The European Private Company

Dissertation thesis

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Abstract

Supranational corporate forms as a means for supporting cross-border entrepreneurial activities on the internal market of the European Union are in the centre of interest of legislation and legal doctrine almost from the beginning of the European integration. However, a full-function corporate form oriented above all to small and medium-sized enterprises (SME) cannot be found among the existing European corporate forms. It was this primary target group, the overwhelming majority of enterprises in Europe belongs to, and the project of the European private company – *societas privata europaea* – should be aimed at.

The origins of the SPE project can be seen in academic debates on which supranational corporate form would be the most suitable for SMEs going back to the seventies of the twentieth century. Under the auspices of CREDA, Centre for Research of Commercial Law by the Paris Chamber of Commerce, the discussions were taken up again in the nineties of the twentieth century and led to the first Draft SPE Regulation being prepared by CREDA in 1997. It was a private draft that has served as a basis for further discussions on the SPE project. Since 2001, the initiative regarding the project has been taken over by the European bodies. The first official Draft SPE Regulation was published by the European Commission on June 25, 2008. Not least, the activities of the European Parliament calling on the Commission to present the draft regulation have been crucial to achieve this stage.

Pursuant to the Draft SPE Regulation presented by the Commission, the SPE is a corporate form with legal personality, having a registered share capital divided into shares that are not publicly traded. The registered office of an SPE need not be located in the same member state as its real seat. An SPE shall be governed by the Regulation and by its own articles of association. The latter must mandatorily regulate those matters that are listed in an annex to the Regulation. In the matters not regulated by the Regulation or the articles of association, an SPE shall be governed by the law which applies to private limited-liability companies in the Member State in which the SPE has its registered office. An SPE can be found *ex nihilo* by one or more natural persons or legal entities. Similarly, it can be found by transformation of an existing legal form under national law or of an SE, by merger or division

of existing companies. The wording of the Draft SPE Regulation presented by the Commission does not require a cross-border element. There can be more share classes in an SPE. The minimum share capital of an SPE shall amount to EUR 1. *Ex silentio*, provision of services or performance of work as consideration for shares is admissible as well. Distributions to shareholders in broadest sense is subject to a balance sheet test of net assets, the articles of association of an SPE can also make the distributions subject to a solvency certificate being issued (solvency test). The founders enjoy a high degree of freedom as regards internal organisation of an SPE. It is possible to set up an SPE with one or more individual directors, with a dualistic system, i.e. having a managing and a supervising body or with a monistic system, i.e. having an administrative body. The shareholders need not adopt the decisions in a formalized shareholders' meeting. An SPE is subject to employee participation rules applicable to private-limited liability companies in a Member State in which the SPE has its registered office. Furthermore, there is a specific regulation regarding the participation in connection with a cross-border transfer of the registered office of an SPE or a cross-border merger, in which an SPE takes part.

SPE as a simple legal form has proven to be unattainable in the further course of the legislative procedure. The legislative procedure and in particular the discussions in the Council of the European Union under the French, Czech, Swedish and Hungarian Presidency in the years 2008 to 2011 changed the SPE project considerably. It now resembles from the formal point of view the European Company (SE), i.e. a European framework filled up with different content depending on the Member State in which the SPE would have its registered office. The background against which the SPE project has been launched, the Draft SPE Regulation presented by the Commission and its development in the course of the legislative procedures are dealt with in the first two chapters of the thesis.

The purpose of the thesis is to answer the question, whether SPE as a new supranational corporate form is able to bring an added value to the existing European corporate forms in general. Moreover, it is aimed at answering the question, whether the SPE project is an efficient tool for effectively supporting cross-border entrepreneurial activities of SMEs on the internal market of the European Union. Hence, the next chapters of the thesis examine those issues that are, in the author's view, crucial to provide answers to the above questions and/or in which the Member States have not been able to agree upon thus far and that have caused that the works on the SPE project in the Council of the European Union were stopped in June 2011.

Chapter Three analyses whether the competences of the European Union to create SPE as a new legal form are given. The answer to this question depends on the fact whether the criteria of subsidiarity and proportionality required by the Treaty on the European Union are met. In practise, discussions related to these issues have been focused on whether the SPE in the wording of the Draft Regulation presented by the Commission without an obligatory mandatory cross-border element is in compliance with these criteria. In the author's view, the cross-border element does not represent a *condcio sine qua non* to comply with these criteria. It is rather a price for a political compromise without which the unanimity of the Member State on the SPE project cannot be achieved. Whether the criteria of subsidiarity and proportionality are met, however, might be doubtful as regards the further course of the legislative procedure. The SPE as it stands now is far from being a uniform legal form. Creation of a uniform legal form, an objective that cannot be achieved beneath the European level, is namely a prerequisite for the subsidiarity criterion being met. Current development of the European law on the one hand and the contribution the SPE could represent on the other hand, also pave the way for reopening the discussion on the proportionality criterion being complied with.

The next Chapter examines the system of legal rules applicable to SPE. The original intent of the SPE project was to exclude the application of national laws within the scope of application of the Regulation entirely. Pursuant to the Draft Regulation prepared by CREDA, an SPE shall be subsidiarily governed by the general principles of the Regulation, general principles of EU company law and general principles common to the laws of the Member States. By this means, a complicated system of legal rules combining European rules with the national ones, as it is known regarding SE, should have been avoided. However, it can be questioned whether such principles do really exist or whether they are sufficiently clear to provide a basis for concrete norms applicable to an SPE. The Draft Regulation presented by the Commission modifies the system. It allows for the application of national law relevant for private-limited liability companies of the Member State, in which the SPE has its registered office for those matters that are not regulated in the SPE Regulation and/or its own articles of association. However, neither this model solves the situation where the regulation in the articles of association is not sufficient or complete. Therefore, the compromise drafts presented in the Council of the European Union actually provides for the same system of the legal rules that is known with regard to existing European legal forms. The national law of private-limited liability companies shall apply to an SPE in all those matters that are not regulated in the SPE Regulation or in its articles of association wholly or where matters are

only partly regulated, then regarding the aspects not covered. National law also influences the SPE project by particular legislative orders or legislative empowerments for the Member State to adopt specific regulation for SPE having its registered office in its respective territory. This is again a price for a compromise on the project but it results in specific national legislation regarding SPE being needed, similarly as it was the case with the existing European legal forms. As a consequence, SPE as a simple and user-friendly corporate form goes entirely in vain. Next, the articles of association of an SPE are dealt with in this chapter. As already mentioned, the draft presented by the Commission has required a considerable range of matters to be covered in the articles of association. These matters were exempted from the subsidiary application of national laws. Model articles of association should have provided guidance to the founders; however, their legal nature was not entirely cleared during the legislative procedure. The compromise drafts presented in the Council distinguish between the matters that shall be covered in the articles of association mandatorily and those that can be but need not be covered in the articles of association.

Chapter Five examines the matters related to the share capital of an SPE. Key discussions have been led with regard to mandatory minimum share capital. The Commission, apparently in line with the trends followed by many national legislators, *de facto* departs from the minimum share capital setting it at EUR 1 only. This approached was not able to reach the consent of the Member States. Although the compromise drafts presented in the Council do still follow the basic rule of a minimum share capital of EUR 1, they allow the Member States to require for the SPEs with a registered office in their respective territories a higher minimum share capital up to EUR 8,000. It is questionable whether the minimum share capital is able to fulfil the functions traditionally mentioned in connection with it. In our view, it is no more than an "entrance fee" for using SPE as a corporate form. The Draft Regulation presented by the Commission also opted for a liberal approach regarding the shareholders' contributions. It allowed the contributions in the form of performance of services or provision of works and departed from mandatory formal procedure of evaluating the contributions in kind. The compromise drafts presented in the Council no more allow for contributions in the form of services or works and the last drafts allow the Member States to require an evaluation of the contribution in kind by an expert. Similarly, the conditions for paying up the contributions are more stringent. The notion of distributions to the shareholders in the SPE project is defined broadly. The conditions under which such distributions are allowed have been brought in line with those known from the Second Company Law Directive (balance sheet tests of net assets and running account profits) by the compromise drafts presented in the Council. In addition,

the latter drafts also entitled the Member States to require a solvency test for the SPEs having its registered office in their respective territories. It appears, therefore, that the SPE does not bring forward any shift or simple regulation in this respect. In relation to those Members States that have not extended the application of the Second Company Law Directive to private-limited liability companies or do not require a solvency test, the SPE project might also represent more stringent regulation than that known for the respective national company forms.

The seat of an SPE and in particular the requirement to have the registered office and the real seat located in the same Member State or departing from such requirement was another hotly debated theme in the SPE project. For the time being, the Member States are not able to reach an agreement on this issue. In the author's view, the possibility to have the registered office and the real seat located in different Member States would be fully in line with the concept of a flexible legal form. It could be appropriately aligned with adequate publication requirements precluding the misuse of such flexibility. This way of solution would also be in line with the trend of the case law of the Court of Justice of the European Union, although for the time being, the requirement of having the registered office and the real seat in the same location does not explicitly violates against this case law. The current state of the compromise drafts presented in the Council refers the issue of the SPE's seat to the applicable national law. Such solution is a suboptimal one as it paves the way for several categories of SPEs depending on the concept of the seat and the conflict of laws doctrine followed by the respective Member State.

Chapter Seven focuses on the employment participation in the SPE. The traditions of the Member States are quite different regarding this issue what has been mirrored in all of the existing European models of the participation in the complicated system including a creation of a special negotiating body, negotiations with the management body and application of default rules. A simple model presented by the Commission with the application of the national laws of the state in which the SPE has its registered office as a basic rule was not sufficient for a compromise among the Member States being attained. Therefore, the drafts from the Council present another European model resembling in its basic structure the one known from the European Company. It can be questioned whether such approach contributes to consistency of the European Company Law and whether the model including the negotiations is suitable for a legal form primarily oriented to the needs of SMEs. Assuming that without such model, it would not be possible to reach an agreement on the SPE project, the SPE model should be accompanied by appropriate thresholds (number of employees) that

would trigger its application so that only SPEs with relevant scale are affected. However, exactly this is the issue, where the views of the Member States differ considerably and that has led to the works on the SPE project being interrupted.

The SPE project, as it stands now, is in the author's view generally not able to represent an added value in the scale of the European corporate forms and if at all, than only as regards the minimum share capital being required, where the maximum is EUR 8,000 what is considerably lower than EUR 120,000 necessary for an SE. It is also doubtful whether the SPE, as it stands now, would be able to be an efficient tool to support the cross-border entrepreneurial activities of SMEs. Whether the efforts to create the SPE as a legal form are reasoned and justified can also be questioned taking into account the time and the costs in the broadest sense invested into the project and only moderate outcomes achieved thus far. It appears that a more suitable means to reache those goals that have been expected from SPE might be a *de facto* harmonization of national laws of private-limited liability companies – a suitable example is lowering or abolishing the minimum share capital requirements as regards national private-limited liability companies across the Member States – accompanied by appropriate regulation in the form of EU law Directives.

Keywords: European private company, societas privata europaea, European corporate forms, supranational corporate forms, European company law, private limited-liability company