

The European Private Company, its shareholders and its creditors

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1. Introduction

In June 2008, the European Commission presented a Proposal for a Council Regulation on the Statute for a European Private Company (*Societas Privata Europaea*, SPE).¹ The SPE will be a new legal form for small and medium-sized companies, allowing them to set up the same European legal entity across the Member States. The SPE will not be the first legal entity based on a European Regulation. There are already three others: the European Economic Interest Grouping, the European Public Company (*Societas Europaea*, SE) and the European Cooperative Society.²

The history of the SPE goes back to the 1990s. In the beginning it was an initiative by academics but over time it gained support in Brussels and it ended up as a 'priority initiative' of the European Commission's 2008 Work Programme.³ The SPE project is not to be confused with a project of a group of company law experts from different Member States. This group is working on a Model Company Law Act for Europe (EMCLA).⁴ Whereas after its adoption the Council Regulation on the SPE Statute is directly applicable in all Member States, the EMCLA will only present Member States with a model which they may or may not use when drafting their own national company law. This paper deals with the Commission's SPE Proposal, not with the EMCLA.

According to the SPE Proposal, the SPE Statute shall apply from July 2010 onwards. However, the adoption of the Proposal is not without problems. The Proposal is based on Article 308 EC Treaty, which means that its adoption requires the unanimous consent of all 27 Member States. As the Proposal is not undisputed, it may be difficult to reach unanimity.⁵ In March 2009, the European Parliament adopted a legislative resolution with regard to the SPE proposing quite

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1 COM(2008)396, Interinstitutional File 2008/0130 (CNS).

2 See respectively Council Regulation (EEC) 2137/85 of 25 July 1985, Council Regulation (EC) 2157/2001 of 8 October 2001, Council Regulation (EC) 1435/2003 of 22 July 2003.

3 For an overview of the history and background of the SPE see O. Uziuhu-Santcroos, 'The SPE: A Necessary Tool for SMES?', in: D.F.M.M. Zaman *et al.* (eds.), *The European Private Company (SPE). A Critical Analysis of the EU Draft Statute*, 2009, pp. 4-6.

4 On this project see T. Baums & P. Krüger Andersen, *The European Model Company Law Project*, ECGI Working Paper Series in Law, No. 097/2008, March 2008. In the group of experts the Netherlands is represented by Harm-Jan de Kluiver, who apparently does not fully support the SPE Proposal. See H.J. de Kluiver, '(Re)Considering the SPE', 2008 *European Company Law*, no. 3, pp. 112-113.

5 A conference on the SPE, held by the European Commission in Brussels on 10th March 2008, revealed several controversial issues. For the report on this conference see M.L. Lennarts & O. Uziuhu-Santcroos, 'Report on the Conference on the European Private Company, *Societas Privata Europaea* (SPE), held in Brussels, 10 March 2008', 2008 *Ondernemingsrecht*, no. 7, pp. 263-268.

a few amendments to the Commission's Proposal.⁶ At present, in September 2009, it is still unclear whether the Commission will come up with an official revised compromise proposal. Whatever the outcome of the discussions will be, in any case the date of July 2010 seems to be a little optimistic.⁷

In this paper I will try to answer the question whether we need the SPE and whether the SPE Proposal provides for adequate protection for two important categories of stakeholders: shareholders and creditors.⁸ In Section 4 below I will examine the potential need for the SPE. Section 5 concentrates on the position of shareholders and Section 6 on the position of creditors.⁹ Section 7 contains a brief analysis and the final Section 8 makes some final remarks. Before examining the need for the SPE, it is wise to take a closer look at what the SPE is. Therefore the focus will first be on the requirements for the establishment of an SPE (Section 2) and the rules which are applicable to an SPE (Section 3). The various sections not only deal with the Commission's Proposal, but also with the relevant amendments by the European Parliament.

On Friday, 26th June 2009, a conference on the SPE was held in Utrecht, organized by Utrecht University's Molengraaff Institute for Private Law. At the basis of this conference was a book on the SPE written by experts of the Ius Commune research programme.¹⁰ This book as well as the report on the conference¹¹ have proved to be important sources for my research.

2. Requirements for the establishment of an SPE

2.1. Article 3 SPE Proposal

According to Article 3(1) SPE Proposal, an SPE shall comply with the following requirements. Firstly, its capital shall be divided into shares. Secondly, a shareholder shall not be liable for more than the amount he has subscribed or agreed to subscribe. Thirdly, an SPE shall have legal personality. Fourthly, its shares shall not be offered to the public and shall not be publicly traded.¹² Finally, an SPE may be formed by one or more natural persons and/or legal entities.¹³

2.2. Minimum capital requirement?

The five requirements mentioned in the previous section seem to have the consent of all those involved with the SPE. However, there are also a number of issues that are not undisputed. The first one relates to the capital of the SPE.

The requirement of a minimum capital when incorporating a private company is present in many continental European jurisdictions. For instance, in the Netherlands there is a minimum capital requirement of €18,000 for the *Besloten Vennootschap* and in Germany the minimum for

6 European Parliament legislative resolution of 10 March 2009 on the Proposal for a Council Regulation on the Statute for a European Private Company, P6_TA(2009)0094.

7 Just to compare: the birth of the SE in 2001 had taken thirty years and at that time the EU consisted of only 15 Member States. On the other hand, the birth of the European Cooperative Society in 2003 was a very quick one.

8 Of course employees are also to be considered important stakeholders. For their position see R. van het Kaar & I. Zaal, 'Employee Participation', in: D.F.M.M. Zaman *et al.* (eds.), *The European Private Company (SPE). A Critical Analysis of the EU Draft Statute*, 2009, pp. 159-174.

9 For specific issues relating to the transfer of the registered office of the SPE to another Member State I refer to S.M. van den Braak, 'Transferring the Registered Office', in: D.F.M.M. Zaman *et al.* (eds.), *The European Private Company (SPE). A Critical Analysis of the EU Draft Statute*, 2009, pp. 175-196.

10 D.F.M.M. Zaman *et al.* (eds.), *The European Private Company (SPE) – A Critical Analysis of the EU Draft Statute*, 2009.

11 O. Uziáhu-Santcroos, 'Report on the Conference on the European Private Company (*Societas Privata Europaea*) on Friday 26th June 2009 in Utrecht, the Netherlands', 2009 *Tijdschrift voor Ondernemingsbestuur*, no. 4, pp. 106-112.

12 This requirement emphasizes the closely held character of the company and thus distinguishes the SPE from the SE.

13 This requirement allows for a single shareholder SPE. In the light of the 12th EC Company Law Directive on the single member company this is not a new phenomenon in the European context.

a *Gesellschaft mit beschränkter Haftung* is €25,000. However, in the wake of the case law of the European Court of Justice (ECJ) with regard to the freedom of establishment,¹⁴ there is a tendency towards abolishing the minimum capital requirement. Germany has recently introduced the *Unternehmergeellschaft* with a minimum capital of €1 and the Netherlands is in the process of abolishing the minimum capital requirement for the *Besloten Vennootschap*.¹⁵ Among the arguments for abolishing it are that its amount is arbitrary and that there is no guarantee that it is still available at the time the creditor wishes his claim to be settled.¹⁶

In line with the tendency at a national level, Paragraph 11 of the preliminary considerations to the SPE Proposal points out that the SPE should not be subject to a high mandatory capital requirement since this would be a barrier to the creation of SPEs. Accordingly, Article 19(4) SPE Proposal states that the capital of the SPE shall be at least €1. However, the European Parliament is of a different opinion. It sticks to the requirement of a certain amount of capital and therefore it has proposed an amendment to Article 19(4) which, in certain circumstances, provides for a minimum of €8,000.¹⁷ For Dorresteyn and Uziahu-Santcroos, this amendment illustrates the difficulties in positioning the SPE in relation to domestic companies.¹⁸

2.3. Size restriction?

The SPE Statute is one of the measures of the Small Business Act (SBA), a Commission policy document designed to assist small and medium-sized enterprises (SMEs).¹⁹ The objective of the SBA is to improve the framework conditions for SMEs, which account for more than 99 % of companies in the European Union, to do business in the Single Market and to improve their market performance. The SPE Statute is supposed to meet this objective by allowing entrepreneurs to set up an SPE following the same, simple, flexible company law provisions across the Member States.²⁰ However, as the SPE Proposal does not contain any company size restriction, large companies and groups may also benefit. The question whether the SPE should be limited to SMEs only has been discussed on several occasions, the main concern being that the SPE may be used by large companies to avoid the application of (rigid) rules of national company law.²¹

2.4. Cross-border element?

Another issue to be addressed is whether the accessibility of the SPE should depend on the presence of a cross-border dimension of the business. There is no cross-border requirement in

14 In this context, there are several milestone judgments by the European Court of Justice: ECJ, 10 July 1986, Case 79/85, *Segers*; ECJ, 9 March 1999, Case 212/97, *Centros*; ECJ, 5 November 2002, Case 208/00, *Überseering*; ECJ, 30 September 2003, Case 167/01, *Inspire Art*.

15 The Bill amending Dutch private company law is pending before Parliament. *Kamerstukken II* 2006-2007, 31 058 (*Wet vereenvoudiging en flexibilisering BV-recht*).

16 H. Boschma, L. Lennarts & H. Schutte-Veenstra, 'The Reform of Dutch Private Company Law: New Rules for the Protection of Creditors', 2007 *European Business Organization Law Review* 8, p. 573.

17 Those advocating that a minimum capital requirement should be maintained see it as an entry price for limited liability and a demonstration of seriousness. See P. Hommelhoff & C. Teichmann, 'Auf dem Weg zur Europäischen Privatgesellschaft (SPE)', 2008 *DstR*, no. 19, p. 931.

18 A.F.M. Dorresteyn & O. Uziahu-Santcroos, 'The Societas Privata Europaea under the Magnifying Glass (Part 2)', 2009 *European Company Law*, no. 4, p. 159. For objections against the abolishment of a minimum capital requirement see P. Hommelhoff, 'Die Europäische Privatgesellschaft (SPE): Auswirkungen auf die nationale GmbH', 2008 *Der Gesellschafter*, no. 6, p. 345.

19 *Think Small First – A 'Small Business Act' for Europe*, Brussels 19 June 2008, COM(2008) 394 (SEC (2008) 2101, SEC (2008) 2102).

20 Explanatory Memorandum to the SPE Proposal, p. 2.

21 See O. Uziahu-Santcroos, 'The SPE: A Necessary Tool for SMES?', in: D.F.M.M. Zaman *et al.* (eds.), *The European Private Company (SPE). A Critical Analysis of the EU Draft Statute*, 2009, p. 13, who also remarks that this has already been experienced with the SE, as is illustrated by the formation of Allianz SE, formerly Allianz AG, a large German insurance firm. By opting for an SE, Allianz managed to reduce the number of representatives on the Supervisory Board. At the same time, according to M.L. Lennarts & O. Uziahu-Santcroos, 'Report on the Conference on the European Private Company, *Societas Privata Europaea* (SPE), held in Brussels, 10 March 2008', 2008 *Ondernemingsrecht*, no. 7, p. 265, the SE runs the risk of becoming obsolete if the SPE will be available to large companies. The size issue was also raised at the conference in Utrecht in 2009. See O. Uziahu-Santcroos, 'Report on the Conference on the European Private Company (*Societas Privata Europaea*) on Friday 26th June 2009 in Utrecht, the Netherlands', 2009 *Tijdschrift voor Ondernemingsbestuur*, no. 4, p. 109.

the Proposal, which means that also in the case of purely national economic activities entrepreneurs may establish an SPE.²² According to the Explanatory Memorandum to the SPE Proposal, an initial cross-border element would significantly reduce the potential of the instrument, it could easily be circumvented and would be difficult to monitor and enforce.²³

The observation has been made that due to the lack of a Community dimension as a prerequisite for the incorporation or the existence of the SPE, the adoption of the SPE Proposal might not be reconcilable with the subsidiarity principle of Article 5 EC Treaty.²⁴ However, according to the Commission the objective of the SPE to enable SMEs to use the same company form across the EU cannot be sufficiently achieved by the Member States themselves and therefore action at EU level is necessary.²⁵ In this context it is noteworthy that the European Parliament has proposed to add cross-border conditions to the Proposal. According to the proposed amendment of Article 3 SPE Proposal, an SPE shall have a cross-border element demonstrated by one of the following: a cross-border business intention or corporate objective; an intention to be significantly active in more than one Member State; establishments in different Member States, or a parent company registered in another Member State. However, the observation has been made that the cross-border requirements proposed by the European Parliament take a different approach from the requirements relating to other supranational legal forms²⁶ and, moreover, that they are very easy to circumvent.²⁷ On the other hand, without a cross-border requirement, the SPE may enter into competition with national legal forms and thus force Member States to adjust their own private limited company forms to the SPE model.²⁸

3. Rules on the law which is applicable to an SPE

3.1. Article 4 SPE Proposal

Article 4 SPE Proposal provides for a hierarchy of rules applicable to the SPE. According to this hierarchy, the SPE is first to be governed by the directly applicable mandatory provisions of the Regulation. However, as the SPE not only intends to have a uniform legal form, but also a flexible one, the Regulation does not provide for an entirely autonomous mandatory regime. Annex I to the Regulation provides a list of matters in respect of which the shareholders of the SPE are obliged to lay down rules in their articles of association. Hence the articles of association constitute the second level. The third level in the hierarchy of applicable rules is the national law related to private companies of the Member State where the SPE is registered. The national law of this Member State only comes into play where a matter is not covered by the articles of the Regulation or by Annex I.

22 This is not the case for the SE. See Article 2 SE Regulation, which includes cross-border conditions.

23 Explanatory Memorandum, p. 3.

24 The issue of subsidiarity was discussed on several occasions. See the presentation by J. Bloemarts, 'Presentations Held at the Public Hearing Before the Committee on Legal Affairs of the European Parliament in Brussels, 22 June 2006, on the European Private Company', 2006 *European Company Law*, no. 6, pp. 265-267. See also M.L. Lennarts & O. Uziahu-Santcroos, 'Report on the Conference on the European Private Company, *Societas Privata Europaea* (SPE), held in Brussels, 10 March 2008', 2008 *Ondernemingsrecht*, no. 7, p. 265. For the position of the Dutch Government see *Kamerstukken II 2007-2008*, 31 543, no. 1-7.

25 Explanatory Memorandum, p. 3.

26 This observation was made by Professor Zaman at the conference in Utrecht in 2009. See O. Uziahu-Santcroos, 'Report on the Conference on the European Private Company (*Societas Privata Europaea*) on Friday 26th June 2009 in Utrecht, the Netherlands', 2009 *Tijdschrift voor Ondernemingsbestuur*, no. 4, p. 107.

27 A.F.M. Dorresteyn & O. Uziahu-Santcroos, 'The Societas Privata Europaea under the Magnifying Glass (Part 2)', 2009 *European Company Law*, no. 4, p. 159.

28 H.E. Boschma & J.N. Schutte-Veenstra, 'De Europese BV: het voorstel voor een SPE-Statuut', 2008 *Ondernemingsrecht*, no. 17, p. 604.

3.2. Regulation

The SPE Proposal comprises ten chapters entitled successively General provisions (I), Formation (II), Shares (III), Capital (IV), Organisation of the SPE (V), Employee participation (VI), Transferring the registered office of the SPE (VII), Restructuring, dissolution and nullity (VIII), Additional and transitional provisions (IX), Final provisions (X). The Proposal also provides for two Annexes. Annex I relates to the articles of association of the SPE and Annex II to the registration of the transfer of the registered office of the SPE. In total the SPE Proposal contains forty-seven articles.

3.3. Articles of association

According to the general provision of Article 4 SPE Proposal, an SPE shall also be governed, as regards the matters listed in Annex I to the Regulation, by its articles of association. The matters covered by Annex I are numerous – the list covers over forty issues – but they have in common that they notably concern the internal organisation of the SPE. As Annex I only prescribes what should be regulated in the articles of association and not how it should be regulated, the shareholders of the SPE are free to determine in their articles of association the internal organisation which is best suited to their needs.

The point has been made that although the contractual freedom of the shareholders to regulate the internal relations of the company may enhance the desired flexibility of the SPE, the flexibility thus achieved comes at a price because the search for tailor-made rules involves high transaction costs.²⁹ It is admitted that the inclusion in the SPE Regulation of model articles of association which could be adopted and/or adapted will meet this objection. However, no model articles have yet been drafted.³⁰

The SPE Proposal does not regulate what happens if a matter listed in Annex I is not or is only partly regulated in the articles of association. The lack of default provisions is generally considered to be a serious problem and the observation has been made that it leads to unacceptable legal uncertainty.³¹

3.4. Applicable national law

According to Article 4 SPE Proposal, where a matter is not covered by the Regulation or by Annex I, an SPE shall be governed by the law which applies to private limited companies in the Member State in which the SPE has its registered office.

It is admitted that the legal technique of Article 4 SPE Proposal aims to set aside national company law as much as possible. However, one may argue that it will be difficult to reach this goal. To begin with, the Regulation does not cover matters like insolvency, employment and tax,³² which are important issues for the operation of the company. Secondly, there are quite a

29 This observation was made by Professor Drury at the conference in Brussels in 2008. See M.L. Lennarts & O. Uziuhu-Santcroos, 'Report on the Conference on the European Private Company, *Societas Privata Europaea* (SPE), held in Brussels, 10 March 2008', 2008 *Ondernemingsrecht*, no. 7, p. 266. See also P. Hommelhoff, 'Die Europäische Privatgesellschaft (SPE): Auswirkungen auf die nationale GmbH', 2008 *Der Gesellschafter*, no. 6, p. 340; A.F.M. Dorresteyn & O. Uziuhu-Santcroos, 'The Societas Privata Europaea under the Magnifying Glass (Part 1)', 2008 *European Company Law*, no. 6, p. 282.

30 This issue was also raised at the conference in Utrecht in 2009. See O. Uziuhu-Santcroos, 'Report on the Conference on the European Private Company (*Societas Privata Europaea*) on Friday 26th June 2009 in Utrecht, the Netherlands', 2009 *Tijdschrift voor Ondernemingsbestuur*, no. 4, p. 109. See also A.F.M. Dorresteyn & O. Uziuhu-Santcroos, 'The Societas Privata Europaea under the Magnifying Glass (Part 2)', 2009 *European Company Law*, no. 4, p. 153.

31 See for instance H.J. de Kluiver, '(Re)Considering the SPE', 2008 *European Company Law*, no. 3, pp. 112-113; A.F.M. Dorresteyn & O. Uziuhu-Santcroos, 'The Societas Privata Europaea under the Magnifying Glass (Part 1)', 2008 *European Company Law*, no. 6, p. 282; H.E. Boschma & J.N. Schutte-Veenstra, 'De Europese BV: het voorstel voor een SPE-Statuut', 2008 *Ondernemingsrecht*, no. 17, pp. 604 and 610 suggest that the applicable national law should function as a safety net.

32 Explanatory Memorandum to the SPE Proposal, p. 2.

few matters that the Regulation itself assigns to the national law of the Member States.³³ Thirdly, upon further reflection the legal technique of Article 4 SPE Proposal is not as clear as it may seem at first glance. In the legal structure of the SPE as laid down in Article 4 SPE Proposal, the applicability of the national law is triggered by the words ‘not covered by’ the Regulation or Annex I. Thus the uniformity of the SPE will to a large extent depend on the interpretation of the wording ‘not covered by’. Is this wording to be interpreted narrowly as advocated by, for instance, De Kluiver and Roest³⁴ or broadly as advocated by, for instance, Drury who fears ‘extreme diversification’ in the varieties of the SPE if it would become dependent on the national laws of the Member States?³⁵ Moreover, as pointed out by De Kluiver and Roest³⁶ and also by Lennarts,³⁷ even if a matter is to be considered exclusively covered by the Regulation or its articles of association, disputes will have to be settled before national courts which are influenced by their own national company law backgrounds. I do agree that even a broad interpretation is not an antidote to diversification but, on the other hand, over time preliminary proceedings before the ECJ may have a harmonising effect.

4. Potential need for the SPE

4.1. Cross-border group structures

Companies wishing to expand across borders can in theory do so by creating either foreign branches which do not have a separate legal personality or foreign subsidiaries that do have legal personality. As a matter of fact cross-border activities are mostly organized through subsidiaries, which have the benefit of limited tax exposure and which are more trusted by local creditors and customers.³⁸ Once the choice has been made to establish a subsidiary abroad instead of a branch, a second question arises: which legal form will the subsidiary have? At this stage of the decision-making process, there are again two options.

The first option is to use the national legal form of the Member State where the subsidiary is to be established. However, this option has the disadvantage that this legal form may be unfamiliar to the parent company.³⁹ As a result, there may be high transaction costs upon the formation of the subsidiary. Besides, a difference in the legal form between the parent company and the subsidiary may also lead to compliance costs associated with the operation of the subsidiary. Moreover, every time the parent company wishes to establish a new subsidiary in another Member State, the disadvantage reappears.

33 S. Rammeloo, ‘Matters Related to Private International Law’, in: D.F.M.M. Zaman *et al.* (eds.), *The European Private Company (SPE). A Critical Analysis of the EU Draft Statute*, 2009, p. 35, provides for an overview of no less than fourteen provisions in the Proposal that refer to the applicable national law.

34 H.J. de Kluiver & J. Roest, ‘Expulsion and Withdrawal of Shareholders’, in: D.F.M.M. Zaman *et al.* (eds.), *The European Private Company (SPE). A Critical Analysis of the EU Draft Statute*, 2009, p. 69.

35 R. Drury, ‘The European Private Company’, 2008 *European Business Organization Law Review* 9, pp. 131-132. See also the observation by Teichmann that there should preferably be no reference to national law at all as reported by M.L. Lennarts & O. Uziuhu-Santcroos, ‘Report on the Conference on the European Private Company, *Societas Privata Europaea* (SPE), held in Brussels, 10 March 2008’, 2008 *Ondernemingsrecht*, no. 7, p. 265.

36 H.J. de Kluiver & J. Roest, ‘Expulsion and Withdrawal of Shareholders’, in: D.F.M.M. Zaman *et al.* (eds.), *The European Private Company (SPE). A Critical Analysis of the EU Draft Statute*, 2009, p. 70.

37 M.L. Lennarts, ‘Voice Rights of Shareholders’, in: D.F.M.M. Zaman *et al.* (eds.), *The European Private Company (SPE). A Critical Analysis of the EU Draft Statute*, 2009, p. 126.

38 This observation was made by J. Simon, ‘Presentations Held at the Public Hearing Before the Committee on Legal Affairs of the European Parliament in Brussels, 22 June 2006, on the European Private Company’, 2006 *European Company Law*, no. 6, p. 274. For the reasons for setting up group structures see also A. Dorresteijn *et al.*, *European Corporate Law*, 2009, pp. 281-282.

39 Because private company law has not been affected by harmonization as much as the law regulating public companies, there are considerable differences between the different national private company forms.

The second option is to use the national legal form of the Member State of the parent company. In this scenario the subsidiary would have a legal form that is familiar to the parent company, but that qualifies as ‘foreign’ in the Member State where it is set up. In theory, however, due to the freedom of establishment it could rely on recognition as a separate legal subject.⁴⁰ Though this option has the advantage of a familiar and similar legal form for all group members, it also has serious disadvantages. At the 2009 conference on the SPE in Utrecht, Teichmann asserted that because of these disadvantages, this option is in fact not an option at all. Among the disadvantages he mentioned were mistrust in the minds of the business partners and the authorities of the Member State of the subsidiary. They may wonder why the parent company has not used a local legal form for its subsidiary and the authorities may tend to respond to the supposed evasion of their domestic law with ‘poisoned arrows’.⁴¹ Whether or not these arrows are reconcilable with the freedom of establishment, in any case they constitute a legal uncertainty that business does not want to face.

4.2. The rationale for the SPE

From the foregoing it may be clear that the facility to incorporate subsidiaries in different Member States that are governed by the same set of rules is an important advantage of the SPE. In cross-border group structures this could save considerable costs. In fact, the advantage of a uniform structure for establishing subsidiaries throughout the EU is commonly accepted as an important rationale for the SPE.⁴² The European label of the SPE is also often mentioned, particularly as a marketing tool for entrepreneurs from the ‘new’ Member States or for those who are considering trading outside the EU or who are considering running a cross-border joint venture.⁴³ The purpose of setting up the SPE for enabling easy start-ups seems to lose weight since due to the recent reforms of national company law the current national legal forms are also more easily accessible.⁴⁴

5. Shareholders

5.1. Introduction

Shareholders’ rights can be divided into two main categories: participation rights and financial rights. Participation rights, often referred to as voice rights,⁴⁵ relate to the possibilities that shareholders have to influence the company’s policy; financial rights relate to the financial benefits that shareholders can derive from the company. In this section, the focus will be on the voice rights provided for by the SPE Proposal.⁴⁶ In Sections 5.2 to 5.6 I will successively introduce the right to be informed, the right to be consulted, the right to challenge resolutions, the right to request a resolution and the right to request an independent expert.

40 ECJ, 30 September 2003, Case 167/01, *Inspire Art*.

41 See O. Uziuhu-Santcroos, ‘Report on the Conference on the European Private Company (*Societas Privata Europaea*) on Friday 26th June 2009 in Utrecht, the Netherlands’, 2009 *Tijdschrift voor Ondernemingsbestuur*, no. 4, pp. 107-108.

42 R. Drury, ‘The European Private Company’, 2008 *European Business Organization Law Review* 9, p. 126; P. Hommelhoff, ‘Die Europäische Privatgesellschaft (SPE): Auswirkungen auf die nationale GmbH’, 2008 *Der Gesellschafter*, no. 6, p. 338.

43 M.L. Lennarts & O. Uziuhu-Santcroos, ‘Report on the Conference on the European Private Company, *Societas Privata Europaea* (SPE), held in Brussels, 10 March 2008’, 2008 *Ondernemingsrecht*, no. 7, p. 264; H.E. Boschma & J.N. Schutte-Veenstra, ‘De Europese BV: het voorstel voor een SPE-Statuut’, 2008 *Ondernemingsrecht*, no. 17, p. 602.

44 This point was made by Professor De Kluiver at the conference in Utrecht. See O. Uziuhu-Santcroos, ‘Report on the Conference on the European Private Company (*Societas Privata Europaea*) on Friday 26th June 2009 in Utrecht, the Netherlands’, 2009 *Tijdschrift voor Ondernemingsbestuur*, no. 4, p. 108.

45 See for instance M.L. Lennarts, ‘Voice Rights of Shareholders’, in: D.F.M.M. Zaman *et al.* (eds.), *The European Private Company (SPE). A Critical Analysis of the EU Draft Statute*, 2009, pp. 117-134.

46 The financial benefits that shareholders can derive from the company are included in Section 6.2 of this paper.

Disputes between shareholders or between shareholders and the company may have a negative impact on the company. In public companies those conflicts can come to an end when the dissatisfied shareholder sells his or her shares on the market. However, in private limited companies there is no market for shares⁴⁷ and that is why shareholders in private limited companies usually have exit rights, *e.g.* the right to expel another shareholder or the right to leave the company oneself. Considering that the private company is an environment with a high risk potential for conflicts because it is *ipso facto* unstable, exit rights are of the utmost importance.⁴⁸ In Sections 5.7 and 5.8 I will deal with the exit rights provided for by the SPE Proposal and in Section 5.9 the focus will be on the role of the applicable national law.

As a starting point for my further research on this issue I will use a joint venture SPE with its registered seat in the Netherlands and with a Dutch shareholder A as one of four shareholders who each hold 25 % of the shares and the voting rights.⁴⁹

5.2. The right to be informed

The right of shareholders to be informed is of great importance. In fact, it is on the basis of information that shareholders determine their position and exercise their rights. According to Article 28(1) SPE Proposal all shareholders shall have the right to be duly informed and to ask questions to the management body about resolutions, annual accounts and all other matters relating to the activities of the SPE. Article 28(2) provides that the management body may only refuse to give access to information if doing so could cause serious harm to the business interests of the SPE.

For our shareholder A these provisions are good news. He will get all the information he asks for, unless ‘serious harm’ will occur. However, if the focus is on the details, there are at least two questions that remain unanswered. The first one relates to the duty of management to supply the information. To whom is this duty owed? Of course it is owed to the individual shareholders who asked for the information, but is it also owed to all shareholders alike because otherwise they would be treated unequally?⁵⁰ The second question relates to procedural issues. Imagine our shareholder A not getting the information he asked for. What remedy is available to him and which court has jurisdiction? Should Article 22(2) of the Brussels I Regulation apply by analogy, which would lead to the Dutch courts having jurisdiction (the court of the registered seat)?⁵¹ Our Dutch shareholder A would probably favour the jurisdiction of the Dutch court, but what if shareholder B, living in the UK, would like to exercise his right to information? Would B also be enthusiastic? I agree with Lennarts who points out that the SPE Proposal should contain an explicit jurisdiction rule, because otherwise the right to information risks being nothing more than a ‘paper tiger’.⁵²

47 See Article 3(1)(d) SPE Proposal.

48 H.J. de Kluiver, ‘(Re)Considering the SPE’, 2008 *European Company Law*, no. 3, p. 112.

49 An SPE may issue non-voting shares. For the rights attached to these shares and the possible complications see M.L. Lennarts, ‘Voice Rights of Shareholders’, in: D.F.M.M. Zaman *et al.* (eds.), *The European Private Company (SPE). A Critical Analysis of the EU Draft Statute*, 2009, p. 120.

50 On the principle of equality see L. Timmerman & A. Doorman, *Rights of Minority Shareholders in the Netherlands, A Report written for the XVth World Congress of the International Academy of Comparative Law, section 4*. Available at <www.ejcl.org>.

51 This suggestion is made by M.L. Lennarts, ‘Voice Rights of Shareholders’, in: D.F.M.M. Zaman *et al.* (eds.), *The European Private Company (SPE). A Critical Analysis of the EU Draft Statute*, 2009, p. 128. See also S. Rammeloo, ‘Matters Related to Private International Law’, in: D.F.M.M. Zaman *et al.* (eds.), *The European Private Company (SPE). A Critical Analysis of the EU Draft Statute*, 2009, p. 40.

52 M.L. Lennarts, ‘Voice Rights of Shareholders’, in: D.F.M.M. Zaman *et al.* (eds.), *The European Private Company (SPE). A Critical Analysis of the EU Draft Statute*, 2009, p. 129.

5.3. The right to be consulted

Article 27(1) SPE Proposal provides for a list of matters that shall be decided by a resolution of the shareholders. These matters include, amongst others, a variation of rights attaching to shares, the expulsion of shareholders, the withdrawal of shareholders, distribution to the shareholders, the acquisition of own shares, a reduction of share capital and the appointment and removal of directors.

According to Article 27(1), the shareholders' resolution shall be taken by a majority as defined in the articles of association. However, according to Article 27(2) for a number of key resolutions (for example, with regard to a variation of rights attaching to shares) the majority may not be less than two-thirds of the total voting rights attached to the shares issued by the SPE.⁵³ For our 25 % shareholder A this means that it depends on the articles of association whether these key resolutions can be taken without his consent. If the articles require a majority between two-thirds (the minimum with regard to these resolutions) and three-quarters, he can be overruled.

The observation has been made that the SPE Proposal, by not forbidding it, allows for the imposition of obligations on shareholders against their will. However, opinions differ on the required majority for such a resolution.⁵⁴ A broad interpretation of the wording 'rights' in Article 27(1)(a) (the variation of rights attaching to shares) will also include obligations and thus, according to Article 27(2), a qualified majority will be mandatory for imposing a variation of the obligations attaching to shares. On the other hand, a narrow interpretation of Article 27(1)(a) will lead to the conclusion that even a simple majority resolution would suffice. But whatever the correct interpretation might be, in both scenarios a shareholder can be confronted with additional obligations against his will. I do agree with Lennarts that this issue merits (re)consideration.⁵⁵ Imagine our shareholder A voting against a resolution imposing the obligation on all shareholders to grant a loan to the SPE and imagine the other three shareholders voting in favour of this resolution. The outcome is that our shareholder A is confronted, against his will, with the imposition of this obligation. This may make a minority position in the SPE very unattractive.

5.4. The right to challenge resolutions

According to Article 27(4) SPE Proposal resolutions shall comply with the SPE Regulation and with the articles of association of the SPE. Thus, according to the Proposal, resolutions can be declared ineffective due to an infringement of the SPE Statute or an infringement of the articles of association. However, according to the proposed amendment to this provision by the European Parliament, resolutions may be declared ineffective also due to an infringement of the applicable national law. Together with Lennarts I note that the amendment introducing a reference to the applicable national law as a ground for annulment is not without importance for minority shareholders.⁵⁶ Imagine the three fellow shareholders of our shareholder A having abused their majority power to enforce a resolution that gravely violates his (A's) interests. Under the SPE Proposal this would not be a ground for an annulment of the resolution since neither the Proposal nor the articles of association (necessarily) refer to the issue of abuse of power. Under the amendment this is different because the reference to the applicable national law brings into play Article 15 Dutch Companies Act, which refers to the principle of reasonableness and fairness. According to this Dutch provision, a resolution that violates the principle of reasonableness and

⁵³ Lennarts, *supra* note 52, p. 119 notes that this threshold in fact includes a quorum, because it takes into account the total voting rights attached to all shares and not only the votes cast.

⁵⁴ Lennarts, *supra* note 52, p. 120.

⁵⁵ Lennarts, *supra* note 52, p. 120.

⁵⁶ Lennarts, *supra* note 52, pp. 124-125.

fairness may be annulled and this will be the case when the interests of a minority shareholder have been gravely violated. The proposed amendment by the European Parliament will thus constitute better protection for our shareholder A.

As for the procedural side of the matter: according to Article 27(4) SPE Proposal this issue is governed by the applicable national law. For our shareholder A this would mean that Article 15(3) and (5) Dutch Companies Act would apply. According to these Dutch provisions he would have one year to bring an action before the Dutch court (the court of the registered seat). However, under the proposed amendment by the European Parliament his position would be less strong because the amendment reduces the time available for challenging the resolution to one month from the date of the resolution.⁵⁷

5.5. The right to request a resolution

Pursuant to Article 29(1) SPE Proposal shareholders holding 5 % of the voting rights attached to the shares of the SPE shall have the right to request the management body to submit a proposal for a resolution to the shareholders. The request must state the reasons and indicate the matters that should be subject to such a resolution. If the request is refused or if the management body does not submit a proposal within 14 calendar days of receiving the request, the shareholders concerned may then submit a proposal for a resolution to the shareholders regarding the matters in question.

The threshold of 5 % is not a barrier for our shareholder A, who holds 25 % of the voting rights. He will be able to make his voice heard.⁵⁸

5.6. The right to request an independent expert

The right to request an independent expert can be characterized as a special information right.⁵⁹ According to Article 29(2) SPE Proposal, if there is any suspicion of a serious breach of the law or of the articles of association of the SPE, shareholders holding 5 % of the voting rights attached to the shares of the SPE shall have the right to request the competent court or administrative authority to appoint an independent expert to investigate and report on the findings of the investigation to the shareholders. The expert will be allowed to have access to the documents and records of the SPE and to require information from the management body.

For our shareholder A holding 25 % of the voting rights, the threshold of 5 % is not a problem. He has the right to request an independent expert. Clear as this may seem, there are also issues that remain unclear. Without going into details, I would like to mention three questions raised by Lennarts.⁶⁰ First, which court is the competent court? Is Article 22(2) of the Brussels I Regulation to be applied by analogy once again? Secondly, how should the wording ‘serious breach of law’ be interpreted? Does the ‘law’ also include the applicable national company law (which in the case of our ‘Dutch’ SPE would imply the applicability of the principle of reasonableness and fairness)? Thirdly, who pays? Without a clear answer to these questions, A’s right to request an independent expert is likely to remain latent.

57 A.F.M. Dorresteyn & O. Uziyahu-Santcroos, ‘The Societas Privata Europaea under the Magnifying Glass (Part 2)’, 2009 *European Company Law*, no. 4, p. 156 note that this time frame seems to be too short for a shareholder who is unaware of the resolution and therefore they suggest that the time should start to run on the date when the shareholder becomes aware of the resolution.

58 M.L. Lennarts, ‘Voice Rights of Shareholders’, in: D.F.M.M. Zaman *et al.* (eds.), *The European Private Company (SPE). A Critical Analysis of the EU Draft Statute*, 2009, p. 127 observes that compared to Dutch law A seems to have a relatively strong position.

59 Lennarts, *supra* note 58, p. 129.

60 Lennarts, *supra* note 58, pp. 130-131.

5.7. Expulsion

Article 17 SPE Proposal deals with the situation where a majority of the shareholders want to expel a minority. The expulsion implies the acquisition of the shares of the expelled shareholders by either the SPE or the other shareholders.⁶¹ Article 17(1) reads as follows: ‘On the basis of a resolution of the shareholders and on an application by the SPE, the competent court may order the expulsion of a shareholder if he has caused serious harm to the SPE’s interest or the continuation of the shareholder as a member of the SPE is detrimental to its proper operation. An application to the court shall be made within 60 calendar days of the resolution of the shareholders’. Article 17(2) deals with the temporary suspension of the rights of the shareholder to be expelled and Article 17(3) with the acquisition of his shares. Hereafter, I will concentrate on the first step towards expulsion, the shareholders’ resolution. For an analysis of the second and third step, successively an application by the SPE to the court and a court order, I would like to refer to De Kluiver and Roest, who are very critical in their evaluation of the procedure.⁶²

According to Article 27 (1)(b) and 27(2) SPE Proposal, the resolution of expulsion requires a qualified majority of two-thirds of the total voting rights attached to the shares issued by the SPE. For our 25 % shareholder A, this means that if his three fellow shareholders want him out, he may be expelled from the SPE. Presuming that A himself will not be in favour of his own expulsion, he will probably try to challenge the resolution on his expulsion. In Section 5.4 above it was shown that A can bring an action for the annulment of the resolution before the Dutch court. Consequently, the Dutch court will verify whether there is a valid ground for expulsion. According to Article 17(1) SPE Proposal, there is a ground for expulsion if A has caused serious harm to the SPE’s interest or when the continuation of his membership is detrimental to the SPE’s operation. Admittedly, whether or not A’s action for annulment will succeed depends on the facts of the case. What was A’s behaviour and does it qualify for expulsion? However, the outcome of the action is not only a matter of facts but also a matter of interpretation. As is clearly shown by De Kluiver and Roest, different national courts may have different views as to how broadly or narrowly the grounds for expulsion are to be interpreted. Besides, under the proposed amendment by the European Parliament, the Dutch courts may also take into account the principle of reasonableness and fairness.⁶³

In addition to his right to challenge the resolution, A seems to have a second possibility to try to block his expulsion. Because his expulsion will be based on a court order, he will have the right to plead his case before the court that has to decide upon the application by the SPE. Assuming that the competent court in this respect is once again the Dutch court,⁶⁴ from a procedural point of view this does not seem to be very efficient.

5.8. Withdrawal

Article 18 SPE Proposal deals with the situation where a shareholder wants to withdraw from the SPE. His withdrawal implies the acquisition of his shares by either the SPE or the other shareholders. Article 18(1) contains the grounds for withdrawal and Article 18(2) to 18(6) provide for the procedure to be followed. Hereafter, I will concentrate on the grounds for withdrawal. For

61 H.J. de Kluiver & J.Roest, ‘Expulsion and Withdrawal of Shareholders’, in: D.F.M.M. Zaman *et al.* (eds.), *The European Private Company (SPE). A Critical Analysis of the EU Draft Statute*, 2009, p. 74 are afraid that the acquisition of the shares by the SPE might harm the interests of the creditors of the SPE. I do not share their concern because I think that the rules relating to share buy-backs (see Section 6.2 of this paper) also apply in the context of expulsion and withdrawal.

62 De Kluiver & Roest, *supra* note 61, p. 65.

63 De Kluiver & Roest, *supra* note 61, p. 72.

64 Compare Section 5.6 of this paper.

a critical analysis of the procedure I would like to refer once again to De Kluiver and Roest, who conclude that with regard to the procedure there are too many open issues.⁶⁵

According to Article 18(1) the right to withdraw is based on two requirements. First, the activities of the SPE are being or have been conducted in a manner which causes serious harm to the interests of the shareholder. Secondly, the serious harm is a result of one or more of the following events: (a) the SPE has been deprived of a significant part of its assets; (b) the registered office of the SPE has been transferred to another Member State; (c) the activities of the SPE have changed substantially; (d) no dividend has been distributed for at least 3 years even though the SPE's financial position would have permitted such a distribution.

It is interesting to note that the European Parliament has proposed to amend Article 18(1) rather fundamentally. According to the amendment, the first requirement of 'serious harm' no longer applies.⁶⁶ As a consequence, the four events mentioned in the Proposal always imply the possibility of a withdrawal for those who did not subscribe to the resolution relating to one of the events. Since these events are of such a nature that their sole occurrence against the will of a shareholder may qualify as 'serious harm', to me this seems to be a valid approach. De Kluiver and Roest are more critical with regard to this amendment, but I doubt whether all their arguments are convincing.⁶⁷ Their main concern seems to be that if the four events mentioned in Article 18(1) SPE Proposal in any case provide for a right to be bought out, the financial consequences for the SPE might be too heavy to bear. I do not share this concern because, first, the right to be bought out does not necessarily have financial consequences for the SPE (the shares may be acquired by the other shareholders), and, secondly, if the SPE acquires the shares of the withdrawing shareholder the rules relating to share buy-backs (see Section 6.2 hereafter) will apply.

Another change proposed by the European Parliament is to no longer limit the grounds for withdrawal to the four events mentioned in the Proposal. According to the amendment the articles of association may also provide for grounds for withdrawal. Since, in practice, the situations in which withdrawal is an appropriate solution for intra-company conflicts may vary, it seems to be a good idea to broaden the scope of the right to withdraw. However, in the opinion of De Kluiver and Roest the best solution would be to introduce a general clause in the Proposal itself, granting a buy-out remedy 'at will', whereby shareholders would have a right to be bought out provided that an appropriate notice period is observed and that the level of payments associated with the exit takes into account the additional costs of refinancing the company as well as, in the case of oppression or unfair conduct on the side of the continuing shareholders, additional payments by the continuing shareholders.⁶⁸

It will be clear from the foregoing that our shareholder A will be better off with the amendment than with the Proposal in situations where he does not agree with his three fellow shareholders and would like to withdraw. Under the amendment he will not have to meet the

65 De Kluiver & Roest, *supra* note 61, p. 78.

66 It has to be noted that the requirement of serious harm is still part of Article 18(6) SPE Proposal. According to De Kluiver & Roest, *supra* note 61, p. 74 footnote 22, the only logical explanation for this is that the European Parliament has overlooked the matter in its resolution.

67 De Kluiver & Roest, *supra* note 61, p. 74.

68 De Kluiver & Roest, *supra* note 61, p. 78. For an elaboration of this exit model see H.J. de Kluiver, 'Private Ordering and Buy-Out Remedies Within Private Company Law: Towards a New Balance Between Fairness and Welfare?', 2007 *European Business Organization Law Review* 8, pp. 103-119. See also M.L. Lennarts, 'Voice Rights of Shareholders', in: D.F.M.M. Zaman *et al.* (eds.), *The European Private Company (SPE). A Critical Analysis of the EU Draft Statute*, 2009, p. 132. See also the presentation by Professor Roest at the conference in Utrecht as reported by O. Uziyahu-Santcroos, 'Report on the Conference on the European Private Company (*Societas Privata Europaea*) on Friday 26th June 2009 in Utrecht, the Netherlands', 2009 *Tijdschrift voor Ondernemingsbestuur*, no. 4, p. 110. This report also makes clear that Professor Teichmann was not very enthusiastic concerning the idea of a buy-out remedy at will.

‘serious harm’ requirement and, in addition, the articles of association may provide for additional grounds for withdrawal.

5.9. Applicable national law

As we have seen in Section 3 above, according to Article 4 SPE Proposal the SPE is governed first by the Regulation, secondly by its articles of association and thirdly by the applicable national law. In Sections 5.2 to 5.8 an overview was given of the voice rights and the exit rights of an SPE’s shareholder as provided for by the proposed Regulation and we have seen what our shareholder A can do when he does not agree with his fellow shareholders. Now the question is whether or not the provisions in the Regulation and the articles of association fully cover all his voice and exit rights. If so, Dutch law has no autonomous role in this context. However, in a more narrow interpretation of the scope of the Regulation, A may also benefit from rights and/or mechanisms provided by Dutch national law. In this context there are (at least) three matters that merit our attention.

In Dutch law there is a distinction between resolutions being null and void and resolutions qualifying for annulment by the court. This distinction is fundamental because in the former case the resolution is null and void *ab initio* and in the latter case the resolution remains valid until it is annulled. As Lennarts observes, the text of the SPE Proposal does not mention the possibility of resolutions being null and void *ab initio*.⁶⁹ Does this mean that nullity *ab initio* on the basis of national law is ruled out? It has to be noted that according to the proposed amendment to Article 27(4) SPE Proposal by the European Parliament, shareholders’ resolutions may be declared ineffective only by means of a court action. Although, on the one hand, it is difficult to imagine a legal system without nullity *ab initio*; on the other hand, the reference to a court action might be an indication of the exclusion of nullity *ab initio*.

A second matter that needs attention is Dutch inquiry proceedings as laid down in Articles 344 to 359 Dutch Companies Act. Does the right to request an independent expert as provided for by Article 29(2) SPE Proposal leave room for the applicability of these proceedings? The aim of the Dutch proceedings is not only to gather information, but it may also be to put an end to intra-company conflicts. In order to attain this aim, the court may order measures such as the annulment of resolutions or the dismissal of directors and it is because of these measures that the Dutch inquiry proceedings are commonly seen as a very important source of minority shareholder protection.⁷⁰ Is the difference in aim and scope sufficient to conclude, as Lennarts does, that the Dutch proceedings do apply to an SPE registered in the Netherlands?⁷¹

With regard to exit rights there seems to be no room for the application of national provisions. But as we have seen in the previous section of this paper, according to the amendment by the European Parliament additional grounds for withdrawal may be introduced in the articles of association and thus national provisions may apply by placing them in the articles of association. However, the applicability of Articles 17 and 18 SPE Proposal cannot be excluded, which is highly regretted by De Kluiver and Roest. Because of the high risk of intra-company conflicts in private limited companies, these authors attach heavy weight to a well developed and detailed mechanism of shareholder dispute resolution including buy-out remedies and therefore they

69 M.L. Lennarts, ‘Voice Rights of Shareholders’, in: D.F.M.M. Zaman *et al.* (eds.), *The European Private Company (SPE). A Critical Analysis of the EU Draft Statute*, 2009, p. 122.

70 L. Timmerman & A. Doorman, *Rights of Minority Shareholders in the Netherlands, A Report written for the XVth World Congress of the International Academy of Comparative Law*, available at <www.ejcl.org>.

71 M.L. Lennarts, ‘Voice Rights of Shareholders’, in: D.F.M.M. Zaman *et al.* (eds.), *The European Private Company (SPE). A Critical Analysis of the EU Draft Statute*, 2009, p. 132.

prefer the possibility of opting out of the Regulation and opting in for a certain national jurisdiction.⁷² Attractive as their approach may seem – it certainly provides for legal certainty – it will also have a negative effect on the uniformity of the SPE throughout the European Union. In my view, the suggestion to introduce a general clause in the Proposal granting a buy-out remedy ‘at will’⁷³ is a better one.

In a discussion on the rights of shareholders and the applicable national law some attention should also be paid to derivative actions, an issue that is not dealt with in the SPE Proposal. The SPE Proposal does not give individual shareholders the right to directly sue directors of the SPE who have not acted in the best interests of the company and therefore have caused damage to the company. According to the Explanatory Memorandum, the directors’ duty to act in the best interest of the company is a duty owed to the SPE and therefore a duty that may only be enforced by the SPE itself.⁷⁴ However, the national company law of some Member States does allow individual shareholders to enforce a company’s claim by way of a derivative action.⁷⁵ The rationale for this derivative action is to resolve the problem of conflicting interests that arises when the SPE itself will have to initiate litigation against a director. As is shown by Olaerts, there are arguments to assume that it depends on the applicable national company law whether or not an SPE shareholder will have a derivative action.⁷⁶ Since Dutch law seems to rule out derivative suits,⁷⁷ our shareholder A has no action against the directors of the SPE if they have violated their duties towards the company.⁷⁸

6. Creditors

6.1. Introduction

Traditionally, the creditors of a company have found protection in capital protection rules, which intend to ensure that shareholders pay a certain amount into the company and to ensure also that this amount is maintained. However, lately the traditional approach has been losing ground to a new one, according to which the creditors of a company are protected by rules that aim to ensure that there shall be no withdrawals of assets from the company to the benefit of the shareholders and at the detriment of the creditors.⁷⁹ In view of the abandonment of a minimum capital requirement in the SPE Proposal, it is obvious that the Commission takes the progressive approach.⁸⁰ In Section 6.2 I will consider the rules that guarantee that there will be no unlawful withdrawals of assets from the SPE.

A prudent creditor who is considering dealing with a company will probably be interested not only in protection against unlawful withdrawals, but he may also ask himself under what

72 H.J. de Kluiver & J.Roest, ‘Expulsion and Withdrawal of Shareholders’, in: D.F.M.M. Zaman *et al.* (eds.), *The European Private Company (SPE). A Critical Analysis of the EU Draft Statute*, 2009, p. 68 and p. 79.

73 See Section 5.8 of this paper.

74 Explanatory Memorandum to the SPE Proposal, p. 9.

75 See D. Latella, ‘Shareholder Derivative Suits: A Comparative Analysis and the Implications of the European Shareholders’ Rights Directive’, 2009 *European Commercial and Financial Law Review*, no. 3, pp. 307-323.

76 M. Olaerts, ‘Directors’ Duties and Liabilities’, in: D.F.M.M. Zaman *et al.* (eds.), *The European Private Company (SPE). A Critical Analysis of the EU Draft Statute*, 2009, p. 148. See also M.L. Lennarts & O. Uziuhu-Santcroos, ‘Report on the Conference on the European Private Company, *Societas Privata Europaea* (SPE), held in Brussels, 10 March 2008’, 2008 *Ondernemingsrecht*, no. 7, p. 268, who believe that the introduction of a derivative suit should be accompanied by the introduction of the business judgment rule.

77 HR 2 December 1994, *NJ* 1995, 288 (*Poot/ABP*).

78 Of course he may have an action based on the general principles of tort law, but in that case it is a duty towards A himself that is at stake. See Section 6.3 of this paper.

79 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*, 2009, p. 83; H. Boschma, L. Lennarts & H. Schutte-Veenstra, ‘The Reform of Dutch Private Company Law: New Rules for the Protection of Creditors’, 2007 *European Business Organization Law Review* 8, p. 603.

80 By raising the minimum capital to €8,000 the European Parliament confesses to the more traditional view.

circumstances the directors can be held liable for misconduct and what his position will be if the company becomes insolvent. In Section 6.3 I will focus on the liability of the directors of the SPE and in Section 6.4 I will make some remarks on the position of creditors if the SPE becomes insolvent. As a starting point for my research in this section I will use an SPE with its registered seat in the Netherlands. Before dealing with the matters I have just mentioned, I would like to make a brief comment on the idea of creditor self-help. According to this notion, creditors are supposed to take care of their own protection by negotiating, for instance, for immediate payment, personal guarantees of directors or retention-of-title clauses.⁸¹ It is admitted that the better the creditor self-help system is supposed to work, the less protection creditors need from company law.⁸²

6.2. Unlawful withdrawals

The SPE Proposal contains three mechanisms for providing for a flow of assets from the SPE to the shareholders: distribution of dividend (Article 21), share buy-backs (Article 23) and capital reduction with repayment on shares (Article 24). According to the relevant provisions, these mechanisms have three common features. First, they are based on a resolution of the shareholders (Article 27(1)(e), (f) and (i)).⁸³ Secondly, they have to satisfy a mandatory balance-sheet test (Articles 21(1), 23(2) and 24(1)) and thirdly, there is an optional solvency test (Articles 21(2), 23(2) and 24(1)).⁸⁴ The balance-sheet test guarantees that after withdrawal from the SPE, the assets of the SPE fully cover its liabilities and that reserves that may not be distributed under its articles of association remain untouched. The solvency test includes a solvency certificate certifying that the SPE will be able to pay its debts as they become due in the normal course of business within one year of the date of the distribution. The solvency certificate is only mandatory if the articles of association so require. However, in the opinion of Barneveld, the absence of the requirement of a solvency certificate does not imply the absence of the requirement of the solvency test itself. In his view, the general duties and liabilities of directors as laid down in Article 31 SPE Proposal also cover the duty of a solvency test.⁸⁵

According to the proposed amendment by the European Parliament to Article 19(4) SPE Proposal, where the articles of association of the SPE do not require a solvency certificate, the capital of the SPE shall be at least €8,000. To prevent a distribution from this capital, the European Parliament also proposes an amendment to the balance-sheet test, providing that the remaining amount of the deposit shall not fall below the amount of the minimum capital.⁸⁶

However reassuring these provisions may be, for a creditor it is also important to know what happens if a distribution of dividend, a share buy-back or a repayment on shares leaves the SPE's liabilities uncovered. Is the unlawful distribution to be compensated by the shareholders and/or the directors? With regard to the shareholders, the SPE Proposal contains a specific

81 H.E. Boschma & J.N. Schutte-Veenstra, 'De Europese BV: het voorstel voor een SPE-Statuut', 2008 *Ondernemingsrecht*, no. 17, p. 607; 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*, 2009, p. 85.

82 A point made by Professor Neville at the conference in Utrecht in 2009. See O. Uziuhu-Santcroos, 'Report on the Conference on the European Private Company (*Societas Privata Europaea*) on Friday 26th June 2009 in Utrecht, the Netherlands', 2009 *Tijdschrift voor Ondernemingsbestuur*, no. 4, p. 109.

83 According to Article 27(2) SPE Proposal, a resolution on the reduction of share capital shall be taken by a qualified majority. For the other resolutions a simple majority may suffice, unless the articles of association provide otherwise.

84 It should be noted that in addition to this, in the case of capital reduction the creditors shall have the right to ask for adequate safeguards. See Article 24(3) SPE Proposal.

85 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*, 2009, p. 91.

86 According to Barneveld, *supra* note 85, p. 90 it is of minor importance whether or not €1 or perhaps even €8,000 may be distributed.

provision. According to Article 22, any shareholder who knew or should have known that the distribution did not satisfy the balance-sheet test or the required solvency test must return to the SPE what he has received. The proposed amendment to this provision by the European Parliament goes even further by stating that all unlawful distributions must be returned, irrespective of any subjective element.

The SPE Proposal does not contain a specific provision with regard to directors who have participated in an unlawful withdrawal. However, according to Barneveld, the general provision of Article 31 SPE Proposal, stating that a director shall have a duty to act in the best interests of the SPE and that he shall be liable to the company for any act or omission in breach of his duties which causes loss or damage to the SPE, also covers the duty and liability in the case of an unlawful withdrawal. In Barneveld's view, if a director proposes a distribution that does not satisfy the balance-sheet test or the solvency test, he can be held liable by the SPE on the basis of Article 31(4) SPE Proposal.⁸⁷ In this view, the proposed amendment of Article 31(5) SPE Proposal by the European Parliament, stating, among other things, that the directors shall pay compensation in particular where payments have been made in breach of Article 21 SPE Proposal, qualifies as a specification of Article 31(4).

Although the protection of creditors can be seen as the rationale for the provisions in the SPE Proposal relating to the recovery of unlawful withdrawals by shareholders and to the compensation to be paid by directors, these provisions do not provide for a claim against the shareholders and/or the directors by the creditors themselves. It is up to the SPE to request recovery by the shareholders or compensation by the directors. However, in case of the insolvency of the SPE, the trustee in bankruptcy can claim on behalf of the SPE. I will come back to this in Section 6.4. Besides, the creditors may have other instruments at their disposal to act against the shareholders and/or the directors. As for the shareholders, under certain circumstances they may be held liable on the basis of the rules of tort.⁸⁸

6.3. Liability of directors

With regard to the liability of directors a distinction can be made between the internal liability of directors towards the company and the external liability of directors towards creditors.

Article 31 SPE Proposal contains a general provision with regard to internal liability. Article 31(1) contains the duty to act in the best interests of the SPE, Article 31(2) states that duties shall be owed to the SPE, Article 31(3) relates to conflicts of interest, Article 31(4) states that if a director acts in breach of his duties, he shall be liable to the SPE for the loss or damage he has caused,⁸⁹ and Article 31(5) states that without prejudice to the provisions of the Regulation, the liability of directors shall be governed by the applicable national law. The articles of association may provide for any other specific duties of directors.⁹⁰ As is clearly shown by Olaerts, the interpretation of Article 31 entails several questions that the national courts will probably answer along the lines of their own national rules on directors' liability, thus threatening

87 Barneveld, *supra* note 85, p. 98.

88 In HR 9 November 1991, *NJ* 1992, 174 (*Nimox*) the shareholder was deemed to have committed a tort against the creditors by voting in favour of a distribution that satisfied the balance-sheet test but nevertheless endangered the company's continuity. See also H. Boschma, L. Lennarts & H. Schutte-Veenstra, 'The Reform of Dutch Private Company Law: New Rules for the Protection of Creditors', 2007 *European Business Organization Law Review* 8, pp. 573-574.

89 In Section 6.2 of this paper we have seen that this general provision may also cover directors' liability in the specific case of an unlawful distribution.

90 See Annex I to the SPE Proposal.

the desired uniformity of the SPE.⁹¹ However, Olaerts also notes that at the same time the introduction of a general standard may turn out to be a valuable step towards bottom-up harmonization in an area that is currently far from harmonised.⁹² Against this background it is noteworthy that the European Parliament has proposed two amendments to Article 31 that contain top-down harmonization. First, the European Parliament proposes an addition to Article 31(4), stating that liability shall not extend to directors who are able to demonstrate their blamelessness and who made known their disagreement with the failure to fulfil duties. Secondly, the European Parliament proposes a new Article 35(5a), stating that any right of action pursuant to this article shall lapse within four years of the date when it arose. Without these two additions, the issues of blamelessness and the time frame will remain subject to national law and hence be subject to bottom-up harmonization. Besides, Dorresteyn and Uziahu-Santcroos note that since the amendments place the SPE at an advantage or a disadvantage in comparison to companies under national law, the amendments may have the side-effect of enhancing intra-state competition.⁹³

The SPE Proposal does not provide for rules relating to the external liability of its directors. Considering this, on the basis of Article 4 SPE Proposal one may argue that the external liability of the directors of an SPE shall be governed by the applicable national law.⁹⁴ For the directors of an SPE with its registered office in the Netherlands this means that with regard to the issue of their external liability, Dutch company law applies.

The Dutch Companies Act offers several grounds for directors' external liability. It contains provisions for liability in the context of the registration of the company (Article 180(2)(a)), minimum capital (Article 180(2)(b) and (c)), share buy-backs (Articles 207a, 207d), insolvency (Article 248) and misrepresenting the company's condition towards third parties (Article 249). However, one can hardly argue that all these provisions apply to the directors of an SPE. It is obvious that the provision of Article 180(2)(a) is not suitable to apply to the directors of an SPE. While in the Dutch system the company acquires legal personality before its registration, the SPE shall acquire legal personality on the date on which it is entered in the register. As a consequence the Dutch system of directors' liability for acts of the company in the time frame between the formation of the company and its registration as provided for in Article 180(2)(a) is without relevance in the context of the SPE. With regard to the Dutch liability of Article 180(2)(b) and (c), there is a similar argument for not applying them to the directors of an SPE, at least under the Commission's Proposal. Because the SPE Proposal does not contain a minimum capital requirement, the Dutch system of directors' liability for the acts of the company in the time frame between the formation of the company and the moment the minimum capital is fully paid up, once again seems without relevance in the context of the SPE. However, if there is to be a minimum capital as provided for by the amendment by the European Parliament, these

91 M. Olaerts, 'Directors' Duties and Liabilities', in: D.F.M.M. Zaman *et al.* (eds.), *The European Private Company (SPE). A Critical Analysis of the EU Draft Statute*, 2009, pp. 144-149. See also A.F.M. Dorresteyn & O. Uziahu-Santcroos, 'The Societas Privata Europaea under the Magnifying Glass (Part 1)', 2008 *European Company Law*, no. 6, p. 281, who also expect that national courts will apply the standards for national companies.

92 Olaerts, *supra* note 91, p. 157. See also M.L. Lennarts & O. Uziahu-Santcroos, 'Report on the Conference on the European Private Company, Societas Privata Europaea (SPE), held in Brussels, 10 March 2008', 2008 *Ondernemingsrecht*, no. 7, p. 266, who note that since bottom-up harmonisation may take years, this is not very attractive for the business community.

93 A.F.M. Dorresteyn & O. Uziahu-Santcroos, 'The Societas Privata Europaea under the Magnifying Glass (Part 2)', 2009 *European Company Law*, no. 4, p. 157. See on this issue also H.E. Boschma & J.N. Schutte-Veenstra, 'De Europese BV: het voorstel voor een SPE-Statuut', 2008 *Ondernemingsrecht*, no. 17, p. 610 who note that the absence of a cross-border requirement may enhance competition between the SPE and a company under national company law.

94 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*, 2009, p. 98.

Dutch provisions may apply – though probably not for long because under the Bill amending Dutch private company law⁹⁵ they will be abolished.

Matters are more complicated with regard to the Dutch provisions under Article 207a and 207b Companies Act (liability for unlawful share buy-backs). According to Article 4 SPE Proposal, matters shall be governed by the applicable national law only where they are not covered by the Regulation or the articles of association. As we have seen in the previous Section 6.2, one may argue that Article 31 SPE Proposal covers the matter of the internal liability of the directors for unlawful share buy-backs. Besides, Article 23(5) SPE Proposal states that shares acquired by the SPE in contravention of the Regulation or the articles of association shall be sold or cancelled within one year of their acquisition. Is this supposed to exclude external liability based on national company law or not? If not, Article 207a and 207b of the Dutch Companies Act may apply.

Among the provisions of the Dutch Companies Act with regard to the external liability of directors there are also two provisions that do not need Article 4 SPE Proposal in order to apply to the directors of an SPE. As for Article 248 (liability in insolvency), in the following Section 6.4 we will see that its application is triggered by mechanisms outside the SPE Proposal and as for Article 249 (liability for misrepresenting the condition of the company), its applicability is triggered by the reference in Article 25 SPE Proposal to the applicable national law.⁹⁶

Another thing which must be kept in mind is that not only company law can serve as a basis for a claim against a company's director but also tort law.⁹⁷ According to the relevant Dutch case law, a director is liable towards a creditor of the company if he has entered into a contract on behalf of the company with the creditor while knowing that the company will not be able to pay its debts and that in the end the creditor will be left empty-handed.⁹⁸ It is evident that this liability also applies to the directors of an SPE, provided, of course, that according to the rules of private international law Dutch tort law will apply.⁹⁹

6.4. Insolvency of the SPE

The effectiveness of any system of creditor protection is ultimately tested when the company becomes insolvent. What is the position of the creditors of an insolvent SPE with its registered seat in the Netherlands? According to Article 40(3) SPE Proposal, insolvency shall be governed by the applicable national law and by Council Regulation (EC) No. 1346/2000.¹⁰⁰ As a result, the creditor of an SPE with its registered seat in the Netherlands is not in a different position than the creditor of any other private limited company declared bankrupt before a Dutch court. Here it is not as such necessary to discuss the position of an SPE's creditor. However, in the light of the foregoing it is noteworthy that the Dutch trustee in bankruptcy has at his disposition several ways of reconstructing the estate of the SPE. In the context of this paper, three of these possibilities deserve our attention. First, the trustee may exercise any right of action that the SPE may have with regard to the internal liability of the directors, including the internal liability for unlawful withdrawals. Secondly, the trustee may challenge any legal acts of the SPE that are detrimental

95 See note 15, *supra*.

96 With regard to Article 249 Dutch Companies Act see M. Olaerts, 'Directors' Duties and Liabilities', in: D.F.M.M. Zaman *et al.* (eds.), *The European Private Company (SPE). A Critical Analysis of the EU Draft Statute*, 2009, p. 151.

97 Article 162 of Book 6 of the Dutch Civil Code.

98 HR 6 October 1989, *NJ* 1990, 286 (*Beklamel*).

99 See in this context also S.M. van den Braak, 'Vestigingsvrijheid en misbruik van de (buitenlandse) vennootschap', 2006 *Ondernemingsrecht*, no. 5, p. 176.

100 For international cases see Articles 3 and 4 of this Regulation (European Insolvency Regulation), according to which in the case of a Dutch SPE the Dutch courts shall have jurisdiction to commence insolvency proceedings and the applicable insolvency law shall be Dutch law.

to the general body of creditors,¹⁰¹ under certain circumstances also including unlawful withdrawals.¹⁰² Thirdly, he may have a claim against the directors of the SPE, based on Article 248 Dutch Companies Act. If the insolvency of the company has been caused by the apparent negligence of the board of directors, the directors and also the shadow-directors are liable for the deficit. These three mechanisms show that the protection of creditors is not only a matter of company law, but also and perhaps even more a matter of insolvency law.¹⁰³

7. Brief analysis

The second section of this paper has shown that with regard to the requirements for the establishment of an SPE, there are still some political decisions to be taken. Do we want a minimum capital requirement or not? Do we want a size restriction or not? Do we want a cross-border requirement or not? The third section of this paper has illustrated that with regard to the rules applicable to an SPE, the hierarchy of applicable rules proposed in Article 4 SPE Proposal entails questions that are difficult to answer. In the fourth section of this paper we have seen that the potential need for the SPE can be reduced essentially to its advantage of offering a uniform structure for establishing subsidiaries throughout the EU.

Considering the issues raised with regard to the applicable rules, two comments can be made with regard to the need for the SPE. To start with, it is not likely that business communities need something whose form and shape is still to be determined. As long as there is uncertainty about the applicable rules, business communities might not be interested in the SPE at all. Secondly, the aim of the uniformity of the SPE does not seem to have been fully attained because the applicable national law seems to play a considerable role. Although the applicable national law is supposed to come into play only at the third level of the hierarchy of applicable rules presented in Article 4 SPE Proposal, it is difficult to imagine the functioning of the first two levels without any help from the applicable national law. As for the Regulation, it will be interpreted by the national courts and it may take some time before preliminary proceedings before the ECJ will have a harmonising effect. As for the matters to be regulated by the articles of association, the question arises what will happen if a matter is not or only partly covered by the articles of association. Most probably, the answer will be found in the applicable national law. Moreover, the third level of applicable rules itself seems to be fairly broad. As we have seen, the applicable national law covers, for instance, the thorny issue of directors' liability.

The fifth section of this paper has highlighted the position of the shareholder of an SPE and we have seen which voice rights and exit rights the Regulation offers him. However, we have also seen that his position is not as clear as it may seem at first glance. Not only are there procedural issues that need clarification, but also the role of the applicable national law entails legal uncertainty. As long as the position of the shareholder remains unclear, one can hardly argue that the SPE Proposal provides for adequate protection. Some comments can be made, though. As we have seen in Sections 5.3, 5.4 and 5.8, a minority shareholder may face additional obligations or other oppressing resolutions, without the possibility to challenge these resolutions and without the possibility of a withdrawal. In my view, this is something that certainly qualifies as inadequate protection. Considering this, the question of how to prevent a shareholder finding

101 See Articles 4(2)(m) and 13 European Insolvency Regulation and Article 42 *et seq.* Dutch Insolvency Act.

102 M.L. Lennarts, *De Twilight zone*, 2006.

103 See also S.M. van den Braak, 'Creditor Protection at the Crossroads of Company and Insolvency Law: The Dutch Example', 2008 *European Company Law*, no. 5, pp. 229-236.

himself in this position will inevitably arise. In theory, his protection can be organised at each of the three levels of applicable rules. Protection at the third level of the applicable national law does not seem to be a good idea, since the legal technique of Article 4 SPE Proposal is already full of problems. In this respect the issues raised in Section 5.9 – for instance the uncertainty with respect to the applicability of Dutch inquiry proceedings – are illustrative. As for protection at the second level of the articles of association, one of the proposed amendments by the European Parliament fits within this option. As we have seen in Section 5.8, the European Parliament has proposed an amendment allowing for grounds for withdrawal in the articles of association. Although I support the idea of broadening the scope of the right to withdraw, I am not convinced that the proposed amendment is the best solution. According to this amendment, the protection of the minority shareholder depends on what the shareholders themselves are willing to put into the articles of association. I doubt whether this is a wise idea because I think that when starting a business, partners simply do not think of everything that can go wrong.¹⁰⁴ Therefore I agree with De Kluiver and Roest who advocate the introduction of a buy-out remedy at will in the Regulation.

Another thing is that for an adequate protection of shareholders, the availability of the principle of reasonableness and fairness seems to be essential. As we have seen in Section 5.4, the European Parliament has proposed an amendment stating that resolutions may be declared ineffective also on the grounds of an infringement of the applicable national law. Considering that the principle of reasonableness and fairness (or a similar principle) is present in the private company laws of most Member States, the amendment in this respect seems to offer adequate protection. On the other hand, by leaving protection to the applicable national law, the amendment does not contribute to the desired uniformity of the SPE.

The sixth section of this paper has concentrated on the position of the creditors of an SPE. We have seen that the SPE Proposal offers protection against unlawful withdrawals from the SPE. Shareholders must return to the SPE what they received and directors have to pay compensation to the SPE. We have also seen that the protection of the creditors of an SPE is not only a matter of company law, but also a matter of tort law and of insolvency law. As a consequence, in some respects the position of the creditors of an SPE is no different from the position of the creditors of any other company.

8. Final remarks

As for the first central question in this paper – whether we need the SPE – the following can be concluded. As long as we do not know what the form and shape of the SPE will be, the answer will probably be in the negative because what business communities need above all is legal certainty. As a consequence, what we first need is certainty about the role of the applicable national law. Moreover, when looking for certainty, we have to keep in mind that the bigger the role for the applicable national law, the less uniform the SPE will be. Since the need for the SPE corresponds to its uniformity, it will be wise to exclude the applicability of the national law as much as possible. On the other hand, a complete disconnection of the SPE from the applicable national law may be an unrealistic expectation.

As for the second central question in this paper – whether shareholders and creditors are adequately protected – the following can be concluded. Considering that the SPE in its current

¹⁰⁴ Just to compare: which partners think of separation at the moment of their marriage?

shape and form is an adventure with an open ending, one can hardly argue that the protection of shareholders and creditors deserves the designation 'adequate'. So the real question is whether we are willing to go for the SPE anyhow, despite the legal uncertainty of that journey. From the perspective of the creditor, the adventurous nature of the journey is not likely to be a problem. The creditor might even be unaware of what kind of adventure he is in because the legal uncertainty does not concern him. Besides, he has other means at his disposal to protect himself. However, for the shareholder the SPE adventure might contain elements of a nightmare. He might find himself stuck in a situation that was not in his tour guide and without the instruments to find a way out. My conclusion is therefore that the shareholder should not be allowed to embark on the SPE adventure unless he is equipped with an adequate buy-out remedy. Adequate protection calls for a buy-out remedy that is not limited to specific events because it is impossible to foresee all the events that may occur along the way. Adequate protection also calls for a remedy in the SPE Regulation because at the beginning of the adventure the shareholder might have forgotten to organise self-help along the way or he might not have been in a position to do so. In that case we simply cannot leave him out in the cold.