SOCIETAS PRIVATA EUROPAEA VERSUS SOCIETAS EUROPAEA

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Abstract
The stage of political procedures and negotiations related to the statute of a new European company: European Private Company triggers the analysing of the main features of such a company and comparing them to those of the companies regulated in Romania and on other member states of the European Union.
Therefore, we shall have a complete picture on the organic statute of this new company and, especially, on the divergent aspects, aspects having prevented the enactment of the Regulation regarding European Private Company (Societas Privata Europaea).
And not least, it is the only way to determine the extent the new trading company contributes to exceed the current issues of business development in the European Union, in which extent the European private company shall represent or not a progress in the matter of European trading companies, where the main mark is represented by the European Company (Societas Europaea).

Keywords: *European company, European private company, transfer of registered office, capital, cross-border element.*

I. Introduction

The statistics indicate that more than 40% of the SMEs in the European Union might develop their cross-border activity but claimed that they lack in the needed instrument[1] as the existing transnational companies: European Economic Interest Group (EEIG), the European Company or the European Cooperative Society[2] do not grant a proper type of SMEs[3]

Therefore, according to Libertas - Europaisches Institut GmbH in the member states, during the period 2004 – 2011, only 739 European Companies were established with various sizes (including family business), which operate in various fields of activity amongst which, 47 were dissolved, during the period 1989-2011 only 1361 GEIE were established (out of which 214 are dissolved) and, during the period 2008-2011, 20 SCE[4] were established.

On the other hand, the diversity of the limited liability companies in the member states indubitably generate their lack in flexibility and, in case of groups of companies, it renders difficult the deployment and effectiveness of the activities of their branches from other states of the European Union. The parent company is compelled to establish each branch of another type in each and every

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[1] KPMG survey presented at Business Europe's SME Action Day on 21 November 2007.

[2] See respectively Council Regulation (EEC) 2137/85 of 25 July 1985, Council Regulation (EC) 2157/2001 of 8 October 2001, Council Regulation (EC) 1435/2003 of 22 July 2003.

[3] According to a general EU definition, small and medium sized enterprises are those with less than 250 employees. Within this category the following sub-categories are distinguished as per Commission recommendation 2003/361/EC: (i) Medium-sized enterprises [headcount <250 and turnover ≤€ 50 million and/or balance sheet total ≤€ 43 million]; (ii) Small enterprises [headcount <50 and turnover ≤€ 10 million and/or balance sheet total ≤€ 10 million] Micro enterprises [headcount <10 and turnover ≤€ 2 million and/or balance sheet total ≤€ 2 million]; (iii) Micro enterprises [headcount <10 and turnover ≤€ 2 million and/or balance sheet total ≤€ 2 million].

[4] The statistics supplied by Libertas-Europaisches Institut GmbH, are made at the level of November 2011; available at <<www.libertas-institut.com>> (latest visit on January 30, 2012)**.**

member state where established, branches to company to different legal regimes. All this generates costs and inconveniences, barriers for the development of international business[5].

To this end, in order to create a type of company destined for small and medium enterprises, The European Commission drafted a study for the feasibility of an European statute of small and medium enterprises (PME –"Les petites et moyennes entreprise").

Based on the Communication of the Commission to the Council and Parliament from May 21, 2003: "Modernization of trading companies' law and strengthening of corporative management in the EU. A plan to advance"[6] and of the Commission Report for legal businesses of the Parliament in 29.11.2006[7], the European Parliament enacted on February 1, 2007 the Resolution which included the recommendations of the Commission regarding the statute of the European private company and the request for the Commission to present, during the year of 2007, a bill according to the recommendations of the Parliament.

In such background, in June 2008, the European Commission presented in front of the Council a proposal for a Regulation (hereinafter the Regulation) for the Statute of the European Private Company (Societas Privata Europaea; hereinafter, the SPE).

The proposal was made on the grounds of art.352 in the TFUE (article 308 EC Treaty) with the significance that, in order to pass it, they needed the approval of all the 27 Member States of the European Union.

On March 10, 2009, the European Parliament approved the proposal with amendments and adopted a law resolution[8] and indicated the Commission to alter its proposal accordingly.

The revised wording of the regulation of the Council regarding the statute of SPE (hereinafter the Regulation Proposal) is in its final step to be passed, as indicated in the document of the Council DRS 84 SOC 432 from May 23, 2011[9] following to conclude a final political agreement

There is currently a decision making blockage due to the rule of unanimity, proposing as way out of the impasse, the elaboration of a new directive or the amendment of the twelfth directive of trading companies, in order to create a simplified company which shall be established by a sole associate, who shall allow the reduction of the business deployment costs of useless formalities. Such proposal was not agreed upon as it would not reach the targets as good as the SPE related proposal.

There existed no preoccupation in Romania for the SPE and the legal studies in the matter al almost inexistent, the undertakers in Romania are interested in extending their activity on the territory of the single market.

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[5] Andreas Bernecker, "A European Private Company - Is Europe's single legal form for SMEs close to approval?", Deutsche Bank Research, July 19, 2010, available at: <<http://www.dbresearch.de/PROD/DBR_INTERNET_DEPROD/ PROD0000000000260277 /A+European+Private+Company%3A+Is+Europe%E2%80%99s+single+legal+form+for+SMEs+close+to+approval%3F.PDF>>.

[6] Communication of the Commission to the Council and Parliament from May 21, 2003 entitled: *"Modernization of the law of trading companies and strengthening of corporative governing in the EU. A plan to go ahead",* COM(2003)284, celex:52003DC0284.

[7] Report from November 29, 2006 of the Commission for legal business of the European Parliament, containing as well regulations to the European Commission related to the statute of the European private company and proposal for the Resolution of the European Parliament in such direction [2006/2013 (INI)] rapporteur Klaus-Heiner Lehne, stage of procedure: A6-0434/2006; This report is based on a regulation draft regarding the statute of EPC jointly promoted by MEDEF and CCI, available at: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A6-2006-0434+0+DOC+PDF+V0//EN&language=EN.

[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; available at <<http://www.europarl.europa.eu/sides/getDoc.do;jsessionid= 3A6D2E4B375D4F87B4AF504459A78D53.node2?pubRef=-//EP//TEXT+TA+P6-TA-2009-0094+0+DOC+XML+V0//EN>> (last seen November 12, 2011).

[9] DRS 84 SOC 432 from May 23, 2011, available at:
<< http://register.consilium.europa.eu/pdf/ro/11/st10/st10611.ro11.pdf>> (last seen on November 11, 2011).

We proposed by this paper to analyse the main features of the European Private Company marked out in official documents, to compare them to those of the main European company: the Europea public limited company - *Societas Europaea*, in order to determine and indicate the extent such new company shall represent or not a progress in the matter of European trading companies and the extent it shall contribute to the removal of the current issues in doing business in the European Union

II. The Main Features of the European Company and of the European Private Company

As indicated, the premise of SPE regulation was created by the current issues existing in the cross-border activity of small and medium enterprises, the SE being, in principle, destined to large enterprises and, by the fact that, SE regulation contains enough limitations of its transnational character.

The statute of the public limited company passed by the European Council Regulation no. 2157/2001 from October 8, 2001[10](hereinafter, the Regulation 2157/2001), was received with lots of enthusiasm by the European legal world and is registered amongst the acts the Council should have passed before 1992 based on the White Paper of the Commission related to the finalization of internal market, approved by the European Council met in Milano in June 1985.

The great advantage of the establishment of a European company is considered that of simplifying the structure of the enterprises which can develop their activity in the entire Europe without the establishment of lots of branches complying with different national regulations[11].

In Romania, the European Company is regulated by Emergency Governmental Ordinance no.52/2008[12] for the amendment and completion of Law no.31/1990 related to trading companies and for the completion of Law no.26/1990 related to the register of companies and, based on such regulation, by the European Regulation no. 2157/2001 related to the Statute of the European Company.

The main features of the Europea public limited company[13] consist of the fact that, it is a capital joint-stock company, with a subscribed capital which cannot be lower than EUR 120,000 and becomes legal person on the date of its registration with the National Register in the member state where its headquarters has the registered office, that is, on the date of its registration with the Register of Companies for those with registered office in Romania, without the possibility for its

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[10] Council Regulation no. 2157/2001 from October 8, 2001 entered into force in 2004, published in the Official Gazette L 294/1 from October 10, 200, Regulation supplemented by Directive no. 2001/86/CE and of the Council from October 8, 2001 to supplement the Statute of the SE regarding workers' involvement, published in the Official Gazette L 294/22 from October 10, 2001, with subsequent amendments, with the last amendment made by Regulation no. 1791/2006 (adopted as a consequence of the adhesion of Romania and Bulgaria to the EU on January 1, 2007), published in the Official Gazette L 363 from December 20, 2006.

[11] F. Blanquet, *Pourquoi créer une société européenne?,* in: *La société européenne*, Dalloz, Paris, 2003, p. 5; J. Beguin, M. Menjucq, G. Bourdeaux, A. Couret, B. le Bars, D. Mainguy, H. Ruiz Fabri, J.-M. Sorel, C. Seraglini, *Droit du commerce international*, Litec, LexisNexis, Paris, 2005, p. 200-214.

[12] Emergency Governmental Ordinance no. 52/2008 for the amendment and supplementation of Law no. 31/1990 related to trading companies and for the supplementation of Law no. 26/1990 related to the Register of Companies, published in the Official Gazette no. 33 from April 30, 2008.

[13] Complete presentation of European Companies and of their evolution in the Report: "Societas Europaea pour une citoyénnete européenne de l'éntreprise" from March 19, 2007, presented by Noelle Lenoir and collectively performed by Ronan Guerlot, Mirko Hayat, Erwan le Meur, Marii-Laure Combet, Marc Guillaume, Reinhard Dammann, Nichel Menjucq, published on the site of the Ministry of Justice of France: <<www.justice.gouv.fr>>;J. Beguin, M. Menjucq, G. Bourdeaux, A. Couret, B. le Bars, D. Mainguy, H. Ruiz Fabri, J.-M. Sorel, C. Seraglini, *Droit du commerce international*, LexisNexis, Ed. Litec, Paris, 2005, p. 200-21; E. E. Ştefan, *O nouă formă de societate. Societatea Europeană (I) (Societas Europaea),* în RDC nr. 1/2007, p. 104.

registration to be performed if the company did not conclude any prior agreement related to the involvement of its employees in the activity of the company, under the conditions provided for by Governmental Decision no. 187/2007 related to the information, advise procedures and other employees' involvement methods in the activity of the European Company[14].

SPE is forecasted to be a limited liability company, legal person starting on the date of its registration with the special register of the member state where it has its registered office, being conceived as a closed company which can be established ex nihilo, with a registered capital of minimum EUR 1.

By its field of application, the regulation draft indicates its implacability in the matter of property, tax regime, labour law, insolvency and tort liability. Such aspects are to be regulated by the applicable domestic law.

Below, the study shall exclusively regard the main features of the two types of European companies and those features, especially, which represent weak points in the negotiations to pass the SE regulation, features which lead to the reforming of the current European company structures.

1. Law of Organic Statute

Regarding the law applicable to SE, seeing that it was designed as a real European law company, this aspect is the outcome of a compromise. Although they went for rare referrals to domestic laws, the referrals were more and more frequent, the European company being a hybrid[15].

According to the provisions of art.9 of Regulation 2157/2001, a SE is regulated by: (a) de provisions of the regulation, (b) in case this regulation explicitly allows it, the provisions in its own statute or (c) in case of aspects not regulated by this regulation or, for the aspects partially regulated by it, in case of those elements which are not regulated by this regulation, by : (i) the legal provisions enacted by the member states for applying the community measures related to the SE; (ii) the legal provisions in the member states applicable to a public limited company established according to the law of the member state where the concerned SE has its registered office; (iii) the provisions in the statute of the company, under the same conditions as for a public limited company established according to the law of the member state where the concerned SE has its registered office.

In case of SPE, its applicable law represented one of the most difficult issues of the regulation draft, as it aimed to the strongest autonomization, in proportion to domestic law, of such entity,

Article 4 of SPE regulation establishes the applicable right of SPE, organic statute of which shall be governed first of all by the provisions of the regulation and, secondly, by the provisions of the article of association of SPE, creating by it a shield to the application of the Member States' law[16].

The associates, *based on the free will principle and on the provisions of art.4 from the Regulation, can insert as well in the articles of association provisions related to the aspects listed in Annex I of the SPE Regulation* (additionally to the compulsory content of the articles of association established by art.8 in the SPE Regulation).

The aspects included in Annex I of the SPE regulation are a lot (there are more than 40 positions), and mainly regard the internal organizing of the SPE

[14] Governmental Decision no. 187/2007 related to the procedures of information, consultancy and other employees' involvement methods in the activity of the European Company, published in the Official Gazette no. 161 from March 7, 2007.

[15] Michel Menjucq, *Droit international et europeen des societes,* 2e edition, Montchrestien, Paris, 2008, p.221-p.222.

[16] Susanne Braun, *"Essay-The European Private Company: A Supranational Company Form for Small and Medium-sized Entreprises?",* German Law Journal, Vol.05 No.11, 2004, p.1393-1408, available at: << http://www.germanlawjournal.com/article.php?id=518>>.

Nevertheless, the *SPE Regulation does not offer the SPE a total autonomy of the legal regime* but, the provisions of the domestic law of the company only apply in case of the aspects expressly mentioned by the regulation. The national law of the company or the domestic applicable law is the law of the Member State where the SPE records its registered office

Third of all, *the aspects uncovered (unregulated) or partially covered by the regulation and by its Annex I, as well as in case of aspects included in Annex I but not contained in the articles of association, they are object of the laws passed by the member states for applying the regulation and, in default, the provisions of the law applicable to the company*

The method to nominate the aspects regulated by the domestic law of the company, by elimination, is criticised in the specialty literature, as there are opinions according to which the application scope of domestic law shall be determined by the interpretation given in each and every Member State to the words: "uncovered by" the Regulation or by Annex I[17].

Obviously, by the legislative technique used by article 4 of the SPE Regulation it is avoided as much as possible the application of the domestic law of the company

2. Formation

2.1. The establishment methods of a company, especially of European companies, have a strong role in the process to choose the establishment type of the company, the simplicity of its establishment offering indubitable advantages.

Unfortunately, being conceived for the development of large businesses, SE cannot be directly established as such, but only indirectly, by four methods[18]:

(i) by merger of two or more public limited companies established based on the law of a member state, having its registered office and headquarters within the Community, provided at least two of them be regulated by the law of different member states.

(ii) by the establishment of an European Holding Company by public limited companies and limited liability company established based on the law of a member state, with the registered office and headquarters on the territory of the Community if at least two of them are regulated by the law of different member states or hold of at least two years a branch regulated by the law of another member state or a branch on the territory of another member state.

(iii) by the establishment of an European Company branch by companies or other public or private law legal entities established on the grounds of the law of a member state, having its registered office and headquarters on the territory of the Community if at least two of them are regulated by the law of different member states or have been holding for at least two years a branch regulated by the law of another member state or by a branch on the territory of another member state.

(iv) by transformation into SE of a public limited company established based on the law of a member state, having its registered office and headquarters on the territory of the Community and if it has been holding for at least two years a branch regulated by the law another member state[19].

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[17] H.J. de Kluiver, J.Roest, *"Expulsion and Withdrawal of Shareholders"* and M.I.Lennarts, *"Voice Rights of Shareholders"*, bouth in: D.F.M.M. Zaman et al. (eds.) *The European Private Company (SPE). A Critical Analysis of the EU Draft Statute*, 2009, p.70 and p.126, indicated by Sandra van den Braak in *"The European Private Company, its shareholders and its creditors"*, Utrecht law Review, Volume 6, Issue 1 (January), 2010.

[18] Romanian regulation does not contain special provisions related to the establishment of European Company, with referrals for such purpose to the European regulation: *"related to this emergency ordinance, European company is the joint stock company established under the conditions and by the mechanisms provided for in the Council Regulation (CE) no. 2157/2001 from October 8, 2001 related to the statute of European Company"* – art. IV paragraph 1 from Emergency Governmental Ordinance no. 52/2008.

[19] For details related to the establishment of SE, in the Romanian doctrine, please see: Manole Ciprian Popa, *Grupurile de societati*, Ed.C.H.Beck, Bucuresti, 2011, p.250 si urm.

Unlike all the other current European entities (European company, European groups with economical interest, the European cooperative companies), SPE can be established *ex nihilo, according to the traditional method for a trading company formation, by its transformation and by the merger of current trading companies.*

We therefore remove a main inconvenient of European company forms which were not to be established as such, from the beginning. Such aspect may have been an obstacle for the option of business agents for an European company.

An SPE shall be established ex nihilo (directly) by one or more private or public law natural or legal persons, according to the provisions of SPE regulation.

The transformation of a current legal person, regulated by the internal law of a member state is the second establishment method for an SPE, under the conditions, according to the regulation*, the member states are compelled to allow the transformation of a limited liability national company in an SPE.* Regarding the other types of national companies, the member states shall allow their transformation in an SPE in the extent domestic law allows their transformation in a limited liability company, in general.

In this establishment method for the SPE, according to the general rules in the matter, the legal person / company which is transformed is neither dissolved nor loses its legal personality.

When domestic law imposes a restriction related to the transformation of a legal person in a limited liability company, such restriction is applied, mutatis mutandis, to the transformation of the SPE as well.

In case the SPE is established *ex nihilo* or *by transformation*, *the establishment of the company shall be regulated by the regulation.*

And not least, the SPE can be established *by merger, according to domestic law.*

2.2. In any of the establishment methods allowed by the regulation, *SPE is established by the signature of the articles of association by the founder members, in written form, it being object of the formal requirements provided for in the applicable domestic law*

By such provision, the regulation first concedes in favour of the member states, giving the possibility of the applicable domestic law for the establishment of SPE to impose as well other shape conditions of the articles of association. In this direction, domestic laws include various provisions, in some cases, being imposed the written form for the validity of the articles of association, in others for proving the articles of association and as well its authentic form for its validity

As for example, the Romanian law[20] imposes as regulation the written form of the articles of association, for its validity and, by exception, the authentic form when the limited liability company is established where a land is brought as contribution to the establishment of the registered capital

The opposability of the articles of association is as well obtained, according to the provisions of the applicable domestic law.

The article of association of the SPE must include at least the aspects provided for by art.8 in the regulation.

The inclusion of additional clauses related to the aspects mentioned in Annex I of the SPE regulation is to be appreciated by the founder members. In such case, domestic law is not applied to those aspects in the extent they are included in the articles of association.

The articles of association may include as well other aspects than those compulsory and elective from the regulation but, such other aspects shall not be regulated by the regulation, but by the applicable domestic law.

2.3. For its legal establishment, *the SPE must be registered according to the provisions of domestic law, with the register held by each and every origin member state.*

[20] Law no.31 from 1990 regarding trading companies and the new Romanian Civil Code.

The same rule applies to the SE which is registered in the member state where it has its registered office, with the publication of the SE registration related announcement, for information, in the Official Gazette of the European Union.

The founder members or any person authorized by them request the registration, which can be performed by electronic means as well.

Article 3 item 3 of the regulation requires as *essential element of the registration as European entity of the SPE, its transnational structure.*

The current shape of the SPE regulation alienates from the initial proposal which included no referral to a cross-border element as they considered that such requirement might significantly reduce the potential of the SPE. The alteration of conception was determined by the fear that such lack of community dimension as precondition of its establishment as an SPE may infringe the principle of subsidiarity regulated by article 5 in the EC Treaty[21].

The difficulties created by the cross-border components imposed for the existing European entities (European company, European group with economical interest, European cooperative company) are removed by flexible criteria included in the regulation

The needed cross-border structure must be proved in the moment of the registration of the SPE by one of the following elements, very easily to fulfil[22]:

i) an intent to operate in another member state than that where the SPE is registered; or

ii) a cross-border activity object mentioned in the articles of association of the SPE; or

iii) a branch or subsidiary registered in member state different from that where the SPE is registered; or

iv) an associate or several associates with residence or registered in more than one member state or in a member state different from that where the SPE is registered

In order to reduce administrative costs and duties related to the registration of the company, the formalities to register the *SPE* are limited to the requirements needed to guarantee the legal certainty, and the *validity and conformity to the provisions of the regulation and to the domestic law of documents registered in the moment an SPE is created are object of one sole check of legality, performed according to domestic law*

Therefore, the member states request the supply of only those pieces of information contained in the Articles of Association of the SPE, the articles of association, the documents certifying the payment of the capital, the police record of the directors, the evidence related to transformations or mergers of the SPE

In all cases, irrespective of the method to check the fulfilment of the registration conditions by an SPE, useless checks of documents and information are avoided.

The sole control of the legality of the articles of association generates the fear of notaries, mainly, in France, Germany and Austria that, the entry of SPE in such form, shall generate losses for their profession[23].

Without derogation from the general rules in the matter of companies, *the legal personality is acquired in the moment of registration with the Register of Companies of the SPE constituted ex nihilo and by transformation and, in the moment of the registration of the merger of the absorbing company with the register of SPE resulted as a consequence of the merger*

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[21] Sandra van den Braak, op.cit., p.4.

[22] A.F.M. Dorresteijn, O.Uzuahu-Santcroos, "The Societas Privata Europaea under the Magnifying Glass (Part 2), European Company Law, no.4, 2009, p.159.

[23] Source: Frankfurter Allgemeine Zeitung. November 4, 2008, p. 21. Wirtschaftswoche.http://www.wiwo.de/politik-weltwirtschaft/bundesregierung-blockiert-europa-gmbh-397226/ (May 19, 2009, called up June 9, 2010); indicata in: Andreas Bernecker, op.cit., p.6.

The attainment of the legal personality by the SE and SPE generate the consequence of the associates' liability for the obligations of the company within the limit of their contribution to the registered capital, with the exclusion of their personal liability for the obligations of SE and SPE, respectively.

3. Registered Capital

The requirements of the minimum registered capital represent one of the most sensitive and debated aspects of a company, which can provide its success or lack of success.

Therefore, one of the three current differences of SPE regulation is represented by that of capital requirements.

Being considered a form for large companies, the capital of a SE cannot be inferior to the amount of EUR 120 000 with the possibility for the law of a member state which provides a higher subscribed capital for the companies developing certain types of activities to be applied to SE with the registered office in the concerned member state.

All the other aspects related to the registered capital of a SE: its maintenance and alteration, as well as the shares, bonds and other similar securities of the SE are regulated by the provisions applicable to a joint stock / public limited company with registered office in the member state where such SE is registered.

For the moment, the SPE is not object of a requirement of compulsorily high capital, as it would be an obstacle for the creation of SPEs. Despite all this, the creditors are protected by excessive distributions to the shareholders, which may affect the capacity of the SPE to pay its debts. For such purpose, they prohibited the distributions consequence of which the liabilities of the SPE is superior to the value of the assets. Additionally, the shareholders may request the executive management body of the SPE to sign a certificate of good standing.

There are, amongst new and especially important provisions which may provide the premises for reaching the targets of the SPE regulation, those related to the *minimum registered capital of the SPE of at least EUR 1.*

Germany objected to such requirement of minimum capital and, in order to avoid abuses, it requested the introduction of a of a minimum capital related requirement which shall provide the good standing of the company, which means that the minimum capital be of at least EUR 8 000.

The base of the possibility of a EUR 1 registered capital for a private company operating on a single market is given by the alteration of the conception on the guarantees the creditors of a company expect and request.

It is well known that, according to its legal significance, the registered capital represents the general pledge of the company's creditors[24]. Despite this legal reality, the social obligations exceeding by far the value of the registered capital so that, de facto, the assets of the company are those providing or not satisfaction of social creditors[25].

And not least, it is proven that the creditors prefer to request other types of guarantees, individual and enforceable, to that offered by the registered capital, the assets being those value of

[24] For this conception effectiveness, please see: Mathias M. Siems, Leif Herzog and Erik Rosenhäger, *"The Protection of Creditors of a European Private Company (SPE)"*, European Business Organization Law Review (2011), vol.12, nr.1, p.152-153; available at: <<http://journals.cambridge.org/action/displayFulltext?type=1&fid=8243692&jid=EBR&volumeId=12&issueId=01&aid=8243691&bodyId=&membershipNumber=&societyETOCSession=>>.

[25] Details in: H.Boschma, L.Lennarts, H.Schutte Veenstra, "The Reform of Dutch Private Company Law: New Rules for Protection of Creditors", European Business Organization Law Review 8, 2007, p.573.

which grants solidity to the company[26]. In certain cases, even the reserve of ownership on grounds of which the seller holds over the property on goods until their full payment presents an important pledge[27].

There is, in the light of the decisions of the Court of Justice of the European Union, the tendency to waive, for the future, the requirements related to the minimum capital.

Therefore, even Germany has recently entered *Unternehmergesellschaft* with a minimum capital of EUR 1 and The Netherlands is in full progress of removing the capital related requirements for *Besloten Vennootshap*[28].

Despite such tendencies, a minimum registered capital of EUR 1 represents a level which cannot be accepted by the legal traditions of all the member states of the European Union, for which reason, politically speaking, the opinions are still divergent regarding the capital of the SPE.

Of course such limitation of the liability of the company leads to additional risks for the business; therefore, they quote studies which show that, for example, 90% of the limited liability companies newly registered in Germany which use the legal form of Great Britain with a minimum capital of EUR 1, were erased in 18 months[29]. For such grounds, a minimum registered capital with a significant value is requested for the SPE[30].

Neither the European Parliament agreed to such new conception and, in order to make a balanced compromise, the last version of the regulation includes the *possibility of each and every member state to be able to establish for the SPE registered on its territory, a minimum registered capital higher than EUR 1, but not more than EUR 8000.*

The large interval between the two minimum thresholds of the registered capital of the SPE shows the difference existing between the member states of the European Union. Poland requests a minimum registered capital of limited liability companies of: EUR 13,869, United Kingdom EUR 1.5, France EUR 1, Hungary, EUR 11,760, Austria EUR 35,000, the Netherlands EUR 18,000, Bulgaria EUR 2,500[31], Romania EUR 45 etc.

We do not believe that the establishment of the minimum capital of SPE by each and every member state, within the interval established by the regulation: 1 Euro- 8,000 Euro, shall lead to the success of the SPE, the minimum share of EUR 1 regarded by the initial proposal being that which, amongst other arguments, may represent an important criterion in choosing this type of private company. There are opinions according to which, such solution related to the share of the capital is capitalized for the Member States which shall set the minimum threshold of the capital, taking into account the particularities of their economical past and the differences existing amongst the economies of the Member States[32].

In all cases, the establishment of the minimum capital to EUR 8000 must not represent a barrier for a trading company which wants to develop international activities but, it must indicate trust in the seriousness of the SPE's associates.

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[26] Drury, Robert/Hicks, Andrew: *"The proposal for a European Private Company"*, The Journal of Business Law, p.441, 1999, :"But the provisions of a minimum capital has not always the effect of providing any sort of guarantee that the business is sufficiently capitalised to protect third parties dealing with it".

[27] For a comparative analysis, please see: L.-C. Wolff, *"Statutory Retention of Title Structures? A Comparative Analysis of German Property Transfer Rules in Light of English and Australian Law"*, 14 Deakin Law Review (2009) p. 1.

[28] Sandra van den Braak, *"The European Private Company, its shareholders and its creditors"*, Utrecht law Review, Volume 6, Issue 1 (January), 2010, available at:<<http://utrechtlawreview.org>>.

[29] Maul/Röhricht. Betriebs-Berater. Heft 30/2008, p. 1578.

[30] Andreas Bernecker, op.cit., p.6.

[31] Source: Impact Assessment, Working Document accompanying the Proposal for a Council Regulation on the Statute for a European Private Company (EPC), op.cit., Annex A3;

[32] Mathias M. Siems, Leif Herzog and Erik Rosenhäger, *"The Protection of Creditors of a European Private Company (SPE)"*, op.cit., p.156;

Additionally, the creditors of the SPE are guaranteed as well by its obligation not to distribute the dividends of its associates if, on the date of the last tax year end, the net assets resulted from the annual accounts of the SPE is, or after such a distribution, may decrease below the share of the capital plus that of the reserves which cannot be distributed according to the articles of association of the SPE. The member states have the possibility to enter as well the *requirements related to the "certificate of good standing"* by which the management body of the SPE certifies that the company is able to pay its debts on the maturity term, in one year's term from the dividends distribution date.

And not least, *the capital of the SPE is integrally subscribed by the associates who can contribute by contributions in cash and in kind, and divided in shares. The labour and service contributions are not allowed.*

Regarding the payment of the registered capital, the regulation establishes that the equivalent of the minimum capital must be fully subscribed and paid on the date the SPE is registered. Where the capital of the SPE is higher than the minimum registered capital, at least 25% of the amount by which the minimum capital is exceeded, shall also be paid on the SPE registration, establishment date

On such grounds, seeing these conditions and the associates' decision, *the articles of association of the SPE must include the share of the capital which is to be paid upon its establishment*.

4. Registered Office

The placement of the registered office of SPE represents a source of differences, due to the various domestic regulations of the member state by which, they either allow the separation of the registered office from the headquarters, or they impose their coexistence on the territory of one member state.

Regarding the SE, the dissociation of the registered office from the headquarters is expressly sanctioned by art.64 in the regulation 2157/2001, with the liquidation of SE, unless such situation is remedied[33].

Generally, analyzing the issue of the registered office of European companies, we must mention that the cross-border mobility of companies is mainly guaranteed by the freedom for establishment, although, article 49 from the TFUE which established such principle does not recognize to companies according to article 54 from the TFUE, the right to move their registered office from the legal system of the home member state in another member state so that, the companies must change for it their nationality and adhere to the legal regime of a new home state. The case law of the Court of Justice of the European Union is sufficiently clear in this direction and there is no reason to be altered

De facto, the company is a legal fiction existence of which is recognized by a domestic law, applicable law due to the connection existing by the registered office of the company - the registered office[34]-, between the company and the member state where established, laws of which are met upon the establishment of the company. Therefore, the application of a domestic law is the prior condition for the existence of any company.

In essence, the main principle of trading company mobility cannot be only reduced to the possibility to extend its activity on the territory of other member states of the European Union, by the establishment of branches, subsidiaries, representative offices or agencies.

[33] Michel Menjucq, op.cit., p.223.

[34] The registered office of companies is named "the registered office" as, all the companies are registered in a National Register of Companies, held by the member state where it declares its office in the articles of association, register kept according to the 1st Company Law Directive (Directive 68/151/EEC of 9 March 1968).

It includes by its nature, the right of the company to move its registered office from one member state to another, according to the business opportunities.

Of course trading companies must be able to develop their activities on the territory of a state different from that where it was established, based on its settlement right and without national formalities which may excessively limit or prevent the effective exercise of the settlement right.

In such context, SE can transfer its registered office from a member state to another, without it leading to the dissolution and liquidation of the company or to the creation of a new legal entity. Such possibility offers a great mobility to the SE[35].

The only restrictions in the freedom of the transfer of the registered office of a SE are those involved in case SE is in progress of dissolution, liquidation, insolvency or insolvability or in other similar procedures.

In order to allow to enterprises to take advantage of all the advantages of the internal market, the SPE must be allowed to establish its registered office and real office in different member states and to transfer the registered office from one member state to another, without being compelled to transfer as well its headquarters or main registered office. Despite all this, one must take measures in the same time in order to prevent the use of the EPC in order to elude the legitimate legal requirements in the member states.

Germany prefers the registered office and the headquarters of the SPE to be in the same state, in order to avoid the tax evasion, and therefore, the difference on such aspect is still unsettled.

According to the SPE regulation, the *SPE has its registered office and headquarters or the main place for the development of the activities on the territory of the European Union, according to the domestic applicable law.*

By this provision, the SPE regulation would rather only make half a step on a territory of "moving sands", establishing as principle the possibility of a company to have its registered office different from the real office and, additionally, to have its registered office and real office in different member states. "The step finalization" is launched according to the desires of each and every member state which can accept or not this possibility by its internal provisions

Therefore, *the domestic law applicable to the SPE shall decide, by its regulations, if the registered office and headquarters or main place for the business activities should be or not on the territory of the same member state.*

More, *the SPE regulation allows the SPE to transfer its registered office from one member state to another, under the conditions shown by the regulation, without the dissolution and loss of the legal personality of the SPE.*

The transfer of the registered office of the SPE from one member state to another can only get involved if dissolution, liquidation or insolvency or SPE payment suspension procedures were initiated.

The check of the legality to transfer the registered office of the SPE devolves upon the competent national authority. Should the conditions of the transfer of the registered office be fulfilled*, the competent authority with control of such transfer legality from the home state can only oppose to the transfer of the registered office due to public order reasons.*

The same right is also held by the national authority of financial surveillance of the SPE, if the SPE is subject to such a check.

The decision of the competent authority on the home state can be brought to court in front of a judicial authority.

In its turn, *the competent authority in the host state* shall analyze if all the conditions of the transfer indicated in the SPE regulation are met as well as all the relevant provisions in its law and, if affirmatively, *it shall decide the registration of the SPE, moment when the transfer produces its effects.*

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[35] Veronique Magnier, Droit des Societes, Dalloz, Paris, 2009, p.373.

On the grounds of the notification related to the registration of the SPE in the host state, the competent authority in the home state decides the erasure of the SPE from its register.

For the opposability of the new registered office registration and of the erasure of the old registered office, such documents are object to advertising.

5. Organizing structures

According to the organizing structures of the SPE, the regulation does not produce conception alterations seeing that, *the main decision making body is the general assembly of the associates, decisions of which must be written down; the management of the SPE is provided by directors which can only be natural persons, the associates having the possibility to decide between the two traditional management methods: unitary or dualist system and, related to the elaboration, delivery, auditing and printing of accounts, SPE is object of the requirements of domestic law.*

Out of such perspective, there is no difference between the SPE and the SE, the SE benefiting from the same main corporative organizing structures.

The representation of the SPE in its reports to third parties is a general duty of the management body of the SPE.

The SPE regulation establishes the main attributions of the general assembly and the minimum majority related conditions needed by the general assembly to pass decisions.

Therefore, *as a general rule, except for contrary provisions from the articles of association, the decisions are passed by the associates with the vote of the simple majority from the total of the voting rights related to the shares of the SPE.* By this provision, the associates have the possibility to establish majority related conditions much lower than those mentioned by the regulation, for passing the low importance decisions for the company

The decisions related to the purchase of its own shares, the increase of the registered capital, the reduction of the registered capital, the transfer of the registered office of the SPE to another member state, the dissolution and amendment of the articles of association are made by the associates with the qualified majority, of at least two thirds of the total of voting rights related to the shares of the SPE, except for the cases when the articles of association provide no higher majority.

An important alteration of the tradition conception related to the convocation of general assembly is marked by the *introduction of the principle of non-convocation of the associates' general assemblies.*

Therefore, *according to article 28 item 3 in the SPE regulation, passing decisions does not need the convocation of a general assembly.*

Such principle one cannot derogate from by the provisions of the applicable domestic law is imposed by the need to reduce the costs of the business but as well by the effective use of the time to pass a decision. Therefore, they remove the conditionings included by all laws of the member states related to the observance of a certain number of days which should flow from the date the associates' general assembly is convoked to the date of its occurrence. The expenses needed for the convocations are added.

In order for the associates' general assembly of an SPE to pass decisions, the management body makes available for all the associations the proposals for decisions, together with sufficient information in order to grant them the possibility to pass a decision, in full knowledge of the facts. Decision passing is recorded in writing, as they are object of the formal requirements provided for by the applicable domestic law. Copies of the decisions and the results of the vote are sent to each and every associate.

As a natural reflection of the fact that associates' passing decisions is fully regulated by the regulation, as principle, *the decisions passed by the associates of the SPE must meet the provisions of the regulation and of the articles of association.*

However, *the right of the associates to bring to court the illegal decisions of the associates' general assembly, which infringe the provisions of the regulation and of the articles of association, is regulated by the applicable domestic law*.

Due to the fact that one must allow the shareholders a high level of flexibility and freedom for organizing the internal business of the SPE, *the private character of the company must reflect as well in the fact that its actions can neither be offered to the public or negotiated on the capital market, nor admitted for transactions or quoted on the regulated markets.*

They appreciate that the private character of "closed company" of the SPE can be an instrument for the limitation of the size of the companies constituted in the SPE, by making the possibility for experimented partners to get involved in the company more and more difficult[36].

The condition to distribute dividends and the reduction of the registered capital, the assignment of shares are regulated by the regulation and the articles of association while the *transformation in a new legal type, the merger and division, dissolution, liquidation, insolvability, suspension of SPE payments and other similar procedures are regulated by the domestic applicable law and by the Regulation (CE) no.1346/2000 of the Council.*

6. Employees' Participation

The third point of difference for passing SPE regulation is that related to employees' participation. This time, Sweden is the one having objected to the initial wording and to the compromise proposals, based on the fear that, the aspects of the regulation related to employees' participation shall not be included in domestic laws.

The blockage created by the issue of employees' participation, extremely sensitive, is no news as the same issue is known to have represented the cause why the passing of SE statute occurred after more than 30 years.

Therefore, directive 2001/86/CE and that of the Council to supplement the Statute of SE related to the involvement of workers[37] offer pledges based on which the establishment of a SE does not lead to the disappearance or attenuation of the employees' involvement regime, which exists in the companies participating to the establishment of a SE.

Such rule set in the matter of employees' participation by directive 2001/86/CE is based on the principle of acquired rights and is known as "avant-apres"[38] principle.

Such a regulation form was used for the employees' involvement seeing the wide diversity of rules and practices which exist in the member states related to the manner employees' representatives are involved in the decision making process at the level of a company, diversity which makes it pointless to introduce a single European model of employees' involvement, applicable to the SE.

Such European directive was transposed in our country by Governmental Decision no.187/2007 related to information, consultancy procedures and other employees' involvement methods in the activity of the European Company.

Employees' involvement represents information, consultancy and participation, as well as any other mechanism by which the representatives of the employees may exert an influence on the decisions to be made within the enterprise and, it is so important as much as, the establishment itself of a SE is subordinated to such involvement.

By the European directive, and according to it, the Governmental Decision no.187/2007 as well establishes concrete procedures to inform and consult the employees, at transnational level, according to the following methods:

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[36] See Susanne Braun, op.cit., p.1399.

[37] Directive 2001/86/CE to supplement SE statute related to workers' involvement, published in the Official Gazette L 294, November 10, 2001, p. 22-32.

[38] For details, see: Michel Menjucq, op.cit., p.235- p.236.

– Special negotiation group consisting of employees' representatives in case of establishment of a SE, group with the role to decide together with the bodies of the participating companies, by written involvement agreement, the involvement methods of employees within SE;

– Representation body**,** established on the grounds of Involvement Agreement, which represents the employees, that is, it informs and consults the employees of a SE and its branches and facilities found in the Community.

The significant differences in the matter of employees' participation within a SPE are due to the different legislative traditions of the member states so that, there must be a balance compromise

On the other hand, we must take into account that employees' rights must be of course met, the Member State must not use the law of the European Union and –export the domestic system[39].

In the meaning of the SPE regulation, "employees' participation" means the influence the body representing the employees and/or the employees' representatives has on the activity of an SPE by:

i) the right to choose or appoint a part of the members of the board of surveillance or of directors of the company or

ii) the right to recommend and/or to oppose to the appointment of some or all the members of the board of directors of the company (art.2 item 2 letter f in the SPE regulation).

As principle, the regulation establishes that the SPE is applied the regulations in the matter of the employees' participation, if such case, applicable in the member state where it has its registered office, except for the aspects regulated by the regulation, offering a uniform solution for any SPE[40].

The SPE regulation contains special dispositions to be applied with precedence related to those of the applicable domestic law, for exceptions, cases when one of the conditions is fulfilled:

i) SPE, for a continuous period of three months from the registration, has at least 500 employees usually working in a member state which provides a degree of employees' participation higher than provided for the employees in the member state where the SPE has its registered office; or

ii) In case of transfer of the registered office of an SPE

- at least a third of the employees, but not less than 500, ordinarily working in the home state on the date it is registered in the host state; and,

- employees in the home state had more participation rights than those in the host state.

Despite all this, if the transnational participation system for the employees created according to this article is applied to the SPE in the moment of the transfer, is to be applied after the transfer, if the SPE and the special negotiation body do not decide in another way.

Employees' participation to the management of the company is a sensitive subject for the member states where there is no such tradition, states where no private company accepts intrusions in the development of its businesses which they regard as a private issue and related to which only the associates are entitled to decide.

The SPE regulation does not impose the obligation of the member states to introduce rules related to the participation of the employees in the limited liability companies managing to correct the regulation of employees' participation in the operation of the SPE, without improperly disturbing the legal culture of each and every member state[41] *which may discourage the establishment of SPE.*

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[39] Joëlle Simon, *"Purpose and tools of European Company Law",* Conference on European Company Law: the way forward, 16 – 17 May 2011, p.4, available at: <<http://ec.europa.eu/internal_market/company/docs/modern/conference201105/simon_en.pdf>>.

[40] Daniel Karnak, *"The European Private Company - Entering the Scene or Lost in Discussion?"*, German Law Journal vol.10, No.08, 2009, p.1327.

[41] Situation we meet at the European Company in which case, the regulations related to the employees' participation within SE is applied to all member states (see: Directive 2001/86/CE of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees).

III. Conclusions

Even if the regulation related to the statute of the European company was transposed in the domestic law of several states[42], the alterations made by it do not lead and cannot lead for now to a revolution in the matter of trading companies operating the European space, seeing that the European company is endowed with a compulsory but limited European identity, it does not benefit from the advantage of European nationality[43], the organic statute of such companies being mainly governed by the law of the member state where the European company has its registered office and the principle of its mobility is affected by the opposition right found at hand of the public authorities in the host member state, opposition based on public interest reasons[44], in case of the intent to move the registered office in another member state.

Related to the statute of the SE, even in its current configuration, the SPE related regulation proposal represents a significant progress to the regulation of European companies.

The European company was conceived as a transnational company which shall provide for the mobility of the companies by the possibility to transfer its registered office from one member state to another, to enable the merger and the establishment of their branches in other member states. Such daring targets did not benefit from the necessary political support and the proposal was amended many times before its enactment. Under such conditions, statistics indicate that the European company did not represent a progress and does not benefit from success.

SPE presents indisputable advantages to any European entity: the possibility of direct establishment - ex nihilo, reduced minimum registered capital, easily performed cross-border structure, possibility for a registered office in a member state and real office in another member state, possibility of registered office transfer form one member state to another, flexibility of the articles of association, of internal organizing, lack to impose the requirements of SPE employees' participation in member states which do not regulate employees' participation etc.

There is to establish the extent in which the largely more extended incidence of the domestic law applicable to the SPE shall represent an important inconvenient in the use of SPE. There is no doubt that in its current configuration, SPE regulation does not offer certainty related to the role of the domestic law applicable to the SPE and, the more the aspects regulated by the domestic law of the SPE, the less uniform the law applicable to the organic statute of the SPE.

We appreciate as the strongest advantage of the SPE: the deployment of cross-border business within a single market through the agency of an instrument legal regime of which is sufficiently uniform, independently from the member state where it develops its activity, directly or by branches, may determine the success of this new instrument for doing business in the European Union.

References:

- Andreas Bernecker, *A European Private Company - Is Europe's single legal form for SMEs close to approval?*, Deutsche Bank Research, July 19, 2010.
- J. Beguin, M. Menjucq, G. Bourdeaux, A. Couret, B. le Bars, D. Mainguy, H. Ruiz Fabri, J.-M. Sorel and C. Seraglini, *Droit du commerce international*, LexisNexis, Ed. Litec, Paris, 2005.
- J. Beguin, *Le rattachement de la societe europeenne,* în *La societe europeenne*, Dalloz, Paris, 2003.

[42] For example, France is the member state where the full EU law was transposed, including that related to Societas Europaea – Law no. 2005-842 from July 26, 2005, published in the Official Gazette from July 27, 2005, found as well in C. com. fr. In art. L 229.1 – L229-15.

[43]Please see J. Beguin, *Le rattachement de la societe europeenne,* în *La societe europeenne*, Dalloz, Paris, 2003, p. 31 and subs.

[44]The grounds for the opposition right was criticised being considered much too general and generating legal insecurity; for such purpose, *Noelle Lenoir Report, op. cit.*

- F. Blanquet, *Pourquoi créer une société européenne?,* in: *La société européenne*, Dalloz, Paris, 2003.
- H.Boschma, L.Lennarts and H.Schutte Veenstra, The Reform of Dutch Private Company Law: New Rules for Protection of Creditors, European Business Organization Law Review 8, 2007.
- Sandra van den Braak, *The European Private Company, its shareholders and its creditors*, Utrecht law Review, Volume 6, Issue 1 (January), 2010.
- Susanne Braun, *Essay-The European Private Company: A Supranational Company Form for Small and Medium-sized Entreprises?,* German Law Journal, Vol.05 No.11, 2004.
- Communication of the Commission to the Council and Parliament from May 21, 2003 entitled: *Modernization of the law of trading companies and strengthening of corporative governing in the EU. A plan to go ahead,* COM(2003)284, celex:52003DC0284.
- A.F.M. Dorresteijn and O.Uzuahu-Santcroos, *The Societas Privata Europaea under the Magnifying Glass* (Part 2), European Company Law, no.4, 2009.
- Robert Drury and Andrew Hicks, *The proposal for a European Private Company*, The Journal of Business Law, 1999.
- 11.Frankfurter Allgemeine Zeitung. November 4, 2008, Wirtschaftswoche.http://www.wiwo.de/politik-weltwirtschaft/bundesregierung-blockiert-europa-gmbh-397226/ (May 19, 2009, called up June 9, 2010).
- Impact Assessment, Working Document accompanying the Proposal for a Council Regulation on the Statute for a European Private Company (EPC), Annex A3;
- Daniel Karnak, *The European Private Company - Entering the Scene or Lost in Discussion?*, German Law Journal vol.10, No.08, 2009.
- H.J. de Kluiver and J.Roest, *Expulsion and Withdrawal of Shareholders*, D.F.M.M. Zaman et al. (eds.) *The European Private Company (SPE). A Critical Analysis of the EU Draft Statute*, 2009.
- M.I.Lennart, *Voice Rights of Shareholders*, D.F.M.M. Zaman et al. (eds.) *The European Private Company (SPE). A Critical Analysis of the EU Draft Statute*, 2009.
- Veronique Magnier, Droit des Societes, Dalloz, Paris, 2009.
- Michel Menjucq, *Droit international et europeen des societes,* 2e edition, Montchrestien, Paris, 2008.
- Manole Ciprian Popa, *Grupurile de societati*, Ed.C.H.Beck, Bucuresti, 2011.
- Report from November 29, 2006 of the Commission for legal business of the European Parliament, containing as well regulations to the European Commission related to the statute of the European private company and proposal for the Resolution of the European Parliament in such direction [2006/2013 (INI)] rapporteur Klaus-Heiner Lehne, stage of procedure: A6-0434/2006.
- Report Noelle Lenoir, *Societas Europaea pour une citoyénnete européenne de l'éntreprise,* from March 19, 2007.
- Mathias M. Siems, Leif Herzog and Erik Rosenhäger, *The Protection of Creditors of a European Private Company (SPE)*, European Business Organization Law Review , vol.12, nr.1, 2011.
- Joëlle Simon, *Purpose and tools of European Company Law,* Conference on European Company Law: the way forward, 16 – 17 May 2011.
- E. E. Ştefan, *O nouă formă de societate. Societatea Europeană (I) (Societas Europaea),* în RDC nr. 1/2007.
- L.-C. Wolff, *Statutory Retention of Title Structures? A Comparative Analysis of German Property Transfer Rules in Light of English and Australian Law*, 14 Deakin Law Review, 2009.