

EXAMPLE PROVISIONS FOR ARTICLES OF ASSOCIATION OF AN SPE

Disclaimer: These example articles of association are provided for information purposes to assist with negotiations on the Statute. They may need to be revised as a result of the discussions. They are not legally binding. The assessment of whether the articles of association of an individual SPE comply with Regulation xx/2008 is in any event the sole responsibility of the competent authority in the Member State concerned, as set out in Article 10 of Regulation xx/2008.

Every European Private Company is required to have articles of association that cover at least the matters set out in the Regulation, as provided for in Annex 1. The articles of association must be registered when the SPE is formed, and any changes to the articles of association must be submitted to the register within 14 calendar days of the day on which the change takes place. An SPE is governed by the Regulation and, as regards the matters listed in Annex 1, by its articles of association. Otherwise the SPE is governed by the national law which applies to private limited liability companies in the Member State in which it has its registered office.

Annex 1 contains the two following categories of provisions:

- (i) mandatory provisions i.e. provisions regarding matters that must be included in the articles of association in all cases e.g. the name of the SPE;
- (ii) permitted provisions where the Annex does not require a provision to be included. The permitted provisions fall into two categories. In some cases, if the SPE wishes to have such a provision it must be stated in the articles and there are relevant requirements e.g. if the transfer of shares is restricted, the details of the restriction including the form, time limit, the applicable procedure, and the rules applicable in the event of the death or dissolution of a shareholder. In other cases a provision may be included but there are no requirements relating to that provision e.g. the articles may include provisions about pre-emption rights when shares are issued or transferred. There are no requirements as to what these provisions say.

This document sets out example provisions for the mandatory provisions and the permitted provisions for which there are relevant requirements, which may be helpful to those wishing to form an SPE. In many cases, the Regulation only requires the articles to state whether the company may or may not do something. The provisions set out a particular approach, but note in the footnotes where the company can choose to adopt a different approach. This was thought to be more helpful than stating e.g. “The company may/may not.....” and leaving the company to delete whichever was not applicable. The provisions chosen are intended to be suitable for a newly-formed SPE which wants flexibility and wants its management body to comprise an administrative board.

Those forming an SPE may want to include other provisions as well in their articles of association. As the SPE is intended to be flexible so as to meet the needs particularly of SMEs, the form of articles of association adopted could vary significantly depending on factors such as the number of shareholders, whether the management are also shareholders, whether a one tier or two tier board system or another type of

management body is chosen and the types of articles of association the shareholders have used in the past. It is therefore important that the shareholders of an SPE satisfy themselves that the articles of association they intend to adopt are appropriate for their particular circumstances.

	Provision to be included in articles of association	Article of Regulation []	Mandatory	Permitted provisions¹	Article number
	<i>Chapter II – Formation</i>				
1.	- the name of the SPE	6	✓		1.1
2.	- the names and addresses of the founding shareholders of the SPE and the nominal value or accountable par of the shares held by them,	8.2, 10	✓		1.3
3.	- the initial capital of the SPE,	10, 19	✓		1.2
	<i>Chapter III – Shares</i>				
4.	- whether sub-division, consolidation or redenomination of the shares is permitted and any applicable requirements,		✓		2.6
5.	- 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,		✓		2.1
6.	- 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,	14.3, 27.1(a)	✓		2.3

¹ Provisions marked with an asterisk are provisions which must be stated in the articles if they exist and where certain requirements apply.

	Provision to be included in articles of association	Article of Regulation []	Mandatory	Permitted provisions¹	Article number
7.	- any pre-emption rights either on issue or on transfer of shares, if any, and any applicable requirements,	16		✓	Part 2 paras 11 and 12
8.	- where the transfer of shares is restricted or prohibited, the details of the restriction or prohibition, in particular the form, time limit, the applicable procedure, and the rules applicable in the event of the death or dissolution of a shareholder,	16		✓*	Part 2 para 1
9.	- where the approval of the share transfer by the SPE or by the shareholders is required or other rights are provided for shareholders or for the SPE on the transfer of shares (for example, right of first refusal), a deadline by which the transferor is to be notified of the decision,	16		✓*	Part 2 para 2
10.	- whether, in addition to Article 17, shareholders have any rights to require other shareholders to sell their shares, and any applicable requirements,	17	✓		Part 2 para 13
11.	- whether, in addition to Article 18, shareholders have the right to sell their shares to other shareholders or to the SPE, who are obliged to buy those shares, and the applicable requirements,	18	✓		Part 2 para 14
	<i>Chapter IV – Capital</i>				
12.	- the financial year of the SPE and how it may be changed,		✓		6.1
13.	- whether the SPE is required to establish reserves and, if so, the type of reserve, the circumstances in which it is to be established and whether it is distributable,	21.1	✓		3.8

	Provision to be included in articles of association	Article of Regulation []	Mandatory	Permitted provisions¹	Article number
14.	- whether consideration in kind are to be evaluated by an independent expert and any formalities that must be complied with,	15.1, 20	✓		3.1
15.	- the time when the payment or provision of the consideration is to be made and any conditions relating to such payment or provision,	15.1, 20	✓		3.1
16.	- whether or not the SPE can provide financial assistance, in particular advance funds, make loans or provide security, with a view to the acquisition of its shares by a third party,		✓		3.2
17.	- whether interim dividends can be paid and any applicable requirements,	21, 27.1(e)	✓		3.3
18.	- whether the management body is required to sign a solvency certificate before a distribution is made, and the applicable requirements,	21.2	✓		3.4
19.	- the procedure the SPE must follow to recover any unlawful distribution,	22	✓		3.5
20.	- whether the acquisition of own shares is permitted and, if permitted, the procedure to be followed, including the conditions under which the shares may be held, transferred or cancelled,	23	✓		3.7
21.	- the procedure for increasing, reducing or otherwise changing the share capital, and any applicable requirements,	24, 27.1(h)-(i)	✓		2.4, 3.6 and 2.6
	<i>Chapter V – Organisation of the SPE</i>				

	Provision to be included in articles of association	Article of Regulation []	Mandatory	Permitted provisions¹	Article number
22.	- the method of adopting shareholder resolutions	27.3	✓		5.1
23.	- subject to the provisions of the Regulation, the majority required to adopt shareholder resolutions	27	✓		5.7, 5.8 and 5.9
24.	- the resolutions to be adopted by the shareholders, in addition to those listed in Article 27(1), the quorum and the required majority of voting rights,	27	✓		5.7, 5.6
25.	- subject to Articles 21, 27 and 29, the rules on proposing resolutions,	21, 27 and 29	✓		5.2
26.	- the period of time and the manner in which the shareholders are to be informed of proposals for shareholder resolutions and, if the articles of association provide for general meetings, general meetings,	27	✓		5.2
27.	- the way in which the shareholders obtain the text of any proposed shareholder resolution and any other preparatory documents in relation to the adoption of a resolution,	27, 28	✓		5.4
28.	- the manner in which copies of an adopted resolution are made available to the shareholders,	27.3	✓		5.11
29.	- where the articles of association provide for the adoption of some or all resolutions at a general meeting, the manner of convening the general meeting, the working methods and the rules on voting by proxy,			✓*	5.2.2, 5.3, 5.6
30.	- the procedure and time limits for the SPE to respond to requests from shareholders for information, to grant access to the documents of the SPE, and to notify resolutions that have	27, 28	✓		5.10

	Provision to be included in articles of association	Article of Regulation []	Mandatory	Permitted provisions¹	Article number
	been adopted by shareholders,				
31.	- whether the SPE's management body is composed of one or more managing directors, a management board (dual board) or an administrative board (unitary board)	26	✓		4.1
32.	- where there is an administrative board (unitary board), its composition and organisation			✓	4.2, 4.3
33.	- where there is a management board (dual board), its composition and organisation			✓	4.2, 4.3
34.	- where there is a management board (dual board) or one or more managing directors, whether the SPE has a supervisory body and, if so, its composition and organization and its relationship with the management body,			✓	Part 2, para 15
35.	- any eligibility criterion of directors	30		✓	Part 2, para 15
36.	- the procedure for appointing and removing directors	27.1(j)	✓		4.4, 4.5
37.	- 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,	25, 27.1(k)	✓		6.2
38.	- any specific duties of directors other than those mentioned in this Regulation,	31		✓	Part 2, para 16
39.	- whether situations involving an actual or potential conflict of interest by a director may be authorised and, if so, an indication of who may authorise such a conflict and the applicable requirements and procedures for the authorisation	31.3	✓		4.6

	Provision to be included in articles of association	Article of Regulation []	Mandatory	Permitted provisions¹	Article number
	of such a conflict,				
40.	- whether related party transactions (as referred to in Article 32) need to be authorised and the applicable requirements,	32	✓		4.7
41.	- the rules on representation of the SPE by the management body, in particular if the directors have the right to represent the SPE jointly or separately and any delegation of this right,	10.2(b), 33	✓		4.8
42.	- the rules on delegation of any management power to another person.	26.1, 33	✓		4.9