



**COUNCIL OF  
THE EUROPEAN UNION**

**Brussels, 27 November 2009**

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**ADDENDUM TO THE NOTE**

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from :            Presidency  
to :                Council

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Subject :        Proposal for a Council Regulation on a European private company  
                    - Political agreement

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Following the discussion in the Permanent Representatives Committee on 25 November 2009 and in view of the meeting of the Council (Competitiveness) on 3 - 4 December 2009, delegations will find in the Annex a revised compromise proposal submitted by the Presidency.

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Revised<sup>1</sup> Presidency compromise proposal for a

**COUNCIL REGULATION**

**on 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,<sup>2</sup>

Having regard to the opinion of the European Parliament,<sup>3</sup>

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 law 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.

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<sup>1</sup> DK, DE: parliamentary scrutiny, DE: general scrutiny reservation.

<sup>2</sup> OJ C [...], [...], p. [...].

<sup>3</sup> OJ C [...], [...], p. [...].

- (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<sup>4</sup> 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.
- (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 the members of the company, while a high level of legal certainty is ensured for members, creditors, employees and third parties in general. Given that a high degree of flexibility and freedom is to be left to the members to organise the internal affairs of the SPE, the private nature of the company should also be reflected by the fact that its units may not be offered to the public or traded either on a regulated market or on a multilateral trading facility. In the interest of legal clarity, employee share schemes should be explicitly allowed. Issuance of other financial instruments should be governed by national law.

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<sup>4</sup> 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).

- (4) In order to enable businesses to reap the full benefits of the internal market, the SPE should be able to transfer its registered office from one Member State to another. The SPE is a new European company form governed by this Regulation but also, as regards certain matters, governed in part by national law, which may differ. Therefore, in the initial phase, whilst experience is gained in the application of this Regulation, the SPE should have its registered office and its central administration and/or its principal place of business in the same Member State. However, two years after the date of application of this Regulation national law should apply.
- (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) First and foremost, the SPE should be governed by the substantive rules set out in this Regulation. Nonetheless, in order to ensure a high degree of contractual freedom it is appropriate to provide for a list of matters, to be set out in an Annex, in respect of which the members of the SPE may lay down rules in the articles of association. Furthermore, in matters where it is explicitly allowed by this Regulation, members should also be able to adopt rules in the articles of association that are different from the substantive default rules set out in this Regulation. In relation to those matters only Community law should apply, and consequently members 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 listed in Annex II of the Regulation. However, if members do not or only partly use the contractual freedom in matters listed in Annex I provided for by this Regulation, in those matters national law shall supplement any omission. National law should also apply to further provisions in the articles of association that are not covered by this Regulation or its Annex I. National law should also apply, provided it is not incompatible with Community law, to matters that are not regulated by the Regulation, such as insolvency, employment and taxation, or to matters that are only partly regulated by it.

- (6a) Member States should aim to ensure that the provisions they adopt in relation to this Regulation in order to ensure its effective application do not result in disproportionate restrictions in the rules applicable to SPEs or in discriminatory treatment of SPEs as compared with private limited-liability companies governed by national law.
- (7) In order to make the SPE an accessible company form for individuals and small businesses. Member States should allow the SPE to be created *ex nihilo*, as a result of the transformation of existing national legal bodies, or merger. In order to facilitate the creation of an SPE by way of transformation, the Regulation should provide for the rules of the transformation procedure. Any explicit or implicit prohibition or restriction applicable to the transformation of legal bodies into a national private company with limited liability should also apply when forming an SPE. However, all Member States should allow the formation of an SPE by the transformation of the private limited-liability companies listed in Annex II. Formation of an SPE by merger should be governed by national law.
- (7a) So that Member States may protect the pre-existing rights of members, creditors, employees and third parties in general, the transfer of registered office to another Member State may not be carried out at the same time as the formation of an SPE by transformation takes place. However, SPEs may subsequently transfer their registered office to another Member State.
- (7b) To ensure the compliance of the SPE with the rules generally applicable to company names, national provisions on the protection and control of company names should apply. Existing companies, firms or other legal bodies the names of which either contain the letters “SPE” or are followed by the abbreviation “SPE” should not be required to change their name or that abbreviation.

- (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 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.<sup>5</sup>
- (8a) To facilitate the formation of an SPE, Member States may draw up model articles of association that entrepreneurs may use as an example when they set up their company. However, the application of the model articles of association shall not be made mandatory.
- (8b) Since Member States follow different traditions with respect to the nature of the participation of members in a company's capital, the unit of the SPE's capital should be either a share or a part, depending on the provisions of the applicable national law. A member should be either a shareholder or an associate, depending on the provisions of the applicable national law.
- (9) Since small businesses often require long term financial and personal commitment, they should be able to adapt the structure of their capital and the rights attached to the units of capital to their specific circumstances. The members of the SPE should therefore be free to determine the rights and obligations attached to their units, the procedure for the variation of those rights and any restriction on the transferability of the units.
- (10) [Deleted]

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<sup>5</sup> 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).

- (11) The SPE should not be subject to a high mandatory capital requirement since this would be a barrier to the creation of SPEs. Nonetheless, Member States should have the possibility to determine the minimum capital for SPEs registered in their territory subject to the limits set by this Regulation. Creditors should be also protected from excessive distributions to members 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. In addition, Member States should have the possibility to require the management body of the SPE to sign a solvency certificate. Those Member States should also lay down provisions on the liability of directors of the SPE with respect to the statement.
- (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, members of the SPE should be free to determine in the articles of association the internal organisation which is best suited to their needs. The general assembly of members should be the main decision-making body of the SPE. An SPE may opt for a sole director, two or more individual directors, a unitary or a dual board structure. Any concept of de facto directors or shadow directors in national law should apply. Mandatory rules ensuring the protection of minority members should be introduced in order to avoid any unfair treatment of members, 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 units of the SPE. The general principle of equal treatment of members in the same position should apply.

- (14) [Deleted]
- (14a) Due to the differences in the national regimes as regards financial assistance to third parties, the expulsion and withdrawal of members and the general duties and liabilities of directors, these matters should be governed by national law.
- (15) 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 members, creditors and employees to the transfer proposal and to the report of the management body should be ensured.
- (16) Employees' rights of participation should be governed by the legislation of the Member State in which the SPE has its registered office. The SPE should not be used for the purpose of circumventing such rights. To that end, where certain conditions are fulfilled, SPEs should start negotiations with the representatives of employees on arrangements for employee participation in the SPE.
- (16a) A trans-national employee participation system established in accordance with Articles 35-35d includes both an agreement on arrangements for employee participation and an employee participation system based on the standard rules.
- (16b) Participation rights should be deemed to be reduced when the proportion of the members of the supervisory board or of the administrative board elected, appointed, recommended or opposed by the employees is lower than the highest proportion existing in the Member States concerned.



- (16c) This Regulation does not impose any obligation on Member States to introduce rules on employee participation for the private limited-liability companies listed in Annex II.
- (17) Employees' rights other than rights of participation should remain subject to Council Directive 2009/38/EC of 6 May 2009 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<sup>6</sup>, Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies,<sup>7</sup> 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<sup>8</sup> 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.<sup>9</sup>
- (18) The Member States should lay down rules on sanctions 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 sanctions must be effective, proportionate and dissuasive.

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<sup>6</sup> OJ L 122, 16.5.2009, p. 28.

<sup>7</sup> OJ L 225, 12.8.1998, p. 16.

<sup>8</sup> OJ L 82, 22.3.2001, p. 16.

<sup>9</sup> OJ L 80, 23.3.2002, p. 29.

- (18a) To ensure that the documents and particulars of SPEs are accessible through the registers of all Member States, Community initiatives - such as the European e-Justice portal or the Internal Market Information System - or other initiatives - such as the European Business Register - aimed at facilitating the Community-wide access to business registers of all Member States should be promoted and used.
- (19) The Treaty does not provide, for the adoption of this Regulation, powers other than those under Article 308.
- (20) 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,

HAS ADOPTED THIS REGULATION:

**CHAPTER I**  
**GENERAL PROVISIONS**

*Article 1*

**Subject matter**

This Regulation, including its Annexes, 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) [Deleted]
  - (b) 'unit' shall be either a share or a part, depending on the provisions of applicable national law, and means a fraction of the capital of an SPE, expressed in percentage or number, conferring rights on the owner of the unit, which may be subject to obligations and conditions, in accordance with this Regulation, the articles of association of an SPE and national law;
  - (ba) 'member' shall be either a shareholder or an associate, depending on the provisions of applicable national law, and means any owner of one or more units whose name is entered in the list of members in accordance with Article 15;

- (c) 'distribution' means any financial benefit derived directly or indirectly from the SPE by a member, in relation to the units held by him, including any transfer of money or property. Distributions may take the form of a dividend, be made through a purchase or sale of property, redemption or other kind of acquisition of units by the SPE or by any other means;
- (d) 'director' means
- (i) where the articles of association provide for a sole director, the sole director of the SPE,
  - (ia) where the articles of association provide for two or more individual directors, any of those individual directors,
  - (ii) where the articles of association provide for a dual board regime, any member of the management board or of the supervisory board, if any,
  - (iii) where the articles of association provide for a unitary board regime, any member of the administrative board;
- (e) 'management body' means
- (i) where the articles of association provide for a sole director, the sole director of the SPE,
  - (ia) where the articles of association provide for two or more individual directors, any of those individual directors,
  - (ii) where the articles of association provide for a dual board regime, the management board,
  - (iii) where the articles of association provide for a unitary board regime, the administrative board,
- designated in the articles of association of the SPE as being responsible for the management of the SPE;

- (ea) 'supervisory board' means a board which supervises the work of the management board or where applicable, the sole director or the individual directors;
- (f) 'employee participation' means the influence of a body which represents the employees and/or of the employees' representatives in the affairs of an SPE by way of:
  - (i) the right to elect or appoint some of the members of the supervisory board or administrative board of the company, or
  - (ii) the right to recommend and/or oppose the appointment of some or all of the members of the supervisory board or administrative board of the company;
- (g) '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;
- (h) 'host Member State' means the Member State to which the registered office of the SPE is transferred.

2. [Deleted]

### *Article 3*

#### **Main characteristics of an SPE**

1. An SPE is a company having legal personality.

Its members bear no personal liability for the obligations of the SPE.

A member is not liable towards the SPE for more than the amount he has subscribed.

2. An SPE shall have a capital divided into units.
- 2a. The units of an SPE shall not be offered to the public by the SPE or by its members and shall not be traded on a regulated market or on a multilateral trading facility.

An offer of the units of an SPE to its members or its employees shall not be regarded as an offer to the public.

For the purposes of paragraph 2a, 'regulated market' means a market defined in point 14 of paragraph 1 of Article 4 of Directive 2004/39/EC<sup>10</sup> and 'multilateral trading facility' means a facility defined in point 15 of paragraph 1 of Article 4 of Directive 2004/39/EC.

3. An SPE shall have a cross-border component<sup>11</sup> at the time of its registration, demonstrated by one of the following:
  - (a) an intention to do business in a Member State other than the one in which the SPE is registered; or
  - (b) a cross-border business object set out in the articles of association of the SPE; or
  - (c) a branch or a subsidiary registered in a Member State other than the one in which the SPE is registered; or
  - (d) a member or members being resident or registered in more than one Member State or in a Member State other than the one in which the SPE is registered.

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<sup>10</sup> OJ L 145, 30.4.2004, p. 1–44.

<sup>11</sup> IT, LT would prefer not having a cross-border element requirement; FR considers that requirement should be less stringent.

*Article 4*

**Rules applicable to an SPE**

1. An SPE shall be governed by:
  - (a) this Regulation and
  - (b) its articles of association.
  
2. In the case of matters that are not, or are only partly, regulated by this Regulation, and if these matters are not listed in Article 8 or Annex I, an SPE shall be governed by the following rules:
  - (a) the provisions of laws adopted by Member States in relation to this Regulation in order to ensure its effective application, and
  - (b) for matters not covered by point (a), the provisions of national law, including the provisions implementing Community law, which apply to private limited-liability companies - listed in Annex II - in the Member State in which the SPE has its registered office, hereinafter "applicable national law".
  
3. Without prejudice to paragraph 1, matters listed in Annex I shall be governed by the applicable national law where such matters have not been included or have been only partly included in the articles of association of an SPE.
  
4. If the nature of the business carried out by an SPE is regulated by specific provisions of national law, those provisions shall apply to the SPE.

**CHAPTER II**  
**FORMATION**

*Article 5*

**Method of formation<sup>12</sup>**

An SPE may be formed:

- (a) *ex nihilo*, in accordance with this Regulation;
- (b) by transformation in accordance with this Regulation;
- (c) by merger in accordance with national law, including the provisions implementing Directive 2005/56/EC of the European Parliament and of the Council.

*Article 5a*

**Formation *ex nihilo***

1. An SPE may be formed *ex nihilo* by one or more natural persons or legal bodies governed by public or private law in accordance with the conditions set out in this Regulation.
2. In order to form an SPE *ex nihilo*, the founding members shall draw up articles of association in accordance with Article 8 and sign them. The founding members or any person authorised by them shall apply for registration of the SPE in accordance with Articles 9, 10 and 11.

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<sup>12</sup> FR and PT wish to maintain division as method of forming an SPE.



**Formation by transformation<sup>13</sup>**

0. An SPE may be formed by the transformation of a legal body governed by the law of a Member State. Member States shall allow the transformation of private limited-liability companies listed in Annex II to an SPE. Member States shall also allow the transformation of legal bodies other than private limited-liability companies listed in Annex II to an SPE to the extent that national law allows for such legal bodies to transform into a private limited-liability company.<sup>14</sup>
1. The formation of an SPE by transformation shall not give rise to the winding up of the transforming legal body or any loss or interruption of its legal personality.
2. Where an SPE is formed by the transformation of an existing legal body, the registered office of the SPE shall be located in the same Member State as the registered office of the transformed legal body.
3. A legal body having subscribed capital may only be transformed to an SPE if it has net assets at least equivalent to the amount of its subscribed capital plus those reserves which may not be distributed under national law or its articles of association.
4. The management body of the transforming legal body shall draw up a transformation proposal, which shall include at least the following particulars:
  - (a) the name of the transforming legal body and the address of its registered office;
  - (b) the proposed name of the SPE and the address of its proposed registered office;

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<sup>13</sup> PT would prefer the Article to be deleted (i.e. formation to be left entirely to national law).

<sup>14</sup> AT: reservation on the concept that "any" legal body is allowed to transform into an SPE.

- (c) the proposed articles of association of the SPE;
  - (d) the proposed timetable for the transformation;
  - (e) the likely consequences of the transformation for employees and the proposed measures concerning them;
  - (f) any rights provided for the protection of members and/or creditors.
5. The management body of the transforming legal body shall draw up a report explaining and justifying the legal and economic aspects of the proposed transformation and setting out the implications for the members, creditors and employees. The report shall be submitted to the members and the employee representatives, or where there are no such representatives, to the employees themselves together with the transformation proposal. At the same time, the report shall be made available to the creditors.
6. Where the management body receives the opinion of the employee representatives on the transformation within 21 calendar days from the date of submission of the report referred to in paragraph 5, it shall be attached to the report.
7. At least one month before the decision referred to in paragraph 8 is taken, the management body of the transforming legal body shall:
- (a) submit the transformation proposal to each of the members and employee representatives, or where there are no such representatives, to the employees of the legal body for examination and make it available to the creditors; and
  - (b) disclose the transformation proposal.

8. The transformation proposal shall be submitted to the members for approval. The decision on the transformation of a private limited-liability company listed in Annex II into an SPE shall be taken by a majority not lower than two-thirds of the total voting rights in the transforming company. Member States may determine a higher majority requirement. The decision on the transformation of any other legal body shall be governed by national law applying to the transformation of such a body into a company listed in Annex II.
9. The protection of any minority members who oppose the transformation and any additional protection of the creditors of the transforming legal body shall be governed by the national law applicable to the transforming legal body. Where the national law applicable to the transforming legal body does not contain such provisions, Member States may adopt provisions to protect the rights of the minority members and/or creditors concerned.
10. The rights and obligations of the transforming company on the terms and conditions of employment arising from national law, practice and individual employment contracts or employment relationships and existing at the date of the registration of the SPE shall be transferred to the SPE.
11. The SPE shall be registered in accordance with Article 9, paragraphs (1) and (4) of Article 10 and Article 11.
12. Any restriction in the national law on the transformation of legal bodies to a private limited-liability company listed in Annex II shall apply to the transformation into an SPE.

## Article 6

### **Name of the company**

0. Without prejudice to this Regulation, the name that an SPE may take shall be governed by the applicable national law.
1. The name of an SPE shall be followed by the abbreviation "SPE".

Only an SPE may use the abbreviation "SPE".

2. Notwithstanding paragraph 1, companies, firms and other legal bodies registered in a Member State before the date of entry into force of this Regulation, the names of which contain "SPE" or are followed by the abbreviation "SPE", shall not be required to modify their names or that abbreviation.

## Article 7

### **Seat of the company**

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

For a period of two years<sup>15</sup> as from [...] <sup>16</sup> an SPE shall have its registered office and its central administration and/or its principal place of business in the same Member State.<sup>17</sup> Thereafter national law shall apply.<sup>18 19</sup>

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<sup>15</sup> ES and NL would prefer longer transitional period, ES: indicated 5 years; IT could not accept any prolongation of the transitional period.

<sup>16</sup> The date of application of this Regulation.

<sup>17</sup> AT: instead of 2 years transitional period and the application of national law would only want the obligation to have both the registered office and the central administration/principal place of business in the same Member State, which could then be reviewed after 5 years.

<sup>18</sup> FI: preferred previous version of the text (doc. 16155/09 ADD 1).

<sup>19</sup> LV, LU: reservation on this provision.

*Article 8*

**Articles of association**

1. An SPE shall have articles of association that cover at least the following particulars:
  - (a) the name of the SPE and the address of its registered office;
  - (b) the business object or business activity of the SPE;
  - (c) the financial year of the SPE;
  - (d) the capital of the SPE;
  - (e) where applicable, the total number of units and, if the units have nominal value, their nominal value;
  - (ea) the pecuniary and non-pecuniary rights and the obligations attached to the units;
  - (eb) the classes of units, if any, and the number of units in each class;
  - (ec) the type of management body, whether there is a supervisory board, and their composition;
  - (f) the amount of the capital to be paid up on formation;
  - (g) the names and addresses of the founding members, the number of units subscribed for by each founding member and, where applicable, to what class those units belong;
  - (h) the amount of each consideration in cash, if any, to be paid by each founding member;
  - (i) the value and nature of each consideration in kind, if any, to be provided by each founding member;
  - (j) the names, addresses and any other information necessary to identify the initial director or directors and, where applicable, the initial auditor or auditors of the SPE.
  
- 1a. In addition to the matters listed in paragraph 1, the articles of association of an SPE may, without prejudice to this Regulation, include provisions concerning matters listed in Annex I. In that case national law shall not apply to those matters to the extent to which they are included in the articles of association.

Without prejudice to this Regulation and applicable national law, the articles of association may also include provisions concerning other matters.

2. The articles of association of an SPE shall be in writing and subject to the formal requirements of the applicable national law.
3. The articles of association and any amendments thereto may be relied upon in accordance with the provisions of the applicable national law.

#### *Article 9*

#### **Formalities relating to registration**

1. The founding members of the SPE or any person authorised by them shall apply for the registration of the SPE, which may be made by electronic means, in accordance with the provisions of the applicable national law.
2. Member States shall not require any particulars and documents to be supplied upon application for the registration other than the following:
  - (a) the name of the SPE and the address of its registered office;
  - (aa) the telephone number, website and e-mail address of the SPE, if any;
  - (b) the business object or business activity of the SPE;
  - (c) the names, addresses and any other information necessary, in accordance with the applicable national law, to identify
    - (i) the director or directors of the SPE,
    - (ii) any other person who is authorised to represent the SPE in dealings with third parties and in legal proceedings,
    - (iii) the auditor of the SPE, if any;

- (ca) the fact whether the persons in letters i) and ii) of point c) represent the SPE individually or jointly;
- (cb) [Deleted]
- (d) the capital of the SPE and the amount that is paid up;
- (e) [Deleted]
- (f) the total number of units;
- (g) if the units have nominal value, the nominal value;
- (ga) the classes of units, if any, and the number of units in each class;
- (h) the name and address of the branches of the SPE, if any, the information necessary to identify the register of the branch and its number of entry;
- (i) the articles of association of the SPE;
- (j) subject to paragraph 6 of Article 15, the list of members;
- (k) the statement of the management body or other proof of the payment of consideration in cash or of the provision of consideration in kind, and details thereof;
- (l) if applicable, the statement of compliance;
- (m) where the SPE was formed as a result of a transformation or merger, the resolution or deed on the transformation or merger that led to the creation of the SPE and proof that the requirements of the applicable national law regarding the protection of creditors and minority members have been complied with;
- (ma) where the SPE was formed as a result of a cross-border merger, the pre-merger certificate, the common draft terms of cross-border merger and proof that the requirements of the applicable national law requiring the protection of creditors and minority members have been complied with;
- (mb) a certificate from the criminal records or a declaration of the director or directors that they have not been disqualified from serving as a director.

- 2a. Where directors provide the SPE and/or the register with a service address in addition to their personal address, only the service address shall be disclosed to third parties. Member States that require disclosure of the personal address of directors of the private limited-liability companies listed in Annex II may also require such disclosure concerning 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. The compliance of the documents and particulars of an SPE with this Regulation, the articles of association and national law shall be subject to control that shall be carried out in accordance with the applicable national law; in particular by a notary, a judicial body, another competent authority and/or by self-certification, including by an authorised signatory. However, unnecessary substantive controls of the documents and particulars shall be avoided<sup>20</sup>.
5. [Deleted]
6. The registration of an SPE shall be disclosed.

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<sup>20</sup> SK: suggests "prohibited" instead of "avoided"; LV: supports SK proposal - would have wanted single control.



### *Article 9a*

#### **Changes to documents and particulars submitted for registration**

1. The management body or any person authorised to represent the SPE shall submit any change with respect to the documents or particulars referred to in paragraph 2 of Article 9 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 the complete text of the articles of association to the register as amended to date.
2. The submission of the changes shall be made in accordance with the provisions of the applicable national law. Paragraph 4 of Article 9 shall apply.
3. The registration of changes with respect to the documents and particulars referred to in paragraph 2 of Article 9 shall be disclosed.

### *Article 10*

#### **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.
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 register of the SPE resulting from the merger.
4. Paragraph 1 shall apply to the registration of any change in the documents and particulars of an SPE.

*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.
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 10, with the number of entry of the SPE in that register;
  - (b) the name of the SPE, the Member State in which the SPE has its registered office, the address of its registered office and, where appropriate, the fact that the company is being wound up;
  - (c) the capital of the SPE;
  - (d) whether distributions are based on a balance-sheet test in accordance with paragraph 1, Article 21 and/or a solvency statement, in accordance with paragraph 4, Article 21.

*Article 12*

**Liability for acts undertaken before the registration of an SPE**

Liability for acts undertaken before the registration of an SPE shall be governed by the applicable national law.

*Article 13*

[Deleted]

*CHAPTER III*

*UNITS*

*Article 14*

**Units**

1. The units owned by each member of the SPE shall be entered in the list of members of an SPE.
2. Where applicable, units carrying the same rights and obligations shall constitute one class.
3. Subject to Article 28, the adoption of an amendment to the articles of association of the SPE which varies the rights or obligations attached to the units or a class of units (including any change to the procedure for varying the rights attached to the units or a class of units) shall require also the consent of a majority of not less than two-thirds of the voting rights attached
  - (a) to the units that are affected by the change, or
  - (b) where there is more than one class of units, to the units in each class that is affected by the change.

Any right to object to such variation of rights or obligations and to seek a remedy thereto shall be governed by applicable national law.

4. Where a unit is owned by more than one person, those persons shall be regarded as one member in relation to the SPE. They shall exercise their rights through a common representative and shall notify the management body of the SPE, without undue delay, of the name of the common representative and any change thereto. Until such notification, the exercise of their rights in the SPE shall be suspended. They shall be jointly and severally liable for the commitments attached to the unit.

*Article 15*

**List of members**

1. The management body of the SPE shall draw up a list of members. Only members may exercise the rights deriving from this Regulation and the articles of association, with regard to the SPE.
  - 1a. The list of members shall contain at least the following:
    - (a) the name, address and any other information necessary, in accordance with the applicable national law, to identify each member of the SPE;
    - (b) the number of units held by the member concerned or the percentage of the capital the units held by the member represents and, if the units have nominal value, their nominal value;
    - (ba) the rights and obligations attached to the units, if any;
    - (c) where applicable, where a unit is owned by more than one person, the names, addresses and any other information necessary, in accordance with the applicable national law, to identify the co-owners and the common representative;
    - (d) the date of acquisition of the units;
    - (e) the amount of each consideration in cash, if any, paid or to be paid by the member concerned to the company;
    - (f) the value and nature of each consideration in kind, if any, provided by the member concerned;
    - (g) the date on which a member ceases to be a member of the SPE.
2. Entries in the list of members shall include the date on which they have been entered.

Information deleted from the list of members and documents submitted by the members shall be stored by the SPE for 10 years of the day of the deletion.

3. [Deleted]
4. On written notification of a transfer of units, the management body shall, without undue delay, enter the member in the list of members, subject to compliance with this Regulation and rules regarding restrictions and prohibitions of the transfer of units in the articles of association, provided that the member submits evidence as to his lawful ownership of the unit.
5. [Deleted]

On the request of the member, the management body shall certify, without undue delay, in writing his membership in the SPE and his holdings.

6. An up-to-date list of members shall be kept by the management body and may be inspected by the members on request. Member States may extend the right to inspect that list to third parties subject to any conditions set out in applicable national law.

The list of members and any amendments thereto shall be lodged with the register and shall be disclosed. However, Member States may decide not to require the disclosure of all or some of the data contained in the list of members. In this case, the register shall provide members or third parties with a copy of the list of members on request. Member States may provide that only third parties proving their legitimate interest may receive such a copy.

7. Where members provide the SPE with a service address in addition to their personal address, only the service address may be disclosed to third parties.

However, Member States that require disclosure of the personal address of members of the private limited-liability companies listed in Annex II may also require such disclosure concerning the SPE.

#### *Article 16*

#### **Transfer of units**

1. Without prejudice to this Regulation, the transfer of the units of an SPE shall be governed by the applicable national law.
2. Subject to Article 28, a decision introducing or amending a restriction on or prohibition of the transfer of units may be adopted only with the consent of all members affected by the restriction or prohibition in question.
3. A unit of a member may not be purchased by another member or a third party unless it is fully paid.

#### *Article 17*

[Deleted]

#### *Article 18*

[Deleted]

## *CHAPTER IV*

### *CAPITAL*

#### *Article 19*

#### **Capital**

1. Without prejudice to Article 43, the capital of the SPE shall be expressed in euro.
2. The capital of the SPE shall be fully subscribed.
3. The capital of the SPE shall be at least EUR 1.

Member States may set a higher minimum capital requirement for SPEs registered in their territory than the amount in the first subparagraph. However, it shall not exceed EUR 8,000.<sup>21</sup>

- 3a. The Commission shall, two years after the date of application of this Regulation, analyse the effect of permitting Member States to set differing minimum capital requirements within the limit set in paragraph 3.
4. If applicable, units may not be issued at a price lower than their nominal value, or where they have no nominal value, their accountable par.

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<sup>21</sup> FR: considers EUR 8,000 to be too high; AT: considers it to be too low.

*Article 20*

**Consideration for units**

1. In the case of units acquired for consideration in cash, the member shall pay up on acquisition at least 25% of their value. In any case, an issue premium must be paid in full at the time of the acquisition of the unit.

However, on formation, at least an amount that is equivalent to the minimum capital requirement set in accordance with paragraph 3 of Article 19 by the Member State in which the SPE has its registered office shall be paid up at the time of acquisition of the units. Where the capital of the SPE is higher than the minimum capital requirement in that Member State, 25% of the amount by which the minimum capital requirement is exceeded shall also be paid up.

The member shall pay the remainder of the consideration when called upon by the management body, unless otherwise prescribed in the articles of association. In any case, the consideration shall be paid in full at the latest 3 years from the date of the acquisition of the unit.

- 1.a In the case of units acquired for consideration in kind, the member shall provide the consideration in full at the time of the acquisition of the unit.

Member States may prescribe that consideration in kind shall be evaluated by an independent expert.



2. Provision of work or services may not be accepted as consideration in kind.
3. Except in the case of a reduction of the capital, members may not be released from the obligation to pay or provide the agreed consideration.

*Article 21*

**Distributions**

1. The SPE may not make a distribution to its members if on the closing date of the last financial year the net assets as set out in the SPE's annual accounts are, or following such a distribution would become, lower than the amount of the capital plus those reserves which may not be distributed under the articles of association of the SPE. The calculation shall be based on the most recently adopted balance sheet. Changes in the capital or the reserves which may not be distributed which have occurred subsequent to the closing date of the financial year shall be taken into account. Where the part of the capital that is not paid up is not included in the assets shown in the balance sheet, this amount shall be deducted from the amount of the capital.
2. The amount of a distribution to members may not exceed the amount of the profits at the end of the last financial year plus any profits brought forward and sums drawn from reserves available for this purpose, less any losses brought forward and sums placed to reserve in accordance with the articles of association of the SPE. The calculation shall be based on the most recently adopted balance sheet.
3. If the articles of association allow for the payment of interim dividends, the following provisions shall apply:
  - (i) interim accounts shall be drawn up showing that the funds available for distribution are sufficient, and

- (ii) the amount to be distributed may not exceed the total profits made since the end of the last financial year for which the annual accounts have been drawn up, plus any profits brought forward and sums drawn from reserves available for this purpose, less losses brought forward and sums to be placed to reserve in accordance with the articles of association of the SPE.
4. Member States may require that at least 15 days before a resolution under Article 28(e) to make a distribution is agreed by the members, the management body must certify in writing that, having made full inquiry into the affairs and prospects of the SPE, the directors have formed the reasonable opinion that the SPE will be able to pay its debts as they fall due in the normal course of business in the year following the date of the proposed distribution (a "solvency statement"). The solvency statement must be signed by the management body and a copy of it must be provided to the members before the resolution on the distribution is taken.

The solvency certificate shall be disclosed in accordance with Council Directive 68/151/EEC of 9 March 1968.

#### *Article 22*

#### **Recovery of distributions**

Any member who has received distributions must return those distributions to the SPE, provided that the SPE proves that the member knew or in view of the circumstances should have been aware of the fact that the distribution was made contrary to Article 21 or that the solvency statement should not have been made.

*Article 23*

**Own units**

1. The SPE shall not, directly or indirectly, subscribe for its own units.
2. An SPE may purchase its own units, unless the articles of association prescribe otherwise.

An SPE may only purchase its own units from the amount available for distribution in accordance with Article 21. The units may not be purchased by the SPE unless they are fully paid.

The SPE shall always have at least one unit carrying voting rights held by a member different from the SPE.

Article 22 shall apply.

3. The right to vote and other non-pecuniary rights as well as the pecuniary rights attached to the SPE's own units shall be suspended, while the SPE is the registered owner of its own units.
4. [Deleted]
5. Units acquired by the SPE in contravention of this Regulation or of the articles of association shall be transferred or cancelled within one year of their acquisition.
- 5a. Where the SPE cancels its own units, its capital shall be reduced accordingly. For this purpose Article 24 shall apply.

6. This Article shall apply *mutatis mutandis* to any units subscribed or acquired by a person acting in his own name but on behalf of the SPE or by a legal body in which the SPE holds a majority of the voting rights or on which it can exercise a dominant influence as defined in Article 24a of the Directive 77/91/EEC.

*Article 24*

**Capital reduction**

0. The capital of the SPE may be reduced either to offset losses or to make a distribution to the members.
1. The resolution of the members to reduce the capital shall state the purpose of the reduction.

If the purpose of the capital reduction is to make a distribution to the members, the management body of the SPE shall notify its known creditors directly, without undue delay, about the reduction of the capital.

The resolution of the members shall be disclosed.

2. The capital may not be reduced below the amount determined by Member States in accordance with paragraph 3 of Article 19.
- 2a. Except for the case where the purpose of the reduction of the capital is to offset losses incurred by the SPE, those creditors whose claims antedate the disclosure of the resolution and which have not fallen due by the date of that disclosure shall have the right to request the SPE to provide them with adequate safeguards.

Requests for adequate safeguards shall be submitted within 30 calendar days of the disclosure of the resolution.

The SPE shall be required to provide safeguards if the creditor credibly demonstrates that due to the reduction of the capital the satisfaction of his claims is at stake, and the SPE has not provided him with adequate safeguards. Member States may, however, prescribe that creditors shall always have the right to obtain adequate safeguards from the SPE. In this case, paragraph 3 shall not apply.

The management body shall reply to the request for adequate safeguards of the creditor within 30 calendar days of the submission of the request.

3. If the SPE does not provide adequate safeguards or the creditor considers the safeguard unsatisfactory, the creditor shall have the right to apply to the competent court for an order that the SPE provide the creditor with adequate safeguard. An application shall be made within 30 calendar days of the response of the SPE to the request or in the absence of a response, within 60 calendar days of the submission of the request.

The court may order the SPE to provide safeguards 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.

- 3a. Any further safeguards provided to the creditors under the applicable national law by confirming capital reduction through court order may also apply.

4. A capital reduction shall take place as follows:
- (a) [Deleted]
  - (aa) where, in accordance with the third subparagraph of paragraph 2a, Member States prescribe that the creditors shall always have the right to obtain adequate safeguards, as soon as the SPE has complied with all its obligations to provide such safeguards;
  - (b) where no creditor has submitted a request to the SPE within 30 calendar days of the disclosure of the resolution of the members on the thirty-first calendar day following that disclosure;
  - (c) where the SPE has creditors at the time when the resolution is adopted and a request has been submitted to the SPE by a creditor within 30 calendar days of the disclosure of the resolution of members and no application is made to the court, on the ninety-first calendar day following the disclosure of the resolution;
  - (d) where the SPE has creditors at the time when the resolution is adopted, a request has been submitted to the SPE by a creditor and an application is made to the court within the deadline set out in paragraph 3, 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, as a result of a reduction of the capital, a distribution is made to the members, paragraphs 1 and 4 of Article 21 and Article 22 shall apply accordingly.
6. 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 members.
7. A capital reduction shall be disclosed.

*Article 25*

[Deleted]

*Article 26*

**Accounts and statutory audit**

1. An SPE shall be subject to the requirements of the applicable national law as regards the preparation, filing, auditing and publication of accounts.
2. The management body shall keep the accounting records of the SPE.

*CHAPTER V*  
*ORGANISATION OF THE SPE*

*Article 27*

**General provisions**

- 1a. The main decision-making body in the SPE shall be the general assembly of the members.
- 1b. [Deleted]
- 1c. The SPE shall have a management body.

Without prejudice to the third subparagraph, 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 members of the SPE, or, where applicable, the supervisory board.

However, in an SPE where the powers of the management body and/or the members of an SPE are partially governed by the applicable national law, the management body may exercise all the powers of the SPE not required by this Regulation, the articles of association or the applicable national law to be exercised by the members of the SPE, or, where applicable, the supervisory board.

- 1d. The decisions of the management body shall be recorded in writing.
2. [Deleted]



3. If the management body of an SPE consists of an administrative board, the SPE shall not have a supervisory board.
- 3a. Where an employee participation system established in accordance with applicable national law applies to the SPE, the SPE shall have an administrative board or a supervisory board as required by the applicable national law.

Where a transnational employee participation system, established in accordance with this Regulation, applies to the SPE, the SPE shall have an administrative board or a supervisory board allowing for the exercise of participation rights.

4. Member States may allow SPEs registered in their territory to have a managing director or managing directors who shall be responsible for the day-to-day management under the same conditions as for private limited-liability companies listed in Annex II.

#### *Article 28*

#### **Resolutions of the general assembly of the members**

1. At least the following matters shall be decided by a resolution of the general assembly of the members:
  - (a) [Deleted]
  - (b) [Deleted]
  - (c) [Deleted]
  - (d) approval of the annual accounts;

- (e) distribution to the members;
- (f) acquisition of own units;
- (g) increase of capital;
- (h) reduction of capital;
- (i) appointment and removal of directors and their terms of office unless the articles of association prescribe that the members of the management body are appointed and their terms of office are determined by the supervisory board;
- (j) where the SPE has an auditor, appointment and removal of the auditor;
- (k) transfer of the registered office of the SPE to another Member State;
- (l) [Deleted]
- (m) [Deleted]
- (n) winding up;
- (o) amendments to the articles of association;
- (oa) making the SPE subject to the standard rules set out in Article 35d, without any prior negotiations.

1a0. Member States may prescribe that the annual accounts need not be approved by a resolution of the general assembly of members.

1a. Point i) of paragraph 1 shall not apply to directors appointed or removed by the employees.

2. Unless the articles of association of the SPE prescribe a higher majority requirement, resolutions on the matters indicated in points (f), (g), (h), (k), (n) and (o) of paragraph 1 shall be taken by a qualified majority of at least two-thirds of the total voting rights attached to the units of the SPE.

Unless the articles of association of the SPE prescribe otherwise, resolutions on matters indicated in points (d), (e) and (oa), and on the removal of directors and auditors and their terms of office as indicated in points (i) and (j) shall be taken by a simple majority of the total voting rights attached to the units of the SPE.

As regards the appointment of directors and auditors, the person receiving the most votes shall be deemed to be appointed, unless otherwise prescribed in the articles of association.

The own units of the SPE and units of members whose voting rights are suspended shall be excluded from the calculation of any quorum and votes cast.

3. Without prejudice to paragraph 2 of Article 30, the adoption of resolutions shall not require the organisation of a general meeting. The management body shall provide all members with the proposals for resolutions together with sufficient information to enable them to take an informed decision. Resolutions shall be recorded in writing and subject to the formal requirements in this respect of the applicable national law. Copies of the decisions taken and voting results shall be sent to every member.
4. Resolutions of the members shall comply with this Regulation and the articles of association of the SPE.

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

5. If the SPE has only one member, he shall exercise the rights and fulfil the obligations of the general assembly 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 in accordance with the provisions of the applicable national law.

*Article 29*

**Information rights of members**

1. Members shall have the right to put questions to the management body relating to
  - (a) the items on the agenda of the general meeting;
  - (b) the proposal for resolutions;
  - (c) any important matters relating to the activities of the SPE.

The management body shall make the questions and the answers to such questions known to all members. The management body may provide an overall answer to questions having the same content. The answer shall be deemed to be given if the relevant information is available on the internet site of the SPE in a question and answer format.

2. The management body may refuse to answer only if doing so could cause serious harm to the business interests, including confidentiality, of the SPE. Refusal of access to information shall be justified in writing and made known to all members.

*Article 30*

**Right to request a resolution and right to convene a general meeting**

1. Members holding at least 5% of the voting rights attached to the units of the SPE shall have the right to request the management body to submit a proposal for a resolution to the members. The articles of association may provide for a threshold lower than 5%.

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

2. Members holding at least 10% of the voting rights attached to the units of the SPE shall have the right to request the management body to convene a general meeting. The articles of association may provide for a threshold lower than 10%.

The request must state the reasons and indicate the matters that should be on the agenda of the general meeting.

3. The voting rights attached to the own units of the SPE and to the units of members whose voting rights are suspended shall be excluded from the calculation of the thresholds in paragraphs 1 and 2.

*Article 30a*

[Deleted]

*Article 31*

**Directors**

1. Only a natural person may be a director of an SPE.
2. [Deleted]
- 2a. [Deleted]
3. A person who is disqualified under national law from serving as a director of a company by the law or a judicial or administrative decision of a Member State may not become or serve as a director of an SPE.
- 3a. Any restrictions applying to a person who was, is or wants to become a director of a company shall also apply to such a person who is to become a director of an SPE. Any restriction applying to a company that has such a person as a director shall also apply to the SPE.
4. Disqualification or restriction of a person serving as a director of the SPE shall be governed by the applicable national law.

*Article 32*

[Deleted]

*Article 33*

[Deleted]

*Article 34*

**Representation of the SPE in relation to third parties**

1. The management body shall have general power to represent the SPE in relation to third parties.
2. Acts undertaken by the management body shall be binding on the SPE even if they are not within the objects of the SPE. Unless otherwise prescribed in the articles of association of the SPE, the general power of representation shall be exercised by the members of the management body individually. Any limitation of the powers of the members of the management body other than that of joint representation by two or more members of the management body may not be relied on against third parties even if they have been disclosed.
3. The management body may grant authorisations to a third party to represent the SPE, unless the articles of association provide otherwise.

**CHAPTER VI**

**EMPLOYEE PARTICIPATION**

*Article 35*

**General provisions<sup>22</sup>**

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.

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<sup>22</sup> EE, IT, PL: reservation on this Article; EE: cannot accept employee participation when SPE is formed *ex nihilo* and cannot accept the lowering of the threshold.

- 1a. Articles 35a - 35d shall apply where one of the following conditions is fulfilled:
- (a) the SPE for a continuous period of three months after its registration has
    - at least 500 employees<sup>23</sup>, and at least 1/2 of its employees habitually work in a Member State that provides for a higher level of participation rights for employees than is provided for those employees in the Member State where the SPE has its registered office; or
  - (b) in the case of the transfer of the registered office of an SPE
    - at least 1/3 of its employees habitually work in the Home Member State at the time of its registration in the Host Member State; and
    - the employees in the Home Member State were provided with a higher level of participation rights than is provided for those employees in the Host Member State.

However, if a trans-national employee participation system, established in accordance with this Article, applies in the SPE at the time of the transfer, it shall continue to apply after the transfer if nothing else is agreed upon between the SPE and the special negotiating body.

- 1b. At least every three years, the management body of the SPE shall carry out a review to decide if the conditions in point (a) of paragraph 1a are fulfilled.

2. [Deleted]

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<sup>23</sup> HU, NL, AT, FI: threshold of 500 employees is still too high.



3. If an SPE takes part in a cross-border merger, the provisions of the laws of the Member States implementing Directive 2005/56/EC of the European Parliament and of the Council shall apply.
4. Member States shall take appropriate measures in conformity with Community law with a view to preventing the misuse of an SPE for the purpose of depriving employees of their right to employee participation or withholding such right.

*Article 35a*

**Election or appointment of members of the special negotiating body**

1. When the conditions in paragraph 1a of Article 35 are fulfilled, either in connection to the formation of the SPE or in connection to the review made in accordance with paragraph 1b of Article 35 the management body of the SPE shall take the necessary steps, including providing the information necessary to establish a special negotiating body, such as the number of employees in each Member State concerned, to start negotiations with the representatives of the employees on arrangements for the participation of employees in the SPE.
2. A special negotiation body representing the employees of the SPE shall be established.
  - (a) The members of the special negotiating body shall be elected or appointed. In electing or appointing the members of the special negotiating body, it must be ensured that the members are elected or appointed in proportion to the number of employees employed in each Member State, by allocating in respect of a Member State one seat per portion of employees employed in that Member State which equals 10%, or a fraction thereof, of the number of employees employed in all the Member States concerned. Accordingly, there shall be at least one representative from each Member State concerned, with the exception of the cases referred to in point (ea);

- (b) [Deleted]
- (c) Member States shall determine the method to be used for the election or appointment of the members of the special negotiating body who are to be elected or appointed in their territory.

Member States shall ensure that the employees, even if they are not represented by an employee representative through no fault of their own, have the right to elect or appoint members of the special negotiating body.

- (d) Member States may provide that the special negotiating body may include members of trade unions whether or not they are employees of the SPE.
- (e) The members of the special negotiating body shall be elected or appointed within 3 months of the date when the conditions in paragraph 1 of Article 35 a are fulfilled.
- (ea) Employees from one or more Member States may refrain from taking part in the establishment of the special negotiating body. Member States shall determine the method to be used in their territory for decisions to refrain from taking part in the establishment of the special negotiating body. Employees that have failed to elect or appoint a member or members within the time limit prescribed in point (e) shall not be taken into account when the seats in the special negotiating body are allocated or when the special negotiating body takes decisions in accordance with paragraphs 2 and 3 of Article 35b.

- (eb) If employees from a Member State or Member States have failed to elect or appoint a member or members in accordance with point (ea) the period in point (e) shall be extended by one month in order to allocate the remaining seat or seats in the special negotiating body to the other members.
- (f) If no members of the special negotiating body are elected or appointed within the period set out in point (e), 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.
- (g) Employees that have refrained from exercising their right to employee participation in accordance with point (ea) may rejoin the trans-national employee participation system when employees elect, appoint, recommend or oppose the appointment of new members of the administrative or supervisory board in accordance with the provisions of the agreement on arrangements for employee participation or paragraph 6 of Article 35d.

#### *Article 35b*

#### **Negotiation procedure**

1. The management body of the SPE and the special negotiating body shall determine, by written agreement, the arrangements for employee participation in the SPE.
2. Without prejudice to paragraph 3, the special negotiating body shall take decisions by the absolute majority of its members provided that such a majority represents the absolute majority of the employees of the SPE. Each member shall have one vote.

3. The special negotiating body shall have the right to decide, by a majority of two-thirds of its members representing at least two-thirds of the employees of the SPE including the votes of members representing employees in at least two Member States,
  - (a) to reduce participation rights in the agreement on arrangements for employee participation in relation to what is provided for in the concerned Member States; or
  - (b) not to open negotiations or to terminate negotiations already opened and to rely on the rules on employee participation, if any, applicable in the Member State in which the SPE has its registered office.
4. Negotiations shall commence as soon as the special negotiating body is established and may continue for six months thereafter.

The parties may decide, by joint agreement, to extend negotiations beyond the six-month period, up to a total of one year of the establishment of the special negotiating body.

- 4a. For the purpose of negotiations the special negotiating body may request experts of its choice to assist it with its work. Such experts may be present at negotiation meetings in an advisory capacity at the request of the special negotiating body.
5. Any expense relating to the functioning of the special negotiating body and, in general, to the negotiations shall be borne by the SPE so as to enable the special negotiating body to carry out its task in an appropriate manner. The SPE may limit the funding to cover one expert only.

**Agreement on arrangements for employee participation**

1. The management body of the SPE and the special negotiating body shall negotiate in a spirit of cooperation with a view to reaching an agreement on the arrangements for the employee participation in the SPE.
  
2. The agreement between the management body of the SPE and the special negotiating body shall include at least the following:
  - (a) the scope of the agreement;
  - (b) the arrangements for employee participation, in particular the number of members in the administrative or supervisory board of the SPE which the employees will be entitled to elect, appoint, recommend or oppose, the procedure as to how these members may be elected, appointed, recommended or opposed by the employees, and their rights;
  - (ba) how to include employees, who refrained from exercising their right to employee participation in accordance with paragraph 2(ea) of Article 35a, in the process of appointing, electing, recommending or opposing new members to the administrative or supervisory board;
  - (c) the date of entry into force of the agreement and its duration, cases where the agreement should be renegotiated, the procedure for its renegotiation and the consequence of a failure to reach a new agreement.

The agreement shall not, unless agreed otherwise, be subject to the standard rules in Article 35d.

*Article 35d*

**Standard rules**

1. The standard rules set out in this Article shall apply as follows:
  - (a) where the parties so agree;
  - (b) where by the deadline in paragraph 4 of Article 35b,
    - (i) no agreement has been concluded and
    - (ii) the special negotiating body has not taken the decision provided for in paragraph 3b of Article 35b.
    - (iii) [Deleted];
  - (c) when the conditions in paragraph 1a of Article 35 are fulfilled, the SPE shall have the right to decide, without any prior negotiation, to become directly subject to the standard rules.
- 1a. [Deleted]
2. The employees of the SPE shall have the right to elect, appoint, recommend or oppose the appointment of a number of members of the administrative or supervisory board of the SPE equal to the proportion applicable in the Member State concerned providing for the highest level of participation rights.<sup>24</sup>
3. Member States may, in the case where the standard rules for employee participation apply and notwithstanding these rules, limit the proportion of employee representatives in the administrative or supervisory board of the SPE to one third.

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<sup>24</sup> EE, LT: replace "for the highest level of participation rights" by "where most of the employees habitually work".

- 3a. If more than one form of participation is prescribed by the law of the Member States concerned, the special negotiating body shall decide which of those forms must be established in the SPE. Member States may decide on the rules that, in the absence of a decision on the matter, shall be applicable for SPEs registered in their territory. The special negotiating body shall inform the SPE of any decisions taken pursuant to this paragraph.
4. The special negotiating body shall decide on the allocation of seats in the administrative or supervisory board among the members representing the employees from the various Member States or on the way in which the employees of the SPE may recommend or oppose the appointment of the members of these bodies according to the proportion of the employees of the SPE in each Member State concerned.
5. Every member of the administrative or supervisory board of the SPE elected, appointed or recommended by the special negotiating body shall be a member with the same rights and obligations as those, non-managing directors, representing the members of the SPE, including the right to vote.
6. When employees elect, appoint, recommend or oppose the appointment of new members of the administrative or supervisory board, a special negotiating body shall be created in accordance with Article 35a.

**CHAPTER VII**  
**TRANSFER OF THE REGISTERED OFFICE OF THE SPE**

*Article 36*

**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 existing before the transfer.

2. An SPE may not transfer its registered office if proceedings for winding-up, liquidation, insolvency or suspension of payments or other similar proceedings have been brought against it, 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 paragraphs 2, 3 and 4 of Article 4, the SPE shall be governed by the law of the host Member State.
4. In respect of any cause of action arising prior to 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 even if the SPE is sued after the transfer.



*Article 37*

**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, the address of its registered office in the home Member State, the information necessary to identify the register referred to in Article 10 and the number of the SPE in that register;
  - (b) the proposed 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 likely consequences of the transfer for employees, and the proposed measures concerning them;
  - (f) where appropriate, detailed information on the transfer of the central administration or principal place of business of the SPE;
  - (fa) any rights provided for the protection of members and/or creditors.
  
2. At least one month before the resolution of the members referred to in point (k) of paragraph 1 of Article 28 is taken, the management body of the SPE shall:
  - (a) submit the transfer proposal to each of the members 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;
  - (b) disclose the transfer proposal.

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

Where the management body receives the opinion of the employee representatives on the transfer within 21 calendar days from the date of submission of the report, that opinion shall be attached to the report.

4. Members 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.
5. The protection of any minority members who oppose the transfer and of the creditors of the SPE shall be governed by the law of the home Member State.

#### *Article 38*

#### **Scrutiny of the legality of the transfer**

1. Each Member State shall designate a competent authority to scrutinise the legality of the transfer.
2. The competent authority of the home Member State shall issue a certificate attesting to the completion of the acts and the formalities to be accomplished before the transfer.

- 2a. The competent authority of the home Member State may oppose the transfer of a registered office within the one-month period referred to in Article 37. Such opposition may be based only on the grounds of public interest.

Where an SPE is supervised by a national financial supervisory authority according to Community directives the right to oppose the change of registered office applies to this authority as well.

Review by a judicial authority shall be possible.

3. Within one month of the receipt of the certificate referred to in paragraph 2, the SPE shall submit the following particulars and documents to the competent authority in the host Member State:
- (a) the certificate provided for in paragraph 2;
  - (b) the transfer proposal, as approved by the members;
  - (c) the particulars and documents listed in points a)-m) and mb) of paragraph 2 of Article 9.

Article 9 and paragraphs (1) and (4) of Article 10 shall apply accordingly.

4. Within a period stipulated by the Member States that shall not be longer than one month of the receipt of the documents and particulars referred to in paragraph 3, the competent authority of the host Member State shall decide whether documents and particulars referred to in paragraph 3 are complete and whether the relevant provisions of the law of the host Member State are complied with. If that is found to be the case, the competent authority of the host Member State shall take the measures necessary for the registration of the SPE.

5. [Deleted]
6. Using the notification form set out in Annex III, 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.
- 7a. On disclosure of the new registration of an SPE, the new registered office may be relied on as against third parties. However, as long as the deletion of the registration of the SPE from the register of the home Member State has not been disclosed, third parties may continue to rely on the previous registered office unless the SPE proves that such third parties were aware of the new registered office.

*Article 39*  
[Deleted]

**CHAPTER VIII**  
**RESTRUCTURING, DISSOLUTION AND NULLITY**

*Article 40*

**Restructuring**

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

*Article 41*

**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 members;
  - (c) in cases set out in the articles of association or the applicable national law.
  
2. Winding-up, liquidation, insolvency, suspension of payments and similar procedures shall be governed by the applicable national law and by Council Regulation (EC) No 1346/2000.<sup>25</sup>
  
3. Dissolution of the SPE shall be disclosed.

*Article 42*

**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) of Article 11(2) and Article 12 of that Directive.

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<sup>25</sup> OJ L 160, 30.6.2000, p. 1.

**CHAPTER IX**  
**ADDITIONAL AND TRANSITIONAL PROVISIONS**

Article 43

**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 date on which the articles of association are signed or, in the case of an amendment, adopted.
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.

**CHAPTER X**  
**FINAL PROVISIONS**

Article 44

**Effective application**

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

*Article 45*

**Sanctions**

The Member States shall lay down the rules on sanctions applicable to infringements of the provisions of this Regulation and shall take all measures necessary to ensure that they are implemented. The sanctions provided for must be effective, proportionate and dissuasive. The Member States shall notify those provisions to the Commission by *[2 years following the entry into force]* at the latest and shall notify it without delay of any subsequent amendment affecting them.

*Article 46*

[Deleted]

*Article 47*

**Obligations of Member States and authorities responsible for registers**

1. Member States 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 calendar year as well as the total number of registered SPEs.
  - 1a. Member States shall inform the Commission about the competent authorities within the meaning of paragraphs 2, 3 and 6 of Article 38. The Commission shall make such information available on its website.
2. The authorities responsible for the register referred to in paragraph 1 of Article 10 shall cooperate with each other with regard to the documents and particulars of the SPEs.

*Article 48*

**Review**

The Commission shall, five year after the entry into force of this Regulation, review its application.

*Article 49*

**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 [2 years after its entry into force].

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

Done at Brussels, [...]

For the Council  
The President  
[...]



Matters on which provisions may be included in the articles of association of an SPE in accordance with paragraph 1a of Article 8:

- (1) the period for which the SPE is established,
- (2) sub-division, consolidation or redenomination of the units,
- (3) restrictions and prohibitions on the transferability of the units,
- (4) the evaluation of consideration in kind,
- (5) the time when the payment of consideration in cash is to be made,
- (6) interim dividends,
- (7) the purchase, transfer and cancellation of own units,
- (8) the increase of capital,
- (9) the procedure for proposing and adopting resolutions of the general assembly of members,
- (10) resolutions to be adopted by the general assembly of the members, in addition to those listed in Article 28(1), the quorum and the required majority of voting rights,
- (11) the means of communication between the SPE and its members,
- (12) the period of time and the manner in which the members are to be informed of proposals for resolutions of the members and items on the agenda of the general meetings,
- (13) the manner in which copies and voting results of an adopted resolution are to be made available to the members,
- (14) the manner of convening the general meeting, the working methods and the rules on voting by proxy,
- (15) the procedure and time limits for the SPE to respond to requests from members for information,
- (16) any eligibility criterion of directors,
- (17) any procedure for appointing or removing directors,

- (18) in cases where the applicable national law does not require an SPE to have an auditor, whether the SPE has an auditor and where the articles of association so provide, the procedure for his appointment, removal and resignation,
  - (19) related party transactions, and whether they need to be authorised, and, if so, the method for their authorisation.
  - (20) the reduction of capital,
  - (21) access to documents of the SPE by the members,
  - (22) the procedure for proposing a resolution to be applied if the management body does not submit a proposal on a request in accordance with paragraph 1 of Article 30,
  - (23) the procedure for convening a general meeting to be applied if the management body does not convene a general meeting on a request in accordance with paragraph 2 of Article 30.
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**List of private limited-liability companies referred to in Article 4**

— In Belgium:

**La société privée à responsabilité limitée (SPRL) / De besloten vennootschap met beperkte aansprakelijkheid (bvba);**

— In Bulgaria:

**ДПСФЕЯРБН Я НЦПЮМХВЕМИО НРЦНБНПМНЯР (ННД);**

— In the Czech Republic:

**Společnost s ručením omezeným;**

— In Denmark:

**anpartsselskab;**

— In Germany:

**Gesellschaft mit beschränkter Haftung;**

— In Estonia:

**osaühing (“OÜ”);**

— In Greece:

**Etaireia Periorismenis Efthisis (“E.P.E.”) / Εταιρία περιορισμένης ευθύνης;**

— In Spain:

**Sociedad de responsabilidad limitada;**

— In France:

**société par action simplifiée (S.A.S.)**

— In Ireland:

**private company incorporated with limited liability and having a share capital;**

— In Italy:

**società a responsabilità limitata (s.r.l.);**

— In Cyprus:

**Ιδιωτική εταιρεία περιορισμένης ευθύνης με μετοχές;**

— In Latvia:

**sabiedrība ar ierobežotu atbildību;**

— In Lithuania:

**Uždaroji akcinė bendrovė;**

— In Luxembourg:

**la société à responsabilité limitée;**

— In Hungary:

**zártkörűen működő részvénytársaság ("Zrt.");**

— In Malta:

**private limited liability company;**

— In the Netherlands:

**Besloten Vennootschap;**

— In Austria:

**die Gesellschaft mit beschränkter Haftung (GmbH);**

— In Poland:

**spółka z ograniczoną odpowiedzialnością;**

— In Portugal:

**Sociedade por quotas;**

— In Romania:

**societate cu răspundere limitată;**

— In Slovenia:

**družba z omejeno odgovornostjo ("d.o.o.");**

— In Slovakia:

**Spoločnosť s ručením obmedzeným,;**

— In Finland:

**yksityinen osakeyhtiö / privat aktiebolag;**

— In Sweden:

**privat aktiebolag;**

— In the United Kingdom:

**private company limited by shares.**

**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 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]*