

European Private Company and the Regulatory Landscape in the EU – An Introductory Note

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The following document presents the position of legal scholars from the new Member States of the European Union assembled in the “Expert Group 10+” acting under the aegis of *Centrum C-Law.org* with respect to the European Commission’s plans to introduce a new, genuinely European legal form for small and medium-sized enterprises. The proposal of uniform Statute for European Private Company, enacted in form of an EC Regulation has been particularly endorsed by French-German initiative coordinated by the CREDA¹ in cooperation with University of Heidelberg. Preparatory work resulted in submitting first proposals, which at first didn’t seem to have gained high priority in the Commission’s agenda. The idea appeared to have lost momentum, particularly in the aftermath of Centros and following pro-establishment ECJ-cases redefining the regulatory landscape for private companies in Europe. Yet a number of Commission’s public consultations confirmed the expected utility of uniform law of private companies in Europe. Consequently, the High Level Group of Company Law Experts recommended further work on the EPC as a medium term priority. Commission’s Company Law Action Plan (CLAP) proclaimed launching a feasibility study even sooner. Such a study commissioned by the European Commission in 2003 (results published in 2005) confirmed the usefulness of further work. Also the recent public consultation and public hearing (Brussels, May 3rd 2006) revealed substantial interest in the EPC. Support for introducing a uniform business form came also from the side of European industry, which expressed interest in such a legal form, particularly for cross-border establishment of subsidiaries in companies’ groups (mainly to operate as sales, distribution and servicing departments abroad).² In the meanwhile, the consultative procedure has already reached the European Parliament. On February 1st 2007 European Parliament passed a resolution with recommendations to the Commission on the European private company statute (2006/2013(INI)). Not

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¹ *Centre de Recherche sur le Droit des Affaires*, a research unit of the Paris Chambers of Commerce.

² The idea was supported inter alia by German industry associations: *Verband Deutscher Maschinen- und Anlagenbau* (VDMA), and *Bundesverband der Deutschen Industrie* (BDI), by French *Mouvement des Entreprises de France* (MEDEF) and *Chambre de Commerce et d’Industrie de Paris* as well as by European organizations: *Organisme des Liaison des Industries Métalliques européennes* (ORGALIME), *Union des Industries de la Communauté européenne* (UNICE) or *Association of European Chambers of Commerce and Industry* (Eurochambers).

surprisingly, the EPC has become one of the core topics of a recent meeting of the Advisory Group on Corporate Governance and Company Law (Brussels, March 8th 2007)³. Opinions on the feasibility and usefulness of the EPC were divided among Group's Members. To recapitulate the main pros and cons raised by the Members, following arguments should be pointed out:

In favour of EPC:

- It would enable companies to get easily organised as a group at EU level, by having a homogenised organisation in Member States.
- It is more convenient to get organised through subsidiaries than through branches (tax reasons, liability limited to the subsidiary and relationships with clients, creditors and authorities of the host country)
- A single legal form would reduce the legal costs and make easier to control different subsidiaries.
- It would provide companies with a more accessible European label for conducting business than the SE one.

Against EPC:

- The ECJ case-law allows companies to establish abroad through branches or subsidiaries.
- The mobility questions are already addressed by the 10th directive on cross-border merger and soon by the 14th directive on the transfer of seat.
- It is impossible to rely on EU law only. EU company law has been designed to solve specific problems and is not a complete body of law, so it provides an inadequate framework for a simplified private company, which would have only minimal regulations covering shareholders, creditors and directors. Therefore, any EPC would have national elements anyway and hence there will not one single EPC but 27 different ones.
- A model law is sufficient for those MS which do not yet have a simplified private company.

The sceptical voices overlook that neither the ECJ pro-liberate jurisprudence nor the 10th and (forthcoming) 14th directives provide an adequate substitute for EPC statute. First, although the ECJ has interpreted the "public interest" exception very strictly, it remains unclear, how national courts are likely to interpret it in future cases, which entails some degree of legal uncertainty. Second, the application of foreign company law by domestic courts, with no recourse to the foreign courts (courts of the country, under whose law the company operates) or to European Courts is likely to bring about substantial deformations of foreign law, not to mention high costs of judicial review, legal advice and law enforcement.

³ Minutes available online at <http://ec.europa.eu/internal_market/company/docs/advisory-committee/minutes6_en.pdf>, (DG MARKT/F2/LZ D(2007), Ref. ADG CG&CL 07/4 rev 1).

Furthermore, whereas 10th or (forthcoming) 14th directives deal with cross-border merger (10) and seat transfer (14), the need of small and medium sized enterprises lies with formation or transformation of foreign companies (subsidiaries). The aforementioned directives do not provide an adequate framework for these operations.

There are good reasons to believe, there is a justified fear that differences in application of the formally European legal form will persist among countries. Additionally a multitude of sources of inspiration for the EPC statute might cause interpretation and application problems. However, these problems are likely to be counterbalanced in middle and long term, by progressing convergence of company laws in EU Member States. Referring to other countries case law will become common in legal argumentation, thus increasing knowledge of legal practice abroad. This should also give rise to search for common principles of European company law, a movement that is clearly needed, and that – as we believe – will dominate the discussion on European company law in the future.

The following document by “Expert Group 10+” addresses issues that remained underrepresented in the current discussion on the EPC Statute. It provides a view from the new Member States. Most of these states are former socialist countries. Over the last years, all these countries have extensively borrowed from western legal systems not only in order to modernise their laws but also in the mandatory process of implementation of *acquis communautaire*. However, in many cases the convergence is limited to the wording of the statutes with differences remaining in the legal practice which is due to quite formalistic attitude of most of the courts in Central and Eastern Europe. In our paper we examine, how the introduction of genuinely European legal form – provided that it would become popular across Europe – would positively influence and enrich legal doctrine in CEE by more direct confrontation with other legal systems. We believe that the spill-over effect would be beneficial for the entire system of national company laws of these countries as well.

Apart from that, the fact is that most of the CEE legal forms equivalent to ltd or GmbH in CEE (e.g. sp. z o.o. Kft, s.r.o.) are relatively less recognisable abroad, putting those availing themselves of these forms on competitive disadvantage as their potential commercial partner will have to spent time and money on investigating on liabilities and other legal questions related to this unknown legal forms. European legal form would mean a better access to the Common Market for less known CEE private companies.

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The “Group 10+” is affiliated at the *Centrum C-Law.org*, a research NGO assembling legal and economics scholars, mainly from the new member states of the European Union. The list of experts involved in the work of the paper is reproduced below. I would like to take this opportunity and thank all who contributed.

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