

EUCC LEGAL WORKING GROUP

Consultation on a possible European Private Company Statute

1. Context

In February 2007 the European Parliament adopted a resolution requesting the European Commission to draw up a statute for a uniform European Private Company (EPC).

The project, initially developed by business and academic circles, gained a wide support from organisations representing business and industry and from the EESC.

All expressed the need of a legal form which would take into account the needs of the SME's and which would be more flexible and simple than the SE;

The European Commission is not really convinced on the need of such a legal form and in order to look for the possible content of the ECP statute, it launched a public consultation ending on 31 October 2007. The two main points of the consultation are:

- Businesses are requested to present the barriers they face when they conduct business through an establishment (subsidiary or branch) in another Member State and they are also invited to take position on the appropriateness of a new European legal form.
- Two models of EPC statute are given and the companies have to choose the better one for them.
 - Model 1: EPC will have multiple shareholders; any natural or legal person may take part in the establishment of the EPC
 - Model 2: EPC will have one single shareholder which can be a parent company or a natural person
- Concerning the statute, two possibilities are given
 - Statute 1: a comprehensive and complete Statute which would contain the major issues relating to the organisation and functioning of a company, without references to the national company law regime. It would leave limited possibility to founders/shareholders to depart from its provisions in the articles of association.
 - Statute 2: a flexible Statute which common provisions on some essential issues concerning the functioning of the company.
For this Statute there are two options:
 - Option 1: matters not covered by the Statute or the articles could be covered by a reference to the general principles of the Statute, the general principles of European company law and the general principles common to the national laws, provided that they are not inconsistent with the provisions of the Statute and Community law.

- Option 2: 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.

2. Draft of “Cooperatives Europe” position on the EPC Statute

“Cooperatives Europe” regrets that the consultation is build up as a questionnaire not giving the respondents the opportunity to explain clearly their position.

In a general way “Cooperative Europe” shows its surprise about the fact that instead of developing the existing legal instruments (ex. SCE Statute), the Commission prefers to create a new one. This new ECP Statute could be, in some cases, in competition with the SCE Statute and may oblige companies to choose between the two legal forms.

“Cooperatives Europe” regrets that the consultation does not SPEcify what kind of companies are concerned by the EPC Statute: joint stock companies, cooperatives..

“Cooperatives Europe” reminds that the SCE is the only company form which may be set up by natural persons.

“Cooperatives Europe” would like to explain its position concerning the EPC Statute:

I. Information about the respondent

“Cooperatives Europe” represents 267 000 co-operative enterprises operating with 5,4 millions employees and 163 million members through Europe.

“Cooperatives Europe” objectives are to support and develop co-operative enterprises across Europe by:

- enhancing co-operative identity, visibility and recognition of their difference and added value,
- recognition of co-operatives as main economic and social partners at EU institutional level,
- developing a strong co-operative system in the enlarged EU and Europe region.

“Cooperatives Europe” represents both SME’s having local activities and big companies with cross-border activities such as banks or pharmaceutical companies.

CECOP’s remarks:

CECOP agrees on the principle of creation of new European instruments as long as they turn out to be useful or essential. The existing statutes: regulations and directives SE and SCE do not respond properly to the specific SME’s requirements.

According to that, the introduction of this new statute will favour and develop the transborder activities of those enterprises.

At this stage, it is difficult to give ones opinion on the contents. It could be only initiated when we will have a draft text of statutes.

But, as several statutes proposals are presently open, how will be determined the text which will be used as the draft regulation?

Remarque de la CECOP :

La CECOP est d'accord sur le principe de la création de nouveaux instruments européens pour autant que ceux-ci s'avèrent utiles ou indispensables. Les statuts existant actuellement : règlements et directives SE et SCE répondent mal aux exigences particulières des petites et moyennes entreprises.

Dans la mesure des remarques faites infra, l'introduction de ce nouveau statut sera de nature à favoriser et à développer les activités transfrontalières de ces entreprises.

Au stade actuel, il est difficile de se prononcer sur les questions de fond. Celles-ci ne pourront véritablement être abordées que lorsque l'on disposera d'un projet de statut.

Mais, comme différentes propositions de statuts sont actuellement ouvertes, comment sera déterminé celle qui fera l'objet d'un projet de règlement ?

II. Do SME's need a European Private Company Statute?

Question 1

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

The main difficulties concern the existence of a plurality of both legal and fiscal systems that SME's have to face and to adapt to.

Question 2

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

The ECC Statute is a good instrument for cooperatives having cross-border businesses, but the several references to national laws can be a barrier for the establishment of companies in the Member States.

Question 3

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

The EPC Statute could be useful for cooperatives if it takes into account their characteristics and SPEcificities. If not, one wonder about its place in companies' law because it still exists other similar legal forms.

Question 4

The question about creating a subsidiary company, an establishment or services in other countries, depends on the size of the company.

The basic point is that in any case the workers' rights must be protected everywhere at the same level.

"Cooperatives Europe" fears that the establishments of different countries will be governed by different laws leading to different level of workers' protection.

Question 5

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.

If the EPC Statute is not comprehensive of the basic principles of cooperatives, the choice will be to prefer the national laws instead of the EPC Statute.

Question 6

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

CECOP'S remark: the problem has been faced within the framework of the SE and SCE regulation: the registered office and the headquarter should be situated in the same state but not necessarily on the same geographic place. The reasons for this can be applied for the same reasons here.

Remarque CECOP : le problème a été rencontré dans le cadre des règlements SCE et SE : Siège social et siège de son administration doivent se trouver dans le même état mais pas nécessairement au même endroit. Les motifs invoqués trouvent alors entièrement à s'appliquer ici aussi.

Question 7

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

- *be open to any person (natural or legal)*
- *be somehow limited? If so, which should be the limitations and why?*

The access to EPC should be open to any person.

“Cooperatives Europe” welcomes the fact that the EPC can be created also by only natural person, as is the case for the SCE (which until now is the only company form that may be set up by one natural person) : this provision is very suitable for SME's.

CECOP's remark: the creation of the EPC by physical persons is logical as SME's are generally enterprises created by physical persons (creation of their own employment). Let us recall that the SCE can be created from scratch and by physical persons in opposition to the SE. Indeed, the physical person and corporate body cohabitation is foreseen by the SCE.

Remarque CECOP : la création d'une SPE par des personnes physiques est dans la logique des choses, les Pme sont généralement des entreprises créées par des personnes physiques (création de leur propre emploi). On peut rappeler que la SCE peut être créée ex nihilo et par des personnes physiques contrairement à la SE. La cohabitation personnes physiques– personnes morales est d'ailleurs prévue par la SCE

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

*Q 7.3. Would you support an EPC Statute if it were restricted to a single shareholder (**Model B** outlined in chapter III)?*

CECOP's remark: the ideal for the EPC is to be, at the same time, single and multi shareholders. But if it is necessary to choose, the multi shareholders model should be kept.

Remarque CECOP : l'idéal est une SPE qui pourrait être à la fois single share holder et multi share holders. Mais si le choix est obligatoire, le modèle multi-share holders devrait être retenu.

Question 8

Q 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?

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

“Cooperatives Europe” reminds the experience of the ECC Statute: the main problems are on legal and fiscal aspects. The risk on different tax laws is the fiscal dumping: companies will establish where, from their point of view, there are the better tax laws.

Cecop's remark: the EPC will then enjoy a “European label” which can be good to balance the lack of trust to the national companies which implement its activity beyond its border: the creation of a subsidiary or the establishment in another member state will also be facilitated.

Remarque CECOP : la SPE acquiert ainsi un « label européen » qui peut remédier au manque de confiance accordé aux entreprises nationales qui exercent une activité transfrontalière : la création de filiales ou d'établissements dans un autre état membre s'en trouve aussi facilitée

Question 9

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

- Model A (EPC having multiple shareholders)

The model allowing multiple shareholders is the better one, but it has to take into consideration the principles of cooperatives and in particular it has to protect the members of the company, knowing their importance in the cooperative form.

Question 10

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

“Cooperatives Europe” agrees with the option 2a (flexible statute with references to the general principles of EU law) but keeps the attention in the fact that the *acquis communautaire* on the cooperative laws has to be preserved. The EPC Statute has not to be a way to weaken the ECC Statute and the cooperative law in general.

CECOP's remark: the answers to questions 11 to 12 (table) require a study in each member state. This research could not be lead because of the deadline assigned to this consultation.

Remarque CECOP : les réponses aux questions 11 et 12 (tableaux) auraient demandé une étude dans chaque état membre, recherche qui n'a pu être menée en raison des délais accordés pour la réponse à cette consultation.

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)¹⁸,
- 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.

The EPC should have a uniform EU standard on employees' involvement as it is the case for the ECC. The risk is that, without a uniform standard, companies can practice some dumping by choosing the country in relation with the better law for them. A directive should be a good solution as it is the case for the SE and the ECC.

CECOP's remark :

The measures of directives 2003/72/CE on SE and 2003/72/CE on SCE are more focused on big companies rather than on small and medium size enterprises: the implementation threshold in terms of employment (50 and more) are too high for the later. In many enterprises, workers would not have access to information, consultation and participation of the decision-making process.

The implementation of minimum European standards would be certainly more adapted. However, these standards should take into account the most advantageous national regime.

Remarque CECOP :

Les dispositions des directives 2003/72/CE sur la SE et 2003/72/CE sur la SCE concernent davantage les grandes entreprises que les petites et moyennes entreprises : les seuils d'application calculés en termes d'emplois (50 et plus) sont trop élevés pour celles-ci. Dans de nombreuses entreprises, les travailleurs risqueraient de ne pas avoir accès à l'information, consultation et participation dans les processus de prise de décision.

L'instauration de standards européens minima serait sans doute la plus adaptée, ces standards devraient toutefois tenir compte des régimes nationaux les plus avantageux en la matière.