documents/cg\\_code\\_nl\\_en.pdf](http://www.ecgi.org/codes/documents/cg_code_nl_en.pdf).

<sup>41</sup> According to clause III.8 of the Dutch Corporate Governance Code, the model observes “the principle of a single organ”.

<sup>42</sup> The provision concerns a matter placed in the competence of the general meeting by law for the purposes of § 298 (1) 10) of the Commercial Code.

ing one management body. According to § 20 (2) of the SECIA, the members of the administrative council shall observe the limitations prescribed by the statute or imposed by the general meeting or administrative council when entering into transactions on behalf of the SE, yet it remains unclear how the general meeting can expand its competence compared to the provisions of the Commercial Code.

When turning to German law to resolve the above-mentioned problem, it appears, after comparing the provisions of the SEEG and AktG, that of the rules directly concerning the general meeting, the SEEG only contains provisions regarding the submission of the annual report to the regular annual meeting, calling a general meeting on demand of the minority, and amendment of the statute (SEEG §§ 48, 51 and 52). Hence, national law, i.e., AktG is applicable under those circumstances. AktG § 119 (1) provides that the general meeting is competent to make decisions in matters clearly prescribed by law and the statute, and adds a sample list of the matters. Pursuant to the second subsection of the same section, a general meeting may adopt decisions concerning everyday economic activities only at the request of the management board. It derives, from the above, that the solutions of German law would not help fill the gaps caused by the particularities of Estonian law since the competence of the general meeting of an Estonian public limited company cannot be expanded by the statute. When the SE registered in Germany wishes to transfer the supervision of certain acts to be carried out by the administrative council in the future to the powers of the general meeting, it may set out the relevant provisions in the statute. But this is not possible according to the Commercial Code. The authors of the article thus opine that one should consider adding a provision allowing to supplement the powers of the general meeting of the SE in the SECIA.

## 5. Foundation of SE

The provisions governing the foundation procedure of the SE seem to have gaps in them in certain matters; thus, we must investigate how to bridge these gaps. Problems related to the general meeting deciding on the approval of the memorandum of association of a holding SE may be brought as examples. According to article 32 (6) of the SE-Statute, the general meeting of each company participating in the foundation of the SE must approve the memorandum of association of the holding SE. As said, the Regulation does not regulate in detail issues related to the procedure of the general meeting, and the SECIA does not prescribe any special provisions either. There are no provisions in national law governing that type of merger. Thus, regardless of the opportunity to establish SE rules on very different levels, the issue remains unregulated.

This gives rise to a number of questions — it is unclear how the shareholders' right to receive information has been ensured, what documents must be submitted to the general meeting and what documents sent to shareholders for advance notice. When a special general meeting decides on the approval of the memorandum of association of the holding SE, shall the general rules of the Commercial Code apply and a one-week advance notice is enough, or must the period of advance notice be longer? What is the quorum and majority required for deciding on the approval of the holding SE? Or to sum it up: if and how are the protection of minority shareholders and the shareholders' right to receive information in general ensured? It is hard to say whether it is a purposeful non-regulation of the legal relationship or a gap that needs to be bridged, and if it is a gap, then whether the relevant provisions governing the decision on a merger should be analogously applied? One of the solutions offered is interpretation of the relevant provisions pursuant to the objective of the Third Council Directive<sup>\*43</sup>, which would probably allow to apply the rules on mergers to the foundation of holding SEs.<sup>\*44</sup> Such a proposal was made at the time that the Directive on cross-border mergers<sup>\*45</sup> had not been adopted yet; nevertheless, we must agree with the principle and thus the Directive on cross-border mergers should be applied to the above-mentioned issues (particularly articles 7–9). As special rules have been prescribed concerning the foundation of the SE and the foundation of the SE is not a cross-border merger<sup>\*46</sup>, the provisions of the Directive on cross-border mergers could only be applied based on analogy. At the same time, such a solution may bring about new problems since the simultaneous application of two different sets of rules may give rise to the question on the basis of which set the transactions are made and this results in new complicated legal problems related, above all, to employee involvement.<sup>\*47</sup>

<sup>43</sup> Third Council Directive 78/855/EEC of 9 October 1978 based on article 54 (3) (g) of the Treaty concerning mergers of public limited liability companies. – OJ L 295, 20.10.1978, pp. 36–43.

<sup>44</sup> C. Teichmann (Note 4), p. 329.

<sup>45</sup> Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies. – OJ L 310, 25.11.2005, pp. 1–9.

<sup>46</sup> According to article 10 of the SE-Statute, the SE has the same rights as companies founded on the basis of national law, and consequently, they can participate in cross-border mergers, but the merger cannot result in the foundation of the SE.

<sup>47</sup> J. Rickford. The Proposed Tenth Company Law Directive on Cross Border Mergers and its Impact in the UK. – European Business Law Review 2005 (16), footnote 58.

## 6. Limitations arising from national law

As noted above, national law applicable to the SE is not limited solely to company law. As the SE is registered in the register of the country of its seat and on the basis of law applicable there, problems may also arise from differences in the registration procedure and the accompanying areas of law. One such issue is the business name, in the selection of which the SE is subjected to the national law of the Member States and the potential problems arising from which are revealed by the foundation of the, thus far, only Estonian SE (SE Sampo Life Insurance Baltic).<sup>48</sup>

Since it was an insurance company, it was also subject to the specific laws of the relevant area. Subsection 6 (1) of the Insurance Activities Act<sup>49</sup> provides that the business name of an insurance undertaking or insurance agent which is a company shall include the word *kindlustus* [insurance]. Insurance activities here are one of the potential fields in which the establishment of the SE is more likely than in many other areas. The problem is that the Act unambiguously prescribes the compulsory part of the business name and it should be in Estonian according to the Act. This definitely gives rise to the question of whether the provision allows for any interpretations concerning the choice of language, i.e., whether the use of an equivalent word in some other language would be in compliance with the Act. If people wish to found the SE specifically in Estonia, the one-on-one application of the Act to the SE would clearly be unreasonable because it is very difficult to imagine why a pan-European public limited-liability company should wish to use an Estonian complement in its business name. It should also be taken into account that so far, practice in Estonia and the planned foundation of SEs shows that one of the goals why they are founded here is to consolidate into a single company activities for which separate group companies have been maintained in Estonia, Lithuania and Latvia.<sup>50</sup> Hence, it may be assumed that the SE registered in Estonia typically operates in at least three countries. When there is a demand, in such a situation, to use Estonian in the business name, it clearly has negative consequences. The provision of the Insurance Activities Act has a single objective — it must be possible to identify the company by its business name as an insurance company. The registrar obviously proceeded from that when making the decision and accepted that English was used. An approach like this must certainly be approved because such a situation hardly damages anyone's interests and such an interpretation of law precludes the possibility that the SE loses ground in competition because of regulatory limitations. Another problem with Estonia is that, unlike in the Nordic Countries, the use of a business name in several different languages or a secondary business name is not allowed<sup>51</sup>, and taking into account of the cross-border nature of the SE, if problems arise in Estonia, we could not avoid the possibility that the SE will be in that case registered in a country allowing the use of the desired business name.

## 7. Conclusions — development of SE as special type of company and trends in Estonian company law

Already Teichmann has indicated that the extensive application of national law to the SE may, in practice, cause gaps in the legal regulation of the relevant type of company.<sup>52</sup> Even if we assume that the type of company will really be operative, the SE will never be likely to become a very broadly used form already because of the objective and peculiarities of its form. Opinions have still been expressed that when more account is taken of the legal environments of the Member States compared to the legislative framework superseding that of the Member States and created for the European Economic Interest Grouping (EEIG)<sup>53</sup>, this gives a reason to hope that the SE form will be actively used in reality.<sup>54</sup> Literature has also taken the position that, in reality, the introduction of the SE has not resulted in a single pan-European form of company but there are as many of them as there are Member States or even more, considering that the SE can choose between one-tier and two-tier management structures in each Member State. One may, of course, object to such a position that the

<sup>48</sup> As of 1 May 2007.

<sup>49</sup> *Kindlustustegevuse seadus*. – RT I 2004, 90, 616; 2007, 4, 20 (in Estonian).

<sup>50</sup> SE Sampo Life Insurance Baltic was founded by the merger of the public limited companies founded in these three countries. On 29.01.2007, a notice concerning the entry into a merger agreement for founding Seesam Life Insurance SE was published, and here too, the SE is formed on the basis of companies located in the same countries.

<sup>51</sup> E.g., in Sweden *Aktiebolagslag* (2005:551) 28:3, *Firmalag* (1974:156) § 11, in Finland *Osakeyhtiölaki* (21.7.2006/624) 2:3, *Toiminimilaki* (128/1979) § 11.

<sup>52</sup> C. Teichmann (Note 4), p. 328.

<sup>53</sup> Council Regulation (EEC) No 2137/85 of 25 July 1985 on the European Economic Interesting Grouping (EEIG). – OJ L 199, 31.7.1985, pp. 0001–0009.

<sup>54</sup> S. Mock. Harmonization, Regulation and Legislative Competition in European Corporate Law. – *German Law Journal*. European and International Law. 01. 12. 2002, Vol. 3, No. 12. Available at <http://www.germanlawjournal.com/article.php?id=216>.

company law of the Member States is largely based on the relevant directives and is thus relatively similar.<sup>\*55</sup> Yet there are also areas in company law in which the harmonisation of the law of the Member States has not been a success or it has not been regarded as necessary (for example, the management structure, issues related to organising a general meeting). Thus, it is formally correct to state that the use of the SE model means that a limited-liability legal person (public limited-liability company) that has registered as the SE may operate everywhere in the European Union, being subject only to European Union law in certain important issues<sup>\*56</sup>, but the substantive analysis of the actual situation and nearly any contact with national law shows that national law is important and this results in implementation problems. Hence, instead of a pan-European single company model, there are actually many different types of SEs and each Member State, including Estonia, has its own problems with legal regulation stemming from gaps between national law and European Union law.

The SE has typically been viewed as an option that gives an entrepreneur greater freedom, since the abolition of the limitations regarding the cross-border change of location compels the Member States to reduce the limitations imposed by their national law, as a result of which the company law environment in Europe, as a whole, should become considerably more liberal.<sup>\*57</sup> At the same time, the SE has actually lost its proclaimed advantages because the cross-border change of location has been, on the one hand, recognised by the decisions of the European Court of Justice<sup>\*58</sup> and, on the other hand, a directive governing cross-border mergers has been adopted. Since the entry into force of the SE-Statute, one has not noticed a particularly wide use of the relevant advantages and thus, it is impossible to say that the supranational legal form of the SE has facilitated, in any manner, the cross-border movement of companies. The reason why the hoped effects have not been achieved may also be the fact that the overall number of the SEs is relatively small<sup>\*59</sup>, which in turn confirms the opinion that there has actually been no need for the advantages of the cross-border movement of the SE. The situation described may have been caused by the fact that the opportunities of cross-border movement are necessary for companies for which the SE is too costly and burdensome. The latter hypothesis cannot be verified today, but it may be confirmed in the course of cross-border mergers that are likely to be carried out as the result of the Directive in the nearest future.

However, we must admit that the SE, as a supranational legal form, is certainly one of the phenomena that serves as a challenge for the Member States to liberalise their legal environments. The foundation practice of SEs has pinpointed details that have gone unnoticed to date but which reveal bottlenecks in national law systems. It is not known on how wide a scale the form will be used in Europe; yet in a sense, the SE obviously serves as a catalyst for the convergence of company law (for instance, German company law has developed an alternative management model to the SE, which, however, cannot be viewed as classically monistic). Changes are not rapid but they do occur. Based on the above, the next step may well be that the management rules of national companies are made more flexible.

The SE as a supranational legal form poses the question to the Member States of what means should be used in the current situation in which company law is characterised by 'forum shopping'. One of the possibilities is to establish rules that prevent companies from leaving, another (and more efficient) possibility is to abolish unreasonable limitations from law and establish rules that are in compliance with market requirements.<sup>\*60</sup> Estonia should also take account of the trend when moving forward. One of the areas in which national law would benefit from improvement, based on the above analysis, is certainly the provisions concerning the structure of the SE management organs. With due regard to both flexibility and competitiveness, a more frequent use of the British model should be considered when improving the provisions concerning the one-tier management structure.

<sup>55</sup> C. Teichmann (Note 4), p. 310.

<sup>56</sup> I. Ulst. Euroopa äriühingu mudel ja selle rakendamise finantssektori äriühingute poolt (Model of *Societas Europaea* and Its Implementation by Financial Sector Companies). – *Juridica* 2005/7, p. 467 (in Estonian).

<sup>57</sup> See, e.g., L. Enriques. Silence is Golden: The European Company Statute As a Catalyst for Company Law Arbitrage. – *Journal of Corporate Law Studies* 2004 (4), pp. 77–95.

<sup>58</sup> Particularly *Centros* (judgment of the Court of 9 March 1999 in case C-212/97: *Centros Ltd. v. Erhvervs- og Selskabsstyrelsen*. [1999] ECR I-01459), *Überseering* (judgment of the Court of 5 November 2002 in case C-208/00. Reference for a preliminary ruling from the Bundesgerichtshof: *Überseering BV v. Nordic Construction Company Baumanagement GmbH (NCC)* [2002] ECR I-9919.), *Inspire Art* (judgment of the Court of 30 September 2003 in case C-167/01: *Kamer van Koophandel en Fabrieken voor Amsterdam v. Inspire Art Ltd.* [2003] OJ C275, 10) and *Sevic* (Judgment of the Court of 13 December 2005 in case C411/03: Reference for a Preliminary ruling from the Landgericht Koblenz in proceedings against *SEVIC Systems AG* [2006] OJ C36, 5).

<sup>59</sup> As of 18 February 2007, all in all 65 SEs have been founded, one of them in Estonia. See <http://www.seeurope-network.org/homepages/seeurope/secpanies.html>.

<sup>60</sup> See F. Kübler. *The Societas Europaea – Implementation and Perspectives*. – *Die Europäische Aktiengesellschaft. Umsetzungsfragen und Perspektiven*. T. Baums, A. Cahn (Hrsg.). Berlin: De Gruyter Recht 2004, pp. 5–7.