



# **Creation of a European Private Company Orgalime Position Paper**

**24 October 2002**

## **1. Introduction**

ORGALIME speaks for 31 trade federations representing some 100,000 companies in the mechanical, electrical, electronic and metalworking industries in 31 European countries. These companies, the overwhelming majority of which are SMEs employ some 7.6 million people and account for 1200 billion Euro of annual output, which is a quarter of the EU's output of manufactured products and a third of the manufactured exports of the European Union.

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.

If further progress is to be achieved in the strategic objective that the Member States set themselves in Lisbon, that is to make the EU the most competitive and dynamic knowledge-based economy of the world by 2010, then we believe that further action is needed to improve and simplify the legal and economic framework in which companies operate within the EU.

An important step in the right direction was the recent adoption of the "Societas Europaea" (SE), by which a European-wide type of company, essentially suited to the needs of large enterprises, was finally created. The final agreement among member states with respect to the SE was in our opinion a significant breakthrough in European company law and should at the least provide a strong motivation for decision-makers, as well as stakeholders, to create a European-wide type of company suited for SMEs. In order to prevent competitive disadvantages for SMEs compared to bigger companies, SMEs must also obtain the possibility to organize their European-wide business activities by using a European-wide type of company. Moreover, the Commission questionnaire on the modernisation of European company law shows that the Commission intends to base company law reforms on the interest and requirements of companies. We welcome such an approach.

## **2. Why SMEs need the European Private Company ("EPC")**

### **a) Current Difficulties to Establish Subsidiaries**

The recently published report of the Commission on SMEs comes to the conclusion that the SMEs are operating more and more at the international level. This is particularly true for engineering companies most of which must operate European-wide and even at a global level because of their high degree of specialisation allowing many companies to serve niche markets. However, experience shows that, particularly for SMEs, the setting up of subsidiaries abroad is often both complex and costly.

A medium-sized engineering company intending to organise its distribution and service activities Europe-wide has to deal with 15 very different company law systems within the EU. Therefore, extensive recourse to legal advice is needed with respect to the requirements for setting up a company and to other local company law provisions. This gives rise to significant costs as well as creating uncertainty.

It also greatly increases the difficulties for the management of Europe-wide distribution and service networks. Problems encountered by companies in this area are not limited to the setting up of a subsidiary. They also occur on a daily basis in the management of the subsidiary and in cases of restructuring.

## **b) Survey Shows Strong SME Support for the EPC**

On the occasion of the European Commission consultation on modernisation of EU company law, one of Orgalime's members conducted a survey among 75 selected companies. The results of the survey clearly show that companies are not satisfied with the current situation with respect to setting up subsidiaries under 15 different legal systems. The survey shows that there is a clear demand for the creation of the European private company, as described hereunder.

95% of the companies who answered the survey would, if possible, set up subsidiaries in EU member states as EPCs. The vast majority of the companies (66%) would even choose an EPC as legal form for subsidiaries, if national labour and tax provisions applied. However, the simplification of the structure of Company taxation in Europe would further facilitate the operating conditions of SMEs and encourage the use of such a company statute.

54% of the respondents expressed an interest to transform existing subsidiaries into EPCs.

Companies consider it would be a substantial advantage if they no longer had to deal with fifteen different company law systems, thereby both saving on costs for setting up and for managing their subsidiaries. Among the benefits that companies would hope to achieve are:

- reduced legal costs for setting up of the subsidiary including for the drafting of company statutes
- more transparency with respect to risks, such as company and management liability
- uniform structures specifically for all management bodies of the company/subsidiaries which would make it easier to control the different subsidiaries.
- better legal certainty particularly with respect to the formalities to be complied with at shareholders' meetings
- 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 exchange of shares

The psychological barrier to setting up subsidiaries under a system with which the company is not familiar should not be underestimated. This lack of transparency does clearly have a negative impact on 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) EU Enlargement increases the benefits of the EPC**

The creation of a European-wide company statute responding to the need of SMEs to operate under flexible and less bureaucratic provisions would present a further important step towards more deregulation. The creation of the EPC statute will become even more

important due to the forthcoming enlargement of the EU. With the accession of every new Member State the advantages to companies would grow exponentially.

We also believe that this would facilitate the economic integration of the new EU Member States be fostered. Even the adoption of the SE which is mainly suited for large companies, amplifies the need to create a company statute for SMEs in order to guarantee SMEs equal opportunities compared to large companies.

### **3. What are the major requirements an EPC must fulfil?**

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. For SMEs in particular, it is vital to reduce bureaucracy and cost. Therefore, the incorporation of an EPC must be as simple as possible and must not lead to incurring high administrative costs for the founder of the new company. Flexibility is also a key factor for SMEs and particularly for:

#### **a) Incorporation**

The existing European-wide company forms, such as the European Economic Interest Group (EEIG) and SE are, for a number of reasons, not suited to SMEs wishing to find a simple route to establishing subsidiaries. Among the reasons are the very strict requirements for incorporation applicable to the EEIG and to the SE: SMEs need an instrument which allows them to set up subsidiaries on the basis of the same rules in every Member State. Too strict requirements with respect to the European character of the EPC (e.g., joint establishment of subsidiaries by two companies from different Member States) are an obstacle. It should be sufficient that the company intending to set up an EPC can prove business activities in at least two Member States.

Moreover, SMEs will only use the EPC, if the minimum capital is not prohibitively high. 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**

For SMEs it is very important that they can structure their companies in a way best suited for their individual requirements. Such a flexibility can only be guaranteed if the rules governing EPCs are based on the freedom of contract principle. A European-wide type of company which does not provide this flexibility would not be used by SMEs and would therefore be of little use.

#### **c) Complementary application of national law**

ORGALIME believes that SMEs have serious problems with the existing differences for the incorporation and management of limited companies within the EU. We would very much hope that with the setting up of an EPC statute, that such differences would be eliminated and, consequently, legal and information costs would 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, should European-wide provisions apply.

An EPC statute providing cross-references to national company law must be avoided: such a mixture between EU and national provisions would create more rather than less need for information and legal advice. SMEs need an EPC statute that includes clear and exhaustive provisions. Problems of interpretation must be solved Europe-wide through the European Court of Justice.

Of course issues of general civil law (conclusion of contracts, authority for directors) play an important role in company law as well. These issues should be dealt with on the basis of national civil law.

However, complicated questions of company law are in almost all cases the reason why companies have to face extensive costs for legal advice and for information.

#### **4. Conclusions**

For SMEs the establishment of subsidiaries in EU Member States gives rise to serious difficulties and high costs.

With the development of the internal market, such costs and difficulties should not exist. The SE has gone part of the way to providing a solution, but is more adapted to major companies.

Orgalime therefore requests the Commission to take a next step in developing the internal market by simplifying the legal environment for companies through promoting the development of the European Private Company which we believe could be better adapted to the needs of SMEs than the present forms of European companies.

We hope that the Commission will take this position into account will be pleased to provide further input collaborate in any preparatory work.