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European Private Company

A solution for minority shareholders within small- and medium sized enterprises in Sweden?

Bachelor's thesis within

Commercial and Tax Law

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Abstract

The Swedish companies act of 2005 regulates public and private limited companies. With these two classification shortages of rights prosper to different kinds of company structures that exist in today's business environment. The Swedish companies act focuses on larger companies and therefore smaller companies are often neglected. Specific problems that may occur in a small- and medium sized enterprise are not solved. The problems that occur in small- and medium sized companies have rather a relation to the bargaining *ex post*. This is because small- and medium sized companies are close kept companies. Hence, the shareholders have a closer relation to each other and are often personally and financially deeply involved in the company, make it more likely for conflicts to occur. When these conflicts ensue, the interaction falls. The trust, loyalty and the long running band to each other weakens. Two options are then available; *to try to repair the relation* or *to leave the company*. The author's opinion is that the proposal brought by the European Commission regarding European private company is sufficiently more minority-friendly in regulating these options. The insight provisions are for instance, more far reaching than in the Swedish companies act. Furthermore, the clearest difference is *the right of withdrawal*, which is found in the proposal for a European private company but not in the Swedish companies act. This provision is however limited. Despite this, a limited provision than no provision is a better option. Therefore the author states a registration to the European private company a better option for these companies. The author believes that if the proposal for the European private company is approved, this potential regulation could compete with the Swedish companies act since it is more beneficial, in not only a minority shareholder aspect but also the corporation structure as such.

List of abbreviations

CCCTB	Common Consolidated Corporate Tax Base
EU	European Union
ECJ	European Court of Justice
Para	Paragraph
SCA	Swedish Companies Act
SME	Small- and Medium sized Enterprises
SOU	Statens Offentliga Utredningar
SPE	Societas Privata Europea (European Private Company)

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I Introduction

I.1 Background

One of the main objectives within the European Union (EU) is to establish an internal market to promote economic and social progress, a high level of employment and to achieve balanced and sustainable development.¹ This by creating harmonization among the Member States. The company law is harmonized in some areas.² In 2008 the European Commission proposed a European private company regulation³ as a result of the European Commission's *Small Business Act*.⁴ This in order to create a simplified legal form to encourage the setting up of small- and medium sized companies in the single market.⁵

The European Commission defines small - and medium sized companies (SMEs) as companies with few owners, low turnover and few employees, if any.⁶ These companies play an important role, not only in the Swedish economy, but throughout all Europe. According to the European Commission more than 99 % of companies in the EU constitute of SMEs but only 8% of them engage in cross-border trade and 5% have subsidiaries or joint ventures abroad.⁷

In Sweden there is no legislation favorable for SMEs. The only regulation provided for limited companies is regulated by the Swedish companies act (SCA).⁸ The SCA however only provide general rules for public and private limited companies.⁹ Only public limited companies are allowed to offer their shares on the market or through massive advertising of their shares and other financial instruments.¹⁰ The SMEs thereby differ from other companies. In limited companies the shareholders control the company by owning shares

¹ C 83/13, art. 3.3. The treaty of the European Union.

² See for instance second Council Directive 77/91/EEC, The formation of public limited liability companies and the maintenance and alteration of their capital.

³ COM(2008) 396 final.

⁴ COM(2008) 394 final.

⁵ COM(2008) 394 final, 1. Context.

⁶ European Commission, 2003-05-06 "Recommendation 2003/361/EC: SME Definition".

⁷ COM(2008) 396/396, final. 1. Context.

⁸ Aktiebolagslag (2005:551).

⁹ Chapter 1 § 2 SCA.

¹⁰ Chapter 1 § 7 SCA.

of the company. By obtaining a share the shareholders often gets a vote. Consequently, buying more shares increases the shareholders influence in the company since there is more votes to use. The limited company is often called the 'nexus of contracts' since the corporation is linked with contractual law and those particular problems which occur.¹¹ The relationship among the shareholders in a corporation are, to an important degree, contractual.¹² The principal contract that binds them is the corporation's articles of association.¹³

When a party obtains the major of the shares, another party gets a minor part. These parties can be illustrated like a scale. The majority shareholder owning more of the shares also have more in influence on the annual meeting, which means the majority shareholder, can get their will through on the minority shareholders expense.

It has recently been noted in Sweden that minority shareholders in SMEs are disgruntled with the protection regulated in the SCA.¹⁴ The reason for the complaint is that minority shareholders are not able to obtain a qualified protection against the oppression from the majority shareholders. Therefore there is a problem.

1.2 Objective

The objective of this thesis is to examine the provisions of minority shareholder protection within SMEs in Sweden. The SCA indicates that it only fits larger companies. An investigation is made to clarify if any problems occur when adapting the provisions since the minority shareholders are part of a smaller company. Therefore, an analysis is made to examine if the provisions in the SCA are enough to protect the minority shareholders in SMEs. If the provisions are not satisfying for minority shareholders in SMEs, an assumption is if the provisions in the potential SPE regulation could be a solution. Consequently, if these SPE provisions are more suitable for minority shareholders in SMEs, is there any possibility for the SPE to compete with the SPE?

¹¹ The Corporate Contract, s. 1426, Jensen, A Theory of the Firm, s. 87f, Cheffins, Company Law – Theory, Structure and operation, s. 31ff.

¹² Armour, J, Hansmann, H & Kraakman, J, The anatomy of corporate law, p. 19.

¹³ In Sweden see chapter 3 SCA.

¹⁴ See for example: Andersson, J, *Minority shareholder in SMEs a question of information ex post and bargaining power ex ante?* Company law and SMEs and McCathery, J.A *The new company law: what matters in an innovative economy* Private Company Law Reform.

This thesis is answering what kinds of problems there are for minority shareholders in SMEs, if minority shareholders protection is satisfied within the SCA and if a registration to a SPE is an answer for minority shareholders.

The SPE proposal is part of the harmonization in the EU and delimits to other parts of the harmonization. These other parts is not examined. Since focus is on minority shareholders in SMEs other sections of the proposal are considered irrelevant and briefly overviewed. The thesis does not examine the reform progress in Sweden, rather the focus is on existing provisions in the SCA today.

The thesis is based on a Swedish perspective and therefore is only Swedish SMEs observed. Other Member States is therefore left aside. The SPE proposal is held to also fit larger companies. Though, this aspect is not examined since this thesis solely investigates SMEs.

Labour law, tax law, accounting, insolvency law and contractual rights in relation to the SPE proposal is not examined. The thesis will not deal in-depth with situations where minority protection rules can be agreed upon in articles of association or for instance with a shareholders' agreement. Instead, mandatory provisions are examined. Only relevant articles in the proposal are chosen and compared with the provisions in the SCA.

I.3 Method and material

This study uses the qualitative research method¹⁵ since it clarifies and gives ground for a deeper understanding for the chosen subject. To achieve the chosen objective relevant articles in the treaties of the European Union, case law, preparatory work, observations from the European Commission and directives are studied. Since the proposal from the European Commission still is a proposal and nothing have happened since the European Council proposed some adjustments in the articles, there is not satisfying information on the field. Regarding the Swedish legislation the SCA from 2005 is examined. In addition relevant preparatory work, case law, Ministry directives, statistics, articles and literature is stu-

¹⁵ Saunders. M. Lewis, P., and Thornhill, A. (2009). *Research Methods for Business Students* (5th ed.). London: Pearson Education Limited.

died.¹⁶ A comparative method is used in the sense that the relevant articles regarding minority shareholder protection is compared vis-à-vis to the provisions set in the SCA.

I.4 Disposition

In order to provide the reader with a basic overview of the SPE proposal, chapter 2 present the proposal from the European Commission regarding SPEs and the advantages with this potential regulation. Chapter 3 describes the SMEs in order for the reader to understand these companies importance in the economy and that they differ from other companies. Chapter 4 present the provisions stated in the SCA and the in the SPE proposal in favour for the minority shareholder. The chapter is aimed for the reader to notice the difference between the provisions provided in the SPE proposal and the provisions in the SCA. As a result of previous chapters, chapter 5 is the analysis where the problems are formulated and discussed regarding the minority shareholder protection in SMEs. Chapter 5 is the analysis where the findings of the thesis is compiled and taken into context, together with the author's opinion on the subject. Finally, chapter 6 presents the concluding remarks.

¹⁶ Lehrberg, B, Praktisk Juridisk Metod, femte upplagan, Institutet för bank och affärsjuridik (IAB), uppsala 2006.

2 The European Private Company

This chapter presents the proposal brought by the European Commission. The headlines follow as in the proposal to make it easier for the reader to follow with the original com document. Furthermore, the chapter is meant for the reader to have in mind since it is important with an overview of the SPE to understand the later arguments that is presented in the thesis. To be able to determine if the SPE could compete with the SCA, consideration must be taken to the corporation as such.

2.1 The purpose of the European private company proposal

The European private company, *Societas Privata Europea*, is a proposal brought by the European Commission, namely, a proposal for a European private company. The proposal came to the 25th of June 2008 is called ‘A Small Business Act for Europe’, which refers to the SPE-regulation.¹⁷

The reason for the proposal is to prosper the competitiveness of smaller firms.¹⁸ This is to help SMEs conducting their business and promote their growth in the internal market.¹⁹ Flexible and simple provisions in the proposal are designed to meet specific needs of small businesses. This leads to that a private limited company can be established more easily. The SPE proposal provides an expanded opportunity to start a company with a single company law which will apply equally to all Member States.²⁰

Actions on EU level are necessary to achieve this goal since other means would entail disproportionate intrusion in national legislation. Thus, the regulation is the most effective way to achieve this goal since the regulation will be directly applicable in all Member States.²¹

A large proportion of all companies in Europe are SMEs.²² Existence of bureaucratic rules leads to small businesses to contract on national borders. To change this, the SPE proposal facilitates to increase these activities and create more job opportunities.

¹⁷ COM(2008) 394 final. 3. Driving an ambitious policy agenda for SMEs: “A small business act” (SBA) for Europe.

¹⁸ COM 2008/396, final. 2. Objectives of the proposal.

¹⁹ COM 2008/396, final. 1. Context.

²⁰ COM 2008/396, 2. Objectives of the proposal.

²¹ COM 2008/396, 4. Subsidiarity and proportionality.

²²http://epp.eurostat.ec.europa.eu/portal/page/portal/european_business/documents/Size%20class%20analysis.pdf (2011-05-10).

Finally, a target of the regulation is to reduce the various costs that usually are a result in the formation of a company because of national rules in different Member States differs.²³

2.2 Basic provisions

What characterizes a SPE is a legal person having a share capital, where the shareholders have a limited responsibility, i.e. that the owners are only responsible for the capital they bring to the company. As it is a private limited company, the SPE may not offer their shares to the public.²⁴

A SPE shall first apply the regulation governing the formation and uniformity within the EU. It provides for a number of regulations affecting the Company's internal organization as determined by the statutes. The SPE applies primarily and the national law is only applicable when it is explicitly mentioned in the proposal.²⁵ Consequently, SPEs registered in Sweden are governed by the SCA, but just when the SPE-regulation do not contain relevant rules in a given area.²⁶

A concrete example of areas not covered by the regulation is labour law, tax law, accounting, insolvency law and contractual rights. The main legislation in the Member State where the company have its registered office shall then apply. Either way, it means that the SPE shall not be treated differently from national entities in tax.²⁷

2.3 Main areas

2.3.1 Share Capital

The share capital of the company shall be at least equal to one euro.²⁸ The reason for having a low share capital is to facilitate starting your own business.²⁹ Thus, it should be up to

²³ COM (2008)396 final, 2. Objectives of the proposal.

²⁴ Art. 3.1-2, 2008/0130 (CNS).

²⁵ COM (2008) 396 final, 7. Explanation of the proposal.

²⁶ Svernlöv och Blomberg, p. 144.

²⁷ Ibid., p.146, Art. 4, 2008/0130 (CNS).

²⁸ Art. 19.4, 2008/0130 (CNS).

²⁹ COM (2008) 396 final, 2. Objectives with the proposal.

shareholders to assess the appropriate size of the share capital of that particular operation conducted since the economy differs substantially from company to company.³⁰

The relatively low share capital is a new aspect in relation to Sweden. The sense in Sweden is that a high share capital is an important part in the protection of creditors.³¹ One reason is the smaller companies often set pledges to its creditors and suppliers also ensures their claims by making sure that ownership passes when payment is made. Companies have different kinds of capital and therefore it is difficult to determine an appropriate capital to be applied by all companies. As a result, it is the shareholders of a company which are best aware of the capital needed.³²

2.3.2 The formation of a European Private Company

The SPE proposal does not contain any limitations on the formation of a European private share-liability company.³³ A SPE can therefore be formed by both physical and legal entities.³⁴ The proposal also provides a company being formed by reverse, for example, by an existing company transformed, through merger or division.³⁵ The European private company will contain the term "SPE" after name of the firm.³⁶ A use of an abbreviation would lead to the SPEs may function as a European brand, in the sense that the abbreviation is recognized in all Member States.³⁷ The regulation does not set up a specific registration procedure for the SPE. However, it added that the basic provisions of the First Company Law Directive³⁸ sets out certain requirements that will make it easier and less expensive to set up a SPE.³⁹ To illustrate this, for example, it has been possible to reg-

³⁰ Svernlöv och Blomberg, p. 142.

³¹ Ibid., p.142 and COM (2008) 396 final, 7. Explanation of the proposal: Chapter IV: Capital.

³² COM (2008) 396 final, 7. Explanation of the proposal: Chapter IV: Capital.

³³ COM (2008) 396 final, 7. Explanation of the proposal: Chapter II: Formation.

³⁴ Art. 3.1 (e), 2008/0130 (CNS).

³⁵ Art. 5.1, 2008/0130 (CNS) and Skog, Förslag till ny europeisk bolagsform för små företag, Balans, 2008, p. 22.

³⁶ Art. 6. 2008/0130 (CNS).

³⁷ Svernlöv, Blomberg och Drozdov, Balans, Det reviderade förslaget om privata europabolag, 2009, p. 25.

³⁸ First Council Directive 68/151/EEC.

³⁹ COM (2008) 396, final 7. Explanation of the proposal: Chapter II: Formation.

ister a SPE electronically.⁴⁰ In addition, the regulation contains an exhaustive presentation of what the Member States may require by a registration of a SPE.⁴¹

There are no requirements set for starting a SPE, for instance like there must exist a transnational element. That is, shareholders need not be from different Member States, or that the business must be conducted in several Member States.⁴² A requirement like this would be considerably less attractive, as most entrepreneurs in general starts to operate locally in their own country.⁴³

2.3.3 Registered office

The SPE is able to move its headquarters to another Member State, provided that it complies with the rules of the proposal.⁴⁴ Since a movement of headquarter is possible, the company maintains its status as a legal entity.⁴⁵

The interests of third parties have is also been considered since the proposal add a provision where the transfer of the seat is not permitted in certain circumstances. Examples of this are in liquidation or insolvency.⁴⁶ A major advantage of SPE is that it is possible to have its registered office and principal registered in different Member States. This in hand means that a movement of the seat to another Member State does not affect SPE representation. This means that a Swedish-registered SPE for example, could move its headquarters to Italy, and thus to cancel the registration in Sweden, to finally register in the Italian registry. The only SPEs have to consider when moving the seat is, areas that are not covered in SPE-regulation or the statutes will be filled out by the Italian Companies legislation.⁴⁷

⁴⁰ COM (2008) 396, final 7. Explanation of the proposal: Chapter II: Formation.

⁴¹ Ibid. And Art.10.1-2 2008/0130 (CNS).

⁴² Skog, Förslag till ny europeisk bolagsform för små företag, Balans, 2008, p. 22.

⁴³ Svernlöv och Blomberg, p.143.

⁴⁴ Art. 35.1, 2008/0130 (CNS).

⁴⁵ COM (2008) 396 final, 7. Explanation of the proposal: Chapter VII: Transfer of the registered office of the SPE.

⁴⁶ Art. 35.2, 2008/0130 (CNS).

⁴⁷ Skog, Förslag till ny europeisk bolagsform för små företag, Balans, 2008, p. 24.

2.3.4 Articles of association

During the formation of a SPE it is also necessary to establish an association to cover the areas listed in the regulation. As the proposal does not regulate all matter which would normally be included in a Companies Act, this does not mean that Member States must apply its national rules on those occasions.⁴⁸ Because the regulation only specifies a list of components which should be written in to the articles of association, the shareholders are left free to decide how the rest should be regulated. This means for example, that it can be regulated in the articles of association how the organization should look like.⁴⁹

2.3.5 Organization

There is no provision in the regulation stating that the company should have a special management organization, this in contrast to SCA. Ergo, it is up to shareholders in the SPE to control whether you want a dualistic or monistic management structure.⁵⁰ The only fixed by the regulation is that the company should have a governing body responsible for the activity.⁵¹

Nor is there any requirement that the meeting must be hold physically, which is the facilitation of small businesses. However, the articles of association have to include how the meeting should be held.⁵² SCA on the other hand contain a requirement where one must be present at a general meeting, and if this cannot be done, a representative must be sent with written authorization.⁵³

There is no hard set requirements on how the internal organization should look like. Thus, SPE can also be a choice for larger companies, particularly companies that have international bands across the Member States through its group. The reason is that the proposal provides flexibility in structuring the organization. This will inevitably lead to SPEs may have the same kind of organization model for its various subsidiaries within the EU.⁵⁴

⁴⁸ Skog, Förslag till ny europeisk bolagsform för små företag, Balans, 2008, p. 22.

⁴⁹ Ibid.

⁵⁰ Ibid. p. 23 and art. 26.2 2008/0130.

⁵¹ Art. 26.1 2008/0130.

⁵² COM (2008) 396, final 7. Explanation of the proposal: Chapter V: Organisation of the SPE.

⁵³ Chapter 7 § 3 SCA.

⁵⁴ Svernlöv och Blomberg, p.143.

2.3.6 Protection

To be able to protect minority shareholders the proposal obtains provisions for these. Those important decisions taken by the company as to receive the annual accounts, reduction of share capital or merger, must be taken by a qualified majority, i.e. two thirds of the votes in the company.⁵⁵

In contrast to SCA there are also provisions in the SPE regulation which concerns rules of the shareholders right to exit. This is hence something which SCA does not have regulated.⁵⁶ Minority shareholders are also given rights to demand an independent expert if they suspect crimes committed against the law or the statutes. In addition, minority shareholders have the right to request a shareholders' resolution.⁵⁷ This will be further dealt with in chapter six of this thesis.

The proposal also cover creditor protection, even though the existence of a low requirement for capital. A so called balance sheet test must be done before distributing assets. The test is a kind of control to be made for a dividend to be possible. For a dividend to be current assets of the company it must cover the debt in full after the dividend has been made.⁵⁸ Articles of association can provide a solvency test to be made for these to enhance the protection of creditors. The solvency test must then act as an assurance that the company pays its debts on time and then before any distribution is made.⁵⁹

2.3.7 Stocks

There is a wide scope for the shareholders, in terms of shares obligations and rights. The only fact that can lead to restrict this space is when it should be considered for a third party or minority shareholders.⁶⁰

The conditions for the transfer of shares shall be determined in the articles of association. A restriction or a new non-transferability of shares requires a decision by qualified majority.

⁵⁵ Art. 27, 2008/0130 (CNS) and Svernlöv och Blomberg, p.145.

⁵⁶ Art. 18 (e), 2008/0130 (CNS).

⁵⁷ Art. 29.1, 2008/0130 (CNS).

⁵⁸ COM (2008) 396 final, 7. Explanation of the proposal: Chapter IV: Capital.

⁵⁹ Art. 21.2, 2008/0130 (CNS).

⁶⁰ COM (2008) 396 final, 7. Explanation of the proposal: Chapter III: Shares.

In order to protect minority shareholder interests also requires consent from shareholders concerned by this restriction or prohibition.⁶¹

2.3.8 Areas not covered by the proposal

The proposal has certain cons in the matter that there are some areas left unregulated. For example there is nothing regulated on taxation, accounting, in-solvency and labor. In addition, the proposal does not regulate rules regarding shareholders contractual rights and obligations as a result of association-one. These excluded areas will be regulated under the national laws and at times it is up to date, although Community legislation.⁶²

The SPE as a statute should be fiscally neutral. For this reason the tax is not regulated in the proposal, it is important to ensure that SPEs are treated equally for tax purposes as other national legal objects.⁶³

⁶¹ Art 16.1 and Art. 27, 2008/0130 (CNS).

⁶² COM (2008) 396 final, 2. Objectives of the proposal.

⁶³ COM (2008) 396 final, 2. Objectives of the proposal.

3 Small- and medium sized enterprises

Last chapter dealt with the basics of the SPE proposal and current chapter deals vis-à-vis with the SME. This since the SPE is a result of the recent observation of the corporation structure of SMEs – they differ from other companies. The chapter is meant for the reader to note the different structure of SMEs in relation to larger companies and to understand that SMEs need an own corporation form with compelling provisions regulated to fit them.

3.1 Definition

*Micro, small and medium-sized enterprises (SMEs) are the engine of the European economy. They are an essential source of jobs, create entrepreneurial spirit and innovation in the EU and are thus crucial for fostering competitiveness and employment. The new SME definition, which entered into force on 1 January 2005, represents a major step towards an improved business environment for SMEs and aims at promoting entrepreneurship, investments and growth. This definition has been elaborated after broad consultations with the stakeholders involved which proves that listening to SMEs is a key towards the successful implementation of the Lisbon goals.*⁶⁴

Table 1: The new definition of small- and medium sized enterprises

Enterprise category	Headcount	Turnover	or	Balance sheet total
Medium	<250	≤ € 50 million	or	≤ € 43 million
Small	<50	≤ € 10 million	or	≤ € 10 million
Micro	<10	≤ € 2 million	or	≤ € 2 million

Source: European Commission 2003.⁶⁵

The table above illustrates the definition brought by the European Commission. This new definition is a recommendation and was adopted on the 6th of May 2003 by the European Commission and is the only definition that comes close to a regulation of a definition of SMEs.⁶⁶ The table declares that medium enterprises are defined as enterprises which em-

⁶⁴ Statement from Günter Verheugen, a member of the European Commission and also responsible for Enterprise and Industry have expressed his opinion regarding the importance of SMEs, *The new SME definition-user guide model declaration* brought by the European Commission.

⁶⁵ Recommendation 2003/361/EC regarding the SME definition.

⁶⁶ Ibid.

ploy fewer than 250 persons and whose annual turnover or annual balance sheet total does not exceed 43 million euro. Small enterprises are defined as enterprises which employ fewer than 50 persons and whose annual turnover or annual balance sheet total does not exceed 10 million euro. Micro enterprises are defined as enterprises which employ fewer than 10 persons and whose annual turnover or annual balance sheet total does not exceed 2 million euro.

3.2 Characteristics

SMEs are close kept companies and do not have many shareholders. The shareholders have a close bond with each other, meaning that they may have family ties, are friends or at least “company-friends” that distinguish their relationship from an investment relationship. Shareholders often have a big investment tied to the company and/or are financially tied to the company. The company has a small number of external board members who do not have as much influence on the internal and external conflicts and on the company’s daily affairs. Therefore, the company does not have a real influence in a scenario where a conflict arises between a majority shareholder and a minority shareholder.⁶⁷

3.3 Small-and medium sized enterprises importance in the economy

3.3.1 In the European Union

The latest observatory of the SMEs in EU was made in 2007 by the European Commission.⁶⁸ In 2005 the SMEs represented 99,8 % of all non-financial enterprises in the EU.⁶⁹ Furthermore, 67.1 % of the jobs in the non-financial economy were provided by SMEs.⁷⁰ Despite this, only 8% of the SMEs engaged in cross border trade and 5 % had subsidiaries or joint ventures abroad.⁷¹

⁶⁷ Andersson, J, *Minority shareholder protection in SMEs: a question of information ex post and bargaining power ex ante?* Company Law and SMEs p.194.

⁶⁸ http://ec.europa.eu/enterprise/policies/sme/facts-figures-analysis/sme-observatory/index_en.htm#h2-1 (2011-05-10).

⁶⁹ http://ec.europa.eu/enterprise/policies/sme/facts-figures-analysis/sme-observatory/index_en.htm#h2-1 (2011-05-10).

⁷⁰ Ibid.

⁷¹ COM(2008) 396 final, 1. Context.

3.3.2 In Sweden

Statistics Sweden's business register from November 2010 states the number of active firms to 381 439.

Table 2: Number of establishments and companies by size class in November 2010.

Class	Number of employees	Number of work stations	Number of enterprises
01	0 employees	718 245	717 697
02	1-4 employees	206 989	183 420
03	5-9 employees	58 426	40 272
04	10-19 employees	36 976	21 041
05	20-49 employees	23 998	11 895
06	50-99 employees	8 400	3 553
07	100-199 employees	3 386	1 626
08	200-499 employees	1 422	968
09	500-999 employees	325	378
10	1000-1499 employees	80	167
11	1500-1999 employees	26	80
12	2000-2999 employees	38	86
13	3000-3999 employees	12	51
14	4000-4999 employees	8	27
15	5000-9999 employees	10	68
16	10000- employees	1	20
Total		1 058 342	981 349

Source: Statistics Sweden's business register, SCB

Class 01-08 are SMEs regarding to the European Commission's definition⁷² and are providing most of the work stations and number of companies in Sweden. The statistics indicate that most companies in Sweden are SMEs.

3.4 Small- and medium sized enterprises in the Swedish companies act

There is no definition of SMEs in the SCA. Only two main groups are regulated, the private and public limited company.⁷³ Only publicly traded companies are allowed to offer their shares on the market or through massive advertising their shares and other financial

⁷² See chapter 3.2 in this study.

⁷³ Chapter 1 § 2 SCA.

instruments.⁷⁴ SMEs differ a lot from stock corporations. The main difference is that a public company has a regulated market which means they can sell their shares on an exchange which an SME cannot.

The SCA Committee⁷⁵ stated 2001 that SCA should be flexible enough to suit both small and large conditions.⁷⁶ They have also said that the categorization of public and private companies carried out as part of Sweden's European adaptation provides this flexibility and has at least temporarily silenced the debate that has long been in Sweden for a special statute for the smaller companies.⁷⁷ This sight have developed in opposite direction the last years since there are several reforms in action.⁷⁸

As part of efforts to adapt to the EU, the share capital of Sweden in the case of private limited companies has been reduced to SEK 50 000, which previously amounted to SEK 100 000.⁷⁹ The Ministry of Justice in Sweden⁸⁰ have written a memorandum where the option to lower the minimum capital of SEK 1 is analyzed.⁸¹ This may be considered as a way to comply with the European Commission presented "Small Business Act" in which the first principle is to create an environment in which entrepreneurs and family businesses and entrepreneurship is rewarded.⁸² These changes are a step towards improving the situation of SMEs and the conflicts that may arise and most importantly, protection of minorities.

In the government's directive⁸³ to the SCA-Committee there is no indication that there are some problems worth discussing in connection to a reform of SCA. It has not been shown

⁷⁴ Chapter 1 § 7 SCA.

⁷⁵ Aktiebolagskommittén.

⁷⁶ SOU 2001:1 p.11

⁷⁷ Ibid.

⁷⁸ Directive 2007:78, 2007:132, directive 2006:96 and 2006:128.

⁷⁹ SOU 2008:45.

⁸⁰ Justitiedepartementet.

⁸¹ SOU 2008:49.

⁸² [http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0394:FIN:sv:PDF\(2011-05-01\)](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0394:FIN:sv:PDF(2011-05-01)).

⁸³ Dir. 1990:46.

much interest in a small company reform in SCA or to a new law.⁸⁴ It is not until recently only a final report submitted by the investigation of a simpler company.⁸⁵

The mission has been to consider amendments to the SCA and the SCA's Ordinance which provides for simplification of the SCA. The work has particularly focused on small companies' needs by simplifying company law.

Furthermore, the investigator has been considering a new business model, and more. The investigation revealed the fact that most of the private limited companies are SMEs. The focus of the investigation has been made to facilitate the SMF administrative costs than minority protection.

The SMEs in the SPE proposal is not explained here because of the fact that the SPE is a result of actions taken to comply with the SMEs.⁸⁶

⁸⁴ Stattin, D, Company Law Reform och Aktiebolagskommittén-bolagsrättsliga reformer i Storbritannien och Sverige, Svensk Juristtidning 2002:2 p.124.

⁸⁵ SOU 2009:34.

⁸⁶ COM (2008) 396 final, 1. Context.

4 The minority shareholder protection

Previous chapter indicated that the SMEs are different kind of companies in relation to larger companies. Although they are small, they are many, and of great importance to the economy in Europe. Current chapter deals with the provisions obtained in favor for minority shareholders. First the provisions in the SCA is presented and secondly the proposed provisions in the SPE proposal. This since the SCA does not regulate SMEs the reader will question if the provisions set out in the SCA really are beneficial for minority shareholders in SMEs.

4.1 In the Swedish companies act

SCA is based on the majority principle.⁸⁷ This means that the owner controlling most of the votes at a general meeting decides the most issues. The majority principle is justified so the company is able to be given a strong decision and effective management. Then the starting point will be that it is difficult to justify legal solutions that give minority shareholders the right to govern and set in the company. However, there are a number of rules that give minority shareholders a limited protection against oppression from the majority owner. Hence is not a shareholder with few stocks without influence. Being able to attend the general meeting, gives one opportunity to make their voices heard which is of great importance. The general meeting is the body made to minority protection linked to SCA. Generally, most of the provisions which are intended to protect minority shareholders are to be found in chapter 7 in SCA and in other chapters of rules about how decisions are made. The minority protection in SCA is found in different parts of the act, most of it in chapter 7 SCA. A summary of the protection is given in the following headlines.

4.1.1 Handling's ban

These provisions prohibit a part to handle cases where the person in the executive is in conflict of loyalty with the company. The disqualification concerns board member and the CEO.⁸⁸ Additionally, a shareholder may not vote in questions concerning his or hers liability.⁸⁹

⁸⁷ Sandström, Svensk Aktiebolagsrätt p.194.

⁸⁸ Chapter 8 § 23, 34 SCA.

⁸⁹ Ibid. 7 § 46 SCA.

4.1.2 Fair-play-provisions

For the protection of minority shareholders there are some basic provisions which are regulated in SCA. There is the similarity-principle⁹⁰ and the general clause⁹¹ These provisions prohibit the board to make a resolution which would be a unfair restriction of the shareholders rights.

4.1.3 Insight-provisions

Principle decisions can be taken by the minority and achieve effect. In SCA this is regulated as a minority who has at least 10% of the equity. This person may enforce the convening of an extraordinary general meeting, deferral of certain meetings, the refusal of discharge, dividends, nomination of the minority auditor.⁹²

4.1.4 Separation-provisions

This is the minorities rights to be resolved out or/and be liquidate from the company. In SCA this is regulated as the liquidation of the company. An alternative is that the company acquired the minority shares and the majority owners are forced to redeem the minority shares.⁹³ This, in accordance to the shares is freely transferable.⁹⁴ This principle may be restricted by regulations of the statutes, which can be of three kinds; consent subject, pre-sale reservations and pre-emptive reservations.

4.1.5 Conditional blocking-provisions

It requires qualified majority for certain decisions on the annual meeting for the minority to have the right of veto. This provision is the core of SCAs minority protection. This is regulated in the SCA for a minority shareholder which holds more than one third of the entire share. He or she can then prevent the amendment of the articles of the association, a directed share issue, reduction of share capital, purchase of own shares, merger, division and change the company category.⁹⁵

⁹⁰ Chapter 4 § 1 SCA.

⁹¹ Ibid. 7 § 47 and 8 § 41.

⁹² Chapter 7 § 13-14, 18 § 11, 29 § 7, 9 § 9 SCA.

⁹³ Ibid. 25 § 21–23 and 29 § 4.

⁹⁴ Ibid. 4 § 7.

⁹⁵ Ibid. 7 § 43- 45, 13 § 2, 5 § 20, 19 § 18.

4.1.6 Retry-provisions

The shareholder have a right to claim the decision which been made at the annual general meeting. This have to be done at court.⁹⁶In the SCA a claim can be based upon formal faults and material faults. However, the resolution must have affected the shareholders legal rights in the company in a negative way.

4.2 In the SPE proposal

According to recital 13 of the preamble to the proposal SMEs need legal structures that can be adapted to their needs and size and are able to evolve as activity develops, shareholders of the SPE should be free to determine in their articles of association the internal organisation which is best suited to their needs. Hence, mandatory provisions ensuring the protection should be introduced in order to avoid any unfair treatment of shareholders. Especially certain key resolutions should be adopted by a majority of no less than 2/3 of the total voting rights attached to the shares issued by the SPE.⁹⁷

4.2.1 Handling's ban

The SPE regulation do not have an own rule on handling ban. Article 32 in the SPE just states that related party transactions shall be governed by the provisions of the applicable national law implementing Council Directives 78/660/EEC and 83/349/EEC.⁹⁸

4.2.2 Separation-provisions

After a resolution taken by the shareholders and on an application by the SPE, a competent court may order the expulsion of a shareholder if he has caused serious harm to the SPE's interest or the continuation of the shareholder as a member of the SPE is detrimental to its proper operation. An application to the court shall be made within 60 calendar days of the resolution of the shareholders.⁹⁹ If the court orders the expulsion of a shareholder, it shall decide whether his shares are to be acquired by the other shareholders and/or by the SPE itself and on payment of the price of the shares.¹⁰⁰

⁹⁶ Chapter 7 § 50- 52 *ibid*.

⁹⁷ Preamble (13) 2008/0130 (CNS).

⁹⁸ Art. 32 2008/0130 (CNS).

⁹⁹ Art. 17.1 *Ibid*.

¹⁰⁰ Art. 17.3 *Ibid*.

The regulation provides for a SPE to be dissolved in the following circumstances: (a) by expiry of the period for which it was established; (b) by the resolution of the shareholders; (c) in cases set out in the applicable national law.¹⁰¹ Winding-up¹⁰² such as liquidation, insolvency, suspension of payments and similar procedures¹⁰³ shall be governed by the applicable national law.

4.2.3 Exit-provisions

This provision in the SPE regulation is the most significant difference in contrast to the SCA. In Article 18 of the proposal there is a given right to any shareholder in the company to withdraw from the European private company as a result of one or more of the following events:

(a) “the SPE has been deprived of a significant part of its assets;(b) the registered office of the SPE has been transferred to another Member State;(c) the activities of the SPE have changed substantially;(d) no dividend has been distributed for at least 3 years even though the SPE's financial position would have permitted such distribution.”¹⁰⁴

The shareholder shall submit his withdrawal in writing to the SPE stating his reasons for the withdrawal.¹⁰⁵ Further on, the management body of the SPE shall then without undue delay, request a resolution of the shareholders on the purchase of the shareholder's shares by the other shareholders or by the SPE itself.¹⁰⁶ In the case of a dispute regarding the price of the shares, their value shall be determined by an independent expert appointed by the parties or, failing an agreement between them, by the competent court or administrative authority.¹⁰⁷

¹⁰¹ Art. 40.1 Ibid.

¹⁰² Art. 40.2 Ibid.

¹⁰³ Art 40.3 Ibid.

¹⁰⁴ Art. 18.1 2008/0130 (CNS).

¹⁰⁵ Art. 18.2 Ibid.

¹⁰⁶ Art. 18.3 Ibid.

¹⁰⁷ Art. 18.5 Ibid.

The competent court may, if satisfied that the interests of the shareholder have suffered serious harm, order the acquisition of his shares by the other shareholders or by the SPE itself and the payment of the price of the shares.¹⁰⁸

An application to the court must be made either within 60 calendar days of the resolution of the shareholders or, where no resolution is adopted within 30 calendar days of the shareholder submitting his notice of withdrawal to the SPE, within 60 calendar days of the expiry of that period.¹⁰⁹

The remedy of exit is hereby of particular importance for disgruntled shareholders in private limited companies, which includes SMEs, since there is no market for shares in these companies.¹¹⁰

4.2.4 Conditional blocking-provisions

The regulation provides resolutions of shareholders, which also is to be found in the SCA. The minority shareholders that controls one third of the company are able to put down a veto against decisions concerning;

(a) variation of rights attaching to shares, (b) expulsion of a shareholder, (c) withdrawal of a shareholder, (i) reduction of share capital, (l) transfer of the registered office of the SPE to another Member State, (m) transformation of the SPE, (n) mergers and divisions, (o) winding up and (p) amendments to the articles of association.¹¹¹

Another con is that the article provides for the possibility to adopt a resolution without requiring the organization of a general meeting.¹¹² This contributes to the minority shareholders being more relaxed, voting how they want and not having the risk to be exposed to reprisals.

4.2.5 Insight-provisions

The regulation gives the right to shareholders to be duly informed and to ask questions to the management body about resolutions, annual accounts and all other matters relating to

¹⁰⁸ Art. 18.6 Ibid.

¹⁰⁹ Ibid.

¹¹⁰ M.L. Lennarts 'Voice rights of shareholders', The European private company p. 117.

¹¹¹ Art. 27.2 2008/0130 (CNS).

¹¹² Art. 27.3 2008/0130 (CNS).

the activities of the SPE.¹¹³ A refusal to give such access to information is only legitimate if so would cause serious harm to the business interact.¹¹⁴

Despite this, the regulation provides the right for shareholders to request a resolution and right to request the management body to submit a proposal for a resolution to the shareholders, holding at least 5 % of the voting rights.¹¹⁵

In the case of suspicion of serious breach of law or of the articles of association of the SPE, shareholders holding at least 5% of the voting rights attached to the shares of the SPE have the right to request the competent court or administrative authority to appoint an independent expert to investigate and report on the findings of the investigation to shareholders. The expert shall be allowed access to the documents and records of the SPE and to require information from the management body.¹¹⁶

4.2.6 Retry-provisions

The right to claim resolutions by the shareholders is not explicitly regulated in the regulation. Simply, it is just stated that the shareholders right to claim a resolution shall be regulated in national legislation.¹¹⁷

¹¹³ Art. 28.1 Ibid.

¹¹⁴ Art. 28.2 Ibid.

¹¹⁵ Art. 29.1 Ibid.

¹¹⁶ Art. 29.2 Ibid.

¹¹⁷ Art. 27.4 2008/0130 (CNS).

5 Analysis

It is clear that the provisions provided in the proposal regarding European Private Companies are far more minority-friendly than in the SCA, which is further explained below. If the SPE is a more beneficial option for minority shareholders, the next step is to determine if there is any chance for the potential SPE regulation to replace the SCA. This chapter is divided into three sections confirming the statement. Section 1 presents the problems which might occur in a SME. Section 2 provides a comparison between the minority shareholder protection in the SCA and the minority shareholder protection in the proposal for a European private company. Section 3 provides a possible solution regarding the European private company. Section 4 extend the possible solution by replacing the existing legislation with the proposal of European private company.

5.1 Problems

Minority shareholder protection under SCA is aimed to both public and private share-liability companies and shall be applicable to all companies. As a result problems occur when the minority owners of SMEs cannot benefit from these rules of protection. This problem have recently been discussed in an article written by Jan Andersson, *Minority shareholder protection in SMEs: a question of information ex post and bargaining power ex ante?*¹¹⁸.

Regarding to Andersson, problems arises when a minority shareholder of an SME gets into conflict with a particular event since he or she is in a different position than a shareholder of a public company. Shares have no visible market value since no buyers are available, and although there would be a buyer available apart from the majority shareholders, it is anyways not certain that he has the freedom of transfer rights.¹¹⁹ This because chapter 4 § 7 in SCA is dispositive. Hence, there is a possibility to insert a clause, which is provided in chapter 4 § 8, 18 or 27 in SCA or otherwise by law. In turn this leads to the scenario where the minority shareholders only market is the majority owners. If minority shareholders sell shares to the majority shareholders they will not pay a fair market price.¹²⁰

¹¹⁸ Andersson, J, *Minority shareholder in SMEs a question of information ex post and bargaining power ex ante?* In Neville, M, *Company law and SMEs*, Thomson Reuters, Kobenhavn, 2010.

¹¹⁹ Stattin, *Company Law Reform*.

¹²⁰ NJA 1996 s.293.

The insight rules and conditional stop rules are providing more problems if the minority shareholders in SMEs make action of the available provisions. According to a study made by the Swedish growth board¹²¹, complicated laws and rules is a reason for barrier in companies' growth. This reason is number two after "own time" in what small business owners believe that barriers to their opportunity to grow.¹²² Accordingly, it is a real problem for these companies. First, it becomes an uncomfortable atmosphere in a small company where everyone knows each other. This creates an inconvenience for the minority owners. Secondly, it leads to costs for all shareholders and do not give a specific benefit to minority shareholders. As a result, the majority owner continues the relationship, even drain the value of minority shareholders' shares until the minority shareholders have enough and sell their shares to majority shareholders, with the conditions created by the great majority. When it comes to costs that incurred, the investigation into the simplification of the SCA is lead down, which been reported to above. As been held, the proposal is to reduce administrative costs in SME businesses. How this proposal pass remains to be seen.

Furthermore, conditions in SMEs are more sensitive when there are close relations in the company. If the interaction falls, it weakens the trust, loyalty and the long-running band. It then occur two options. Either to find a way to create a new basis for trust, loyalty and ties or that one party must leave the company. In most cases, the minority owner is the one who must leave the company. The minority owner has no bargaining possibility, to neither establish a new base of trust, develop loyalty and the close relationship between the parties or a departure with fair conditions for the minority.

When it comes to the fair-play provisions in SCA, it entails a number of disadvantages. The general clause in chapter 7 § 47 is written in a general way. A change in the legal scope that have occurred to the new SCA is that the word "may" from the older SCA has been replaced with "are capable of". This must mean an increase in protection when it added a requirement that there must be "devoted to" give an unfair advantage to a shareholder or another to the detriment of the company or any other shareholder. Nevertheless, this increase has no effect on the minority owners of SMEs on which clause is not used ten.¹²³ A general clause is only effective through its sanctions and the sanctions carried out

¹²¹ Tillväxtverket.

¹²² Tillväxtverket, *Hinder för tillväxt*, electronical source(2011-05-09).

¹²³ Andersson, Minority shareholder protection in SMEs: a question of information ex post and bargaining power ex ante? p.198.

against the company and can only utilize minority indirectly, if at all there. According to the legal comments on SCA, it is held that

*'A decision on the annual meeting which is contrary to the general clause can after claim for an action under 29 § 50 SCA be declared invalid. For shareholders who contribute to the decision to liability and obligation to redeem the victim shares eligible under Chapter 29 § 3 and 4.'*¹²⁴

Despite the fact that the general clause has its own scope, such as supplementing the principle of equality, so can the general clause apply decision may be challenged as a violation of the principle of equality.¹²⁵ The general clause is made in a way that it also can include measures that benefit a third party ("other"). As mentioned earlier, such protection is no actual benefit for minority shareholders. This leads to an uncertain bargaining position of minority shareholders and weakens their position. Majority owners can always use their superiority in spite of this general clause because they are the majority shareholder and controls the company. The minority are being exploited due to the majority's superiority. Minority bargaining position may be weakened if the sanctions from the principle of equality and the general clause do not favor minority shareholders.

What the minority shareholders need is provisions on withdrawal. Unfortunately, there are no rules on exit in the SCA. These rules are important for minority shareholders because they are the only type of rules for SMEs that puts minorities in a position where they can negotiate and achieve a renewed basis for trust, loyalty and close ties between the parties or an exit with fair conditions. Also in the proposal for SPE the issue has been raised on shareholders right to exit.¹²⁶ As been said, this kind of rules does not exist in Sweden.

Provisions granting withdrawal for shareholders would bring remarkable improvements for minorities when they can negotiate their exit and in this case, even if compensation should be awarded. Additionally it has to be made an over-weighting so that this is not misused by minority shareholders and not allow the majority principle as SCA is based on lapse. According to Andersson's article, minority shareholder must be in a stronger bargaining position in relation to the majority shareholders. The traditional company rules for the protec-

¹²⁴ Andersson, S, Johansson, S, Skog, R, Aktiebolagslagen. En kommentar på internet.

¹²⁵ Nial, H, & Johansson s. 153 och Pehrson i Festskrift till Sveriges Advokatsamfund p. 499 f.

¹²⁶ Art. 18.1 2008/0130 (CNS).

tion of minority shareholders are not met in the SME because of the way these companies operate.

For the rules on exit to be useful, two requirements must be met:

First, the minority must have access to information that is similar to that of a hypothetical perfect market. Laws or general conditions shall be provided to give minority shareholders access to this information and they must have effective sanctions which are equivalent. An exit rule, which the company or majority shareholders buy the minority shares at a fair price. Second, the rules on exit in the law or the articles of association must strengthen minority shareholders weak negotiating position when a particular event occurs. However, this is the negotiations between minority shareholders and majority shareholders. The rules of withdrawal must be written in a way causing an exit with proportionately lower qualifications for minorities than it would otherwise in a legitimate basis for an exit.

Regarding the first condition, in the current SCA, there is rules on shareholders' right of access to the company. The rule in chapter 7 § 32 SCA focuses on the question right pertaining to individual share owners at a general meeting with one exception; information need not be issued if the board considers that it could significantly damage the company. This reasoning, "significant harm to the company", can be utilized by the board under chapter 8 § 8 SCA appointed by the general meeting where the majority principle is crucial, that is, the majority can agree among themselves to vote for the ones who should sit in the board. Consequently, these can then refuse to give information to minority shareholders later. However, if the minority has a shareholding of more than one third of the company's shares, they have a right to veto decisions of the majority wishes to pursue. This rule is of great importance to minority shareholders in SMEs. They could then veto that some people who they know is intending to use its position to the detriment of minority shareholders, so they do not get elected to the board. But still, there exists the barrier of 1/3 of all shares to be held by minority shareholders for this to be possible.

When it comes to the insight- provisions the catch that minority shareholders will hold 10 percent of all shares to be able to stop some resolution of the shareholders could be disastrous for the company. In spite of these insight provisions the SCA does not give the minority an unlimited power to make positive decisions for the company. The minority is given only one competent to make a principal resolution.

The decision in the 'Balken-case' contributes to the assumption were the SCA is statue for larger companies and the court have chosen to blindly follow these provisions instead of

using a teleological interpretation. This may seem unfair when the minority owners are at a disadvantage. If they are forced to sell their shares to the majority owners, the same conditions should not apply as if they voluntarily choose to sell their shares because of lack of interest in the company.

5.2 Comparison of minority shareholder protection

Regarding the conditional blocking provisions, art. 27.2 in the SPE proposal lists several matters which require a resolution taken by a qualified majority that may not be any less than two thirds of the total voting rights attached to the shares issued by the SPE. A supermajority requirement is a common means of protecting minority shareholders in company law.¹²⁷ A higher threshold than two thirds may be adopted in the articles of association of the SPE.¹²⁸ The provisions in the SCA are similar where the majority only can deprive a resolution with two thirds of the total votes in these matters.¹²⁹ On the other hand, art. 27.2 includes a quorum by requiring two thirds of the votes attaching to all shares, which means not only those represented at the meeting, vote in favour of the resolution.¹³⁰ The SCA require analogous provisions except from the provision in chapter 7 § 43 SCA. It regulates three specific situations in addition, the change of the articles of association, 1) the shareholders right in the company's profit or other assets decreasing as a result of the change, 2) the right to transfer or acquire shares in the company is restricted through a reservation according to chapter 4 § 8, 18, or 27 3) the legal relationship between shares is shaken. In all these cases a change of the articles of association is only valid if all shareholders are represented at the meeting such as 9/10 of these are represented of the total sum of the shares in the company. This higher set requirements indicates that some provisions must be changed with caution, because it would for instance, damage the company and the minority shareholders if the company is no longer a profit making company. In addition to the second situation stated in chapter 7 § 43 SCA, there is a similar provision in art. 16 in the proposal for a SPE. Decisions for a consent from all the shareholders affected by the restriction regarding transfer of shares have to be made only with the consent of all shareholders affected by the restriction. Apart from art. 16 in the proposal, the shareholders in

¹²⁷ M.L. Lennarts 'Voice rights of shareholders', The European private company p. 118.

¹²⁸ Art. 4 and 8 2008/0130 (CNS).

¹²⁹ See 4.1.5 in this work.

¹³⁰ M.L. Lennarts 'Voice rights of shareholders', The European private company p. 119.

SPEs will not have the protection granted in chapter 7 § 43 p. 1 and 3 SCA. Another remark is that art. 27.2 do not take into account the position of holders of non-voting shares.¹³¹ Subsequently, these shareholders do not have voting rights; the requirement of supermajority does not protect them. However, this is not regulated in the SCA either.

The issue of challenging resolutions in the SPE is, as been declared above, up to the national legislation where the company has its registered office. In fact the proposal does not even address the question when exactly a resolution that violates the SPE proposal. The European Parliament has proposed an amendment to the text of art. 27.4. In spite of that it leaves the possibility of resolutions being null and void unmentioned. This is not mentioned in the proposal in contrary to the SCA.¹³² Further on, the proposal does not indicate which court is competent to decide on an appeal by a shareholder of a SPE to annul a resolution of the general meeting. The amendment brought by the European Parliament concerning art. 27.4 in the proposal provide that the court which has jurisdiction in relation to the SPE's registered office should have jurisdiction. It is reasonable since art. 27.4 refer the matter of the validity of resolutions of the general meeting of a SPE to the applicable national law. In art. 4 of the proposal this is the law of the Member State where the SPE has its registered office. The division of jurisdiction to the court of the Member States where the SPE is registered means that the parallel is ensured. This means that the competent court will be able to apply *lex fori*.¹³³

The insight rights in the SPE is of great importance because of the fact that only a shareholder who is duly informed is able to exercise these provisions to their full potential. The proposal contain information rights which provide shareholders to be duly informed and to ask questions to the management body about resolutions, annual accounts and other matters relating to the activities of the SPE. These provisions are in fact not to be found in the SCA. Furthermore art. 29.1, provide an shareholder holding 5 % of the voting rights shall have the right to request the management body to submit a proposal for a resolution to the shareholders. The threshold in SCA is that the minority must control at least 10 % to be able to have these rights. This literally means that the minority protection regarding this matter is doubled in the SPE. The right to request an independent expert provided in art.

¹³¹ Ibid. p. 120.

¹³² See chapter 7 § 51 SCA.

¹³³ M.L. Lennarts 'Voice rights of shareholders', *The European private company* p. 126.

29.2 can be characterized as a special right to be informed about the company's policy.¹³⁴ The provision comes into use if there is a suspicion of serious breach of law or the articles of association of the SPE. The shareholder who wants to ask the competent court or administrative authority to appoint an independent expert must hold over 5 % of the voting rights. In SCA there is similar provision providing an opportunity to address a nomination of a minority auditor, although, the minority shareholders must control at least 10 % of the votes. Even here is the provisions in the SPE proposal more advantageous than the in the SCA. Thus, the proposal does not regulate which court or administrative body is competent to be requested. There are opinions stating that these provisions is therefore not enough and that it must be clear which court or administrative body is competent.¹³⁵

Nevertheless, the provisions regarding withdrawal in art. 18 are of excessive importance. The fact that the minority shareholder is able to negotiate about his or her exit is a provision not granted in the SCA. This puts them in an equivalent bargaining position with the majority shareholder which is necessary for a justice exit.

After a balance between the provisions set in the SCA and in the SPE proposal, it is clear that the provisions in the SPE proposal are more beneficial for minority shareholders than those in the SCA.

5.3 Is the European private company a solution?

Minority shareholders in SMEs are a very exposed part of the company, which has been declared above. The reason for this is that SMEs differ from other companies; the shares may not be offered to the public or listed on a stock exchange. Another factor is the ownership structure, i.e. the relation between the shareholders. The SMEs are characterized as having few owners which contributes to the fact that it is a close kept company and the owners have a close relation. Traditionally, the corporate law is built on the principal-agent-theory where the division of corporate bodies, in particular focusing on the problems that arise when ownership and management is different persons. In SMEs the ownership and the management is often constituted of the same persons.¹³⁶ This leads to the scenario where the conflict of interest occurs. The fact that the minority shareholders only control a

¹³⁴ Ibid. p. 129.

¹³⁵ Ibid. p. 131.

¹³⁶ Compare Sandström, Svensk aktiebolagsrätt, p. 171.

minor part of the shares reduces their right to govern since the SCA is based on the majority-principle. This leads to the fact that they get easily run over by the majority shareholders which literally control the company.

The Swedish legislator has inserted some provisions in the SCA to protect the minority shareholders. A question is if these provisions really are enough to protect the minority shareholders within SMEs since the SCA is based to fit larger companies. The SCA consists of over 800 paragraphs¹³⁷ and was legislated to apply to both large and small companies regardless of whether there is just one owner or several. This is not an impressive solution because all companies are different and therefore cannot have the same provisions. Therefore a strong critique is held from the author against 'one-size-fits-all' company law. Throughout history, the limited company has gone from almost exclusively being a statute for large companies to today where most companies are SMEs.¹³⁸ Though, the provisions in the SCA are still adapted to the original concept of limited liability companies which deals with both information asymmetry and conflict of interest that arise when the management and ownership are separated. These kinds of conflicts are not those that arise in SMEs where the ownership and the management are not separated, i.e. the principal-agent-principle does not exist here. Therefore the authors opinion is; to be able to examine the practical protection for minorities in SMEs, some of these provisions have to be removed in mind as a result of just being nothing more than theory for these companies or of smaller impact. These provisions are particularly the insight rules since SMEs are smaller companies where everyone knows each other and information leaks out in one or another way from the management body to the shareholders, which principally are the same persons. The provisions concerning handling ban, separation, conditional stop provisions and retry can be removed in mind because these problems the provisions are aiming to solve are not the biggest issue in SMEs. Shareholders in a SME are often personally and financially deeply involved in the company which means that conflicts are more likely to arise than within a public company.¹³⁹ The issue is hence that the close band the shareholders in the company have can break in accordance to a typical event. What happens is when the interaction falls, it weakens the trust, loyalty and the long running band. As been held earlier, the solution is either to find a way to strengthen the trust, loyalty and the long run-

¹³⁷ 819 paragraphs divided into 32 chapters.

¹³⁸ Skog, R. Ny företagsform utan personligt ägaransvar? And statistics from Bolagsverket.

¹³⁹ M.L. Lennarts 'Voice rights of shareholders', The European private company p. 117.

ning band *or* leave the company. Neither of these options has been dealt with in the SCA, which is a miss. To be able to negotiate to a fair exit there have to exist provisions, i.e. the minority shareholder must be given a stronger bargaining position. As been held, rules regarding a shareholders right to withdraw from the company are not regulated in the SCA. The exit provision is of great importance for disgruntled shareholders in SMEs since there is no, or at least very limited, market for shares in these kind of companies. The fact that shares in a SME is not freely traded makes it virtually impossible for a disgruntled shareholder to leave the company by selling his shares. However, exit rules are regulated in the proposal for the SPE regulation.¹⁴⁰ Articles 18 provide any shareholder to withdraw from the European private company ‘...as a result of one or more of the following events’. This indicates that the provision is not available in all circumstances, i.e. it is limited. Consequently, if a particular event does not fall within article 18. 1 (a)-(d) there is no right to withdraw. This means that leaving the company is not always an option. On the other hand a shareholder maybe does not want to sell his shares, rather to stay involved in the company. These two scenarios; (a) the event is not dealt with in art. 18.1 (a)-(b), and (b) the minority shareholder wants to remain involved; leads back to the starting point and the provision is therefore excluded. After declaring the absence of the exit provision in these matters, the comparison must be made of the overall minority provisions after a split of the protection *ex post* and *ex ante*.

The provisions *ex ante* in the SPE proposal are significant stronger than in the SCA especially the insight provisions. A possibility to be duly informed, to ask questions to the management body, to request a resolution and to in suspicion of serious breach request a competent court to appoint an independent expert, which is granted in the SPE proposal should be fundamental in all corporations. However, the SMEs do not have much problems with the insight since the company is small. What these companies need is stronger provisions *ex post*. The *ex post* provision in the SPE regulation regarding withdrawal is not so strong as it should be. The author understands that the drafters of the proposal may have made this limitation so that it will not be abused by the minority shareholders in a way were they can exit from the company for unserious reasons. However, there should not be any limits on the reasons for withdrawal in SMEs regarding the author’s opinion. The limited company is regarded as nexus of contracts and there should therefore exist facilities to in order to agree on withdrawal as a fundamental provision.

¹⁴⁰ Art. 18.1 2008/0130 (CNS).

Nevertheless, the remedies provided in the SPE proposal are far more minority-friendly than the SCA. Therefore could a registration to a SPE be a more beneficial option for minority shareholders in contrast to the SCA.

5.4 Possibility for the potential European private company regulation to have competition?

The SMEs constitute, as it is shown in the statistics, the substantial part of the companies in Sweden and the rest of the EU. The SPE proposal, unlike the SCA, sets a low requirement of share capital. Earlier, it has been held by the European Court of Justice (ECJ) that it is possible for the seat and head-office being located in different Member States.¹⁴¹ The reason for this is that most people who want to start a business prefer countries with more favorable corporate rules. In particular the size of the share capital which has a prominent role.¹⁴² Because of the fact that it has been proven that a lower capital attracts entrepreneurs to set up a company, there can be drawn a parallel conclusion that the SPE-regulation will have a similar effect, and thus may outcompete the SCA. An arrangement like this will probably be easier for many to start a business in SPE-regulation. Therefore, entrepreneurs will probably chose SPE-regulation, rather than engage in a private limited company under the Swedish legislation.

There have been discussions in the literature regarding the belief of a shortage of creditor protection. However, there are basic and essential provisions given creditors the safety they need. For instance, a balance sheet test at dividends and also that it is possible to prescribe on solvency test in the statutes. The internal organizational model, which is up to the shareholders to decide, is another factor to. Since there are no requirements in the regulation for a two-tier or one-tier governance, it has been free to the company to choose how they want the internal organization. This too has a big advantage, then we can have the same sort of building to the organization in all Member States. This is something that companies especially can benefit from where it has subsidiaries in other Member States. Small businesses have great use of this provision, when one does not need to adapt to a number of rules such as in the SCA. These rules are usually not suitable for smaller companies. To be able to transfer the registered office to another Member State without the company loses its legal capacity is another advantage. At the same time has the ability to

¹⁴¹ Svernlöv och Blomberg, p.145.

¹⁴² Case 212/97, Centros.

operate both locally and extend it to other Member States, as a national law does not offer the same way.

One might also ponder why the Swedish legislators have modified the minimum share capital in private limited company to SEK 50 000? The reduction can be seen as a part of the reform process within the EU regarding private companies.¹⁴³ Although it is apparent from the preparatory work to strengthen business competitiveness through a reduction of share capital¹⁴⁴, the case could be that the Swedish legislation already senses a competition because of the proposal on SPE. It is also believed that a statutory requirement for minimum share capital shall act as a "seriousness-clause"¹⁴⁵ in order to form a private limited company. This is for anyone who plans to set up a company to be both willing and financially capable.¹⁴⁶ Since this approach is the most common, at least in Sweden, the SPE-regulation may possibly in this context not be able to compete with the Swedish company form.

There are a number of advantages in forming a corporation under the SPE regulation. As to doing it electronically, it becomes a known brand in Europe; it can operate in their country and also in other Member States and choice-possibility on how to form the company. These factors will probably be very attractive to many contractors, when they are given more opportunity than the SCA.

An opportunity to move headquarter without losing the capacity and also have its seat and headquarters in different Member States provide a favorable image for those who want to start a business. Consequently, the formation of a private limited company under the SCA can in that sense be less attractive when one of the SPE-regulation offers more favorable conditions.

The structure of the organization is another factor which allows a simplification for those who want to start an own small business. Although this is something that bigger companies get benefitted of, the parties by a group with subsidiaries around the Member States, and may have the same kind layout of the internal organization of several Member States. Consequently, it means that by SPE-regulation one does not need to take into account the na-

¹⁴³ Svernlöv, Förslag om sänkt aktiekapital available at <http://www.sweden.gov.se/sb/d/10615/a/105004> (2011-05-10).

¹⁴⁴ Svernlöv, C och Larsson Dozet, T, Sänk aktiekapitalet till 50 000 kronor, Balans, 2008, s.21.

¹⁴⁵ Svernlöv, C och Larsson Dozet, T, Sänk aktiekapitalet till 50 000 kronor, Balans, 2008, p. 21.

¹⁴⁶ Ibid, p.21.

tional legislation of the countries it operates in. Even here it seen that the SCA have a competition, since the SCA imposes several requirements on how the organization should look like, which is usually not suited for small business.

The only drawback encountered with the SPE proposal is that it not deals with areas as taxation. This can make it difficult for entrepreneurs to assess tax when, for example, has subsidiaries in different Member States. This tax will vary since the national legislation between the Member States are different. The new proposal from the European Commission regarding a common corporate tax base, could be the missing part to the SPE regulation. If both the SPE and the CCCTB proposal are accepted the problem could be solved. This since both the SPE and CCCTB proposal is a result of European Commission's 'Small Business Act'. The low share capital, that the form is flexible and the same throughout the EU, to the internal organization can have the same form regardless of the Member State of the company is, the ability to move its seat among member countries and also to SPE-the company offers a brand that is recognized throughout the EU, makes the SPE a compelling corporate form.

According to Commission's working staff in June 2008 the SPE would come to compete with national company law forms.¹⁴⁷ This, since the SPE accessible to all founders, irrespective of any cross-border dimension. Additionally, the Ministry of Justice has, in a memorandum from 2006¹⁴⁸ stated that the SCA is in a need of a reform. Even the Swedish Government has expressed a positive attitude regarding the SPE proposal.¹⁴⁹

Therefore can the SPE compete with the SCA for private limited companies, but also for other national company forms.¹⁵⁰

¹⁴⁷ SEC(2008) 2099, 5.4 Cross-border dimension.

¹⁴⁸ JU 2006/8869/L1 Behovet av en ny bolagsform.

¹⁴⁹ 2007/08:FPM133, 2.1. Preliminary Swedish position.

¹⁵⁰ Svernlöv, Blomberg och Drozdov, Balans, Det reviderade förslaget om privata europabolag, 2009, s.25.

6 Conclusions

The problems in SMEs are connected with the SME as a corporation. It is a close held company with few owners and low turnover. This indicates that everyone knows each other in the company and have close bands. Mostly, there are no problems with the management and ownership since they often derive from the same persons. Rather problems occur after this close band is threatened by a particular conflict. The conflict can therefore, weaken the trust, loyalty and the long running band. It then occur two options; either *to find a new basis to strengthen the trust, loyalty and the long running band* or *to leave the company*. In most cases, it is the minority shareholder that leaves the company. By leaving the company, the minority shareholder in a SME is put in a different position than a shareholder of a public company. This because of the fact that the shares in SMEs have no visible market value since there is no buyer available. Even if there was a buyer available, it is not sure that he or she has the freedom of transfer rights since the SCA provide for the companied to agree on different kinds of reservation.

By comparing the provisions set in the SPE proposal it is clear that the SPE proposal is more minority-friendly, for example the threshold is only 5 % for shareholder who wants to ask the competent court or administrative authority to appoint an independent expert. In the SCA there is similar provision providing an opportunity to address a nomination of a minority auditor, although, the minority shareholders must control at least 10 % of the votes.

The provisions *ex ante* in the SPE proposal are significant stronger than in the SCA especially the insight provisions. A possibility to be duly informed, to ask questions to the management body, to request a resolution and to in suspicion of serious breach request a competent court to appoint an independent expert, which is granted in the SPE proposal should be fundamental in all corporations. However, the SMEs do not have much problems with the insight since the company is small.

Therefore, what the minority shareholders in SMEs really need is stronger provisions *ex post*. The proposal for a SPE regulation contains such a provision, but it is limited. However, this limited provision is better than no provision about exit at all. The minority protection in the SPE proposal is a more beneficial option for the minority shareholders in SMEs than the protection regulated in SCA.

Finally, after an observation of the SPE proposal and how the SPE is thought to operate in the future if the proposal is accepted, it can be stated that it is advantageous in several matters. For instance is the companies' possibility to move headquarter to another Member State, the low share capital requirement and to register the company electronically. The Swedish Governance has also expressed positively regarding the proposal. Therefore the SPE proposal could most likely compete with the SCA.

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