JOINT COMMITTEE ON COMPANY LAW
('Joint Committee')

of the

Dutch Bar

and the

Royal Netherlands Notarial Organisation

Opinion

on the

Proposal for a Council Regulation on the Statute for a European private company (COM(2008, 396); Parliamentary Papers 31 543 (the 'Proposal')

1. General observations

1.1 The Proposal aims to create a new European legal form, the Societas Privata Europaea ('SPE'), which is 'intended to enhance the competitiveness of small and medium-sized enterprises (SMEs) by facilitating their establishment and operation in the Single Market'. In the European Union (the Joint Committee assumes that this includes the EEA) we already have three supranational legal forms: the European Economic Interest Grouping (EEIG), the European Public Limited Liability Company (SE) and the European Cooperative Society (SCE). None of these three legal forms has hitherto proved to be a success. Nonetheless, the Joint Committee considers that it is in itself a fine idea to create a European legal form that is the same in all countries. To achieve this, however, many safeguards are required, which is a requirement that the Joint Committee considers is in any event not met in the Proposal. Indeed, it is even questionable whether this requirement is capable of being met.

1.2 The Proposal is based on a uniform regime. However, under the Regulation national law is applicable, in addition to the Regulation, to a number of essential matters. Moreover, the Proposal does not relate to matters in the field of employment law (this evidently also includes the right of employee participation), tax law, reporting and insolvency. This will result in forum shopping (in which country is the SPE to have its corporate seat?!) and uncertainty about the applicable legislation. Entrepreneurs will also choose the country that has the easiest or most flexible legal system, the lowest liability risk and the minimum costs.

1.3 An SPE would be subject to the Regulation and to its own articles of association as regards the matters listed in an annex to the Proposal. If these matters are regulated in the articles of

association, this would seem to create a certain uniformity. However, such uniformity would only be relative since these matters could be arranged in very different ways in the articles of association. Matters that are not regulated in the Proposal or, as stipulated in the annex, in the articles of association will continue to be governed by the applicable national law, which is also hardly conducive to uniformity.

The annex is also very extensive. It follows that the costs of advice for the preparation of articles of association are likely to increase rather than decrease, which is contrary to one of the objectives of the Proposal, namely to reduce the costs of company formation.

1.4 The Proposal seems to indicate that it chooses the law of the Member State where the SPE has its corporate seat as conflicts rule for determination of the applicable national law. The Joint Committee wonders whether this observation is correct. It is not entirely clear to the Joint Committee whether 'registered office' always has the same meaning as the 'corporate seat' ('statutaire zetel' in Dutch).

1.5 A workable European legal form should, in the opinion of the Joint Committee, be based as far as possible on non-mandatory law, which is a wish expressed by entrepreneurs in practice. However, the Proposal is currently based to a large extent on mandatory law. The Joint Committee realises that choosing non-mandatory law would be at odds with the desire for a uniform regime. A solution could be found by opting for supplementary law. The proposal could then, for example, be based on 'Model Articles of Association' for the SPE, from which the parties could derogate. This would achieve a degree of uniformity whilst also creating flexibility.

1.6 According to the Proposal, an SPE can be formed only by natural persons and EU legal entities as referred to in Article 48 of the EC Treaty (see Article 3, paragraph 3, of the Proposal). The Joint Committee does not understand why a distinction is made in this respect between natural persons and legal entities and why – as regards legal entities – non-EU residents cannot form an SPE. After all, as no Community basis is required for the transfer of shares, conversion or merger, it would seem possible for non-EU legal entities too to obtain an SPE by this roundabout route. The Joint Committee would like to have this confirmed. This also shows that there is no reason to limit the categories of founder.

1.7 The introduction of the SPE is intended to encourage founders to choose an SPE rather than a comparable national legal form. However, these national legal forms often have a well-defined system of safeguards for the protection of creditors and minority shareholders. Although these systems are admittedly being simplified and made more flexible in many EU countries, a number of basic protection principles continue to exist within the applicable national law. As a result of the introduction of the SPE, which does not provide some of these safeguards, this well-defined system of basic protection at national level for creditors and minority shareholders will be lost if large-scale use is indeed made of the SPE.

1.8 Four general policy options for arriving at the SPE are examined in the Impact Assessment (point 6 of the Explanatory Memorandum to the Proposal). The possibility of improving the European Company Statute (SE) has evidently been discarded, but wrongly in the view of the Joint Committee. If the problems in the current SE could be solved, the SE could be converted into a European legal form that would be suitable as a European private company, i.e. a 'light version' of the SE. The Joint Committee suspects that the procedure for changing the SE into a so-called 'SE light' would be faster and more efficient than creating a new European legal form.

1.9 In the case of an SPE the formalities for formation, registration, the issue and transfer of shares and amendment of the articles of association are limited. In the opinion of the Joint Committee, these acts should be hedged around with more safeguards both for reasons of legal certainty and to combat abuse. Provision could conceivably be made for this in the Regulation. Alternatively, these formalities could be governed (or continue to be governed) by national law so that the national protection rules too remain applicable in this context (see also 1.7 above).

2. Article-by-article commentary

2.1 *Chapter I: General provisions.*

2.1.1 In the opinion of the Joint Committee, Article 3, paragraph 2, defines the offering of shares to the public in very broad terms, which will make it very difficult for a private company to fulfil the requirement referred to in Article 3, paragraph 1 (d), for the formation of an SPE.

2.1.2 Under Dutch law, a general introductory section (General Provisions) would be applicable to the SPE as legal entity in Book 2 of the Dutch Civil Code (Legal Entities). This would provide, among other things, that the requirements of reasonableness and fairness apply to the relationship between a company and its organs (Article 2:8 Civil Code) and regulate how resolutions can be annulled, ratified and confirmed (Articles 2:14 and 2:15 Civil Code). As the Proposal does not contain any comparable introductory provisions, the Joint Committee wonders whether these national provisions will also apply to the SPE or whether European law that is yet to be developed will become applicable, with all the uncertainties that this will entail for a long time to come.

2.2 *Chapter II: Formation*

2.2.1 The Joint Committee wonders whether it would be possible for supplementary provisions to be applicable to the SPE by virtue of the articles of association and, if so, would urge that this should be the case. Is it possible, for example, for reference to be made in the articles of

association, as regards the subjects regulated in annex 1, to a set of rules or a resolution to be adopted other than in the articles of association?

2.2.2 As already indicated above, the formalities for the formation and registration of the SPE should, in the opinion of the Joint Committee, either be subjected to national law or otherwise be hedged around with strict safeguards. A competent authority that can ensure the legal validity of the formation will have to be designated in each country. In the case of the Netherlands, the safeguard should be the compliance test applied by a Dutch civil law notary.

Another question is to what extent EU countries may impose more far-reaching requirements nationally for the formation of an SPE, as for example in the Netherlands the requirement of a 'certificate of no objection' issued by the Minister of Justice. Does this requirement come within Article 10, paragraph 4, of the Proposal. What is the position regarding other national requirements (e.g. compliance supervision)? Does this cover the control carried out *ex proprio motu* by the Trade Register in the Netherlands.

2.2.3 According to Article 13 of the Proposal, branches of an SPE are governed by the law of the Member State in which they are located. This would create a source of tension between the law applicable to the SPE (the law of the state where it has its corporate seat) and the law of the state where a branch is located, if this is the head office. The Joint Committee wonders whether this could not cause problems or result in forum shopping (in relation to the corporate seat).

2.3 *Chapter III: Shares*

2.3.1 The list of shareholders is not disclosed in the Netherlands. In view of the privacy aspects, the Joint Committee queries whether the requirement in the Proposal (Article 15 (3)) that the list be disclosed is entirely logical. Nor is it apparent from the Proposal how the list should be disclosed.

2.3.2 For reasons of legal certainty and to combat abuse, a notarial deed is required in the Netherlands for the transfer and issuing of shares in a private company (BV) (or closed public company (NV). The Proposal merely requires a written agreement in this context. The Joint Committee considers that this does not provide an adequate safeguard. A possible solution could be for national law to remain applicable to the transfer and issuing of shares. Another question is what law is applicable to the protection of third parties if the acquisition of shares is not valid: should this be the applicable law at the time of the transfer or the applicable law at the time when the desired protection must be given to third parties, i.e. at the time of a subsequent transfer?

2.3.3 The Proposal lacks a provision regulating the encumbering of shares (pledge and usufruct). However, such a provision should be included and should also set out the rights of pledgees

and usufructuaries. This also applies to the issuing of depositary receipts for shares, which is an arrangement often applied in the Netherlands, particularly in the case of family-run companies. It should also be evident from the articles of association whether the holders of depositary receipts for shares have rights at general meetings.

2.3.4 Articles 17 and 18 of the Proposal set out an arrangement that resembles the dispute resolution procedure in the Netherlands. The proposed arrangement appears to be of a mandatory nature. In the opinion of the Joint Committee, however, shareholders should be free to determine their own procedure for dispute resolution.

2.4 *Chapter IV: Capital*

The Joint Committee considers that the Proposal should contain rules governing the liability of directors if distributions are made to shareholders contrary to the provisions of the Proposal. Is it intended that this liability should be regulated by the applicable national law (thus resulting in differing liability arrangements)? Or is it perhaps the intention that the sole sanction should be the obligation of shareholders to return the distribution, as regulated in Article 22? In addition, the Joint Committee is struck by the fact that although reserves prescribed by the articles of association may not be distributed (Article 21, paragraph 1), this prohibition does not apply to statutory reserves (e.g. revaluation reserves).

2.5 *Chapter V: Organisation of the SPE*

2.5.1 The Joint Committee has objections to the disclosure of certain of resolutions of shareholders as referred to in Article 27, paragraph 1 (see Article 27, paragraph 6), in particular the resolutions referred to at (a), (c), (e) and (k), and does not consider that such disclosure serves any reasonable interest. The Joint Committee has no objection to the disclosure of the consequences of other resolutions, for example the removal of a director.

2.5.2 The Joint Committee considers that Article 14, paragraph 3, and Article 27, paragraph 2, should be couched in non-mandatory rather than mandatory terms. These articles provide that the resolutions to which they refer always require a two-thirds majority of the votes.

2.5.3 Under Article 28 shareholders have a right to receive information from the management body of the SPE. The Joint Committee wonders whether this right to be informed is a right that may be exercised by shareholders individually or only by the general meeting of shareholders as an organ of the SPE.

2.5.4. The Joint Committee wonders why legal entities too cannot be a director of an SPE (Article 30, paragraph 1), as is customary in the Netherlands, provided of course that any liability is passed on to the natural person behind the veil of incorporation.

2.5.5. It is unclear whether the requirement in Article 31, paragraph 1, that a director has a duty to 'act in the best interests of the SPE' also means that all management board decisions and acts must be guided by such interests. Nor is it clear whether the expression 'the best interests of the SPE' means the 'corporate interest', which is interpreted in the Netherlands as including the interests of all stakeholders involved in the company and its undertaking.

2.5.6. The Joint Committee assumes that the provisions of Article 31, paragraph 2, are in keeping with the provisions of Article 2:9 of the Dutch Civil Code. But the obligations of directors extend beyond this. The Joint Committee also considers that a provision such as Article 2:8 of the Civil Code (which covers the obligations of directors to other persons) would be desirable for an SPE. See also the observations in part 2.1.2.

2.5.7. The Joint Committee considers that the provisions of Article 31, paragraph 3, would be unworkable in practice. The conflicts of interest referred to in that provision are inevitable (e.g. the situation in which a director of an SPE is also a director of a subsidiary). What it comes down to is that in such a case there is an arrangement that provides for the resolution of such conflicts.

2.5.8. Article 31, paragraph 4, provides that a director of an SPE is liable to the company for any act or omission in breach of his duties deriving from the Regulation, the articles of association of the SPE or a resolution of shareholders which causes loss or damage to the SPE. Under Dutch law, a director is liable only if there has been 'serious culpability'. The Joint Committee considers that the Proposal should qualify the liability in this way or declare national law applicable to such liability (which would not be conducive to the desired uniformity).

2.6 *Chapter VI: Employee participation*

The Joint Committee wonders whether the concept of employee participation is the same as that in the definition contained in the employee participation directive for the SE and SCE, in brief what is known as 'employee participation in legal entities'? If this is indeed the case, Article 38 could simply refer to the provision for cross-border mergers (Tenth Directive).

2.7 *Chapter X: Final provisions*

The Joint Committee considers that in view of the European character of the SPE registration in an international trade register should be a condition of formation. It should also be possible for third parties to consult this register.

The Hague, 16 September 2008