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# CCBE COMMENTS ON THE PROPOSED STATUTE FOR A EUROPEAN PRIVATE COMPANY

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## Introduction

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 on policy issues which affect European citizens and lawyers.

On 25 June 2008, the European Commission issued a proposal for a Council Regulation on the Statute for a European private company.

The CCBE would like to take part in the reflection on the adoption of a new Community act aimed at facilitating the establishment and development of small and medium-sized enterprises within the European Union.

In this respect, the CCBE would like to make several comments to the EU institutions on the proposal for a Regulation issued by the Commission.

## CCBE comments

At the outset, the CCBE would like to note that it has followed very closely the discussions about whether to impose a cross-border requirement for the future European private company or not. The majority of CCBE members are of the opinion that introducing an objective trans-national criterion would discourage the development of the European private company. They felt however that companies which will be set up under the European private company regime should include in the articles setting out the objects of the company a statement confirming their intention to carry out cross-border activities i.e. a subjective trans-national criterion.[1]

### Article 2 – Definitions

Under Article 2, the term "*director*" means "*any individual managing director, any member of the management, administrative board or supervisory body of an SPE*".

This definition is inaccurate and does not cover all the means of management under national laws in some Member States.

The CCBE proposes that the definition of "director" be drafted as follows: *any member of the management body or of the supervisory body of an SPE*". Besides, the proposal for a Regulation should clarify what is meant by "management body" or "supervisory body".

### Article 3 – Requirements for the establishment of an SPE

The CCBE shares the idea that the shares of a European private company should not be publicly traded and/or offered to the public.

[1] A minority within the CCBE felt that the establishment of a European private company should be subject to the objective criterion of trans-nationality; the minority proposes that a European private company should be duly established only on the condition that: i) it has at least two shareholders having their domicile or their registered seat in two different Member States of the European Union ; or ii) it establishes a filial or a branch in a Member State other than the one of its registered seat. The use of any other criterion (such as the obligation for the company to have activities in several Member States) would be difficult and create legal uncertainty, according to this minority opinion.

However, the CCBE finds that the definition of the concept of shares of the European private company being "offered to the public" should be rephrased to enable the possibility of carrying out some specific operations, such as the subscription of shares by employees of the company.

Therefore, it would be desirable that Article 3.2 of the proposal be drafted as follows: "*For the purposes of point (d) of paragraph 1, shares shall be regarded as 'offered to the public' where a communication is addressed to more than 20 persons who are neither employees, nor existing shareholders of the SPE in any form and by any means, and it presents sufficient information on the terms of the offer and the shares to be offered so as to enable an investor to decide to purchase or subscribe to these shares, including when shares are placed through financial intermediaries*".

**ARTICLE 9 – Registration**

The CCBE thinks that it would be useful to set up a European register of all the European private companies registered in EU countries. Indeed, the European private company aims at facilitating the establishment and development of small and medium-sized enterprises so that they could benefit from the opportunities of the single market but, any commercial partner needs to have reliable legal and financial information on the other contracting party especially when it is established abroad. Therefore, the CCBE would propose to set up a European register which could be easily consulted by any interested party.

**Article 10 – Formalities relating to registration**

Article 10.4(b) of the proposal provides notably that the registration of the European private company be subject to the fulfillment of one of the two following requirements: "*a control by an administrative or judicial body of the legality of the documents and particulars of the SPE*" or "*the certification of the documents and particulars of the SPE*".

In order to ensure legal certainty, the CCBE would recommend that the registration of the SPE be subject to the fulfillment of both these requirements.

Furthermore, the CCBE regrets the inaccuracy of the text, as the proposal does not mention the identity of the body in charge of the "*certification*" and the objective and the consequences attached of the certification.

The CCBE therefore recommends to the EU institutions to clarify the content of the obligation and proposes that this certification be carried out only by lawyers or notaries.

Finally, Article 10.5 of the proposal would require that any changes made to these documents be submitted to the register in charge of receiving constitutive documents of the company. The CCBE proposes that harmonized forms should be created by the EU institutions to reduce the operational cost of European private companies.

**Article 11 – Disclosure**

Article 11 imposes the disclosure of some legal particulars in all acts or documents sent by the company to third parties.

The CCBE would suggest that the list of particulars be completed by the mention of the capital of the company when it can be fixed at one euro.

**Article 14 – Shares**

This Article should be interpreted in the light of Chapter III of Annex I of the proposal.

The CCBE would like to draw the attention of the EU institutions to the fact that, as such, the proposal does not give any indications about the possibility to create shares with multiple voting rights attached

to them. The CCBE thinks that the proposal should include indications having regard to the diversity of national laws in this respect.

**Article 15 – List of shareholders**

Article 15 of the proposal obliges the management body to draw up a list of shareholders, to keep it and to make it available to shareholders and third parties.

When reading this Article, it seems that the list would not be publicly accessible. Therefore, the CCBE proposes that the list of shareholders be made public in order to protect the capital creditors. It might be useful for them to have information on the share-ownership of the company.

**Article 16 – Transfer of shares**

Under Article 16.2 of the proposal, "*All agreements on the transfer of shares shall be in written form*".

This Article seems to ignore the principle of the "simple agreement" which prevails in some Member States which do not impose the establishment of a written form to evidence the exchange of consent. Therefore, the CCBE would like the EU institutions to elaborate this Article further and notably mention whether a written form is requested to confirm the validity of the transfer or whether it is only of probative value.

**Article 17 – Expulsion of a shareholder**

Article 17 of the proposal provides for the means of expulsion of a shareholder within the European private company. The consideration of the terms of this Article shows that some clarifications are needed.

Article 17 provides that the expulsion of a shareholder can be implemented by a "*resolution of the shareholders and on an application by the SPE*". Yet, the text does not mention the quorum needed to adopt the resolution. The CCBE recommends that such a resolution be adopted by a two-third qualified majority.

Equally, Article 17.3 provides that the court decides "on payment of the price of the shares". Does this mean that the court itself sets the price of the shares of the expelled shareholder or that it appoints an expert to this end? The CCBE would favour the second option.

In addition, the proposal does not take into account forms of share-ownership where there is an apparent shareholder and a real shareholder. The ownership of shares through trusts is notably concerned here. In such a case, which shareholder would be expelled? Would it be the apparent shareholder or the real shareholder?

Finally, the CCBE would like to draw the attention of the EU institutions to the need to set the scope of this article, which is currently imprecise.

**Article 18 – Withdrawal of a shareholder**

Article 18 of the proposal gives the right to any shareholder to withdraw from the European private company as a result of one or more of the following events:

> *(a) "the SPE has been deprived of a significant part of its assets;*
>
> *(b) the registered office of the SPE has been transferred to another Member State;*
>
> *(c) the activities of the SPE have changed substantially;*
>
> *(d) no dividend has been distributed for at least 3 years even though the SPE's financial position would have permitted such distribution."*

The CCBE would find it useful to clarify the conditions to be met before the shareholder may exercise his right of withdrawal from a European private company.

What does "*deprived of a significant part of its assets"* mean? The scope of this condition should be defined. The CCBE proposes to consider that the "*SPE has been deprived of a significant part of its assets*" when it has not received "fair compensation" in exchange for the asset.

Furthermore, the implementation of the right of withdrawal of any shareholder should have a legal framework: it could be exercised only if the shareholder withdrawing himself/herself has not approved the events mentioned in points (a) to (d) on which he/she justifies his/her withdrawal.

**Article 19 – Capital**

The majority of CCBE members support a capital of at least EUR 1[2].

Article 19.3 of the proposal authorises a partial payment of the shares of the capital without setting any minimum amount to pay or a period of time within which to pay the remaining part.

The CCBE considers that the statutes of the company should fix a minimum amount to be paid (for example a fourth) and set a period for payment of the rest of the capital (for example five years).

**Article 21 – Distributions**

Under Article 21.1 of the proposal, it is possible to make a distribution to shareholders provided that, after the distribution, "*the assets of the SPE fully cover its liabilities*".

This requirement is extremely inaccurate to the extent that, in accountancy terms, the decrease of the assets is necessarily followed by an equal decrease of the liabilities.

The CCBE recommends using the concept of "distributable amounts": the management body should note the existence of "distributable amounts" prior to any distribution to shareholders. These should be equal to the profit of the financial year accrued with the balance carried forward and the reserves which the company can distribute freely minus the previous deficits and sums to be posted in the reserves under the law or statutes.

Article 21.2 of the proposal allows for the requirement that the management body of the European private company draw up a "solvency certificate" prior to any distribution to shareholders. This statement proves that the company will be able to pay on time the debts in the short term.

The text does not mention any consequences in cases where distributions are decided by the management body when it is not able to pay its debt on time, despite the "solvency certificate".

In such a case, the CCBE would favour that the members of the management body who have signed the "solvency certificate" be held liable for the company.

**Article 24 – Capital reduction**

Article 24 provides for the capital reduction of European private companies. In this respect, any creditor has the right to oppose it since the capital reduction might compromise the recovery of his credit.

[2] A minority proposed that the capital be fixed at 10,000 € at least. This sum, without preventing the creation of an enterprise, would contribute to the protection of social creditors.

The CCBE finds it necessary to restrict the right of opposition open to creditors in case of capital reduction. This right should not be exercised in case of capital reduction justified by losses; this reduction is then considered as stabilising the accounts.

**Article 26 – General provisions (Organisation of the SPE)**

The European private company has a management body which "*may exercise all the powers of the SPE not required by this Regulation or the articles of association to be exercised by the shareholders*".

This Article should be further elaborated in order to forbid the management body from exercising powers conferred on the supervisory body. The CCBE therefore proposes that the provision be phrased as follows: "The management body may exercise all the powers of the SPE not required by this Regulation or the articles of association to be exercised by the shareholders or by the supervisory body".

**Article 29 – Right to request a resolution and right to request an independent expert**

Under Article 29.1 of the proposal, shareholders holding at least 5% of voting rights have the right to submit proposals for resolutions.

In this regard, the CCBE suggests two changes to the text: first, the ceiling of share-ownership necessary to request resolutions should be considered both in terms of capital and of voting rights; second, the bodies representing employees (for example the enterprise committee in France) within the European private company should also have the right to submit proposals for resolutions.

Article 29.2 of the proposal gives the right to shareholders holding at least 5% of the voting rights within a European private company to request the court to appoint an expert.

As previously indicated, the CCBE finds it useful that the percentage of share-ownership be considered both in terms of capital and of voting rights and that this right to appoint an expert also be given to bodies representing the employees.

**Article 30 – Directors**

Article 30 forbids any person who is disqualified from serving as a director to become a director of a European private company.

The CCBE would like to draw the attention of the EU institutions to the practical difficulties of accessing information on disqualifications. Therefore, the CCBE would find it useful to ensure the exchange of information between EU Member States to facilitate access to information on the existence of such disqualifications against a person. The aim is to avoid that a person so disqualified be appointed director of a European private company in another Member State.

**Article 36 – Transfer procédure**

Article 36 provides the procedure for the transfer of the registered seat to another Member State.

The CCBE notes that the proposal only refers to national law on the protection of minority shareholders and creditors.

In this respect, the CCBE would like the Regulation to define *de minimis* the means of protection of minority shareholders and of creditors.

As such, Shareholders would be entitled to oppose the transfer of the registered seat and to force the company to buy back their shares. Equally, the holders of debts before the transfer could either reject the opposition request, or order the establishment of safety nets or request the reimbursement of the debts.