

22 September 2008

BUSINESSEUROPE COMMENTS ON THE COMMISSION PROPOSAL FOR A REGULATION ON THE STATUTE FOR A EUROPEAN PRIVATE COMPANY (SOCIETAS PRIVATA EUROPAEA - SPE)

SUMMARY

BUSINESSEUROPE has strongly called for the adoption of an optional legal tool which addresses the size and needs of SMEs allowing them to overcome the obstacles they currently face when crossing borders. Therefore, we very much welcome and fully support the Commission proposal for a regulation on the statute for a European private company (Societas Privata Europaea, referred to below as SPE)¹.

By enabling entrepreneurs to comply with the same, simple and flexible company law provisions across the member states, thereby helping them to reduce the administrative and financial costs they currently face when wanting to expand beyond national borders, this instrument will increase the appeal of cross-border activities and help to boost companies' mobility. With the benefit of a real "European label", SMEs will also be able to reinforce their presence in international markets.

BUSINESSEUROPE believes that the SPE statute is key to further complete the internal market integration, to strengthen the EU cohesion policy and to increase Europe's competitiveness in a global context.

In this context, and bearing in mind the benefits that the SPE statute will bring to European private companies wanting to expand beyond their national frontiers and to the internal market and European competitiveness as a whole, BUSINESSEUROPE urges Council members to support this project unanimously as required by article 308 of the EC Treaty, the legal basis for this key legislative proposal. We are positive that the French presidency, aware of the benefits of this tool, will be able to conclude an agreement on this dossier soon.

¹ Proposal for a Regulation on the Statute for a European private company COM(2008) 396/3.

INTRODUCTION

BUSINESSEUROPE very much welcomes and fully supports the Commission proposal for a regulation on the statute for a European Private Company (Societas Privata Europaea, referred to below as SPE)². We have strongly called for the adoption of this instrument, key to further complete internal market integration, strengthening the EU cohesion policy and contributing to an increase of Europe's competitiveness in a global context.

In 1998, BUSINESSEUROPE 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 in 2007 we welcomed the adoption of MEP Klaus-Heiner Lehne's report by the European Parliament plenary.

On May 2007, 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. We were therefore very satisfied to hear Commissioner McCreevy say that the Commission was planning to put forward a proposal for this statute by mid-2008 at the latest³.

BUSINESSEUROPE considers that the SPE by allowing entrepreneurs to comply with the same, simple and flexible company law provisions across the member states will help European private companies to overcome the obstacles they currently face when crossing borders. Differences between national laws governing these companies in member states lead to additional and disproportional administrative and financial costs. Through this instrument, costs related to access to information and legal counselling will be reduced, thereby increasing the appeal of cross-border activities. Also, with the benefit of a real "European label" SMEs will be able to reinforce their mobility in the Internal Market and presence in international markets.

In this context, and providing the benefits that the SPE statute will bring to European private companies wanting to expand beyond their national frontiers and to the internal market and European competitiveness as a whole, BUSINESSEUROPE strongly calls on Council members to support this project unanimously as required by article 308 of the EC Treaty, the legal basis for this key legislative proposal. We are positive that the French presidency, aware of the benefits of this tool, will be able to conclude an agreement on this dossier soon.

² Proposal for a Regulation on the Statute for a European private company COM(2008) 396/3.

³ <http://www.europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/07/592&format=HTML&aged=0&language=EN&guiLanguage=en>.

BUSINESSEUROPE COMMENTS ON THE COMMISSION PROPOSAL

As previously advocated by BUSINESSEUROPE⁴, the SPE should:

- Be a legal form available to all, on a voluntary basis, whether natural or legal persons, single or multiple shareholders;
- Be eligible to be formed from scratch, 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 SPE would be intended to conduct operations having a European aspect broadly defined;
- Be based on contractual freedom;
- National 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 law;
- 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 SPE registered office (i.e. national laws).

We are pleased to see that the Commission has taken into account BUSINESSEUROPE's views when elaborating its proposal.

Although fully supporting the Commission initiative, BUSINESSEUROPE would like to offer some comments on specific issues, which we believe will make the use of this tool more flexible and accurate, as set out below.

⁴ Response to the consultation on a possible statute for a European Private Company (SPE), (MARKT/19.07.2007), 5 November 2007.

1. Law governing the SPE

BUSINESSEUROPE has considered⁵, that in order to ensure clarity of the SPE and to provide shareholders and third parties with an effective degree of legal certainty, the SPE should be governed by an EU regulation, containing provisions on essential issues, and by its articles of association within the principle of contractual freedom, without any reference to member states' legislation.

As mentioned above, national 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 law.

However, the draft regulation refers to national company law in a few cases. In this context BUSINESSEUROPE has the following remarks:

▪ Shareholder resolutions

BUSINESSEUROPE considers that the proposal for a regulation should include rules on the legal consequences of shareholder resolutions. In our view, shareholder resolutions should only become inoperative in the case of fundamental violations. Furthermore, it is important to set a minimum contestation period, which the shareholders can increase.

▪ Inoperative articles of association

The regulation should also clearly define the legal consequences of inoperative articles of association, whereby the nature of the specific legal consequences themselves would be subordinate.

2. Distributions

BUSINESSEUROPE believes that article 2.1 should include a provision making it clear that payments between the company and the shareholder which are covered by a benefit in return, reimbursement clause and which are on conditions customary for the market should not be regarded as distributions, in order to limit the scope of this definition in paragraph 2.1 (b) and in article 2.2. This concept includes not only one-sided payments such as dividends or payments due to distribution of reserves, but any flow of assets. Bearing in mind that article 27.1 (e) of the draft regulation requires any distribution to the shareholders to be the object of a resolution by the shareholder meeting, an addition such as the one proposed above will ensure that only payments in business transactions between company and shareholder that are a financial benefit in relation to the shares held by the shareholder would have to be submitted for a shareholder resolution.

⁵ Response to the consultation on a possible statute for a European Private Company (EPC), (MARKT/19.07.2007), 05 November 2007.

3. Prohibition of public offer of SPE's shares

According to article 3.1 (d) the company is deemed to be a private company if “its shares shall not be offered to the public and shall not be publicly traded”. BUSINESSEUROPE believes that a trade-off between mandatory and enabling rules regarding the internal management of the company is strictly related not only to the offering of shares to the public, but to the offering of any other financial instrument. In this respect it should be forbidden for an SPE to offer to the public shares or any other financial instruments.

Regarding the definition of public offer, it could be advisable to make direct reference to the definitions of public offer as it is contained on the article 2 of directive 2003/71/EC. Article 3.2, in fact, contains the same definitions of the quoted directive, however a direct reference to the directive could give assurance that any change to the original definition of public offer, should be automatically transferred to the SPE statute.

4. Conflicts of interest

We believe that conflicts of interest are part of company' life. Hence, it seems problematic to state that a director must avoid any situation that can be reasonably regarded as likely to give rise to an actual or potential conflict of interest, even if it is possible to derogate from this rule in the articles of association.

It seems more appropriate to focus on agreements between a director or a shareholder and any related parties and the SPE, and to provide for an authorisation of those agreements by the body stipulated in the articles of association.

BUSINESSEUROPE proposes that article 31.3 is amended so as to reflect that, as a default rule, and if no provision is made in the articles of association on how to tackle conflicts of interest, it is for the management body or shareholder decision representing more than 50% of the eligible votes, according to the articles of association, to authorise any agreement entered into, either directly or through an intermediary between the SPE and one of its directors or one of its shareholders holding more than 10% of voting rights or, in the case of a corporate shareholder, the company which controls it. Regarding the procedure for authorisation of any actual or potential conflicts of interest, the director or concerned shareholder should not count for any quorum requirement for any meeting and their votes should not be counted at any meeting for determining whether any authorisation will be given.

5. Transfer of shares

Article 16.1 provides that a decision introducing or amending a restriction on or prohibition of the transfer of shares may be adopted only with the consent of all shareholders affected by the restriction or prohibition in question. The explanatory memorandum provides that in such cases the decision requires the consent of each shareholder affected by the restriction or prohibition. BUSINESSEUROPE believes that, in order to strike a proper balance between majority and minority interests, the unanimity requirement should be replaced by qualified majority rule.

6. Majority requirements

Whereas a majority of at least two thirds is required for a wide range of structural decisions, only a simple majority is applicable for capital increases (article 27.1 (h) and 2). This question is of particular relevance to minority shareholders and as a result we propose that it is included in the list enumerated in paragraph 2.

7. Refusal to supply information

Article 28, 2 of the Commission proposal gives the management body the right to refuse access to information if the business interests of the SPE would otherwise be seriously harmed. However, BUSINESSEUROPE believes that, taking into account that SPE is a private company, within the principle of contractual freedom, the regulation should allow articles of association to specify this condition.

8. Right to request a resolution and right to request an independent expert

The Commission proposes that on article 29 shareholders holding 5% of the voting rights attached to the shares of the SPE shall have the right to request to the management body to submit a proposal for a resolution to the shareholders and that in case of suspicion of serious breach of law or of the articles of association shall have the right to request the competent court or administrative authority to appoint an independent expert to investigate and to report on the findings. Moreover, it considers that the articles of association may grant these rights to individual shareholders or shareholders holding less than 5% of the voting rights attached to the shares. BUSINESSEUROPE considers that this figure should be replaced by 10% of the voting rights attached to the shares as in the case of private companies this percentage seems more appropriate.

We would also like to draw attention to the fact that shareholders' right to request the competent court or administrative authority to appoint an independent expert to investigate and to report on the findings, in case of suspicion of serious breach of law or of the articles of association, will prove very expensive for SMEs. Therefore we suggest the deletion of that provision.

9. Other references to national provisions

The draft regulation also makes regular reference to member states' national provisions adopted to implement particular directives. For the purpose of clarification, it should be stipulated clearly that these provisions are applicable if they apply in the member state for comparable national corporate forms.

10. Minimum capital

BUSINESSEUROPE fully supports the set of the SPE minimum share capital at 1 euro. This symbolic amount will facilitate start-ups, as advocated by the Commission, and reflects the fact that SMEs will be potentially the biggest users of this tool. However, we believe that if this requirement will raise problems for certain member states, a compromise should be found and a reasonable amount agreed.

11. Cross-border dimension

BUSINESSEUROPE supports the Commission decision not to introduce the requirement that the SPE should have a cross-border dimension. BUSINESSEUROPE considers that this dimension is not necessary in order to allow sufficient flexibility for companies. The SPE should be available to companies which, as a first step, want to set up their business at national level and only later expand their business across borders.

12. Tax-related issues

For reasons of legal certainty and with a view to avoiding double taxation, the Commission and member states are urged to extend the relevant Community tax rules to the SPE without delay.

13. European jurisprudence database on the SPE

BUSINESSEUROPE would like to suggest the creation of a database to serve as a jurisprudential platform for application and interpretation of the SPE by member states. However, when this platform is consulted, national corporate specificities and national company law traditions should be borne in mind. This platform could be incorporated in e-justice portals and be managed by interested business and justice parties.

14. Articles of association

BUSINESSEUROPE very much welcomes the initiative by the Commission to draft and present model articles of association on the SPE. These models should include a very simplified form for single member companies. We believe this will lead to some clarity and a more user-friendly statute. We believe that the model articles should be translated into all EU official languages from the first day the regulation enters into force.

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