

**Council Regulation of \_\_\_\_\_  
on the Statute for a European private company (SEP-Regulation)**

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,

Having regard to the opinion of the European Parliament,

Having regard to the opinion of the Economic and Social Committee,

Whereas:

- (1) The completion of the internal market and the improvement it brings about in the economic and social situation throughout the Community mean not only that barriers to trade must be removed, but also that the structures of production must be adapted to the Community dimension and existing structures of companies or groups of companies must be able to operate as efficiently as possible, regardless of the State in which they are registered.
- (2) Achieving these objectives gives rise to legal and psychological difficulties and tax problems. The approximation of Member States' company law by means of Directives based on Article 44 of the Treaty can overcome some of those difficulties. Such approximation does not, however, release companies governed by different legal systems from the obligation to choose a form of company governed by a particular national law. The lack of choice of a Community-wide standard form restricts the options for optimising structures by means of company transactions.
- (3) The legal framework within which business must be carried on in the Community is still based largely on national laws and therefore no longer corresponds to the economic framework within which it must develop if the objectives set out in Article 18 of the Treaty are to be achieved. That situation forms a considerable obstacle to the creation of groups of companies from different Member States.
- (4) It is therefore essential that a single Community-wide legal form should be available to companies.

- (5) Member States are obliged to ensure that the provisions applicable to European private companies (SEPs) under this Regulation do not result either in discrimination arising out of unjustified different treatment of SEPs compared with the companies listed in Annex II to Regulation (EC) No. 2157/2001 or in disproportionate restrictions on the formation of a SEP or on the transfer of its registered office.
- (6) It is essential to ensure as far as possible that the economic unit and the legal unit of business in the Community coincide. For that purpose, provision should be made for the creation, side by side with companies governed by a particular national law, of companies below the level of a European company carrying on business under the law created by a Community Regulation directly applicable in all Member States.
- (7) The provisions of such a Regulation will permit the creation and management of companies with a European dimension, free from the obstacles arising from the disparity between the national regulations applying to commercial companies and the limited territorial application of national company law.
- (8) If the objective of legal rules governing SEPs is to be attained, it must be possible for anyone to form an SEP, even without a cross-border dimension.
- (9) National provisions applying to the companies listed in Annex II (EC) No. 2157/2001 in relation to mergers, demergers and form changes should therefore apply where an SEP is formed.
- (10) The SEP itself must take the form of a corporation with a share capital, that being the form most suited, in terms of both financing and management, to the needs of a company carrying on business on a European scale. In order to ensure that such companies are of reasonable size, a minimum amount of capital should be set so that they have sufficient assets without making it difficult for small and medium-sized enterprises to form SEPs.
- (11) As regards formation, structural changes and disposal of shares, and the formalities to be observed in the course thereof, the SEP shall be governed by the legal infrastructure of the State in which it is registered, unless the Regulation states the contrary. However, the provisions of this Regulation will ensure a uniform appearance for all SEPs in business dealings and create a Community-wide system for Corporate Governance and Community-wide transparency for the SEP's company data and its shareholdings.

- (12) In order to combat abuses, in particular money-laundering and the financing of terrorism, a uniform standard for identifying shareholders and company organs as well as those holding rights to company shares shall be provided. This objective is also pursued by regulations on the service of summons and jurisdiction as well as a Community-wide recognition of prohibitions on certain activities for managing directors.
- (13) The closer definition of the internal structure will only provide a largely discretionary framework. It will remain possible to define internal structures according to national custom; however, expenditure for this will be minimised in light of the given legal framework. Mandatory provisions are restricted to the essentials for protecting minority shareholders and legal transactions.
- (14) Participation by an SEP's employees in resolutions of its company organs shall be in accordance with the law of the State in which the SEP is registered. Where employees of an SEP are working in Member States where there are no such rights, for the purpose of establishing a quorum they shall count as employees in the State of the registered office. Where such rights do exist, they shall be exercised at branch level.
- (15) In order to ensure uniform standards, a unification of the law on business associations involving SEPs is required.
- (16) Each Member State must be required to apply the sanctions applicable to companies named in Annex II to Regulation (EC) No. 2157/2001 governed by its law in respect of infringements of this Regulation.
- (17) This Regulation does not cover other areas of law such as taxation, competition, intellectual property or insolvency, excepting the management's obligation to institute insolvency proceedings, where applicable. The provisions of the Member States' law and of Community law are therefore applicable in the above areas and in other areas not covered by this Regulation.
- (18) The entry into force of this Regulation must be deferred so that each Member State may set up in advance the necessary machinery for the formation and operation of SEPs with registered offices within its territory, so that the Regulation may be applied.
- (19) The SEP should be enabled to transfer its registered office to another Member State. More detailed rules will be introduced by the future Directive on cross-border transfers of registered offices.

- (20) The Treaty does not provide, for the adoption of this Regulation, powers of action other than those of Article 308 thereof.
  
- (21) Since the objectives of the intended action, as outlined above, cannot be adequately attained by the Member States in as much as a European private company is being established at European level and can therefore, because of the scale and impact of such company, be better attained at Community level, the Community may take measures in accordance with the principle of subsidiarity enshrined in Article 5 of the Treaty. In accordance with the principle of proportionality as set out in the said Article, this Regulation does not go beyond what is necessary to attain these objectives,

has adopted this Regulation:

## **Title 1**

### **General provisions**

#### **Article 1**

##### **Definition**

- (1) A company<sup>1</sup> may be set up within the territory of the Community in the form of a European private company (Societas Europaea Privata or SEP<sup>2</sup>) on the conditions and in the manner laid down in this Regulation.
- (2) The capital of an SEP shall be divided into shares. No shareholder shall be liable for more than the amount he has subscribed.
- (3) Subject to a provision to the contrary in the company statutes, an SEP shall be formed for an unlimited term<sup>3</sup>.
- (4) An SEP shall have legal personality.

#### **Article 2**

##### **Founders**

SEPs may be set up by any natural or legal persons (founders)<sup>4</sup>.

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<sup>1</sup> The legal form of an SEP as opposed to an SE should not be restricted only to commercial companies; the administration of private wealth (e.g. companies established for the purchase of properties abroad) should also be possible.

<sup>2</sup> The name and abbreviation are formed by analogy with the 'SE' or 'SCE' in order to ensure a uniform appearance for European company forms.

<sup>3</sup> A limited term for companies is a feature of numerous legal systems (e.g. France). Although there are historical reasons for this, it should not be adopted.

<sup>4</sup> By contrast with SEs, there should be no restrictions on the formation of SEPs.

### **Article 3**

#### **Applicable law**

- (1) Foundation, changes to the company statutes and share transfers, including the formalities to be observed in the course thereof, shall be governed by the law of the State in which the SEP is entered in the register established in Article 3 of First Council Directive 68/151/EEC (the State of Registration) for companies listed in Annex II to Regulation (EC) No. 2157/2001 in the applicable version, provided that this Regulation does not provide otherwise. This is the State in which the SEP's statutory seat is located within the meaning of this Regulation.
- (2) In all other cases, the legal relations between an SEP and its organs and shareholders, including the shareholders' legal relations among themselves, shall be governed solely by this Regulation<sup>5</sup>.
- (3) The provisions of this Regulation may be departed from in the company statutes or by shareholders' resolutions, unless this Regulation provides otherwise<sup>6</sup>.

### **Article 4**

#### **Service of summons**

Service of summons to SEPs or their company organs may be effected in the State in which they are registered. Lawsuits against SEPs or their company organs may be brought before the courts in the State in which they are registered<sup>7</sup>. A company organ within the meaning of this Regulation is any managing director or any member of a supervisory or administrative board (Article 10)<sup>8</sup>.

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<sup>5</sup> The *ratio legis* is that the SEP derives from the existing legal infrastructure in the State in which it is registered. That is why all questions of procedural law are subject to applicable national law.

<sup>6</sup> The provision makes it clear that this Regulation contains discretionary rules. Where provisions are mandatory, the Regulation expresses this directly or indirectly (e.g. by 'only', 'at least', 'shall', 'may not').

<sup>7</sup> In order to facilitate legal transactions, Article 4 provides a regulation on the service of summons and jurisdiction in the State in which a company is registered. This is supported by Article 6(3). The SEP itself must ensure that it is contactable.

<sup>8</sup> Including the supervisory or administrative boards in the concept of company organs is important in relation to Article 28, Article 41(4) and Article 50.

## **Article 5 Group**

- (1) If an SEP (controlling company) has a significant holding in a company (controlled company) or if it is able to exert significant influence on the management of another company by other means, they shall be deemed to form a Group. Where there is more than one controlling or controlled company, these together shall also form a group.
- (2) The controlling company shall compensate for the disadvantages which the controlled company experiences owing to its exertion of influence within the meaning of paragraph 1 unless this exertion of influence occurs in the course of a joint economic, social or financial interest in the context of targets set for the Group, in which the concerns of all Group members are adequately taken into account<sup>9</sup>. Sentence 1 shall not apply where a contract has been concluded between companies in which the controlling company undertakes to compensate for balance sheet losses incurred by the controlled company.
- (3) In order to be valid, a contract within the meaning of paragraph 2 sentence 2 requires the approval of the contracting parties' shareholder assemblies, with a majority of at least three quarters of the votes cast, and must be entered in the register established in Article 3 of First Council Directive 68/151/EEC. Its term shall extend to at least one full business year for the controlled company.

## **Title 2 Foundation**

### **Article 6 Contents of company statutes**

- (1) An SEP's statutes must include<sup>10</sup>:
  - a) the SEP's company name and statutory seat,
  - b) the amount of the share capital,

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<sup>9</sup> This is a somewhat less specific version of the Rozenblum rule in French law; see French Court of Cassation, JCP E 1985, II, 14614.

<sup>10</sup> An SEP need not indicate its company objects. The objects have nothing to do with the power of representation. On an optional basis, the management's powers may be limited in relation to shareholders. Otherwise, the company objects may concern possible duties of authorisation which come within the area of public trade-and-industry law.

- c) the capital contribution to be paid by each shareholder in respect of the shares they have subscribed.
- (2) An SEP's company name shall include the designation 'Societas Europaea Privata' or 'SEP'<sup>11</sup>.
- (3) The statutory seat must be sufficiently specific for a summons to be effectively served on the SEP.
- (4) The company statutes shall be drafted in one of the official languages of the European Union. Where they must be submitted to a court or authority in the State in which the SEP is registered, a translation into the Court language of that State must be provided. The correspondence of the translation to the original shall be certified by a person authorised to do so.

#### **Article 7** **Shares and share capital**

- (1) The shareholders' shares must be expressed in whole euros. The total sum of the shares shall comprise the share capital. This shall amount to at least ten thousand euros.
- (2) The company statutes may provide for the issue of new shares subject to a condition or a time limit; Article 15 shall apply analogously. In such case, the maximum sum of shares that may be issued shall be determined by the company statutes. Once new shares are subscribed to, the share capital shall be deemed increased.

#### **Article 8** **Managing directors**

- (1) The SEP shall have at least one managing director. The first managing directors shall be appointed by a resolution of the shareholders or by the company statutes.
- (2) Managing directors must have legal capacity. Natural persons acting as managing directors must have unlimited capacity to conduct business. Where non-natural persons are managing directors, the provisions of this

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<sup>11</sup> In other respects, a company must be formed in accordance with national law; see Article 3(1).

Regulation concerning managing directors shall also apply to their representative organs<sup>12</sup>.

- (3) No person may be a managing director who is prohibited from taking up an office of this kind by the decree of a court or administrative authority of a Member State<sup>13</sup>.
- (4) Each managing director shall represent the SEP comprehensively, both judicially and extra-judicially. The company statutes or a shareholders' resolution may determine only that, if there is more than one managing director, the SEP is to be represented jointly by two managing directors, by one managing director in association with a holder of commercial power of attorney or by all managing directors in unison<sup>14</sup>.
- (5) Each managing director shall be entitled to represent the SEP in legal transactions
  - a) on his/her own, in his/her own name or
  - b) on his/her own, acting as the representative of a third party.

This shall be without prejudice to Article 28.

The company statutes or a shareholders' resolution may only prohibit an action described in sentence 1 a) or b).

- (6) Any other restriction of a managing director's power of representation shall be invalid with respect to third parties. This shall apply in particular to a restriction that a managing director may represent the company only in certain transactions or types of transaction or only under certain circumstances or for a certain time or at certain places.

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<sup>12</sup> By contrast with German law, but in line with numerous other legal systems, legal persons and partnerships may also be managing directors of SEPs. The precondition for this is that equivalent obligations regarding publication in the register and liability be imposed on their representative organs.

<sup>13</sup> The provision contains a Community-wide recognition of prohibited activities.

<sup>14</sup> In cross-border transactions, the primary interest is the clarity of representational powers. For this reason, in paragraphs 4-6, the Regulation allows only a limited scope in conferring power of representation. As a rule, in legal terms, a managing director shall be entitled to represent the company on his/her own and to self-contract/to represent multiple entities, which corresponds to the typical situation in SMEs. The options of dual control or joint representation (see also Section 36a Companies Act 1985) are permitted.

- (8) The managing directors and their power of representation shall be registered with the register established in Article 3 of First Council Directive 68/151/EEC. This shall also apply to changes thereto.
- (9) The provisions of this Regulation concerning managing directors shall apply also to deputy managing directors, if these have been appointed<sup>15</sup>.

## **Article 9**

### **Holders of commercial power of attorney**

- (1) The SEP may have holders of commercial power of attorney. These will be entitled to represent the SEP in accordance with paragraph 2<sup>16</sup>.
- (2) Each holder of commercial power of attorney may represent the SEP in business dealings comprehensively, both judicially and extra-judicially. The company may only decide that the SEP is to be represented jointly by two holders of commercial power of attorney, by a holder of commercial power of attorney acting jointly with a managing director or by a holder of commercial power of attorney acting jointly with a managing director or with another holder of commercial power of attorney.
- (3) Each holder of commercial power of attorney may represent the SEP in legal transactions
  - a) on his/her own, in his/her own name or
  - b) on his/her own, as a representative of a third party.The company may only prohibit an action described in sentence 1 a) or b).
- (4) Article 8(6) also shall apply to holders of commercial power of attorney<sup>17</sup>.

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<sup>15</sup> In line with practice in many Member States, paragraph 9 also establishes the admissibility of deputy managing directors.

<sup>16</sup> The need to maintain a sufficient number of persons with capacity to act, whose power of representation is easy to verify, justifies the incorporation of the Central European concept of the holder of commercial power of attorney (*Prokurist*). In relation to the German and Austrian Commercial Codes, their power of representation is more formalised in the interest of simpler handling in legal transactions. The difference in the scope of a managing director's and a holder of commercial power of attorney's power of representation becomes evident in structural measures (such as merger agreements).

<sup>17</sup> See the note on Article 9(4).

- (5) The holder of commercial power of attorney and his/her power of representation shall be registered with in the register established under Article 3 of First Council Directive 68/151/EEC. The same shall apply to changes thereto.

## **Article 10**

### **Supervisory and administrative boards**

An SEP may have a supervisory or administrative board<sup>18</sup>. Article 31 shall also apply to its members, as shall Article 30, provided that the company statutes do not provide otherwise.

## **Article 11**

### **Registration**

- (1) The entry of an SEP in the register established in Article 3 of First Council Directive 68/151/EEC may only occur once the identity of shareholders, company organs and any authorised representatives has been established in accordance with Article 8 of Directive 2005/60/EC. This shall also apply to any changes thereto.
- (2) The State in which an SEP is registered shall maintain the SEP's company data in the form set out in Annex I to this Regulation for electronic inspection. Fees charged for this may not exceed those charged for comparable information concerning the companies listed in Annex II to Regulation (EC) No. 2157/2001 in the applicable version<sup>19</sup>.
- (3) The provisions enacted by the State in which a company or a branch is registered for the purpose of implementing the provisions of First Council Directive 68/151/EEC and Eleventh Council Directive 89/666/EEC shall apply to information regarding an SEP on printed documents.

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<sup>18</sup> This article serves to clarify that an SEP may also be organised in accordance with a two-tier or one-tier model; the managing directors are thus equated with *officers* under British law or *directeurs* under French law.

<sup>19</sup> In general, an SEP will be registered as a GmbH (limited liability company). Article 11 creates a Community-wide minimum standard as regards identification (money laundering problems) and also a format that can be used throughout the EU for an SEP's extract in the Commercial register, in order to make information easily accessible for the purpose of legal transactions despite language barriers.

## **Article 12** **Formation of an SEP**

- (1) An SEP shall be formed upon registration in the register established in the State in which its statutory seat is located, pursuant to Article 3 of First Council Directive 68/151/EEC.
- (2) The SEP shall be liable for legal transactions on its behalf which were concluded prior to registration only if all shareholders agree to the transaction either in general or in the specific case<sup>20</sup>.

## **Title 3** **Structural change<sup>21</sup>**

### **Art 13** **Amendments to the company statutes**

- (1) The company statutes may be amended only by a resolution of the shareholders. This shall be without prejudice to Article 7(2) sentence 3.
- (2) The resolution requires a majority of at least three quarters of the votes cast. The company statutes may impose further requirements.
- (3) After a resolution is reached on amending the statutes, a complete, new version of the company statutes, taking account of any changes, must be submitted to the register established in Article 3 of First Council Directive 68/151/EEC.
- (4) Amendments to company statutes shall have no legal effect until they are registered with the register established in Article 3 of First Council Directive 68/151/EEC.

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<sup>20</sup> The provision incorporates the French legal institution of the '*reprise*' for an SEP. The German concept of the '*Vorgesellschaft*' ['company prior to registration'] does not offer any advantages in technical legal terms.

<sup>21</sup> With reference to Article 3(1), Title 3 regulates only a few aspects, in particular in connection with the protection of minority shareholders (Article 13(1) and (2)), the principle of equal treatment (Articles 15 and 16) and the transparency of legal relations (Article 13(3) and (3) and Article 14). In the light of the considerable harmonisation underway in the law on structural changes, Article 17 may be limited to a mere reference to legal consequences.

## **Article 14**

### **Capital increase**

- (1) If an increase in share capital has been resolved upon, an express declaration by the subscriber to the shares shall be required for the subscription of any new share or any share whose nominal value has increased.
- (2) The subscriber's declaration shall include:
  - a) the information concerning the person of the subscriber prescribed by this Regulation for shareholders;
  - b) a designation of the share subscribed to;
  - c) a designation of the capital contribution owed.

Any condition or time limit being part of the subscriber's declaration must correspond to the condition or stipulation of time in Article 7(2) sentence 1.

- (3) The provisions of this Regulation on shares shall apply to any new shares or to shares whose nominal value has increased or to shares upon a reduction of share capital.
- (4) The share capital may be reduced below the minimum sum designated in Article 7(1) if this sum is arrived at by means of a capital increase and the capital increase is applied for registration at the same time with the capital reduction for registration in the register established in Article 3 of First Council Directive 68/151/EEC.
- (5) Upon being entered in the register established in Article 3 of First Council Directive 68/151/EEC, new shares shall be deemed issued and shares whose nominal value has been increased shall be deemed increased.

## **Article 15**

### **Subscription right**

- (1) The term in which a shareholder's subscription right may be exercised in respect of new shares or shares whose nominal value has increased may not be less than two weeks. This term shall begin upon receipt of the subscription offer.

- (2) Unless otherwise specified in the company statutes, a subscription right following a resolution to increase capital may be excluded if this is in the SEP's overwhelming interest. The exclusion shall require a majority of three quarters of the votes cast.

### **Article 16**

#### **Capital increase from company funds**

- (1) If the SEP increases its share capital by converting reserves, net annual profits or profits carried forward (a capital increase from company funds), the new shares or shares whose nominal value has increased shall be allotted to the shareholders in proportion to their previous shares, unless otherwise specified in the company statutes or established by a shareholders' resolution on the capital increase by a majority of three quarters of the votes cast.
- (2) If the capital increase from company funds leads to only part of a new share being allotted to an existing share, this partial right may be disposed of independently and may be inherited.
- (3) The rights arising from a new share may be exercised only if partial rights, which together form a full share, are united in single ownership or if more than one entitled party, whose partial rights together amount to a full share, unite in order to exercise their rights in accordance with Article 21 of this Regulation.

### **Article 17**

#### **Restructuring**

A restructuring of an SEP (merger, demerger or change of legal form) shall be governed by the law of the State in which it is registered for all companies listed in Annex II to Regulation (EC) No. 2157/2001.

**Title 4**  
**Share capital and shares**

**Article 18**  
**Payment of the capital contribution<sup>22</sup>**

- (1) Upon registration, an SEP may claim payment of the capital contributions laid down in the company statutes.
- (2) Once the SEP's claim has arisen, each shareholder may request payment of a capital contribution to the SEP.
- (3) An SEP may not validly waive its claim to payment of a capital contribution or may not reach a compromise with regard to the claim. This shall not apply if the debtor is insolvent and has compromised with its creditors as to avoid proceedings pursuant to Annex A or Annex B to Regulation (EC) No. 136/2000 or a similar proceedings or if its liability for damages has been arranged in such proceedings.
- (4) The claim to payment of a capital contribution shall become statute-barred 10 years from the point at which the claim arises. If proceedings in accordance with Annex A or Annex B to Regulation (EC) No. 136/2000 are instituted against the SEP's assets, the claim will become statute-barred only after the expiry of a period of six months from the time at which proceedings were instituted.

**Article 19**  
**Refund of capital contributions**

- (1) If a contribution is refunded to the shareholder, the SEP is entitled to return. Article 18 applies analogously.
- (2) The following, in particular, is not regarded as refund:

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<sup>22</sup> This right of the SEP to raise and maintain capital departs from the classic, continental principle of fixed capital to be raised prior to subscription. It is replaced by a limited partnership without a general partner, following the model of the British company limited by guarantee or the US LLC. The shareholders make contributions at a point in time determined by them (Article 18(1)). As well as the SEP, each shareholder can demand payment to the SEP (Article 18(2)). Upon restitution of the contribution, these claims will be renewed (Article 19). The limitation period is uniformly regulated (Article 17(4)), although obstacles to and the recommencement of the limitation period shall be governed by the law in the State in which the SEP is registered. In the case of legal successors, there shall be joint and several liability (Article 20) and the details shall also be in accordance with the law of the State in which it is registered.

- a) the allotment of a share of profits made in good faith on the basis of a balance sheet prepared in good faith;
  - b) the granting of credit to a shareholder or a person closely associated with a shareholder, provided that this is undertaken with businessman's due diligence.
- (3) Paragraphs 1 and 2 shall also apply to other legal acts matching economically the refund of the contribution.

**Article 20**  
**Joint and several liability**

If the person owing a contribution has left the SEP, both he/she and his/her legal successor to the share shall be jointly and severally liable for claims under Articles 18 and 19. The same shall apply where there is more than one party entitled to a share (Article 21) or for the owners of a split share (Article 22(3)).

**Article 21**  
**Several entitled parties**

- (1) If an undivided share belongs to more than one jointly entitled person, the latter must exercise their rights with regard to such share jointly.
- (2) They shall be jointly and severally liable to the SEP for the contributions to be made in respect of a share.
- (3) Where there is no common representative for jointly entitled persons, legal acts which an SEP has to perform vis-à-vis the owner of a share shall be deemed effective, even if they are performed against only one of the jointly entitled persons. If a shareholder has more than one heir, sentence 1 shall apply only in relation to legal acts performed later than one month after the accrual of the inheritance takes place.

**Article 22**  
**Alienation of shares<sup>23</sup>**

- (1) Shares may be inherited. They may be divided, consolidated, assigned and encumbered by means of legal transactions, unless otherwise provided in the company statutes.
- (2) The acquisition of a share or rights in respect thereof may be upheld against the SEP only upon receipt of proof of lawful acquisition. The acquisition of a share or rights in respect thereof may be upheld against third parties only upon publication of the list of shareholders (Article 27) in the register established in Article 3 of First Council Directive 68/151/EEC.
- (3) Paragraph 2 shall also apply to the division and consolidation of shares.

**Article 23**  
**Redemption<sup>24</sup>**

- (1) Provided that the company statutes do not provide otherwise, a shareholder's share may be fully or partially redeemed if
  - a) proceedings in accordance with Annex A or Annex B to Regulation (EC) No. 136/2000 or similar proceedings have been instituted or an application for such proceedings has been turned down due to insufficient assets;
  - b) execution has been levied with regard to the share and such measure has not been rescinded within three months of a summons being served on the SEP;
  - c) there good cause is shown with regard to the shareholder involved;
  - d) the shareholder involved agrees;

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<sup>23</sup> Article 22(1) clarifies a shareholder's basic freedom to dispose of its shares. Paragraph 2 incorporates the French concept of *opposabilité au tiers*. The SEP or any third party may always rely on the transfer of rights in its favour, e.g. in the case of admission to a shareholders' assembly or claims under Article 20. However, the successor to a share may not insist upon admission to the shareholders' assembly until it has proved its lawful acquisition thereof to the company.

<sup>24</sup> Article 23 contains a typical catch-all rule, which largely dispenses with an equivalent clause in the company statutes.

- e) the share to be redeemed was acquired by the SEP pursuant to Article 25.
- (2) Redemption requires a shareholders' resolution. The shareholder involved is not entitled to vote on this.
- (3) Redemption shall be effective if the shareholder involved has received due compensation.
- (4) Upon effectiveness of the redemption, the share is deemed cancelled and the shareholder involved is deemed having left the SEP. Compensation is the surrogate for third parties' rights to the share. The reduction of share capital connected with the redemption and the amendmend of the company statutes shall be applied for registration with the register established in Article 3 of First Council Directive 68/151/EEC.
- (5) Without the consent of the shareholder involved a share may be redeemed pursuant to the company statutes only if such redemption was permitted in the original statutes or by an amendment thereto prior to the acquisition of or the subscription to the share.

**Article 24**  
**Exclusion and obligation to purchase<sup>25</sup>**

- (1) If more than 95% of the shares in an SEP are held directly or indirectly by a single shareholder (majority shareholder), such shareholder may demand the transfer of shares from the remaining (minority) shareholders to itself or to a third party appointed by it against payment of a compensation amounting to the actual value of the shares.
- (2) Each minority shareholder may refuse to transfer its shares as long as there is no expert appraisal confirming that the price offered by way of a compensation at least matches the shares' actual value. An expert shall be appointed in accordance with the law of the State of the statutory seat of the SEP. Following submission of the appraisal, the minority shareholder shall transfer its shares without prejudice to its right to request judicial review of the appraisal.

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<sup>25</sup> In accordance with the legal situation regarding company takeovers, the SEP statute also allows the possibility of excluding minority shareholders against payment of appropriate compensation. The right of exclusion takes the form of an action for enforcing an obligation to sell. There is no requirement of immediate transfer as with listed companies. However, if a dispute concerning the expert evaluation of the shares arises, it will not affect the fundamental obligation to transfer. Conversely, following acquisition of over 95% of shares, an exit strategy is also facilitated for minority shareholders. The threshold of 95% corresponds to Article 38(1) and Article 47(2).

- (3) Within three months of being informed that the prerequisites in paragraph 1 are met, a minority shareholder may request acquisition of its shares by the majority shareholder pursuant to paragraphs 1 and 2.

**Article 25**  
**Purchase of a company's own shares**

- (1) A company may not purchase its own shares for which contributions have not been paid in full.
- (2) It may purchase certain shares for which contributions have been paid in full, provided that the consideration does not constitute refund of the contribution within the meaning of Article 19.
- (3) Paragraphs 1 and 2 shall also apply if an SEP acquires rights to its shareholders' shares<sup>26</sup>.

**Article 26**  
**Shareholders' list<sup>27</sup>**

- (1) After each change in the person of a shareholder, its name or address or after any constitution, transfer, change in contents or expiry of a third party's right to shares, the SEP shall draw up a list of shareholders.
- (2) The shareholders' list must include the following information:
  - a) Name, date of birth or the register established in Article 3 of First Council Directive 68/151/EEC and the shareholder's original or amended registration number and address.
  - b) Identifying designation and amount of the share.
  - c) Time and legal basis of acquisition.

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<sup>26</sup> The Regulation restricts the right to purchase own shares or equivalent actions in economic terms to the extent that this could reduce the liability basis for creditors, thereby reducing capital stock.

<sup>27</sup> The principal means of establishing share transparency is the shareholders' list, whose publication in the register leads to the consequences set out in Article 22(2) and Article 27. In particular, the far-reaching consequences in Article 27(3) for the party losing its rights require firstly that shareholders be identified and secondly that the accuracy of the list be confirmed by a public authority.

- d) Any pledges of and usufruct in shares with the designation of the entitled party pursuant to a) as well as the time and legal basis of the acquisition or expiry of the right.

If a share or right to a share belongs to a partnership which is not recorded in a register within the meaning of Article 3 of First Council Directive 68/151/EEC or a comparable register, its partners and subsequent changes shall be noted therein pursuant to a).

- (3) Summonses may be served by an SEP on shareholders and entitled parties within the meaning of paragraph 2 d) at the address registered in the shareholders' list. Lawsuits brought against shareholders under Articles 18, 19 and 24 may be brought before the respective competent court.

### **Article 27** **Publication of the shareholders' list**

- (1) The shareholders' list shall be submitted to the register established in Article 3 of First Council Directive 68/151/EEC and shall be published therein in accordance with the said Directive and the legal provisions of the State of the statutory seat.
- (2) Publication may not occur until the identity of the new shareholder or that of the new entitled party has been established in accordance with Article 8 of Directive 2005/60/EG and a notary, a court or another competent authority in the State in which the SEP is registered has certified the accuracy of this list, taking account of any changes.
- (3) The most recently published shareholders' list shall apply in favour of any person acquiring a right to a share or a right to such a right through a legal transaction, unless
  - a) the purchaser was aware of the inaccuracy or was unaware thereof as a result of gross negligence, or
  - b) the party affected by the registration in the shareholders' register opposed it within one year of submission of the shareholders' list to the register referred to in paragraph 1.

**Article 28**  
**Liability of managing directors and shareholders<sup>28</sup>**

- (1) The company organs are jointly and severally liable for damages to the SEP if the latter's assets are reduced due to actions of the company in favour of one of the following: a company organ, a shareholder, a person closely associated with a company organ or shareholder, a company over which the SEP, the company organ or the shareholder can exert a controlling influence or a person or company that can exert a controlling influence over a company organ. A forbearance to exercise a right is deemed equivalent with an action.
- (2) The recipient of a payment pursuant to paragraph 1 shall be liable to the SEP for restitution of what obtained from a reduction of assets pursuant to paragraph 1. . The recipient can rely on the fact that what obtained no longer exists only upon proof that the recipient did not know or need not have known that the money received was a payment pursuant to paragraph 1.
- (3) Article 18(2) also applies to claims of the SEP under paragraphs 1 and 2.
- (4) Liability as specified in paragraphs 1 and 2 is excluded where there is no duty to compensate in accordance with Article 5(2) sentence 1 clause 2 or there is a contract in accordance with Article 5(2) sentence 2 and 5(3). Liability as specified in paragraphs 1 and 2 shall apply only where the action or forbearance is not in the SEP's clear interest. This is presumed in favour of the creditor if
  - a) at the time of the action or forbearance the SEP had not properly acquitted all of its obligations to disclose its accounts, or
  - b) at the time of the action or forbearance, proceedings specified in Annex A or Annex B of Regulation (EC) No. 136/2000 should have been instituted (Article 48), or
  - c) at the time of the action, the actor was involved in a conflict of interest. There will be no conflict of interest if the action or

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<sup>28</sup> Article 28 imports the Anglo-American legal institutions of *fraudulent transfer* and *wrongful trading* into a clearly defined concept of liability. On the one hand, a managing director who, without any justifiable reason in business terms, places assets belonging to an SEP in a shareholder's sphere of influence will be liable. On the other hand, the recipient will be liable in respect of its unjust enrichment. Paragraph 4 sentence 2 eases the creditor's burden of proof in certain regards.

forbearance was permitted by a shareholders' resolution; shareholders acting or benefiting will not be entitled to vote on this.

- (5) An SEP's claims as specified in paragraphs 1 and 2 will become statute-barred 10 years after they arise.
- (6) This shall be without prejudice to the liability of managing directors and shareholders under other legal provisions.

**Title 5**  
**Management and shareholders' assembly**

**Section One**  
**Management**

**Article 29**  
**Management's powers**

Managing directors are bound in their relations with the SEP to comply with the restrictions placed on the scope of their power to represent the SEP by the company statutes or, in the absence of a provision to the contrary therein, by the shareholders' resolutions.

**Article 30**  
**Revoking a managing director's appointment**

- (1) The appointment of a managing director may be revoked at any time, without prejudice to claims for compensation arising from existing contracts.
- (2) The company statutes may restrict the admissibility of revocation in cases where there is good cause for revocation. Such good cause is, in particular, a serious breach of duty or incapacity for proper management.

**Article 31**  
**Liability of managing directors**

- (1) In matters concerning the SEP, managing directors shall exercise the due diligence of a prudent manager.

- (2) Managing directors in breach of their duties shall be jointly and severally liable to the SEP for any damage ensuing.
- (3) There is no breach of duty if, in carrying out his/her tasks, the managing director had a reasonable knowledge of the situation and it could be assumed that his/her action or forbearance was in the SEP's well-understood interest.
- (4) Claims under paragraphs 1 to 3 shall become statute-barred after five years.

## **Section Two Shareholders<sup>29</sup>**

### **Article 32 Rights arising from the company statutes**

Rights of the shareholders in matters concerning the SEP as well as the exercise of such rights are determined by the company statutes, unless otherwise provided in this Regulation.

### **Article 33 Right to information and right of inspection**

- (1) The managing directors must without undue delay provide shareholders with information on matters concerning the SEP upon request and allow them access to the company records and documents.
- (2) Managing directors may refuse to provide information or allow inspection if there is a concern that the shareholder might be using these for non-company purposes, thereby putting the company or an associated undertaking at a material disadvantage. Refusal requires a shareholders' resolution.
- (3) Paragraphs 1 and 2 may not be derogated by the company statutes.

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<sup>29</sup> Article 32 et seq. are largely discretionary catch-all rules for shareholders' internal relations. Only Articles 33, 36(4), 37(3) and 40 are mandatory. Article 35(3) and (4) are partly mandatory and Article 41 only provides an option for an arbitration court, which, however, where third parties are affected by the proceedings (e.g. co-partners), must be so composed as to exclude any manipulation of the judges by such third parties.

### **Article 34** **The shareholders' competences**

Unless otherwise provided in the company statutes, the following shall be subject to shareholders' resolutions:

1. establishing the annual accounts and allotting the profits;
2. the resolution on publication of individual accounts in accordance with international accounting standards and on the approval of the annual accounts prepared by the managing directors<sup>30</sup>;
3. approval of consolidated accounts prepared by the managing directors;
4. transfer of the seat of management;
5. the appointment and dismissal of managing directors, the formal approval of their actions, and changes of their power of representation;
6. regulations for auditing and monitoring of management;
7. appointing holders of commercial power of attorney and other authorised persons for the overall operation of business;
8. representing the SEP in any lawsuits it has to prosecute against managing directors.

### **Article 35** **Resolution by majority of votes**

- (1) The resolutions to be passed by shareholders with regard to the SEP require a majority of the votes cast, unless otherwise provided in this Regulation.
- (2) Each euro of a share shall give rise to one vote.
- (3) Powers of attorney must be at least in text form in order to be valid. They will be kept by the SEP.

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<sup>30</sup> Here, the Regulation provides a right to opt for international rather than national accounting; see also Article 44(1) clause 2.

- (4) A shareholder who is discharged or relieved of a liability by a resolution shall have no vote in this and may not vote on behalf of another one. The same applies to a resolution concerning the undertaking of a legal transaction or the bringing or the execution of a lawsuit against such shareholder. The company statutes may determine any other cases in which shareholders are not entitled to vote.

**Article 36**  
**Resolutions passed in assembly**

- (1) The shareholders' resolutions shall be passed in assemblies.
- (2) An assembly need not be held if all shareholders have declared in writing that they agree with the resolution to be taken or agree to vote in writing.
- (3) The shareholders shall record the minutes immediately after a resolution is taken. The minutes shall be signed by the chairperson.
- (4) Resolutions which, under this Regulation, require a majority of at least three quarters of the votes cast at the passing of the resolution may only be reached in assemblies.

**Article 37**  
**Convening assemblies**

- (1) An assembly of shareholders shall be convened by the managing directors. Unless otherwise provided in the company statutes, any managing director is entitled to convene an assembly.
- (2) Apart from cases expressly laid down, an assembly must be convened where this appears necessary in the interest of the SEP.
- (3) If it results in preparing the annual or interim accounts or if it appears upon due assessment of the circumstances that a loss amounting to half of the share capital has occurred, the managing directors must convene a shareholders' assembly without undue delay.

**Article 38**  
**Convening by a minority of shareholders**

- (1) Shareholders whose shares amount to at least one twentieth of the share capital are entitled at any time to request that a shareholders' assembly be convened, provided that they indicate the purpose and reasons.
- (2) Similarly, shareholders have a right to request that matters for which a resolution is required be reported in the convocation of the assembly.
- (3) If their request is not met or there is no person to whom such requests should be addressed, the shareholders designated in paragraph 1 may convene an assembly themselves, indicating its purpose and reasons. The assembly shall resolve whether the resulting costs are to be borne by the SEP.

**Article 39**  
**Form of convocation**

- (1) An assembly shall be convened by inviting shareholders by registered post. Letters of convocation must be sent at least a week in advance. The assembly should be held at the SEP's statutory seat.
- (2) The purpose of an assembly should be indicated in the letter of convocation.
- (3) If an assembly is not properly convened, resolutions may be passed only if all shareholders are present.
- (4) The same also applies to resolutions concerning matters which were not announced at least three days prior to the assembly in the manner prescribed for convening assemblies.

**Article 40**  
**Special rights and duties**

A shareholder's privilege may not be adversely affected without its consent, given by means of a shareholders' resolution, nor may duties that were not laid down in the company statutes be imposed on it without the involved shareholder's consent.

**Article 41**  
**Avoidance of shareholders' resolutions**

- (1) Shareholders' resolutions are deemed effective upon announcement by the chairperson at the assembly. If a resolution is not passed in an assembly, it is deemed effective upon signature of the minutes of the resolution.
- (2) Shareholders' resolutions may be avoided by any shareholder on the basis that they have infringed the provisions of the company statutes, the applicable law of the State in which the SEP is registered or this Regulation, by bringing an lawsuit before the competent court in the State of the statutory seat of the SEP.
- (3) The period for avoiding resolutions is one month. It commences from the day on which the shareholder bringing the lawsuit obtained knowledge of the resolution.
- (4) The company statutes may submit competence for legal disputes arising between an SEP and its company organs or shareholders or among the company organs to a court of arbitration. If the effects of an arbitration award affect third parties who are not parties to the arbitration proceedings, arbitration is permitted only if it is ensured that the composition of the court of arbitration is immune to influence from the parties of the dispute.

**Article 42**  
**Employees' rights**

Participation by an SEP's employees in resolutions to be taken by company organs shall be determined by the law of the State in which the SEP is registered. If the SEP has a branch in another Member State, the provisions of the latter State shall apply to any persons employed there. If the latter State does not provide for employee participation within the meaning of sentence 1, sentence 1 shall also apply to these employees.

**Title 6**  
**Annual accounts and allotment of profits<sup>31</sup>**

**Article 43**  
**Duty to maintain orderly accounts and monitoring thereof**

- (1) The managing directors shall ensure that the SEP's accounts are properly kept.
- (2) The managing directors shall take appropriate measures, in particular by setting up a risk management system, to ensure that developments jeopardizing the continuance of the SEP are recognised at an early stage.

**Article 44**  
**Annual accounts**

- (1) The preparation and the contents of the annual accounts and, where necessary, a directors' report and the audit of these documents by an agency provided for this purpose shall be governed by the law of the State in which the SEP is registered, unless otherwise provided in this Regulation.
- (2) Pursuant to First Council Directive 68/151/EEC, the documents referred to in paragraph 1 shall be published in accordance with the provisions of the State in which the SEP is registered.

**Article 45**  
**Claim to annual net profits**

- (1) The shareholders may claim the annual net income plus any profits carried forward, minus losses carried forward, provided that this amount is not excluded from allotment to the shareholders by a legal provision, by the company statutes, by a resolution pursuant to paragraph 2 or as additional expenses pursuant to the resolution on the allotment of profits. If the balance sheet is prepared taking account of a partial allotment of profits or if reserves are dissolved, the shareholders may claim the net annual profits, in derogation of sentence 1.

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<sup>31</sup> An SEP's accounting is largely subject to the law of the State in which it is registered. However, the shareholders may switch to accounting in accordance with international standards. Provisions on the use of profits protect minority shareholders.

- (2) When resolving on the allotment of profits, shareholders may allocate amounts to the reserves or carry them forward as profits, unless otherwise provided in the company statutes.
- (3) Profits shall be allotted in proportion to each share. If new shares are issued in the course of the business year or if existing shares have their nominal value increased, they shall take part in the allotment, provided that no resolution on the allotment of profits had been reached when they were issued or had their nominal value increased. Other rules concerning allotment may established by the company statutes or by a resolution of the shareholders, notwithstanding Article 40.

**Title 7**  
**Termination of an SEP<sup>32</sup>**

**Article 46**  
**Winding-up**

- (1) An SEP shall be wound up:
  1. upon expiry of the period specified in the company statutes;
  2. by a resolution of the shareholders; unless otherwise provided in the company statutes, such resolution requires a majority of three quarters of the votes cast;
  3. if there is cause with regard to the SEP due to which a company listed in Annex II to Regulation (EC) No. 2157/2001 is deemed or should be wound up under the law of the State in which the SEP is registered.
- (2) The company statutes may establish further causes for winding up.
- (3) Winding up shall be done by liquidators. Article 9 of this Regulation applies accordingly. Apart from that, the liquidation procedure for the companies listed in Annex II to Regulation (EC) No. 2157/2001 shall be governed by the applicable law of the State in which it is registered.

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<sup>32</sup> In accordance with Regulation (EC) No. 2157/2001, the liquidation of an SEP will be governed by the law of the state in which it is registered. In the absence of promotional activities, the interest of cross-border protection is less prominent, apart from the liquidators' power of representation.

**Article 47**  
**Action for dissolution**

- (1) An SEP may be wound up by a court judgment if it becomes impossible to achieve the company's purposes or if there are other good causes for winding up with regard to the SEP's circumstances.
- (2) An action for dissolution must be brought against the SEP. It may be brought only by shareholders whose shares together amount to at least one twentieth of the share capital. Article 41(4) applies accordingly.
- (3) The courts of the statutory seat have exclusive jurisdiction for such action

**Article 48**  
**Duty to apply for the institution of insolvency proceedings<sup>33</sup>**

If an SEP is insolvent, the managing directors must apply for the institution of proceedings in accordance with Annex A or Annex B of Regulation (EC) No. 136/2000 without undue delay. In particular insolvency must be presumed if the SEP has stopped making payments or if it has become over-indebted<sup>34</sup>.

**Article 49**  
**Action for nullity**

- (1) If the company statutes contain no provisions on the amount of the share capital or if provisions on the company's objects are void, any shareholder, managing director and, if there is a supervisory board, any member thereof, may bring an action to have the SEP declared nul and void.
- (2) The courts of the statutory seats have exclusive jurisdiction for such action.

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<sup>33</sup> In principle, creditors are also entitled to institute insolvency proceedings. However, they incur further costs in so doing, which deter creditors from such a course of action. This is contrary to the purposes of orderly liquidation and restructuring, which are the goals of insolvency proceedings. For that reason, as well as regulating mere secondary effects (Article 28), the Regulation also prescribes an original duty for managing directors to institute proceedings.

<sup>34</sup> There is no harmonisation on the point in time at which insolvency should begin. However, uniform criteria are in the interest of business transactions, so that a minimum standard is prescribed here.

- (3) A defect affecting provisions on the company's objects may be remedied by a unanimous shareholders' resolution.
- (4) If an SEP's nullity is entered into the register established under Article 3 of First Council Directive 68/151/EEC, Article 46(3) applies accordingly.
- (5) The validity of legal transactions undertaken with third parties shall not be affected by the SEP's nullity. The shareholders shall make the stipulated contributions, as far as this is necessary to meet all liabilities incurred.

## **Title 8 Final provisions**

### **Article 50 Member States' powers**

The Member States' powers to ensure that the companies listed in Annex II to Regulation (EC) No. 2157/2001, their shareholders and their company organs comply with their obligations under this Regulation and the applicable law as laid down in this Regulation, shall also encompass SEPs, their shareholders and their company organs. In particular, this also applies to provisions of criminal-law<sup>35</sup>.

### **Article 51 Currency of share capital**

Article 67 of Regulation (EC) No. 2157/2001 applies accordingly.

### **Article 52 Transformation**

- (1) The Member States shall make all appropriate provisions so as to ensure the effectiveness of this Regulation.
- (2) Each Member State shall designate the authorities within the meaning of Articles 24 and 27. It shall inform the Commission and the other Member States hereof.

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<sup>35</sup> This provision ensures that in the case of a breach of duty the same sanctions are available as those that can be taken against companies within the meaning of Annex II to Regulation (EC) No. 2157/2001 in the relevant Member State.

**Article 53**  
**Entry into force**

- (1) This Regulation shall enter into force on \_\_\_\_\_ .
- (2) This Regulation shall be binding in its entirety and directly applicable in all Member States.

## Annex I

*The text boxes must be completed in one of the national languages of the State in which the SEP is registered. The entry fields must be filled in or ticked.*

### 1. General information

1	Company name				
2	Statutory seat	Number			
		Street			
		Town			
		Postal Code			
		Country			
3	Subscribed share capital (€)				
4	Unsubscribed capital increase (€)				
5	General role on representation	indivi- dually	two MDs	two MDs or MD and holder of com- mercial power of attor- ney	all MDs jointly
		self-dealing prohibited		multiple repre- sentation prohi- bited	
6	Company statutes in the version of (DD.MM.YYYY)				
7	Link for downloading company statutes				
8	Link for downloading current shareholders' list				
9	Annual accounts	Relevant date for the most recently submitted annual accounts		Relevant date for the most recently submitted approved	

			consolidated accounts
10	Link for downloading the consolidated accounts		
11	Place(s) in which branches are established		
12	Register of branches within the meaning of Article 3 of First Council Directive 68/151/EEC		
13	Winding up of the company decided on with effect from		

*The following information should be provided instead for branches within the meaning of Eleventh Council Directive 89/666/EEC:*

1	Name of main branch				
2	Statutory seat of the main branch				
3	Register for the branch within the meaning of Article 3 of First Council Directive 68/151/EEC				
4	Name of the branch				
5	Place where the branch is established	Number			
		Street			
		Town			
		Postal Code			
		Country			
6	Subscribed share capital (€)				
7	Unsubscribed capital increase (€)				
8	General rules on representation	individually	two MDs	two MDs or MD and holder of commercial power of attorney	all MDs jointly

		self-dealing prohibited	multiple representation prohibited
9	Company statutes in the version of (DD.MM.YYYY)		
10	Link for downloading company statutes		
11	Link for downloading current shareholders' list		
12	Annual accounts	Relevant date for the most recently submitted annual accounts	Relevant date for the most recently submitted approved consolidated accounts
13	Link for downloading the consolidated accounts		
14	Winding up of the company decided upon with effect from		

## 2. Managing directors

*Repeat for each director.*

*For an SEP in liquidation, indicate the liquidators instead.*

### 2.1 Natural persons

1	Name of managing director		
2	Managing director's date of birth (DD.MM.YYYY)		
3	Managing director's power of representation	According to general rule	Always individually
		self-dealing prohibited	multiple representation prohibited

### 2.2 Legal persons

1	Managing director's company name	
2	State in which the managing director is registered	
3	Registration authority and registration number of managing director	

1	Name of the managing director's organ with power of representation			
2	Date of birth of organ with power of representation (DD.MM.YYYY)			
3	Power of representation of this company organ	According to general rule	Always individually	
		self-dealing prohibited	multiple representation prohibited	

### 3. Holders of commercial power of attorney

*Repeat for each authorised representative*

1	Name of holder of commercial power of attorney					
2	Holders's date of birth (DD.MM.YYYY)					
3	Holder's power of representation	individually	jointly with other holder of commercial power of attorney	jointly with MD	jointly with MD or other holder of commercial power of attorney	

		Self-dealing prohibited	multiple representation prohibited

#### 4. Supervisory and administrative boards

*Repeat for each member*

1	Name of member		
2	Member's date of birth (DD.MM.YYYY)		
3	Member's office	Chairman	Deputy chairman