



The SE in Germany

October 8, 2004

University of Southern Denmark / Odense

Dr. Christoph Teichmann

Institut für deutsches und europäisches Gesellschafts- und Wirtschaftsrecht

For a detailed report see:

C. Teichmann in: Oplustil/Teichmann (ed.), *The European Company – all over Europe*, De Gruyter/Berlin, 2004, p. 107 et seq.



SE in Germany

Options for national legislation

- I. Formation: protection of minority shareholders (and creditors)
- II. Transfer of seat: protection of minority shareholders and creditors
- III. Management structure: one-tier and two-tier system
- IV. Involvement of Employees: Transformation of the directive



SE in Germany

I. Formation of the European Company

1. *Merger** (public limited-liability companies)
2. *Holding SE** (public and private limited-liability companies)
3. *Subsidiary* (companies and firms, Art. 48 EC-Treaty)
4. *Conversion* (public limited-liability companies)

* National law implementing the Regulation: protection of minority shareholders, creditors and employees.



SE in Germany

Formation of an SE by Merger

1. Draft terms of merger
 2. Creation of special negotiating body (employees)
 3. General meeting
 4. Certificate attesting completion of pre-merger acts
-
5. Scrutiny of legality of merger
 6. Registration
- pre-merger acts*
- formation of SE*



SE in Germany

Merger: Review of the exchange ratio

- (1) *Company law*: Defect of the resolution justifies a challenge to the resolution, blocking the completion of the merger.
- (2) *Separate procedure*: Right to challenge the resolution is excluded, review of the exchange ratio in a separate court procedure not blocking the merger.
- (3) *Problem*: German company ceases to exist, claims will be directed against the SE; Art. 25 para. 3 Reg. requires approval of other merging company.



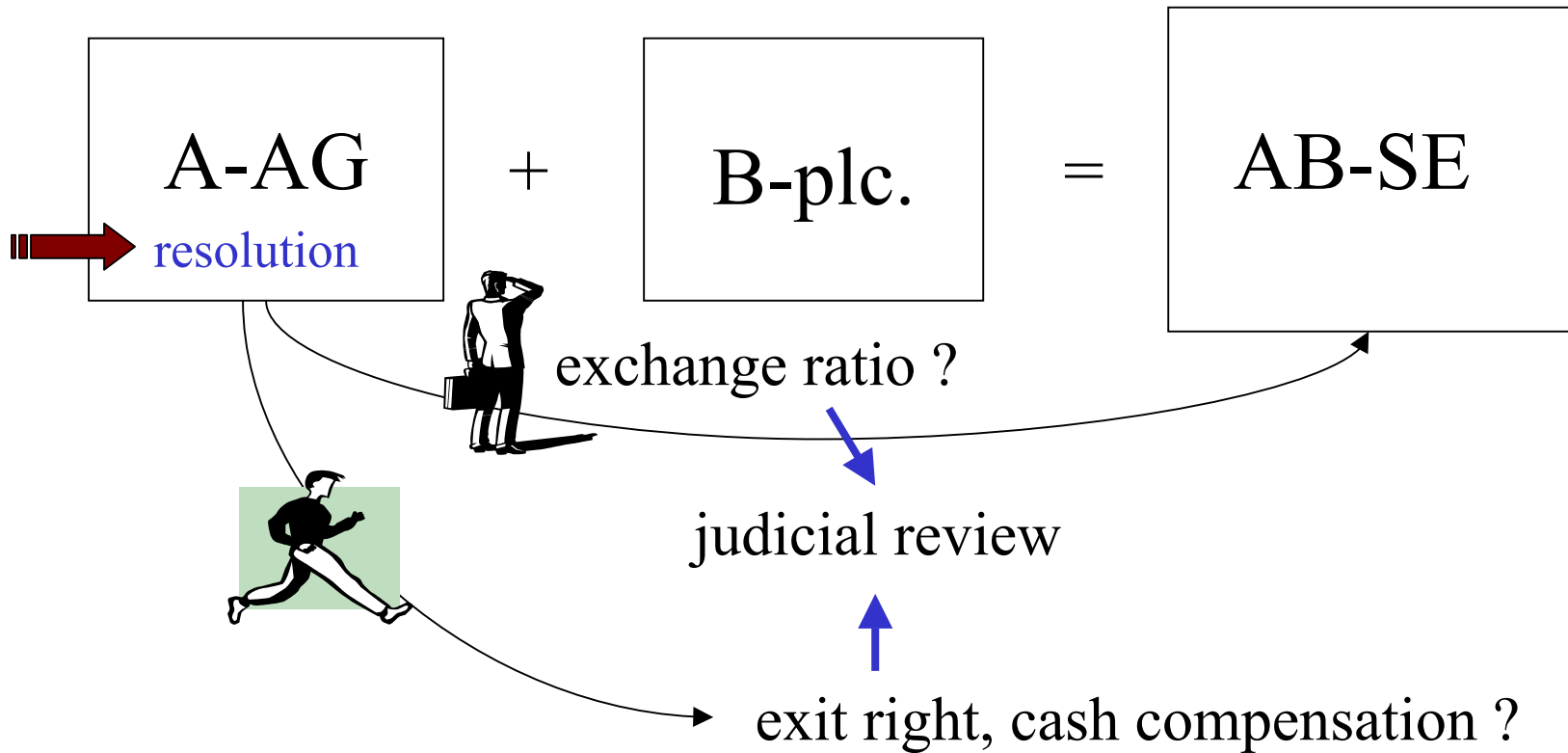
SE in Germany

Merger: Appraisal right

- (1) *General idea*: Majority may not force minority into fundamentally different legal framework (German company law: e.g. merger of public and private company).
- (2) *Formation of SE*: SE with registered seat in Germany is not very different from German AG. \Rightarrow Need for protection only in cases where SE will be located abroad.
- (3) *Appraisal right* and: an inappropriate offer may be challenged in a separate court procedure (not blocking the completion of the merger).



SE in Germany





SE in Germany

Merger: Protection of creditors

- (1) *National law*: Right to demand security if satisfaction of the claim is endangered by the merger.
- (2) *Application "taking into account the cross-border nature of the merger"*: Under national law, demand for security becomes due after the merger has been registered.
- (3) *Additional protection*: Demand for security prior to the merger, if cross-border character of the transaction may have a detrimental effect to the position of the creditor.



SE in Germany

Formation of a holding SE

1. Draft terms of formation
2. Creation of special negotiating body (employees)
3. General meeting
4. Exchange of shares – two different deadlines

5. Scrutiny of legality
6. Registration

pre-formation acts

formation of SE



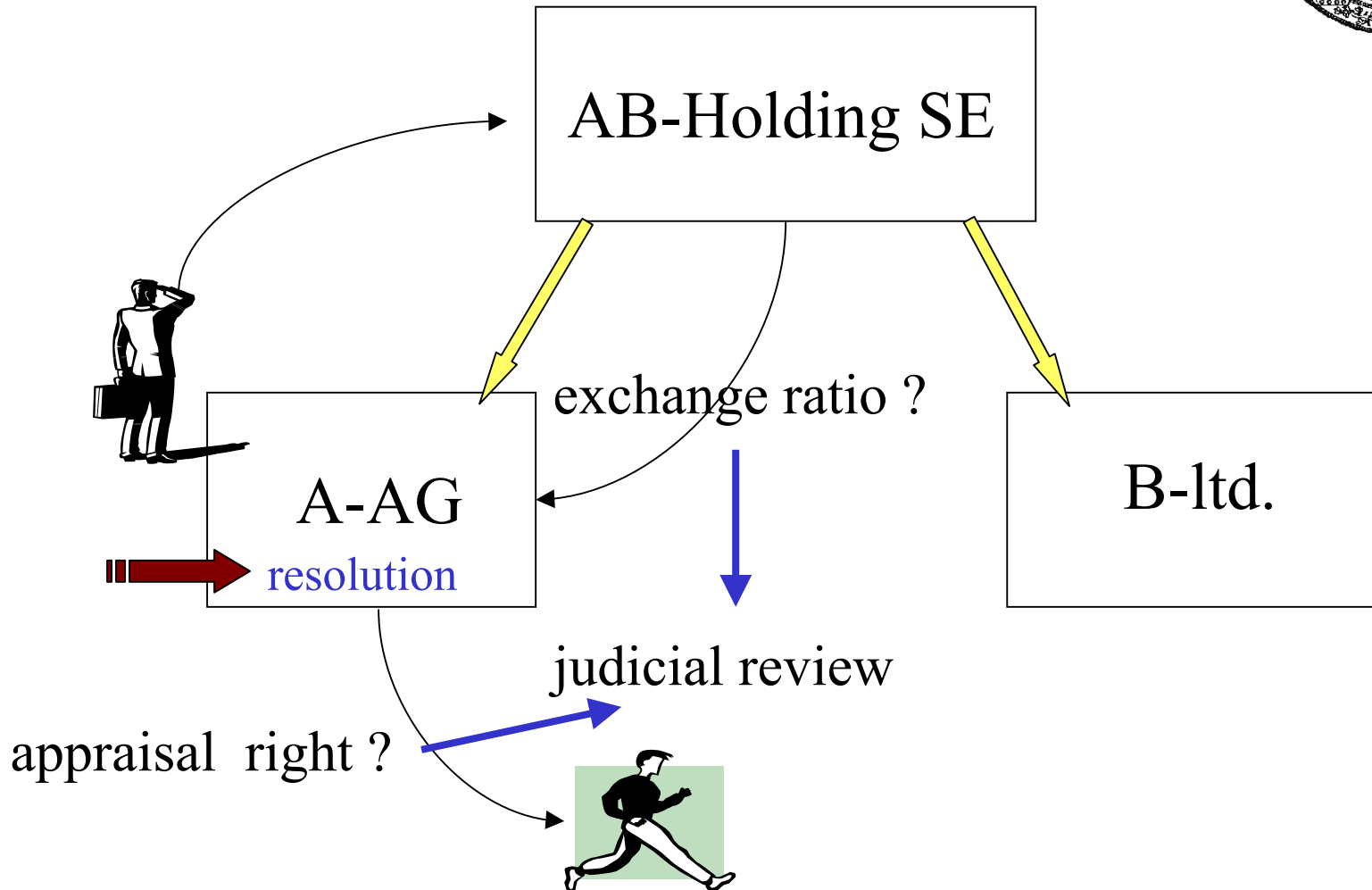
SE in Germany

Holding SE: Protection of minority shareholders

1. Majority of general meeting: *qualified* majority
2. Right to *exchange* the shares (= exit right): provided for by the Regulation !
3. National legislation:
 - ⇒ Review of *exchange ratio*
 - ⇒ *Appraisal right*, if SE will be registered in another MS



SE in Germany





SE in Germany

Options for national legislation

- I. Formation: protection of minority shareholders (and creditors)
- II. Transfer of seat: protection of minority shareholders and creditors**
- III. Management structure: one-tier and two-tier system
- IV. Involvement of Employees: Transformation of the directive



SE in Germany

Transfer of seat

1. Seat means „*registered office*“
2. However, registered office and headquarter need to be in the same state (in compliance with freedom of establishment)
3. Minority protection: *Appraisal* right
4. Creditor Protection: Demand for *security* prior to the transaction, if the transfer of seat may have a detrimental effect to the position of the creditor.



SE in Germany

Options for national legislation

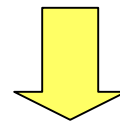
- I. Formation: protection of minority shareholders (and creditors)
- II. Transfer of seat: protection of minority shareholders and creditors
- III. Management structure: one-tier and two-tier system**
- IV. Involvement of Employees: Transformation of the directive



SE in Germany

Management system: one-tier or two-tier system

⇒ depends on the form adopted in the statutes of the SE

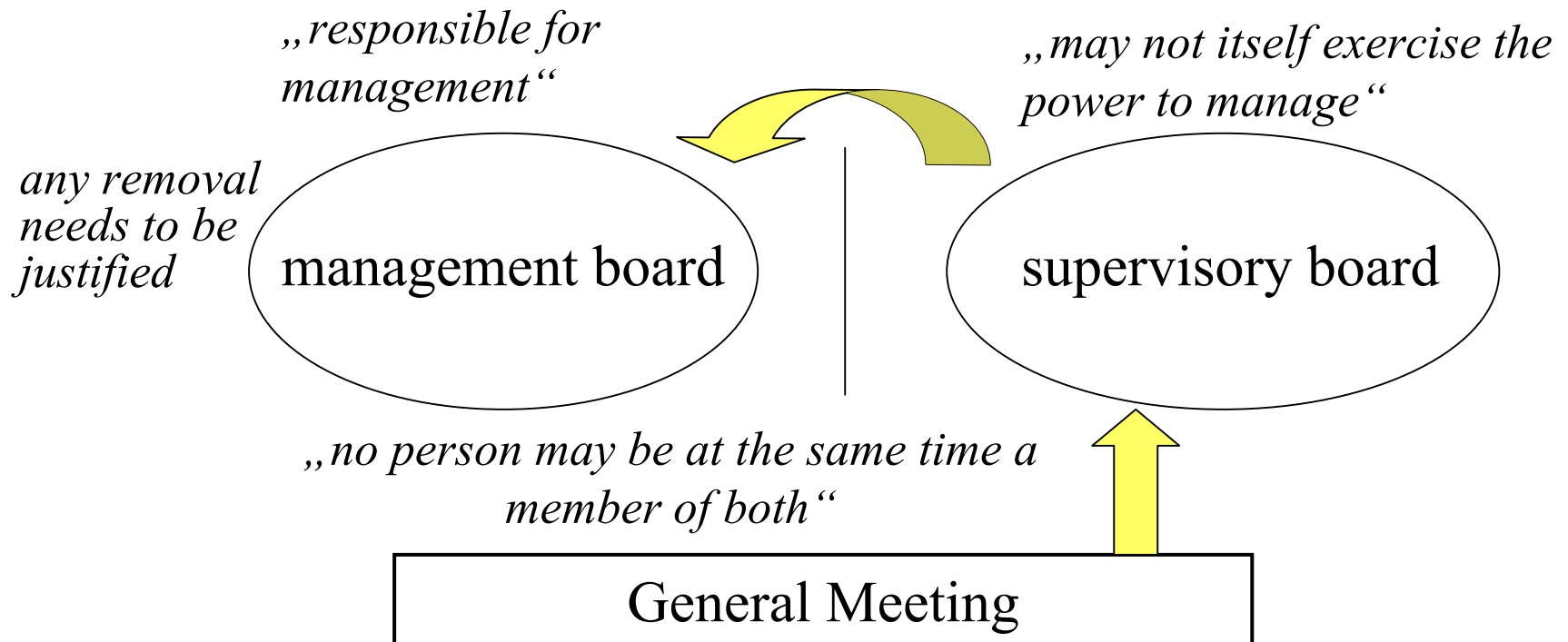


What is a one-tier / two-tier system?



SE in Germany

Two-tier system: mandatory separation of functions





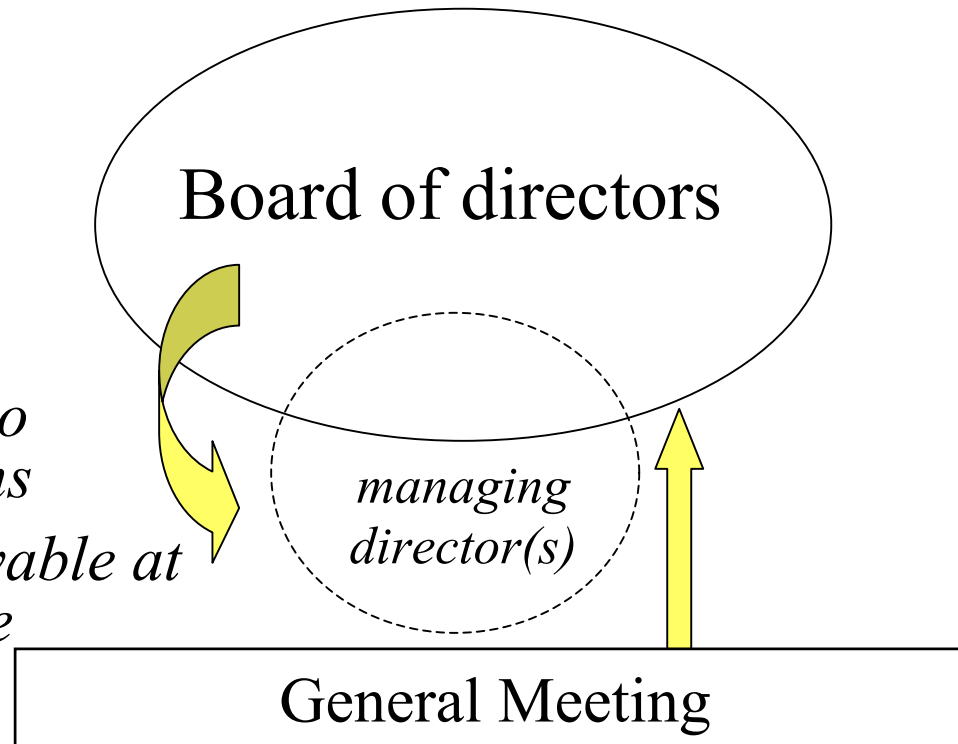
SE in Germany

One-tier system: flexible separation of functions

➤ *may be members of the board*

➤ *subject to instructions*

➤ *removable at any time*





SE in Germany

Options for national legislation

- I. Formation: protection of minority shareholders (and creditors)
- II. Transfer of registered office: protection of minority shareholders and creditors
- III. Management structure: one-tier and two-tier system
- IV. Involvement of Employees: Transformation of the directive**



SE in Germany

Involvement of Employees

⇒ Council Directive 2001/86/EC; to be implemented in the MS

Main features:

- Primacy of *negotiations*: prior to formation of SE
- Principle of "*before and after*"
- *Standard rules* in case negotiations fail



SE in Germany

Involvement of Employees

- ⇒ Negotiations: Creation of the Special Negotiating Body
- *electoral committee* to nominate German members of SNB
 - electoral committee constituted by *works councils*
 - *direct election* only if no works council is existing



SE in Germany

Involvement of Employees

⇒ Later structural changes affecting employees' rights

- new negotiations on involvement of employees
- possible misuse of an SE (criminal offence) if structural change occurs within one year after creation of the SE



SE in Germany

Involvement of Employees

⇒ Standard rules

(if negotiations fail or parties expressly opt for standard rules)

- Body representative of employees (SE works council)
- Information and consultation: once a year
- Participation in company organs („co-determination“)



SE in Germany

Involvement of Employees

Co-determination in Germany

Members of the *supervisory board* to be elected by employees:

- less than 500 employees: none
- more than 500 employees: one third
- more than 2,000 employees: a half (casting vote of chairman, usually appointed by shareholder representatives)



SE in Germany

Employee participation in a one-tier system

1. As members of the *board of directors* employee representatives are involved in the day-to-day management as well as in the strategic decisions
2. “Number of members equal to the proportion before registration of the SE“.
3. Dispute: equal to proportion of half the number of members
⇒ in relation to the whole board ?
⇒ in relation to non-executive board members ?



SE in Germany

Conclusion

- The SE – no „one size fits all“ but special purpose vehicle
- The SE – katalyst to national reform
- The SE – blueprint for further European legislation