



**COUNCIL OF  
THE EUROPEAN UNION**

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Subject: Proposal for a Council Regulation on the Statute for a European private  
company (SPE)  
*- Revised Presidency compromise proposal*

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Delegations will find in Annex a revised compromise proposal prepared by the Presidency on the basis of recent discussions in the Working Party.

Changes with respect to the previous version of the Presidency proposal (doc. 17152/08) are underlined.

Revised Presidency compromise 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,<sup>1</sup>

Having regard to the opinion of the European Parliament,<sup>2</sup>

Having regard to the opinion of the European Economic and Social Committee,<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.
- (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.

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<sup>1</sup> OJ C [...], [...], p. [...].

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

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

<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)

- (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 shares may not be offered to the public or traded either on a regulated market or on a multilateral trading facility. However, offers of shares to less than 100 natural persons or legal bodies should be authorised as they are addressed to a restricted circle of persons. Moreover, in the interest of legal clarity, employee share schemes should be explicitly allowed.
- (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. Other issues relating to the seat of an SPE should be governed by national law, in accordance with Community law.
- (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 members 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 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, national law should apply to further provisions in the articles of association that are not required by this Regulation or its Annex I. Moreover, where the articles of association of an SPE, intentionally or by omission, do not include a provision which is required by Annex I, that matter shall be governed by applicable national law. 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. [...]
- (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* or as a result of the transformation, the merger or the division of existing national legal bodies. Member States must ensure that SPEs are not treated less favourably than national private limited-liability companies. The creation of an SPE by way of transformation, merger or division of legal bodies should be governed by [...] national law, including [...] any explicit or implicit prohibition or restriction applicable to the transformation, merger or division of [...] legal bodies [...] into a national private company with limited liability.

- (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. The formation of an SPE by merger of existing legal bodies from different Member States should be governed by national law including the provisions implementing Directive 2005/56/EC.
- (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 contain either the abbreviation or the letters “SPE” should not be required to change their name.
- (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.<sup>5</sup>
- (9) Since small businesses often require long term financial and personal commitment, they should be able to adapt the structure of their subscribed capital and the rights attached to shares to their specific circumstances. The members of the SPE 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 its members, the SPE should have the possibility of applying to court to expel members who seriously harm its interests and members 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 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.
- (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.

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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).

- (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 their 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 one or more individual managing directors, a unitary or a dual board structure. However, 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 shares of the SPE. While a limit may be introduced on the right to request a resolution [...], 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. A threshold of 10% should apply to the right to convene a general meeting.
- (14) [...]
- (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. Where the national legislation of the Member State to which the SPE transfers its registered office does not provide for [...] employee participation [...], the participation of employees in the company following the transfer should in certain circumstances be negotiated. [...]
- (17) 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<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>

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<sup>6</sup> 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).

<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.

- (18) 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.
- (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 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) 'member of an SPE' means any natural person or legal body whose name is entered in the list of members in accordance with Article 15;
  - (b) 'share' means a unit of capital, expressed in percentage or number, conferring rights on the holder of the unit, which may be subject to obligations and conditions, in accordance with this Regulation and the articles of association of an SPE;<sup>10</sup>
  - (c) 'distribution' means any financial benefit derived directly or indirectly from the SPE by a member, in relation to the shares held by him, including any transfer of money or property. Distributions may take the form of a dividend, be made through a purchase of property, redemption or other kind of acquisition of shares by the SPE or by any other means;
  - (d) 'director' means
    - (i) any individual managing director,
    - (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) an individual managing director,
    - (ii) where the articles of association provide for a dual board regime, the management board,

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<sup>10</sup> PT prefers using the term „social participation/parts“. LT has a reservation on this definition.

(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 an SPE;

(ea) 'supervisory board' means a board which supervises the work of the management board or where applicable, the managing director;

(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.

(i) [...]

(j) [...]

2. For the purposes of point b) of paragraph 1 Member States may determine additional characteristics of the unit of capital with respect to SPEs having their registered office in their territory.

### *Article 3*

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

1. An SPE shall have the following characteristics <sup>11</sup>:

(a) its capital shall comprise shares,

(b) a member of an SPE shall not be liable for more than the amount he has subscribed <sup>12</sup>,

(c) it shall have legal personality,

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<sup>11</sup> BE, DE, IE, AT, UK consider that a cross-border element should be included in the characteristics. NL has a scrutiny reservation on this issue.

<sup>12</sup> DE: stress that the member is not personally liable for the obligations of the company.



- (d) its shares 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,
  - (e) it may be formed by one or more natural persons and/or legal bodies.
2. For the purposes of point (d) of paragraph 1, shares shall be regarded as 'offered to the public' where they are offered for subscription or sale to more than 100 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.<sup>13</sup>
- An offer of the shares of an SPE to its employees shall not be regarded as an offer to the public.
3. For the purposes of point (d) of paragraph 1, 'regulated market' means a market defined in point 14 of paragraph 1 of Article 4 of Directive 2004/39/EC<sup>14</sup> and 'multilateral trading facility' means a facility defined in point 15 of paragraph 1 of Article 4 of Directive 2004/39/EC.
4. [...]

*Article 4*  
**Rules applicable to an SPE**

1. An SPE shall be governed by:
- (a) [...] this Regulation, including its Annexes, 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 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<sup>15</sup>
  - (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 in the articles of association of an SPE.<sup>16</sup>

<sup>13</sup> NL prefers this paragraph to be deleted.

<sup>14</sup> OJ L 145, 30.4.2004, p. 1–44

<sup>15</sup> DE proposes to delete paragraph 2 point a).

<sup>16</sup> IE, LT, NL, SK, FI, SE prefer to include the word “partly” in paragraph 3 so that it would read “... where such matters have not or only partly been included in the articles...”. Moreover, according to ES and LT, this paragraph is in contradiction with Art. 8(1).

**CHAPTER II**  
**FORMATION**

*Article 5*  
**Method of formation**

1. An SPE may be formed by any of the following methods:
  - (a) the creation of a SPE *ex nihilo*, in accordance with this Regulation;
  - (b) the transformation of an existing legal body <sup>17,18</sup>;
  - (c) the merger of existing legal bodies;
  - (d) the division of an existing legal body.<sup>19</sup>
  
2. Formation of the SPE by the transformation, merger or division of existing legal bodies shall be governed by the national law applicable to the transforming legal body, to each of the merging legal bodies or to the dividing legal body. Formation by transformation shall not give rise to the winding up of the legal body or any loss or interruption of its legal personality.

An SPE may not be formed by transformation, merger or division of legal bodies, if the applicable national law prohibits, restricts or does not provide for a possibility to:

  - (a) [...] transform such legal bodies into a private limited-liability company,
  - (b) [...] merge or divide such legal bodies where, in the case of a merger, the resulting company or, in the case of a division, at least one recipient company is a private limited-liability company.
  
3. [...]
  
- 3a. 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 transforming legal body.

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<sup>17</sup> RO and AT have a reservation on the term “legal body”.

<sup>18</sup> FI and SE prefer not allowing the transformation of a national company into an SPE.

<sup>19</sup> DE and AT: reservation on points (c) and (d).

*Article 6*  
**Name of the company**

1. The name of an SPE shall be followed by the abbreviation "SPE".  
Only an SPE may add the abbreviation "SPE" to its name.<sup>20</sup>
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", shall not be required to modify their names.

*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. [...] <sup>21</sup>

*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 an SPE shall be in writing and signed by every founding member.
3. The articles of association and any amendments thereto may be relied upon in accordance with the provisions of the applicable national law implementing paragraphs 5, 6 and 7 of Article 3 of Directive 68/151/EEC.<sup>22</sup>
4. Without prejudice to this Regulation, Member States may draw up model articles of association.<sup>23</sup>

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<sup>20</sup> PT asks to include the word "Limitada" in the name of an SPE created by transformation.

<sup>21</sup> BE, FR, LU, PL and AT prefer to keep the following part of the last phrase "The seat of the SPE shall be governed by national law." If this sentence is added, the COM would like to add also reference to Community law. Moreover, IE, NL, SK and FI ask to add the possibility to have the central administration outside the EU.

<sup>22</sup> OJ L 65, 14.3.1968, p. 8

<sup>23</sup> IE, NL and FI ask for default rules in the Regulation.

*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 implementing Article 3 of Directive 68/151/EEC.
2. Member States shall not require any particulars and documents to be supplied upon application for the registration of an SPE 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 to identify
    - (i) the 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) of paragraph 2 represent the SPE individually or jointly;
  - cb) if applicable, the fact that the SPE has a single member and the name, address and any other information necessary to identify him;
  - d) the subscribed capital of the SPE and the amount that is paid up;
  - e) the share classes, if any, and the number of shares in each share class;
  - f) the total number of shares;
  - g) if the shares have nominal value, the nominal value;
  - h) the name and address of the branches of an 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 declaration of 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, merger or division of companies, the resolution or deed on the transformation, merger or division 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 regarding the protection of creditors and minority members have been complied with;

mb) a certificate from the criminal records or a declaration of the director that he has not been disqualified from serving as a director.

2a. Where directors and/or a single member 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.

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 a single control.<sup>24</sup> This control 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, there shall be no duplication of substantive controls of the documents and particulars.

5. The management body [...] or any person authorised to represent the SPE shall submit any change with respect to the particulars or documents referred to in [...] paragraph 2 to the register within 14 calendar days <sup>25</sup> 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.<sup>26</sup> The submission of the changes may be done by electronic means in accordance with [...] paragraph 1. Paragraphs 3 and 4 shall apply.

6. The registration of an SPE 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 in accordance with Article 3 of Directive 68/151/EEC.

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<sup>24</sup> DE, EE, and AT propose to delete the reference to a single control.

<sup>25</sup> UK prefers shortening the period.

<sup>26</sup> BE, ES, IT, NL, AT and UK prefer that the SPE submits only the amendments. UK: such submission should be made within 40 days.

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.

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 in the register of the SPE resulting from the division.

4. Paragraph 1 shall apply to the registration of any change in the documents and particulars of an SPE.

#### *Article 11* **Disclosure**<sup>27</sup>

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 10, 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**

Liability for acts undertaken before the registration of an SPE shall be governed by the applicable national law, including the provisions implementing Article 7 of Directive 68/151/EEC.

#### *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.<sup>28</sup>

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<sup>27</sup> IE proposes to add a reference to Article 11 in all provisions requiring disclosure.

<sup>28</sup> OJ L 395, 30.12.1989, p. 36

**CHAPTER III**  
**SHARES**

*Article 14*  
**Shares**

1. The shares of the SPE shall be entered in the list of members of an SPE.
2. If relevant, shares 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 or any other resolution of the members which varies the rights attached to the shares or a class of shares (including any change to the procedure for varying the rights attached to the shares or a class of share) shall require also the consent of a majority of not less than two-thirds<sup>29</sup> of the voting rights attached
  - (a) to the shares that are affected by the change or
  - (b) where there is more than one class of shares, to the shares [...] in each class that is affected by the change.
4. Where a share 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 share.
5. [...]

*Article 15*  
**List of members of an SPE**

1. The management body of the SPE shall draw up a list of members. The list shall contain at least the following:
  - (a) the name, [...] address and any other information necessary to identify each member of an SPE;
  - (b) the number of shares held by the member concerned or the percentage of the capital the share held by the member represents and, if the shares [...] have nominal value, their nominal value;
  - (ba) the votes attached to the shares, if any;

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<sup>29</sup> IE prefers a ¾ majority.

- (c) if applicable, where a share is owned by more than one person, the names, addresses and any other information necessary to identify the co-owners and of the common representative;
- (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 member concerned to the company;
- (f) the value and nature of each consideration in kind, if any, provided or to be provided by the member concerned;<sup>30</sup>
- (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. In case members provide the SPE with a service address in addition to their personal address, only the service address may be disclosed to third parties.

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

5. The list of members shall, unless proven otherwise, constitute evidence of the accuracy of the matters listed in points (a) to (g) of paragraph 1. Only members registered in the list of members may exercise the rights of members deriving from this Regulation and the articles of association, with regard to the SPE.

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. The list of members and any amendments thereto 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 complete list of members shall be kept by the management body and may be inspected by the members or third parties on request.<sup>31</sup>

<sup>30</sup> ES prefers to merge points e) and f).

<sup>31</sup> DK, ES and UK: third parties should have access only when they have legitimate interest.



*Article 16*  
**Transfer of shares**

Subject to Article 28, a decision introducing or amending a restriction on or prohibition of the transfer of shares may be adopted only with the consent of all members affected by the restriction or prohibition in question.<sup>32</sup>

With the exception of Article 17, shares of a member may not be purchased by another member or a third party unless they are fully paid.

*Article 17*  
**Expulsion of a member**<sup>33</sup>

1. A member may be expelled from an SPE if he has caused serious harm to the SPE's interest or the continuation of his membership in the SPE is detrimental to its proper operation.<sup>34</sup>

A member may also be expelled from an SPE if he has not paid up the consideration in cash or provided the consideration in kind in accordance with Article 20 and the articles of association of the SPE.

1a. A member holding more than 50% of the total voting rights attached to the shares of the SPE may not be expelled.

2. In situations described in paragraph 1, the management body of the SPE shall send a written notice to the member concerned presenting the reasons for expulsion. The member concerned shall respond to this notice within 8 calendar days of its receipt.

2a. If the management body considers that the grounds for expulsion continue to exist and/or the member has not responded to the notice in paragraph 2, the management body of the SPE shall request a resolution of the members regarding the expulsion within 15 calendar days of receiving the response or of the expiration of the deadline set out in paragraph 2. The member concerned shall not have the right to vote when this decision is taken and his shares shall be excluded from the calculation of the quorum and voting rights.<sup>35</sup>

[...]

3. The members of the SPE or the SPE shall have the right to buy the shares of the member concerned at an equitable price<sup>36</sup>.

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<sup>32</sup> PL prefers not to restrict the transfer of shares or to do so only for a limited period of time, e.g. for 3 years. IT has a scrutiny reservation.

<sup>33</sup> IE, NL, PL, FI and SE prefer to leave this matter to national law.  
DE, IE, ES and IT: scrutiny reservation. UK prefers to leave this matter to the articles of association.

<sup>34</sup> IE, ES, CY, NL, PL, SK and FI: terms, such as "serious harm" and "detrimental", should be more clearly defined.

<sup>35</sup> AT and FI request the convocation of the general meeting.

<sup>36</sup> IT has a reservation.

4. In the case of a dispute regarding the equitable 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.<sup>37</sup>
5. Where no agreement is reached under paragraphs 3 and 4 within 90 calendar days of the resolution of the members, the member concerned shall have the right to sell his shares to third parties in accordance with the articles of association. [...]
6. The amount corresponding to the price of the shares shall be paid, without undue delay, to the member being expelled from the SPE.
7. In the case of a dispute between the parties, on the application of the member concerned [...] or on the basis of a resolution of the members and on an application by the SPE, the competent court may order the expulsion of a member.<sup>38</sup>
8. If the court orders the expulsion of a member, it shall decide whether his shares are to be purchased by the other members and/or by the SPE itself and/or on payment of the equitable price of the shares. Paragraph 6 shall apply.

#### *Article 18*

#### **Withdrawal of a member** <sup>39</sup>

1. A member 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 member 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;
  - (ca) as a result of a resolution in paragraph 3 of Article 14, the rights of the member are diminished or his obligations are increased provided that the member concerned did not vote in favour of the resolution;
  - (d) any other situation set out in the articles of association.
2. The member shall submit his withdrawal in writing to the SPE stating his reasons for the withdrawal.

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<sup>37</sup> DE has a scrutiny reservation.

<sup>38</sup> AT prefers setting a deadline for application to the court.

<sup>39</sup> ES requests for the possibility to reduce the capital without transfer of share. UK prefers to leave this matter to the articles of association.

3. The management body of the SPE shall, within 15 calendar days of receiving the notice referred to in paragraph 2 [...], request a resolution of the members on the withdrawal. The member concerned shall not have the right to vote when this decision is taken and his shares shall be excluded from the calculation of the quorum and voting rights.
4. Where the members of the SPE fail to adopt a resolution referred to in paragraph 3 or do not accept the member's reasons for withdrawal within 15 calendar days of the submission of the notice referred to in paragraph 2, the management body shall notify the member of that fact without undue delay.
5. The members of the SPE or the SPE shall have the right to buy the shares of the member concerned at an equitable price.
6. In the case of a dispute regarding the equitable 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.
7. Where no agreement is reached under paragraphs 5 and 6 within 90 calendar days of the resolution of the members, the member concerned shall have the right to sell his shares to third parties in accordance with the articles of association. [...]
8. The amount corresponding to the price of the shares shall be paid, without undue delay, to the member withdrawing from the SPE.
9. On an application of the member, the competent court may, if satisfied that the interests of the members have suffered serious harm, order the purchase of his shares by the other members and/or by the SPE itself and/or the payment of the equitable price of the shares. Paragraph 8 shall apply.

## 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.<sup>40</sup>
4. If applicable, shares may not be issued at a price lower than their nominal value, or where they have no nominal value, their accountable par.

### *Article 20* **Consideration for shares**

1. In the case of shares acquired for consideration in cash, the member shall pay up on acquisition at least 25 % of their [...] value [...]. The member shall pay the consideration in full within 3 years of the acquisition of the share.

In the case of shares acquired for consideration in kind, the member shall provide the consideration in full within 3 years of the acquisition of the share<sup>41</sup>.

2. Provision of work or services may not be accepted as consideration in kind. Member States may allow SPEs having their registered office in their territory to accept work or services as consideration in kind provided that a report by an independent expert in accordance with Article 10 of the Directive 77/91/EEC is drawn up.
3. Except in the case of a reduction of the subscribed capital, members may not be released from the obligation to pay or provide the agreed consideration.

### *Article 21* **Distributions**

1. Except in the case of a reduction of the subscribed capital, 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 subscribed capital plus those reserves which may not be distributed under the applicable national law or the articles of association of the SPE. Changes in the subscribed capital which have occurred subsequent to the closing date of the financial year shall be taken into account. Where the uncalled part of the subscribed capital is not included in the assets shown in the balance sheet, this amount shall be deducted from the amount of the subscribed capital.

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<sup>40</sup> BE, DE, ES, LV, LT, LU, MT and AT request a higher level of minimum capital. DK has a scrutiny reservation.

<sup>41</sup> SK: consideration in kind should be provided in full at the time of the acquisition of the share.

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 applicable national law or 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 applicable national law or the articles of association of the SPE.
4. Member States may require that the management body of the SPE, in addition to complying with paragraphs 1-3, shall sign a statement, hereinafter a 'solvency certificate', at the latest 15 calendar days before a distribution is made,<sup>42</sup> 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. Members shall be provided with the solvency certificate before the resolution on the distribution referred to in Article 28 is taken.<sup>43</sup>

The solvency certificate shall be disclosed.

#### *Article 22*

#### **Recovery of distributions**

Any member who has received distributions made contrary to Article 21 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 irregularities.<sup>44</sup>

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<sup>42</sup> FI: it should be at the time of distribution.

<sup>43</sup> IE, NL, PL and UK: it should be optional for Member States whether to require the balance sheet test, under paragraph 2, or the solvency test, under paragraph 4. IT and AT prefer to have both tests mandatory.

<sup>44</sup> AT prefers to reverse the burden of proof: „Any member who has received distributions made contrary to Article 21 must return those distributions to the SPE. A member shall, however, not be compelled to pay back a profit share that he has received in good faith.”

*Article 23*  
**Own shares**

1. The SPE shall not, directly or indirectly, subscribe for its own shares.
2. An SPE may only purchase its own shares from the amount available for distribution in accordance with Article 21. [...] Article 22 shall apply. Shares may not be purchased by the SPE unless they are fully paid.

The SPE shall always have at least one share held by a member different from the SPE.

3. The right to vote and other non-pecuniary rights as well as the 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 subscribed capital shall be reduced accordingly.
- 4a. Shares acquired by the SPE shall be transferred or cancelled within three years of their acquisition.
5. Shares acquired by the SPE in contravention of this Regulation, [...] the articles of association or the applicable national law shall be transferred or cancelled within one year of their acquisition.
6. This Article shall apply mutatis mutandis to any shares subscribed or acquired by a person acting in his own name but on behalf of the SPE and by a subsidiary in which the SPE holds a majority of the voting rights or on which it can exercise a dominant influence in accordance with the provisions of the applicable national law implementing Article 24a of the Directive 77/91/EEC.

*Article 24*  
**Capital reduction**

1. The resolution of the members to reduce the subscribed capital of the SPE shall be disclosed.<sup>45</sup> The resolution shall state the purpose of the reduction, in particular whether it is to make a distribution to members or to offset losses incurred by the SPE. The management body of the SPE shall notify its known creditors directly about the reduction of the subscribed capital.
2. The subscribed capital may not be reduced below the amount set out in 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.

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<sup>45</sup> ES considers that once the resolution is disclosed it is not necessary to notify the creditors.

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.

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 them 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.

4. A capital reduction shall take place as follows:

- (a) [...]
- (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 sixty-first 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 subscribed capital, a distribution is made to the members, Articles 21 and 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.

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

*Article 25*

[...]

*Article 26*

**Accounts and statutory audit**

1. An SPE shall be subject to the requirements of the applicable national law, including the provisions implementing directives 78/660/EEC, 83/349/EEC and 2006/43/EC, 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. The general assembly shall determine the organisation of the SPE, subject to this Regulation.<sup>46</sup>
- 1c. The SPE shall have a management body [...]. 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.
2. [...]
3. If the management body of an SPE consists of an administrative board [...], the SPE shall not have a supervisory board.

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<sup>46</sup> ES prefers a Member State option on the management structure.



*Article 28*

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

1. Without prejudice to paragraph 2, at least the following matters shall be decided by a resolution of the general assembly of the members by a majority as defined in the articles of association of the SPE:
- (a) variation of rights attaching to shares;<sup>47</sup>
  - (b) expulsion of a member;
  - (c) withdrawal of a member;<sup>48</sup>
  - (d) approval of the annual accounts;<sup>49</sup>
  - (e) distribution to the members;
  - (f) acquisition of own shares;
  - (g) increase of subscribed capital;
  - (h) reduction of subscribed capital;
  - (i) appointment and removal of directors and their terms of office;<sup>50</sup>
  - (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<sup>51</sup>;
  - (l) transformation of the SPE;
  - (m) mergers and divisions;
  - (n) winding up;
  - (o) amendments to the articles of association, not covering matters mentioned in points (a) to (n);<sup>52</sup>
  - (oa) making the SPE subject to the standard rules set out in Article 35d, without any prior negotiations.

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<sup>47</sup> SK and SE suggest deleting point a).

<sup>48</sup> DE and ES: the right of withdrawal under Art. 18 should not be subject to such a decision. Better refer to the "consequences of the withdrawal of a shareholder".

<sup>49</sup> IE and UK do not consider it necessary to have a resolution on point d).

<sup>50</sup> FI: add "and exemptions from their liability".

<sup>51</sup> ES considers that the transfer of registered office within one Member State should be decided by qualified majority.

<sup>52</sup> LT and SK: delete the second part of this phrase.

<sup>53</sup> UK: add in this list "change of name". SK: add "transfer of substantial part of the company's assets".

2. Resolutions on the matters indicated in points (a), (b), (c), (f), (g), (h), (k), (l), (m), (n) and (o) of paragraph 1 shall be taken by a qualified majority.<sup>54</sup>

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 of the SPE.<sup>55</sup>

The own shares of the SPE and shares of members whose voting rights are suspended shall be excluded from the calculation of the quorum and voting rights.

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.<sup>56</sup> 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 fulfill 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 implementing paragraphs 5, 6 and 7 of Article 3 of Directive 68/151/EEC.

#### *Article 29*

#### **Information rights of members**

1. Members shall have the right to ask questions relating to the items on the agenda of the general meeting or to the proposal for resolutions and [...] other important 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. Refusal of access to information shall be justified in writing.

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<sup>54</sup> SE prefers the decisions in points f) and g) to be taken by simple majority.

<sup>55</sup> IE prefers that qualified majority is defined as  $\frac{3}{4}$  of the total voting rights. BE, EL and ES consider that other resolutions than stated in points a) to o) should have the quorum determined by the Regulation and to require simple majority of votes for their adoption.

<sup>56</sup> DE and AT consider that “recorded in writing” should also cover certification by a notary.

*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 shares of the SPE shall have the right to request the management body to submit a proposal for a resolution to the members.

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 members concerned may then circulate a proposal for a resolution to the members regarding the matters in question.

2. [...]

Members holding at least 10 % of the voting rights attached to the shares of the SPE shall have the right to request the management body to convene a general meeting.

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

If the request is refused or if the management body does not convene the general meeting within 14 calendar days of receiving the request, the members concerned may then convene the general meeting.

3. [...]

*Article 31*

**Directors**

1. Only a natural [...] person<sup>57</sup> 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.<sup>58</sup>

- 2a A person in accordance with whose directions or instructions the directors of the SPE are accustomed to act shall be considered a director as regards all duties and liabilities to which the latter are subject.

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<sup>57</sup> IT, CY and PT: a legal person should be allowed to become a director of an SPE.

<sup>58</sup> RO disagrees with the provision on *de facto* directors.

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

*Article 32*  
**General duties of directors** <sup>59</sup>

A director shall have a duty owed to the SPE

- (a) to act in the way he considers, in good faith, would be most likely to promote the success of the SPE for the benefit of its members as a whole;
- (b) to exercise reasonable care, skill and diligence.

*Article 33*  
**Related party transactions** <sup>60</sup>

The disclosure of related party transactions shall be governed by the provisions of the applicable national law implementing Council Directives 78/660/EEC <sup>61</sup> and 83/349/EEC. <sup>62</sup>

*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. The articles of association of the SPE shall set out whether the general power of representation is to be exercised by the members of the management body individually or jointly. Any other limitation of the powers of the members of the management body, following from the articles of association, a resolution of members or a decision of the management body or supervisory board, if any, may not be relied on against third parties even if they have been disclosed.
3. The management body may delegate the right to represent the SPE in accordance with the articles of association.

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<sup>59</sup> DK, IE, NL, SK, SE and UK prefer the deletion of this Article.

<sup>60</sup> UK: related party transactions should be prohibited unless authorized in accordance with the articles of association.

<sup>61</sup> OJ L 222, 14.8.1978, p. 11.

<sup>62</sup> OJ L 193, 18.7.1983, p. 1.

**CHAPTER VI**  
**EMPLOYEE PARTICIPATION**

*Article 35*  
**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.
- 1a. Articles 35a - 35d shall apply where the following conditions are fulfilled:
  - (a) more than 500 employees of an SPE representing at least three quarters of the total number of its employees habitually work in a Member State or Member States that is different from the Member State where the SPE has its registered office and
  - (b) the Member State where the SPE has its registered office does not provide for at least the same level of participation rights for employees as the other Member State or Member States referred to in point (a).
2. In the case of the transfer of the registered office of an SPE Article 39 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<sup>63</sup> shall apply.

*Article 35a*

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

1. When the conditions in paragraph 1a of Article 35 are fulfilled, the management body of the SPE shall take the necessary steps, including providing the information necessary to establish a special negotiating body, to start negotiations on arrangements for the participation of employees in the SPE.
2. A special negotiation body representing the employees of the SPE shall be established.

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.

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<sup>63</sup> OJ L310, 25.11.2005, p. 1.

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. It shall ensure that, as far as possible and without increasing the overall number of members, the special negotiating body shall include at least one member representing each establishment of the SPE.

Member States shall ensure that the employees of the establishments in which there are no employee representatives through no fault of their own, have the right to elect or appoint members of the special negotiating body.

Member States may provide that the special negotiating body may include members of trade unions whether or not they are employees of the SPE.

The members of the special negotiating body shall be elected or appointed within 3 months of the date when the conditions in paragraph 1a of Article 35 are fulfilled.

If the special negotiating body is not established within the period set out in paragraph 2 through the fault of the employees or employee representatives, the SPE shall rely on the rules on employee participation in force in the Member State where the SPE has its registered office.

#### *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, not to open negotiations or to terminate negotiations already opened and to rely on the rules on employee participation in force in the Member State where 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.

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. Member States may limit the funding to cover one expert only.

*Article 35c*

**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,
  - (c) the date of entry into force of the agreement and its duration, cases where the agreement should be renegotiated and the procedure for its renegotiation.

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 3 of Article 35b;
  - (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.
2. Member States may, in the case where following prior negotiations the standard rules for employee participation apply and notwithstanding these rules, limit the proportion of employee representatives in the administrative board of the SPE.
3. 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 employee participation where the most of the employees are situated.

4. The special negotiating body, or in the case set out in point c) of paragraph 1 the employees 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 full member with the same rights and obligations as those 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, with the exception of the case set out in point c) of paragraph 1.

**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 and 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 and 3 of Article 4, the SPE shall be regulated 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.

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<sup>64</sup> SK: add a new paragraph 5 on enforcement and recognition of administrative decisions.



*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 for inspection;
  - (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 for consultation by the creditors [...].

Where the management body receives, in good time,<sup>65</sup> the opinion of the employee representatives on the transfer, that opinion shall be attached to the report.

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<sup>65</sup> IE and UK prefer a precise time limit (e.g. 21 days to submit an opinion).

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. Without prejudice to Article 18, 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<sup>66</sup> 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 present the following 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.

Those documents shall be deemed to be sufficient to apply for the registration of the SPE in the host Member State. Articles 9-11 shall apply accordingly.

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.<sup>67</sup>
5. [...]

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<sup>66</sup> IE prefers a two-month period.

<sup>67</sup> UK: delete this paragraph.

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*

#### **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

(a) 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 and

(b) those employees had rights to employee participation in the home Member State and

(c) those employees in the home Member State would not be entitled to rights to employee participation in the host Member State after the transfer.

[...]

3. Where [...] the conditions [...] in paragraph 2 are fulfilled, Articles 35a - 35d shall apply accordingly [...].

4. [...]

5. [...]

6. [...]

**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.<sup>68</sup>

*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>69</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>68</sup> DE: reservation.

<sup>69</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*

**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 46*

[...]

*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 and the other Member States about the competent authority within the meaning of Article 38.
2. The authorities responsible for the register referred to in paragraph 1 of Article 10 shall cooperate with each other to ensure that the documents and particulars of the SPEs listed in paragraph 2 of Article 9 are also accessible through the registers of all other Member States.<sup>70</sup>

*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 [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*

[...]

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<sup>70</sup> DE, ES, AT and SK prefer leaving the issue of cooperation of national registries in the horizontal context of discussions for the 1st Directive, without limiting it to SPEs in particular.

## ANNEX I

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

### ***Chapter II – Formation***

- (1) the name of the SPE and the address of its registered office,
- (2) the business object or business activity of the SPE,
- (3) the subscribed capital of the SPE [...],
- (4) the amount of the subscribed capital to be paid up on formation,
- (5) the names and addresses of the founding members, the number of shares subscribed for by each founding member and, if they have nominal value, their nominal value,
- (6) the amount of each consideration in cash, if any, to be paid by each founding member,
- (7) the value and nature of each consideration in kind, if any, to be provided by each founding member,
- (8) any terms and conditions of the subscription of shares,
- (9) the names, addresses and any other information necessary to identify the first directors of the SPE [...],
- (10) [...]
- (11) whether the SPE is established for a limited or unlimited period,
- (12) whether or not the management body may amend the provisions of the articles of association as regards the address of the registered office of the SPE and/or its business object or business activity,

### ***Chapter III - Shares***

- (13) if relevant, the share classes and the number of shares in each share class,
- (14) the total number of shares,
- (15) whether or not sub-division, consolidation or redenomination of the shares is permitted and any applicable requirements,
- (16) 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,

- (17) 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,
- (18) whether or not there are any pre-emption rights either on issue or on transfer of shares, and any applicable requirements,
- (19) whether or not the transfer of shares is restricted or prohibited, and the details of the restriction or prohibition, in particular the form, time limit, the applicable procedure,
- (20) whether or not the approval of the share transfer by the SPE or by the members is required or other rights are provided for members or for the SPE on the transfer of shares (for example, right of first refusal), and if so, a deadline by which the transferor is to be notified of the decision,
- (21) without prejudice to this Regulation, the conditions and the procedure of the expulsion and the withdrawal of a member,
- (22) whether or not, in addition to Article 17, members have any rights to require other members to sell their shares, and any applicable requirements,
- (23) whether or not, in addition to Article 18, members have the right to sell their shares to other members or to the SPE, who are obliged to buy those shares, and the applicable requirements,

#### ***Chapter IV – Capital***

- (24) the financial year of the SPE and how it may be changed,
- (25) whether or not the SPE is required to establish, in addition to the legal reserves, reserves and if so, the type of reserve, the circumstances in which it is to be established and whether it is distributable,
- (26) without prejudice to this Regulation, whether or not consideration in kind is to be evaluated by an independent expert or by the members and any formalities that must be complied with,
- (27) without prejudice to this Regulation, the time when the payment or provision of the consideration is to be made and any conditions relating to such payment or provision,
- (28) [...]
- (29) without prejudice to this Regulation, whether or not interim dividends can be paid and any applicable requirements,
- (30) without prejudice to this Regulation, whether or not the purchase 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,
- (31) without prejudice to this Regulation, the procedure for increasing, reducing or otherwise changing the subscribed capital, and any applicable requirements,



## *Chapter V – Organisation of the SPE*

- (32) the method of adopting member resolutions,
- (33) subject to the provisions of this Regulation, the majority required to adopt [...] resolutions of the members,
- (34) whether or not there are 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,
- (35) subject to Articles 21, 28 and 30, the rules on proposing resolutions,
- (36) the means of communication between the SPE and its members (e.g. electronic means or correspondence),
- (37) the period of time and the manner in which the members are to be informed of proposals for resolutions of the members and general meetings,
- (38) the way in which the members obtain the text of any proposed resolution of the members and any other preparatory documents related to the adoption of a resolution or the items on the agenda of the general meeting,
- (39) the manner in which copies and voting results of an adopted resolution are made available to the members,
- (40) [...] the manner of convening the general meeting, the working methods and the rules on voting by proxy,
- (41) the procedure and time limits for the SPE to respond to requests from members for information, to grant access to the documents of the SPE, and to notify resolutions that have been adopted by members,
- (42) whether or not the right in Article 30(1) shall be granted to individual members or to members holding less than 10% of the voting rights attached to the shares of the SPE,
- (43) whether or not the right in Article 30(2) shall be granted to individual members or to members holding less than 5% of the voting rights attached to the shares of the SPE
- (44) whether the SPE's management body is composed of one or more managing directors, a management board (dual board regime) or an administrative board [...] (unitary board regime),
- (45) where there is an administrative board [...] (unitary board regime), its composition and organisation,
- (46) where there is a management board (dual board regime), its composition and organisation,

- (47) where there is a management board or one or more managing directors, whether the SPE has a supervisory board, and if so, its composition and organisation and its relationship with the management body,
- (48) the method of recording the decisions of the management body,
- (49) [...]
- (50) whether or not there are any eligibility criterion of directors,
- (51) the procedure for appointing and removing directors,
- (52) 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 provide that the SPE should have an auditor, the procedure for his appointment, removal and resignation,
- (53) whether or not there are any specific duties of directors other than those mentioned in this Regulation,
- (54) whether or not related party transactions as referred to in Article 33 are permitted, whether or not they need to be authorized, and, if so, the method for their authorization,
- (55) the rules on representation of the SPE by the management body, in particular if its members have the right to represent the SPE jointly or separately [...],
- (56) whether or not the right to represent the SPE in relation to third parties, in cases other than those indicated in this Regulation, can be delegated to another person and the applicable requirements.

## ANNEX II

### List of private limited-liability companies referred to in Article 4

— In Belgium:

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— In Bulgaria:

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— In the Czech Republic:

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— In Denmark:

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— In Germany:

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— In Estonia:

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— In Greece:

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— In Spain:

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— In France:

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— In Ireland:

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— In Italy:

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— In Cyprus:

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— In Latvia:

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— In Lithuania:

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— In Luxembourg:

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— In Hungary:

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— In Malta:

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— In the Netherlands:

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— In Austria:

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— In Poland:

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— In Portugal:

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— In Romania:

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— In Slovenia:

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— In Slovakia:

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— In Finland:

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— In Sweden:

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— In the United Kingdom:

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ANNEX III

**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]*