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accompanying the

Proposal for a

COUNCIL REGULATION

on the Statute for a European Private Company (SPE)

Impact assessment

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COMMISSION WORKING DOCUMENT

Impact assessment on a European Private Company Statute (SPE)

1. INTRODUCTION

The Lisbon Strategy[1] aims at boosting growth and jobs by increasing Europe's attractiveness as a place to invest and work. The Strategy underlines that removing remaining barriers in the Single Market will create new opportunities for market participants and the resulting competition will spur investment and innovation.

Helping small and medium sized enterprises[2] to exploit the full potential of the Single Market forms integral part of the Lisbon strategy. SMEs are a driving force of the EU economy. They account for more than 99% of all European companies and provide around 70% of jobs in the European Union.

The potential for the expansion of SMEs in the Single Market, however, remains unfulfilled. More than 40% of SMEs operating in the EU market would like to develop their cross-border activity but complain that they lack the instruments to do so[3].

The Commission's public consultations[4] have shown that the diversity of national legislations and company law forms is a barrier to expansion in the Single Market. Having uniform, yet flexible, company law rules for private companies across Member States could help reduce some of the obstacles and costs European SMEs currently face.

More uniform company law rules could help SMEs keen to expand in other Member States save on the costs of setting-up and running their businesses abroad. Cross-border groups would also benefit from such rules which would allow them to set up the same organisational structure in all Member States.

A possible solution, supported by stakeholders in the consultations mentioned above and analysed in this impact assessment report (IA), is the Statute for a European Private Company (*Societas Privata Europaea* - SPE).

The Commission's Communication on the Single Market for 21st century Europe[5] mentions the SPE Statute as one of the measures to facilitate cross-border activities of SMEs. The SPE Statute also forms part of the Small Business Act for Europe to be put forward in June 2008 and which aims at introducing concrete measures to unlock the growth potential of SMEs.

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1 Communication to the Spring European Council "Working together for growth and jobs. A new Start for the Lisbon Strategy", COM (2005) 24.

2 According to a general EU definition, small and medium sized enterprises are those with less than 250 employees. Within this category the following sub-categories are distinguished as per Commission recommendation 2003/361/EC: (a) Medium-sized enterprises [headcount <250 and turnover ≤€ 50 million and/or balance sheet total ≤€ 43 million]; (b) Small enterprises [headcount <50 and turnover ≤€ 10 million and/or balance sheet total ≤€ 10 million] Micro enterprises [headcount <10 and turnover ≤€ 2 million and/or balance sheet total ≤€ 2 million]; (c) Micro enterprises [headcount <10 and turnover ≤€ 2 million and/or balance sheet total ≤€ 2 million].

3 KPMG survey presented at BusinessEurope's SME Action Day on 21 November 2007.

4 Public consultation: http://ec.europa.eu/internal_market/company/epc/index_en.htm; the EBTP: http://ec.europa.eu/yourvoice/ebtp/consultations/2007_en.htm.

5 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. A single market for 21st century Europe, COM(2007) 724 final, 20.11.2007.

2. PROCEDURAL ISSUES AND CONSULTATION OF INTERESTED PARTIES

The European Private Company Statute (SPE) was initially developed by business and academic circles and gained broader support over time from business and industry organisations as well as from the European Economic and Social Committee[6]. It was listed as a possible medium term measure in the Commission 2003-2009 Action Plan on Modernising Company Law and Enhancing Corporate Governance[7].

A feasibility study on the SPE[8] was launched by the European Commission, its results presented in December 2005. A question on the need for the SPE was also included in the public consultation of spring 2006 on the future priorities of the Commission Company Law and Corporate Governance Action Plan[9].

Furthermore, the Legal Affairs Committee of the European Parliament held a public hearing on the SPE on 22 June 2006 where different aspects of the possible SPE Statute were discussed among experts. The Committee also drafted an own-initiative report on the SPE and a resolution requesting the European Commission to present a proposal for a uniform SPE before the end of 2007[10], was endorsed by the European Parliament in February 2007[11]. The Parliament reiterated its support and strong commitment to the initiative in a resolution of 25 October 2007[12].

In July 2007, the Services of Directorate General Internal Market & Services launched a specific public consultation on the SPE to gather stakeholders' views on the need and the possible content of a future Statute. 75 contributions were received of which approximately half came from individual companies. These were mostly SMEs, though a few replies came from large groups or companies belonging to such groups. The other half came from business associations, lawyers, accountants and trade unions.

In addition, a survey among companies in the 27 Member States was conducted through the on-line platform, the European Business Test Panel (EBTP). Over 500 companies replied to the EBTP. Some 25% of the respondents were micro enterprises (0-10 employees), 46% small and medium companies (10-249 employees) and 28.5% companies with more than 250 employees. Two thirds of the companies were from the EU-15 and one third from the EU-12. The sectors most represented were services (40%) and goods (33%), though 25% of the respondents were active in both. 35% of the respondent companies had an establishment in at least one other Member State and 64% engaged in cross-border trade or provision of services.

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6 See Opinion of the Economic and Social Committee on a 'European Company Statute for SMEs' (2002/C 125/19).

7 Communication from the European Commission to the Council and the European Parliament "Modernising company law and enhancing corporate governance in the EU – a plan to move forward" COM(2003)284 final

8 The feasibility study is available at: http://ec.europa.eu/enterprise/entrepreneurship/craft/craft-priorities/craft_spe_event.htm.

9 http://ec.europa.eu/internal_market/company/consultation/index_en.htm.

10 European Parliament Report with recommendations to the Commission on the European private company Statute (2006/2013(INI)), A6-0434/2006 final.

11 European Parliament resolution with recommendations to the Commission on the European private company Statute (2006/2013(INI)).

12 European Parliament resolution on the 14th company law directive and the European Private Company (B6-0399/07).

The detailed results of the consultations will be presented in the context of the discussion of particular issues. The summary reports of the consultations are available on the Commission website[13].

To receive further input from experts and stakeholders on the key aspects of the possible SPE, the Commission held a conference on 10 March which was attended by 130 participants (SMEs, larger companies, cooperatives, lawyers, notaries, trade unions and academics). The conference showed a strong consensus on the key features of the SPE. The SPE must be widely accessible, easy to set up, cheap to run, and as uniform throughout the EU as possible. It should leave a great deal of flexibility to founders and shareholders to organise themselves internally in the way that is best suited to their activity. The debates also highlighted that there is room for different approaches on important aspects of the SPE, as regards e.g. capital, directors' duties and liabilities, the issue of registered office and real seat or workers' participation[1.3]

The Commission's advisory group on corporate governance and company law[14] provided information for the preparation of the IA and provided advice in relation to the key aspects of the SPE. The IA has also been actively discussed in an inter-service steering group, established at the beginning of 2007, to which the representatives from the Secretariat General, the Legal Service and the Directorates Generals for Taxation and Customs Union, Enterprise and Industry, Employment and Social Affairs and Economic Affairs take part. This group met twice and also commented on the IA in writing. Its comments are reflected in the IA.

The IA report was been examined by the Impact Assessment Quality Board on 16 April 2008. Following the Board's opinion, several changes were made to this IA. In particular, the description of the limited harmonisation scenario in section 5.2.2. was expanded. A description of the relative importance of the SPE initiative to other relevant policies for SMEs was inserted in section 5.4, together with a description of the costs which national companies might incur when switching to the SPE and which Member States might face as a result of the introduction of the SPE. The possibility of limiting the access to the SPE to companies according to their size was added as an additional sub-option in section 6.1 (Sub-option A). Considerations on the relationship between the SPE and national law and on whether the SPE contributes to simplifying company law of making it more complex were inserted in Sub-option C.3 in section 6.1. In sub-option C.3 some examples of the issues that would be left to the SPE founders' discretion were added. The tax considerations in Option E.2 in section 6.1 were clarified. Minimum capital requirements and rules on distributions to shareholders were separated and addressed as different sub-options (F and G) in section 6.1. The specific company law concepts (e.g. balance sheet test, solvency test) have been clarified in the text of the IA.

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13 http://ec.europa.eu/internal_market/company/epc/index_en.htm

14 The group is composed of twenty non-governmental experts from various professional backgrounds (issuers, investors, employees' representatives, academics, regulated professions, etc.) with particular experience and knowledge of the subject. They provide detailed technical advice on preparing corporate governance and company law measures.

3. PROBLEM DEFINITION

3.1. Context

SMEs are the driving force of the EU economy. The report "*SMEs in Europe 2003*", which is based on extensive literature and studies, considers SMEs are a key driver of economic growth. Indeed, the 23 million EU SMEs[15] account for more than 99% of all European enterprises and provide jobs for around 97 million people[16]. This represents close to 70% of total private employment in the EU-25, as shown in Annex 1, graph A1[17]. Supporting the development of SMEs, therefore, is crucial for the improvement of the EU economy.

To foster economic activity, all EU Member States about a century ago introduced in their legislations legal entities known as 'companies', which all offer to their founders and members some form of limitation of personal liability. This explains to a large extent the enormous success of these legal vehicles which make it possible to engage in economic activity without putting the entirety of one's assets at risk.

Most EU Member States have at least two kinds of companies. The first kind, the joint stock company (e.g. the AG, SA, NV, plc, etc), is designed for large companies. It is often subject to a high minimum capital requirement and detailed internal organisation rules. Its shares may be listed on the stock market. This kind of company is often referred to as "public companies". The second kind of company is designed for smaller companies (e.g. the GmbH, the SARL, the sprl, etc). While this form offers its founders and members the much needed limitation of liability, it is often designed some way between a joint stock company and a partnership to take account of the fact that the personal involvement of shareholders usually is very strong in small companies. This makes of this second kind of company the preferred legal form for small companies. These company forms cannot offer their shares to the public and as a result are often referred to as 'private companies'.

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15 Estimations vary on the exact number of EU-27 SMEs: Eurostat, in European business, Facts and figures 2007, mentions 19 million enterprises in the EU-27's non-financial business economy in 2004. The 2003 Observatory on EU SMEs: (http://ec.europa.eu/enterprise/enterprise_policy/analysis/doc/smes_observatory_2003_report8_en.pdf, indicates an absolute number of around 24,668 million SMEs for EU 15 (18,698 million, 2003 data) + EU 12 + Turkey (5,970 million, 2001 data). These statistical differences stem mainly from a different evaluation of the number of micro enterprises and from the fact that Eurostat data do not take into account personal services where many enterprises are SMEs. However, both Eurostat and the EU Observatory on EU SMEs acknowledge that 99.8 % of EU-27 enterprises are SMEs.

16 Calculated from the information reported on European Commission (2003): "SMEs in Europe 2003", Observatory of European SMEs 2003/No. 7, DG Enterprise Publications and European Commission (2003): "The impact of EU enlargement on European SMEs", Observatory of European SMEs 2003/No.6, DG Enterprise Publications. This data and other data mentioned in this impact assessmentbased on the Observatory of European SMEs reports, is primarily drawn from Eurostat's SMEs database and an European Network for SME Research (ENSR) survey among over 7 600 SMEs in Europe, compiled by the Commission.

17 See Annex 1.

3.2. Problem: low participation of SMEs in the Single Market

SMEs are crucial for the EU economy but their participation in the Single Market remains low, both in absolute terms and compared to large companies. Only about 5% of EU SMEs have foreign subsidiaries or joint ventures, compared to 20% of large companies[18].

SMEs, however, have a strong potential to expand into new markets. 40% of the European SMEs interviewed in a recent survey conducted by KPMG[19] mention that such expansion is important for them. Overall, about a quarter of the total respondents to that survey had an international presence but these were more often larger companies: 42% had revenues in excess of € 50 million, 33% between € 10 and 50 million and 24% with revenues below € 10 million.

The KPMG survey shows that although there is a great potential among SMEs for the expansion of business beyond national borders, SMEs do not fully use the opportunities the Single Market offers them as they face many obstacles hindering their development, be it at national, EU or at a global level. Taxation, heavy regulation of labour and administrative burdens are considered to be the greatest obstacles to SMEs development. More than 40 % of the companies operating on the EU market consider that they lack sufficient information about doing business abroad. Just as many mention that they lack instruments to facilitate their internationalization. In Sweden, Hungary and Denmark, this percentage exceeds 50%.

3.3. Causes and drivers of the problem: legal and administrative requirements SMEs face when starting and operating a business in the European Union

Companies and company founders seeking to benefit from the Single Market face legal and administrative barriers every time they seek to set up a business in a new Member State. These legal and administrative requirements affect both the creation and the day-to-day operation of businesses. These barriers require companies to dedicate human and financial resources and expose them to significant costs.

Though all companies wishing to expand cross-border are affected, these administrative and legal burdens are proportionately much heavier for smaller companies and their founders, who often have fewer sufficient financial and human resources than large companies.

This IA report focuses strictly on specific problems related to the company law burdens on the formation and operation of companies in the Single Market. Other problems encountered by SMEs in the Single Market, including those related to the diversity of tax regimes and labour legislations and other regulatory restrictions, are outside the scope of this IA.

Company law compliance comes at a cost. These compliance costs are generated (1) by the formation of a company and (2) by the day-to-day operation of a company. In addition, the

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18 Survey of the Observatory of European SMEs (Flash EB N° 196) conducted by Gallup Organisation Hungary between 11/2006-01/2007 upon the request of DG for Enterprise and Industry See Annex 1, graph A3.

19 Survey presented at BusinessEurope's SME Action Day on 21 November 2007. The KPMG study and the presentations at the conference are available at: http://www.businesseurope.eu/Content/Default.asp?PageId=496. Results of the study are based on interviews with 840 SMEs in the EU. The focus of market research was on expansion strategies, internationalisation behaviour and perceived reform needs.

diversity of national company forms in the EU means that some company forms are less well known and trusted than others. The less well known forms of companies are less trusted in other Member States as a result and this is detrimental to cross-border activity.

3.3.1. Compliance costs associated with the formation of a company in a Member State (home Member State or a different Member State)

In general, compliance costs are defined as expenditure in conforming with legislation. In the context of formation of companies, compliance costs are identified as the cash or assets which company founders must put up to be able to create a company. These costs are primarily generated by minimum capital obligations, administrative costs (including notaries' fees) and the need for expert legal advice.

The first source of compliance costs upon the creation of a company is the <u>minimum legal capital</u> requirement. The average minimum legal capital is of about €10,000 in the EU-15 and of about €4,400 in the EU-12, even though some countries have much higher requirements (e.g. €35,000 in Austria, €18,550 in Belgium or €13,870 in Poland)[20]. Even though the consideration put up for the minimum capital requirement can be used for the company's initial investment, it exposes company founders to a potential cost because it can oblige them to put up more money that is actually necessary to launch the company. As an example, one could argue that a minimum capital requirement of €35,000 (which is the case in Austria), of which 50% must be paid up upon the formation of the company, might be excessive for a company which is operated from the home of one of its founders and which, to start its activity, requires a couple of computers (at a global cost of approximately €2,000).

The second source of compliance costs covers <u>administrative costs</u> associated with the registration of a new company. This includes registration and notary fees, administrative and publication fees. According to a study conducted in 2008 by Baker & McKenzie for the German company association VDMA, these costs taken globally are estimated to average around €1300 for small companies[21].

The third source of compliance costs upon the creation of a company is <u>expert legal advice</u>. Typically, expert legal advice would cover advice on the company form and the drafting of articles of association. The Baker & McKenzie study estimates that, if the cost of expert legal advice is taken into account, the average cost on the formation of a small company, excluding minimum capital requirement, rises to around €4,300, it is multiplied by 3. However, unlike capital and administrative costs which are the same for national and foreign company founders on a given market, the cost of expert legal advice falls to a greater extent on foreign companies, which require guidance notably with regard to the company legal form, which will be different in every Member State.

The total of the above costs on the creation of a company, including capital, can run up to levels that can deter from company formation in some markets. The Baker & McKenzie study, for example, estimates that a total of €28,550 would be required in Belgium, €20,500 in the Netherlands, or € 16,500 in Italy, to set up a small company.

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20 See Annex A3

21 Member States covered by the study: AT, BE, UK, FR, HU, IT, NL, PL, ES and SE. See Annex 3, table A2

Example

Shunk&Co GMBH KG, a German group gave the following example at the public hearing of the European Parliament on 22 June 2006. The example is relevant in so far as Schunk faces the same obstacles as SMEs. However, Schunk itself is not a SME.

An export-oriented German company having 1,300 employees, operates in 12 EU countries by means of own subsidiaries. It plans to set up additional subsidiaries.

Internal approach

When only internal resources are used (which is possible when a subsidiary is being created in a Member State which has a legal framework similar to that of the home Member State and where the language barrier does not constitute a significant problem), setting up a subsidiary involves one to two months of a qualified specialist or approximately 200-400 working hours and it can represent up to €12,000 of personnel cost. In addition, 4-5 journeys are necessary on average, which involves an additional cost of €1,500-3,000.

External approach

If the language barrier and the differences in the legal system of the Member State of destination are significant, the company will have recourse to an external consultant or a lawyer to coordinate the subsidiary creation process locally. The costs of creation will differ depending on the Member State. For instance, the fixed cost of setting up a subsidiary with help of external consultant in Czech Republic would average €15,000 and € 20,000 in Poland. In addition, administrative fees and notaries fees etc. add up to between €1,200 and 6,500. It would take on average two to four months (sometimes up to six months) before all the conditions for a company's incorporation are met[22].

No matter which approach is chosen, therefore, companies face significant costs as a result of the diversity of company forms, when seeking to expand in the Single Market

3.3.2. Difficulties and compliance costs associated with the operation of national company forms

Of the more than two thirds of EBTP respondents who have an establishment in another Member State, respectively 69% and 65% identify the diversity of national legislations governing the operation of a company and the difficulty of dealing with different company law systems as the most burdensome barriers to conducting business in other Member States.

With each Member State comes a different form of company and different rules on the organisation and structure of companies, company organs, shareholders' rights, shares, etc.

This diversity of private limited company forms in the EU exposes on companies to a lack of flexibility which makes it extremely complicated for groups of companies to rationalize the internal organisation of their subsidiaries. SMEs expanding in the Single market have to choose a different company form in each Member State. As a result, they will have to operate under a different internal organisation and different articles of association in each Member State. They do not have the flexibility to opt for the same internal structure throughout their organisation. For example, a group of companies present in 6 Member States will have 6 different company forms, each with a different management structure. In contrast, a domestic group of comparable size can apply a single model.

22 Based on the presentation by Kristina Schunk, legal consultant at Schunk GMBH&CO. KG, held at the public hearing before the Legal Affairs Committee of the European Parliament in Brussels, 22 June 2006, on the European Private Company, published in European Company Law, December 2006, vol. 3, issue 6.

In addition, groups must keep track of differing requirements existing in national law and which often go into the details of the day-to-day operation of the company. For example, the convocation to a general meeting of a SARL of more than 25 associates formed in Luxembourg must be sent to the shareholders 8 days in advance of the date of the meeting. In France, the same convocation must be sent 15 days in advance of the meeting. Similarly, the documents that must be sent to associates vs. made available to them at the registered address of the company will differ from one Member State to the other.

The Baker & McKenzie study estimates the compliance costs associated with the day-to-day operation of companies in various Member States to average €2,300 on a yearly basis[23]. This is only partly consistent with the results of the EBTP. Only some 14% of the EBTP respondents who have an establishment in another Member State estimate the yearly legal costs associated to the operation of a company in another Member State to be below €5,000. In contrast, almost 57% consider these costs to exceed €5,000 and close to 30% consider them to exceed €10,000. The differences in estimates owe to the fact that the average cost of expert legal advice will depend on the size of the company, the complexity of its structure, the complexity of the relevant rules of the particular Member State, etc.

Furthermore, SMEs are also constrained in their ability to transfer their registered office to other Member States. The lack of flexible means to move their registered office and business operations to other Member States exposes SMEs to opportunity costs. Even though the directive on cross-border mergers, which was to be transposed by 15 December 2007, provides companies with an indirect way to move to another Member State (i.e. by creating a new company in another Member State and merging the existing company into that company), it is considered too complex a procedure for SMEs.

3.3.3. Lack of trust in foreign legal forms

43% of the EBTP respondents who have an establishment in another Member State mention the lack of trust in foreign legal forms as an obstacle to the cross-border business operation. Companies indicate that operating in another Member State under their domestic legal form (e.g. by providing cross-border services or via branches) makes it more difficult to penetrate markets and gain the trust of consumers and business partners. This explains in part that some companies prefer to set up subsidiaries established under the better-known and more trusted legal form of the Member State with which they trade.

The lack of trust in foreign legal forms is particularly acute for businesses from new Member States. While company forms such as the UK "Ltd" or the German "GmbH" are well known in most Member States, the same cannot be said of the company forms of the new Member States (e.g. the Polish "sp. z o.o." or the Hungarian "Kft"). This makes the penetration of other EU markets by SMEs from the EU-12 more difficult.

3.4. Expected development and the need for the EU to act

While it may be expected that certain obstacles such as the lack of trust in the less known company forms might reduce over time, small companies wishing to expand cross-border will continue in the future to face the issues described in Section 3.3. The diversity of national company laws and forms, as business unfriendly as it may be, is long anchored in the legal

[23] Annex 3, table A4

traditions of the Member States. Even though some Member States are currently reviewing their private company legislations, nothing today gives grounds to expect any major change to this diversity over the short term.

Even assuming that all Member States would decide simultaneously to make their company laws more business friendly, the end result would still remain a patchwork of different legal models and company forms. Only action undertaken at EU level can create a legal environment that is sufficiently uniform throughout the EU to serve the practical needs of SMEs wishing to take advantage of the Single Market.

The legal basis for EU action would depend on the option chosen.

Should the EU legislator decide to adopt a Statute for a European Private Company, the EU action would be based on Article 308 of the EC Treaty. This provision provides a legal basis for EU actions aiming to attain one of the Community objectives[24] in the absence of any specific legal basis in the EC Treaty. This is the case of the creation of a new European legal form such as the SPE. Article 308 is the legal basis of the existing European legal forms, i.e. the European Company, the European Economic Interest Grouping and the European Co-operative Society.

Should the option be chosen to harmonise Member States' laws on some aspects of their laws on private companies, Article 95 (ex 100a) of the EC Treaty could be an appropriate legal basis. This provision provides a legal basis for measures which have as their object the improvement of the conditions for the establishment and functioning of the Single Market.

4. OBJECTIVES

The main objective is to enhance competitiveness of small and medium sized companies by facilitating their establishment and operation in the Single Market. Given the economic importance of SMEs and the difficulties they face seeking to take advantage of the Single Market, the action should target primarily SMEs even though it may at the same time benefit larger companies and groups. Ideally, any action taken should serve in the short term to facilitate the activities of those SMEs, albeit relatively few in number, which are already in the Single Market. In the longer term, it should serve to encourage a larger number of SMEs to operate business activities in other Member States.

In particular, the initiative aims at:

4.1. Providing for a simple, flexible corporate law regime widely known across the EU, adapted to the specific needs SMEs and based on uniform principles throughout the EU

Respondents to the Commission public consultations[25] consider that the ability to apply a single set of rules to businesses across the EU would facilitate, and reduce costs on, the formation and operation of subsidiaries in other Member States. To be

24 Article 308 of the EC Treaty can be used as a legal basis for an EU measure if action by the Community proves necessary to attain one of the objectives of the Community and the EC Treaty has not provided the necessary powers.

25 The public consultation: http://ec.europa.eu/internal_market/company/epc/index_en.htm; the EBTP: http://ec.europa.eu/yourvoice/ebtp/consultations/2007_en.htm.

attractive to SMEs, such single set of rules must respond to the specific needs of SMEs, in particular as regards flexibility in the internal organisation and freedom for the location of registered office and principal place of business. It should also give companies a common label known to all.

4.2. Reducing compliance costs arising from the operation of businesses in several different company law systems:

– *Reducing costs of setting up a company or a subsidiary abroad*

The first specific objective would be to reduce compliance costs related to the establishment of subsidiaries in other EU Member States, in particular the costs arising from the disparities in Member States' laws with regard to the formation of companies and the drafting of articles of association (see section 3.3.1).

– *Reducing costs of administration and operation of a company or a subsidiary abroad*

The second specific objective would be to reduce the costs related to the day-to-day operation of companies in other Member States, in particular the costs of continuous legal advice on different national laws related to company organisation and structure, shareholders' rights, shares etc. (see section 3.3.2).

These objectives can be reached by limited and targeted action without imposing on Member States an extensive amendment to their legal systems.

5. POLICY OPTIONS AND THEIR RESPECTIVE IMPACTS

For the sake of clarity, this section only addresses high level policy options, i.e., the respective merits of doing nothing, harmonising national laws or proposing a new company form. These options are discussed and measured against the following pre-defined criteria:

(a) Uniformity: The creation and operation of a small company should be governed by essentially the same company law rules in all Member States. Uniformity is also a cost indicator: the more uniformity throughout the EU, the lower the costs for companies. The European label is also an advantage which would derive from the uniformity of rules.

(b) Flexibility: An environment should be established to facilitate the operation of SMEs across the Member States. Company founders should have the maximum flexibility to choose the internal organisation which best suits their needs, but without prejudicing third parties' interests. Like larger companies, SMEs should also benefit from the possibility to transfer their registered office from one Member State to another. Flexibility, which captures simplicity, also is a cost indicator: the greater the flexibility left to companies, the more companies can make choices adapted to their needs and control their costs.

(c) Legal certainty: There should be absolute certainty about the applicable law with a view to ensuring legal certainty for all relevant stakeholders.

(d) Effectiveness: The extent to which the measure fulfils the objectives of the proposal.

(e) Political acceptability: The political risk associated with the proposed measure.

Political acceptability is presented alongside criteria a) to d) although, unlike these other criteria, it is a criterion of feasibility and should, as a result, be considered independently. Experience shows that certain company law matters are particularly sensitive in a number of Member States: the Commission has had to withdraw some proposals after more than 20 years of discussion[26]; some other proposals have taken close to 30 years to reach adoption[27]. Proposals which run a high risk of being politically unacceptable should be disregarded from the outset, irrespective of their merits on substance.

The options for the content of the SPE Statute are discussed separately in Section 6. Section 6.2, contains a comparison of the retained content options with the baseline scenario.

5.1. Baseline option: 'no action'

The existing framework is composed of various instruments which actually or potentially address some of the difficulties identified in Section 3 but fail to meet the objectives identified in Section 4.

Description

- *Existing relevant EU legal forms*

The European Company ("SE") Statute[28], which entered into force in 2004, provides for a European corporate form governed by a set of uniform rules in all Member States and offers a European label to businesses. With a minimum subscribed capital of €120,000, the SE is designed for large companies. SEs can also only be created by companies already operating in more than one Member State. Some 140 SEs have been created to-date.

The European Co-operative Society ("SCE")[29], cannot be used by capital companies due to its principles which are specific to co-operatives. The SCE Statute entered into force only in August 2006 and to-date no single establishment of a SCE has been reported. An evaluation report on the ESC is scheduled for 2011.

- *Possibilities created by the Community case law on corporate mobility*

Recent rulings of the European Court of Justice[30] establish the right of individuals and legal persons to register companies anywhere in the EU irrespective of the location of their business activities. According to a study conducted for the European Corporate Governance

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26 5th company law directive on the structure of public limited companies, proposals for a European Association and a European Mutual Society.

27 SE Regulation, 10th company law directive on cross-border mergers of limited liability companies

28 Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE), O.J. [2001] L 294, p. 1

29 Council Regulation (EC) No 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society (SCE), O.J. [2003] L 207, 1

30 Centros (C-212/97), Überseering (C-208/00), Inspire Art (C-167/01), Sevic, C-411/03.

Institute[31], the number of private limited companies from all Member States incorporating in the UK per year increased by 560% after the Centros judgement of the ECJ.

- *Implementation of the Services Directive*

The Services Directive[32], to be transposed by 28 December 2009, will reduce barriers currently hampering the cross-border provision of services and the freedom of establishment[33]. In particular, the Directive will streamline authorisation processes and simplify administrative procedures. Member States will have to establish points of single contacts through which service provides can obtain all relevant information and complete, at a distance and by electronic means, all procedures and formalities relating to their activities.

- *Cross-border mergers directive*

The cross-border merger directive[34], which was to be transposed by 16 December 2007, gives all limited liability companies, including SMEs, the possibility to develop their cross-border business by merging with businesses from other Member States.

- *The reform of national company laws*

Recent policy developments and trends both at EU and national levels could improve the business environment of European companies, in particular SMEs. In particular, the 'one stop shop' initiative[35], which enables companies to undertake at a single point all the formalities associated with the creation of a business, and the EU simplification program[36], should significantly reduce the administrative cost of setting up companies.

- *One-stop initiatives*

On-going initiatives such as the "one-stop shop initiative" enable companies to undertake at a single point all the formalities associated with the creation of a business. Moreover, the trend in national legislations to give private limited companies more flexibility can be expected to have a positive impact on SMEs, notably by reducing the costs on the formation and the operation of companies.

<u>Assessment</u>

The existing framework fails to meet the policy objectives.

The existing framework is <u>not sufficiently effective</u> because it fails to address the specific needs of SMEs, at least for two reasons. The first reason is that some of the existing tools, like the SE and the SCE, which offer a European label, are ill-suited to SMEs. The second reason

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31 M. Becht, C. Mayer, H.F. Wagner (2006). Where do firms incorporate?, Working paper no. 70/2006.

32 Directive 2006/123/EC of the European parliament and of the Council of 12 December 2006 on services in the internal market. O.J. [2006], L 376, p. 36.

33 The Directive will apply to all cases where a business seeks to establish in a Member State, irrespective of whether a provider intends to start a new business or whether an existing business seeks to open a new establishment, for example a subsidiary or a branch.

34 Directive 2005/56/EC of the European parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies. O.J. [2005], L 310, p. 1

35 See section 3.3. http://ec.europa.eu/enterprise/entrepreneurship/start_en.htm

36 See http://ec.europa.eu/internal_market/company/simplification/index_en.htm. The initiative aims at cutting red tape and reducing unnecessary administrative burdens imposed on businesses.

is that even though the existing framework facilitates establishment and makes company mobility within the EU feasible, company founders still have to set up and run companies under a different national company form in each Member State. This, as described in sections 3.3.1 and 3.3.2 above, is cost intensive. It is also proportionately more expensive for SMEs, which have fewer human and financial resources than larger companies.

The existing framework does not ensure the level of uniformity and flexibility which would enable SMEs to save costs on the creation and operation of their businesses in the Single Market.

The baseline scenario also is not politically acceptable since there seems to be a growing consensus that SMEs at present do not benefit sufficiently from the Single Market. It is this political imperative which has led the Commission to propose the Small Business Act and which underlies the Single Market Review.

Nothing, however, indicates that all Member States will undertake to reform their company legislations. Furthermore, even if SMEs would benefit from simpler company law forms and a one-stop shop procedure for the creation of their businesses, they would still have to operate under different national forms and would as a result still face a lack of uniformity and flexibility.

5.2. Alignment of national company laws for private companies

5.2.1. Extensive harmonisation by means of a directive

Description

Such harmonisation would seek to align national company laws in respect of all issues relating to the establishment and operation of a company, i.e., the rules on formation, registration, internal organisation, shares, minority and third party protection (creditors and employees).

Assessment

Such harmonisation would make the various national private company forms similar to one another in all key respects and ensure a high level of uniformity, thus reducing costs on the formation and the operation of subsidiaries in different Member States. However, it would require deep changes to national legislation, going far beyond company law and as a result would run into strong political opposition.

5.2.2. Limited harmonisation

Description

Alternatively, the harmonisation could be limited to those aspects which are the most problematic and costly in cross-border establishment. To be useful to SMEs, harmonisation, in particular, should cover capital, registration requirements and the internal organisation of companies (i.e., management structure, general meetings, rights of shareholders). Other matters, such as the rules on creditors' protection, directors' liability, insolvency, where national legislations are very different, would be left outside the scope of harmonisation.

Assessment

Harmonisation of certain limited aspects of national company forms would offer SMEs a greater degree of uniformity compared to the present situation. Indeed, while still having to set up businesses under national company forms, SMEs would be subject to the same capital requirements and identical rules on internal organisation throughout the EU. Depending on the outcome of the political negotiations, such harmonisation could also be effective and offer them more flexibility than they have at present.

However, even though limited harmonisation might seem to offer a higher degree of feasibility than the extensive harmonisation envisaged in the preceding option, such a reform would nonetheless run into significant political difficulties. Firstly, national company laws are long anchored in the legal traditions of Member States. They are often considered as forming a consistent set of rules, so that modifying only certain key aspects would be resisted as altering the overall balance. This is true, in particular of company forms, and the suggestion to modify certain core aspects of the operation of private limited companies while leaving others untouched is likely to run into strong opposition as a result. Secondly, national company forms reflect the different legal and corporate cultures of the Member States. To offer SMEs a sufficient degree of uniformity (i.e. similarity between the national company forms), harmonisation should seek to impose the same standards throughout the EU, rather than mere minimum standards. Seeking to introduce common aspects in very different company forms, each of which is considered to be consistent and self contained, would be a difficult political exercise. Recent discussions on the directive on capital maintenance show that harmonisation in such core aspects of company law provide ample evidence of this.

Furthermore, by altering core aspects of national company forms while leaving others untouched such harmonisation risks creating legal uncertainty with regard to national company forms that have been well established for decades.

Lastly, even assuming that one would succeed in making such harmonisation a reality, SMEs would still be left with a variety of national forms and no European label.

5.3. Improvement of an existing EU legal forms – Statutes for a European Company (SE) and a European Co-operative Society (SCE)

Description

Existing legislation, in particular the SE Statute, could be made more accessible to SMEs. This, however, would require profound amendments to the existing SE Statute, both to make it more uniform and to address the specific needs of SMEs. This option would require a thorough redrafting and re-negotiation of the SE Regulation.

Assessment

An evaluation of the SE Statute will be carried out in 2008/2009 with a view to assessing the attractiveness of the SE and propose necessary improvements, if appropriate. A report is to be published in 2009. Reopening the SE to negotiation before the publication of this report would not make sense. Further, re-opening the discussion on the SE Statute is likely to make the negotiations more complex than focusing the discussion strictly on private companies. The SCE Statute, for its part, will be only evaluated in 2011.

5.4. A Statute for a European Private Limited Company (SPE)

Description

A proposal would be made for a new European legal form, the "Societas Privata Europeae" or "SPE", designed for private limited companies, which would provide an alternative company form to be voluntarily adopted by companies. Such a company could be created in the same form in any Member State either from scratch by any legal or natural person or by an existing company by transformation or via a merger with another company. The SPE would leave great flexibility to shareholders to determine the internal organisation of the company. Regulation would be limited to those areas where it is strictly necessary to ensure a satisfactory degree of protection for stakeholders. SPEs would also be able to transfer their registered office to other Member States.

Furthermore, the SPE could, as any other company form, be used to engage into cross-border trade without setting up any separate establishment in another Member State. It could also equally provide groups with a very useful tool as they would be able to set up SPEs as subsidiaries in Member States throughout the EU.

Assessment

A uniform SPE Statute would allow individual SMEs to expand in the Single Market using a single company form, substantially similar in all Member States. Such uniformity of the SPE throughout the EU would also allow company founders and shareholders to make significant *cost savings* both on the formation and on the operation of the SPE, compared to national forms (cost savings on the company's capital and on expert legal advice on company law matters). These savings, however, are likely to be greater on the formation and operation of 'subsequent SPEs' (e.g. subsidiaries) than on the formation and operation of 'first time' SPEs. Legal advice with regard to local social, administrative, tax and labour matters, which would fall outside the scope of the SPE Statute, however, would also still be required, as SPEs would be active in the national environment of the Member States. Furthermore, the SPE cannot be expected to result in a reduction of the registration and publication fees, since SPEs would always have to be registered on the companies' register to come into existence.

A uniform SPE with the same name and content throughout the EU would offer SMEs a *European label* which would make cross-border business easier and help companies compete in the global environment, by enhancing their image, visibility, competitiveness and dynamism. This may be true, in particular, for the companies of the EU-12 whose national company forms are less well-known throughout the EU than the company forms of the EU-15.

The SPE would leave company founders full flexibility to choose the internal organisation of the company best suited to their needs and activities and thus *save costs*. For example, shareholders could decide to have one director rather than a board, or to hold general meetings by telephone rather than by meeting physically, thus saving on travel costs and time. This increased flexibility would also allow cross-border groups to make economies of scale by choosing the same management structure as they create more SPEs, thus saving on legal advice.

The SPE could offer a high level of legal certainty by avoiding as much as possible references to national law as far as the company form is concerned. Matters pertaining to the SPE would be regulated either in the SPE Statute or in the SPE's articles of association (as prescribed in the Statute). However, there would still need to be references to national law for example for insolvency matters, but these should be limited.

By offering SMEs a corporate vehicle which is uniform and legally certain, yet flexible, the SPE would constitute the most effective and targeted means to achieve the objectives set out in Section 4. Most importantly, SMEs would be entirely free to choose the SPE form or not. The SPE as such, therefore, does not impose any new administrative burden on companies and is fully compliant with the Commission's objectives to cut red tape.

A proposal for a SPE also presents a good level of political acceptability as it would not require Member States to modify their existing legislations and, on sensitive issues, could draw on solutions agreed and implemented in the SE and the cross-border mergers directive.

How many companies are likely to be interested in the SPE Statute?

The exact number of companies that would use the SPE is impossible to determine. Based on the assumption that the SPE will be widely available, simple, easy to set up, cheap to run, uniform and flexible, **all EU companies** which do not wish to offer their shares to the public may be potentially interested in using it.

The SPE should appeal certainly to companies which already have subsidiaries or joint ventures and could transform their current legal form(s) into more flexible SPE(s). Based on the 2007 European Commission survey[37], according to which about 5% of all EU SMEs have foreign business partnerships, of which 77% are located within the EU (see Annex 1), the number of SMEs that could potentially be interested in the SPE is of **about 1.15 million**. As regards medium and large companies, of which 20% have foreign business partnerships, **about 7,600 companies** could potentially benefit from the SPE.

Since the transformation of a national company into a SPE would be subject to national law, the costs of switching from a national company form to a SPE should not exceed the costs which companies face today when switching other (national) company forms. Switching company forms usually becomes significantly more costly when it entails in addition a delisting of securities from a stock exchange. Switching from a listed public company to a SPE would be no exception.

Obviously, even if the SPE is an attractive enough form for SMEs to want to use it, it will not become well-known overnight. Efforts will need to be made in particular by the European institutions to inform companies and company founders about the SPE and ensure the attractiveness of the label if it is to have value.

What is the added-value of the SPE for SMEs?

Even though it would offer SMEs a valuable business vehicle, the SPE does not purport to solution alone all difficulties which SMEs face in the Single Market. As described in Section 3.3 indeed, the SPE would provide a response to only part of these difficulties. The SPE should rather be seen in the more global context of the Commission's policy in favour of SMEs. The SPE is one of the measures envisaged as part of the Small Business Act (SBA), which is specifically intended to make the Single Market more approachable to SMEs. Other measures envisaged in the SBA include the reduction of unnecessary administrative burdens,

[37] See note 17.

the increase of SMEs' participation in EU programmes, the improvement of SMEs' access to public procurement, and the reduction of obstacles to cross-border trade. SMEs will also benefit from other wider policies not specifically targeted at SMEs, such as the simplification of EU legislation. Together with these other measures, the SPE can be expected to offer small businesses a tool that makes it easier for them to set up or expand their activity.

What burdens are Member States likely to experience as a result of the introduction of the SPE?

Though Member States are not expected to incur severe expenditure as a result of the introduction of the SPE, they will have to make space for the SPE as a new company form in their legal systems. This will require an adjustment to the companies' registers of the Member States to include the SPE as a new category of company. Member States will be able to build on existing systems, so that the IT systems of the companies' registries would only require to be adjusted to include the SPE. The introduction of the SPE will also require that the entities running the companies' registries train some member of their staff to become familiar with the features of the SPE and its registration requirements. The extent of the training will be somewhat limited since the SPE will be governed for a series of matters by the national law applicable to private limited liability companies.

5.5. Comparison of the options (summary)

In the table below, the options are measured against pre-defined criteria, mentioned at the beginning of Section 5. Each scenario is rated between "---" (very negative impact), "=" (no change) and "+++" (very positive impact).

Scenario / Criteria	Uniformity	Flexibility	Legal Certainty	Effectiveness	Political acceptability
Baseline	-	-	++	--	-
Extensive harmonisation	++	+	++	++	--
Partial harmonisation	+	+	++	+	-
Improvement of existing legislation	+	+	++	++	-
SPE	++	++	++	++	+

As has been explained in section 5.1, the baseline scenario fails to offer SMEs the level of uniformity required to take advantage of the Single market and as a result does not offer any effective tool to help SMEs take advantage of the Single Market. It also is not consistent with the Commission's current policy in favour of SMEs.

Extensive harmonisation, which could be equally effective as the SPE Statute in terms of uniformity and legal certainty, should also be discarded because it is politically unfeasible.

Partial harmonisation would still be difficult to achieve politically and would likely not provide for sufficiently uniform rules and fail to secure sufficient level of legal certainty by leaving many issues to national law. As a result, it would not be effective. Harmonisation, whether extensive or partial, would also not provide for a European label, unlike the SPE.

Improving the existing SE and/or SCE Statutes to adapt them to the needs of SMEs must be discarded as politically unfeasible at this stage, as these instruments must first be evaluated. Furthermore, reopening these company forms to adapt them to the specific risks burdening them, which would not be effective.

Lastly, while offering a satisfactory level of legal certainty, the SPE would offer a good level of uniformity by making the same company form available throughout the EU. It would offer flexibility by letting companies free to opt for their internal organisation. It presents also a reasonable degree of political acceptability, as entrepreneurs will be free to choose it (or not) as a company form and also not least because the European Parliament strongly supports EU action in this field[38].

6. EUROPEAN PRIVATE COMPANY STATUTE – DESCRIPTION, ANALYSIS OF IMPACTS AND COMPARISON OF SUB-OPTION

This section discusses each main issue to be covered by the possible SPE Statute. Summary tables at the end of each sub-section measure the comparative advantages and disadvantages of the different possible solutions against the criteria described in section 5, i.e. uniformity, flexibility, legal certainty, effectiveness and political acceptability. Except for effectiveness, not all criteria are relevant for each content option. Politically unrealistic options are discarded from the outset and do not appear in the summary tables.

6.1. Content sub-options

A. Companies falling within the scope of the SPE Statute

Option A1: Limitation to businesses of a certain size

Description: The SPE would only be available to SMEs subject to a limit in size. Such a limit could be defined e.g. by reference to the number of shareholders, the number of employee, or the annual turnover.

Assessment: Such an option would deprive the SPE of part of its usefulness and attractiveness. As a flexible tool, the SPE should remain a relevant legal form throughout the life and growth of the company. If the SPE were reserved to small companies, such a limit might result in sanctioning successful SPEs whose activity has grown or even in inciting SPEs to limit the growth of their business, both of which would be inconsistent with the global policy objective to help SMEs expand in the Single Market. It would result de facto in a mandatory obligation on SPEs which have reached a certain size to change company form, thus exposing them to additional costs and administrative burdens. If the SPE, in contrast, is reserved to larger companies, it would deprive small companies, which have the most difficulties expanding their activity in the Single Market, of an instrument to do so. There also, the SPE would not fulfil its policy objective. This option, therefore, must be discarded.

Option A2: Opening the SPE to businesses of all sizes

Description: The SPE would be available to all businesses with no restriction on size. However, the SPE would be prohibited from offering its shares on the stock markets. . If an SPE intends to offer their shares to the public, they would need to transform their company form into a public limited liability.

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38 See note 9-11.

Assessment: Such an option would make of the SPE a legal form that would be relevant to companies throughout their lives and expansion. The SPE would be relevant to small businesses wishing to expand in the Single Market and would remain relevant while they grow. The prohibition on public offers is standard in national private company forms. When the possibility is given to companies to offer their shares to the public, this always comes with detailed rules about the companies' internal organisation to protect shareholders, as shareholders of listed companies often do not have a direct relationship with the management. Prohibiting public offers means, therefore, that more flexibility can be left to the SPE in determining its internal organisation.

Summary of the retained option

	Uniformity	*Flexibility*	*Legal certainty*	*Effectiveness*
Option A.2: Opening the SPE to businesses of all sizes	Neutral, as the kind of company that can use the SPE form has no impact on the uniformity of the SPE	High, as the SPE will be able to evolve as the business develops	High, as no complicated size criteria will have to be applied and monitored	High, as the SPE will remain a relevant company form throughout the life of a business, with the exception of listed companies
	=	++	++	+++

B. Degree of autonomy vis-à-vis national legislation

Option B.1: Autonomy from national law in general

Description. The SPE would have an entirely autonomous regime, with uniform rules on company law, tax law, accounting law and labour law in all Member States. There would be no references to the national law in the SPE Statute.

Assessment. This option is politically unrealistic and should be discarded. Such an autonomous SPE regime would require harmonisation of tax law and labour law, where Member States are very reluctant to agree on common rules.

Option B.2: Autonomy from national company law regimes

Description. While the SPE would be autonomous from national company laws, issues such as accounting, insolvency law, tax law, labour and social security law and criminal law would not be covered by the SPE Statute. For these matters, a SPE would be subject to the national law of the Member State of its incorporation.

Assessment. An autonomous set of rules applicable to SPEs in all Member States would allow founders to save some of the compliance costs of setting up and organising businesses across the EU by allowing them to use the same company form and arrange their company's affairs in the same way in every Member State as there would be few references to national legal provisions. Drawing up articles of association or applying rules e.g. on capital maintenance or share transfers would not require professional advice in each Member State as the rules would be identical regardless of the place of registration of the SPE.

Option B.3: Reliance on national company law

Description. The SPE Statute would contain some basic principles on the formation, organisation and transfer of the registered office of a SPE, but other matters (such as shares, capital, and creditor protection) would be governed by the national law of the Member State of the incorporation of the SPE. This is the model of the SE Statute.

Assessment. This approach implies the application of a complex combination of national and European rules, requiring an extensive legal advice, which SMEs cannot afford. Stakeholders find the system of SE Statute as too complicated and creating legal uncertainty. This solution would also result in 27 different SPE forms in the EU.

Comparison of the retained options

	Uniformity	*Flexibility*	*Legal certainty*	*Effectiveness*
Option B.2: Autonomy from Member States' company law legislation	High, on company law matters.	Full flexibility to determine the company's internal organisation.	High, on company law matters, as only the Statute and the SPE's articles of association apply.	Effective, ensures application of the same company law rules to the SPE in every MS.
	++	++	++	++
Option B.3: Reliance on Member States' company law legislation	A little more uniformity than at present, but overall fairly low	Flexibility would depend on the applicable national law	Low, as the different national rules would apply to the majority of issues.	Ineffective, limited added value as companies would have to apply different national rules.
	+	=	=	=

The table above shows that option B.2 would ensure a higher level of uniformity, legal certainty and it would be more efficient than option B.3. In option B.3, the degree of flexibility would depend on the national legislations while in option B.2 the level would be defined by the Statute, which increases legal certainty.

C. Degree of uniformity of the Statute

Option C.1. Uniform Statute

Description. The SPE Statute would contain a complete set of rules regulating the external (e.g. representation, creditor protection) and the internal affairs (i.e. organisation and operation) of the SPE autonomously and independently from the national laws. It would leave limited possibility to founders/shareholders to depart from its provisions in the articles of association.

Assessment. This option would ensure the absolute uniformity of the SPE form across the EU. Shareholders, however, would lack the flexibility to choose an internal organisation best suited to their needs (in relation to the size of a company or sector of its activity). The Statute, as a result, would be less appealing to companies.

Furthermore, the experience of negotiations of the SE is a useful reference in this context. The initial draft SE Statute contained a complete set of rules creating a SE completely autonomous and independent from national legislations. No political agreement could be reached on such an ambitious proposal and a new approach had to be developed, i.e. a Statute containing independent rules on the SE to the extent possible and numerous references to the national laws of the Member States on other issues.

Option C.2. Full flexibility

Description. The Statute would leave full flexibility to the shareholders to regulate all company matters in the articles of association, i.e. internal organisation, capital, protection of creditors, liability of directors, employees' participation rights etc. The Statute would be limited to a few provisions on the creation of the SPE and the obligation to regulate all other matters in the articles of association.

Assessment. Giving total freedom to shareholders to arrange for all company matters, both on internal organisation and the company's relations with third parties, would result in an insufficient level of protection of third parties. This option is politically unfeasible and therefore should be discarded.

Option C.3. Uniformity on core issues in external relations and flexibility in internal affairs

Description. The Statute would contain provisions on some core issues (the basic features of the SPE) which are indispensable for the formation of the company and the SPE's relations to third parties (e.g. registration, representation of the SPE vis-à-vis third parties, creditor protection). But the internal organisation of the SPE would be left for the most to be governed by the articles of association. The Statute would prescribe the minimum content of the articles of association while leaving founders free to decide on the substance of these matters (e.g. pecuniary and non pecuniary rights of the shareholders, the method of decision-making, quorum, management powers, etc). The shareholders could also make use of model articles of association, which would be developed by the Commission in parallel to the SPE Statute. The model could be taken by companies off-the-shelf or provide an example to draw from. Most importantly, the Statute and the matters forming part of the minimum content of the articles as prescribed by the Statute would take precedence over national law.

Assessment. This SPE model would give company members more flexibility than Option C.1. The SPE would be uniform throughout the EU as regards its main characteristics (e.g. limited liability of the shareholders, share capital, contributions, name of the company) and matters which have an impact on the interests of third parties (e.g. profit distribution, formation, disclosure, creditor and minority shareholder protection). The broad contractual freedom which would apply to other issues not of direct concern to third parties would allow the shareholders to adapt the organisation and operation of the SPE to their business needs. In particular, they would be able to decide on the management structure, the manner in which shareholders' resolutions should be adopted (with the possibility of not having a general meeting), the majority required for the resolutions, etc. It would also allow companies to opt for the same – uniform – internal organisation and the same articles in all subsidiaries set up as SPEs, thus making significant savings on legal advice. The model articles of association could also contribute to substantially reduce the costs of the legal advice and provide added legal certainty. Option C.3 would also offer a very good level of legal certainty, as the SPE would be governed first by the SPE Statute and the matters forming part of the minimum content of the articles as prescribed by the Statute. All other matters would be governed by the national law of the Member State in which the SPE has its registered office. This would guarantee that there is no legal vacuum. At the same time, it would not impose on Member States the burden of introducing specific legislation to address matters not covered by the Statute and the minimum content of the articles. For all matters not covered the SPE Statute and the minimum content of the articles, the SPE would be assimilated to the equivalent national private company form. For example, the Polish authorities could decide that the SPE in Poland would be governed, for all matters not covered by the SPE Statute and the matters forming part of the minimum content of the articles, by the national law applicable to the sp. z.o.o. This also means that the SPE would not lead to any new legal regime or added complexity in the national legislations of Member States but merely offer SMEs an additional legal form, alongside existing national legal forms.

Comparison of the retained options

	Uniformity	*Flexibility*	*Legal certainty*	*Effectiveness*
Option C.1. Uniform Statute	Very high, with the same set of rules used by every SPE in the EU.	No flexibility for the founders in designing internal/external company's affairs.	Very high; no references to national law or to the articles of association.	Low. No possibility of adapting the SPE to the needs of different companies Not attractive for businesses.
	+++	+	+++	+
Option C.3. Uniformity in the external and flexibility in the internal affairs	Significant level of uniformity on the content of the Statute and the list of matters to be covered by the Articles (drafting tasks).	Flexibility left to founders on the internal organisation of a company.	Good because Statute would contain uniform core rules, the list of matters to be covered by the Articles. Limited references to national company legislation.	High. Ensures legal certainty while allowing the shareholders to adapt the Statute to the specific needs of their company.
	++	++	++	+++

The table shows that option C.1 would ensure more uniformity and legal certainty than option C.3 though its lack of flexibility risks making the SPE unattractive to businesses. Option C.3 offers a better balance between uniformity and flexibility without compromising legal certainty.

D. Cross-border dimension

Option D.1: No cross-border dimension

Description. The SPE may be set up by any legal or natural person(s) in any Member State.

Assessment. This option would make the SPE widely available as it would allow any natural person or legal entity to set up a SPE, irrespective of any cross-border presence or activity. The impact of a SPE open to domestic and cross-border businesses alike would be greater as more companies could use the SPE form. As a company form which leaves shareholders free to choose the internal organisation best suited to their needs, the SPE should be attractive in a purely domestic context. Of course, founders of domestic businesses with no ambition to expand abroad (e.g. small retail businesses), might still prefer opting for national company forms with which they may be more familiar. However, founders of other businesses, which do not exclude expanding abroad at a later stage, may find it attractive to opt for the SPE company form from the outset. This would allow them to expand abroad using the SPE form, i.e., with the same internal organisation and the same articles. This option would also offer a wider choice of legal forms for SMEs and foster competition between the SPE and national company forms. It could put pressure on Member States to make their laws more attractive for entrepreneurs. On the other hand, this may make these Member States more reluctant to accept such a Statute.

It may be argued, however, that making the SPE accessible also to companies with no cross-border dimension is not fully in line with the subsidiarity principle. However, such availability of the SPE would make it much easier for companies to expand on a cross-border basis, as companies set up as SPEs could expand in the Single Market using the same company form (the SPE). This would make cross-border expansion easier. This also means that SMEs would enjoy the benefits of the SPE (cost savings, uniformity, flexibility) as they set up their first subsidiary or joint venture in another Member State.

Option D.2: Cross-border dimension

Description. The SPE may be set up by any legal or natural person(s) in any Member State provided there is a cross-border element (e.g. shareholders from at least two different Member States or, or evidence of cross-border activity).

Assessment. Serious consideration was given to this option. A cross-border requirement would mean that the SPE, like the SE, is strictly focused on cross-border activity. Such a cross-border element would appear consistent with the objective of helping SMEs to expand cross-border and make a better use of the possibilities of the Single Market. The need for EU intervention might also raise fewer questions with regard to the subsidiarity principle. The SPE would also not come in direct competition with national company forms and, as a result, it might be less criticised. However, on a closer look, the absence of a cross-border requirement actually makes the SPE more 'Single Market' friendly, rather than the contrary. The absence of any such requirement would enable company founders to set up their business as a SPE at home. This means that they could later set up subsidiaries in other Member States also formed as SPEs, with the same internal organisation and the same articles of association. This, of itself, would make cross-border expansion in the Single Market significantly easier and cheaper. Furthermore, cross-border requirements in the form of shareholders from different Member States are purely formal and can be easily circumvented. Other cross-border requirements, such as the evidence of a cross-border activity, would require constant monitoring on the part of Member States to ensure than every SPE meets the requirement on an on-going basis. Not only would this impose significant administrative costs on Member States, but it would also expose SPEs to a heavy reporting burden which would be inconsistent with the global policy objective of making the Single Market more approachable to SMEs.

Comparison of the retained options

	Legal certainty	*Effectiveness*	*Political acceptability*
Option D.1: No cross-border dimension	High. No need to examine and monitor the cross-border element by the registering authority.	Greater choice of legal forms. Pressure on Member States to introduce more business-friendly corporate legislation.	May be opposed by some MS as it would create direct competition between the national legal forms and the SPE.
	+++	+++	+
Option D.2: Cross-border dimension	On-going control that the cross-border requirement continues to be met during the life of the SPE would be cumbersome and costly for MS	Limited to companies with cross-border activity. Limited competition between national legal forms and the SPE.	Focus on cross-border activity; more directly linked to the completion of the Single Market; more easily accepted by MS.
	+	+	++

The table shows that the lack of requirement for a cross-border element has very positive impact both on legal certainty and the effectiveness of the legislation, compared to Option C.2. The only drawback is that Member States may find option C.1 challenging as their national private companies forms will face the direct competition of the SPE. On the whole, therefore, preference is given to a SPE without any cross-border requirement.

E. The company's seat and its transfer

Option E.1: Inseparability of the registered office and the principal place of business

Description. The registered office and the principal place of business of an SPE would have to be in the same Member State. The transfer of the registered office to another country would, therefore, require the simultaneous transfer of the principal place of business.

Assessment. The SE Regulation applies this principle. However, this approach is not in line with the recent case law of the Court of Justice, which allows company having its registered office in a Member State to have its principal place of business in another Member State. This option, therefore, should be discarded.

Option E.2: Separation of the registered office and the principal place of business

Description. The registered office and the principal place of business of an SPE would not have to be in the same Member State. The transfer of the registered office to another country would, therefore, not require the simultaneous transfer of the principal place of business. Such a freedom would confirm the recent case law of the European Court of Justice.

Assessment. This approach would facilitate the exercise of the freedom of establishment for the SPE based on a uniform, simple and easily applicable principle, i.e., that a company may locate its registered office and its headquarters in different Member States as well as move the registered office and/or the principal place of business to another Member State. At present, companies cannot transfer their registered office to another Member State without first winding up their business in their home Member State and then setting a new company business in their host Member State, which triggers a heavy tax burden. The only way for a company to transfer its registered office to another Member State is to create a company abroad and be taken over by that company. The takeover would qualify as a cross-border merger falling within the scope of Directive 2005/56/EC. This, however, is perceived as being unduly cumbersome.

The change of the registered office triggers the change of the national company legislation applicable to the SPE. One may argue that this may give rise to forum shopping and a race to lighter regulatory environments which are less protective of shareholders, creditors and employees. The risk of extensive forum shopping, however, may be overstated. According to a study conducted for the European Corporate Governance Institute[39], the number of private limited companies from all Member States incorporating in the UK per year increased by 560% after the Centros judgement of the ECJ in 1997. The main rationale for the creation of those companies in the UK was ease of registration and low costs. A sufficiently uniform SPE Statute means that the cost of setting up a SPE will be approximately the same throughout the EU, thus making forum shopping less attractive Furthermore, company law is not the only legislation that applies to companies. Numerous other national legislations apply to companies such as labour, commercial or environmental legislation. These legislations usually apply to businesses located on the national territory. For example, the Danish factory of a Danish company will remain subject to Danish environmental legislation, even if the company transfers its registered office to another Member State.

The effectiveness of the transfer of the SPE's registered office would much depend on whether it is tax neutral. The (tax) Merger Directive[40] provides that the transfer of registered office of an SE or SCE from a home Member State to a host Member State does not result in

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[39] M. Becht, C. Mayer, H.F. Wagner (2006). Where do firms incorporate?, Working paper no. 70/2006.

[40] Directive 90/435/EEC of 23 July 1990 on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Members States, amended by Council Directive 2005/19 /EC of 17 February2005 90/434/EEC as amended by Council Directive 2005/19/EC of 17.2.2005

any taxation of the unrealised capital gains on the assets which remain effectively connected with a permanent establishment of the SE or SCE in the home Member State (article 10b). There are diverging views as to whether this provision strictly and only applies to the SE and SCE or whether, following the case law of the ECJ[41], it would apply mutatis mutandis to other types of companies. To ensure absolute clarity, the rules of the (tax) Merger Directive should be amended to cover the transfer of the registered office of the SPE and therefore ensure that the transfer is tax neutral.

This option ensures legal certainty by introducing an easily determinable and uniform principle on the applicable company law, i.e. the law of the company's place of incorporation.

Option E.3: Determination of an applicable rule by the law of the Member State of registration

Description. The Statute would not contain any provisions on the SPE's seat and leave it to conflict of laws to determine the applicable law in the light of the recent case law of the European Court of Justice. Accordingly, some Member States would require the registered office and the principal place of business of the company to be in the same country ("real seat" principle)[42], while others would allow the SPE the registered office and headquarters in different countries ("incorporation principle"). As regards the transfer of the registered office, the Member States applying the real seat principle could require that the SPE moving its registered office from/to their jurisdiction transfers its real seat/principal place of business as well. Companies moving from/to the incorporation state could relocate their registered office alone.

Assessment. This approach would give companies less flexibility and legal certainty in both at the stage of the formation and later, when they wish to transfer their registered office. The SPE's right to move its registered office without simultaneous transfer of the principal place of business would depend on the principle (incorporation or real seat) applied by the Member State of destination. This option would limit the effectiveness of the instrument and create legal uncertainty with regard to the applicable law. In addition, this approach would be conflicting with the objective to ensure the uniformity of the SPE Statute in all Member States.

In this context the recent developments in some Member States are worth noting. Further to the recent case law of the Court, some Member States applying the real seat principle have introduced (Hungary)[43] or are considering to opt[44] for the incorporation principle (Germany).

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[41] C-9/02, de Lasteyrie, 11 March 2004, O.J. [2004] C 94/6

[42] According to the principle of "the real seat" a company is governed by the law of the country where its headquarters or principle place of business. The following Member States apply it: BE, DE, ES, FR, LU, PT, EL, LT, PL, EE, NO, AT, SL, LV.

[43] Act L+I of 2007, entered into force on 1 September 2007.

[44] The press communication of the German Ministry of Justice (BMJ) on the reform (available at: http://www.bmj.bund.de/. The motive for this change was to give German companies the same flexibility as the companies from other Member States enjoy, i.e. using their national form (e.g. GmbH) to conduct their business outside the national territory.

Comparison of the retained options

	Uniformity	Flexibility	Legal certainty	Effectiveness	Political acceptability
Option E.2: Separation of the registered office (RO) and the principal place of business (HO)	High. Same principle applying to all SPEs across the EU.	High. Full freedom to choose the location of the HO and the RO.	Sufficient, as the same principle would apply in all MS. Applicable law =law of the MS of registration.	Flexibility in the allocation of a company's business. Some regulatory competition between MS laws.	Good, because solution limited to the SPE, but possible opposition of MS requiring RO and HO to be located in the same MS
	++	+++	++	+++	++
Option E.3: Determination of an applicable rule by the law of the MS of registration	None as national law would apply.	Dependent on the rules applied by MS.	The applicable law would depend on the law of the country of registration. No uniform principle.	No added value to the present situation where companies encounter obstacles when moving to another MS.	More easily accepted by MS as national law rules would apply with respect to the SPE's seat.
	=	=	=	=	+++

The table clearly indicates that option E.2 would be favourable in terms of uniformity, flexibility, legal certainty and effectiveness, even though it may be less acceptable to some Member States that still apply the real seat principle.

F. Capital regime

Option F.1: Minimum capital based on the average existing in the "Old member States" (EU-15)

Description: The SPE would be subject to a minimum capital requirement set at the level of the average minimum capital in the EU-15, i.e., €10,000 or €12,000.

Assessment: Minimum capital used to be considered as providing essential protection to creditors. This, however, is now largely challenged. Creditors usually insist on other means of protection. Banks, for example, will usually require another form of security, be it a personal guarantee, a mortgage or other form of security. Yet, it could be argued that a minimum capital requirement would have the effect of a seriousness test and discourage abusive company creations. However, a level as high as €10,000 or €12,000 would be comparatively very high for entrepreneurs of the EU-12, and make the SPE much less accessible to them than to entrepreneurs of the EU-15, which, as a matter of policy, is unacceptable. This option, therefore, should be discarded.

Option F.2: Minimum capital based on the average existing in the "New Member States" (EU-12)

Description: The SPE would be subject to a minimum capital requirement set at the level of the average minimum capital in the EU-12, i.e., €5,000.

Assessment: With a lower minimum capital requirement, the SPE would be accessible to EU entrepreneurs of all Member States, though the differences in standards of living mean that, in relative terms, the SPE would remain, as a matter of fact, less accessible to entrepreneurs of the EU-12 than to those from the EU-15. The real question here is that of the added value of such a minimum mandatory capital level. Even less than Option F.1, this option would not afford creditors any protection. A low level of minimum capital also would probably not prove sufficiently deterrent to prevent abusive company creations. Furthermore, like Option F.1, it would ignore the fact that SMEs have different actual capital requirements depending on the nature of their activity.

Option F.3: Minimum capital of €1

Description: The SPE would be subject to a minimum capital requirement of €1.

Assessment: This option would align the SPE with private limited liability company forms in the UK, France, Ireland and Cyprus and would be in line with the current trend at national level to suppress minimum capital requirements[45]. It would also take stock of the growing consensus that creditors do not rely in practice on minimum capital requirements for protection. It would also significantly contribute to making of the SPE a truly flexible form which entrepreneurs can adapt to their exact needs. It would also make the SPE equally accessible to the entrepreneurs of the EU-12 and of the EU-15.

Comparison of the retained options

	Uniformity	Flexibility	Legal certainty	Effectiveness	Political acceptability
Option F.2: Minimum capital at level of EU-12 average	Neutral, as founders would put up whichever capital above the minimum threshold as is required for the launch of the SPE's activities are.	Low, as founders would have to put up at least the minimum capital, no matter what the actual capital needs for the launch of the SPE's activities are.	Neutral, as a minimum capital requirement has no impact on legal certainty.	Low, as it would not protect creditors while imposing on SPE founders a stringent and rigid requirement.	High as most MS still impose minimum capital requirements.
	=	-	=	-	++
Option F.3: Minimum capital of €1	Neutral as founders would put up whichever capital as is required for the launch of the SPE's activities are.	High, as founders would put up the exact amount of capital they need for the launch of the SPE's activities.	Neutral, as a level of capital has no impact on legal certainty.	High, as founders would put up the exact amount of capital they need for the launch of the SPE's activities.	Lower than option F.2, as only a minority of MS have such low minimum capital requirements.
	=	++	=	++	+

The table indicates that Option F.3 is to be preferred to Option F.2 as being more effective and making it possible for SPE founder to put up the exact amount of capital needed to launch the activities of the SPE. This said, Option F.3 may appear less familiar to Member States than Option F.2.

G. Distributions to shareholders

Option G.1: Simplified Second Company Law Directive regime

Description. The SPE Regulation could take over certain core provisions of the Second Company law Directive on the capital of public limited companies, as are adapted to the specific needs of private companies and are deemed to be necessary for the protection of creditors and shareholders. These provisions would include the rules on distribution limits (e.g. the balance sheet test which prohibits distributions as a result of which liabilities would

[45] France is considering the suppression of the minimum capital requirement for the SAS. The Netherlands are considering the same measure for the B.V.

exceed assets), specific creditor protection measures in case of capital reduction, and provisions on capital increase and share redemption. There would be mandatory rules in the SPE Statute (unlike the Second Directive which provides them as a minimum and allows Member States to introduce more stringent requirements). Other provisions unduly cumbersome for SMEs, e.g. expert evaluation of contributions in kind, would be left out.

Assessment. This option would expose SMEs to unnecessary burdens. In addition to making the distribution of dividends conditional on the existence of a positive balance-sheet (assets exceeding liabilities) after dividend distribution, it would also make the capital reduction subject to the preliminary approval of the shareholders' meeting and would also impose specific creditor protection rules on the SPE, which are unduly cumbersome for small businesses. It would also unnecessarily limit shareholders' freedom in the decision-making and would reduce the flexibility of the SPE.

Option G.2: Balance-sheet test

Description. The SPE Statute would contain fewer provisions on the capital regime than in Option G.1. Like Option G.1, it would require a balance-sheet test along the model of the Second Company Law Directive, but this test would apply before any distribution including share redemptions, acquisition of own shares and dividend distribution. The articles of association could require non-distributable legal or statutory reserves if the shareholders find it necessary. Also, the shareholders would be free to introduce a liquidity test in the articles of association in addition to the balance-sheet test required by law, to ensure that no distribution is made unless the SPE remains able to pay its debts when these become due. The SPE Statute would also prescribe that the most important decisions in relation to the company's capital (e.g. capital increase or reduction) have to be taken by the shareholders.

Assessment. Founders would have more flexibility in designing the SPE’s capital regime than in option E.1. The same test, the balance-sheet test, would have to be satisfied before any kind of transfer of the SPE's assets to the shareholders. The model articles of association to be elaborated by the Commission could encourage using an additional liquidity test that is not yet common in the Member States but could increase the shareholders and creditors security. This option would also give shareholders freedom to determine the rules on capital increase and reduction and share redemption. SPEs would also be able to adopt flexible rules on own shares, capital increase and, with some limitations, on capital reduction.

Option G.3: Solvency test

Description. The Statute would contain the same provisions as in option G.2, with the difference that at every distribution the SPEs would have to satisfy a solvency test instead of a mere balance-sheet test. A solvency test would combine a balance sheet test and a liquidity test. For example, as is the case in New Zealand, the board, in order to make a lawful distribution, would have to satisfy itself that (1) the company must remain able to pay its debts as they fall due and (2) the value of the company’s assets must exceed the value of its liabilities, including contingent liabilities. This option would require a statement by the directors of the SPE confirming that the above conditions are met at the time of the distribution.

Assessment. This option would give the same flexibility to the founders as option G.2 in designing the SPE’s capital regime. In relation to distribution limits, it would also be consistent, because the same test would apply on the occasion of every distribution. A twofold cumulative test may even ensure more security for shareholders and creditors than a pure balance-sheet test as it does not only take into account the net assets of the company but also its prospects for the future. On the down side, measuring the future liquidity of a company is a very burdensome and expensive requirement for small companies. Also, potential directors' liability may influence the management of the company in both positive and negative ways. Lastly, most entrepreneurs are unfamiliar with such a test which only exists in a few Member States (e.g. UK, NL, HU).

Regarding start-up capital and the other elements of the capital regime, the same assessment applies as in option G.2.

Comparison of the options

	Uniformity	*Flexibility*	*Legal certainty*	*Effectiveness*	*Political acceptability*
Option G.1: Simplified Second Company Law Directive regime	High, since all SPEs would apply the same capital regime.	No flexibility on the terms of share redemption and increase/reduction of capital, minimum capital requirement	SPEs would apply the same provisions in all MS.	Too rigid system to be attractive for SMEs.	Rules designed for public companies and considered by some MS as outdated.
	+++	+	+++	+	+
Option G.2: Balance-sheet test	Lower level of uniformity than E.1. Common provisions would apply only to distributions.	Flexibility on the terms of share redemption and increase/reduction of capital, minimum capital, etc. Important restrictions only on distributions.	Common provisions on some elements of the capital regime, freedom left to the shareholders on other matters.	More flexibility but mandatory provisions on distributions.	A known system of distribution and freedom to the shareholders on other matters. May be questioned by some MS.
	++	++	++	+++	++
Option G.3: Solvency test	Lower level of uniformity than E.1. Common provisions would apply only to distributions.	Flexibility with regard to terms of share redemption and increase/reduction of capital, minimum capital, etc. Important restrictions would only apply to distributions.	Common provisions on some elements of the capital regime, freedom left to the shareholders on other matters.	More flexibility but mandatory provisions on distributions. Mandatory solvency test may be too burdensome for SMEs.	A system of distribution that is only known is a few MS and outside the EU.
	++	++	++	++	+

The table shows that limiting the scope of the restrictive provisions to the absolutely necessary and avoiding the introduction of burdensome provisions result in the highest level of effectiveness and may also reach the most political support. Option G.2 also embodies an acceptable compromise between uniformity, flexibility and legal certainty.

H. Employee participation

Option H.1: Rules determined by Statute

Description. The SPE Statute would contain a completely new, ad hoc, employee participation regime.

Assessment. This would have the advantage of ensuring the uniformity of employee participation rules in all SPEs throughout the EU. As such, it would, therefore, contribute to the uniformity of the SPE Statute and employees of SPEs would be subject to the same regime throughout the EU.

The major disadvantage of this option is that it would reopen the employee participation debate. The SE Statute and of the cross-border mergers directive were stalled for decades until Member States found an agreement on employee participation. Reopening the employee participation debate in the context of the SPE would expose the SPE to an unreasonable political risk. This option, therefore, must be discarded.

Option H.2: National rules of Member States of the place of incorporation of an SPE

Description. The SPE would be subject to the employee participation rules applying to the similar kind of companies in the Member State in which the SPE is incorporated.

Assessment. By assimilating the SPE to similar national company forms, this option is both simple and legally certain. Although SPE founders creating a SPE ex-novo would, in choosing the Member State in which to incorporate their SPE, de facto also choose the national employee participation regime applicable to their SPE, this would not be a change to today's situation as company founders can set up companies anywhere in the EU regardless of the location of the company's principal place of business.

This option, however, would not address the sensitive situation in which a SPE with employee participation transfers its registered office to a Member State which does not provide for this right. The SPE, as a result, could be a potential vehicle to escape national employee participation regimes. This would create legal uncertainty and would be unacceptable for employees and for Member States. Another, yet smaller, disadvantage is that the employee participation regime of the SPE would vary from one Member State to the other, though this should not be overstated as only six Member States provide for mandatory employee participation in companies with 100 or fewer employees[46].

Option H.3: National rules of Member States of the place of incorporation of a SPE, combined with specific rules in the case of cross-border mergers and seat transfers in the SPE Statute inspired from the SE Directive and the Directive on cross-border mergers

Description. The SPE would be subject to the employee participation rules of its Member State of incorporation. However, the SPE Statute would contain in addition specific rules on the cross-border transfer of the SPE registered office, inspired from the rules existing in the directive on cross-border mergers.

Assessment. This option has the same advantages of Option H.2 without its major disadvantage (not addressing the cross-border seat transfer). It is, therefore, a flexible, yet efficient and legally certain option, which is beneficial to both employees and companies. In addition, employee participation in the case of the cross-border transfer of the SPE's registered office would be addressed by referring to solutions which have been agreed at EU level and embedded in the cross-border mergers' directive). As a result, this option should offer a higher degree of political acceptability. The rules on employee participation contained in the cross-border mergers' Directive are considered to be complex and fairly cumbersome. But these rules would be of limited practical relevance since they would only apply in those

46 SE: from 25 employees; DK: from 35 employees; CZ, SK and SI: from 50 employees; NL: from 100 employees.

cases where a SPE that is subject to employee participation in its Member State of registration transfers its registered office to a Member State which offers no employee participation or a lower level of employee participation. At present, only six Member States legally impose employee participation in small companies. In light of their limited actual impact, the rules inspired from the rules on employee participation in the cross-border mergers' directive, therefore, would not appear disproportionate.

Comparison of the retained options

	Uniformity	*Flexibility*	*Legal certainty*	*Effectiveness*	*Political acceptability*
Option H.2: National rules of Member States of the place of incorporation of an SPE	None, as national law would apply	High. Employee participation regime determined by choice of Member State of registration	Low, because transfer of the SPE's registered office unregulated.	Low, because transfer of the SPE's registered office unregulated.	Low, because SPE could be used to escape employee participation regime.
	+	+++	+	+	+
Option H.3 National rules of Member States of the place of incorporation of an SPE combined with employee participation rules of the SE on cross-border seat transfer and of the Directive on cross-border mergers	None upon creation of the SPE (national legislation); but common rules on cross-border seat transfers	Medium: choice of employee participation regime determined by choice of MS of registration. But common regime applicable to cross-border seat transfers	High. Mobility situations (transfer of seat) would be covered.	Effective as maintains existing participation rights. It also allows companies some freedom in case of start-ups.	High: aligns SPE with national forms and addresses sensitive situations (seat transfer) with rules already existing in EU legislation.
	++	++	+++	++	+++

Option H.3 is to be preferred as it builds on existing agreements and avoids politically dangerous loopholes.

6.2. Summary of the suggested content sub-options

The table below summarizes the content sub-options for the SPE which would be suggested to be retained. Together, these sub-options form together the suggested core package of the SPE.

Content Option	**Suggested Sub-option**
A. Companies within the scope of the Statute	Option A.2: no restriction on the size of companies
B: Degree of Autonomy	Option B.2: Autonomy from national company law regimes
C: Degree of Uniformity	Option C.3. Uniformity in the external and flexibility in the internal affairs
D: Cross-Border Dimension	Option D.1: No cross-border dimension
E: Company's seat and its Transfer	Option E.2: Separation of the registered office and the principal place of business
F: Capital Regime	Option F.3: Minimum capital requirement of €1
G: Distributions to shareholders	Option G.2: Balance sheet test
H: Employee Participation	Option H.3 Employee participation rules of the SE and of the Directive on cross-border mergers

The table below compares the suggested core SPE package with the baseline scenario in light of the pre-defined criteria.

Criteria	**Impact Rating from zero (0) to high (+++)**		**Explanation of Rating and aspects of the core SPE package most relevant for the criteria**
	In absolute terms	Compared to Baseline Scenario	
Uniformity	++	++	Since it will be autonomous from Member States' company legislations regarding company forms, the SPE will be substantially the same in all Member States. As a result, it will offer SMEs a high degree of uniformity, which does not exist in the baseline scenario.
Flexibility	+++	+++	The SPE would make available in all Member States a company form for SMEs with a high degree of flexibility as far as the internal organisation of the company is concerned. At present, this flexibility only exists in some of the national company forms. The possibility for an SPE to have its registered office and principal place of business in different Member States will also give SPEs flexibility, no matter where SPEs are located in the EU. This flexibility at present only exists in those Member States which have modified their national legislation following the recent case law of the ECJ. This would also mean that the SPE can transfer its registered office from one Member State to the other, without losing legal personality. This possibility currently does not exist. The absence of a minimum capital requirement would enable companies to choose the level of capital best adapted to their actual needs.
Legal Certainty	++	=	The SPE will offer SMEs legal certainty since it will be governed for all company law matters by the EU instrument creating it. For other matters, e.g. labour law or insolvency law, the law of the Member State in which the SPE is registered will apply.
Effectiveness	+++	+++	In the absence of any cross-border requirement, the SPE will be available to all. Because of its uniformity, it will be available in the same form in all Member States. These features, combined with the high degree flexibility as regards capital and internal organisation, will make of the SPE a highly effective instrument for SMEs. At present, SMEs must operate under a separate national company form in each Member State.
Political Acceptability	++	+	The SPE responds to the growing consensus that action is needed to help SMEs make the most of the Single Market, which the baseline scenario does not offer. The adoption of the SPE will not require Member States to make extensive amendments to their existing legislations, as the SPE will stand as a separate form alongside to the existing national company forms. With regard to the sensitive issue of employee participation, the SPE would be in the situation of any comparable national company form. The specific rules that would have to be introduced in the SPE Statute to cater for specific mobility situations such as the transfer of seat, would be drawn from existing instruments (SE Regulation) and solutions which have already been accepted by Member States and the European Parliament.

7. THE SUMMARY OF THE IMPACTS OF THE SPE STATUTE

The SPE with the content suggested in section 6 would bring positive **economic impacts** to the EU economy. As shown in Table 1 below, it would stimulate growth and expansion of EU businesses in the Single Market by reducing the costs of setting up a company in a Member State and the compliance costs resulting from diverging Member States' company law regimes. In the short term, the impact may be greater for those SMEs which already operate in other Member States. In the medium to longer term, a wider range of companies might use the new company form, which could have a multiplier effect by facilitating more cross-border investment and joint ventures.

The European label would make it easier for EU SMEs, in particular those from EU12, to integrate in the single market and compete in a globalised environment. The SPE, because of its uniformity, the option to move its registered office to another Member State and its European label, could also be attractive to non EU entrepreneurs wishing to set foot in the EU. Also, by providing entrepreneurs with an additional choice of a legal form the SPE Statute will intensify competition between corporate legal forms in the EU and thus increase the pressure on EU Member States to make their laws more flexible and business friendly. This would contribute to the Lisbon aim to simplify and modernise regulatory environment and cut red tape. The SPE Statute will be an option for companies and, therefore, would not impose any new administrative burden on them. The Member States would need to adapt their national registration systems to a new legal form and there will be some costs of adaptation of the national laws to the rules introduced in the SPE Statute. However, these costs would not be significant.

Table 1. The table below illustrates the expected gains from having the SPE Statute (preferred option) compared to the identified costs companies currently face (baseline).

Baseline: current company law related costs of cross-border activities	**Preferred option: the SPE**
High minimum capital requirement in some Member States	No minimum capital requirement. Savings will depend on the MS, ranging **from €0 to €35.000**. The higher the minimum capital requirement in the MS law the bigger savings SPE would bring (e.g. **AT: €35.000; EL: €18.000; LT: €2896; UK, IE: 0**). See Table A3 for data on other MS.
Legal advice required on issues related to setting up a subsidiary in another MS (company law matters only, excluding other matters such as labour or environment) Notary fees	No or less external professional advice to draft articles and preparing documents for registration. Model articles of association available – if taken of the shelf would significantly reduce legal costs The savings, which would vary depending on the MS, the SPE size, the complexity of the articles etc. are estimated by SMEs themselves to **€2000 - €10000**.[47]
Legal advice (company law matters only, excluding other matters such as labour or environment) required on issues related to day-to-day management and internal administration of a network of subsidiaries in different MSs	No external professional advice needed for day-to-day operation of business in other MSs as the same rules would apply across the EU. Possibility to set up the same organisational structure for all subsidiaries in the cross-border group EU. The savings, which would vary depending on the MS, the SPE size etc., are estimated to **€750 - €8000**.
Unfamiliarity with foreign legal forms	**European label** recognisable across the Member States. A strong marketing tool in and outside the EU.
No possibility to transfer a company's registered office to another MS	Possibility to move the SPE registered office to another MS – more flexibility for SMEs

[47] EBTP test panel

As mentioned in Chapter 5.4 the SPE would address only part of the problems SMEs face in the Single Market. Other on-going EU measures for SMEs or for business in general such as simplification of EU legislation, reduction of administrative burdens or 'one-stop-shop' also contribute to enhancing competitiveness of SMEs and the benefits of the SPE should be looked at in this broader context.

As regards the **social impacts**, the SPE, as an attractive company form, could help foster business creation and expansion. This in turn could have a positive effect on job creation and employment.

The number of jobs which the SPE might contribute to create will depend on the overall creation of businesses, the actual take up of the SPE as a company form and the rate of success and development of businesses formed as SPEs. Furthermore, a certain part of the SPEs that would be created would possibly result from the transformation of existing national company forms, so that the associated jobs would not be newly created but merely transferred to the SPE. It is accordingly very difficult to give any precise estimate of the number of jobs which the SPE might contribute to create, let alone of net job creations.

As estimated in Section 5.4, about 1.15 million SMEs could be potentially interested in the SPE. If, as an example, 10% of these SMEs adopt the SPE form, this would result in the creation of 115,000 SPEs. If these SPEs employ on average 5 persons, this would result in the creation of 575,000 jobs.

The possibility given to the SPE to transfer its registered office cross-border could raise concerns with regard to the safeguard of employee rights. These concerns, however, are not founded. The SPE would, like any other company form, have to abide by the Rome convention[48] which provides that employment contracts are governed by the law of the country where employees habitually carries out their work. Also, employee participation rights in the preferred option (H.3) would be guaranteed by drawing on the existing rules of the SE Regulation and the cross-border mergers directive. While, company founders creating a SPE ex novo could choose to register the SPE in a Member State with less stringent participation rules than the Member State in which the SPE employees are located, this possibility already exists in relation to all national company forms under the Community case law.

The measure will have no **environmental impacts**.

8. THE INSTRUMENT TO BE USED

8.1. Self regulation

To ensure legal certainty, notably for third parties, a company form must be embedded in law and enforceable in the legal systems of the Member States. Self regulation, therefore, is not an option.

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48 Convention on the Law applicable to Contractual Obligations opened for signature in Rome on 19 June 1980. The consolidated version of the Convention as well as the First protocol on the interpretation of the Convention by the Court of Justice and the Second Protocol conferring on the Court of Justice powers to interpret the Convention have been published in the OJ C27 of 26.1.98, p.34).

8.2. Recommendation

A recommendation would not succeed in introducing a new legal form into the Member States' laws and ensure the application of a uniform set of rules in all Member States. It would not secure a sufficient level of legal certainty. While giving more flexibility to Member States, the measure would note be sufficiently effective.

8.3. Directive

The directive would not guarantee directly applicable provisions uniformly applied across the EU and the introduction of a European legal form. It would not ensure legal certainty due to the many references to the national laws. Such instrument would not be attractive for companies and, therefore, its effectiveness would be limited.

8.4. Regulation

The regulation would be the most appropriate means to ensure the uniformity of the Statute in all EU Member States. This instrument was clearly favoured by the experts at the public hearing at the European Parliament[49] and by a majority of the participants to the conference on the SPE held on 10 March 2008[50]. All the existing European legal forms have been introduced by regulation.

Criteria / Instruments	Legal certainty	Effectiveness	Political acceptability
Status quo	=	=	-
Self regulation	-	-	-
Recommendation	-	-	+
Directive	++	+	++
Regulation	+++	+++	++

Since providing for a new European legal form operating according to a common set of rules across the EU requires that the uniform rules apply directly in all Member States the Regulation would be the most appropriate instrument.

A SPE Regulation would, in this instance, be a proportionate measure, tailor-made to fulfil the objectives of providing for a simple, flexible corporate law regime widely known across the EU, adapted to the specific needs of SMEs, based on uniform principles throughout the EU and reducing compliance costs. It will offer SMEs a uniform, legally certain, yet flexible tool to expand their activities in the Single Market. The SPE will be available as an additional tool in the toolkit of SMEs, which they can, if they wish, choose to use. It will reduce compliance costs while not imposing any new cost or administrative burdens on SMEs. Furthermore, by introducing a new legal form, the SPE regulation would not impose on the Member States any requirement to modify substantially their existing laws, but merely to introduce the SPE alongside national company forms.

A directive or recommendation, in theory more proportionate, would not achieve the necessary level of uniformity and legal certainty and therefore would not be sufficiently effective.

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49 See Chapter 2.
50 Idem.

9. CONSISTENCY WITH THE MAIN EU POLICIES AND OBJECTIVES

The Lisbon Strategy[51] aims at boosting growth and jobs by increasing Europe's attractiveness as a place to invest and work. Removing remaining barriers in the Single Market will create new opportunities for market participants and the resulting competition will spur investment and innovation. By reducing the costs of setting up and operation of a company in a Member State and providing for a European label, the SPE would complement other EU and Member States' actions, mentioned in chapter 5. It would improve the efficiency and the competitive position of EU companies and would, therefore, contribute to meeting the Lisbon objectives. The SPE Statute is also listed in the Single Market Review and forms part of the Small Business Act for Europe to be put forward in June 2008 which aims to unlock the SMEs' growth potential and facilitate cross-border activity of SMEs[52].

10. EVALUATION AND MONITORING

Should a measure on the SPE Statute be adopted, the Commission, with the help of the company law expert groups (i.e. Company Law Expert Group and the Advisory Group on Corporate Governance and Company Law), will closely monitor and evaluate the results and impacts of such measure.

This process will be developed in two steps:

10.1. Monitoring

The Commission will examine regularly the process of adaptation of the national laws to the requirements of the measure and its impacts. The following data will be examined:

- Quantification of the number of the SPEs established;
- Identification of the trends, in particular: (a) Member States with the highest number of SPEs' registrations or locations of the SPEs' principal places of business and why; (b) types of companies (size, industry sector, geographical presence) which use the SPE form; (c) SPE formation methods (from scratch, transformation, merger etc.); (d) whether the SPE Statute is used for the creation of subsidiaries in other Member States or rather as an instrument for trading (providing services) in other Member States; (e) the location/transfer of the registered office and the principal place of business of the SPE in different Member States.

10.2. The evaluation report

The SPE Statute should be evaluated five years after the date of its entry into force. It should analyse its effectiveness, relevance for the market and form a basis for a decision on any amendments, if needed. The evaluation will be based on the data gathered from the monitoring exercise, complemented with information collected from companies, Member States and stakeholders.

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51 Communication to the Spring European Council "Working together for growth and jobs. A new Start for the Lisbon Strategy", COM (2005) 24.

52 See Chapter 1.

In order to evaluate the results and the impacts of the new legislation, some evaluation questions should be addressed:

- How many companies/individuals have decided to create or transform into a SPE since the entry into force of the SPE Statute? Which Member States, if any, are the most popular destinations for SPEs (both the registration and the location of principal place of business)? Why?

- How many companies have used the model articles of associations?

- How much have the advisory costs related to the creation and operation of a company decreased?

- How many of the SPEs have their registered office and principal place of business in the same or different Member States? How long does it take to transfer the registered office? How costly is it? Are there still obstacles that have not been removed by the measure?

- Are there any legal ambiguities in the SPE Statute or in the rules applying to it that should still be addressed? Have there been any risks identified that have not been properly treated either by the Community law or by national legislation?

- What have been the impacts on the main stakeholders, i.e. minority shareholders, creditors, employees?

- Have there been any reforms of the national company laws on private liability companies of the Member States in relation to the entry into force of the SPE Statute?

ANNEXES (in a separate document)