Company law: statute for a European private company

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The Committee on Legal Affairs adopted a report drafted by Klaus-Heiner **LEHNE** (EPP-ED, DE) and amended the proposal for a Council regulation on the Statute for a European private company.

The main amendments are as follows:

Definitions: the committee clarified the definitions of 'distribution', and inserted a definition for 'level of employee participation'.

Requirements for SPE: Members added to the requirements with which an SPE must comply, specifying in addition to those listed in the proposal, the following: (i) its business objective must be clearly defined and must consist of producing or trading goods and/or providing services; (ii) it shall have a cross-border component demonstrated by one of several factors listed in the text e.g a cross-border business intention or business objective.

Seat: an SPE shall not be under any obligation to have its central administration or principal place of business in the Member State in which it has its registered office. If the central administration or principal place of business is located in a Member State other than that in which it has its registered office, the SPE shall lodge in the register of the Member State where the central administration or principal place of business is located, the particulars referred to in the text. The information recorded in the register shall be deemed to be accurate. The registered office shall be the address at which all legal documents relating to the SPE are to be served.

Articles of association: the articles of association of a SPE shall be in writing and signed by every founding shareholder. Further formalities may be prescribed by applicable national law, unless the SPE uses official model articles of association that are published by the Commission in the Official Journal.

Registration: copy of each registration of an SPE and copies of all subsequent amendments thereto shall be sent by the respective national registers to a European register managed by the Commission and the competent national authorities and held in that European register. The Commission shall monitor the data entered in that register, particularly with a view to avoiding possible abuses and mistakes. If the SPE is unable to demonstrate that it complies with the requirement described above regarding a cross-border component within two years of registration, it shall be converted into the appropriate national legal form.

Formalities: the list of shareholders is now added to the documents that the company has to deposit and display at the register, and changes in the shareholder-structure of the company become public.

Disclosure: the letters and order forms of an SPE, whether they are in paper or electronic form, as well as its website, if any, shall state the following particulars: details of its central administration or principal place of business, the existence of any branches and details of the members of the executive management body of the SPE.

Transfer of shares: all agreements on the transfer of shares shall be at least in written form. Member States should be able to arrange for stricter provisions for the transfer of shares. Transfer of shares

becomes effective in relation to third parties, on the day the shareholder is entered in the list of shareholders or the third party's status as shareholder is published in the register.

Withdrawal of a shareholder: the right of withdrawal shall be exercisable by shareholders who do not subscribe to certain resolutions listed in the text. The Statute for the SPE may provide for additional grounds for withdrawal.

Share capital: the Commission had not specified a capital stock when the SPE is established, stating only that the capital shall be EUR 1. Members stated that the SPE shall be at least EUR 1, provided that the articles of association require that the management body sign a solvency certificate. Where the articles of association contain no provision to that effect, the capital of the SPE shall be at least EUR 8 000. 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 8 years after the company's registration.

Distributions: a distribution shall be permissible only where the remaining amount of the deposit does not fall below the minimum amount referred to in the text.

Capital reduction: similarly, it is specified that a reduction of the share capital shall be permissible only where the remaining amount of the deposit does not fall below the minimum amount.

Executive management body: this is now re-named, Members having deleted "management body". Members' resolutions shall be internally binding on the executive management body.

Resolutions of the shareholders: resolutions of the shareholders may be declared ineffective on the grounds of an infringement of the provisions of the articles of association, of the Regulation or of the applicable law only by means of an action before the court that has jurisdiction in relation to the SPE's registered office.

An action may be brought within 1 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 and the complainant does not give his or her subsequent agreement. The articles of association may allow a longer time for appeal.

General duties and liabilities of directors: Members amended the text to restate clearly the principle of joint and several liability of the directors, while at the same time making it possible for that liability not to extend to anyone who can demonstrate their blamelessness or had made known their personal disagreement. They also provide that directors shall pay compensation in particular where payments have been made in breach of the provisions on distribution, or own shares in the company have been acquired in breach of the provisions on acquisition of own shares. A requirement on the part of the directors to compensate the company's creditors shall not be waived on the grounds that they acted in accordance with a resolution of the shareholders. However, any right of action pursuant to this provision shall lapse within 4 years of when it arose.

References to national law: references to national law should be avoided wherever possible. Members felt that 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 might expect throughout the EU. Members provided rules specific to the SPE regarding: the liability of executive directors, the consequences of defective resolutions and the consequences of ineffective clauses in the articles of association. (See above).

Employee participation: where more than 500 employees of the SPE 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 provisions of the Directive 2001/86/EC on employee participation shall apply accordingly.

Non-euro Member States: SPEs with a registered office in Member States that have not adopted the euro shall, in addition, express their capital in euro.

Arbitration clause: a new Article is inserted providing for referral to arbitrators of disputes.

Severability clause: a further new provision aims to clarify which rules apply where individual clauses of the articles of association are ineffective.

Web-pages: Member States shall maintain web pages listing SPEs registered in their territory and any court judgments relating to the operation of SPEs in their territory. The Commission shall maintain a web page which provides an electronic link to those discrete national web pages.