The European Private Company: Entrepreneurial Flexibility & the Practicalities of National Law

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Abstract

The European Private Company or Societas Privata Europaea (SPE) is an instrument presented by the European Commission with the aim of facilitating the establishment and operation of small and medium-sized enterprises (SMEs) in the Single Market. The features of this corporate vehicle distinguish it from other limited liability companies available to entrepreneurs in the Union. The European Private Company is designed to be widely accessible, easy to set up, cheap to run, and as uniform throughout the EU as possible, but also at the same time offering a great deal of flexibility to founders and shareholders to internally organise themselves. As with the Societas Europaea (SE), there are certain gaps in the SPE Statute, which prompt for the application of national laws. This solution could result in 27 different SPE forms in the EU, which will effectively lead to jurisdictional competition. Whether such competition would manifest into a 'race to the bottom' or it will lead to a conversion of the European corporate law and a creation of 'market-for-rules' that promotes economic growth, depends on what companies regard as a 'more favourable' system.

Keywords: European private company, Freedom of establishment, European Community Forms of Incorporation, European company law, International Private Law

Introduction

Recently, the European institutions have grasped the potential of the small and medium-sized enterprises and have placed them at the heart of the Lisbon Growth and Jobs Strategy (EU Communication 551, 2005) Major European support programmes for 2007-2013 aim at the creation of a business-friendly environment for SMEs, which are the engine of Europe's economy. In November 2007 the Commission's communication on the Single Market for 21st century Europe (EU Communication 724, 2007) observed that the Single Market has to deliver better results and tangible benefits to SMEs. Despite these actions, SMEs have still to realise their full potential on the Single Market, mainly as the legal frameworks which regulate their activities are "somewhat limiting" (Small Business Act for Europe, 2008) As Drury (2008) observes, private company law has been much less touched by harmonisation than laws regulating public companies.

The emergence of the European Single Market, which promotes high levels of international trade and foreign direct investments, has supported an increased tendency amongst entrepreneurs to establish and operate multinational companies which are in turn regulated by legal frameworks that suit entrepreneurial needs. The recession that engulfed the economies of all Member States forced all entrepreneurs to look even harder for new markets, potential customers and trading partners far beyond their national borders.

Nevertheless, multinational companies are bound by the fact that each of their subsidiaries has its own national domicile, which in turn brings about numerous implications for cross- border business activities. A potential solution to this problem would be the creation of a 'multidomestic' company, characterised as a truly transnational legal entity. However, lack of political consensus within the EU as to the exact legal form of such entity delayed the emergence of such a company form until October 2001, when the Statute for a European company was finally introduced.

The emergence of the European Private Company as a viable corporate entity has to a larger extent been overshadowed by the prolonged development of the Societas Europaea (SE). A total of 30 years passed between the introduction of the first draft of the SE Statute (1970) (Teichman, 2003) and its final acceptance by the Member States at the summit of Nice in December 2000. The Regulation of the SE (Council Regulation (EC) No 2157/2001) and the corresponding Directive on the rights of employees of SEs (Council Directive 2001/86/EC) entered into force on 8 October 2001 and although subject to wide criticism at the time, the statute is considered a major breakthrough as it enabled European companies to merge across borders and to move their seat in different Member States without liquidation. Although broad consensus within the EU favoured an environment which promoted trade within the internal market, criticism of the EU statue for the SE centred on the fact that the reduction of articles within the SE Statute led to the application of existing national laws in areas where consensus agreement between Member States could not be achieved. This undermined the uniformity of the SE and meant the creation of different types of SE forms depending on the member state of incorporation.

Despite these drawbacks, the corporations have made use of the SE statute within the internal market, as opposed to the SMEs which are facing a rather fragmented and difficult to penetrate Single Market. The 'Small Business Act for Europe' (2008) is attempting to change the *status quo* and introduces the 'Think Small First' principle. It 'aims to improve the overall policy approach to entrepreneurship, to irreversibly anchor the "Think Small First" principle in policy making from regulation to public service, and to promote SMEs' growth by helping them tackle the remaining problems which hamper their development.' (EU Communication 394, 2008) After a series of modernisation initiatives by both the Member States and the European institutions directed primarily at larger entities, SMEs are finally going to be able to exploit the full potential of the Single Market through the European Private Company.

Overview of the Proposal on the Statue for European Private Company

A detailed overview of the proposal for SPE Statute would shed more light on the practical implications of the aforementioned concepts. The framework of the proposal is threefold, consisting of the general provisions of the regulation, the articles of association (Annex I) and the linking articles to the relevant provisions of the applicable national law. The latter are applicable to areas outside the scope of the two former parts, such as labour law, insolvency law or tax law. As a rule, the applicable national law shall be determined accordingly with the place where the SPE has its registered office, however the implications of this rule shall be observed below. According to the general provisions of the SPE Statute, the European Private Company is a limited-liability company, i.e. its owners have limited liability for the company's debts and obligation, to the extent of the amount they have subscribed for. The shares of the company are private and cannot be offered to the public or publicly traded. The SPE can be formed by one or more natural persons and/or legal entities under Article 54 TFEU, a concept promoted by the 12th EC Company Law Directive on the single member company (1989, OJL 395).

The SPE can be set up *ex nihilio* by one or more shareholders or by transformation, merger or division of an existing company without dissolution (Articles 3 and 5 of the Proposal for a Council Regulation on a European private company – Political agreement 10611/11 DRS 84 SOC 432). The name of the company shall be followed by the abbreviation 'SPE' pursuant to Article 6. Initially the proposal allowed for the registered office and central administration or principal place of business to be situated in different Member States, retaining the position held by the ECJ in the *Centros* judgment (Case C-212/97, Centros Ltd v Erhverus-og Selkabsstyrelsen [1999] ECR I-1459). Nevertheless, some delegations, including Germany and Austria, prompted for a prohibition of separating the registered office and the central administration. Ultimately, the Compromise proposal of the Hungarian presidency decided that the matter should be resolved in accordance with the applicable national law. Nevertheless, this idea was once again dismissed by the German delegation and hence left the matter to be resolved at subsequent Council meetings.

One of the best features of the European Private Company is its flexibility and the freedom that shareholders have in shaping the company according to their own needs. This is implicitly expressed in the rather short number of general articles regulating the internal organization of the company and leaving most of the matters to be resolved in the articles of association by the shareholders.

Due to the major differences in the national regimes regarding financial assistance to third parties, the expulsion and withdrawal of members and the general duties and liabilities of directors, these matters shall be regulated by the relevant applicable national legislation. Corresponding with the latest practice in the United Kingdom (Companies Act, 2006), there is no obligation for the shareholders to hold physical general meetings, because decisions can be taken by written or electronic resolutions. Article 28(1) lists the matters that shall be decided by a resolution of the general assembly of the members, such as approval of annual accounts, change of capital, distributions, appointment and removal of directors and auditors, etc. Some of these decisions require a qualified majority of at least two-thirds of the total voting rights in the European Private Company (Article 28(1), points f, g, h, k, n and o), while others can be taken by a simple majority (Article 28(1), points d, e, i, j and oa). Nevertheless, all aforementioned matters can be resolved in a different way, if the shareholders decide to amend the general provisions within the articles of associations. However, this would require sophisticated legal advice, which in most cases is out of reach for the majority of small companies. One solution to this problem can be the drafting of different sets of model articles by professionals and scholars.

This has already been done by a small team from two universities, namely Exeter and Heidelberg, as envisaged by Article 13 and Schedule 1 of the CREDA/MEDEF Draft Regulation. They have defined two classes of potential companies, which would require different standard form articles, according to their function. The first class consists of the small owner-managed businesses incorporated by a few shareholders, operating as quasi-partnership, which would like to have a central role in its management. Their presumed lack of financial instruments targeted at sophisticated legal advice, would be compensated by a flexible yet ready-made form of constitution, tailored to their needs (Drury, 2008) The second class of businesses would be entities with larger and more diverse group of participants, some of which would be more active in the day-to-day management of the company, others would play a passive role, but would nevertheless be involved financially within the business. This scenario would require a more defined managerial organization, with defined obligations for issuing reports and instructions from and to the body of shareholders. Both options can be implemented, because, as Drury observes, the concept of the proposal is based on the British approach that everything is allowed unless the law strictly prohibits it, rather than limiting the constitution of a company to pre-defined norms permitted by the relevant law, such as in the German legal system (Drury, 2008).

There has been a slight decrease in the protection of information rights of the shareholders when comparing the Commission and the latest Presidency proposal. Initially, shareholders had the right to be informed of the company's affairs, the right to request a resolution and the right to request an independent expert (Commission's Proposal for the European Private Company, Articles 27-29). The Presidency proposal refines the text of the former rights, but excludes from the statute the latter. Hence, in case of allegations of serious breach of law or of the articles of association of the European Private Company, minority shareholders can no longer request the appointment of an independent expert, who shall have complete access to documents and records of the company in order to investigate the suspicions. Although, the articles of association can be complemented with such provisions, uninformed minority shareholders shall have fewer instruments to protect their own interests as shareholders do not therefore have the right to bring derivative actions against directors. Unanimous shareholder agreements are not implemented within the statute, regardless of their ability to confidentially protect the rights of minority shareholders.

This omission might be mitigated by the requirement for qualified majority votes on particular issues, according to Cheung (2008). The SPE Statute does not however allow shareholders to "squeeze-out" minority shareholders and the majority shareholders are not obliged to buy the shares of a minority shareholders and no provision exists regarding pre-emption rights in case of a capital increase or sale of shares. The management body of the SPE, namely the directors have the power to manage the SPE regarding all matters, except those required by the SPE Statute, the articles of association or the applicable national law to be exercised by the shareholders (European Private Company Proposal on the European Private Company Article 27 1c) The management body can vary in its structure depending on the consent of the shareholders, reflected in the articles of association.

Different concepts regarding the management structure exist across the different EU Member States. These are exemplified in the German *GmbH* model of one or more managing directors, the Dutch dual management board, or the British administrative board. Such flexibility in defining the managerial structure will (it is proposed) make the European Private Company more recognizable to the entrepreneurs who rather than being limited by national legislation will have the freedom to structure the company as to maximise opportunities and competitive advantage.

Individuals that have been disqualified for serving as directors in any Member State cannot become directors of an SPE, thus preventing rogue directors from misusing the concept of freedom of establishment, by forming a company in one Member State, while trading in another, where he has been already disqualified. As mentioned earlier, provisions regulating the general director duties and liabilities have been removed from the latest revision of the statute and left to be governed by national law. This decision is considered to be inappropriate given the underlying idea of the legislator, to create a self-sufficient statute, with limited references to national law. Admittedly, the area of law concerning director duties is neither overly controversial, nor rather inconsistent amid Member States so as to be unregulated by the statue. Nevertheless, the relatively small absolute number of shareholders in SMEs and their presumably low national diversification would reduce the negative impact of the lack of uniformity in director duties within the SPE Statute. Furthermore, even the initial proposal of the Commission, which imposed certain duties on directors of an SPE, was lacking precision compared to the statutory principles in the Companies Act 2006. The UK Act deals explicitly with the underlying requirements of a company's directors such as the duty to act within powers, to promote the success of the company, to exercise independent judgments, reasonable care, skill and diligence, to avoid conflicts of interest, not to accept benefits from third parties and to declare an interest in a proposed transaction or arrangement (Companies Act, 2006 subsection 171-177).

Another issue regulated only by the applicable national law is the taxation of the European Private Company. Its components consist of administrative and accounting formalities, multiple taxation, the practice of withholding tax and offsetting of cross-border losses. Conceptually the proposal ensures that the SPE would be subject to the same tax regulations as national companies, in accordance to the place of incorporation. In 2008 the Commission proposed to extend to the European Private Company the scope of three Directives, in order to ensure that companies formed as an SPE are not in a worse position than national legal forms. None of these directives, namely the Parent Subsidiary Directive Council Directive 90/435/EEC, the Merger Directive (Council Directive 2005/56/EC) and the Interest and Royalties Directive (Council Directive 2003/49/EC) have been amended to reach the goal set out by the Commission. However, such action can be expected to take place simultaneously with the adoption of the SPE Statute.

The role of international private law

An interesting question arises as to whether the formation of legislation around the SE and especially the SPE is in fact a new legislative environment, which stands independently of the conflict of laws (law applicable and jurisdiction). Two characteristics of the novel company form may lead to the conclusion that rules of private international law do not affect its affairs. Namely, the fact that the creation and operation of the SPE should be governed by the same company rules in all Member States and the absence of any cross-border requirement, both of which are included in the content of a directly applicable regulation. The latter element would allow any natural person or legal entity to create an SPE without previous cross-border activity. However, political factors rendered unfeasible the adoption of a completely uniform SPE Statute, devoid of any references to national laws.

As pointed out by the Commission, such an autonomous SPE regime requires harmonisation of tax law and labour matters, where Member States are very reluctant to agree on common regulation (Commission Staff Working Document [2008] SEC, 2098 (Impact assessment) p 23). There are two instruments for closing these legal gaps, namely by recourse to principles of European company law and common principles of Member State law or with reference to the applicable national law of the Member States, defined by the registered office of the SPE. Once again political acceptability plays vital role in balancing the level of implementation of these instruments within the SPE Statute. Some Member States fear that recourse to the underdeveloped framework of European company law would result in disproportionate legal uncertainty. However, Hommelhoff (2008) argues that the total of legally uncertain issues would not be greater compared to the cases which resort to each national law.

In line of his observations, the rejection of the Compromise proposal of the Hungarian presidency might be rendered as positive by reason of postponing a project for SPE Statute that overly gives recourse to national laws even regarding less controversial areas of law. In any case, the provisions of the SPE Statute that assign both expressly or implicitly a number of issues to the national laws of the Member States might need to be supplemented by private international law rules, based on Community or national law. This dualistic approach is underpinned by a doctrinal subdivision of the articles within the statute, where some refer to national laws in accordance with EC law, while others give recourse to national laws not being affected by the EC law. For example Article 5 of the Compromise proposal read as follows: 'An SPE may be formed ... by merger in accordance with national law, including the provision implementing Directive 2005/56/EC of the European Parliament and of the Council.'

Whether the statute refers merely to the internal laws of the home Member State or it also includes the conflict of laws rules of the latter is an issue unanswered by the legislative environment surrounding the European Private Company. Rammeloo (cited in Zaman *et al.,* 2010) responds to this issue in the affirmative manner and highlights that that 'private international law is likely to become an indispensable tool' complementing the SPE Statute. He further establishes two categories of matters that necessitate the referral to the *lex societatis*, the first of which is subjected to the application of national laws, such as the liability of directors. In some cases, private international rules would determine the law applicable concerning directors of companies that have relocated their principal place of business in another Member State. Such directors would most likely operate in the host member state, hence, the key elements of their wrongdoings would occur there. The application of national laws of the Member State, where the company has its registered office should be rendered inappropriate in such cases. Moreover, the liability of directors has been excluded from the scope of the Rome II Regulation (EC Regulation 864/2007 OJ L 199/40). Therefore, the national conflict of laws rules would determine the outcome of such issues. The second category includes matters such as contractual agreements between founders preceding the formation of the SPE, voting agreement between shareholders, rights *in personam* and rights *in rem* regarding the transfer of shares in an SPE, etc. In defining the law applicable regarding these areas of law, conflict of laws rules would be indispensable.

The allocation of jurisdiction in disputes regarding an SPE shall be subjected to the *lex fori* principle, namely that the appropriate court to hear the case would match the registered seat of the company. However, this principle cannot be applied to matters falling in the second category defined above, which presupposes recourse to special jurisdiction rules concerning contractual obligations, tort, ownership and transfer of company securities. In such cases it is necessary to read the SPE Statute in conjunction with the jurisdiction rules of Brussels Regulation 44/2001 [2001] (Brussels I). However, this Regulation cannot be applicable to internal disputes concerning the formation, constitution, functioning and dissolution of an SPE, simply because the wording of the legislation does not include European juristic persons, such as the European Private Company. This is another aspect of the Community law that should undergo modernization in order to promote legal certainty towards the European Private Company.

It can be concluded that the legislation around the SPE and formerly the SE cannot be applied without reference to the conflict of laws principles, despite the attempt by the European Commission to introduce a uniform business vehicle. What underpinned this outcome is the emphasis on cross-border activity placed by the legislator when drafting the statutes of supranational entities.

The application of national laws on the European Private Company in the context of freedom of establishment

The recent developments in the case law of the ECJ have influenced the situation of companies active on the internal market and wishing to engage in cross-border activities. Likewise, the cases of *Centros*, *Überseering*, *Inspire Art* and *Sevic Systems* have marginalized some advantages of the initial SPE Statute, which allows for the separation of statutory and administrative seat. The practical implications of these judgments are namely the option of transferring the registered seat of a company in another Member State without subsequent liquidation. This gives incentive to the entrepreneurs to use familiar national company forms in cross-border activities.

A British limited company can create its German, Dutch or Swedish subsidiaries in the form of Ltd. However, this does not undermine all advantages of the European Private Company, if we assume however that the final statute allows for the separation of registered seat and principal place of business. Creditors and customers of the British limited from the foreign markets would be less confident in interacting with the foreign company. This negative effect would be quashed with the creation of the SPE (Hommelhoff, 2008) Furthermore, according to Article 36(1) of the SPE Statute, as presented by the Commission, the transfer of the registered office does not alter the identity of the European Private Company, neither does it require the winding-up and liquidation of the company. What results from this transfer is a change in the applicable national law. Another possibility for the entrepreneurs deriving from the freedom of establishment doctrine is the free choice of company law applicable to their businesses. As was already pointed out, British limited companies can be freely incorporated with the sole purpose of operating on the German market, thus avoiding stricter rules of the host Member State. However, formation and management of a pseudo-foreign legal entity requires extensive knowledge of the regulatory framework applicable to it. This leads to increased costs for consultations concerning contract, tort, company or tax law. Hence, the wider choice of company forms to entrepreneurs comes at a higher cost that can be circumvented if a uniform supranational legal entity for SMEs in the face of the European Private Company is introduced (Braun, 2009).

The proposal of the Commission prompted for the separation of the registered office and the principle place of business. Although, this proposal was rendered rational by most delegation, the German delegation was of the opinion that the European Private Company should not be granted such freedom. Because of the unexpected position of the German delegation, expressed on 30th of May 2011 at a meeting of the Competitiveness Council, there are yet no thorough repercussions either by scholars, or by political observers. The Commission and the Presidency proposal prompted for the separation of the registered office and the principle place of business. However, the latter proposal observed that it is necessary to prevent the use of the European Private Company to circumvent legitimate legal requirements of Member States. It is important to note, that the rationale behind this amendment is not strictly contradicting the *Inspire Art* judgment, where the Court observed that 'the sole purpose of enjoying the benefit of more favourable legislation does not constitute abuse.' Abusive behaviour cannot be rendered *per se*, therefore it has to be put in a perspective *vis-à-vis* its economic and social impact.

There are still some regulatory gaps within the statute, which compromise its unanimous adoption, such as the employee participation issues in the event of transferring the registered office. The Compromise proposal technically did not resolve any of the main outstanding issues, which were left to the discretion of the Member States (Articles 7, 19 and 35 of the Compromise proposal for the European Private Company). This would segregate the Member States into two groups, namely these requiring the registered office and central administration to be in the same country (*siege real* or *effektiver Verwaltungssitz)* (Ebke, 2002) and those, allowing the registered office and the principal place of business in two different countries (the incorporation doctrine). There is a tendency in the EU of a shift from the real seat to the incorporation theory. This was the case in Hungary, whose government materialized this tendency with the Act on Business Organisations 2007 that entered into force on 1st September 2007. Even the strongest proponent of the real seat theory - Germany, has seriously considered opting for the incorporation theory. The motive for this change was to give German companies the same flexibility as the companies from other Member States enjoy, i.e. using their national form (e.g. GmbH) to conduct their business outside the national territory (www.bmj.bund.de accessed July 2011)

Referring to the main point, the outcome of deregulating the company's seat issue would lead to lack of uniformity of the SPE Statute and legal uncertainty regarding the applicable national law. Leaving the issue of the SPE seat to be resolved by national law would undermine the image of the European Private Company and would promote "forum-shopping", which is incompatible with the idea of the SPE as a uniform supranational legal entity. Therefore, it is more appropriate to consider the other two options, namely the permission or prohibition of separation of registered office and central administration. After all, the former concept has been at the very heart of the SPE Proposal, while the latter have been implemented within the SE statute.

The initial proposal for the seat of the SPE has two aspects. First, it does not require the registered office and the principal place of business of an SPE to be located in the same Member State. Hence, the transfer of the registered office to another country would not require the simultaneous transfer of the principal place of business and *vice versa*.

The concept of freedom of establishment does not confer the right to companies to transfer its registered office without dissolution in the home state and a subsequent setting up of a new company in the host state. This operation is not an acceptable option for entrepreneurs, because of the heavy tax burdens arising from it. There is another technical solution, which requires the creation of a company in the host state, which takes over the company in the home state, according to Directive 2005/56/EC (2005) regulating cross-border mergers. Nevertheless, this option renders disproportionate especially regarding SMEs. Even if the SPE Statute enables the transfer of the registered office, its effectiveness remains doubtful. If the (tax) Merger Directive (Council Directive 90/435/EEC [1990]) does not cover the transfer of the registered office of the SPE, than the latter would result in taxation of the unrealised capital gains on the assets which remain effectively connected with a permanent establishment of the SPE in the home country (Article 10b). In this case, the transfer would be rendered as unduly cumbersome.

Considering the aforementioned developments in the case law of the ECJ, it seems reasonable to expect that the final SPE Statue would enable the separation of registered office and head office within the EU. However, the reluctant delegations can be influenced to accept that model only if appropriate measures are introduced that would protect the interests of various stakeholders and in particular the employees. There are other reasons which render the allowance of separation as the better option for the SPE. Determining the applicable law simply by defining the registered office does not lead to any errors in law. Applying the real seat doctrine in order to establish the applicable law might be very difficult, especially when dealing with the location of the head office of an international company, such as the European Private Company. The separation of registered and head office would enable SPEs to register subsidiaries in a Member State, which company law regime seems mostly suitable or well-known, whilst transferring the head offices of each subsidiary in different Member States, where they prefer to conduct business. In this way all company forms would be governed by one company law regime, which significantly reduces the costs of legal aid. As mentioned earlier, the German delegation discarded the option to separate the registered and head office of the SPE and required the opposite approach to be implemented within the statute. This method impedes the mobility of the company, because it cannot transfer its registered seat while retaining the position of the principal place of administration. In addition to that, the company is not allowed to transfer solely the head office in another Member State. Such impediments greatly hinder corporate mobility, whilst increasing the state control over companies active on their territory.

These Member States do not want to have a weakened fiscal control due to lack of transparency of information about SPEs registered in other countries. Another discrepancy arises from the fact that some Member States allow their companies to freely separate the head and registered offices. If the statute does not allow that, the SPE would be put in disadvantage towards companies from countries with laxer regulation. Taking in account the case law of the ECJ, it is clear that such requirement contradicts the jurisprudence of the court and violates EC law. Any such measures can be allowed to exist in the legal order only if they pursue a legitimate objective in the public interest, are appropriate to ensuring the attainment of that objective and do not go beyond what is necessary to attain it - a concept also knows as the *Gebhard* test. If we create a fictional scenario, the objective of the rule according to the German delegation would be employee protection. However, the ECJ has stated that the freedom of establishment can be impeded only in rarely exceptional cases on a case-by-case basis. Therefore, any general and abstract reasoning shall be rendered inappropriate. An abstract prohibition on the separation of registered and head office could not pass the *Gebhard* test, because it does not take in account any individual analysis on a single abusive situation. Finally, prohibiting the location of an SPE's head office and registered office in different Member States would be discriminatory *vis-à-vis* companies formed under some national laws.

Conclusions

The continued compromise approach of successive presidencies of the EU has limited the overall development of the SPE. The recent rejection of the compromise proposal of the Hungarian presidency (30th May 2011) by the delegations from Germany and Sweden again reaffirmed member states differences in respect of this aspect of company law.

Countries with an historical attachment to retaining "real seat" approach to company incorporation contrive to boycott proposals that would allow the registered office and principal place of business to be situated in different Member States.

If an article allowing the separation of the registered office and head office of the SPE is implemented within the final version of the statute, such companies would be able to register its subsidiaries in any Member State. This would therefore enable entrepreneurs to select the location of subsidiaries on the basis of which company law regime is most appealing and consequently reduces business costs in areas such as incorporation, liquidation, capital requirements as all subsidiaries could potentially be regulated by the same company law. On the other hand, the principal places of business can be recognised as that which represents a market deemed most profitable the shareholders. This approach would, it is proposed here, enable both sufficient flexibility to support entrepreneurship and legal uniformity across the EU as the application of law would depend on the country of registration. A supplementary effect of this decision would be the regulatory competition between the laws of the Member States, which has proven to be essential to the development of national company laws.

Continued focus on small and medium enterprises in the re-emergence of the EU from the global economic down emphasises the importance of this sector. The desire for entrepreneurs to maximise the opportunities offered within the EU internal market will only be sustained if the EU remains an attractive place to do business. Competing economies within Asia and Latin America may offer attractive alternatives unless the EU can take significant steps to harmonising the application of company law in a way which is approachable and most importantly workable across the member states. The continued development of the SPE is without doubt a step forward in terms of supporting the SME sector in Europe but without the political will to adopt a truly harmonised approach to the SPE statute the internal market may remain "a work in progress" for the foreseeable future.

References

Journal Articles

Braun, S (2009) 'The European Private Company: A Supranational Company Form for Small and Medium-sized Enterprises? German Law Journal Vol. 13, Number pp. 331-344

Cheung, R (2008) 'The use of statutory unanimous shareholder agreements and entrenched articles in reserving minority shareholders' rights: a comparative analysis'. Company Lawyer Vol. 29, Number 8, pp. 234 - 241

Drury, R (2008) 'The European Private Company' 9 European Business Organisation Law Review Vol. 9, Issue 1, pp. 125-136

Ebke, W. (2002) The Real Seat Doctrine in the Conflict of Corporate Laws. The International Lawyer, Vol.36 pp 1015-1016

Hommelhoff, P. (2008) 'The European Private Company Before its Pending Legislative Birth'. German Law Journal, Vol, 9 Number 6 pp. 799 - 818

Teichmann, C. (2003) The European Company – A Challenge to Academics, Legislatures and Practitioner. German Law Journal Vol.4 No 4 pp 309-331

Niek, Z., Schwarz, C. A., Lennarts, L., de Kluiver, H-J., Dorresteijn, A. (2010) *European private company (SPE): a critical analysis of the EU draft statute* (Intersentia Publishers, 2010)

Cases

Case C-212/97, Centros Ltd v Erhverus-og Selkabsstyrelsen [1999] ECR I-1459

Legislation and official documents

Implementing the Community Lisbon Programme – Modern SME policy for Growth and Employment [2005] COM 551

Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *A single market for 21st century Europe* [2007] COM 724

Impact Assessment on the SBA [2008] SEC 2101

Proposal presented on June 30, 1970, OJ 1970, C 124/1

Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European Company (SE) [2001] OJ L 294/1

Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees [2001] OJ L 294/22
Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Think Small First 'A "Small Business Act" for Europe'*- [2008] COM 394
12th Council Directive 89/667/EEC on single-member private limited liability companies [1989] OJ L 395
Articles 3 and 5 of the Proposal for a Council Regulation on a European private company – Political agreement 10611/11 DRS 84 SOC 432
Companies Act 2006 (HMSO) sub sections 288, 298 and 333
Articles for the Proposal for a Council Regulation on a European private company from http://ec.europa.eu/internal_market/company/docs/epc/proposal_en.pdf
Article 28(1), points (f),(g),(h),(k),(n) and (o) from http://ec.europa.eu/internal_market/company/docs/epc/proposal_en.pdf
Article 28(1), points (d),(e),(oa),(i) and (j) from http://ec.europa.eu/internal_market/company/docs/epc/proposal_en.pdf
Commission's Proposal, Articles 27-29. From http://ec.europa.eu/internal_market/company/docs/epc/proposal_en.pdf
Companies Act 2006 (HMSO) sub sections171-177
Council Directive 90/435/EEC on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States [1990] OJ L 225
Council Directive 90/434/EEC on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States [1990] OJ L 225
Council Directive 2003/49/EC on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States [2003] OJ L 157
Commission Staff Working Document [2008] SEC, 2098 (Impact assessment) p 23
EC Regulation 864/2007 on the Law applicable to non-contractual obligations [2007] OJ L 199/40
Council Regulation (EC) 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial mattes [2001] OJ L 12/1
Articles 7, 19 and 35 of the Compromise proposal of the Statute for the European Private Company (2011) from http://register.consilium.europa.eu/pdf/en/11/st08/st08084.en11.pdf
Directive 2005/56/EC of the European Parliament and of the Council on cross-border mergers of limited liability companies [2005] OJ L 310
Council Directive 90/435/EEC on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States [1990] OJ L 225

Websites

http://www.europeanprivatecompany.eu/news
http://register.consilium.europa.eu/pdf/en/11/st08/st08084.en11.pdf