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*Committee on Legal Affairs*

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## **DRAFT REPORT**

with recommendations to the Commission on the European private company  
statute  
(2006/2013(INI))

Committee on Legal Affairs

Rapporteur: Klaus-Heiner Lehne

(Initiative – Rule 39 of the Rules of Procedure)

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## MOTION FOR A EUROPEAN PARLIAMENT RESOLUTION

**with recommendations to the Commission on the European private company statute (2006/2013(INI))**

*The European Parliament,*

- having regard to Article 192, second paragraph, of the EC Treaty,
  - having regard to Rules 39 and 45 of its Rules of Procedure,
  - having regard to the communication from the Commission to the Council and European Parliament of 21 May 2003 'Modernising Company Law and Enhancing Corporate Governance in the European Union - a Plan to Move Forward' (COM(2003)0284),
  - having regard to the public hearing held by the Commission on the future priorities of the action plan to modernise company law and corporate governance and the outcome thereof,
  - having regard to the report of the Committee on Legal Affairs (A6-0000/2006),
- A. whereas the public hearing held in the European Parliament's Committee on Legal Affairs on 22 June 2006 underscored the need for a European Private Company as a legal form for small and medium-sized undertakings engaged in crossborder business,
- B. whereas the possibility should extend for one or more natural or legal persons who do not necessarily reside in one Member State to establish a European Private Company (EPC) on Community territory, in accordance with Community law and procedure which will have to be set out in a regulation,
- C. whereas an EPC should possess legal personality and its assets should be limited to its liability in respect of the company's debts to creditors,
- D. whereas the EPC should be able to choose between a monolithic or dual structure,
- E. whereas the EPC should be registered in the country in which the head office is located in the appropriate register in accordance with national provisions pursuant to Article 3 of Directive 68/151/EEC<sup>1</sup> with a valid business address,
- F. whereas existing employee co-determinate rights of the Member State in which the head office of the company is located and of Community law must be respected in an EPC,
1. Requests the Commission during 2007 to submit to Parliament, on the basis of Article 308 of the EC Treaty, a legislative proposal on the Statute for a European Private Company and requests that this proposal be drawn up within the framework of interinstitutional

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<sup>1</sup> First Council Directive 68/151/EEC of 9 March 1968 on co-ordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community (OJ L 65, 14.3.1968, p. 8). Last amended by the Directive of the European Parliament and the Council (OJ L 221, 4.9.2003, p. 13).

deliberations and in accordance with the detailed recommendations set out in the Annex;

2. Confirms that the recommendations respect the principle of subsidiarity and the fundamental rights of citizens;
3. Considers that the requested proposal will not have any financial implications;
4. Instructs its President to forward this resolution and the enclosed detailed recommendations to the Commission and the Council and the parliaments and governments of the Member States.

## **ANNEX TO THE DRAFT RESOLUTION:**

### **DETAILED RECOMMENDATIONS ON THE CONTENT OF THE REQUESTED PROPOSAL**

#### ***Recommendation 1 (Community law as a basis for the type of company)***

The European Parliament takes the view that an EPC Statute should be based as far as possible on Community legislation and thus dispense with references to national law: it should therefore be conceived as a uniform and definitive statute. The provisions of the regulation on the statute for a European Company should therefore apply to the EPC, and the areas of law regulated in this regulation should be withdrawn from the jurisdiction of Member States. As regards subsidiary law, the order of precedence should be as follows: other Community law; the provisions governing comparable types of company in the Member State in which the company has its seat in accordance with its statutes. The relevant types of company in the respective Member States should be listed in an Annex.

#### ***Recommendation 2 (capital stock)***

The European Parliament takes the view that the capital stock of the EPC should be divided into shares with a specific nominal value; that members' shares should be rounded off in full euros; that the minimum capital should be EUR 10 000 or the equivalent in another currency at the time of registration; and that the minimum capital which determines the liability of members would not necessarily have to be paid in.

#### ***Recommendation 3 (Organisation)***

The European Parliament proposes that the EPC should have at least one executive director and that the first executive directors should be designated by decision of the members or in the articles of association; that no person who has been prohibited by decision of a court or administrative authority of a Member State from occupying a position comparable to that of executive director may be executive director.

#### ***Recommendation 4 (Content of articles of association)***

The European Parliament proposes that the articles of association contain the following information: the legal form and business name of the company; the duration of the company's life, if limited; the object of business; the seat of the company; the company capital and the body or bodies entitled to represent the company vis-à-vis third parties and in court; and the contribution to be made by each member in respect of the company shares held by him or her.

#### ***Recommendation 5 (Liability of the executive director)***

The European Parliament takes the view that the executive director or directors of the EPC must be liable individually or jointly and severally vis-à-vis the company for all acts committed contrary to the provisions applicable to the company; they should be liable under the same conditions for the dereliction of duty and a failure to exercise the care which is reasonably expected of management; should a legal person represent the company or assume the duties of management - or be involved therein - its own executive directors should be subject to the same conditions, duties and liabilities under criminal and civil law as if they had managed the company in their own name, irrespective of the liability of the legal person which they manage.

***Recommendation 6 (Liability of executive directors and members in the event of a reduction in net worth)***

The European Parliament takes the view that company bodies should be liable as the joint and several debtor for liabilities incurred by the EPC where the assets of the EPC have been reduced for the benefit of a company body, a member or a person closely associated with one of these through acts of the company; that the recipient of an unwarranted payment by the company should be responsible for refunding it; that liability should only occur if the act was not in the true interests of the EPC; and that the liability of the executive directors or members under other legal provisions should not be thereby affected.

***Recommendation 7 (Payments)***

The European Parliament considers that the payment of company assets to members should only be permissible in so far as the assets exceed the capital stock of the members; that, by way of derogation, payments should be permitted if the executive directors declare in this connection that they firmly believe that the company will continue to be able for a period of one year after the disbursement to settle any liabilities that are due; that, notwithstanding this declaration, in so far as the company is not in a position to settle liabilities that are due, the executive directors should be liable individually and jointly and severally vis-à-vis the creditors covered for damages; that liability should be ruled out if the executive directors have exercised the requisite care in issuing the declaration, especially if the payment difficulties are attributable to circumstances which were not foreseeable when the declaration was made.

***Recommendation 8 (Annexes to the regulation)***

The European Parliament proposes that the regulation contain the following annexes:

- (a) model articles of association which members may adopt wholly or in part;
- (b) for every Member State the types of company with which the EPC is equated in respect of areas not covered by this regulation, in particular the implementation of accounting, penal, social and labour law provisions;
- (c) the designations of the company bodies in the various official languages.

***Recommendation 9 (End-of-year payments)***

The European Parliament considers that the EPC should be subject to the harmonised

accounting provisions (Regulations 78/660/EEC<sup>1</sup> and 83/349/EEC<sup>2</sup> which apply in each Member State to the equivalent type of company.

***Recommendation 10 (conversion)***

The European Parliament takes the view that a EPC must be able to merge<sup>3</sup>, change its seat, split and change into a European joint stock company<sup>4</sup>, as far as possible according to Community law which has already been harmonised; in the absence of any relevant Community law, the provisions of the Member States which apply to comparable legal forms in the relevant Member State should apply; that in this connection rules on codetermination in the Member State in which the head office is located should apply according to Community law;

***Recommendation 11 (dissolution, liquidation, insolvency and suspension of payments)***

The European Parliament considers that the executive directors of an EPC must be obliged to apply for insolvency proceedings to be initiated without undue delay, and at the latest three weeks after the company has become insolvent or overindebted; that they should be directly and jointly and severally liable in the event of a dereliction of this duty vis-à-vis creditors who thereby incur losses; that furthermore, in respect of dissolution, liquidation, insolvency or the suspension of payments and comparable procedures, the EPC should be subject to the provisions applicable to companies to which they are equated in each Member State through this regulation.

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<sup>1</sup> Fourth Council Directive 78/660/EEC of 25 July 1978 based on Article 54 (3) (g) of the Treaty on the annual accounts of certain types of companies (OJ L 222, 14.8.1978, p. 11). Last amended by Directive 2006/46/EC of the European Parliament and the Council (OJ L 224, 16.8.2006, p. 1).

<sup>2</sup> Seventh Council Directive 83/349/EEC of 13 June 1983 based on Article 54(3)(g) of the Treaty on consolidated accounts (OJ L 193, 18.7.1983, p. 1). Last amended by Directive 2006/46/EC of the European Parliament and the Council (OJ L 224, 16.8.2006, p. 1).

<sup>3</sup> Directive.

<sup>4</sup> Regulation.

## EXPLANATORY STATEMENT

### I. Background

The European Private Company Statute is intended to provide small- and medium-sized enterprises (SMEs) in Europe with a form of company which will make it easier for them to conduct cross-border business. The need for such a statute was most recently voiced at a hearing of the European Parliament's Committee on Legal Affairs on 22 June 2006.

In order to consolidate the single market and thereby achieve the desired improvement in the economic and social conditions in the Community, one clear priority is the elimination of barriers to trade. However, such an approach in itself would be incomplete without parallel efforts to further develop Community factors of production and to adapt them to the increasingly cohesive single market.

While the European Company (SE) covers large limited companies, the EPC focuses on SMEs. The SE Statute took a long time to develop and the outcome is unsatisfactory, for the market has not yet adopted the SE as a company form for limited companies. One reason for this is that the SE is not a uniform European form of company, but has remained a patchwork owing to the many references to national law. This increases legal uncertainty and is expensive.

### II. Point of view of the rapporteur

#### 1. Re: Content

The EPC Statute should avoid the disadvantages of the SE Statute. It should therefore dispense as far as possible with references to national law and create a uniform European form of company. This would automatically cut consultancy costs, since cross-border activities would no longer be subject to the law of individual Member States but to a uniform statute. Some references will, however, be necessary in particular in harmonised areas of the law (for instance registers or accounting).

The need for uniformity arises from the fact that SMEs are in many cases active across borders through marketing or after-sales service companies (subsidiaries). In order to make things easier for undertakings, subsidiaries should ideally be set up and managed in all Member States according to the same rules. So that economic players from different legal traditions are able to have easy access to a new form of company, it is also necessary that various options be available, if possible, including the choice between a unitary structure and a dual structure.

In order to allow private companies to remain flexible in economic transactions they must also have some scope for transformation, including mergers, relocation of head office seats or flotation (changing forms of company to an SE). Harmonised Community law should be used here as far as possible.

In this connection, the urgent need for a directive on cross-border relocations of company seats is clear.

However, a statute must do more than merely make it easier to set up and organise companies. Firstly, it must strike a fair balance between the bodies within a company; secondly it must also contribute to the security of business transactions and protect a company's creditors. This takes place for example through balanced rules on liability. The relationship between creditor protection and flexible company start-up rules is also discussed in connection with the rules on stock capital. The recommendation is minded to retain the principle of minimum capital, but to dispense with the obligation to make cash payments. A further aspect of creditor protection are the restrictions on disbursements, so as to ensure that the minimum capital of the company remains for creditors and that assets unduly paid to individual members can be retrieved.

## 2. Re: Procedure

Under Article 192, paragraph 2, ECT and Rules 39 and 45 of the European Parliament's Rules of Procedure, Parliament has chosen the option of a legislative own-initiative report. By so doing, it is calling on the Commission to take legislative action. In accordance with the interinstitutional framework agreement between Parliament and the Commission (signed on 26 May 2005), the Commission is obliged to take this legislative request into account.

In drawing up the draft report, the rapporteur had at his disposal three proposals for an EPC statute, in particular a draft by the Paris Chamber for Trade and Industry, a draft from Professor Dr. Hommelhoff's previous chair (PD Dr. Teichmann) of the University of Heidelberg and finally a draft by Dr. Vossius, a notary from Munich.