

**Draft proposal for a**  
**Directive of the European Parliament and the Council**  
**on Single Member Companies (SMC)**

**22 July 2013**

**Prepared for the European Commission by members of the former Reflection  
Group on the future of EU company law, and other Professors,  
as an own initiative project**

## **Background**

In its report of 5 April, 2011, the Reflection Group on the future of EU Company Law recommended to make available a private company template in national jurisdictions for a single shareholder company with a simple structure.<sup>1</sup>

In its Action Plan of 12 December, 2012, the European Commission declared that it would continue to explore means to improve the administrative and regulatory framework in which SMEs operate in order to facilitate SMEs' cross border activities, provide them with simple, flexible and well-known rules across the EU and reduce the costs they are currently facing.<sup>2</sup>

As the European Commission has signalled its interest in exploring the possibilities of providing harmonisation of the single member company (SMC), as evidenced by its public consultation,<sup>3</sup> members of the former Reflection Group gathered at their own initiative to produce a draft proposal to assist the Commission in its on-going effort to achieve harmonisation of SMCs throughout the Union.

## **Rational and scope of proposal**

The rationale behind the proposal is to help small and medium-sized enterprises (SMEs) by providing a type of company with limited liability that has a simple governance structure and a single template or articles. Such a type of company, it is believed, will make it easy and cost efficient to establish a business presence both *ab initio* for the would-be entrepreneur and as a first step in a cross-border expansion.

The scope of the proposal is the private limited company, that is, limited liability companies that are not covered by the capital maintenance regime of the 2<sup>nd</sup> Company Law Directive.<sup>4</sup> This scope would probably overlap with the scope of the 12<sup>th</sup> Company Law Directive that provides some harmonisation of single member companies.<sup>5</sup> The limited liability company provides the entrepreneur protection against personal ruin and is the workhorse of modern day enterprise. The privilege of limited liability must be accompanied by sufficient safeguards of creditors, notably against any abuse of the limited liability.

## **Providing certainty and simplicity across the Internal Market**

The aim of the proposal is to provide a targeted harmonisation of a type of private limited company that is characterised by having one single member or shareholder. Such a single member company (SMC) requires a more simple governance structure as there are no minority interests to protect. Targeted harmonisation will make it much easier and cheaper for SMEs to establish subsidiaries in

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<sup>1</sup> Reflection Group Report, at 3.3.2 (ii) and 4.2.

<sup>2</sup> Commission, Action Plan, at 4.4.

<sup>3</sup> Consultation on Single-member limited liability companies, DG MARKT, Internal Market/Company Law, expires 15 September 2013.

<sup>4</sup> Second Council Directive 77/91/EEC of 13 December 1976 on coordination 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, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent (with later amendments).

<sup>5</sup> See Codification Directive 2009/102/EC of the European Parliament and of the Council of 16 September 2009 in the area of company law on single-member private limited liability companies, repealing the former Directive 89/667/EEC.

other Member States as the need to know the national company law of the other Member State would be significantly reduced. The aim of the SMC project is the entry of small and medium-sized enterprises to the whole Internal Market. The directive on the SMC should facilitate this by providing certainty and simplicity across the Internal Market.

To facilitate easy and costless formation, full advantage should be taken of the on-going effort to connect the business registers of the Union, whereby formation should be available online for the entrepreneurs from any entry point in any Member State where the relevant Member State provides online formation facilities.

The proposal does not strive to create full harmonisation of private limited companies, not even when they happen to be single member companies. As has been emphasised by many observers, including the Reflection Group,<sup>6</sup> it is important to respect national company law and the inherent differences in national governance systems to the greatest extent possible. Instead, the proposal would provide an option for entrepreneurs to take advantage of alongside the other features of national company law, some indigenous to national law, some resulting from harmonisation by other EU initiatives. For this reason the proposal envisages that its harmonisation of the SMC is supplemented by provisions of national company law applicable to private limited companies, except where the proposal expressly prohibits such application or is incompatible with national law.<sup>7</sup> Consequently, certain important issues of company law such as transfer of seat are not dealt with directly in the proposal but are left for national law or for future harmonisation, and the guiding principle is that national law will apply where the Directive is silent.

### **Tendency within Member States to have simplified forms of Limited companies**

This approach is inspired by recent developments in the national company law of the Member States, notably the reform of the private limited company in Germany, where entrepreneurs may choose to establish their private limited company (GmbH) as an *Unternehmergeellschaft* (UG).<sup>8</sup> The UG can be seen as a version of the GmbH in so far as the rules on GmbHs apply equally to the UG to the extent that the relevant provision of the GmbH Act does not provide otherwise, but it is at the same time a type of private company in its own right and distinguishable by the UG label. Equally, this proposal hopes that the SMC will provide a similar unique brand recognisable and available for entrepreneurs throughout the Union to provide a vehicle for business, enterprise and growth alongside other more traditional types of company known to national law.

Many other Member States have introduced simplified forms of Limited companies in the last years. We provide here some examples.

Denmark: Denmark has adopted a reform in 2013 inspired by the German reform of 2008, which introduces the *Iværksætterselskab* (IVS) as a new separate type of private limited company (*Anpartsselskab*, ApS). The IVS is considered to be a sub-set of the ApS and is covered by the same rules as the ApS except that the IVS can have a share capital of 1 DKK, whereas the ApS must have 50,000 DKK as share capital.

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<sup>6</sup> Reflection Group Report, at 1.3.

<sup>7</sup> Also known as 'negative harmonisation'.

<sup>8</sup> Introduced in 2008 by the German Act: *Gesetz zur Modernisierung des GmbH-Rechts und zur Bekämpfung von Missbräuchen*. A similar approach has just been enacted in Danish company law in the form of an IVS to supplement the traditional ApS.

France: France simplified the SARL in 2008, as well as the *Société par actions simplifiée* (SAS), which is a type of public limited company. In both cases, the minimum capital is 1 euro. More recently, France announced on the 17th of July 2013 a reduction by 50 % of the incorporation costs charged by the commercial registry and accounting exemptions for micro-entities (less than 10 employees).

Italy: Italy introduced the *SRL semplificata* in and the *SRL semplificata with a capital ridotto* (if the shareholder is below 35 years old), with a minimum capital of 1 euro.

Netherlands: Netherland introduced the Dutch Flex BV in 2012, which significantly increases the flexibility of the BV. For instance, the minimum capital of 18 000 euros has been abolished.

Spain: Spain created the *Sociedad Limitada Nueva Empresa* in 2003, with a minimum share capital of 3,000 euros, and made significant reforms (requirement to have 48 hours company formed through electronic means). Spain is currently planing to introduce the *sociedad limitada de formación sucesiva*, where the legal capital will not need to be fully paid out on constitution (*Proyecto de Ley de apoyo a los emprendedores y su internacionalización* of 3rd July 2003).

At the same time a tendency emerged in various Member States to provide entrepreneurs with access to standardised (template-based) articles of association to further reduce costs of establishment. This tendency is driven by endeavours manifested in some Member States (e.g. France, Germany, Hungary, Poland, Portugal) to create legal and technical frameworks enabling online registration for accelerated and less costly companies establishment. Therefore, an EU harmonisation would benefit from the momentum created by Member States, because it would offer their entrepreneurs the same benefit in other Member States.

Current developments in Member States illustrate the fundamental review of the law of private companies which will result in company law being simpler and much more flexible.

As the Directive would dovetail with national law, we have refrained from making references to national law throughout the proposal. Thus, in all cases where the proposal is silent, national law would apply.

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# Draft proposal for a Directive of the European Parliament and the Council on Single Member Companies (SMC)

*Preamble omitted*

Have adopted this directive:

## ***Chapter 1*** ***General Provisions***

*Article I-1*

### **Subject matter**

1. The coordination measures prescribed by this Directive shall apply to the laws, regulations and administrative provisions of the Member States relating to the types of company listed in Annex I.

*Comments: The Annex I should be the same as in the 12<sup>th</sup> CLD, which is a list of the available private limited companies in national law.*

2. Among the companies listed in Annex I, the Member States shall provide as a choice of particular limited liability company type the Single Member Company (SMC).

*Comments: This emulates the German approach, where the UG is considered a variation of the GmbH company type. The approach is similar, for instance, in France (EURL is a variation of the SARL), Denmark (IVS is a variation of ApS), Italy, Spain. In order for the European Commission to have jurisdiction under article 50 of the TFEU, it is necessary that the SMC appears as a sub-type of an existing national company form and not as a new type of form. This should also increase acceptability in Member States. Member States will be able to keep any form of simplified GmbH/SARL/SRL/BV/Limited which already exist.*

3. The SMC shall be an independent limited liability company type distinguishable from the other company types listed in Annex I. The SMC shall be governed by:

(a) this Directive;

(b) the national law applicable to the companies listed in Annex I unless this Directive states otherwise or the national law is incompatible with this Directive; and

(c) its articles of association.

*Article I-2*  
**Definitions**

1. 'founding shareholder' means the first natural or legal person who upon formation of the SMC subscribes for the share of the SMC or upon conversion of another company into an SMC is the single shareholder.
2. 'relevant Member State' means the Member State in which the SMC has its registered office.

*Comments: The issue of whether the relevant Member State should accept as the address of the director, especially if it is the single shareholder, an address located in another Member State is delicate as this deals with the issue of the real seat. It should be possible for the Member States who want to keep the real seat approach to require that the address of the SMC is located in the relevant Member State. The Commission might consider to force Member States to accept the use of domiciliation companies.*

3. 'SMC' means a Single Member Company as governed by this Directive.

***Chapter II***  
***Formation***

*Article II-1*  
**Method of formation**

1. The SMC can be created either by being formed *ab initio* or by conversion of a national company according to this Directive.

*Comments: The rules on formation have to be standardised and legally simplified, namely both the procedural and – indispensably – the substantive law of formation. A mere reference to national law would fail to achieve the aim of facilitating access to foreign markets.*

2. Member States shall not require any particulars and documents to be supplied upon application for the registration of an SMC other than the following as far as Member States find it necessary:

(a) the name of the SMC and the address of its registered office

(b) the name(s), address(es) and any other information necessary to identify the founding shareholder, or co-owners of the single share and legal representative as the case may be

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



- (d) the address of the principal place of business
- (e) the par value of the single share, if applicable
- (f) the share capital of the SMC
- (g) the articles of association of the SMC
- (h) where the SMC is formed as a result of a conversion, the resolution that led to the creation of the SMC.

*Comments: Article II-1.2 realizes “negative harmonization” without saying it. Member States will not be allowed to introduce requirements not listed in the paragraph. This should raise less opposition than stating a long list of national requirements that need to be eliminated. The burden of proof of applying such national requirement will be shifted on each Member State. The list is a maximum and the Member State may settle for less information at formation of the SMC.*

*We have included “the address of the principal place of business” (requested by Hungary) in order to reduce concerns of Member States of use of shell companies, by providing more information on the SMC.*

*Because the list is limited, the Member States should not be able to require a bank statement at incorporation as evidence that the shares were paid. The new Dutch FlexBV just removed this requirement in the Netherlands.*

3. The documents and particulars referred to in Section 2 shall be provided in the language or languages required by the law of the relevant Member State.

*Comments: We do not think that it is possible to force the use of English on Member States, or the use of the national language of the single shareholder (eg Finish for an Italian subsidiary). This approach was also the one adopted for the SPE. A Member State may allow English or other languages besides its official language.*

4. A Member State may require that the registered office and the principal place of business are located in the Member State or the same address.

*Comments: there is no point in opening the discussion on the real seat as this could compromise the project. Therefore, Member States should remain free to keep this requirement.*

5. Registration of the SMC may be subject to only one of the following requirements:

- (a) a control by an administrative or judicial body of the legality of the documents and particulars of the SMC
- (b) the certification of the documents and particulars of the SMC.

*Comments: “single point of control” should reduce administrative costs; removing the notaries might prove politically difficult and might not be an obstacle to online formation as they already intervene in the creation of local SMCs (eg: Spain, Germany); in practice, anecdotal evidence indicates that notaries in some jurisdictions seem to be more effective and business friendly than commercial registers (eg: Spain, Luxembourg, Poland). However, in others they are very expensive (Italy). The fee charged by notaries will be decided by the relevant Member State and will probably be low. This was also the approach adopted for the SPE.*

*The Commission might also think to force the national registry to communicate the information to all relevant national administrations.*

6. A Member State may not require the SMC to obtain a licence or authorisation as a condition of registration.

*Comments: The relevant Member State may of course require such licence or authorisation after formation if required to perform a certain activity.*

*In many Member States, certain activities (eg banking, insurance) cannot be exercised by an GmbH/SARL/SRL/BV/Limited. It is a separate issue which should not be harmonised.*

7. The SMC is formed for an unlimited period of time unless otherwise indicated in its articles of association.

*Comments: This is ‘negative harmonisation’, because some MSs may limit the duration (eg France). To create a limited duration, the articles would have to be amended as it is probably not necessary to have this as a default option in the single template envisaged to serve as articles upon formation.*

8. In the case of an SMC formed *ab initio*, the SMC is formed and acquires its limited liability status and status as a legal person upon registration of the information required by this Directive in the national business register.

*Comments: This was the solution in the SPE. It is important that the rule be harmonized EU wide so that the single shareholder is not obliged to search the law of the relevant Member State. There was strong support within the working group for avoiding referring to national law here and set a clear marker that registration initiates legal personality.*

## *Article II-2*

### **Formation by conversion**

1. Member States shall at least allow the types of companies listed in Annex I to convert into an SMC.

2. A company listed in Annex I wishing to convert into an SMC must:

- (a) have passed a resolution of its single shareholder to approve the conversion
- (b) have provided the same particulars as mentioned in Article II-1, Section 2, needed to form an SMC to the relevant business register
- (c) must not be subject to co-determination or similar arrangements regarding employee representation that prevent the governance structure envisaged in Chapter V of this Directive.

*Comments: Transformation from a national company form not listed in Annex I (eg AG/Société anonyme) might create problems It is less intrusive for MS to force AG/Société anonyme to convert itself into a national GmbH/SARL/SRL/BV/Limited and then into an SMC. Conversion into an SMC will be done when there is already only one shareholder in the GmbH/SARL/SRL/BV/Limited. Minority shareholders will need to have been bought before the conversion in the SMC takes place.*

3. Conversion of the SMC is provided by the act of registration and the SMC is converted and acquires its status as an SMC upon registration of the information required by this Directive.

4. An SMC formed by conversion need not use the single template as its articles of association upon its initial conversion, but if it does not it must provide a copy of its articles of association to the business register before conversion. Any provision of its articles of association that is incompatible with this Directive shall be of no effect,.

*Comments: This provision will reduce the risk of articles of associations of the former GmbH/SARL/SRL/BV/Limited not being compatible with the SMC.*

5. Subject to Section 4, an SMC formed by conversion is subject to the same requirements as an SMC created on formation.

#### *Article II-3*

#### **Name of the company**

The name of the SMC must include the abbreviation SMC/Uni/UP and otherwise must comply with the law of the relevant Member State. Only an SMC may use this abbreviation in its company name.

*Comments: A choice of abbreviation should be made. It is important for third parties to know that it is an SMC (e.g. Ltd-SMC., GmbH-SMC, BV-SMC). The proposal “Uni” (e.g. uniLtd., uniGmbH, uniBV) and UP (.eg. upLtd., upGmbH, uBV), both for unipersonal) or “unae personae » have been made. The use of a Latin name might be more acceptable for MS. This will also provide an European label. However, a national company could still use SMC as its name.*

## Article II-4

### Articles of association

1. Where an SMC is formed *ab initio* or by conversion it may upon its initial registration with the business register of the relevant Member State use a single template as its articles of association. The single template shall have a uniform content except for the name, share capital, registered office or seat, and (if applicable) limitations in the powers of the management body to represent the SMC. Once these individual issues have been entered into the single template, the template shall constitute the articles of association of that SMC.

*Comments: The single shareholder “may” use the single template but is not forced to do so. Therefore, the SMC could be used by larger companies with very detailed provisions.*

2. The Commission shall adopt, by means of delegated acts in accordance with Article VIII-1, measures specifying the uniform content of the single template.

*Comments: We supplement this with an independent draft proposal for a delegated act on the single template.*

3. After the registration of the SMC in the business register of the relevant Member State whether formed *ab initio* or upon conversion the SMC may change its articles as provided by the law of the relevant Member State.

4. The articles of association of an SMC shall be in writing and signed by the founding shareholder.

## Article II-5

### Registration

1. Member States shall allow application to be made by electronic means, where this is made available for the registration for other types of companies. Application for registration shall be made by the founding shareholder of the SMC or by any person authorised by him, her or it.

*Comments: Mandating the introduction of online-registration frameworks and procedures should be avoided at this stage. Instead a non-discrimination clause should appropriately balance Member State’s autonomy with the promotion of the online establishment. However, The Commission might consider imposing on the national register a duty to register the company within 24 hours (or 48 hours) provided all documents are valid and AML requirements have been satisfied. Duplication of AML work by different parties involved in creating the company is a duplicating and slowing factor (eg bank opening the account., lawyer representing the client, notary). In addition, KYC rules might be different among Member States.*

2. Access to the business register of the relevant Member State must be provided throughout the European Union by use of the national business registers of its Member States taking advantage of the interconnectedness of the business registers.

*Comments: The entry into force of this provision may be delayed, if interconnectedness is not available in all Member States.*

3. The relevant Member State must accept such registration with its business register and cannot require the physical presence of the natural or legal persons making the registration in its territory.

*Comments: This is a limited “negative harmonisation” which is necessary to facilitate cross-border establishment of SMCs.*

#### *Article II-6*

### **Liability for acts undertaken before the registration of an SMC**

Where acts were performed on behalf of an SMC before its registration, the SMC may assume the obligations arising out of such acts after its registration. This can be done through a resolution of the single shareholder. Where the SMC does not assume those obligations, the persons who performed those acts shall be jointly and severally liable, without limit.

*Comments: It is important to have some harmonization for the acts accomplished by the founding shareholder before registration, especially since many of them (eg: opening a bank account) might occur in the Member State where the single shareholder is located and not in the Member State where the SMC will be created. This is the solution adopted for the SPE.*

*However, we are aware that this may be contrary to the tradition in some Member States – e.g. in Poland the principle of continuation applies. The company automatically (ex lege) assumes or liabilities from the pre-registration period.*

#### *Article II-7*

### **Formalities relating to registration**

The Commission shall adopt, by means of delegated acts in accordance with Article VII-1, measures specifying the particulars to be provided to register the SMC and the format to be used by the business registers of the Member States.

## **Chapter III** **Shares**

#### *Article III-1*

### **Single Share**

1. The share capital of the SMC must upon its formation or conversion and while it remains an SMC be represented by one share.

*Comments: We decided against allowing the capital to be divided into multiple shares in the SMC, even if owned by one shareholder. This should eliminate the risk of*

*having companies registered as SMC while some shares have been sold to third parties, making them shareholders. Commercial registers will be able to block the division of capital into several shares after formation. The regime of the transfer of shares will be the one of the relevant Member State.*

*The Commission might consider a provision requiring no-par value shares in SMCs.*

2. As long as the SMC maintains its status as a single member company:

(a) no further shares may be issued; and

(b) the single share may not be divided into more than one share

3. If there are co-owners of the single share, the rights attached to the single share may only be exercised by one representative, who acts for the co-owners.

*Comments: This situation may arise, for example in case of death of the single shareholder who is a natural person, where the estate of the deceased person becomes jointly-owned (indivision). The heirs will need to appoint a single representative to exercise their rights. The method of appointment of the representative is to be decided by the relevant Member State.*

4. The single share provides one vote, which shall be deemed sufficient to make all resolutions according to this Directive and to make all decisions, elections and other acts of decision making according to the law of the relevant Member State.

#### *Article III-2*

##### **Identification of single member**

The SMC must at all times record the identity and address of any natural or legal person who owns the share or the co-owners and any legal representative as the case may be in its register of members and the information must be publicly accessible in the business register of the relevant Member State.

*Comments: It is important that the single shareholder be easily identified, especially in a cross border context. However, nominee shareholders, as in the UK and Ireland, should be allowed.*

#### *Article III-3*

##### **Prohibition of own share**

The SMC cannot itself, directly or indirectly, own its single share.

## **Chapter IV**

### **Capital**

#### **Article IV-1**

#### **Share capital**

1. The share capital of the SMC must upon its formation or conversion amount to a nominal sum in the applicable currency representing a payment in kind or in cash as the case may be.

*Comments: Contribution in kind should be possible but will be subject to national company law. It is too difficult to try to harmonize this area of the law. In most cases, SMEs will not make a contribution in kind but a contribution in cash. Therefore, it should not be an obstacle to the creation of SMCs by SMEs.*

#### *1<sup>st</sup> alternative:*

2. The share capital of the SMC shall be at least EUR 1 or a similar symbolic amount in the currency of the relevant Member State which has not the Euro as its national currency.

*Comments: This is a first possibility which we would favour but we consider it to be difficult to accept for certain Member States.*

#### *2nd alternative:*

2. A Member State shall set a minimum sum for the share capital of an SMC, which may not exceed 5,000 EUR. The minimum sum for the share capital of an SMC shall not exceed the minimum sum required in the Member State for the relevant type of company listed in Annex I.

*Comments: A Member State may apply a lower minimum capital than 5,000 EUR if its national GmbH/SARL/SRL/BV/Limited already allows a lower amount. This will allow a level playing field between the SMC and the national company form and prevent the SMC from being at a disadvantage.*

3. If the minimum share capital as set in accordance with Section 2 has not been paid up in full and the SMC becomes unable to meet its financial obligations within one year of commencing business or converting to an SMC, whichever is later, the founding shareholder shall be liable for the liabilities incurred but not paid, above the minimum capital, up to 5,000 EUR less any amount paid up in respect of the share capital. This is without prejudice to any further liability that the founding shareholder may incur in accordance with the laws of the Member States.

If the share of the SMC has been transferred within the period mentioned in Section 3, liability will rest upon the founding shareholder and any subsequent natural or legal persons who acquired the share within this period jointly and severally.

*Comments: Many SMC have a short life expectancy and might not survive more than 12 months. The provision creates strict liability (no fault-liability) up to the maximum level envisioned by the directive when a shareholder has not fully paid the minimum*

*capital required by the relevant Member State, but the strict liability is capped at the minimum capital required by the relevant Member State. The idea is to reduce concerns by Member States of foreign SMCs creating liabilities in their Member State and then not having enough money to cover them once they default. This strict liability will be supplemented by any applicable national law on liability for abuse of the limited liability or similar provisions like wrongful trading, which will normally require proof of recklessness or similar faults. However, this provision on strict liability is not usually found in Member States and might raise technical oppositions.*

*The sociedad limitada de formación sucesiva, to be introduced in Spain (Bill of 3rd July 2013), provides that, in case of liquidation of the company, voluntary or forced, the single shareholder and the director will be jointly and severally liable up to the amount of 3,000 euros, which is the legal capital for SRL (this provision is criticised by a Spanish academic as too complex). This is similar to our suggestion.*

*The laws which apply to the liability incurred by the founding shareholder laws covered are company, insolvency or other applicable laws of the Member State.*

4. The Member States shall not impose any maximum on the amount of the share capital of the SMC.

*Comments: Some Member States impose a ceiling on “simplified” forms of GmbH/SARL/SRL/BV/Limited which they many available only for natural persons (eg: Spain with the SNLE, Italy with the SRL semplificata). This should be removed since the SMC could also serve large groups of companies.*

#### *Article IV-2*

#### **Subscription and payment of share capital**

The relevant Member State must accept the payment of the contribution in cash into a bank account of a bank within the European Union in the name of the SMC as sufficient payment in respect of the share capital of the SMC.

*Comments: Member States or commercial registries should not request that a bank account be established in their own Member State. This would slow significantly the process whereas not having to open a bank account in the relevant Member State will reduce the need for duplication of AML procedures. This is also an attempt at negative harmonisation on marital issues, because some MSs require consent from spouse when contributions are made.*

#### *Article IV-3*

#### **Dividend and other distributions**

1. Distributions, which include dividends, shall be decided by resolution of the shareholder on the recommendation of the management body.

2. A distribution can only be made:



(i) after an amount at least equal to the share capital has been reserved as undistributable; and

(ii) if the management body and the shareholder have each determined that the SMC will continue to be able to pay its debts as they become due and payable following the proposed distribution.

*Comments: This provision is an attempt to satisfy both Member State who use the legal capital as a yardstick for distribution and those who want to adopt a modern (US and English solvency test) approach. It provides an extra protection for the Member States relying on legal capital and should be easy to manage in both small and large SMC (group subsidiaries). This approach is very close to the Dutch FlexBV. Interim dividends can be paid if this is acceptable under national law.*

3. If the SMC is unable to pay its debts as they become due and payable after a distribution, any director who, at the time the distribution was made, knew, or should reasonably have anticipated this outcome will be jointly and severally liable to the SMC for the shortfall resulting from the distribution. The same applies to the shareholder.

*Comments: This provision creates a special duty for the director and the shareholder. This should provide an extra creditor protection, compared to existing Member State law, and reduce concerns of abuse by the parent company or shareholder to the detriment of the subsidiary.*

#### *Article IV-4*

#### **Change of share capital**

The relevant Member State must accept the payment of cash into a bank account of a bank within the Union in the name of the SMC as sufficient payment for any increase in share capital.

### ***Chapter V Organisation of the SMC***

#### *Article V-1*

#### **General provisions**

1. The organisation of the SMC consists of the shareholder and a management body comprising one or more directors as registered with the business register of the relevant Member State.

*Comments: Since the SMC could be used as a subsidiary for large groups, it is important that there are no limits on the number of directors. This is also negative harmonisation since some Member States limit the number of directors in their simplified GmbH/SARL/SRL/BV/Limited (eg: Spain with the SNLE).*

2. Where in the law of the relevant Member State reference is made to the general meeting of a company, a decision by the shareholder of the SMC shall be treated as if it had taken place at a duly convened general meeting.

3. Where the law of the Member State requires the shareholder to make a decision on a particular matter, as opposed to a resolution, that decision must be recorded in writing and provided to the SMC. The SMC must keep a record of any such decision made within the previous five years."

#### *Article V-2*

#### **Resolutions of the shareholder**

1. The adoption of resolutions by the shareholder shall not require a general meeting and no other formal requirements may be made as to the power of the shareholder to make resolutions, the place where resolutions are to be made, or the time required to make a resolution, except that they must be made in writing and provided to the SMC.

*Comments: This paragraph duplicates article 4(1) of the 12<sup>th</sup> company law directive (Directive 2009/102/EC of the European Parliament and of the Council of 16 September 2009 in the area of company law on single-member private limited liability companies). However, it is more precise as it explicitly states that no general meeting is necessary. The single shareholder can take its decision at any moment. The director, when not the single shareholder, can also ask the latter to take decisions at regular periods, such as asking him/her to approve the accounts.*

*It is important for the interest and the success of the SMC, that the single shareholder can take his/her decisions from another Member State than the relevant Member State. Therefore, it is necessary to prevent them from any requirement that the resolution is be made in the relevant Member State. This is also an indispensable limitation to the real seat doctrine, which we think should not raise major objections from Member States. For instance, the Dutch FlexBV introduced in 2012, which applies to both unipersonal and pluripersonal BV, provides that the articles of association may provide that shareholders' meeting can be held outside of the Netherlands.*

*Resolution made in writing should cover resolutions done through e-mails or other electronic means as long as the text is retrievable for documentation purposes as set out in Subsection 2 below.*

2. The SMC must keep a record of resolutions provided to it within the last five years.

*Comments: This paragraph duplicates article 4(2) of the 12<sup>th</sup> company law directive (Directive 2009/102/EC of the European Parliament and of the Council of 16 September 2009 in the area of company law on single-member private limited liability companies) which will apply. Article 4(2) of Directive 2009/102/EC states that « the Decisions taken by the sole member in the field referred to in paragraph 1 shall be recorded in minutes or drawn up in writing ». However, they add a duty to keep a*

*record of resolutions provided to it within the last five years. Article 4(2) will continue to apply to SMC which are not subject to this directive.*

*The sanction for not keeping a record of the resolutions has been left in the 12<sup>th</sup> directive to the Member States. The Commission might consider to harmonise this. However, this point was not discussed in the working group.*

*There is no need to require written contracts when the shareholder is dealing with the company, as this will follow from national law due to Art. 5 of the 12<sup>th</sup> CLD. Nor is it necessary to require publicity about resolutions as resolutions concerning the articles will be made public according to national law.*

3. At least the following matters shall be decided by a resolution of the shareholder:

- (a) approval of the annual accounts
- (b) distribution to the shareholder
- (c) increase of share capital
- (d) reduction of share capital
- (e) appointment and removal of directors
- (e) remuneration, if any, of directors, including when the shareholder is a director
- (f) change of the registered office
- (g) where the SMC has an auditor, appointment and removal of the auditor
- (h) conversion and transformation of the SMC
- (i) mergers and divisions
- (j) dissolution
- (k) any other amendments to the articles of association, not covering matters mentioned in points (a) to (j).

*Comments: It is important to harmonise the powers of the single shareholder in order to make it easy and understandable for SMEs and group subsidiaries alike. Issues not covered in this article are subject to the company law of the relevant Member State. This includes rules on related parties transactions. Even if specific rules would be useful for groups, there is a risk that, given that national regimes are very different, it will be difficult to harmonize. However, article 5 of the 12<sup>th</sup> company law directive (Directive 2009/102/EC of the European Parliament and of the Council of 16 September 2009 in the area of company law on single-member private limited liability companies) will apply.*

*Sanctions for the violation of this provision will be decided by Member State law.*

*Comments on directors' remuneration: Directors' remuneration should be decided by the single shareholder. Where the single shareholder is also the director, he or she is allowed to vote. In many Member States, the director is entitled to a remuneration only if there is a decision of the shareholders (eg France, Luxembourg)*

4. Unless the articles of association provide otherwise, the shareholder may delegate one or more of the powers listed in Section 2 to the management of the SMC by written authorisation to be included in the articles of association. The delegation cannot last more than five years and the date of expiry shall be stated in the articles of association.

*Comments: The right to delegate might be dangerous. However, prohibiting delegation would reduce the flexibility of the SMC. Delegation is not possible in certain Member States (eg: France, Belgium, Poland) Delegation is possible in others Member States (eg soon in Luxembourg according to a recent bill)*

#### *Article V-3*

#### **Directors**

1. A director is appointed by resolution of the shareholder for an unlimited period, unless otherwise decided, and the shareholder may remove a director at any time at will by resolution. The removal of a director immediately terminates the director's power to act as a director on behalf of the SMC, but does not affect other rights or obligations in private or public law. The number of directors shall be determined by the shareholder from time to time.

*Comments: The term "director" is used in the UK/IE to designate the management of the private limited company. In other member states, the term "Director" is used for public limited companies. Instead the term "manager" (gérant, Geschäftsführer) is used. Therefore, the term "manager" could be considered instead of "directors" in the English and other language versions of the directive.*

*It is essential that the director can be removed at will. This is not always possible in all Member States (eg: France, Luxembourg requiring "good cause"). In small and large groups, this would constitute an indirect way to make sure that the "interest of the group" is taken into account.*

*The right to a fair trial and to be removed only subject to fair procedures, according to article 6 of the ECHR should apply but should be left to Member States, as not all Member States recognize the right to a fair trial in case of dismissal (France and UK do, but not Denmark). In addition, since for SMEs, the director will often be the single shareholder, there is even less reason to harmonise*

2. Only a natural person may be a director of an SMC and the appointment must comply with the law of the relevant Member State on qualifications for directors.

*Comments: Directors of the SMC should be natural persons. This is usually the case for GmbH/SARL/SRL/BV/Limited in the Member States. This was also the proposal in the SPE regulation (Art. 30). It will be a serious limitation for large groups and it would be better to allow also legal persons as directors. However, there was a concern within the former RG that this would not be accepted by Member States, as they would like to apply criminal liability on the directors, and some of them do not recognize criminal liability for legal persons.*

*A possibility to solve this problem, while preserving existing flexibility, would be to not include this provision in the directive. Therefore, Member States which allow legal persons to be director of a GmbH/SARL/SRL/BV/Limited (eg Netherlands, Luxembourg) could continue to do so in their SMCs.*

A shareholder who is a natural person may appoint himself or herself as a director.

*Comments: This possibility is important for SMEs. It should not raise problems with the Member States.*

If a legal decision on disqualification has been made against the director in another Member State and is still outstanding, the decision must be disclosed upon registration in accordance with Section 3.

*Comments: Knowledge of disqualification is usually limited to the national Member State and national law vary considerably from the UK where disqualification is public to Denmark where it is confidential. However, it would be very useful to know if there has been a disqualification in another MS. Since this disclosure relies on the good faith of the single shareholder, its effectiveness is highly debatable. This might be a problem for a company form which will be used mostly for cross-border activities or could be used for circumvention.*

*A way to solve this problem would be to allow the “single point of control”, and/or the national register, of the relevant MS to send a request to the national register in another Member State in order to know if there has been a disqualification. This could be linked to the implementation of Directive 2012/17/EU as regards the interconnection of central, commercial and companies registers which is due in 2017.*

3. Directors must be registered with the business register of the relevant Member State.

4. Any person in accordance with whose directions or instructions the directors of the company are accustomed to act, without having been formally appointed shall be considered a director as regards all duties and liabilities to which the latter are subject. A person is not to be regarded as a shadow director by reason only that the directors act on advice given by him or her in a professional capacity.

*Comments: This provision is designed to cover “de facto directors” and “shadow directors” while providing a limited harmonisation of the concept of “de facto director” or “shadow” for the purpose of the SMC. This provision might also alleviate concerns by Member States of abuses by the single shareholder. This was*

*also the proposal in the SPE regulation (Art. 30). The current draft is influenced by the UK Companies Act (Section 251).*

#### *Article V-4*

### **Representation of the SMC in relation to third parties**

1. Subject to the articles of association, the SMC shall be represented in relation to third parties by any one director. Acts undertaken by the directors shall be binding on the SMC even if they are not within the object of the SMC.

*Comments: It is important for the protection of third parties that any person called “director” of an SMC is entitled to bind the company. This will create confidence in this legal instrument.*

2. The articles of association of the SMC 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 the shareholder or a decision of the management body, if any, may not be relied on against third parties even if they have been disclosed.

3. Without prejudice to any other way in which the SMC may be dissolved, the management body may file for bankruptcy or any similar insolvency procedure available under the applicable law of a Member State.

4. Directors may delegate the right to represent the SMC in accordance with the articles of association.

*Comments: This kind of flexibility is useful and usual in Member States, especially for large SMCs. However, some Members think, this should be left up to the Member States, as this may interfere too much with civil law (Vollmacht, pouvoir).*

#### *Article V-5*

### **Shareholder instructions**

#### *1<sup>st</sup> alternative:*

1. The sole shareholder has the right to give instructions to the directors. In giving these instructions the sole shareholder may take into account the interest of the whole group.

2. However, instructions by the sole shareholder are not binding on any director in as far as following the instruction would violate applicable laws of a Member State.

#### *2<sup>nd</sup> alternative:*

1. The duty laid out in Article V-3, does not prevent a director from following an instruction from the single shareholder, which may include the interest of a group of which the SMC is part, to the extent that it is compatible with the said duty and applicable law.

*Comments: This provision would be very useful for groups, large and small. We think that one of the major benefits of the SMC would be to facilitate the uniform direction of a number of foreign subsidiaries. Professor Hommelhoff went as far as to say that « Without such a regulation the whole SMC project is useless. » There is a large support (although not unanimous) within the working group, and also within the drafting committee, to include a rule on this topic. The justification for this is that there is only one shareholder and therefore duties of directors towards other shareholders are not relevant and would therefore not pose a limitation. On the other hand this will only be acceptable to Member States if there is an exemption for directors in the case that the interest of other stakeholders would be prejudiced in a way that such Member State does not allow for its own companies. Therefore, we do not define the group interest and its balancing with the subsidiary's own interest as we think that this would be too much for the Member States.*

*We think that it would be easier to simply rely on the existing Member States law (« would violate applicable laws of a Member State”) on interest of the group. Irrespectively of the version chosen, we are aware that this provision is fraught with difficulties because it effectively touches areas such as the duty of directors under national law, wrongful trading, abuse of limited liability and issues of insolvency law. It may be wiser to abandon the provision in face of stark opposition from the MS.*

*However, Member States might be more open to recognise shareholder instructions. For instance, in the Dutch FlexBV, the articles of association may now stipulate that a corporate body has the right to issue specific instructions to the Board. The Board must follow these instructions unless these are in conflict with the company's interests. The Commission might also consider to make this possibility optional.*

## **Chapter VI** **Employee Participation**

### **Article VI-1**

#### **General provisions**

1. If the SMC is or becomes subject to co-determination or similar arrangements regarding employee representation according to the laws of a Member State and this prevents the governance structure envisaged in Chapter V of this Directive, the SMC must terminate its status as a single member company and apply for conversion into another company type available according to the law of the relevant Member State.

*Comments: We do not think that it is appropriate to have an SMC with co-determination, as there are very technical requirements in MS legislation which come into play in such cases. It would be too much for a directive on the SMC to try to regulate this. We feel that it is better to require the single shareholder to convert the SMC into a company form of the relevant Member State.*

2. No co-determination or similar arrangements regarding employee representation or consultation according to the law of the relevant Member State may apply to the SMC unless it employs more than 50 employees.

*Comments: The single shareholder, especially in the SME type, should benefit from a safe harbour in all Member States, from rules on co-determination. Entrepreneurs should be sure, when they establish an SMC in another Member State that they are not subject to co-determination rules which they would violate without knowing. We have set arbitrarily the threshold for this safe-harbour at 50 employees (The threshold in DK is 35<sup>9</sup>, and in SK 50).*

*Professor Hommelhoff suggests that “this threshold has to be clearly higher than 50 employees – 250, perhaps also 150. To Member States with a lower threshold could be given an option to set their national threshold, but only, if the employee participation in this Member State is at least co-determination to one third ». Several other members also agree on raising this threshold to such higher level.*

3. The Commission shall adopt, by means of delegated acts in accordance with Article VIII-1, measures specifying the calculation of the number of employees in respect of Section 2.

## **Chapter VII** **Changes To The Company Form**

### **Article VII-1**

#### **Conversion and transformation**

1. The SMC has a right at any time to convert itself into a company type registered in Annex 1 and recognised by the relevant Member State as a type of national company.

*Comments: We do not use the term transformation in the context of becoming an SMC but conversion, since the SMC is already a type of company listed in Annex 1. Using the term “transformation” for moving from and GmbH/SARL/SRL/BV/Limited to an SMC would create the impression that the SMC is a different company form, which is not the case. It is a type of the GmbH/SARL/SRL/BV/Limited. The term transformation should be used for changes that imply a new company type.*

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<sup>9</sup> In Denmark, a private or public limited company is subject to co-determination if it has employed 35 persons or more on average over the last three years. If subject to co-determination, the employees are entitled to decide by ballot if they want to appoint representatives as directors serving on the upper level of the dual executive system (Bestyrelsen, Board of Directors). Many companies that are subject to co-determination do not have employee representation, because the employees prefer other forms of representation provided by collective agreements, eg information committees that are outside the governance structure of the company. A survey from 1999 put the number of Danish companies with representation to 20 pct of those who were subject to co-determination; a number that is believed to have fallen further in recent years. Although the proposed limit of 50 persons is higher than the applicable threshold in Danish law it is likely to be acceptable to Denmark as there are probably no private companies in the range of 35-50 employees.



The decision to convert is made by resolution of the shareholder and is contingent on the SMC making the necessary changes to conform with the requirements in the law of the relevant Member State applicable to that type of company.

2. Transformation by the SMC into a company type other than those registered in Annex 1 is subject to the provisions of the law of the relevant Member State applicable to the transformation of these types of companies.

The decision to transform the SMC into a company type other than those registered in Annex 1 is made by resolution of the shareholder.

*Comments: The SMC should be allowed to transform itself into another type of company (eg: France, from SARL-SMC to SASU-SMC), just like the GmbH/SARL/SRL/BV/Limited. This should be regulated by Member States legislation.*

*Comments on dissolution: Dissolution is governed by the laws of the relevant Member State. A simplified dissolution procedure providing for basic rights of creditors of the SMC, could be a sound proposition, provided that the Directive describe such rules. However, the development of such rules might face opposition from Member States.*

#### Article VII-2

##### **Failure to maintain status**

1. If the SMC violates the requirements in this Directive for maintaining its status as a single member company,, the management of the SMC and the shareholder are obliged either to meet the requirements again or to enter into conversion according to Article VII-1 no later than four weeks after learning of sufficient facts to reach the conclusion that the requirements have been violated. The existence of several co-owners of the share is not a violation of the requirements of this directive.

*Comments: This provision is necessary in the unlikely event that the SMC does not voluntarily satisfy the requirements. This does not cover the situation where there are several heirs to a deceased single shareholder, which is expressly permitted in Art III-1(3). In such case, the SMC is not in violation of the directive since the shareholders can only exercise their rights by appointing a common representative. They would be in violation of the directive only if they split the share, which should be block by the registry.*

*The question of beneficial ownership is a separate matter and should not be harmonised.*

2. If Section 1 is not complied with, the competent authorities designated by the relevant Member State may take steps to effect a mandatory conversion into a company type listed in Annex 1 or transformation in another company type. If the SMC fails to undertake any steps needed in connection with such a mandatory conversion or transformation, the competent authority may instead terminate the SMC according to its law on liquidation of companies.

## ***Chapter VIII*** ***Delegated Acts***

### *Article VIII-1*

#### **Delegation of powers**

The Commission shall be empowered to adopt delegated acts in accordance with Article VIII-2 concerning the supplementing and amending of the conditions for the single template of the SMC, and the calculation of the number of employees.

*Comments: It is very important that the Commission be empowered to modify the Template in order to adapt it to unforeseen difficulties, if this can be done without modifying the directive. The use of delegated rather than implementing act was not discussed as it is mostly a political decision. Whether it should be done through delegated act or rather through implementing act is a decision for the Commission.*

### *Article VIII-2*

#### **Exercise of the delegation**

1. The power to adopt delegated acts is conferred on the Commission subject to the conditions laid down in this Article.
2. The delegation of power shall be conferred for an indeterminate period of time from the date referred to in Article XI-2.
3. The delegation of power may be revoked at any time by the European Parliament or by the Council. A decision of revocation shall put an end to the delegation of the power specified in that decision. It shall take effect the day following the publication of the decision in the Official Journal of the European Union or at a later date specified therein. It shall not affect the validity of any delegated acts already in force.
4. As soon as it adopts a delegated act, the Commission shall notify it simultaneously to the European Parliament and to the Council.
5. A delegated act shall enter into force only if no objection has been expressed either by the European Parliament or the Council within a period of 2 months of notification of that act to the European Parliament and the Council or if, before the expiry of that period, the European Parliament and the Council have both informed the Commission that they will not object. That period shall be extended by 2 months at the initiative of the European Parliament or the Council.

## **Chapter IX Amendments**

### **Article IX-1**

#### **Amendments to Directive 2009/102/EC**

*General comments under Article IX-1: The 12<sup>th</sup> company law directive (now Directive 2009/102/EC of the European Parliament and of the Council of 16 September 2009 in the area of company law on single-member private limited liability companies) applies to the SMC. Therefore, it is necessary to modify provisions in this directive which are incompatible with the SMC.*

*Alternatively, the Commission could consider replacing altogether the 12th Directive with this draft directive on the SMC if this would be more acceptable to the Member States. In such case, a decision should be taken on article 6 of the 12th Directive which forces Member States to apply the same rules on single member public limited companies. However, extending the SMC directive to public limited companies would prove probably very unpopular with them.*

Directive 2009/102/EC is amended as follows:

(1) Article 2 is amended as follows:

The following paragraph 3 is added:

« Single-member companies established according to Directive XXX/UE are not subject to paragraph 2 ».

*Comments on Article 2(2) of the 12th directive: Member States should allow a natural person to be the sole member of several companies and a single-member company or any other legal person to be the sole member of a company. It is important that this provision be removed since it can be anticipated that for SMEs created as SMCs, there will be cross border groups where an SMC is the parent of another SMC.*

*In order to limit disruption of national company law, Member States may keep these limitations for GmbH/SARL/SRL/BV/Limited which are not SMCs. Probably, they would not apply the option for all GmbH/SARL/SRL/BV/Limited as this would create a discrimination.*

(2) Article 7 is amended as follows:

(a) The existing paragraph becomes paragraph (1)

(b) The following paragraph 2 is added :

(2) « Single-member companies established according to Directive XXX/UE are not subject to paragraph 1 ».

*Comments on Article 7 of the 12th directive: Member States should allow the SMC, even if they allow individual entrepreneur to set up an undertaking the liability of which is limited to a sum dedicated to a stated activity. Many Member States currently allow for both (eg France, Spain).*

#### *Article IX-2*

#### **Amendments to Directive 2013/34/EU**

Directive 2013/34/EU is amended as follows :

(1) Article 36 is amended as follows:

The following paragraph 9 is added:

“Member States are deemed to have exempted micro-entities that are SMC subject to Directive XXX/EU from all the obligations referred to in Article 36 and shall be deemed to have given the permissions referred to in Article 36 Paragraph 2.

(2) Paragraph 9 becomes Paragraph 10

*Comments: There should be an advantage for being an SMC, especially for SMEs. This could be an opportunity to reduce accounting burdens, at least when the SMC is a micro-entity. Therefore, we suggest that the Commission go beyond the Directive 2012/6/EU of the European Parliament and of the Council of 14 March 2012 amending Council Directive 78/660/EEC on the annual accounts of certain types of companies as regards micro-entities, which created the concept of « micro-entity » and authorized Member States to create exemptions.<sup>10</sup>*

*The Commission might even consider a full exemption from the Accounting directive 2013/34/EU, as was the case in the original proposal which led to the Directive 2012/6/EU. There might be more support now among Member States than in 2007, when the proposal was introduced. For instance, France announced on the 17th of July that micro-entities, defined as companies with less than 10 employees, will not have to establish notes to the financial statements (Annexe), and if they want, they will be exempted from the obligation to publish their accounts.*

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<sup>10</sup> This directive is now part of Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings.

***Chapter X***  
***Final Provisions***

*Article X-1*

**Transposition**

Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by ... at the latest. They shall forthwith communicate to the Commission the text of those provisions.

Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

*Article X-2*

**Entry into force**

This Directive shall enter into force on the 20th day following its publication in the Official Journal of the European Union.

*Article X-3*

**Addresses**

This Directive is addressed to the Member States.

## ANNEX I

### Types of companies referred to in Article I-1

— *Belgium:*

‘société privée à responsabilité limitée/besloten vennootschap met beperkte aansprakelijkheid’,

— *Bulgaria:*

‘дружество с ограничена отговорност, акционерно дружество’,

— *Czech Republic:*

‘společnost s ručením omezeným’,

— *Denmark:*

‘anpartsselskaber’,

— *Germany:*

‘Gesellschaft mit beschränkter Haftung’,

— *Estonia:*

‘aktsiaselts, osühing’,

— *Ireland:*

‘private company limited by shares or by guarantee’,

— *Greece:*

‘εταιρεία περιορισμένης ευθύνης’,

— *Croatia:*

‘Društvo s Ogranicenom Odgovornoscu’,

— *Spain:*

‘sociedad de responsabilidad limitada’,

— *France:*

‘société à responsabilité limitée’,

— *Italy:*

‘società a responsabilità limitata’,

— *Cyprus:*

‘ιδιωτική εταιρεία περιορισμένης ευθύνης με μετοχές ή με εγγύηση’,

— *Latvia:*

‘sabiedrība ar ierobežotu atbildību’,

— *Lithuania:*

‘uždaroji akcinė bendrovė’,

— *Luxembourg:*

‘société à responsabilité limitée’,

— *Hungary:*

‘korlátolt felelősségű társaság, részvénytársaság’,

— *Malta:*

‘kumpannija privata/Private limited liability company’,

— *The Netherlands:*

‘besloten vennootschap met beperkte aansprakelijkheid’,

— *Austria:*

‘Gesellschaft mit beschränkter Haftung’,

— *Poland:*

‘spółka z ograniczoną odpowiedzialnością’,

— *Portugal:*

‘sociedade por quotas’,

— *Romania:*

‘societate cu răspundere limitată’,

— *Slovenia:*

‘družba z omejeno odgovornostjo’,

— *Slovakia:*

‘spoločnosť s ručením obmedzeným’,

— *Finland:*

‘osakeyhtiö/aktiebolag’,

— *Sweden:*

‘aktiebolag’,

— *United Kingdom:*

‘private company limited by shares or by guarantee’