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The law applicable to the European Private Company (Societas Privata Europaea - SPE)

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1. In a market for corporate charters, a new company form may be compared to a new product to be introduced to the market. We therefore need to ask:

- is there a real need in the market which the existing products do not sufficiently meet?
- supposing there is a need: how should the new product be designed in order to fulfill the requirements of the market?

2. The core principle of the common market may be summarized as follows: crossing borders must not cause additional cost. This has been widely achieved for the sale of goods; cross-border marketing of goods is a daily reality not only for large companies but also for many medium sized and even small enterprises.

3. In the area of company law, however, crossing the border still creates considerable additional cost. When exploring new markets, companies often feel the need to establish subsidiaries abroad in order to organize their distribution and service activities. But there is no uniform company law in Europe. This diversity of jurisdictions is appreciated in academic literature. It is, however, regarded as a burden by practitioners who have to manage a cross-border group of companies incorporated in different jurisdictions.

4. A prior need to be considered is therefore the efficient organization of a group of companies incorporated in different member states. This need can best be met by European legislation introducing a supranational legal entity of the type of a private company:

- a uniform body of company law will create economies of scale when incorporating several subsidiaries in different member states and operating them in daily business,
- the possibility to draft the same articles of association for each subsidiary of the group facilitates the implementation of a coherent internal group governance.

5. The legal rules applicable to such European private company should offer a reliable framework for the relationship to third parties and contractual freedom for the internal affairs. This can only be achieved by a European Regulation which is directly applicable in every member state and available in all official languages.

6. An SPE at the lowest common denominator is not in the interest of those who need, for their cross-border business, a reliable legal entity with a good reputation. Mandatory rules therefore are necessary for the relationship to third parties, e.g. disclosure of information and creditor protection. The content of the rules may well be more rigid than national company law. What matters for potential users of the SPE is not the particular content of the rules but their Europe-wide uniformity.

7. As regards the internal affairs of the company, the articles of association should be the main source of law. The freedom of contract shall cover the determination of the corporate governing bodies, the organization of relations among them, the shareholders' rights as well as the manner of access and withdrawal of a shareholder. Since no third party interests are concerned, there is no pressing need either for European or national legislation to interfere with mandatory law. The option to draft one standard set of articles for all the companies of the group will considerably facilitate the internal management of a group of companies.

8. The proposal of the European Commission (2008) follows a combined approach: National law shall only apply if a particular matter is not covered by the Regulation. Annex I to the Regulation contains a long list of items that should be dealt with in the articles; all the matters listed in Annex I are also excluded from the application of national law.

9. Even though granting contractual freedom to the parties is essential for the potential use of the SPE, two problems remain to be solved:

- the articles of association may turn out to be incomplete. At the start of a long-term relationship, it is rather difficult to foresee every single problem that may arise in the future. The long list of Annex I helps to avoid gaps in the articles, but there may nevertheless be cases which are either not mentioned in the list or which the parties omitted by purpose or by mistake when drafting the articles.
- for many member states it would not be acceptable to offer contractual freedom without any judicial remedy as to the content of the articles. They may see the need for judicial recourse, for instance, in cases where provisions of the articles are extremely unfair to one of the shareholders (usually the minority).

10. Model articles could facilitate incorporation of the SPE and provide a helpful tool when drafting the articles. They may also be regarded as a guideline as to what could be a fair solution for the issues being dealt with in the articles. They do not, however, have the quality of a legal default rule unless they are authorized in some way by the European legislator.

11. National courts should have the possibility to assess the validity of a particular provision in the articles and to close possible gaps in the articles. They should, first, take into account the framework of the SPE Regulation and try to find a solution based on European law. As a last resort, they should have the right to apply national law. In either case, they shall respect the intention of the parties as reflected in the articles.

12. Bearing in mind that the general aim of the SPE is to reduce the complexity of a cross-border group of companies, it is essential that the intra-group management must not be fragmented by references to different national legal systems when it comes to deal with a standard set of articles the parent company has implemented in its subsidiaries. The shareholders therefore shall have the right to choose in their articles the applicable national law.

13. Shareholders shall also have the right to insert an arbitration clause in the articles. The possibility to establish a coherent intra-group policy can thereby be maintained: the parent uses one single set of articles; it regulates to the greatest possible extent, all the issues relevant for internal group management; for the purpose of closing possible gaps, the standard articles refer to the same jurisdiction and contain an arbitration clause; thereby coherent litigation may be achieved within the group.

14. It should be noted that an SPE providing the above mentioned legal features will also be a useful tool for cross-border joint ventures. Contractual freedom for the internal affairs and the possibility to implement arbitration clauses will be appreciated for this application as well.