

EUROPEAN PRIVATE COMPANY: PERSPECTIVES OF LEGAL REGULATION

Sauliaus Katuoka, Vaida Česnulevičiūtė

Mykolas Romeris University, Faculty of Law,
Department of International and European Union Law
Ateities 20, LT-08303 Vilnius, Lithuania
Telephone (+370 5) 271 4669

E-mail: skatuoka@mruni.eu; vaida.cesnuleviciute@eversheds.lt

Received on 15 February, 2012; accepted on 15 March, 2012

Abstract. *The purpose of this article is to analyse the main provisions of the European private company not limited by the provisions as presented by the European Commission in its Proposal for a Council Regulation on the statute for European private company, but also including amendments introduced by the European Parliament and taking into account the negotiations in the Council of the European Union.*

This article analyses the development of the European private company and explains why such legal form of a company is needed. It provides the analysis of the main provisions of the proposal for the Regulation, the assessment of advantages and drawbacks of the alternatives introduced by the European Parliament and considered in the Council of the European Union, evaluation of the response of these provisions to the specific needs of small and medium-sized enterprises. The article also presents conclusions and suggestions for the improvement of the legal provisions.

Keywords: *EU company law, European Private Company, Council regulation on the Statute for a European Private Company, small and medium-sized enterprises.*

Introduction

One of the main purposes of the European Union is to create the single market and ensure its proper functioning. At present, the institutions of the European Union emphasise the importance of small and medium-sized enterprises (SME), however, by now no effective system that would encourage the activities of SMEs in the European Union was in place. Small and medium-sized enterprises face the same challenges as large enterprises, however, their possibilities in respect of human resources and finances are significantly smaller. Establishment of business in another country for SMEs costs almost the same amount as for large enterprises, however, it represents a much higher part of SMEs income.

The results of the Lisbon Strategy¹ achieved in five years did not meet the expectations, therefore in 2005 it was decided to move from long-term goals to urgent actions and to pay more attention to the economic growth and employment, creation of new and better jobs. One of the measures to implement the Lisbon Strategy is strengthening the single market. Therefore, helping small and medium-sized enterprises to establish and function in the single market is one of the ways to implement the Lisbon Strategy. The Small Business Act² of the European Commission, encouraging to express political will by acknowledging that SMEs play the major role in the EU economy and to implement extensive SMEs political programme in the EU and Member States, shows that attention to SMEs increases. The Statute for a European Private Company forms part of this Act.

A medium-sized enterprise is defined as an enterprise which employs fewer than 250 persons and whose annual turnover does not exceed EUR 50 million or whose annual balance-sheet total does not exceed EUR 43 million³. SMEs represent 99%⁴ of all enterprises and they create around 70% of jobs in the EU⁵. However, their activities in the single market are very limited and usually they are functioning in the national markets without expanding to other states. The main obstacles of international activities for SMEs are the absence of the EU instruments (44%), lack of information on business opportunities in other Member States (40%), tax differences (39%), etc.⁶

- 1 Communication from the Commission to the Council, "Working together for growth and jobs. A new start for the Lisbon Strategy", 2 February 2005, COM(2005) 24.
- 2 Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions – "Think Small First" – A "Small Business Act" for Europe, 25 June 2008, COM(2008) 394 final.
- 3 Commission Recommendation 2003/361/EC concerning the definition of micro, small and medium-sized enterprises, 6 May 2003. OJ L 124, p. 36, art. 2, p. 1.
- 4 Citizens' summary, European Commission proposes the creation of a European Private Company (SPE) [interactive]. [accessed 10-01-2012]. <http://ec.europa.eu/internal_market/company/docs/epc/citizens_summary_en.pdf>.
- 5 Commission staff working document accompanying the proposal for a Council regulation on the Statute for a European Private Company (SPE) – Impact assessment, SEC (2008) 2098.
- 6 BusinessEurope, SME Action Day, materials, 21 November 2007 [interactive]. [accessed 11-03-2011]. <<http://212.3.246.117/docs/1/mnipbmanonbgdnklmeofhbnpdb39dwnw69lte4q/unice/docs/DLS/2007-01613-E.pdf>>.

Council Regulation on the statute for a European private company (hereinafter referred to as the Statute, the Regulation or the SPE Regulation)⁷ is an important tool that would enable SMEs to actively participate in the single market. The European private company (*Societas Privata Europea*) is a form of European private limited company. The main advantage of this company is uniformity in all Member States. Instead of the Lithuanian Uždaroji akcinė bendrovė (UAB), German *Gesellschaft mit beschränkter Haftung* (GmbH) or Italian *Società a responsabilità limitata* (Srl), the European private company (SPE) could be established in the entire European Union.

The SPE would be a flexible company allowing shareholders decide on the inside structure of the company. The SPE should be attractive to business as it would limit the time and expenses required due to different national rules on incorporation and functioning of a company (legal consultations, management and administration particularities).

The primary aim of the article is to analyse the main provisions of the Council Regulation on the statute for a European private company and to assess the new company form needed. The study is not limited to the draft Regulation as presented by the European Commission, but extends to cover the proposed amendments by the European Parliament⁸, negotiation material of the Council⁹ and the assessment of pros and cons of any possible alternatives.

As of yet there are no extensive studies on the topic of the regulation of the SPE. The article discusses the Regulation which is still in its draft stage. The research focuses on the possible amendments to the Regulation, the suggestions as found in *travaux préparatoires* as well as their foreseeable positive or negative effect.

1. Genesis of the European Private Company

The modernisation and harmonisation of the company law in the EU could be divided into two groups. Firstly, creation of new company forms within the EU. Secondly, the adoption of directives harmonising national laws. However, when directives are transposed to national law, they become a product of national legal order that can be hardly given any “European” – supranational – character¹⁰.

Even if each Member State attempts to modernise its company law and make it more business-friendly, the final result would be many different types of companies. Therefore, only actions that are taken on the European level would create a legal

7 Commission proposal for a Council Regulation on the statute for a European private company, 2008 June 25, COM(2008) 396/3.

8 European Parliament legislative resolution of 10 March 2009 on the proposal for a Council regulation on the Statute for a European private company, P6_TA(2009)0094.

9 Proposal for a Council Regulation on a European private company - Political agreement, the Council of the European Union, 23 May 2011, 10611/11, if not indicated otherwise.

10 Braun, S. The European Private Company: A Supranational Company Form for Small and Medium-sized Enterprises? [interactive]. *German Law Journal*. 2004, 11: 1398–1399, p. 1394 [accessed 21-12-2011]. <http://www.germanlawjournal.com/pdfs/Vol05No11/PDF_Vol_05_No_11_1393-1408_EU_Braun.pdf>.

environment that would be uniform throughout the EU and meet the expectations of the SMEs¹¹.

The European private company would be useful not only for entrepreneurs but also for creditors and business partners as they would not have to get acquainted with the main differences of companies in each Member State. The SPE would foster cooperation because companies could use this form when creating joint ventures. A “European label” would be an advantage in marketing not only inside the EU but also when entering international markets. Such form of a company would also attract investors from outside the EU as they would not have to know the particularities of all twenty seven company law systems but would rather use the SPE that could be transferred from one state to another if needed¹².

The idea of the European private company came from private initiative of academics and entrepreneurs. In 1959, in the Congress of the French Notaries the idea of a company having a uniform structure in all the Community was initially raised. It was aimed at increasing the competitiveness of the companies functioning on the Community level¹³. In 1995 CREDA¹⁴ (French Research Centre on Business Law) initiated the international project in order to research the perspectives of the European private company.

However, this idea was only accelerated in 2001 when it was supported by the European Economic and Social Committee¹⁵ and the high level group of company law experts recommended to launch a feasibility study on the possible Statute of a European private company. In response to this recommendation, the European Commission issued a Communication “Modernising Company Law and Enhancing Corporate Governance in the European Union - A Plan to Move Forward” in which this feasibility study was listed as a short-term measure. On 25 June 2008, the Commission presented the proposal for a Council Regulation on the statute for a European private company.

The European private company would not be the first supranational form of a company. However, the European legal persons existing by now do not meet the requirements of SMEs. The European Economic Interest Grouping¹⁶ (EEIG) is aimed at fostering cooperation without creating joint ventures or merging, however it does not seek profit. The European Company (*Societas Europaea*)¹⁷ *does not meet the needs of SMEs due to public form, high share capital (at least EUR 120 000), possibility*

11 *Supra* note 5, p. 11.

12 Drury, R. The European Private Company [interactive]. *European Business Organization Law Review*. 2008, 1: 126, 127, 130 [accessed 10-12-2011]. <<http://journals.cambridge.org>>.

13 Blanquet, F. The draft of the European Commission: the European company. 6 December 1999, Symposium “Company law as a tool for companies in the Europe of the 21st century”, p. 16 [interactive]. [accessed 21-12-2011]. <<http://www.creda.cciip.fr/colloques/pdf/1999-droit-Europe-%20XXIe/droit-societes-actes-F.pdf>>.

14 CREDA – *Centre de recherche sur le droit des affaires*.

15 European Economic and Social Committee, Own-initiative opinion, European Company Statute for SMEs, 21 March 2002, ESC 363-2002.

16 Council Regulation (EEC) No 2137/85 of 25 July 1985 on the European Economic Interest Grouping (EEIG). [1985] OJ L 199, p. 1–9.

17 Council Regulation (EC) No 2157/2001 of 8 October 2001 on the statute for a European company (SE). [2001] OJ L 294, p. 1–21.

to create it only out of several companies incorporated in different Member States and complicated regulation including both national and the EU law. The European Cooperative Society (*Societas Cooperativa Europaea*)¹⁸ is managed by democratic principles. Its members can also include clients, employees or suppliers. Thus, it does not create the form to conduct business but rather satisfies the needs of its members by using economy of scale.

2. General Provisions

The draft of the Council Regulation on the statute for a European private company lays down the foundations regarding the establishment and functioning of the European private limited liability company in the European Union¹⁹. The title of the company (*Societas Privata Europea*) has been chosen specifically so that no associations are invoked with the legal company forms of the Member States.

The main features of the SPE are contractual freedom in internal affairs of the company and reliable procedure for cross-border establishment (foundation and transfer of seat)²⁰. SPE is a legal personality having share capital. The liability of its shareholders is limited by the subscribed amount. It is not allowed to offer to the public or publicly trade in shares of an SPE. The possibility to trade in shares is related with higher degree of control of the company and detailed regulation of its internal affairs, therefore in order to ensure flexibility and leave more freedom to shareholders public trading had to be restricted. The same prohibition to publicly offer or trade in shares of the private limited company (UAB) is established in the Law of the Republic of Lithuania on Companies²¹. It should be noted that offering of shares of an UAB to the shareholders, employees and creditors is not considered as public. Any such provision or definition of the term “public” is missing in the SPE Statute. That gap could create legal uncertainty, thus it is advisable to define the term “public” by excluding shareholders, current and previous employees and creditors.

An SPE can be established by one or more natural or legal persons. The activities of SMEs are significantly facilitated by allowing one natural person to create SPE. Initially, no cross-border element was required in order to create the European Private Company because usually companies are established and start their activities in the national market and only later expand abroad. Therefore, SPE could also be created by persons not intending to have cross-border activities and consequently would compete with the national forms of companies. Such regulation could raise doubts with regard

18 Council Regulation (EC) No 1435/2003 of 22 July 2003 on the statute for a European Cooperative Society (SCE). [2003] *OJ L* 207, p. 1–24.

19 *Supra* note 7, explanatory memorandum, Part 1.

20 Teichmann, C. The European Private Company [interactive]. *European Company Law*. 2004, 4: 162–165, p. 163 [accessed 12-12-2011]. <www.kluwerlawonline.com>.

21 Lietuvos Respublikos akcinių bendrovių įstatymas (su pakeitimais ir papildymais) [Law on Companies of the Republic of Lithuania]. *Official Gazette*. 2000, No. 64-1914.

to the competence of the EU as violating the principle of subsidiarity. However, as SPE facilitates the expansion of business in the single market, the competence of the EU could be based on the provision of the EU Treaty providing the Union with shared competence in the area of the internal market²². However, the European Parliament and the Council of the European Union wanted to have the cross-border element. Therefore, the most recent project of the SPE Statute²³ establishes the following requirements:

- (a) an intention to do business in a Member State other than the one in which SPE is registered; or
- (b) a cross-border business object set out in the articles of association; or
- (c) a branch or a subsidiary registered in a Member State other than the one in which SPE is registered; or
- (d) member(s) being resident or registered in more than one Member State or in a Member State other than the one in which SPE is registered.

It is considered that these requirements are rather aimed at preventing *regime shopping* than at complying with the principle of subsidiarity. After the ECJ decision in *Centros*²⁴ companies can choose to register in a country having more favourable company law (it is estimated that after this judgment the number of companies establishing in the United Kingdom increased by 560%²⁵). Moreover, the requirements laid down are formal and can be easily circumvented. For example, by having a member from another country with 1% shares. However, such a requirement could cause problems when selling shares or changing the place of residence. Business object in the articles of association is a simple formality. Cross-border activities would have to be monitored and consequently would result in additional costs. 15% of companies registered in the EU are „*shelf companies*“, thus by acquiring such company the requirement of a branch or a subsidiary could be easily satisfied²⁶.

To conclude, the principle of subsidiarity would be followed even without such requirements that create formal obstacles for creation of SPE and burden institutions with compliance control.

3. Applicable Law

The SPE Statute provides that only matters not dealt with by the Regulation or Annex I (matters that can be governed by the articles of association) should be governed by national law. Such regulation raises questions as to how any open provisions, inaccuracies in legal drafting and ambiguities in the Regulation or the articles of

22 30.3.2010, Consolidated version of the Treaty on the Functioning of the European Union, C 83, vol. 53, p. 51, Article 4(2)(a).

23 *Supra* note 17, art. 3(3).

24 Case C-212/97, *Centros Ltd v. Erhvervs- og Selskabsstyrelsen* (1999), ECR I-01459.

25 *Supra* note 5, p. 27.

26 Lenoir, N. The Societas Europaea (SE) in Europe. A promising start and an option with good prospects [interactive]. *Utrecht Law Review*. 2008, 1: 15 [accessed 11-12-2011]. <<http://www.utrechtlawreview.org/publish/articles/000057/article.pdf>>.

association should be solved. There is a threat that domestic courts will not be able to separate the assessment of the SPE from the imperative notions of national law on limited liability companies²⁷. It can be foreseen that the domestic courts will ask the European Court of Justice to give a preliminary ruling on the question of interpretation of the Regulation²⁸. However, it remains unclear what law should be applied to the questions referred to in Annex I and not transferred to the articles of association. If the application of national law is prohibited under the Regulation, then any ambiguities or *vacatio iuris* should be dealt with according to the fundamental principles and aims of the Regulation as well as the main principles of the company law of the European Union and its Member States²⁹.

Such regulation would mean more work for the national courts as the SPE Regulation as well as the articles of association of the company would have to be interpreted according to the generally accepted legal principles and not according to domestic law. That would be a bigger challenge for common law courts as they follow precedents and only rarely make new law³⁰. In order to achieve harmonised interpretation and application of the SPE Regulation, the most important and influential court decisions could be published in all official languages of the European Union³¹. Thus, when dealing with *vacatio iuris* or any ambiguities, the courts could develop company law of the EU³². It can also be said that it would be difficult to foresee the outcome of the dispute regarding any contradictions between the SPE Regulation, articles of association and domestic law. However, the problems should be solved in time with the help of developed case-law and legal doctrine. Another possible solution would be to allow the parties choosing alternative dispute resolution mechanisms (ADR) instead of court proceedings³³.

Different from the initial proposal of the Commission, the compromise by the Council proposes referring to national law, where certain issues listed in Annex I have not or have only partly been included in the articles of association. Such provision would bring clarity to the national courts that would have to solve disputes related to SPE or to company lawyers. However, for all other parties such automatic application of national law would not bring any legal clarity and can be even surprising as usually the matters are not covered or in particular are only partly covered by the articles of association unintentionally. Such regulation is similar to provisions governing *Societas Europaea* that are strongly criticised due to complexity of application of multi-layered legal systems. Free movement of capital was the driving force behind the harmonisation of public limited companies as their shares were listed and could be purchased by

27 Radwan, A. European Private Company and the Regulatory Landscape in the EU - An Introductory Note [interactive]. *European Business Law Review*. 2007, 4: 778 [accessed 11-12-2011]. <<http://www.kluwerlawonline.com>>.

28 *Supra* note 22, art. 267.

29 Drury, R., *supra* note 12, p. 130.

30 *Ibid.*, p. 131.

31 Radwan, A., *supra* note 27, p. 778.

32 *Ibid.*, p. 778.

33 Drury, R., *supra* note 12, p. 132.

investors across borders. Therefore, such criticism would be even more pronounced for SPE as national laws of Member States governing private limited companies are much less harmonised than those governing public limited companies.

In this respect, the middle way between those options could be chosen. The founders of the company should take the risk that matters not covered at all would be governed by provisions of national law that are not known or even surprising. In such cases gaps could be filled even without applying to a court and in case of a dispute it would be easier for the court to decide. However, if the matter is only partly covered by the articles of association, national law should not be applied. Articles of association should be interpreted according to the intention of the parties, the aims of the SPE Statute and general principles of company law.

4. Seat of the Company

One of the provisions causing most of the disagreements in the Council is the seat of the company. Following judgment in *Centros*, the European Commission explicitly stated that the SPE does not need to have its central administration or principal place of business in the Member State where it has its registered office. As some Member States could not accept it, the most recent political proposal was to establish that this matter would be governed by national law. However, due to different theories of law used in different countries such proposal was not accepted either.

The first theory applied in most Member States is the real seat doctrine (*siège réel*). Under this doctrine, the company is governed by the law of the Member State in which the real seat (central administration) of the company is placed, whether or not this company was created according to the law of that Member State³⁴. Thus the company needs to meet all the requirements of the Member State in which it has its central administration. Consequently, the real seat of the company has to be in a country where it is incorporated³⁵. This doctrine is followed in Austria, Germany, France, Italy, Belgium, etc³⁶.

The incorporation theory is followed in the United Kingdom, the Netherlands, Sweden, Denmark, etc. In the incorporation theory the place of incorporation is the connecting factor between the company and the state. Therefore, regardless of where the company has its centre of interests, the law of the Member State of incorporation is applied. Thus the founders of the company can decide on the law that would be applicable to the company³⁷.

34 Garcia-Riestra, M. The transfer of seat of European Company v free establishment case-law [interactive]. *European Business Law Review*. 2004, 6: 1296 [accessed 01-12-2011]. <<http://www.kluwerlawonline.com>>.

35 Kuehrer, N. Cross-border company establishment [interactive]. *European Business Law Review*. 2001, 5/6: 112 [accessed 01-12-2011]. <<http://www.kluwerlawonline.com>>.

36 Wymeersch, E. The transfer of the company's seat in European company law [interactive]. *Common Market Law Review*. 2003, 3: 668 [accessed 01-12-2011]. <<http://www.kluwerlawonline.com>>.

37 Kuehrer, N., *supra* note 35, p. 111, 118.

Societas Europaea is not allowed to have its real seat in the country other than that of its incorporation. The primary aim of such a requirement is to prevent companies from choosing more favourable regimes in other countries and circumventing national law (f.e. avoiding employee participation in management of the company). It could also be argued that creditors and business partners who do not know foreign law (e.g. representation rules) are protected³⁸. However, such a rule can hardly be compatible with the freedom of establishment.

Even though the ECJ has never explicitly stated that the right of primary establishment cannot be restricted, the court practice has the tendency of removing all the barriers of free movement of companies³⁹. It should be noted that the real seat doctrine provided in the SE regulation has been criticised by many legal commentators⁴⁰.

5. Expulsion or Withdrawal of the Shareholder

The Regulation does not provide for neither *squeeze-out* nor *sell-out* rights, but these matters can be governed by the articles of association. However, under specific circumstances expulsion or withdrawal of the shareholder is allowed⁴¹. According to the EC proposal, upon resolution of the qualified majority of shareholders the court can order expulsion if shareholder causes harm to the company. Therefore, only minority shareholder could be expelled from the company. In this respect, the Lithuanian law is more favourable to the shareholders as such right is entrusted to 1/3 of shareholders and they can apply directly to court without passing the resolution⁴². It is likely that the parties tend to reach the consensus before applying to court, thus the requirement to pass a shareholders' resolution could be considered as not only limiting the rights of shareholders but also as excessive.

The Regulation provides that the shareholder has a right to withdraw from the SPE, if the SPE has been deprived of a significant part of its assets; the registered office of SPE has been transferred to another Member State; the activities of SPE have changed substantially or no dividend has been distributed for at least 3 years even though SPE's financial position would have permitted such distribution and such actions caused a serious harm to the shareholder⁴³. The European Parliament proposes to expand this right in all cases when the shareholder did not agree with those actions rather than when they caused any harm. Such a rule could possibly allow minority shareholders to abuse the right and block the decisions of the majority by threatening to withdraw if the company

38 *Ibid.*, p. 111.

39 Vaccaro, E. Transfer of seat and freedom of establishment of European Company law [interactive]. *European Business Law Review*. 2005, 4: 1363 [accessed 01-12-2011]. <<http://www.kluwerlawonline.com>>.

40 Garcia-Riestra, M., *supra* note 34; Lenoir, N., *supra* note 26.

41 *Supra* note 7, explanatory memorandum, part 7, chapter III.

42 Lietuvos Respublikos civilinio kodekso patvirtinimo, įsigaliojimo ir įgyvendinimo įstatymas [Civil Code of the Republic of Lithuania]. *Official Gazette*. 2000, No. 74- 2262. Book 2, Chapter IX.

43 Article 18.

or shareholders do not have funds to acquire shares. Furthermore, the Regulation does not provide that if shareholders who voted against the resolution to accept withdrawal would have to purchase the shares. Such gap should be filled by providing that this financial obligation should bind only those who voted in favour of the resolution.

The Council leaves the right of expulsion and withdrawal to national law. However, this can create legal uncertainty due to differences in national legislation. For example, the Commercial Code of France⁴⁴ provides that such questions should be regulated by the articles of association while in the United Kingdom the Companies Act⁴⁵ establishes the proper rules. As shareholders of private limited companies do not have markets where they could sell the shares, the clear regulation of withdrawal is very important. Ability to withdraw can influence the decision to invest. Therefore, this matter should be clear from the start without further investigation of national legislation.

It would be advisable to establish minimum standards in the Regulation and allow shareholders deciding on additional cases where withdrawal or expulsion rights could be exercised.

6. Share Capital

The success of a new business to the large extent depends on accessibility to financing. The reputation of the borrower has an impact but also the lenders would require further assurance that the loan will be repaid⁴⁶.

To the large extent the protection of creditors is based on contractual arrangements, such as guarantees by directors, retention of title, etc. However, both continental and common law systems agree that legal mechanisms have also a role to play⁴⁷.

The proposal of the Commission sets out the requirement of minimum share capital of EUR 1. Such requirement is not common in the EU, however, according to researches share capital does not serve any important function. High level group of company law experts listed the main functions of share capital as described by orthodox legal and financial theory⁴⁸. Firstly, capital is intended to protect creditors' interests. It ensures that the company is unable to make "distributions to shareholders when the assets of the company would as a result be reduced below the legal capital as expressed in the

44 Le code de commerce [Commercial Code of France], version consolidée au 13 février 2010. Art. L227-16 – L227-20.

45 Companies Act 2006, the United Kingdom, Art 994, 996.

46 Siems, M.; Herzog, L; Rosenhäger, E. The European Private Company (SPE): An Attractive New Legal Form of Doing Business? [interactive]. *Journal of International Banking and Financial Law*. 2009, 5: 150 [accessed 01-12-2011]. <<http://www.ssrn.com>>.

47 Teichmann, C., *supra* note 20, p. 164.

48 Report of the High Level Group of Company Law Experts on a modern regulatory framework for company law in Europe. 4 November 2002 [interactive]. [accessed 21-11-2011]. <http://ec.europa.eu/internal_market/company/docs/modern/report_en.pdf>, p. 78.

company's balance sheet" or reduce the capital without adequately protecting creditors⁴⁹. However, the creditors usually are more concerned about the general financial situation of the debtor and the cash-flows rather than the share capital. Secondly, capital protects shareholders by fixing the nominal value of the share and not allowing to issue shares below such value and by apportioning the rights of shareholders. Lastly, it can ensure the adequacy of a company's assets for its activities, however this function is rather controversial as capital requirements substantially differ from company to company⁵⁰. Another function could be prevention of starting the business without any consideration of risk because if an initial investment by the entrepreneur is made then s/he at least bears the risk of losing that investment or has to think of the reasonable arguments to persuade investors⁵¹.

Capital requirements for private limited companies in the Member States range from EUR 1 in the United Kingdom to EUR 35.000 in Austria⁵². Thus it would be hard to decide on the amount that would have rational grounds and at the same time would be accessible for entrepreneurs from different Member States. Any average number would be only a mathematical calculation and not the rational and logical need. Therefore, the capital of EUR 1 was chosen following current trends in order to ensure flexibility, the aims of share capital and the results it achieves.

However, the proposal of the Council is to allow Member States setting a higher minimum capital requirement of a maximum of EUR 8.000 for SPEs registered in their territory⁵³. Such provision is established as a political compromise because majority of the Member States requires share capital for their national private limited companies. The limit of EUR 8.000 is close to the arithmetical average of capital requirements in all Member States (i.e. about EUR 8,213⁵⁴). However, it is considered that the share capital in all Member States should be the same. If the capital is intended to protect creditors, then differences of capital requirement depending on the country of incorporation would not create any legal certainty. As referred above, share capital does not protect creditors and they prefer contractual measures. Such regulation is less favourable for the entrepreneurs of the EU-12 where the average share capital for national private limited companies is EUR 4.685⁵⁵ thus could become an obstacle when establishing SPE and consequently hinder cross-border activities. Furthermore, different requirements would encumber the transfer of seat from one country to another as this could require the increase of share capital.

49 A Modern Regulatory Framework for Company Law in Europe: A Consultative Document of the High Level Group of Company Law Experts [interactive]. [accessed 21-11-2011]. <http://ec.europa.eu/internal_market/company/docs/modern/consult_en.pdf>, p. 23.

50 *Ibid.*, p. 23–24.

51 Teichmann, C., *supra* note 20, p. 165.

52 Data taken from: Commission staff working document accompanying the proposal for a Council Regulation on the Statute for a European Private Company (SPE) – Impact assessment, SEC (2008) 2098, Annex 3, Table A3.

53 Article 19.

54 *Supra* note 52.

55 *Ibid.*

7. Employee Participation

Employee participation in the management of a company is one of the most controversial matters. Because of its political importance this question has always been an obstacle in the quest to establish a European company form. For example, it was the inability to reach consensus on the question of employee participation that led to the failed attempts to enact the European company statute. Even though only few countries regulate employee participation in small companies, the main discussion is based on the fact that medium-sized business as well as corporate groups can also establish the SPE⁵⁶.

The employee rights with regard to decision-making greatly varies as between the Member States. This results from different understanding of concepts of employee participation in Member States⁵⁷.

In the United Kingdom, a company is held to be a tool for representing the interest of shareholders. It should thrive to achieve wealth for the shareholders, however, the interests of the employees should not be disregarded⁵⁸. The Law of the Republic of Lithuania on Companies stipulates that the management bodies of a company are obliged to act for the benefit of its shareholders. No other interest groups are mentioned in the Law. Whereas in Germany, employee participation has deep roots and is one of the fundamental principles of company law (e.g. on some occasions employees enjoy the right to nominate a number of candidates to the supervisory board)⁵⁹.

Before the execution of the draft SPE Regulation, there were views in the legal doctrine to set the ambits of employee participation in the management of the European private company. The most appropriate compromise would be to establish that employee participation provisions do not affect those companies that employ 49 or less employees. Therefore, the main aim of SMEs, that is to create small-sized retail and service companies could be achieved without the involvement of employees⁶⁰. However, such provisions did not find their way into the Regulation.

According to the general rule, employee participation is governed by the national law of the home Member State. The procedure for participation differs in every Member State, however, that should not be considered as a major hindrance as only six countries stipulate for employee participation in companies employing 100 or less employees (Sweden – 25 and more employees, Denmark – 35 and more employees, Czech Republic, Slovak Republic and Republic of Slovenia – 50 and more employees)⁶¹. In Germany, a

56 Kornack, D. The European Private Company – Entering the Scene or Lost in Discussion? [interactive]. *German Law Journal*. 2009, 10(08): 1321–1331, p. 1326 [accessed 21-11-2011]. <http://www.germanlawjournal.com/pdfs/Vol10No08/PDF_Vol_10_No_08_1321-1332_Developments_Kornak.pdf>.

57 Picard, S. European company law versus participation rights how to resist the steamroller effect [interactive]. *Transfer: European Review of Labour and Research*. 2010, 16: 101 [accessed 02-12-2011]. <<http://sagepublications.com>>.

58 *Supra* note 45, art. 172.

59 Lenoir, N., *supra* note 26, p. 14.

60 *Ibid.*

61 *Supra* note 5, p. 33.

rigid employee participation system is applied to companies employing more than 500 employees⁶².

However, the Council proposed important amendments to the rules on employee participation. This was done in order to prevent circumvention of national legislation providing higher degree of employee participation by incorporating a company in a Member State having less favourable rules.

Even if the application of national law can be avoided by incorporating in one Member State and then undertaking activities in another, some Member States would not agree with the EU Regulation making this process even easier. Such practice would become even more tempting if according to the proposal of the Commission the central administration of the SPE could be located in the state other than the principal place of business. At the same time, the Council wants the SPE to remain a flexible and understandable tool for SMEs.

Under the recent proposal by the Hungarian presidency, if for a continuous period of three months after its registration the SPE has at least 500 employees working habitually in a Member State that provides for a level of participation rights that is higher than provided in the Member State where the SPE has its registered office, the SPE would have to start negotiations with the representatives of the employees on arrangements for the participation of employees in the SPE⁶³. As opposed to the previous proposals⁶⁴, for the sake of compromise this one only includes a single threshold of the number of employees. Previously a double threshold – i.e. that the company needs to have at least 500 employees, and at least 1/2 of them need to habitually work in a Member State providing for a higher level of participation, was suggested. A double threshold is more favourable for employees and it also meets the legal expectations of both employees and employers as even when the threshold of the employees is reached, the applicable law depends on where the majority of them habitually work.

Furthermore, the Council intends to regulate in more detail the procedures on employee participation by establishing the rules on composition of the special negotiating body and negotiation procedure. These rules substantially correspond to the provisions of Directive 2001/86/EB supplementing the Statute for a European company with regard to the involvement of employees, however the rules in the SPE Statute are shorter and simpler. This meets the purpose of the Statute to be easily understandable for those wishing to start or expand their business within the EU. Even more, the SPE Regulation includes cases when the representatives of the employees are not elected or appointed.

Such method of legal drafting, where all the provisions are in one document is considered to be better as it is easier to use and understand for those to whom it is primarily intended, namely employees and entrepreneurs.

62 Teichmann, C., *supra* note 20, p. 165.

63 *Supra* note 9.

64 Proposal for a Council Regulation on a European private company - Political agreement, the Council of the European Union, 27 November 2009, 16115/09.

Lithuanian company law has no rules on employee participation, therefore in this respect a Lithuanian UAB should be more attractive for business than SPE. However, this would again depend on where the large part of the employees of SPE habitually works.

It is considered that the rules proposed by the Council introduce the best balance between the interests of shareholders and employees. Below the certain threshold, shareholders can be confident that the rules of the country of incorporation of SPE are applied. When the threshold is exceeded the employee participation rules (if more favourable) would be regulated by the law of the state where big part of employees work. However, the Member States cannot agree on the threshold and if a single or double threshold should be applied. Therefore, not only the final provisions of the Regulation are not clear but the approval of the Regulation itself becomes doubtful.

8. Transfer of the Registered Office

As it was mentioned above, the case-law of the ECJ tends towards allowing more possibilities for the mobility of companies within the European Union. However, the legal certainty and adopted provisions only allow transferring the registered office to any other Member State for the European Company and European Cooperative Society. Companies of any other form that are willing to transfer their registered office can only achieve this result under Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies, however, such process is much more intricate.

While the 14th Company Law Directive on the cross-border transfer of the registered office of limited companies is still being debated⁶⁵, the possibility and legal grounds to transfer the registered office as stipulated in the SPE Regulation is a very worthy addition to the company law of the European Union.

The procedure for the transfer of the registered office is almost identical to the procedure set forth in the Council Regulation on the Statute for a European Company. A qualified majority of votes of the shareholders is needed for the transfer. The shareholders can also determine that their agreement on the transfer would depend on the conditions for employee participation. This notion is of particular importance in case where the transfer would significantly expand the rights of employee participation, for example, by providing a right to elect a certain number of members to managing bodies.

The managing body of the SPE that is willing to transfer its registered office prepares the transfer documentation where all legal and economic grounds for the transfer are laid down. Specifically, those are any relevant aspects of the transfer that affect the shareholders, creditors and employees.

Both the home Member State and the host Member State authorities also participate in the transfer. Firstly, the home state authorities check whether the procedure as set

65 European Parliament resolution of 10 March 2009 with recommendations to the Commission on the cross-border transfer of the registered office of a company (2008/2196(INI)).

forth in the SPE Regulation has been complied with and issues a transfer certificate. The Regulation does not provide for a time-bar for issuance, however, in order to prevent any abuse, such term should be set. Secondly, one month after the receipt of such certificate, SPE shall provide the host Member State authorities with the certificate, the articles of association as approved by the shareholders and the transfer proposal. The list of documents should be exhaustive and the authorities should not require any additional documentation. The authorities of the host Member State review the presented documents and verify whether the transfer procedures are complied with and afterwards register the SPE in the host state.

The Council is proposing to implement certain amendments to the procedure. Firstly, the Council is of the opinion that a similar provision that can also be found in the Council Regulation on the Statute for a European Company should be implemented in the Regulation as well. The amendment would allow the home state challenging the transfer within one month. Secondly, the proposal of the Council involves expanding the list of the required transfer documents so that it would commensurate to the list of documents required for SPE establishment. However, such an amendment, which is contrary to the one proposed by the Commission, would make the transfer tantamount to establishment in the host Member State. This would defeat the purpose of the simplified and more flexible mobility of companies within the EU as envisioned by the SPE Regulation. In that regard, all the administrative procedures should be simplified and should not require all the same documents as under the establishment procedure. The home and host Member State entity registers should co-operate and verify the transfer within their own channels. Any additional expenses because of any translations could be included in the fee for the entire administrative procedure.

9. Existing Situation

It took 30 years from the first proposal on the European company by the Commission in 1970 to the approval of the Regulation. The first proposal for the Statute of the European Cooperative Society was submitted by the Commission in 1992 and it took 10 years for it to become a reality. It should be noted that a part of the problems arising at that time are now solved (e.g. by the Directive on cross-border mergers). Therefore, it is thought that the approval of the SPE Regulation should not take that long.

It should be noted that neither the Swedish (second half of 2009) nor the Belgian (second half of 2010) and Hungarian (first half of 2011) Presidencies of the Council of the EU could break the deadlocks on the place of registered office and central administration of the SPE, the share capital or employee participation. However, the Council tends to accept weak compromises by leaving to national law the ultimate right to decide on problematic matters. However, the outcome of such legislation would make the SPE not the European but rather a hybrid form of company as it happened with the European company. Consequently, due to numerous references to national legislation

the SPE could fail to reach its goals of being understandable and acceptable for small and medium enterprises.

Conclusions

1. The European Union and its Member States share the competence to enact legislation regarding the internal market. The fact that the proposal for the Council Regulation on the Statute for a European private company stipulates no cross-border requirement when establishing the SPE is not a breach of the subsidiarity principle as this is the only way to achieve the aims of the SPE. If the Council adopted the cross-border activity requirement, the SPE would no longer be a favourable company form for *ex novo* businesses and would hinder cross-border activities in a sense that in order for a company to expand to other Member States it would have to change its legal form. What is more, the proposed requirements are very formal and it would be difficult to oversee compliance. Therefore, such regulation could be inefficient.

2. The Council proposal to either require the SPE principal place of business and central administration to be in the same Member State, or to allow domestic law to prevail on this matter can be held to be unreasonable as it restricts the freedom of establishment. The adoption of the real seat theory in the Statute for a European company was widely criticised. The ECJ has been steering its case-law towards eliminating all of the remaining obstacles that hinder the freedom of establishment. Thus the adoption of the aforementioned provision as proposed by the Council would mean a step backwards for the modernisation of company legislation.

3. Share capital requirements can only serve as preventive measure in irrational decisions to start a business and cannot fully protect the interests of creditors. A high threshold of the required share capital would restrict the establishment of the SPE, especially for SMEs from the new Member States. Such a requirement would not stimulate the establishment of the SPE and, therefore, would not encourage the expansion of cross-border business. The most appropriate solution would be to set capital requirement of EUR 1 and allow the shareholders to decide on the share capital they need to start the business.

4. Neither the European Parliament nor the Council could see the proposal of the European Commission to stipulate that the question of employee participation should be governed by the law of the Member State where the registered seat is located as acceptable. From the employee perspective, it would be sensible to establish that once the number of employees exceeds a certain threshold, employee participation should be governed by the law of the Member State where the majority of the employees are working, provided that such law enshrines more favourable conditions. Even though a limit of 500 was only an option in the discussions of the Council and the final number in the Regulation might be lower, SMEs would not exceed such a threshold in most of the cases and, therefore, there should not be any hindrances in applying such a provision.

5. Provisions regarding transfer of the registered office of the SPE can be considered as big leap forward as it stimulates the mobility of companies in the EU. Even though the analysis of the case-law of the European Court of Justice proves that it is now accepted practice to transfer the registered office to another Member State without losing legal status and the same can also be achieved through cross-border merger. However, the possibilities in the former are more on a theoretical level, and the latter pose a legal and economical challenge.

References

- A Modern Regulatory Framework for Company Law in Europe: A Consultative Document of the High Level Group of Company Law Experts [interactive]. [accessed 21-11-2011]. <http://ec.europa.eu/internal_market/company/docs/modern/consult_en.pdf>.
- Blanquet, F. The draft of the European Commission: the European company. 6 December 1999, Symposium “Company law as a tool for companies in the Europe of the 21st century” [interactive]. [accessed 21-12-2011]. <<http://www.creda.ccip.fr/colloques/pdf/1999-droit-Europe-%20XXIe/droit-societes-actes-F.pdf>>.
- Braun, S. The European Private Company: A Supranational Company Form for Small and Medium-sized Enterprises? *German Law Journal*. 2004, 11: 1398–1399.
- BusinessEurope, SME Action Day, materials, 21 November 2007 [interactive]. [accessed 11-03-2011]. <<http://212.3.246.117/docs/1/MNIPBMKANONBGDNKLME-OFHBNPDB39DWNW69LTE4Q/UNICE/docs/DLS/2007-01613-E.pdf>>.
- Case C-212/97, *Centros Ltd v. Erhvervs- og Selskabsstyrelsen* (1999), ECR I-01459.
- Citizens’ summary, European Commission proposes the creation of a European Private Company (SPE) [interactive]. [accessed 10-01-2012]. <http://ec.europa.eu/internal_market/company/docs/epc/citizens_summary_en.pdf>.
- Commission proposal for a Council Regulation on the Statute for a European private company, 2008 June 25, COM(2008) 396/3.
- Commission Recommendation 2003/361/EC concerning the definition of micro, small and medium-sized enterprises, 6 May 2003. *OJ L* 124.
- Commission staff working document accompanying the proposal for a Council Regulation on the Statute for a European Private Company (SPE) – Impact assessment, SEC (2008) 2098.
- Communication from the Commission to the Council, “Working together for growth and jobs. A new start for the Lisbon Strategy”, 2 February 2005, COM(2005) 24.
- Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions - “Think Small First” – A “Small Business Act” for Europe, 25 June 2008, COM(2008) 394 final.
- Companies Act 2006, the United Kingdom.
- Council Regulation (EC) No 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society (SCE). [2003] *OJ L* 207, p. 1–24.
- Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE). [2001] *OJ L* 294, p. 1–21.
- Council Regulation (EEC) No 2137/85 of 25 July 1985 on the European Economic Interest Grouping (EEIG). [1985] *OJ L* 199, p. 1–9.
- 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, p. 1–9.
- Drury, R. The European Private Company. *European Business Organization Law Review*. 2008, 1: 125–136.
- European Economic and Social Committee, Own-initiative opinion, European Company Statute for SMEs, 21 March 2002, ESC 363-2002.
- European Parliament legislative resolution of 10 March 2009 on the proposal for a Council regulation on the Statute for a European private company, P6_TA(2009)0094.
- European Parliament Resolution of 10 March 2009 with recommendations to the Commission on the cross-border transfer of the registered office of a company (2008/2196(INI)).
- Garcia-Riestra, M. The transfer of seat of European Company v free establishment case-law. *European Business Law Review*. 2004, 6.
- Kornack, D. The European Private Company – Entering the Scene or Lost in Discussion? *German Law Journal*. 2009, 10(08): 1321–1331.
- Kuehrer, N. Cross-border company establishment. *European Business Law Review*. 2001, 5/6.
- Le code de commerce [Commercial Code of France], version consolidée au 13 février 2010.
- Lenoir, N. The *Societas Europaea* (SE) in Europe. A promising start and an option with good prospects. *Utrecht Law Review*. 2008, 1.
- Lietuvos Respublikos akcinių bendrovių įstatymas (su pakeitimais ir papildymais) [Law of the Republic of Lithuania on Companies]. *Official Gazette*. 2000, No. 64-1914.
- Lietuvos Respublikos civilinio kodekso patvirtinimo, įsigaliojimo ir įgyvendinimo įstatymas [Civil Code of the Republic of Lithuania]. *Official Gazette*. 2000, No. 74-2262.
- Picard, S. European company law versus participation rights how to resist the steamroller effect. *Transfer: European Review of Labour and Research*. 2010, 16.
- Proposal for a Council Regulation on a European private company - Political agreement, the Council of the European Union, 23 May 2011, 10611/11.
- Proposal for a Council Regulation on a European private company – Political agreement, the Council of the European Union, 27 November 2009, 16115/09.
- Radwan, A. European Private Company and the Regulatory Landscape in the EU – An Introductory Note. *European Business Law Review*. 2007, 4.
- Report of the high level group of company law experts on a modern regulatory framework for company law in Europe. 4 November 2002 [interactive]. [accessed 21-11-2011]. <http://ec.europa.eu/internal_market/company/docs/modern/report_en.pdf>.
- Siems, M.; Herzog, L; Rosenhäger, E. The European Private Company (SPE): An Attractive New Legal Form of Doing Business? *Journal of International Banking and Financial Law*. 2009, 5.
- Teichmann, C. The European Private Company. *European Company Law*. 2004, 4.
- Vaccaro, E. Transfer of seat and freedom of establishment of European Company law. *European Business Law Review*. 2005, 4.
- Wymeersch, E. The transfer of the company's seat in European company law. *Common Market Law Review*. 2003, 3.
-

EUROPOS PRIVATI BENDROVĖ: TEISINIO REGULIAVIMO PERSPEKTYVOS

Sauliaus Katuoka, Vaida Česnulevičiūtė

Mykolo Romerio universitetas, Lietuva

Santrauka. Straipsnyje analizuojamos pagrindinės Europos privačios bendrovės nuostatos, neapsiribojant vien Europos Komisijos parengto Tarybos reglamento dėl Europos privačios bendrovės statuto projekto nuostatomis, bet nagrinėjant ir Europos Parlamento pasiūlytus pakeitimus bei derybų Europos Sąjungos Taryboje medžiagą.

Europos privati bendrovė (*Societas Privata Europaea, SPE*) – tai europinė privačios ribotos atsakomybės bendrovės forma. SPE nėra pirmasis europinis juridinis asmuo, tačiau iki šiol esančios europinės bendrovių formos neatitinka mažų ir vidutinių įmonių poreikių. Pagrindinis SPE privalumas turėtų būti vienoda forma visose Europos Sąjungos valstybėse narėse. Europos privati bendrovė turėtų būti lanksti bendrovių teisinė forma, paliekanti daug galimybių patiems akcininkams reguliuoti bendrovės vidinę struktūrą. SPE turėtų sumažinti laiko sąnaudas ir išlaidas, patiriamas dėl skirtingų nacionalinių įmonių steigimo ir veiklos taisyklių (teisinės konsultacijos, bendrovės valdymo ir administravimo specifika). Šios formos bendrovė turėtų skatinti tarpvalstybinį verslą, galėtų būti pranašumas rinkodaroje tiek vidaus rinkoje, tiek ir už Europos Sąjungos ribų. SPE galėtų būti patraukli ir užsienio investuotojams.

Tačiau politinio kompromiso Europos Sąjungos Taryboje rezultatai SPE reglamentavimą gali padaryti per daug sudėtingą, todėl ši bendrovė nepasiektų jai keliamų tikslų. Tarpvalstybinio elemento reikalavimas steigiant bendrovę būtų daugiau formalumas, apsunkinantis tiek verslą, tiek institucijas, turinčias kontroliuoti bendrovių atitiktį šiam reikalavimui. Nuostata, kad registruotosios ir centrinės administracijos buvimo vieta būtų toje pačioje valstybėje, neatitinka Europos Teisingumo Teismo praktikos tendencijų. Akcinis kapitalas nebeatlieka svarbios funkcijos, todėl jo įtvirtinimas SPE statute smulkiems ir vidutiniams verslininkams nepagrįstai sudarytų papildomų kliūčių. Dėl valstybėse egzistuojančių skirtingų bendrovių teisės principų darbuotojų dalyvavimas priimant sprendimus yra vienas pagrindinių klausimų, trukdančių priimti Reglamentą.

Nuo tinkamo šių klausimų suregulavimo priklauso ne tik paties projekto tapimas teisės aktu, bet ir šios bendrovės formos naudojimas praktikoje.

Reikšminiai žodžiai: Europos bendrovių teisė, Europos privati bendrovė, Tarybos reglamentavimas dėl Europos privačios bendrovės statuto, mažos ir vidutinės įmonės.

Saulius Katuoka, Mykolo Romerio universiteto Teisės fakulteto Tarptautinės ir Europos Sąjungos teisės katedros profesorius. Mokslinių tyrimų kryptys: tarptautinė jūrų teisė, tarptautinė viešoji teisė, Europos Sąjungos teisė.

Saulius Katuoka, Mykolas Romeris University, Faculty of Law, Department of International and European Union Law, Professor. Research interests: international law of the sea, international public law, European Union law.

Vaida Česnulevičiūtė, Mykolas Romeris University, Faculty of Law, Department of International and European Union Law, Professor. Research interests: international law of the sea, international public law, European Union law.

Vaida Česnulevičiūtė, Mykolas Romeris University, Faculty of Law, Department of International and European Union Law, Lecturer. Research interests: European Union law, company law, finance law.