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**CONSULTATION ON A POSSIBLE STATUTE
FOR A EUROPEAN PRIVATE COMPANY (EPC)**

Consultation by the Services of the Internal Market Directorate General

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Consultation document of
the Services of the Internal Market Directorate General

Preliminary remark

The following document has been drafted by the services of the Internal Market Directorate-General in order to assess the economic need for a European Private Company (EPC) in addition to already existing European legal forms, i.e. the European Economic Interest Grouping (EEIG), the European Company (SE) and the European Co-operative Society (SCE). The following document provides indications of the issues that may be addressed in a possible legal instrument. It does not reflect the European Commission's views and is without prejudice to its future decisions on further measures concerning the EPC, if any.

(1) INTRODUCTION

I. The purpose of the consultation

In its Action Plan on Modernising Company Law and Enhancing Corporate Governance in the EU¹, the Commission foresaw, as a short term priority, the launch of a feasibility study to evaluate the advantages and the drawbacks of a possible European Private Company Statute (EPC). Depending on the outcome of the feasibility study, an initiative could be put forward in the medium term.

The EPC concept was initially developed by business and academic circles. Over time it gained broad support from organisations representing business and industry as well as from the European Economic and Social Committee. Several studies have been conducted on this subject, both by business organisations and academics. All proposed a European legal form for private companies which would take account of their needs for more flexibility in organising their structure and internal relations.² The main reason for these proposals was that the national legislation governing private companies in the Member States varies widely due to different national legal traditions and the lack of harmonisation in this field. This divergence is seen as a legal barrier for businesses acting in the form of private companies in more than one Member State.

The Commission commissioned a feasibility study on a possible EPC the results of which were presented in December 2005. The question of the need for an EPC was also posed in the public consultation of spring 2006 on the future priorities of the Commission Company Law and Corporate Governance Action Plan.³

Furthermore, in February 2007, the European Parliament adopted a resolution requesting the European Commission to draw up a statute for a uniform EPC. Recommendations as to the possible content of such statute are annexed to the Resolution.⁴

The results of the feasibility study and the spring 2006 public consultation show that the views of stakeholders are not uniform either on the need for the EPC or on the scope and content of the possible Statute.⁵ In the public consultation, a significant number of respondents supported the initiative or rather an idea of a uniform supranational company Statute. Nonetheless a number of them considered this initiative as of low relevance either because it does not attract sufficient interest from the industry or because it is premature as the European Company Statute or the cross-border merger directive have not yet produced their full effect. There are also views that, following the recent case law of relevance to corporate mobility, there is no need for an additional corporate form in the EU. Furthermore, the feasibility study has not covered all aspects of the analysis required for the preparation of the impact assessment. The possible matters to be covered by the EPC Statute, in particular those suggested by the European Parliament in its report, should also be subject to a consultation.

¹ http://ec.europa.eu/internal_market/company/modern/index.htm

² For the purpose of this paper a private company is considered as a company which: a) does not issue shares to the public; b) whose shareholders are usually bound by a strong bond of partnership.

³ http://ec.europa.eu/internal_market/company/consultation/index_en.htm

⁴ European Parliament - Report with recommendations to the Commission on the European private company statute (2006/2013(INI)).

⁵ The term "Statute" refers to the possible legal instrument which would set out the rules on the EPC in the Community law.

In order to be in a better position to assess the need for and the possible content of an EPC Statute, the Services of the Internal Market Directorate General have decided to launch a specific public consultation on the EPC. A questionnaire has been developed for this purpose with the involvement of the Advisory Group on Corporate Governance and Company Law. The objective of the consultation is to prompt comments on specific potential measures directly focused on the question whether, and if so by what means, the EPC concept should translate into reality. Consultations form part of the impact assessment process that aims at carrying out the cost-benefit analysis of any possible future measure on the issues in question.

Responses to this consultative paper should be concise, focused principally on the questions raised and provided **no later than 31 October 2007**. They should be sent to DG MARKT, unit F2, European Commission, B-1049 Brussels. Responses may also be sent by e-mail to Markt-F2@ec.europa.eu.

Unless an explicit request is made for confidential treatment, contributions will be treated as documents that the Commission can make public. The results of the consultation will be published at: http://ec.europa.eu/internal_market/company/epc/index_en.htm.

II. Do SMEs need a European Private Company?

The Commission Lisbon Agenda (2005)⁶ underlines the importance of small and medium-sized companies (SMEs) which account for ninety percent of all companies and two thirds of jobs, for the competitiveness of the European economy. However, companies still face serious problems and costs when they want to operate or conduct business cross-border. SMEs, with their limited financial and personal resources, are those most affected by regulatory and administrative burdens. In particular, small companies wishing to expand their activity to other Member States by setting up a branch or a subsidiary⁷ often have to incur substantial costs in terms of time and expertise in order to acquire the necessary information about different national laws and regulations.

Existing European forms, i.e. the European Company Statute, the European Co-operative Society or the European Economic Interest Grouping, are not considered as sufficient to address the SMEs' needs. The SE Statute is designed for public companies, and perceived as too rigid and too expensive for smaller companies. Both the SE and the SCE are not genuinely uniform vehicles due to a strong influence of the national rules on their shape and functioning. Although the EEIG could facilitate cross-border co-operation between SMEs, it may not serve as a substitute to a classic corporate legal form.

However, in recent years, several measures which may contribute to the increased mobility of SMEs have been adopted at EU level. By way of example, one aim of the Services Directive was to increase the possibilities to provide cross-border services. The Directive on cross-border mergers, which will apply from December 2007, sets out a harmonised legal framework for

⁶ see SEC (2005) 981.

⁷ The main differences between a **subsidiary** company and a **branch** are the following:

- (a) **legal personality** – a subsidiary has a separate legal personality from its parent company, while a branch forms an integral part of the undertaking which created it and doesn't have a separate legal personality;
- (b) **contracts with third parties** - a subsidiary concludes them in its own name, whereas a branch acts on behalf of the undertaking of which it forms part;
- (c) **liability** - a subsidiary is liable for its commitments with its own assets, while in the case of a branch liability extends to all the assets of the undertaking of which it forms part;
- (d) **the assets** – a subsidiary company may own its assets, while the branch assets are the property of the undertaking of which it forms part.

mergers of businesses from different Member States. These measures, once in application, should substantially improve the integration of SMEs in the internal market. In addition, the Commission's Action programme⁸ which sets as a target a 25% reduction of administrative burdens by 2012 should significantly contribute to improving the entrepreneurial environment.

Respondents to this consultation are requested to assess the need for the EPC Statute in the context of recent and forthcoming market developments and consider whether the EPC form, the principles of which are presented below, answers sufficiently and appropriately to their needs.

III. Which model of a European Private Company Statute?

The main purpose of the EPC would be to make cross-border operations within the EU easier, so that a company in one Member State can, with minimum cost and delay, set up one or more operating companies in other Member States. The process may be easier if these new companies have a similar legal framework and constitution in each Member State where they are registered⁹. Such companies will be labelled as EPCs.

Supporters of the EPC Statute believe a uniform but flexible European form to be the appropriate solution to the problems faced by SMEs today. The EPC would have legal personality, enjoy limited liability and be governed by the uniform company law rules across Europe. It would also be less rigid and more open to small companies than the European Company Statute. It is claimed that the EPC would make it easier and cheaper for SMEs to operate their cross-border business by setting up joint ventures or get organised as European groups and networks of companies according to the same rules embodied in the EPC Statute and a company's articles of association. It would give SMEs a European corporate form, now only available to large companies (i.e. the SE).

The objective of a European Private Company is to provide uniform rules on the form, organisation and functioning of a company. Therefore, it should be clear from the start that the Statute does not aim at providing a complete regime for SMEs but rather to provide a set of company law rules facilitating cross-border operations within the EU. Issues, such as accounting, insolvency law, tax law, labour and social security law and criminal law would not be covered by the Statute. Regarding these matters an EPC would be subject to the national law of the Member State where it is registered.

Before respondents address the questions presented in this document they should be aware of the different possible EPC models as well as the different possible regulatory approaches to the EPC Statute. They are briefly presented below.

3.1. Possible EPC models

Two basic EPC models are being contemplated:

Model A - An EPC having multiple shareholders

⁸ Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions on "Action programme for reducing administrative burdens in the EU", (COM(2007)23 final)

⁹ For the purpose of this document the word "constitution" has the same meaning as "articles of association" or "company statutes".

The multiple-shareholder model would permit wide shareholder participation. Any natural or legal person may take part in the establishment of the EPC. Accordingly this would require a company law framework which ensures that shareholder decisions are properly taken and minority shareholders' interests protected (provisions on company formation, shareholders, share capital, general meeting, management, termination of the company, etc.).

Model B - A simplified EPC restricted to a single shareholder

The necessary regulatory framework for the single-shareholder model might be simpler than for the multiple-shareholder one, because it would not be necessary to provide rules on the relations between shareholders, different classes of shares, etc. The single shareholder may be either a parent company or a natural person. This model could be of interest to companies wishing to form a network of (wholly-owned) subsidiaries to conduct operations in other Member States.

The scope of the issues covered by the EPC Statute (section III of this questionnaire) would depend on the model chosen. In addition, both models would have to deal with questions related to e.g. creditor protection, employee participation.

3.2. Possible regulatory approaches to the EPC Statute

The EPC could either be a very flexible instrument, giving the members of the company a lot of freedom to find contractual solutions or provide a tighter frame based on a more detailed but more uniform set of rules within the Statute itself. Depending on the approach chosen for the EPC, there would be different implications for its final shape. Different regulatory options are presented below with an indication of possible advantages and drawbacks. The two options are at the two ends of the regulatory scale. The objective is to find a regulatory method that creates an optimal equilibrium between legal certainty and contractual freedom.

Option 1 – A comprehensive and complete Statute

A comprehensive and complete Statute would contain autonomous rules for an EPC on all major issues relating to the organisation and functioning of a company, without references to the national company law regime. It would leave limited possibility to founders/shareholders to depart from its provisions in the articles of association.

In this context, the experience of negotiations of the European Company Statute should be recalled. The initial draft SE Statute contained a complete set of rules to regulate the organisation and functioning of the European Company autonomously and independently from the national laws. As no political agreement among the Member States could have been reached on such an ambitious proposal, a new approach had to be developed, i.e. a Statute containing independent rules on the SE to the extent possible and referring for other issues to the national laws of the Member States.

Characteristics:

- uniform Statute across the EU, containing a complete set of rules for the EPC;
- more legal certainty regarding the applicable company law rules;

- reduced counselling/advisory costs for companies;
- lengthy and possibly complex Statute;
- limited contractual flexibility for members;
- the application of national civil law rules would be reduced but not avoided.

Option 2 – A flexible Statute

A Statute containing provisions on some core issues which are essential for the functioning of a company and determining the matters that must be included in the articles of association, leaving the founders freedom as to how to regulate those matters. The founders would also have the option either to adopt, fully or partly, model articles of association attached to the Statute or regulate the issues mentioned in the Statute otherwise. References to the national company law regimes should be avoided. As regards the matters not covered by the Statute or the articles of association, there are two possible solutions:

Option 2a. Under this option, matters not covered by the Statute or the articles of association, in principle, could be covered (in the following order of relevance): by a reference to the general principles of the Statute, the general principles of European company law and the general principles common to the national laws, provided that they are not inconsistent with the provisions of the Statute and Community law.¹⁰

Option 2b. Under this option, matters not covered by the Statute or the articles of association should be covered by a reference to the national law of the Member State where the EPC is registered.

Such model of an EPC would give more flexibility to the members of a company than option 1. However, such statute would not lead to the emergence of one uniform structure of the EPC across the EU. Allowing broad contractual freedom would result in a variety of EPC structures in the EU but could lead to enhanced convergence of the national company law regimes in the long run.

Characteristics:

- flexibility, giving members a lot of freedom in deciding upon the structure and the functioning of the company;
- possibility for groups of companies which have establishments in different Member States to apply the same company law rules to all their subsidiaries;
- does not achieve one uniform model of the EPC in the entire EU as the freedom given to shareholders in shaping the articles of association would result in many different EPC structures across the EU;
- could still involve some counselling/advisory costs, in particular in the case of drafting articles of association not based on the model provided by the Statute;

¹⁰ The legal and technical difficulties of this approach would be very significant given the problems related to identifying "general principles of European company law".

- legal uncertainty as regards the rules applicable if a matter is not regulated by the Statute or the articles of association (**Option 2a**);
- the EPC would, to certain extent, be subject to the national law, e.g. as regards the issues of general civil law such as conclusion of contracts (**Option 2b**).

IV. The structure and the core elements of a European Private Company

As explained in chapter III, there are different models and regulatory approaches for the EPC. There is no uniform view on the scope, the content and the structure of a possible Statute.

The main purpose of the EPC is to make cross-border operations within the EU easier by providing entrepreneurs with the possibility to establish companies having similar legal framework and constitution in each Member State where they are registered.

EPCs, as other companies, will need to be subject to company law in one form or another. Company law aims to balance and, where appropriate, protect the interests of the various stakeholders and participants – mainly shareholders, creditors, and directors. Countries require this *quid pro quo* in return for granting shareholders the benefit of limited liability in their national law. Much of company law is therefore concerned with the way in which the company is administered by its directors and shareholders.

To meet the objectives described above, the legal framework for the EPC should be very similar in the Member States. Therefore, it has to be determined to which extent the company law framework for the EPC can be set out at EU level, rather than relying on the existing legal framework of Member States.

V. Social aspects – employees' involvement in the company's decision-making process

The right of workers to participate in the decision-making process of a company is regulated differently across the EU. Negotiations on the European Company Statute showed that reaching an agreement on a common European standard on workers' participation is difficult. Therefore, departing from the compromise reached on this issue in relation to the European Company¹¹ would seem difficult.

Employees' participation is relevant for companies of various sizes. Therefore it may be necessary to include some provisions in a Statute for a European Private Company. The EPC should not become a vehicle which could be used to disregard workers' acquired rights. At the same time since the EPC would be a legal form mainly targeted at SMEs, it should respect their needs for flexibility and not be unduly burdensome.

¹¹ Directive 2001/86/EC supplementing the Statute for a European company with regard to the involvement of employees (available in pdf format at: http://ec.europa.eu/employment_social/labour_law/docs/directive2001_86_en.pdf).

(2) THE QUESTIONNAIRE

The main parts of the questionnaire (**sections II-V**) follow the structure of the explanatory part.

Questions in **Section I** intend to gather information about the respondents.

Section II aims at exploring the difficulties companies (especially SMEs) face when they conduct cross-border business activity in the EU as well as gathering stakeholders views on different possible solutions to these problems.

In **Section III** respondents are requested to indicate their preference as to the possible model of an EPC and the regulatory option.

Section IV contains questions related to the possible content of an EPC Statute.

Section V focuses on social aspects, in particular the issue of employees' involvement in the company's decision-making process, in relation to the possible EPC Statute.

In **Section VI** stakeholders are invited to provide additional comments.

Furthermore, the **Annex** of this questionnaire aims at collecting data for the purpose of the impact assessment on the EPC Statute which the Commission is required to deliver before putting forward any legislative or non-legislative proposal. Such economic assessment has to prove the added value of the EPC Statute. Therefore, respondents who would wish to contribute to the impact assessment are invited to provide responses to the questions listed in the Annex.

I. Information about the respondent

A. Name of the company/organisation and your function

B. Its legal form/size/field of activity

C. Indicate whether you conduct cross-border activity and in which form (branches, subsidiaries¹², provision of services, export/direct sales of goods) and/or plan to expand your activity to other Member State(s) in the foreseeable future? If so, please indicate in which Member State(s).

II. Do SMEs need a European Private Company Statute?¹³

Question 1

Q 1.1. Do you face barriers related to the legal form of your company¹⁴ when you are conducting cross-border activity¹⁵?

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

¹² For the explanation of the differences between a subsidiary and a branch please see footnote 7.

¹³ When questions in section II refer to the EPC, respondents should reply to them having in mind the preferred model of the EPC as presented in Section III of the Introduction. The respondents will be requested to indicate the preferred model of the EPC in Section III of the Questionnaire (questions 9 and 10).

¹⁴ i.e. solely company law related barriers, excluding financial or language barriers, regulatory issues related to consumer protection or to the sale of goods or provision of services, etc.

¹⁵ Cross-border activity for the purpose of this questionnaire encompasses any business a company carries out in another Member State.

- 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?).

Question 2

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

- yes, in particular because:

- companies may operate under a foreign legal form, following the recent case law on corporate mobility;
- companies have the possibility to merge with businesses from other Member States;
- other reasons;

- no (please give reasons).

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.

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 subsidiaries¹⁶ in the form of an EPC?

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.

Question 6

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

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)?

¹⁶ Usually companies owned by only one shareholder, which often is a holding company. Such holding company may wish to do business in different Member States by means of subsidiaries established according to the national law of these Member States. The subsidiaries are usually owned solely or with a controlling majority by the holding company.

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?

III. Which model of an EPC?¹⁷

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.

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.

IV. The structure and the core elements of a European Private Company

Question 11

Please indicate in the table below, by ticking the appropriate box(es) in columns (2)-(4) or (5)-(7) (depending on which model you have chosen in Question 9), whether in your opinion certain elements of company law would be best dealt with:

- under a possible EPC Statute (**EU**) or
- should be left for the shareholders to decide in the articles of association (**AoA**) or
- should be referred to existing national law in the Member State where the EPC is registered (**MS**).

¹⁷ If you consider that there is no need for an EPC Statute you may leave the questions in section III unanswered.

If you believe that the regulation of a certain issue should be dealt with by more than one category of rules (e.g. by EU and AoA), please indicate it in the table and list the issues that should be covered by the EPC Statute in the box for comments.

Table. Column 1 sets out some of the main elements of company law which apply to private limited liability companies in most Member States. In columns (2)-(7) respondents should indicate at which level (EPC Statute, articles of association or national law) should the issues be regulated with regard to Model A (columns (2)-(4)) or Model B (columns (5)-(7)). Certain matters may not be dealt with in the articles of association, therefore some boxes cannot be filled and are crossed out.

MAIN ELEMENTS OF COMPANY LAW	Full EPC: multiple shareholders			Simple EPC: single shareholder			No view	Comments
	EU (2)	AoA (3)	MS (4)	EU (5)	AoA (6)	MS (7)	(8)	(9)
FORMATION								
Formation								
Registration		X				X		
Name of company								
Public disclosures		X				X		
SHAREHOLDERS								
Keeping records		X				X		
Information rights								
General meeting (convocation)								
Resolutions, voting								
Minority rights								
Mergers								
SHARE CAPITAL								
Minimum legal capital								
Share classes, rights								
Offers, issues								
Pre-emption rights								
Minimum capital								
Capital increase								
Capital reduction								
Distribution limits								
Redemptions								
Public disclosures		X				X		
Creditor protection								
MANAGEMENT								
Nomination of directors								
Powers of directors								
Duties of directors								
Eligibility								
Liability								
Public disclosures								
Board structure								
Conflicts of interest								

Question 12

12.1. Do you agree that the possible elements of company law listed in the table are exhaustive for the EPC?

12.2. If your answer is no, do you think that:

- other elements should be added to the list? If so, which ones?

- some elements should be removed from the list? If so, which ones and why?

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)¹⁸,
- 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.

VI. Other suggestions

This consultation paper reflects the questions brought up during the discussions of the last two years.

Interested parties are invited to indicate in their responses whether, in their view, any additional aspects should be taken into account to facilitate the cross-border business of small and medium-sized companies, company groups, or other enterprises having interest in an EPC.

¹⁸ For more information see footnote 11.

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.

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.

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.

Question

Q A3.1. If your company is part of a group of companies, would you consider setting up subsidiaries in the form of an EPC? Please explain the reasons. In particular, please indicate approximately how big would be a cost savings for your company (in Euro):

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

Q A3.2. 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.