

The SE in Austria

Some Aspects of Corporate and Tax Law

**Conference „SE: Its use and implementation“
University of Southern Denmark
Odense, 8 October 2004**

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The European Company

1. applicable law

2. transfer of the registered office

3. formation by merger

4. formation of a Holding-SE

5. tax reform

1. applicable law

1.1. national laws on the introduction of the SE

■ **GesRÄG 2004: federal gazette I Nr. 67/2004 dated 24 June 2004**

- Art I: Act on the implementation of the European Company („SEA“)
- Art II to VIII: Changes of other national laws like the Stock Corporation Act („SCA“)
 - ➔ combined with the implementation of the SE-statute was a deregulation of the SCA: foundation of a public company by one person or use of new media for board-meetings

■ **Where having authority to issue new rules, the legislator decided to retain the principles of national stock corporation law *mutatis mutandis*.**

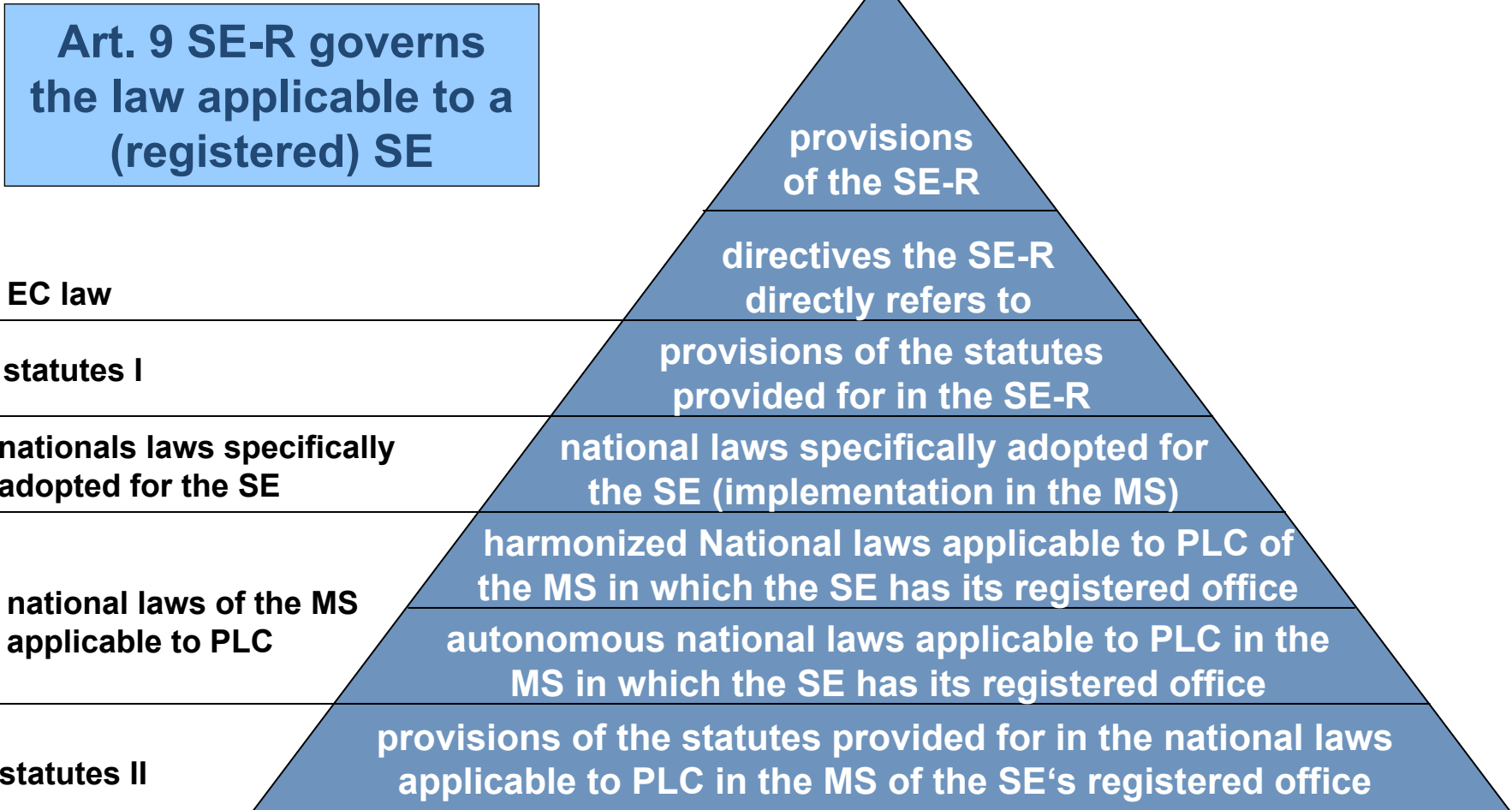
- discretionary areas
 - legislative requirements
 - ➔ Protection of creditors
 - ➔ protection of minority shareholders
 - special legal basis to ensure effective application of the SE-Regulation (Art 68)
- 
- transfer of the registered office serves as the model

■ **Art. VI ArbVG: federal gazette I Nr. 82/2004 dated 15 July 2004**

- transformation of the SE-Directive through a new part (Art. VI: §§ 208 et sequ) in the Act on employee participation in national companies

1. applicable law

1.2. pyramid of legal sources



The European Company

1. applicable law

2. transfer of the registered office

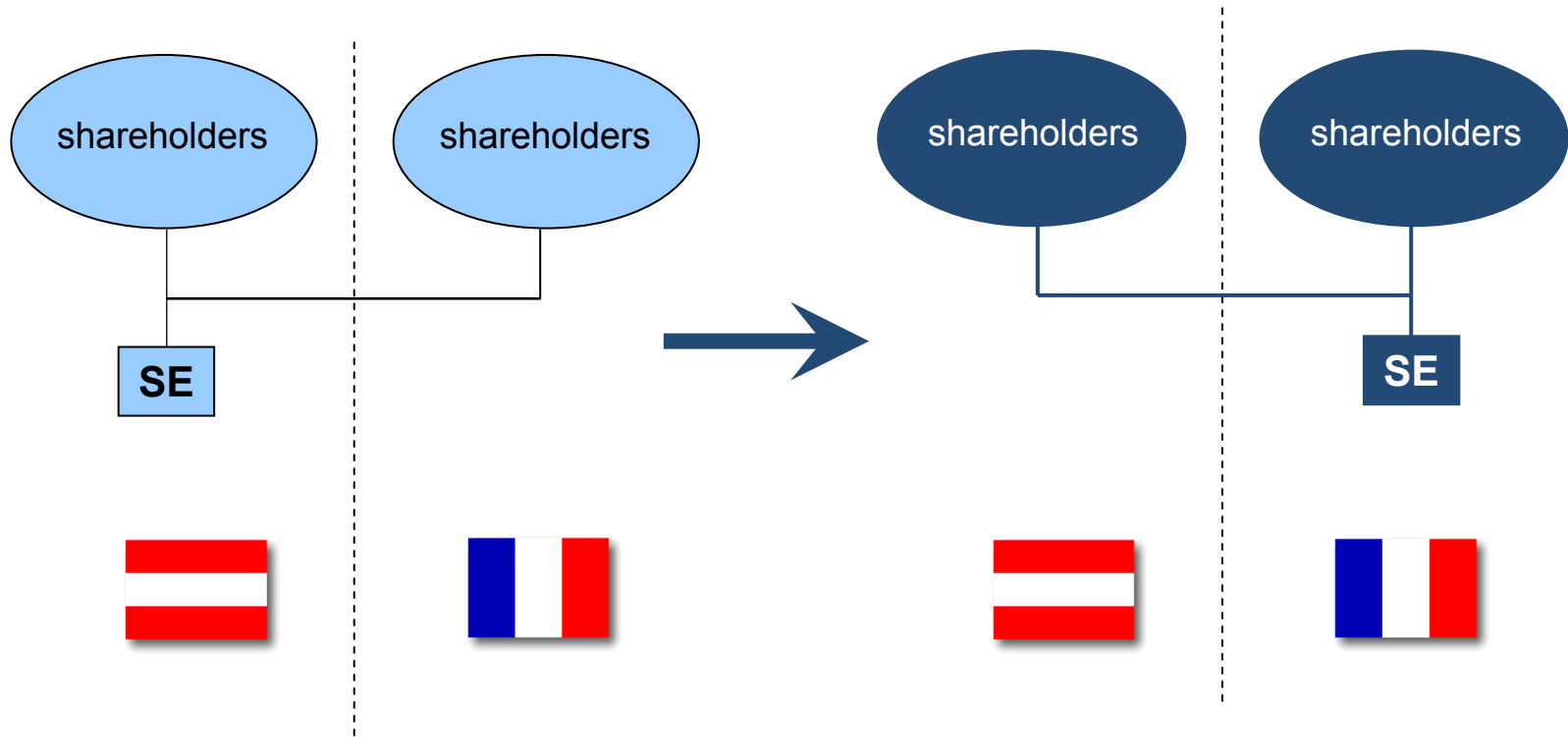
3. formation by merger

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2. transfer of the registered office

2.1. veto-right of the supervisory authority



- According to § 10 para 6 Insurance Supervisory Act (VAG) the Austrian Financial Market Authority (Finanzmarktaufsicht) can veto the transfer, if the rights of the insured are not sufficiently protected Art. 8 para 14 SE-VR

2. transfer of the registered office

2.2. consequences on the shareholders

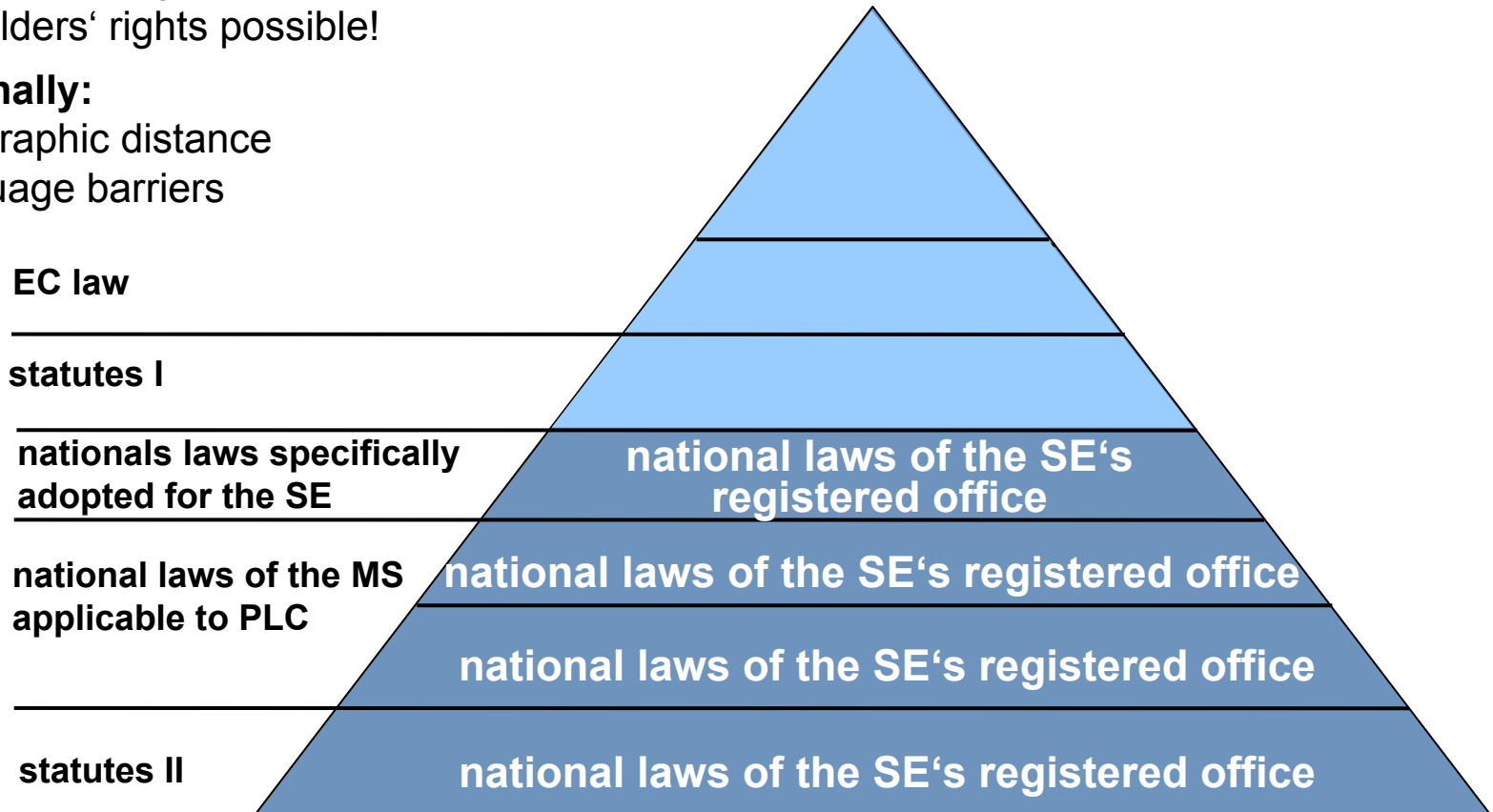
- after the transfer of the registered office the SE is subject to a new national jurisdiction

→ material changes of the shareholders' rights possible!

additionally:

→ geographic distance

→ language barriers



2. transfer of the registered office

2.3. protection of minority shareholders

■ appraisal right (§ 6 in connection with § 12 SEA)

- has to be reviewed by an independent expert and offered in the transfer proposal
- legislator did not distinguish between listed and non-listed companies
- allows *dissenting* shareholders to exit the company for a cash compensation
 - dissenting vote
 - objection against the shareholders' vote to be included in the minutes
 - declaration on the exit within one month after the shareholders' resolution
- security for the cash offer (§ 21 in connection with § 12 SEA)
 - endangerment of the claims is not necessary in this case
 - contradiction to the principle of creditor protection that creditors must provide credible evidence that their claims are prejudiced
- on demand of a shareholder the cash compensation is subject to review by the court, while a challenge of general meetings resolution based on the inadequacy of the cash compensation is excluded → blocking of the transfer is not possible
 - the review (but not the cash offer as such) is subject to the explicit acceptance by all companies, the registered office of which is located in a jurisdiction that does not provide for such a procedure (Art. 25 para 3 SE-R)

2. transfer of the registered office

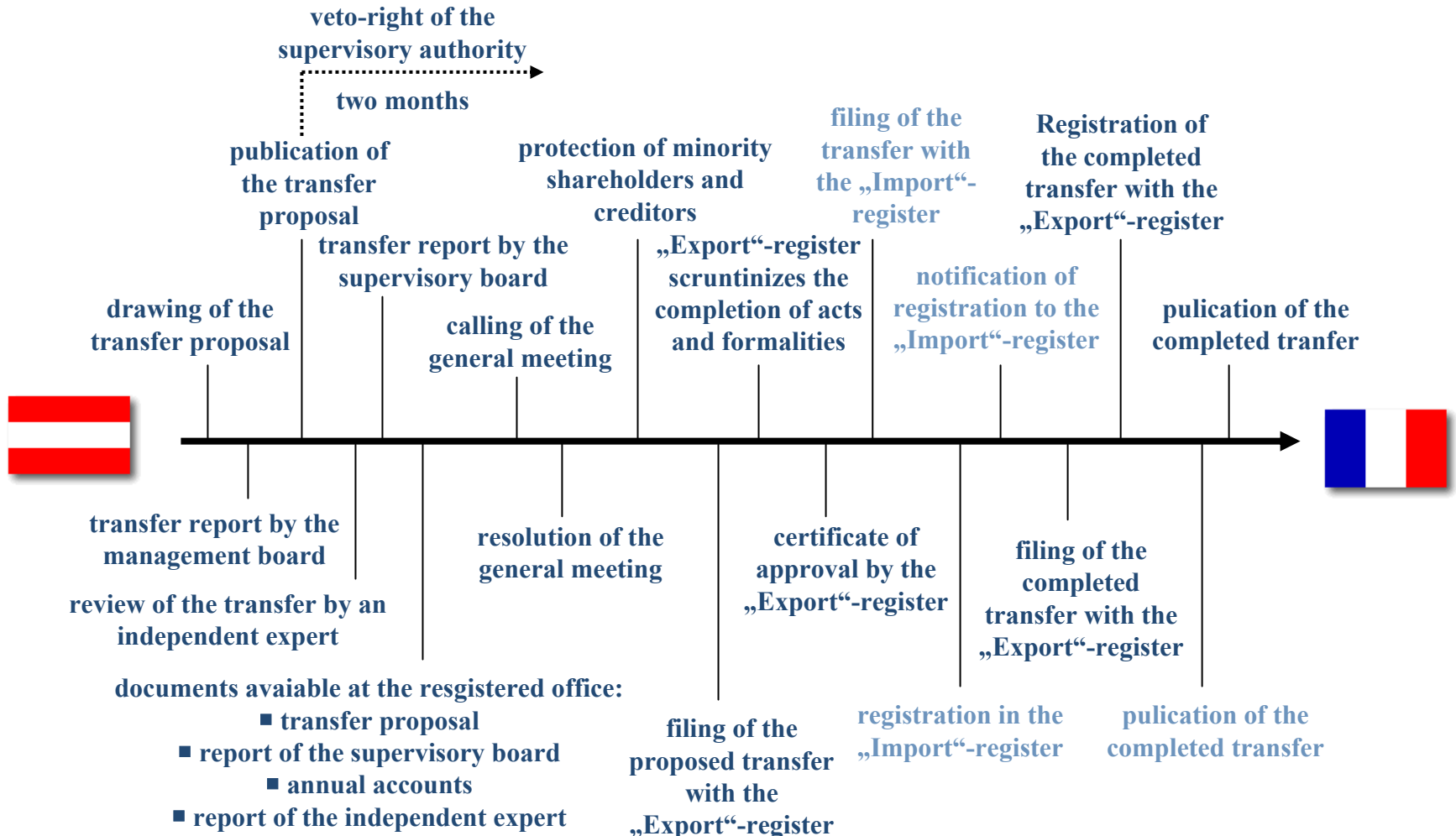
2.4. creditor protection

- **§ 14 SEA introduces a preliminary protection regime, calling for securities before the registration of the transfer of the registered office**
 - Art. 8 para 7 SE-R as legal basis? SE-R does not contain an explicit creditor's right to demand security before the transfer like Art. 8 para 1 of the proposed 14. Directive
- **Is such a creditor protection necessary?**
 - SE does not cease to exist – no change of the assets and liabilities due to the transfer
 - Art. 8 para 16 SE-R already protects the creditors' interests by maintaining former jurisdiction for such claims, which arose prior to the registration of the transfer in the new Member State (one month after the publication of the transfer proposal)
 - Differentiate according to the type of creditor? (contract vs. tort)?
- **creditors have to credibly establish that the satisfaction of their claims are in danger because of the transfer**
 - cross-border transfer of assets is not subject to the transfer of the registered office
 - Regulation 44/2001 ensures recognition and enforcement of judgments in civil and commercial matters
 - judicial procedure unclear

guideline for the transfer of the registered office

requirements in the „Export-MS“

requirements in the „Import-MS“



The European Company

1. applicable law

2. transfer of the registered office

3. formation by merger

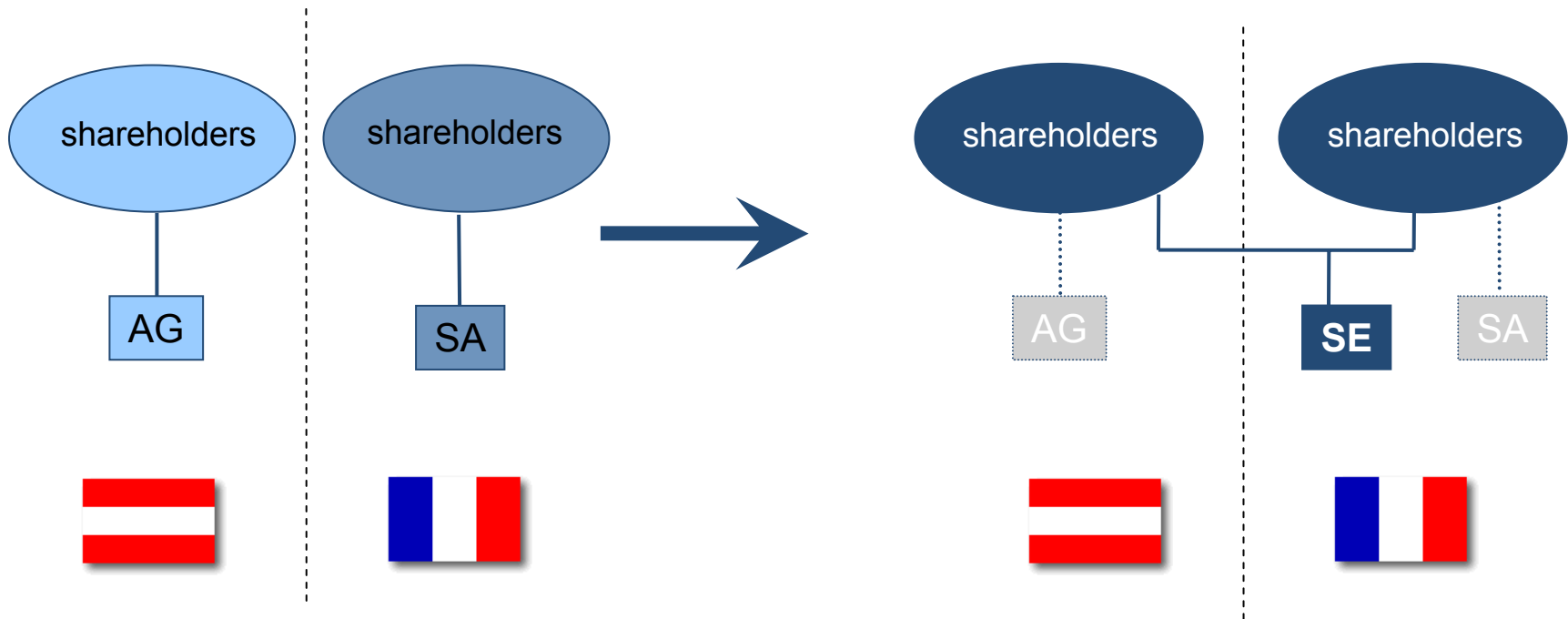
4. formation of a Holding-SE

5. tax reform

3. formation by merger

3.2. merger by formation

- both companies cease to exist

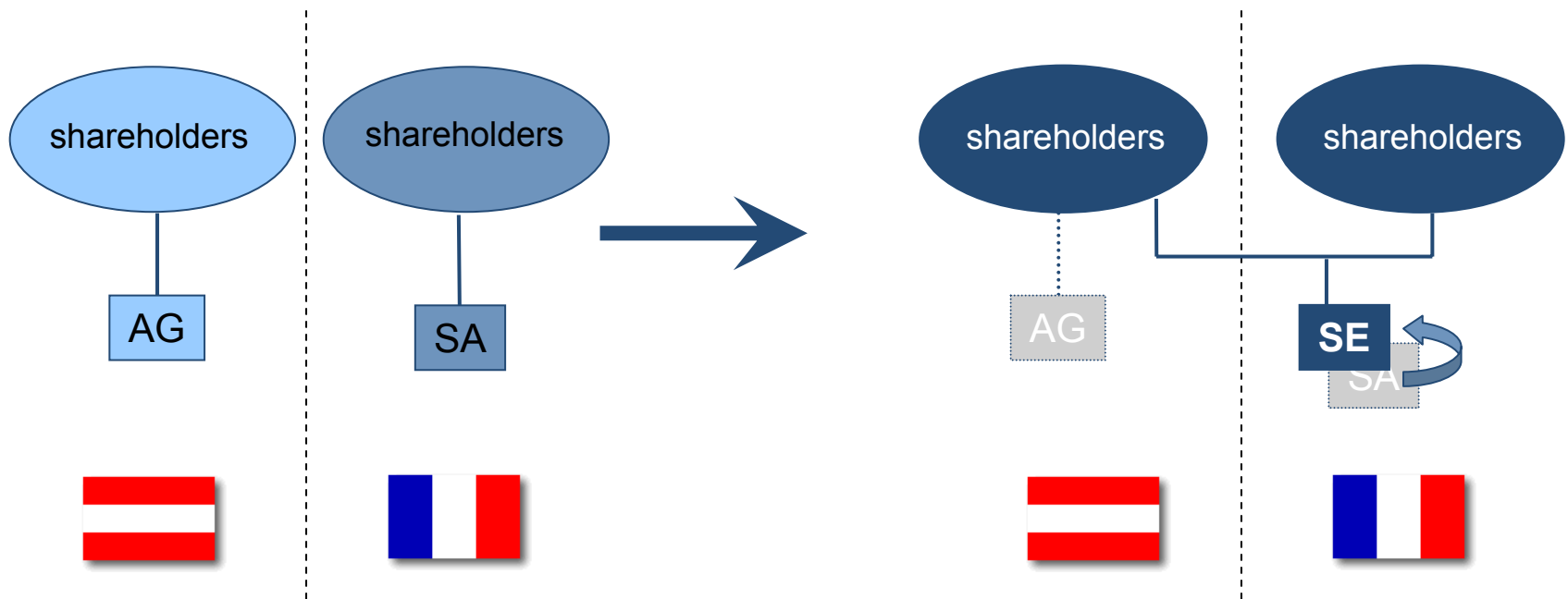


- also more than two PLC can participate in the merger

3. formation by merger

3.3. merger by acquisition

- for the acquiring company the merger is combined with a conversion
- transferring company ceases to exist

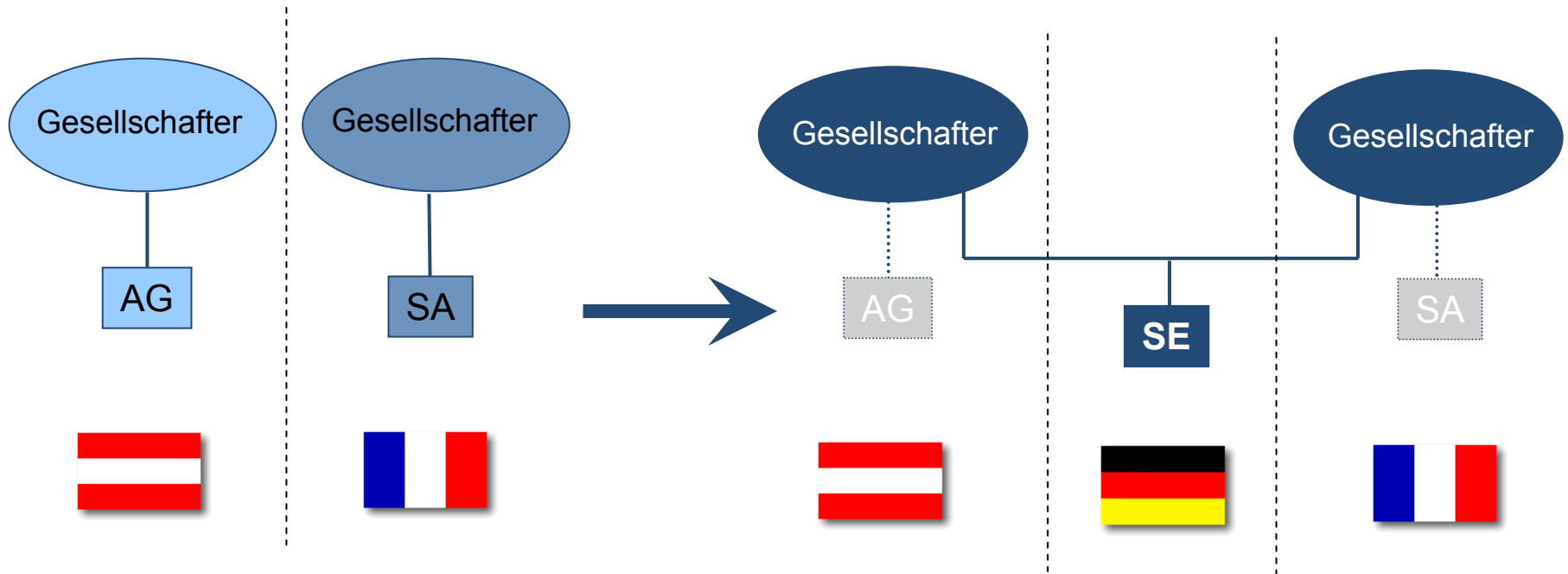


- also more than two PLC can participate in the merger

3. formation by merger

3.4. merger by formation in a third MS

- both companies cease to exist



3. formation by merger

3.6. protection of minority shareholders (I)

■ Review of the share-exchange ratio by the court (§ 22 SEA)

- on demand of a shareholders
- the review is subject of a court proceeding separated from the formation process
- if the court finds the share-exchange ratio to be unfair, the shareholders receive compensation in cash
- § 22 SEG adds SE-specific aspects to the national procedure (§§ 225c et sequ SCA)
 - According to Art. 25 para 3 SE-R the procedure is only applicable if all companies, the registered office of which is located in a jurisdiction that does not provide for such a procedure, explicitly accept it when approving the draft terms.



the shareholders cannot contest the general meetings resolutions on the basis of an inadequate share-exchange ratio or the non-compliance with information obligations in the preparatory documents on the merger

3. formation by merger

3.6. protection of minority shareholders (II)

■ appraisal right (§ 17 in connection with § 21 SEA)

- only if the registered office is outside Austria
 - if the registered office is located in the MS of one of the founding parties or in a third MS
- if the registered office of the SE will be in Austria, no appraisal right is granted
- reviewed by an independent expert and offered in the draft terms of the merger
- legislator did not distinguish between listed and non-listed companies
- allows *dissenting* shareholders to exit the company for a cash compensation
 - dissenting vote
 - objection against the shareholders' vote to be included in the minutes
 - declaration on the exit within one month after the shareholders resolution
- on demand of a shareholder the cash compensation is subject to review by the court, while a challenge of general meetings resolution based on the inadequacy of the cash compensation is excluded → blocking of the merger is not possible
 - the review (but not the cash offer as such) is subject to the explicit acceptance by all companies, the registered office of which is located in a jurisdiction that does not provide for such a procedure (Art. 25 para 3 SE-R)

3. formation by merger

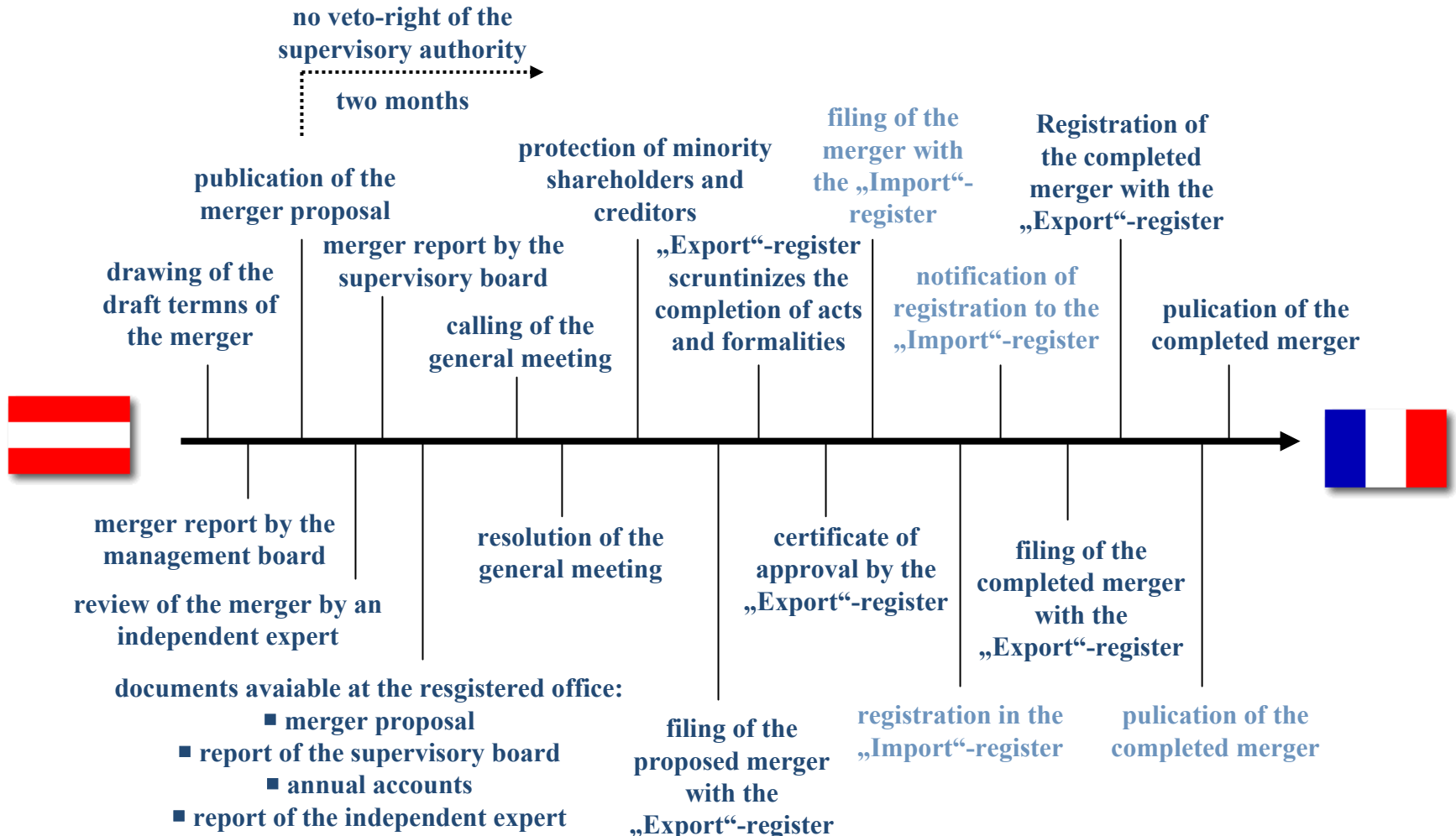
3.7. creditor protection

- **§ 23 SEA introduces a preliminary protection regime, calling for securities before the registration of the merger, if the registered office of the SE is located outside Austria**
 - i.e. in the MS of one of the founding parties or in a third MS
 - if the registered office of the SE will be located in Austria, national law (§ 226 SCA) applies, which only grants deferred creditor protection (i.e. after the registration)
- **creditors have to credibly establish that the satisfaction of their claims are in danger because of the merger within one month after the resolution of the general meeting**
 - the register court has to decide whether this is the case or not – procedure unclear
- **lack of legal basis for such a provision**
 - Art. 24 para 1 SE-R calls on the rules of the MS applicable to a merger of national PLC
 - the phrase „taking into account the cross-border nature of the merger“ only supplements the reference to national law and might justify preliminary protection in some cases, but clearly does not provide for an SE-specific creditor protection regime

guideline for the formation by merger

requirements in the „Export-MS“

requirements in the „Import-MS“



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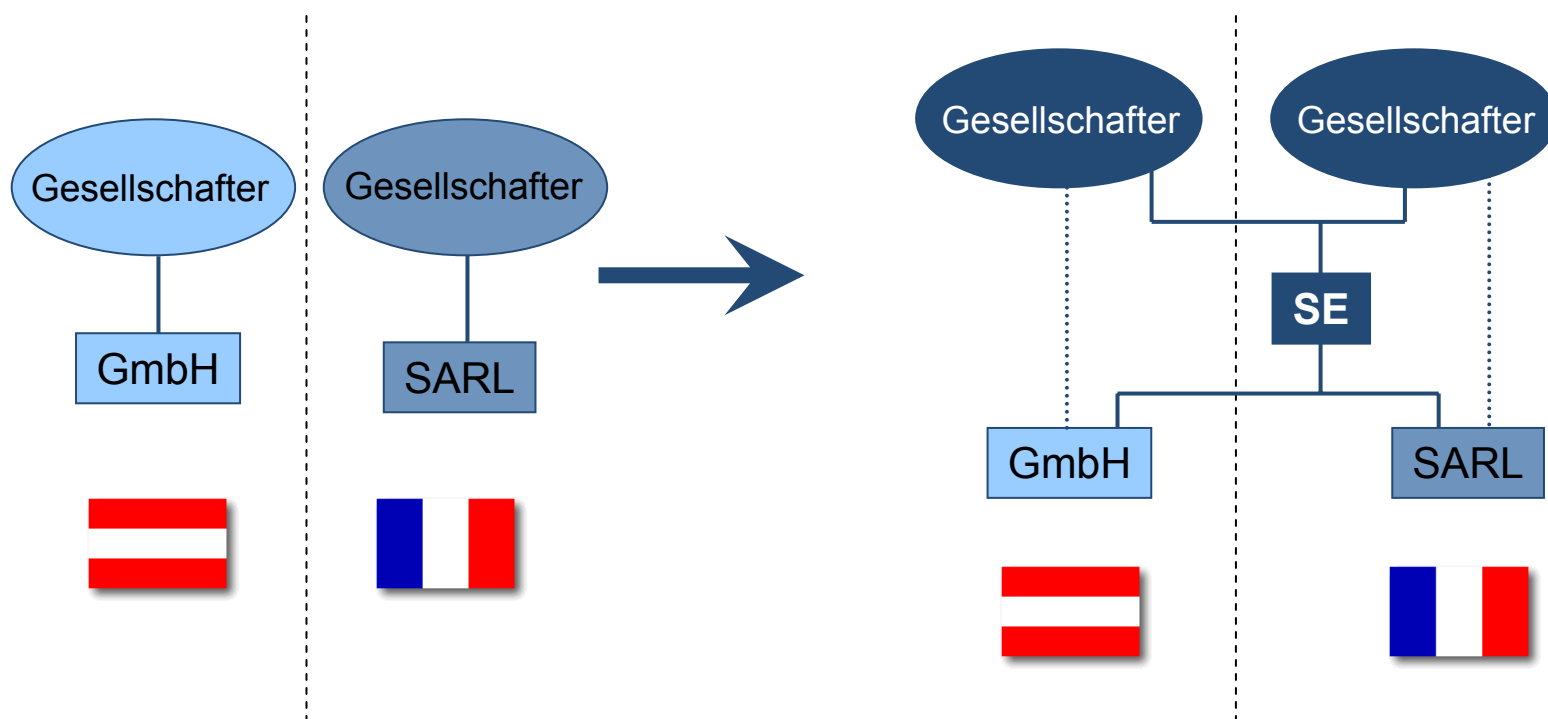
4. formation of a Holding-SE

5. tax reform

4. formation of a Holding-SE

4.1. scenario I

- unabhängige Gesellschaften, die nach dem Recht verschiedener MS gegründet wurden

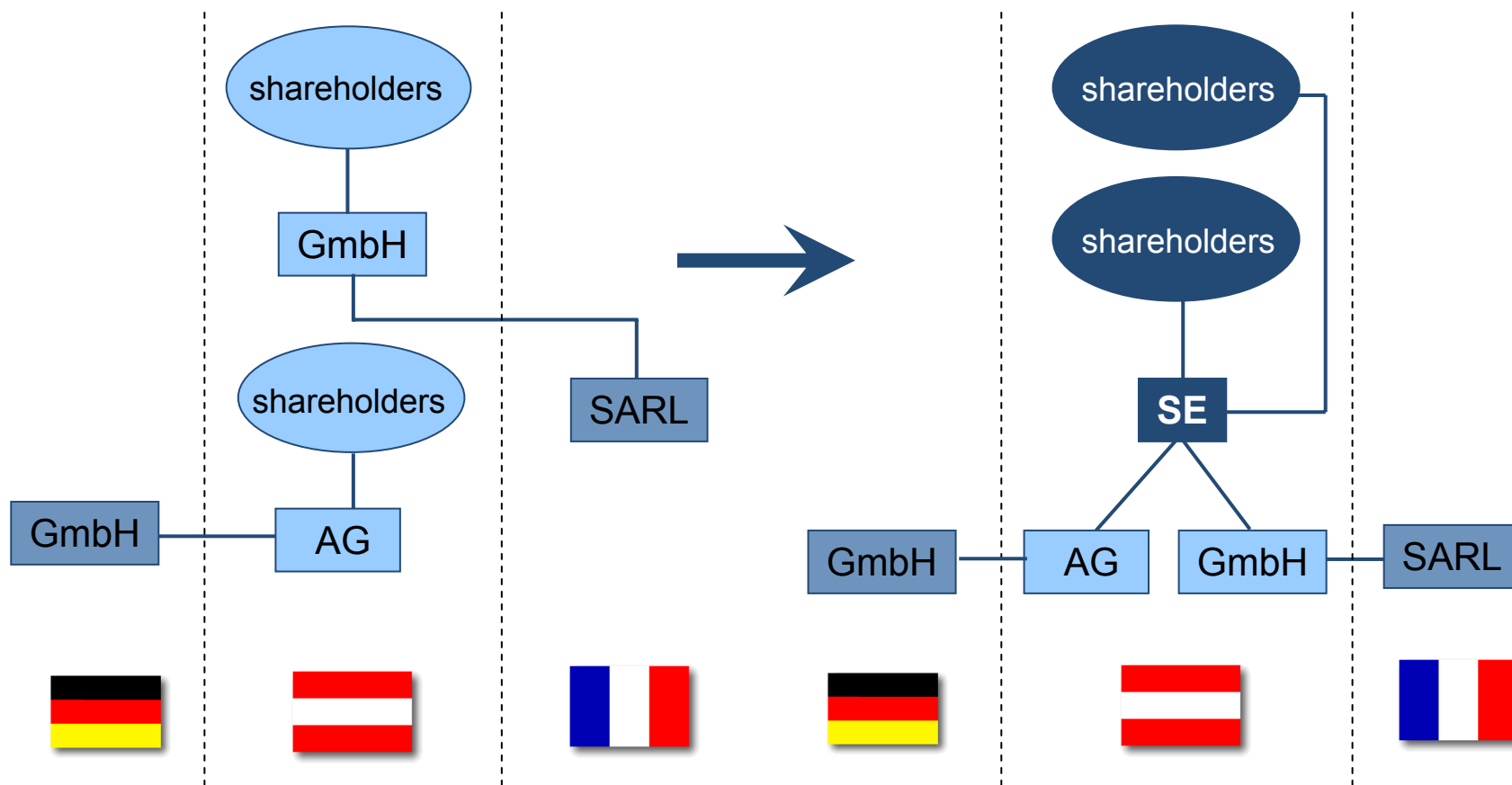


- es können auch drei oder mehr Gründungsgesellschaften beteiligt sein

4. formation of a Holding-SE

4.2. scenario II

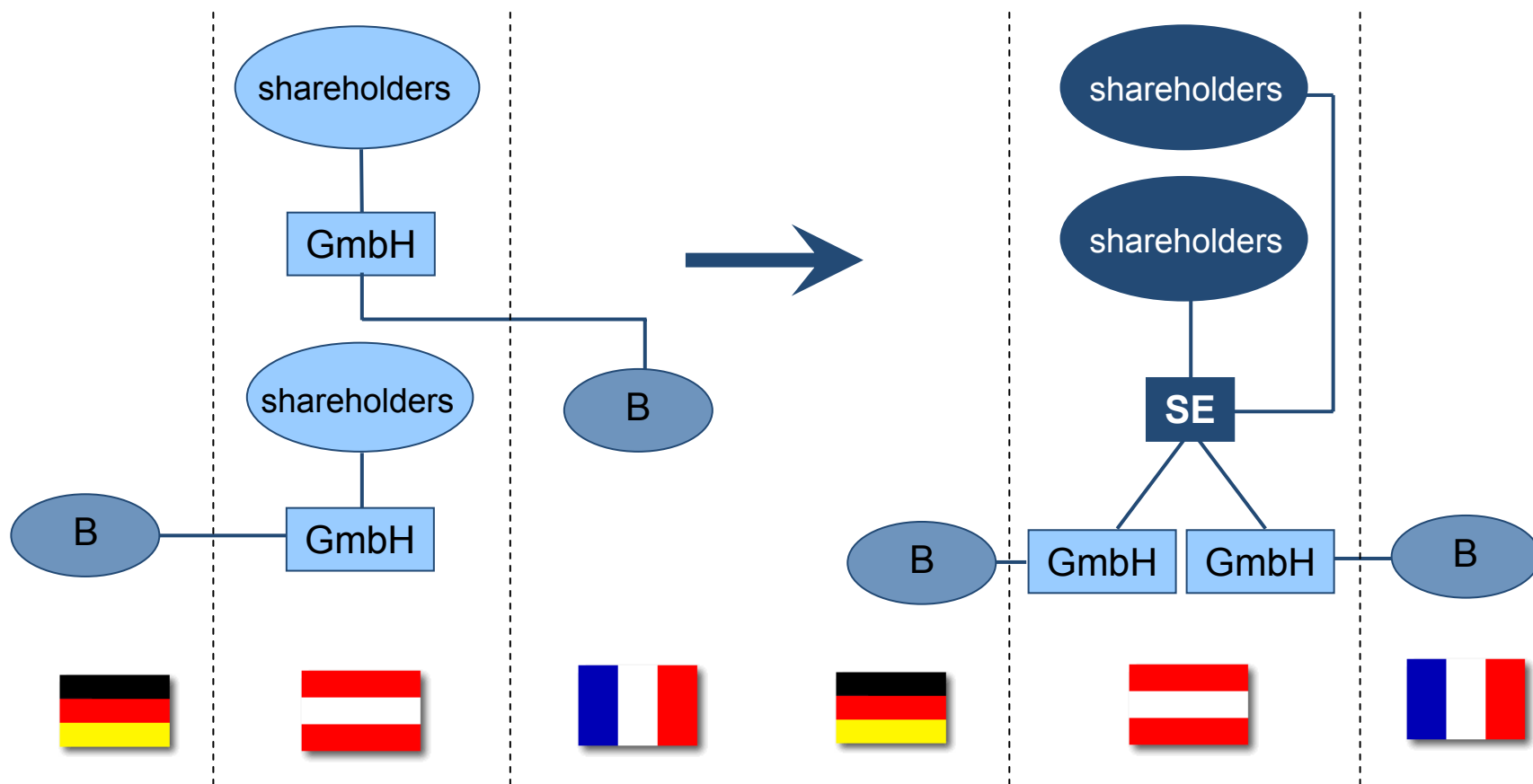
- unrelated companies with subsidiaries in other MS



4. formation of a Holding-SE

4.3. scenario III

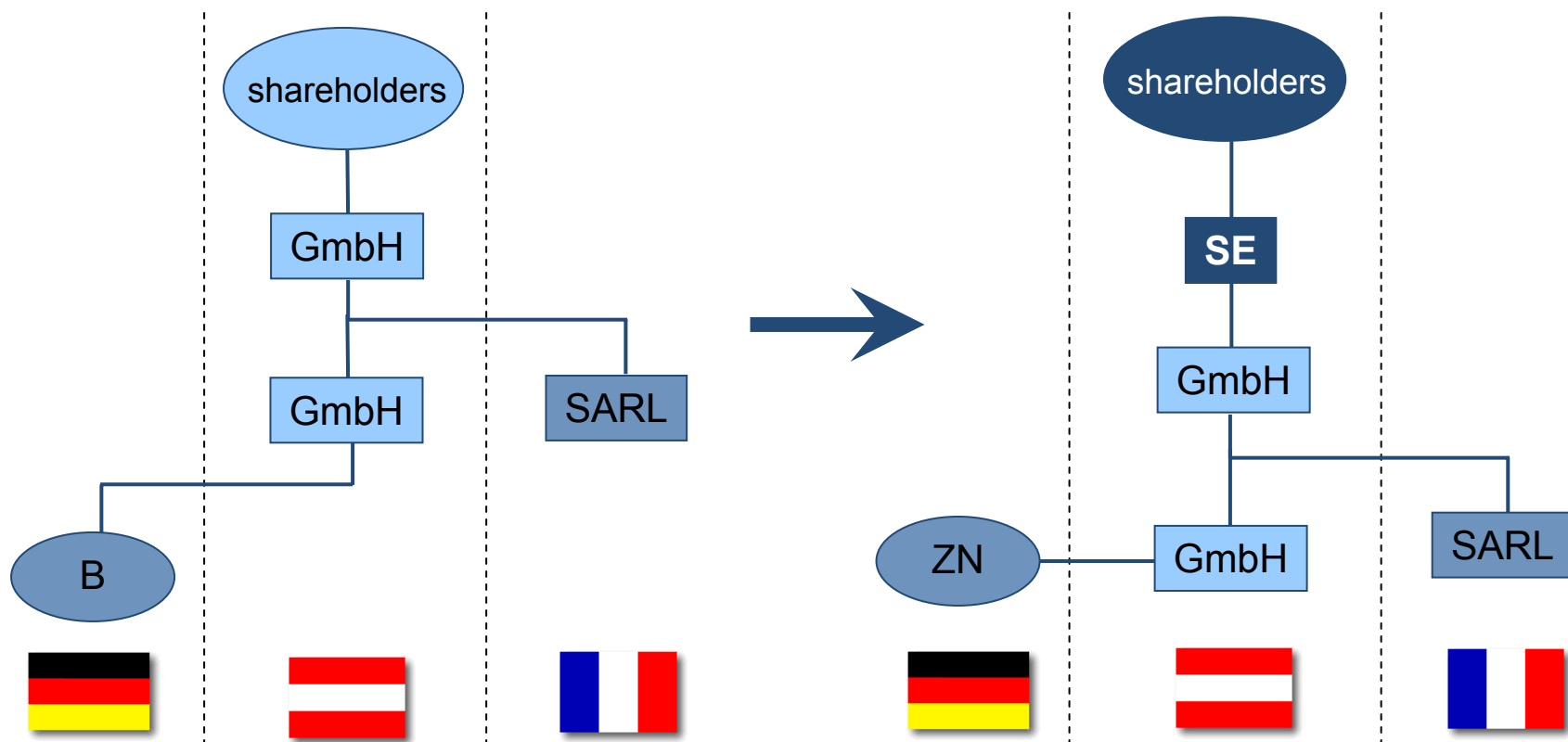
- unrelated companies with branches in other MS



4. formation of a Holding-SE

4.4. scenario IV

- group with subsidiary and branch in other MS



4. formation of a Holding-SE

4.5. protection of minority shareholders

- **SEA does not extend the protection regime of the cross-border mergers to the formation of a Holding-SE**
 - even if the registered office is located outside Austria, no appraisal right is granted
- **protection by information (§ 26 Abs 1 SEA)**
 - draft terms for the formation of a Holding-SE (Art. 32 SE-VO)
 - report of the management board (Teil des Gründungsplans)
 - report of the supervisory board
 - audit by an independent expert
- **protection by vote (§ 26 Abs 2 SEG)**
 - Art. 32 para 6 SE-R does not clarify the required majority
 - SEA requires a qualified majority of not less than three quarters of the votes cast
- **review of the share-exchange ratio by the court (§ 26 para 1 SEA in connection with §§ 18, 22 SEA)**
 - this review lacks any systematic justification, because the exchange of shares is voluntarily and on the basis of a disclosed share-exchange ratio (i.e. the shareholder is aware of the exact share-exchange ratio when making his decision whether to participate in the Holding-SE or not) the and founding parties do not cease to exist

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5. tax reform

5.1. Merger Directive and EC-law

- **Merger Directive as well as its new proposal safeguard the taxpayer only if the assets remain effectively connected with a permanent establishment in the „Exit-MS“**
- **the judicature of the ECJ (Hughes de Lasteyrie du Saillant) seems to be in conflict with this principle of the Merger Directive**
 - the payment of an exit taxation has to be deferred until the assets are actually sold
 - judicature is based on the fundamental freedoms
 - primary law can not restrict secondary law
- **European legislator is bound by primary law (see ECJ’s judicature on the free movement of goods)**
- **Merger Directive and its proposal have to be changed accordingly**
- **national legislators have to amend rules based on the Merger Directive**

5. tax reform

5.2. reform of the Austrian exit tax regime

■ levying of any exit tax is deferred until

- the assets are actually sold
- or transferred to a state outside the EU
- and limited for a period of 10 years
- and capped by the lower of
 - the hidden reserves at the time of the exit
 - and the actually realized capital gains

■ in the case of an outbound-merger

■ in the case of the cross-border transfer of assets

■ in the case of a change of domicile of an individual

■ and similar outbound-cases

■ for assets entering into the Austrian jurisdiction a step-up to the real value is granted unconditionally (i.e. without reference to the „Exit-MS“