



5 November 2007

### **RESPONSE TO THE CONSULTATION ON A POSSIBLE STATUTE FOR A EUROPEAN PRIVATE COMPANY (EPC), (MARKT/ 19.07.2007)**

#### **SUMMARY**

BUSINESSEUROPE has been actively following the debate on the European private company statute since its inception and has strongly called for the adoption of a legal form which addresses the size and needs of SMEs.

On previous occasions BUSINESSEUROPE<sup>1</sup> has pointed to the importance of adopting this alternative instrument for SMEs. Small and medium companies are the core of the European Union since 90% of its entrepreneurial fabric is composed of SMEs. We believe that it would place them in a better position to contribute more effectively to the development of the Internal Market and will also strengthen the EU cohesion policy.

Therefore, we fully support the current Commission consultation hoping that it would lead to a proposal for a European private company statute, as announced by Commissioner McCreevy, which should provide for a more simplified, flexible and clear framework for small and medium enterprises (SMEs). A real "European label" will help reinforcing their mobility in the Internal Market and presence in international markets.

#### **The European private company statute should**

- Be a legal form available to all, on a voluntary basis, whether natural or legal persons;
- Be possible to be formed *ex nihilo*, in order to foster entrepreneurship in accordance with the recommendations made by the European Commission;
- Have its registered office in the European Union and the possibility to transfer it to any Member State, without any dissolution or creation of any new legal person;
- Be designed according to a dynamic concept, in that the EPC would be intended to conduct operations having a European aspect broadly defined; and
- Be based on contractual freedom.

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<sup>1</sup> BUSINESSEUROPE's response to the Commission consultation on future priorities of the Company Law and Corporate Governance Action Plan (31 March 2006); BUSINESSEUROPE's position paper on The Future of the Commission Company Law and Corporate Governance Action Plan (8 November 2006).



## INTRODUCTION

BUSINESSEUROPE has been actively following the debate on the European private company statute since its inception and has strongly called for the adoption of a legal form which addresses the size and needs of SMEs.

In 1998 we expressly supported the Project for a Regulation on the European private company statute presented by MEDEF and the CCIP. We have been inputting into the Commission initiatives on this subject and early this year we welcomed the adoption of MEP Klaus-Heiner Lehne's report by the European Parliament plenary.

Last May, BUSINESSEUROPE and EUROCHAMBRES organised a conference under the auspices of the European Economic and Social Committee where business representatives and other stakeholders from all around Europe expressed strong support for the statute and urged the Commission to move more rapidly to meet strong demand from the business community. Therefore, it was with enormous satisfaction that we heard Commissioner McCreevy stating the Commission plans to put forward a proposal for this Statute by mid-2008 at the latest<sup>2</sup>.

On previous occasions BUSINESSEUROPE<sup>3</sup> has pointed to the importance of adopting this alternative instrument for SMEs. Small and medium companies are the core of the European Union since 90% of its entrepreneurial fabric is composed of SMEs. We believe that it would place them in a better position to contribute more effectively to the development of the Internal Market and will also strengthen the EU cohesion policy.

We consider that EU initiatives in the area of company law and corporate governance should concentrate on initiatives that will provide optional means for companies to reap the benefits of the internal market and adapt their structures to suit their needs in a flexible manner. Moreover instruments that envisage a real degree of corporate mobility in the EU are of key importance.

Therefore, we fully support the current Commission consultation hoping that it would lead to a proposal for a European private company statute, as announced by Commissioner McCreevy, which should provide for a more simplified, flexible and clear framework for small and medium enterprises (SMEs). A real "European label" will help reinforcing their mobility in the Internal Market and presence in international markets.

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<sup>2</sup><http://www.europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/07/592&format=HTML&aged=0&language=EN&guiLanguage=en>

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BUSINESSEUROPE considers that the European private company statute should:

- Be a legal form available to all, on a voluntary basis, whether natural or legal persons;
- Be possible to be formed *ex nihilo*, in order to foster entrepreneurship in accordance with the recommendations made by the European Commission;
- Have its registered office in the European Union and the possibility to transfer it to any Member State, without any dissolution or creation of any new legal person;
- Be designed according to a dynamic concept, in that the EPC would be intended to conduct operations having a European aspect broadly defined, i.e. that they must have at least two members which are nationals of two or more Member States, or simply conduct economic operations at European level, i.e. operations conducted beyond the boundaries of any single Member State; and
- Be based on contractual freedom what would cover the following:
  - the definition of the members' rights, which would be unequal and specific;
  - the approval of new members;
  - the withdrawal or expulsion of a member;
  - the internal organisation of the company;
  - the powers of corporate bodies; and
  - the terms of transfer of the shares.

In the areas where the Statute leaves room for contractual freedom, it should include the obligation of shareholders to find an agreement on the applicable rules. In order to simplify this process for smaller and medium sized companies the Statute should provide for model articles.



## BUSINESSEUROPE RESPONSE TO SPECIFIC QUESTIONS

### II. DO SMEs NEED A EUROPEAN PRIVATE COMPANY STATUTE?

#### Question 1

**Q 1.1. Do you face barriers related to the legal form of your company when you are conducting cross-border activity?**

**Q 1.2. If so, please explain which of these barriers are the most burdensome:**

- **difficulty in dealing with a number of different company law systems (legal and other, counsel's fees);**
- **lack of trust in foreign legal forms in business relations with business partners from other Member States;**
- **different national rules for the operation of a company which makes day-to-day management more expensive;**
- **other barriers related to the legal form of your company (which ones?).**

Small and medium companies currently face several barriers when conducting cross-border activities, which impedes them from fully benefiting from the internal market and to expand their businesses beyond national borders.

Often the differences between national legislation governing private companies in Member States lead to additional and disproportional administrative and financial costs, by requiring access to information and legal counselling, reducing the appeal of cross-border activities.

BUSINESSEUROPE considers that the adoption of an optional European private company statute would allow SMEs to benefit from a simplified common European legal form suited to their needs, reducing the costs they currently incur when going cross-border, while increasing legal certainty and therefore motivating them to expand.

#### Question 2

**Do you consider that the current legal framework is sufficient for your company's current or future cross-border business?**

No. The existing legal forms, such as the European company statute, the European cooperative society or the European economic interest grouping do not address the specific need of SMEs.

The existing European company statute or "*societas europaea*", (hereinafter "SE") is ill-suited to SMEs because it was designed mainly for large companies. It is inherently cumbersome, due in particular to the fact that this type of company may issue securities to the general public. One of the recitals of the SE regulation is very explicit in this sense in that it provides that the SE must be of a "reasonable size". The minimum capital required is €120,000 euros which is too high for SMEs.

The European economic interest grouping only gives a partial answer as its activity must be the continuation of its members' activity and members' liability is unlimited.



The cross-border Merger Directive does not fill the legal gaps either, because neither the formation of new nor the conversion of existing companies come under its scope. These will, however, be the most relevant fields of application of the EPC statute.

Equally, to adopt a legal form of the Host Member State (when this State has a complicated and elaborate corporate governance system) could represent a “cost” to the SME cross-border activities.

Moreover, BUSINESSEUROPE believes that the EPC will provide SMEs with a legal form that enables them to set up joint ventures, become organised as European groups and networks of companies (European label) helping them to reinforce their presence in international markets.

BUSINESSEUROPE considers that the current legal framework for SMEs which would like to expand their business into other Member States could be highly improved through the adoption of a legal form which specifically takes into consideration their needs and interests.

### **Question 3**

***Q 3.1. Do you think there is a need for a European Private Company (EPC)? Please give reasons to your answer.***

***Q 3.2. Do you think that the company form of an EPC itself (“European label”) would give an added value to your business? Would it be helpful in cross-border activities?***

***Q 3.3. Do you consider that a Statute for an EPC would address the problems identified by you in Q 1? Would it be the most appropriate means? Please explain why.***

As above-mentioned, BUSINESSEUROPE considers that a legal form specifically addressing the needs of SMEs would be more suitable as it would reduce the regulatory burdens they currently face. Around 90% of companies in Europe are small and medium companies. We believe that they are best placed to stimulate and develop the Internal Market. But this will only be possible if in return they can fully benefit from its advantages and from a regulatory environment which allows them to pursue their businesses at the lowest possible cost and with a higher degree of legal certainty.

BUSINESSEUROPE believes that a simple and flexible optional instrument based on contractual freedom would be more suitable for SMEs as it could simultaneously take account of the rights of minority shareholders and liability and control rules.

We consider that a genuine open and simple European structure that provides SMEs with a European identity is a competitive advantage in particular for companies from the new Member States.

Also the conversion of existing companies into European Private Company could be very helpful for groups already holding companies in other jurisdictions since they can then more easily implement parallel governance structures in all subsidiaries. It will



also reduce transaction costs if companies can be converted before they are put up for sale, since potential acquirers will be familiar with the governance of such companies.

The EPC thus appears at the same time as a catalyst of European integration, allowing for more mobility of companies within the Internal Market, and as a factor of legal certainty which is particularly attractive for foreign investors.

Also in terms of image, as above-mentioned, the EPC would offer SMEs a genuine “European identity” enhancing their image, visibility, competitiveness and dynamism, as was extensively shown by the feasibility study conducted by the European Commission in 2005.

Finally, we deem that the incorporation of the EPC (for instance with a single shareholder) independently from the EU dimension of the SME could be a valuable instrument to simplify the national framework providing to the SME a further legal form different from the Home Member State legal form.

**Question 4**

**Q 4.1. If your company conducts or intends to conduct cross-border activities, do you/would you prefer to:**

- set up an establishment in another EU Member State,
- provide cross-border services while keeping the permanent establishment in your own Member State,

**Q 4.2. If you have/would like to have an establishment in another EU Member State, do you/would you prefer to set it up:**

- as a company (subsidiary), or - as a branch, or
- without any formal organisation (de facto branch)?

**Q 4.3. If you prefer to set it up as a company (subsidiary), would you prefer to register it in the other Member State:**

- in a legal form of that Member State, or
- in a legal form of your own Member State, if it were allowed and recognised by the other Member State automatically or if certain minimum requirements were fulfilled (this procedure may be described as a single company passport)
- in the legal form of an EPC having multiple shareholders (Model A)
- in the legal form of an EPC having a single shareholder (Model B)?

*Please give reasons and, if you choose more than one alternative, please rank in order.*

**Q 4.4. Do you think it would be useful for groups of companies to set up subsidiaries in the form of an EPC?**

The preference goes clearly to an establishment in another Member State as a subsidiary. The most effective groups of companies are structured around subsidiaries. This makes it possible to reduce the tax risk and tax burden, and at local level it is preferable to create a subsidiary to deal with both creditors and customers.

BUSINESSEUROPE considers that the EPC should be open to both single and multiple shareholders.



Finally, the availability of a common legal vehicle would make it possible to reduce the costs (administrative and financial) for groups related to the setting-up of subsidiaries across the EU.

#### **Question 5**

**Q 5.1. Do you know an existing legal form of a private limited liability company, except for the limited liability company of your own jurisdiction, which you would consider suitable for an EU-wide activity of your business? If so, please indicate which one and explain why.**

**Q 5.2. Provided that you identified a preferred foreign national legal form, if you had the choice between such national form and the EPC, which of them would you choose for your business? Please give reasons for your answer.**

There is no national limited liability company form that offers the same advantages as an EPC, such as the European brand.

#### **Question 6**

**Should the EPC be allowed to have its registered office and its headquarters in different Member States? Please give reasons.**

The registered office of the EPC would be located within the European Union and may be transferred to any Member State, without any dissolution or creation of any legal person.

In light of the recent case law of the European Court of Justice, in particular the *Überseering*<sup>4</sup> ruling, a company incorporated under the law of a Member State that moves its seat to another Member State should be recognised and *locus standi* granted. Therefore, companies already registered and recognised in a Member State now have the option of moving their real seat to another Member State and will have to be recognised by the host Member State.

Also, regarding the recent consultation by the Commission on the simplification of company law, accounting and auditing, BUSINESSEUROPE supported the revision of article 7 of the European company statute whereby the registered office of an SE shall be located in the same Member State as its head office and allows Member States to provide in addition that SEs registered in their territory have the obligation to locate their head office and their registered office in the same place.

The fact that the company's headquarters may be located in a country other than the country of registration of the EPC would increase corporate mobility.

We would also like to take this opportunity to reiterate our views on the effective need for a 14<sup>th</sup> company law directive on the transfer of registered seat. Even if the revision of article 7 of the European company statute may have as a consequence an increase in corporate mobility and a European private company statute likewise, this will not

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<sup>4</sup> Case C-208/00, judgment of 5 November 2002





apply to companies other than registered SEs and EPCs. A 14<sup>th</sup> company law directive would improve corporate mobility, key for companies to benefit fully from the internal market.

#### **Question 7**

**Q. 7.1. Do you think that the access to an EPC should:**

- be open to any person (natural or legal)
- be somehow limited? If so, which should be the limitations and why?

**Q 7.2. Should it be possible to establish a single-shareholder EPC?**

**Q 7.3. Would you support an EPC Statute if it were restricted to a single shareholder (Model B outlined in chapter III)?**

BUSINESSEUROPE has since the very beginning advocated that the European private company should be an open form available to all, whether natural or legal persons. Moreover, it should also be available to either a single shareholder or to multiple shareholders and should be possible to set it up from scratch in order to foster entrepreneurship in accordance with the recommendations made by the European Commission.

#### **Question 8**

**Q 8.1. If the question of taxation in relation to the EPC Statute would not be addressed at the EU level, would you nevertheless find the EPC useful?**

**Q 8.2. If so, what would be in your view the added value of this legal form?**

BUSINESSEUROPE believes that companies making an election for the European private company statute should be the first beneficiaries not only of a European cross-border tax loss relief scheme, such as contained in the current proposal for a common consolidated corporate tax base, which would avoid multiple taxation but also of any other customised measure, excluding any discrimination as compared with other legal forms. However, the EPC would still be useful without any specific tax measures.

### **III. WHICH MODEL OF AN EPC?**

#### **Question 9**

**Which EPC model presented in section 3.1 do you find the most feasible:**

- Model A (EPC having multiple shareholders)
- Model B (EPC having a single shareholder)
- other model (please describe its characteristics)?

**Please explain why you prefer this model.**

As mentioned above, BUSINESSEUROPE considers that what is important is to have an optional flexible and open legal form based on contractual freedom, available to all, whether natural or legal persons. Moreover, it should also be available to either a single shareholder or to multiple shareholders and it should be possible to set it up from scratch in order to foster entrepreneurship.





**Question 10**

***Which of the regulatory options presented in section 3.2 do you find best for the EPC Statute:***

- ***Option 1 (comprehensive and complete Statute)***
- ***Option 2a (flexible statute with references to the general principles of EU law)***
- ***Option 2b (flexible statute with references to national law)***
- ***other option (please describe its characteristics)?***

***Please explain why you prefer this model.***

For BUSINESSEUROPE it is key that, in order to ensure clarity of the European private company statute and to provide shareholders and third parties with an effective degree of legal certainty, the EPC should be governed by an EU regulation, containing provisions on essential issues, and by its articles of incorporation, within the principle of contractual freedom, without any reference to Member States' legislation.

However, domestic laws may apply in few cases regarding public policy issues (accounting and tax law, procedures for insolvency and cessation of payments, labour and social law and criminal laws).

**V. SOCIAL ASPECTS – EMPLOYEES' INVOLVEMENT (INFORMATION, CONSULTATION AND PARTICIPATION) IN THE COMPANY'S DECISION-MAKING PROCESS**

**Question 13**

***What would be, in your opinion, the best solution for the EPC:***

- ***should there be a uniform or a minimum EU standard on employees' involvement for the EPC;***
- ***should the EPC Statute follow the same solution as regards the employees' involvement as the one applicable for the European Company (SE);***
- ***should rules on employees' participation be determined by the law of the Member State in which the EPC's seat is located;***
- ***should existing employees' rights be maintained when a national company is converted into an EPC or an EPC into a national company (if their level is higher than in the national law applicable after the conversion)?***

***Please give reasons for your answer.***

BUSINESSEUROPE believes that the rules concerning the information and consultation of employees, and where applicable, their involvement in the Company's corporate bodies should be determined by the laws governing the European Private Company registered office (i.e. national laws).

Since 2002, a general framework Directive on information and consultation ensures that minimum standards are in place in each Member State concerning employees' involvement in companies. These standards should be applied, including to employees' involvement in EPCs. Aligning employee involvement rules of EPCs on the ones prescribed by the Directive on employees' involvement supplementing the Statute for a European Company Statute<sup>5</sup> is not a suitable solution as these rules were designed for

<sup>5</sup> Council directive 2001/86/EC of 8 October 2001



large companies, are not suited for SMEs and would be constitute an obstacle for SMEs to opt for the EPC statute in the future.

#### **ANNEX: ADDITIONAL QUESTIONS ON THE POSSIBLE EPC STATUTE:**

##### **Question A1**

***If you have experience in conducting business by means of branches and/or subsidiaries in other Member States, please indicate the costs related to the company law aspects of:***

- establishing a separate company/branch in another Member State (including the time costs and the costs of notary fees and translation);***
- running such business.***

***Please provide examples if available.***

The establishment of a separate company in another Member State can easily amount to costs of 20,000 to 60,000 euros, depending on the legal structure and the Member State at issue. The costs of running such business is too dependent on the concrete case in point.

##### **Question A2**

***Q A2.1. If you consider that there is a need for an EPC Statute, please explain what would be the advantages of such a company form compared to the present situation. In particular, please indicate approximately how big would be a cost saving for your company (in Euro):***

- up to 1.000***
- 1.000-5.000***
- 5.000-10.000***
- more than 10.000.***

The savings can amount to more than 10,000 euros.

***Q A2.2. If possible please indicate to which types of costs the savings relate (e.g. formation, running the business) and whether they are one-off costs or annual costs.***

The main savings can be achieved through a considerable reduction of day-to-day external legal advice. Depending on specific cases, such as extraordinary general meetings and the nomination or dismissal of directors, the annual costs saved can be in the area of 15,000 to 30,000 euros.

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