(Re)Considering the SPE

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On 10 March 2008 the European Commission organized a conference on the European Private Company. A number of speakers, I had the privilege to be one of them, were invited to discuss the most relevant issues that should be taken care of in drafting an EPC regulation.[1] As the representatives of the European Commission, Pierre Delsaux and Philippe Pellé, emphasized a couple of times, that this basically was the last occasion to share views with the Commission before a draft for a Regulation will be presented to the European Parliament. The task that the European Commission has taken on, is a daunting one. Drafting a good company law statute is extremely challenging as is well-known to all who have been involved in drafting a national statute.[2] Of course the lure of simplicity is a siren song which we all love to hear and would even more love to give in to. Unfortunately lawyers, and all familiar with classical literature, realize the consequences. The practice of navigating through the reality of (commercial) life and designing good law is inevitably complicated.

A fundamental problem with the current approach of the SPE[3] is that it mainly focuses on the initial stage of setting up a company. It mostly leaves aside the stage of dealing with conflicts and protecting shareholders and third parties. This is a substantial concern because the private company is an environment with a high risk potential for conflicts, both within the company and *vis-à-vis* third parties (notably creditors).[4] The first category – intra company conflicts – stems from the fact that the environment of a private company is, *ipso facto*, unstable. The goals and activities of a company are open-ended and ultimately will be determined on the basis of majority rule. The main part of what company lawyers do, is dealing with such conflicts and trying to work out arrangements satisfactory to all parties. However, arrangements can only be efficiently negotiated 'in the shadow of the law' (to quote a well known phrase from the sociology of law). Settlements depend, paradoxically, to a large extent on a body of well developed case law. The second category of conflict arises when a private company goes bankrupt. The fundamental issue here is whether a reasonable equilibrium between creditors on the one hand and directors/shareholders on the other hand has been observed. Have directors and/or shareholders taken advantage of the company when the possibility of bankruptcy was already on the horizon? A balanced answer to this question is difficult but absolutely crucial for the credibility of every type of private company. Its importance is even greater as in the case of the SPE it will directly have an impact on the credibility of the European Union. A few scandals if the SPE is used to the detriment of third parties will be a major negative development for the EU!

On the basis of the currently circulating drafts, I have to conclude that legal remedies related to these two, crucial, areas are not easily available and will turn out to be time-consuming, costly and unpredictable. How should this be addressed? I see three possible options. The first option is that the SPE Regulation – not only the rules but also the explanatory notes – will be much more specific and detailed on these issues than currently envisaged. A second option is that these matters will be left to the national law of the Member State where the company is registered – or the national law of the COMI – if a bankruptcy occurs. In almost all national laws a bankruptcy will open up a large body of case law. The third option is to rethink whether a regulation after all is the appropriate way forward. If the goal is to simplify the setting up of companies in other Member States and cutting costs, a Directive might be very effective and the EU will not have to be bogged down in the details. An example is the 12th EC Company Law Directive (on the single member company). Such a Directive could spell out what requirements should be met before a company may present itself as a 'European' company ('SPE' plus an indication of the registered seat).[5] In setting out such minimum requirements the Directive could refer to an Annex which may resemble the current (draft) proposal for an SPE regulation. On that basis the Member States would be free to either remodel their already existing private company law or design a new company form.

1 The presentations and subsequent discussion are taped on video and can be viewed at <http://ec.europa.eu/internal_market/company/epc/index_en.htm>.

2 As I myself have experienced in my role of chairman of the commission preparing the fundamental overhaul of Dutch company law. See for an overview thereof Harm-Jan de Kluiver, 'Towards a Simpler and More Flexible Law of Private Companies', ECLR 2006 pp. 45-68 as well as 'Private Ordering and Buy-Out Remedies Within Private Company Law: Towards a New Balance between Fairness and Welfare', EBOR 2007, pp. 103-120.

3 A draft has been presented by Prof. Christoph Teichmann in this journal (Volume 2006, Issue 6 p. 279ff.).

4 For an extensive discussion of these areas in a comparative context see for example Walter Van Gerven/Harm-Jan de Kluiver, The European Private Company, Kluwer-Intersentia, 1995.

5 For example by using the customary indications of the country of registration like UK, F, D, Sp, It, NL etc.

I am relatively open to what option would be preferred (all have their pros and cons) although I have a slight preference for the third one. But in any case I would call on the European Commission and the European Parliament to take some time to (re)consider the above. After all, one thing is sure: it is of the utmost importance that the European business community is provided with a high level of legal certainty if the SPE is introduced. In this respect the credibility of the European Union at large is at stake. That should not be taken lightly.