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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 Position on the European Private Company

Introduction

UEAPME welcomes the new proposal of the European Commission for a regulation on the European Private Company statute.

In our opinion, this regulation can be considered a first step in the right direction. However, we believe that some points must be further analysed and discussed.

As a first comment, the majority of UEAPME members would like to underline that – as we stated in our previous position papers – it is very important that the new regulation is adapted to SMEs and to their needs. It is therefore of the utmost importance to limit access to the statute only to “real” SMEs. This would avoid the discussions, which have already started, on which elements of the proposal are relevant for SMEs.

The only limitation that the Commission introduces to the use of the EPC statute concerns the prohibition to offer shares to the public. On one hand, this prohibition does not help to restrain the scope of the EPC statute to SMEs. On the other hand, the definition of “offered to the public” seems too wide to us. It must be allowed to send information to a limited group of potential investors/owners regarding terms of offer, and this should not be considered as offer to the public.

1. GENERAL PROVISIONS

Article 3. Requirements

The title of this provision is misleading: the provision is not about requirements but essential characteristics. We are very happy that the limited liability of the shareholders is one of the main characteristics of the EPC.

Article 4. Rule applicable to an SPE

The law regulating the EPC is listed in a hierarchic order: first of all the regulation, second the statutes, third the national law (where the statutes does not say anything and in some matters that can only be regulated by national law (as accountancy, fiscality, social matters...)). We would

also like to underline that, to make the EPC statute a real european instrument, the application of national law should be used as less as possible. The EPC must be european .

2. FORMATION

Article 6 and Article 9. Registration and name of the Company

Some provision for acceptable/unacceptable names for EPCs should be foreseen, so as where the responsibility for ruling on this matter lies. It would be necessary to avoid that two EPCs formed in different countries have the same name. It should also be avoided that an EPC formed in a country has an identical name of an existing domestic limited company.

3. SHARES

Article 15-16 list of shareholders

Provisions must be foreseen to ensure that a responsible person is identified to keep the list of shareholders register up to date. Possibly this can be done by ensuring that the provisions under article 31 (general duties and liability of directors) cover responsibilities for the directors to ensure that all the EPC's legal and constitutional obligations are complied with.

Furthermore, the list of shareholders should give a certain guarantee for representing the true shareholder-structure. In practice, it might occur that somebody buys "shares" from a former shareholder, which is still in the list. The good faith in the correctness of the list should be protected, if the buyer acted in good faith and the company register has not been updated with relevant information on the new ownership structure for at least one year. Thus, it would be an obligation of the new shareholder and the companies director to ensure that the list of shareholders is being updated after an acquisition of shares. The omittance to file any changes would constitute breach of a contractual duty of the director.

Article 17 and 18. Expulsion and withdrawal of shareholders

Concerning the withdrawal of a shareholder in our opinion these issues are to be left to the shareholders to decide. For instance, in the case of a EPC created by a couple, the notion of "harm to their interests" seems to be more economic.

4. CAPITAL

Article 19 Minimum Capital

UEAPME agrees with the principle that the EPC needs to be made competitive vis-a-vis other legal forms.

On the other hand, in the relations with the partners, mainly the financial ones and to ensure a protection for third parties, a capital is needed. This is a general guarantee for the creditors.

Moreover, in case of forming a company with practically no capital stock, the formation costs (e.g. in Germany for a GmbH > minimum 300 €) must be borne by the shareholders. Otherwise, the company runs danger of starting with an adverse balance and thus might come into conflict

with national insolvency law. Therefore, at least a moderate minimum capital requirement seems more appropriate, as the example concerning the company formation costs clarifies.

Special rules for (hidden) contributions in kind and their evaluation are not mentioned, but would be necessary.

Article 21 distribution

UEAPME believes that an EPC should be allowed by law to make distributions, guaranteed by a balance sheet test or a solvency test. It should be clarified who is responsible for making them. Whether the directors make a declaration that the company will be able to pay its debts as they fall due over the next 12 months and it turns out that the company is in fact unable to pay its debts after the distribution, then the directors should be liable to repay to the company the amounts they authorised to be distributed.

5. INTERNAL ORGANISATION OF THE SPE

Article 27 Collective decisions of shareholders

Only matters that require qualified majority should be enumerated, for the other points it should be left to statutes to decide by which majority they should be taken.

- Minority Rights

Minority rights ought to reflect a possibility for the minority to safeguard that their rights as shareholders are not impaired. In UEAPME opinion the minority rights should required at least 10 % of the voting rights.

Article 30 and 31 Directors

The regulation foresees that any person disqualified in any Member State from serving as a director of a company should not be allowed to become director of a EPC. Otherwise the frequent problem might occur, that a person, e.g. disqualified in Spain to be director of a SRL, SRLNE or SA, registers a EPC in France while maintaining a registered office there, and continues to pursue his business activities in Spain. The regulation should be more precise at this purpose.

6. TRANSFER OF THE SPE'S REGISTERED OFFICE

The transfer of the EPC's registered office only needs to be covered by the Regulation, because the Commission gave up the project of a 14th company law Directive on the issue of transfer of seat at the beginning of this year. The Commission's intention to cover the topic in the Regulation on the EPC statute clearly shows that the reasons given for stopping the work on the 14th Company law Directive were wrong. The transfer of seat still is an important topic for European company law, but it is maybe preferable not deal with it in the SPE statute

7. RESTRUCTURING

If this matter is to be referred to specifically, all cases where national law is to apply should also be referred to - e.g. accounting and reporting, tax and insolvency, etc.

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