



A European Private Company

Is Europe's single legal form for SMEs close to approval?

July 19, 2010

- Small and medium-sized enterprises (SMEs) in Europe have long called for a matching legal form valid across the EU (similar to that of the European company (SE) for large firms).
- The main benefits would be the availability of uniform Europe-wide company structures, significant cost reductions for businesses and further integration of the internal market.
- Given the differing national views regarding the concrete features of the new legal form there is currently no sign of an agreement being reached at the European level in the short term; however, it is possible that progress will be made in negotiations during the year.
- The key issues being discussed in depth are company formation, transnationality and employee participation rights in the new European private company (SPE).

German SMEs wanting to do business in other EU states are virtually unable to set up subsidiaries there in the form of a German private limited company (GmbH). Potential clients are wary of foreign legal forms; they are afraid of dealing with mailbox firms. This is why companies normally choose a legal form typical of the location (such as the S.à r.l. in France or the Sp. z o.o. in Poland). As a result, the companies incur not inconsiderable costs for legal advice, as they seldom possess detailed knowledge about legal forms of business organisation abroad. SMEs throughout the EU have this problem: either they shoulder the increased costs or they refrain entirely from establishing operations in other EU states. For this reason, European SMEs have long been calling for the option of a single EU-wide legal form (similar to the European company (Societas Europaea, SE) for large companies that has been in existence since 2004) to make cross-border activities easier and to improve their competitiveness.

In response, the European Commission put forward a proposal in 2008 in the framework of the "Small Business Act" (SBA) for Europe providing for a Regulation for a Statute for a European Private Company (Societas Privata Europaea or SPE). The proposal was passed by the European Parliament in March 2009 with some amendments. The German government also cited the introduction of the SPE as an objective in its coalition agreement of October 26, 2009 (page 109). However, the Council Regulation proposed at the EU level in December 2009 did not achieve the unanimity required for it to be adopted – partly due to the position of the German government. Since then there has been no more progress, as confirmed by administrators at the European Commission. This means that the statute was not able to come into force as originally intended on July 1, 2010. Hopes are, however, being placed in the Belgian EU presidency in H2 2010.

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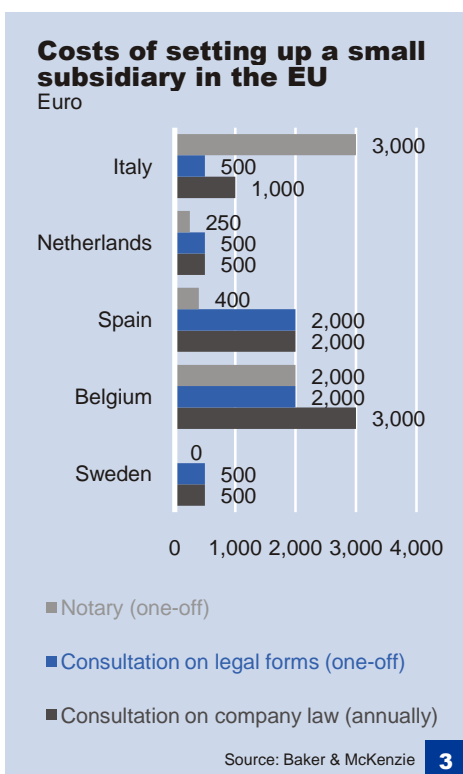
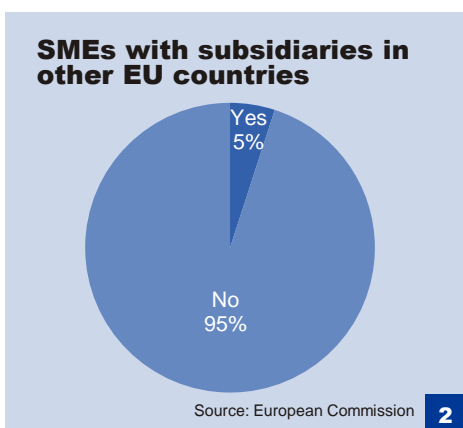
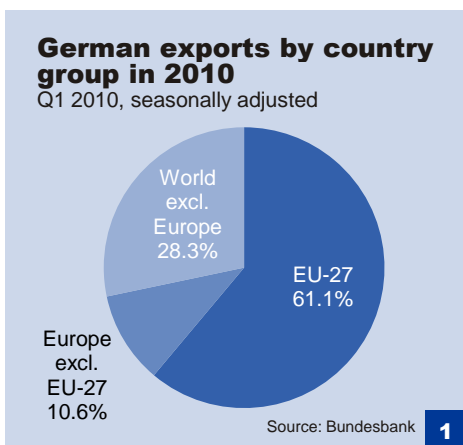
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After explaining the economic importance of the SPE, we shall in the following describe the proposal from the European Commission and its path through the different institutions (including the current situation). Subsequently we shall continue with a detailed evaluation focusing on the contentious areas of the proposal (company formation, transnationality and employee participation rights) and a brief comparison of the experience gathered with the European company (SE).

Economic significance of the SPE

Some 98% of all German exporting businesses are small and medium-sized enterprises.¹ Their main trading partners are located in the other member states of the European Union. This means that more than 60% of German exports go to the EU-27, some 10% to other European countries and 30% are sent outside Europe. This underlines the significance of the single European market – especially for small and medium-sized enterprises. However, German SMEs generate only around 20% of all German export sales¹ and only 5% of European SMEs have subsidiaries in other EU states. Indeed, the costs incurred in establishing and maintaining a subsidiary in another EU state can – on account of the difference in legal forms – be prohibitively high and under certain circumstances prevent a German SME from doing business at all in a different EU state. For example, any business wishing to set up a subsidiary with just two employees in Belgium or Italy has to expect to cough up EUR 2,000 or EUR 3,000 respectively simply to cover notary costs. Of those SMEs that constantly pursue business activities in other EU countries, over 30% regularly seek legal advice when they encounter difficulties concerning legal form. The annual costs thus incurred are high, and for far over half of the companies surveyed the figure was more than EUR 5,000. For these reasons, a single EU-wide legal form would appear to be a suitable means of achieving uniform company structures across Europe, significantly reducing transaction costs and further boosting the integration of the single European market. Since SMEs account for 70% of private-sector jobs in the EU, they certainly also possess significant potential to create jobs. A swift introduction of the SPE would in any case be welcome from an economic point of view.

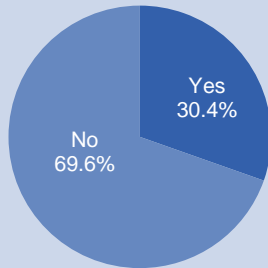
Lean proposal presented by the European Commission

According to the plans of the European Commission the SPE is meant to be a joint-stock company with limited liability (Article 1) like the German GmbH, i.e. the shareholders are liable up to the amount of the capital for which they have subscribed (Article 3).² The company can be founded *ex nihilo*, by transformation, merger or division (Article 5), and registration of the SPE is only subject to a legality check of the documents at one level, either by an administrative or judicial body or via certification by a notary (Article 10). The minimum share capital of the SPE has the symbolic value of EUR 1 (Article 19). An SPE may have its principal place of business and its registered office in two different member states (Article 7). The shares are not to be publicly traded (Article 3) and the exact conditions for a transfer of shares are to be set out in the SPE's articles of association (Article 16, Annex I). Companies enjoy considerable room for manoeuvre when drawing up the articles of

¹ Institut für Mittelstandsforschung in Bonn. IfM Bonn – Bedeutung der außenwirtschaftlichen Aktivitäten für den deutschen Mittelstand. Bonn 2007.
² European Commission. Proposal for a Council Regulation on the statute for a European private company of June 25, 2008.



Legal advice on form of business organisation?



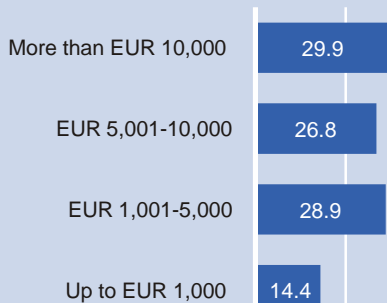
European SMEs faced with difficulties doing business in other EU member countries.

Source: European Commission

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Annual costs of legal advice

In %

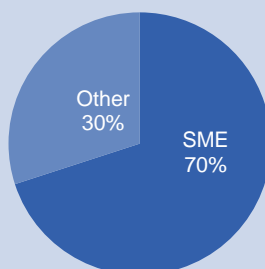


SMEs faced with difficulties doing business in other EU member countries caused by legal form.

Source: European Commission

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SMEs are key employers in the EU



SME share of total private-sector employment in the EU.

Source: European Commission

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association and establishing the structure of the SPE (Article 8, Annex I). However, for the purpose of reducing the cost of setting up an SPE the European Commission shall be mandated to make model articles of association available as a “public service”.³ The SPE can be operated by a two-tier (dual) board (separate supervisory and management bodies) or by a single-tier (unitary) board (administrative board). Distributions may only be made to shareholders if the SPE satisfies a balance-sheet test (assets must, following the distribution, fully cover liabilities) (Article 21). Fundamentally, the rules on employee participation are those applicable in the member state in which the SPE has its registered office (Article 34). The SPE’s registered office may be transferred without restriction to any other member state of the European Union (Article 35). However, if lower co-determination standards apply in the host member state than in the home member state, the management body and the representatives of the workforce are required to negotiate an agreement on employee participation. In the absence of an agreement, the rules of the home member state shall be maintained (Article 38). Matters related to accounting, insolvency, labour and tax laws shall continue to be governed at the national level, but the EU member states are to ensure tax neutrality for the SPE across member states.⁴

EU institutions dragging their feet on consultations

The European Parliament proposed several major amendments to the draft proposal.⁵ For instance, the SPE should have a cross-border component as documented by one of several criteria (Amendment 70). Otherwise, it will be treated as a private limited-liability company in the member state in which the SPE has its registered office. Possible components: a cross-border corporate object, a cross-border business intention, 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. Moreover, further formation formalities as prescribed by applicable national law are to be possible, so the two-stage registration procedure common in Germany for example (legality check by both a notary and the registry office for a GmbH) may be maintained (Amendments 20 and 79). Furthermore, in the case of distributions, a solvency test is required in addition to the balance-sheet test; i.e. an SPE must declare that it will be able to pay its debts as they become due in the normal course of business within one year of the date of the distribution. If a solvency certificate is not provided, the capital of the SPE shall be at least EUR 8,000 instead of EUR 1 (Amendment 33). Here, too, the European Parliament wants to bring the provisions of the SPE statute more in line with the provisions of Germany’s GmbH law (minimum share capital: EUR 25,000). But the most fundamental amendment to the proposal pertains to employees’ rights of participation: the standard home-member-state rule ceases to apply if given criteria are exceeded in a certain way, with the key criteria being the size of the workforce and the share employed in a member state with higher co-determination standards than the country in which the SPE has its registered office. If, for instance, the SPE has between 500 and

³ Anzinger. Betriebs-Berater. Heft 49/2009, p. 2608.

⁴ European Commission. Proposal for a Council Regulation on the statute for a European private company of June 25, 2008, page 2.

⁵ European Parliament. European Parliament legislative resolution of 10 March 2009 on the proposal for a Council regulation on the Statute for a European private company.

The SPE time line

The first notions about a single legal form for SMEs in the EU cropped up in the 1970s. However, as was the case with the European company (SE), the path to its realisation will be very long owing to the different visions about its structure at the national level. Following a feasibility study in 2005 and a report from the European Parliament in 2006 the European Commission conducted a public consultation round and a survey of the European Business Test Panel in 2007. In 2008 the Commission hosted a major conference with participants from 24 member states and tabled a proposal for a Council regulation for the SPE in June of the same year. The European Parliament accepted a revised version of the proposal in March 2009. A compromise proposal put forward by the Swedish presidency of the Council in November 2009 failed in December 2009 to achieve the unanimity required. Originally the plan had been for the SPE regulation to come into force on July 1, 2010. The Belgian presidency says it will readdress this issue in the second half of the year.

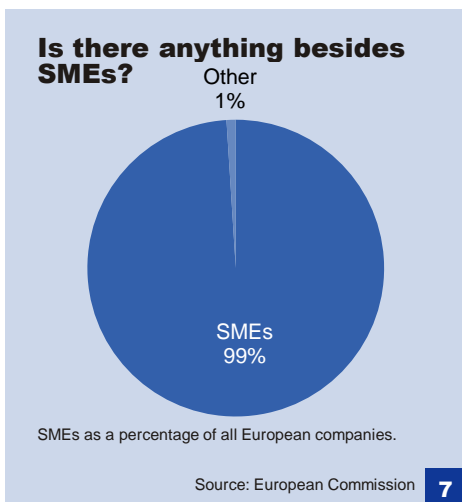
1,000 employees and more than 25% of them work in a country that is not home to the registered office but that has more employee participation rights, the home-member-state rule does not apply. Instead, the negotiations solution applicable to the European company (SE) is also to apply to the SPE (Amendments 71 and 73).

On November 27, 2009 the Swedish presidency of the Council tabled a compromise proposal.⁶ It also prescribes that the SPE must have a cross-border component (Article 3). Formation of an SPE by division is to be ruled out (Article 5). Also, the principle is dropped that the registered office and principal place of business may be located in two different member states (Article 7). Instead it is proposed that, initially, for a period of two years the two must be in the same country. Like the Parliament’s proposal, this draft also strengthens the position of notaries. For example, an SPE’s articles of association are to be subject to the formal requirements of the applicable national law (Article 8). It follows that if an SPE were to be registered in Germany the articles of association would require certification by a notary. In response to demands for a higher minimum capital requirement the Swedish presidency of the Council proposed that the respective member states have the option of setting a higher capital requirement not exceeding EUR 8,000 for SPEs registered in their territory (Article 19). The issue of employee participation is also resolved in this proposal by means of a special negotiating body along with standard rules (Article 35 and 35a through 35d).

Agreement has allegedly been reached in the meantime on the issue of a legality check of documents. The failure of negotiations in December 2009 is said to be attributable to the minimum capital requirement, employee participation rights and, in connection with the latter, the possibility of maintaining the principal place of business and the registered office of the SPE in two different countries. In countries like Germany in particular there are fears that the unrestricted choice of a country of registration could be abused to circumvent rights on employee participation. At present, mainly the positions of the governments of Germany and Austria are blocking an agreement. Following the “Lisbon” judgment handed down by Germany’s Federal Constitutional Court on June 30, 2009 and the subsequently adopted *Integrationsverantwortungsgesetz* (Integration responsibility law) of September 22, 2009, the situation has not become any easier.⁷

Assessment of the SPE: Good for SMEs and the single market

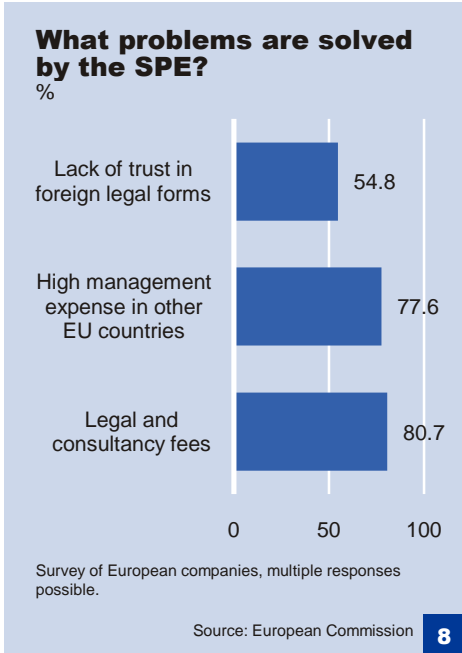
The idea of introducing the SPE is to be welcomed. The benefits are obvious: the provision of a single legal form across the EU also at the SME level can help companies to substantially reduce the cost of doing business in a different EU member state and boost related legal certainty. This in turn brings the EU closer to its objective of de facto completion of the internal market. The alternative of harmonising the legal forms of SMEs across the EU is unrealistic. Currently, this would not be politically feasible and it is also doubtful



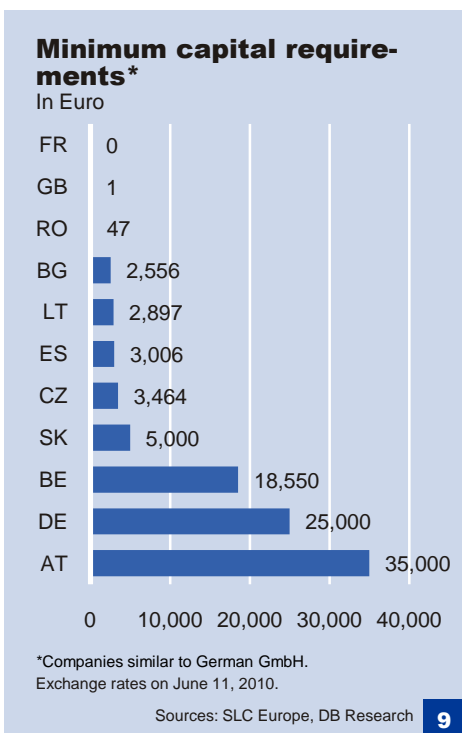
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⁶ Revised Presidency compromise proposal for a Council Regulation on an European private company, dated November 27, 2009. We address the compromise proposal only briefly since it still contains certain lacunae (e.g. in Article 7) and for this reason it is more a basis for discussion than a final draft.

⁷ An act of assent is required from the Bundestag and the Bundesrat (Germany’s first and second chambers of parliament) to permit Germany’s representative at the European level to vote for the SPE regulation. For more (in German) see Hommelhoff/Teichmann. GmbHRundschau. Heft 7/2010, p. 347ff.



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whether such standardisation would be desirable in the first place. The formation of a German GmbH with a registered office abroad is not practicable either.⁸

Several studies document the considerable demand for a single European legal form for SMEs. Some 99% of the companies in the European Union are SMEs. A survey conducted by the European Commission among 517 European businesses found that 67% expected the SPE to make it simpler and cheaper to set up cross-border subsidiaries in the EU.⁹ This is backed by a study commissioned by the VDMA (Verband Deutscher Maschinen- und Anlagebau – German Engineering Federation): any business wanting, for instance, to set up subsidiaries in five other EU member states must currently reckon with having to pay EUR 5,000 in one-off formation costs and EUR 16,500 in annual consultancy costs. The VDMA says the introduction of the SPE could lower these costs by 80%.¹⁰ The company executives surveyed indicate that the main problems that can be solved by the SPE are legal and consultancy fees, the high management expense in other EU countries and the lack of trust in foreign legal forms. According to KPMG, 60% of German companies and 66% of foreign companies can imagine setting up their subsidiaries in other parts of Europe as SPEs.¹¹

The European Commission conducted detailed discussions with European SMEs on various occasions in 2007 and 2008 on how to structure the SPE and subsequently geared its proposal to the companies' needs. All three major amendments put forward by the European Parliament (pertaining to formation, cross-border activities and employee participation in the SPE) oppose this orientation at least in principle and should therefore be reviewed carefully as to their necessity.

Minimum capital requirement: Big is beautiful

Increasing the minimum capital requirement from EUR 1 to EUR 8,000 impedes the formation of an SPE in exactly the same way as opening the door to a two-stage legality check does. The European Commission contends that a uniform minimum capital requirement would unleash considerable difficulties owing to the differing standards of living within the European Union: it says the minimum capital requirement in the EU-15 (old member states) averages EUR 10,000 - 12,000, while the figure in the EU-12 (new member states) is merely EUR 4,000.¹² It is a fact that the minimum capital requirements of comparable company forms across the EU widely differ in some cases. Furthermore, company capital requirements are seen to vary substantially from sector to sector. Moreover, the Commission indicates that cash flow or personal guarantees command much greater importance as creditor protection nowadays than minimum capital requirements do.¹³

At this juncture it has to be pointed out that the minimum capital requirement is not the same as a company's capital requirement. Besides, as a legal form, the SPE is focused on SMEs that operate across EU borders and in most cases have capital-intensive

⁸ See Teichmann. RIW. Heft 3/2010, p. 121ff.

⁹ Financial Times Deutschland, September 18, 2009, p. 3SA03.

¹⁰ Verband deutscher Maschinen- und Anlagenbauer. Press release June 25, 2008.

¹¹ KPMG. Press release March 2, 2009.

¹² European Commission. Commission staff working document accompanying the Proposal for a Council Regulation on the Statute for a European Private Company, p 6f.

¹³ European Commission. Proposal for a Council Regulation on the statute for a European private company of June 25, 2008, page 8.

A sufficient minimum capital requirement is a buffer against losses

operations anyway.¹⁴ And the fact that the specification of a minimum capital requirement presents difficulties because there is currently such a broad range among the EU states does not mean that it can be waived entirely. It is precisely the limited degree of liability that often induces particularly risky business conduct: a study has shown that 90% of newly registered limited companies in Germany using the UK legal form with a minimum share capital of EUR 1 had already been deregistered within 18 months.¹⁵ For this reason, a significant minimum capital requirement (the amount being negotiable) is also desirable for the SPE. Not only acknowledged legal experts demand a minimum value as a threshold for professionalism and as a buffer against losses¹⁶. The German business federation VDMA, for instance, says it also regards a minimum capital requirement of EUR 10,000 as appropriate¹⁷. In this context it is to be welcomed that the European Parliament called for a revision of the Commission's draft on this matter and that the Swedish presidency of the Council responded accordingly. Even though it may be questionable whether it really makes sense that the minimum capital requirements differ across the EU member states and whether it might not be preferable to have a uniform rate (that is relevantly higher than EUR 1) under certain circumstances (the target being a single legal form), the revised proposals head in the right direction.

A single legality check is sufficient***Legality check: Small is beautiful***

By contrast, things do not appear to be heading in the right direction with the allowance of a two-stage legality check based on additional national rules. Notary fees are also costs that should not have to arise, according to the Commission. Since model articles of association are to be made available for the SPE, a single legality check should suffice. Besides, the SPE founders may choose to have the legality of their documents controlled by either the registry office or a notary. So anyone preferring to have a legality check performed by a notary may continue to choose this option. German, French and Austrian notaries in particular fear that the introduction of the SPE in the form proposed by the Commission will result in losses of revenue for their profession.¹⁸ However, the good idea of a simple procedure for setting up a company should not be jeopardised by undue consideration of the vested interests of specific groups.

A transnationality check creates legal uncertainty***Evidence of transnationality: Superfluous bureaucracy***

The European Commission deliberately refrains from prescribing bureaucratic evidence of cross-border activity as a prerequisite for the SPE. Otherwise, continual extensive checks would be needed and there would be an atmosphere of legal uncertainty. Changes of legal form could suddenly become necessary on a change of business strategy. Besides, such an evidence rule could probably be circumvented quite easily.¹⁹ The option of the SPE is addressed to SMEs. For this reason, formation formalities should not be overly

¹⁴ Anzinger. Betriebs-Berater. Heft 49/2009, p. 2610.

¹⁵ Maul/Röhrlich. Betriebs-Berater. Heft 30/2008, p. 1578.

¹⁶ Anzinger. Betriebs-Berater. Heft 49/2009, p. 2610; Hommelhoff/Teichmann. GmbHHRundschau. Heft 17/2008, p. 904.

¹⁷ Verband deutscher Maschinen- und Anlagenbauer. Argumentationshilfe Europäische Privatgesellschaft of September 2008.

¹⁸ Frankfurter Allgemeine Zeitung. November 4, 2008, p. 21; Wirtschaftswoche. <http://www.wiwo.de/politik-weltwirtschaft/bundesregierung-blockiert-europa-gmbh-397226/> (May 19, 2009, called up June 9, 2010).

¹⁹ Hommelhoff/Teichmann. GmbHHRundschau. Heft 17/2008, p. 900.



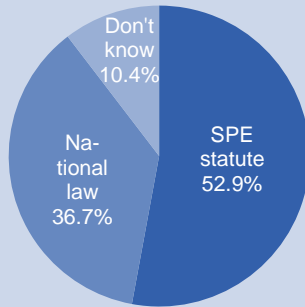
complex. The SPE joins a line-up of already existing national legal forms. Placing restrictions on the SPE would be wrong from an economic standpoint. A certain amount of competition between existing legal forms in the framework of the European subsidiarity principle is desirable and will help in establishing the SPE as a European “seal of quality”, as planned by the European Commission.²⁰

Employee participation: Long and arduous dispute

Employee participation continues to be a highly contentious issue. There are fears that companies could locate their principal place of business (and the lion’s share of their employees) in a country with high employee participation standards, while basing their registered office in a country with a very low level of co-determination. Going by the principle of the home member state, the low standards for employee participation would apply for the bulk of the employees. This means that the SPE could be misused to circumvent employee participation rights. True, such an approach would, under certain circumstances, possibly be in keeping with the Commission’s proposal. The European Parliament’s proposal goes to the other extreme and introduces very complicated threshold value combinations and the complex negotiations solution of the European company (SE). The compromise proposal put forward by the Swedish EU presidency contains a complex solution that on numerous occasions refers to national rules on employee participation. All three proposals (Commission, Parliament and Swedish presidency) fail, therefore, to grasp the visions of the business community. After all, the majority of the entrepreneurs themselves would like to have the rule set out in the SPE statute, i.e. they want no special national arrangements.

The political atmosphere on employee participation rights may correctly be regarded as “highly charged”.²¹ However, this must not lead to the rules on employee participation becoming too complicated or conflict-laden. This fear has been expressed by, for example, a judge of Germany’s Federal Court of Justice, Wulf Goette, who is head of the Second Civil Panel on corporate law.²² He has warned emphatically against an exaggerated willingness to compromise and against ultimate failure of the SPE proposal on the co-determination issue. It is important to note here that the SPE is conceived as a legal form for SMEs. They rarely employ more than 500 workers. This means that – also in Germany with its high employee participation standards – these companies do not fall under special rules on co-determination.²³ If the European SMEs do not reach the relevant threshold values anyway, it would make all the less sense to allow the SPE to fail on the employee participation issue.

Where should worker co-determination be regulated?



Survey of companies in the EU.

Source: European Commission

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The European company (SE) – a success story that took its time

The European company (also *Societas Europaea*, abbreviated SE) was launched on October 8, 2004, primarily as a legal form for European public limited-liability companies, on the basis of EC Council Regulation 2157/2001 on the Statute for a European company (SE) of October 8, 2001. In Germany, the national law on the introduction of the European company (SE-Einführungsgesetz) came into effect on December 29, 2004. Initially, many were reluctant to embrace the SE. Some of the reasons for this were the complicated rules on employee participation rights and the legal uncertainty linked with numerous references to national law. The first company to become an SE in Germany was MAN Diesel in 2006. Now there are many prominent examples, including Allianz, BASF, BP Europe and Porsche Automobil Holding.

²⁰ European Commission. Commission staff working document accompanying the Proposal for a Council Regulation on the Statute for a European Private Company, p. 4.

²¹ Anzinger. *Betriebs-Berater*. Heft 49/2009, p. 2611.

²² *Frankfurter Allgemeine Zeitung*. May 28, 2009, p. 12.

²³ *Süddeutsche Zeitung*. November 11, 2009, p. 18; *Betriebs Berater*. Heft 49/2009, p. 2611.

Employee participation and the SE – only limited value as a model

In the case of the SE, employers and employees are required to reach a written agreement on employee involvement in the SE being formed, doing so in the framework of a special negotiating body (selection of representatives according to a country factor, trade unions having a right of proposal). A qualified majority is necessary for adoption. If employee participation rights are scaled back, two-thirds of the members representing at least two-thirds of the employees from at least two member states must be in agreement. However, this complex majority rule only applies under certain conditions. If no agreement is reached by the body of negotiators, a complex set of standard rules kicks in to secure the employees' participation rights. This arrangement differs in turn depending on how the SE is formed. Moreover, employees in the SE enjoy specific consultation rights.

Conclusion: Rapid agreement to the benefit of SMEs

It was because of a very similar debate on employee participation rights that it took roughly 30 years to prepare and adopt legislation to launch the European company (SE).²⁴ It is to be hoped that the SPE will not meet a similar fate. After all, the depicted gains that may be achieved via early implementation of the SPE are simultaneously the losses to be suffered if its implementation is delayed.

The SE itself is not suitable as a company form for SMEs. This is due to the restrictions on formation and above all on the high minimum capital requirement of EUR 120,000. Nonetheless, it is still worthwhile to take a brief look at the experience gained with SEs to date. There was considerable reluctance to accept the SE in Europe, particularly because of the complicated rules of the SE Regulation and the scarcely comprehensible links between European and national law.²⁵ The BDI, the federation of German industries, has also criticised the numerous references to national law in SE legislation.²⁶ A complex mixture of European and national laws would not lead to the legal certainty desired by SMEs, which is a declared objective for the introduction of the SPE.

The SPE is a perfect example of how the bureaucracy of the European legislative process initially dilutes the implementation of a broadly supported idea and could ultimately nullify it. An SPE whose statute takes account of all the particular national interests, losing the characteristic of EU-wide uniformity defining it in the process and therefore finding only little or no acceptance for it in the business community is no help to anyone. The economic value-added that could indisputably be offered by a sensibly structured SPE should not be put at stake. It is to be hoped that the plans of the Belgian EU presidency to focus intensively on the SPE issue will result in an acceptable regulation and a final agreement before the end of 2010.

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²⁴ Hadding/Kießling. Zeitschrift für Wirtsch.- und Bankrecht. Heft 04/2009, p. 150.

²⁵ Verband deutscher Maschinen- und Anlagenbauer. Argumentationshilfe Europäische Privatgesellschaft.

²⁶ BDI and BDA. Positionspapier. Berlin 2008.