



European Private Company Statute ETUC Position

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172. EC

Introduction

1. European 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. ETUC is 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 run¹. ETUC assesses any proposal in the field of company law according to this view.

2. The introduction of a European Private Company Statute (EPCS) is part of the Action Plan of the European Commission on Modernisation of Company Law and Enhancement of Corporate Governance². It is intended to provide a uniform but flexible legal form for small and medium sized enterprises (SME).

3. In this position paper, ETUC will not take a pertinent stand on the need and desirability of an EPCS, nor on its minimum statutory content concerning its legal personality, capital requirements, board structure, registration, minority rights, financial statements etc. It will comment on that if and when a concrete proposal is on the table.

3.1 However, whatever may be the outcome of the European Commission's and the European Parliament's considerations on whether or not to propose the introduction of an EPCS, it should be clear from the outset, that any proposal on an EPCS should adequately address the rights of the employees to information, consultation and participation in the affairs and decision making process of the European Private Company (hereafter: SPE, Societas Privata Europaea).

Information and consultation

¹ note: cf. 'Corporate Governance at the European Level' resolution adopted by the ETUC Executive Committee, 14-15 March 2006, <http://www.etuc.org/a/2250>

² http://ec.europa.eu/internal_market/company/modern/index_en.htm

4. 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 2002/14/EC (general framework for informing and consulting employees) and Directive 94/45/EC (European works councils) – be applicable to the SPE. It is also clear that national legislation concerning the consultation of employees would apply with regard to the planned formation of an 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.

5. 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.

Participation

6. The main problem to be solved is how to prevent the application of the SPE 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. Abstaining from any regulatory safeguards concerning participation rights would indeed mean the acceptance of many loopholes out of national employee participation systems.

7. Due attention should be given to the fact that employee participation rights at board level are common in at least 11 Member States and Norway and cover companies with SME size as well in several of them. Application thresholds range from 25 (Sweden), 35 (Denmark), 50 (Czech Republic, Slovak Republic), 100 (Netherlands), 150 (Finland) 200 (Hungary) and 300 (Austria) employees up to 500 (Germany, Slovenia) and 1000 employees (Luxembourg).³ They form part of the vulnerable fabric of the industrial relations systems of many Member States. 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.

8. 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.

8.1.1. 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 and/or to require Member States to impose analogous application of the participation provisions of national company law.

This has been the way in which the participation issue has been tackled 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.

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See: <http://www.seeurope-network.org/homepages/seeurope/countries.html>

8.1.2. The SPE form may be eligible whatever the operations considered by its founders: 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, et cetera. 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 an SPE in another Member State. Therefore, a negotiating provision and a 'before-after' provision analogous to the one embodied in the SE-directive are indispensable in order to safeguard pre-existing participation rights. In case of an SPE operating in the Member State of its registration only, it should be beyond all doubt that this Member State should require the analogous application of the participation provisions of national company law.

ETUC Demands

9. The EPCS should ensure that the establishments of an SPE in the EU Member States be covered by the national legislation concerning the information and the consultation of the employees in accordance with Directive 2002/86/EC (general framework for informing and consulting employees) and Directive 94/45/EC (European works councils).

9.1. The EPCS should require 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.

9.2. The EPCS should contain a negotiating provision as well as a 'before-after' provision concerning participation rights in case of an SPE with cross-border dimension analogous to the one embodied in the SE-directive. For an SPE operating in the Member State of its registration only, the EPCS should ensure analogous application of the participation provisions of that Member States company law.
