# ORGALIME POSITION PAPER
# on the creation of a
# European Private Company Statute

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## 1. Introduction

Orgalime represents the interests of the European mechanical, electrical, electronic and metalworking industries at the level of the EU. Our members include, at the present time, 35 national trade federations representing some 130,000 companies in 24 European countries. These industries, which include mainly SMEs, employ some 10 million people and account for around 1,598 billion euro of output.

Orgalime believes that if substantial achievements have been attained in the development of the internal market for goods, there are other areas where companies still face serious problems. One of these is the entry barrier for companies, particularly SMEs with limited financial and personnel resources, who wish to set up Europe-wide company structures. These companies still face both administrative problems and costs when setting up European-wide company structures. A simplification of the regulatory framework of the EU in this area would therefore be welcome and would represent a concrete step forward in the Commission's simplification agenda.

## 2. Background

In Lisbon, the then 15 EU Member States set themselves a new strategic target: they want to make the EU the most competitive and dynamic knowledge-based economy of the world by 2010. This target can only be achieved by improving and simplifying the European legal framework for companies. Through effective deregulation on European as well as on national level, costs and bureaucratic burdens for companies must be reduced in order to strengthen the position of European enterprises for global competition.

EU decision-makers often emphasise correctly the importance of SMEs for the European economy. The European Commission recently announced a more pragmatic, comprehensive and inclusive policy for SMEs and committed itself to the "Think Small First Principle". Now it is time to present concrete proposals for the improvement of the legal and economic framework for SMEs.

The "Societas Europeae" (SE) came into force in 2004. The final agreement among Member States with respect to the SE was a major breakthrough in European company law and should motivate and even oblige decision-makers as well as stakeholders to create a Europe-wide type of company tailored to SMEs. In order to prevent competitive disadvantages for SMEs compared to bigger companies, SMEs must also obtain the possibility to organise their Europe-wide business activities by using a European



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company statute. Moreover, the European Commission Consultation on Future Priorities for the Action Plan on Modernising Company Law and enhancing Corporate Governance in the EU shows that the Commission correctly intends to base company law reforms on the interest and requirements of companies. This is the right approach.

### 3. SMEs need a European Private Company

#### a) Current difficulties to establish subsidiaries

The 2001 report of the European Commission on SMEs comes to the conclusion that the activities of SMEs become more and more international. This is particularly true for companies of the engineering industry which must operate Europe-wide and even global due to their very specific products which are in many cases individual configurations to solve specific problems of their customers. However, experience shows that for SMEs in particular the formation of subsidiaries in other countries is often very complicated and costly.

A medium-sized engineering company intending to organise its distribution and service activities Europe-wide has to deal with 25 very different national company law systems within the EU. Therefore, extensive counselling is needed with respect to the requirements for setting up a company and to other company law provisions. This causes significant costs as well as insecurities and difficulties for the internal planning of the Europe-wide distribution and service network. These problems are not limited to the formation of a subsidiary. They occur also in cases of restructuring and during the daily management of the company.

#### b) Survey shows strong SME support for the EPC

On the occasion of the European Commission Consultation on Modernisation of EU Company Law in 2002 an Orgalime member association conducted a survey among 75 selected companies. The results of the survey clearly showed that companies disapproved of the fact that they have had to set up subsidiaries under, at that time, 15 different legal systems. The survey demonstrated the clear need for the creation of a European Private Company (EPC). 95% of the companies would, if possible, set up new subsidiaries in EU Member States as an EPC. The vast majority of the companies (66%) would even have choosen an EPC as the legal form for subsidiaries if national labour and tax provisions were applicable. 54% of the companies stated that they would be interested in transforming existing subsidiaries into an EPC.

Companies consider it as an outstanding advantage if they would no longer have to deal with (at that time) 15 different company law systems any longer and that, therefore, costs would be reduced for counselling regarding the formation and the drafting of a company statute. Moreover, they expect more transparency with respect to risks, such as company and management liability. Beyond legal aspects, companies emphasise benefits with respect to the organisation of the group. This includes the creation of uniform structures specifically for all management bodies of the various companies, which would make it easier to control the different subsidiaries.



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Moreover, companies considered the following aspects to be important:

- Better legal certainty particularly with respect to the formalities of a shareholders meeting to be complied with;
- More flexibility regarding the registration of an EPC;
- Simplifying cross border mergers;
- Better transparency of mergers;
- Uniform financing of companies with respect to the issue and transformation of shares.

The psychological barrier to set up subsidiaries under a system, which is unfamiliar to the company, should not be underestimated. This lack of transparency negatively affects the willingness of SMEs to take risks. Access to foreign markets is much easier for SMEs if they can realise it by using a familiar legal form for their subsidiaries.

**c) New feasibility study confirms results of 2002 survey**

The European Commission launched a feasibility study on a new European legal statute for SMEs in 2003. The final results that were published in December 2005 argue for the EPC. One out of two companies interviewed endorses the creation of a European statute for SMEs. Companies with an annual turnover of more than 5 million euro are the most favourable. This does not come as a surprise, as those companies in particular have the potential to found subsidiaries in other Member States where they then encounter the above-mentioned difficulties.

The feasibility study also proves how important a 'European label' of an EPC for SMEs really is. This 'European label', which would not be attained through company law harmonisation, would not just have a marketing result. The authors of the study correctly point out, that it would also facilitate SME cross-border activities. The EPC structures would be known by business partners in other EU Member States so that all partners would know with whom they are dealing. Thus, the study assumes that for example it will be much easier for a SME from country X to do business with and to gain the confidence of an enterprise from country Y if it possesses a European status with characteristics known to its partner than if it is organised in an unknown legal form of a company according to the national law of country X.

**d) EU enlargement increases advantages of the EPC**

The creation of a European company statute responding to the need of SMEs to operate under flexible and unbureaucratic provisions would present a further important step towards more deregulation. Such a European type of company is even more important in the light of both the past enlargement, as well as the future EU enlargement (Romania and Bulgaria), since the advantages for the enterprises increase with every accession of a new Member State and, moreover, the economical integration of the new Member States in the Common Market is facilitated.



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## 4. Major requirements an EPC must fulfill

Although the need for an EPC is obvious, enterprises will only accept such a new type of company if a number of basic requirements are fulfilled. Reduced bureaucracy and costs are vital, particularly for SMEs. Therefore, the incorporation of an EPC should be as simple as possible and must not incur high administrative costs for the founder of the new company. Moreover, flexibility is essential for SMEs.

### a) Incorporation

SMEs need an instrument, which allows them to set up subsidiaries on the basis of the same rules in every Member State. Due to a number of reasons, already existing European company statute forms, such as the European Economic Interest Group (EEIG) and the SE, are not tailored to the needs of SMEs. The very strict requirements for the incorporation are only one of the reasons why companies refrain from setting up an SE and an EEIG respectively. Too strict requirements with respect to the European character of the EPC (for example joint establishment of an EPC by two companies from different Member States) must be avoided. It is sufficient if the company intending to set up an EPC proves business activities in at least two Member States.
Moreover, SMEs will only use the EPC if the minimum capital is not prohibitive. A possible and realistic solution would be to apply Article 6 of the second Company Law Directive 77/91/EEC, which provides € 25,000 as share capital.

### b) Freedom of contract

It is very important for SMEs that they can structure their companies in a way best suited for their individual requirements. Such flexibility can only be guaranteed if the rules governing the EPC are based on the freedom of contract principle. SMEs would not use an inflexible European company statute, which would therefore in our opinion remain largely unused.

### c) Complementary application of national law

SMEs have serious problems with the existing differences for the incorporation and management of limited companies within the EU. Companies expect the differences to vanish if the EPC is introduced and, consequently, counselling and information costs to decrease. This can only be achieved if the complementary application of national company law provisions is excluded. Moreover, it must be clear that in the first place, shareholders must be able to regulate all important issues in the memorandum of association. Only in the second place and with respect to a limited number of elementary issues, Europe-wide provisions may apply.
An EPC statute must not provide cross-references to national company law. Such a mixture between EU and national provisions would create rather more than less need for information and counselling. SMEs depend on an EPC statute including clear and exhaustive provisions. Problems of interpretation must be solved Europe-wide by the European Court of Justice.



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Certainly issues of general civil law (conclusion of contracts, authority for directors) play an important role in company law as well. These issues should further on be dealt with on the basis of national civil law, as they do not cause extensive counselling and information costs. The complicated questions of company law are the crucial problem, which has to be solved as soon as possible.

## 5. Summary and Conclusions

The establishment of subsidiaries in EU Member States entails significant difficulties and high costs for SMEs. Due to 25 very different national systems of company law, extensive counselling is needed with respect to the requirements for setting up a company and to other company law provisions. This causes significant costs as well as uncertainties and difficulties for the internal planning. The psychological barrier to set up subsidiaries under a system, which is unfamiliar to the company, should not be underestimated either. Lack of transparency regarding liability issues and other obligations prevents SMEs from setting up subsidiaries in different EU Member States.
There is a strong interest of European companies in the creation of an EPC.

The EPC is needed to establish a level playing field for SMEs after bigger companies were given the possibility to organise their Europe-wide activities in a European type of company, the SE.

As far as the structure and the content of a possible EPC statute is concerned, it must be clear that business would only accept and use the EPC, if the incorporation is as simple as possible and does not incur high costs. The statute must provide the founder of an EPC with a high degree of flexibility. The requirements with respect to the European character of the EPC (e.g., joint establishment of an EPC by two companies from different Member States) must not be too strong. It is sufficient if the company intending to set up an EPC can prove business activities in at least two Member States. Moreover, complementary application of national company law provisions and cross-references to national company law should be avoided.

Orgalime would see the statute of the EPC as concrete move in the direction of simpler and better regulation in the internal market.



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