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Consultation Paper from the European Commission on a possible Statute for a European Private Company (EPC)

CCBE response

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The Council of Bars and Law Societies of Europe (CCBE) represents more than 700,000 European lawyers through its member bars and law societies of the European Union and the European Economic Area. The CCBE responds regularly on behalf of its members to policy consultations which affect European citizens and lawyers.

The responses of the CCBE to the consultation are set out below:

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?

Yes. The members of the CCBE Company Law Committee have noticed that their clients face various barriers when conducting cross-border activity, especially small and medium-sized companies which do not have sufficient legal resources.

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?).

As already stated in 2002, the lack of a single legal form for companies conducting cross-border activities involves considerable costs which are particularly burdensome for SMEs. Unlike large enterprises, SMEs usually have no in-house legal departments at all or only small ones. An SME therefore needs to turn to outside counsel when setting up and operating subsidiaries in different European countries, each of which has its own corporate law regime. This barrier to the cross-border establishment of subsidiaries would be greatly reduced if the legal form of the subsidiary in all countries was the same. Everyone in the SME dealing with European subsidiaries would benefit from this change since the corporate life of all such subsidiaries would follow the same rules¹. In addition, the foreign investors sometimes encounter some difficulties when setting up companies in Member States in the form of joint ventures. A single legal form, common to all Member States, could facilitate this type of investment.

¹ Response of the CCBE Company Law Committee to the consultative document of the Commission's High level group on "A Modern Regulatory Framework for Company Law in Europe" (June 2002), p. 17.

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).

No. The only existing instrument, the European Interest Grouping, is definitely not an alternative to the European Private Company, because of its many restrictions (e.g. auxiliary activities only, profit making only on behalf of its members, joint and several liability of the members). These deficits are the main reason for the low aggregate number of EIGs that have been formed over the years².

However, it is important to take account of the case-law of the European Court of Justice (Überseering judgment), which provides that each European company is free to establish itself in another Member State, while pointing out that the legal personality it has been granted in its country of origin should be respected.

The European Private Company Statute could and should examine in detail whether it would be possible for a French company to have a French subsidiary in Germany, this subsidiary remaining subject to the French law, even if the issue remains as to whether such a measure is appropriate, taking account of its potential tax implications.

Question 3

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

The EPC is not only needed, for the reasons outlined in the answer to question 1, but it is also very desirable in order to achieve equality. It would put an end to the discrimination between the big companies, which may adopt the form of a European Company, and the SMEs, which have no such option, since the lack of flexibility and high operational costs of the SE are not suitable for SMEs. Such discrimination is even less justified since the main difficulties that have characterised the creation of the SE will not apply in the case of the EPC, since it is possible to restrict this legal form to companies with less than 500 employees³.

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?

Certainly, since, although some SMEs are able to bear the costs arising from the diversity of laws applicable in Europe, most of them are forced to forgo any cross-border activity, or at least to limit it. Furthermore, it must be observed that the EPC would be very interesting in the case of joint ventures⁴.

² CCBE Response to the European Commission Consultation on Future Priorities for the Action Plan of Modernising Company Law and enhancing Corporate Governance in the European Union, p. 10.

³ Response of the CCBE Company Law Committee to the consultative document of the Commission's High level group on "A Modern Regulatory Framework for Company Law in Europe" (June 2002), p. 18.

⁴ Company Law Committee meeting of 20 April 2007.

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.

Since the costs concerned arise from the diversity of existing legal regimes, the only way to cut them is to unify these various regimes.

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,

In our view, the question is not properly presented: our experience shows that it is not possible to give it a global answer. The question must be examined on a case-by-case basis, taking account of various criteria, such as the company's area of activity, the taxation applicable, etc.

In many cases, however, it may be observed that cross-border service provision is not the best solution where management costs, marketing, establishment of close relationships with the clients and co-investment with local partners are concerned.

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)?

In our view, the setting up of a business in another country without a clear legal framework cannot in any case be advocated, as it leaves too many uncertainties as to the applicable law and taxation.

However, we think the question is not properly presented: our experience shows that it is not possible to give it a global answer. The question must be examined on a case-by-case basis, taking account of various criteria, such as the company's area of activity, the taxation applicable, etc.

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.

The CCBE is in favour of the creation of the EPC, because of the simplification and cost reduction it could bring. However, it is difficult to choose between the two models put forward by the Commission

(single shareholder model or multiple shareholders model), as the CCBE is convinced that a maximum flexibility and a very wide freedom of choice should be left to the shareholders.

Like the French SAS (Société par actions simplifiées), which can be a one-person company or have multiple shareholders, we believe the EPC Statute should rely on the shareholders' choice on that point.

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 main problem that our clients face is to know which legal form to adopt in order to conduct their business in another country or to set up a joint company with a foreign entity. We therefore consider that the EPC Statute could prove to be extremely useful as regards the setting up of subsidiaries or the creation of joint ventures, on condition that this statute gives the shareholders greater contractual freedom.

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.

See answer to Question 5.2. below.

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.

In our view, the European Private Company must provide for the legal framework and the principles which should govern the companies operating across Europe while freeing itself as far as possible from the existing national rules. Our answers to the table of the Question 11 show which issues should be, in our view, covered by the EPC Statute and not by the national law.

Question 6

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

The members of the CCBE are of the view that the European Private Company should be allowed to have headquarters that are distinct from its registered office. However, the CCBE highlights that the existence of headquarters being distinct from the registered office could make it difficult to determine the law applicable to the company, particularly in related fields of company law, such as taxation, social legislation, bankruptcy law, etc.

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?

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Any person, natural or legal, alone or not, should be able to set up an EPC⁵. The only acceptable limitation would be a cross-border requirement. Although such a requirement was provided for in the initial proposal, it is no longer contained in the European Parliament's recommendations included in the Resolution of February 2007. This omission, for which no explanation has been given, raises two issues: first, it raises the question of the legal competence of the European Community to deal with the EPC issue; secondly, this change could reduce the project's political acceptability⁶.

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

Yes⁷.

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

Not necessarily. The EPC Statute should allow sufficient flexibility and give the main actors, i.e. the shareholders, the freedom to choose which model (single shareholder or multiple shareholders) they want for their organisation. Furthermore, in order to have a scope of application as broad as possible, for SMEs as well as for company groups, the EPC Statute should be a flexible tool that can be adjusted to various circumstances. Finally, it must be highlighted that, if the European Private Company was to be restricted to a single shareholder, this legal form could not be used to establish partnerships in the form of joint ventures, which are particularly important for the new Member States.

Question 8

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

It would be unfortunate if the taxation issues that were addressed with the SE were to be forgotten in the creation of the EPC. However, if no agreement is reached between the Member States on these taxation issues, the EPC Statute will nevertheless remain extremely useful for the reasons outlined in the answer to Question 4 above.

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

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.

The CCBE believes that maximum flexibility should be granted. For this reason, the committee would prefer a model that allows the setting up of a company having multiple shareholders or a single

⁵ Response of the CCBE Company Law Committee to the consultative document of the Commission's High level group on "A Modern Regulatory Framework for Company Law in Europe" (June 2002), p. 18.

⁶ Company Law Committee meeting of 20 April 2007.

⁷ Response of the CCBE Company Law Committee to the consultative document of the Commission's High level group on "A Modern Regulatory Framework for Company Law in Europe" (June 2002), p. 18.

shareholder, according to the choice of those concerned. In our view, the setting up of these two types of structures should be considered simultaneously, in a single EPC Statute.

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 option.

The EPC, compared to the SE, should provide much greater flexibility⁸, but this flexibility must come from the possibility for the partners to set themselves the main operational rules of their company, not from references to national law. The EPC must be resolutely European and, as such, must exclude any fall-back on national company law, which means that the Statute laid down in the European Regulation must be comprehensive and complete enough⁹. Therefore, the Statute should fully set out all appropriate principles, but it must leave the application of these principles to the discretion of the parties to the memorandum of association.

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), 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**).

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.

First of all, it should be noted that the CCBE believes that a greater flexibility should be given to the shareholders regarding the structure of their relations within the European Private Company. Accordingly, we believe that the EPC could operate under either a one-tier (Chairman and Board of Directors) or a two-tier system of administration (Executive Board and Supervisory Board), according to the choice of the shareholders.

⁸ Response of the CCBE Company Law Committee to the consultative document of the Commission's High level group on "A Modern Regulatory Framework for Company Law in Europe" (June 2002), p. 17.

⁹ Response of the CCBE Company Law Committee to the consultative document of the Commission's High level group on "A Modern Regulatory Framework for Company Law in Europe" (June 2002), p. 19.

	Full multiple shareholders EPC:			Simple single shareholder EPC:			No view	Comments
	EU	AoA	MS	EU	AoA	MS		
FORMATION								
Formation	X			X				
Registration	X			X				
Name of company		X			X			
Public disclosures	X			X				
SHAREHOLDERS								
Keeping records	X			X				
Information rights	X			X				
General meeting (convocation)		X			X			
Resolutions, voting		X			X			
Minority rights	X			X				
Mergers	X			X				
SHARE CAPITAL								
Minimal legal capital	X			X				
Share classes, rights								(1)
Offers, issues	X			X				
Pre-emption rights		X			X			
Capital increase								
Capital reduction	X			X				
Distribution limits	X			X				
Redemptions	X			X				
Public disclosures	X			X				
Creditor protection	X			X				
MANAGEMENT								
Nomination of directors		X			X			

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Powers of directors	X							
Duties of directors		X			X			
Eligibility		X			X			
Liability	X			X				
Public disclosures	X			X				
Board structure		X			X			
Conflicts of interest	X			X				

(1) The members of the CCBE Company Law Committee consider that the European Private Company Statute should apply only to non publicly-traded companies. Therefore it is necessary to provide the possibility for any European Private Company to adopt the form of a European Company before going to the financial markets.

Question 12

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

No

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?

In our view, these elements should be completed in order to include rules which do not necessarily belong only to company law, but govern a significant part of the companies' operation, such as social legislation, bankruptcy law, etc.

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 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.

From the experience with the SE, one can assume that this item will be one of the main issues at stake in future discussions on the EPC Statute. The consensus that was finally reached was that the

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SE cannot, in our view, necessarily be transposed to the EPC, which applies to entities whose nature and size are extremely different. However, the application of national provisions in a structure whose statute would essentially fall under European law is not necessarily desirable and may lead to social dumping.

The French experience has proved that the requirement for extremely low social standards (for example, the threshold of 11 or 50 employees required for establishing bodies representing the workforce) is in fact an obstacle to hiring. Therefore, if minimum social standards common to all European countries are to be introduced in the EPC Statute, these standards should, in our view, be of very limited scope.

The CCBE is of the view that the contracting parties should be given maximum freedom on this issue, but that discussions on common minimum social rules should take place in order to increase the EPC project's political acceptability.

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.