Company law: statute for a European private company

2008/0130(NLE) - 10/03/2009 - Text adopted by Parliament, 1st reading/single reading

The European Parliament adopted by 578 votes to 72, with 25 abstentions, a legislative resolution amending, under the consultation procedure, the proposal for a Council regulation on the Statute for a European private company. Parliament's key amendments inserted new provisions on employee participation.

The main amendments were as follows:

Definitions: Parliament 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, that the SPE shall have a cross-border component demonstrated by one of several factors listed in the text e.g a cross-border business intention or corporate object; or establishments in different Member States,

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 etc 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 is located, the particulars referred to in the text.

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.

Registration: a 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 corporate object, including an explanation of the cross-border component of the business objective of the SPE, where appropriate must be included upon application for the registration of a SPE, as well as a list of shareholders.

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 include 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: this 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 articles of association of 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 capital of the SPE shall be at least EUR 1, provided that the articles of association require that the executive 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: these 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 has jurisdiction in relation to 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 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: the general rule is that the SPE shall be subject to the rules on employee participation, if any, applicable in the Member State in which it has its registered office. Those rules shall apply to the entire workforce of the SPE. However, this general rule will not apply where: a) the SPE employs altogether more than 1 000 employees and more than 25 % of the total workforce habitually works in a Member State or Member States which provide for a greater level of employee participation

than the Member State in which the SPE has its registered office; b) the SPE employs altogether between 500 and 1 000 employees and more than 33 % of the total workforce habitually works in a Member State or Member States which provide for a greater level of employee participation than the Member State in which the SPE has its registered office; c) the SPE has been founded through the transformation of an existing company, the merger of existing companies, or the division of an existing company (i.e. the SPE is not created in accordance with the Regulation), and it employs altogether fewer than 500 employees, and more than 33 % of the total workforce habitually works in a Member State or Member States which provide for a greater level of employee participation than the Member State in which the SPE has its registered office; (d) the SPE has been created in accordance with this Regulation and employs altogether fewer than 500 employees, and more 50 % of the total workforce habitually works in a Member State or Member States which provide for a greater level of employee participation than the Member State in which the SPE has its registered office.

In the event that any of these exceptions apply, certain specified provisions of Directive 2001/86/EC and Directive 2005/56/EC will apply. An adaptation clause provides for rules to be applied in the absence of provisions on employee participation.

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.