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EUROPEAN PRIVATE COMPANY – USEFUL TOOL OR WISHFUL THINKING?

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Ladies and gentlemen,

It is an honour and a great pleasure to be a speaker at this 5th EU Company Law Conference and I would like to warmly thank the organisers of this Conference : the Federation of German Industries for having dedicated this second panel to the European Private Company – EPC.

As you may know, this new legal form was born from a business community's initiative.

The EPC is a company designed by and for business, and especially for SMEs, independent companies or groups subsidiaries.

In 1998, the French Business Confederation – MEDEF – and the Paris Chamber of Commerce made public a proposal for a European Private Company.

However, it is not only a French initiative elaborated by French lawyers, it is the result of the work of a group of lawyers and practitioners from different Member States.

And I am very pleased to be part of the same panel than an eminent member of our working group, Professor Robert Drury.

Moreover, this proposal immediately received the support of Business Europe and EuroChambers and, since 2002, of the European Economic and Social Committee, and earlier this year, from the European Parliament.

And last but not least, the EPC is part of the priorities of the European Action Plan on Company Law and Corporate Governance.

The Commission has put that topic on the agenda of the advisory group on European company and corporate governance. I will elaborate later on that point.

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☞ **Why such an initiative ?**

It is true that the SE represents a major breakthrough especially because it allows European companies to cross merge and transfer their seat from one Member State to another Member State.

Moreover, it is important for a company to do business as a European company and no more as an Italian, German or French company.

But the SE is inherently cumbersome, mainly because that this type of company may issue securities to the general public. And the other European structure, the European Economic Interest Grouping (EEIG) only gives a partial answer, because its activity must be the continuation of its members activity, and because the members' liability is unlimited.

Furthermore, the SE has been originally designed for large enterprises and may not meet all the expectations of the business community and in particular SMEs (independent or groups subsidiaries) which are the main constituents of the European economy.

SMEs represent more than 90% of the European Union economy and two-thirds of jobs. They are more and account for more frequently seen working across the internal market and so it is important that they can develop and thus contribute to economic growth. They should therefore be offered the best conditions to achieve the objectives laid down in Lisbon ; this is essential for Europe's future.

Having a common and truly European legal structure based on contractual freedom would allow them to organise into European groups or networks of companies and to form joint European enterprises.

The EPC could also enable European groups of companies to implement a homogeneous organisation in all their subsidiaries in different Member States. And as such it perfectly fits into the better regulation approach.

The future entry into force of the provisions of the Services Directive, which aims to facilitate supply of services by SMEs in the European Union, is an additional argument in favour of this European legal structure.

As far as its image is concerned, the EPC will offer a truly European label, which could be of great importance for new Member States companies.

☞ **What are the main features of the EPC ?**

The EPC would be :

- a limited liability company,
- a very open form, accessible to both natural and legal persons, which could be set up *ab initio*, as long as the EPC undertakes economic activities in two or more Member States,

- a company based on contractual freedom which would cover :
  - the determination of the corporate governing bodies,
  - the organisation of relations among them,
  - the shareholders' rights,
  - the manner of access, withdrawal or removal of a shareholder

- a genuine European company governed by the provisions of the regulation and the provisions of the articles of association compatible there with. This is a crucial point. The matters governed by the regulation shall not be subject to application of the law of the Member States, even with respect to those points which it does not settle expressly. This is a major difference with the SE regulation which very frequently refers to national laws. The regulation on the EPC is exhaustive and independent of the national law which may not be asserted, even on a subsidiary basis. This is very important in order to secure the unitary and therefore European – wide, character of the legislation, and the clarity and security which the form must provide to the shareholders and third parties. The regulation must also protect the shareholder's contractual freedom, the scope of which it must expressly define. That is the only way to prevent the scope from being limited and violated upon by mandatory or suppletory provisions of national laws, many of which are less liberal than the regulation itself. We know that it is a concern for some lawyers who are doubtful as whether it would be possible to draft a complete regulation of company law for private companies. But we really think it is feasible without having a too detailed regulation.

- but the EPC will still be subject to the general rules of Member States regarding accountancy law, tax law, criminal law and labour law.

In conclusion, I would like to address the following concerns raised by some opponents :

↳ **Firstly**, some people claim that the proposal is now obsolete because it was made public in 1998 and that it would not have an added value, since the SE and the 10th directive enable companies to merge cross border and the draft of 14th directive will enable the transfer of seat.

It is not the case at all for several reasons :

- EPC deals with creation and transformation. With regard to merger and transfer of seat, the EPC will be governed by the 10th and future 14th directives,
- the ECSC's opinion and the more recent European Parliament resolution clearly proved my point,
- and the Commission expressed its interest for this proposal, as I have already mentioned it.

We perfectly understand that the European Commission does not want to start a new process without being sure of the proposal's accuracy, but the previous consultations already showed a strong interest from the respondents.

Anyway the European Commission's advisory group is finalizing a questionnaire on EPC. And if I may make a suggestion, I would encourage you to answer this questionnaire.

↳ **Secondly**, I want to make clear that the purpose of an European Private Company is not to escape from national forms of companies, as a French lawyer, I can tell that we are quite happy with our national company law. The objective is not either to challenge national legal forms of companies such as the British PLC (Private Limited Company), the simplified GmbH and the French SAS (*Société par actions simplifiée*).

The objective is really to create a European legal form and we think it is possible.

The EPC regulation will be an enabling regulation.

Our ambition is not to convince the Eurosceptics, i.e. those who never trust in a European company. Our ambition is to help SMEs to develop intra European business.

I thank you very much for your attention.
