ARTICLES

The European Private Company Before its Pending Legislative Birth

By Peter Hommelhoff *

A. Introduction

In the summer of 2008, the EU Commission will present the draft regulation for a European private company. The Commission indicates by this announcement of the internal market commissioner,[1] after prolonged hesitation that it wishes to comply with the urgent and detailed request of the European Parliament (EP)[2] and to initiate the legislative process. Apparently, the arguments directed at the small and medium sized enterprises (SME) and their specific interests have now, after the EU parliamentarians, also convinced the Commission. In fact, the significance of this group of enterprises in the economy of the Community cannot be over-estimated. The Commission therefore acts with appropriate responsibility in not confining itself to taking up the draft regulation[3] prepared ten years ago by business practitioners and academic lawyers (CCIP/CNPF working group) but being prepared (as can be seen in the Consultation Paper of the General Directorate Internal Market of July 2007[4]) to develop its own statute for a European private company. This paper is intended, mainly on the basis of that Consultation Paper but also on the basis of the EP resolution[5], to introduce the main issues and central regulatory elements of the new legal form of community law.

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[1] Fietz, in: GMBHR 321 (2007).

[2] Accessible at www.eurparl.europa.eu/registre/recherche through "advanced search" in the document type "texts adopted" as of 1 February 2007; in this text, see also the reference to almost identical draft of the European Parliament legal committee with the exception of the co-determination passages.

[3] Reproduced in VORSCHLÄGE FÜR EINE EUROPÄISCHE PRIVATGESELLSCHAFT (Boucourechliev/Hommelhoff eds., 1999), 281 (mainly in the area of creditor protection). See also the revised version by Christoph Teichmann, in EUROPEAN COMPANY LAW 279 (2006).

[4] Accessible at http://ec.europa.eu/internal_market/company/epc/index_de.htm

[5] See, *supra*, note 2.

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B. The Necessity for an EPC

In spite of the legislative initiative promised by the Commission, the practical necessity for the EPC as a supra-national legal form in addition to those already in existence is still an open political question. The necessity for the EPC has to be justified even if only for the reason that all 27 Member States deciding the matter in the Council of Ministers according to Art. 308 EC[6] must be convinced in favour of the EPC and its statute.

I. A Single Organisation

If a SME wishes to be active in the entire European internal market as well as in the three EEA states, by means of local companies as is the norm, it must concern itself in the most extreme case with 29 legal systems, meaning that for the formation of national companies and their operation it must deal with that number of national company laws. On the principle that good advice is expensive, this legal fragmentation leads to very high advisory costs – equally in money and time.[7] This expense, to which the Consultation Paper openly refers[8], is confirmed by the German Chamber of Industry and Commerce (DIHK) in a survey of its member companies and discussions in its working groups and committees published in October 2007.[9] While many of the companies replying did not confirm impediments in cross-border business, a quarter of them nevertheless see in the variety of national regulations a massive problem for their businesses.

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[6] In its judgement of 2 May 2006(Rs. C-436/03, Coll. 2006, I-3733), the European Court of Justice [ECJ] specified this provision as the legal basis for companies of Community law; see hereto CHRISTOPH TEICHMANN, BINNENMARKTKONFORMES GESELLSCHAFTSRECHT, (2006), at 192; in contrast, see Peter-Christian Müller-Graff, *Rechtsgrundlagen im Gemeinschaftsrecht für die Europäische Privatgesellschaft*, in NEUE WEGE IN DIE EUROPÄISCHE PRIVATGESELLSCHAFT, 289, 294 (Hommelhoff/Helms eds., 2001), who suggests to resort to Art. 95 EC as the legislative basis.

[7] See already Peter Hommelhoff, *Die "Société fermée européenne" – eine supranationale Gesellschaftsform für kleine und mittlere Unternehmen im Europäischen Binnenmarkt* -, in WERTPAPIERMITTEILUNGEN [WM] 2102 (1997), at 2102-3; see further
Christian Steinberger, *Die Europäische Privatgesellschaft – Schaffung einer europaweiten Gesellschaftsform für kleine und mittlere Unternehmen im Binnenmarkt*, BETRIEBSBERATER [BB] 7 (2006), at 28 with figures in note 16 (drawing on the experience of the *Verband Deutscher Maschinen- und Anlagenbau* [VDMA])

[8] See, *supra*, note 4 at 4 under II.

[9] Statement of 31 October 2007 at the occasion of the EU consultation on the European Private Company, accessible at www.dihk.de through the link "Recht und Fairplay" on the "DIHK-Positionen zu Gesetzesvorhaben" in answer to Question 1 to the EU Commission

The percentage of companies which confirmed the necessity for an EPC, i.e. 75%, greatly exceeds this number.[10] They see many advantages in the legal form of the EPC, including simpler formation of foreign subsidiaries, a single legal form recognised and known in the entire EU and having the same conditions in each state, consequent simplification in internal management in medium-sized groups[11], increased legal certainty in case of the formation of subsidiaries abroad, increased company mobility, externally effective internationalisation (European label), reduction of advisory costs on formation and ongoing management.[12] On the whole, apparently many enterprises see in the EPC an extremely attractive vehicle for their cross-border activities in the European internal market. In their opinion, the EPC is tailored to the need of SMEs.[13]

II. Alternative National Forms?

The existing legal forms of community law fall more or less far behind as the Consultation Paper accurately reports[14]. In particular, the European company (SE) is said to be directed at a widely distributed shareholding, is too inflexible and too expensive for smaller enterprises and is not a genuine unitary instrument because ultimately of the major influence of national regulations[15]. Contrary to the original aspiration for the SE[16], it is, as a legal form, entirely unsuitable for the organisation of a SME in a cross-border manner in the internal market. The same applies to the

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[10] *Id.*, see the answer to Question 3.

[11] In comparison see Axel Brandi, *Diskussionsbeitrag Einsatzmöglichkeiten einer EPG und ihre Akzeptanz in der mittelständischen Wirtschaft*, in: NEUE WEGE IN DIE EUROPÄISCHE PRIVATGESELLSCHAFT, 79 (Hommelhoff/Helms eds.,.2001) after consultation of a number of medium-size enterprises in east Westphalia; see also Harald Kallmayer, *Einsatzmöglichkeiten einer EPG im Konzern*, ibid., at 84

[12] Specifically on the assessment of the engineering company VDMA, see Steinberger, *supra*, note 7, at 28; in comparison see also Peter Hommelhoff, in FESTSCHRIFT FÜR PETER DORALT, 201, 202 (Kalss, Nowotny & Schauer eds., 2004).

[13] See the DIHK Statement, *supra*, note 9 in the answer to Question 3.

[14] See *supra*, note 4 in the answer to (1) II at 4.

[15] In detail ROBERT GUTSCHE, DIE EIGNUNG DER EUROPÄISCHEN AKTIENGESELLSCHAFT FÜR KLEINE UND MITTLERE UNTERNEHMEN IN DEUTSCHLAND (1993) summarized at 239; consult also TEICHMANN, *supra*, note 6 at 273 with further references in footnote 249 of the text; for an emphatically positive contrasting view, although not fully convincing, see Heribert Heckschen, *Die SE als Option für den Mittelstand*, in: WIRTSCHAFTSRECHT. FESTSCHRIFT FÜR WESTERMANN, 999 (Rainer, Albertz & Eberhard eds., 2008).

[16] SE Statute recital 13 sentence 2 (OJ EC of 10 November 2001, L 294/1), also reproduced in HANS-WERNER NEYE, DIE EUROPÄISCHE AKTIENGESELLSCHAFT, 265 (2005); see also Françoise Blanquet, *Das Statut der Europäischen Aktiengesellschaft (Societas Europaea). Ein Gemeinschacftsinstrument für die grenzüberschreitende Zusammenarbeit im Dienste der Unternehmen*, ZGR 20 (2002), at 52.

European Economic Interest Group and the European Co-Operative – alone because of their very narrowly regulated objectives.

Encouraged by the Überseering judgment of the ECJ[17] and by the possibility existing in many Member States, or shortly to be introduced there, of transferring the registered office of the company abroad without liquidation[18], many SMEs will initially consider using the legal form with which they are familiar at home for their foreign activity. An engineering company from Bielefeld may conduct its French, Italian and Spanish subsidiaries in the form of a German GmbH. That outweighs all advantages of the EPC at a single stroke. But the problem lies on the other side of the market[19]. The customers of the Bielefeld company in France or Italy are uncertain and cannot be really confident in what is for them a foreign legal form. With the EPC this would be different because after its introduction it would also be familiar in these states. From the political perspective of community law, the specific aspect of equality must also be considered[20]: The SME from Riga could not use the Lithuanian GmbH with which it is familiar as its cross-border organisation. For this reason also, the English Limited is also excluded as a functioning substitute for the EPC[21].

III. Models

For what purposes should the EPC be provided and on what should it be modelled? From the perspective of medium-sized businesses, sales and service subsidiaries abroad are concerned[22]. This gave rise in the Consultation Paper to the question of whether the EPC should be structured as a one-man company or as a

[17] C-208/00, Coll. 2002, I-9947 "*Überseering*"; see also TEICHMANN, *supra*, note 6 at 89.

[18] In the government bill (MoMiG) § 4a GmbHG new version, a German *Gesellschaft mit beschränkter Haftung* (Limited Liability Corporation) (GmbH) is also able to seek permission to move its registered office abroad (details *Hofmann*, ZIP 2007, 1581). The transfer of registered office, according to established judgements, still involves the dissolution of the company (for a critical view of this consult C. *Teichmann, supra*, note 6 at 171). A solution may be provided in the soon to be anticipated codification of international company law: see Hans-Werner Neye, *Casenote* on a decision by the *Oberlandesgericht [OLG]* (Higher Regional Court) Munich of 4 October 2007), in: EwiR, 716 (2007).

[19] See Hommelhoff, *supra,* note 12 at 204; *Steinberger*, *supra*, note 7 at 29-31; Oliver Vossius, *Die Europäische Privatgesellschaft – Societas Europaea Privata*, EWS 438 (2007), at 440.

[20] See Radwan& Arkadiusz *European Private Company and the Regulatory Landscape in the EU - An Introductory Note*, 18 EUROPEAN BUSINESS LAW REVIEW 769, 771 (2007); *Steinberger*, *supra*, note 7 at 29.

[21] See *Vossius*, *supra*, note 19 at 440.

[22] See *Steinberger*, *supra*, note 7 at 28; see also *Brandi, supra*, note 11 at 81.

company with several shareholders[23]. German businesses argue in favour of freedom: it should be possible to form an EPC with one or more shareholders, whether natural or legal persons.[24] This should be accepted because the EPC must also be available to be used as a joint venture.[25] In addition, this supra-national legal form should also acquire the specific strength typical of all "second" corporate forms in the EU Member States, namely as "utility furniture "[26] for all thinkable purposes (including immaterial or charitable) which are not legally forbidden. Major businesses must also be able to use the EPC as part of their groups.[27]

The EPC Regulation should therefore be tailored to the specific interests of the SMEs in the Community and be structured on the model of both a sales and service subsidiary abroad as well as that of a joint venture in the medium-sized economy. However, these models must not be inscribed in stone. The EPC shareholders must rather retain complete flexibility[28] provided that the protection of creditors or similar interests is adequately provided for.[29]

IV. Interim Conclusion

To summarize: In the European internal market, a supra-national EPC tailored to the specific concerns and interests of small and medium-sized companies would be advantageous for many reasons. Neither the already existing legal forms of community law nor any one of the national legal forms can perform its function. The draft regulation for the EPC should provide the maximum possible flexibility in accordance with the typical applications in the medium-sized economy.

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[23] *Supra*, note 4 , see (1) III at 5 (Model A and B).

[24] DIHK Statement, *supra*, note 9 at 4 in answer to Question 7.

[25] In detail Hans-Jürgen Hellwig,*Zum Einsatz einer EPG als Jointventure*, in: NEUE WEGE IN DIE EUROPÄISCHE PRIVATGESELLSCHAFT, 89 (Hommelhoff & Helms eds., 2001); see also Brandi, *ibid.*, at 81.

[26] This description is known to come from Herbert Wiedemann, *Unternehmensrecht und GmbH-Reform,* in JURISTENZEITUNG [JZ] 592 (1970), at 596.

[27] This idea was also the basis of the European Private Company (EPC) Draft Regulation of the CCIP/CNPF Working Group, *supra*, note 3, Preamble at 282.

[28] On company law freedoms see the seminal book by FRITZ RITTNER, DIE WERDENDE JURISTISCHE PERSON (1973) at 248.

[29] On the protection of individuals and minorities *see supra*, note 4, section II at 4; on commercial co-determination of employees, *see supra*, note 4, section II at 6.

C. Principles

The Consultation Paper of the General Directorate Internal Market[30] lists in detail the areas which should in its opinion be regulated in an EPC statute, namely formation, shareholders, capital and management, but then asks business whether these areas should each be regulated in the Regulation or in the statutes of the individual company or by the Member State. What the content of such regulation may be is hardly mentioned although this itself requires discussion to the greatest possible extent throughout the community. Some approaches and principles are therefore dealt with here.

I. Limitation of Liability and Creditor Protection

Precisely since they are not intended to be organised as mere branches, foreign subsidiaries require legal personality[31] in order to take their place on the market. Logically, the parent finds it important that the contractual partners and creditors of its subsidiaries cannot have recourse to it. This insulation of the group against risks is implemented by the limited liability function of the subsidiary. It is also significant for SMEs in the internal market, because, while risks arising within a foreign subsidiary and therefore from a strange jurisdiction are incalculable and cause apprehension, owners of SMEs who are averse to risks, are particularly sensitive.[32]

The indispensable protection of creditors (stable and effective) could then be modelled on the limited partner liability[33] with limited liability of the shareholders and exclusion of liability if the shareholder's contribution has been fully paid up. This system of protection should be adequate from the point of view of creditors. The parent SME on the other hand would not be able to accept this because it would lead to a direct confrontation with an unspecified number of creditors of the subsidiary. That is extremely burdensome, results in a disorganised competition between subsidiaries and is not completely balanced because of the ultimate limited liability of the parent SME.

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[30] See *supra*, note 4, in answer to section (2) IV see Question 11 at 12; most of the companies asked did not answer, see DIHK Statement, *supra*, note 9, section IV at 5.

[31] TEICHMANN, *supra*, note 6 at 328 correctly sees the grant of legal personality as the key to the integration of a supra-national legal form into the legal systems of the Member States.

[32] Peter Hommelhoff, *supra,* note 7, at 2104.

[33] This solution is suggested by Vossius, *supra*, note 19 at 443, for further discussion.

Contrasted with the above is internal liability between the companies[34], i.e. the channelling of liability through the foreign companies in the interests of the parent SME without neglecting the protection of the creditors of the subsidiary. This protection is initially and solely organised and dealt with at the level of the subsidiary and its assets. That is only logical because, unlike in a branch, the subsidiary itself acts independently of its parent abroad.

The corporate law protection system to be prescribed for the EPC requires even more intensive discussion: The continental asset protection system with statutory minimum capital[35] (admittedly without its acknowledged gaps)[36] or the Anglo-Saxon liquidity protection system.[37] It is not intended here to set these systems against each other – all the more so because the European Parliament on the basis of the asset protection system, has suggested a considerable number of concrete details.[38] To say only the following: A choice given to the states as to the system to be used for the EPC in the state where it is registered would contradict the basic principle of community-wide uniformity and would, for the SME, considerably complicate the management of its group in the internal market.[39] Likewise, the combination of both protection systems as a political compromise is not to be recommended. Such cumulative protection could overload the EPC which is intended to be simply constructed and burden it to an excessive extent compared with other legal forms.[40] However, the Commission and the Council of Ministers will not be able to avoid a clear decision in principle on creditor protection in the EPC.

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[34] For the legal position under German law, see the "TRIHOTEL" decision by the *Bundesgerichtshof* [BGH] (Federal Court of Justice - FCJ), published in GMBHR 927 (2007), at 931, where the FCJ applies the valid fundamentally preventative "*Basisschutzkonzept*" (Base Protection Concept) of §§ 30, 31 GmbHG and thereby rejects to "lift the veil" which would in many cases be extremely excessive and would seriously undermine the basis for the GmbH legal form.

[35] This is recommended by the European Parliament. Hereto, see the commentary by Hommelhoff, in FESTSCHRIFT FÜR PRIESTER, 251(2007)], however, with mediating compromises.

[36] See Volker Röhricht, *Insolvenzrechtliche Aspekte im Gesellschaftsrecht,* in ZIP 505 (2005), 514; see the decision by the BGH, published in GMBHR 927 (2007), at 929 [16] with further references.

[37] See the report by Rüdiger Veil, *Kapitalerhaltung. Das System der Kapitalrichtlinie versus situative Ausschüttungssperren*, in DAS KAPITAL DER AKTIENGESELLSCHAFT IN EUROPA, 92 (Lutter ed., 2006), 96-113; Joost, in: DIE GMBH-REFORM IN DER DISKUSSIONSONDERTAGUNG DER , GESELLSCHAFTSRECHTLICHEN VEREINIGUNG, 46 (Peter Behrens, Peter Hommelhoff & Detlev Joost, eds., 2006).

[38] *Supra,* note 35.

[39] *Supra,* note 11.

[40] Such a combination is recognized in USA and New Zealand law, see Veil, *supra,* note 37 at 96.

II. Insolvency Law

According to the General Directorate, liquidation and insolvency law should not be provided for in the EPC Regulation. While the first may be based on an omission,[41] insolvency is intentionally not included.[42] For two reasons, this requires greater in-depth discussion. Firstly, the instruments of creditor protection between company law and insolvency law as shown in recent legal developments in many Member States are functionally practically interchangeable;[43] politically preventative or reactive protection of creditors, effectiveness and the associated extent of rules and administration are concerned.[44] And secondly, in several Member State legal systems, the stage prior to insolvency, i.e. the company crisis, is regulated with increasing precision and legal obligations.[45]

A clearer demarcation (distinction) between company law and insolvency law in the EPC statute must therefore be considered again, in particular, if the demarcation would condemn those responsible in the foreign subsidiaries, their management as well as that of the parent, to degrees of uncertainty varying from one Member State to another, as to how they should behave in a crisis, pending insolvency and insolvency itself.[46] There are therefore many indications that these points of contact in the ongoing management to insolvency law (up to and including the obligation to make an insolvency application and liability for delaying to do so) should, for reasons of legal uniformity and legal certainty, be

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[41] The DIHK Statement is more open on this, *supra,* note 9, in answer to Question 12.

[42] See the Consultation Paper, *supra,* note 4, in answer to Question (1) III at 5.

[43] On creditor protection by insolvency law in England see Thomas Bachner, *Gläubigerschutz durch Insolvenzrecht in England*, in DAS KAPITAL DER AKTIENGESELLSCHAFT IN EUROPA, 526 (Lutter ed., 2006).

[44] See for example, the discussion on the approach to protection of (deemed capital) shareholder loans: Huber/Habersack, *GmbH-Reform: Zwölf Thesen zu einer möglichen Reform des Rechts der kapitalersetzenden Gesellschafterdarlehen,* in BetriebsBerater [BB], 1 (2006); Mathias Habersack, *Gesellschafterdarlehen nach MoMiG: Anwendungsbereich, Tatbestand und Rechtsfolgen der Neuregelung,* in ZIP 2145 (2007), at 2146-7 on the one side, and Peter Hommelhoff, in DIE GMBH-REFORM IN DER DISKUSSION (*supra*, note 37), 124., and Bork, *Abschaffung des Eigenkapitalersatzrechts zugunsten des Insolvenzrechts?,* in ZGR 250 (2007), 252, 254 on the other.

[45] DRENCKHAN, GLÄUBIGERSCHUTZ IN DER KRISE DER GMBH (2005); Veil, *Krisenbewältigung durch Gesellschaftsrecht,* in ZGR 374 (2006); Kalss/Adensamer/Oelkers , in DAS KAPITAL DER AKTIENGESELLSCHAFT IN EUROPA (*supra*, note 43), 134 .

[46] See Karsten Schmidt, in: DAS KAPITAL DER AKTIENGESELLSCHAFT IN EUROPA (*supra*, note 43), 188; emphasising preventative creditor protection by insolvency law; specifically on the EPC see Ulrich Ehricke, *Die Überwindung von Akzeptanzdefiziten als Grundlage zur Schaffung neuer supranationaler Gesellschaftsformen in der EU,* in 64 RABELS Z 497 (2000), 503-4.

regulated in an EPC Regulation as has been recommended by the European Parliament.[47] This does not in the least aim at the entire europeanisation of insolvency law on the occasion of the establishment of a new legal form of community law.

III. Structural Freedom

SMEs are usually strongly characterised by the personality and individuality of their owners, by the relationship of the owners between themselves, by their particular objectives, but also strongly by the markets on which the individual SME is active and by its products and services. SMEs therefore require the maximum possible structural freedom for the drafting of their statutes.[48] This applies to the EPC and similarly to major companies and regional public bodies if they wish to avail of this legal form and tailor it to their requirements.

Nevertheless, the Consultation Paper for the EPC again proposes for discussion an intensive and very detailed legal framework from which the founders and shareholders can deviate in the statutes only to a limited degree.[49] The Consultation Paper lists, as possible advantages of such a concept, the greater uniformity among all European Private Companies within the Community together with the comprehensive overall regulation, greater legal certainty and less advisory costs. On the contrary, the companies through the DIHK statement[50] demand the greatest possible freedom in the statutes for the internal organisation in the EPC, this being of the greatest significance for SMEs.

One's own opinion must concern itself with clear distinctions. The extent of regulation in the EPC Regulation has nothing to do with the freedom of design. Only the question of what is optional is decisive. Detailed complete regulation can even provide major freedom of design provided that its provisions are to a great extent susceptible to change. The EPC Regulation, however strictly or loosely its provisions may be construed, must provide the greatest possible scope to design the statutes freely in the actual individual case. Only by this means, will the specific concerns of potential users of this community legal form be catered for.

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[47] *Supra*, note 2, Recommendation 11.

[48] For more details see Wolfgang Zöllner, *Inhaltsfreiheit bei Gesellschaftsverträgen,* in: FESTSCHRIFT 100 JAHRE GMBH GESETZ, (Lutter/Ulmer/Zöllner eds., 1992) 85, 88; KARSTEN SCHMIDT, GESELLSCHAFTSRECHT, (4th ed., 2002) 114. and Hommelhoff, *Gestaltungsfreiheit im GmbH-Recht*, in: GESTALTUNGSFREIHEIT IM GESELLSCHAFTSRECHT, 38 (Lutter/Wiedemann eds.,1997).

[49] See, *supra* note 4, in answer to (1) III2 option 1, at 6.

[50] See, *supra*, note 9 in answer to Question 10; see also *Steinberger*, *supra*, note 7 at 29.

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On the other hand, freedom of design also necessarily involves renunciation of certain options. The EPC may not, for example, participate on the capital markets, because investor protection requires a wide range of mandatory provisions. The General Directorate Internal Market ultimately agrees.[51]

IV. Protection of Minorities and Individuals

Freedom of design demands responsibility on the part of the drafter of the statutes. It is therefore logical to leave the protection of minorities and individuals in the EPC to him or more precisely, whoever wishes to enter the company as a minority shareholder should himself ensure his own protection at the time of the formation or his entry. This concept suggests itself where a company is a minority shareholder usually having the necessary expertise either itself or through its advisors. One could, in parallel, argue for a joint venture statute.

The Consultation Paper adopts a different approach.[52] It sees a need to regulate minority protection in an EPC statute, if there are a number of shareholders. According to the General Directorate, it must also be ensured that the decisions in the company are properly made, i.e. by resolutions of general meetings. All of this can only be dispensed with if the EPC, according to the statutory plan, is intended to be used exclusively as a wholly owned company. The DIHK in its statement does not deal with the protection of minorities but argues for the admission of several shareholders[53] and relies for the powers of the general meeting on the provisions in the statutes.[54]

Ultimately, one has to agree with the General Directorate as to the configuration of an EPC which has exclusively companies as shareholders,[55] because, apart from the lack of awareness of problems which is often found and the occasional limited power of individual founders or shareholders to enforce their will, it is above all the aspect of legal certainty and security which indicates the necessity to regulate in the EPC Regulation a minimum of majority and individual protection. For joint ventures, on the other hand, there is no room for such precaution. Self-regulation is indicated.

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[51] Consultation Paper, *supra*, note 4, in answer to question (1) II at 4: here the EPC is distinguished from the SE as a "public company".

[52] *Supra*, note 2, in answer to question (1) III 1 at 6.

[53] *Supra*, note. 4, in answer to Question 7.

[54]. *Supra*, note 4, in answer to Question 10.

[55] See Hommelhoff, *supra,* note 7, at 2106; Karsten Heider, *Gesellschafterpflichten nach dem EPG-Statut*, in: ßNEUE WEGE IN DIE EUROPÄISCHE PRIVATGESELLSCHAFT, 138 (Hommelhoff/Helms eds.,.2001).

V. Obligatory More Than One State

Since the EPC should, above all, facilitate the cross-border activity of the SME in the internal market,[56] it could be advisable that the cross-border element of the connection between the EPC on the one hand and its founders and shareholders on the other be made obligatory as a condition for formation. The principle of subsidiarity also favours this.[57] It cannot be the task of the Union to offer a supra-national legal form for the economic activity within only one Member State and that in competition with the national legal forms. With the obligatory cross-border element, the EPC Regulation would only continue the reservation which already applies to other corporate bodies of community law.[58]

The Consultation Paper apparently assumes an obligatory cross-border element and, logically therefore, does not enter into any discussion thereof. On the other hand, greater liberality was demanded earlier in the literature:[59] If the founding company is active in the economy of at least two Member States, that must be adequate. This should be accepted, because firstly, a subsidiary EPC could then already be formed if business involvement abroad is still only intended and secondly, at the location of the founder or founders with subsequent transfer of registered office and management centre to the target Member State. If the EPC (in a certain limited sector) enters into competition with a national legal form, the Member States will be able to live with that. Since the Centros judgement of the ECJ, the company forms are, in any event, in competition with each other. [60]

VI. Company Co-Determination

Due to the conflict about co-determination, decades were required until the statute for the European Company was finally passed at the Nice summit.[61] Many feared

[56] Consultation Paper, *supra*, note in answer to question (1) IV at 8.

[57] On the principle of subsidiarity see only Streinz, in: STREINZ, EUV/EGV, 2003, Art. 5 EC, see note in the margin at 30 with further references.

[58] Art. 4 ss. 2 EEIA Regulation; Art. 2 SE Regulation; Art. 2 European Cooperative Regulation (SCEVO).

[59] See for example Steinberger, *supra*, note 7, at 29 following the high level group on company law (Winter Group).

[60] On company law competition between legislatures in detail most recently, see TEICHMANN, *supra*, note 6 at 320.

[61] On the troubled history of the coming into being of the SE in detail, see *Blanquet*, in ZGR, 20 (2002), at 21; see also GRUNDMANN, EUROPÄISCHES GESELLSCHAFTSRECHT (2004), 480 ; SCHWARZ, EUROPÄISCHES GESELLSCHAFTSRECHT (2000) 643; TEICHMANN, *supra*, note 6) p. 249.

that the EPC project would suffer the same fate, in particular in the Commission.[62] The Consultation Paper therefore obligingly lays down the cornerstones:[63] It would have been difficult to retreat from the compromise found for the SE. The EPC should not be available to be used as an instrument to avoid co-determination. On the other hand, the solution for the EPC should respect the need of SMEs for flexibility and not burden them with undue difficulty. The DIHK is very reserved on the question of co-determination (not particularly surprising).[64]

In the legislative process for the EPC, co-determination cannot be circumvented. Three reasons for this can be urged. Firstly, this legal form should be available as a group element for major companies[65] and may therefore employ a greater number of people. Secondly, it will be intended to enable the EPC to be formed by the transformation of a national company. This possibility should not be denied to companies under national law already subject to co-determination. And thirdly, the European Parliament, in its resolution, has requested the Commission[66] to take account of the co-determination implication and not to fall below the standard already reached at Community level in this respect.[67]

One could imagine that co-determination provisions would only apply when the number of employees of an EPC exceeds a certain threshold. As a number of states with quite low thresholds meanwhile belong to the EU,[68] the minimum for the EPC could be fixed at 50 employees. That would leave most SME sales and service companies free of co-determination. Above that threshold, the Regulation could proceed according to the Community law basic precedent[69] of a co-determination agreement with default solution (however, emphatically more simple than in the

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[62] Notably Karel van Hulle, *Geleitwort. Die EPG – ein Blick aus Brüssel*, in: NEUE WEGE IN DIE EUROPÄISCHE PRIVATGESELLSCHAFT, VII (Hommelhoff/Helms eds., 2001).

[63] *Supra*, note 4 in answer to (1) V p. 8.

[64] *Supra*, note 9 in answer to Question 13.

[65] *Supra*, note 27.

[66] Consultation Paper, *supra*, note 4, in answer to (2) Question 13.

[67] See Hommelhoff, *supra*, note 35 at 253-4.

[68] For a review of the co-determination regimes in the EU see MÄVERS, DIE MITBESTIMMUNG DER ARBEITNEHMER IN DER EUROPÄISCHEN AKTIENGESELLSCHAFT (2002) 58; see also the contributions in UNTERNEHMENS-MITBESTIMMUNG DER ARBEITNEHMER IM RECHT DER EU-MITGLIEDSTAATEN, ZHR SONDERHEFT No. 72 (Theodor Baums & Peter Ulmer eds., 2004).

[69] On similarities and the (few) differences between the negotiation solution of the SE Directive and the 10th Directive, see Teichmann, in: DER KONZERN 89 (2007).

case of the SE). Naturally, founders must be enabled to structure their groups active throughout the Community in the various Member States according to uniform principles.[70]

In order to further facilitate and stimulate the formation of an EPC, a co-determination moratorium according to the Danish example[71] could be allowed. For the first three years after its formation, the EPC (with the exception of the transformation of a national company already subject to co-determination) could be free of co-determination. Only after the expiry of this moratorium is the introduction of co-determination in the company to be negotiated, if the number of employees in the EPC exceeds the thresholds (here suggested to be 50). The then necessary coordination between the co-determination agreement and the powers of the shareholders under the statutes is not a special problem for the EPC.[72]

D. The Regulatory System

At a time when the EU Commission has committed itself to reducing bureaucracy, there is everything in favour of intensive efforts towards a lean and easily understandable EPC Regulation in its construction and systems with practically convenient provisions. From a regulatory point of view, concentration on general principles and avoidance of excessively intensive detail in the Regulation must be considered. The experience gained in the 1970s with the draft statute for the SE is an argument for such a regulatory concept.[73] Its comprehensive regulation with the objective of regulating the organisation and functioning of the SE autonomously and independently of national law did not, even among the then small number of Member States, find the necessary support.[74]

I. Comprehensive Regulation

The General Directorate has been well advised to survey companies as to their preferred regulatory concept: That of a comprehensive regulation by the EPC

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[70] *Supra*, note 11.

[71] See Hommelhoff, *supra*, note 12, at 209.

[72] On this problem in the SE see Habersack, *Grundfragen der Mitbestimmung in SE und SCE sowie bei grenzüberschreitender Verschmelzung*, in: 171 ZHR 613 (2007), at 613; for a contrasting view see Teichmann, *supra*, note 69 at 93; both authors argue different positions on freedom of the social partners in the structure of an agreement on worker participation.

[73] See Blanquet, in ZGR 20 (2002), at 23-4; TEICHMANN, *supra*, note 6 at 249.

[74] Consultation Paper, *supra*, note 4 on (1) III 2 at 6 points this out explicitly

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Regulation itself or the alternative of a Regulation limiting itself to some (mostly mandatory)[75] core provisions indispensable for the functioning of a company, and otherwise to stating areas of regulation in the Regulation which must be provided for in the statutes by the founders in accordance with their own preferred design.[76] For both regulatory concepts, the Consultation Paper lists the advantages and disadvantages of each in detail. The answer of the companies in the statement of the DIHK [77] is surprising. The majority prefer in principle the comprehensive regulation because this provides the legal certainty favoured by the companies, simplifies the formation of the company in other Member States and the formation of group structures. Ultimately, only a uniform statute for the EPC can achieve the objective of facilitating cross-border activity.

Seen accordingly, the change of concept from the Community law full regulation to half regulation[78] in the case of the SE was, from the point of view of the companies, a serious error which must not be repeated.[79] The EPC requires a uniform statute solely with rules of community law without the addition of national law rules. That of course means in practice no single uniform for all private companies. It must rather be reserved to their founders in the exercise of design freedom to give each company its own character. Within individual groups this will in any event take the same form, so that group subsidiaries will have the same structure. Distinction must therefore be made between the uniform EPC statute and the uniformity of all EPC statutes in any particular group.

The plea of the companies for comprehensive full regulation corresponds noticeably with the experience in France after the introduction of the SAS with its open design.[80] The wide-ranging lack of statutory regulations led to considerable legal uncertainty among companies, including major companies, and initially scared them off from using this new legal form. It follows therefore that the acceptance and practical application of the EPC as a new organisation form of community law would be very severely inhibited if the EPC Regulation did not offer comprehensive regulation. The regulatory concept is a prerequisite for success

[75] See Vossius, *supra*, note 19 at 441.

[76] Consultation Paper, *supra*, note 4, to (1) III 2 at 6.

[77] *Supra*, note 9, in answer to Question 10 at 5.

[78] *Supra*, note 73.

[79] For a pointedly critical view of the EP decision see also *supra*, note 2, recommendation 1 sentence 1; see also Hommelhoff, *supra*, note 35 at 246.

[80] I thank RA Dr. Dietmar Helms, Frankfurt, for the information on French corporate practice.

– namely among SMEs and their owners who are particularly sensitive to legal risks. The European Parliament agrees. In its first recommendation, it clearly listed those areas which should be regulated in the EPC Regulation as conclusively as possible. They extend from the legal nature of the EPC and its legal capacity and capacity to act, to liability of a shareholder in an EPC for its debts.[81]

II. Regulatory Instructions and Discretionary Law

Complete regulation does not necessarily mean uniform regulation. Even with comprehensive regulation, the legislature does not need in the least to regulate everything itself. Conceptually, it would be adequate if the legislator intended only to ensure that a certain complex (for example, the right of individual shareholders to information) be regulated in the statutes. For such complexes, the legislator could impose an obligation to regulate them in the articles,[82] the precise compliance therewith together with the regulations prescribed by the legislature would ultimately result in comprehensive regulation. By imposing the task of self-regulation, the legislature also avoids deprivation of choice, to a greater extent than with discretionary law, and considerably strengthens the exercise of design freedom with self-responsibility of the drafter of the statutes.

The businesses surveyed do not seem to wish to evade this self-responsibility. They name a whole list of areas which should be provided for in the articles,[83] the general meeting, shareholders' resolutions and voting rights, the sale and repurchase rights, capital increase, but, above all in questions of management, the surveyed companies see room for the design of articles, the nomination of the managing directors and their rights and duties including conflicts of interest, the structure of management and its publication obligation. However, with this list it remains open whether the companies request for these complexes only the freedom to regulate or expect such self-regulation tasks to be imposed in the EPC Regulation.

Recently sharp criticism from notaries has been made of the instrument of statutory imposition of self-regulation.[84] If the legislature, by statutorily prescribed drafting tasks, wishes to deflect the real problems to practitioners, this is, in their view, a case of inadequate fulfilment of the legislative task. This, however, can also be seen

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[81] *Supra*, note 2, recommendation 1; see also Hommelhoff, *supra*, note 35 at 246.

[82] For a seminal book on prescribed self-regulation, see CONSTANTIN BEIER, DER REGELUNGSAUFTRAG ALS GESETZGEBUNGSINSTRUMENT IM GESELLSCHAFTSRECHT (2002), specifically on the EPC at 256.

[83]. DIHK Statement, *supra*, note 9, section IV at 5.

[84] Vossius, *supra*, note 19 at 441.

in reverse: The instructions to regulate as an expression of respect owed by the legislator to the variety of the individually characterised SME.

Be that as it may – for the founders of the EPC, the problem of prescribed self-regulation lies elsewhere. They cannot be sufficiently certain whether the provisions of the articles made by them in accordance with the regulatory instructions, are legally sound. In addition, the development of such provisions in the articles costs quite a bit in time and money and stands therefore in contradiction to the basic aims of the EPC.[85] Whether a precedent articles (Table A)[86] issued by the legislature can constitute a politically convincing way out requires critical reflection again against the background of the debate conducted on the planned precedent articles in the German GmbH.[87] Instead, the legislature could incorporate the content of such precedent articles immediately in the EPC Regulation. The Table A solution could be a fallback position if the issue of a precedent articles on the English model were a condition for the approval of Great Britain of the EPC Regulation.

III. Instruments for Closing Gaps

The legislative concept for the EPC is therefore heading for a complete and comprehensive provision in the Regulation – although certainly not in the detail of a listed SE. Against this background, the most controversial issue can be addressed, namely how can gaps in the EPC statute according to the Regulation be filled: Exclusively at the level of community law or by recourse also to national law of the Member States in which the EPC has its registered office?[88]

The consequences of recourse to Member State law are known. Contrary to the basic concept of the EPC, the individual national companies would be partially repatriated. For the parent company, this would result in lack of transparency and

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[85] *Supra*, note 7.

[86] On their function see Dietmar Helms, *Mustersatzungen für die Europäische Privatgesellschaft*, **in:** NEUE WEGE IN DIE EUROPÄISCHE PRIVATGESELLSCHAFT, 259 (Hommelhoff/Helms eds.,.2001); and recently DRURY, EUROPEAN COMPANY LAW (2006), 267, 268.

[87] For information on the current political discussion see Bayer, Hoffmann & Schmidt, *Satzungskomplexität und Mustersatzung,* in: GMBHR 953 (2007), ; Heidinger, *Fluch und Segen der privatschriftlichen Mustersatzung,* in: STATUS: RECHT DB 07/2007, at 243; Karsten, *Kann man eine GmbH auf einem Bierdeckel gründen?,* in: GMBHR 958 (2007).

[88] See the controversial discussion reported by Daniela Mattheus,*Die EPG: Grundkonzept und rechtspolitische Eckpunkte*, in: NEUE WEGE IN DIE EUROPÄISCHE PRIVATGESELLSCHAFT, 97 (Hommelhoff/Helms eds.,.2001).

in legal uncertainty. The legal uniformity would be endangered. That would be diametrically opposed to the urgent wish of the SMEs surveyed for a Europe-wide uniform and legally secure EPC.[89]

Nevertheless, the suggestion that gaps in the statute be closed by recourse to the principles of the statute, namely the principles of European company law, and if that is not adequate, to the common principles of Member State law,[90] meets with wide rejection in German literature.[91] European community law, according thereto, is not at present sufficiently developed to the extent that general principles, which would contribute to the solution of practical problems, can be identified. And even with deduction from such principles of community law, their result is not as predictable as is the case with national law.

To this I reply: Of course legal uncertainty is associated with closing gaps by resort to principles. However, for the SME active throughout the internal market, the total of legally uncertain issues is not greater than would be the case with resort to each national law. It would therefore be politically indefensible to allow the EPC project to fail because of a dispute as to how to deal with closing gaps. It would be equally indefensible to reject the uniformity so urgently demanded by businesses[92] and thereby to reduce the acceptance of this legal form. The SE concept with its mixture of community and national law is completely intolerable for SMEs. [93]This should not even in reduced form be imposed on the EPC. A political balance must be found between closing gaps by recourse to national law and European law. The scales should be tipped in favour of community mechanisms.

IV. Interpretation Committee and European Jurisprudence

The scales should be tipped in favour of community mechanisms even if only because, on the coming into force of the EPC Regulation with community law

[89] DIHK Statement, *supra*, note 9, section III in answer to Question 10/VII at 6.

[90] This is the formula originally proposed for the SE Regulation; having regard to the common principles of the laws of the Member States, it will only be sustainable for the EPC without this part because English and Irish law on the one hand, and Scandinavian law on the other, are not part of the continental European legal family. The expansion of the EC must be taken into account in any event in the formula for closing gaps for the EPC. A first attempt to develop legal principles and regulatory concepts in European Company Law is made by Veil, *supra*, note 35 at 799.

[91] Most recently *Wicke, Die Euro-GmbH im "Wettbewerb der Rechtsordnungen"*, in: GMBHR 356 (2006), 357-8 (with further references)

[92] *Supra*, note 10.

[93] *Supra*, note 79

provisions for closing gaps, many academics in legal faculties will extract solutions from the principles of the Regulation, community company law and possibly[94] the company law of the Member States, on many of the problem issues. Why should there not be (as for international accountancy law)[95] a private interpretation committee on European company law? It is certainly needed. It is certain that, even before the first closing the gap case reaches the European Court in Luxembourg through the national courts in their function of community courts,[96] academics together with practitioners will have developed a stock of arguments on general principles of company law in the community. The judges in Luxembourg will then be able to consider these in order to themselves establish principles of European community law on the basis mainly of the EPC Regulation[97]. As an additional security, in this respect it might be advisable to establish a specialised company law chamber in the European Court of First Instance.

V. Interim Conclusion

I come to my conclusion. The idea of a community-wide uniform European Private Company has now, after a long run-up, been adopted by the EU organs – first by the European Parliament and now by the Commission. In the coming summer, they will present a draft of an EPC Regulation. Whether this can serve any of the Member States as a basis for the modernisation of its own company law, we will see. In any event, this is not the objective of the EPC Regulation drafters, so that nothing is prejudged.

The draft Regulation will provide company lawyers in the Union and beyond it with a unique chance to engage with each other in an intense discussion on many stimulating questions of company law in a constructive search for EU-wide acceptable solutions, in a manner which has so far not taken place with the inclusion of practitioners from business and associations, the legal professions, the

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[94] *Supra*, note 90

[95] BILANZRECHTSMODERNISIERUNGSGESETZ (BILMOG), www.der-betrieb.de/pdf/081107_bilmog_refe.pdf (§ 342 ss 1 p. 1 No. IV HGB - Commercial Code) wishes to impose an additional (national) task on the private accountancy committee DRSC

[96] On the inter-action of national and European courts, see Ulrich Everling, *Das Europäische Gesellschaftsrecht vor dem Gerichtshof der Europäischen Gemeinschaften,* in: FESTSCHRIFT FÜR LUTTER, 33 (2000).

[97] See Gregor Bachmann, *Grundtendenzen der Reform geschlossener Gesellschaften in Europa*, in: ZGR 351 (2001), 373; on closing the gaps in connection with the EPC Statute in general see Armin Hatje, *Lückenschluss im Europarecht*, in: NEUE WEGE IN DIE EUROPÄISCHE PRIVATGESELLSCHAFT, 247 (Hommelhoff/Helms eds., 2001); HEIKE VÖLTER, DER LÜCKENSCHLUSS IM STATUT DER EUROPÄISCHEN PRIVATGESELLSCHAFT (2000).

courts and ministerial bureaucracy. The project of a uniform EPC could provide a strong impetus to real europeanisation of company law in the Community. Legal faculties in the EU and EEA should not miss this opportunity of contributing to the design of company law of the Community in conformity with the internal market.

E. Summary – Concluding Theses

1. Medium-Sized Companies welcome the introduction of the EPC for many reasons – in particular, cost and time reasons.

2. Neither the existing forms of community law nor national forms can match the advantages of an EPC.

3. Based on the model of sales and service companies of an SME abroad, the EPC should be legally open as "utility furniture" with one or more shareholders.

4. The EPC should be designed as a legal personality with limited liability. The necessary creditor protection should not follow the KG model but the model of internal liability in company law. Whether this should be according to the continental European concept or that of the Anglo-Saxon legal world requires further discussion in preparation for a political decision.

5. Contrary to the ideas of the Commission so far, it should again be considered whether certain points of reference with insolvency law such as the duties and obligations to make an insolvency application should also be included in the EPC Regulation.

6. The EPC must, as far as at all possible, be flexibly designed as an organisation instrument primarily for medium-sized businesses but also as an element in a group for major companies and for the public sector. Logically therefore, access to the capital markets must be declined.

7. In the interest of legal certainty and legal consistency, a certain minimum protection for minorities and individuals should be included in the EPC Regulation.

8. In the EPC Regulation, it should be an adequate condition for formation that at least one of the founders is already active in business in at least two EU Member States in any form whatsoever.

9. Co-determination in the EPC should arise only from a certain threshold (e.g. 50 employees) and then only three years after foundation (with the exception of the

transformation EPC). In addition, the principle of negotiation with the default provision should apply.

10. Only a comprehensive regulation provides the legal certainty which SMEs require and demand.

11. For reasons of legal certainty but also for reasons of cost, the EPC Regulation should grant structural freedom mainly by means of discretionary provisions and less by prescribing drafting tasks. Model articles of association like the English Table A can be dispensed with.

12. Gaps in the EPC statute should be closed by recourse to community law principles or common principles in the EU Member States. Legal uncertainty thereby arising would not be greater than that in the case of recourse to various national laws of Member States.

13. The development of principles of European company law is the task of the European Court. Legal academics in the Member States should assist in this process – possibly organised in an interpretation committee.

14. The EPC provides a unique chance for company law academics of continuous discourse in the EU.