



UNION EUROPEENNE DE L'ARTISANAT ET DES PETITES ET MOYENNES ENTREPRISES
EUROPÄISCHE UNION DES HANDWERKS UND DER KLEIN- UND MITTELBETRIEBE
EUROPEAN ASSOCIATION OF CRAFT, SMALL AND MEDIUM-SIZED ENTERPRISES
UNIONE EUROPEA DELL'ARTIGIANATO E DELLE PICCOLE E MEDIE IMPRESE

UEAPME's response to the Consultation on a possible European Private Company (EPC) Statute

Introduction

UEAPME welcomes the public consultation on a possible European Private Company (EPC) recently launched by the European Commission.

UEAPME will fully support the creation of the EPC Statute if the opinion of SMEs on the elements of such a statute is really taken into account, in order to avoid creating a company form for SMEs that does not respond to the needs of SMEs.

In particular, SMEs need a flexible statute, which guarantees the contractual freedom of the founders. Moreover, the future EPC Statute should not act as a mandatory substitute for national statutes but as an optional statute.

QUESTIONNAIRE ON THE EPC

Section II. Do SMEs need a European Private Company Statute?

Question 1

Do SMEs need a European Private Company?

UEAPME is of the opinion that SMEs need a European company form if this form is fully adapted to their needs.

1.1. Do you face barriers related to the legal form of your company when you are conducting cross-border activity?

Yes. As the existing company forms in each Member State are not necessarily compatible, entrepreneurs meet many administrative and legal barriers. In particular, the necessity to be aware of the different national company laws is a problem. Gathering the information on legal and administrative element to respect is frequently a lengthy and costly procedure for an entrepreneur. One of the main difficulties met are the bookkeeping rules; it is very difficult for SMEs to cope with the different bookkeeping rules of member states.

Could you please mention any examples?

1.2. If so, please explain which of these barriers are the most burdensome:

- difficulty in dealing with a number of different company law systems (legal and other counsel's fees),*
- lack of trust in foreign legal forms in business relations with business partners from other Member States,*
- different national rules for the operation of a company which makes day-to-day management more expensive,*
- other barriers related to the legal form of your company (which ones?).*

In UEAPME's opinion, SMEs can face all the barriers mentioned above but the most burdensome is the difficulty in dealing with different company law systems.

Question 2

Do you consider that the current legal framework is sufficient for your company's current or future cross-border business?

Yes it is sufficient. But sometimes SMEs face difficulties when they want to operate cross-borders. Therefore, in our opinion, European enterprises require a unique company legal form, valid in all EU Member States, easily accessible, recognised in other Member States and based on a single law. If the European Commission is to promote cross-border business, the creation of the EPC Statute should be a very important element towards the consolidation of the Internal Market.

Question 3

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

An EPC Statute would be very useful under the condition to be fully flexible, adapted to the needs of SMEs, simple and that should not bring about further obligations and constraints to SMEs. This Statute would be very useful for SMEs and in particular for those enterprises operating in **bordering regions** or SMEs **highly specialized** or renowned in Europe.

Such a statute in fact could provide transparency to these enterprises and enhance the confidence of consumers and third parties in general.

3.2. Do you think that the company form of an EPC itself ('European label') would give an added value to your business? Would it be helpful in cross-border activities?

UEAPME is of the opinion that the 'European label' would be a clear added value to the businesses. However, it should be stated that those enterprises not having a cross-border activity at the moment of their foundation should also be able to use the EPC Statute. These companies might undertake cross-border activities at a later stage.

However, UEAPME thinks that the EPC Statute should have a general link requirement and therefore a European business goal (i.e. European nationality of at least one shareholder or a European business focus). This requirement would avoid the EPC Statute being used by companies solely operating outside the territory of the EU.

3.3. Do you consider that a Statute for an EPC would address the problems identified by you in Q1? Would it be the most appropriate means? Please explain why.

If the EPC Statute is adapted to SMEs' needs and encompasses SMEs' requirements on structure and core elements, it can be an appropriate company form. Otherwise, it will be a useless solution for SMEs. For this reason UEAPME encourages the Commission to consult SMEs organisations on the element of the Statute.

Question 4

Q 4.1. If your company conducts or intends to conduct cross-border activities do you/would you prefer to:

- set up an establishment in another EU Member State,*
- provide cross-border services while keeping the permanent establishment in your own Member State.*

Both cases are possible. Although the majority of SMEs conducting cross-border activities prefer to develop the activity or provide services and keeping their establishment in their country, there might be other companies wanting to open an office in another EU Member State.

Q 4.2. If you have/would like to have an establishment in another EU Member State, do you/would you prefer to set it up:

- as a company (subsidiary), or*
- as a branch, or*
- without any formal organisation (de facto branch)?*

It depends on the type of activity the company wants to undertake in another country. In general, small businesses have limited financial and personal resources and therefore are concerned about the costs that the development of their activity in another Member State can bring about. A significant part of the costs are legal costs, since the enterprise has to be familiar with the legal regime in the country where it aims to establish.

With the creation of the EPC Statute, enterprises would be subject to Community Company law -as far as possible-. As a consequence, an important part of the costs currently faced by those SMEs having a branch or developing a commercial activity in another Member State would disappear. This would result in less regulatory and administrative burdens.

Q 4.3. If you prefer to set it up as a company (subsidiary), would you prefer to register it in the other Member State:

- in a legal form of that Member State, or*

- in a legal form of your own Member State, if it were allowed and recognised by the other Member State automatically or if certain minimum requirements were fulfilled (this procedure may be described as a single company passport)
- in the legal form of an EPC having multiple shareholders (Model A)
- in the legal form of an EPC having a single shareholder (Model B)?
Please give reasons and, if you choose more than one alternative, please rank in order.

Generally European SMEs who prefer to set up as a company, would prefer to register in the legal form of an EPC having multiple or single shareholder (Model A). This would avoid having to refer to the equivalent legal form existing in the Member States.

This would also give the advantage of a European label. The idea behind the EPC Statute is to create a European company form that would be governed by the uniform company law.

Q 4.4. Do you think it would be useful for groups of companies to set up subsidiaries in the form of an EPC?

In UEAPME's opinion it is important to avoid that the EPC status is used by large corporations. For those form of companies, in fact, another instrument has been created, the *societas Europea* that fix many requirements to be respected. To permit to those companies to use the EPC it would be necessary to insert in it requirements that are not necessary for SMEs. Consequently the EPC would become less flexible and would create many additional burdens and then, would not be adapted to SMEs any more

On the other hand little groups of companies as parent –daughter companies should be allowed to use the EPC. It is important to repeat that EPC should anyway focus n the requirements of the SMEs.

Question 5

Q 5.1. Do you know an existing legal form of a private limited liability company, except for the limited liability company of your own jurisdiction, which you would consider suitable for an EU-wide activity of your business? If so, please indicate which one and explain why.

In UEAPME's opinion an EPC Statute should not be made up on any national company form example as this would mean to follow a national law. As we have said an EPC statute to be useful has to be absolutely independent from any national law.

Q 5.2. Provided that you identified a preferred foreign national legal form, if you had the choice between such national form and the EPC, which of them would you choose for your business? Please give reasons for your answer.

UEAPME supports the creation of an EPC form, national company forms can be suitable for some companies at the moment and might enable to provide cross-border services but it is time to go beyond and create a truly European company form for SMEs.

Question 6

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

If the EPC statute does not foresee to refer to a national law for any element, yes. In this case registration should be allowed in the Member State where the company has an official address, even if the company has located its headquarters in another Member State. Otherwise, whether a national law is to be respected, it is necessary to create stricter rules to avoid the companies to register where the law is more favorable but to have its headquarters in another place.

As regards registration, it would be very useful to introduce the idea of one-stop-shop in order to carry out administrative formalities in just one country (i.e. file the registration in one Member State). The administrative formalities linked to the registration must be simplified and less costly.

Question 7

Q. 7.1. Do you think that the access to an EPC should:

UEAPME thinks that access should be open to natural and legal persons.

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

Yes, it should be possible.

Q 7.3. Would you support an EPC Statute if it were restricted to a single shareholder?

In UEAPME opinion the EPC statute should not be restricted to a single shareholder but also opened to multiple shareholders.

Question 8

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

Yes, it would still be useful.

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

The essential added value is to create a form that is based only on European law and not on national laws.

Section III. Which model of an EPC?

Question 9

Which EPC model presented in section 3.1 do you find the most feasible:

- Model A (EPC having multiple shareholders)

- Model B (EPC having a single shareholder)

- Other model (please describe its characteristics)?

Model A and Model B should be both possible and feasible.

Please explain why you prefer this model.

To be useful an EPC Statute should be adapted to a wide variety of SMEs. If it is restricted to a single shareholder, many stakeholders would be excluded.

Question 10

Which of the regulatory options presented in section 3.2 do you find best for the EPC Statute:

- **Option 2 Flexible Statute, b)** *matters not covered by the Statute or the articles of association should be covered by a reference to the national law of the Member State where the EPC is registered.*

The best option is 2a, a flexible statute with references to the general principles of EU law.

As far as the reference to the general principles of EU law is concerned, UEAPME believes that references to national law should be avoided as far as possible.

IV. The structure and the core elements of a European Private Company

The EPC Statute

The EPC Statute should contain:

- a **definition** of the EPC

The definition does not need to be very concrete since the following provisions will help to define the EPC but it must state that the EPC is a corporate body with a legal personality. The definition should also contain a “genuine link” requirement to the EU (as mention in answer 3.2).

- the various **procedures of formation and transformation:**

EPC should be formed by means of creation (ex nihilo), transformation, through a merger or division. It should be possible to transform the EPC back into a national company form. The EPC should be as accessible as possible for company founders. It must be noted that the above-mentioned transformation processes have to be tax neutral.

- a provision on the **Articles of Association**

The following elements should be considered as mandatory contents of the Articles of Association: the legal form and business name of the company, the duration of the company’s life (if limited), the business object, statutory seat of the company (registered office) and the company’s capital.

- a provision on the **minimum capital requirement**

The capital requirement should be in the range of 3000 to 5000 Euro; as for the type of contributions, it is preferable not to allow contributions in kind since they are more difficult to assess. The capital does not necessarily have to be paid in at the moment of the registration.

- a provision on **the registration of the company** (see answer to question 6)
- a provision on the **governing law**, (see answer to question 10) As stated above, EU company law should be applicable as far as possible.
- specific provisions on the **organisation and operation of the EPC** such as the liability of shareholders and officers.

The liability of the directors should be individual or distributed according to the responsibility of each of the directors.

- Term of the fiscal year
- a provision on the rules of **Criminal law** to be applicable in case the officers or shareholders incur in a criminal act

In this case the applicable law will be the Criminal law of the country where the registered office is located.

- a provision on the **dissolution, liquidation, insolvency and suspension of payments**:

International insolvency law must be applied. Council regulation (EC) No 1346/2000 of 29th May 2000 on insolvency proceedings contains a common set of rules. What is not regulated by these set of rules, the reference to national rules is necessary.

The EPC should contain the following **annexes**:

- standard Articles of Association, which members might adopt wholly or in part in order to speed up the company-formation.
- the form of a company to which the EPC shall be considered equivalent in each member state
- national bodies/authorities where the EPC can be registered

Articles of Association (AoA):

The following issues should be left for the shareholders to decide. The inclusion of the following issues in the AoA should not be mandatory, shareholders should decide whether to include them on the articles of association or not.

On the shareholders:

- the rights of the shareholders and the pecuniary and non-pecuniary rights relating to each class of shares,
- the decisions which might be taken collectively by the shareholders and the required procedures and requirements, in particular as to the manner of consultation and requirements as to the quorum and majority .

On the share capital:

- the contribution by each member,
- the valuation of the contribution in kind,
- the price for the acquisition or assignment of the shares should not be considered mandatory,
- the manner of transfers of shares: body approving the transfer, the procedure and timetable,

On the company's management:

- the nomination of directors,
- their powers and duties, as well as the eligibility and the board structure
- terms of appointment of statutory auditors and their function and duties

V. Social aspects – employees' involvement (information, consultation and participation) in the company's decision-making process

Question 13

What would be, in your opinion, the best solution for the EPC:

- should there be a uniform or a minimum EU standard on employees' involvement for the EPC,

- should the EPC Statute follow the same solution as regards the employees' involvement as the one applicable for the European Company (SE)

- should rules on employees' participation be determined by the law of the Member State in which the EPC's seat is located,

- should existing employees' rights be maintained when a national company is converted into an EPC or an EPC into a national company (if their level is higher than in the national law applicable after the conversion)?

Please give reasons for your answer.

As it stands today, employees' rights are not an issue in the context of the EPC.

Following the **Commission Recommendation 2003/361/EC of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises** ["A medium-sized

enterprise is defined as an enterprise which employs fewer than 250 persons and whose annual turnover does not exceed EUR 50 million or whose annual balance-sheet total does not exceed EUR 43 million.” Therefore bigger enterprise cannot be considered a SME. The EPC to be useful for SMEs should be applicable only to them. For such a little enterprise an involvement of employees is not necessary.

The EPC Statute should only cover the company form (stock capital, number of shareholders, seat of the company) and not cover issues such as: statute of employees, trade unions representation, etc.

In spite of this, UEAPME believes greater harmonization at EU level in the social domain is necessary.

Conclusion

The EPC Statute is an important element of the overall Internal Market Policy and will contribute to the goal of reducing the administrative burden by 2012 at the following conditions:

- That it really solve the problem of SMEs in the internal market
- That it follows only the European law and not national law provisions
- That it is limited to the SMEs and not open to big companies and, consequently, is really fitted for SMEs
- That it is flexible
- That its provisions are mostly based on the choice of the parties.

At those conditions the creation of an EPC statute will represent an added value for SMEs and for the European economy as a whole.

The Statute should guarantee both contractual freedom and legal certainty.

UEAPME urges the Commission to publish a legislative proposal on the EPC Statute in the months to follow.

Brussels, *November 2007*

For further information on this position paper, contact:

MARIA CIMAGLIA, LEGAL AFFAIRS
UEAPME,
Rue Jacques de Lalaing, 4,
B-1040 Brussels.
Tel: +32 2 2307290
E-mail: m.cimaglia@ueapme.com