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accompanying the

Proposal for a

COUNCIL REGULATION

on the Statute for a European Private Company (SPE)

Summary of the Impact assessment

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1. INTRODUCTION

1.1. Procedural aspects

The European Private Company Statute (SPE) was a medium term measure (2005-2008) of the Commission's Action Plan on Modernising Company Law and Enhancing Corporate Governance in the EU. It also forms part of the Single Market Review and is one of the key features of the Commission's Small Business Act which was announced in November 2007 and seeks to make the Single Market accessible to small and medium-sized enterprises (SMEs).

A feasibility study on the SPE was published in December 2005. The Legal Affairs Committee of the European Parliament held a public hearing on the SPE in June 2006. It issued an own-initiative report, endorsed by the European Parliament in February 2007, which calls for a Commission proposal for an SPE.

In addition to two public consultations which were conducted between July and November 2007, DG Internal Market and Services organised a public conference in March 2008 which gathered experts from various Member States and addressed key options for an SPE.

1.2. Low participation of SMEs in the Internal Market

SMEs account for more than 99% of companies and for almost 70% of private employment in the European Union. Despite the key role of SMEs in the European economy, only 8% of SMEs engage in cross-border trade and only about 5% have set up subsidiaries or joint ventures abroad. Recent surveys and public consultations show that despite their strong potential for cross-border expansion, SMEs face legal and administrative obstacles which hinder their development in the Single Market.

The main legal and administrative obstacles which SMEs face in their cross-border development in the Single Market include:

- *Compliance costs associated with the formation of a company.* Compliance costs on the formation of a company include essentially the costs of registration and legal advice, notary fees and the minimum start-up capital. While minimum capital requirements and administrative costs are the same for national and foreign company founders, the cost of legal advice falls to a greater extent on foreign founders who have to get acquainted with new company forms and regimes.

- *Difficulties and compliance costs associated with the operation of a company generated by the diversity of national rules.* Different legal rules on the organisation and structure of companies, company organs, shareholders' rights, shares, etc., make the day-to-day operation of foreign subsidiaries more expensive compared with domestic subsidiaries. The day-to-day operation of foreign subsidiaries requires continuous legal advice. Even though the cost of such advice will largely depend on the size and complexity of the subsidiary, a third of respondents to consultations consider it to be in excess of €10,000 per year.

- *Lack of trust in foreign legal forms.* SMEs find it often difficult to operate in another Member State under their home company form, and as a result often choose to set up subsidiaries instead. This is true, in particular, of SMEs from the

EU-12, which use company forms which are less known in other Member States than the company forms of the EU-15. In this respect, the ability to do business under a company form common to all Member States, which would confer an EU label, is considered a significant asset.

2. THE EXPECTED DEVELOPMENT AND THE NEED FOR THE EU TO ACT

The diversity of national company laws and forms, as business unfriendly as it may be, is long anchored in the legal traditions of the Member States. Nothing today gives grounds to expect this to change over the short term. Furthermore, only action undertaken at EU level can create a legal environment that is sufficiently uniform throughout the EU to serve the practical needs of SMEs wishing to take advantage of the Single Market.

Should the EU legislator decide to adopt an SPE Statute, Article 308 of the EC Treaty would constitute the appropriate legal basis.

3. OBJECTIVES

The initiative seeks to enhance the competitiveness of SMEs by facilitating their operation in the Single Market. In particular, the initiative aims at providing a flexible corporate law regime widely know across the EU and based on common principles, adapted to the specific needs of SMEs. It also aims at reducing the compliance costs which arise both on the creation and on the operation of companies in other Member States.

4. POLICY OPTIONS

The impact assessment presents three alternative high level policy options to the SPE.

- *Taking no action and relying on existing legislation and case law*. The existing legal framework, however, is ill-suited to the specific needs of SMEs and fails to reduce the legal and administrative obstacles which SMEs face when seeking to expand in the Single Market.

- *Harmonising the company laws of the Member States*, so that the requirements on the creation and the operation of companies are uniform in all Member States. Even though the scope of such harmonisation may be limited, such an option would require Member States to amend rules which have formed part of the core provisions of their national company laws for decades and with which they are regarded as forming a whole. Such a major overhaul of national legislations does not appear politically feasible at present.

- *Improving the SE* and adapting it to the needs of SMEs, but achieving a 'one-size-fits-all' company form would make of the SE Regulation extremely complex. In addition, the SE is to be evaluated in 2009.

By contrast with the above options, the SPE alone would give individuals and companies, no matter where they are based in the EU, access to the same company form. The SPE could be created from scratch by a legal or natural person or be established by an existing company, either by transformation or by a merger with another company. The SPE could be established

in a Member State and provide services or operate via branches or subsidiaries in its own or another country. A group of companies could also be transformed into a group of SPEs (with a mother company being an SPE or another company form).

In addition to the European label, which according to the respondents to consultations would make cross-border business easier, the SPE is expected to offer significant *cost savings* due to its *uniformity* throughout the EU. The mere use of the same company form in several Member States would limit the need for legal advice upon the creation of subsidiaries and reduce associated costs. The legal costs associated with the day-to-day operation of subsidiaries in several Member States would also be reduced. Furthermore, the SPE would leave company founders full *flexibility* to choose the internal organisation of the company best suited to their needs and activities and thus *save costs*. The SPE could offer a high level of *legal certainty* by avoiding as much as possible references to national law as far as the company form is concerned. Lastly, the SPE would exist in the Member States alongside national company forms. The introduction of the SPE in the legal orders of the Member States would not entail any harmonisation of core aspects of national company legislations and therefore it seems politically feasible.

5. SUB-OPTIONS FOR A SPE

The impact assessment assesses a number of options for the key features of the SPE, which have a direct impact on the SPE's flexibility, accessibility, uniformity and legal certainty.

5.1. Companies falling within the scope of the SPE Statute

Any restriction of the SPE to businesses of a certain size would oblige businesses to switch company forms at some point, which is both cumbersome and costly. To avoid exposing SMEs to undue administrative burdens and costs, the SPE, therefore, should be available to businesses upon formation and remain available to them as they develop and grow. However, like national private limited company forms, the SPE should not be allowed to offer its shares to the public or access the stock markets, as this would entail detailed rules, especially with regard to the internal organisation of the SPE, to protect shareholders.

5.2. Degree of autonomy vis-a-vis national legislation

The first option is that of an SPE, which would be totally autonomous and would not rely in any way on national legislation. This option, which would require the full harmonisation of tax and labour laws and therefore it is unrealistic.

The second option is that of an SPE, which would be autonomous from the national company law regimes. Such an option would achieve a satisfactory degree of uniformity in the EU as company law aspects would be covered in the Statute and would therefore be the same across the EU. This would also ensure legal certainty while making it possible to offer to shareholders a high degree of flexibility in determining the internal organisation of the SPE.

The third option is that if an SPE, which would heavily rely on national company legislations. While such option may offer a high degree of political acceptability, it would result in a different SPE in every Member State and would deprive individuals and companies of the specific benefits of a uniform company form throughout the EU, in particular cost savings and increased efficiency. It would, therefore, fail to fulfil the policy objectives.

5.3. Degree of uniformity of the Statute

The first option would be one of a comprehensive Statute which would seek to regulate both the external and the internal affairs of the SPE. Even though this would ensure full uniformity of the SPE in the EU and a very high degree of legal certainty, it would deprive shareholders of any of the much needed flexibility, notably in determining the internal organisation of the SPE. The pursuit of such a 'one-size-fits-all' company statute would most likely make the SPE statute unattractive to businesses.

The second option envisaged is the exact opposite to the first option, i.e., a SPE Statute which would leave full flexibility to the shareholders of the SPE to regulate in the articles of association all company matters, including capital, creditor protection or employee participation. Such an option, which is likely to result in insufficient third party protection, would certainly meet strong opposition from the Member States.

The third and chosen option consists in regulating in the SPE Statute the main characteristics of the SPE (limited liability, share capital, contributions, name) and matters relevant to third parties (creditor protection, disclosure, employee participation), while leaving internal matters (general meetings, management structure) to the free determination of the shareholders in the articles of association. This balanced option would entail limited references to national law, thus ensure a significant degree of uniformity of the SPE in the EU and legal certainty, while offering much needed flexibility as regards internal organisation.

5.4. Cross-border dimension

The first, chosen, option would be to make the SPE accessible to all founders, irrespective of any cross-border dimension. In other words, the SPE would come in competition with national company law forms. This is the chosen option because it offers a high degree of legal certainty and offers founders a free choice between the SPE and national company law forms, even though it could prove politically less acceptable than the second, more restrictive, option.

The second option would consist in making access to the SPE subject to a cross-border requirement (e.g. shareholders from different Member States or evidence of cross-border activity). Such a SPE may be politically more acceptable because it would appear more focused on making the Internal Market more accessible. However, it would offer less legal certainty because of the need to control the existence of the cross-border dimension on a continuous basis. It would also limit the choice of company forms for entrepreneurs.

5.5. The company seat and its transfer

The first option which could be envisaged is to provide that the registered office and the head office of the SPE must be in the same Member State. The transfer of the registered office of a SPE to another Member State, as a result, would entail the transfer of the head office. This option is contrary to the ruling of the European Court of Justice in the *Centros* case.

The second option is to allow the SPE to have its registered office and its head office in different Member States and therefore, to transfer its registered office without having to transfer its head office at the same time. The express provision for this freedom would be enshrined in the Regulation would ensure uniformity across the EU and offer a very high degree of flexibility in the organisation of businesses. It would also achieve a satisfactory

degree of legal certainty, though the regulation would have to state clearly which national law is applicable to the SPE.

The third option under consideration would consist in leaving this matter to the national legislation of the Member State of registration of the SPE. Such an option would not offer any uniformity since there would be a different regime in every Member State. Nor would it offer much legal certainty. In addition, it would not bring any improvement to the current situation and the impossibility of companies to transfer their registered office from one Member State to the other.

5.6. Capital regime

Mandatory minimum capital requirements account for a large part of company formation costs and are no longer considered as appropriate creditors' protection. Also, care should be taken to make the SPE accessible to entrepreneurs of all EU-27 Member States. A minimum capital of €1, as exists in the UK 'limited' or the French SARL, therefore, appears to be the better option. In light of the differences in standards of living, opting for a mandatory minimum capital requirement, whether based on the average in the EU-15 (€10,000-12,000) or in the EU-12 (€4,000) would make the SPE less accessible to entrepreneurs of the EU-12.

5.7. Distributions to shareholders

The first envisaged option consists in building the capital regime of the SPE on a simplified second Company Law Directive. Even though such an option would ensure a high degree of legal certainty and uniformity across the EU, it would, however, deprive SMEs of any flexibility and prove exceedingly burdensome.

The second option would make distributions to shareholders subject to a balance sheet test that is well known across the Member States. This option would entail less uniformity as more freedom would be left to the shareholders in the articles of association, but a satisfactory degree of flexibility would be left to shareholders regarding e.g. capital increase or share redemption.

The third option, i.e. the combination of a balance sheet test with a mandatory liquidity test, though ensuring a higher degree of protection for creditors, would expose SPEs to disproportionate costs.

5.8. Employee participation

The first option envisaged is to create an ad-hoc employee participation regime for the SPE. In light of the fact that solutions on employee participation already exist in the SE Statute and in the Directive on cross-border mergers and of the high political sensitivity of employee participation questions, this option should be discarded.

The second option would consist in leaving employee participation entirely to the legislation of the Member State in which the SPE has its registered office. While this option would offer SPE a high degree of flexibility, it would not address the question of employee participation in case of cross-border seat transfer. The fact that the SPE could be used to escape national employee participation regimes, could make the SPE unacceptable.

The third option would consist in subjecting the SPE to the employee participation regime of the Member State in which it has its registered office while inserting in the SPE statute rules

governing employee participation in the case of the cross-border transfer of the SPE's registered office. While giving SPEs the needed flexibility, this option would ensure that the SPE cannot be used as a vehicle to escape employee participation regimes.

6. EVALUATION AND MONITORING

The Commission will conduct a yearly review of the take up of the SPE in the Member States. In addition, the Commission will conduct an assessment of the effectiveness and relevance of the SPE Statute to be published five years after the entry into force of the Statute.