

DE GRUYTER

*Heribert Hirte,
Christoph Teichmann (Eds.)*

**THE EUROPEAN PRIVATE
COMPANY – SOCIETAS
PRIVATA EUROPAEA (SPE)**

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**EUROPEAN COMPANY AND FINANCIAL LAW
REVIEW SPECIAL VOLUME 3**

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The European Private Company – Societas Privata Europaea (SPE)

Edited by
Heribert Hirte and Christoph Teichmann



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Special Volume 3

Preface

In June 2008, the European Commission published its proposal for a European Private Company (EPC). It aroused great interest amongst practitioners and academics. Business associations appreciated the prospect of having a uniform legal entity for organizing cross-border activities in the Common Market. Legal scholars partly supported this view, whereas others raised concerns about possible competition between the EPC and its national counterparts.

The European Company and Financial Law Review (ECFR), in 2009, dedicated several presentations of its 4th international symposium, held in The Hague, to the European Private Company. The discussions proved that designing the EPC – or, in Latin: *Societas Privata Europaea* (SPE) – involves dealing with the whole range of private company law.

In this respect, there is still a great variety amongst the Member States' jurisdictions. European harmonization so far mainly focused on listed companies since most of the Member States were not prepared to harmonize the laws on private companies. The EPC could offer a compromise solution. It adds an additional layer of company law without interfering with national law.

In order to summarize the discussion of the past years, this special volume offers a guideline to the EPC from a comparative law perspective. Authors from different jurisdictions express their views on the core issues of private company law: formation, internal affairs, creditor protection, minority protection, tax law – to name just a few. When an EPC Regulation is finally enacted, their contributions will serve as a first guidance to the new law.

We are grateful to the translators who helped this ECFR's special volume to see the light of day: *Beatriz de Luque* (who translated *Latorre's* contribution), *Austin Dunne* (who translated the general report as well as *Wicke's* and *Witt's* contribution) and *Roger Fabry* (who translated *Navez's* and *Krause's* contribution). We also thank the numerous helping hands in Hamburg and Würzburg without whose spontaneous help this special volume would not have been possible. Among them, we would like to thank in particular *Audrey Goodwater*, assistant to the editorial board, who managed to index the whole book in the narrow timeframe of the publication process.

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Abbreviations

ABLJ	American Business Law Journal
AcP	Archiv für die civilistische Praxis
AG	Die Aktiengesellschaft
AktG	Aktiengesetz
AuR	Arbeit und Recht
BB	Betriebs-Berater
B.J.I.B. & F.L.	Butterworths Journal of International Banking and Financial Law
BtDrs	Bundestagsdrucksache
CKLR	The Chicago Kent Law Review
CMLR	Common Market Law Review
COM	European Commission
Comp.Law.	The Company Lawyer
DB	Der Betrieb
DJT	Deutscher Juristentag
DStR	Deutsches Steuerrecht
DStZ	Deutsche Steuer-Zeitung
EBOR	European Business Organization Law Review
EBLR	European Business Law Review
ECFR	European Company and Financial Law Review
ECGI	European Corporate Governance Institute
ECL	European Company Law
EEIG	European Economic Interest Grouping
EPC	European Private Company
EuZA	Europäische Zeitschrift für Arbeitsrecht
EuZW	Europäische Zeitschrift für Wirtschaftsrecht
EWS	Europäisches Wirtschafts- und Steuerrecht
FBR	Family Business Review
FAZ	Frankfurter Allgemeine Zeitung
FBR	Family Business Review
FR	Finanz-Rundschau
FS	Festschrift
GesRZ	Der Gesellschafter
GLJ	German Law Journal
GmbH	Gesellschaft mit beschränkter Haftung
GmbHG	GmbH-Gesetz
GmbHR	GmbH-Rundschau
GS	Gedächtnisschrift
GPR	Zeitschrift für Gemeinschaftsprivatrecht
HGB	Handelsgesetzbuch
HLR	Harvard Law Review
Int Comp Corp Law J	International and Comparative Corporate Law Journal
IStR	Internationales Steuerrecht
JBL	The Journal of Business Law
IWB	Internationales Steuer- und Wirtschaftsrecht
JCL	The Journal of Corporation Law

Konzern	Der Konzern
KSzW	Kölner Schrift zum Wirtschaftsrecht
MLR	Modern Law Review
MünchHdbArbR	Münchener Handbuch zum Arbeitsrecht
NJ	Nederlandse Jurisprudentie
NJW	Neue Juristische Wochenschrift
NZA	Neue Zeitschrift für Arbeitsrecht
NZG	Neue Zeitschrift für Gesellschaftsrecht
RabelsZ	Rabels Zeitung
RdA	Recht der Arbeit
RdS	Revista de Derecho de Sociedades
RIW	Recht der internationalen Wirtschaft
SLR	Stanford Law Review
StB	Der Steuerberater
StuB	Unternehmensteuern und Bilanzen
Ubg	Die Unternehmensbesteuerung
WM	Wertpapiermitteilungen
ZESAR	Zeitschrift für europäisches Sozial- und Arbeitsrecht
ZEuP	Zeitschrift für Europäisches Privatrecht
ZGR	Zeitschrift für Unternehmens- und Gesellschaftsrecht
ZHR	Zeitschrift für das gesamte Handels- und Wirtschaftsrecht
ZInsO	Zeitschrift für das gesamte Insolvenzrecht
ZIP	Zeitschrift für Wirtschaftsrecht

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Societas Privata Europaea (SPE) – General Report

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A. Introduction: A new chapter in European company law

In June 2008, the European Commission presented its draft for a European Private Company (SPE). In the subsequent four years, the draft was intensively discussed and repeatedly amended in the negotiations at European level. The significance this discussion has and will have for European company law is only gradually penetrating the general consciousness – with the SPE draft a new chapter in European company law has been opened in many respects.

While for many years listed companies were the centre of attention, the SPE set in motion an intensive and genuinely European discourse on the legal questions of small companies. For the first time in the history of European company law, the interests of small and medium-sized companies and not those of the capital market occupy centre stage. This discussion touches on systemic questions of the law of non-listed companies at a depth never previously achieved. How wide is the contractual freedom of the shareholders? How can flexibility and creditor protection be reconciled? How do we deal with worker participation in the small and medium-sized company sector? These questions are no longer discussed merely in national circles, but on the European stage.

The SPE was therefore a major leap forward for true European legal scholarship in company law. The fact that in this collection the contributions of authors from various Member States can quite naturally discuss one and the same legislative project shows the level which European discourse has achieved. For that alone the endeavour has been worthwhile – even though we, together with many others, do not lose sight of the objective that this legal form be available in the near future in reality for small and medium-sized companies in the European internal market.

This present general report is aimed at summarizing the discussion and the knowledge gained. It will show where the crucial strands in the discussion should to be directed, where obstacles are to be overcome and how this is inseparable from the basic questions of the law on small companies. Firstly, the *history and legislative process* so far on the SPE will be described (B.). An analysis of the *European character and uses* of the SPE (C.) will follow. Then the questions of *formation* (D.), *creditor protection* (E.), *internal organisation* (F.) and *employee participation* (G.) will be dealt with before a *conclusion* is drawn (H.).

B. History and legislative process

“Pour une SARL européenne” – that is the title given by the French company lawyer Jeanne Boucourechliev to her fundamental paper of 1973¹ in which she argued for a flexible legal form available throughout Europe besides the Societas Europaea (SE), discussion of which had been proceeding for some years. According to Boucourechliev, the SE as a legal form for big companies left much to be desired for small and medium sized companies which intended to expand their activities into the European internal market. As S.A.R.L. and S.A. in France or GmbH and AG in Germany offer complementary legal forms and uses, so also at European level there should be a small and flexible easily managed legal form besides that for big companies.

It took a certain time before the French paper received its due attention and discussion outside the country and in particular in German academic circles.² From the cross-border dialogue which ensued, an internationally composed working group resulted which in 1998, under the leadership of the French business confederation MEDEF³ and the research institute of the Paris Chamber of Industry and Commerce (CREDA)⁴, produced a first draft for the statute of a “Société Fermée Européenne”.⁵ The terminology indicates what was involved. A European legal form with a closed circle of shareholders. Some time later, the Latinised form “Societas Privata Europaea” came to be used.⁶ This makes it clear that a second European company is concerned which has its place side by side with the Societas Europaea which had meanwhile be introduced (2001).⁷

¹ J. Boucourechliev, *Pour une SARL européenne* (1973). On the early history of the SPE in detail A. Lévi, ‘De la ‘SARL Européenne’ à la ‘Societas Privata Europaea’: Étapes d’un long Cheminement’, FS Hommelhoff, (2012), p. 663.

² Fundamentally P. Hommelhoff, ‘Die Société fermée européenne’, WM (1997), p. 2101.

³ See the presentation by J. Simon, held at the public hearing before the Committee on legal affairs of the European Parliament in Brussels, 22 June 2006, ECL (2006), p. 274.

⁴ Centre de recherché sur le droit des affaires.

⁵ Accessible in French, English and German on the CREDA website: www.etudes.ccip.fr/dossiers/spe/de/textde.htm. On the preparatory work: J. Boucourechliev (ed.), *Propositions pour une société fermée européenne* (1997); J. Boucourechliev/P. Hommelhoff (ed.), *Vorschläge für eine Europäische Privatgesellschaft* (1999); cf. also the advanced version of the draft at C. Teichmann, ‘Text of the draft EC Regulation for a European Private Company (SPE)’, ECL (2006), p. 279.

⁶ For the first time C. Teichmann, (fn 5), p. 279.

⁷ Regulation (EC) No. 2157/2001 of the Council on the Statute for the European Company (SE) of 08.10.2001, OJ. EC No. L 294, p. 1.

The proposal developed by the working group meeting in Paris composed of English, German, French and Dutch experts spread in academic literature⁸ and was discussed at many conferences throughout Europe.⁹ In 2002, the European Commission formed an expert group to develop proposals for the modernisation of European company law. The final report of this High Level Group of Company Law Experts also dealt with the project of the SPE and recommended to the European Commission that it obtain a feasibility study.¹⁰ This was to be presented in 2005¹¹ but remained, in its recommendations, too imprecise in order to provide the Commission with a clear direction for further progress. It had been realised in the economy, however, that the SPE could be an extremely helpful instrument particularly for small and medium-sized companies with cross-border activities.¹² In view of the inactivity of the European Commission, the European Parliament took the initiative at the beginning of 2007 and unmistakably called upon the Commission to act.¹³ On 25.6.2008, the Commission finally presented a draft for an EU Regulation on the statute for a European private company (SPE).¹⁴

8 J. Boucourechliev/P. Hommelhoff (ed.) (fn 5); D. Helms, *Die Europäische Privatgesellschaft* (1998); P. Hommelhoff/D. Helms, 'Weiter auf dem Weg zur Europäischen Privatgesellschaft', GmbHR (1999), p. 53; P. Hommelhoff/D. Helms (ed.), *Neue Wege in die Europäische Privatgesellschaft* (2001).

9 Cf. conference reports by D. Helms, 'Auf dem Weg zur Europäischen Privatgesellschaft', GmbHR (1999), p. 963, P. Limmer, 'Die Europäische Privatgesellschaft', notar (1999), p. 138 (both on the conference in Heidelberg), P. Dejmek, 'Neue Dynamik im Europäischen Gesellschaftsrecht – eine Europäische Privatgesellschaft als Ergänzung zur Europäischen Aktiengesellschaft?', GmbHR (2002), p. 107 (hearing at the European Economic and Social Committee), D. Helms, 'GmbH-Dokumentation Nochmals – Auf dem Weg zur Europäischen Privatgesellschaft', GmbHR (2000), p. 125 (conference in London), D. C. Schautes, 'GmbH-Dokumentation', GmbHR (2000), p. 1255 (conference in Rotterdam).

10 Final Report of the High Level Group (on EPC p. 113 ff.) of 4.11.2002 is accessible as "working paper" under www.europeanprivatecompany.eu and under http://ec.europa.eu/internal_market/company/modern/index_en.htm.

11 The French version is available on the website of the EU Commission: http://ec.europa.eu/internal_market/company/epc/index_de.htm.

12 See e.g. the presentation held before the Committee on legal affairs of the European Parliament by the in-house counsel of a German middle sized company K. Schunk, ECL (2006), p. 275.

13 Under: www.europeanprivatecompany.eu the initiative report of the European Parliament of 1.2.2007 is available as "working paper". cf. also http://ec.europa.eu/internal_market/company/epc/index_de.htm. Also on the initiative report e.g. S. Kuck/M. Weiß, 'Der Initiativbericht des Europäischen Parlaments für eine Europäische Privatgesellschaft', Konzern (2007), p. 498, C. Teichmann, 'European Parliament Calling for Legislative Action on the European Private Company', ECL (2007), p. 122.

14 Accessible under: http://ec.europa.eu/internal_market/company/epc/index_de.htm.

According to Art. 352 TFEU, the draft requires the approval of all Member States.¹⁵ It was intensively processed in the following French, Czech, Swedish and Hungarian presidencies.¹⁶ The current basis of discussion is the version of 9.11.2009, issued under the Swedish presidency.¹⁷ The Hungarian presidency had restricted itself in view of the advanced negotiated text to a few proposed amendments on sensitive points.¹⁸ The course of the proceedings in the European Parliament should also be referred to. There, the Commission draft was agreed on 10.3.2009 with a large majority. This decision of the Parliament contains some significant proposals for amendment, particularly on the questions of minimum capital and employee participation.¹⁹ **Annex I** thereto (p. 435) presents the draft of the European Commission and marks the changes which had so far arisen up to the version negotiated under the Hungarian presidency.

In December 2009 and in summer 2011, it was attempted at meetings of the European Council to achieve agreement on the SPE statute but without success. The separation between central administration and registered office as well as the co-determination of the employees are issues which are still undecided.²⁰ Particularly the German delegation expressed scepticism on these points as they were dealt with in this version.²¹ The background is the co-determination problem dealt with in **Krause's** contribution.²²

15 Art. 352 TFEU (ex-Art. 308 EC Treaty) is the authorising provision for the introduction of supranational legal forms. This was clarified by the ECJ in its European Cooperatives judgement (ECJ, Rs. C-436/03, Slg. 2006, I-3733). For an opposed view see P.-C. Müller-Graff, 'Rechtsgrundlagen im Gemeinschaftsrecht für die Europäische Privatgesellschaft', in: P. Hommelhoff/D. Helms (ed.), (fn 8), p. 289 (305).

16 On the political obstacles H.-W. Neye, 'Die Europäische Privatgesellschaft: Uniformes Recht ohne Harmonisierungsgrundlage?', FS Hüffer (2010), p. 717 ff. On the position after the Czech Presidency cf. S. Jung, 'Welche SPE braucht Europa?', DStR (2009), p. 1700 ff., on the capital structure. As to the achievements under the Swedish presidency: A. Sandberg/R. Skog, 'SPE – a company law dead end?', AG (2010), p. 580; P. Hommelhoff/C. Teichmann, 'Die SPE vor dem Gipfelsturm – Zum Kompromissvorschlag der schwedischen EU-Ratspräsidentschaft', GmbHR (2010), p. 337; S. Jung, 'Die „schwedische“ Societas Privata Europaea', BB (2010), p. 1233.

17 Accessible under www.europeanprivatecompany.com (under "legal texts").

18 The Hungarian Presidency's draft of the first half-year 2011 is accessible under www.europeanprivatecompany.eu.

19 Accessible under: www.europeanprivatecompany.eu (under "legal texts"); cf. S. Kuck, 'Die Europäische Privatgesellschaft nach dem Votum des Europäischen Parlaments', Konzern (2009), p. 131, and C. Teichmann/P. Limmer, 'Die Societas Privata Europaea (SPE) aus notarieller Sicht – eine Zwischenbilanz nach dem Votum des Europäischen Parlaments', GmbHR (2009), p. 537.

20 Cf. the Memorandum of the Swedish Presidency of 27.11.2009, accessible at 'legal texts' under www.europeanprivatecompany.eu

21 Cf. P. Hommelhoff/C. Teichmann, 'Für die 'Europa-GmbH' schlägt die Stunde des Bundes-tags', FAZ of 29.06.2011, p. 23.

The position of the German delegation was made even more difficult because, on the basis of a judgement of the Federal Constitutional Court which has been taken into account in the Integration Responsibility Act, a separate approval act will be necessary.²³ Since, on the other hand, German industry and also important representatives of most parties take a positive view of the SPE project,²⁴ there are reasons to hope that a compromise can be found on these remaining questions.

C. The European character and uses of the new legal form

I. Complete statute model as a company law guide

1. Regulation by a EU Regulation

Like all supra-national legal forms (European Economic Interest Group, European Public Company and European Cooperative), the SPE is also intended to be regulated by a European regulation. The advantage of a regulation is that its text applies directly in all EU Member States and – unlike a directive – does not require transformation by the national legislator (Art. 288 ss. 2 TFEU). One and the same legal text available in all official European languages is used throughout the EU.

The European Commission in the structure of the SPE Regulation follows the form of a European complete statute on questions of company law.²⁵ The provisions of the European Regulation on formation, financial structure and internal organisation of the SPE are intended to be as conclusive as possible and to be

²² In this special volume, p. 375 et seq.

²³ Cf. H.M. Anzinger, 'Fällt der Schlagbaum für das Europäische Gesellschaftsrecht?', AG 2009, 739 ff.; also R. Krause, in this special volume, p. 393.

²⁴ Cf. Press reports in FAZ (8.12.2010) and Handelsblatt (9.12.2010).

²⁵ H.M. Anzinger, 'Die Europäische Privatgesellschaft – vom Vollstatut zum tragfähigen Kompromiss', BB (2009), p. 2606; P. Hommelhoff/C. Teichmann, 'Eine GmbH für Europa: Der Vorschlag der EU-Kommission zur Societas Privata Europaea (SPE)', GmbHR (2008), p. 897; H. Krejci, *Societas Privata Europaea (SPE) – Zum Kommissionsvorschlag einer Europäischen Privatgesellschaft* (2008); S. Maul/V. Röhrich, 'Die Europäische Privatgesellschaft – Überblick über eine neue supranationale Rechtsform', BB (2008), p. 1574; S. Steiner, *Societas Privata Europaea – Perspektiven einer neuen supranationalen Rechtsform* (2009), p. 56 ff.; H. Wicke, 'Die Euro-GmbH im Wettbewerb der Rechtsordnungen', GmbHR (2006), 356. Monograph on associated questions: H. Völter, *Lückenschluss im Statut der EPG* (2000).