

EUROPEAN PRIVATE COMPANY: A NEW INSTRUMENT FOR DOING BUSINESS IN EUROPEAN UNION?

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Abstract

Designed as a real European company, with a minimum registered capital of EUR 1, largely accessible, easy to organize and cheap to run, the European private company is to represent a significant reform in the matter of company law in the European Union.

Without doubt, the adequacy of the European private company statute to the legal traditions of all member states is an important factor of its use by the foreseen beneficiaries: small and medium enterprises.

The advanced stage of the political procedures and negotiations related to the statute impose the analyzing of all the main features of the European Private Company, marked out in official documents and their comparison to those of the companies regulated in Romania and on other member states of the European Union, in order to determine the extent such new company shall represent or not a new and effective instrument for doing business in the European Union.

Keywords: *European Private Company, company, transfer of the registered office, capital, cross-border element, single market, SME*

JEL Classification: K10, K20

I. Preamble

Without doubt, the differences amongst domestic laws and the diversity in the types of trading companies represent barriers for the development of the single market so that there is the possibility to remove, by a type of company regulated by legal uniform rules, adapted to the needs of small and medium enterprises, the difficulties such entities encounter related to the operation costs, and to lead to the development of their cross-border activities.

Additionally, the statistics indicate that more than 40% of the SMEs in the European Union might develop their cross-border activity but claimed that they lack in the needed instrument¹ as the existing transnational companies: European Economic Interest Group (EEIG), the European Company or the European Cooperative Society (SCE)² do not grant a proper type of SMEs³.

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¹ KPMG survey presented at BusinessEurope's SME Action Day on 21 November 2007;

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 According to a general EU definition, small and medium sized enterprises are those with less than

In order to create such a company, the European Commission drafted a study for the feasibility of the European statute of the small and medium enterprises (PME –“Les petites et moyennes entreprise”).

On the grounds of the Communication of the Commission to the Council and Parliament from May 21, 2003: “Modernization of trading companies’ law and strengthening of corporative management in the EU. A plan to advance”⁴ and of the Commission Report for legal businesses of the Parliament in 29.11.2006⁵, the European Parliament enacted on February 1, 2007 the Resolution which included the recommendations of the Commission regarding the statute of the European private company and the request for the Commission to present, during the year of 2007, a bill according to the recommendations of the Parliament.

In such background, *in June 2008, the European Commission presented in front of the Council a proposal for a Regulation (hereinafter the Regulation) for the Statute of the European Private Company (Societas Europaea hereinafter the EPC).*

The proposal was made on the grounds of art.352 in the TFUE (article 308 EC Treaty) with the significance that, in order to pass it, they needed the approval of all the 27 Member States of the European Union and, the unanimity was difficult to obtain.

As a consequence of the consultation, the European Parliament approved, on March 10, 2009, the proposal with amendments, adopted a law resolution⁶ and indicated the Commission to alter its proposal accordingly.

The revised wording of the regulation of the Council regarding the statute of EPC was in its final step to be passed, as indicated in the document of the Council DRS 84 SOC 432 from May 23, 2011⁷ following, shortly after, to conclude a final political agreement.

250 employees. Within this category the following sub-categories are distinguished as per Commission recommendation 2003/361/EC: (i) Medium-sized enterprises [headcount <250 and turnover ≤€ 50 million and/or balance sheet total ≤€ 43 million]; (ii) Small enterprises [headcount <50 and turnover ≤€ 10 million and/or balance sheet total ≤€ 10 million] Micro enterprises [headcount <10 and turnover ≤€ 2 million and/or balance sheet total ≤€ 2 million]; (iii) Micro enterprises [headcount <10 and turnover ≤€ 2 million and/or balance sheet total ≤€ 2 million];

⁴ Communication of the Commission to the Council and Parliament from May 21, 2003 entitled: “Modernization of the law of trading companies and strengthening of corporative governing in the EU. A plan to go ahead”, COM(2003)284, celex:52003DC0284;

⁵ Report from November 29, 2006 of the Commission for legal business of the European Parliament, containing as well regulations to the European Commission related to the statute of the European private company and proposal for the Resolution of the European Parliament in such direction [2006/2013 (INI)] rapporteur Klaus-Heiner Lehne, stage of procedure: A6-0434/2006; This report is based on a regulation draft regarding the statute of EPC jointly promoted by MEDEF and CCIP; <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A6-2006-0434+0+DOC+PDF+V0//EN&language=EN>;

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; available at <<<http://www.europarl.europa.eu/sides/getDoc.do;jsessionid=3A6D2E4B375D4F87B4AF504459A78D53.node2?pubRef=-//EP//TEXT+TA+P6-TA-2009-0094+0+DOC+XML+V0//EN>>> (last seen November 12, 2011);

⁷ DRS 84 SOC 432 from May 23, 2011, available at:

In the current configuration, EPC presents the features of a real European entity, the project (inspired from French simplified shares corporation - SAS) having a coherence different from that regarded for the European company, meaning that it creates an autonomous statute in relation to the European domestic law.

We proposed by this paper to analyze the main features of the European Private Company marked out in official documents, to compare them to those of other European companies but as well to those of national companies, in order to determine the extent such new company shall represent or not a new and effective instrument for doing business in the European Union.

II. Features of the European Private Company

As indicated, the premise of EPC regulation consists of the fact that the diversity of limited liability companies in the member states generate a lack of flexibility and, in case of groups of companies, it makes difficult the development and optimization of the activities of their branches in other states of the European Union. The parent company is compelled to establish each branch in another type in each and every member state where it is established, branches to be object of different legal regimes.

Additionally, the costs for the initial establishment and development of limited liability companies are presently significant and regard not only the registered capital and the costs for consultancy, drafting and authentication or certification of articles of association.

According to a study conducted in 2008 by Baker & McKenzie for the German company association VDMA, these costs taken globally are estimated to average around €1300 for small companies (21)⁸

The total of the above costs on the creation of a company, including capital, can run up to levels that can deter from company formation in some markets. The Baker & McKenzie study, for example, estimates that a total of €28,550 would be required in Belgium, €20,500 in the Netherlands, or € 16,500 in Italy, to set up a small company⁹.

Seeing that the European private company refers to small and medium enterprises (without imposing any such restriction, the large companies and the

<< <http://register.consilium.europa.eu/pdf/ro/11/st10/st10611.ro11.pdf>>> (last seen on November 11, 2011);

⁸ Based on the presentation by Kristina Schunk, legal consultant at Schunk GMBH&CO. KG, held at the public hearing before the Legal Affairs Committee of the European Parliament in Brussels, 22 June 2006, on the European Private Company, published in European Company Law, December 2006, vol. 3, issue 6;

⁹ Impact assessment, Working Document accompanying the Proposal for a Council Regulation on the Statute for a European Private Company (EPC), {COM (2008) 396}, {SEC (2008)2099}, Brussels SEC(2008)2098; available at:

<< http://ec.europa.eu/internal_market/company/docs/epc/impact_assesment_en.pdf>>;

groups may also be beneficiaries of the Regulation) it is established under the same conditions in any other member state, is simple and flexible by allowing the associates to decide as many aspects as possible, assuring, in the same time, a high level of legal certainty for the associates, creditors, employees and third parties, in general.

Based on such realities, the essential aspects of the organic statute of EPC, they desire to remove the largest part of such current issues from the matter of national and cross-border limited liability companies.

1. Governing Law

Law applicable to EPC represented one of the most difficult issues of the regulation draft.

Article 4 of the Regulation establishes the applicable right of EPC, organic statute of which shall be governed first of all by the provisions of the regulation and, secondly, by the provisions of the article of association of EPC, creating by it a shield to the application of the Member States' law¹⁰.

The associates, *based on the free will principle and on the provisions of art.4 from the Regulation, can insert as well in the articles of association provisions related to the aspects listed in Annex I of the Regulation* (additionally to the compulsory content of the articles of association established by art.8 in the Regulation).

The aspects included in Annex I of the Regulation are a lot (there are more than 40 positions), and mainly regard the internal organizing of the EPC.

Nevertheless, the *Regulation does not offer the EPC a total autonomy of the legal regime* but, the provisions of the domestic law of the company only applies in case of the aspects expressly mentioned by the regulation. The national law of the company or the domestic applicable law is the law of the Member State where the EPC records its registered office.

Third of all, *the aspects uncovered (unregulated) or partially covered by the regulation and by its Annex I, as well as in case of aspects included in Annex I but not contained in the articles of association, they are object of the laws passed by the member states for applying the regulation and, in default, the provisions of the law applicable to the company.*

The method to nominate the aspects regulated by the domestic law of the company, by elimination, is criticised in the specialty literature, there are opinions according to which the application scope of the domestic law shall be determined by the interpretation given in each and every Member State to the words: "uncovered by" Regulation or by Annex I¹¹.

¹⁰ Susanne Braun, "Essay-The European Private Company: A Supranational Company Form for Small and Medium-sized Enterprises?", German Law Journal, Vol.05 No.11, 2004, p.1393-1408, available at: << <http://www.germanlawjournal.com/article.php?id=518>>>;

¹¹ H.J. de Kluiver, J.Roest, "Expulsion and Withdrawal of Shareholders" and M.I.Lennarts, "Voice Rights of Shareholders", both in: D.F.M.M. Zaman et al. (eds.) *The European Private Company (EPC). A Critical Analysis of the EU Draft Statute*, 2009, p.70 and p.126, indicated by Sandra van den Braak in "The European Private Company, its shareholders and its creditors", Utrecht law Review, Volume 6, Issue 1

It is obvious that, by the legislative technique used by article 4 of the Regulation it is avoided as much as possible the application of the domestic law of the company.

2. Establishment Methods

Unlike all the other current European entities (European company, European groups with economical interest, European cooperative companies), EPC can be established *ex nihilo*, *by transformation and merger*.

An EPC shall be established ex nihilo (directly) by one or more private or public law natural or legal persons, according to the provisions of EPC regulation.

The transformation of a current legal person, regulated by the internal law of a member state is the second establishment method for an EPC, under the conditions, according to the regulation, *the member states are compelled to allow the transformation of a limited liability national company in an EPC*. Regarding the other types of national companies, the member states shall allow their transformation in an EPC in the extent national law allows their transformation in a limited liability company, in general.

In this establishment method for the EPC, according to the general rules in the matter, the legal person / company which is transformed is neither dissolved nor loses its legal personality.

When domestic law imposes a restriction related to the transformation of a legal person in a limited liability company, such restriction is applied, *mutatis mutandis*, to the transformation of the EPC as well.

In case the EPC is established *ex nihilo* or *by transformation*, *the establishment of the company shall be regulated by the regulation*.

And not least, the EPC can be established *by merger, according to domestic law*.

On the other hand, as it is known, for encouraging the businesses, all the member states of the European Union regulated, approx. one hundred years ago, legal entities known as "companies", which mainly offered its founders the limitation of personal liability. This main feature of companies: distinct legal personality, with the effect of associates' liability limitation, explains the extraordinary use of such legal instruments which give the possibility to develop a business without risking the full assets of the contractor.

Therefore, EPC is registered on the traditional line of limited liability companies and *has legal personality, with the consequence of the liability of associates for the obligations of the company in the limit of their contribution to the registered capital, that is, with the exclusion of their personal liability for the obligations of EPC*.

3. Articles of Association

In any of the establishment methods allowed by the regulation, *EPC is established by the signature of the articles of association by the founder members, in written form, it being object of the formal requirements provided for in the applicable domestic law.*

By such provision, the regulation first concedes in favour of the member states, giving the possibility of the applicable domestic law for the establishment of EPC to impose as well other shape conditions of the articles of association. In this direction, domestic laws include various provisions, in some cases, being imposed the written form for the validity of the articles of association, in others for proving the articles of association and as well its authentic form for its validity.

As for example, the Romanian law¹² imposes as regulation the written form of the articles of association, for its validity and, by exception, the authentic form when the limited liability company is established where a land is brought as contribution to the establishment of the registered capital.

The opposability of the articles of association is as well obtained, according to the provisions of the applicable domestic law.

According to article 8 in the regulation, *the articles of association of the EPC must include at least the following aspects:*

- a) name of EPC and address of its registered office;
- b) activity object or commercial activity of the EPC;
- c) tax year of EPC;
- d) registered capital of EPC;
- e) if applicable, the total number of units, if the units have a nominal value, their nominal value;
 - ea) monetary and nonmonetary rights, as well as obligations related to units;
 - eb) categories of units, if applicable, and number of units in each category;
 - ec) type of management body, if there is a surveillance board, and their structure;
- f) share of the registered capital to be paid upon establishment;
- g) names and addresses of the founder members, number of units subscribed by each and every founder member and, if applicable, of what category such units belong to;
- h) the share of each and every cash contribution, if there is one, which is to be paid by each and every founder member;
- i) value and type of each in kind contribution, if there is one, which is to be brought by each and every founder member;
- j) names, addresses and any other information needed for identifying the director or initial directors and, if applicable, the auditor or initial auditors of the EPC.

¹² Law no.31 from 1990 regarding trading companies and the new Romanian Civil Code;

The inclusion of additional clauses related to the aspects mentioned in Annex I of the regulation is to be appreciated by the founder members. In such case, domestic law is not applied to those aspects in the extent they are included in the articles of association.

The articles of association may include as well *other aspects than those compulsory and elective* from the regulation but, such other aspects shall not be regulated by the regulation, but by the applicable domestic law.

4. Registered Capital

The EPC is not object of a requirement of registered capital compulsorily increased, as it may constitute a barrier for the creation of EPCs. Nevertheless, the creditors are protected by the excessive distributions to the shareholders, which may affect the capacity of the EPC to pay its debts. For such purpose, they prohibited the distributions as a consequence of which the liabilities of EPC are superior to the value of the assets. Additionally, the shareholders may request to the management executive body of the EPC to sign a certificate of good standing.

There are, amongst the provisions of news and the special importance which may provide the premises for reaching the objectives of the regulation, those related to the *minimum registered capital of the EPC of at least EUR 1*.

The base of the possibility of a EUR 1 registered capital for a private company operating on a single market is given by the alteration of the conception on the guarantees the creditors of a company expect and request.

It is well known that, according to its legal significance, the registered capital represents the general pledge of the company's creditors. Despite this legal reality, the social obligations exceeding by far the value of the registered capital so that, de facto, the assets of the company are those providing or not satisfaction of social creditors¹³.

And not least, it is proven that the creditors prefer to request other types of guarantees, individual and enforceable, to that offered by the registered capital, the assets being those value of which grants solidity to the company¹⁴.

There is, in the light of the decisions of the Court of Justice of the European Union, the tendency to waive, for the future, the requirements related to the minimum capital. Therefore, Germany has recently entered *Unternehmergeellschaft* with a minimum capital of EUR 1 and The Netherlands is in full progress of removing the capital related requirements for *Besloten Vennootschap*¹⁵.

¹³ Details in: H.Boschma, L.Lennarts, H.Schutte Veenstra, "The Reform of Dutch Private Company Law: New Rules for Protection of Creditors", European Business Organization Law Review 8, 2007, p.573;

¹⁴ Drury, Robert/Hicks, Andrew: "*The proposal for a European Private Company*", The Journal of Business Law, p.441, 1999, : "But the provisions of a minimum capital has not always the effect of providing any sort of guarantee that the business is sufficiently capitalised to protect third parties dealing with it";

¹⁵ Sandra van den Braak, "*The European Private Company, its shareholders and its creditors*", Utrecht law

Despite such tendencies, a minimum registered capital of EUR 1 represents a level which cannot be accepted by the legal traditions of all the member states of the European Union, for which reason, politically speaking, the opinions are still divergent regarding the capital of the EPC.

Neither the European Parliament agreed this new conception and, in order to make a balanced compromise, the last version of the regulation includes the *possibility of each and every state to be able to establish for the EPC registered on its territory, a minimum registered capital higher than EUR 1, but not more than EUR 8000.*

The large interval between the two minimum thresholds of the registered capital of the EPC shows the difference existing between the member states of the European Union. Poland requests a minimum registered capital of limited liability companies of: EUR 13,869, United Kingdom EUR 1.5, France EUR 1, Hungary, EUR 11,760, Austria EUR 35,000, the Netherlands EUR 18,000, Bulgaria EUR 2,500¹⁶, Romania EUR 45 etc.

We do not believe that the establishment of the minimum capital of EPC by each and every member state, within the interval established by the regulation: 1 Euro- 8,000 Euro, shall lead to the success of the EPC, the minimum share of EUR 1 regarded by the initial proposal being that which, amongst other arguments, may represent an important criterion in choosing this type of private company.

Additionally, the creditors of the EPC are guaranteed as well by its obligation not to distribute the dividends of its associates if, on the date of the last tax year end, the net assets resulted from the annual accounts of the EPC is, or after such a distribution, may decrease below the share of the capital plus that of the reserves which cannot be distributed according to the articles of association of the EPC. The member states have the possibility to enter as well the *requirements related to the "certificate of good standing"* by which the management body of the EPC certifies that the company is able to pay its debts on the maturity term, in one year's term from the dividends distribution date.

And not least, *the capital of the EPC is integrally subscribed by the associates who can contribute by contributions in cash and in kind, and divided in shares. The labour and service contributions are not allowed.*

Regarding the payment of the registered capital, the regulation indirectly contains provisions, by establishing the conditions for the payment of the associates' contributions. Therefore, the contributions in cash must be paid in proportion of 25% and the contributions in kind must be integrally paid, in the moment the shares are purchased, for what represents the part of the registered capital equating the minimum capital requirements.

On such grounds, seeing these conditions and the associates' decision, *the articles of association of the EPC must include the share of the capital which is to be paid upon its establishment.*

Review, Volume 6, Issue 1 (January), 2010, available at:<<<http://utrechtlawreview.org>>>;

¹⁶ Source: Impact Assessment, Working Document accompanying the Proposal for a Council Regulation on the Statute for a European Private Company (EPC), op.cit., Annex A3;

5. Registered Office

The cross-border mobility of companies is mainly guaranteed by the freedom for establishment. Despite all this, Article 49 from the TFUE which establishes the freedom of establishment does not recognize to companies according to Article 54 from the TFUE, the right to move their registered office from the legal system of the home member state¹⁷ in another member state so that, the companies must change for it their nationality and adhere to the legal regime of a new home state. The case law of the Court of Justice of the European Union is sufficiently clear in this direction and there is no reason to be altered.

And it because, the company is a legal fiction existence of which is recognized by a domestic law, law applicable to the connection existing by the registered office of the company - the registered office¹⁸-, between the company and the member state where it is formed, laws of which are met upon the establishment of the company. Therefore, the application of a domestic law is the prior condition for the existence of any company.

On the one hand, many Member States do not allow for a company with the registered office registered according to the articles of association on their territory (the Home State) to have the headquarters known as real registered office, on the territory of another member state (Host State)¹⁹.

In order to allow to enterprises to take advantage of all the advantages of the internal market, the EPC must be allowed to establish its registered office and real office in different member states and to transfer the registered office from one member state to another, without being compelled to transfer as well its headquarters or main registered office. Despite all this, one must take measures in the same time in order to prevent the use of the EPC in order to elude the legitimate legal requirements in the member states.

According to the regulation, the *EPC has its registered office and headquarters or the main place for the development of the activities on the territory of the European Union, according to the domestic applicable law.*

By this provision, the regulation would rather only make half a step on a territory of "moving sands", establishing as principle the possibility of a company to have its registered office different from the real office and, additionally, to have its registered office and real office in different member states. "The step finalization" is

¹⁷ The home member state means the member state where there is the registered office of the company right before the transfer of its registered office in another member state;

¹⁸ The registered office of companies is named "the registered office" as, all the companies are registered in a National Register of Companies, held by the member state where it declares its office in the articles of association, register kept according to the 1st Company Law Directive (Directive 68/151/EEC of 9 March 1968);

¹⁹ Report of the Reflection Group On the Future of EU Company Law, European Commission, Brussels, April 5, 2011, available at: <<http://ec.europa.eu/internal_market/company/modern/index_en.htm#background>> (last seen on November 14, 2011);

launched according to the desires of each and every member state which can accept or not this possibility by its internal provisions.

Therefore, *the applicable domestic law will allow the EPC to decide, by its regulations, if the registered office and headquarters or main place for the business activities should be or not on the territory of the same member state.*

More, *the regulation allows the EPC to transfer its registered office from one member state to another, under the conditions shown by the regulation, without the dissolution and loss of the legal personality of the EPC.*

The transfer of the registered office of the EPC from one member state to another can only get involved if dissolution, liquidation or insolvency or EPC payment suspension procedures were initiated.

The check of the legality to transfer the registered office of the EPC devolves upon the competent national authority. Should the conditions of the transfer of the registered office be fulfilled, *the competent authority with control of such transfer legality from the home state can only oppose to the transfer of the registered office due to public order reasons.*

The same right is also held by the national authority of financial surveillance of the EPC, if the EPC is subject to such a check.

The decision of the competent authority on the home state can be brought to court in front of a judicial authority.

In its turn, *the competent authority in the host state shall analyze if all the conditions of the transfer indicated in the regulation are met as well as all the relevant provisions in its law and, if affirmatively, it shall decide the registration of the EPC, moment when the transfer produces its effects.*

On the grounds of the notification related to the registration of the EPC in the host state, the competent authority in the home state decides the erasure of the EPC from its register.

For the opposability of the new registered office registration and of the erasure of the old registered office, such documents are object to advertising.

6. Registration

Seeing the capacity of legal person of the EPC, it must be registered according to the provisions of the domestic law, in the register kept by each and every home state.

The founder members or any person authorized by them request registration, which can be also electronically performed.

Article 3 item 3 of the regulation requires as *essential element of the registration as European entity of the EPC, its transnational structure.*

The current shape of the Regulation alienates from the initial proposal which included no referral to a cross-border element as they considered that such requirement might significantly reduce the potential of the EPC. The alteration of conception was determined by the fear that such lack of community dimension as

precondition of its establishment as an EPC may infringe the principle of subsidiarity regulated by article 5 in the EC Treaty²⁰.

The difficulties created by the cross-border components imposed for the existing European entities (European company, European group with economical interest, European cooperative company) are removed by flexible criteria included in the regulation.

The needed cross-border structure must be proved in the moment of the registration of the EPC by one of the following elements, very easily to fulfil²¹:

- i) an intent to operate in another member state than that where the EPC is registered; or*
- ii) an cross-border activity object mentioned in the articles of association of the EPC; or*
- iii) a branch or subsidiary registered in another member state than that where the EPC is registered; or*
- iv) an associate or several associates with residence or registered in more than one member state or in another member state than that where the EPC is registered.*

In order to reduce administrative costs and duties related to the registration of the company, the formalities to register the EPC are limited to the requirements needed to guarantee the legal certainty, and the *validity and conformity to the provisions of the regulation and to the domestic law of documents registered in the moment an EPC is created are object of one sole check of legality, performed according to domestic law.*

Therefore, the member states request the supply of only those pieces of information contained in the Articles of Association of the EPC, the articles of association, the documents certifying the payment of the capital, the police record of the directors, the proves related to transformations or mergers of the EPC.

In all cases, irrespective of the method to check the fulfilment of the registration conditions by an EPC, useless essence checks of documents and information are avoided.

The registration of an EPC is made in the member state where it has its registered office, in the national register of companies appointed by the domestic law.

Without derogation from the general rules in the matter of companies, *the legal personality is acquired in the moment of registration with the Register of Companies of the EPC constituted ex nibilo and by transformation and, in the moment of the registration of the merger of the absorbing company with the register of EPC resulted as a consequence of the merger.*

7. Organizing

According to the organizing structures of the EPC, the regulation does not produce conception alterations seeing that, *the main decision making body is the general assembly of the associates decisions of which must be written down; the management of the EPC is provided by directors which can only be natural persons, the associates having the possibility to decide*

²⁰ Sandra van den Braak, op.cit., p.4;

²¹ A.F.M. Dorrestejn, O.Uzuahu-Santcroos, "The Societas Privata Europaea under the Magnifying Glass (Part 2), European Company Law, no.4, 2009, p.159;

between the two traditional management methods: unitary or dualist system and, related to the elaboration, delivery, auditing and printing of accounts, EPC is object of the requirements of domestic law.

The representation of the EPC in its reports to third parties is included in the general attributions of the management body of the EPC.

The regulation establishes the main attributions of the general assembly and the minimum majority related conditions needed by the general assembly to pass decision.

Therefore, as a general rule, except for contrary provisions from the articles of association, the decisions are passed by the associates with the vote of the simple majority from the total of the voting rights related to the shares of the EPC. By this provision, the associates have the possibility to establish majority related conditions much lower than those mentioned by the regulation, for passing the low importance decisions for the company.

The decisions related to the purchase of its own shares, the increase of the registered capital, the reduction of the registered capital, the transfer of the registered office of the EPC to another member state, the dissolution and amendment of the articles of association are made by the associates with the qualified majority, of at least two thirds of the total of voting rights related to the shares of the EPC, except for the cases when the articles of association provide no higher increase.

An important alteration of the tradition conception related to the convocation of general assembly is marked by the introduction of the principle of non-convocation of the associates' general assemblies.

Therefore, according to article 28 item 3 in the Regulation, passing decisions does not need the convocation of a general assembly.

Such principle one cannot derogate from by the provisions of the applicable domestic law is imposed by the need to reduce the costs of the business but as well by the effective use of the time to pass a decision. Therefore, they remove the conditionings included by all laws of the member states related to the observance of a certain number of days which should flow from the date the associates' general assembly is convoked to the date of its occurrence. The expenses needed for the convocations are added.

In order for the associates' general assembly of an EPC to pass decisions, the management body makes available for all the associations the proposals for decisions, together with sufficient information in order to grant them the possibility to pass a decision, in full knowledge of the facts. Decision passing is recorded in writing, as they are object of the formal requirements provided for by the applicable domestic law. Copies of the decisions and the results of the vote are sent to each and every associate.

As a natural reflection of the fact that associates' passing decisions is fully regulated by the regulation, as principle, *the decisions passed by the associates of the EPC must meet the provisions of the regulation and of the articles of association.*

However, *the right of the associates to bring to court the illegal decisions of the associates' general assembly, which infringe the provisions of the regulation and of the articles of association, is regulated by the applicable domestic law.*

Due to the fact that one must allow the shareholders a high level of flexibility and freedom for organizing the internal business of the EPC, *the private character of the*

company must reflect as well in the fact that its actions can neither be offered to the public or negotiated on the capital market, nor admitted for transactions or quoted on the regulated markets.

They appreciate that the private character of "closed company" of the EPC can be an instrument for the limitation of the size of the companies constituted in the EPC, by making the possibility for experimented partners to get involved in the company more and more difficult²².

The condition to distribute dividends and the reduction of the registered capital, the assignment of shares are regulated by the regulation and the articles of association while the *transformation in a new legal type, the merger and division, dissolution, liquidation, insolvability, suspension of EPC payments and other similar procedures are regulated by the domestic applicable law and by the Regulation (CE) no.1346/2000 of the Council.*

8. Employees' Participation

There are, in the matter of employees' participation, significant differences, this being another important aspect where, due to the different legislative traditions of the member states, there must be a balance compromise.

In the meaning of the regulation, "employees' participation" means the influence the body representing the employees and/or the employees' representatives has on the activity of an EPC by:

- i) the right to choose or appoint a part of the members of the board of surveillance or of directors of the company or
- ii) the right to recommend and/or to oppose to the appointment of some or all the members of the board of directors of the company (art.2 item 2 letter f in the regulation).

As principle, the regulation establishes that the EPC is applied the regulations in the matter of the employees' participation, if such case, applicable in the member state where it has its registered office, except for the aspects regulated by the regulation, offering a uniform solution for any EPC²³.

The regulation contains special dispositions to be applied with precedence related to those of the applicable domestic law, for exceptions, cases when one of the conditions is fulfilled:

- i) EPC, for a continuous period of three months from the registration, has at least 500 employees usually working in a member state which provides a degree of employees' participation higher than provided for the employees in the member state where the EPC has its registered office; or
- ii) In case of transfer of the registered office of an EPC
 - at least a third of the employees, but not less than 500, ordinarily working in the home state on the date it is registered in the host state; and,

²² See Susanne Braun, op.cit., p.1399;

²³ Daniel Karnak, "The European Private Company - Entering the Scene or Lost in Discussion?", German Law Journal vol.10, No.08, 2009, p.1327;

- employees in the home state had more participation rights than those in the host state.

Despite all this, if the transnational participation system for the employees created according to this article is applied to the EPC in the moment of the transfer, it is to be applied after the transfer, if the EPC and the special negotiation body do not decide in another way.

Employees' participation to the management of the company is a sensitive subject for the member states where there is no such tradition, states where no private company accepts intrusions in the development of its businesses which they regard as a private issue and related to which only the associates are entitled to decide.

The regulation does not impose the obligation of the member states to introduce rules related to the participation of the employees in the limited liability companies managing to correct the regulation of employees' participation in the operation of the EPC, without improperly disturbing the legal culture of each and every member state²⁴ which may discourage the establishment of EPC.

III. Conclusions

Even in its current configuration the EPC related Regulation represents a significant progress to the regulation of the other European companies.

Its correspondence (destined to large enterprises and groups of companies): the European Company was thought as well as a transnational company which may provide the mobility of companies by the possibility to transfer the registered office from one member state to another, to enable the merger and establishment of their branches in other member states etc. such daring targets did not benefit from the needed political support and the proposal was amended many times before its enactment. Under such conditions, the statistics indicate that the European company did not represent a progress and did not enjoy success.

For the future, an important step in the performance of rules of common law for the trading companies in the European Union shall be made by the European Project Model Company Act (EMCA), project having as model the American Model Business Corporation Act (MBCA)²⁵. The purpose of such project is not to standardize domestic laws in the matter of companies by offering one single act, but to make available for the member states a model for the domestic laws, model to be voluntarily used by the member states.

Until the concretization of other European projects in the matter of trading companies, the EPC presents uncontested advantages to any other European entity:

²⁴ Situație pe care o întâlnim la Societatea Europeană în cazul careia, reglementările privind participarea salariaților la SE se aplică tuturor statelor membre (see: Directive 2001/86/CE of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees);

²⁵ On the EMCA project, see: T. Baums & P. Krüger Andersen, *The European Model Company Law Act Project*, European Corporate Governance Institute, Law Working Paper No. 097/2008, March 2008. See also the EMCA website: www.asb.dk/emca;

the possibility of direct establishment - ex nihilo, reduced minimum registered capital, very easy to perform cross-border structure, possibility to have its registered office in a member state and the real office in another member state, possibility to transfer the registered office from one member state to another, flexibility of the articles of association, of internal organizing, failure to impose requirements to the employees' participation of the EPCs registered in member states which do not regulate employees' participation etc.

There is to establish the extent in which the largely more extended incidence of the domestic law applicable to the EPC shall represent an important inconvenient in the use of EPC. There is no doubt that in its current configuration, EPC Regulation does not offer certainty related to the role of the domestic law applicable to the EPC and, the more the aspects regulated by the domestic law of the EPC, the less uniform the law applicable to the organic statute of the EPC.

We appreciate as the strongest advantage of the EPC: the deployment of cross-border business within a single market through the agency of an instrument legal regime of which is sufficiently uniform, independently from the member state where it develops its activity, directly or by branches, may determine the success of this new instrument for doing business in the European Union.