

**Government Response to Consultation on the Proposal
for a European Council Regulation on the Statute for a
European private company (SPE)**

Table of Contents

3 - Executive summary

4 - Introduction

5 - Responses by question

15 - Annex A – Advisory Group

16 - Annex B - List of respondents

Executive Summary

The Department for Business, Enterprise and Regulatory Reform issued a consultation document in October 2008 on the Proposal for a European Council Regulation on the Statute for a European private company.

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. The aim of the consultation was 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.

BERR contacted stakeholders in its company law Advisory Group. BERR also contacted legal, accountancy and business representative bodies in Scotland, and sent out notice of the consultation to a database of interested parties.

Fourteen responses were received of which one was a company, four were interested individuals and nine contained the views of representative bodies. Overall, the response to the consultation was positive; respondents foresee benefits in the availability of the SPE form, including administrative simplicity and cost savings. However, respondents have brought to BERR's attention a number of aspects of the proposal that could be improved. Negotiations are ongoing and we will use the responses to inform our negotiating position.

Introduction

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”)) (the “Proposal”).

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, by reducing 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 Government is supportive of proposals to increase competition in the single market and reduce costs and burdens on companies, particularly SMEs.

The Department for Business, Enterprise and Regulatory Reform (BERR) issued a consultation document on the Proposal on 17 October 2008. The aim of the consultation was 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. The closing date for responses was 21 November 2008.

At the time the consultation document was issued, the French Presidency was seeking broad political agreement on the Proposal by the end of 2008. In light of this demanding timetable, the consultation was open for a period of only five weeks.

BERR contacted stakeholders in its company law Advisory Group. A list of the members of the Advisory Group appears at Annex A. BERR also contacted legal, accountancy and business representative bodies in Scotland, and sent out notice of the consultation to a database of interested parties. A small stakeholder group was also convened. It included the Confederation of British Industry, Forum of Private Business, Law Society, Institute of Directors and British Chamber of Commerce.

The consultation posed 13 questions in total. This report provides a summary of the views expressed and the Government’s response. The list of respondents is provided at Annex B.

Once the Presidency realised agreement could not be reached the Presidency issued a compromise text on the Proposal on 16 December 2008 (the ‘revised text’). This text will be the starting point for future negotiations.

Analysis of Stakeholder Responses and HMG Response

1. Usefulness for SMEs

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

Respondent's views were largely positive, noting that the SPE offers a light touch regime resulting in cost and administrative benefits, particularly for those companies wishing to operate in other Member States. Positive respondents did however emphasise that any new company form needs to be as certain, easy to use and self-contained as possible in order to be attractive.

Other respondents questioned whether many UK SMEs would find it useful, as only a small minority of SMEs have operations in more than one Member State, and as the UK private company is well known there would be no image or marketing benefits from using an SPE label.

Three respondents were concerned that it would add another company form to the 27 already available, adding expense as those wishing to set up companies will need to seek advice in order to decide which form is the most appropriate through which to conduct business. There was also concern amongst these respondents that the three systems of law involved would add uncertainty, complexity and therefore cost.

The Government will continue to strive for a regulation that is attractive to UK SMEs, by promoting the importance of legal certainty and making clear the types of entities which may benefit from the new form.

2. Savings for SMEs

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

Whilst respondents were not able to quantify the savings, most agreed that the Proposal should offer some savings for SMEs, but mainly in Member States where the cost of company registration is high. Consequently, the advantages are likely to be higher for those SMEs outside the UK. Respondents considered that for UK SMEs, the costs saved would be most likely to be legal costs. One respondent thought it may reduce knowledge barriers as well as costs.

Others noted, however, that any cost savings would be insignificant in relation to the overall costs of setting up a cross-border operation and that adoption of the new format will not affect other business-related costs. Another respondent doubted any savings for SMEs in using the SPE form, but thought larger private companies might benefit as the SPE label might provide an international brand.

The Government appreciates that the SPE form is unlikely to be a significantly more attractive form than the UK private company form, as the costs of setting up a private company in the UK are already low. The Government does however recognise that the SPE form may be useful for some enterprises, particularly to improve the ability to establish and operate in the Single Market.

3. Cross-border requirement

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?
--

Most respondents agreed that the SPE form should be available to all companies, arguing that limiting the SPE form to companies having a presence in more than one Member State would be unnecessary and would hinder future growth. One respondent noted that all companies are potentially cross-border and so should have the SPE form available to them, and was concerned that there may be difficulties for companies that do not temporarily comply with the cross-border requirement.

One respondent thought that it should be limited to companies which have a subsidiary or parent in at least one other Member State, because if it were available to all companies it may give rise to abuses, such as transferring to another Member State to avoid or reduce their UK tax liability, or to operate under a more lenient regime. This was highlighted in another respondent's response, which noted that there should be concern if the difference between the regimes applicable to SPEs and other bodies corporate in the UK leads to the use of SPEs instead of private limited companies.

Another respondent considered the criteria should be having more than one company, company branch or subsidiary in more than one Member State, and was concerned that if the regulation was to apply to companies without a Community dimension, there would be subsidiarity objections.

The Government believes there should be some form of cross-border element in order to be able to form an SPE. The UK has argued that European intervention should only occur when companies have a presence in more than one Member State. However, in light of the consultation responses we recognise that any cross border requirement should be light touch. This point will be discussed further with other Member States. BERR is also discussing tax implications with HMRC and Treasury.

4. Minimum capital requirement

- 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?

Almost all respondents agreed that minimum capital of 1 Euro is sufficient for an SPE, noting that creditors look to other factors when assessing the credit worthiness of a company, for example, a good cashflow and credit reference. One respondent considered 1 Euro to be sufficient as long as adequate measures exist in the regulation to protect shareholders and creditors.

Three respondents considered 1 Euro insufficient and suggested various higher figures, from 100 Euro to 10,000 Euro, citing creditor protection as the reason for a higher minimum capital requirement. One respondent suggested 1 Euro for SMEs with a higher minimum capital for larger companies.

Almost all respondents, however, agreed that a minimum capital requirement of several thousand Euros would be too high, as it would be a significant disincentive to using the SPE form, particularly in the UK.

The Government will continue to fully support the Commission's proposal of 1 Euro. The Government agrees with the respondents to the consultation that anything significantly higher would make the proposal unattractive to UK companies.

5. Valuation of non-cash consideration

- Q5 Do you believe that there should be some form of independent valuation of non-cash consideration paid for SPE shares?

The majority of respondents considered a mandatory requirement for independent valuation of non-cash consideration unnecessary as such valuations are costly and it would be a disincentive to using the SPE form. They are of the view that the need for independent valuation should be a matter for the relevant parties to decide.

Two respondents advocated for independent valuation of non-cash consideration: one for the reason that it would help avoid inflated valuations for illiquid assets, and the other argued that those dealing with SPEs from a variety of countries should be entitled to be satisfied that there had been some independent valuation.

The Government does not believe independent valuation of non-cash consideration should be compulsory, as the costs of the valuation could greatly

outweigh the value of the consideration in question. The Government will argue for flexibility on this point. The revised text suggests that this will be a Member State option.

6. Dividends/ purchase own shares/ capital reductions

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?

Most respondents believed the balance sheet and solvency certificate tests were sufficiently clear for management bodies to be able to make the calculation of whether the SPE is in a position to pay dividend/ purchase own shares/ make a capital reduction.

A number of respondents favoured a mandatory solvency certificate either instead of the balance sheet test or in addition to that test, on the basis that it would provide greater creditor and shareholder protection. One respondent considered the requirement for a solvency certificate should be accompanied by a test of the honesty and reasonableness with which the certificate was being given, so as to protect innocent breaches of requirements and to reduce the need for professional assistance. The same respondent also noted that the effectiveness of the solvency certificate requirement will depend on the sanction attached; if severe, then professional advice will be required, if not, then there will be no deterrent for the dishonest and the respondent thought Article 22 needed strengthening in this respect.

One respondent considered the draft text on this matter to be obscure and thought it would produce different results according to whether the 4th Directive or international accounting standards are applied and how they are adopted in each Member State; this respondent favoured a solvency certificate requirement. Another respondent emphasised the importance of the Regulation expressly requiring prospective and contingent liabilities to be taken into account; and another stressed that a lack of clarity in the law cannot be corrected by reference to (non-authoritative) explanatory material.

The Government considers that it should be left to each MS to decide whether it wishes to impose (a) a balance sheet test; (b) a solvency certificate requirement; (c) both tests; or (d) balance sheet test with optional solvency certificate. Member States should decide on the applicable tests in the case of distributions, purchase of own shares and capital reduction so that Member States have flexibility to apply different tests in each case.

7. Protection for creditors and 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?

Respondents were divided on whether the current Proposal provides enough protection for creditors and minority shareholders. A number of respondents considered the Proposal to provide sufficient protection, but many respondents thought the Proposal could be improved in this regard. Generally, respondents thought the Proposal provided better protection for minority shareholders than for creditors.

The most popular solution to increase creditor protection suggested by these respondents was a mandatory requirement for a solvency certificate to be prepared when making distributions.

One respondent held strong views on this question. Regarding creditors, the respondent believed that inclusion of a book value net assets test for distributions (rather than a test using real values) provides the wrong balance of protection. The same respondent considered Article 24.7 (which requires the equal treatment of shareholders 'in the same position') ambiguous and could be read as preventing the buy out of a single shareholder, as contemplated under Article 18.

Another respondent emphasised the need for Article 22 to make clear that shareholders who know or should be aware of irregularities are liable to repay the distributions, and another thought matters relating to creditor and minority shareholder protection should be left to national law.

In the revised text, an additional solvency certificate requirement for the making of distributions is a Member State option, rather than left as a matter for the articles. The Government notes that respondents favour the mandatory preparation of solvency certificates prior to the making of distributions in order to provide greater creditor protection, and would prefer a Member State option to decide which test (or combination thereof) should be applied in the case of distributions, purchase of own shares and capital reduction. The Government will also work with other Member States to try to ensure that the text is clarified and strengthened to ensure greater clarity.

8. Shareholder resolutions

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?

The majority of respondents responded positively to this question.

Two respondents questioned why two-thirds had been selected as the level for the qualified majority and would prefer a three-quarters majority, to be consistent with UK law.

Two other respondents considered several of the matters to be passed by a majority as specified in the articles, including approval of accounts and distributions, could be dispensed with or dealt with by the directors and if these matters were to be decided by shareholder resolution then the SPE would be less flexible than the UK private company. Another respondent thought the majority required for transformation of the SPE should be dealt with by national legislation.

The Government agrees that it may be impractical to require shareholders to approve the annual accounts. As regards the level for qualified majority, while three-quarters would helpfully align with UK law, the Government does not feel that this matter is of the nature that should be strongly pursued by the UK.

9. 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?

There were a variety of responses to this question.

A number of respondents considered that procedures relating to the appointment and removal of directors should rightly be regulated by the Articles. One respondent thought this matter should be left to national law, and another thought this should not require shareholder approval (as currently required by Article 27).

One respondent considered a number of matters could be settled by shareholder resolution or by the board, rather than be settled by the articles, including reserving policy, valuation requirements, composition and organisation of the unitary management or supervisory board, director appointment and removal procedures, delegations of management powers.

Another respondent emphasised that the establishment of reserves and whether or not they are to be distributable should be dealt with in the proposal itself.

Two respondents argued that the procedures relating to the appointment, removal and resignation of the auditor should be left to national law. The latest text of the Proposal deals with this concern. The text on auditors in Annex 1 now reads:

- *in cases where the applicable national law does not require an SPE to have an auditor, 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,*

The Government will argue for this text to remain. The Government has noted the other comments of respondents and will take these into account as the negotiations move forward.

10. Directors' duties

Q10 Do you agree that general directors' duties should be dealt with in the Proposal?

Respondents overwhelmingly favoured directors' duties to be left to national law, for the reasons that the law on this matter needs to be sufficiently clear and there has not, as yet, been any discussion to harmonise directors' duties at EU level.

Although a couple of respondents see benefits in a uniform solution, even they thought it best to leave it to national law unless and until the Commission takes any action on this matter.

One respondent suggested that the duties in the proposal could act as a default where there is no codification of duties in national law of the Member State of registration. Another respondent suggested that the proposal set down the outline of basic duties and national law could also apply to fill in the details of the duties that apply in the Member State of registration.

Two respondents suggested that if Article 31 is to be retained, it should provide that directors must act in what they consider 'in good faith' to be in the best interests of the company.

The Government considers that directors' duties should be left to national law, as Member States have widely varying and well-established regimes for directors' duties, and the UK has, as part of the Companies Act, put directors' duties on a statutory footing. The UK will continue to push for directors' duties to be those applicable in the Member State in which the SPE is registered. We have also noted the specific reference to 'good faith'.

11. Employee participation

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

There was a mixed response to this question. Whilst a majority of respondents agreed that the Government should support the employee participation elements

of the Commission's proposal, there were a number of caveats employed and doubts raised.

One respondent stated that they did not support any system of mandatory employee participation in legislation, but accepted that the provisions were necessary in order to ensure that the instrument came into being. Further respondents supported the provisions provided that these did not become more stringent during negotiations.

One respondent expressed concern that the inclusion of employee participation rights would act as a material disincentive to the transfer of SPE's registered offices. Another respondent felt that the requirements were not stringent enough and that they may be used by companies to evade legislation protecting employees' rights, adding that the employee participation provisions should be based on those that exist in the European Company Statute Directive.

One respondent considered that there should be no uniform employee participation requirement and that the SPE should adopt the law according to either its home or host member state, whilst a further respondent felt that the UK's flexible approach to employee participation helps to foster good practice and should not be jeopardised by any requirement to have employee participation.

In response to the views received, the Government will support the Commission's proposal on employee participation. Whilst it must be appreciated that there will be considerable future debate between Member States over the role of employee participation in SPEs, the Government will seek to ensure that the employee participation rights remain consistent with those already established by the Cross Border Mergers Directive.

12. Other comments

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

A variety of comments were submitted in response to this question. These ranged from general comments on the proposal as a whole to suggestions on more specific matters.

General comments include:

- The suggestion that the proposal should proceed with caution, as it could have serious unintended consequences.
This is in line with the UK's approach to the negotiations; the UK has argued the importance of taking the necessary time to produce a quality regulation.
- The emphasis should be on simplicity, ease of registration and minimisation of bureaucracy.

This is the focus of the Government's company law policy, and will argue for a regulation that reflects these principles

- The availability of the SPE form will not create a genuinely level playing field as several important matters that have a material influence on the operation of an SPE will be left to national law (tax, insolvency, accounting etc).
The UK agrees and has made this point to the Commission.

More specific suggestions include:

- Dealing with acceptable corporate names in the proposal (and to set up a database to facilitate this).
The revised Article 4 text makes clear that for matters not covered by the regulation or in Annex 1, national law will apply. This will mean that the provisions dealing with company names in UK law will apply to SPEs.
- The regulation should state that an SPE will be validly incorporated even if its articles do not deal with the matters required by the annex, with a default to apply in such case (either national law or draft model articles).
The UK has identified this issue and will seek an appropriate resolution in the negotiations, with the input of representatives from company registries.
- A facility for the public to easily check an SPE's registration details, for example a web page.
Details of SPEs registered in the UK will be available on the Companies House website. EU registrars are looking at ways to link up to facilitate access to details of SPEs registered across the Member States.
- Clarifying the definition of the prohibition on offers to the public, for example using the definition in the Prospectus' Directive.
The revised text contains the following definition:
shares shall be regarded as 'offered to the public' where a communication is addressed to more than 100 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.

13. Impact assessment

Q13 Do you have any comments on the Impact Assessment?
--

The European Commission produced an EU Impact Assessment to accompany the Proposal. In addition, BERR produced a UK Impact Assessment on which it asked for comments as part of the consultation.

The majority of respondents did not make any comments on the impact assessment.

One respondent noted that the expected benefits of the SPE form are likely to be outweighed by the risk of costs, particularly for SMEs in their role as creditors. This respondent urged BERR to consider moving to Option 2 – oppose the Proposal – if the desired improvements are not made.

Another respondent emphasised the costs that will be incurred due to the need to seek advice about the differences between UK private companies and SPEs and their relative merits.

One respondent was critical of the EU Impact Assessment, particularly in respect of two aspects: that the possibility of allowing existing companies to ‘passport’ into other jurisdictions was not considered, and that insufficient consideration was given to ‘jurisdiction shopping’.

The other critical respondent considered the impact assessment made unwarranted assumptions of fact and law. The respondent noted the costs identified fail to include the uncertainties and legal difficulties of operating the SPE and do not mention possible damage to the UK system of corporate governance. Of particular concern is the assumption that low participation by SMEs in the single market is due to lack of harmonisation of company law, when a better explanation is that smaller companies are less likely than large ones to engage in cross frontier activities for reasons of scale. The respondent also questions the claim that the adoption of the SPE will lead to higher levels of corporate governance and creditor protection across the EU.

The Government notes these comments, which will inform further revisions of the UK Impact Assessment as the Proposal develops.

Annex A

Advisory Group members

Association of British Insurers

Confederation of British Industry

Forum of Private Business

Federation of Small Businesses

GC 100 Group

Institute of Chartered Accountants of England and Wales

Institute of Chartered Secretaries and Administrators

Investment Management Association

Institute of Directors

The Law Society

National Association of Pension Funds

Quoted Companies Alliance

Trades Union Congress

United Kingdom Shareholders Association

Annex B

List of respondents

Companies

Andrew Turvey Solutions Limited

Individuals

Colin Perry

Jeffrey Holden

Professor Jonathan BK Rickford

Richard Green

Representative bodies

Association of Chartered Certified Accountants

British Chambers of Commerce

Confederation of British Industry

Institute of Chartered Accountants in England in Wales

Institute of Chartered Secretaries and Administrators

Law Reform Committee of the Bar Council

The Law Society

The Law Society of Scotland

Unite the Union