

## CONSIDERATIONS ON THE NEW COMMUNITY LEGISLATION REGARDING THE EUROPEAN PRIVATE SOCIETY

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**Abstract:**

The European Commission has proposed a new legal form for European companies and for the private European society, or "Societas Privata Europaea" (SPE). The advantages of this new legal form are a greater flexibility and lower costs for small and medium enterprises who wish to pursue activities in other states of the European Union than they are registered. According to the Regulation submitted to discussion, the specificity of the European Private Society in terms of its legal form is that, on the one hand, it undertakes a number of features of joint stock companies, such as the method of formation of governing bodies (the two, dual and unitary systems being accepted), but are retained also specific elements to the limited liability companies, meaning the fact that shares may not be offered for public trading. In terms of how social responsibility and contribution in proportion to the capital, this feature included in the Regulation is found in both legal forms. By this time the Community legislature has followed the new legal form of company are not subject to mandatory capital requirements high so provided in this respect the amount of 1 euro, so that provides to the contrary is inconsistent with the rationale that has outlined the relevant Community legislation by a company widely permissive.

Concluding, the article subject to comment retains those provisions of the new Community act defining the specific new limited liability company establishing the European elements while giving the European business environment the interest for it.

**Keywords:** European Private Society, social capital.

**JEL Classification:** K 33

## I. INTRODUCTION

This work's purpose is to bring to the fore an issue that is on the table of the Union's legislative bodies, an issue that presents a strong interest in the business environment of all Member States of the European Union. In this respect, the European Council of 8<sup>th</sup>-9<sup>th</sup> March 2007 underlined that reducing the administrative burdens is important to stimulate Europe's economy, having regard in particular the possible benefits created thus for small and medium enterprises. It insisted on the need for an intensive joint action of the European Union and its Member States. Under this initiative, have been the company law and the accounting and auditing at the European level identified as priority areas.

In order to create a flexible form of society, the European Commission carried out a feasibility study for developing a European statute for small and medium enterprises (PME - Les petites et moyennes entreprises") based on the obtained results up to December 2005.

On the base of the Commission's Communication to the Council and Parliament on 21 May, 2003 "Modernizing company law and strengthening corporate governance (1) in the EU. A Plan to Move Forward" (2) and on the Report of the Committee on Legal Affairs of the Parliament of 29.11.2006 (3), the European Parliament adopted on February 1, 2007 the "Resolution contain ing recommendations to the Commission regarding the European Company Statute (4) and the request that during 2007 the Commission to submit a legislative proposal in accordance with the recommendations of the Parliament, to be adopted in legislative form th e SPE status.

In the planning phase, completed in summer 2008, SPE presented the characteristics of a genuine European entity. The project (inspired by French simplified joint stock companies - SAS) has a different logic from that envisaged in the European society for the purpose of creating an autonomous status in relation to the European national laws.

The topic is interesting because the existing legal forms for "supranational" companies are not particularly attractive for small and medium enterprises, imposing in this regard the need to regulate (5) a community legal form distinct from the present ones. (6)

The existing legal forms for supranational companies are not particularly attractive for small and medium enterprises. The new form of laws for small and medium-sized private companies so-called the European Private Society proposed by the European Commission at the pressure of the European Parliament creates a number of advantages, in that by its permissible provisions stimulates the creation of new enterprises, mainly due to the provision that capital must at least one euro. The EPS is designed, according to Union's newest regulations, as a company with limited liability and its shares cannot be tender or sold. In addition to a low level of minimum capital, the EPS has several other advantages such as speed of establishment and electronically registration. The proposal of the European Commission also provides that the verification of the validity of documents submitted by the company is to be done only once, and the society's address and its administrative headquarters should not be identical. Not least, through the new legislative provision was pursued the creation of a new status of the European Private Company allowing it to operate under the same uniform principles in all Member States.

All these specificity items listed above, "outlined" by the new Community act, which also define the importance of this normative rule, will be widely exposed in this paper underlying, where, according to the author's opinion, the added benefits inserted in the Union's Regulation.

## II. SPECIFIC ELEMENTS OF THE EUROPEAN PRIVATE SOCIETY

On June 25, 2008, the European Commission adopted a communication entitled "Think small first": Priority for SMEs - A "Small Business Act" for Europe (2) encouraging entrepreneurship, the development of legislation favorable to SMEs. SMEs in Europe are 99% of the total number of enterprises, providing 70% of the total number of jobs and contributing more than 45% of GDP in the EU.

As part of the SBA package (*Small Business Act*), the European Commission presents proposals regarding: a general block exemption on categories in terms of state aids (General Block Exemption Regulation – GBER) (7), regarding a new status of the European Private Society (EPS), a new directive on the reduction of VAT (8) for services provided locally and a change of the directive regarding late payments to ensure the timely payments to SMEs. Actions are designed to sustain the implementation of integrated guidelines and program of Lisbon of the Community by transposing the Lisbon Strategy into concrete actions for SMEs.

The existing forms of Community societies (9), in particular the European society (ES, whose legal status was established by the Regulation (EC) No. 157/2001 of the Council on October 8<sup>th</sup>, 2001 on the status of the European Society (10) are designed for large enterprises, while a private company (hereinafter "SPE"), is addressed to small businesses. Minimum capital requirement for an ES and its restrictions on the setting makes this form of society to be inadequate for many businesses, especially smaller. Given the problems faced by these businesses as a result of legislations' diversity on companies and the ES' inadequate character for small businesses, it is advisable to provide some form of European company designed especially for them, which can be created in the entire European Union.

In this respect, the European Commission has proposed a new legal form for companies and for the Private European Company, or “Societas Privata Europaea” (SPE). After the European Stock Company (ESC), The European Cooperative (EC) and the European Grouping of Economic Interest (EEIG), this new legal form is designed specifically for small and medium enterprises.

EPS has the legal personality from the moment since it was recorded in the register in the State where the society has its social headquarters, nominated by the national law applicable in accordance with Article 3 of Directive 68/151/EEC(11). For the purposes of Article 7 of the Regulation: "An EPS has its registered office and central administration or headquarters of business within the Community." A literal interpretation of the text shows that the two elements may be

located in different States of the European Union. Therefore, the head office and its headquarters must not be identical being established in different Member States giving the EPS the possibility to transfer their registered office from one Member State to another, without being obliged to transfer its central administration or headquarters. The social capital is divided into shares, each shareholder being liable only for social obligations only to the limit of the intake of the subscribed capital, but the fact that shares cannot be offered for public trading (element characteristic of the limited liability companies).

EPS can be composed of one or more individuals and/or legal entities (12), called 'the founding shareholders'. Under the provisions of the Regulation referred to in Article 45 of this Regulation, Member States shall authorize the establishment of an EPS in the following ways: the establishment of an EPS in accordance with this Regulation; the conversion of an existing company; the merger of some existing companies and the division of an existing company. Under Article 45 of this Regulation, Member States shall notify the Commission the form of the limited liability companies referred to in Article 4 Line 2 until July 1, 2010 at the latest.

### III. BRIEF CONSIDERATION OF THE NEWEST ITEMS AND VIEWS CONCERNING IT

a) *Capital.* This regulation provides that shareholders must flow the agreed intake in cash or in kind agreed contribution. Its capital must be at least 1 euro (13). The previous proposal, of 1999, stipulated a minimum capital of 25,000 Euros and the European Parliament has asked that this threshold should lower to less than 10,000 Euros. Member States in which does not apply the third stage of economic and monetary union may require the EPS's headquarters are situated in their territory to express their capital in national currency which does not exclude the possibility that an EPS's capital to turn to 0 Euros. The exchange rate between euro and national currency is the one in the last day of the month preceding the registration of the EPS.

We believe that through this regulation, the Community legislature has pursued that the new legal form of the European company should not be subject to mandatory high capital requirements, as this would constitute an obstacle to the creation of EPS's. On the other hand, it should be borne in mind that one of the fundamental principles of commercial transactions is the protection of the creditors. Thus, also in the presented case, meaning the one of the EPSs, the creditors must be protected from excessive activities of shareholders, which could affect the ability of the EPS to pay its debts. For this purpose, the distributions should be forbidden where the liabilities of the EPS is superior to the asset value. However, shareholders should be free to require the management organ of the EPS's to sign a certificate of solvency. Since the creditors' protection has to be guaranteed in case of reduction of capital of the EPS, certain rules relating to the date on which such capital reductions are prerequisites should be settled.

b) *The formation* of an EPS is made in writing and signed by all founding shareholders. Regarding its enforceability, the new Community provision holds that regarding on the shareholders, the management and supervision of the EPS, if any, it becomes incident on the date on which the integrant act was signed or, in the case of modifications, on the date on which they were taken, and as regards to third parties in accordance with applicable national legislation which transposes Article 3 Lines 5, 6 and 7 of Directive 68/151/EEC.

Another advantage conferred by the Regulation is that registration will be done electronically (14), thus giving a higher speed for the establishment. Simplifications were made with regard to the documentation that must accompany the application for registration of the EPS, meaning that in the moment of the introduction of application, the Member States only require the following information and documents: a) the name and address of the EPS's head office; b) name, address and any other information necessary to identify the persons authorized to represent EPS in its relationships with third parties, in the court or involved in the administration, supervision or control of the EPS; c) share capital of EPS; d) the categories and number of shares of each category, the total number of shares; d) the nominal value or accountable equivalent of the shares; e) the

integrant act of the EPS; f) if the EPS was formed as the result of conversion, merger or division of some societies, the decision of conversion, merger or division which led to the formation of the EPS. In this respect, Article 10 Line 4 of the Regulation decides that the registration of the EPS must be subject to one of the following requirements: the control of legal documents and information on the EPS, or certification of documents and information on the EPS made by a judicial or administrative body, or certification of the documents and information regarding by the EPS. Under Article 46, the authorities responsible for the mentioned books shall notify the Commission before 31 March each year, about the name, registered office and registration number of the EPS that have been registered and removed from the register during the preceding year and the total number of registered EPS. The authorities cooperate to ensure that documents and information on the EPS's listed in Article 10 Line 2 are also available through the registers of all Member States.

Checking the validity of the submitted documents is done only once, by the legal or administrative state's authorities (15).

According to the new Regulation, there will be a greater flexibility in the internal organization of the new limited liability company, the European Commission does not impose a model of statute, but certainly will establish a minimum list of issues related to organization, capital, equity shares that are to be regulated by statute. The fact is that shareholders have a relatively large freedom of configuration of the company, which makes this legal form to be attractive to larger companies. National legislation will regulate those areas not covered by statute, such as those elements related to employment law, taxation, and bankruptcy procedures. Flexibility is seen by the fact that a dual EPS can operate as a limited liability company with a President and a Board, or unitary, just with a Management Board.

On internal organizational issues, we believe that should be introduced binding rules to ensure protection for minority shareholders in order to ensure their equal treatment in the sense that the "essential" decisions should be adopted by a majority that does not represent less than two thirds of all voting rights attached to shares issued by the EPS. In addition, the right to request intervention of an independent expert to investigate abuses observed or seen before can be limited, this right cannot be a condition for the possession of over 5% of the voting rights of the EPS, and so the integrant act of the EPS can provide a lower limit.

c) *The distribution of dividends* can be made based on a proposal from the governing body to shareholders provided that, after assignment, the EPS's assets to cover fully the liabilities. The EPS is not authorized to allocate those reserves which distribution is prohibited by the integrant act. If the integrant act enforces that requirement, the management of the EPS signs a declaration called the "certificate of solvency", before the division, attesting the fact that the EPS is able to pay its debts at maturity, under normal operation of the economic activities within one year from the date of distribution. Shareholders who received dividends distributed in violation of Article 21 of the Regulation must return it to the EPS, which has to prove that the shareholder knew or, taking into account the circumstances, should have been aware of the deficiencies.

d) With regard to the *responsibility for acts performed before the time of EPS's registration*, Article 12 of this Regulation provides that if the acts were performed on behalf of the EPS before registration, the EPS can assume the obligations arising from such acts, after registration. If the EPS does not assume these obligations, individuals who have achieved it are unlimited and jointly responsible for the actions in question. On two latter issues that have been presented, can hold that the Romanian law provides exactly as the Union's legislation.

e) *Other provisions.* According to the Community standard the EPS dissolves or at the expiry of the period for which was established by decision of shareholders, or in the cases provided for by the national applicable law. The national applicable law governs the dissolution. The national applicable law and the Regulation (EC) No. 1346/2000 of the Council govern liquidation, insolvency, suspension of payments and similar procedures. The dissolution of the EPS is published. Also, the EPS's nullity is governed by the national applicable legislation implementing

Article 11 Line 1 of the Directive 68/151/EEC [a], [b], [c] and [e], unless the objects of the company as indicated by [c] and the provisions of Article 11 Line 2 and Article 12 of the Directive.

#### IV. RECOGNIZED WORKERS' RIGHTS IN THE EPS

Regarding workers' rights recognized in the EPS, the relevant Community acquis, granting employees' border rights of information, consultation and participation, and ensuring the participation rights of workers meaning the Directives 94/45/EC and Directive 2005/56/EC should be fully kept. With regard to the rights of participation of employees, are applicable the laws of the Member State where is the registered office of the EPS, called in literature "Member State" should govern them. It requires a great attention to this case because the formation of the Private European Companies must not evade these rights. Thus, if the national law of the Member State where the EPS transfers its registered office does not provide the same level of employee participation as a Member State of origin, the participation of employees in the company after the transfer should be, in certain circumstances, negotiated. If negotiation fails, the provisions that apply in society before the transfer should continue to apply after transfer. From the date of registration, the EPS is subject to the provisions in force in the host Member State, if any, on the modalities of participation of the employees. The above shall not apply where employees of the EPS in the home Member State for at least one third of the total number of employees of the EPS, including branches or subsidiaries of the EPS of any Member State, if the following conditions are met:

- The host Member State's legislation does not provide at least the same level of participation with the existing Member State of origin before the registration in the host Member State (16);
- The host Member State's law does not give employees of the EPS's offices in other Member State the benefit of exercising rights of participation they enjoyed before the transfer.

The Board may refuse access to information only where this would cause serious harm to the economic interests of the EPS. We believe that the above falls under the Directive 2002/14/EC of March 11, 2002 establishing a general framework for informing and consulting employees in the European Community.

Other rights of employees than the rights of participation should remain subject to the Directive 94/45/EC of September 22, 1994 establishing a European Works Council or a procedure for informing and consulting employees in undertakings and groups of undertakings with a Community dimension (17), the Directive 98/59/EC of July 20, 1998 on the proximity of laws of the Member States relating to collective redundancies (18), the Directive 2001/23/EC of March 12, 2001 on the proximity of laws of Member States relating to the maintenance of the rights of workers in the event of transfers of undertakings, businesses or parts of undertakings or businesses (19), the Directive 2002/14/EC of the European Parliament and the Council of March 11, 2002 establishing a general framework for informing and consulting the employees in the Community (20).

**V. SPECIFIC ELEMENTS REGARDING THE REGISTERED OFFICE  
SUBJECTED TO TRANSFER**

The transfer of the registered office is an issue governed by the present specific Community rule imposed by even the specifics of this legal form of business in Europe. In practical terms, the registered office of an EPS could be transferred in another Member State in accordance with Chapter VII of this Regulation (21). The transfer of the registered office of an EPS should not dissolve the EPS, the interruption or loss of its legal personality or affecting the rights and obligations under any contract of the EPS existing before the transfer. The transfer takes effect from the date of registration of the EPS in the host Member State (head office is located in the host Member State's territory). Thus, in order of transfer, the management of the EPS advocating a transfer draws up a proposal to establish a transfer, which includes the following information:

- the EPS's name and its registered office's address in the State of origin;

- the name and address of the EPS proposed to its head office in the host Member State;
- the proposed act of integration for the EPS in the host Member State;
- the proposed transfer calendar;
- the date on which it is proposed that the EPS transactions to be considered in accounting as operated in the host Member State;
- the transfer for employees and the proposed measures in this regard;
- where appropriate, detailed information on the transfer of central administration or principal place of the EPS's business.

At least one month before the decision to shareholders, the management of the EPS shall submit the proposal of transfer to shareholders and employee representatives or, where no such representatives, to the employees of the EPS to be considered and makes it available to creditors for verification by which is published the proposal of transfer .

The management of the EPS in a report sent to shareholders explaining and justifying the legal and economic aspects of the proposed transfer and stating the consequences of the transfer for shareholders, creditors and employees. The report, together with the proposal for transfer is submitted to shareholders and employees' representatives or, where there are no such representatives, to the employees themselves. In the case in which the board receives in time the approval of the employees' representatives of the transfer that opinion is sent to shareholders. The proposal for transfer is submitted to shareholders for approval in accordance with the provisions of the integration of the EPS regarding its amendment. If the EPS is subject to a regime of employee participation, the shareholders may reserve the right to connect the transfer to the express ratification of the arrangements for the participation of employees in the host Member State. The laws of the Member State of origin govern the protection of a minority of shareholders and EPS's creditors who oppose the transfer.

Regarding the legality of transferring the registered office, each Member State shall designate a competent authority to control the legality of the transfer by verifying compliance with the transfer procedure. The competent authority of the Member State shall verify if the requirements are met and, if so, shall issue a certificate certifying that all necessary formalities in accordance with the transfer procedure was made in the State of origin. Within one month of receiving the certificate, the mentioned European Private Company presents to the competent authority of the host Member State the following documents: the certificate; the proposed act for the integration of the SPE in the host Member State, as approved by shareholders; the proposal to transfer as approved by shareholders.

These documents are considered sufficient to allow the registration of the EPS in the host Member State. The competent authority of the host Member State shall, within 14 calendar days from the receipt of documents, if the conditions of form and substance to transfer the registered office met and, if so, respond appropriately for the registration of the SPE. The competent authority of the host Member State shall notify the competent authority responsible for the deletion from the SPE Member State with regard to registration of EPS in the host Member State. The registration from the host Member State and removals from the home Member State shall be published.

## VI. CONCLUSIONS

"Small Business Act" includes an ambitious set of measures to allow the SMEs to fully benefit from the options of the market, enabling them to expand in international markets by targeting more resources to small businesses access to finance, research, development and innovation.

This paper also proposed to present a number of advantages of this new legal form whichever has in this respect a greater flexibility, capital of one euro and lower costs due primarily to the electronic records for SMEs who wish to pursue activities in other states of the European Union than they are registered.

Not in the least, the issue of some Union uniform provisions regarding the settlement of a European limited liability company is enforced; the need of some permissible provisions for SMEs lies in the fact that according to the European Commission figures, about 99% of companies in the EU are SMEs and they provide about 70% of jobs in the private sector, but only 8% of them unfold transnational activities and only 5% of SMEs have subsidiaries abroad.

## FOOTNOTES:

(1) For a comprehensive analysis of the meaning of the concept of corporate governance of companies see John Lowry, Alan Dignam, *Company Law*, Third Edition, Oxford University Press, 2006, p. 387, Piperea Gheorghe *Societate comercială. Piața de capital. Acquis comunitar*, All Beck Publishing-house, Bucharest, 2005, pp. 534-593.

(2) *The Commission's Communication to the Council and Parliament of May 21, 2003 entitled "Modernizing company law and strengthening corporate governance in the EU. A Plan to Move Forward", COM (2003) 284, CELEX: 52003DC0284.*

(3) *The Report of the Committee on Legal Affairs of the European Parliament on November 29, 2006, containing recommendations for the European Commission on the European Company Statute and the proposal for a resolution of the European Parliament in this direction [2006/2013 (INI)] Reporter Klaus -Heiner Lehne.*

(4) *The European Parliament's resolution 2006/2013 (INI).*

(5) *Proposal Regulation on the European Private Company statute presented by the Commission COM (2008) 396 final, 2008/0130 (CNS) Brussels, June 25, 2008.*

(6) For a detailed presentation of the companies see Stanciu D. C. *rpenaru, Drept comercial român, Eighth Edition, Bucharest, Legal Universe, 2008, p. 150 ff., Gheorghe Piperea, Drept Comercial. I<sup>er</sup> Volume, C.H Beck Publishing-house, Bucharest, 2009, p. 74 ff.*

(7) A "Small Business Act" for Europe COM (2008) 394 final, *Rapporteur: Mrs. Constance Hanniffy*(IE/EPP)  
*Member of the Offal Local Council, Regional Authority for the Central District (Midland Regional Authority) and the  
 Regional Assembly for the Border Areas, Central and Western (Border, Midland and Western Regional Assembly).*

(8) A new General Block Exemption Regulation on state aids will simplify the procedures and reduce costs. This will increase the intensity of support for SMEs and will facilitate the benefit from aid for training, research and development, environmental protection and other types of aid for SMEs.

(9) A new proposal on the VAT will offer Member States the option to apply reduced VAT rates for services provided locally, including the services that use intensively the labor force that is provided in particular small and medium enterprises.

(10) *The European Public limited-liability Company governed by the Regulation (EC) no. 2001/2157, hereinafter the "European society", the European Cooperative Society under Regulation (EC) no. 1435/2003 of the Council and a European Economic Interest Grouping under Regulation (EEC) no. 2137/85; more details, Vâlcu Elise Nicoleta, Societary Law. University course, Sitech Publishing House, Craiova, 2008, pp.113-115*

(11) OJ L 294, November 10, 2001, Regulation amended by the Regulation (EC) no. 1791/2006 (OJ L 363, 20.12.2006).

(12) *OJ L 65, March 14, 1968.*

(12) "Legal entity" means or a limited private company, hereinafter "European society", a European Cooperative Society, Economic Interest Grouping and the European Private Company.

(14) Article 19 of the Regulation.

(15) Article 10 of the Regulation.

(16) For the registration, it is advisable to use the registers established by the first Directive 68/151/EEC of March 9, 1968 on the coordination, to the equivalence of the guarantees required by Member States to companies within the meaning of Article 58, second paragraph of the Treaty, to protect the interests of members or third parties; OJ L 65, March 14, 1968, Directive last amended by the Directive (EC) 2006/99/EC (OJ L 363, December 20, 2006,

(17) The level of employee participation is measured according to the proportion of the employees' representatives in the management or supervisory body or in their committees or in the management units that manage the company's profit, subject to the existence of a representation of the employees; OJ L 254, September 30, 1994, p. 64. Directive as last amended by the Directive (EC) 2006/109/CE (OJ L 363, December 20, 2006)

(18) *OJ L 225, July 12, 1998*

(19) *OJ L 82, March 22, 2001*

(20) *OJ L 80, March 23, 2002*

(21) *Article 35 of the Regulation.*

