

COMMISSION OF THE EUROPEAN COMMUNITIES

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2008/0130 (CNS)

Proposal for a

COUNCIL REGULATION

on the Statute for a European private company

(presented by the Commission)

{SEC(2008) 2098}
{SEC(2008) 2099}

EXPLANATORY MEMORANDUM

1. CONTEXT

The Commission's communication on the Single Market for 21st century Europe[1] stresses the need for the continuous improvement of the framework conditions for businesses in the Single Market.

Small and medium-sized enterprises (SMEs) account for more than 99% of companies in the European Union but only 8% of them engage in cross-border trade and 5% have subsidiaries or joint ventures abroad. While it has become easier in recent years to set up businesses across the EU, more needs to be done to improve the access of SMEs to the Single Market, facilitate their growth and unlock their business potential.

The European Private Company Statute (Societas Privata Europaea) forms part of a package of measures designed to assist SMEs, referred to as the Small Business Act for Europe (SBA). The objective of the SBA is to make it easier for SMEs to do business in the Single Market and consequently to improve their market performance. The SPE is one of the priority initiatives of the Commission's 2008 Work Programme[2].

2. OBJECTIVES OF THE PROPOSAL

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. At the same time, the Statute has the potential to benefit larger companies and groups.

The proposal for a Statute for an SPE is adapted to the specific needs of SMEs. It allows entrepreneurs to set up an SPE following the same, simple, flexible company law provisions across the Member States.

The proposal also aims to reduce compliance costs on the creation and operation of businesses arising from the disparities between national rules both on the formation and on the operation of companies.

The proposal does not regulate matters related to labour law, tax law, accounting, or the insolvency of the SPE. Nor does it deal with the contractual rights and obligations of the SPE or those of its shareholders other than those deriving from the articles of association of the SPE. These matters will continue to be governed by national law and existing Community law instruments, where relevant.

The choice of SPE as a legal form to conduct business activities in the EU should be neutral from a tax perspective. It is therefore important to ensure that the SPE enjoys the same tax treatment as similar national legal forms. To this end, the European Commission intends to

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1 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, 20.11.2007.

2 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions: "Commission Legislative and Work Programme 2008" - COM(2007) 640.

begin discussions with Member States in autumn 2008 with a view to tabling a proposal to extend to the SPE the scope of the Parent Subsidiary Directive (90/435/EEC)[3], the Merger Directive (90/434/EEC)[4] and the Interest and Royalties Directive (2003/49/EC)[5]. The Commission's objective is to ensure that these measures are in place and benefit SPEs from the start of their operations.

3. LEGAL BASIS

The proposal is based on Article 308 of the EC Treaty. This provision provides the legal basis for EU actions aiming to attain one of the Community objectives in the absence of any specific legal basis in the EC Treaty. Article 308 is the legal basis of the existing European company forms, i.e. the European Company, the European Economic Interest Grouping and the European Co-operative Society.

4. SUBSIDIARITY AND PROPORTIONALITY

The proposal aims to make the Single Market more accessible to SMEs by providing them with an instrument that facilitates the expansion of their activities in other Member States. However, the proposal does not make the creation of an SPE subject to a cross-border requirement (e.g. shareholders from different Member States or evidence of cross-border activity). In practice, entrepreneurs usually set up businesses in their own Member State before expanding to other countries. An initial cross-border requirement would, therefore, significantly reduce the potential of the instrument. In addition, a cross-border requirement could easily be circumvented and monitoring and enforcing it would put an unreasonable burden on Member States.

Action at EU level is necessary to enable SMEs to use the same company form across the EU. This objective cannot be achieved by the Member States themselves. Even if all Member States committed to making their corporate legislations more business-friendly, SMEs would still face a patchwork of 27 national regimes.

By offering SMEs a corporate vehicle that is uniform and legally certain, yet flexible, the SPE would constitute the most effective and targeted means of achieving the objective set out above. An alternative means of achieving the same objective would be to harmonise at least the core provisions of national company law regimes applicable to private limited-liability companies. This solution would entail a significant and probably disproportionate intrusion in Member States' legislations. In contrast to harmonisation, this proposal leaves national law largely untouched. It provides SMEs with an alternative form that would exist in parallel to national company forms.

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3 Council Directive 90/435/EEC of 23 July 1990 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States (OJ L 225, 22.9.1990, p. 6).

4 Council Directive 90/434/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 Member States (OJ L 225, 20.8.1990, p.1).

5 Council Directive 2003/49/EC of 3 June 2003 on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States (OJ L 157, 26.6.2003, p. 49).

The creation of a new European legal form requires a legal instrument that is directly applicable, i.e. a regulation. Neither a recommendation nor a directive would result in a uniform regime that is applicable in all Member States.

5. CONSULTATION OF INTERESTED PARTIES

The European Private Company Statute was initially developed by business and academic circles in the 1990s and gained broader support over time from industry organisations and from the European Economic and Social Committee[6]. It was listed as a possible measure of the 2003-2009 Action Plan on Modernising Company Law and Enhancing Corporate Governance[7]. The 2006 public consultation on the future priorities of the Commission in the fields of company law and corporate governance confirmed this support[8].

In June 2006, the Legal Affairs Committee of the European Parliament held a public hearing on the SPE and drafted an own-initiative report and a resolution calling on the European Commission to present a proposal for an SPE before the end of 2007[9]. The Parliament reiterated its support and firm commitment to the initiative in a resolution of 25 October 2007[10]. Given the strong interest of the Parliament in the proposal, it should be closely associated in the work on the SPE from the start.

In July 2007, the Directorate General for Internal Market and Services launched a specific public consultation on the SPE. In addition, a survey among companies in the 27 Member States was conducted through the European Business Test Panel[11].

On 10 March 2008, the Commission held a conference on the SPE.

The European Commission's advisory group on corporate governance and company law[12] provided information in relation to the impact assessment and advised on the substance of the SPE Statute. The group is also drafting examples of provisions for the articles of association of an SPE, which will be made available to facilitate the understanding of the draft Statute.

6. IMPACT ASSESSMENT

Recent surveys[13] and public consultations show that, despite their strong potential, SMEs face legal and administrative obstacles, which hinder their development in the Single Market.

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6 Opinion of the Economic and Social Committee on a 'European Company Statute for SMEs' (OJ C 125, 27.5.2002, p. 19).

7 COM(2003) 284.

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

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

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

11 Consultation: http://ec.europa.eu/internal_market/company/epc/index_en.htm
EBTP: http://ec.europa.eu/yourvoice/ebtp/consultations/2007_en.htm

12 http://ec.europa.eu/internal_market/company/advisory/index_en.htm

13 Survey of the Observatory of European SMEs (Flash EB N° 196) conducted by Gallup Organisation Hungary upon the request of DG for Enterprise and Industry, Survey presented at BusinessEurope's SME Action Day on 21 November 2007.
http://www.businesseurope.eu/Content/Default.asp?PageId=496

Although all companies wishing to expand cross-border are affected by legal and administrative barriers, these are proportionately greater for smaller companies, who are less well equipped in terms of financial and human resources.

The difficulties which businesses face as a result of the diversity of company forms essentially consist of *compliance costs on the formation of a company* (e.g. mandatory minimum capital requirement, registration and notary fees, cost of expert legal advice) and of *difficulties and compliance costs associated with the operation of a company,* which make the day-to-day operation of foreign subsidiaries more expensive compared with domestic subsidiaries.

SMEs are also hindered in their cross-border development by the *lack of trust in certain foreign company forms* in other Member States. This problem exists mainly in relation to the less widely known company forms.

The impact assessment examines four high level policy options:

– *Taking no action and relying on existing legislation and case law:* despite efforts to make company formation quicker and easier throughout the EU, SMEs still have to face 27 company law regimes.

– *Seeking to harmonise the company laws of the Member States:* A high degree of harmonisation of national regimes would be necessary to significantly reduce the costs of company formation and operation across Member States. However, the major changes to national legislation which this approach would entail would not necessarily be proportionate to the objective of the proposal.

– *Improving the European Company Statute (SE) and adapting it to the needs of SMEs:* Making the Statute of the SE accessible to SMEs would require significant amendments. This option would require a thorough redrafting and re-negotiation of the SE Regulation before it is evaluated in 2008/2009.

– *Proposing an SPE Statute for SMEs:* The creation of a new European legal form targeting SMEs best solves the problems presented above by offering a company form featuring uniform rules on formation throughout the EU, flexibility as regards the internal organisation, thus saving costs. It would also offer SMEs a European label and thus make cross-border business easier.

7. EXPLANATION OF THE PROPOSAL

Chapter I: General provisions

The general provisions define the main *features of the SPE*. The SPE is a company having legal personality and share capital. It is a limited-liability company, i.e. its shareholders may not be liable for more than the amount they have subscribed for. As the SPE is a private company, the shares of the SPE may not be offered to the public or be publicly traded.

There is no restriction on the *formation of the SPE*. It may be set up by one or more founders, natural persons and/or companies or firms under Article 48 of the EC Treaty. In addition, an SE, a European Co-operative Society, a European Economic Interest Grouping or another SPE may also take part in the formation of an SPE.

As regards the scope of application of the Statute and its interface with national law, the Regulation provides that:

(1) An SPE is governed first and foremost by the directly applicable mandatory provisions of the Regulation. These rules facilitate the formation and ensure the necessary uniformity of the SPE in the EU.

(2) The Regulation requires a range of matters, in particular the internal organisation of the SPE, to be regulated in the articles of association (Annex I). In order to ensure flexibility, shareholders are free to decide how to regulate these questions, subject only to the rules of the Regulation.

(3) In matters covered by the SPE Statute, national company law is only relevant where specified by the Regulation. The provisions which are required or allowed by Annex I to be included in the articles of association are not subject to national law.

The provisions of the Regulation and the list of matters in Annex I which must be covered in the articles of association define the scope of the EU rules. The proposal does not contain any default provisions which apply in case the articles do not cover the matters listed in Annex I. However national law has to set out the sanctions of such omission or other breach of the Regulation.

National law governs those matters which are not covered by the Regulation or by the articles of association of the SPE as stipulated in Annex I. This is the case, in particular, for matters not mentioned in Annex I or in areas which are outside the scope of company law as such (e.g. labour, insolvency or tax law). The relevant applicable law is the law of the Member State where the SPE has its registered office, which applies to private limited-liability companies. Member States shall notify the name of the respective company form to the Commission.

Chapter II: Formation

The Regulation does not restrict the manner in which an SPE may be created. A SPE may be set up ex nihilo, in accordance with the provisions of the Regulation. It may also be created by transforming or dividing an existing company or by the merger of existing companies. Any company form existing under national law (private or public, with or without legal personality) may become an SPE, in accordance with the relevant provisions of national law. An SE or another SPE may also participate in the formation of an SPE.

The name of any European Private Company must be followed by the abbreviation "SPE". The SPE is required to have its registered office and its central administration or principal place of business in the territory of the Member States. However, in accordance with the Centros judgment[14] of the European Court of Justice, the SPE may be set up with its registered office and central administration or principal place of business in different Member States. Shareholders may also decide to transfer the registered office of the company to another Member State.

[14] C-212/97.

The Regulation does not set up a specific registration procedure for the SPE but builds on the provisions laid down by the First Company law Directive (68/151/EEC), while setting out some requirements to make the formation of an SPE easier and cheaper. First, it must be possible to apply for the registration of a SPE by electronic means. Secondly, the Regulation contains a closed list of documents and particulars which Member States may require for the registration of the SPE. Changes in the documents and particulars must also be filed at the register.

Finally, the proposal provides for a single legality check, i.e. either control of the legality of the SPE's documents and particulars by an administrative or judicial body, or their certification by a notary, on registration of an SPE. Founders of the SPE must not be required to satisfy both conditions.

Chapter III: Shares

The Regulation allows shareholders a large degree of freedom to determine matters relating to *shares*, in particular the rights and obligations attached to shares. An SPE may issue ordinary or priority shares. Restrictions only apply when necessary in the interest of third parties or minority shareholders.

All shareholdings must be registered in the *list of the shareholders* drawn up and kept by the management body of the SPE. This list serves as evidence of shareholdings, unless proven otherwise. The list may be inspected by the shareholders or third parties on request.

The conditions for the *transfer of the shares* must be regulated in the articles of association. Any new restriction or prohibition on transfers requires a qualified majority decision (Article 27). In addition, to protect the interests of minority shareholders, such decision requires the consent of each shareholder affected by the restriction or prohibition.

The Regulation does not provide shareholders with the right to *squeeze-out* minority shareholders. Nor does it put an obligation on the majority shareholder or the SPE to buy the shares of the minority shareholder (*sell-out right*). Such provisions may be adopted in the articles of association. However, the Regulation allows both the expulsion and the withdrawal of a shareholder under specific circumstances.

Chapter IV: Capital

In order to facilitate start-ups, the Regulation sets the *minimum capital* requirement at €1. The proposal departs from the traditional approach that considers the requirement of a high minimum of legal capital as a means of creditor protection. Studies show that creditors nowadays look rather at aspects other than capital, such as cash flow, which are more relevant to solvency. Director-shareholders of small companies often offer personal guarantees to their creditors (e.g. to banks) and suppliers also use other methods to secure their claims, e.g. providing that ownership of goods only passes upon payment. Moreover, companies have different capital needs depending on their activity, and thus it is impossible to determine an appropriate capital for all companies. The shareholders of a company are the best placed to define the capital needs of their business.

The Regulation does not restrict the founding shareholders' right to decide what type of *consideration* is to be provided for the shares upon creation of the SPE or on capital increase. Accordingly, the articles of association must set out whether the founders need to provide consideration in cash or in kind. 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. Also, the articles must provide whether an expert valuation of the consideration in kind is needed or not. Shareholders are liable for their contribution, in accordance with the provisions of national law.

The Regulation contains uniform rules regarding *distributions* (e.g. dividend, purchase of the SPE's own shares, incurring of debt) to shareholders from the assets of the SPE. A distribution may only be made if the SPE satisfies a balance-sheet test, i.e. after the distribution its assets fully cover its liabilities. The proposal does not define "assets" or "liabilities", in this respect the relevant accounting provisions apply (i.e. the Fourth Directive (78/660/EEC) or Regulation (EC) No 1606/2002).

Since the preparation of a solvency test on distributions only exists at present in few Member States, the proposal does not make it mandatory for SPEs. However, it explicitly allows shareholders to provide for a solvency test in the articles, in addition to the balance-sheet test that is required by the Regulation. If shareholders require the management body to sign a solvency certificate before distribution, they also have to define the related requirements (e.g. the grounds, the criteria) and the certificate is to be disclosed.

The proposal does not prevent the SPE from acquiring its own shares under certain conditions to protect the company's assets. Before the acquisition of its own shares, the SPE must carry out a balance-sheet test and, if prescribed in the articles of association, a solvency test. Shareholders decide on acquisition. The non-pecuniary rights attached to the respective shares (in particular, voting and pre-emption rights) will be suspended. Additional conditions and further restrictions may be set out in the articles of association.

Chapter V: Organisation of the SPE

The shareholders of the SPE enjoy a high degree of freedom in determining the internal organisation of the SPE, subject to the Regulation. Article 27 provides a non exhaustive list of the *decisions which must be taken by shareholders.* The articles of association must set out the required majority and quorum for voting subject to Article 27 which provides that certain of these decisions require a qualified majority (i.e., at least 2/3 of the voting rights of the SPE, but the articles may provide for a greater majority, e.g. 3/4).

There is no obligation to hold physical general meetings. The method for the decision-making of shareholders is to be prescribed in the articles of association. Shareholders have broad information rights regarding the affairs of the SPE. Their right to challenge collective resolutions is subject to national law.

The Regulation ensures two specific minority rights for the shareholders: the right to request a shareholders' resolution and the right to request the competent court or administrative authority to appoint an independent expert (in particular, an independent auditor).

All decisions which are not listed in the Regulation or in the articles of association fall under the competence of the SPE's *management body* which is responsible for running the company. The articles determine the management structure of the SPE (a single director or several directors, a one-tier or a two-tier board system). However, if the SPE is subject to employee participation, the chosen management structure must allow for the exercise of this right.

The shareholders of the SPE decide on the appointment and removal of directors. The articles must set out the term of directors' mandates and any eligibility criterion. The Regulation

prohibits anyone who is disqualified from serving as a director in any Member State from serving as a director of the SPE.

The Regulation imposes on directors the duty of acting in the best interests of the company. Accordingly, *directors' duties* are owed to the SPE and may only be enforced by the company. The Regulation does not give individual shareholders or creditors the right to directly sue the members of the management body.

The Regulation lays down a general standard of care by requiring from directors the care and skill reasonably required in the conduct of business. The interpretation of this provision may be developed by national courts. While the Regulation also identifies the most important specific duties of the directors (e.g. propose distributions), the articles may set out further duties. Directors are required to avoid any actual or potential conflicts of interests. However, the articles of association may provide that situations involving such conflicts may be authorised.

The Regulation establishes *directors' liability* for any loss or damage suffered by the SPE due to the breach of their duties deriving from the Regulation, articles of association or a resolution of shareholders. However other aspects of liabilities, e.g. the consequences of the breach of duties or any business judgement rule, are governed by national law.

Chapter VI: Employee participation

Employee participation exists in small companies only in a few Member States (e.g. Sweden, Denmark).

The general principle, derived from the Directive on cross-border mergers (2005/56/EC), is that the SPE is subject to the employee participation rules of the Member State where it has its registered office. Accordingly, the SPE, as regards employee participation, will be no more and no less attractive than comparable national companies.

Cross-border mergers involving SPEs are governed by the Directive on cross-border mergers. However, special rules are required in the case of the transfer of the registered office of an SPE.

Chapter VII: Transfer of the registered office of the SPE

The SPE can transfer its registered office to another Member State, while maintaining its legal personality and not having to wind-up. In order to protect the interests of third parties, the Regulation does not allow the transfer of the SPE's registered office during winding-up, liquidation or similar proceedings.

The transfer procedure is inspired by the provisions on the transfer of the registered office of the SE Regulation.

The Regulation provides for a special regime where an SPE that is subject to employee participation transfers its registered office to another Member State where there is no or a lower level of employee participation rights or which does not provide for employees of establishments of the SPE situated in other Member States the same entitlement to exercise participation rights as they enjoyed before the transfer. In such cases, if at least one third of the SPE's employees are employed in the home Member State, negotiations must take place between the management body and the representatives of the employees to reach an

agreement on the participation of employees. In the absence of an agreement, the participation arrangements existing in the home Member State are maintained.

Chapter VIII: Restructuring, dissolution and nullity

The Regulation refers the dissolution of an SPE or its transformation to a national company form to national law. Also, the SPE may merge with other companies and be divided up in accordance with the rules applicable to private limited-liability companies.

Chapter IX: Additional and transitional provisions

Article 42 allows SPEs registered in a Member State outside the euro-zone to express their capital and to draw up their accounts in the national currency of that Member State, although such SPEs may also express their capital and/or draw up their accounts in euro.

Chapter X: Final provisions

The Regulation requires the adoption of certain provisions by Member States. In particular, the procedural rules on registration, on the transfer of the registered office of the SPE along with sanction for breach of the Regulation and the articles of association, have to be adopted.

2008/0130 (CNS)

Proposal for a

COUNCIL REGULATION

on the Statute for a European private company

(Text with EEA relevance)

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 308 thereof,

Having regard to the proposal from the Commission[15],

Having regard to the opinion of the European Parliament[16],

Having regard to the opinion of the European Economic and Social Committee[17],

Whereas:

(1) The legal framework in which business is carried out in the Community remains largely national. This exposes companies to a wide diversity of national laws, company forms and company regimes. The approximation of national laws by means of directives based on Article 44 of the Treaty can overcome some of these difficulties. Such approximation, however, does not release persons seeking to create companies from the obligation to adopt in each Member State a company form governed by the national law of that Member State.

(2) Existing Community forms of company, notably the European Company (SE), whose legal form was established by Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European Company[18] are designed for large companies. The minimum capital requirement for an SE and the restrictions on its formation make that form of company unsuitable for many businesses, in particular of a smaller size. In view of the problems faced by such businesses as a result of the diversity of company law regimes and the unsuitability of the SE for small businesses, it is appropriate to provide for a European company form specifically designed for small businesses, which it is possible to create throughout the Community.

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15 OJ C , , p. .

16 OJ C , , p. .

17 OJ C , , p. .

18 OJ L 294, 10.11.2001, p. 1. Regulation as last amended by Regulation (EC) No 1791/2006 (OJ L 363, 20.12.2006, p. 1).

(3) Since a private company (hereinafter "SPE") which may be created throughout the Community is intended for small businesses, a legal form should be provided which is as uniform as possible throughout the Community and as many matters as possible should be left to the contractual freedom of shareholders, while a high level of legal certainty is ensured for shareholders, creditors, employees and third parties in general. Given that a high degree of flexibility and freedom is to be left to the shareholders to organise the internal affairs of the SPE, the private nature of the company should also be reflected by the fact that its shares may not be offered to the public or negotiated on the capital markets, including being admitted to trading or listed on regulated markets.

(4) In order to enable businesses to reap the full benefits of the internal market, the SPE should be able to have its registered office and principal place of business in different Member States and to transfer its registered office from one Member State to another, with or without also transferring its central administration or principal place of business.

(5) To enable businesses to gain efficiencies and save costs, the SPE should be available in every Member State, with as few variations as possible as regards the company form.

(6) To ensure a high degree of uniformity of the SPE, as many matters pertaining to the company form as possible should be governed by this Regulation, either through substantive rules or by reserving matters to the articles of association of the SPE. It is therefore appropriate to provide for a list of matters, to be set out in an Annex, in respect of which the shareholders of the SPE are obliged to lay down rules in the articles of association. In relation to those matters only Community law should apply, and consequently shareholders should be able to set out rules to regulate those matters, which are different from the rules prescribed by the law of the Member State where the SPE is registered, in relation to national forms of private limited-liability companies. National law should apply to matters where this is provided for by this Regulation and to all other matters that are not covered by the articles of this Regulation, such as insolvency, employment and tax, or are not reserved by it to the articles of association.

(7) In order to make the SPE an accessible company form for individuals and small businesses, it should be capable of being created *ex nihilo* or of resulting from the transformation, the merger or the division of existing national companies. The creation of an SPE by way of transformation, merger or division of companies should be governed by the applicable national law.

(8) In order to reduce the costs and administrative burdens associated with company registration, the formalities for the registration of the SPE should be limited to those requirements which are necessary to ensure legal certainty and the validity of the documents filed upon the creation of a SPE should be subject to a single verification, which may take place either before or after registration. For the purposes of registration, it is appropriate to use the registries designated by First Council Directive 68/151/EEC of 9 March 1968 on the co-ordination of safeguards which, for the protection of the interests of members and others, are required by Member States of

companies within the meaning of the second paragraph of Article 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community[19].

(9) Since small businesses often require long term financial and personal commitment, they should be able to adapt the structure of their share capital and the rights attached to shares to their specific circumstances. SPE shareholders should therefore be free to determine the rights attached to their shares, the procedure for the variation of those rights, the procedure to be followed if shares are transferred and any restriction on such transfer.

(10) In order to preserve both the operation of the SPE and the freedom of shareholders, the SPE should have the possibility of applying to court to expel shareholders who seriously harm its interests and shareholders of the SPE whose interest suffered serious harm as a result of specific events should have the right to withdraw from the SPE.

(11) The SPE should not be subject to a high mandatory capital requirement since this would be a barrier to the creation of SPEs. Creditors, however, should be protected from excessive distributions to shareholders which could affect the ability of the SPE to pay its debts. To this end, distributions that leave the SPE with liabilities exceeding the value of the assets of the SPE should be prohibited. Shareholders, however, should also be free to require the management body of the SPE to sign a solvency certificate.

(12) Since creditors should be granted protection in the event of a reduction of the capital of the SPE, certain rules should be laid down concerning when such reductions are to take effect.

(13) Since small businesses need legal structures that can be adapted to their needs and size and are able to evolve as activity develops, shareholders of the SPE should be free to determine in their articles of association the internal organisation which is best suited to their needs. An SPE may opt for one or more individual managing directors, a unitary or a dual board structure. However, mandatory rules ensuring the protection of minority shareholders should be introduced in order to avoid any unfair treatment of shareholders, in particular certain key resolutions should be adopted by a majority of no less than two-thirds of the total voting rights attached to the shares issued by the SPE. While a limit may be introduced on the right to request a resolution or to request an independent expert to investigate abuses, such right may not be made conditional on the ownership of more than 5% of the voting rights of the SPE, although the articles of association of the SPE may provide for a lower threshold.

(14) Competent national authorities should monitor the completion and legality of the transfer of the registered office of an SPE to another Member State. The timely access of shareholders, creditors and employees to the transfer proposal and to the report of the management body should be ensured.

(15) Employees' rights of participation should be governed by the legislation of the Member State in which the SPE has its registered office (the "home Member State"). The SPE should not be used for the purpose of circumventing such rights. Where the national legislation of the Member State to which the SPE transfers its registered

[19] OJ L 65, 14.3.1968, p. 8. Directive as last amended by Directive 2006/99/EC (OJ L 363, 20.12.2006, p. 137).

office does not provide for at least the same level of employee participation as the home Member State, the participation of employees in the company following the transfer should in certain circumstances be negotiated. Should such negotiations fail, the provisions applying in the company before the transfer should continue to apply after the transfer.

(16) Employees' rights other than rights of participation should remain subject to Council Directive 94/45/EC of 22 September 1994 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees[20], Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies[21], Council Directive 2001/23/EC of 12 March 2001 on the approximation of the law of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses[22] and Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community[23].

(17) The Member States should lay down rules on penalties applicable to infringements of the provisions of this Regulation, including infringements of the obligation to regulate in the articles of association of the SPE the matters prescribed by this Regulation, and should ensure that they are implemented. Those penalties must be effective, proportionate and dissuasive.

(18) The Treaty does not provide, for the adoption of this Regulation, powers other than those under Article 308.

(19) Since the objectives of the proposed action cannot be sufficiently achieved by the Member States in so far as they involve the creation of a company form with common features throughout the Community and can therefore, by reason of the scale of the action, be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity laid down in Article 5 of the Treaty. In accordance with the principle of proportionality as set out in that Article, this Regulation does not go beyond what is necessary to achieve those objectives,

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20 OJ L 254, 30.9.1994, p. 64. Directive as last amended by Directive 2006/109/EC (OJ L 363, 20.12.2006, p. 416).

21 OJ L 225, 12.8.1998, p. 16.

22 OJ L 82. 22.3.2001, p. 16.

23 OJ L 80, 23.3.2002, p. 29.

HAS ADOPTED THIS REGULATION:

CHAPTER I
GENERAL PROVISIONS

Article 1
Subject matter

This Regulation lays down the conditions governing the establishment and operation within the Community of companies in the form of a European private company with limited liability (Societas Privata Europaea, hereinafter "SPE").

Article 2
Definitions

1. For the purposes of this Regulation, the following definitions shall apply:

   (a) 'shareholder' means the founding shareholder and any other person whose name is entered in the list of shareholders in accordance with Articles 15-16;

   (b) 'distribution' means any financial benefit derived directly or indirectly from the SPE by a shareholder, in relation to the shares held by him, including any transfer of money or property, as well as the incurring of a debt;

   (c) 'director' means any individual managing director, any member of the management, administrative board or supervisory body of an SPE;

   (d) 'management body' means one or more individual managing directors, the management board (dual board) or the administrative board (unitary board), designated in the articles of association of the SPE as being responsible for the management of the SPE;

   (e) 'supervisory body' means the supervisory board (dual board), designated in the articles of association of the SPE as being responsible for the supervision of the management body;

   (f) 'home Member State' means the Member State in which the SPE has its registered office immediately before any transfer of its registered office to another Member State;

   (g) 'host Member State' means the Member State to which the registered office of the SPE is transferred.

2. For the purposes of point (b) of paragraph 1, distributions may be made through a purchase of property, the redemption or other kind of acquisition of shares or by any other means.

Article 3

Requirements for the establishment of an SPE

1. An SPE shall comply with the following requirements:

   (a) its capital shall be divided into shares,

   (b) a shareholder shall not be liable for more than the amount he has subscribed or agreed to subscribe,

   (c) it shall have legal personality,

   (d) its shares shall not be offered to the public and shall not be publicly traded,

   (e) it may be formed by one or more natural persons and/or legal entities, hereinafter "founding shareholders".

2. For the purposes of point (d) of paragraph 1, shares shall be regarded as 'offered to the public' where a communication is addressed to persons in any form and by any means, and it presents sufficient information on the terms of the offer and the shares to be offered so as to enable an investor to decide to purchase or subscribe to these shares, including when shares are placed through financial intermediaries.

3. For the purposes of point (e) of paragraph 1, 'legal entities' shall mean any company or firm within the meaning of the second paragraph of Article 48 of the Treaty, a European public limited-liability company as provided for in Regulation (EC) No 2001/2157, hereinafter "European Company", a European Co-operative Society as provided for in Council Regulation (EC) No 1435/2003, a European Economic Interest Grouping as provided for in Council Regulation (EEC) No 2137/85 and an SPE.

Article 4

Rules applicable to an SPE

1. An SPE shall be governed by this Regulation and also, as regards the matters listed in Annex I, by its articles of association.

   However, where a matter is not covered by the articles of this Regulation or by Annex I, an SPE shall be governed by the law, including the provisions implementing Community law, which applies to private limited-liability companies in the Member State in which the SPE has its registered office, hereinafter "applicable national law".

CHAPTER II
FORMATION

Article 5
Method of formation

1. Member States shall allow the formation of an SPE by any of the following methods:

   (a) the creation of a SPE in accordance with this Regulation;

   (b) the transformation of an existing company;

   (c) the merger of existing companies;

   (d) the division of an existing company.

2. Formation of the SPE by the transformation, merger or division of existing companies shall be governed by the national law applicable to the transforming company, to each of the merging companies or to the dividing company. Formation by transformation shall not give rise to the winding up of the company or any loss or interruption of its legal personality.

3. For the purposes of paragraphs 1 and 2, 'company' shall mean any form of company that may be set up under the law of the Member States, a European Company and, where applicable, an SPE.

Article 6
Name of the company

The name of an SPE shall be followed by the abbreviation "SPE".

Only an SPE may add the abbreviation "SPE" to its name.

Article 7
Seat of the company

An SPE shall have its registered office and its central administration or principal place of business in the Community.

An SPE shall not be under any obligation to have its central administration or principal place of business in the Member State in which it has its registered office.

Article 8
Articles of association

1. An SPE shall have articles of association that cover at least the matters set out in this Regulation, as provided for in Annex I.

2. The articles of association of a SPE shall be in writing and signed by every founding shareholder.

3. The articles of association and any amendments thereto may be relied upon as follows:

(a) in relation to the shareholders and the management body of the SPE and its supervisory body, if any, from the date on which they are signed or, in the case of amendments, adopted;

(b) in relation to third parties, in accordance with the provisions of the applicable national law implementing paragraphs 5, 6 and 7 of Article 3 of Directive 68/151/EEC.

Article 9
Registration

1. Each SPE shall be registered in the Member State in which it has its registered office in a register designated by the applicable national law in accordance with Article 3 of Directive 68/151/EEC[24].

2. The SPE shall acquire legal personality on the date on which it is entered in the register.

3. In the case of a merger by acquisition, the acquiring company shall adopt the form of an SPE on the day the merger is registered.

In the case of a division by acquisition, the recipient company shall adopt the form of an SPE on the day the division is registered.

Article 10
Formalities relating to registration

1. Application for registration shall be made by the founding shareholders of the SPE or by any person authorised by them. Such application may be made by electronic means.

2. Member States shall not require any particulars and documents to be supplied upon application for the registration of a SPE other than the following:

(a) the name of the SPE and the address of its registered office;

(b) the names, addresses and any other information necessary to identify the persons who are authorised to represent the SPE in dealings with third parties and in legal proceedings, or take part in the administration, supervision or control of the SPE;

(c) the share capital of the SPE;

[24] OJ L 65, 14.3.1968, p. 8.

(d) the share classes and the number of shares in each share class;

(e) the total number of shares;

(f) the nominal value or accountable par of the shares;

(g) the articles of association of the SPE;

(h) where the SPE was formed as a result of a transformation, merger or division of companies, the resolution on the transformation, merger or division that led to the creation of the SPE.

3. The documents and particulars referred to in paragraph 2 shall be provided in the language required by the applicable national law.

4. Registration of the SPE may be subject to only one of the following requirements:

(a) a control by an administrative or judicial body of the legality of the documents and particulars of the SPE;

(b) the certification of the documents and particulars of the SPE.

5. The SPE shall submit any change in the particulars or documents referred to in points (a) to (g) of paragraph 2 to the register within 14 calendar days of the day on which the change takes place. After every amendment to the articles of association, the SPE shall submit its complete text to the register as amended to date.

6. The registration of an SPE shall be disclosed.

Article 11
Disclosure

1. The disclosure of the documents and particulars concerning an SPE which must be disclosed under this Regulation shall be effected in accordance with the applicable national law implementing Article 3 of Directive 68/151/EEC.

2. The letters and order forms of an SPE, whether they are in paper or electronic form, as well as its website, if any, shall state the following particulars:

(a) the information necessary to identify the register referred to in Article 9, with the number of entry of the SPE in that register;

(b) the name of the SPE, the address of its registered office and, where appropriate, the fact that the company is being wound up.

Article 12
Liability for acts undertaken before the registration of an SPE

Where acts were performed on behalf of an SPE before its registration, the SPE may assume the obligations arising out of such acts after its registration. Where the SPE does not assume

those obligations, the persons who performed those acts shall be jointly and severally liable, without limit.

Article 13
Branches

Branches of an SPE shall be governed by the law of the Member State in which the branch is located, including the relevant provisions implementing Council Directive 89/666/EEC[25].

CHAPTER III
SHARES

Article 14
Shares

1. The shares of the SPE shall be entered in the list of shareholders.

2. Shares carrying the same rights and obligations shall constitute one class.

3. Subject to Article 27, the adoption of an amendment to the articles of association of the SPE which varies the rights attached to a class of shares (including any change to the procedure for varying the rights attached to a class of share) shall require the consent of a majority of not less than two-thirds of the voting rights attached to the shares issued in that class.

4. Where a share is owned by more than one person, those persons shall be regarded as one shareholder in relation to the SPE. They shall exercise their rights through a common representative, who in the absence of any notification to the SPE shall be the person whose name appears first in the list of shareholders for that share. They shall be jointly and severally liable for the commitments attached to the share.

Article 15
List of shareholders

1. The management body of the SPE shall draw up a list of shareholders. The list shall contain at least the following:

   (a) the name and address of each shareholder;

   (b) the number of shares held by the shareholder concerned, their nominal value or accountable par;

   (c) where a share is owned by more than one person, the names and addresses of the co-owners and of the common representative;

[25] OJ L 395, 30.12.1989, p. 36.

(d) the date of acquisition of the shares;

(e) the amount of each consideration in cash, if any, paid or to be paid by the shareholder concerned;

(f) the value and nature of each consideration in kind, if any, provided or to be provided by the shareholder concerned;

(g) the date on which a shareholder ceases to be a member of the SPE.

2. The list of shareholders shall, unless proven otherwise, constitute evidence of the authenticity of the matters listed in points (a) to (g) of paragraph 1.

3. The list of shareholders and any amendments thereto shall be kept by the management body and may be inspected by the shareholders or third parties on request.

Article 16
Transfer of shares

1. Subject to Article 27, a decision introducing or amending a restriction on or prohibition of the transfer of shares may be adopted only with the consent of all shareholders affected by the restriction or prohibition in question.

2. All agreements on the transfer of shares shall be in written form.

3. On notification of a transfer, the management body shall, without undue delay, enter the shareholder in the list referred to in Article 15, provided that the transfer has been executed in accordance with this Regulation and the articles of association of the SPE and the shareholder submits reasonable evidence as to his lawful ownership of the share.

4. Subject to paragraph 3, any transfer of shares shall become effective as follows:

(a) in relation to the SPE, on the day the shareholder notifies the SPE of the transfer;

(b) in relation to third parties, on the day the shareholder is entered in the list referred to in Article 15.

5. A transfer of shares shall be valid only if it complies with this Regulation and the articles of association. The provisions of the applicable national law concerning the protection of persons who acquire shares in good faith shall apply.

Article 17
Expulsion of a shareholder

1. On the basis of a resolution of the shareholders and on an application by the SPE, the competent court may order the expulsion of a shareholder if he has caused serious harm to the SPE's interest or the continuation of the shareholder as a member of the

SPE is detrimental to its proper operation. An application to the court shall be made within 60 calendar days of the resolution of the shareholders.

2. The court shall decide whether, as an interim measure, the voting and other non-pecuniary rights of such shareholder should be suspended until a final decision is taken.

3. If the court orders the expulsion of a shareholder, it shall decide whether his shares are to be acquired by the other shareholders and/or by the SPE itself and on payment of the price of the shares.

Article 18
Withdrawal of a shareholder

1. A shareholder shall have the right to withdraw from the SPE if the activities of the SPE are being or have been conducted in a manner which causes serious harm to the interests of the shareholder as a result of one or more of the following events:

   (a) the SPE has been deprived of a significant part of its assets;

   (b) the registered office of the SPE has been transferred to another Member State;

   (c) the activities of the SPE have changed substantially;

   (d) no dividend has been distributed for at least 3 years even though the SPE's financial position would have permitted such distribution.

2. The shareholder shall submit his withdrawal in writing to the SPE stating his reasons for the withdrawal.

3. The management body of the SPE shall, on receipt of the notice referred to in paragraph 2, without undue delay, request a resolution of the shareholders on the purchase of the shareholder's shares by the other shareholders or by the SPE itself.

4. Where the shareholders of the SPE fail to adopt a resolution referred to in paragraph 3 or do not accept the shareholder's reasons for withdrawal within 30 calendar days of the submission of the notice referred to in paragraph 2, the management body shall notify the shareholder of that fact without undue delay.

5. In the case of a dispute regarding the price of the shares, their value shall be determined by an independent expert appointed by the parties or, failing an agreement between them, by the competent court or administrative authority.

6. On an application of the shareholder, the competent court may, if satisfied that the interests of the shareholder have suffered serious harm, order the acquisition of his shares by the other shareholders or by the SPE itself and the payment of the price of the shares.

   An application to the court shall be made either within 60 calendar days of the resolution of the shareholders referred to in paragraph 3 or, where no resolution is

adopted within 30 calendar days of the shareholder submitting his notice of withdrawal to the SPE, within 60 calendar days of the expiry of that period.

CHAPTER IV
CAPITAL

Article 19
Share capital

1. Without prejudice to Article 42, the capital of the SPE shall be expressed in euro.

2. The capital of the SPE shall be fully subscribed.

3. The shares of the SPE do not need to be fully paid on issue.

4. The capital of the SPE shall be at least EUR 1.

Article 20
Consideration for shares

1. Shareholders must pay the agreed consideration in cash or provide the agreed consideration in kind in accordance with the articles of association of the SPE.

2. Except in the case of a reduction of the share capital, shareholders may not be released from the obligation to pay or provide the agreed consideration.

3. Without prejudice to paragraphs 1 and 2, the liability of shareholders for the consideration paid or provided shall be governed by the applicable national law.

Article 21
Distributions

1. Without prejudice to Article 24, the SPE may, on the basis of a proposal of the management body, make a distribution to shareholders provided that, after the distribution, the assets of the SPE fully cover its liabilities. The SPE may not distribute those reserves that may not be distributed under its articles of association.

2. If the articles of association so require, the management body of the SPE, in addition to complying with paragraph 1, shall sign a statement, hereinafter a 'solvency certificate', before a distribution is made, certifying that the SPE will be able to pay its debts as they become due in the normal course of business within one year of the date of the distribution. Shareholders shall be provided with the solvency certificate before the resolution on the distribution referred to in Article 27 is taken.

   The solvency certificate shall be disclosed.

Article 22
Recovery of distributions

Any shareholder who has received distributions made contrary to Article 21 must return those distributions to the SPE, provided that the SPE proves that the shareholder knew or in view of the circumstances should have been aware of the irregularities.

Article 23
Own shares

1. The SPE shall not, directly or indirectly, subscribe for its own shares.

2. In the case of acquisition by the SPE of its own shares, Articles 21 and 22 shall apply mutatis mutandis. Shares may not be purchased by the SPE unless they are fully paid. The SPE shall always have at least one issued share.

3. The right to vote and other non-pecuniary rights attached to the SPE's own shares shall be suspended, while the SPE is the registered owner of its own shares.

4. Where the SPE cancels its own shares, its share capital shall be reduced accordingly.

5. Shares acquired by the SPE in contravention of this Regulation or the articles of association shall be sold or cancelled within one year of their acquisition.

6. Subject to paragraph 5 and to the articles of association of the SPE, the cancellation of shares shall be governed by the applicable national law.

7. This Article shall apply mutatis mutandis to any shares acquired by a person acting in his own name but on behalf of the SPE.

Article 24
Capital reduction

1. In the case of a reduction of the share capital of the SPE, Articles 21 and 22 shall apply mutatis mutandis.

2. Following the disclosure of the resolution of the shareholders to reduce the capital of the SPE, those creditors whose claims antedate the disclosure of the resolution shall have the right to apply to the competent court for an order that the SPE provide them with adequate safeguards.

   An application shall be made within 30 calendar days of the disclosure of the resolution.

3. The court may order the SPE to provide safeguards only if the creditor credibly demonstrates that due to the reduction in the capital the satisfaction of his claims is at stake, and that no adequate safeguards have been obtained from the SPE.

4. A capital reduction shall take effect as follows:

(a) where the SPE has no creditors at the time when the resolution is adopted, on its adoption;

(b) where the SPE has creditors at the time when the resolution is adopted and no creditor has made an application within 30 calendar days of the disclosure of the resolution of the shareholders, on the thirty-first calendar day following that disclosure;

(c) where the SPE has creditors at the time when the resolution is adopted and an application is made by a creditor within 30 calendar days of the disclosure of the resolution of shareholders, on the first date on which the SPE has complied with all orders by the competent court to provide adequate safeguards or, if earlier, the first date on which the court has determined, in relation to all applications that the SPE need not provide any safeguards.

5. If the purpose of a reduction of the capital is to offset losses incurred by the SPE, the reduced amount may be used only for this purpose and shall not be distributed to the shareholders.

6. A capital reduction shall be disclosed.

7. In the case of a capital reduction, the equal treatment of shareholders in the same position shall be ensured.

Article 25
Accounts

1. An SPE shall be subject to the requirements of the applicable national law as regards preparation, filing, auditing and publication of accounts.

2. The management body shall keep the books of the SPE. The bookkeeping of the SPE shall be governed by the applicable national law.

CHAPTER V
ORGANISATION OF THE SPE

Article 26
General provisions

1. The SPE shall have a management body, which shall be responsible for the management of the SPE. The management body may exercise all the powers of the SPE not required by this Regulation or the articles of association to be exercised by the shareholders.

2. The shareholders shall determine the organisation of the SPE, subject to this Regulation.

Article 27

Resolutions of shareholders

1. Without prejudice to paragraph 2, at least the following matters shall be decided by a resolution of the shareholders by a majority as defined in the articles of association of the SPE:

   (a) variation of rights attaching to shares;

   (b) expulsion of a shareholder;

   (c) withdrawal of a shareholder;

   (d) approval of the annual accounts;

   (e) distribution to the shareholders;

   (f) acquisition of own shares;

   (g) redemption of shares;

   (h) increase of share capital;

   (i) reduction of share capital;

   (j) appointment and removal of directors and their terms of office;

   (k) where the SPE has an auditor, appointment and removal of the auditor;

   (l) transfer of the registered office of the SPE to another Member State;

   (m) transformation of the SPE;

   (n) mergers and divisions;

   (o) winding up;

   (p) amendments to the articles of association, not covering matters mentioned in points (a) to (o).

2. Resolutions on the matters indicated in points (a), (b), (c), (i), (l), (m) (n), (o) and (p) of paragraph 1 shall be taken by a qualified majority.

   For the purposes of the first subparagraph, the qualified majority may not be less than two-thirds of the total voting rights attached to the shares issued by the SPE.

3. The adoption of resolutions shall not require the organisation of a general meeting. The management body shall provide all shareholders with the proposals for resolutions together with sufficient information to enable them to take an informed decision. Resolutions shall be recorded in writing. Copies of the decisions taken shall be sent to every shareholder.

4. Resolutions of the shareholders shall comply with this Regulation and the articles of association of the SPE.

The right of shareholders to challenge resolutions shall be governed by the applicable national law.

5. If the SPE has only one shareholder, he shall exercise the rights and fulfill the obligations of the shareholders of the SPE set out in this Regulation and the articles of association of the SPE.

6. Resolutions on matters indicated in paragraph 1 shall be disclosed.

7. Resolutions may be relied on as follows:

(a) in relation to the shareholders, the management body of the SPE and its supervisory body, if any, on the date they are adopted,

(b) in relation to third parties, in accordance with the provisions of the applicable national law implementing paragraphs 5, 6 and 7 of Article 3 of Directive 68/151/EEC.

Article 28

Information rights of shareholders

1. Shareholders shall have the right to be duly informed and to ask questions to the management body about resolutions, annual accounts and all other matters relating to the activities of the SPE.

2. The management body may refuse to give access to the information only if doing so could cause serious harm to the business interests of the SPE.

Article 29

Right to request a resolution and right to request an independent expert

1. Shareholders holding 5% of the voting rights attached to the shares of the SPE shall have the right to request the management body to submit a proposal for a resolution to the shareholders.

The request must state the reasons and indicate the matters that should be subject to such resolution.

If the request is refused or if the management body does not submit a proposal within 14 calendar days of receiving the request, the shareholders concerned may then submit a proposal for a resolution to the shareholders regarding the matters in question.

2. In the case of suspicion of serious breach of law or of the articles of association of the SPE, shareholders holding 5% of the voting rights attached to the shares of the SPE shall have the right to request the competent court or administrative authority to appoint an independent expert to investigate and report on the findings of the investigation to shareholders.

The expert shall be allowed access to the documents and records of the SPE and to require information from the management body.

3. The articles of association may grant the rights set out in paragraphs 1 and 2 to individual shareholders or to shareholders holding less than 5% of the voting rights attached to the shares of the SPE.

Article 30
Directors

1. Only a natural person may be a director of an SPE.

2. A person who acts as a director without having been formally appointed shall be considered a director as regards all duties and liabilities to which the latter are subject.

3. A person who is disqualified under national law from serving as a director of a company by a judicial or administrative decision of a Member State may not become or serve as a director of an SPE.

4. Disqualification of a person serving as a director of the SPE shall be governed by the applicable national law.

Article 31
General duties and liabilities of directors

1. A director shall have a duty to act in the best interests of the SPE. He shall act with the care and skill that can reasonably be required in the conduct of the business.

2. The duties of directors shall be owed to the SPE.

3. Subject to the articles of association of the SPE, a director shall avoid any situation that can be reasonably regarded as likely to give rise to an actual or potential conflict between his personal interests and those of the SPE or between his obligations towards the SPE and his duty to any other legal or natural person.

4. A director of the SPE shall be liable to the company for any act or omission in breach of his duties deriving from this Regulation, the articles of association of the SPE or a resolution of shareholders which causes loss or damage to the SPE. Where such breach has been committed by more than one director, all directors concerned shall be jointly and severally liable.

5. Without prejudice to the provisions of this Regulation, the liability of directors shall be governed by the applicable national law.

Article 32

Related party transactions

Related party transactions shall be governed by the provisions of the applicable national law implementing Council Directives 78/660/EEC[26] and 83/349/EEC[27].

Article 33

Representation of the SPE in relation to third parties

1. The SPE shall be represented in relation to third parties by one or more directors. Acts undertaken by the directors shall be binding on the SPE even if they are not within the objects of the SPE.

2. The articles of association of the SPE may provide that directors are to exercise jointly the general power of representation. Any other limitation of the powers of the directors, following from the articles of association, a resolution of shareholders or a decision of the management or supervisory body, if any, may not be relied on against third parties even if they have been disclosed.

3. Directors may delegate the right to represent the SPE in accordance with the articles of association.

CHAPTER VI
EMPLOYEE PARTICIPATION

Article 34

General provisions

1. The SPE shall be subject to the rules on employee participation, if any, applicable in the Member State in which it has its registered office, subject to the provisions of this Article.

2. In the case of the transfer of the registered office of an SPE Article 38 shall apply.

3. In the case of a cross-border merger of an SPE with an SPE or other company registered in another Member State, the provisions of the laws of the Member States implementing Directive 2005/56/EC of the European Parliament and of the Council[28] shall apply.

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[26] OJ L 222, 14.8.1978, p. 11.
[27] OJ L 193, 18.7.1983, p. 1.
[28] OJ L 310, 25.11.2005, p. 1.

CHAPTER VII
TRANSFER OF THE REGISTERED OFFICE OF THE SPE

Article 35
General provisions

1. The registered office of an SPE may be transferred to another Member State in accordance with this Chapter.

   The transfer of the registered office of an SPE shall not result in the winding-up of the SPE or in any interruption or loss of the SPE's legal personality or affect any right or obligation under any contract entered into by the SPE existing before the transfer.

2. Paragraph 1 shall not apply to SPEs against which proceedings for winding-up, liquidation, insolvency or suspension of payments have been brought, or in respect of which preventive measures have been taken by the competent authorities to avoid the opening of such proceedings.

3. A transfer shall take effect on the date of registration of the SPE in the host Member State. From that date, for matters covered by the second paragraph of Article 4, the SPE shall be regulated by the law of the host Member State.

4. For the purpose of judicial or administrative proceedings commenced before the transfer of the registered office, the SPE shall be considered, following the registration referred to in paragraph 3, as having its registered office in the home Member State.

Article 36
Transfer procedure

1. The management body of an SPE planning a transfer shall draw up a transfer proposal, which shall include at least the following particulars:

   (a) the name of the SPE and the address of its registered office in the home Member State;

   (b) the name of the SPE and the address of its proposed registered office in the host Member State;

   (c) the proposed articles of association for the SPE in the host Member State;

   (d) the proposed timetable for the transfer;

   (e) the date from which it is proposed that the transactions of the SPE are to be regarded for accounting purposes as having been carried out in the host Member State;

(f) the consequences of the transfer for employees, and the proposed measures concerning them;

(g) where appropriate, detailed information on the transfer of the central administration or principal place of business of the SPE.

2. At least one month before the resolution of the shareholders referred to in paragraph 4 is taken, the management body of the SPE shall:

(a) submit the transfer proposal to the shareholders and employee representatives, or where there are no such representatives, to the employees of the SPE for examination and make it available to the creditors for inspection;

(b) disclose the transfer proposal.

3. The management body of the SPE shall draw up a report to the shareholders explaining and justifying the legal and economic aspects of the proposed transfer and setting out the implications of the transfer for shareholders, creditors and employees. The report shall be submitted to the shareholders and the employee representatives, or where there are no such representatives, to the employees themselves together with the transfer proposal.

Where the management body receives in time the opinion of the employee representatives on the transfer, that opinion shall be submitted to the shareholders.

4. The transfer proposal shall be submitted to the shareholders for approval in accordance with the rules of the articles of association of the SPE relating to the amendment of the articles of association.

5. Where the SPE is subject to an employee participation regime, shareholders may reserve the right to make the implementation of the transfer conditional on their express ratification of the arrangements with respect to the participation of employees in the host Member State.

6. The protection of any minority shareholders who oppose the transfer and of the creditors of the SPE shall be governed by the law of the home Member State.

Article 37

Scrutiny of the legality of the transfer

1. Each Member State shall designate a competent authority to scrutinise the legality of the transfer by verifying compliance with the transfer procedure laid down in Article 36.

2. The competent authority of the home Member State shall verify, without undue delay, that the requirements of Article 36 have been met and, if that is found to be the case, shall issue a certificate confirming that all the formalities required under the transfer procedure have been completed in the home Member State.

3. Within one month of the receipt of the certificate referred to in paragraph 2, the SPE shall present the following documents to the competent authority in the host Member State:

(a) the certificate provided for in paragraph 2;

(b) the proposed articles of association for the SPE in the host Member State, as approved by the shareholders;

(c) the transfer proposal, as approved by the shareholders.

Those documents shall be deemed to be sufficient to enable the registration of the SPE in the host Member State.

4. The competent authority in the host Member State shall, within 14 calendar days of receipt of the documents referred to in paragraph 3, verify that the substantive and formal conditions required for the transfer of the registered office are met and if that is found to be the case, take the measures necessary for the registration of the SPE.

5. The competent authority of the host Member State may refuse to register an SPE only on the grounds that the SPE does not meet all the substantive or formal requirements under this Chapter. The SPE shall be registered when it has fulfilled all requirements under this Chapter.

6. Using the notification form set out in Annex II, the competent authority of the host Member State shall, without undue delay, notify the competent authority responsible for removing the SPE from the register in the home Member State of the registration of the SPE in the host Member State.

Removal from the register shall be effected as soon as, but not before, a notification has been received.

7. Registrations in the host Member State and removals from the register in the home Member State shall be disclosed.

Article 38

Arrangements for the participation of employees

1. The SPE shall be subject, as from the date of registration, to the rules in force in the host Member State, if any, concerning arrangements for the participation of employees.

2. Paragraph 1 shall not apply where the employees of the SPE in the home Member State account for at least one third of the total number of employees of the SPE including subsidiaries or branches of the SPE in any Member State, and where one of the following conditions is met:

(a) the legislation of the host Member State does not provide for at least the same level of participation as that operated in the SPE in the home Member State prior to its registration in the host Member State. The level of employee participation shall be measured by reference to the proportion of employee

representatives amongst the members of the administrative or supervisory body or their committees or of the management group which covers the profit units of the SPE, subject to employee representation;

(b) the legislation of the host Member State does not confer on the employees of establishments of the SPE that are situated in other Member States the same entitlement to exercise participation rights as such employees enjoyed before the transfer.

3. Where one of the conditions set out in points a) or b) of paragraph 2 is met, the management body of the SPE shall take the necessary steps, as soon as possible, after disclosure of the transfer proposal, to start negotiations with the representatives of the SPE's employees with a view to reaching an agreement on arrangements for the participation of the employees.

4. The agreement between the management body of the SPE and the representatives of the employees shall specify:

(a) the scope of the agreement;

(b) where, during the negotiations, the parties decide to establish arrangements for participation in the SPE following the transfer, the substance of those arrangements including, where applicable, the number of members in the company's administrative or supervisory body employees will be entitled to elect, appoint, recommend or oppose, the procedures as to how these members may be elected, appointed, recommended or opposed by employees, and their rights;

(c) the date of entry into force of the agreement and its duration, and any cases in which the agreement should be renegotiated and the procedure for its renegotiation.

5. Negotiations shall be limited to a period of six months. The parties may agree to extend negotiations beyond this period for an additional six-month period. The negotiations shall otherwise be governed by the law of the home Member State.

6. In the absence of an agreement, the participation arrangements existing in the home Member State shall be maintained.

CHAPTER VIII
RESTRUCTURING, DISSOLUTION AND NULLITY

Article 39
Restructuring

The transformation, merger and division of the SPE shall be governed by the applicable national law.

Article 40
Dissolution

1. The SPE shall be dissolved in the following circumstances:

   (a) by expiry of the period for which it was established;

   (b) by the resolution of the shareholders;

   (c) in cases set out in the applicable national law.

2. Winding-up shall be governed by the applicable national law.

3. Liquidation, insolvency, suspension of payments and similar procedures shall be governed by the applicable national law and by Council Regulation (EC) No 1346/2000[29].

4. Dissolution of the SPE shall be disclosed.

Article 41
Nullity

The nullity of the SPE shall be governed by the provisions of the applicable national law implementing Article 11(1) of Directive 68/151/EEC, points (a), (b), (c) and (e), except for the reference in point (c) to the objects of the company, of Article 11(2) and Article 12 of that Directive.

CHAPTER IX
ADDITIONAL AND TRANSITIONAL PROVISIONS

Article 42
Use of national currency

1. Member States in which the third phase of the economic and monetary union (EMU) does not apply may require SPEs having their registered office in their territory to express their capital in the national currency. An SPE may also express its capital in euro. The national currency/euro conversion rate shall be as on the last day of the month preceding the registration of the SPE.

2. An SPE may prepare and publish its annual and, where applicable, consolidated accounts in euro in Member States where the third phase of the economic and monetary union (EMU) does not apply. However such Member States may also require SPEs to prepare and publish their annual and, where applicable, consolidated accounts in the national currency in accordance with the applicable national law.

[29] OJ L 160, 30.6.2000, p. 1.

CHAPTER X
FINAL PROVISIONS

Article 43
Effective application

Member States shall make such provision as is appropriate to ensure the effective application of this Regulation.

Article 44
Penalties

The Member States shall lay down the rules on penalties applicable to infringements of the provisions of this Regulation and shall take all measures necessary to ensure that they are implemented. The penalties provided for must be effective, proportionate and dissuasive. The Member States shall notify those provisions to the Commission by 1 July 2010 at the latest and shall notify it without delay of any subsequent amendment affecting them.

Article 45
Notification of private limited-liability companies

Member States shall notify the form of private limited-liability company referred to in the second paragraph of Article 4 to the Commission by 1 July 2010 at the latest.

The Commission shall publish this information in the *Official Journal of the European Union*.

Article 46
Obligations of authorities responsible for registers

1. The authorities responsible for the register referred to in Article 9(1) shall notify the Commission before 31 March each year, of the name, registered office and registration number of the SPEs registered in and removed from the register in the preceding year as well as the total number of registered SPEs.

2. The authorities referred to in paragraph 1 shall cooperate with each other to ensure that the documents and particulars of the SPEs listed in Article 10(2) are also accessible through the registers of all other Member States.

Article 47
Review

The Commission shall, no later than 30 June 2015, review the application of this Regulation.

Article 48
Entry into force

This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

It shall apply from 1 July 2010.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels,

For the Council
The President

ANNEX I

The articles of association of an SPE shall regulate at least the following:

Chapter II – Formation

– the name of the SPE,

– the names and addresses of the founding shareholders of the SPE and the nominal value or accountable par of the shares held by them,

– the initial capital of the SPE,

Chapter III - Shares

– whether sub-division, consolidation or redenomination of the shares is permitted and any applicable requirements,

– the pecuniary and non-pecuniary rights and the obligations attached to the shares (share classes), in particular

– (a) the participation in the assets and profits of the company, if any,

– (b) the votes attached to the shares, if any,

– the procedure for agreeing on any variation of the rights and obligations attached to the shares (share classes), and, subject to Article 14(3), the required majority of voting rights,

– any pre-emption rights either on issue or on transfer of shares, if any, and any applicable requirements,

– where the transfer of shares is restricted or prohibited, the details of the restriction or prohibition, in particular the form, time limit, the applicable procedure, and the rules applicable in the event of the death or dissolution of a shareholder,

– where the approval of the share transfer by the SPE or by the shareholders is required or other rights are provided for shareholders or for the SPE on the transfer of shares (for example, right of first refusal), a deadline by which the transferor is to be notified of the decision,

– whether, in addition to Article 17, shareholders have any rights to require other shareholders to sell their shares, and any applicable requirements,

– whether, in addition to Article 18, shareholders have the right to sell their shares to other shareholders or to the SPE, who are obliged to buy those shares, and the applicable requirements,

Chapter IV – Capital

– the financial year of the SPE and how it may be changed,

– whether the SPE is required to establish reserves and if so, the type of reserve, the circumstances in which it is to be established and whether it is distributable,

– whether consideration in kind are to be evaluated by an independent expert and any formalities that must be complied with,

– the time when the payment or provision of the consideration is to be made and any conditions relating to such payment or provision,

– whether or not the SPE can provide financial assistance, in particular advance funds, make loans or provide security, with a view to the acquisition of its shares by a third party,

– whether interim dividends can be paid and any applicable requirements,

– whether the management body is required to sign a solvency certificate before a distribution is made, and the applicable requirements,

– the procedure the SPE must follow to recover any unlawful distribution,

– whether the acquisition of own shares is permitted and, if permitted, the procedure to be followed, including the conditions under which the shares may be held, transferred or cancelled,

– the procedure for increasing, reducing or otherwise changing the share capital, and any applicable requirements,

Chapter V – Organisation of the SPE

– the method of adopting shareholder resolutions,

– subject to the provisions of this Regulation, the majority required to adopt shareholder resolutions,

– the resolutions to be adopted by the shareholders, in addition to those listed in Article 27(1), the quorum and the required majority of voting rights,

– subject to Articles 21, 27 and 29, the rules on proposing resolutions,

– the period of time and the manner in which the shareholders are to be informed of proposals for shareholder resolutions and, if the articles of association provide for general meetings, general meetings,

– the way in which the shareholders obtain the text of any proposed shareholder resolution and any other preparatory documents in relation to the adoption of a resolution,

– the manner in which copies of an adopted resolution are made available to the shareholders,

– where the articles of association provide for the adoption of some or all resolutions at a general meeting, the manner of convening the general meeting, the working methods and the rules on voting by proxy,

– the procedure and time limits for the SPE to respond to requests from shareholders for information, to grant access to the documents of the SPE, and to notify resolutions that have been adopted by shareholders,

– whether the SPE's management body is composed of one or more managing directors, a management board (dual board) or an administrative board (unitary board),

– where there is an administrative board (unitary board), its composition and organisation,

– where there is a management board (dual board), its composition and organisation,

– where there is a management board (dual board) or one or more managing directors, whether the SPE has a supervisory body, and if so, its composition and organisation and its relationship with the management body,

– any eligibility criterion of directors,

– the procedure for appointing and removing directors,

– whether the SPE has an auditor and where the articles of association provide that the SPE should have an auditor, the procedure for his appointment, removal and resignation,

– any specific duties of directors other than those mentioned in this Regulation,

– whether situations involving an actual or potential conflict of interest by a director may be authorised and, if so, an indication of who may authorise such a conflict and the applicable requirements and procedures for the authorisation of such a conflict,

– whether related party transactions as referred to in Article 32 need to be authorised and the applicable requirements,

– the rules on representation of the SPE by the management body, in particular if the directors have the right to represent the SPE jointly or separately and any delegation of this right,

– the rules on delegation of any management power to another person.

ANNEX II

NOTIFICATION FORM CONCERNING THE REGISTRATION OF THE TRANSFER OF THE REGISTERED OFFICE OF AN SPE

NOTIFICATION

concerning the registration of the transfer of the registered office of a European private company (SPE)

[Name and address of the new register/competent authority]

hereby informs

[Name and address of the former register/competent authority]

that the following transfer of the registered office of an SPE has been registered:

[Name of the SPE]

[New registered office of the SPE]

[New number of entry in the register]

[Date of registration of the transfer]

In accordance with Regulation … on the Statute for a European private company, the following SPE is to be removed from its former register on receipt of this notification:

[Name of the SPE]

[Former registered office of the SPE]

[Former number of entry in the register]

Done at…, […]

[signed]