

BERR

Department for Business
Enterprise & Regulatory Reform

**PROPOSAL FOR A EUROPEAN
COUNCIL REGULATION ON THE
STATUTE FOR A EUROPEAN
PRIVATE COMPANY (SPE)**

Consultation Document

OCTOBER 2008

Proposal for a European Council Regulation on the Statute for a European private company (SPE)

The Department for Business and Regulatory Reform (BERR) invites your views on the Proposal for a European Council Regulation on the Statute for a European private company (SPE).

Issued Date **16th October 2008**

Respond by Date **21st November 2008**

Enquiries to

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Proposal for a European Council Regulation on the Statute for a European private company (SPE)

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Executive Summary

2.1 On 25th June 2008 the European Commission formally adopted the proposal for a Council Regulation on the Statute for a European Private Company (Societas Privata Europaea), ("SPE") – See Annex A (the "Proposal"). This consultative document seeks your views on the Proposal, which is currently being discussed by Member States.

2.2 The proposal for the European Private Company Statute forms part of a package of measures designed to assist SMEs, referred to as the Small Business Act for Europe ("SBA"). The objective of the SBA is to make it easier for SMEs to do business in the Single Market and consequently improve their market performance.

2.3 The Proposal creates a new European legal form intended to enhance the competitiveness of SMEs by facilitating their establishment and operation in the Single Market. There are no restrictions on the size of company which can form an SPE therefore any private limited company may benefit from the Proposal.

2.4 The Proposal aims to reduce compliance costs on the creation and operation of companies arising from the disparities between national rules both on formation and on the operation of companies. The Proposal does not regulate matters relating to tax, accounting and insolvency, and other than specific references to employee participation does not regulate labour law. All these issues are left to national law.

2.5 The Proposal will not require UK private limited companies to take any action; if the Proposal is adopted and passed as an EC Regulation it will simply offer an alternative form of incorporation for companies.

2.6 UK companies may benefit from an alternative model to the UK private limited company, particularly if they are working in more than one Member State. The aim of this consultation is to seek views on the detail of the Proposal to ensure that any new legal form will offer benefits to UK businesses without adding additional burdens or uncertainties.

2.7 The French Presidency hope that broad political agreement can be reached on the Proposal by the end of 2008. This is a very demanding timetable and therefore this consultation will only last five weeks, closing on 21st November. We expect negotiations will continue on many of the technical aspects of the proposal beyond December. If you would like to be kept informed of progress and respond to any additional questions please indicate this when you reply to this consultation.

How to respond

2.10 When responding please state whether you are responding as an individual or representing the views of an organisation. If responding on behalf of an organisation, please make it clear who the organisation represents and, where applicable, how the views of members were assembled.

2.11 Responses to this consultation, including supporting evidence, must be received by letter, fax or email by **21st November 2008** and should be sent to:

Kate Gillies
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1 Victoria Street

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SW1H 0ET

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Confidentiality & Data Protection

2.13 Information provided in response to this consultation, including personal information, may be subject to publication or disclosure in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004). If you want other information that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence.

2.14 In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Department.

2.15 The Department will process your personal data in accordance with the DPA and in the majority of circumstances this will mean that your personal data will not be disclosed to third parties.

Help with queries

2.16 Questions about the policy issues raised in the document can be addressed to:

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Company Law and Governance

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1 Victoria Street

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2.17 If you have comments or complaints about the way this consultation has been conducted, these should be sent to:

Vanessa Singhateh
Better Regulation Team
1 Victoria Street
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SW1H 0ET

Vanessa.Singhateh@berr.gsi.gov.uk

Consultation Questions

- Q1 Do you agree that a European Private Company form would be useful to SMEs?**
- Q2 Do you agree that the Proposal will offer savings for SMEs? If so are you able to quantify those savings?**
- Q3 Do you agree that the SPE should be available to all companies whether or not they have a presence in more than one Member State?**
- Q4 a) Do you agree that minimum capital of 1 Euro is sufficient for an SPE?**
- b) Do you think that a minimum capital requirement of several thousand Euros will be a significant consideration for UK businesses when they consider whether to incorporate as/ convert to being an SPE?**
- Q5 Do you believe that there should be some form of independent valuation of non-cash consideration paid for SPE shares?**
- Q6 Do you believe that the balance sheet test and solvency certificate test, as drafted in Article 21, together with the European Commission's statement on the nature of "assets" and "liabilities" as set out in its Explanatory Memorandum are sufficiently clear for management bodies to be able to make the calculation of whether the SPE is in a position to pay dividends/ purchase own shares/ make a capital reduction?**
- Q7 Do you agree that the current Proposal provides enough protection for (i) creditors; and (ii) minority shareholders? If not what other information should be given to (i) creditors and (ii) minority shareholders?**
- Q8 Do you agree with the Proposal as to the matters which need to be passed by a two thirds majority and which matters can be decided by a majority as specified in the Articles of Association?**
- Q9 Do you think that certain matters which the Proposal leaves to the Articles of Association (such as the procedure relating to the appointment and removal of directors and their terms of office) should be regulated in the Proposal itself, and/or do you think that certain matters currently set out in the Proposal should be left for the SPE to regulate itself in its Articles of Association?**
- Q10 Do you agree that general directors' duties should be dealt with in the Proposal? If yes, do you think the duties as drafted in Article 31 provide sufficient clarity and certainty for directors and protection for shareholders?**
- Q11 Do you agree that the UK should support the employee participation elements of the Proposal?**
- Q12 Are there any other comments you would like to make on the Proposal?**
- Q13 Do you have any comments on the Impact Assessment?**

Background and Overview

3.1 The European Private Company Statute was first developed in the 1990s. It was one of the measures listed in Company Law Action Plan of 2003. In 2006 the European Parliament Legal Affairs Committee drafted a report and resolution calling for a formal European Commission proposal by the end of 2007.

3.2 In July 2007 the European Commission undertook a formal consultation; over two thirds of the responses supported some kind of intervention to assist companies working in more than one Member State.

3.3 Following a conference in March 2008 a formal proposal for the SPE was adopted on 25th June 2008. The Proposal for the European Private Company Statute, (Societas Privata Europaea) forms part of a package of measures designed to assist SMEs, referred to as the Small Business Act for Europe (SBA). The objective of the SBA is to make it easier for SMEs to do business in the Single Market and consequently improve their market performance. Research suggests that only around 5% of EU SMEs have foreign subsidiaries or joint ventures compares with 20% of large companies. In the UK the figure is estimated at 7.5% of all SMEs having an establishment in more than one Member State.

3.4 There are many reasons why SMEs do not participate in the single market. This Proposal deals with those problems and costs associated with the legal and administrative barriers faced by companies, in particular differences in company law.

3.5 These costs are thought to fall into three main areas

- Compliance costs associated with the formation of a company
- Difficulties and compliance costs associated with the operation of a company generated by the differences in national rules
- A lack of trust in foreign legal forms.

3.6 The Government has very little information on the costs associated with setting up a subsidiary overseas, but the European Commission Impact Assessment suggests that cost of legal advice on the incorporation process can range from 1,500 Euros to over 7,000 Euros. When taking into account registration fees, costs of a Notary, which is required in many Member States, taxes and administrative fees and any costs associated with the publication of information the total costs range from 2,000 to 10,000 Euros.

3.7 In addition to these start up costs the minimum capital requirements vary widely across Member States starting from 1 Euro in some Member States to 35,000 Euros in Austria. Not all capital is required to be paid up but such high requirements in some Member States could act as a barrier particularly to those businesses that do not require high levels of capital to begin trading.

3.8 The Government is supportive of proposals which will lead to increased competition across the single market and those which reduce the costs and burdens on companies, particularly SMEs. It therefore supports the overall objectives of the SPE. However, the Proposal does not deal with other important issues which may act as a barrier, for example the costs associated with cultural differences, language difficulties and labour requirements in other Member States. The Government would welcome views on whether reducing costs associated with company law will be sufficient compared to other costs to encourage SMEs to enter new markets.

3.9 The Proposal for a European Private Company statute is enabling legislation therefore companies will not be obliged to do anything unless they choose to become an SPE rather than a UK private limited company. We expect that companies will look at the overall costs and benefits of the SPE compared to national form and make a decision based on overall benefits for individual companies.

Q1 Do you agree that a European Private Company form would be useful to SMEs?

Q2 Do you agree that the Proposal will offer savings for SMEs? If so are you able to quantify those savings?

Description of the Proposal

4.1 Chapter I: General Provisions (Articles 1 – 4)

4.1.1 This Chapter explains the main features of the SPE. The SPE will be a company which has legal personality, a share capital and limited liability. The SPE will be a private company and therefore its shares may not be offered to the public or publicly traded.

4.1.2 The SPE will be governed by the following hierarchy of laws:

- (1) the provisions of the Regulation itself
- (2) the SPE's Articles of Association
- (3) if the issue is not dealt with within (1) or (2), then the default position will be the applicable national law of the country in which the SPE has its registered office.

4.2 Chapter II: Formation (Articles 5 – 13)

4.2.1 This Chapter explains how the SPE can be created. The SPE can be set up (i) from scratch; (ii) by transforming an existing company; (iii) by merging existing companies; or (iv) by the division of an existing company.

4.2.2 Unlike other European company forms such as the SE Company or European Economic Interest Groupings there is no requirement for the SPE to have a presence in more than one Member State.

4.2.3 Any company which becomes an SPE has to have the abbreviation 'SPE' following its name.

4.2.4 An SPE can have its central administration or principal place of business in a different Member State to the Member State where it has its registered office.

4.2.5 The SPE acquires legal personality on the date on which it is entered in the register of the Member State where it has its registered office.

4.2.6 The information required and the formalities relating to registration are similar to the requirements in UK domestic law. The documentation provided to Registrar of Companies will need to be accompanied by a written statement of compliance – however, other Member States may require that SPEs set up in their territories have their registration documentation checked/ approved by an administrative or judicial body, such as a notary.

Q3 Do you agree that the SPE should be available to all companies whether or not they have a presence in more than one Member State?

4.3 Chapter III: Shares (Articles 14 – 18)

4.3.1 Under Article 27 in Chapter V the variation of rights attaching to any shares needs to be approved of by a shareholder resolution passed by at least two thirds of the total voting rights attached to the shares, and additionally, under Article 14 of Chapter III, the variation of rights attaching to any shares of a particular class needs to be approved of by a further shareholder resolution passed by at least two thirds of the voting rights attached to the shares issued in that class.

4.3.2 Article 15 details the information which should be in the list of shareholders. This list is to be kept by the management body and can be inspected by shareholders and third parties on request.

4.3.3 All agreements on the transfer of shares must be in writing.

4.3.4 The Proposal details procedures for the expulsion and withdrawal of shareholders. UK Company Law does not have such provisions (other than in the context of take-overs), leaving companies in the UK to deal with these issues in their Articles of Association if they so wish.

4.4 Chapter IV: Capital (Articles 19 – 25)

4.4.1 The Proposal stipulates that SPEs must have a minimum capital of 1 Euro. In the UK there is no required minimum capitalisation for private companies. However, many Member States have minimum capitalisation requirements of several thousand Euros (for example in Austria the requirement is 35,000 Euros), and there is therefore significant pressure from other Member States for the Proposal to contain a higher minimum capitalisation requirement; notably the European Parliament has suggested that the level should be set at 10,000 Euros.

Q4 a) Do you agree that minimum capital of 1 Euro is sufficient for an SPE?

b) Do you think that a minimum capital requirement of several thousand Euros will be a significant consideration for UK businesses when they consider whether to incorporate as/ convert to being an SPE?

4.4.2 The Proposal states that shareholders must pay the agreed consideration for the shares in cash or provide the agreed consideration in kind. The Proposal contains no provision for the valuation of non-cash consideration, although Chapter IV of Annex 1 (matters which must be regulated in an SPE's Articles of Association), states that the Articles of Association must cover "whether consideration in kind are to be evaluated by an independent expert and any formalities that must be complied with".

Q5 Do you believe that there should be some form of independent valuation of non-cash consideration paid for SPE shares, dealt with in the Articles or in the body of the regulation?

4.4.3 Article 21 of the Proposal sets out that an SPE may, on the basis of a proposal of the management body, make a distribution to shareholders "provided that after the distribution, the assets of the SPE fully cover its liabilities". The Proposal itself does not contain a definition of "assets" and "liabilities"; however, the European Commission's Explanatory Memorandum to the Proposal makes the following statement: "The proposal does not define "assets" or "liabilities", in this respect the relevant accounting provisions apply (i.e. the Fourth Directive (78/660/EEC) or Regulation (EC) No 1606/2002)." The Articles of Association can stipulate that the management body of the SPE must, additionally, sign a solvency certificate certifying that the SPE will be able to pay its debts as they become due in the normal course of business within one year of the date of the distribution/ purchase of own shares/ capital reduction.

The same balance sheet test, with an optional additional solvency certificate test, is also applied in Articles 23, in relation to purchase of own shares, and Article 24, in relation to a capital reduction.

Q6 Do you believe that the balance sheet test and solvency certificate test, as drafted in Article 21, together with the European Commission's statement on the nature of "assets" and "liabilities" as set out in its Explanatory Memorandum are sufficiently clear

for management bodies to be able to make the calculation of whether the SPE is in a position to pay dividends/ purchase own shares/ make a capital reduction?

4.4.4 Article 24 deals with capital reductions. Reductions can be made by the same rules as those applied to distributions, however shareholders have an additional right to apply to the competent court for an order to get the SPE to provide adequate safeguards.

4.4.5 The Proposal provides that notice of the capital reduction must be filed with the Registrar of Companies, and a copy of the shareholder resolution approving the capital reduction must be filed with the Registrar of Companies.

4.4.6 Various Member States believe that Chapter IV of the Proposal does not provide enough protection for creditors and/ or minority shareholders.

Q7 Do you agree that the current proposal provides enough protection for (i) creditors; and (ii) minority shareholders? If not what other information should be given to (i) creditors and (ii) minority shareholders?

4.4.7 SPEs will have to comply with the national law of the Member State where their registered office is located in relation to the preparation, filing, auditing and publication of accounts.

4.5 Chapter V: Organisation of the SPE (Articles 26 – 33)

4.5.1 Article 27 sets out that the following matters must be decided by a majority of not less than two thirds of the total voting rights attached to the shares issued by the SPE:

- (a) variation of rights attaching to shares;
- (b) expulsion of a shareholder;
- (c) withdrawal of a shareholder;
- (d) reduction of share capital;
- (e) transfer of the registered office of the SPE to another Member State;
- (f) transformation of the SPE;
- (g) mergers and divisions;
- (h) winding up;
- (i) amendments to the Articles of Association, not covering matters specifically listed in Article 27.

4.5.2 Article 27 sets out that the following matters must be decided by a shareholder resolution passed by a majority, as defined in the Articles of Association – i.e. it is left to the Articles of Association to stipulate what that majority is.

- (a) approval of the annual accounts;
- (b) distributions to the shareholders;
- (c) acquisition of own shares;
- (d) redemption of shares;
- (e) increase of share capital;
- (f) appointment/removal of directors and their terms of office;
- (g) where the SPE has an auditor, appointment and removal of the auditor.

Q8 Do you agree with the Proposal as to the matters which need to be passed by a two thirds majority and which matters can be decided by a majority as specified in the Articles of Association ?

4.5.3 Annex I sets out matters which must be covered in an SPE's Articles of Association.

Q9 Do you think that certain matters which the Proposal leaves to the Articles of Association (such as the procedure relating to the appointment and removal of directors and their terms of office) should be regulated in the Proposal itself, and/or do you think that certain matters currently set out in the Proposal should be left for the SPE to regulate itself in its Articles of Association?

4.5.4 There is no requirement for the organisation of a general meeting. Resolutions can be passed by means of written resolution whereby the management body provides all shareholders with the proposals for resolutions together with sufficient information to enable shareholders to take an informed decision.

4.5.5 Shareholders holding 5% of the voting rights attached to the shares of the SPE have the right to request the management body to submit a proposal for a resolution to the shareholders. If the request is refused, or if the management body does not submit a proposal within 14 calendar days of receiving the request, the shareholders concerned may then submit a proposal for a resolution to the shareholders regarding the matters in question.

4.5.6 In the case of suspicion of a serious breach of law or of the Articles of Association, shareholders holding 5% of the voting rights attached to the shares of the SPE have the right to request the competent court or administrative authority to appoint an independent expert to investigate and report on the findings of the investigation to shareholders.

4.5.7 The Proposal only allows natural persons to be directors. Any person who is disqualified under national law cannot become a director of an SPE.

4.5.8 The duties of directors are owed to the SPE. A director is under a duty to act in the best interests of the SPE. The director must act with the care and skill that can reasonably be required in the conduct of the business. The liability of directors is governed by the national law of the Member State in which the SPE has its registered office.

Q10 Do you agree that general directors' duties should be dealt with in the Proposal? If yes. Do you think the duties as drafted in Article 31 provide sufficient clarity and certainty for directors and protection for shareholders?

4.6 Employee Participation (Article 34 and 38)

4.6.1 The proposal includes measures that allow for employee participation in the supervisory or administrative organ of the SPE. The nearest UK equivalent to a supervisory or administrative organ is the board of directors.

4.6.2 For a newly created SPE, the Commission proposes that the national law on employee participation of the EU Member State where the new company has its registered office shall apply. Employees in the UK do not have a statutory right to involvement at board level within a company though there is nothing to prevent employers and employees from creating such arrangements voluntarily.

4.6.3 The proposal suggests a different approach for an established SPE with existing employee participation arrangements that wishes to transfer its registered office to another Member State. Where employees of an established SPE have statutory employee participation rights and the SPE seeks to transfer its registered office to the UK the management of the SPE will be required to negotiate with its employees over the level of employee participation in the SPE. Should no agreement over employee participation be reached then the employee participation rules of the home Member State apply.

4.6.4 The Government considers that the employee participation elements of the current proposal should be supported. However, it believes that such rights should be consistent with those established by existing European Directives which contain employee participation provisions, such as the European Company Statute, European Cooperative Society and the Cross Border Mergers Directives.

Q11 Do you agree that the UK should support the employee participation elements of the proposal?

4.7 Chapter VII: Transfer of the Registered Office of the SPE (Articles 35 – 37)

4.7.1 The Proposal permits the transfer of a SPEs registered office to another Member State whilst maintaining legal personality – i.e. there is no requirement for the SPE to be wound up and then re-incorporated in the new Member State. The Proposal does not allow an SPE to transfer its registered office if winding up, liquidation, insolvency or suspension of payments procedures against it have been started, or if preventive measures have been taken by the competent authorities to avoid the opening of such proceedings.

4.8 Chapter VIII: Restructuring, Dissolution and Nullity (Articles 39 – 41)

4.8.1 The SPE can be dissolved in three circumstances: (i) by the expiry of the period for which it was established (if it was established for a defined period); (ii) by a resolution of the shareholders; or (iii) in the cases set out in applicable national law.

4.8.2 Liquidation, insolvency, suspension of payments and similar procedures are governed by the national law of the Member State in which the SPE has its registered office.

4.9 Chapter IX: Additional and Transitional Provisions (Article 42)

4.9.1 This article deals with the use of national currency for those Member States outside the euro-zone.

4.10 Chapter X: Final Provisions (Articles 43 - 48)

4.10.1 Member States must lay down the rules on penalties applicable to infringements of provisions of the Regulation. Penalties must be effective, proportionate and dissuasive.

4.10.2 The Proposal is for the Regulation to enter into force from 1 July 2010.

Q12 Are there any other comments you would like to make on the Proposal?

Q13 Do you have any comments on the Impact Assessment?

What Happens Next

5.1 The Government will aim to publish the results of this consultation exercise within twelve weeks of the closing date.

5.2 A copy of the Code of Practice on Consultation is in Annex C



**COUNCIL OF
THE EUROPEAN UNION**

**Brussels, 30 June 2008
(OR. fr)**

11252/08

**Interinstitutional File:
2008/0130C (CNS)**

DRS 17

PROPOSAL

from: Commission

dated: 27 June 2008

Subject: Proposal for a COUNCIL REGULATION on the Statute for a European private company

Delegations will find attached a proposal from the Commission, submitted under a covering letter from Jordi AYET PUIGARNAU, Director, to Mr Javier SOLANA, Secretary-General/High Representative.

Encl.: COM(2008) 396 final



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 25.6.2008
COM(2008) 396 final

2008/0130 (CNS)

Proposal for a

COUNCIL REGULATION

on the Statute for a European private company

(presented by the Commission)

{SEC(2008) 2098}

{SEC(2008) 2099}

EXPLANATORY MEMORANDUM

1. CONTEXT

The Commission's communication on the Single Market for 21st century Europe¹ stresses the need for the continuous improvement of the framework conditions for businesses in the Single Market.

Small and medium-sized enterprises (SMEs) account for more than 99% of companies in the European Union but only 8% of them engage in cross-border trade and 5% have subsidiaries or joint ventures abroad. While it has become easier in recent years to set up businesses across the EU, more needs to be done to improve the access of SMEs to the Single Market, facilitate their growth and unlock their business potential.

The European Private Company Statute (Societas Privata Europaea) forms part of a package of measures designed to assist SMEs, referred to as the Small Business Act for Europe (SBA). The objective of the SBA is to make it easier for SMEs to do business in the Single Market and consequently to improve their market performance. The SPE is one of the priority initiatives of the Commission's 2008 Work Programme².

2. OBJECTIVES OF THE PROPOSAL

The initiative creates a new European legal form intended to enhance the competitiveness of SMEs by facilitating their establishment and operation in the Single Market. At the same time, the Statute has the potential to benefit larger companies and groups.

The proposal for a Statute for an SPE is adapted to the specific needs of SMEs. It allows entrepreneurs to set up an SPE following the same, simple, flexible company law provisions across the Member States.

The proposal also aims to reduce compliance costs on the creation and operation of businesses arising from the disparities between national rules both on the formation and on the operation of companies.

The proposal does not regulate matters related to labour law, tax law, accounting, or the insolvency of the SPE. Nor does it deal with the contractual rights and obligations of the SPE or those of its shareholders other than those deriving from the articles of association of the SPE. These matters will continue to be governed by national law and existing Community law instruments, where relevant.

The choice of SPE as a legal form to conduct business activities in the EU should be neutral from a tax perspective. It is therefore important to ensure that the SPE enjoys the same tax

¹ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: "A single market for 21st century Europe" - COM(2007) 724, 20.11.2007.

² Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions: "Commission Legislative and Work Programme 2008" - COM(2007) 640.

treatment as similar national legal forms. To this end, the European Commission intends to begin discussions with Member States in autumn 2008 with a view to tabling a proposal to extend to the SPE the scope of the Parent Subsidiary Directive (90/435/EEC)³, the Merger Directive (90/434/EEC)⁴ and the Interest and Royalties Directive (2003/49/EC)⁵. The Commission's objective is to ensure that these measures are in place and benefit SPEs from the start of their operations.

3. LEGAL BASIS

The proposal is based on Article 308 of the EC Treaty. This provision provides the legal basis for EU actions aiming to attain one of the Community objectives in the absence of any specific legal basis in the EC Treaty. Article 308 is the legal basis of the existing European company forms, i.e. the European Company, the European Economic Interest Grouping and the European Co-operative Society.

4. SUBSIDIARITY AND PROPORTIONALITY

The proposal aims to make the Single Market more accessible to SMEs by providing them with an instrument that facilitates the expansion of their activities in other Member States. However, the proposal does not make the creation of an SPE subject to a cross-border requirement (e.g. shareholders from different Member States or evidence of cross-border activity). In practice, entrepreneurs usually set up businesses in their own Member State before expanding to other countries. An initial cross-border requirement would, therefore, significantly reduce the potential of the instrument. In addition, a cross-border requirement could easily be circumvented and monitoring and enforcing it would put an unreasonable burden on Member States.

Action at EU level is necessary to enable SMEs to use the same company form across the EU. This objective cannot be achieved by the Member States themselves. Even if all Member States committed to making their corporate legislations more business-friendly, SMEs would still face a patchwork of 27 national regimes.

By offering SMEs a corporate vehicle that is uniform and legally certain, yet flexible, the SPE would constitute the most effective and targeted means of achieving the objective set out above. An alternative means of achieving the same objective would be to harmonise at least the core provisions of national company law regimes applicable to private limited-liability companies. This solution would entail a significant and probably disproportionate intrusion in Member States' legislations. In contrast to harmonisation, this proposal leaves national law largely untouched. It provides SMEs with an alternative form that would exist in parallel to national company forms.

³ Council Directive 90/435/EEC of 23 July 1990 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States (OJ L 225, 22.9.1990, p. 6).

⁴ Council Directive 90/434/EEC of 23 July 1990 on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States (OJ L 225, 20.8.1990, p.1).

⁵ Council Directive 2003/49/EC of 3 June 2003 on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States (OJ L 157, 26.6.2003, p. 49).

The creation of a new European legal form requires a legal instrument that is directly applicable, i.e. a regulation. Neither a recommendation nor a directive would result in a uniform regime that is applicable in all Member States.

5. CONSULTATION OF INTERESTED PARTIES

The European Private Company Statute was initially developed by business and academic circles in the 1990s and gained broader support over time from industry organisations and from the European Economic and Social Committee⁶. It was listed as a possible measure of the 2003-2009 Action Plan on Modernising Company Law and Enhancing Corporate Governance⁷. The 2006 public consultation on the future priorities of the Commission in the fields of company law and corporate governance confirmed this support⁸.

In June 2006, the Legal Affairs Committee of the European Parliament held a public hearing on the SPE and drafted an own-initiative report and a resolution calling on the European Commission to present a proposal for an SPE before the end of 2007⁹. The Parliament reiterated its support and firm commitment to the initiative in a resolution of 25 October 2007¹⁰. Given the strong interest of the Parliament in the proposal, it should be closely associated in the work on the SPE from the start.

In July 2007, the Directorate General for Internal Market and Services launched a specific public consultation on the SPE. In addition, a survey among companies in the 27 Member States was conducted through the European Business Test Panel¹¹.

On 10 March 2008, the Commission held a conference on the SPE.

The European Commission's advisory group on corporate governance and company law¹² provided information in relation to the impact assessment and advised on the substance of the SPE Statute. The group is also drafting examples of provisions for the articles of association of an SPE, which will be made available to facilitate the understanding of the draft Statute.

6. IMPACT ASSESSMENT

Recent surveys¹³ and public consultations show that, despite their strong potential, SMEs face legal and administrative obstacles, which hinder their development in the Single Market.

⁶ Opinion of the Economic and Social Committee on a 'European Company Statute for SMEs' (OJ C 125, 27.5.2002, p. 19).

⁷ COM(2003) 284.

⁸ http://ec.europa.eu/internal_market/company/consultation/index_en.htm

⁹ European Parliament Report with recommendations to the Commission on the European private company Statute (2006/2013(INI)), A6-0434/2006 final.

¹⁰ European Parliament resolution on the 14th company law directive and the European Private Company (B6-0399/07).

¹¹ Consultation: http://ec.europa.eu/internal_market/company/epc/index_en.htm

EBTP: http://ec.europa.eu/yourvoice/ebtp/consultations/2007_en.htm

¹² http://ec.europa.eu/internal_market/company/advisory/index_en.htm

¹³ Survey of the Observatory of European SMEs (Flash EB N° 196) conducted by Gallup Organisation Hungary upon the request of DG for Enterprise and Industry, Survey presented at BusinessEurope's

Although all companies wishing to expand cross-border are affected by legal and administrative barriers, these are proportionately greater for smaller companies, who are less well equipped in terms of financial and human resources.

The difficulties which businesses face as a result of the diversity of company forms essentially consist of *compliance costs on the formation of a company* (e.g. mandatory minimum capital requirement, registration and notary fees, cost of expert legal advice) and of *difficulties and compliance costs associated with the operation of a company*, which make the day-to-day operation of foreign subsidiaries more expensive compared with domestic subsidiaries.

SMEs are also hindered in their cross-border development by the *lack of trust in certain foreign company forms* in other Member States. This problem exists mainly in relation to the less widely known company forms.

The impact assessment examines four high level policy options:

- *Taking no action and relying on existing legislation and case law:* despite efforts to make company formation quicker and easier throughout the EU, SMEs still have to face 27 company law regimes.
- *Seeking to harmonise the company laws of the Member States:* A high degree of harmonisation of national regimes would be necessary to significantly reduce the costs of company formation and operation across Member States. However, the major changes to national legislation which this approach would entail would not necessarily be proportionate to the objective of the proposal.
- *Improving the European Company Statute (SE) and adapting it to the needs of SMEs:* Making the Statute of the SE accessible to SMEs would require significant amendments. This option would require a thorough redrafting and re-negotiation of the SE Regulation before it is evaluated in 2008/2009.
- *Proposing an SPE Statute for SMEs:* The creation of a new European legal form targeting SMEs best solves the problems presented above by offering a company form featuring uniform rules on formation throughout the EU, flexibility as regards the internal organisation, thus saving costs. It would also offer SMEs a European label and thus make cross-border business easier.

7. EXPLANATION OF THE PROPOSAL

Chapter I: General provisions

The general provisions define the main *features of the SPE*. The SPE is a company having legal personality and share capital. It is a limited-liability company, i.e. its shareholders may not be liable for more than the amount they have subscribed for. As the SPE is a private company, the shares of the SPE may not be offered to the public or be publicly traded.

There is no restriction on the *formation of the SPE*. It may be set up by one or more founders, natural persons and/or companies or firms under Article 48 of the EC Treaty. In addition, an SE, a European Co-operative Society, a European Economic Interest Grouping or another SPE may also take part in the formation of an SPE.

As regards the scope of application of the Statute and its interface with national law, the Regulation provides that:

- (1) An SPE is governed first and foremost by the directly applicable mandatory provisions of the Regulation. These rules facilitate the formation and ensure the necessary uniformity of the SPE in the EU.
- (2) The Regulation requires a range of matters, in particular the internal organisation of the SPE, to be regulated in the articles of association (Annex I). In order to ensure flexibility, shareholders are free to decide how to regulate these questions, subject only to the rules of the Regulation.
- (3) In matters covered by the SPE Statute, national company law is only relevant where specified by the Regulation. The provisions which are required or allowed by Annex I to be included in the articles of association are not subject to national law.

The provisions of the Regulation and the list of matters in Annex I which must be covered in the articles of association define the scope of the EU rules. The proposal does not contain any default provisions which apply in case the articles do not cover the matters listed in Annex I. However national law has to set out the sanctions of such omission or other breach of the Regulation.

National law governs those matters which are not covered by the Regulation or by the articles of association of the SPE as stipulated in Annex I. This is the case, in particular, for matters not mentioned in Annex I or in areas which are outside the scope of company law as such (e.g. labour, insolvency or tax law). The relevant applicable law is the law of the Member State where the SPE has its registered office, which applies to private limited-liability companies. Member States shall notify the name of the respective company form to the Commission.

Chapter II: Formation

The Regulation does not restrict the manner in which an SPE may be created. A SPE may be set up *ex nihilo*, in accordance with the provisions of the Regulation. It may also be created by transforming or dividing an existing company or by the merger of existing companies. Any company form existing under national law (private or public, with or without legal personality) may become an SPE, in accordance with the relevant provisions of national law. An SE or another SPE may also participate in the formation of an SPE.

The name of any European Private Company must be followed by the abbreviation "SPE". The SPE is required to have its registered office and its central administration or principal place of business in the territory of the Member States. However, in accordance with the *Centros judgment*¹⁴ of the European Court of Justice, the SPE may be set up with its

¹⁴ C-212/97.

registered office and central administration or principal place of business in different Member States. Shareholders may also decide to transfer the registered office of the company to another Member State.

The Regulation does not set up a specific registration procedure for the SPE but builds on the provisions laid down by the First Company Law Directive (68/151/EEC), while setting out some requirements to make the formation of an SPE easier and cheaper. First, it must be possible to apply for the registration of a SPE by electronic means. Secondly, the Regulation contains a closed list of documents and particulars which Member States may require for the registration of the SPE. Changes in the documents and particulars must also be filed at the register.

Finally, the proposal provides for a single legality check, i.e. either control of the legality of the SPE's documents and particulars by an administrative or judicial body, or their certification by a notary, on registration of an SPE. Founders of the SPE must not be required to satisfy both conditions.

Chapter III: Shares

The Regulation allows shareholders a large degree of freedom to determine matters relating to *shares*, in particular the rights and obligations attached to shares. An SPE may issue ordinary or priority shares. Restrictions only apply when necessary in the interest of third parties or minority shareholders.

All shareholdings must be registered in the *list of the shareholders* drawn up and kept by the management body of the SPE. This list serves as evidence of shareholdings, unless proven otherwise. The list may be inspected by the shareholders or third parties on request.

The conditions for the *transfer of the shares* must be regulated in the articles of association. Any new restriction or prohibition on transfers requires a qualified majority decision (Article 27). In addition, to protect the interests of minority shareholders, such decision requires the consent of each shareholder affected by the restriction or prohibition.

The Regulation does not provide shareholders with the right to *squeeze-out* minority shareholders. Nor does it put an obligation on the majority shareholder or the SPE to buy the shares of the minority shareholder (*sell-out right*). Such provisions may be adopted in the articles of association. However, the Regulation allows both the expulsion and the withdrawal of a shareholder under specific circumstances.

Chapter IV: Capital

In order to facilitate start-ups, the Regulation sets the *minimum capital* requirement at €1. The proposal departs from the traditional approach that considers the requirement of a high minimum of legal capital as a means of creditor protection. Studies show that creditors nowadays look rather at aspects other than capital, such as cash flow, which are more relevant to solvency. Director-shareholders of small companies often offer personal guarantees to their creditors (e.g. to banks) and suppliers also use other methods to secure their claims, e.g. providing that ownership of goods only passes upon payment. Moreover, companies have different capital needs depending on their activity, and thus it is impossible to determine an appropriate capital for all companies. The shareholders of a company are the best placed to define the capital needs of their business.

The Regulation does not restrict the founding shareholders' right to decide what type of *consideration* is to be provided for the shares upon creation of the SPE or on capital increase. Accordingly, the articles of association must set out whether the founders need to provide consideration in cash or in kind. They are free to decide what property, rights, services, etc. they accept as consideration for the shares and when it has to be paid or provided. Also, the articles must provide whether an expert valuation of the consideration in kind is needed or not. Shareholders are liable for their contribution, in accordance with the provisions of national law.

The Regulation contains uniform rules regarding *distributions* (e.g. dividend, purchase of the SPE's own shares, incurring of debt) to shareholders from the assets of the SPE. A distribution may only be made if the SPE satisfies a balance-sheet test, i.e. after the distribution its assets fully cover its liabilities. The proposal does not define "assets" or "liabilities", in this respect the relevant accounting provisions apply (i.e. the Fourth Directive (78/660/EEC) or Regulation (EC) No 1606/2002).

Since the preparation of a solvency test on distributions only exists at present in few Member States, the proposal does not make it mandatory for SPEs. However, it explicitly allows shareholders to provide for a solvency test in the articles, in addition to the balance-sheet test that is required by the Regulation. If shareholders require the management body to sign a solvency certificate before distribution, they also have to define the related requirements (e.g. the grounds, the criteria) and the certificate is to be disclosed.

The proposal does not prevent the SPE from acquiring its own shares under certain conditions to protect the company's assets. Before the acquisition of its own shares, the SPE must carry out a balance-sheet test and, if prescribed in the articles of association, a solvency test. Shareholders decide on acquisition. The non-pecuniary rights attached to the respective shares (in particular, voting and pre-emption rights) will be suspended. Additional conditions and further restrictions may be set out in the articles of association.

Chapter V: Organisation of the SPE

The shareholders of the SPE enjoy a high degree of freedom in determining the internal organisation of the SPE, subject to the Regulation. Article 27 provides a non exhaustive list of the *decisions which must be taken by shareholders*. The articles of association must set out the required majority and quorum for voting subject to Article 27 which provides that certain of these decisions require a qualified majority (i.e., at least 2/3 of the voting rights of the SPE, but the articles may provide for a greater majority, e.g. 3/4).

There is no obligation to hold physical general meetings. The method for the decision-making of shareholders is to be prescribed in the articles of association. Shareholders have broad information rights regarding the affairs of the SPE. Their right to challenge collective resolutions is subject to national law.

The Regulation ensures two specific minority rights for the shareholders: the right to request a shareholders' resolution and the right to request the competent court or administrative authority to appoint an independent expert (in particular, an independent auditor).

All decisions which are not listed in the Regulation or in the articles of association fall under the competence of the SPE's *management body* which is responsible for running the company. The articles determine the management structure of the SPE (a single director or several

directors, a one-tier or a two-tier board system). However, if the SPE is subject to employee participation, the chosen management structure must allow for the exercise of this right.

The shareholders of the SPE decide on the appointment and removal of directors. The articles must set out the term of directors' mandates and any eligibility criterion. The Regulation prohibits anyone who is disqualified from serving as a director in any Member State from serving as a director of the SPE.

The Regulation imposes on directors the duty of acting in the best interests of the company. Accordingly, *directors' duties* are owed to the SPE and may only be enforced by the company. The Regulation does not give individual shareholders or creditors the right to directly sue the members of the management body.

The Regulation lays down a general standard of care by requiring from directors the care and skill reasonably required in the conduct of business. The interpretation of this provision may be developed by national courts. While the Regulation also identifies the most important specific duties of the directors (e.g. propose distributions), the articles may set out further duties. Directors are required to avoid any actual or potential conflicts of interests. However, the articles of association may provide that situations involving such conflicts may be authorised.

The Regulation establishes *directors' liability* for any loss or damage suffered by the SPE due to the breach of their duties deriving from the Regulation, articles of association or a resolution of shareholders. However other aspects of liabilities, e.g. the consequences of the breach of duties or any business judgement rule, are governed by national law.

Chapter VI: Employee participation

Employee participation exists in small companies only in a few Member States (e.g. Sweden, Denmark).

The general principle, derived from the Directive on cross-border mergers (2005/56/EC), is that the SPE is subject to the employee participation rules of the Member State where it has its registered office. Accordingly, the SPE, as regards employee participation, will be no more and no less attractive than comparable national companies.

Cross-border mergers involving SPEs are governed by the Directive on cross-border mergers. However, special rules are required in the case of the transfer of the registered office of an SPE.

Chapter VII: Transfer of the registered office of the SPE

The SPE can transfer its registered office to another Member State, while maintaining its legal personality and not having to wind-up. In order to protect the interests of third parties, the Regulation does not allow the transfer of the SPE's registered office during winding-up, liquidation or similar proceedings.

The transfer procedure is inspired by the provisions on the transfer of the registered office of the SE Regulation.

The Regulation provides for a special regime where an SPE that is subject to employee participation transfers its registered office to another Member State where there is no or a

lower level of employee participation rights or which does not provide for employees of establishments of the SPE situated in other Member States the same entitlement to exercise participation rights as they enjoyed before the transfer. In such cases, if at least one third of the SPE's employees are employed in the home Member State, negotiations must take place between the management body and the representatives of the employees to reach an agreement on the participation of employees. In the absence of an agreement, the participation arrangements existing in the home Member State are maintained.

Chapter VIII: Restructuring, dissolution and nullity

The Regulation refers the dissolution of an SPE or its transformation to a national company form to national law. Also, the SPE may merge with other companies and be divided up in accordance with the rules applicable to private limited-liability companies.

Chapter IX: Additional and transitional provisions

Article 42 allows SPEs registered in a Member State outside the euro-zone to express their capital and to draw up their accounts in the national currency of that Member State, although such SPEs may also express their capital and/or draw up their accounts in euro.

Chapter X: Final provisions

The Regulation requires the adoption of certain provisions by Member States. In particular, the procedural rules on registration, on the transfer of the registered office of the SPE along with sanction for breach of the Regulation and the articles of association, have to be adopted.

Proposal for a

COUNCIL REGULATION

on the Statute for a European private company

(Text with EEA relevance)

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 308 thereof,

Having regard to the proposal from the Commission¹⁵,

Having regard to the opinion of the European Parliament¹⁶,

Having regard to the opinion of the European Economic and Social Committee¹⁷,

Whereas:

- (1) The legal framework in which business is carried out in the Community remains largely national. This exposes companies to a wide diversity of national laws, company forms and company regimes. The approximation of national laws by means of directives based on Article 44 of the Treaty can overcome some of these difficulties. Such approximation, however, does not release persons seeking to create companies from the obligation to adopt in each Member State a company form governed by the national law of that Member State.
- (2) Existing Community forms of company, notably the European Company (SE), whose legal form was established by Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European Company¹⁸ are designed for large companies. The minimum capital requirement for an SE and the restrictions on its formation make that form of company unsuitable for many businesses, in particular of a smaller size. In view of the problems faced by such businesses as a result of the diversity of company law regimes and the unsuitability of the SE for small businesses, it is appropriate to provide for a European company form specifically designed for small businesses, which it is possible to create throughout the Community.

¹⁵ OJ C , , p. .

¹⁶ OJ C , , p. .

¹⁷ OJ C , , p. .

¹⁸ OJ L 294, 10.11.2001, p. 1. Regulation as last amended by Regulation (EC) No 1791/2006 (OJ L 363, 20.12.2006, p. 1).

- (3) Since a private company (hereinafter "SPE") which may be created throughout the Community is intended for small businesses, a legal form should be provided which is as uniform as possible throughout the Community and as many matters as possible should be left to the contractual freedom of shareholders, while a high level of legal certainty is ensured for shareholders, creditors, employees and third parties in general. Given that a high degree of flexibility and freedom is to be left to the shareholders to organise the internal affairs of the SPE, the private nature of the company should also be reflected by the fact that its shares may not be offered to the public or negotiated on the capital markets, including being admitted to trading or listed on regulated markets.
- (4) In order to enable businesses to reap the full benefits of the internal market, the SPE should be able to have its registered office and principal place of business in different Member States and to transfer its registered office from one Member State to another, with or without also transferring its central administration or principal place of business.
- (5) To enable businesses to gain efficiencies and save costs, the SPE should be available in every Member State, with as few variations as possible as regards the company form.
- (6) To ensure a high degree of uniformity of the SPE, as many matters pertaining to the company form as possible should be governed by this Regulation, either through substantive rules or by reserving matters to the articles of association of the SPE. It is therefore appropriate to provide for a list of matters, to be set out in an Annex, in respect of which the shareholders of the SPE are obliged to lay down rules in the articles of association. In relation to those matters only Community law should apply, and consequently shareholders should be able to set out rules to regulate those matters, which are different from the rules prescribed by the law of the Member State where the SPE is registered, in relation to national forms of private limited-liability companies. National law should apply to matters where this is provided for by this Regulation and to all other matters that are not covered by the articles of this Regulation, such as insolvency, employment and tax, or are not reserved by it to the articles of association.
- (7) In order to make the SPE an accessible company form for individuals and small businesses, it should be capable of being created *ex nihilo* or of resulting from the transformation, the merger or the division of existing national companies. The creation of an SPE by way of transformation, merger or division of companies should be governed by the applicable national law.
- (8) In order to reduce the costs and administrative burdens associated with company registration, the formalities for the registration of the SPE should be limited to those requirements which are necessary to ensure legal certainty and the validity of the documents filed upon the creation of a SPE should be subject to a single verification, which may take place either before or after registration. For the purposes of registration, it is appropriate to use the registries designated by First Council Directive 68/151/EEC of 9 March 1968 on the co-ordination of safeguards which, for the protection of the interests of members and others, are required by Member States of

companies within the meaning of the second paragraph of Article 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community¹⁹.

- (9) Since small businesses often require long term financial and personal commitment, they should be able to adapt the structure of their share capital and the rights attached to shares to their specific circumstances. SPE shareholders should therefore be free to determine the rights attached to their shares, the procedure for the variation of those rights, the procedure to be followed if shares are transferred and any restriction on such transfer.
- (10) In order to preserve both the operation of the SPE and the freedom of shareholders, the SPE should have the possibility of applying to court to expel shareholders who seriously harm its interests and shareholders of the SPE whose interest suffered serious harm as a result of specific events should have the right to withdraw from the SPE.
- (11) The SPE should not be subject to a high mandatory capital requirement since this would be a barrier to the creation of SPEs. Creditors, however, should be protected from excessive distributions to shareholders which could affect the ability of the SPE to pay its debts. To this end, distributions that leave the SPE with liabilities exceeding the value of the assets of the SPE should be prohibited. Shareholders, however, should also be free to require the management body of the SPE to sign a solvency certificate.
- (12) Since creditors should be granted protection in the event of a reduction of the capital of the SPE, certain rules should be laid down concerning when such reductions are to take effect.
- (13) Since small businesses need legal structures that can be adapted to their needs and size and are able to evolve as activity develops, shareholders of the SPE should be free to determine in their articles of association the internal organisation which is best suited to their needs. An SPE may opt for one or more individual managing directors, a unitary or a dual board structure. However, mandatory rules ensuring the protection of minority shareholders should be introduced in order to avoid any unfair treatment of shareholders, in particular certain key resolutions should be adopted by a majority of no less than two-thirds of the total voting rights attached to the shares issued by the SPE. While a limit may be introduced on the right to request a resolution or to request an independent expert to investigate abuses, such right may not be made conditional on the ownership of more than 5% of the voting rights of the SPE, although the articles of association of the SPE may provide for a lower threshold.
- (14) Competent national authorities should monitor the completion and legality of the transfer of the registered office of an SPE to another Member State. The timely access of shareholders, creditors and employees to the transfer proposal and to the report of the management body should be ensured.
- (15) Employees' rights of participation should be governed by the legislation of the Member State in which the SPE has its registered office (the "home Member State"). The SPE should not be used for the purpose of circumventing such rights. Where the national legislation of the Member State to which the SPE transfers its registered

¹⁹ OJ L 65, 14.3.1968, p. 8. Directive as last amended by Directive 2006/99/EC (OJ L 363, 20.12.2006, p. 137).

office does not provide for at least the same level of employee participation as the home Member State, the participation of employees in the company following the transfer should in certain circumstances be negotiated. Should such negotiations fail, the provisions applying in the company before the transfer should continue to apply after the transfer.

- (16) Employees' rights other than rights of participation should remain subject to Council Directive 94/45/EC of 22 September 1994 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees²⁰, Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies²¹, Council Directive 2001/23/EC of 12 March 2001 on the approximation of the law of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses²² and Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community²³.
- (17) The Member States should lay down rules on penalties applicable to infringements of the provisions of this Regulation, including infringements of the obligation to regulate in the articles of association of the SPE the matters prescribed by this Regulation, and should ensure that they are implemented. Those penalties must be effective, proportionate and dissuasive.
- (18) The Treaty does not provide, for the adoption of this Regulation, powers other than those under Article 308.
- (19) Since the objectives of the proposed action cannot be sufficiently achieved by the Member States in so far as they involve the creation of a company form with common features throughout the Community and can therefore, by reason of the scale of the action, be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity laid down in Article 5 of the Treaty. In accordance with the principle of proportionality as set out in that Article, this Regulation does not go beyond what is necessary to achieve those objectives,

²⁰ OJ L 254, 30.9.1994, p. 64. Directive as last amended by Directive 2006/109/EC (OJ L 363, 20.12.2006, p. 416).

²¹ OJ L 225, 12.8.1998, p. 16.

²² OJ L 82, 22.3.2001, p. 16.

²³ OJ L 80, 23.3.2002, p. 29.

HAS ADOPTED THIS REGULATION:

CHAPTER I
GENERAL PROVISIONS

Article 1
Subject matter

This Regulation lays down the conditions governing the establishment and operation within the Community of companies in the form of a European private company with limited liability (Societas Privata Europaea, hereinafter "SPE").

Article 2
Definitions

1. For the purposes of this Regulation, the following definitions shall apply:
 - (a) 'shareholder' means the founding shareholder and any other person whose name is entered in the list of shareholders in accordance with Articles 15-16;
 - (b) 'distribution' means any financial benefit derived directly or indirectly from the SPE by a shareholder, in relation to the shares held by him, including any transfer of money or property, as well as the incurring of a debt;
 - (c) 'director' means any individual managing director, any member of the management, administrative board or supervisory body of an SPE;
 - (d) 'management body' means one or more individual managing directors, the management board (dual board) or the administrative board (unitary board), designated in the articles of association of the SPE as being responsible for the management of the SPE;
 - (e) 'supervisory body' means the supervisory board (dual board), designated in the articles of association of the SPE as being responsible for the supervision of the management body;
 - (f) 'home Member State' means the Member State in which the SPE has its registered office immediately before any transfer of its registered office to another Member State;
 - (g) 'host Member State' means the Member State to which the registered office of the SPE is transferred.
2. For the purposes of point (b) of paragraph 1, distributions may be made through a purchase of property, the redemption or other kind of acquisition of shares or by any other means.

Article 3
Requirements for the establishment of an SPE

1. An SPE shall comply with the following requirements:
 - (a) its capital shall be divided into shares,
 - (b) a shareholder shall not be liable for more than the amount he has subscribed or agreed to subscribe,
 - (c) it shall have legal personality,
 - (d) its shares shall not be offered to the public and shall not be publicly traded,
 - (e) it may be formed by one or more natural persons and/or legal entities, hereinafter "founding shareholders".
2. For the purposes of point (d) of paragraph 1, shares shall be regarded as 'offered to the public' where a communication is addressed to persons 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.
3. For the purposes of point (e) of paragraph 1, 'legal entities' shall mean any company or firm within the meaning of the second paragraph of Article 48 of the Treaty, a European public limited-liability company as provided for in Regulation (EC) No 2001/2157, hereinafter "European Company", a European Co-operative Society as provided for in Council Regulation (EC) No 1435/2003, a European Economic Interest Grouping as provided for in Council Regulation (EEC) No 2137/85 and an SPE.

Article 4
Rules applicable to an SPE

1. An SPE shall be governed by this Regulation and also, as regards the matters listed in Annex I, by its articles of association.

However, where a matter is not covered by the articles of this Regulation or by Annex I, an SPE shall be governed by the law, including the provisions implementing Community law, which applies to private limited-liability companies in the Member State in which the SPE has its registered office, hereinafter "applicable national law".

CHAPTER II

FORMATION

Article 5

Method of formation

1. Member States shall allow the formation of an SPE by any of the following methods:
 - (a) the creation of a SPE in accordance with this Regulation;
 - (b) the transformation of an existing company;
 - (c) the merger of existing companies;
 - (d) the division of an existing company.
2. Formation of the SPE by the transformation, merger or division of existing companies shall be governed by the national law applicable to the transforming company, to each of the merging companies or to the dividing company. Formation by transformation shall not give rise to the winding up of the company or any loss or interruption of its legal personality.
3. For the purposes of paragraphs 1 and 2, 'company' shall mean any form of company that may be set up under the law of the Member States, a European Company and, where applicable, an SPE.

Article 6

Name of the company

The name of an SPE shall be followed by the abbreviation "SPE".

Only an SPE may add the abbreviation "SPE" to its name.

Article 7

Seat of the company

An SPE shall have its registered office and its central administration or principal place of business in the Community.

An SPE shall not be under any obligation to have its central administration or principal place of business in the Member State in which it has its registered office.

Article 8

Articles of association

1. An SPE shall have articles of association that cover at least the matters set out in this Regulation, as provided for in Annex I.

2. The articles of association of a SPE shall be in writing and signed by every founding shareholder.
3. The articles of association and any amendments thereto may be relied upon as follows:
 - (a) in relation to the shareholders and the management body of the SPE and its supervisory body, if any, from the date on which they are signed or, in the case of amendments, adopted;
 - (b) in relation to third parties, in accordance with the provisions of the applicable national law implementing paragraphs 5, 6 and 7 of Article 3 of Directive 68/151/EEC.

Article 9
Registration

1. Each SPE shall be registered in the Member State in which it has its registered office in a register designated by the applicable national law in accordance with Article 3 of Directive 68/151/EEC²⁴.
2. The SPE shall acquire legal personality on the date on which it is entered in the register.
3. In the case of a merger by acquisition, the acquiring company shall adopt the form of an SPE on the day the merger is registered.

In the case of a division by acquisition, the recipient company shall adopt the form of an SPE on the day the division is registered.

Article 10
Formalities relating to registration

1. Application for registration shall be made by the founding shareholders of the SPE or by any person authorised by them. Such application may be made by electronic means.
2. Member States shall not require any particulars and documents to be supplied upon application for the registration of a SPE other than the following:
 - (a) the name of the SPE and the address of its registered office;
 - (b) the names, addresses and any other information necessary to identify the persons who are authorised to represent the SPE in dealings with third parties and in legal proceedings, or take part in the administration, supervision or control of the SPE;
 - (c) the share capital of the SPE;

²⁴ OJ L 65, 14.3.1968, p. 8.

- (d) the share classes and the number of shares in each share class;
 - (e) the total number of shares;
 - (f) the nominal value or accountable par of the shares;
 - (g) the articles of association of the SPE;
 - (h) where the SPE was formed as a result of a transformation, merger or division of companies, the resolution on the transformation, merger or division that led to the creation of the SPE.
3. The documents and particulars referred to in paragraph 2 shall be provided in the language required by the applicable national law.
 4. Registration of the SPE may be subject to only one of the following requirements:
 - (a) a control by an administrative or judicial body of the legality of the documents and particulars of the SPE;
 - (b) the certification of the documents and particulars of the SPE.
 5. The SPE shall submit any change in the particulars or documents referred to in points (a) to (g) of paragraph 2 to the register within 14 calendar days of the day on which the change takes place. After every amendment to the articles of association, the SPE shall submit its complete text to the register as amended to date.
 6. The registration of an SPE shall be disclosed.

Article 11
Disclosure

1. The disclosure of the documents and particulars concerning an SPE which must be disclosed under this Regulation shall be effected in accordance with the applicable national law implementing Article 3 of Directive 68/151/EEC.
2. The letters and order forms of an SPE, whether they are in paper or electronic form, as well as its website, if any, shall state the following particulars:
 - (a) the information necessary to identify the register referred to in Article 9, with the number of entry of the SPE in that register;
 - (b) the name of the SPE, the address of its registered office and, where appropriate, the fact that the company is being wound up.

Article 12
Liability for acts undertaken before the registration of an SPE

Where acts were performed on behalf of an SPE before its registration, the SPE may assume the obligations arising out of such acts after its registration. Where the SPE does not assume

those obligations, the persons who performed those acts shall be jointly and severally liable, without limit.

Article 13
Branches

Branches of an SPE shall be governed by the law of the Member State in which the branch is located, including the relevant provisions implementing Council Directive 89/666/EEC²⁵.

CHAPTER III
SHARES

Article 14
Shares

1. The shares of the SPE shall be entered in the list of shareholders.
2. Shares carrying the same rights and obligations shall constitute one class.
3. Subject to Article 27, the adoption of an amendment to the articles of association of the SPE which varies the rights attached to a class of shares (including any change to the procedure for varying the rights attached to a class of share) shall require the consent of a majority of not less than two-thirds of the voting rights attached to the shares issued in that class.
4. Where a share is owned by more than one person, those persons shall be regarded as one shareholder in relation to the SPE. They shall exercise their rights through a common representative, who in the absence of any notification to the SPE shall be the person whose name appears first in the list of shareholders for that share. They shall be jointly and severally liable for the commitments attached to the share.

Article 15
List of shareholders

1. The management body of the SPE shall draw up a list of shareholders. The list shall contain at least the following:
 - (a) the name and address of each shareholder;
 - (b) the number of shares held by the shareholder concerned, their nominal value or accountable par;
 - (c) where a share is owned by more than one person, the names and addresses of the co-owners and of the common representative;

²⁵ OJ L 395, 30.12.1989, p. 36.

- (d) the date of acquisition of the shares;
 - (e) the amount of each consideration in cash, if any, paid or to be paid by the shareholder concerned;
 - (f) the value and nature of each consideration in kind, if any, provided or to be provided by the shareholder concerned;
 - (g) the date on which a shareholder ceases to be a member of the SPE.
2. The list of shareholders shall, unless proven otherwise, constitute evidence of the authenticity of the matters listed in points (a) to (g) of paragraph 1.
 3. The list of shareholders and any amendments thereto shall be kept by the management body and may be inspected by the shareholders or third parties on request.

Article 16
Transfer of shares

1. Subject to Article 27, 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.
2. All agreements on the transfer of shares shall be in written form.
3. On notification of a transfer, the management body shall, without undue delay, enter the shareholder in the list referred to in Article 15, provided that the transfer has been executed in accordance with this Regulation and the articles of association of the SPE and the shareholder submits reasonable evidence as to his lawful ownership of the share.
4. Subject to paragraph 3, any transfer of shares shall become effective as follows:
 - (a) in relation to the SPE, on the day the shareholder notifies the SPE of the transfer;
 - (b) in relation to third parties, on the day the shareholder is entered in the list referred to in Article 15.
5. A transfer of shares shall be valid only if it complies with this Regulation and the articles of association. The provisions of the applicable national law concerning the protection of persons who acquire shares in good faith shall apply.

Article 17
Expulsion of a shareholder

1. On the basis of a resolution of the shareholders and on an application by the SPE, the competent court may order the expulsion of a shareholder if he has caused serious harm to the SPE's interest or the continuation of the shareholder as a member of the

SPE is detrimental to its proper operation. An application to the court shall be made within 60 calendar days of the resolution of the shareholders.

2. The court shall decide whether, as an interim measure, the voting and other non-pecuniary rights of such shareholder should be suspended until a final decision is taken.
3. If the court orders the expulsion of a shareholder, it shall decide whether his shares are to be acquired by the other shareholders and/or by the SPE itself and on payment of the price of the shares.

Article 18

Withdrawal of a shareholder

1. A shareholder shall have the right to withdraw from the SPE if the activities of the SPE are being or have been conducted in a manner which causes serious harm to the interests of the shareholder 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.
2. The shareholder shall submit his withdrawal in writing to the SPE stating his reasons for the withdrawal.
3. The management body of the SPE shall, on receipt of the notice referred to in paragraph 2, without undue delay, request a resolution of the shareholders on the purchase of the shareholder's shares by the other shareholders or by the SPE itself.
4. Where the shareholders of the SPE fail to adopt a resolution referred to in paragraph 3 or do not accept the shareholder's reasons for withdrawal within 30 calendar days of the submission of the notice referred to in paragraph 2, the management body shall notify the shareholder of that fact without undue delay.
5. In the case of a dispute regarding the price of the shares, their value shall be determined by an independent expert appointed by the parties or, failing an agreement between them, by the competent court or administrative authority.
6. On an application of the shareholder, the competent court may, if satisfied that the interests of the shareholder have suffered serious harm, order the acquisition of his shares by the other shareholders or by the SPE itself and the payment of the price of the shares.

An application to the court shall be made either within 60 calendar days of the resolution of the shareholders referred to in paragraph 3 or, where no resolution is

adopted within 30 calendar days of the shareholder submitting his notice of withdrawal to the SPE, within 60 calendar days of the expiry of that period.

CHAPTER IV ***CAPITAL***

Article 19 **Share capital**

1. Without prejudice to Article 42, the capital of the SPE shall be expressed in euro.
2. The capital of the SPE shall be fully subscribed.
3. The shares of the SPE do not need to be fully paid on issue.
4. The capital of the SPE shall be at least EUR 1.

Article 20 **Consideration for shares**

1. Shareholders must pay the agreed consideration in cash or provide the agreed consideration in kind in accordance with the articles of association of the SPE.
2. Except in the case of a reduction of the share capital, shareholders may not be released from the obligation to pay or provide the agreed consideration.
3. Without prejudice to paragraphs 1 and 2, the liability of shareholders for the consideration paid or provided shall be governed by the applicable national law.

Article 21 **Distributions**

1. Without prejudice to Article 24, the SPE may, on the basis of a proposal of the management body, make a distribution to shareholders provided that, after the distribution, the assets of the SPE fully cover its liabilities. The SPE may not distribute those reserves that may not be distributed under its articles of association.
2. If the articles of association so require, the management body of the SPE, in addition to complying with paragraph 1, shall sign a statement, hereinafter a 'solvency certificate', before a distribution is made, certifying that the SPE will be able to pay its debts as they become due in the normal course of business within one year of the date of the distribution. Shareholders shall be provided with the solvency certificate before the resolution on the distribution referred to in Article 27 is taken.

The solvency certificate shall be disclosed.

Article 22
Recovery of distributions

Any shareholder who has received distributions made contrary to Article 21 must return those distributions to the SPE, provided that the SPE proves that the shareholder knew or in view of the circumstances should have been aware of the irregularities.

Article 23
Own shares

1. The SPE shall not, directly or indirectly, subscribe for its own shares.
2. In the case of acquisition by the SPE of its own shares, Articles 21 and 22 shall apply *mutatis mutandis*. Shares may not be purchased by the SPE unless they are fully paid. The SPE shall always have at least one issued share.
3. The right to vote and other non-pecuniary rights attached to the SPE's own shares shall be suspended, while the SPE is the registered owner of its own shares.
4. Where the SPE cancels its own shares, its share capital shall be reduced accordingly.
5. Shares acquired by the SPE in contravention of this Regulation or the articles of association shall be sold or cancelled within one year of their acquisition.
6. Subject to paragraph 5 and to the articles of association of the SPE, the cancellation of shares shall be governed by the applicable national law.
7. This Article shall apply *mutatis mutandis* to any shares acquired by a person acting in his own name but on behalf of the SPE.

Article 24
Capital reduction

1. In the case of a reduction of the share capital of the SPE, Articles 21 and 22 shall apply *mutatis mutandis*.
2. Following the disclosure of the resolution of the shareholders to reduce the capital of the SPE, those creditors whose claims antedate the disclosure of the resolution shall have the right to apply to the competent court for an order that the SPE provide them with adequate safeguards.

An application shall be made within 30 calendar days of the disclosure of the resolution.

3. The court may order the SPE to provide safeguards only if the creditor credibly demonstrates that due to the reduction in the capital the satisfaction of his claims is at stake, and that no adequate safeguards have been obtained from the SPE.

4. A capital reduction shall take effect as follows:
 - (a) where the SPE has no creditors at the time when the resolution is adopted, on its adoption;
 - (b) where the SPE has creditors at the time when the resolution is adopted and no creditor has made an application within 30 calendar days of the disclosure of the resolution of the shareholders, on the thirty-first calendar day following that disclosure;
 - (c) where the SPE has creditors at the time when the resolution is adopted and an application is made by a creditor within 30 calendar days of the disclosure of the resolution of shareholders, on the first date on which the SPE has complied with all orders by the competent court to provide adequate safeguards or, if earlier, the first date on which the court has determined, in relation to all applications that the SPE need not provide any safeguards.
5. If the purpose of a reduction of the capital is to offset losses incurred by the SPE, the reduced amount may be used only for this purpose and shall not be distributed to the shareholders.
6. A capital reduction shall be disclosed.
7. In the case of a capital reduction, the equal treatment of shareholders in the same position shall be ensured.

Article 25

Accounts

1. An SPE shall be subject to the requirements of the applicable national law as regards preparation, filing, auditing and publication of accounts.
2. The management body shall keep the books of the SPE. The bookkeeping of the SPE shall be governed by the applicable national law.

CHAPTER V

ORGANISATION OF THE SPE

Article 26

General provisions

1. The SPE shall have a management body, which shall be responsible for the management of the SPE. 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.
2. The shareholders shall determine the organisation of the SPE, subject to this Regulation.

Article 27
Resolutions of shareholders

1. Without prejudice to paragraph 2, at least the following matters shall be decided by a resolution of the shareholders by a majority as defined in the articles of association of the SPE:
 - (a) variation of rights attaching to shares;
 - (b) expulsion of a shareholder;
 - (c) withdrawal of a shareholder;
 - (d) approval of the annual accounts;
 - (e) distribution to the shareholders;
 - (f) acquisition of own shares;
 - (g) redemption of shares;
 - (h) increase of share capital;
 - (i) reduction of share capital;
 - (j) appointment and removal of directors and their terms of office;
 - (k) where the SPE has an auditor, appointment and removal of the auditor;
 - (l) transfer of the registered office of the SPE to another Member State;
 - (m) transformation of the SPE;
 - (n) mergers and divisions;
 - (o) winding up;
 - (p) amendments to the articles of association, not covering matters mentioned in points (a) to (o).

2. Resolutions on the matters indicated in points (a), (b), (c), (i), (l), (m) (n), (o) and (p) of paragraph 1 shall be taken by a qualified majority.

For the purposes of the first subparagraph, the qualified majority may not be less than two-thirds of the total voting rights attached to the shares issued by the SPE.

3. The adoption of resolutions shall not require the organisation of a general meeting. The management body shall provide all shareholders with the proposals for resolutions together with sufficient information to enable them to take an informed decision. Resolutions shall be recorded in writing. Copies of the decisions taken shall be sent to every shareholder.

4. Resolutions of the shareholders shall comply with this Regulation and the articles of association of the SPE.

The right of shareholders to challenge resolutions shall be governed by the applicable national law.

5. If the SPE has only one shareholder, he shall exercise the rights and fulfill the obligations of the shareholders of the SPE set out in this Regulation and the articles of association of the SPE.
6. Resolutions on matters indicated in paragraph 1 shall be disclosed.
7. Resolutions may be relied on as follows:
 - (a) in relation to the shareholders, the management body of the SPE and its supervisory body, if any, on the date they are adopted,
 - (b) in relation to third parties, in accordance with the provisions of the applicable national law implementing paragraphs 5, 6 and 7 of Article 3 of Directive 68/151/EEC.

Article 28

Information rights of shareholders

1. Shareholders shall have the right to be duly informed and to ask questions to the management body about resolutions, annual accounts and all other matters relating to the activities of the SPE.
2. The management body may refuse to give access to the information only if doing so could cause serious harm to the business interests of the SPE.

Article 29

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

1. Shareholders holding 5% of the voting rights attached to the shares of the SPE shall have the right to request the management body to submit a proposal for a resolution to the shareholders.

The request must state the reasons and indicate the matters that should be subject to such resolution.

If the request is refused or if the management body does not submit a proposal within 14 calendar days of receiving the request, the shareholders concerned may then submit a proposal for a resolution to the shareholders regarding the matters in question.

2. In the case of suspicion of serious breach of law or of the articles of association of the SPE, shareholders holding 5% of the voting rights attached to the shares of the SPE shall have the right to request the competent court or administrative authority to

appoint an independent expert to investigate and report on the findings of the investigation to shareholders.

The expert shall be allowed access to the documents and records of the SPE and to require information from the management body.

3. The articles of association may grant the rights set out in paragraphs 1 and 2 to individual shareholders or to shareholders holding less than 5% of the voting rights attached to the shares of the SPE.

Article 30

Directors

1. Only a natural person may be a director of an SPE.
2. A person who acts as a director without having been formally appointed shall be considered a director as regards all duties and liabilities to which the latter are subject.
3. A person who is disqualified under national law from serving as a director of a company by a judicial or administrative decision of a Member State may not become or serve as a director of an SPE.
4. Disqualification of a person serving as a director of the SPE shall be governed by the applicable national law.

Article 31

General duties and liabilities of directors

1. A director shall have a duty to act in the best interests of the SPE. He shall act with the care and skill that can reasonably be required in the conduct of the business.
2. The duties of directors shall be owed to the SPE.
3. Subject to the articles of association of the SPE, a director shall avoid any situation that can be reasonably regarded as likely to give rise to an actual or potential conflict between his personal interests and those of the SPE or between his obligations towards the SPE and his duty to any other legal or natural person.
4. A director of the SPE shall be liable to the company for any act or omission in breach of his duties deriving from this Regulation, the articles of association of the SPE or a resolution of shareholders which causes loss or damage to the SPE. Where such breach has been committed by more than one director, all directors concerned shall be jointly and severally liable.
5. Without prejudice to the provisions of this Regulation, the liability of directors shall be governed by the applicable national law.

Article 32
Related party transactions

Related party transactions shall be governed by the provisions of the applicable national law implementing Council Directives 78/660/EEC²⁶ and 83/349/EEC²⁷.

Article 33
Representation of the SPE in relation to third parties

1. The SPE shall be represented in relation to third parties by one or more directors. Acts undertaken by the directors shall be binding on the SPE even if they are not within the objects of the SPE.
2. The articles of association of the SPE may provide that directors are to exercise jointly the general power of representation. Any other limitation of the powers of the directors, following from the articles of association, a resolution of shareholders or a decision of the management or supervisory body, if any, may not be relied on against third parties even if they have been disclosed.
3. Directors may delegate the right to represent the SPE in accordance with the articles of association.

CHAPTER VI
EMPLOYEE PARTICIPATION

Article 34
General provisions

1. The SPE shall be subject to the rules on employee participation, if any, applicable in the Member State in which it has its registered office, subject to the provisions of this Article.
2. In the case of the transfer of the registered office of an SPE Article 38 shall apply.
3. In the case of a cross-border merger of an SPE with an SPE or other company registered in another Member State, the provisions of the laws of the Member States implementing Directive 2005/56/EC of the European Parliament and of the Council²⁸ shall apply.

²⁶ OJ L 222, 14.8.1978, p. 11.

²⁷ OJ L 193, 18.7.1983, p. 1.

²⁸ OJ L 310, 25.11.2005, p. 1.

CHAPTER VII
TRANSFER OF THE REGISTERED OFFICE OF THE SPE

Article 35

General provisions

1. The registered office of an SPE may be transferred to another Member State in accordance with this Chapter.

The transfer of the registered office of an SPE shall not result in the winding-up of the SPE or in any interruption or loss of the SPE's legal personality or affect any right or obligation under any contract entered into by the SPE existing before the transfer.

2. Paragraph 1 shall not apply to SPEs against which proceedings for winding-up, liquidation, insolvency or suspension of payments have been brought, or in respect of which preventive measures have been taken by the competent authorities to avoid the opening of such proceedings.
3. A transfer shall take effect on the date of registration of the SPE in the host Member State. From that date, for matters covered by the second paragraph of Article 4, the SPE shall be regulated by the law of the host Member State.
4. For the purpose of judicial or administrative proceedings commenced before the transfer of the registered office, the SPE shall be considered, following the registration referred to in paragraph 3, as having its registered office in the home Member State.

Article 36

Transfer procedure

1. The management body of an SPE planning a transfer shall draw up a transfer proposal, which shall include at least the following particulars:
 - (a) the name of the SPE and the address of its registered office in the home Member State;
 - (b) the name of the SPE and the address of its proposed registered office in the host Member State;
 - (c) the proposed articles of association for the SPE in the host Member State;
 - (d) the proposed timetable for the transfer;
 - (e) the date from which it is proposed that the transactions of the SPE are to be regarded for accounting purposes as having been carried out in the host Member State;

- (f) the consequences of the transfer for employees, and the proposed measures concerning them;
 - (g) where appropriate, detailed information on the transfer of the central administration or principal place of business of the SPE.
2. At least one month before the resolution of the shareholders referred to in paragraph 4 is taken, the management body of the SPE shall:
- (a) submit the transfer proposal to the shareholders and employee representatives, or where there are no such representatives, to the employees of the SPE for examination and make it available to the creditors for inspection;
 - (b) disclose the transfer proposal.
3. The management body of the SPE shall draw up a report to the shareholders explaining and justifying the legal and economic aspects of the proposed transfer and setting out the implications of the transfer for shareholders, creditors and employees. The report shall be submitted to the shareholders and the employee representatives, or where there are no such representatives, to the employees themselves together with the transfer proposal.
- Where the management body receives in time the opinion of the employee representatives on the transfer, that opinion shall be submitted to the shareholders.
4. The transfer proposal shall be submitted to the shareholders for approval in accordance with the rules of the articles of association of the SPE relating to the amendment of the articles of association.
5. Where the SPE is subject to an employee participation regime, shareholders may reserve the right to make the implementation of the transfer conditional on their express ratification of the arrangements with respect to the participation of employees in the host Member State.
6. The protection of any minority shareholders who oppose the transfer and of the creditors of the SPE shall be governed by the law of the home Member State.

Article 37

Scrutiny of the legality of the transfer

1. Each Member State shall designate a competent authority to scrutinise the legality of the transfer by verifying compliance with the transfer procedure laid down in Article 36.
2. The competent authority of the home Member State shall verify, without undue delay, that the requirements of Article 36 have been met and, if that is found to be the case, shall issue a certificate confirming that all the formalities required under the transfer procedure have been completed in the home Member State.

3. Within one month of the receipt of the certificate referred to in paragraph 2, the SPE shall present the following documents to the competent authority in the host Member State:
 - (a) the certificate provided for in paragraph 2;
 - (b) the proposed articles of association for the SPE in the host Member State, as approved by the shareholders;
 - (c) the transfer proposal, as approved by the shareholders.

Those documents shall be deemed to be sufficient to enable the registration of the SPE in the host Member State.

4. The competent authority in the host Member State shall, within 14 calendar days of receipt of the documents referred to in paragraph 3, verify that the substantive and formal conditions required for the transfer of the registered office are met and if that is found to be the case, take the measures necessary for the registration of the SPE.
5. The competent authority of the host Member State may refuse to register an SPE only on the grounds that the SPE does not meet all the substantive or formal requirements under this Chapter. The SPE shall be registered when it has fulfilled all requirements under this Chapter.
6. Using the notification form set out in Annex II, the competent authority of the host Member State shall, without undue delay, notify the competent authority responsible for removing the SPE from the register in the home Member State of the registration of the SPE in the host Member State.

Removal from the register shall be effected as soon as, but not before, a notification has been received.

7. Registrations in the host Member State and removals from the register in the home Member State shall be disclosed.

Article 38

Arrangements for the participation of employees

1. The SPE shall be subject, as from the date of registration, to the rules in force in the host Member State, if any, concerning arrangements for the participation of employees.
2. Paragraph 1 shall not apply where the employees of the SPE in the home Member State account for at least one third of the total number of employees of the SPE including subsidiaries or branches of the SPE in any Member State, and where one of the following conditions is met:
 - (a) the legislation of the host Member State does not provide for at least the same level of participation as that operated in the SPE in the home Member State prior to its registration in the host Member State. The level of employee participation shall be measured by reference to the proportion of employee

representatives amongst the members of the administrative or supervisory body or their committees or of the management group which covers the profit units of the SPE, subject to employee representation;

- (b) the legislation of the host Member State does not confer on the employees of establishments of the SPE that are situated in other Member States the same entitlement to exercise participation rights as such employees enjoyed before the transfer.
3. Where one of the conditions set out in points a) or b) of paragraph 2 is met, the management body of the SPE shall take the necessary steps, as soon as possible, after disclosure of the transfer proposal, to start negotiations with the representatives of the SPE's employees with a view to reaching an agreement on arrangements for the participation of the employees.
4. The agreement between the management body of the SPE and the representatives of the employees shall specify:
 - (a) the scope of the agreement;
 - (b) where, during the negotiations, the parties decide to establish arrangements for participation in the SPE following the transfer, the substance of those arrangements including, where applicable, the number of members in the company's administrative or supervisory body employees will be entitled to elect, appoint, recommend or oppose, the procedures as to how these members may be elected, appointed, recommended or opposed by employees, and their rights;
 - (c) the date of entry into force of the agreement and its duration, and any cases in which the agreement should be renegotiated and the procedure for its renegotiation.
5. Negotiations shall be limited to a period of six months. The parties may agree to extend negotiations beyond this period for an additional six-month period. The negotiations shall otherwise be governed by the law of the home Member State.
6. In the absence of an agreement, the participation arrangements existing in the home Member State shall be maintained.

CHAPTER VIII ***RESTRUCTURING, DISSOLUTION AND NULLITY***

Article 39 **Restructuring**

The transformation, merger and division of the SPE shall be governed by the applicable national law.

Article 40
Dissolution

1. The SPE shall be dissolved in the following circumstances:
 - (a) by expiry of the period for which it was established;
 - (b) by the resolution of the shareholders;
 - (c) in cases set out in the applicable national law.
2. Winding-up shall be governed by the applicable national law.
3. Liquidation, insolvency, suspension of payments and similar procedures shall be governed by the applicable national law and by Council Regulation (EC) No 1346/2000²⁹.
4. Dissolution of the SPE shall be disclosed.

Article 41
Nullity

The nullity of the SPE shall be governed by the provisions of the applicable national law implementing Article 11(1) of Directive 68/151/EEC, points (a), (b), (c) and (e), except for the reference in point (c) to the objects of the company, of Article 11(2) and Article 12 of that Directive.

CHAPTER IX
ADDITIONAL AND TRANSITIONAL PROVISIONS

Article 42
Use of national currency

1. Member States in which the third phase of the economic and monetary union (EMU) does not apply may require SPEs having their registered office in their territory to express their capital in the national currency. An SPE may also express its capital in euro. The national currency/euro conversion rate shall be as on the last day of the month preceding the registration of the SPE.
2. An SPE may prepare and publish its annual and, where applicable, consolidated accounts in euro in Member States where the third phase of the economic and monetary union (EMU) does not apply. However such Member States may also require SPEs to prepare and publish their annual and, where applicable, consolidated accounts in the national currency in accordance with the applicable national law.

²⁹ OJ L 160, 30.6.2000, p. 1.

CHAPTER X
FINAL PROVISIONS

Article 43

Effective application

Member States shall make such provision as is appropriate to ensure the effective application of this Regulation.

Article 44

Penalties

The Member States shall lay down the rules on penalties applicable to infringements of the provisions of this Regulation and shall take all measures necessary to ensure that they are implemented. The penalties provided for must be effective, proportionate and dissuasive. The Member States shall notify those provisions to the Commission by 1 July 2010 at the latest and shall notify it without delay of any subsequent amendment affecting them.

Article 45

Notification of private limited-liability companies

Member States shall notify the form of private limited-liability company referred to in the second paragraph of Article 4 to the Commission by 1 July 2010 at the latest.

The Commission shall publish this information in the *Official Journal of the European Union*.

Article 46

Obligations of authorities responsible for registers

1. The authorities responsible for the register referred to in Article 9(1) shall notify the Commission before 31 March each year, of the name, registered office and registration number of the SPEs registered in and removed from the register in the preceding year as well as the total number of registered SPEs.
2. The authorities referred to in paragraph 1 shall cooperate with each other to ensure that the documents and particulars of the SPEs listed in Article 10(2) are also accessible through the registers of all other Member States.

Article 47

Review

The Commission shall, no later than 30 June 2015, review the application of this Regulation.

Article 48
Entry into force

This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

It shall apply from 1 July 2010.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels,

For the Council
The President

ANNEX I

The articles of association of an SPE shall regulate at least the following:

Chapter II – Formation

- the name of the SPE,
- the names and addresses of the founding shareholders of the SPE and the nominal value or accountable par of the shares held by them,
- the initial capital of the SPE,

Chapter III - Shares

- whether sub-division, consolidation or redenomination of the shares is permitted and any applicable requirements,
- the pecuniary and non-pecuniary rights and the obligations attached to the shares (share classes), in particular
 - (a) the participation in the assets and profits of the company, if any,
 - (b) the votes attached to the shares, if any,
- the procedure for agreeing on any variation of the rights and obligations attached to the shares (share classes), and, subject to Article 14(3), the required majority of voting rights,
- any pre-emption rights either on issue or on transfer of shares, if any, and any applicable requirements,
- where the transfer of shares is restricted or prohibited, the details of the restriction or prohibition, in particular the form, time limit, the applicable procedure, and the rules applicable in the event of the death or dissolution of a shareholder,
- where the approval of the share transfer by the SPE or by the shareholders is required or other rights are provided for shareholders or for the SPE on the transfer of shares (for example, right of first refusal), a deadline by which the transferor is to be notified of the decision,
- whether, in addition to Article 17, shareholders have any rights to require other shareholders to sell their shares, and any applicable requirements,
- whether, in addition to Article 18, shareholders have the right to sell their shares to other shareholders or to the SPE, who are obliged to buy those shares, and the applicable requirements,

Chapter IV – Capital

- the financial year of the SPE and how it may be changed,
- whether the SPE is required to establish reserves and if so, the type of reserve, the circumstances in which it is to be established and whether it is distributable,
- whether consideration in kind are to be evaluated by an independent expert and any formalities that must be complied with,
- the time when the payment or provision of the consideration is to be made and any conditions relating to such payment or provision,
- whether or not the SPE can provide financial assistance, in particular advance funds, make loans or provide security, with a view to the acquisition of its shares by a third party,
- whether interim dividends can be paid and any applicable requirements,
- whether the management body is required to sign a solvency certificate before a distribution is made, and the applicable requirements,
- the procedure the SPE must follow to recover any unlawful distribution,
- whether the acquisition of own shares is permitted and, if permitted, the procedure to be followed, including the conditions under which the shares may be held, transferred or cancelled,
- the procedure for increasing, reducing or otherwise changing the share capital, and any applicable requirements,

Chapter V – Organisation of the SPE

- the method of adopting shareholder resolutions,
- subject to the provisions of this Regulation, the majority required to adopt shareholder resolutions,
- the resolutions to be adopted by the shareholders, in addition to those listed in Article 27(1), the quorum and the required majority of voting rights,
- subject to Articles 21, 27 and 29, the rules on proposing resolutions,
- the period of time and the manner in which the shareholders are to be informed of proposals for shareholder resolutions and, if the articles of association provide for general meetings, general meetings,
- the way in which the shareholders obtain the text of any proposed shareholder resolution and any other preparatory documents in relation to the adoption of a resolution,
- the manner in which copies of an adopted resolution are made available to the shareholders,
- where the articles of association provide for the adoption of some or all resolutions at a general meeting, the manner of convening the general meeting, the working methods and the rules on voting by proxy,
- the procedure and time limits for the SPE to respond to requests from shareholders for information, to grant access to the documents of the SPE, and to notify resolutions that have been adopted by shareholders,
- whether the SPE's management body is composed of one or more managing directors, a management board (dual board) or an administrative board (unitary board),
- where there is an administrative board (unitary board), its composition and organisation,

- where there is a management board (dual board), its composition and organisation,
- where there is a management board (dual board) or one or more managing directors, whether the SPE has a supervisory body, and if so, its composition and organisation and its relationship with the management body,
- any eligibility criterion of directors,
- the procedure for appointing and removing directors,
- whether the SPE has an auditor and where the articles of association provide that the SPE should have an auditor, the procedure for his appointment, removal and resignation,
- any specific duties of directors other than those mentioned in this Regulation,
- whether situations involving an actual or potential conflict of interest by a director may be authorised and, if so, an indication of who may authorise such a conflict and the applicable requirements and procedures for the authorisation of such a conflict,
- whether related party transactions as referred to in Article 32 need to be authorised and the applicable requirements,
- the rules on representation of the SPE by the management body, in particular if the directors have the right to represent the SPE jointly or separately and any delegation of this right,
- the rules on delegation of any management power to another person.

ANNEX II

**NOTIFICATION FORM CONCERNING THE REGISTRATION OF THE
TRANSFER OF THE REGISTERED OFFICE OF AN SPE**

NOTIFICATION

**concerning the registration of the transfer of the registered office of a European private
company (SPE)**

[Name and address of the new register/competent authority]

hereby informs

[Name and address of the former register/competent authority]

that the following transfer of the registered office of an SPE has been registered:

[Name of the SPE]

[New registered office of the SPE]

[New number of entry in the register]

[Date of registration of the transfer]

**In accordance with Regulation ... on the Statute for a European private company, the
following SPE is to be removed from its former register on receipt of this notification:**

[Name of the SPE]

[Former registered office of the SPE]

[Former number of entry in the register]

Done at..., [...]

[signed]

Summary: Intervention & Options

Department /Agency: BERR	Title: Impact Assessment of EU Proposal for a European Private Company Statute	
Stage: Draft	Version: 2	Date: 14 July 2008
Related Publications: EU Impact Assessment "Proposal for a Council Regulation on the Statute for a European Private Company (SPE) "		

Available to view or download at:

http://ec.europa.eu/internal_market/company/docs/epc/impact_assesment_en.pdf

Contact for enquiries: Maureen Beresford CLG

Telephone: 020 7215 3342

What is the problem under consideration? Why is government intervention necessary?

SMEs are an important driving force in the EU economy but there is evidence that they face significant problems in participating in and benefiting from the Single Market. In particular, taxation, labour regulation and administrative burdens are considered obstacles to SME development. There is a lack of harmonisation in company law across EU countries which imposes costs on companies which are proportionately heavier for smaller companies. As a consequence only around 5% of SMEs participate in the EU Single Market compared to 20% of large companies.

What are the policy objectives and the intended effects?

The EU Proposal is for a new legal form (the European Private Company or SPE) which would allow entrepreneurs to set up an SPE following the same, flexible company law provisions across all Member States. The proposal aims to reduce costs associated with formation and the internal workings of the SPE whilst maintaining good corporate governance. This in turn is expected to enhance the competitiveness of SMEs.

What policy options have been considered? Please justify any preferred option.

We have considered three options:

1. Accept the proposal in full.
2. Oppose the proposal.
3. Accept the proposal but with amendments particularly in relation to the cross-border element, some closer links to national law to ensure legal certainty, and other minor changes to ensure creditor protection.

Option 3 is the preferred option as we believe that this would maximise the net benefits to the UK.

When will the policy be reviewed to establish the actual costs and benefits and the achievement of the desired effects? 2013

Ministerial Sign-off For consultation stage Impact Assessments:

I have read the Impact Assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options.

Signed by the responsible Minister:

.....Date:



Summary: Analysis & Evidence

Policy Option: 3	Description:
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COSTS	ANNUAL COSTS	Description and scale of key monetised costs by 'main affected groups' Costs for registry of coping with an alternative legal form £250k.
	One-off (Transition) Yrs	
	£ 250,000	
	Average Annual Cost (excluding one-off)	
£	Total Cost (PV)	£ 250,000
<p>Other key non-monetised costs by 'main affected groups'</p> <p>Legal advice required on appropriate legal form for companies with existing overseas venture. Familiarisation costs with SPE form for UK companies, intermediaries, investors and creditors.</p>		

BENEFITS	ANNUAL BENEFITS	Description and scale of key monetised benefits by 'main affected groups' Reduced costs for UK companies of setting up and running an overseas enterprise using the SPE form. A 10% reduction in administrative costs could produce a one-off saving of 430 Euros (£339) and an annual saving of 230 Euros (£181) for each subsidiary set up as an SPE. Assume take up of SPE form by 5% of 16k private companies with cross-border activity.
	One-off Yrs	
	£ 339 10	
	Average Annual Benefit (excluding one-off)	
£ 181	Total Benefit (PV)	£ 1.2 million
<p>Other key non-monetised benefits by 'main affected groups' Greater levels of EU competition and integration as more SMEs may participate in EU Single Market. Greater consistency in company form for UK companies in dealing with SPEs. Possibly greater levels of corporate governance and creditor protection if standards rise across the EU.</p>		

Key Assumptions/Sensitivities/Risks Assume that final form of SPE is largely consistent with UK private limited company form and has no detrimental effect on corporate governance/creditor protection. Registrar costs assumes relatively low take up of SPE form in UK in the short term. Assume 5% of 16k private companies involved in cross-border activity adopt SPE form and savings are 10% of current costs..

Price Base Year 2007	Time Period Years 10	Net Benefit Range (NPV) £	NET BENEFIT (NPV Best estimate) £ 954k
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What is the geographic coverage of the policy/option?	EU			
On what date will the policy be implemented?	1 July 2010			
Which organisation(s) will enforce the policy?	n/a			
What is the total annual cost of enforcement for these organisations?	£0			
Does enforcement comply with Hampton principles?	Yes/No			
Will implementation go beyond minimum EU requirements?	No			
What is the value of the proposed offsetting measure per year?	£ n/a			
What is the value of changes in greenhouse gas emissions?	£ n/a			
Will the proposal have a significant impact on competition?	No			
Annual cost (£-£) per organisation (excluding one-off)	Micro	Small	Medium	Large
Are any of these organisations exempt?	Yes/No	Yes/No	N/A	N/A

Impact on Admin Burdens Baseline (2005 Prices)	(Increase - Decrease)
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Increase of £ 0

Decrease of £ 0

Net Impact £ 0

Key:

Annual costs and benefits: Constant Prices

(Net) Present Value

Evidence Base (for summary sheets)

Background

The proposed European Private Company (Societas Privata Europaea) statute forms part of the much wider Small Business Act (SBA), a package of measures designed to assist SMEs. The objective of the SBA is to make it easier for SMEs to do business in the Single Market and consequently improve their market performance.

The EPC proposal creates a new voluntary European legal form which will be available to SMEs. It will allow companies to be formed following the same, simple flexible company law provisions across Member States. The proposal aims to reduce compliance costs for the creation and operation of business arising from the disparities between national rules both on formation and on the internal operation of companies.

The proposal does not regulate matters related to tax law, accounting or the insolvency of the SPE. It does not deal with labour law beyond the articles on Employee participation. Nor does it deal with the contractual rights and obligations of the SPE or those of its shareholders other than those deriving from the articles of association of the SPE. These matters will continue to be governed by national law and existing Community law instruments where relevant.

The decision to use the SPE will be left to individual companies. They will need to consider the benefits of the SPE against national laws. In the UK this would be the private limited company.

The idea of an EPC has been around for many years and the Department undertook informal consultation on this matter in 2005. The results of that consultation concluded that UK SMEs did not identify significant problems when working overseas. Furthermore the UK private limited company was becoming the vehicle of choice for not only UK companies but also many European companies, who due to recent ECJ rulings can now register in any Member state whilst conducting its business in another. Thousands of German companies choose to register in the UK to take advantage of our light touch system, bypassing the more heavily regulated German system.

As a result of pressure from the European Parliament, France and Germany the Commission consulted on the idea of an EPC during 2007. The response rate was low (only 76 from across the EU and only 7 from the UK) but 75% of these supported some form of intervention to reduce costs, legal barriers and bureaucracy for companies who work in more than one member state. Many member states also see attractions in having a European badge which may open markets they have difficulty breaking into. There is though no evidence that this is the case for UK companies as the UK private company form is a strong and recognised brand. In response to the consultation the Commission agreed to formally propose the EPC statute.

Why Do we need to Intervene?

The EU Impact Assessment (see the reference at top of summary sheet) prepared in conjunction with the draft proposal sets out the rationale for intervention in this area (EU IA pages 6-11). There is evidence of low levels of participation in the EU Single Market amongst SMEs because of legal and administrative barriers faced by businesses when starting and operating a business in the EU. In particular, differences in company law across EU member states impose costs that fall disproportionately on SMEs.

These costs are thought to fall in three areas:

- Compliance costs associated with the formation of a company.
- difficulties and compliance costs associated with the operation of a company generated by the diversity of national rules.
- A lack of trust in foreign legal forms.

The consequence of this is that SMEs are discouraged from setting up overseas operations to the detriment of both their domestic and the wider EU market. Analysis by the EU (EU IA Annex 1, Graph A2) shows that on average only 5% of EU SMEs have a foreign subsidiary or joint venture. For the UK this figure is 7.5%. This compares with a figure of 20% for large companies at the EU level. Furthermore, an EU survey of SMEs (see EU IA page 7) found that 40% of such firms thought that an expansion into the EU would be important for them and 40% felt that they lacked sufficient information about doing business abroad.

What are the Policy Objectives?

The main objective of the proposed SPE legal form is to enhance the competitiveness of SMEs by facilitating their establishment and operation in the Single Market (EU IA page 12). This in turn is expected to increase the effectiveness of the EU Single Market by boosting levels of competition and reducing compliance costs.

The EU Impact Assessment (page 12) sets out two main objectives of the proposal:

- providing for a simple, flexible corporate law regime widely known across the EU, adapted to the specific needs of SMEs and based on uniform principles throughout the EU.
- reducing compliance costs arising from the operation of businesses in several different company law systems. (Including both set up and operating compliance costs).

What is the Population that will be affected?

The current EU proposal would open up the SPE form to all UK businesses regardless of whether they currently have an overseas operation or not. However, the UK's preferred position (assumed under option 3) is that the SPE form is limited to those firms who already operate in the EU market.

Informal consultations with stakeholders suggest that few UK companies are likely to take up the SPE, at least in short term, given the uncertainty that will surround this new legal form and the current strong brand of the UK private limited.

The proposal for a European Private Company statute is enabling legislation. Companies will not have to do anything unless they choose to become an SPE rather than a UK limited company. Calculations using the UK company population statistics (forthcoming BERR/ONS paper on Company Population Statistics using FAME May 2007 data) and the EU figure on the level of cross border activity by UK SMEs (as above) suggest that around 161,000 private companies might want to consider converting to the SPE form.

In practice however it is more likely that medium-sized companies and perhaps some more growth-oriented and established small companies might choose to consider this form. Applying the 7.5% figure to the population of medium companies and those small companies who provide Companies House with their full accounts (as a proxy for more growth-oriented small companies) suggests that only around 16,000 small and medium private companies might be interested in adopting this legal form. (In practice we might expect that the percentage of medium companies with any cross-border operation is higher than the SME average of 7.5%

but even assuming a large company average of 20% would only suggest a population of 42,000 small and medium private companies might be interested in the SPE form).

It is also possible that the introduction of this new legal form might encourage some non-corporate businesses in the UK to incorporate but we have no evidence to determine the likely scale of such conversion. Similarly, although the SPE statute is part of the SBA there would be nothing to prevent large private companies from adopting the SPE form if they perceived benefits from doing so. We have no evidence on the likely take up amongst this group of companies in the UK but assuming that in line with the EU average around 20% of such companies have cross-border activities, around 5,000 might wish to consider the SPE corporate form.

Although the proposal will harmonise some areas of company law there will still be significant parts left to national laws, this includes accounting and auditing issues, taxation, labour law and insolvency law. All companies that become an SPE will still need to ensure that they have the relevant systems in place to deal with national legislation. Therefore they will continue to depend on advice from consultants and lawyers who specialise in these fields of expertise. These additional costs lead us to believe that those companies who will have sufficient resources to negotiate the continuing national law provisions will on the whole be medium and larger small companies.

Costs and Benefits

The introduction of the SPE will provide an alternative legal form for existing and yet to be formed EU businesses. There will be some wider costs and benefits from the introduction of the SPE form regardless of the take up in the UK e.g. registry costs and EU wide benefits to the Single Market. However, the key assumption is that UK companies will only adopt the SPE form if they perceive that the benefits outweigh the costs. There are also then those costs and benefits which will depend on both the final detail of the EU SPE proposal and the extent to which the form is adopted by EU companies. These costs and benefits are set out in more detail below:

Costs

Registry Costs

The UK registrar will also incur costs associated with implementing new procedures for the SPE. Assuming that the take up of the SPE will be relatively small in the short term, initial costs may be in the region of £250,000. This figure is based on the work associated with the introduction of the SE (European Public) company.

Legal advice on deciding whether to adopt SPE form

The EU IA (annex 3, table A2) sets out the likely costs of acquiring legal advice on company law issues which a company might face when choosing to incorporate. In the UK the current cost of taking legal advice on the company structure to be adopted, the drafting of articles of association etc. is 2400 Euros (£1890). The cost amongst other EU member states can be much greater (as much as 7500 Euros in Belgium). This cost is likely to increase in all countries if a further corporate form (the SPE) has to be considered. The cost could be quite substantial if the SPE corporate form is made available to all UK companies regardless of whether they have any existing overseas activity. (The total UK private company population is 2.2 million).

Possibly reduced Corporate Governance /Creditor Protection

The SPE corporate form is expected to be a less heavily regulated corporate form than currently exists in the UK. If the SPE was adopted by large numbers of existing UK companies (especially larger ones) this might undermine existing levels of UK corporate governance/creditor protection depending on the final detail of the regulation. However, we do not expect that for many UK companies the benefits for adopting the SPE form are likely to outweigh the costs and we will be working with other member states to ensure that corporate governance and creditor protection levels are maintained.

Familiarisation costs for intermediaries, companies, investors, creditors

The introduction of the SPE will provide a new corporate form which UK intermediaries, existing companies, investors and creditors will have to come to terms with and understand, as well as evaluating the impact on their own commercial dealings with such entities. The scale of such costs will depend on the take-up of the new corporate form in both the UK and the rest of the EU member states, and the differences in detail between it and the UK private limited form.

Benefits

Reduced Compliance Costs for Companies setting up and operating

The Commission IA suggests that current costs of legal advice and administrative costs of incorporating in EU member states average 4,300 Euros (£3386) with a range of 2,000 to 10,000 Euros. The compliance costs for day-to-day operation of a company are estimated by the EU as 2,300 Euros (£1811) on average with a range of 750 to 6,000 Euros. SPEs will still need some legal advice on those aspects of the regulation left to national law, however if we assume a 10% reduction of compliance costs on both incorporation and in day-to-day activities this could represent a one-off saving of 430 Euros (£339) and an annual saving of 230 Euros (£181) for each subsidiary. Although the scale of such benefits might seem modest, they could in practice be much greater and research has shown that even modest reductions in administrative costs can be decisive for small companies (Becht and Mayer). For larger companies these savings are likely to be greater in absolute terms.

Our calculation of the benefits of this proposal is based on the assumption that around 5% of the 16k medium and small growth-oriented private companies identified above are likely to adopt the SPE form. However, the evidence on the take up of the SE (European Public Company) form suggests that even this may be an overestimate (there are currently seven SEs registered at Companies House).

Assuming that minimum capital requirements are required for the SPE, then the compliance costs could be significantly reduced in some member states. For example, 35,000 Euros (£27,560) are currently required in Austria. Companies may still agree themselves to higher levels but it will no longer be a statutory requirement.

Benefits of increased effectiveness of EU Single Market/increased competition

If the introduction of the SPE corporate form meets its objectives of encouraging the participation of more SMEs in the European Union's Single Market then the increased levels of competition and raised productivity should bring net economic benefits to all Member States. These benefits, whilst real, are difficult to quantify at the level of the individual policy or regulation.

Greater consistency of European Company form for those UK companies who deal with European businesses.

If the SPE form is adopted widely by companies operating across borders within the EU Single Market then there could be savings in the longer term in both familiarisation costs and ongoing administrative costs for those such as investors, intermediaries and creditors interacting with such companies. For example, where currently they need to be aware potentially of 27 different company law regimes they might now only need to understand the SPE form and some other popular company forms. Again it is difficult to quantify such benefits which will depend on the detail of the SPE form and the degree to which it is adopted across the EU.

Possibly greater levels of Corporate Governance/Creditor Protection in EU in longer term

To the extent that the final form of the SPE is popular (possibly because of its branding etc.) it could raise the minimum level of corporate governance and/or creditor protection across the EU to the benefit of UK investors, companies, consumers and creditors. Again these benefits are difficult to quantify at this stage and depend on the final form of the SPE and the level of take up across the EU.

Options

Option 1

Accept the Proposal in Full, as drafted

The proposal currently drafted appears to be a good first attempt by the Commission. Discussions with UK representative bodies specifically the CBI and BCC have suggested that they think the proposal is a great improvement on the SE (European public company) regulation. The proposal will give high levels of flexibility to companies, with much of their decision process left to the articles of association.

The UK could simply agree the proposal as currently drafted however, this could lead to some additional costs for UK companies. For example:

One of the objectives of the proposal is to increase competition across borders but there is no specific requirement for the SPE to have a presence in one or more member state. The UK has argued for some time that further European action is only appropriate if it will improve a company's ability to work cross border. Leaving the SPE available to all companies could add additional cost to all new companies who would need to invest time and resource in deciding whether the UK private limited company or the SPE would be the most appropriate form for them.

The proposal details those issues that must be dealt with in the company's Articles of Association. There are a number of points for further consideration here:

1. What will happen if a company does not effectively deal with all issues.
2. It may be better for some of the issues currently in the articles to be formally regulated to ensure legal certainty.
3. Should national law act as a safety net to pick up any issues not dealt with by the articles.

In order to ensure that the SPE offers both flexibility, legal certainty and good corporate governance it is important that the UK undertakes a detailed analysis of the proposal and where

possible seeks to achieve amendments or improvements to the proposal, and therefore should not accept the proposal as currently drafted.

Costs associated with this proposal are detailed in the European Impact Assessment.

Option 2

Oppose the Proposal

The proposal is based on unanimity, therefore if the UK does not believe that there is sufficient benefit for SMEs then it would be possible to oppose the proposal.

As already stated evidence suggests that take up for UK companies will be relatively small at least in the first few years. The UK private company form is well known and understood by both companies and formation agencies. It is easy to set up a company and it can be done with minimal capital and by registering electronically it is possible to be registered within one day.

Recent ECJ hearings have made it possible to register a company in one member state whilst having your place of business in another member state. Thousands of companies from other member states, particularly German companies are taking advantage of this case law and choosing to incorporate in the UK to benefit from our relatively simple procedures compared to those in Germany. The UK does not receive any specific benefits from this, other than the demonstration of ease of registration in the UK. Companies House has to undertake some additional work associated with registering these companies as they have to deal with other European registries on a case by case basis.

Companies are also already able to set up branches and subsidiaries in other member states, and there is no evidence for UK companies that this is a particular problem.

However, not all national company form are as well know, and flexible as the UK private limited company form. Many member states say that their companies are finding it difficult to set up other member states.

The SPE is likely to be less heavily regulated than many national forms therefore it could put pressure on some member states to de-regulate their own national forms to enable them to compete. Such changes can only be to the benefit of all European companies in the longer term.

Although there will still be costs for companies in understanding those issues left to national law and differences of culture, we can assume that there will be some level of savings for those entities that choose to become SPEs.

For these reasons we do not think it is helpful for the UK to oppose the proposal which may provide some benefits to SMEs in the UK and perhaps more significantly in other member states.

Option 3

Accept the proposal but with some amendments

The current proposal is a good starting point, but to ensure that SMEs are able to achieve the maximum benefits whilst maintaining good standards of corporate governance and creditor protection the UK should seek some amendments.

Specific amendments should be sought in the following areas:

1. The SPE should only be available to those companies who have a presence in more than one member state. This approach does not put the SPE in direct competition with national laws, but allows those companies who wish to work cross borders to benefit from the simplified procedures. This approach will not add any costs to those companies who do not work cross border. If the SPE was available to all existing and new companies they would all potentially have to invest time and resource into determining whether the SPE would be a useful company form for them.
2. Directors' duties. The current proposal suggests four general directors' duties along with a reference to other duties in national laws. The UK Companies Act has just placed directors' duties on a statutory footing. The duties have also been widened to take account of other factors such as employees and the environment. These duties should be a requirement of SPEs as well, and our preference is to keep the duties to national law so it is very clear which duties apply.
3. Articles of Association. The current draft leaves a great deal of the internal workings of the company to the articles of association. The UK is supportive of greater flexibility in these areas but there must be legal certainty for the companies who are regulated by SPE. Without legal certainty in these areas companies may find themselves subjected to additional costs when third parties question the approach taken in the articles. Clear links to an appropriate legal system whether this is national law or the regulation should minimise any additional costs which may arise as a result of legal uncertainty.
4. We are looking closely at the proposals for capital maintenance, and this may be an area where amendments are required as discussions move forward.

Specific Impact Test

We have considered the three mandatory impact tests (gender, race, disability) and the recommended options are unlikely to have any discriminatory effects.

The statute is part of the wider Small Business Act and has been designed with the needs of SMEs in mind. A further Small Firms impact test is not considered necessary.

References

1. EU Impact Assessment:

http://ec.europa.eu/internal_market/company/docs/epc/impact_assesment_en.pdf

2. Becht and Mayer: "Where Do Firms Incorporate? Deregulation and the Cost of Entry", Marco Becht, Colin Mayer and Hannes F. Wagner (European Corporate Governance Institute, Law Working Paper No. 70/2006, August 2007)

Specific Impact Tests: Checklist

Use the table below to demonstrate how broadly you have considered the potential impacts of your policy options.

Ensure that the results of any tests that impact on the cost-benefit analysis are contained within the main evidence base; other results may be annexed.

Type of testing undertaken	<i>Results in Evidence Base?</i>	<i>Results annexed?</i>
Competition Assessment	Yes	Yes/No
Small Firms Impact Test	Yes	Yes/No
Legal Aid	No	Yes/No
Sustainable Development	No	Yes/No
Carbon Assessment	No	Yes/No
Other Environment	No	Yes/No
Health Impact Assessment	No	Yes/No
Race Equality	Yes	Yes/No
Disability Equality	Yes	Yes/No
Gender Equality	Yes	Yes/No
Human Rights	No	Yes/No
Rural Proofing	No	Yes/No

THE SEVEN CONSULTATION CRITERIA

Criterion 1 When to consult

Formal consultation should take place at a stage when there is scope to influence the policy outcome.

Criterion 2 Duration of consultation exercises

Consultations should normally last for at least 12 weeks with consideration given to longer timescales where feasible and sensible.

Criterion 3 Clarity of scope and impact

Consultation documents should be clear about the consultation process, what is being proposed, the scope to influence and the expected costs and benefits of the proposals.

Criterion 4 Accessibility of consultation exercises

Consultation exercises should be designed to be accessible to, and clearly targeted at, those people the exercise is intended to reach.

Criterion 5 The burden of consultation

Keeping the burden of consultation to a minimum is essential if consultations are to be effective and if consultees' buy-in to the process is to be obtained.

Criterion 6 Responsiveness of consultation exercises

Consultation responses should be analysed carefully and clear feedback should be provided to participants following the consultation.

Criterion 7 Capacity to consult

Officials running consultations should seek guidance in how to run an effective consultation exercise and share what they have learned from the experience.

The complete code is available at:

<http://www.berr.gov.uk/bre/policy/scrutinising-new-regulations/reviewing-consultation-process/page44083.html>

