

**THE EUROPEAN PRIVATE COMPANY STATUTE**

**SMEs vs. BIG COMPANIES**

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Mariya Pandova

Mémoire de recherche  
Master 2 Droit Bancaire et Financier  
Université de Strasbourg  
Prof. Jochen Bauerreis

# The European Private Company Statute

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## INTRODUCTION

### 1. Historical Background – how the idea came up

The idea to create a European Private Company or Societas Privata Europaea (SPE) is not a new one – the first plans date back to the 1950s. However, it took some time before it came into existence. The SPE proposal is intriguing as it inspires a revolution in EU Company law with its simplicity and with the regulatory competition throughout the European Union it proposes, and at the same time it is a source of continuous political disagreements. Debates originate from the reluctances of Member states to obey the imposed new rules of company law as being too liberal and from the fear of the possible use of the SPE in order to escape stringent national rules by small and medium-sized enterprises (SMEs) and by groups of companies as well. Thus a true race-to-the bottom competition of legal systems throughout the European Union is created.

What is the SPE in short? The SPE is a private limited liability company with a European label, a minimal capital requirement of € 1 and is designed to be an alternative legal form for SMEs that would exist in parallel to national company forms.<sup>1</sup> The Proposal is based mostly on contractual freedom and thus turns into the first one-size-fits-all corporate vehicle accessible to anyone.

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<sup>1</sup> Proposal for a Council Regulation on the Statute for a European Private Company COM (2008) 396 of 25.06.2008

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In 1959, emerging from the Council of Europe, which failed to produce an agreed text, the original proposal for a European Company was presented at the 57th Congress of French Notaries. Later on, a draft regulation was published by the European Commission in 1970.<sup>2</sup> In 1995 the research department of the Paris Chamber of Commerce and Industry asked an international group of scholars to investigate the project of a European private company in detail. The results of this private initiative were published in 1997 and already included a draft Regulation to set up the SPE statute<sup>3, 4</sup>.

In September 1998, the proposal was presented by the Paris Chamber of Commerce and Industry<sup>5</sup> and the French business organization MEDEF<sup>6, 7</sup>. It was drafted by a group of company representatives and specialists in company law from several nationalities and has since then been supported by the Union of Industrial and Employers' Confederation of Europe (UNICE) and EUROCHAMBRES.<sup>8</sup>

The idea developed over the years and after a positive feasibility study by the Commission's Company Law Action Plan the European Parliament requested the Commission to draw up a legislative proposal for the SPE in February 2007. In June 2008, the Commission presented its Proposal for a 'Council Regulation on

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<sup>2</sup> Susanne Braun. The European Private Company: A Supranational Company Form for Small and Medium-sized Enterprises? Essay published in German Law Journal November 2004, [www.germanlawjournal.com](http://www.germanlawjournal.com)

<sup>3</sup> Propositions pour une société fermée européenne, sous la dir. de J. Boucourechliev, CREDA, OPOCE, 1997

<sup>4</sup> Mathias Siems, Leif Herzog and Erik Rosenhäger. The European Private Company (SPE): An Attractive New Legal Form of Doing Business? Working Paper 27 February 2009

<sup>5</sup> <http://www.etudes.cci.fr/dossier/15-la-societe-privée-europeenne>

<sup>6</sup> <http://www.medef.com>

<sup>7</sup> Report of the High Level Group of Company Law Experts on a Modern Regulatory Framework of Company Law in Europe (Winter report), 4 November 2002

<sup>8</sup> Susanne Braun. Cited above

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the Statute for a European private company' (COM (2008) 396/3 of 25 June 2008)<sup>9</sup>. This proposal has been welcomed by the Committee on Legal Affairs of the European Parliament, despite suggesting some amendments in detail (Meeting of 22 January 2009; see also Draft Report 2008/0130(CNS) of 9 September 2008)<sup>10</sup>.

However, the revolutionary proposal for SPE inspired political debates based on the huge differences in national legislations of Member States and on the fear of fraudulent behaviour due to the easy establishment and low cost of the SPE and the possibility for its use not only by SMEs but by big groups of companies as well. Therefore, on 10 March 2009, after discussions at the Council, the European Parliament adopted its legislative resolution approving the proposed Regulation and introducing at the same time crucial amendments<sup>11</sup>. These bring significant changes in several fields – a cross-border component is now required, a European register must be created, the central administration must now coincide with the registered office, more stringent rules on employee participation are included as well as a change in the minimum capital requirements and a requirement for a solvency certificate is added. These amendments brought further debates within the Council of Ministers, which came up with a Revised Compromise Proposal submitted by the Presidency<sup>12</sup>. However, the subsequent voting at the Council meeting on 3-4 December 2009 did not reach the necessary unanimity for the

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<sup>9</sup> Proposal for a Council Regulation on the Statute for a European Private Company COM (2008) 396 of 25.06.2008

<sup>10</sup> Mathias Siems, etc. Cited above

<sup>11</sup> European Parliament legislative resolution of 10 March 2009 on the proposal for a Council regulation on the Statute for a European private company (COM(2008)0396 – C6-0283/2008 – 2008/0130(CNS))

<sup>12</sup> Revised Presidency compromise proposal for a COUNCIL REGULATION on a European private company, Annex to Addendum 1 16115/09, Brussels 27 November 2009

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adoption of the Regulation. Further work on the matter is required as states the Press Release of the 2982<sup>nd</sup> Council meeting<sup>13</sup>.

What is to follow next? Strictly speaking, the legislative procedure ends with the lack of unanimity in the Council. The Proposal was supposed to be approved under the consultation procedure<sup>14</sup> according to which the work involved in the consultation procedure is shared between the Commission and the Council: the Commission submits proposals and the Council makes the decisions. Before any decision is taken by the Council, however, various stages must be completed which, depending on the field concerned, also involve the European Parliament, the Economic and Social Committee and the Committee of the Regions in addition to the Commission and the Council. The Parliament may accept or reject the proposal or propose amendments. The Council is not legally obliged to take account of the opinions or amendments emanating from Parliament. These opinions are nevertheless of considerable political importance.<sup>15</sup>

This procedure, however, was changed with the entry into force on 1 December 2009 of the long-awaited Lisbon Treaty. The Proposal for the Statute of the SPE is one of the many that fall under Annex 4 of the Communication from the Commission to the European Parliament and the Council on the Consequences of

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<sup>13</sup> 17076/09 (Presse 365) PRESS RELEASE 2982nd Council meeting Competitiveness (Internal Market, Industry and Research), Brussels, 3-4 December 2009

<sup>14</sup> Article 308 Treaty establishing the European Community

<sup>15</sup> Dr Klaus-Dieter Borchardt, *The ABC of Community law*, Fifth edition, European Commission, Directorate-General for Education and Culture, Publications unit, 2000

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the entry into force of the Lisbon Treaty for ongoing inter-institutional decision-making procedures<sup>16</sup>.

As a consequence, the consultation procedure under art.308 TEC prescribed for the adoption of the Statute for the SPE is substituted by the approval procedure according to art.352 TFEU. According to this legislative procedure, now consent of the European Parliament is required – “the Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures”<sup>17</sup>. The substitution of provisions enters into force with the Lisbon Treaty on 1 December 2009 and in such case the Parliament is no longer entitled to make amendments to the proposed act – it can only accept or reject it.<sup>18</sup> However, only 3 days later, the Council of EU hurries up to make a decision on the matter but is unable to reach unanimity.

What is the legally correct thing to do in this case? Was the Council supposed to demand the approval without amendments of the Parliament before voting? And if in the negative, can the vote of the Competitiveness Council on 3-4 December 2009 be considered as legitimate? In my opinion after 1 December 2009, the approval of the proposal without amendments by the European Parliament is a mandatory step of the legislative procedure envisaged in art.352 TFEU. Therefore,

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<sup>16</sup> Brussels, 2.12.2009 and 11.12.2009 COM(2009) 665 final/2 CORRIGENDUM : remplacement de "approval procedure" par "consent procedure" Concerne la version EN - COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL Consequences of the entry into force of the Treaty of Lisbon for ongoing interinstitutional decision-making procedures; Annex 4

<sup>17</sup> art.352 TFEU

<sup>18</sup> Dr Klaus-Dieter Borchardt, The ABC of Community law, Fifth edition, European Commission, Directorate-General for Education and Culture, Publications unit, 2000

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theoretically speaking, it seems legitimate to neglect the decision of the Council from 3-4 December 2009 and seek the rightful approval of the European Parliament before a following vote in the Council. Only then we can consider the procedural rules complied with.

What is to happen with the proposed amendments to the original Commission proposal? As it is, the Parliament in the approval procedure is no longer entitled to make amendments, however, practice and reason show that what has been achieved so far in negotiations and debates within all EU institutions can hardly be overthrown easily. It rests with the Commission to amend its original proposal in a way that would be acceptable by the Parliament and the Council.

It should be noted that the Spanish, Belgian and Hungarian Presidencies (January 2010 – June 2011) will give high priority to the monitoring and evaluation of the implementation of the Small Business Act and its Action Plan with a view to contributing to the debate on the post-2010 SME's policy. The aim is to further develop SMEs' policies, and to take them duly into account within the framework of the post-2010 Lisbon Strategy. Entrepreneurship is pointed as being vitally important.<sup>19</sup> This 18-month programme, however, was drafted before the final vote in the Council and therefore there is no accurate answer as to the future actions concerning the SPE Statute which should in no manner be neglected.

I cannot but bring to attention the never-ceasing initiatives undertaken by EUROCHAMBRES and BUSINESSEUROPE in support of the adoption of the SPE

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<sup>19</sup> Note from the future Spanish, Belgian and Hungarian Presidencies to Coreper/Council; Draft 18-month programme of the Council 16771/09, Brussels, 27 November 2009

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Proposal<sup>20</sup>. As of 16 February 2010 those 2 organisations are sending Letters of support for the European Private Company Statute to the EU Member States – France, Germany, and Austria so far. In those letters EUROCHAMBRES and BUSINESSSEUROPE express their disappointment from the December Competitiveness Council’s failure to reach an agreement on the European Private Company Statute and urge the Member States to reiterate their support for this important project. The 2 organisations emphasise the need of a simple and flexible statute and insist on: absence of a cross-border element to set up an SPE; keeping the minimal capital as low as possible; providing possibility for SPEs to transfer their registered office without further impediments; and leaving worker-participation rules as a matter of national laws.

The procedural and contextual problematic around the SPE Statute are yet to be solved and hopefully the EU will finally reach an agreement, thus revolutionising Company law within the EU and making the first real step towards the unification of company forms.

### 2. Review of the SE and how its practical failure affects SPE provisions

In order to better understand the current proposal for the SPE, it is necessary to compare it with its “older sister” – the European Company SE due to the close connection between the two – their similarities and differences. The SPE is the next logical step in the development of EU company law ideas and its content is shaped not only by the existence and evolution of the SE but mostly by its

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<sup>20</sup> <http://www.eurochambres.eu/Content/Default.asp?PageID=65>

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practical failure. Yes, we can safely say the SE has not had great success. In its 6<sup>th</sup> year of existence there are barely 620 SEs<sup>21</sup> most of which are registered in the Czech Republic and Germany. In Bulgaria for reference there is not a single SE so far.

Many are the reasons for such lamentable results. Firstly, the SE was created at a time when the EU consisted only of 15 Member States in 2001– therefore it was adapted to the needs and to the current level of legislation of these countries. The new 12 Member States from Central and Eastern Europe are generally speaking poorer and the minimal capital requirements of € 120 000 for establishing an SE turn quite cumbersome, thus excluding all attractiveness of the SE. The exception we have to mention is the Czech Republic, where the SE seems to proliferate.

So, what is the SE in short? It is a creation of communitarian law designed to fit the needs of big groups of companies in their cross-border activities. It is a public limited liability company with share capital and exercising cross-border activity within the EU. The great revolution of the SE is that it permits for the first time the cross-border legal merger<sup>22</sup> and the transfer of seat<sup>23</sup> of a company from one Member State to another without liquidation!

However, there are some rules in the Statute of the SE that diminish its attractiveness. Such are: (1) the applicable law – it leaves too much room for

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<sup>21</sup> As of 22<sup>nd</sup> August 2010 according to research of European Trade Union Institute ETUI; <http://ecdb.worker-participation.eu/>

<sup>22</sup> The Tenth Directive 2005/56/EC on cross-border legal mergers of limited liability companies is adopted later on 25.11.2005

<sup>23</sup> The 14<sup>th</sup> Directive on transfer of seat was abandoned by the European Commission and only the ECJ case-law develops the notions of transfer of seat within the EU

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applying national laws – art.9 SE Statute<sup>24</sup>; (2) the requirement that the real seat and the statutory seat of the SE be in the same Member State – art.7 SE Statute; (3) the minimal capital required for its establishment is set at € 120 000 – art.4 SE Statute; (4) an SE cannot be incorporated ex nihilo and (5) the companies that constitute one SE have to be in different Member States – art.2; (6) rules on employee participation are quite stringent and they have to be complied with before incorporating the SE – art.1 - 4.

It is exactly those problematic rules that guide the formation of the initial proposal for the SPE Statute – learning from mistakes and trying to create a new form suitable not for big companies, but for small ones, the EU legislator stipulates the exact opposite rules of the SE in the SPE Statute. More attention is paid that (1) the applicable law is almost entirely communitarian – art.4 SPE Statute<sup>25</sup>; (2) the real seat can differ from the statutory one - art.7; (3) the capital is set at € 1 – art.19; (4) the SPE can be incorporated ex nihilo and (5) no cross-border element is required – art.5; (6) employee participation is left for national law to decide – art.34. The SPE Statute preserves only the rules on transfer of seat as they are in the SE Statute – art.35.

Even though the SPE is especially designed to fit small and medium-sized companies, its rules permit the use of the SPE not only by SMEs, but by anyone! It makes it easy, cheap and thus extremely attractive for all sorts of companies to establish an SPE – whether to restructure the corporate governance of a group of companies, or simply to avoid the more demanding national legislation.

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<sup>24</sup> Council regulation (EC) 2157/2001 of 8 October 2001 on the Statute for a European Company (SE)

<sup>25</sup> Proposal for a Council Regulation on the Statute for a European Private Company COM (2008) 396 of 25.06.2008

### 3. The problematic between SMEs and Big Companies

It is precisely this problematic use of the SPE by anyone that is the subject of this work. It is interesting to see how the same rules apply to different types of companies and bring different kinds of benefits to each of them. SMEs and groups of companies have different motives, needs and financial abilities; the Member State of origin is not without significance either – its national law, and the financial possibilities of the population. Therefore the flexible rules most suitable for SMEs are considered as motive for law-shopping and fraudulent behaviour by the big groups of companies. In this line of thinking, Member States argued on the initial Commission proposal of the SPE Statute and as a result the European Parliament and subsequently the Council came up with amending the problematic legal texts in different ways.

Significant changes in several fields are being proposed – a cross-border component is now required, a European register must be created, the central administration must now coincide with the registered office, more stringent rules on employee participation are included as well as a change in the minimum capital requirements and a solvency certificate<sup>26</sup>.

In this essay, I will investigate the application of the SPE Statute firstly for SMEs (I), and secondly for big companies and groups of companies (II). I will follow the

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<sup>26</sup> European Parliament legislative resolution of 10 March 2009 on the proposal for a Council regulation on the Statute for a European private company (COM(2008)0396 – C6-0283/2008 – 2008/0130(CNS))

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initial Commission proposal as well as the amendments and in each part and I will reason on the benefits and disadvantages for the different types of companies. For the purposes of this research, I will focus only on specific rules of the SPE Statute: (1) capital; (2) incorporation – cross-border element; (3) seat theory and transfer of seat; (4) employee participation. I will divide those specific rules between SMEs and big companies according to their main interests.

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## PART I – SMEs NEED THE SPE

Let's start with small and medium-sized enterprises and their need of a European Private Company. In this part I would focus the attention firstly on the general notions concerning the SMEs (Section 1) and then I would develop in detail the specific rules of the proposed European Private Company Statute (Section 2).

### Section 1. General notions

The SPE is especially designed for small and medium-sized enterprises (SMEs). The Commission's communication on the Single Market for 21st century Europe<sup>27</sup> stresses the need for the continuous improvement of the framework conditions for businesses in the Single Market.

Small and medium-sized enterprises (SMEs) account for more than 99% of companies in the European Union but only 8% of them engage in cross-border trade and 5% have subsidiaries or joint ventures abroad. While it has become easier in recent years to set up businesses across the EU, more needs to be done to improve the access of SMEs to the Single Market, facilitate their growth and unlock their business potential.

The European Private Company Statute (Societas Privata Europaea) forms part of a package of measures designed to assist SMEs, referred to as the Small Business

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<sup>27</sup> 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" – COM (2007) 724, 20.11.2007.

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Act for Europe<sup>28</sup>. The objective of this Small Business Act is to make it easier for SMEs to do business in the Single Market and consequently to improve their market performance. The SPE is one of the priority initiatives of the Commission's 2008 Work Programme<sup>29, 30</sup>.

In Section 1 it is important to explain the notion and legal definition of SMEs (A), and then to discuss what is their interest and need of the SPE Statute (B) before the rules of the SPE Proposal are scrutinised.

## A. Legal definition of SMEs

SMEs are considered to be the most important factor in job creation and innovation in the EU. But what exactly is an SME? According to a recommendation by the Commission since 2003<sup>31</sup> there is a communitarian legal definition of SMEs. Medium-sized enterprises have a turnover of not more than €50 million or a balance sheet total not exceeding €43 million and fewer than 250 employees. Small enterprises are defined as having fewer than 50 employees and an annual turnover and/or an annual balance-sheet total of not more than €10 million<sup>32</sup>,

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<sup>28</sup> Final Communication From The Commission To The Council, The European Parliament, The European Economic And Social Committee And The Committee Of The Regions "Think Small First" - A "Small Business Act" For Europe, Brussels, 25.6.2008 Com(2008) 394

<sup>29</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions: "Commission Legislative and Work Programme 2008" – COM (2007) 640.

<sup>30</sup> Explanatory memorandum of Commission Proposal for a Council Regulation on the Statute for a European Private Company COM (2008) 396 of 25.06.2008

<sup>31</sup> COMMISSION RECOMMENDATION of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (notified under document number C(2003) 1422) (2003/361/EC)

<sup>32</sup> Mathias Siems etc, cited above

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whereas micro enterprises have 10 or fewer employees and an annual turnover and/or balance-sheet total of no more than €2 million<sup>33</sup>.

The EU legislator in its drive to make Europe the world's most competitive and dynamic knowledge-based economy<sup>34</sup> noted that SMEs are the backbone of Europe's economy and the key to its competitiveness and that their small size makes them very sensitive to changes in the commercial environment in which they operate<sup>35</sup>.

## B. Debates on the need of SPE Statute for SMEs

Being so innovative, the SPE Statute provokes controversial opinions. The need and interest of SMEs in the creation of a flexible and low-cost European Private Company can be seen from 2 perspectives – a negative (1) and a positive (2) one.

### 1. Negative position

Not all that glitters is gold. As much as the SPE Statute provides flexibility and cost-effectiveness, there are some doubts as to its necessity. Do small and micro enterprises actually need an EU label? Are they going to transfer their seat to

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<sup>33</sup> [http://ec.europa.eu/enterprise/policies/sme/facts-figures-analysis/sme-definition/index\\_en.htm](http://ec.europa.eu/enterprise/policies/sme/facts-figures-analysis/sme-definition/index_en.htm)

<sup>34</sup> Report on the implementation of the European Charter for small enterprises, 13 February 2003, Com (2003) 21 final/2; Report on the implementation of the European Charter for small enterprises in the candidate countries for accession in the European Union, 21 January 2003, SEC (2003) 57, 1.

<sup>35</sup> European Charter for Small Business, adopted by the General Affairs Council in Lisbon on 13 June 2000 and endorsed at the Feira European Council Meeting on 19-20 June 2000

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another Member State? In fact out of those 99% of companies in the European Union that are defined as SMEs only 8% engage in cross-border trade and 5% have subsidiaries or joint ventures abroad as is stated in the Explanatory memorandum of the Proposal for a Regulation on the Statute for a European Private Company. That leaves a small percentage of entrepreneurs and companies that would actually need a European company form in order to start or conduct their business in a better way. Does that justify an action on an EU level? One could safely say that those 8% can use the existing methods of freedom of establishment with almost the same results as an SPE would provide.

As to the revolutionary minimal capital of € 1 – it already exists in at least 3 Member states' legislations: the UK – Ltd. - private company limited by shares - no capital required, France – Société par actions simplifiée SAS, Société à responsabilité limitée (SARL and EURL) - no capital required, Bulgaria – Дружество с ограничена отговорност ООД (OOD) with capital approximately equal to € 1. In those 3 countries it is irrelevant for start-up companies whether the SPE Statute is adopted in that respect. It is interesting in this case to compare the national limited liability company with the SPE – they could turn out to be quite the same and the SPE would be a true parallel corporate governance solution for entrepreneurs. If the Statute is preserved as offered in the initial proposal, then the SPE would have the advantages of offering an EU label and possibilities to transfer seat or central administration. However, if the proposed changes are adopted, then the SPE statute loses all attractiveness compared to national companies.

However, in all other Member States that do not offer such a small capital for start-ups all sizes of business would be interested in the option of having a low-cost company form. This can be considered as cheating and even if both the SPE and the national legal persons have the same number of employees and the same turnover, still the business culture in that MS will favour the national more stringent legislation as more trustworthy.

There exists the question – why do SMEs need a European Private Company if, generally speaking, all European businesses are free to use the British limited company, the French SAS, SARL or the Bulgarian OOD regardless of their actual centre of administration. The freedom of establishment of companies within the EU is proclaimed by the EU treaties<sup>36</sup> and supported by the jurisprudence of the ECJ in its benchmark case-law *Centros*<sup>37</sup>, *Überseering*<sup>38</sup>, *Inspire Art*<sup>39</sup>, *Daily Mail*<sup>40</sup>, and *Cartesio*<sup>41</sup>.

It results clearly from the case-law *Centros*, *Überseering* and *Inspire Art* that the choice to establish a company or a branch in a host Member State with the only intention to escape the rules of domestic law where the central administration is situated doesn't constitute abuse or fraud, and the home Member State therefore cannot forbid it. According to the landmark decision in *Centros*, a

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<sup>36</sup> Articles 49-55 TFEU

<sup>37</sup> Judgement of the Court of 9 March 1999, case C-212/97, <http://curia.europa.eu/>

<sup>38</sup> Judgement of the Court of 5 November 2002, case C-208/00

<sup>39</sup> Judgement of the Court of 30 September 2003, case C-167/01

<sup>40</sup> Judgement of the Court of 27 September 1988, case 81/87, European Court reports 1988 page 05483

<sup>41</sup> Judgement of the Court of 16 December 2009, case C-210/06

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Member State has to recognise a company which is formed in accordance with the law of another Member State, even if this company has its actual centre of administration in the former country. In *Überseering*, the ECJ also held that where a company is formed in accordance with the law of a Member State in which it has its registered office, but then moves its headquarters to another Member State, the latter country must not deny the company's legal capacity. *Inspire Art* addressed the limits of these principles: while Member States can prevent fraud, this did not justify conditions relating to minimum capital and directors' liability on a company formed in accordance with the law of another Member State.<sup>42</sup>

This affirms the right of entrepreneurs to exercise their right of law shopping in another Member State. However, there is a limit to such right. It is judged in ECJ's decision of *Daily mail* and 20 years later – confirmed in the *Cartesio* case, surprisingly going against the trend of more recent ECJ case-law and therefore meeting strong criticism<sup>43</sup>. Here it is the Member State of origin that impedes the free movement of its company into another Member State, proclaimed by the ECJ as not prohibited by the EU Treaties. In both cases the ECJ states that it is the national law that creates legal persons and confers to them legal capacity; and it is the same national law that defines how this company should cease to exist.<sup>44</sup>

Another burden falls on MS out of the Economic and Monetary Union – the SPEs registered in such MS must express their capital both in the national currency and in euro.

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<sup>42</sup> Mathias Siems, etc. Cited above

<sup>43</sup> Luca Cerioni. Cited above

<sup>44</sup> Michel Menjucq, *Droit International et europeen des societes*, p.128 etc.

The amendments proposed by the European Parliament on 10 March 2009 create significant difficulties for SMEs - a cross-border component for establishing an SPE is now required; a central European register must be created; the central administration of an SPE must now coincide with its registered office; more stringent rules on employee participation are included as well as a change in the minimum capital requirements into € 8 000 or € 1 with a requirement for a solvency certificate. That creates additional difficulties for entrepreneurs and adds to the doubts whether the SPE legal form is necessary when in fact its use is considerably impeded.

### 2. Positive perspective

It could be contended that most SMEs are happy with the domestic legal forms, thus, not demanding any European form of business. However, in the common European market even SMEs often have the ambition to expand across the borders of their home state. When doing so, they have to decide on how exactly to undertake this step. If the management only appoints an agent abroad, the SME usually does not face particular problems. If it intends a more far-reaching expansion, it may think of setting up a subsidiary or joining forces with a foreign company by way of a joint venture. The subsidiary option has the advantages of retaining complete control over the expansion and of limiting potential liability to a separate legal entity.

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However, setting up a subsidiary in another jurisdiction can be a costly and cumbersome undertaking. For instance, companies would have to deal with red tape and/or to buy legal expertise in the host state's legal system. These obstacles may be more severe than for bigger companies because SMEs will usually have less financial resources and in-house legal expertise. SMEs could therefore reduce costs for international expansion remarkably if they were able to have their local solicitors draft standard documents applicable to each subsidiary the company may want to establish.

The SPE would provide this possibility. Thus, it is no surprise that industry groups such as EUROCHAMBRES support the idea that SMEs should also have the possibility of establishing a European form of company<sup>45</sup>.

In its Position Paper on the European Private Company Statute dated from November 2007<sup>46</sup>, EUROCHAMBRES stipulates the results of its research – SMEs report that they face difficulties when conducting cross-border business activities. These difficulties are partly due to the differences of national laws and registrar authority practices in different Member States. There is also the issue of lack of trust in foreign legal forms and legislation which further complicate management of SMEs. Therefore SMEs and especially young entrepreneurs have expressed their interest in having the option of a uniform European Private Company form as with such a common statute there is no necessity in general to deal with

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<sup>45</sup> See position paper of November 2007 available at <http://www.eurochambres.be/content/Default.asp?PageID=145>

<sup>46</sup> See position paper of November 2007 available at <http://www.eurochambres.be/content/Default.asp?PageID=145> and position paper of September 2008 at [http://www.eurochambres.be/DocShare/docs/2/PHMLKCFCCIJMJLCKMJKKEONK14LKT4YBDCC5Y4D9YBD/EUROCHAMBRES/docs/DLS/PP\\_EPC\\_2008\\_V1\\_0-2008-00848-01.pdf](http://www.eurochambres.be/DocShare/docs/2/PHMLKCFCCIJMJLCKMJKKEONK14LKT4YBDCC5Y4D9YBD/EUROCHAMBRES/docs/DLS/PP_EPC_2008_V1_0-2008-00848-01.pdf)

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different national company law. It should lower consultancy fees for the formation of the company and configuration of the memorandum of association. Also, it simplifies the calculation of risks with respect to liability for the companies and the managers. It can facilitate access to capital. It should bring more legal certainty, in particular with respect to complying with formalities of general shareholders' meetings. It should encourage the creation of uniform structures, particularly with respect to management bodies of subsidiaries in different EU Member States. Last but not least, it should convey a European label that might be of interest in doing business in the European internal market but also in global trade activities.

With a new flexible SPE Statute, SMEs could opt for a more favourable company form than the national one. It could result that the SPE will have less stringent rules as for minimal capital requirements for example (as is the case in Germany – GmbH with minimal capital € 25 000, the Netherlands – BV € 18 000 etc). Thus entrepreneurs would be less interested in using the communitarian freedom of establishment for “shopping” for a cheaper and easier legal system that offers national company forms with no or minimal capital requirements (eg. UK – Ltd. Private company limited by shares - no capital required, France – SARL and EURL - no capital required, Bulgaria – limited liability company OOD with capital approximately equal to € 1).

However, SMEs cannot really escape national law, nor taxation of their home country as their business is too small to use all the possibilities offered by community law. They are often not aware of the options freedom of

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establishment or law shopping can provide, and most of the time they cannot afford any of those options. They would simply incorporate an SPE in their own MS and would still fall under the scope of taxation, worker participation and insolvency rules. No fraudulent behaviour would occur.

Moreover, even if entrepreneurs want to shop for law – tax benefits, or employee participation rules – they would be able to do it freely and using an EU form, identical in all Member States. SPEs would also be able to transfer their registered office within the internal market! No fraudulent behaviour would occur either as the SPE would represent the absolute freedom of establishment of companies proclaimed by the EU Treaties – one person whether legal or natural can create an SPE in any of the EU Member States whether having its registered office and central administration in that MS, and as soon as that person decides – he would be able to transfer the registered office or its central administration into another MS! Yes, SMEs choose your law out of any MS. There will be no need of turning to the ECJ jurisprudence in order to justify such a freedom proclaimed by the EU treaties and the SPE Statute.

Furthermore, the SPE has some inherent advantages over national company forms. First, the use of national forms abroad may arouse suspicions of deceitful conduct because business partners may not be familiar with the chosen form. Secondly, if this company becomes involved in legal proceedings, local judges may be less familiar with foreign legal forms, creating the risk of having the applicable company law applied wrongly. Thirdly, the SPE may have a marketing advantage

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over domestic forms of company. This is particularly important when the company starts its cross-border business and is not yet well established in the foreign market.<sup>47</sup>

## Section 2. Specific rules

Having explained the general notions and the interest in an SPE Statute, it is necessary to research the specific rules stipulated in the Commission Proposal. Bearing in mind the political debates on those specific rules, I am obliged to investigate both the initial Commission Proposal as well as the subsequent amendments offered by the European Parliament and the Council.

Out of the 4 issues subject of this work, here I will focus the attention on 2 problematic issues in the different versions of the Statute: the minimal capital (A); and the incorporation of the SPE with or without a cross-border element (B) as being the first and biggest concern of SMEs. The other issues concerning the seat theory and transfer of seat procedures, as well as rules on employee participation deserve more attention when it comes to big companies and groups of companies. Therefore, a detailed research will be presented in Part II of this work.

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<sup>47</sup> Mathias Siems, etc. Cited above

## A. Capital

In<sup>48</sup> order to facilitate start-ups, the proposed Regulation sets the *minimum capital* requirement at €1 (art. 19 p.4 of the Proposal). The proposal departs from the traditional approach that considers the requirement of a high minimum of legal capital as a means of creditor protection. Studies show that creditors nowadays look rather at aspects other than capital, such as cash flow, which are more relevant to solvency. Director-shareholders of small companies often offer personal guarantees to their creditors (e.g. to banks) and suppliers also use other methods to secure their claims, e.g. providing that ownership of goods only passes upon payment. Moreover, companies have different capital needs depending on their activity, and thus it is impossible to determine an appropriate capital for all companies. The shareholders of a company are the best placed to define the capital needs of their business. Shareholders are liable for their contribution, in accordance with the provisions of national law.

The Parliament however amended this rule as follows: “art.19 p.4. The capital of the SPE shall be at least € 1, provided that the articles of association require that the executive management body sign a solvency certificate as referred to in Article 21. Where the articles of association contain no provision to that effect, the capital of the SPE shall be at least € 8 000.”<sup>49</sup>”

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<sup>48</sup> Explanatory memorandum Chapter IV of Commission Proposal for a Council Regulation on the Statute for a European Private Company COM (2008) 396 of 25.06.2008

<sup>49</sup> European Parliament legislative resolution of 10 March 2009 on the proposal for a Council regulation on the Statute for a European private company (COM(2008)0396 – C6-0283/2008 – 2008/0130(CNS))

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The Council at its turn modified the amendment:

“Art. 19 p. 3. The capital of the SPE shall be at least € 1. Member States may set a higher minimum capital requirement for SPEs registered in their territory than the amount in the first subparagraph. However, it shall not exceed € 8,000.

Art. 19 p. 3a. The Commission shall, two years after the date of application of this Regulation, analyse the effect of permitting Member States to set differing minimum capital requirements within the limit set in paragraph 3.”<sup>50</sup>

Three different versions have been proposed – capital of € 1; € 8,000 or a sum in between if a MS so desires. The last proposition seems least advisable as thus in different MS the SPE will have different capital requirements within the limits of € 1 – € 8,000 and the initial desire to create a uniform company will be overthrown. On the other hand, such option would at least give MS a choice to better adapt the SPE to the specificities of their national economic and business lives.

As is the case with the Parliament amendment, a minimal capital of € 8,000 is considered too low in some MS, or too high in others<sup>51</sup>. The option of providing a solvency certificate to lower the initial capital to € 1 is quite questionable – how will this certificate protect creditors’ interests in practice? Who will control its issuance and credibility? What will be the responsibility of the entrepreneurs for non-compliance or fraud? Such certificate seems as an unnecessary bureaucratic burden with unclear effects, and could easily turn just into a sheet of paper without practical significance.

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<sup>50</sup> Revised Presidency compromise proposal for a COUNCIL REGULATION on a European private company, Annex to Addendum 1 16115/09, Brussels 27 November 2009

<sup>51</sup> FR: considers € 8,000 to be too high; AT: considers it to be too low.

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In a Joint letter to the Member of Council Working party on Company law of 22 October 2008, EUROCHAMBRES and BUSINESSEUROPE urge the Council not to amend the initial proposal on the SPE Statute specifically concerning the minimal capital requirement so that the Statute remains attractive and affordable. The 2 organisations underline that nowadays capital is not seen as the best guarantee for creditors. Instead, other guarantees such as solvency test, balance sheet requirements etc are offered to the creditors with the Commission Proposal.

It must be supported that the capital requirement for an SPE should remain at € 1, this way it will be accessible for all entrepreneurs throughout the European Union regardless which MS they come from. It will become a true alternative for national company forms, thus tacitly abolishing law-shopping for more favourable and low-cost company forms via the communitarian freedom of establishment of companies. It would bring unification of company law rules in all MS and through a common European register would make business more reliable and transparent.

It should be noted as well that the initial SPE Proposal created a limited liability company with capital divided in shares. This decision departs from the existing legal forms in most MS – limited liability companies such as the GmbH, SARL and ООД (OOD) have capital divided into parts, whereas shares are typical for Aktiengesellschaft (AG), Société Anonyme (SA), Акционерно Дружество (AD) and the SE. Such innovation would have created quite some trouble when applying relevant national laws and using rules for SAs to Ltds. Subsequently, this was

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amended by the Council and an eventual SPE would have subscribed capital divided into units<sup>52</sup>.

### B. Incorporation and cross border element

The Commission Proposal excludes a requirement for a cross-border element in order to incorporate an SPE. Thus, unlike the other communitarian company forms (the EEIG, the SE and the SCE), it is interchangeable with no matter which national company form.<sup>53</sup> Debates ensuing, EUROCHAMBRES in its Letter<sup>54</sup> expressly pointed out the importance of an absence of such cross-border requirement as being one of the key pillars in the SPE Statute, especially important for SMEs. The 2 organisations claim that more than 90% of entrepreneurs would be deprived of using this company form and that would turn contrary to the objective of the SPE Statute.

However, new amendments were proposed by the Parliament and the Council. The European Parliament added a new point (ea) to paragraph 1 of art. 3 in the Commission's Proposal stating that the SPE shall have a cross-border component, demonstrated by one of the following: a cross-border business intention or corporate object; an objective to be significantly active in more than one Member

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<sup>52</sup> article 3 point 2 Revised Presidency compromise proposal for a COUNCIL REGULATION on a European private company, Annex to Addendum 1 16115/09, Brussels 27 November 2009

<sup>53</sup> Les nouveaux outils de la mobilité des entreprises en Europe, CREDA, Chambre de commerce et d'industrie de Paris, 2 June 2008, Federico PERNAZZA Professeur à l'Université La Sapienza (Rome), Avocat au Barreau de Rome

<sup>54</sup> Joint letter to the Member of Council Working party on Company law of 22 October 2008, EUROCHAMBRES and BUSINESSEUROPE

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State; establishments in different Member States; or a parent company registered in another Member State. Later on, the Council confirmed this amendment in paragraph 3 of art.3<sup>55</sup> of its Revised Presidency Compromise Proposal. Also there it is noted that Italy and Latvia would prefer not having a cross-border element requirement; whereas France considers that requirement should be less stringent.

While it is clear when an establishment, a parent company or a member of the SPE are in another Member State, it is uncertain how the terms “cross-border business intention or corporate object” or “objective to be significantly active” (resp. “intention to do business in another MS” or “a cross-border business object”) could be defined. Wouldn't they be too vague and lead to circumventing the rule? Who will be in charge of monitoring whether the business intention or object are actually fulfilled or just exist on paper? Would not fulfilling the cross-border business intention or corporate object for example cause the SPE to be dissolved? While debating and trying to create a rule that would satisfy all political interests, a more important issue is omitted – additional problems are evoked.

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<sup>55</sup> Article 3, paragraph 3. An SPE shall have a cross-border component at the time of its registration, demonstrated by one of the following:

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

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On the one hand, it is very difficult to negotiate with certain MS on the question about the existence or not of a cross-border element when establishing an SPE. On the other hand, even if the SPE is of purely national character with just national shareholders or with the sole intention to operate on a domestic market, it can evolve and later acquire a cross-border element. That way the SPE will be accessible to more entrepreneurs and would easily encourage cross-border activities through its EU label and flexibility. In the contrary case, the practical application of the SPE Statute will be significantly encumbered.<sup>56</sup>

There exists a contrary opinion which deserves to be mentioned: in particular, ignoring the condition of a sustainable cross-border element for the SPE entails the risk, based on the Treaty of Lisbon, that national parliaments will initiate subsidiarity proceedings before the European Court of Justice, which could lead to the nullification of a future SPE Regulation (Art. 5 III Treaty on the European Union, together with Art. 263 Treaty on the Functioning of the European Union and Art. 8, Protocol No.2 on the Application of the Principle of Subsidiarity and Proportionality). In the German Bundestag, for example, a quarter of its members is enough to initiate a subsidiarity procedure of this kind.<sup>57</sup>

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<sup>56</sup> Les nouveaux outils de la mobilité des entreprises en Europe, CREDA, Chambre de commerce et d'industrie de Paris, 2 June 2008, Pierre DELSAUX Directeur à la Commission européenne

<sup>57</sup> European Private Company (SPE) - Corporate Governance and Company Law News (January 2010) compiled by Johannes Heuschmid for SEEurope project

## PART II – BIG COMPANIES’ INTEREST IN THE SPE

A bigger interest the SPE Statute provokes in big companies and groups of companies even if it is not originally created to fit their needs. The SPE Statute is open to anyone and should therefore also be seen from the point of view of large entities as they reveal a different perspective concerning the most debated on rules of the statute. They need equally to have a more flexible and more effective instrument to organise their corporate governance. SMEs and groups of companies have different motives, needs and financial abilities; the Member State of origin is not without significance either – its national law, and the financial possibilities of the population. Therefore the flexible rules most suitable for SMEs are considered as motive for law-shopping and fraudulent behaviour by the big groups of companies. In this line of thinking, Member States argued on the initial Commission proposal of the SPE Statute and as a result the European Parliament and subsequently the Council came up with amending the problematic legal texts.

It is important to develop the general notions of the form of large entities and their motivation (Section 1) before the specific rules proposed by the Commission, the Parliament and the Council are discussed (Section 2).

## Section 1. Notions

There are around 40 500 groups of companies, French or foreign, representing more than 150 000 companies and employing around 57% of all workers – according to *Mémento Pratique Groupes de Sociétés*. This phenomenon of regrouping covers quite diverse economic situations, more specifically concerning the size of the established companies. In fact, the majority of groups consist of micro-groups, employing less than 500 workers. Less than 100 very big groups of companies each employing more than 10 000 people in numerous establishments of different nationality can be named. Groups of companies are not only different in their size, but in their objectives as well: securing power, optimisation of capital management, access to privileged markets, etc.<sup>58</sup> It is necessary to describe the notion of large entities and groups of companies (A), in order to better understand the reasons for their interest in the SPE Statute and the debates they cause (B).

### A. Big companies and groups of companies – definition

With the lack of legal definition of large companies and groups of companies, it is the legal theory and practice that develop the notions.

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<sup>58</sup> Michel Menjucq, *Droit International et européen des sociétés*, 2 édition, Domat droit privé, Montchrestien Lextenso éditions 2008

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A big company is in general one that is not small or medium-sized, i.e. it must have a turnover of more than €50 million or a balance sheet total exceeding €43 million and more than 250 employees<sup>59</sup>. Such a company remains a single entity even if it has many branches, agencies or secondary establishments in different MS, as all of them are deprived of legal personality.

A group of companies is the entity consisting of several companies linked together, each of them having their own legal personality. One of the companies holds directly or indirectly the others under its influence and exercises control over the entity by a uniformity of decision.<sup>60</sup> The group itself has more of an economical significance rather than juridical one as it has no legal personality – just its members. It is irrelevant what turnover or how many employees a group has. The companies forming a group may actually fall under the definition of an SME!

The mother company can perform both an industrial and financial role – it organises the management of all companies in the group and at the same time conducts other business activities. When the mother company has purely managing functions, it is referred to as a holding.

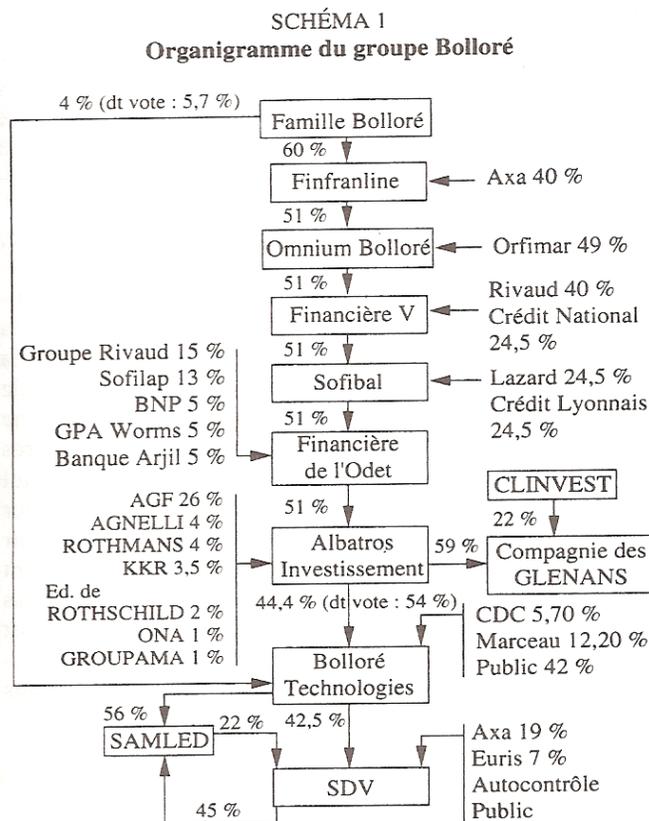
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<sup>59</sup> As opposed to the notion of small and medium-sized enterprises developed above.

<sup>60</sup> Michel Menjucq, *Droit International et europeen des societes*, 2 edition, Domat droit privé, Montchrestien Lextenso editions 2008

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When more than half of a company's capital is owned by another company, it is called a subsidiary; in the contrary case – there is participation in its capital. However, in both cases the parent company can exercise control over the other one, the necessary percentage of ownership being different in each case. It depends how dispersed the ownership of shares is. It is possible to possess the control in a company with as low as 2% of its capital – this exists in the so-called holding in cascade structures (check the scheme below).



It is important that the owned capital confers the majority of the voting rights for the control over the target company to exist. In this example, Vincent Bolloré has

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succeeded in keeping the control of his group due to a cascade structure. With as little as 2% of the capital of Albatros Investissement (60% × 51% × 51% × 51% × 51% × 51%), Vincent Bolloré and his family control the principal shareholder of Bolloré Technologies. Thus, the Bolloré family owns directly or indirectly 59,7% of the voting rights in Bolloré Technologies.<sup>61</sup>

Big companies and groups of companies may or may not exercise cross-border activities; they may or may not have establishments in other countries; and they may or may not trade their shares to the public. In fact, they may be organised in such structures that they don't even issue shares! However, all of them have some interest in the proposed SPE Statute.

### B. Reasons for their interest in the SPE

Keeping this vast and diverse notion of big companies and groups of companies in mind, I will investigate their common interests and concerns when doing business and organising themselves as corporate structures.

It is useful to distinguish 2 points that explain the interest of large entities towards the SPE – the first one is the lack of practical interest in the existing EU company forms (1), and the second one is the attractiveness of the SPE itself (2).

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<sup>61</sup> Jinyu Zhang, Orhan Musayev, Jean-Philippe Erb - Les opérations de LBO et techniques assimilées, Exposé Groupes des sociétés 2009 Université de Strasbourg

## 1. Big companies and their access to the EU company forms

There are 3 already existing EU company forms – the European Company SE<sup>62</sup>, the European Economic Interest Grouping EEIG<sup>63</sup> and the European Cooperative Society ECS<sup>64</sup>. However, the EEIG and the SCE are created to fit specific purposes only and therefore are not useful for the purposes of restructuring a group of companies.

The EEIG aims to facilitate or develop the economic activities of its members and to improve or increase the results of those activities. It cannot make profits for itself! The activities of the grouping must not be more than ancillary to the economic activities of its members.<sup>65</sup> It cannot exercise directly or indirectly a power of management or supervision over its members in particular in the fields of personnel, finance and investment; it cannot hold shares in a member undertaking; nor can it employ more than 500 persons. Moreover, the members of a grouping are to have unlimited and several liability for the debts of the EEIG. The EEIG may or may not have legal personality.

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<sup>62</sup> Council regulation (EC) 2157/2001 of 8 October 2001 on the Statute for a European Company (SE), OJ L 294/1 of 10.11.2001

<sup>63</sup> Council Regulation (EEC) No 2137/85 of 25 July 1985 on the European Economic Interest Grouping (EEIG), OJ L 199/1 of 31.07.1985

<sup>64</sup> Council Regulation (EC) No 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society (SCE), OJ L 207/1 of 18.08.2003

<sup>65</sup> Art. 3 EEIG Regulation

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Cooperatives are primarily groups of persons or legal entities with particular operating principles such as democratic structure and control and the distribution of the net profit for the financial year on an equal basis. These principles include notably the primacy of the individual. The SCE has legal personality and capital divided in shares; it may have limited liability as well. However, it must have at least 5 members and its minimal capital is set at € 30, 000. Its principal object is the satisfaction of its members' needs and/ or the development of their economic and social activities, in particular through the conclusion of agreements with them to supply goods or services or to execute work of the kind that the SCE carries out or commissions. An SCE may also have as its object the satisfaction of its members' needs by promoting their participation in economic activities in one or more SCEs and/or national cooperatives.<sup>66</sup>

The SE is the first limited-liability company form created by the EU and for the first time it regulates cross-border legal merger and transfer of seat in another MS. However, the SE is open only to groups of companies and not to single entities. The only 4 ways to create an SE are connected with having at least 2 companies in at least 2 different Member States – SE must be a holding, a subsidiary, or it can be created through merger of 2 companies, or transformation of one which has a subsidiary in another MS as well<sup>67</sup>. Moreover, those groups of companies have to be public and they are obliged to have cross-border activities. Choosing a MS with more favourable legal system is limited as the registered office and the central administration of the SE have to be in the same MS. Those

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<sup>66</sup> Art. 1, paragraph 3 SCE Statute

<sup>67</sup> art. 2 SE Statute

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requirements limit significantly the application of the SE Statute which explains the small number of existing SEs. Therefore, the SE is also created to fit specific purposes and its use is therefore limited to a small percentage of companies.

A group of companies on a national level cannot take advantage of any EU label, nor can do so a big company with branches in different MS as due to their lack of legal personality the company cannot be defined as a group. It is also possible that an SME wants to reorganise its business as a group, but cannot afford the expensive SE form.

Summing up, neither of the existing EU company forms provides a uniform European label facilitating restructuring of companies and their corporate governance. Something new is needed.

### 2. Big companies and SPE

The SPE is the first creation of EU company law that is flexible and can be a “one-size-fits-all vehicle” for corporate governance. With its initial lack of cross-border requirement and a capital of only € 1, the SPE can be used by SMEs, big companies and groups of companies, regardless if they are purely domestic or have intracommunitarian business.

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Groups are often composed of a big number of companies, subsidiaries, sub-subsidiaries that correspond to a corporate governance of legal structures, with the concerns of responsibility. These big enterprises equally need a more flexible and effective instrument, not forgetting the common structures with other partnerships, other enterprises that meet the needs of cooperation between the diverse types of enterprises in Europe. It is therefore necessary to give big enterprises and their subsidiaries an opportunity to structure themselves in the form of the SPE.<sup>68</sup>

The first big advantage of the European Private Company is that it can be used for cheap and easy reorganisation of corporate governance. New holdings or subsidiaries can be created and the company can be structured in any way imaginable for the price of €1! It is even possible that an SE incorporates several SPEs in different MS in order to merge them into an SE!

Another advantage is that a big company can use all the flexibility the SPE proposes – it can shop for the most suitable applicable laws initially by choosing the MS of the registered office while having its central administration in another MS, or subsequently by transferring its seat. Thus the company can legally circumvent stringent national requirements – for example high capital requirements, strict employee participation rules as in Germany, taxation, insolvency proceedings. Regulatory competition is thus encouraged among EU

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<sup>68</sup> Les nouveaux outils de la mobilité des entreprises en Europe, CREDA, Chambre de commerce et d'industrie de Paris, 2 June 2008, Bernard FIELD Président de la Commission « Droit de l'entreprise » du MEDEF, Secrétaire général de Saint-Gobain

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member states. In order to make their company forms more attractive MS would have to lower capital requirements; to offer flexibility in employee participation systems and to abolish the real seat theory. On the other hand, forum and law shopping via the SPE would only be associated with rules not covered by the Statute and the articles of association as they are set as the applicable law (art.4). Such are the mandatory national rules concerning insolvency, taxation, and labour law rights. The question whether employee participation should be governed by national law or the Statute still remains open.

Thirdly, with the new proposed amendments by the European Parliament and the Council of Ministers it is much easier for big companies and groups of companies than for SMEs to establish SPEs as they can invest in a bigger subscribed capital and the cross-border component is not a problem either. Ironically, the existence of these amendments is provoked mostly by the possibilities for big companies and groups of companies to circumvent national laws and the aim was to limit such fraudulent behaviour. However, the result is actually creating more difficulties for SMEs rather than for big entities, the only exception being the added rules on employee participation.

### Section 2. Specific rules

In order to better explain the interest of big companies and groups of companies in the SPE statute we have to focus on the specific rules of the proposed

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regulation. The capital requirement and the debates around it (€ 1 or € 8, 000) are of little interest to big companies and groups of companies as they can afford it therefore it is unnecessary to discuss it in detail. Whether the SPE shall have a cross-border element could be a burden for purely national companies but considering their size, financial abilities and legal expertise it can be presumed that they would easily overcome it. The conclusions on the cross-border element for SMEs in Part I of this work apply to big companies and groups as well.

In this section I would focus the attention on certain rules of the SPE Statute mostly concerning big companies and groups: the seat theory and the transfer of seat (A) and employee participation (B).

### A. Seat theory and transfer of seat

Big companies and groups of companies are very interested in setting up a company with an EU label *ex nihilo* and being able to freely reorganise the group via mergers or transfers to other member states. To satisfy this need, there are several points to be made clear: the rules on the registered seat and central administration (1); and the freedom of establishment expressed via transfer of seat or transformation (2). In order to better grasp the true use of the seat theories and the transfer of seat, it is necessary to explain the notion of freedom of establishment first.

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The existing European Company cannot be set up ex nihilo and this creates a burden to its use. That is why the SPE Statute by giving this option provokes the initial interest of big companies and groups of companies.

The TFEU (articles 49-55) proclaims the freedom of establishment of nationals of a MS – i.e. physical and legal persons. Establishing oneself means to implant materially for an undetermined period of time in a Member State with the purpose to exercise an economical activity.<sup>69</sup> The second paragraph of article 49 TFEU stipulates: “Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 54, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the Chapter relating to capital.”

There are 2 forms of the right of establishment – a principal one and a secondary one. The principal freedom of establishment consists of the right of a company to implant its seat wherever it so chooses (incorporation), whereas with the secondary form of freedom of establishment an already implanted company remaining in its MS of origin can create agencies, branches or subsidiaries in a different MS (re-incorporation). It is that secondary form that represents the

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<sup>69</sup> Michel Menjuq, *Droit International et europeen des societes*, p. 124

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incontestable reality of the European market, the principal one being just partially specified.<sup>70</sup>

In fact the right of incorporation doesn't constitute only of the creation of a company ex nihilo, but mostly in performing cross-border legal mergers, which is defined as a modality of the freedom of establishment by the ECJ in its judgment in the SEVIC case<sup>71</sup>. There lies the true interest of big companies and groups of companies as they often reorganize themselves. Now, it is possible to merge with a foreign company – cross-border legal merger in the EU is possible with the SE Regulation, SCE Regulation, the 10<sup>th</sup> Directive on cross-border legal mergers<sup>72</sup> and the SEVIC judgement. Since this right is well regulated on communitarian level, it won't be subject to this work.

The secondary freedom of establishment (re-incorporation) is largely developed with the jurisprudence of the European Court of Justice. Since 1999 with its case-law Centros, Überseering and Inspire Art the ECJ has given priority to the theory of incorporation, affirming that the accepting MS cannot use the real seat doctrine to prevent a company established according to the theory of incorporation from creating a branch; nor to contest its legal capacity and especially its access to justice; nor to apply the dispositions of its local company law as internationally mandatory norms.

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<sup>70</sup> Michel Menjucq, *Droit International et europeen des societes*, p. 124

<sup>71</sup> Judgement of the Court of 13 December 2005, case C-411/03

<sup>72</sup> Directive 2005/56/EC of the European Parliament and the Council of 26 October 2005 on cross-border legal mergers of limited liability companies, OJ L 310/1, 25.11.2005

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The SPE Statute proposes 2 conflict rules concerning big companies and groups of companies and their freedom of establishment – the localization of seat in connection with the right of incorporation (1) and the transfer of seat as a way of reorganisation (2).

## 1. Seat theory

The debate on whether the SPE will have its registered office and central administration in different member states or not has to be resolved in order to develop the notions on transfer of seat. In other words, would the European Union support the real seat theory or the theory of incorporation?

Let's explain first the 2 theories<sup>73</sup>. In order to recognize a foreign entity, the system of incorporation admits that a company is validly created since it is regularly created according to the law of a foreign country, in other words the theory of incorporation requires just a formal criterion of registration of a company. Such for example is the law in England. According to the real seat theory, however, the validity of the matriculation according to the state of origin is not sufficient so that the company is recognized as regularly created. It is also necessary that the company is registered in the competent country – i.e. where

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<sup>73</sup> Menjucq p. 58

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the central administration or principal place of business is situated. Here the formal criterion is not sufficient – a material one is also demanded.

In its initial proposal the European Commission expressly determines the theory of incorporation – “An SPE shall not be under any obligation to have its central administration or principal place of business in the Member State in which it has its registered office.” states the second paragraph of article 7. That is the exact opposite to the solution in the European Company statute where the real seat and the statutory seat have to be in the same MS, considered as one of the reasons for its lack of success.

The Parliament confirms the Commission’s solution and adds that in the case when the registered office and the central administration or principal place of business are located in different member states the SPE shall lodge particular information in the register of the MS where the central administration is located or in a European central register. The registered office shall be the address at which all legal documents relating to the SPE are to be served.<sup>74</sup>

The Council at its turn proposes that the SPE shall have its registered office and central administration or principal place of business in the European Union without creating a more specific rule. In the second paragraph of the proposed

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<sup>74</sup> art. 7 paragraphs 2,3 and 3a of the European Parliament legislative resolution of 10 March 2009 on the proposal for a Council regulation on the Statute for a European private company (COM(2008)0396 – C6-0283/2008 – 2008/0130(CNS))

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article 7 it is added that for a transitional period of 2 years from the date of the application of the SPE regulation, an SPE shall have its registered office and central administration in the same MS and after national law shall apply.

During the debates on this provision, Estonia and the Netherlands declared that they would prefer a longer transitional period, and Austria claimed that instead of this provision they would only want the obligation to have both the registered office and the central administration or principal place of business in the same Member State, which could be then reviewed after 5 years.

The solution proposed by the Council is a step back to the real seat theory and then simply leaves national law to decide what the answer will be. This is unacceptable as it would turn the SPE into a national form, creating 27 different legal regimes, which is contrary to the initial purpose of the Regulation.

It is important to keep the decision of the initial proposal as the newest step in EU's constant support of the incorporation theory. In its latest case *Cartesio* the ECJ rules that transfer of the real seat of a company originating from a MS using the incorporation theory is possible and cannot be impeded by the host MS. This ruling together with the SPE and its possibility to have the statutory and real seat in different MS actually legalises for the first time cross-border transfer of seat, and facilitates a subsequent adoption of the abandoned 14<sup>th</sup> Directive.

## 2. Transfer of seat

Companies encounter difficulties when modifying the localization of their seat. There are 2 situations of transfer of seat: transfer of the registered seat as described in article 35 of the SPE Statute (a); transfer of the real seat and transformation according to ECJ's Cartesio ruling (b).

### **(a) transfer of the registered seat as described in article 35 of the SPE Statute**

Before the adoption of the 10<sup>th</sup> Directive on cross-border legal mergers and before the judgement of the SEVIC case, the only way for a company to move its registered seat in another country was by dissolving itself via liquidation in the MS of origin to be later re-constituted in a different MS – this is however quite expensive and complicated. As proposed 14<sup>th</sup> Directive on seat transfer was abandoned by the EU Commission, and without any other communitarian legal text in the field of transfer of seat, there are 2 techniques used in practice to achieve the desired result. The first one consists of creating an upstream holding in another country and transferring shares or assets to it – a group of companies is created or reorganised<sup>75</sup>. The second method is for smaller companies – they can create a shell company in another country, then merge it with the first one by

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<sup>75</sup> Such technique is used by Shell in 2005 when the group reorganizes and creates Royal Dutch Shell plc – [www.shell.com](http://www.shell.com)

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using the 10<sup>th</sup> Directive and SEVIC case and finally the first company is dissolved without liquidation.

The transfer of seat procedure is for the first time legalised with the SE Statute and is later repeated in the SPE Statute. Article 35 of the SPE Statute reads as follows: The registered office of an SPE may be transferred to another Member State. It shall not result in the winding-up of the SPE or in any interruption or loss of the SPE's legal personality or affect any right or obligation under any contract entered into by the SPE existing before the transfer. A transfer shall take effect on the date of registration of the SPE in the host Member State. These rules have not been changed neither by the Parliament, nor by the Council of Ministers.

In their joint letter EUROCHAMBRES and BUSINESSSEUROPE support that the SPE must remain a simple and flexible statute. The Council must retain the most important characteristics of the proposed statute if it is to achieve its overall objectives and be of benefit to SMEs. One of those characteristics is the possibility for the SPE to transfer its registered office without imposing a more stringent regime than that imposed on national corporate forms.

Moreover, the Council adds a new article 5b in its Compromise proposal where it describes the creation of SPE via transformation without liquidation of an existing company. This transformation of a legal entity into an SPE can only happen in the same MS – “Where an SPE is formed by the transformation of an existing legal

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body, the registered office of the SPE shall be located in the same Member State as the registered office of the transformed legal body”<sup>76</sup>.

It remains inexplicable why the SPE Statute does not provide rules on transfer of real seat when it clearly separates the registered office from the central administration and both of them could be relocated to another MS; also raising questions is the fact that after the Cartesio ruling and the proposed transformation of companies from one MS to another the Council of Ministers mentions national transformation of a company into SPE. For those unresolved issues one has to turn once again to the ECJ jurisprudence.

### **(b) transfer of the real seat and transformation according to Cartesio**

The SPE Statute arranges only the transfer of registered office even though it proposes that the registered office and the central administration can be in different MS. The transfer of real seat has been a problematic topic in the EU and the 2 ECJ decisions of Daily Mail and Cartesio seem to repeat each other even with a time difference as big as 20 years. Surprising is also the fact that the Council proposes rules on transformation within a MS but omits cross-border transformation such as proposed by the ECJ in Cartesio.

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<sup>76</sup> Article 5b, paragraph 2 Council

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The Cartesio case indicates three possible situations as regard the cross-border seat transfer: a) transfer of the head office alone without the transfer of the registered office; b) transfer of the registered office alone without the transfer of the head office, and without a change of the applicable national law; c) transfer of the registered office, either alone or with the head office, with a change of the applicable national law – so called transformation. In the situations in a) and b) the possibility for companies to implement such modalities of transfer would entirely depend on the national laws of their Member States of incorporation and according to the SPE statute both of them must be possible.

The transfer of real seat therefore remains uncertain – it rests with the MS of origin of a company to decide how a company is created and when it ceases to exist. If the SPE Statute preserves the separation of central administration and registered office, then according to Cartesio the MS of origin must not preclude such a transfer of real seat. The accepting MS is also prevented from denying the company access to its laws.

With the ECJ decision in Cartesio for the first time is developed the idea of the transformation of a company in another MS. Transformation of a company can happen when a company decides to transfer both its statutory seat and its real seat in another MS, i.e. it decides to transfer seat together with changing the applicable law. This situation would be the only one permitting the freedom of establishment of companies created in whatever Member State (but would be subject, particularly in case of transfer of the registered office alone, to the assessment of its compatibility with overriding requirement in the public

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interest). This would be so because, irrespective of the Member State to which companies wish to move the head office with a conversion of the legal form, the host Member State cannot refuse the incoming transfer and cannot require the reincorporation *ex novo* under its legislation, but can only indicate the fulfillments to be complied with for the conversion of the legal form.<sup>77</sup>

If the EPC were introduced according to the current proposal it would thus be, after the *Cartesio* ruling, the only legal form allowing businesses to transfer either the registered office together with the head office or the head office alone or the registered office alone.<sup>78</sup> The *Cartesio* ruling together with the SPE and its possibility to have the statutory and real seat in different MS actually legalises for the first time cross-border transfer of seat, and facilitates a subsequent adoption of the abandoned 14<sup>th</sup> Directive.

### B. Employee participation

Corporate governance has yet another side besides incorporation and restructuring. Companies do not only enjoy rights and freedoms when conducting business but they are subject to numerous obligations corresponding to social protection of the workers. The SPE statute provides some rules only on employee participation, leaving the rest of labour rights and work organization to communitarian and national law.

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<sup>77</sup> Luca Cerioni, *The cross-border mobility of companies within the European Community after the Cartesio ruling of the ECJ*, *Journal of Business Law* (Sweet & Maxwell), scheduled for publication in Issue n. 4 of 2010.

<sup>78</sup> Luca Cerioni, cited above

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The priority aims of EU social policy are to increase employment and worker mobility, to improve the quality of jobs and, working conditions, to inform and consult workers, to combat poverty and social exclusion, to promote equality between men and women, and to modernise social protection systems.<sup>79</sup> In order to achieve these goals the European Union has set minimum requirements in the field of labour rights and work organisation. These requirements concern collective redundancies, insolvency and the transfer of undertakings, the consultation and information of workers, working hours, equal treatment and pay, and posted workers. They have been supplemented by framework agreements between the European social partners.<sup>80</sup>

Worker participation is part of the "involvement of employees" as defined in article 2 (h) of Directive 2001/86/EC<sup>81</sup> - "any mechanism, including information, consultation and participation, through which employees' representatives may exercise an influence on decisions to be taken within the company". A set of directives provide for the information and consultation of the workers on a regular basis, at both national and transnational levels<sup>82</sup>, whereas only three

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<sup>79</sup> [http://europa.eu/legislation\\_summaries/employment\\_and\\_social\\_policy/index\\_en.htm](http://europa.eu/legislation_summaries/employment_and_social_policy/index_en.htm)

<sup>80</sup> [http://europa.eu/legislation\\_summaries/employment\\_and\\_social\\_policy/employment\\_rights\\_and\\_work\\_organisation/index\\_en.htm](http://europa.eu/legislation_summaries/employment_and_social_policy/employment_rights_and_work_organisation/index_en.htm)

<sup>81</sup> Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees

<sup>82</sup> The Directive establishing a general framework for informing and consulting employees in the European Union seeks to strengthen dialogue within enterprises and ensure employee involvement upstream of decision-making, with a view to better anticipation of problems and the prevention of crises. The Directive for the establishment of a European Works Council or a procedure for informing and consulting employees applies to EU-scale undertakings or groups with at least 1000 employees and at least 150 employees in each of two Member States. Three Directives provide for the involvement of employees (i.e. information, consultation and participation in the supervisory board or board of directors) in enterprises adopting the European

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Directives provide for the involvement of employees (i.e. information, consultation and participation in the supervisory board or board of directors) in enterprises adopting the European Company Statute<sup>83</sup> or the European Cooperative Society Statute<sup>84</sup>, or deriving from a cross-border merger<sup>85</sup>.

The directives concerning the establishment of European Works Councils (94/45/EC, entry into force: 1996)<sup>86</sup> replaced in 2009 by a new Directive<sup>87</sup>; workers' involvement in the European Company (2001/86/EC, 2004) and the setting up of a framework for information and consultation of employees (2002/14/EC, 2005)<sup>88</sup> set Europe-wide standards for the involvement of employees in company decision-making. They codify a European standard on information and consultation rights – in some countries having a significant impact on national labour relations systems – and additional participation

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Company Statute or the European Cooperative Society Statute, or deriving from a cross-border merger. The Directive relating to collective redundancies provides that an employer who envisages collective redundancies must consult and provide workers' representatives with specified information concerning the proposed redundancies.

<sup>83</sup> Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European Company with regard to the involvement of employees, OJ L 294/22, 01.11.2001

<sup>84</sup> Council Directive 2003/72/EC of 22 July 2003 supplementing the Statute for a European Cooperative Society with regard to the involvement of employees, OJ L 207, 18.08.2003

<sup>85</sup> Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies

<sup>86</sup> Council Directive 94/45/EC of 22 September 1994 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees

<sup>87</sup> Directive 2009/38/EC of the European Parliament and of the Council of 6 May 2009 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees (Recast)

<sup>88</sup> Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community - Joint declaration of the European Parliament, the Council and the Commission on employee representation

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schemes for cross-border companies and cooperatives. This doubtless represents an achievement for Social Europe.<sup>89</sup>

Article 2 (k) of Directive 2001/86/EC defines "participation" as: "the influence of the body representative of the employees and/or the employees' representatives in the affairs of a company by way of: the right to elect or appoint some of the members of the company's supervisory or administrative organ, or the right to recommend and/or oppose the appointment of some or all of the members of the company's supervisory or administrative organ".<sup>90</sup>

The obligations to involve employees concern mainly big companies and groups of companies usually applying to EU-scale undertakings or groups with at least 1000 employees and at least 150 employees in each of two Member States. SMEs are left out of the scope of application of the worker participation rules according to the SPE Statute and these rules are therefore irrelevant to them in contrast with big companies and groups of companies.

A company should not be defined by the sole interest of its shareholders and managers but also by the stakeholders (as a principle of Corporate Governance). Worker participation means that social interests can be made effective at the

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<sup>89</sup> <http://www.worker-participation.eu/About-WP/Why-Worker-Participation/Worker-interest-representation-in-Europe-Towards-a-better-understanding-of-the-pieces-of-a-still-unfinished-jigsaw>

<sup>90</sup> Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees

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level of decision making of a company. Worker participation has to be underlined, thus, by European legislation in order to enforce workers making their interests to the same extent effective as those introduced by the shareholders. European legislation ruling worker participation rights at transnational level is based on a broad political consensus of the European Parliament and among European Governments until today.<sup>91</sup> According to the analysis prepared by Sigurt Vitols, Norbert Kluge and Michael Stollt countries are classified based on their overall scores on the participation index. The 'stronger participation rights' group includes nine countries: Austria, Denmark, Finland, France, Germany, Greece, Luxembourg, the Netherlands and Sweden. The rest 18 MS provide weaker participation rights, however each of the two groups accounts for roughly half of EU27 GDP, making their importance in economic terms approximately equal.<sup>92</sup>

In all 3 versions (Commission, Parliament, Council proposals) of the SPE Statute the rules governing employee participation in fact distribute the applicable law. There are no definitions. The general rule is that the law of the registered office will determine the rules on employee participation. The problematic arises when there is a transfer of the registered office or a cross-border merger – then specific rules developed in article 38 of the Statute or Directive 2005/56/EC of the European Parliament and of the Council shall apply.<sup>93</sup>

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<sup>91</sup> <http://www.worker-participation.eu/About-WP/Why-Worker-Participation>

<sup>92</sup> <http://www.worker-participation.eu/About-WP/European-Participation-Index-EPI>

<sup>93</sup> article 34 SPE Statute

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The Parliament adds exceptions to the general rule and develops a complicated scheme including the number of employees of the SPE (more than 1000, between 500 and 1000 or fewer than 500) and the percentage of the total workforce habitually working in a MS or MSs which provides for a greater level of employee participation than the Member State in which the SPE has its registered office. Upon reaching the thresholds, the Directive 2001/86/EC on employee involvement of the SE and Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies shall be applicable as provided for.

The Council confirms the general rule that the SPE shall be subject to the rules on employee participation, if any, applicable in the Member State in which it has its registered office. New rules on creating a Special Negotiating Body and conducting negotiations are added; they would apply in 2 cases<sup>94</sup>: (1) the SPE for a continuous period of three months after its registration has at least 500 employees, and at least 1/2 of its employees habitually work in a Member State that provides for a higher level of participation rights for employees than is provided for those employees in the Member State where the SPE has its registered office; or (2) in the case of the transfer of the registered office of an SPE at least 1/3 of its employees habitually work in the Home Member State at the time of its registration in the Host Member State; and the employees in the Home Member State were provided with a higher level of participation rights

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<sup>94</sup> Article 35 of the Revised Presidency compromise proposal for a COUNCIL REGULATION on a European private company, Annex to Addendum 1 16115/09, Brussels 27 November 2009

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than is provided for those employees in the Host Member State. In case of a cross-border legal merger, Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies shall apply.

EUROCHAMBRES and BUSINESSUROPÉ in their letter of support for the European Private Company Statute<sup>95</sup> stress that rules concerning workers' participation should be determined by the laws governing the SPE's registered office. Discussion on this matter must not lead to any change that will impose extra burdens or impede adoption of the statute.

The rules on employee participation must exist – they must distribute fairly the applicable law and should see to not escaping national law to the detriment of employees. However, such rules must have an appropriate threshold applicable to big companies and groups of companies only, exercising cross-border activities or reorganisations. Social protection serves as a balance to the easily accessible corporate governance model of the SPE and is therefore indispensable.

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<sup>95</sup>[http://www.eurochambres.eu/DocShare/docs/2/BFLLCGHDFOENBPPFOJHPBDHL515CVHQ7VCYDVOHT43VY/EUROCHAMBRES/docs/DLS/EPC\\_joint\\_letter\\_FR2-2010-00102-01.pdf](http://www.eurochambres.eu/DocShare/docs/2/BFLLCGHDFOENBPPFOJHPBDHL515CVHQ7VCYDVOHT43VY/EUROCHAMBRES/docs/DLS/EPC_joint_letter_FR2-2010-00102-01.pdf)

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## CONCLUSION

Currently, the SPE Proposal suggests a revolution in EU Company law and its Amendments bring this idea somewhat down to earth. However, the coming into life of the Regulation of SPE is still uncertain, as are uncertain the most debated on aspects of it. What remains undisputed still is the need of such a company in the Single Market. Most interesting is the fact that despite being created for SMEs, the SPE is extremely useful for groups of companies that have a bigger incentive to shop for more favourable applicable company law within the Common Market. It is the fear of such a fraudulent behaviour that creates the political debates and prevents the EU institutions from a final adoption of the Statute for SPE.

The adoption of a flexible and easily accessible statute for the European Private Company would trigger regulatory competition within the European Union and is indispensable for the further development of communitarian company law. It would facilitate a future Directive on transfer of seat, as well as new company forms such as a European Association, a European Mutual Society and even a European Foundation.

# The European Private Company Statute

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## BIBLIOGRAPHY

### Books and articles

1. Michel Menjucq, Droit International et europeen des societes, 2 edition, Domat droit privé, Montchrestien Lextenso editions 2008
2. Mémento Pratique Groupes de Sociétés 2009-2010, editions Francis Lefebvre
3. Mathias Siems, Leif Herzog and Erik Rosenhäger. The European Private Company (SPE): An Attractive New Legal Form of Doing Business? Working Paper 27 February 2009 Final version published in (2009) Butterworths Journal of International Banking and Financial Law 247-250
4. Susanne Braun. The European Private Company: A Supranational Company Form for Small and Medium-sized Enterprises? Essay published in German Law Journal November 2004, [www.germanlawjournal.com](http://www.germanlawjournal.com)
5. Pour une SARL européenne, sous la dir. de J. Boucourechliev, CREDA, PUF, 1973.
6. Propositions pour une société fermée européenne, sous la dir. de J. Boucourechliev, CREDA, OPOCE, 1997.
7. EUROCHAMBRES Position paper on the European Private Company of November 2007 available at <http://www.eurochambres.be/content/Default.asp?PageID=145> and Position paper on the Statute for the SPE of September 2008 at [http://www.eurochambres.be/DocShare/docs/2/PHMLKCFCCIIMJLCKMJKKEONK14LKT4YBDCC5Y4D9YBD/EUROCHAMBRES/docs/DLS/PP\\_EPC\\_2008\\_V1\\_0-2008-00848-01.pdf](http://www.eurochambres.be/DocShare/docs/2/PHMLKCFCCIIMJLCKMJKKEONK14LKT4YBDCC5Y4D9YBD/EUROCHAMBRES/docs/DLS/PP_EPC_2008_V1_0-2008-00848-01.pdf)
8. Les nouveaux outils de la mobilite des enterprises en Europe – Fusions transfrontalières, SE, SPE; CREDA, Chambre de commerce et d’industrie de Paris, 2 June 2008
9. The SE remains an ambitious European project - Dr Norbert Kluge, coordinator of the European Worker Participation Competence Centre (EWPCC) at the ETUI (Brussels) - Brussels , June 2010 - <http://www.worker-participation.eu/European-Company/SE-COMPANIES-News/Review-2010/Conference-on-the-Statute-for-a-European-Company-Brussels/The-SE-remains-an-ambitious-European-project>

# The European Private Company Statute

---

10. Droit du commerce international août 2008 - août 2009 Louis d' Avout, Professeur à l'Université de Lyon (Jean Moulin, Lyon III); Sylvain Bollée, Professeur à l'Université Paris I Panthéon-Sorbonne, Recueil Dalloz 2009 p. 2384
11. Société privée européenne : approbation par le Parlement européen de la proposition de règlement (10 mars 2009, P6, TA (2009), 0094) Benoît Lecourt, Maître de conférences à l'Université de Cergy-Pontoise, Revue des sociétés 2009 p. 431
12. Proposition de règlement relatif au statut de la Société privée européenne Com (2008), 396, 25 juin 2008 Benoît Lecourt, Maître de conférences à l'Université de Cergy-Pontoise, Revue des sociétés 2008 p. 684
13. European Private Company (SPE) - Corporate Governance and Company Law News (January 2010) compiled by Johannes Heuschmid for SEEurope project (contact: [mstollt@etui.org](mailto:mstollt@etui.org))
14. Luca Cerioni, The cross-border mobility of companies within the European Community after the *Cartesio* ruling of the ECJ, *Journal of Business Law* (Sweet & Maxwell), scheduled for publication in Issue n. 4 of 2010.
15. Jinyu Zhang, Orhan Musayev, Jean-Philippe Erb - Les opérations de LBO et techniques assimilées, Exposé Groupes des sociétés 2009 Université de Strasbourg

## EU documents

16. Dr Klaus-Dieter Borchardt, The ABC of Community law, Fifth edition, European Commission, Directorate-General for Education and Culture, Publications unit, 2000
17. Report on the implementation of the European Charter for small enterprises, 13 February 2003, Com (2003) 21 final/2; Report on the implementation of the European Charter for small enterprises in the candidate countries for accession in the European Union, 21 January 2003, SEC (2003) 57, 1.

## The European Private Company Statute

---

18. Final Communication From The Commission To The Council, The European Parliament, The European Economic And Social Committee And The Committee Of The Regions "Think Small First" - A "Small Business Act" For Europe, Brussels, 25.6.2008 Com(2008) 394
19. COMMISSION RECOMMENDATION of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (notified under document number C(2003) 1422) (2003/361/EC)
20. Commission Working Document Report On The Implementation Of The SBA, Brussels, 15 December 2009 Com(2009) 680
21. Note from the future Spanish, Belgian and Hungarian Presidencies to Coreper/Council; Draft 18-month programme of the Council 16771/09, Brussels, 27 November 2009
22. Report of the High Level Group of Company Law Experts on a Modern Regulatory Framework of Company Law in Europe (Winter report), 4 November 2002
23. 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" – COM (2007) 724, 20.11.2007.
24. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions: "Commission Legislative and Work Programme 2008" – COM (2007) 640.
25. European Charter for Small Business, adopted by the General Affairs Council in Lisbon on 13 June 2000 and endorsed at the Feira European Council Meeting on 19-20 June 2000
26. Judgement of the Court of 9 March 1999, case C-212/97
27. Judgement of the Court of 5 November 2002, case C-208/00
28. Judgement of the Court of 30 September 2003, case C-167/01
29. Judgement of the Court of 13 December 2005, case C-411/03
30. Judgement of the Court of 27 September 1988, case 81/87, European Court reports 1988 page 05483
31. Judgement of the Court of 16 December 2009, case C-210/06

# The European Private Company Statute

---

## EU legislation

32. Treaty establishing the European Community (TEC)
33. Treaty on the Functioning of the European Union (TFEU)
34. European Regulation of Company and Securities Law 2009-2011, second edition, Ars Aequi Libri
35. Proposal for a Council Regulation on the Statute for a European Private Company COM (2008) 396 of 25.06.2008
36. European Parliament legislative resolution of 10 March 2009 on the proposal for a Council regulation on the Statute for a European private company (COM(2008)0396 – C6-0283/2008 – 2008/0130(CNS))
37. Revised Presidency compromise proposal for a COUNCIL REGULATION on a European private company, Annex to Addendum 1 16115/09, Brussels 27 November 2009
38. 17076/09 (Presse 365) PRESS RELEASE 2982nd Council meeting Competitiveness (Internal Market, Industry and Research), Brussels, 3-4 December 2009
39. Brussels, 2.12.2009 and 11.12.2009 COM(2009) 665 final/2 CORRIGENDUM : remplacement de "approval procedure" par "consent procedure" Concerne la version EN - COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL Consequences of the entry into force of the Treaty of Lisbon for ongoing interinstitutional decision-making procedures; Annex 4
40. Council regulation (EC) 2157/2001 of 8 October 2001 on the Statute for a European Company (SE), OJ L 294/1 of 10.11.2001
41. Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European Company with regard to the involvement of employees, OJ L 294/22, 01.11.2001
42. Council Regulation (EEC) No 2137/85 of 25 July 1985 on the European Economic Interest Grouping (EEIG), OJ L 199/1 of 31.07.1985

# The European Private Company Statute

---

43. Council Regulation (EC) No 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society (SCE), OJ L 201/1 of 18.08.2003
44. Council Directive 2003/72/EC of 22 July 2003 supplementing the Statute for a European Cooperative Society with regard to the involvement of employees, OJ L 207, 18.08.2003
45. Tenth Directive 2005/56/EC of the European Parliament and the Council of 26 October 2005 on cross-border legal mergers of limited liability companies, OJ L 310/1, 25.11.2005
46. Council Directive 94/45/EC of 22 September 1994 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees
47. Directive 2009/38/EC of the European Parliament and of the Council of 6 May 2009 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees (Recast)
48. Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community - Joint declaration of the European Parliament, the Council and the Commission on employee representation

## Links

49. <http://www.etudes.cci.fr/dossier/15-la-societe-privee-europeenne>
50. <http://www.medef.com>
51. <http://www.eurochambres.eu/Content/Default.asp?PageID=65>
52. <http://ecdb.worker-participation.eu/>
53. [http://ec.europa.eu/enterprise/policies/sme/facts-figures-analysis/sme-definition/index\\_en.htm](http://ec.europa.eu/enterprise/policies/sme/facts-figures-analysis/sme-definition/index_en.htm)

## The European Private Company Statute

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54. <http://curia.europa.eu/>
55. <http://www.eurochambres.be/content/Default.asp?PageID=145>
56. [http://www.eurochambres.eu/DocShare/docs/2/BFLLCGHDFOENBPPFOJHPBDHL515CVHQ7VCYDVOHT43VY/EUROCHAMBRES/docs/DLS/EPC joint letter FR2-2010-00102-01.pdf](http://www.eurochambres.eu/DocShare/docs/2/BFLLCGHDFOENBPPFOJHPBDHL515CVHQ7VCYDVOHT43VY/EUROCHAMBRES/docs/DLS/EPC_joint_letter_FR2-2010-00102-01.pdf)
57. <http://www.worker-participation.eu/European-Company/SE-COMPANIES-News/Review-2010/Conference-on-the-Statute-for-a-European-Company-Brussels> -  
Conference on the Statute for a European Company - Brussels / Review 2010 / SE
58. [http://ec.europa.eu/enterprise/policies/sme/small-business-act/implementation/files/sba\\_imp\\_en.pdf](http://ec.europa.eu/enterprise/policies/sme/small-business-act/implementation/files/sba_imp_en.pdf)
59. <http://www.eib.org/attachments/strategies/sme-consultation-2007-2008-en.pdf>
60. [http://europa.eu/legislation\\_summaries/employment\\_and\\_social\\_policy/index\\_en.htm](http://europa.eu/legislation_summaries/employment_and_social_policy/index_en.htm)
61. <http://www.worker-participation.eu/About-WP/Why-Worker-Participation/Worker-interest-representation-in-Europe-Towards-a-better-understanding-of-the-pieces-of-a-still-unfinished-jigsaw>

## SOMMAIRE EN FRANÇAIS

### LA SOCIÉTÉ PRIVÉE EUROPÉENNE

#### PETITS ET MOYENS ENTREPRISES VS. GRANDS ENTREPRISES ET GROUPES D'ENTREPRISES

#### INTRODUCTION

*L'idée de créer la Société Privée Européenne (SPE) n'est pas nouvelle – les premiers plans reviennent jusqu'aux années 1950. Ce qui est vraiment intéressant c'est la révolution en la matière réglementaire que la simplicité du Statute pour le SPE propose. Toutefois, c'est la source des débats politiques continus à cause des grandes différences entre les législations nationales des différents Etats Membres et aussi du peur d'une usage frauduleuse par les petits et moyens entreprises et les groupes des sociétés. En Juin 2008, la Commission Européenne a présenté sa 'Proposition de RÈGLEMENT DU CONSEIL relatif au statut de la Société Privée Européenne' (COM (2008) 396/3 de 25 Juin 2008).*

*Puis, après discussions au Conseil des Ministres, le Parlement Européen a adopté sa résolution législative le 10 Mars 2009, en approuvant la Régulation proposée et en introduisant des amendements essentiels en quelques règles : un élément transfrontalier est introduit ; l'administration centrale doit coïncider avec le siège statutaire ; plus des règles sur la participation des travailleurs sont inclus ; un changement du capital minimal avec un certificat de solvabilité au préalable. Ces changements ont invoqué plusieurs des débats politiques au Conseil des Ministres qui a composé une Proposition révisée de compromis de la présidence concernant le Règlement du Conseil relatif à la société privée européenne<sup>96</sup>. Néanmoins, étant donné que l'unanimité requise pour un accord n'a pas été atteinte, le Conseil est*

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<sup>96</sup> Revised Presidency compromise proposal for a COUNCIL REGULATION on a European private company, Annex to Addendum 1 16115/09, Brussels 27 November 2009

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*convenu que des travaux supplémentaires étaient requis en ce qui concerne la proposition visant à établir la forme juridique de la société privée européenne<sup>97</sup>.*

*Il faut mentionner les initiatives incessantes de EUROCHAMBRES et BUSINESSSEUROPE en faveur d'adoption de la Proposition du SPE. Les 2 organisations appuient pour un statut simple et flexible.*

*Bien que le SPE est crée particulièrement pour les PME, ces règles permettent que la soiciété soit utilisé par quiconque ! C'est facile et moins chère à établir et ainsi extrêmement attractive pour tous les entreprises – pour se réorganiser ou simplement pour éviter une législation nationale plus stricte.*

*Les PME et les groupes des sociétés ont des motifs différents, des besoins et abilités financiers très divers ; l'Etat membre d'origine n'est pas sans signification non plus – avec sa législation nationale et les possibilités financiers de sa peuple. C'est ça la raison pour que les règles flexibles le plus adaptés aux PME soient considérés comme motive pour law-shopping et comportement frauduleuse par des grandes groupes des sociétés.*

*Dans ce travail je rechercherai sur l'application du Statut SPE premièrement par les PME (I), et deuxièmement par les grandes entreprises et groupes d'entreprises (II). J'examinerai la proposition initiale de la Commission ainsi que les amendements par le Parlement et le Conseil et je raisonnerai sur des avantages et désavantages pour les différent types des entreprises. Pour les buts de ma recherche, je concentrerai sur quelques règles spécifiques de la SPE, notamment : (1) le capital minimal ; (2) l'incorporation et l'élément transfrontalier ; (3) théorie du siège et le transfert du siège ; (4) participation de travailleurs. Je diviserai ces règles entre les PME et les grandes entreprises selon les intérêts principales de chacune.*

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<sup>97</sup> 17076/09 (Presse 365) COMMUNIQUÉ DE PRESSE de 2982ème session du Conseil Compétitivité (marché intérieur, industrie et recherche) Bruxelles, les 3-4 décembre 2009

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## PARTE I – PME

*On commence avec les PME et leur besoin d'une Société Privée Européenne. Dans cette partie je vous présenterai les notions générales concernant les PME (Séction 1) et après je développerai en détails les règles spécifiques de la Proposition pour le SPE (Séction 2).*

*Le SPE est particulièrement créé pour les PME. Les petites et moyennes entreprises (PME) représentent plus de 99% des entreprises dans l'Union européenne, mais seules 8% d'entre elles exercent des activités commerciales transfrontalières et 5% possèdent des filiales ou des entreprises communes à l'étranger.*

### *Séction 1*

*Ici on trouvera les notions et la définition légale des PME (A), et leurs intérêt et besoin du Statut SPE (B).*

### *Séction 2*

*Les règles spécifiques concernant les petits et moyens entreprises sont plus tôt 2 : le capital minimal (A) ; et l'incorporation du SPE avec ou sans élément transfrontalier (B).*

## PARTE II – GRANDES ENTREPRISES

*L'intérêt plus grand du SPE on trouve dans les grandes entreprises et les groupes de sociétés, même si le statut n'est pas créé particulièrement à leur convenance. Ils ont besoin tout aussi d'un instrument plus souple et efficace pour s'organiser mieux au niveau du gestion d'entreprise. Souvent les règles adaptés pour les PME sont considérés d'être abusifs quand utilisés par les grandes groupes. Par conséquence la proposition initiale de la Commission Européenne a été modifié pour prévenir une telle pratique abusive possible.*

*Dans cette partie on trouvera les notions générales sur la forme des grandes entreprises et leur intérêt dans le SPE (Séction 1), après les règles spécifiques du statut vont être discutés (Séction 2).*

## *Séction 1*

*Il est nécessaire d'expliquer la notion des grandes entreprises et des groupes (A) pour mieux comprendre les raisons de leur intérêt dans le SPE et les débats ils ont invoqué (B).*

## *Séction 2*

*Les grandes entreprises sont peu concernés soit par un capital minimal plus grand, soit par une exigence d'activité transfrontalière. Pour eux la problématique du statut SPE se pose par : la théorie du siège et le transfert du siège (A) ; et la participation des travailleurs (B).*

## *CONCLUSION*

*La proposition pour le SPE a suggéré une révolution en droit communautaire, même si l'amendements proposés revient en arrière. Ainsi, l'adoption du Règlement pour le SPE n'est pas certaine, comme ne sont pas certains les aspects les plus discutés. Néanmoins, le besoin d'une telle entreprise dans le Marché Intérieur est incontesté.*

*L'adoption d'un statut SPE flexible et facilement accessible va déclencher une compétition réglementaire dans l'Union Européenne et elle est ainsi indispensable pour le développement à venir du droit communautaire. Elle va faciliter une future Directive sur le transfert du siège, ainsi que les nouvelles formes des sociétés européennes comme une Association Européenne ; une Société Mutuelle Européenne ou une Fondation Européenne.*

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## NOTES AND REMARKS