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DRAFT REPORT

on the proposal for a Council regulation on the Statute for a European private
company
(COM(2008)0396 – C6-0283/2008 – 2008/0130(CNS))

Committee on Legal Affairs

Rapporteur: Klaus-Heiner Lehne

Symbols for procedures

- * Consultation procedure
majority of the votes cast
- **I Cooperation procedure (first reading)
majority of the votes cast
- **II Cooperation procedure (second reading)
*majority of the votes cast, to approve the common position
majority of Parliament's component Members, to reject or amend
the common position*
- *** Assent procedure
*majority of Parliament's component Members except in cases
covered by Articles 105, 107, 161 and 300 of the EC Treaty and
Article 7 of the EU Treaty*
- ***I Codecision procedure (first reading)
majority of the votes cast
- ***II Codecision procedure (second reading)
*majority of the votes cast, to approve the common position
majority of Parliament's component Members, to reject or amend
the common position*
- ***III Codecision procedure (third reading)
majority of the votes cast, to approve the joint text

(The type of procedure depends on the legal basis proposed by the Commission.)

Amendments to a legislative text

In amendments by Parliament, amended text is highlighted in ***bold italics***. In the case of amending acts, passages in an existing provision that the Commission has left unchanged, but that Parliament wishes to amend, are highlighted in **bold**. Any deletions that Parliament wishes to make in passages of this kind are indicated thus: [...]. Highlighting in *normal italics* is an indication for the relevant departments showing parts of the legislative text for which a correction is proposed, to assist preparation of the final text (for instance, obvious errors or omissions in a given language version). Suggested corrections of this kind are subject to the agreement of the departments concerned.

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DRAFT EUROPEAN PARLIAMENT LEGISLATIVE RESOLUTION

**on the proposal for a Council regulation on the Statute for a European private company
(COM(2008)0396 – C6-0283/2008 – 2008/0130(CNS))**

(Consultation procedure)

The European Parliament,

- having regard to the Commission proposal to the Council (COM(2008)0396),
 - having regard to Article 308 of the EC Treaty, pursuant to which the Council consulted Parliament (C6-0283/2008),
 - having regard to Rule 51 of its Rules of Procedure,
 - having regard to the report of the Committee on Legal Affairs (A6-0000/2008) and the opinion of the Committee on Economic and Monetary Affairs,
1. Approves the Commission proposal as amended;
 2. Calls on the Commission to alter its proposal accordingly, pursuant to Article 250(2) of the EC Treaty;
 3. Calls on the Council to notify Parliament if it intends to depart from the text approved by Parliament;
 4. Calls for initiation of the conciliation procedure under the Joint Declaration of 4 March 1975 if the Council intends to depart from the text approved by Parliament;
 5. Asks the Council to consult Parliament again if it intends to amend the Commission proposal substantially;
 6. Instructs its President to forward its position to the Council and Commission.

Amendment 1

Proposal for a regulation

Recital 8

Text proposed by the Commission

(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

Amendment

(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 Regulation 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

validity of the documents filed upon the creation of a SPE should be subject to a single *preventive* verification. For the purposes of registration, it is appropriate to use the registries designated by First Council Regulation 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

Or. de

Justification

To bring the recital into line with Amendments 11 and 12.

Amendment 2

Proposal for a regulation Recital 11

Text proposed by the Commission

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

Amendment

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

Or. de

Justification

To bring the recital into line with Amendment 22.

Amendment 3

Proposal for a regulation

Recital 15

Text proposed by the Commission

(15) Employees' rights of participation should be governed by the legislation of the Member State in which the SPE has its registered office (the "home Member State"). The SPE should not be used for the purpose of circumventing such rights. Where the national legislation of the Member State to which the SPE transfers its registered office does not provide for at least the same level of employee participation as the home Member State, the participation of employees in the company following the transfer should in certain circumstances be negotiated. Should such negotiations fail, the provisions applying in the company before the transfer should continue to apply after the transfer.

Amendment

(15) Employees' rights of participation should be governed by the legislation of the Member State in which the SPE has its registered office (the "home Member State"). The SPE should not be used for the purpose of circumventing such rights. ***Where a predominant part of the workforce is employed in Member States with employee participation that is more extensive than the level of participation in the home Member State, the company should start negotiations with the employees on a uniform system of participation within the SPE.*** Where the national legislation of the Member State to which the SPE transfers its registered office does not provide for at least the same level of employee participation as the home Member State, the participation of employees in the company following the transfer should in certain circumstances be negotiated. Should such negotiations fail, the provisions applying in the company before the transfer should continue to apply after the transfer.

Or. de

Justification

To bring the recital into line with Amendment 42.

Amendment 4

Proposal for a regulation

Article 2 – paragraph 1 – point (b)

Text proposed by the Commission

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

Amendment

(b) 'distribution' means any financial benefit derived directly or indirectly from the SPE by a shareholder, in relation to the shares held by him, including any transfer of money or property, as well as the incurring of a debt, ***that is not balanced by a full claim to compensation or reimbursement***;

Or. de

Justification

Clarification. The Commission proposal is based on a very wide concept of distribution that includes all types of outflow of assets. Bearing in mind the obligation to adopt resolutions laid down in Article 27(1)(e), the concept of distribution needs to be clarified to guarantee the smooth running of business transactions within the company.

Amendment 5

Proposal for a regulation

Article 2 – paragraph 1 – point (d)

Text proposed by the Commission

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

Amendment

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

Or. de

Justification

The concept of 'management organ' was hitherto used exclusively for the two-tier system (see, for example, Article 39 of Regulation No 2157/2001). However, the definition given in the

Commission proposal also concerns the one-tier system. In order to maintain the useful distinction between them, a different overarching concept is proposed to cover the management bodies in both systems.

Amendment 6

Proposal for a regulation

Article 2 – paragraph 1 – point (e) a (new)

Text proposed by the Commission

Amendment

(ea) 'level of employee participation' means the proportion of employee representatives amongst the members of the administrative or supervisory body or their committees or of the management group which covers the profit units of the SPE;

Or. de

Justification

The definition has been taken from Article 38(2)(a) (second sentence) and inserted here for the sake of better readability.

Amendment 7

Proposal for a regulation

Article 3 – paragraph 1 – point (e) a (new)

Text proposed by the Commission

Amendment

(ea) it shall have a cross-border component, for example in the form of a corresponding business object, or the fact that founding members are resident in different Member States, or the fact that the SPE's registered office and its central administration or principal place of business are in different Member States.

Or. de

Justification

The Commission proposal makes no mention of any cross-border component. Since such a component appears necessary for reasons related to competition law but should not create formalistic bureaucratic obstacles to the founding of companies, a component should be required that can be provided by the founders of small and medium-sized enterprises.

Amendment 8

Proposal for a regulation
Article 5 – paragraph 3

Text proposed by the Commission

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

Amendment

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

Or. de

Justification

Clarification. The wide concept of company used in the Commission proposal would include partnerships, which have not hitherto been covered by EU company law.

Amendment 9

Proposal for a regulation
Article 8 – paragraph 3 – point (a)

Text proposed by the Commission

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

Amendment

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

Or. de

Justification

See Amendment 2.

Amendment 10

Proposal for a regulation

Article 10 – paragraph 2 – point (b)

Text proposed by the Commission

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

Amendment

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

Or. de

Justification

Clarification.

Amendment 11

Proposal for a regulation

Article 10 – paragraph 2 – point (b) a (new)

Text proposed by the Commission

Amendment

(ba) the business object, including an explanation of the cross-border component of the business object of the SPE, where appropriate;

Or. de

Justification

With a view to Amendment 3 (cross-border component), it appears appropriate for the business object to be entered in the register.

Amendment 12

Proposal for a regulation Article 10 – paragraph 4 – introduction

Text proposed by the Commission

Amendment

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

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

Or. de

Justification

The obligatory nature of one of the two control possibilities has been taken from Article 10 of Directive 68/151/EEC.

Amendment 13

Proposal for a regulation Article 10 – paragraph 4 – point (b)

Text proposed by the Commission

Amendment

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

(b) the certification **or authentication in due legal form** of the documents and particulars of the SPE.

Or. de

Justification

The addition is based on Article 10 of Directive 68/151/EEC.

Amendment 14

Proposal for a regulation Article 10 – paragraph 5

Text proposed by the Commission

Amendment

The SPE shall submit any change in the particulars or documents referred to in points (a) to (g) of paragraph 2 to the register within 14 calendar days of the day

The SPE shall submit any change in the particulars or documents referred to in points (a) to (g) of paragraph 2 to the register within 14 calendar days of the day

on which the change takes place. After every amendment to the articles of association, the SPE shall submit its complete text to the register as amended to date.

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. ***The second sentence of paragraph 1 and paragraph 4 shall apply mutatis mutandis.***

Or. de

Justification

It should also be possible for amendments to the articles of association to be submitted electronically and checked in the same way as registration.

Amendment 15

**Proposal for a regulation
Article 11 – paragraph 1**

Text proposed by the Commission

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 Regulation 68/151/EEC.

Amendment

(Does not affect English version.)

Or. de

Justification

(Does not affect English version.)

Amendment 16

**Proposal for a regulation
Article 15 – paragraph 1**

Text proposed by the Commission

1. The management body of the SPE shall draw up a list of shareholders. The list shall

Amendment

1. The ***executive*** management body of the SPE shall draw up a list of shareholders.

contain at least the following:

The list shall contain at least the following:

Or. de

Justification

See Amendment 2.

Amendment 17

**Proposal for a regulation
Article 15 – paragraph 2**

Text proposed by the Commission

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

Amendment

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

Or. de

Justification

Linguistic correction.

Amendment 18

**Proposal for a regulation
Article 15 – paragraph 3**

Text proposed by the Commission

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

Amendment

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

Or. de

Justification

See Amendment 2.

Amendment 19

Proposal for a regulation Article 16 – paragraph 3

Text proposed by the Commission

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

Amendment

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

Or. de

Justification

See Amendment 2. The addition is intended to clarify who is to make the requisite notification.

Amendment 20

Proposal for a regulation Article 18 – paragraph 1

Text proposed by the Commission

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

Amendment

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

Or. de

Justification

The list of grounds for withdrawal should not be restricted to the four events proposed by the

Commission. Any possibility that it might be too easy to withdraw is removed by the judicial review and the criterion of 'serious harm' in paragraph 6.

Amendment 21

Proposal for a regulation Article 18 – paragraph 3

Text proposed by the Commission

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

Amendment

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

Or. de

Justification

See Amendment 2.

Amendment 22

Proposal for a regulation Article 18 – paragraph 4

Text proposed by the Commission

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

Amendment

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

Or. de

Justification

See Amendment 2.

Amendment 23

Proposal for a regulation Article 19 – paragraph 4

Text proposed by the Commission

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

Amendment

1. The capital of the SPE shall be at least EUR **10 000**.

Or. de

Justification

Der Änderungsantrag soll hilfsweise eine Diskussionsalternative zum Kommissionsvorschlag bieten, der an sich begrüßt wird. Das Stammkapital auf 10.000 Euro zu setzen, war ein Vorschlag der Parlamentsresolution vom 1. Februar 2007 (P6_TA(2007)0023). . Zwar dient das Stammkapital nicht dem Gläubigerschutz, so dass es auch bei 1 Euro belassen werden könnte. Allerdings könnten 10.000 Euro eine gewisse Seriositätsschwelle darstellen. Die Stammkapitalschwelle darf jedoch für Unternehmensgründer kein ernsthaftes und unüberwindbares Gründungshindernis werden. In manchen Mitgliedstaaten könnte eine Kapitalschwelle von 10.000 Euro schwerer wiegen als in anderen. Allerdings ist mit der Annäherung der Lebensbedingungen innerhalb der EU zu erwarten, dass in naher Zukunft die vorgeschlagene Seriositätsschwelle in den EU-Mitgliedstaaten einheitlich empfunden wird.

Amendment 24

Proposal for a regulation Article 20 – paragraph 3

Text proposed by the Commission

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

Amendment

3. Where the value of the consideration in kind falls short of the value of the share acquired, the shareholder shall pay a consideration in cash equal to the shortfall. The company's claim to payment shall lapse eight years after the company's registration.

Or. de

Justification

The welcome aim of the Commission document is to create a legal form of undertaking that is as uniform as possible throughout the Community. Accordingly, it should avoid references to national law on points that are significant to companies. These points include liability for possible differences in value.

Amendment 25

Proposal for a regulation Article 21 – paragraph 1

Text proposed by the Commission

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

Amendment

1. Without prejudice to Article 24, the SPE may, on the basis of a proposal of the ***executive*** management body, make a distribution to shareholders provided that, after the distribution, the assets of the SPE fully cover its liabilities. The SPE may not distribute those reserves that may not be distributed under its articles of association. ***A distribution shall be permissible only where the remaining amount of the deposit does not fall below the minimum amount referred to in Article 19(4).***

Or. de

Justification

In line with Amendment 18 (capital stock of EUR 10 000).

Amendment 26

Proposal for a regulation Article 21 – paragraph 2

Text proposed by the Commission

2. If the articles of association so require, the management body of the SPE, in addition to complying with paragraph 1, shall sign a statement, hereinafter a 'solvency certificate', before a distribution is made, certifying that the SPE will be

Amendment

2. If the articles of association so require, the ***executive*** management body of the SPE, in addition to complying with paragraph 1, shall sign a statement, hereinafter a 'solvency certificate', before a distribution is made, certifying that the

able to pay its debts as they become due in the normal course of business within one year of the date of the distribution. Shareholders shall be provided with the solvency certificate before the resolution on the distribution referred to in Article 27 is taken.

SPE will be able to pay its debts as they become due in the normal course of business within one year of the date of the distribution. Shareholders shall be provided with the solvency certificate before the resolution on the distribution referred to in Article 27 is taken.

Or. de

Justification

See Amendment 2.

Amendment 27

**Proposal for a regulation
Article 22**

Text proposed by the Commission

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

Amendment

Any shareholder who has received distributions made contrary to Article 21 must return those distributions to the SPE.

Or. de

Justification

In a limited liability company it can generally be assumed that shareholders are aware of the regularity of specific distributions.

Amendment 28

**Proposal for a regulation
Article 24 – paragraph 1**

Text proposed by the Commission

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

Amendment

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

apply mutatis mutandis.

apply mutatis mutandis. *A reduction of the share capital shall be permissible only where the remaining amount of the deposit does not fall below the minimum amount referred to in Article 19(4).*

Or. de

Justification

In line with Amendment 18 (capital stock of EUR 10 000).

Amendment 29

**Proposal for a regulation
Article 25 – paragraph 2**

Text proposed by the Commission

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

Amendment

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

Or. de

Justification

See Amendment 2.

Amendment 30

**Proposal for a regulation
Article 26 – paragraph 1**

Text proposed by the Commission

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

Amendment

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

be internally binding on the executive management body.

Or. de

Justification

See Amendment 2. The addition has been made in the interests of clarification.

Amendment 31

Proposal for a regulation
Article 27 – paragraph 2

Text proposed by the Commission

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

Amendment

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

Or. de

Justification

Including resolutions on increases of share capital in the list for qualified-majority decisions will offer greater protection for minority shareholders.

Amendment 32

Proposal for a regulation
Article 27 – paragraph 3

Text proposed by the Commission

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

Amendment

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

shareholder.

Or. de

Justification

See Amendment 2.

Amendment 33

**Proposal for a regulation
Article 27 – paragraph 4**

Text proposed by the Commission

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

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

Amendment

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

Resolutions of the shareholders may be declared ineffective on the grounds of an infringement of the provisions of the articles of association, of this Regulation or of the applicable law only by means of an action before the court that is competent for the SPE's registered office.

An action may be brought within one month from the date of the resolution by any shareholder who did not vote in favour of the resolution, provided that the company does not remedy the deficiency in the resolution or the complainant does not give his or her subsequent agreement. The articles of association may allow a longer period.

Or. de

Justification

The welcome aim of the Commission document is to create a legal form of undertaking that is as uniform as possible throughout the Community. Accordingly, it should avoid references to national law on points that are significant to companies. These points include the consequences of defective resolutions.

Amendment 34

Proposal for a regulation

Article 27 – paragraph 7 – point (a)

Text proposed by the Commission

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

Amendment

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

Or. de

Justification

See Amendment 2.

Amendment 35

Proposal for a regulation

Article 28 – paragraph 1

Text proposed by the Commission

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

Amendment

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

Or. de

Justification

See Amendment 2.

Amendment 36

Proposal for a regulation

Article 28 – paragraph 2

Text proposed by the Commission

2. The management body may refuse to

Amendment

2. The **executive** management body may

give access to the information only if doing so could cause serious harm to the business interests of the SPE.

refuse to give access to the information only if doing so could cause serious harm to the business interests of the SPE.

Or. de

Justification

See Amendment 2.

Amendment 37

**Proposal for a regulation
Article 29 – paragraph 1**

Text proposed by the Commission

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

Amendment

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

Or. de

Justification

See Amendment 2.

Amendment 38

**Proposal for a regulation
Article 29 – paragraph 1 – subparagraph 3**

Text proposed by the Commission

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

Amendment

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

Justification

See Amendment 2.

Amendment 39

**Proposal for a regulation
Article 29 – paragraph 2 – subparagraph 2**

Text proposed by the Commission

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

Amendment

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

Justification

See Amendment 2.

Amendment 40

**Proposal for a regulation
Article 31 – paragraph 5**

Text proposed by the Commission

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

Amendment

5. Directors shall in particular have an obligation to pay reimbursement where payments have been made in contravention of Article 21 or own shares in the company have been acquired in contravention of Article 23(2). Where reimbursement is required to satisfy the company's creditors, the obligation of directors to pay reimbursement shall not be lifted by virtue of the fact that they acted in accordance with a resolution of the members.

Justification

The welcome aim of the Commission document is to create a legal form of undertaking that is as uniform as possible throughout the Community. Accordingly, it should avoid references to national law on points that are significant to companies. These points include the liability of directors.

Amendment 41

Proposal for a regulation
Article 31 – paragraph 5 a (new)

Text proposed by the Commission

Amendment

5a. Claims pursuant to this article shall lapse after four years.

Or. de

Justification

Necessary addition in line with Amendment 33 (liability of directors).

Amendment 42

Proposal for a regulation
Article 33

Text proposed by the Commission

Amendment

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

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

2. The articles of association of the SPE may provide that **directors** are to exercise jointly the general power of representation. Any other limitation of the powers of the directors, following from the articles of association, a resolution of shareholders or a decision of the management or supervisory body, if any, may not be relied

2. The articles of association of the SPE may provide that **members of the executive management body** are to exercise jointly the general power of representation. Any other limitation of the powers of the directors, following from the articles of association, a resolution of shareholders or a decision of the management or

on against third parties even if they have been disclosed.

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

supervisory body, if any, may not be relied on against third parties even if they have been disclosed.

3. **Members of the executive management body** may delegate the right to represent the SPE in accordance with the articles of association.

Or. de

Justification

With a view to Amendment 2, the new concept makes clear that the supervisory organ (in the two-tier system) has no power of representation. Only the management organ may represent the company.

Amendment 43

Proposal for a regulation

Article 34 – paragraph 1 a (new)

Text proposed by the Commission

Amendment

1a. Where more than 500 employees of the SPE, corresponding to at least three-quarters of the employees, work in a Member State or Member States which provide for a greater degree of employee participation than the Member State in which the SPE has its registered office, the following provisions shall apply:

(a) the management or administrative organ shall take the necessary steps to start negotiations with the representatives of the employees of establishments or subsidiaries on arrangements for the involvement of employees of the SPE. For this purpose, the management or administrative organ shall create a special negotiating body representative of the employees of the SPE;

(b) members of the special negotiating body shall be elected or appointed. In electing or appointing members of the special negotiating body, it must be

ensured that these 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 taken together;

(c) the management or administrative organ shall determine the method to be used for the election or appointment of the members of the special negotiating body. It shall ensure that, as far as possible, such members shall include at least one member representing each subsidiary or each establishment. Such measures must not increase the overall number of members;

(d) without prejudice to national provisions on thresholds for the establishing of a representative body, the SPE shall ensure that employees in subsidiaries or establishments in which there are no employees' representatives through no fault of their own have the right to elect or appoint members of the special negotiating body;

(e) the special negotiating body and the competent organ of the SPE shall determine, by written agreement, arrangements for the involvement of employees within the SPE;

(f) subject to point (g), the special negotiating body shall take decisions by a majority of its members. Each member shall have one vote;

(g) the special negotiating body may decide by the majority set out in the fourth sentence not to open negotiations or to terminate negotiations already opened, and to rely on the rules on information and consultation of employees in force in the Member States where the SPE has employees. Such a decision shall stop the procedure to conclude the agreement

referred to in point (f). Where such a decision has been taken, none of the provisions of the standard rules (see point (k)) shall apply.

The majority required to decide not to open or to terminate negotiations shall be the votes of 50% of the members representing at least 51% of the employees, including the votes of members representing employees employed in at least two Member States;

(h) the competent organs of the participating legal persons and the special negotiating body shall negotiate in a spirit of cooperation with a view to reaching an agreement on arrangements for the involvement of the employees within the SPE.

The agreement between the competent organ of the SPE and the special negotiating body shall include at least the following:

(i) the scope of the agreement,

(ii) the composition, number of members and allocation of seats on the representative body which will be the discussion partner of the competent organ of the SPE in connection with arrangements for the information and consultation of the employees of the SPE and its subsidiaries and establishments,

(iii) the frequency of meetings of the representative body,

(iv) the financial and material resources to be allocated to the representative body,

(v) the number of members in the SPE's administrative or supervisory body 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;

(i) 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 period referred to in the first sentence, up to a total of nine months from the establishment of the special negotiating body;

(j) where the parties have failed to conclude an agreement by the deadline laid down in point (i) and the special negotiating body has not taken a decision pursuant to point (g), the rules laid down in point (k) (standard rules) shall apply. They shall also apply where the parties so agree;

(k) in accordance with points (g) and (j), the following provisions shall apply to employee participation in the SPE:

(i) the employees of the SPE, its subsidiaries and establishments or their representative body shall have the right to elect, appoint, recommend or oppose the appointment of one third of the members of the administrative or supervisory body of the SPE;

(ii) the representative body shall decide on the allocation of seats within the administrative or supervisory body among the members representing the employees from the various Member States or on the way in which the SPE's employees may recommend or oppose the appointment of the members of these bodies according to the proportion of the SPE's employees in each Member State. If the employees of one or more Member States are not covered by this proportional criterion, the representative body shall appoint a member from one of those Member States, in particular the Member State of the SPE's registered office where that is appropriate;

(iii) every member of the administrative or supervisory body of the SPE who has been elected, appointed or recommended by the representative body or, depending on the circumstances, by the employees shall be a full member with the same rights and obligations as the members representing the members of the SPE, including the right to vote.

Or. de

Justification

Der Vorschlag der Kommission ist klar und eindeutig und wird im Grundsatz aufrechterhalten. Allerdings berücksichtigt er nicht ein mögliches Niveaufälle in den Arbeitnehmermitbestimmungsrechten, das auftreten kann, wenn die Arbeitnehmer in unterschiedlichen Mitgliedstaaten arbeiten. Dieser Mangel soll durch die Änderung behoben werden. Etwaige weitergehende Missbrauchstatbestände kann die SPE nicht vollkommen ausräumen. Denn weder das Gesellschaftsrecht im Allgemeinen noch der Verordnungsvorschlag zur SPE im Besonderen kreieren diese Möglichkeiten, sondern der status quo im Sozialrecht gibt sie vor. Der Vorschlag orientiert sich an den Regeln der SCE-Richtlinie, der SE-Richtlinie sowie der Richtlinie zur grenzüberschreitenden Verschmelzung und versucht, diese Regeln an die Bedürfnisse der SPE anzupassen.

Amendment 44

Proposal for a regulation

Article 36 – paragraph 1 – introduction

Text proposed by the Commission

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

Amendment

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

Or. de

Justification

See Amendment 2.

Amendment 45

Proposal for a regulation Article 36 – paragraph 2 – introduction

Text proposed by the Commission

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

Amendment

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

Or. de

Justification

See Amendment 2.

Amendment 46

Proposal for a regulation Article 36 – paragraph 3

Text proposed by the Commission

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

Amendment

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

Or. de

Justification

See Amendment 2.

Amendment 47

Proposal for a regulation Article 36 – paragraph 3 – subparagraph 2

Text proposed by the Commission

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

Amendment

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

Or. de

Justification

See Amendment 2.

Amendment 48

Proposal for a regulation Article 38 – paragraphs 2 to 6

Text proposed by the Commission

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

(a) the legislation of the host Member State does not provide for at least the same level of participation as that **operated in the SPE in the home Member State prior to its registration in the host Member State. The level of employee participation shall be measured by reference to the proportion of employee representatives amongst the members of the administrative or supervisory body or their committees or of the management group which covers the profit units of the SPE, subject to**

Amendment

2. Paragraph 1 shall not apply where **more than 500** employees of the SPE, **corresponding to at least three-quarters of the employees, work in a Member State or Member States which provide for a greater degree of employee participation than the host Member State**, and where one of the following conditions is met:

(a) the legislation of the host Member State does not provide for at least the same level of participation as that **which applied in the home SPE prior to the transfer**;

employee representation;

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

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

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

(a) the scope of the agreement;

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

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

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

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

3. Where pursuant to paragraph 2 paragraph 1 does not apply, Article 34(1a) points (a) to (i) shall apply mutatis mutandis.

by the law of the home Member State.

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

6. Where the parties have failed to conclude an agreement by the end of the period referred to in Article 34(1a)(i) and the special negotiating body has not taken any decision pursuant to Article 34(1a)(g), the participation arrangements existing in the home **SPE prior to its registration in the host** Member State shall be maintained.

Or. de

Justification

The amendment is designed to bring Article 38 into line with the rules laid down in Article 34 without altering the system established in Article 38. The reference level is no longer the right of participation in the SPE's home country of registration but the participation arrangements that the SPE has adopted in keeping with Article 34. The definition of 'level of participation' in Article 2 has also been included.

Amendment 49

Proposal for a regulation Article 43 a (new)

Text proposed by the Commission

Amendment

Article 43a

Severability clause

Should any clauses of the articles of association be ineffective, the remaining clauses of the articles of association shall remain effective. The ineffective clauses of the articles of association shall be replaced with the corresponding clause of the sample articles of association until they have been corrected by means of a resolution of the members. Where the sample articles of association make no provision for a corresponding clause, the ineffective clause shall be replaced with the law relating to limited-liability companies of the Member State in which the SPE has its registered office.

Justification

The amendment aims to clarify which rules apply where individual clauses of the articles of association are ineffective.

Amendment 50

Proposal for a regulation
Annex I – Chapter IV – Capital – indent 7

Text proposed by the Commission

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

Amendment

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

Justification

See Amendment 2.

Amendment 51

Proposal for a regulation
Annex I – Chapter V – Organisation of the SPE – indent 10

Text proposed by the Commission

– 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),

Amendment

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

Justification

See Amendment 2.

Amendment 52

Proposal for a regulation

Annex I – Chapter V – Organisation of the SPE – indent 13

Text proposed by the Commission

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

Amendment

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

Or. de

Justification

See Amendment 2.

Amendment 53

Proposal for a regulation

Annex I – Chapter V – Organisation of the SPE – indent 20

Text proposed by the Commission

– 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,

Amendment

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

Or. de

Justification

See Amendment 2.

Amendment 54

Proposal for a regulation

Annex I – Chapter V – Organisation of the SPE – indent 21

Text proposed by the Commission

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

Amendment

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

Or. de

Justification

See Amendment 2.

EXPLANATORY STATEMENT

The Commission proposal is to be welcomed. It closely corresponds to the European Parliament's resolution with recommendations to the Commission on the European private company statute (2006-2013(INI)) of 1 February 2007 (P6_TA(2007)0023). In its draft regulation the Commission has clearly demonstrated that it attaches considerable importance to the creation of a uniform form of company under Community law that is attractive for small and medium-sized businesses. To this end the Commission is proposing, inter alia, that the conditions for setting up a company should be kept as simple as possible and that the subsequent 'life' of the SPE should also not be burdened with unnecessary bureaucracy.

The rapporteur supports the Commission proposal. The proposed amendments are essentially aimed at responding to the debates that are to be anticipated within the Council and to counteract blockages within the Council. This applies in particular to three of the four main points of the draft report, namely: 1. the minimum capital, 2. employee participation and 3. checks on registration. The fourth key point addressed in the amendments concerns 4. references to national law. The rapporteur takes the view that some of these references should be replaced by rules specific to SPEs in the regulation itself. In so doing, the rapporteur is echoing Parliament's call for a form of company that is as uniform as possible.

1. Minimum capital

The Commission has not specified a capital stock when the SPE is established. The SPE can be established with one euro.

The rapporteur has a certain sympathy for this simple condition for establishing an SPE. In practice, capital stock does not help to protect creditors. However, it cannot be denied that a certain amount of 'start-up capital' may represent a threshold for solidity that will enhance the SPE's reputation. The rapporteur recognises that the proposed EUR 10 000, which corresponds to Parliament's proposal of 1 February 2007, will be harder to raise in some Member States than in others. Given that material living conditions within the EU are improving constantly and disparities between the Member States are being ironed out, however, it is to be expected that EUR 10 000 may be seen as a reasonable threshold for solidity in all the Member States in the near future. It should also be borne in mind that a certain amount of capital represents the counterpart to the limited extent of the company's liability.

The rapporteur would clearly state, however, that he does not see this proposed amendment as crucial for the general acceptability of the SPE. The key point is that minimum capital should not represent a serious obstacle to establishment. In this context, a lower amount of capital stock is also conceivable.

2. Employee participation in the company

The rapporteur recognises that the arrangements proposed by the Commission (the participation rules of the country where the SPE has its registered office apply) are clear and unequivocal and reflect the status quo. As such, he supports the essence of the proposal.

However, it cannot be denied that this arrangement is open to being circumvented. This would be the case where the SPE has recruited employees in different Member States. The rapporteur would stress that this situation is not being created by the SPE regulation but corresponds to the law in force. Moreover, neither company law in general nor the SPE regulation in particular are responsible for distortions in social legislation within the European Union. The rapporteur nevertheless wishes to anticipate employees' concerns in the SPE regulation and address them as far as possible within this Community legal framework.

The rapporteur has left untouched the principle set out in the Commission proposal that the legislation of the country in which the company has its registered office should serve as a yardstick. However, an exception should be made where the law of the country of registered office, which in principle applies, would curtail the participation rights enjoyed by a certain proportion of the SPE's employees in the Member State in which they actually work. In this event, the SPE's management is called upon to provide uniform participation arrangements throughout the SPE in a process of negotiations with employees' representatives. Standard rules would apply where management and employees are unable to agree on a uniform solution. The standard rules would lay down uniform participation of one-third of the SPE's employees.

This addition to the Commission proposal is aimed at preventing any possibility of circumvention. At the same time it reflects a basic concern of the SPE regulation, namely to establish a uniform solution for each SPE. Furthermore, the possibility of negotiation strengthens the responsibility of entrepreneurs and employees. Finally, the standard rules offer a clear alternative solution.

The rapporteur has based the wording of this proposal on the SE directive, the SCE directive and the mergers directive. The special features of the SPE by comparison with the SE and SCE have been taken into account.

The proposed amendment does not contain all the details which may prove necessary. This would overburden the draft regulation, which should be directly readable for the founders of a company. If necessary, this omission could be rectified by means of a Commission communication on the subject.

3. Checks on registration

A key point of the Commission proposal is that the setting-up of an SPE should be as simple and unbureaucratic as possible. This point should be preserved. However, the 'solidity' and acceptability of the SPE in business transactions make it necessary to provide for possible checks on crucial aspects. The SPE must not become a haven for dubious business practices. Consequently provision should be made for a minimum of preventive checks when the SPE is registered and where changes are made to the articles of association. This very loose condition for establishing an SPE is counterbalanced by a guarantee of sustainability and legal certainty that will strengthen the SPE's reputation. The principle here is: as much protection as possible for legal transactions, as much freedom as possible in legal transactions.

4. References to national law

The aim of the SPE regulation is to create a uniform form of company across the EU. This means that references to national law should be avoided wherever possible. The SPE regulation should therefore offer rules of its own on points that are crucial for the 'daily life' of the SPE. This will enhance legal certainty with regard to legal transactions within the EU internal market, since both members and third parties will know what rules they can expect throughout the EU.

Areas in which the rapporteur considers it appropriate to provide rules specific to the SPE are: the liability of executive directors, the consequences of defective resolutions and the consequences of ineffective clauses in the articles of association.

Possible criticism by some Member States on the grounds that certain rules laid down in the proposal for a regulation diverge from their national law cannot be seen as convincing. On the contrary, it merely confirms that the proposed regulation is comprehensive. The regulation will not only harmonise national law but create new Community law. Finally, the SPE will not replace existing national forms of company but will merely provide an alternative to them - and only where the existing conditions for establishment are met. Member States can therefore fully maintain their existing law for national companies.

5. Miscellaneous aspects: cross-border component

The Commission's concern to make it possible to establish companies with as little bureaucracy as possible finds particularly clear expression in the absence of any cross-border component. The rapporteur supports this liberal approach. Nevertheless, he is aware of the technical and legal provisions of the EC Treaty, according to which the EU legislator may generally act only where there is a cross-border component. On the other hand, the requirement for a cross-border component must not be used as a pretext for hindering the creation of companies. The rapporteur is therefore proposing that the conditions relating to the cross-border component should be defined as widely as possible. A corresponding reference in the business object, the fact that founding members are resident in at least two Member States or the fact that the registered office and central administration are in different Member States should suffice.