Date

18 September 2008

Le Président

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Comptables
Européens
AISBL

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Commissioner Charlie McCreevy
European Commission
Rue de la Loi 200
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B- 1049 Bruxelles

cc: Claire Bury

Dear Commissioner,

Re: Proposal for a Council Regulation on the Statute for a European Private Company

1. FEE (Fédération des Experts Comptables Européens, Federation of European Accountants) welcomes the progress made on the development of regulations for the European Private Company (SPE), since the achievement of an integrated single market has to offer the possibility of establishing and conducting business on a genuinely European basis. The legal form of SPE will only be successful if it will be a truly European company with, as far as appropriate, uniform rules in each Member State. We therefore welcome the instrument of a Regulation.

2. We have reviewed the Proposal for a Council Regulation on the Statute of a European Private Company and our observations are set out below. We note that draft example articles of association are currently being developed and may provide comments thereon once these are publicly available.

General observations

3. The SPE has clear merits as a corporate form, provided that it remains a truly European company and not too many provisions would be left to national law, whereby notably the possibility to transfer the legal seat, and to have its main operations in another country is an important provision. The merits are especially there for:
   - Groups with subsidiaries in different countries
   - Companies that (start to) operate across borders
   - Companies setting up a business (notably in certain countries)

4. We are of the opinion that the costs and benefits of the SPE requirements need to be carefully considered in order to provide the SPE with a competitive regime compared to the national regimes available. The SPE Regulation, however, should not go beyond the requirements that current apply for public companies under the Second Directive. In general private companies should have a less onerous regime than public companies.

5. The Explanatory Memorandum to the draft Regulation explicitly states that the initiative creates a new European legal form intended to enhance the competitiveness of SMEs by facilitating their establishment and operation in the Single Market. The proposal for a statute for an SPE is adapted to the specific needs of SMEs. Larger companies can also benefit from using the SPE form, for example to have the same legal form for all their subsidiaries as referred to in paragraph 3. However we believe that the SPE form should not be allowed for companies that have to attract outside capital, be it in form of equity or debt financial instruments, where the public interest comes into play. This idea is already included in the Regulation in Article 3.1. (d) for shares but needs to be extended to other financial instruments. We would not support the introduction of any quantitative size limits.

6. The Explanatory Memorandum (Section 7 Explanation of the Proposal, Chapter IV Capital) seems to imply that the SPE can be formed with contributions in kind in the form of services: "They are free to decide what property, rights, services, etc. they accept as consideration for the shares and when it has to be paid or provided". This would constitute a major change compared to current company law and may not be intended, notably given the accounting implications and bankruptcy implications. As already set out in paragraph 3 we do not consider the SPE to be the appropriate mechanism to introduce contributions in kind in the form of services in the context of "Capital" and we suggest to delete any reference to "services" in the Explanatory Memorandum and the draft Regulation itself in this respect.

7. The draft Regulation is not sufficiently clear as to whether there is the flexibility of having no par value, or different amounts of par value or nominal value shares. We believe that maximum flexibility should be provided and that Article 19 and the Explanatory Memorandum, Section 7, Explanation of the Proposal, Chapter IV, Capital should explicitly state that shares can have no par value, or different amounts of par value or nominal value shares.

8. Article 27 and the annex of the draft Regulation refer to appointment, removal and resignation of the auditor. However, this is regulated by the Statutory Audit Directive, so by law and should not form part of Article 27 or the annex on articles of association. Moreover, Article 25.1 states that an SPE shall be subject to the requirements of the applicable national law as regards preparation, filling, auditing and publication of accounts. At least the wording needs to be clarified. In addition Article 27.1(k) requires that shareholders appoint auditors, which would preclude directors doing so if there is a casual vacancy, which would cause difficulties in practice. This constitutes another reason for only referring to the Statutory Audit Directive. The relation between the draft Regulation and the Statutory Audit Directive should be clarified. Moreover it would be helpful if the Regulation, in case the articles related to audit were to be kept, could use the same terminology as in the Statutory Audit Directive, notably using the word "dismissal" instead of the words "removal and resignation".

9. Article 25.1 of the Regulation states that an SPE shall be subject to the requirements of the applicable national law for preparation, filing, auditing and publication of accounts. This means for accounting that national GAAP applies, and that in certain Member States not all options included in the Fourth and Seventh Directives and in the IAS Regulation (option to extend the use of IFRS to other companies and individual accounts) would be available to an SPE. An SPE can still select its preferred accounting regime, provided that the SPE could easily transfer its seat to the Member State where its preferred accounting regime would be allowed.

10. We appreciate the introduction of a simple capital structure and note that several Member States have already introduced a low minimum capital requirement, be it one euro or otherwise. We however want to emphasize that it is important that the company is

adequately funded so that it remains solvent given the nature of its business, the risks related to its business and the size of its business.

11. Article 21 introduces an optional additional "solvency certificate" to be signed by the management body of the SPE in addition to the balance sheet test ("provided that the assets of the SPE fully cover its liabilities"). FEE published in September 2007 a Discussion Paper on Alternatives to Capital Maintenance Systems. In this Discussion Paper FEE proposed the introduction of an alternative capital maintenance regime in the form of a solvency-based regime, which would involve both a "snapshot" (balance sheet test or net-asset test) test and a "forward looking" test. FEE envisages that this solvency-based regime would be introduced on a phased basis. This new regime would be optional at Member State level. The Discussion Paper can be found at our website: http://www.fee.be/publications/default.asp?library_ref=4&category_ref=44&private=False

    Alternatives to the current capital maintenance regime are a sensitive issue and the SPE should therefore not contain capital maintenance provisions that go beyond the current system of the Second Directive before a more extensive and in depth debate has taken place.

    When a company is subject to an audit, the auditor's role in respect to a solvency certificate may need further consideration.

Detailed observations

Explanatory Memorandum

12. In the Explanatory Memorandum, Section 7 Explanation of the Proposal, Chapter I: General provisions (page 5), last sentence first paragraph: "As the SPE is a private company, the shares of the SPE may not be offered to the public or be publicly traded" should be extended to prohibit the use of "other financial instruments offered to the public or publicly traded", as explained in paragraph 5 of this letter.

Draft Regulation

13. Article 3 includes the statement in (a) its capital shall be divided in shares". This would more logically fit in Article 19 to provide the link between Article 19 (share capital) and Article 20 (shares).

14. Article 3.1 is a mixture of information about shares and legal aspects related to the legal person or entity. The article would be more readable if (c) "it shall have legal personality" and (e) "it may be formed by one or more natural persons and/ or legal entities, hereinafter "founding shareholders", were included in a separate subparagraph (Article 3.2).

15. Article 5.3 refers to a European company and where applicable an SPE. However an SPE is a European company. We therefore suggest the Article 5.3 to read: "For the purposes of […] a European Company, including, where applicable, an SPE".

16. Article 7 on the seat of the company concerns the location of the registered office and administration. The article does not state however that an SPE must have a registered office. It may be also helpful if the article were to explain that the registered office is the official contact point for the SPE.

17. Article 10.2 (b) requires that addresses to identify the persons who are authorised to represent the SPE in dealings with third parties, and in legal proceedings take part in the administration, supervision or control of the SPE are supplied. It needs to be clarified that not the home addresses are meant but valid business addresses are sufficient.

18. Article 18.1 (d) addresses withdrawal of a shareholder. A shareholder should have the right to withdraw from the SPE in case of serious harm to his interests as a result of four particular events (Art. 18.1 (a) – (d)). We think the right to withdraw should not be restricted to these four events but should rather be possible in any event the shareholder has an important reason to withdraw. Therefore, Article 18.1 should provide a general clause (e.g. "A shareholder shall have the right to withdraw from the SPE in case of serious harms to his interests.") or should at least clarify that the named events are only examples. In case the named events are not thought to be only examples, we suggest to modify the provision of Article 18.1 (d). The requirement that "no dividend has been distributed for at least 3 years" is too simplistic and can easily be circumvented by paying a very low dividend. The requirement needs to be reformulated, for example "no or clearly unreasonably low". (Alternatively a minimum percentage of annual profit distributions could be introduced in the draft Regulation unless the articles of association of an SPE would establish otherwise.)

19. Article 22 indicates that "any shareholder who has received distributions made contrary to Article 21 must return those distributions to the SPE […]". We would prefer the Article to state, instead of "must return", "is liable to return". This will in a way avoid the question as to who will force the shareholder to pay back the distribution. The burden of proof should be on the SPE for means of legal certainty. Shareholders who got distributions from the company in good faith need to be protected from being obliged to pay back these distributions.

20. Article 23 covers own shares. However we believe that there is no need to formulate very restrictive requirements for own shares for a private company as currently is the case. We suggest either to delete article 23 or to make the requirements less strict in nature.

21. We would appreciate if Article 28 could be clarified in that it applies to any shareholder, and not shareholders as a whole since the information right are is particularly important for minority shareholders. This could be done by replacing the words "shareholders shall have the right" by "a shareholder has the right".

22. Article 25.2 refers to keeping the "books". A more general and usually terminology is "accounting records".

23. Article 26.1 states that the management body is responsible for the management of the SPE. This would be more accurately formulated in the following way: the management body is responsible for the direction and management of the SPE, to cover the high level strategic decision making activities of the directors in addition to the operational activities.

24. Article 27.1 indicates the matters that shall be decided by a resolution of the shareholders. This includes in (e) the distribution to the shareholders. However, we suggest that interim dividends could be either subject to approval by shareholders or to approval by the directors, as defined by the SPE in its articles of association, at the choice of the SPE.

25. Article 27.(4) on resolutions of shareholders should be brought in line with the other bullet points and therefore the words "where the SPE has an auditor" should be omitted. As indicated in Paragraph 6 of this letter, national requirements should apply.

26. Article 30 states that only a natural person may be a director of an SPE. We believe that in particular for larger companies, it should be allowed to have corporate director(s), provided that a natural person is identified that acts on behalf of the corporate director(s).

27. We would prefer Article 31.1 to be less categorical: a director shall have a duty to act in what he considers, in good faith, to be in the best interest of the SPE. This redrafting would avoid that shareholders are offered blanket opportunities to sue directors.

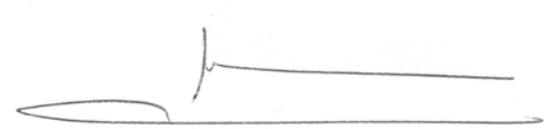
28. Article 32 provides that related party transactions are themselves to be governed by the applicable national law implementing the Fourth and Seventh Directives, however it concerns the disclosure of related party transactions. Therefore we suggest that the words "Related party transaction" should be replaced by "**Disclosure** of related party transactions".

Annex I

29. Chapter IV in Annex I refers to "the procedure the SPE must follow to recover any unlawful distribution". However it is not clear who is liable for deemed unlawful distribution. Do third parties have some recourse against the company itself or against shareholders? The provision needs to be completed with something like "unless clearly laid down in Member States Law". Alternatively the whole indent could be deleted.

We are pleased to discuss with you any aspect of this letter you may wish to raise with us.

Yours sincerely,



Jacques Potdevin
FEE President