European Parliament's Committee on Legal Affairs

Public Hearing on a European Private Company Statute,

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Need for a European Private Company Statute

1. According to its advocates, the introduction of a European Private Company Statute (EPCS) is justified above all by the objective of having (1) a uniform but flexible legal medium for small and medium sized enterprises (SME) that is (2) eligible irrespective of whether or not a European Community dimension is at stake.
It is questionable, however, if the introduction of such a medium without any Community dimension as a prerequisite for its applicability would meet the subsidiarity criterion, given the possibilities created or to be created by the recent European Court of Justice's (ECJ) case law on the freedom of establishment, the Directive on cross-border mergers and the forthcoming Directive on the transfer of the registered seat.

2. The freedom of establishment as interpreted by the ECJ in its recent case law provides companies with a registered seat in a Member State the right to have their establishments in other Member State registered there (whether or not its central administration is also located there) and to be recognised as a private legal subject in all Member States.
It thus enables entrepreneurs to incorporate their economic activities in any of the corporate forms available in those other Member States which do not require the registered seat to correspond with the company's central administration.
One could argue that it is up to each 'real seat' Member State to decide on whether or not to maintain or abolish the real seat requisite. One could argue more generally that it is up to each Member State how to respond to the emerging competition of corporate forms triggered by the ECJ's case law.

3. In light of this, each Member State could consider introducing more flexible (private company like) corporate forms in its legislation, as several states already have done and others are at present deliberating.
The sole remaining justification of a EPCS therefore seems to be the 'European label' of this corporate type, which is supposed to help overcome the possible lack of confidence encountered by a national private company species in its cross-border business relations.
I doubt if imposing on all Member States a EPCS whose accessibility does not depend on any community dimension and whose sole remaining objective is providing a 'European label', would be compatible with subsidiarity. This doubt only increases if all the political and legislative energy needed for its regulation, as well as all the complex problems to be solved, are taken into account.

Safeguarding workers' rights

4. One of the problems to be solved is how to prevent the application of the EPCS from undermining pre-existing employee rights to participation at board level and from withholding from employees such participation rights to which they would be entitled under national company law.
Whatever may be the outcome of Parliament's considerations on whether or not to propose the introduction of a EPCS, it is essential from a trade unions point of view that this problem be adequately addressed. See further paragraph 8 ff.

5. As employee rights to information and consultation should apply irrespective of the legal form of the entrepreneur, it is obvious that the Member States would have to ensure that the relevant national legislation – in accordance with Directive 2002/86/EC (general framework for informing and consulting employees) and Directive 94/45/EC (European works councils) – be applicable also to the European private company (SPE).
It is also clear that national legislation concerning the consultation of employees would apply with regard to the planned formation of the SPE through conversion or absorption (merger) of an existing undertaking or in any other case wherein an existing undertaking is affected by the formation of an SPE.

6. It would, however, be inconsistent with the European law nature of the SPE, to abstain from any additional legislation requiring the setting-up of a European level 'SPE works council' (analogous to the one embodied in the SE Directive) in case the SPE covers establishments and/or subsidiaries in two or more Member States and thus has a European dimension.
In this case, abstaining from additional legislation and solely relying on the EWC Directive (applicable only if certain high levels of workforce are met) would induce a free choice between the SE statute and the EPCS and thereby a possible circumvention of the SE Directive.

7. As far as labour law and social security law is concerned, however, I do not foresee a need for additional provisions in connection with the introduction of a EPCS.
As far as the formation of an SPE entails the transfer of an undertaking or a merger, the general national rules in accordance with Directive 2001/23/EC (safeguarding employee rights in case of transfer of undertakings) will apply.
The rules governing the employment contract itself and social security generally apply irrespective of the legal qualification and the type of incorporation of the employer. The reference rules of private international law (Rome Convention) and social security coordination (Regulation 1408/78/EC) generally refer to the *lex loci laboris as* the applicable law, thus abstracting from the law of the registered seat or the establishment of the employer.

Employee participation at board level

8. The reasoning in the English executive summary of the feasibility study with regard to employees' participation rights at board level is confusing, unreliable and unconvincing.
It fails to give due attention to the fact that employee participation rights at board level are common in at least 10 Member States and cover companies with SME size as well in several of them. Application thresholds range from 25 (Sweden), 35 (Denmark), 50 (Czech Republic), 100 (Netherlands) and 200 employees (Hungary) up to 500 (Germany, Slovenia) and 1000 employees (Luxembourg).[1]
The reasoning seems to quit objectivity and to be politically preoccupied where it argues that safeguarding pre-existing participation rights and analogous application of participation provisions would lead to *'excessive'* worker involvement, *'end in a crisis in the internal relations of the SME'* and *'disrupt the institutional environment of the enterprise'* (p. 63).
The risks of social dumping and buying the jurisdiction are mentioned as real and important, but argued away by stating that *'it is always preferable to add strict provisions progressively if necessary rather than introducing them from the start'* (p. 64).

9. Certainly, company law has a facilitating function towards entrepreneurs and investors. It should, however, also regulate the corporate checks and balances in order to meet the interests of long term value-creation, public wealth and social cohesion. I am convinced that a corporate governance model which encourages business and employees to reach agreement on all important elements of corporate policy and management will perform better in the long run. For the sake of fostering balanced corporate governance, employee participation rights at board level should be a benchmark for Community action in the field of company law and part of any initiative to enable or ease business operations in EU.[2]
However, the argument, here, is not whether or not it should be so, nor whether the different forms of employee participation existing in so many Member States are less or more controversial.
The point is, they legitimately exist and form part of the vulnerable fabric of national industrial relations systems. It should not be, therefore, a deliberate aim or even only a collateral effect of Community legislation that they be undermined or by-passed through optional corporate forms immune to employee participation.

10. Since a harmonisation of company law provisions concerning employee participation rights at board level has proven to be beyond reach so far, there is no other acceptable solution than to safeguard pre-existing rights in the SPE's formation process and leave to the Member States the right to impose analogous application of the participation provisions of national company law on the SPE.

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[1] See: http://www.seeurope-network.org/homepages/seeurope/countries.html
[2] Cf. Corporate Governance at European level, resolution adopted by the ETUC Executive Committee, 14-15 March 2006 (http://www.etuc.org/r/660)

This has been the way in which the participation issue has been tackeled in the context of the SE and the cross-border merger directive. That should be the way to do also in the case of the forthcoming directive concerning the transfer of the registered office.

11. Regarding the SPE one could be inclined to assume that it would suffice to leave it to the discretion of the Member State of its registration to impose analogous application of the employee participation rules of the national company law.
However, according to its advocates, the EPCS should be accessible whatever the operations considered by the founders of the SPE, purely national as well as cross-border operations: initial formation, merging of a pre-existing entity in a newly formed SPE, conversion of a pre-existing entity in an SPE, formation of a joint subsidiary-SPE or a holding-SPE, transfer of an existing undertaking's assets and liabilities to a newly formed SPE, etcetera.
It is obvious that several of these operations could entail the absorption of pre-existing companies by a newly formed SPE registered in another Member State and/or a shift of control to a an SPE in another Member State.

12. Therefore, the assumption is false, I think, even if we take into account that according to the proposal it would be required that the SPE's registered office should correspond to its central administration .
Abstaining from any regulatory safeguarding of pre-existing participation rights along the lines set out in the SE directive and the cross-border merger directive would indeed mean the acceptance of many loopholes out of national employee participation systems.
I conclude, therefore, that proposing the introduction of an EPCS without provisions safeguarding pre-existing employees' participation rights would be inconsistent with the relevant *acquis communautaire* and present an affront to European workers.