Developments

The European Private Company – Entering the Scene or Lost in Discussion?

By Daniel Kornack[*]

A. Introduction

More than a year has passed since the European Commission introduced the European Private Company (Societas Privata Europaea, SPE) in June 2008. What has become of the draft statute? This paper is meant to give a short overview of its basic features, the other European institutions' discussions and statements, the problems that prevented the proposal from being adopted so far and possible solutions that were introduced.[1]

On 25 June 2008, the European Commission published a "Proposal for a Council Regulation on the Statute for a European Private Company"[2] which shall take effect 1 July, 2010. The creation of this new statute is part of the 2003 Action Plan "Modernising Company Law and Enhancing Corporate Governance in the European Union"[3] and the "Small Business Act for Europe" ("Think Small First").[4] The SPE gained further importance when in October 2007 the European Commissioner for the Internal Market and Services, Charlie McCreevy, announced that he saw no need for a 14th Directive on the cross-border transfer of the registered office and stopped work on that draft.[5]

---

[*] Doctoral Student at the Max-Planck-Institute for Intellectual Property, Competition and Tax Law, Munich, Germany. Email: DanielKornack@gmx.de.

[1] For a comprehensive analysis of the Commission proposal, *see* HEINZ KREJCI, SOCIETAS PRIVATA EUROPAEA/SPE (2008) and the literature cited by Thomas Bücker, *Die Organisationsverfassung der SPE*, 173 ZEITSCHRIFT FÜR DAS GESAMTE HANDELSRECHT UND WIRTSCHAFTSRECHT 281, 285 n.13 (2009).

[2] *See* Commission Proposal for a Council Regulation on the Statute for a European private company, COM(2008)396 final (June 25, 2008).

[3] Modernising Company Law and Enhancing Corporate Governance in the European Union – A Plan to Move Forward, COM(2003)284 (May 21, 2003).

[4] *See* Communication from the Commission To the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Think Small First. A Small Business Act for Europe, COM(2008)394 final (June 25, 2008).

[5] Charlie McCreevy, Speech at the European Parliament's Legal Affairs Committee (Oct. 3, 2007) (speech 592/07), available at http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/07/592. The aim of this directive was partly reached by the European Court of Justice's recent *Cartesio* judgment, Case C-210/06 CARTESIO Oktató

https://doi.org/10.1017/S2071832200001656 Published online by Cambridge University Press

With the SPE, the European Union is about to advance its role from a mere observer and regulator of Member States' corporate laws to a competitor in the large field of private limited-liability company forms. The outcome might be an increase of competition between legislators for small and medium sized enterprises (SMEs) depending on the features of the SPE.

B. Features of the SPE

In several surveys, consultations, public hearings and conferences, the last one was held by the European Commission on 10 March 2008 in Brussels, companies and business representatives have emphasized the need for a company statute that is easy to set up, cheap to run, uniform and flexible.[6] In order to offer SMEs such a real alternative to national legal forms, the Commission presented the SPE as a limited-liability company with legal personality which does not require any kind of a cross-border element. The statute avoids references to national law wherever possible. The draft regulation contains a fully (even though not in every detail) regulated statute – as far as company law is concerned. It does not rule on matters of labor law, tax law, accounting or insolvency. At the same time, it allows most of the interior matters of the company to be regulated by its articles of association. Annex I contains "drafting tasks": a catalog of matters which are not covered by the regulation itself but need to be regulated in either way by the articles (Art. 8 para. 1[7]). They are meant to keep the statute flexible and adjustable to the respective company's needs. Even though the proposal does not contain model articles which could help lowering transaction costs for the drafting of the articles of association,[8] the Commission services created example provisions for articles of association.[9] Thus, there is a good chance that the final statute will be accompanied by official model articles.

és Szolgáltató bt (ECJ 16 December 2008); *but see* European Parliament resolution of 10 March 2009 with recommendations to the Commission on the cross-border transfer of the registered office of a company (2008/2196(INI)), EUR. PARL. DOC. P6-TA(2009)0086 (2009).

[6] *See* Commission Staff Working Document accompanying the Proposal for a Council Regulation on the Statute of the European Private Company (SPE), at 5-6, SEC(2008)2098.

[7] Articles not marked differently are those of the Commission's proposal for an SPE statute.

[8] For further information on the function of model articles *see* Robert Drury, *The European Private Company*, 9 EUR. BUS. ORG. L. REV. 125, 132 (2008).

[9] *Example provisions for articles of association of an SPE,* Council Register (12124/08) (July 23, 2008) (Commission).

https://doi.org/10.1017/S2071832200001656 Published online by Cambridge University Press

C. The European Parliament's view

The European Parliament has always supported the introduction of a company statute for SMEs under Community law. In February 2007, it passed a resolution requesting the Commission to submit a proposal on a statute for a European Private Company.[10] Recently, on 10 March 2009, it adopted with a broad majority of 578 against 72 votes with 25 abstentions a resolution[11] which generally welcomes the Commission's proposal of 25 June 2008. Nevertheless, Parliament proposed 72 amendments concerning five main points and minor changes. Even though the SPE statute is legally based on Art. 308 EC and, therefore, the European Parliament's resolution (in the following: resolution) will not be binding for the Council, it shows some legal and political problems which cause the need for further negotiations. On the other hand, it offers possible solutions to these issues. As the preceding report of the Parliament's Committee on Legal Affairs explicitly states, the resolution's aim is "to counteract blockages within the Council."[12] Therefore, the major amendments of the Parliament's resolution shall be introduced in the following.

I. Requirement of a Cross-border Element

Even though the resolution mentions the question whether the SPE should require a cross-border element only under miscellaneous aspects, this is a key issue for the character of the SPE and its scope of application. The Commission's draft statute does not contain any cross-border element. Through this, it meets the demands of businesses. Despite its support for this liberal approach, the resolution recalls the legal need for such an element to comply with the principle of subsidiarity (Art. 5 para. 2 EC).[13] However, to ensure that a cross-border element would not become an obstacle for the creation of SPEs, it proposes a list of four alternative easy-to-fulfill factors (Amendment 70, Art. 3 para. 1 point (ea)). This list contains a "cross-border business intention or business object", an "objective to be significantly active in more than one Member State", "establishments in different Member States" or "a parent company registered in another Member State".[14] If the SPE fails to

[10] Eur. Parl., Resolution with recommendations to the Commission on the European private company statute (2006/2013(INI)), EUR. PARL. DOC. P6_TA(2007)0023.

[11] Eur. Parl., 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)), EUR. PARL. DOC. P6_TA(2009)0094 (2009).

[12] Eur. Parl., Comm. on Legal Affairs, Report on the proposal for a Council regulation on the Statute for a European private company (COM(2008)0396 – C6-0283/2008 – 2008/0130(CNS)), at 42, A6-0044/2009 (Feb. 4, 2009).

[13] *Id.* at 44.

[14] The original report of the Committee on Legal Affairs also allowed an SPE to comply with the cross-border requirement by having its registered office and its central administration or principal place of business in different Member States. On the other hand, it demanded subsidiaries instead of establishments in different Member States, *id.* at 14.

comply with the requirement of a cross-border element within two years it shall be converted into the corresponding national company statute (Amendment 21, Art. 9 para. 3a).[15]

It is obvious that such a requirement could easily be circumvented. At best, it would not have any effect. More likely, it could create compliance costs for enterprises and monitoring costs for the Member States and the Commission. Experience from the SE statute shows that even a stricter cross-border element cannot prevent circumvention.[16] In the Council's legal service's view, the draft complies with Art. 5 para. 2 EC even without a cross-border element anyway.[17] The Commission stresses that the SPE as an optional instrument is less intrusive than – as an alternative to reach the given aim - harmonization of Member States' core principles.[18] It, however, concedes that the imminent competition between the new European statute and Member States' statutes as a result of the lack of a cross-border element could lower political acceptability.[19] This is especially important as the Council, under Art. 308 EC, can pass the proposal only unanimously. Ultimately, it is a political, not a legal question, whether stronger regulatory competition in corporate law is deemed favorable or not.

II. Capital

The second key point concerns the SPE's capital, especially its minimum legal capital. The statute's capital system is based on the Anglo-American system (liquidity orientation)[20] with some elements from continental Europe. While the Commission allows an SPE to be set up with a share capital of 1 € (Art. 19 para. 4), Parliament demands a minimum capital of € 8.000 unless it is certified by the executive management body that the company is able to pay its debts as they become due in the normal course of business within one year after founding (Amendment 33, Art. 19 para. 4). If the management signs such a solvency

---

[15] The reference in Amendment 21 to Art. 3 para. 1 point (eb) is due to differences between the Legal Affairs Committee's report and the final resolution. The report proposed an additional requirement to define a business object from a limited range of objects which was declined in the plenary.

[16] Horst Eidenmüller, Andreas Engert & Lars Hornuf, *Incorporating under European Law: The Societas Europaea as a Vehicle for Legal Arbitrage*, 10 EUR. BUS. ORG. L. REV. 1, 22 (2009).

[17] Council (EC), Progress Report on the Proposal for a Council Regulation on the statute for a European private company, at 3, No. 16400/1/08 Rev 1 (Nov. 28, 2008); *but see* the critical statement of the German Bundesrat, Drucksache (479/08) (Oct. 10, 2008).

[18] COM(2008)396 final, *supra* note 2, at 3.

[19] SEC(2008)2098, *supra* note 6, at 26; *see* Adriaan F. M. Dorresteijn & Odeaya Uziahu-Santcross, *The Societas Privata Europaea under the Magnifying Glass (Part 1)*, 5 EUR. COMPANY L. 277, 279-80 (2008) (questioning the necessity of a European instrument).

[20] Walther Hadding & Erik Kießling, *Die Europäische Privatgesellschaft (Societas Privata Europaea)*, 63 ZEITSCHRIFT FÜR WIRTSCHAFTS- UND BANKRECHT 145, 147 (2009).

certificate, the SPE needs to be capitalized with a minimum of only € 1. Even though the draft resolution recognized the Commission's finding that a high minimum legal capital cannot be seen as an effective means of creditor protection,[21] it underlined the function as a threshold for solidity and as a counterpart for limited liability.[22] Nevertheless, the rapporteur *Klaus-Heiner Lehne* stressed, that a minimum capital should not burden the establishment of an SPE.

The system of a registered share capital as a means of creditor protection is also limited as regards the raise of capital and distributions. According to Art. 20 para. 1, shareholders pay the agreed consideration in cash or in kind. Their liability for the consideration is subject to national law. The Commission's explanatory memorandum states that the articles of association are free to determine the time and the way the consideration is paid or provided. Services are explicitly cited as an example of a possible consideration in kind.[23]

Regarding capital maintenance, the Commission's draft statute introduces in Art. 2 para. 1 point (b) a wide notion of distributions. It covers "any financial benefit derived directly or indirectly from the SPE by a shareholder, in relation to the shares held by him, including any transfer of money or property, as well as the incurring of a debt." The European Parliament proposes to limit this definition to those benefits not balanced by a consideration (Amendment 10, Art. 2 para. 1 point (b)). Distributions are allowed on the basis of a balance-sheet test; as far as the SPE's assets fully cover its liabilities (Art. 21 para. 1). Another limit to distributions is the company's share capital as the reservation in favor of the rule on capital reductions (Art. 24) shows.[24] The resolution tries to clarify this prohibition (Amendment 35, Art. 21 para. 1).[25]

Furthermore, shareholders can require the management body to sign a solvency certificate as described above (Art. 21 para. 2).[26] This solvency test can only be made in addition not

[21] COM(2008)396 final, *supra* note 2, at 7.

[22] A6-0044/2009, *supra* note 12, at 42.

[23] COM(2008)396 final, *supra* note 2, at 7-8.

[24] *See* Peter Hommelhoff & Christoph Teichmann, *Eine GmbH für Europa: Der Vorschlag der EU-Kommission zur Societas Privata Europaea (SPE)*, 99 GMBHRUNDSCHAU 897, 906 (2008); different Hadding & Kießling, *supra* note 20, at 149.

[25] On the shortcoming of this attempt, *see* Peter Hommelhoff, *Unternehmensfinanzierung in der Europäischen Privatgesellschaft*, 173 ZEITSCHRIFT FÜR DAS GESAMTE HANDELSRECHT UND WIRTSCHAFTSRECHT 255, 264 n.38 (2009).

[26] The application of this procedure to an SPE's formation was introduced during the discussions in the Legal Affairs Committee as a compromise to keep the minimum legal capital at a symbolic € 1 while trying to secure sufficient capitalization according to the needs of the respective company.

alternatively to the mandatory balance-sheet test.[27] It can be doubted that in situations where this means of creditor protection were necessary shareholders would voluntarily make use of it. An incentive for shareholders to use this option anyway might be included in Art. 22. This provision states that in case of distributions made contrary to Art. 21, shareholders shall only be liable if they knew or should have been aware of the irregularities.[28] A solvency certificate could demonstrate that the shareholders acted *bona fide*. On the other hand, according to the draft resolution, in a private limited-liability company shareholders know about the circumstances of distributions.[29] Therefore, the Parliament proposes to oblige them to return any distribution made in breach of Art. 21 without the need to prove their specific awareness (Amendment 37). Moreover, it recommends directors' liability for wrongful distributions regardless of a prior shareholders' resolution (Amendment 52, Art. 31 para. 5).

III. Employee Participation

The third point, regarding the system of employee participation, is probably the most controversial one. Because of its political importance, this issue has always been an obstacle for consensus on European legislation. For instance, mainly disagreement about employee participation caused the failure of the first four proposals for a European Company (*Societas Europaea, SE*) statute.[30] Even though only a few Member States have employee participation rules for small companies, there is at least room for discussion regarding medium sized companies and groups of companies which are supposed to make use of the SPE as well.

In general, the rules of the Member State in which the company has its registered office (which, according to Art. 7 para. 2, need not be the Member State where its central administration or principal place of business is) apply (Art. 34).[31] After a transfer of the registered office the rules of the (new) host Member State shall apply (Art. 38 para. 1). An exemption is made where one third of the employees work in the (old) home Member State which granted a greater level of employee participation (Art. 38 para. 2). In this case,

---

[27] On the different functions of balance sheet tests and solvency tests, *see* Wolfgang Schön, *Balance Sheet Tests or Solvency Tests – or Both?*, 7 EUR. BUS. ORG. L. REV. 181 (2008)

[28] Pablo Rüdiger S. de Erice & Frank Gaude, *Societas Privata Europaea – Unternehmensleitung und Haftung*, DStR 857, 861 (2009).

[29] A6-0044/2009, *supra* note 12, at 25.

[30] Mathias Siems, Erik Rosenhäger & Leif Herzog, *Aller guten Dinge sind zwei: Lehren aus der Entwicklung der SE für die SPE*, DER KONZERN 393, 400 (2008).

[31] For a detailed, critical analysis of the draft's system of employee participation *see* Peter Hommelhoff, Rüdiger Krause & Christoph Teichmann, *Arbeitnehmer-Beteiligung in der Europäischen Privatgesellschaft (SPE) nach dem Verordnungsentwurf*, 99 GMBHRUNDSCHAU 1193 (2008).

the Commission's proposal obliges the management body to begin negotiations with employee representatives on arrangements for future participation. As in Art. 3 para. 1 of the Directive on employee participation in the Societas Europaea (Directive 2001/86/EC),[32] these negotiations are mandatory. If they fail, the arrangements existing in the home Member State before the transfer shall be maintained (Art. 38 para. 6). Cross-border mergers involving an SPE shall be governed by the national provisions implementing the cross-border mergers Directive (Directive 2005/56/EC)[33] (Art. 34 para. 3).

The advantage of this regulation is quite clear: it offers a simple uniform solution for any SPE. On the other hand, it bears the risk of circumvention of stricter employee participation regimes by the use of pseudo-foreign SPEs (e.g. an SPE registered in the United Kingdom but operating mainly or solely in Germany).[34]

To prevent this circumvention, the Parliament's resolution proposes amendments to Art. 34 and Art. 38. Where the provisions of the Member State of the registered office provides for participation rights, they shall apply to the entire workforce (Amendment 71, Art. 34 para 1). More important, the general principle that employee participation is subject to the rules of the Member State of the registered office as laid down in Art. 34 para. 1 is not applied in certain situation. These exemptions are dependent on the number of employees and their share in Member States with a greater level of employee participation than in the registered office's Member State. They combine the systems of workers' participation of Directives 2001/86/EC and 2005/56/EC. Four different constellations are defined:

> 1. large SPEs with at least 1000 employees and 25% of the total workforce in Member States with a greater level of workers' participation,
> 2. SPEs with 500 to 999 employees and more than 1/3 of the total workforce in such Member States,
> 3. SPEs with less than 500 employees which are formed by transformation, (national) merger or division and have 1/3 of the workforce in such Member States, or
> 4. SPEs with less than 500 employees which are formed *ex nihilo* and have more than 50% of their workforce in such Member States.

---

[32] Council Directive 2001/86 of 8 October 2001 Supplementing the Statute for a European company with regard to the involvement of employees, 2001 O.J. (L 294) 22.

[33] Directive of the European Parliament and of the Council 2005/56 of 26 October 2005 on cross-border mergers of limited liability companies, 2005 O.J. (L 310) 1.

[34] *See* Hommelhoff, Krause & Teichmann, *supra* note 31, at 1195 (finding as a result of the ECJ's rulings on the freedom of establishment that this construction can already be used with any company form from another EU Member State).

In all these constellations, Directive 2001/86/EC shall apply, which means that negotiations between the management and employee representatives shall be undertaken. To avoid this procedure where it is thought to be too burdensome, a reference to Art. 16 para. 4 of Directive 2005/56/EC allows the SPE to choose standard rules instead. Furthermore, employee representatives can vote with a qualified majority of 2/3 to apply the provisions of the registered office's Member State, and Member States may limit the share of employee representatives in the board to 1/3. In constellations 2-4, Art. 16 para. 3 point (e) and para. 5 of Directive 2005/56/EC also apply.[35]
The same rules on employee participation shall govern the transfer of the registered office (Amendment 73, Art. 38 para. 2). Thus, the provisions of the host Member State apply unless the conditions of Art. 34 para 1a are fulfilled.

In the resolution, employee participation is dynamic as it shall be (in case of an increase) or may be (in case of a decrease) adapted whenever a threshold is passed (Amendment 72, Art. 34a). This dynamism is important especially for SPEs with employees in different Member States as a change in the number of employees does also affect the share of employees in certain Member States.

Amendment 77 (Recital 17) calls for the Member States to secure compliance with these rules on employee participation by introducing penalties for their infringements.

IV. References to National Law

Another important part of the report is related to the rules applicable to an SPE. The Commission proposes that, according to Art. 4, an SPE shall be primarily governed by the regulation and the articles of association insofar as they regard the drafting tasks of annex I. Only those matters which are not covered by the regulation or its annex I shall be governed by national law. The draft Parliament resolution stressed the need for uniformity of the statute.[36] As a consequence, the regulation needed to be as comprehensive as possible. Therefore, the European Parliament proposes further SPE specific rules in the areas of directors' liability (Amendment 52, Art. 31 para. 5), consequences of defective resolutions (Amendment 44, Art. 27 para 4) or ineffective clauses in the articles of association (Amendment 63, Art. 43 point (a)) and shareholders' liability for the consideration in kind (Amendment 34, Art. 20 para 3). Nevertheless, it recommends the application of national laws on limited-liability companies if a clause in the articles of association is ineffective and (possible) model articles of association do not provide a corresponding clause (Amendment 63, Art. 43 point (a)).

---

[35] On the interlinkage of these two Directives *see* Olaf Kisker, *Unternehmerische Mitbestimmung in der Europäischen Gesellschaft, der Europäischen Genossenschaft und bei grenzüberschreitender Verschmelzung im Vergleich*, 59 RECHT DER ARBEIT 206 (2006).

[36] A6-0044/2009, *supra* note 12, at 44.

V. Registration / Compliance

The last main point the resolution deals with is the SPE's registration. The Commission proposes a very liberal approach with a single verification which may take place before or even after registration (Rec. 8). Furthermore, it allows an application via electronic means. In contrast, the resolution demands a preventive verification (Amendment 4, Rec. 8) and expands the list of documents or particulars which must be filed upon application at the register (Amendment 22, Art. 10). The Parliament also proposes the creation of a central European register which receives data about the registration of an SPE and subsequent amendments from national registers and shall monitor it "to [avoid] possible abuses and mistakes" (Amendment 21, Art. 9 para. 3a). The Legal Affairs Committee's report underlined the need to have as much protection as necessary and as much freedom as possible for legal transactions.[37] This principle also describes the Parliament's overall view towards the SPE statute.

D. The Council's Position

Under the French Presidency, the Council undertook some efforts to reach agreements on disputed issues. The relationships with national law, the cross-border element, compliance control, the company's registered office, share capital, directors' liability and employee participation were identified as main problems.[38] As shown above, this goes in line with the debates in the European Parliament. From the results of the discussions in the Competitiveness Council of 1 and 2 December 2008, the Presidency created a compromise proposal[39] which was discussed in the Working Party on Company Law until April 2009. As a result, the succeeding Czech Presidency created a revised Presidency compromise proposal[40] which is meant to facilitate debates "and make possible swift progress towards an agreement on the proposed Regulation."[41]

---

[37] Id.

[38] 16400/1/08 Rev 1, *supra* note 17, at 2; Council (EC), '2910th meeting of the Council: Competitiveness (internal market, industry and research) Brussels, 1 and 2 December 2008' (press release), No. 16577/08 (Dec. 1-2, 2008), at 10.

[39] Council (EC), Proposal for a Council Regulation on the Statute for a European private company (SPE), No. 17152/08 (Dec. 11, 2008).

[40] Council (EC), Proposal for a Council Regulation on the Statute for a European private company (SPE), No. 9065/09 (Apr. 27, 2009), not yet accessible.

[41] Council (EC), Progress report on the Proposal for a Council Regulation on the statute for a European private company (SPE), No. 9658/09 (May 8, 2009), at 3.

The first draft made additional references to national law "to avoid any legal vacuum",[42] e.g. in case of a failure to comply with the drafting tasks of annex I. Further references were made regarding the connection of the registered office and the central administration or principal place of business, details on directors' liability, prohibitions or restrictions on transformations, mergers and divisions, and liability for acts undertaken before the registration of an SPE.

It did not introduce the requirement of a cross-border element even though the Presidency had expressed its sympathy for a corresponding business object.[43] Regarding share capital, the draft was based on the 2nd company law directive.[44] It demanded at least 25% of the consideration in cash to be paid up on issue of the shares, while the consideration in kind had to be fully provided within five years. Furthermore, work services should not be accepted as considerations in kind. The limit to distributions also repeated the concept of Art. 15 of the 2nd company law directive: firstly, a net-assets over subscribed capital test, and, secondly, a limitation to the profits of the last financial year adjusted by profits or losses brought forward and reserves. These limitations should apply to financial assistance provided by the SPE, too. The proposal also incorporated the provisions on interim dividends of the 2nd company law directive. The competence to require an additional solvency certificate was shifted from the shareholders to the Member States. On the other hand, no increase of the minimum legal capital was proposed.

The provisions on employee participation were left unchanged by the first Presidency compromise proposal; the general provisions as well as those governing the transfer of the registered office. This gives rise to the apprehension that larger differences existed between the Member States' opinions.

Nevertheless, the latest revised compromise proposal created "a comprehensive framework, with the aim of accommodating concerns related to a possible circumvention [...] while [...] preserving the flexibility of the instrument". This includes (under certain conditions) a negotiation solution.[45]

It introduces further amendments concerning the expulsion and withdrawal of shareholders, the consideration for shares, the role of the general assembly and the representation of the SPE. Moreover, minority rights (Art. 28 and 29) were clarified and expanded by the right to convene a general meeting, the procedure of the transfer of the

[42] 16400/1/08 Rev 1, *supra* note 17, at 3.

[43] *Id.* at 4.

[44] Second Council Directive 77/91 of 13 December 1976 on the coordination of safeguards, 1977 O.J. (L 26) 1 (EEC).

[45] 9658/09, *supra* note 41, at 3.

registered office was aligned to the SE-regulation, and a third annex was introduced listing corresponding national forms of private-limited liability companies.[46]

E. Outlook

The Council's progress report of 8 May 2009 named employee participation, the cross-border element, minimum legal capital and safeguards, compliance control and directors' duties as main issues that needed further discussion. This, again, goes in line with the amendments proposed by the European Parliament. Maybe the support of the three major groups in Parliament for the provisions on employee participation and the large overall support can be seen as a hint for a possible political compromise which - together with the second Presidency proposal - facilitates negotiations in the Council. Due to the existing differences regarding the controversial matters of the statute and the numerous problems the former Czech Presidency had to face beyond the SPE, an agreement could not be reached so far. Yet, some further progress was achieved.
The new Swedish Presidency does not mention the SPE in its work program. The Competitive Council, however, is going to hold a conference "From the Charter for Small Enterprises to the Small Business Act" on 4-6 October 2009.[47] Regarding the SPE, special attention will surely be given to the issue of employee participation.[48] Nothing but a "neutral" solution to this problem will help the statute get the necessary unanimous support from the Member States.[49]

The above has shown that it is far from clear whether on 1 July 2010 the SPE will enter the scene and entrepreneurs from every Member State will be able to form European private companies. Until then, a lot of differences have to be settled.

---

[46] 9658/09, *supra* note 41, at 2-3.

[47] Swedish Presidency, *Work programme for the Swedish Presidency of the EU. 1 July – 31 December 2009*, at 32, available at http://www.se2009.eu/polopoly_fs/1.6248!menu/standard/file/Work%20Programme%20for%20the%20Swedish%20Presidency%201%20July%20-%2031%20Dec%202009.pdf.

[48] Swedish law entitles employees even in small companies (at least 25 employees) to elect representatives to the board of directors, *see* Lone L. Hansen & Erik Werlauff, *Employee Representation on the Board of Directors of a Company with its Registered Office in a Nordic Country*, 6 EUROPEAN COMMUNITY LAW 68, 71 (2009).

[49] *See* Hommelhoff, Krause & Teichmann, *supra* note 31, at 1196.

https://doi.org/10.1017/S2071832200001656 Published online by Cambridge University Press