Company law: statute for a European private company

2008/0130(NLE) - 25/06/2008 - Legislative proposal

PURPOSE: to lay down the conditions governing the establishment of companies in the form of a European private company with limited liability (Societas Privata Europaea, "SPE").

LEGISLATIVE ACT: Council Regulation.

CONTENT: this proposal forms part of a package of measures designed to assist SMEs, referred to as the Small Business Act for Europe (SBA).

The objective of the SBA is to make it easier for SMEs to do business in the Single Market and consequently to improve their market performance. The proposal creates a new European legal form intended to enhance the competitiveness of SMEs by facilitating their establishment and operation in the Single Market. The statute for a European Private Company will allow an SPE to be created and operate according to uniform principles in all Member States. It has been designed to address the current onerous obligations on companies operating across borders, who need to set up subsidiaries in different company forms in every Member State in which they want to do business. The SPE aims to reduce compliance costs on the creation and operation of businesses arising from the disparities between national rules both on the formation and on the operation of companies.

General provisions: the SPE is a company having legal personality and share capital. It is a private limited-liability company. As regards the scope of application of the Statute, the Regulation provides that: (1) an SPE is governed first by the directly applicable mandatory provisions of the Regulation; (2) the Regulation requires a range of matters, in particular the internal organisation of the SPE, to be regulated in the articles of association. In order to ensure flexibility, shareholders are free to decide how to regulate these questions subject only to the rules of the Regulation; (3) in matters covered by the SPE Statute, national company law is only relevant where specified by the Regulation. The provisions which are required or allowed by Annex I to be included in the articles of association are not subject to national law. The provisions of the Regulation and the list of matters in Annex I which must be covered in the articles of association define the scope of the EU rules. National law governs those matters which are not covered by the Regulation or by the articles of association of the SPE as stipulated in Annex I. This is the case, in particular, for matters such as insolvency or tax law).

Formation: an SPE may be set up ex nihilo, in accordance with the provisions of the Regulation. It may also be created by transforming or dividing an existing company or by the merger of existing companies. An SE or another SPE may also participate in the formation of an SPE. The name of any European Private Company must be followed by the abbreviation "SPE".

The Regulation does not set up a specific registration procedure for the SPE. It sets out some requirements to make the formation of an SPE easier and cheaper:

- it must be possible to apply for the registration of a SPE by electronic means;

- the Regulation contains a closed list of documents and particulars which Member States may require for the registration of the SPE;

- the proposal provides for a single legality check, i.e. either control of the legality of the SPE's documents and particulars by an administrative or judicial body, or their certification by a notary, on registration of an SPE.

Shares: the proposal allows shareholders a large degree of freedom to determine matters relating to shares, in particular the rights and obligations attached to shares. An SPE may issue ordinary or priority shares. Restrictions only apply when necessary in the interest of third parties or minority shareholders.

The conditions for the transfer of the shares must be regulated in the articles of association. Any new restriction or prohibition on transfers requires a qualified majority decision. There are provisions to protect minority shareholders.

Capital: in order to facilitate start-ups, the Regulation sets the minimum capital requirement at €1. The articles of association must set out whether the founders need to provide consideration in cash or in kind. The Regulation contains uniform rules regarding distributions (e.g. dividend, purchase of the SPE's own shares, incurring of debt) to shareholders from the assets of the SPE. A distribution may only be made if the SPE satisfies a specified balance-sheet test, but there is no mandatory solvency test on distributions, but the proposal explicitly allows shareholders to provide for a solvency test in the articles. The proposal does not prevent the SPE from acquiring its own shares under certain conditions to protect the company's assets, if the SPE carries out a balance-sheet test and, if prescribed in the articles of association, a solvency test.

Organisation: the shareholders of the SPE enjoy a high degree of freedom in determining the internal organisation of the SPE, subject to the Regulation. The proposal provides a non exhaustive list of the decisions which must be taken by shareholders. The articles of association must set out the required majority and quorum for voting subject to the text which provides that certain of these decisions require a qualified majority (i.e., at least 2/3 of the voting rights of the SPE, but the articles may provide for a greater majority, e.g. 3/4). The Regulation ensures two specific minority rights for the shareholders. The articles determine the management structure of the SPE (a single director or several directors, a one-tier or a two-tier board system). However, if the SPE is subject to employee participation, the chosen management structure must allow for the exercise of this right. The Regulation does not give individual shareholders or creditors the right to sue the members of the management body.

Employee participation: employee participation exists in small companies only in a few Member States (e.g. Sweden, Denmark). The general principle is that the SPE is subject to the employee participation rules of the Member State where it has its registered office. However, special rules are required in the case of the transfer of the registered office of an SPE.

Transfer of the registered office: the SPE can transfer its registered office to another Member State, while maintaining its legal personality and not having to wind-up. In order to protect the interests of third parties, the Regulation does not allow the transfer of the SPE's registered office during winding-up, liquidation or similar proceedings. The transfer procedure is inspired by the provisions on the transfer of the registered office of the SE Regulation.

The Regulation provides for a special regime where an SPE that is subject to employee participation transfers its registered office to another Member State where there is no or a lower level of employee participation rights or which does not provide for employees of establishments of the SPE situated in other Member States the same entitlement to exercise participation rights as they enjoyed before the transfer.

Restructuring, dissolution and nullity: the proposal refers the dissolution of an SPE or its transformation to a national company form to national law.