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The European Private Company (SPE)

A Critical Analysis of the EU Draft Statute



Ius Commune Europaeum

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PREFACE

This book deals with the Proposal for a Council Regulation on the Statute for a European private company (*Societas Privata Europaea*, SPE) as put forward by the European Commission in the summer of 2008. It adds to the comments already made in the legal literature by dealing with key aspects of the SPE Proposal in an extensive way and by including, where relevant, the amendments adopted by the European Parliament in March 2009. The book aims to contribute to the debate on the characteristics of the SPE and to how this legal form can best be implemented within the context of national law. The latter is illustrated by including a Dutch perspective of the various issues dealt with.

Although the SPE Proposal has a long history it should no longer be assessed on its own merits. The proper context is the EU's policy regarding Small and Medium Enterprises as the Proposal is one of the legislative initiatives of the Small Business Act, the policy document communicated by the Commission in the summer of 2008. The basic question is, of course, whether the SPE is needed in order to achieve the goals set out in the Small Business Act, notably helping this category of enterprises to benefit more from the opportunities offered by the Single Market. Therefore, it will be relevant to assess the possible successes or failures of the SPE and whether or not there are alternatives to achieve the objectives set out by the Commission. These general, yet fundamental aspects of the SPE are dealt with by *Odeaya Uziahu* in the opening chapter. She also discusses the cross-border element as a requirement for setting up an SPE, as has been put forward by the European Parliament.

The other chapters are largely arranged according to the provisions of the SPE Proposal.

One of the first material provisions of the SPE Proposal, Article 4, deals with the applicable law. This article differs considerably from the parallel provision in the SE Statute. In comparison with the SE, the SPE legislation and the articles of association should cover much more ground as harmonisation has not affected national law regarding private limited companies to the same extent as it has done with respect to public companies. Moreover, national forms of private limited companies demonstrate a greater variety than public limited companies, as the latter are basically shaped according to the needs of the capital market. Notwithstanding the

Commission's view that the legal form of the SPE should be 'as uniform as possible', *Stephan Rammeloo* explains that private international law will play a significant role in the life of an SPE. By their very nature, certain matters fall outside the scope of the SPE Proposal or the national law to be applied to private-limited liability companies (to which the SPE Proposal refers concerning certain issues).

Niek Zaman and *Monique Koppert-van Beek* explore the seemingly simple articles dealing with the formation of the SPE but immediately stumble upon the basic question of who has or should have access to the SPE. Furthermore, they discuss several elements of the formation and registration process against the background of the Commission's aim to limit formalities to those which are essential to ensure legal certainty. An important and strongly disputed feature of the SPE is the option to locate the registered office and the real seat in two different Member States. The contribution furthermore deals with other important elements for the start-up period such as the assumption of pre-incorporation acts and related liabilities.

Various issues related to the shares of the SPE are the subject of the contribution by *Han van Manen*. He concludes, *inter alia*, that relying on national law concerning matters such as usufruct and the pledge of shares cannot be avoided. Moreover, the SPE Proposal does not fully regulate the consequences of some of its provisions, especially in relation to the option not to attach voting rights to shares.

Similar to private limited companies under national law, SPEs cannot serve as a vehicle for listed enterprises and their shares will not be freely transferable. For that reason special attention must be paid to the expulsion and withdrawal of shareholders, a topic which is dealt with by *Harm-Jan de Kluijver* and *Joti Roest*. One of the issues they discuss is the criteria according to which national courts must assess whether or not expulsion and withdrawal are justified.

The SPE Proposal fits within the trend set by Member States to minimise capital requirements for private limited companies under national law and to reduce compliance costs on the formation of a company. The initial capital of the SPE is set at € 1 but this is offset by subjecting distributions to a balance-sheet test and an optional solvency test which are regarded as offering the required protection to creditors. In his contribution to this book, *Jaap Barneveld* explores the proposed articles for the SPE as well as the amendments proposed by the European Parliament which are meant to partly redirect the approach proposed by the Commission.

How the SPE will function and whether or not it will constitute a viable alternative to existing private company forms depends to a great extent on the internal organisation of the SPE, the issue which is dealt with by *Christiaan A. Schwarz*. He explains that in companies such as the SPE is meant to be, the shareholders generally fully control the company to such an extent that there is no factual separation between ownership and control. Therefore, the SPE allows shareholders to retain a decisive grip on the functioning of the organisation. Nevertheless, the SPE's flexibility also allows for the creation of decisive powers for the management which may be an attractive scheme where SPEs have multiple shareholders and delegated management in the hands of outsiders.

Apart from the right of withdrawal, the SPE Proposal offers protection to minority shareholders by other means. Disgruntled shareholders may not wish to make use of their exit right but may instead prefer to voice their opinion on the

course which the company should take. In her contribution, *Loes Lennarts* analyses the measures provided by the SPE Proposal to minority shareholders who wish to influence the policy of the company. The most important of those rights are: the right of a one-third minority to block certain decisions, the right to have decisions annulled by the courts and the right to request an investigation by an independent expert. As the SPE Proposal provides a rather rudimentary regulation for these issues, the courts will inevitably have to draw on national law to fill in the gaps.

Although the SPE Proposal introduces some general standards with respect to directors' duties, it leaves much of this subject to the national law of the Member State where the SPE will be registered. *Mieke Olaerts*, in analysing the consequences of this approach, clarifies how the duties and liabilities of the SPE's directors can only be fully understood if not only national company law, but also national law regarding insolvency and civil liability are taken into account.

The perennial issue of employee participation is discussed by *Robbert van het Kaar* and *Ilse Zaal*. Their analysis includes the amendments put forward by the European Parliament and shows that the Commission has underestimated the importance of relying on the *acquis communautaire* in this respect. Where earlier directives, such as on the involvement of employees in the SE, offer principles and mechanisms to achieve flexible solutions, the SPE Proposal largely neglects these by referring the matter to the domestic arrangements of the Member State where the SPE is registered. This approach would be largely acceptable if the assumption is correct that SPEs will be 'small companies', as suggested by the Explanatory Memorandum. However, a cap on the number of employees is rightly missing and therefore the European Parliament's amendments serve to prevent any abuse of the SPE to evade employee participation rules.

The SPE Proposal rather extensively provides for rules concerning the transfer of the registered office. For the greater part, the provisions mirror those already in force for the SE. Although corporate mobility has been enhanced by rather recent EU legislation and case law, according to *Sandra van den Braak* the SPE nevertheless offers added value especially more legal certainty in the process of relocating. She further notices that the SPE Proposal lacks some essential provisions for the protection of minority shareholders and creditors if the company seat is transferred.

Finally, *Niek Zaman* and *Erwin Roelofs* illustrate the SPE's flexibility by systematically exploring how the SPE can be used for corporate restructuring, covering transactions like transformations, mergers and divisions both in a domestic and cross-border setting.

The contributors to this book are members of the *Ius Commune* academic network, a cooperation programme between the Universities of Utrecht, Maastricht, Amsterdam and Leuven (<www.iuscommune.eu>). This book on the SPE is the result of common research in the programme 'Legal Persons in Europe'. At the forthcoming Utrecht Conference on the European Private Company of 26 June 2009, the debate on the SPE will be continued. Scholars and practitioners from the Netherlands and abroad will specifically focus on the need for the SPE and on the position of minority shareholders, creditors and employees. A paper with references to this conference by Sandra van den Braak is scheduled to be published in the *Utrecht Law Review* of January 2010 (<www.utrechtlawreview.org>).

Although many issues regarding the SPE Proposal may need further research and a substantial review of several provisions is required in order to gain political support, eventually the SPE Statute will be adopted as a matter of course within the framework of the enterprise and industry policies at the EU level. And even then, it may take a long time before we can speak of the success or failure of the SPE.

Utrecht, April 2009

Niek Zaman
Christiaan A. Schwarz
Loes Lennarts
Harm-Jan de Kluiver
Adriaan Dorresteyn

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