THE INSTITUTE OF CHARTERED ACCOUNTANTS IN ENGLAND AND WALES

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By email Maureen.beresford@berr.gsi.gov.uk

Dear Maureen

PROPOSAL FOR A EUROPEAN COUNCIL REGULATION ON THE STATUTE FOR A EUROPEAN PRIVATE COMPANY (SPE)

The Institute of Chartered Accountants in England and Wales (the Institute) is pleased to respond to your request for comments on the consultation paper *Proposal for a European Council Regulation on the Statute for a European private company* (SPE) published by the Department for Business and Regulatory Reform (BERR) in October 2008.

Please contact me should you wish to discuss any of the points raised in the attached response.

Yours sincerely

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THE INSTITUTE OF CHARTERED ACCOUNTANTS IN ENGLAND AND WALES

ICAEW Representation

ICAEW REP 149/08

Memorandum of comment submitted in December 2008 by The Institute of Chartered Accountants in England and Wales, in response to the *Proposal for a European Council Regulation on the Statute for a European private company (SPE)* consultation paper published by the Department for Business and Regulatory Reform (BERR) in October 2008.

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INTRODUCTION

1. The Institute of Chartered Accountants in England and Wales (the Institute) welcomes the opportunity to comment on the consultation paper Proposal for a European Council Regulation on the Statute for a European private company (SPE) published by the Department for Business and Regulatory Reform (BERR) in October 2008.

WHO WE ARE

2. The Institute operates under a Royal Charter, working in the public interest. Its regulation of its members, in particular its responsibilities in respect of auditors, is overseen by the Financial Reporting Council. As a world leading professional accountancy body, the Institute provides leadership and practical support to over 132,000 members in more than 160 countries, working with governments, regulators and industry in order to ensure the highest standards are maintained. The Institute is a founding member of the Global Accounting Alliance with over 700,000 members worldwide.

3. Our members provide financial knowledge and guidance based on the highest technical and ethical standards. They are trained to challenge people and organisations to think and act differently, to provide clarity and rigour, and so help create and sustain prosperity. The Institute ensures these skills are constantly developed, recognised and valued.

RESPONSE TO SPECIFIC QUESTIONS

Q1 Do you agree that a European Private Company form would be useful to SMEs?

4. The essential challenge in creating a new, competitive legal form at EU level is a dual one. First there is the very sound principle of creating as little regulation at EU level as possible in order to leave matters to member states. The difficulty is that the more that is left to member states, the more complex becomes the regime (in the manner of the SE). On the other hand, to do anything else requires a complete code of company law to be created at EC level. Such a complete code would raise fundamental policy issues to be debated with stakeholders and ultimately would lead to a very carefully thought through and drafted code, and potentially a lengthy one. The other part of the challenge is to be deregulatory. We are very concerned that the draft Regulation fails to address these issues successfully. It is a half-way house between leaving things to members states vs a complete code. The major policy matters in the code have not been properly thought through and consulted upon. The specific proposals are not deregulatory. We foresee little take-up of the SPE legal form in the UK.

Q2 Do you agree that the Proposal will offer savings for SMEs? If so are you able to quantify those savings?

5. We doubt that this will bring savings, in particular for SMEs (as opposed to larger private companies, where utilising the SPE form may pass a cost/benefit analysis for example as providing international branding).

Q3 Do you agree that the SPE should be available to all companies whether or not they have a presence in more than one Member State?

6. Yes.

Q4 a) Do you agree that minimum capital of 1 Euro is sufficient for an SPE?

7. Yes

b) Do you think that a minimum capital requirement of several thousand Euros will be a significant consideration for UK businesses when they consider whether to incorporate as/ convert to being an SPE?

8. We believe that minimum capital requirements will not be the biggest consideration, given that there will be so many other disincentives preventing UK Ltds converting to SPEs (or establishing new UK SPEs). However, we note that it is wrong in principle for there to be minimum capital requirements for private companies.

9. We also consider it important that the current economic climate does not give rise to a hasty reaction of requiring minimum capital (or other measures) within the legal form of companies. There may, of course, be certain types of business that require higher degrees of creditor protection, such as certain financial services; but this is driven by the type of business conducted and not by the legal form of the entity which conducts it – it is for the regulators of such business activities to prescribe any additional margins of super-protection.

Q5 Do you believe that there should be some form of independent valuation of non-cash consideration paid for SPE shares?

10. No.

Q6 Do you believe that the balance sheet test and solvency certificate test, as drafted in Article 21, together with the European Commission's statement on the nature of "assets" and "liabilities" as set out in its Explanatory Memorandum are sufficiently clear for management bodies to be able to make the calculation of whether the SPE is in a position to pay dividends/ purchase own shares/ make a capital reduction?

11. We believe the law must be clear, and that the Commission cannot correct a lack of clarity in the law by reference to (non-authoritative) explanatory material. We also note that the Proposal (when read together with the EM) would not achieve our policy objective of moving towards a real (rather than book) value test for distributions.

Q7 Do you agree that the current Proposal provides enough protection for (i) creditors; and (ii) minority shareholders? If not what other information should be given to (i) creditors and (ii) minority shareholders?

12. (i) Regarding creditors, we believe that inclusion of a book value net assets test for distributions (rather than a test using real values) provides the wrong balance of protection.

13. We also note that Article 24 states that Article 21 (on distributions) shall also apply to capital reductions. However, Article 21 also includes the option of requiring solvency statement from directors. It is unclear how Article 24.2 (which allows for creditors to apply to court for adequate safeguards) would work in the cases where directors have issued a solvency statement. These provisions need clarification as there would be no point in a solvency basis if an application to court can still be made.

14. We also consider that Article 21.2 is overly prescriptive, for example, there should be no requirement at EU level for publication of the directors' solvency declaration.

15. A general comment regarding Article 21 is that we object strongly to the fact that such distributions provisions are included in a European Private Company Regulation, when none currently exist at EU level for private companies (as the Second Directive is applicable to PLCs only). As a general concern, we note that inclusion of Article 21 in the SPE Regulation perhaps could become a less than ideal benchmark – especially any exclusion of real values in favour of accounts figures - that may, practically speaking, constrain the details of future reform.

16. (ii) In our view, the capital maintenance regime was introduced to protect creditors (not minority shareholders). We also note that Article 24.7, which requires the equal treatment of shareholders 'in the same position', is ambiguous and could be read as being restrictive (for example, as preventing the buy out of a single shareholder, as contemplated under Article 18). We therefore consider that Article 24.7 should be deleted. Please see also our comment regarding Articles 17 and 18 at Q12 below.

Q8 Do you agree with the Proposal as to the matters which need to be passed by a two thirds majority and which matters can be decided by a majority as specified in the Articles of Association?

17. Of the matters listed, we do not believe that transformation of the SPE (for example into a UK limited company) should be dealt with in the Regulation (which currently would require a two thirds majority) - we believe this should instead be dealt with by national legislation.

Q9 Do you think that certain matters which the Proposal leaves to the Articles of Association (such as the procedure relating to the appointment and removal of directors and their terms of office) should be regulated in the Proposal itself, and/or do you think that certain matters currently set out in the Proposal should be left for the SPE to regulate itself in its Articles of Association?

18. We note that the accounts and audit requirements are to be left to national law (Article 24). However, under Article 4, national law only applies to the extent the Regulation and SPE Articles (Annex 1) do not apply. Therefore, if the Articles are required (under Annex 1) to provide "whether the SPE has an auditor and where the articles.. provide that the SPE should have an auditor, the procedure for his appointment, removal etc…", care needs to be taken to ensure that this does not undermine audit requirements under national law. We also believe that the relationship with the Statutory Audit Directive (and national law implementing it) needs to be clarified.

19. We also consider the requirement to set out in the Articles whether or not the SPE can provide financial assistance is not necessary.

Q10 Do you agree that general directors' duties should be dealt with in the Proposal? If yes, do you think the duties as drafted in Article 31 provide sufficient clarity and certainty for directors and protection for shareholders?

20. No. Article 31 goes beyond existing legislation (eg the SE Regulation) in addressing the general duties and liabilities of directors. The ICAEW does not support this codification of directors' duties at EU level – especially without proper stakeholder consultation. If the Article 31 is to be retained in the SPE Regulation, it should be amended to say that directors must act <u>in what they consider in good faith to be</u> in the best interests of their company.

Q11 Do you agree that the UK should support the employee participation elements of the Proposal?

21. Yes.

Q12 Are there any other comments you would like to make on the Proposal?

22. 1) Would SPEs be subject to the overseas companies regime, which would appear to defeat one of the main objects of introducing SPEs.

23. 2) The Proposal's treatment of shareholders appears to us to be peculiar in some respects, for example, the provisions on expulsion and withdrawal of shareholders (see Articles 17 and 18).

Q13 Do you have any comments on the Impact Assessment?

24. We note that the Impact Assessment cites taxation and labour regulation as obstacles to SME participation in the Single Market. However, we note that the SPE Regulation will leave such issues to national law, and thus will not alleviate issues arising from a lack of harmonisation in these areas across EU countries. We also challenge the implication that 95% of SMEs do not participate in the EU Single Market "as a consequence" of the disproportionately high company law costs associated with cross border activity, as we believe many smaller businesses are likely to have more localised operations simply because they are smaller enterprises (rather than due to cost implications of cross-border activity). We also query how this 5% figure of SMEs with cross-border activity has been derived.

25. We also query the one off cost saving of £339 per company set up as an SPE (such saving due to reduced costs of setting up and running an overseas enterprise). This is because we note that the costs of setting up a UK private company (which could trade overseas) can be as little as £170, meaning that the cost saving of £339 is unlikely to be achieved for most UK businesses setting up subsidiaries for overseas activity.

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