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J. Barneveld

LEGAL CAPITAL AND CREDITOR PROTECTION – SOME COMPARATIVE REMARKS

1. Introduction

1.1. Competition of the Private Corporate Form

The regulatory framework applicable to the private limited liability company has been or is in the process of being amended in many European countries. Case law at European level has led to competition between the different versions of this corporate form.[1] The ability for companies to migrate puts pressure on national legislatures to ensure that their private company is as attractive as possible. In this search for the best private company form, the fundamentals of (private) company law are being reconsidered all over Europe.

In Germany, this reconsideration has resulted in the *Gesetz zur Modernisierung des GmbH-Rechts und zur Bekämpfung von Missbräuchen* (MoMIG), which amends the law for the German private company (GmbH).[2] After extensive debate and discussions, the German *Bundestag* finally approved the bill on 26 June 2008. It is considered to be the most comprehensive reform of the GmbH Act since its introduction in 1892.

The United Kingdom has enacted a new statute concerning both public and private companies: the Companies Act 2006 (CA2006).[3] This act almost entirely replaces the Companies Act 1985. The far-reaching amendments made by the Act, are largely based on the findings of the Company Law Steering Group (CLR) that conducted an extensive review of the British company law between 1998 and 2001.[4]

1 *Centros*, Case C-212/97 of 9 March 1999 [1999] ECR I-1459, *Überseering*, Case C-208/00 of 5 November 2002 [2002] ECR I-9919, *Inspire Art*, Case C-167/01 of 15 November 2003 [2003] *ECR* I-10155 & *Sevic Systems*, Case C-411/03 of 13 December 2005 [2005] ECR 10,805.

2 Law on the modernisation of the law of private limited liability companies and to combat abuses.

3 See Payne 2008.

4 Rickford 2004.

The original bill was introduced to the British Parliament in November 2005 and will enter into force over a period of time ending in October 2009.

A Bill revising the law concerning the Dutch private company (BV) is currently pending before the Dutch Parliament.[5] The Bill is based on several studies. In 2004, an Expert Group that was asked by the Government to advise on a new law for the BV published its findings.[6] At the same time, another study was carried out to research possible solutions for the strict capital protection system applying to the BV.[7] In 2005, a third study was carried out focusing solely on the alternatives for the capital protection regime.[8] All reports proposed far-reaching modifications of the system of capital and creditor protection.

The various initiatives in the three countries have a similar goal: to make the law on private companies more efficient and flexible while bearing in mind the interests of creditors.

1.2. Legal Capital Under Pressure

In searching for the best corporate form for private companies, one of the main questions that has presented itself is whether legal capital is the right means to protect the creditors of the company. The Second Company Law Directive (Second Directive) imposes a complex system of legal capital on all public companies.[9] Although the directive does not apply to private companies, many Member States used to include these companies within the scope of the directive. The core concept of legal capital is that restrictions are imposed on corporate activity by reference to the shareholders' capital investment, as shown on the balance sheet. The system consists of rules concerning the raising of the company's capital (prescribing a minimum level of equity capital which has to be invested by its shareholders) and maintaining this capital (restricting transfers of assets to shareholders where the net assets fall below the value of the equity capital invested). The Second Directive has been inspired by the German approach to shareholder and creditor protection, and has been criticised by Anglo-American scholars for being too inflexible and costly, while providing little or no benefit to corporate creditors. American scholars – influenced by theories from law and economics – have argued that creditors should primarily be protected by contract, not by law.[10]

Over the course of the last decade there has been a detailed debate on the desirability of capital maintenance in Europe.[11] In 2004, the High Level Group of Company Law Experts advised the European Commission to review the feasibility of an alternative to the capital formation and maintenance rules. The Commission

5 *Wet ter vereenvoudiging en flexibilisering van het BV-recht*. See Boschma, Lennarts & Schutte-Veenstra 2008.
6 De Kluiver et al. 2004.
7 Lennarts & Schutte-Veenstra 2004.
8 Boschma, Lennarts & Schutte-Veenstra 2005.
9 Second Directive of 13 December 1976 (77/91/EEC).
10 See for instance, Enriques & Macey 2001.
11 See Mülbert & Birke 2002; Lutter 2006 and Armour 2006.

assigned this task to KPMG, which presented its report in January 2008.[12] Surprisingly, the study concluded that the costs of the capital regime are not overly burdensome and that the reduction of these costs should not be the motivation for replacing the system with an alternative regime.[13] Hence, the Commission foresees 'no follow-up measures or changes to the Second Company Law Directive in the immediate future'.[14] Therefore, the system of legal capital continues to be mandatory for public companies of Member States.

Still, the system of legal capital has been one of the most important subjects of discussion in the search for a flexible law for private companies. The new (or proposed) laws of Germany, the UK and The Netherlands alter the rules on raising and maintaining the capital of the private company. Although all three countries have made their private company form more flexible, they choose different regimes of capital or creditor protection, which all more-or-less depart from the classical legal capital doctrine.

1.3. Introducing the SPE

As the system of legal capital and creditor protection underwent drastic reforms in national laws, the European Parliament requested the European Commission (Commission) in 2007 to submit a legislative Proposal on the Statute for a European Private Company (or *Societas Privata Europaea*, SPE).[15] On 25 June 2008, the Commission published this Proposal for a Council Regulation ('Regulation' or 'Proposal').[16] The Proposal regulates the raising and maintaining of a SPEs capital and provides for the liability of shareholders and directors. Since private company law is more nationally distinctive than that applying to public companies, the Commission aims only to refer to national law sparingly. Variety in the sorts or types of the SPE could jeopardise its attractiveness.[17] Matters which are not covered by the regulation or by annex 1 (the articles of association),[18] are governed by national law.[19] The relevant

12 KPMG 2007.

13 The Federation of European Accountants (FEE) also published a report on alternatives to capital maintenance regimes and reached a different conclusion than that of KPMG. The FEE is in favour of the introduction at EU-level of an optional alternative regime in the form of a solvency-based regime. See FEE 2007.

14 See Position of DG Internal Market and Services, *Results (n 17 Nelissen auters 2009).*

15 European Parliament, *Report with recommendations to the Commission on the European Private Company statute*, 29-11-2006, 2006/2013 (INI)), Committee on Legal Affairs. The concept of a European Private Company is not new. In 1973 Jeanne Boucourechliev wrote a book on a European SARL. Under her supervision researchers from different countries investigated the prospects for a European close or private company. See McCahery, Raaijmakers & Vermeulen 2004, p. 384.

16 Commission of the European Communities, *Proposal for a Coucil Regulation on the Statute for a European Private Company*, SEC(2008)2098, SEC(2008)2099), Brussels, COM(2008)396/3.

17 Drury 2008, p. 131.

18 Article 8.1 Regulation provides that an SPE shall have articles of association that cover at least the matters set out in this Regulation, as provided for in Annex I.

19 Art. 4 Regulation.

applicable law is the law that applies to private limited-liability companies of the Member State where the SPE has its registered office.

Apparently, the drafters intended this applicability of national law to be limited. However, on several important topics, national private law will be to a great extent applicable to the SPE.[20] This raises the question when is a matter to be considered to be 'covered' by the regulation? As will be discussed in this chapter, certain matters are just partly dealt with in the Regulation. It is unclear if this implies that relevant national laws are excluded, or that broader national provisions of private law still apply.

1.4. Responses to the Proposal

For the SPE to succeed as an attractive alternative to the national private company forms, it needs to strike the right balance between flexibility for its shareholders and directors on the one hand, and protecting the SPEs creditors on the other. It has been noted that this balance is difficult to find, but absolutely crucial for the credibility of the SPE and of the European Union at large.[21]

For example, the Joint Committee on Company Law of the Dutch Bar and the Royal Netherlands Notarial Organisation believe that the Commission did not succeed in finding this balance. The Joint Committee fears that if the SPE is to be used on a large scale, the well-defined system of basic creditor protection at national level will be lost. It argues that although the systems of creditor protection are in the process of being simplified in many EU countries, a number of basic protection principles continue to exist within the applicable national law. Some of these safeguards are not provided for by the Regulation of the SPE.[22]

Although the European Parliament welcomes the Proposal of the Commission, it does suggest some amendments. In its legislative resolution of 10 March 2009 (Resolution), it requests the Commission to alter a fair number of provisions concerning capital and creditor protection.[23] It is likely, therefore, that the Regulation as proposed by the Commission will be amended with regards (some of) these subjects, before it will be signed into law.

In this chapter the provisions of the Regulation concerning the capital of the SPE will be reviewed. It will be examined, whether the Proposal contains a sufficient system of creditor protection. References will be made to the recent amendments of the German, UK and Dutch law for private companies.

20 The High Level Group stated that 'for the introduction of an SPE-statute, a proper connection with the law of the jurisdiction of incorporation has to be established, since many concepts of private law are also applicable in company law'.

21 See De Kluiver 2008.

22 Joint Committee on Company Law 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'.

23 European Parliament legislative resolution of 10 March 2009 on the Proposal for a Council Regulation on the Statute for a European private company (COM(2008)0396 – C6-0283/2008-2008/0130(CNS)).

2. Raising the Capital

2.1. *Minimum Capital*

2.1.1. SPE

The minimum capital rule requires that the incorporators of a company place assets of at least a specified aggregated total minimum value into the corporate asset pool. The Second Directive imposes this requirement for all public companies and many continental European jurisdictions also used to require a minimum capital when incorporating a private company. Earlier Proposals for a SPE Regulation did include the requirement that the capital of the SPE had to be no less than € 25,000 at the time of registration.[24]

However, since the time of those Proposals minimum capital has become a heavily criticised topic and many European countries have abolished it. The Commission is aware of this landslide in the landscape of creditor protection and has chosen to follow this trend. In its most recent Proposal, the minimum capital requirement is set at € 1.[25] The Explanatory Memorandum mentions that studies indicate that creditors nowadays prefer to investigate aspects other than capital, such as cash-flow, which are more relevant to solvency.[26] Another argument to refrain from the introduction of a minimum capital requirement is that creditors are perfectly capable of protecting themselves by contract. Sophisticated creditors place their trust in the covenants in loan contracts and may negotiate for personal guarantees and collateral, whilst trade creditors use retention-of-title clauses or will ask for immediate payment. Moreover, the Commission argues, companies have different capital needs depending on their activity, and thus it is impossible to determine an appropriate capital for all companies. The shareholders of the company know best how much capital it needs.

The European Parliament does not seem to agree though. In its Resolution it proposes to amend the Commissions Proposal, so that that the capital of the SPE shall be at least € 1, provided that the articles of association require that the executive management body signs a solvency certificate. Where the articles of association contain no provision to that effect, the capital of the SPE should be at least € 8,000, according to the European Parliament. Also the Committee on Legal Affairs (CLA),[27] the Committee on Employment and Social Affairs (CESA)[28] and the Com-

24 See McCahery, Raaijmakers & Vermeulen 2004, p. 384.
25 Art. 19.4 Regulation.
26 EM, p. 7.
27 Committee on Legal Affairs, Draft Report on the Proposal for a Council Regulation on the Statute for a European Private Company, 9 September 2008.
28 Committee on Employment and Social Affairs, Opinion for the Committee on Legal Affairs on the Proposal for a Council Regulation on the Statute for a European Private Company, 5 November 2008.

mittee on Economic and Monetary Affairs (CEMA)[29] all prefer a higher minimum capital, so long as the articles of association do not require a solvency statement. In its Explanatory Statement, the CLA states that it does have 'a certain sympathy' for a minimum capital of € 1, but that it should be borne in mind that a certain amount of capital represents the counterpart to the limited extent of the company's liability. The CLA therefore favours a minimum capital of € 10,000, but clearly states that it does not see the proposed amendment as crucial for the general acceptability of the SPE: 'The key point is that minimum capital should not represent a serious obstacle to establishment'.

2.1.2. Germany

The absence of a minimum capital requirement for the SPE has also been criticised by German scholars.[30] Since Germany has a long tradition of minimum capital, proposals to abolish this requirement for the GmbH have led to intense discussions during the legislative process of the MoMIG.[31] The main argument that was made in favour of the minimum capital requirement is that it constitutes a test of seriousness:

> 'In dem Erfordernis, bei der Unternehmensgründung das gesetzlich vorgeschrieben Mindestkapital aufzubringen, kann ein "Seriositätstest" gesehen werden. Gesellschafter, die nicht in der Lage sind, den notwendigen Kapitalbetrag aufzubringen, sollen das Haftungsprivileg einer Kapitalgesellschaft niet in Anspruch nehmen dürfen'.[32]

> 'Wer kein Kapital einsetzen muss, handelt allzu oft nach dem Motto "erst gründen, dann nachdenken"'.[33]

During the discussions some proposed to increase the amount of minimum capital and others proposed to completely abolish the requirement.[34] The German legislature tried to satisfy both sides. The MoMIG does not change the € 25,000 minimum capital requirement for incorporating a GmbH. However, the Bill does introduce a new corporate form: the *Unternehmergesellschaft* (*haftungsbeschränkt*) (UG).[35] The MoMIG allows the formation of an UG with a minimum capital of € 1. Accordingly, the UG is not subject to strict rules on raising its capital. However, it is required to save 25% of its profits every year in order to raise its capital to an amount at least

29 Committee on Economic and Monetary Affairs, Opinion for the Committee on Legal Affairs on the Proposal for a Council Regulation on the Statute for a European Private Company, 3 December 2008.

30 See Hommelhoff & Teichman 2008 and Hommelhoff & Teichmann 2008a.

31 The first attempt of the German legislator to lower the amount of the minimum capital requirement was in 2004, when the *Mindestkapitalgesetz* was proposed: *Gesetz zur Bekämpfung von Mißbräuchen, zur Neuregelung der Kapitalaufbringung und zur Förderung der Transperanz im GmbH-Recht*, draft 30 November 2003.

32 Lanfermann & Richard 2008, p. 1611.

33 Hommelhoff &Teichman 2008, p. 904.

34 Noack & Beurskens 2008, p. 111.

35 Entrepeneur company with limited liability.

equal to € 25,000. After it has saved € 25,000 euro, it may call itself a GmbH. Except for a few special provisions, the UG will be subject to the same rules that are applicable to the regular GmbH. The UG (or GmbH-light) offers entrepreneurs limited liability without any capital requirement. It is, therefore, seen as the German answer to the high number of UK Ltds. established by Germans over the last few years.[36]

2.1.3. United Kingdom

The United Kingdom never introduced a minimum capital requirement for its private limited liability company (limited). This position has not been altered by the Companies Act 2006. It has been argued that this is an important reason why over the last decade many European entrepreneurs have decided to incorporate their business as a limited liability company in the UK.

The CLR criticises the theory behind minimum capital as a means to protect creditors of a public company. For private companies it goes even further:

> 'For private companies, where levels of share capital were often very low, and proprietors often remunerated by salaries for employment rather than dividends, the doctrine was widely recognized as devoid of value'.[37]

It has been argued that the mandatory rules of legal capital provide protection for involuntary debtors (such as tort victims), who have not been in the position to protect themselves by contract. The CLR does not agree with this argument in favour of a minimum capital requirement. The CLR argues that the most vulnerable involuntary creditors are protected by compulsory insurance and the effects of the protections negotiated by contractual creditors provide in a great majority of cases a substantial free rider advantage. Therefore, the CLR concludes that generally speaking, 'it is clear that capital maintenance is neither a proportionate nor a well-targeted regime for securing on going creditor protection'.

2.1.4. The Netherlands

In The Netherlands the minimum capital requirement of € 18,000 for the BV would be abolished as a result of the pending Bill. Unlike in Germany, this departure of the system of minimum capital has not met much opposition. The Dutch legal community seems to agree that company law should remove the concept as soon as possible.

The Dutch legislature argues that the requirement does not protect creditors sufficiently. First of all, the required amount is arbitrary. It is not linked to the risks or size of the business. Secondly, it is argued that the function of 'equity-cushion' does not protect creditors when they need this the most. Creditors need this cushion when the company incurs losses. Yet, the requirement does not guarantee that this

36 Schmidt 2008, p. 1094.
37 Rickford 2004, p. 932.

cushion will still be there for creditors if the company becomes insolvent. The capital supplied to the company can evaporate easily. The minimum capital rule does not prohibit the company to use this money to conduct business or invest. Nothing precludes loss of share capital by trading.

2.1.5. Conclusion

As many countries nowadays (or in the near future will) offer a limited liability corporate form without a minimum capital requirement, the Commission's decision to refrain from such an obligation for the SPE is to be welcomed. Such a condition could deter entrepreneurs from establishing an SPE whilst not providing any significant protection to the SPEs creditors.

2.2. *Consideration for Shares*

Since the SPE does not require a minimum capital, there is no need to extensively regulate the raising of this capital. There is no authorised capital in the SPE, thus the memorandum is not required to state the maximum amount of capital which can be issued. The capital has to be fully subscribed; however, the shares do not need to be fully paid up on issue.[38] The articles of association need to provide for the time when the payment is to be made and any conditions relating to such payment or provision. The Regulation does provide that except in the case of a reduction of the share capital, shareholders may not be released from the obligation to pay or provide the agreed consideration.

Founding shareholders are free to decide what type of consideration is to be provided for the shares upon creation of the SPE or on capital increase. The articles of association can provide that the consideration has to be paid in cash or kind.[39] They also have to regulate whether consideration in kind is to be evaluated by an independent expert and any formalities that must be complied with. Evaluation by an expert of consideration in kind is, therefore, not obligatory. An important departure from the current doctrine is that the regulation allows services and labour to be accepted as consideration. Liability of shareholders in cases of insufficient contributions is left to the applicable national law.[40]

The provisions concerning the consideration for shares are very flexible and have been criticised for not providing for liability for overvalued contributions in kind.

> 'Angesichts dieser Liberalität bei der Kapitalaufbringung – man ist fast geneigt zu sagen: Sorglosigkeit – erscheint es nur noch als Kosmetik, daβ Art. 20 Abs. 2 SPE-VO-E

[38] Art. 19 Regulation.
[39] EM, p. 7 and Art. 20.1 Regulation.
[40] Art. 20 Regulation.

festhält, daβ die Anteilseigner nicht von ihrer Pflicht zur Einlageleistung befreit werden können'.[41]

The European Parliament proposes to remove the reference to national law and to provide a provision stating that where the value of the consideration in kind falls short of the value of the share acquired, the shareholder shall pay a consideration in cash equal to the shortfall and that the company's claim to this payment shall lapse eight years after the company's registration.[42]

3. Distributions

3.1. Restriction of Distributions

3.1.1. SPE: Balance-Sheet Test

Shareholders can decide by resolution to distribute dividends.[43] This is, however, only possible on the basis of a proposal by the management body.[44] Moreover, distributions have to satisfy a balance-sheet test, namely the assets of the SPE must fully cover its liabilities after the distribution. The Proposal neither defines 'assets' nor 'liabilities', but the Commission states that the relevant accounting provisions apply, i.e. the Fourth Directive or Regulation (EC) No. 1606/2002. The articles of association can provide that certain reserves may not be distributed.

The current Proposal allows distributions from capital. German scholars have argued that this must be a misunderstanding.[45] They believe that Article 21.2 intends to ensure that capital (and not reserves) cannot be distributed. Therefore, these scholars propose an amendment to the text to express this intention. However, no matter what the intention of the Commission was, the current wording of the relevant provision can lead to no other conclusion than that the distribution of the company's capital to its shareholders is permitted.

The European Parliament shares the opinion of the German scholars that the capital of the SPE should not be allowed to be distributed. In its Resolution, it proposes to add an extra sentence to Article 21.1, providing that 'a distribution shall be permissible only where the remaining amount of the deposit does not fall below the minimum amount referred to in Article 19.4'.[46]

41 Kersting 2008, p. 17.
42 Amendment 34.
43 Art. 27.1.e Regulation.
44 Art. 21.1 Regulation. The articles of association can provide that the SPE is allowed to distribute interim dividends. In this case the articles need to regulate what requirements apply.
45 Hommelhoff & Teichman 2008, p. 906: 'Die Auszahlungssperre erstreckt sich auch auf das statutarische Gesellschaftskapital der SPE. Der Entwurfstext spricht in Art. 21 I S. 2 umständlich, wenn nicht sogar missverständlich von "Rücklagen, die ihrer Satzung zufolge nicht ausschüttungsfähig sind."(…) In der privatautonomen Entscheidung für ein statutarisches Gesellschaftskapital oberhalb des von Art. 19 IV geforderten einen Euros liegt die Entscheidung der Gesellschafter, diesen Betrag zu sperren'.
46 Amendment 35.

Whether it is permissible to distribute capital is, however, of little importance in this author's opinion. By accepting a very low minimum capital, the proposal appears to depart from the notion that the company's capital should protect its creditors. Does it really matter if this € 1 (or perhaps € 8.000) may be distributed? Would it not simply be contradictory to argue on the one hand that a low minimum capital is permitted because studies show that creditors are not protected by capital, and on the other prohibit the company to distribute this capital as a means of creditor protection? It seems clear that the protection of creditors should be found somewhere else.

It is remarkable that although reserves prescribed by the articles of association may not be distributed, no such prohibition exists for statutory reserves. Does this mean that the Proposal allows distribution out of a revaluation reserve?[47]

3.1.2. SPE: Optional Solvency Test

The Proposal allows shareholders to provide for a solvency test in the articles of association, in addition to the balance-sheet test.[48] The Commission believes that it is not desirable to introduce a mandatory solvency test, since it currently only exists in few Member States. How the insolvency test should be executed, is at the shareholder's discretion. If the shareholders choose to require the management body to perform a solvency test before distribution, they also have to define the related requirements, e.g. the grounds, the criteria etc.[49] This provides the Board of Directors with some legal certainty; the Board knows what solvency test it is expected to perform.

If the articles require a solvency test, the Board of Directors needs to sign a statement – 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.[50] The shareholders have to be provided with this solvency certificate before they resolve on the distribution. The Regulation states that the solvency certificate should be disclosed, but does not state to whom and how this should be done.

As was mentioned before, the European Parliament prefers an obligatory solvency test if the SPEs capital is less than € 8,000. It seems that the European Parliament believes that an SPE with a capital of at least € 8,000 can do without a solvency test, because the balance-sheet test will sufficiently protect creditors. However, when there is no such capital to protect creditors, a solvency test has to perform this task.

In this author's opinion this reasoning – that provides for a connection between the SPEs minimum capital and the requirement for a solvency certificate – is questionable and can lead to confusion. No protection for creditors should be

47 This has been noted by the The Joint Committee on Company Law of the Dutch Bar and the Royal Netherlands Notorial Organisation, p. 5.

48 Art. 21.2 Regulation.

49 EM, p. 8.

50 Art. 21.2 Regulation.

expected from such a low amount of capital. Creditors should, therefore, be protected by the duties of conduct of directors and shareholders. The Board of Directors is always obligated – no matter if it is or is not required to sign a solvency certificate – to examine whether the company will be able to pay its debts when they become due after a distribution. In this author's opinion, this is implied by its duty towards the company, as stipulated in Article 31.1 of the Regulation: 'a director shall have a duty to act in the best interests of the SPE'. It will never be in the best interests of the SPE to distribute such an amount that it will not be able to pay its debts afterwards. If a director fears that a distribution will harm the company's financial position in this manner, he should not propose such a distribution and resist a pay out. This duty does not depend on a certificate. Directors will, therefore, always have to look further than the balance-sheet when considering a distribution.

3.1.3. Comparative Remarks

Article 30.1 of the GmbH Act provides that funds necessary to maintain the company's registered share capital must not be paid to the shareholders.[51] The German GmbH, therefore, has to satisfy a stricter balance-sheet test in the case of a distribution: the assets need to cover not only the liabilities, but also the amount of registered share capital.

Restriction of distributions is one of the few areas where English company law is in some respects stricter than German law.[52] In the United Kingdom, distributions are regulated by a rule of common law and a statutory regime. The common law states that 'a company cannot return capital (or perhaps any corporate assets) to its shareholders, except to the extent authorised by or under a relevant statutory procedure or by way of a contract for full consideration'.[53] The CA2006 provides that a company can only lawfully make distributions from profits available for that purpose.[54] These profits are defined as its accumulated realised losses, so far as not previously written off in a reduction or reorganisation of capital duly made. Both rules imply that a distribution should satisfy a balance-sheet test and that – unlike the Regulation for the SPE – capital is not available for distribution. Although the CLR proposed to reverse the position that the common law and statutory regimes operate in tandem and to make the statute the exclusive source of rules in this area, the legislature did not adopt this Proposal in the CA 2006.

Under current Dutch law, distributions have to satisfy a balance-sheet test. It is not allowed to distribute the company's share capital. The Dutch bill replaces this test with a solvency approach. There is an ongoing debate about the question how this approach should be implemented. Until recently, the bill required the Board of Directors to perform a solvency test before approving a distribution. However, recent amendments of the Proposal have deleted the boards' right to approve the

51 'Das zur Erhaltung des Stammkapitals erforderliche Vermögen der Gesellschaft darf an die Gesellschafter nicht ausgezahlt werden'.

52 Schmidt 2008, p. 1104.

53 Davies 2008, p. 291. See *Ridge Securities Ltd v IRC* [1964] 1 W.L.R. 479 at 495.

54 S. 830 CA 2006.

distribution and the formal requirement of a solvency test. Since these amendments have met a considerable amount of criticism, it is difficult to predict what the outcome of the legislative process on this matter will be.

3.2. *Definition of Distribution*

3.2.1. SPE

Article 1.b provides that 'a "distribution" means any financial benefit derived directly or indirectly from the SPE by a shareholder, in relation to the shares held by him, including any transfer of money or property, as well as the incurring of a debt'. Section 2 continues: 'For the purpose of point (b) of paragraph 1, distributions may be made through a purchase of property, the redemption or other kind of acquisition of shares or by any other means'. This definition is extremely broad. It covers dividend payment, purchase of the SPEs own shares and payments to shareholders because of a capital reduction. However, most likely it also covers many other transactions that shareholders use to withdraw assets from the company. Many companies use intra-group transactions to optimise their financial structure, for instance 'cash-pooling'. In a group, the holding company will often 'pool' liquidity from subsidiaries by transferring money to them. This means that the assets of the subsidiary are reduced, but that it receives a claim against its parent in return.[55] However, these transactions are usually based on the book value of the asset (the value as stated in the company's accounts, which often does not reflect its real (market) value). If the market value of the asset exceeds the book value, this difference in value could be regarded as a distribution of the subsidiary to its parent company. To facilitate this system of cash-pooling, groups of companies often use (upstream) loans from the company to its shareholders. One can argue that payment of the amount of these loans, qualifies as a distribution. Another common practice is to finance the company with (downstream) loans from shareholders to the company instead of capital. It is unclear, if payments on these loans (interest-payments and repayments) are to be considered as distributions to shareholders. It hardly needs saying that these questions need to be addressed before the SPE will ever become an attractive alternative for SMEs. Both in Germany and the United Kingdom, court decisions have given rise to these kind of questions and in both countries the legislature has recently responded to these questions.

3.2.2. Germany

The introduction of the MoMIG narrowed the applicability of Article 30 GmbHG. In 2003 the *Bundesgerichtshof* (BGH) ruled that (upstream) loans to shareholders qualified as a distribution.[56] These loans were, therefore, not allowed to be paid out of capital. Despite the fact that the company received a full claim on the shareholder

[55] Noack & Beurskens 2008, p. 114.
[56] BGH (II ZR 171/01, 24 November 2003).

for the amount of the loan, the BGH held that it was in fact a distribution that had to satisfy the balance-sheet test as stipulated in Article 30 GmbHG. This constituted a problem for the legal practice. The German legislature, therefore, chose to depart from the BGHs reasoning. Since the introduction of the MoMIG, payments to shareholders no longer qualify as distribution when they form part of a cash-pooling agreement or when the company receives a full claim (*vollwertigen Gegenleistungs- oder Rückgewähranspruch*) as compensation.[57] Therefore, the payment of the loan amount to the shareholder is, in terms of balance-sheet, neutralised by booking a corresponding claim for repayment on the asset side of the balance sheet. The legislature argues that the new rule does not imply a greater risk for creditors of the company. They are protected by the requirement that the consideration for the payment has to be full and at market value.[58]

Before the introduction of the MoMIG, (downstream) loans from shareholders to the company were under certain circumstances considered to be a substitute for equity (*eigenkapitalersetzende Darlehen*) and could not be repaid to shareholders, because payments on these loans were considered to be contrary to Article 30 GmbHG. The German legislature also departed from this view, by adding a sentence to the provision explicitly stating that the article does not apply to payments on shareholder loans (*Gesellschafterdarlehen*). The legislature states that shareholder loans only cause problems when a company is heading for insolvency, and that these problems should, therefore, be addressed in the Insolvency Code.

3.2.3. United Kingdom

The CA2006 provides a broad definition of distribution: 'distribution means every description of distribution of a company's assets to its members, whether in cash or otherwise'.[59] This definition also gave rise to complicated characterisation questions, in relation to corporate actions that do not follow the procedure for dividends but which result in cash or other assets that belonged to the company ending up in the hands of shareholders.[60] These questions were raised after the decision *Aveling Barford Ltd. v. Perron Ltd.* in 1989, concerning the sale of a property by a company which had no distributable profits at a considerable undervalue to another company controlled by the company's ultimate sole shareholder.[61] First of all, there was no doubt that this was a breach of duty on the part of the directors of the transferring company.[62] Secondly, the intra-group transaction itself was considered to be void as an unauthorised return of capital. This raised doubt as to whether an intra-group transfer of an asset at book value (i.e. possible undervalue) would constitute a distribution, and thus require the company to have distributable profits sufficient to cover the difference in value.

57 S. 30 GmbHG. See MoMIG Begründung, p. 98.
58 MoMIG Begründung, p. 99.
59 S. 829 CA 2006.
60 Ferran 2008, p. 243.
61 *Aveling Barford Ltd v Perion Ltd.* [1989] BCLC 626.
62 Davies 2008, p. 291.

The legislature responded to this concern by amending the rule on distributions in kind in the CA2006.[63] The new rule does not change the position in *Aveling Barford*. If a company, which does not have distributable profits makes a distribution by way of a transfer of assets at an undervalue, this will be deemed an unlawful distribution contrary to the CA2006. However, the new law clarifies the position of a company that does have distributable profits and provides that where certain conditions are met, the amount of any distribution consisting of or arising from the sale, transfer or other disposition by a company of a non-cash asset to a member of the company should be calculated by reference to its book value. If an asset is transferred for a consideration no less than its book value, the amount of the distribution is zero, but if it is transferred for a consideration less than its book value, the amount of the distribution is equal to that shortfall. The conditions that have to be satisfied are that at the time of the disposition of the asset, the company must have profits available for distribution and that such a distribution could be made without contravening the statutory requirements. To remove all possible uncertainty, the legislature added a provision to the CA2006, stating that the lawfulness and amount of distributions in kind are established by the statutory rules and not by any applicable common law rules.[64]

3.2.4. The Netherlands

The Dutch bill on the reform of private company law proposes uniform rules for situations in which assets leave the company, e.g. by virtue of the payment of dividends, purchase of own shares and payments to shareholders due to capital reduction.[65] However, the bill does not mention other kinds of payment to shareholders, like the just mentioned intra-group transactions. It is, therefore, assumed that these transactions are not governed by the rules considering distributions.

3.2.5. Conclusion

In this author's opinion the German and UK experiences with a broad definition of 'distributions' and the recent responses of the German and UK legislatures to those experiences clearly indicate that the SPE should apply a narrower definition of distribution. The European legislature should explicitly state that intra-group transactions do not qualify as a distribution when the company receives a full consideration for the amount it paid to its shareholders. The recent amendments of German and UK law could be used as inspiration in the search for suitable wording. The European Parliament has, however, already proposed such an amendment. In its Resolution it suggests to add a sentence to the definition of distribution, stating that a payment does not qualify as such if it 'is (...) balanced by a full claim to compensation or reimbursement'.[66]

63 S. 845 CA2006.
64 S. 851 CA2006.
65 Memorie van Toelichting, p. 28.
66 Amendment 10.

This does not imply that the risks that are inherent to intra-group transactions should not be addressed. However, instead of extending the scope of the distribution rules, it is submitted that solutions should be found in the rules concerning the liability of shareholders and directors.

3.3. Liability of Shareholders

3.3.1. SPE

Article 22 of the Regulation provides that any shareholder who has received distributions made contrary to Article 21 must return those distributions to the SPE, provided that the SPE proves that the shareholder knew or, in light of the circumstances, should have been aware of the irregularities. German scholars and the European Parliament have taken the position that shareholders should be obliged to restitute every unlawful distribution, irrespective of any subjective element.[67] In its Resolution, the European Parliament, therefore, proposes to change Article 22 so that any shareholder who has received distributions made contrary to Article 21 must return those distributions to the SPE.[68]

In this author's opinion, however, the importance of Article 22 should not be exaggerated. The wording of the provision clearly indicates that all distributions that did not satisfy the balance-sheet test or lacked a required solvency certificate need to be returned if shareholders knew or should have known this. However, if the certificate has been signed and the balance-sheet test is satisfactory, the distribution is not contrary to the requirements of Article 21. Therefore, Article 22 only provides for shareholder liability in the case these two (formal) requirements are not met. If, despite the balance-sheet test and the certificate, the company is not able to pay its debts within one year, and the shareholder knew it would be unable to do so at the time of the distribution, it cannot be held liable on the basis of Article 22. This does not seem justified and thus leads to an important question: to what extent is national law applicable in the case of a distribution that prejudices the company and its creditors? As Article 22 'covers' shareholder liability for distributions made contrary to the SPE statute, national rules of company law explicitly considering the liability of shareholders vis-à-vis the company for unlawful distributions will not be applicable.[69]

However, in many EU countries shareholders can be held liable for distributions and other withdrawals that prejudice creditors, on the basis of broader concepts of private law.[70] Liability of shareholders becomes a specifically relevant issue when the company has become insolvent. When a company approaches insolvency,

67 Hommelhoff & Teichman 2008, p. 908. 'Rechtswidrigkeit der Ausschüttung allein soll nicht ausreichend, um den Erstattungsanspruch zu begründen. (…) Diese seine Privilegierung zulasten des Gesellschaftsvermögens und damit zulasten der Gesellschaftsgläubiger überrascht und bedarf besonderer Legitimierung'.

68 Amendment 37.

69 For instance: s. 847 CA2006, Art. 30/31 GmbhG and Art. 216 Book 2 Dutch Civil Code.

70 For an extensive comparative analysis of this topic, see Vanderkerckhove 2007.

there is a 'natural tendency' for all parties involved to try to reclaim their investment.[71] Since in insolvency cases the equity claims of shareholders are subordinated to those of the company's debt holders, shareholders are provided with an incentive to withdraw assets from the company when this is still possible. Therefore, the trustee in bankruptcy will skim the company's paperwork in search of (hidden) distributions. Besides the possibility to claim restitution of such a withdrawal on the basis of the relevant provision in the company law code, trustees (and sometimes creditors) can base their claim on alternative concepts of private law.

3.3.2. Alternative Grounds of Liability: Germany

In Germany shareholders of a GmbH can be held liable for the company's debts, under the doctrine of 'existence destroying interventions' (*Existenzvernichtende Eingriffe*).[72] Shareholders can be held liable when they withdraw assets from the company without having ensured that the latter is able to satisfy its liabilities and when the withdrawal causes the insolvency. For liability to arise there must have been an actual transfer of corporate assets for their personal benefit or for the benefit of a corporation in which the shareholder participates, without appropriate compensation.[73]

The trustee can, in certain circumstances, avoid certain transactions made on the brink of insolvency. Section 133 of the German Insolvency Code allows the trustee to avoid any transfer of an interest or debt incurred by the debtor that was made within ten years before filing for insolvency, provided it was made with an intention to prejudice creditors. However, the courts tend to interpret the subjective element very narrow and in order to make a transaction subject to avoidance it is required that the other party, i.e. the shareholder, had knowledge of the intention of the debtor to prejudice creditors. Therefore, not many distributions are being avoided on the basis of the German fraudulent transfer law.[74]

3.3.3. Alternative Grounds of Liability: United Kingdom

British law permits the shifting of the responsibility for the debts of a failed company onto its shareholder in limited circumstances. The courts in the United Kingdom are very reluctant to lift the corporate veil, but in particular circumstances a parent company may be jointly liable in tort with a subsidiary. Shareholders that intervene directly in running the affairs of a company run the risk of being held liable to be a *de facto* director.

71 See Mülbert & Birke 2002, p. 709.

72 Vanderkerckhove 2007, p. 59.

73 BGH 13 December 2004, reported in (2005) 3 NWJ-Spezial, 124-125. See Vanderkerckhove 2007 p. 60. Shareholders can be held liable as well, on the basis of *Durchgriffshaftung*.

74 Wagner 2006, p. 221.

3.3.4. Alternative Grounds of Liability: The Netherlands

In The Netherlands case law has also tended towards shareholder liability for debts of the corporation on the basis of the rules on tort. A substantive number of court decisions have refined the idea that shareholders – especially parent companies – may have a legal duty to take into account the interests of their company's creditors. In the *Nimox*-case, the Dutch Supreme Court (*Hoge Raad*) held the sole shareholder of a company liable because he voted in favour of a distribution that satisfied the balance-sheet test.[75] However, at the time of the distribution, the shareholder could reasonably expect this to lead to a situation in which the claims of the company's creditors could no longer be met. Therefore, the shareholder was deemed to have had committed a tort and could be held liable for the damage suffered by the company's creditors as a consequence of the distribution.

The liability of shareholders for distributions that prejudice creditors is also often based on the Dutch transaction avoidance law (*actio pauliana*). In these cases, the trustee seeks to avoid the payment of the distribution to the shareholder on basis of the insolvency code, by arguing that the company knew, or should have known, that the distribution would harm the company's creditors. *Actio Pauliana* is an important legal instrument to claim the restitution of distributions when a company has started insolvency proceedings.[76]

Another ground for liability of shareholders in The Netherlands is the 'shadow-director' doctrine. When, for instance, a parent company intensively influences the subsidiary's daily management, it may be considered as a 'shadow-director'. In that capacity it can be held liable on basis of the provisions concerning the liability of formal directors.

3.3.5. Conclusion

All Member States studied have legal theories to hold shareholders liable for withdrawals that prejudice the company's creditors. As Article 22 of the Proposal for an SPE-Statute does not 'cover' the liability of shareholders vis-à-vis the company's creditors or its trustee in bankruptcy, it is submitted that these national legal concepts will be applicable to the SPE. Piercing of the corporate veil, tort law and insolvency law of the applicable national law will be used by the trustee and creditors of an insolvent SPE to claim restitution for unlawful distributions and other withdrawals. This implies national law will govern a very important part of creditor protection. Since Member States use a variety of legal concepts to hold shareholders liable, shareholders of an SPE will need to seek legal advice in these different countries to assess their possible liabilities.

75 HR 8 November 1991, *NJ* 1992, 174.

76 Fraudulent transfer law is an important means of creditor protection in the United States as well. See Baird 2006, p. 199-215.

3.4. Liability of Directors

The Regulation does not provide a provision regulating the liability of directors for unlawful distributions. This omission has met with considerable criticism. The Dutch 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 different 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?'[77]

Although one can argue both ways, it is submitted that the liability of directors for unlawful distributions is not fully 'covered' by the regulation. Article 31 of the Proposal regulates the general duty and liability of directors. Paragraph 4 states that a director of an SPE shall be liable to the company for any act or omission in breach of his duties deriving from this Regulation, the articles of association of the SPE or a resolution of shareholders that causes loss or damage to the SPE. Directors' duties are explicitly owed to the SPE and may only be enforced by the company. Paragraph 5 provides that without prejudice to the provisions of the Regulation, the liability of directors shall be governed by the applicable national law.

In this author's opinion, this broad and general provision regarding the liability of directors, does 'cover' liabilities of directors vis-à-vis the company, for instance in the case of an unlawful distribution. If a director proposes a distribution that does not satisfy the balance-sheet test or if he knows the company is not going to be able to pay its debts afterwards, he violates his duty against the SPE and can therefore be held liable by the SPE on the basis of Article 31(4). If insolvency proceedings have been initiated, the trustee can claim the damage on behalf of the SPE.

However, Article 31 of the Regulation does not 'cover' the liabilities of directors vis-à-vis creditors or the trustee in bankruptcy. The regulation does not provide individual creditors the right to directly sue directors.[78] Neither does it provide a provision concerning 'wrongful trading': a liability for (shadow) directors that keep trading after they knew or should have realised that insolvency was inescapable. Therefore national law will apply to these liabilities. The same problem as mentioned in relation to the liability of shareholders, applies here; various EU countries apply different rules to director liability vis-à-vis creditors and the trustee.[79]

[77] Joint Committee on Company Law 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.

[78] EM, p. 9.

[79] The topic of director liabilities is further discussed in Olaerts contribution to this book.

The European Parliament proposes to replace paragraph 5 with a new text:

> 'Directors shall pay compensation in particular where payments have been made in breach of Article 21 or own shares in the company have been acquired in breach of Article 23(2). A requirement on the part of directors to compensate the company's creditors shall not be waived on the grounds that they acted in accordance with a resolution of the shareholders'.[80]

The amendment is justified by arguing that the Regulation for an SPE should avoid references to national law on points that are significant to companies, including the liabilities of directors. It is doubtful, however, whether the amendment achieves this objective. The added paragraph does not change the fact that the liability of directors vis-à-vis creditors and the trustee is not 'covered'. National law will be applicable to this extent. Providing an explicit liability for unlawful distributions is, however, to be welcomed. The second sentence of the proposed paragraph underlines that directors bear the responsibility for the payment of the distribution and that they cannot hide behind the decision of the shareholders.

4. Purchase of Own Shares, Capital Reduction and Financial Assistance

4.1. Purchase of Own Shares

Article 23 of the Proposal provides that the SPE shall not, directly of indirectly, subscribe for its own shares. The articles of association have to determine whether the SPE is permitted to acquire its own shares, and if it is, the procedure to be followed, including the conditions under which the shares may be held, transferred or cancelled. Such an acquisition must be decided by a resolution of the shareholders.[81] The acquired shares have to be fully paid and the SPE shall have at least one issued share. The provisions concerning the balance-sheet test and optional solvency test (Art. 21) and the liability of shareholders for unlawful distributions (Art. 22) also apply. As was mentioned before, the European Parliament proposes to provide for an explicit liability for directors who have acquired own shares in breach of Article 23.2.

4.2. Capital Reduction

Reduction of the SPEs share capital shall be decided by a resolution of the shareholders by a qualified majority, as defined in the articles of association.[82] Creditors are being protected by the fact that the capital reduction has to satisfy the same tests as distributions and purchase of own shares. In addition to this protection, following the disclosure of the resolution of the shareholders to reduce capital, those

[80] Amendment 52.
[81] Art. 27.1.f Regulation.
[82] Arts. 27.1.i and 27.2 Regulation.

creditors whose claims antedate the disclosure of the resolution shall have the right to apply to the competent court for an order that the SPE provide them with adequate safeguards. The Regulation states that a capital reduction should be disclosed, but does not explain how this should be done. It is uncertain if this implies that national law will govern the disclosure.

4.3. Financial Assistance

Whether or not the SPE can provide financial assistance, in particular advance funds make loans or provide security, with a view to the acquisition of its shares by a third party, has to be regulated by the articles of association. In this author's opinion, when providing financial assistance, the directors of the company owe the same duty towards the company, as they do in relation to any other transaction: they have to determine if the financial assistance is in the interests of the SPE.

5. Shareholder Loans

5.1. SPE

It has been argued that (downstream) shareholder loans should be regulated in the SPE statute. German scholars have stressed that it may be necessary to include the doctrine of postponement of shareholder loans.[83] Although this is considered to be an insolvency issue, it has been argued that it should nevertheless be dealt with to combat undesirable effects of undercapitalisation.

5.2. Comparative Remarks

Specific rules on shareholder loans have been introduced in many EU countries. The laws of Austria, Italy, Spain and Germany provide for specific rules on loans granted by shareholders to the company.[84]

Germany changed its rules on shareholder loans in the MoMIG. The reform bill moved the rules that were developed under case law and the GmbH Act to the German Insolvency code. All loans granted by shareholders will be subordinated to the claims of debt holders in insolvency. All payments in relation to these loans within one year before the date of insolvency can be reclaimed by the trustee. The transfer of the rules to the insolvency code implies that they have become applicable to all entities with limited liability that have their centre of business in Germany. This means that they will apply to the SPE as well.

The legal systems of the United Kingdom, France and The Netherlands do not provide any specific rules and regulations on shareholder loans at all. Although in all these countries arguments have been raised to introduce such regulations,

[83] Lennarts & Uziahu-Sanctroos 2008.
[84] See Gelter & Roth 2007, p. 40.

neither the CA2006 nor the current Bill on the Dutch private company law reform aim to introduce such rules.

5.3. Conclusion

In this author's opinion, the hybrid position of shareholders that have granted loans to the company, poses some difficult questions. By financing the company with loans instead of capital, shareholders can limit their exposure to entrepreneurial risks. It also allows them to easily withdraw assets from the company by negotiating high interest payments and reclaiming the loan before insolvency. This way, they are able to severely limit the downside potential of their undertakings, while still reaping all the upside potential. This constitutes a risk of opportunistic behaviour that should be addressed. This risk increases, when the shareholder obtains collateral for the loan he grants to the company.[85]

As the current Proposal does not regulate shareholder loans at all, national law applies. Since the treatment of such loans varies significantly among the Member States, it is desirable that the statute for an SPE provides a uniform regulation on this matter.

6. Concluding Remarks

The Regulation as proposed by the Commission seems to depart from the basic concept that the SPEs capital should protect its creditors. In view of the recent amendments of private company law in Germany, the United Kingdom and The Netherlands, this does not come as a surprise. It seems clear that the protection of creditors is not to be found in the company's share capital. However, this departure from a rules-based approach implies that the protection of creditors should be provided by other legal concepts. The liability of directors and shareholders for transactions that withdraw assets from the SPE to the detriment of its creditors is a key element of this protection. It should be borne in mind that this liability will to a large extent be determined by the applicable national law.[86] Broad concepts of private law, such as piercing the corporate veil, tort law and transaction-avoidance law, are commonly used to hold shareholders and directors liable for unlawful withdrawals, when the rules on the maintenance of capital do not suffice. With a minimum number of rules concerning the raising and maintaining of the capital of the SPE, these concepts will become even more important. In this author's opinion, it is beyond the scope of the SPE statute to provide a uniform regulation for all these

[85] See Cahn 2006, p. 298, who argues that it should not be allowed for shareholders to obtain collateral for their loans to the company at all.

[86] Unfortunately, the question *which* national law is applicable will not always be easy to answer. If shareholders or directors are being held liable on the basis of tort, the conflict of law principles in the area of torts apply. This implies that the law of the place of injury controls. If shareholders are being held liable on the basis of transaction avoidance law, the applicable insolvency code has to be established on the basis of Council Regulation (EC) No. 1346/2000 on insolvency proceedings.

concepts. Such unification would only be possible in combination with a comprehensive unification of material European tort and insolvency law. If the current Proposal provides for the required balanced system of creditor protection, is therefore debatable. On the one hand, the fact that an important part of this system will be governed by national law evidently jeopardises the intended uniformity. On the other hand, these national laws are supported by a large body of case law that can provide legal certainty.

The flexible and uniform rules concerning the formation and organisation of the internal affairs of the SPE will have to persuade SME's to establish an SPE instead of a national private company form. As the protection of creditors and hence the liability of shareholders and directors to a great extent will be governed by national law, it is to be seen if this part of the Regulation will be a compelling reason to choose for the SPE.