

THE EUROPEAN PRIVATE COMPANY – DREAM BIG BUT CAUTIOUSLY?

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ABSTRACT

The recent financial crisis has revealed the importance for the companies to operate in a flexible legal environment allowing for fast adaptation to changing market circumstances. Therefore, being aware of the problems resulting from diversity of company laws, it is pertinent to create a European company form designed specifically for SMEs. The EPC would offer the flexibility expected from a genuine European form, by the possibility to be created in the State of their choice and to transfer the registered office and real seat to another State without particular difficulties.

Why, then, there are still so many hesitations that effectively block the final implementation? There is no time for 'balanced' approaches which only give the impression of a compromise but in fact result in the slowing down of necessary company law changes. Focusing too much on the national legal framework in which business is carried out in the EU, exposes companies to the application of the wide diversity of national laws and company regimes. Should we stay behind, making short-term decisions favoring mainly national companies and do not paying sufficient attention to the idea of European integration, it will result in decrease of the entrepreneurship and international competitiveness of companies.

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1. INTRODUCTION

The recent financial crisis has highlighted some imperfections in the field of company law and brought about a lot of vivid discussions concerning legal as well as financial reforms, questions about additional securities and other possible methods to resolve the economic recession and turn towards prosperity. Furthermore, it has revealed the importance for the companies to operate in a flexible legal environment allowing for fast adaptation to changing market circumstances in order to survive and to thrive in other business directions.

There has already been conducted a lot of research on who has been impacted by the downturn to the highest extent. They all have a common punch line – these were small and medium-sized enterprises (hereafter: SMEs) which react most sensitively to changes in the value of the currency, fluctuations in the economic growth, and as a result also in the rate of the employment. In this context, it would seem natural to look in the first instance for facilities and enhancing economic factors for SMEs. Each well-used chance to overcome the crisis means not only a regular income to the state budget, but also the stability of the employment. Therefore, the European Private Company (hereafter: EPC) proposal seems to suit just perfectly to solve the most fundamental problems of SME clearly outlined in times of financial crisis. I believe that Europe still has a chance to grow up to be truly a community and such an instrument as EPC would fit into the idea of an internal market based on the lack of formal barriers in conducting business activities, but also on trust - the common to all the member states.

In recent years there have been significant changes with respect to the companies' reorganizations such as the European Company Statute or the Cross-border Merger Directive that proved the high demand for simplified and enhanced corporate mobility within the EU.¹ These, however, focus their main interest almost entirely with large companies, whereas many research point out that these are in fact small and medium-sized enterprises that play a fundamental role in the European economy, where they account for more than 90 % of all firms, a fact that is repeatedly acknowledged in various EU documents.² To-

¹ T. Baums "Aktuelle Entwicklungen im Europäischen Gesellschaftsrecht" *AG*, 2007, p. 57; S. Grundmann „General Principles of Private Law and *Ius Commune Modernum* as Applicable Law?" *Festschrift for Buxbaum*, 2000, p.216.

² Commission Staff Working Document: Impact assessment on the Directive on the cross-border transfer of registered office, Brussels 12/12/2007 (SEC(2007)1707), 13; see also K.Eckstein "Grenzüberschreitende Verschmelzung von kleinen und mittleren Unternehmen. Eine Untersuchung auf der Grundlage der aktuellen Gesetzesentwicklung in Deutschland" *Wirtschaftsrecht Band I*, Berlin, 2009.

day, creating a European Company requires the participation of national companies from at least two Member States and a minimum capital of €120,000. But many small companies do not have such a large sum of money. Therefore, there exists clearly a need for creating an instrument that would simplify the legal framework for SMEs with a view to facilitating their trading within the internal market, enabling companies from different States to pool their resources and giving a European scale from the outset.³ Therefore, thanks to the EPC Regulation, those dealing with the EPC would no longer have to worry about the substantial differences that exist between various national forms of private companies.⁴

2. HISTORY

The beginning of the idea for greater mobility for SMEs can be sought in the voices of the internal market players such as a private initiative of business and academics who first raised the specific need for a European legal form of private company, to facilitate small and medium-sized enterprises.⁵ The private initiative has resulted in a detailed proposal for the EPC complementary to the national forms of private companies in member states. As a consequence, in 2008, the Commission submitted the proposal for a Council Regulation on the statute for a European Private Company⁶ as a response to the relevant European Parliament resolution⁷.

The EPC Statute was identified as a medium-term measure of the Commission's Action Plan on Modernizing Company Law and Enhancing Corporate Governance in the EU. Afterwards, the Commission presented the review of the "Small Business Act for Europe" – a set of legislative and non-legislative

³ J. Barneveld "Legal Capital and Creditor Protection: Some Comparative Remarks" in D.F.M.M. Zaman, et al. (eds.) *The European Private Company (SPE). A Critical Analysis of the EU Draft Statute*, Antwerp, Intersentia 2009, p. 81-102. Dół formularza

⁴ R. Drury "The European Private Company" *EBOR* 9, 2008, p. 126. ; H. – W. Neye „Die Europäische Privatgesellschaft: Uniformes Recht ohne Harmonisierungsgrundlage?“ in P. Kindler, J. Koch, P. Ulmer, M. Winter (eds) *Festschrift für Uwe Hüffer*, 2009, p. 717 – 718;

⁵ P. Hommelhoff, C. Teichmann "Die SPE vor dem Gipfelsturm. Zum Kompromissvorschlag der schwedischen EU – Ratspräsidentenschaft" *GmbHRR*, 2010, p. 337; Report of the high level group of the Company Law experts on a modern regulatory framework for Company Law in Europe ("Winter Report"), Brussels, 4 November 2002, p.113.

⁶ Proposal for a Council regulation of 27 June 2008 on the Statute for a European private company COM (2008) 396/3.

⁷ European Parliament resolution of 1 February 2007 with recommendations to the Commission on the European private company statute 2006/2013(INI).

initiatives established in order to create a level playing field for SMEs and improving the legal and administrative environment throughout the EU.⁸ In this document, the EPC is considered as one of the key initiatives. Therefore, the Commission emphasized the importance of the EPC for the EU and urged the member states to adopt the regulation in question without delay.⁹ Similar approach presents the European Parliament, in particular in its most recent resolution on the Single market for Enterprises and Growth, where the need to adopt the Statute for the European Private Company is emphasized in order to “facilitate the establishment and cross-border operation of small and medium sized enterprises in the Single Market”.¹⁰ Unfortunately, the most recent public debate held by the Council on the compromise text of the EPC “failed to secure the unanimity required for the proposal to be approved”.¹¹

Currently, it seems that the Parliament is no longer entitled to make amendments in the approval procedure. However, the practice shows that what has been achieved in negotiations within the EU institutions can hardly be easily overturned. It is now in the Commission’s hands to amend its original proposal in a way acceptable both to the Parliament and to the Council. So far, in the most recent Commission’s communication, it is stated that since the 2012 pub-

⁸ Commission Communication ‘Think Small First’ – A ‘Small Business Act’ for Europe COM (2008) 394 final, 25.6.2008; Fischer zu Cramburg “EU – Kommission stellt ‘Small Business Act’ mit einem Statut für die Europäische Privatgesellschaft (SPE) vor” *NZG*, 2008, p. 546.

⁹ The review of the Communication – 23 February 2011, COM (2011)78 final

¹⁰ European Parliament resolution of 6 April 2011 on a Single Market for Enterprises and Growth (2010/2277(INI)); P7_TA-PROV(2011)0146.

¹¹ 2008/0130(NLE) – 30/05/2011 Debate in Council; Revised Presidency compromise proposal for a Council Regulation for a European Private Company, Annex to Addendum 1 16115/09 Brussels 27 November 2009; This procedure was changed with the entry into force on 1 December 2009 of the TFEU. Before that the legislative procedure ended with the lack of unanimity in the Council. Initially, the Proposal was supposed to be approved under the consultation procedure according to which the work was shared between the Commission and the Council: the Commission submits proposals and the Council makes the decisions. Before any decision was taken by the Council, however, various stages must have been completed which also involved *i.a.* the European Parliament. The Parliament might accept or reject the proposal or propose amendments. The Council was not legally obliged to take account of the opinions or amendments emanating from Parliament. These opinions were nevertheless of considerable political importance. At the current state of law, the Proposal for the Statute of the EPC is one of the many that fall under Annex 4 of the Communication from the Commission to the European Parliament and the Council on the Consequences of the entry into force of the Lisbon Treaty for ongoing inter-institutional decision-making procedures. As a consequence, the consultation procedure under art. 308 EC prescribed for the adoption of the Statute for the EPC is substituted by the approval procedure according to art. 352 TFEU. According to this legislative procedure, now consent of the European Parliament is required.

lic consultation demonstrated stakeholders' hesitation as to the proposal, the Commission will continue to explore means to improve the regulatory framework in order to facilitate SMEs' cross border activities. In the same vein, it is worth mentioning that although the Reflection Group in its response to the Commission's Action Plan continues to support the EPC, at the same time it shares the view that the continued legislative opposition necessitate analyzes of alternatives for SMEs.

3. EPC WITH A TRULY EUROPEAN NATURE

It should not come as a surprise that the most characteristic feature of the EPC is to become a genuinely European company that would not be subject to the national company law of any of the member state.¹² This assumption is supposed to facilitate the international use of this legal form. Namely, running a business in the form of the EPC would not require the knowledge of various aspects of company laws from other member states.¹³ In order to avoid the problematic issue applicable to the SE according to which in particular fields of law the references to national company laws are required, the EPC is intended to be governed only by the provisions of the Regulation and the provisions of the articles of association which would not be inconsistent therewith.¹⁴ Nevertheless, the EPC would remain subject to the national rules of member states as far as accountancy law, tax law, penal law and bankruptcy law are concerned.¹⁵

In this sense it should be, however, noticed that many concepts in European company law as well as in private law in general are obviously embedded in

¹² J. Wagner "Europäischen Gesellschaftsformen" *Anwaltsblatt*, 2009, p. 409; H. Anzinger "Europäische Privatgesellschaft – vom Vollstatut zum tragfähigen Kompromiss, *BB*, 2009, p. 2607.

¹³ The proposal of the Regulation does not restrict the manner in which an EPC may be created. An EPC may be set up *ex nihilo*, in accordance with the provisions of the Regulation. It may also be created by transforming or dividing an existing company or by the merger of existing companies. Any company form existing under national law may become an EPC, in accordance with the relevant provisions of national law. An SE or another EPC may also participate in the formation of an EPC.

¹⁴ P. Hommelhoff "Die Europäische Privatgesellschaft (SPE): Auswirkungen auf die nationale GmbH" *GesRZ*, 2008, p. 343.

¹⁵ C. Steinberger "Die Europäische Privatgesellschaft – Schaffung einer europaweiten Gesellschaftsform für kleine und mittlere Unternehmen im Binnenmarkt" *BB*, 2006, Supplement No. 7, p. 28; P. Hommelhoff "Die Europäische Privatgesellschaft – Diskussionsstand 2003 und Fortgang" *Festschrift für Peter Doralt*, Manz Wien, 2004, p. 201.

national concepts and legal traditions.¹⁶ From this perspective it may be difficult for the EPC to run the business activities completely outside a national body of private law.¹⁷ Without any doubt, a reference to national law in the form of the link to the jurisdiction of the EPC's incorporation will have to be made.¹⁸ However, in my opinion, such a connection would be fully justified and as such does not have negative impact on the strong need for such a legal form.¹⁹

From the outset of discussion concerning the possible ways of the establishment of the EPC it was empathized that in principle the access to the EPC should be unrestricted. As a consequence, the requirement that companies from at least two member states are to be involved in the incorporation of the EPC is not suited for SMEs.²⁰ The proponents claim that only the unrestricted access to the EPC would indeed facilitate a full development of this form of a company within the EU and that the EPC should be available for every citizen of the Union.²¹ Additionally, it is also noted that this form should be an improved alternative to national forms of private companies and if so, a process of convergence of national company laws is not excluded.

The initial proposal of the Commission did not make the establishment of the EPC subject to a cross-border requirement. It was explained that, in practice, entrepreneurs usually set up businesses in their states where they reside before expanding abroad. An initial cross-border requirement would, therefore, create significant burdens on the establishment of the EPC and unnecessarily minimize the potential of the instrument. Furthermore, since monitoring and enforcing of the requirement in question would be in fact unfeasible, it may appear that in practice, a cross-border requirement could easily be circumvented.²²

¹⁶ J. Bormann and D. König "Der Weg zur Europäischen Privatgesellschaft – Bestandsaufnahme und Ausblick" *RIW*, 2010, P. 112.

¹⁷ T. Bücker "Die Organisationsverfassung der SPE" *ZHR* 173, 2009, p. 307; P. Hommelhoff and C. Teichmann "Bundesrat bremst Europa-GmbH: Erwiderung auf seine Stellungnahme zum SPE-Verordnungsvorschlag" *GmbHHR*, 2009, p. 37.

¹⁸ W. Blomeyer "Auf dem Weg zur Europäischen Genossenschaft" *BB*, 2000, p. 1741; W. Blomeyer "Die Zukunft der Genossenschaft in der Europäischen Union an der Schwelle zum 21. Jahrhundert" *ZfgG* 50, 2000, p. 191.

¹⁹ H-J de Kluiver "(Re)Considering the SPE" *European Company Law*, 2008, Vol.5, Issue 3, p. 112.

²⁰ C. Peters and P. Wüllrich "Gesellschaftsrechtliche Einigung Europas durch die Societas Privata Europaea (SPE)" *DB*, 2008, 2180; H. Wicke "Die Euro – GmbH im Wettbewerb der Rechtsordnungen" *GmbHHR*, 2006, p. 359.

²¹ C. Peters and P. Wüllrich "'Borderless flexibility': the Societas Privata Europaea from a German Comparative Law Perspective" *Company Lawyer*, 30, 2009, p. 214.

²² R. Kiem "Erfahrungen und Reformbedarf bei der SE – Entwicklungsstand" *ZHR* 173, 2009, p. 163; S. Fischer "Brücken zur Europäische Privatgesellschaft" *ZeUP* 2004, p. 743.

There appeared a question, however, whether the proposal remains in accordance with the subsidiarity principle set down in art. 9 and 10 of the TFEU.²³ It is argued that in order to invoke the EU law some connection with a European Union is indispensable. The justification of this opinion could be found for instance in the established case-law of the ECJ, where the Court consistently maintains that a clear-cut cross-border activity is always requisite.²⁴ From this perspective, it would be enough to fulfill the requirement in question if the EPC conducts business activities in more than one member state. Furthermore, it could be also noticed that the possibility to establish the EPC ex nihilo would allow a national companies to apply that form irrespective of pursuing any trans-border activity. It was argued, that this could highly impact national company law since the EPC could be perceived as a tool to eliminate national legal forms of private companies.²⁵ The question that could be posed here may sound trivial, but why not give priority to a form that is more efficient from the point of view of economic, legal or administrative optimization? If this is a European form of business which better responds to the needs of the market and its participants, as opposed to national forms of companies – then it is logical to use the more efficient form. Otherwise, what kind of interest is more important that would be able to justify a less effective form?

The amendments proposed by the European Parliament to the proposed Regulation presumed that the EPC should have a cross-border component demonstrated by one of the following:

- a cross-border business intention or corporate object,
- an objective to be significantly active in more than one member state,
- establishments in different member states, or
- a parent company registered in another member state.

²³ M. Martinek “Die Europäische Privatgesellschaft ohne verbindliche Mehrstaatlichkeit – Plädoyer für einen grenzüberschreitenden Bezug als Zulassungsvoraussetzung für die neue *Societas Privata Europaea*” in G. Hönn et al. (eds.) *Festschrift für Peter Kreutz*, Wolters Kluwer, 2009, p. 747.

²⁴ On the other hand please note that there could be parallel with ECJ ruling on art. 14 TFEU where the Court has held that recourse to that legal basis does not presuppose the existence of a specific cross-border dimension in every situation referred to by the measure founded on that basis. See e.g. Joined Cases C – 465/00, C – 138/01 and C – 139/01 *Österreichischer Rundfunk and Others*[2003] ECR I – 4989; Olivier in A. G. Toth (ed.) “The Oxford Encyclopedia of European Community Law, Vol. 2, The Law of the Internal Market” *OUP*, 2005, p. 397.

²⁵ Statement of the Confederation of German Trade Unions to a proposal for a regulation of the Council on a Statute for a European Private Company (Deutscher Gewerkschaftsbund Bundesvorstand), 29 July 2008, p. 3.

Afterwards, this amendment has been confirmed by the Council in the Revised Presidency Compromise Proposal. It is also mentioned that some countries prefer not having a cross-border element requirement like Italy and Latvia; whereas France notices that the requirement should be more flexible.²⁶

It clearly follows from the mentioned that the cross-border element would be useful, however, its formulation is far from simple since it encompasses additional obstacles for the SMEs that intend to establish the EPC.²⁷ It seems that the unequivocal cross-border component is required at a later stage when the EPC should demonstrate it within two years from the day of its creation. It is understandable that the suggested amendments intend to satisfy the subsidiary principle, but at the same time they decrease the attractiveness of the EPC.²⁸

4. PROS AND CONS

A European legal form established on the strength of contractual freedom would allow SMEs to organize into a group of companies and to form joint European companies.²⁹ The vehicle of a common European nature would suit perfectly SMEs being active in several member states or intending to merge cross-border or SMEs that need a European structure to establish European joint ventures.³⁰ Additionally, the EPC enables also a group of companies to implement a uniform management in all their subsidiaries in different member

²⁶ Article 3, paragraph 3. An SPE shall have a cross-border component at the time of its registration, demonstrated by one of the following:

(a) an intention to do business in a member state other than the one in which the SPE is registered; or

(b) a cross-border business object set out in the articles of association of the SPE; or

(c) a branch or a subsidiary registered in a member state other than the one in which the SPE is registered; or

(d) a member or members being resident or registered in more than one member state or in a member state other than the one in which the SPE is registered.

²⁷ C. Teichmann and P. Limmer “Die Societas Privata Europaea (SPE) aus notarieller Sicht – eine Zwischenbilanz nach dem Votum des Europäischen Parlaments” *GmbHRR*, 2009, p. 539.

²⁸ L. Cerioni “The European Private Company: Basic Legal Aspects and Some Open Issues on Its Tax Treatment, *European Taxation*, 2004, p. 547.

²⁹ R. Dammann and D. Weber-Ray “La société privée européenne: un outil novateur” *Bull. Joly Sociétés*, 2008, p. 811; R. Weber “Praxisfragen der Europäische Privagesellschaft” in VGR (ed.) *Gesellschaftsrecht in der Diskussion*, 2008 (Dr Otto Schmidt 2009), p. 88.

³⁰ P. Nazaruk “Koncepcja Europejskiej Spólki Prywatnej” *Prawo Spólek*, 2005, No 6, p.29.

states.³¹ At last but not at least, the EPC once properly established could then freely transfer its seat abroad.

Eventually, the EPC should not be reserved to large business only. SMEs have limited resources to deal with linguistic, administrative and legal difficulties.³² The EPC could change that; the common simple and flexible form of a company would facilitate the first step that should be taken when starting a business abroad.³³ As a result, the costs of creating and operating subsidiaries of in various member states would be very much reduced if their legal form could be the same in all member states. This uniform European standard would be advantageous mainly for companies originating from smaller states as well as from Eastern European countries and for states focused in particular on export (e.g. Germany).³⁴

In contrast to the aforementioned, the opponents claim that this specific European form would be rarely used for business if the national companies are allowed to merge and transfer their seats across borders.³⁵ However, the 10th and the proposal of the 14th Directives do not provide an adequate framework for the EPC. Additionally, the EPC responds to the needs to overcome obstacles arising during formation or transformation of foreign companies (subsidiaries) rather than deal with the cross-border mergers or transfer of seat.³⁶ Nevertheless, these different areas could complement each other. For instance, the EPC rules could allow that the place of the registered office and the real seat diverges while the 14th Directive could leave this issue to the member states. In this way, the Directive contains the rules on the transfer of the registered seat while the member states decide if the registered office can be transferred alone (without the real seat) or whether the main place of business will have to follow the registered office.

³¹ A. Bottiau and M. Martinek “La future société privée européenne (Societas Privata Europaea), menace pour la GmbH” *Bull. Joly Sociétés*, 2009, p. 809.

³² W. Niemeier „What kind of companies will a ‘One-Euro EPC’ generate?” in C. Teichmann, H. Hirte (eds.) *The European Private Company (SPE)*, ECFR – *Special Volume*, 2012.

³³ Joëlle Simon – Lecture at the Conference on the European Private Company, Brussels 10 March 2008.

³⁴ W. Hadding and E. Kiessling “Die Europäische Privatesellschaft (Societas Privata Europaea - SPE)” *WM* 2009, p. 145.

³⁵ O. Vossius “Die Europäische Privatesellschaft – Societas Europaea Privata (EPG/SEP)” *EWS*, 2007, p. 441;

¹ Bormann, D. König “Der Weg zur Europäischen Privatgesellschaft - Bestandsaufnahme und Ausblick” *RiW*, 2010, p. 111-119

³⁶ A. Radwan “European Private Company and the Regulatory Landscape in the EU” *EBLR*, 2007, p. 770; A.F.M. Dorrestein and O.Uziah-Santcross “The Societas Privata Europaea under the Magnifying Glass (Part 1)” *European Company Law*, December 2008, Vol.5, Issue 6, p. 279.

5. TRANSFER OF THE REGISTERED SEAT

Since the establishment of a company form with common features throughout the EU could be better achieved at EU level than by the member states alone, the EU may adopt measures, in accordance with the principle of subsidiarity laid down in art. 9 and 10 of the TFEU.³⁷ Even if all member states committed to make their national company laws more business-friendly, SMEs would still face a patchwork of many national set of rules. By offering SMEs a corporate vehicle that is uniform throughout the EU, the EPC constitutes the most effective means of achieving the objective set out above.³⁸

It comes as no surprise that the EPC must have its registered office, central administration or principal place of business in the EU.³⁹ Based on the Proposal, if the central administration is located in a member state other than that in which the EPC has its registered office, the EPC should lodge in the register of the member state where the central administration is located *inter alia* the name of the EPC and the address of its registered office or the amount of the share capital. This is one of the typical solutions used by the theory of incorporation. If so, it would provide the EPC with more flexible regime than that applicable to companies originating from the States applying the real seat theory. One of the consequences is that the EPC may transfer its registered office to another member state.⁴⁰

The procedure of the transfer is patterned on the provisions on the transfer of the registered office in the SE Regulation. Consequently, similarly to the SE, the transfer of the registered office of the EPC must not result in the winding-up of the EPC or in any interruption or loss of its legal personality or affect any right or obligation under any contract entered before the transfer. As far as judicial or administrative proceedings are concerned, the EPC should be considered as having its registered office in the home member state to all the proceedings commenced before the transfer of the registered office.

In this light, it is puzzling that the proposal of the EPC does not impose rules on the transfer of real seat, when at the same time it clearly separates the registered office from the real seat. It is even more surprising if we take into

³⁷ M. Brems and K. Cannivé “Die Europäische Privatgesellschaft (SPE) als Baustein des internationalen Konzerns” *Der Konzern* 2008, p. 639.

³⁸ P. Hommelhoff “The European Private Company Before its Pending Legislative Birth” *German Law Journal*, 2008, Vol. 9, No. 6, p.802.

³⁹ C. Teichmann “The European Private Company” *European Company Law*, 2004, p. 162 – 165.

⁴⁰ J. Schmidt „Der Vorschlag für eine Verordnung über die europäische Privatgesellschaft (SPE) – eine europäische Rechtsform speziell für KMU“ *EWS*, 2008, p. 455 – 456.

account that the ECJ in the cases *Centros*, *Überseering*, *Inspire Art*, *Sevic*, *National Grid Inuds* or *Vale* has already facilitated the cross-border movement of companies.⁴¹ In fact, they strengthen the capacity of the EPC in so far as its registered office does not have to correspond to the location of its real seat. On the other hand, it may no longer be necessary for the EPC to have the real seat and registered office located in different member states, if there is a common set of rules governing the EPC. One could argue that the SMEs could expect to be recognized while transferring its seat abroad solely base on the aforementioned ECJ case-law. Unfortunately, this in practice usually requires judicial action that is costly and time consuming. In this light, it could effectively compete with the obligation for the member state to automatically recognize the legal personality of the EPC moving its head office abroad based on the provisions of the Regulation on the EPC. At the same time, the issues that are not addressed by the proposed Regulation should be governed by the law applicable to private limited-liability companies in the member state in which the EPC has its registered office.

Unfortunately, the Council responded negatively to the Commission's proposal and suggested simply that the EPC should have its registered office and central administration in the EU without creating a more specific rule. However, in the second paragraph of the proposed article 7, it is added that for transitional period of 2 years from the date of the application of the EPC regulation, EPC shall have its registered office and central administration in the same member state and then national law shall apply.⁴² It has to be emphasized that from the point of view of enhancement of flexibility on the internal market, the amendments proposed by the Council are an unacceptable step backwards. It in fact turns the EPC into a national form, creating 27 different legal regimes, that is contrary to the intention of the Regulation. It would be highly recommended to keep the initial proposal as the newest step in favor of the incorporation theory, in particular if we take into account the recent case law the ECJ in which it ruled that the transfer of the real seat of a company originating in a member state applying the incorporation theory is possible and cannot be impeded by the host member state. This together with the EPC and its possibility to locate its registered office and central administration in different member states would significantly facilitate the transfer of seat.

⁴¹ W. Meilicke "Kurzkommentar zu EuGH vom 30.09.2003 Rs. C – 167/01 – Inspire Art" *GmbHHR*, 2003, p. 1260.

⁴² During the debates on this provision, Estonia and the Netherlands declared that they would prefer a longer transitional period. Austria claimed that instead of this provision they would only want the obligation to have both the registered office and the central administration or principal place of business in the same member state, which could be then reviewed after 5 years.

6. CONCLUSIONS

Focusing too much on the national legal framework in which business is carried out in the EU exposes companies to the application of the wide diversity of national laws and company regimes. Should we stay behind, make short-term decisions favoring mainly national companies and do not pay sufficient attention to the idea of European integration, the pace of the European integration will be reduced. Furthermore, the precipice between the European Union and the USA as well as APEC will increase. As a consequence, due to the weakness of the economic growth there will be the decrease of the entrepreneurship and international competitiveness of companies.

Therefore, being aware of the problems faced as a result of the diversity of company laws, it is pertinent to create a European company form designed specifically for SMEs.⁴³ The legal form should be as uniform as possible throughout the European Union, with issues which would lack substantive convergence left to the contractual freedom of the founders.⁴⁴ The EPC would offer the flexibility expected from a genuine European corporate form, by the possibility to be created in the state of their choice and, where appropriate, to transfer its registered office and real seat to another state without particular difficulties.⁴⁵ In accordance with the initial proposal of the Commission, the EPC Regulation expressly applies the theory of incorporation – “An EPC shall not be under any obligation to have its central administration in the Member State in which it has its registered office.” states the second paragraph of article 7.

From my point of view, it would be most beneficial if the initial approach is retained, because the incorporation principle suits better the internal market needs than the real seat principle. If this solution would not be feasible for the political reason, it would then be obviously better to leave the issue to the national law than to prohibit the divergence of the location of the registered office and the real seat. This is because a couple of member states already allow for such a divergence and the suggested interdictory condition would be a step backwards for their company law limiting the attractiveness of the EPC as an alternative for their national company forms.⁴⁶ One can find in the

⁴³ H. Krejci „Zehn Fragen zum Kommissionsvorschlag für eine Societas Privata Europaea (SPE)“ *Österreichische Notariatszeitung*, 2008, p. 362 – 367.

⁴⁴ J. Basedow “Theorie der Rechtswahl oder Parteiautonomie als Grundlage des Internationalen Privatrechts” *RabelsZ* Bd. 75, 2011, p. 32 – 59.

⁴⁵ T. Bücker “Die Organisationsverfassung der SPE” *ZHR* 173, 2009, p. 281 – 308; Feasibility Study of a European Statute for SMEs, Contract letter No FIF 20030950.

⁴⁶ H. Fleischer „Supranationale Gesellschaftsformen in der Europäischen Union. Prolegomena zu einer Theorie supranationaler Verbandsformen“ 174 *ZHR*, 2010, p. 385 – 428. Dóċ formularza

Proposal that the member states should ensure that the provisions adopted in relation to the EPC Regulation do not result in disproportionate restrictions in the rules applicable to the EPC or in discriminatory treatment of the EPC as compared with private limited-liability companies governed by national law. On that ground, if the requirement that the registered office and the central administration must be located in the same member state is maintained, it may happen that the EPC comes across more obstacles to the freedom of establishment if it decides to transfer its real seat to another member state (with the retention of the registered office in its state of origin) than national companies originated from the state accepting the divergence in question – usually applying the incorporation theory.⁴⁷

The economic crisis has already confirmed that to some of the rules of national company law must be given a second thought.⁴⁸ This concerns in particular the rules which limit the flexibility of companies' reincorporation and adaptation to the rapidly changing market conditions.⁴⁹ I believe it is better for a member state to surrender some revenue and influence on an emigrating company than lose that as a result of bankruptcy proceedings of that company. It is very well known that the company's bankruptcy impacts the economy of the state much deeper than just a loss of revenue for that state. This encompasses also redundancies, possible insolvencies of that company's creditors as well as an overall negative impact on the economy of that state.

Why, then, there are still so many hesitations, and the voices of opposition acting in order to effectively block the final implementation? In my opinion, the answer to that intriguing question is surprisingly simple: Europe may not be ready for this – for being the community of rights as well as community of obligations. Most recent example of Greece fits into this picture perfectly – most of us are willing to accept the offered facilities and support but we are not ready to bear the responsibility which is immanently assigned to that. Are we ready for a shared responsibility for the sake of economic growth and general welfare mainly perceived by SMEs? Is really the Greek's bankruptcy necessary in order to ascertain that in the long – term perspective the common solutions have a huge potential for boosting the economic development and the rising standard of living for EU citizens?

⁴⁷ P. Hommelhoff, C. Teichmann "Auf dem Weg zur Europäischen Privatgesellschaft (SPE)" *DStR*, 2008, s.925; "Société Privée Européenne: une société de partenaires" Conseil National du Patronat Français, Chambre de Commerce et d'Industrie de Paris, 1998, p.9.

⁴⁸ "Sign of crisis" Nordea Bank – Economic Outlook, August 2011; "Ways of coping as the crisis mutates" Economic Research – Credit Agricole; Quarterly no. 135 – 1st quarter 2012.

⁴⁹ S. van den Braak "The European Private Company, Its Shareholders and Its Creditors" *Utrecht Law Review* 6, 2010, p. 1.

Therefore, in my view, there is no time and place for ‘balanced’ approaches which only give the impression of a compromise but in fact result in the slowing down of positive and necessary company law changes. In this sense, I think that the suggested balanced compromise, which intends to find a solution acceptable to all member states, is not satisfactory. Namely, it is suggested that the registered office and the real seat of the EPC should be in the EU based on the applicable national law. This does not give the necessary impetus for the European company law amendments. The preparatory works of the EPC Regulation are the perfect opportunity to discuss pros and cons of the problem of the location and determination of the company’s seat.⁵⁰ To be more precise, the discussion should encompass the advantages and disadvantages, but also benefits and costs for the internal market (and not only for the particular member state) of the application of the real seat theory and the incorporation theory in order to find most beneficial solution.

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⁵⁰ D. Kornack “The European Private Company – Entering the Scene or Lost in Discussion?” *German Law Journal* 10, 2009, p. 1321.

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